[OFFICIAL ENGLISH TRANSLATION]

2001-4189(IT)I

BETWEEN:

LOUIS GUAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 14, 2002, at Ottawa, Ontario, by
the Honourable Judge Pierre Archambault

Appearances

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Justine Malone

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* with respect to the 1996, 1997 and 1998 taxation years are dismissed.

Signed at Drummondville, Quebec, this 14th day of January 2003.

"Pierre Archambault"

J.T.C.C.

Translation certified true
on this 25th day of February 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

Date: 20030114
Docket: 2001-4189(IT)I

BETWEEN:

LOUIS GUAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Archambault, J.T.C.C.

[1] Louis Guay has challenged the assessments made by the Minister of National Revenue (the **Minister**) with respect to the 1996, 1997 and 1998 taxation years (the **relevant period)**. The Minister included in Mr. Guay's income, as a benefit from employment, tuition fee reimbursements of $1,465 in 1996, $18,917 in 1997 and $21,415 in 1998. Mr. Guay contends that the reimbursements are not taxable benefits by reason of the particular circumstances of his employment with a Canadian company, the Eldorado Gold Corporation (**Eldorado**).

Facts

[2] From 1993 to 1996, Mr. Guay was the chargé d'affaires at the Canadian Embassy in the Dominican Republic. At the end of his assignment, Mr. Guay returned to Canada while awaiting a new posting. After receiving a number of offers that he did not find satisfactory, Mr. Guay was offered a position as the

Director General of Eldorado in the Dominican Republic. On August 2, 1996, Mr. Guay obtained unpaid leave for a period of 36 months from the Department of Foreign Affairs (the **Department)**. On September 6, 1996, he signed a contract of employment, the most important provisions of which are as follows:

1. EMPLOYMENT

1.1 The Company hereby employs and confirms the appointment of the Employee as its Director General of the Caribbean Basin, with the Employee to be located in Santo Domingo, Dominican Republic, or such other place as agreed upon by the Company and the Employee after September 6, 1997. The Employee agrees to hold such other offices to which he may be appointed by any subsidiary of the Company. The Employee hereby accepts such employment and appointment on the terms and conditions set forth in this Agreement.

2. TERM

2.1 The Employee's term of employment and appointment shall be for a period of three years, commencing on September 6, 1996. The term of this Agreement shall thereafter continue on a yearly basis on the same terms as set forth in this Agreement, or on such other terms as agreed to by the Company and the Employee, unless the Company or the Employee gives notice to the other that they do not wish to renew this Agreement within 60 days of the expiry of its term.

3. REMUNERATION

3.1 The Company shall pay the Employee an annual salary of US$75,000 payable semi-monthly in arrears in 12 equal monthly installments (less applicable source deductions) based upon the employee devoting 100% of his time to the business and affairs of the Company, provided however that the Employee may devote up to 25% of his time to the business and affairs of Energold Mining Ltd.

...

3.3 The Company will reimburse the Employee for expenses incurred as a result of employment in the Dominican Republic, including, inter alia, schooling for the Employee's children, storage of personal effects and property management in Canada, one return

> trip to Canada for the Employee and his family once per calendar year, and operating costs for a motor vehicle used for professional purposes, to a maximum of US$35,000 per calendar year upon presentation of statements and vouchers by the Employee to the Company. Such amount will be reviewed by the Company every year and will, in the discretion of the Chief Executive Officer, be modified to reflect changes in the rate of inflation in the Dominican Republic as specified by the International Monetary Fund or other acceptable agency and changes in the Dominican Republic currency.

[3] Among the important duties that Mr. Guay had to accomplish at Eldorado was the negotiation to privatize a gold mine belonging to the government of the Dominican Republic. For the term of his employment contract, Mr. Guay had to move with his family to the Dominican Republic, and his five children attended the Lycée français of Santo Domingo, the only educational institution offering education in French in that country. In accordance with the contract mentioned above, Eldorado reimbursed the tuition fees paid to the lycée during the relevant period.

