Practice Notes and Comments

This regular feature is edited by Gregory J. Winfield of McCarthy Tétrault LLP. It discusses tax developments affecting the taxation of compensation and retirement and focuses on Canada Revenue Agency policies and practices.

TAXABLE BENEFITS

Employer-provided Parking: Taxable Fringe Benefit or Tax-free Perk?

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Under the Income Tax Act,[1] employer-provided parking is taxable as a general employment benefit[2] and not as a benefit in respect of the use of a motor vehicle.[3] The GST/HST benefit associated with the cost of employer-provided parking is also taxable as a benefit.[4]

The CRA's Administrative Policies

In 2009, the Canada Revenue Agency ("CRA") issued a news release[5] on the topic of employer-provided parking where it announced the introduction of a new, interactive questionnaire available to help employers determine whether the parking they provide to employees is considered a taxable benefit.[6]

The questionnaire was based on the CRA's various historical administrative positions on employer-provided parking, modified by recent jurisprudence.

The CRA's view is that employer-provided parking generally constitutes a taxable benefit to the employee, regardless of whether or not the employer owns the lot, as was the case in the recent jurisprudence involving the Branksome Hall private school parking lot, discussed below.

The amount of the benefit is based on the fair market value of the parking less any amount the employee pays to use the space. The CRA has stated that if the fair market value of the parking can not be determined, no benefit should be added to the employee's T4.[7]

The CRA provides several examples when this could occur:

- the business operates from a shopping centre or industrial park where parking is available to both employees and non-employees; or
- the employer provides what has become known as "scramble parking" – meaning there are fewer spaces than there are employees who require parking and the spaces are available on a first-come, first-served basis.[8]

In addition, the CRA will generally take the view that no taxable benefit arises for an employee when an employer provides parking to employees for business purposes where the employee regularly has to use his or her own automobile (or one the employer supplies) to perform his or her duties.[9]

The CRA considers a parking space provided to an employee who is generally required to use his or her vehicle three or more days on a weekly basis for employment-related travel to be used "regularly" for employment-related reasons, such that no taxable benefit is deemed to arise.[10]

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[1] R.S.C. 1985, c. 1 (5th Supplement), as amended, hereinafter referred to as the "Act." Unless otherwise stated, statutory references in this article are to the Act.

[2] Paragraph 6(1)(*a*).

[3] Subsection 6(1.1).

[4] Subsection 6(7).

[5] Canada Revenue Agency News Release, February 4, 2009, "Employer-provided Parking."

[6] The questionnaire can be found on the CRA's website at http://www.cra-arc.gc.ca/payroll/index.html, by selecting "P" from the drop-down menu for "Parking."

[7] CRA Employers' Guide: Taxable Benefits – T4130 (Rev. 2009), Chapter 3, "Parking."

[8] For a discussion of what constitutes "scramble parking," see CRA technical interpretation 2000-0022565.

[9] Ibid.

[10] CRA technical interpretation 2004-0101151E5.

The reference to week in the above technical interpretation was to a five-day normal work week. The CRA later clarified that this was meant to be a general guideline and as a result, an employee who is required to use the parking space for employment-related reasons more than half the number of work days, would also not be deemed to receive a taxable employment benefit.[11]

If, on the other hand, it is determined that there is only "incidental use" of the parking spot for the employer's business and there is employer-provided parking, the CRA would permit a reduction in the parking benefit "on some reasonable basis to account for the incidental business use. For example, the benefit otherwise determined could be reduced on the basis of the number of days used in the employer's business in the calendar year."[12]

The CRA's position is different when it comes to reducing the benefit for periods where the employee is out of town and unable to use the parking spot. The CRA states no reduction would be available since the parking space is being held for the employee's use, notwithstanding that he or she may be unavailable to use the parking space from time to time.[13]

The CRA subsequently said that its position would be no different and the taxable benefit not reduced when other employees randomly used the parking spot while the employee is out of town.[14]

Finally, if the employee has a disability, the parking benefit is generally not taxable.[15]

Parking Jurisprudence

The courts have come to various conclusions in determining whether employer-provided parking constitutes a taxable employment benefit, each case decided based on its own facts and circumstances. The question of the value of such benefit has also been litigated.

Perhaps the starting point is the basic premise that the cost of getting to work is always a personal expense. This was confirmed most recently in a 2006 case by former Chief Justice Bowman who wrote: "The general rule of course is that the cost of travelling from one's home to one's place of work is not a deductible expense. This has been settled law for many years."[16]

Although one would think that the cost of parking at work, if paid by the employer, would also be considered to be a personal expense, the former Chief Justice reached a different conclusion in 2008 when he commented he had "serious doubts whether providing an employee with a parking space is ever a taxable benefit."[17]

Primary Beneficiary – Employer or Employee?

