Docket: 2006-3793(EI)

BETWEEN:

ZAVECO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 25, 2007 at Montreal, Quebec

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant:	Laddie H. Schnaiberg
Counsel for the Respondent:	Isabelle Pipon, Student at Law

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed, and the decision of the Minister of National Revenue is vacated.

Signed at Ottawa, Canada, this 5th day of September, 2007.

"G. A. Sheridan"

Sheridan, J.

Citation: 2007TCC529
Date: 20070905
Docket: 2006-3793(EI)

BETWEEN:

ZAVECO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The issue in this appeal is whether the Minister of National Revenue properly calculated the insurable earnings and accordingly, the employer premiums, of the Appellant, Zaveco Ltd., in respect of its employee Shameer Ally.

[2] Mr. Ally was employed as a superintendent in an apartment building owned by the Appellant during the period December 12, 2005 to June 16, 2006. He was paid $450 per week, $30 of which was attributed to the value of the apartment the Appellant provided to him as part of the job. The Minister adjusted this amount on the basis that the apartment's value ought to be proportionally equal to the rent charged to tenants for apartments of the same square footage and layout in the building. These were rented for approximately $650 per month. The Minister increased the apartment component of Mr. Ally's weekly salary from $30 to $150; his insurable earnings for the period were likewise increased from $12,412 to $16,200[1]. The Appellant was reassessed accordingly for the employer's premiums. It is from that assessment that the Appellant appeals.

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[1] The calculation of these amounts is set out in paragraph 5 of the Reply to the Notice of Appeal:

(i) the weekly value of the apartment, supplied by the Appellant to the Worker was established as follows:

$ 650. per month x 12 months = $ 7,800.

$ 7,800. divided by 52 weeks = $ 150. per week

(j) the Worker's earning were established as follows:

$ 450. (salary) + $ 150. (value of the rent) = $ 600. per week

$ 600. X the last 27 weeks = $ 16,200.

[3] The amount of insurable earnings is calculated in accordance with the provisions of the *Insurable Earnings and Collection of Premiums Regulations* as set out below:

> 2.(1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is
>
> > (a) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, and
> >
> > ...
>
> (3) For the purposes of subsections (1) and (2), "earnings" does not include
>
> > (a) any non-cash benefit, other than the value of either or both of any board or lodging enjoyed by a person in a pay period in respect of their employment if case remuneration is paid to the person by their employer in respect of the pay period;

[4] Testifying on behalf of the Appellant was Zave Aberman, its principal and the manager of the company's rental property business. At the hearing, Mr. Aberman made no secret of his unhappiness with the Respondent's position, often disrupting the testimony of the Respondent's witnesses by making noises and pulling faces. It finally became necessary for the proper conduct of the hearing to have him remove himself from the counsel table to sit in the public gallery.

[5] Notwithstanding such foolish behaviour, Mr. Aberman was nonetheless credible in his evidence regarding the property management practices in Montreal. He has some 30 years' experience in the business. I accept his evidence that landlords routinely provide rental accommodation, as part of their remuneration, to their building superintendents. As well as being an incentive for accepting a demanding, but modestly paid, position, this practice ensures there is a company representative on hand to respond to tenants' needs and to the protect the landlord's property.

[6] The Respondent called Mr. Ally. He was originally hired as the building super in 1999. While not officially on duty "24-7", he was required to live in the building and to make himself generally available to tenants and prospective renters. His duties included maintaining the building and grounds, as well as seeing to emergency maintenance problems, collecting rent, showing rental units and accepting rental applications. He also had to be available to the demanding Mr. Aberman, who made

the rounds of his apartment buildings on a daily basis, and presented himself at Mr. Ally's apartment every morning at eight o’clock. The rental applications that Mr. Ally had to provide to prospective tenants, rent collection records and similar documents were kept in the apartment; janitorial tools and equipment were apparently stored elsewhere in the building.

[7] The Respondent's other witness was Mr. Henriot Cléophat, the Appeals Officer. I accept his evidence that upon receiving the Appellant's objection to the Minister's determination, Mr. Cléophat tried to meet with Mr. Aberman to discuss his concerns. Mr. Aberman refused to do so, telling him to "talk to his lawyer". His lawyer, the same counsel who represented the Appellant at the hearing, neglected to file his materials within the time provided by Mr. Cléophat. On cross-examination of Mr. Cléophat, counsel took the unusual tack of blaming him for his own short-comings in this regard. In any event, Mr. Cléophat quite rightly made his deliberations based on what he had on the file: essentially, that Mr. Ally occupied a 4½-room apartment in a building where apartments of the same square footage and layout commanded a monthly rent of $650 per month. As a result, the Minister determined that the Appellant's provision of an apartment ought to be valued at $150 per week rather than $30.

[8] Had Mr. Aberman behaved more sensibly at the beginning, Mr. Cléophat might have had a more complete picture. In any case, having had the benefit of the Appellant's and Respondent's evidence, I am of the view that a proper assessment of the value of the apartment provided by the Appellant cannot be made strictly on the basis of square footage. While I accept that tenants occupying an apartment of equivalent size were paying approximately $150 per week, what they got for that price included the peaceful and private enjoyment of their premises. The same cannot be said for Mr. Ally's apartment. The evidence of both Mr. Aberman and Mr. Ally supports the conclusion that the super's apartment was effectively a branch plant of the Appellant's property management office. Its lower rental value was the result of the onerous conditions that applied to its occupancy: being constantly available to receive Mr. Aberman on his daily visits and to deal with tenant complaints, as well as collecting rent, cleaning the building, shovelling snow, cutting grass and screening new renters. Counsel for the Appellant is correct in his submission that for an accurate evaluation to be made, like must be compared with like: because of the obligations that came with the super's apartment, Mr. Ally's apartment was not "like" the similarly sized apartments occupied by non-employee tenants.

[9] In support of the Minister's contention that the value of the apartment ought to be the fair market value of a similar apartment, counsel for the Respondent referred

the Court to the decision in *Résidence au Fil de l'Eau Inc. v. Canada (Minister of National Revenue)*[2]. In that case, however, the Court specifically found that the employer had failed to adduce sufficient evidence to satisfy its onus of showing "an adjustment for loss of enjoyment and privacy of [the employees'] apartments"[3]. That is not the case here. For the reasons set out above, I am satisfied that the Appellant has met its onus of showing the value it attributed to the accommodation was the correct one. The appeal is allowed on the basis that Mr. Ally's insurable earnings from December 12, 2005 to June 16, 2006 were $12,412.

Signed at Ottawa, Canada, this 5th day of September, 2007.

"G. A. Sheridan"

Sheridan, J.

[2] [1996] T.C.J. No. 1345.

[3] *Supra*, at paragraph 12.

CITATION:	2007TCC529
COURT FILE NO.:	2006-3793(EI)
STYLE OF CAUSE:	ZAVECO LTD. AND THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	April 25, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	September 5, 2007

APPEARANCES:

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Counsel for the Respondent:	Isabelle Pipon, Student at Law

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