[4] In the course of his cross-examination, Mr. Guay admitted that he was not required by the terms of his employment contract with Eldorado to send his children to a French school. He moreover acknowledged that, regardless of the circumstances of his presence in the Dominican Republic, he would have sent his children to the French lycée.[1] Lastly, he acknowledged that the terms and conditions of his employment had been negotiated with his employer, including those relating to the reimbursement of the tuition fees. When counsel for the respondent asked him why he had not demanded a higher salary to take the tuition fees into account, he replied that it was hard to obtain a higher salary because they wanted people with the same responsibilities to receive the same compensation. The Court asked him why they had not grossed up the amount of the reimbursement (which could go as high as $35,000) to take the tax implications into account, and Mr. Guay replied that he had not thought of this because he believed that the amount was not taxable.

[5] Mr. Guay submitted that, during the relevant period, he had not abandoned his residence in Canada and therefore he continued to report his income in this country.

---

[1] In argument, he added that it went without saying that he had to have the means to send his children to a “fee paying” school.

Position of the parties

[6] The respondent submits that the reimbursement by Mr. Guay's employer for his children's tuition fees is a taxable benefit under paragraph 6(1)(*a*) of the *Income Tax Act* (the ***Act***). Since the tuition fees were an expense that had not been required by his employer for the performance of his duties, their reimbursement represented for Mr. Guay the reimbursement of a personal expense; the effect of this reimbursement was to enrich him and, thus, the amount had to be included in his income as a taxable benefit. In support of her position, counsel for the respondent cited the following decisions: *Dionne v. Canada*, [1996] T.C.J. No. 1691 (QL); affd [1998] F.C.J. No. 1612 (C.A.) (QL); *Leduc Estate v. Canada*, [1995] T.C.J. No. 1514 (QL); *Canada v. Huffman*, [1990] F.C.J. No. 529 (C.A.) (QL); and *Detchon v. Canada*, [1995] T.C.J. No. 1342 (QL).

[7] Mr. Guay, on the other hand, contends that the reimbursement he obtained for his children's tuition fees was not related at all to the services he rendered to Eldorado. According to him, there was no solution other than to send his children to a French lycée given Canada's constitutional values that guarantee him the right to receive instruction in either official language in Canada.

[8] He also relied on the decision rendered by the Federal Court of Appeal in *Guay v. Canada*, [1997] F.C.J. No. 470 (QL). Mr. Guay was the appellant in that case. According to the decision, the tuition fees reimbursed by his employer while he was living in Canada were not a taxable benefit because of the requirements of his employment with the Department. In paragraph 1 of his decision, Judge Décary noted: "A rotational employee who begins to work for the Department is immediately informed that he or she must accept [TRANSLATION] 'the principle of rotational employment inherent in such work' and be prepared [TRANSLATION] 'to accept any assignment that the Department considers useful or necessary, either in Ottawa or at any of Canada's diplomatic or consular missions abroad.'" The judge below had found that attending the Lycée Claudel was the only realistic option for Mr. Guay's children if the appellant found himself once again abroad and if he decided that his children were to continue their education in a French education system. Here is what Judge Décary goes on to say at paragraph 10 of his decision:

> Once the only realistic option available to an employee, because of the rotational nature of his or her employment, is to enrol his or her children in the only institution in Ottawa that offers the French education system recognized throughout the world, it can no longer be concluded that there is an insufficient relationship between the expenses incurred by the employee and the employee's employment.

[9] Although Mr. Guay acknowledged that the circumstances existing during the relevant period were very different from those existing in 1991, the taxation year at issue before the Federal Court of Appeal, he argued that some of the principles stated in that decision could be applied to the case at bar. He cited paragraph 1.1 of his employment contract, which he says stipulates that he had to agree to work in a place other than Santo Domingo and, accordingly, there was the same element of "permutability" in the contract with Eldorado as in the contract between him and the Department. Since there was no solution other than to send his children to the French lycée in Santo Domingo, this school being the only institution offering instruction in French in the Dominican Republic, Mr. Guay contends that the conclusions of the Federal Court of Appeal in *Guay* should also be applied to the facts of these appeals.

Analysis

[10] The relevant provision in the case at bar is paragraph 6(1)(*a*) of the *Act*, which states as follows:

> **Amounts to be included as income from office or employment.**
>
> **6(1)** There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:
>
> **(a) Value of benefits** — the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment, except any benefit
>
> ...