A 1997 case involved George Monteith,[18] an employee of the Municipality of Metropolitan Toronto, who was given a free, reserved parking spot in Toronto's Metro Hall. The Court found that the provision of an assigned parking stall was indeed a taxable benefit.

In a 1999 case involving SaskTel,[19] the issue was whether parking provided to certain groups of employees constituted a taxable benefit. In this case, the employees paid a nominal amount for the parking space, which was significantly below both the fair market value of such a space as well as the actual cost to SaskTel of providing that space.

The Court concluded that SaskTel was the primary beneficiary of the free parking since it was utilized by them during office hours and they gained no personal benefit from such parking.

In 2000, two employees of Telus, Daniel Chow and Brian Topechka, who worked at Telus Plaza in Edmonton, were assessed a taxable benefit for their parking spots. The Judge concluded that "the economic benefit flowing from the provision of parking spaces to the appellants was gained by Telus, as their employer,"[20] but each for slightly different reasons.

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[11] CRA technical interpretation 2005-0110211E5.
[12] CRA technical interpretation 2005-0134251E5.
[13] CRA technical interpretation 2003-0001435.
[14] CRA technical interpretation 2003-0006585.
[15] Supra note 7.

[16] *Toutov v. R.*, 2006 DTC 2928.
[17] *Rachfalowski v. The Queen*, 2008 TCC 258 at paragraph 21.
[18] *Monteith v. Canada* [1997] T.C.J. No. 1282.
[19] *Saskatchewan Telecommunications v. The Queen*, 99 DTC 1306.
[20] *Chow v. Canada* [2000] T.C.J. No. 902.

In Mr. Chow's case, the Court ruled that since Mr. Chow, a corporate financial analyst in the Treasury Division, had to work late hours, it was cheaper for Telus to provide him with a parking space than to pay for taxi fares home. As a result, the main benefit was to Telus as opposed to the employee.

Mr. Topechka, on the other hand, was required to begin his work day at five a.m., which allowed Telus the opportunity "of investing its cash assets in financial markets during the prime hours of operation in Canada and thus enabling it to better products and returns."[21] Since Mr. Topechka could not use public transportation to make it to work at 5 a.m., his only alternative was to drive to work.

As a result, the Court concluded that the parking spot was not a taxable benefit to him since "it was Telus's economic advantage to provide the parking privilege and at the most economical way."[22]

In 2001, the Tax Court considered the case of James Todd,[23] the President and CEO of Ice Drilling Systems Inc., a drilling service corporation with business operating headquarters in Red Deer, Alberta and financial operations in Calgary. Each business day, he worked in Red Deer in the morning and Calgary in the afternoon and drove the 160 kilometers each way between the two cities.

In that case, Todd argued that all of the parking charges assessed against him "were in fact for business parking and were of no personal benefit to (him)." The Judge agreed and found no taxable benefit accrued to Mr. Todd.

In 2007, the Tax Court was asked to determine whether parking provided to an additional 16 Telus employees resulted in a taxable employment benefit.[24] The Court held that for 14 of the 16 affected employees, a taxable benefit did arise while in the other 2 cases, it did not. As Judge Rowe wrote in one of the most memorable passages in recent years:

> It is apparent these taxable benefit appeals will continue to be case-specific. The range of results will encompass clear-cut, resounding victories, nail-biting overtime shoot-out wins, hitting-the-goalpost efforts that fall just short, decently-played contests ending in a loss, and complete blowouts where one party never had any greater chance of survival than a tiny ice floe in a future envisaged by Al Gore.[25]

The Tax Court also indicated that such a determination

> … requires an examination of the totality of the evidence with a view to assessing on a reasonable, practical basis whether under the particular circumstances the employee's enjoyment of the expenditure by the employer was ancillary to the benefit derived by his employer.[26]

In 2009, two other Telus employees went to Court over parking passes.[27] Richard Schroter testified that his daily commute time was reduced by about an hour when he drove his own car as opposed to taking public transit and that he had spent this additional hour at work rather than at home.

This, however, was not enough to convince the Judge that the primary beneficiary of the pass was Telus. As the Court wrote: "Mr. Schroter's decision to drive to work was essentially a matter of personal choice."[28]

The other Telus employee, Jim Johannsson, who held the positions of Director of Consumer Strategy and Director of Marketing Operations, argued that he needed his vehicle for work. The Judge concluded that the parking "was provided primarily for business reasons and that Mr. Johannsson did not receive a taxable benefit."[29]

Also in 2009, the Tax Court held that Leslie Bernier,[30] an employee of Saskatchewan Industry and Resources, was required to include in his income a taxable benefit relating to his free parking spot since "the