[11] As may be noted, this is a provision that casts a very broad net. It covers "the value of board, lodging and other benefits of any kind whatever received or enjoyed ...". In the French version, this paragraph covers, inter alia, "*autres avantages quelconques qu'il a reçus ou dont il a joui* ...".

[12] First, an analysis must be made of the nature of the expenses that Eldorado reimbursed to Mr. Guay. It must be noted that the tuition fees paid by Mr. Guay to the French lycée of Santo Domingo were the ordinary, everyday expenses of an employee, what are commonly called personal expenses. This is the conclusion

reached by Judge Garon (as he then was) in *Guay v. R.*, T.C.C., No. 93-3028(IT)I, May 21, 1996 (1996 CarswellNat 2867), at paragraph 72, when he wrote that it cannot be denied that tuition fees for the dependent children of an employee are expenses of a personal nature:

> ... In paying those expenses, parents are discharging a personal obligation which, in principle, is incumbent upon them in their capacity as parents. The reimbursement of those expenses by an employer at first glance constitutes a benefit within the meaning of paragraph 6(1)(*a*) of the *Income Tax Act*.

[13] In *Leduc* (*supra*), Judge Dussault reaches the same conclusion at paragraph 45:

> One may consider the simple example of an employer who decided to pay only part of an employee's remuneration in cash and who undertook to pay or reimburse certain of his personal expenses such as those for housing, food, transportation, the children's education and so on. It is difficult to see how the claim could be made that such employee was not enriched or did not receive a benefit as a result of the payment or reimbursement of expenses that have traditionally been considered personal or living expenses, and thus, essentially consumer expenditures.
>
> [Emphasis added.]

[14] In *Dionne* (*supra*), the Federal Court of Appeal dismissed Mr. Dionne's appeal, and Judge Décary, writing on behalf of the court, relied on the decision in *Leduc* in his reasons for dismissing the appeal. Judge Décary stated that "*the reasons* [of Judge Dussault] *for that decision are compelling*."[2]

[15] There is also the *Detchon* (*supra*) decision where Judge Rip, referring to tuition fees, stated at paragraph 51: "*The employer was in fact paying for an ordinary personal expense of the appellants* ...".

[16] Even if the tuition fees constituted personal or living expenses, this does not necessarily mean that the reimbursement thereof is a taxable benefit for the purposes of the *Act*. For example, one need only refer to all the exceptions listed in paragraph 6(1)(*a*) of the *Act*. Moreover, there is the decision of the Federal Court of Appeal in *Guay*, recognizing that there can be exceptional situations where such

[2] Paragraph 2.

reimbursement will not give rise to an inclusion in income. This is what Judge Décary said in *Dionne* (*supra)*, at paragraph 3:

> Relying on the recent decision of this Court in Guay v. The Queen, [1997] 216 N.R. 101 (F.C.A.) the appellant argued that reimbursing the costs of transporting food was not a taxable benefit within the meaning of paragraph 6(1)(*a*) of the Income Tax Act. This decision is of no assistance in the case at bar. That case involved the extraordinary expenses which rotational employees of the Department of Foreign Affairs and International Trade incurred to ensure their children would be educated in Canada in a manner consistent with the education available during their overseas posting.
>
> [Emphasis added.]

[17] Similarly, I believe that the *Guay* decision on which Mr. Guay has relied in these appeals is of no assistance since the exceptional situation described in that decision is not present here. First of all, I do not share Mr. Guay's point of view that his employment contract with Eldorado established a system of "permutability" similar to the one existing in the Department. The Department's employees had to accept the principle of "permutability" at the outset of their employment, that is, they had to be prepared to accept any assignment that the Department might consider useful or necessary. In the case at bar, Eldorado could not assign Mr. Guay elsewhere but the specified location in the Dominican Republic, unless he agreed to it. I refer to the key words of the agreement between Mr. Guay and Eldorado: "... *or such other place as agreed upon by the Company and the Employee* ...".

[18] In my opinion, in their essential elements, the facts of these appeals cannot be distinguished from those in *Leduc* and in *Dionne*. In those two cases, the taxpayers worked in Canada's North.[3] Mr. Dionne worked as a teacher for the Commission scolaire Kativik, while Mr. Leduc was employed by the Hôpital de l'Ungava. Both received financial assistance for expenses of food transportation by air. In the case of Mr. Leduc, the hospital paid the transportation costs, whereas in Mr. Dionne's case, he was reimbursed for the transportation expenses.

[19] In my opinion, Messrs. Dionne and Leduc faced a situation similar to that of Mr. Guay. They really had no choice but to incur higher costs in order to obtain

---

[3] In the case of Mr. Leduc, in Tasiujaq situated on Ungava Bay, and in the case of Mr. Dionne, in Akulivik, a village situated on Hudson Bay.

food of good quality. If they had been employed in the south, the two taxpayers would not have had to incur such high costs for their food. It may be concluded, therefore, that the only realistic option available to them was to incur transportation costs in order to feed themselves adequately. Obviously, they could have contented themselves with the mediocre food available in Canada's North. Fortunately for them, their employer was ready to help them financially to obtain better quality food.

[20] As for Mr. Guay, he could have contented himself with sending his children to public schools and they would have been educated in Spanish, which might have had some advantages. However, he wanted his children to be educated in French and, accordingly, he decided to incur tuition fees to achieve his objective. In my opinion, this decision is completely legitimate: it was up to Mr. Guay to decide on the language of instruction for his children and also on the criteria—such as the quality of that education—that were to be given preference.

[21] I believe that it is appropriate to compare—and this, moreover, is the approach I took in *Dionne*—Mr. Guay's situation with that of other persons staying in the same location as he, that is, in the Dominican Republic. As a point of comparison, one could use the case of Canadians living in the Dominican Republic who also want their children to be educated in French but who are not entitled to a reimbursement for tuition fees. Such persons would then be forced to pay their tuition fees with after-tax money. If it were to be concluded that Mr. Guay is not required to include in his income the reimbursement for the tuition fees, he would be obtaining a benefit that other Canadians living in Santo Domingo do not have. In my opinion, the reimbursement for the tuition fees enabled him to enrich himself in comparison with these other Canadians.

[22] Mr. Guay argued that, if the reimbursement for the tuition fees had to be included in income, the effect would be to discriminate against employees such as him, who have several children, and it would also result in depriving these employees of remunerative employment. I do not share this point of view. In my opinion, Mr. Guay could have adopted the strategy indicated by Judge Bowman (as he then was) of this Court, whose comments are cited by Judge Dussault in *Leduc* at paragraph 53:

> I will close by referring to a comment by my colleague Judge Bowman, also from Pezzelato, supra:

> If employers wish to ensure that their employees do not suffer a tax burden resulting from the conferral of benefits, they should gross up the benefit by the tax cost, including the tax on the amount of the gross-up. After all, the employer can deduct it.

[23] If Mr. Guay had received a reimbursement that was grossed up to $70,000, for example, instead of the $35,000 provided for in his contract, he could have had, after tax, the money he needed to pay all the tuition fees that he had to pay. It seems to me that this way of doing things would have complied with the principle that executives performing the same duties were to receive the same compensation. It would also have the advantage of not being discriminatory towards other Canadians who have to pay tuition fees with after-tax money.

[24] I would add that Mr. Guay's situation is no different from that of employees of Canadian corporations who are posted to the big cities of the world such as New York, London, Paris or Hong Kong, where housing costs are exorbitant. In those cases, the employers have no choice but to provide housing to the employees or substantially subsidize the rent that must be paid in order to compensate their employees who must assume much higher living expenses.[4] According to paragraph 6(1)(*a*) of the *Act*, "There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable: (a) ... the value of benefits ... lodging ...".

[25] For all these reasons, the appeals of Mr. Guay are dismissed.

Signed at Drummondville, Quebec, this 14th day of January 2003.

"Pierre Archambault"

J.T.C.C.

Translation certified true
on this 25th day of February 2004.

Sophie Debbané, Revisor

---

[4] For an illustration of such circumstances, see my decision in *Rio v. The Queen*, T.C.C., No. 2001-2904(IT)I, dated January 14, 2003.