[21] Ibid.
[22] Ibid.
[23] *Todd v. R.* [2001] 3 CTC 2816.
[24] *Adler et al. v. The Queen,* 2007 DTC 783.
[25] Ibid.
[26] Ibid.
[27] *Schroter et al. v. The Queen,* 2008 TCC 681 (reaffirmed by the Federal Court of Appeal in *Schroter v. The Queen,* 2010 FCA 98).
[28] Ibid. at paragraph 32.
[29] Ibid. at paragraph 53.
[30] *Bernier v. The Queen,* 2009 TCC 312.

parking provided to the Appellant by the Employer primarily benefitted the Appellant and not the Employer."[31]

In 2010, Patrick Long, was employed as a mechanic by Adelaide Motors Inc., a car dealership located in downtown Toronto. Adjacent to the lot occupied by the dealership was a parking lot in which some Adelaide Motors employees parked their vehicles. Mr. Long was assessed a taxable benefit for the use of the parking lot.[32]

The Judge concluded that no taxable benefit arose since Mr. Long seldom used the lot and

> … on the few days he drove to work, he had, at best, a chance of finding an available space for his car in the Parking Lot. This put him in no better position than the unidentified interlopers … who took advantage of Adelaide Motors' unregulated parking practices to use the Parking Lot for free.[33]

In a case[34] that garnered widespread media[35] attention in 2010, Toronto parking lot attendants and maintenance workers were assessed on the value of parking at Toronto Parking Authority lots when at work for free.

These workers were not required to take their car to work nor, in fact, were they required to even own a car. As a result, the use of the parking space was not a benefit to the employer but rather a mere convenience to employees. Accordingly, the Court ruled that the provision of the spaces was indeed taxable, notwithstanding the employees' argument that there was no economic loss to their employer because the lots were never full.[36]

Value of the Benefit

Assuming that the parking benefit is indeed taxable, the other issue that has come before the courts is what the value of such a parking space should be.

In 1998, a taxpayer challenged the taxable benefit associated with a reserved parking stall at Toronto's Metro Hall which he used only about 20% of the year because the rest of the time he walked to work. Donald Richmond argued that "a benefit not used is not a benefit received" and as a result, he should only have been assessed a benefit equal to 20% of the fair market value of the parking spot since he only used it 20% of the time.[37]

The Judge disagreed, referring to a previous parking case in which the Court said:

> Whether the Appellant used the property is of little consequence. It was available to him and was accordingly a benefit to him. He adduced no evidence to establish that the value of the assigned exclusive parking spot was less than that assessed by the Minister.[38]

Most recently, the Tax Court had to deal with the value of a parking space on private property. The case[39] involved approximately 100 employees of Branksome Hall, a private girls' school in Toronto's Rosedale neighbourhood.

The Branksome employees were reassessed for their 2003 and 2004 taxation years to include $92 per month in their income, which the CRA determined to be the fair market value of the free parking provided by the school.

Three expert witnesses, one for the employees and two for the CRA, each gave independent evidence about the fair market rental rate for the parking at the school. Each expert used the "direct comparison" approach in their valuations, which values the benefit by reference to parking costs at other similar lots.

The employees' expert witness compared parking rates at various lots at other schools, hospitals and health care facilities, and

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[31] Ibid. at paragraph 2.
[32] *Long v. The Queen*, 2010 TCC 153.
[33] Ibid. at paragraph 18.
[34] *Toronto Parking Authority et al. v. MNR et al.*, 2010 TCC 193.
[35] See, for example, "Tax court rules against parking employees," *The Globe and Mail,* April 28, 2010 and "City staff billed for unused parking," *The Toronto Star*, May 13, 2010.
[36] In an interesting postscript to the case, *The Toronto Star* reported that the city of Toronto announced that it would spend up to $8 million to compensate 1,700 employees facing back taxes for parking privileges. To get the money, the employees had to agree to file a notice of objection with the CRA by June 30, 2010 and, if their appeals were successful, turn over any refund they received to the city. "City workers off the hook for back taxes on parking," *The Toronto Star*, May 15, 2010.
[37] *Richmond v. Canada* [1998] T.C.J. No. 258.
[38] *Soper v. M.N.R.*, 87 DTC 522.
[39] *Geraldine Anthony, Heather Friesen, Leslie Morgan and Jarrod Baker v. the Queen*, 2010 TCC 533.

concluded the fair market value of a parking space was $40 per month.

One of the CRA's experts used comparables that included other neighbourhood commercial lots, as well as lots at universities and private colleges. The other expert used neighbourhood lots, but discounted the rates by 50% to take into account the school's more remote location. They came up with a fair market value of between $75 and $80 monthly.

After an extremely detailed and thorough analysis, the judge concluded that the appropriate monthly taxable benefit rate should be $75 for 2003 and $77 for 2004.

The judge also concluded that since parking was not available to the employees during holidays and in the summer, the taxable benefit should be based on only nine months' worth of parking.