Docket: 2014-60(IT)I

BETWEEN:

RICHARD SZYMCZYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 2 and August 14, 2014 at Toronto, Ontario

Before: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	Al Meghji Martha MacDonald Patrick Reynaud
Counsel for the Respondent:	Bobby J. Sood Lorraine Edinboro

JUDGMENT

The appeal with respect to assessments made under the *Income Tax Act* for the 2008 and 2009 taxation years is allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that standby charges should be determined based on the appellant's income tax returns.

Signed at Ottawa, Ontario this 30th day of December 2014.

"J.M. Woods"

Woods J.

Citation: 2014 TCC 380
Date: 20141230
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REASONS FOR JUDGMENT

Woods J.

I. Introduction

[1] This appeal under the *Income Tax Act* concerns the standby charge and operating expense benefit that are required to be included in a taxpayer's income if an automobile has been supplied by the taxpayer's employer.

[2] The appellant, Richard Szymczyk, had automobiles assigned to him by his employer, General Motors of Canada Limited ("GMCL"). He appeals from assessments that increased the amount of the automobile benefit for his 2008 and 2009 taxation years. The appeal is governed by the informal procedure.

[3] By way of background, in 1981 the government proposed to substantially increase the income inclusion required for employer-supplied automobiles. GMCL expressed concern to the Department of Finance about the effect of the proposed legislation on its employees.

[4] It appears that the Department of Finance did not modify the proposed legislation to take GMCL's concern into account. However, Revenue Canada, Taxation authorized GMCL to use a simplified method of computing the standby charge and operating expense benefit with respect to its executives and senior managers (the "Authorization"). The Authorization also dealt with other employees but this is not relevant to this appeal.

[5] GMCL relied on the Authorization for many years to prepare T4 slips for executives and senior managers, including Mr. Szymczyk for the 2008 and 2009 taxation years. Mr. Szymczyk used the amounts in the T4s to prepare his income tax returns for these years.

[6] The first in-depth audit that the Canada Revenue Agency (CRA) undertook with respect to these benefits commenced in 2010, which was approximately 28 years after the Authorization was issued. The auditor began reviewing GMCL's records relating to the 2008 taxation year around March 2011 (Affidavit of Norman Fernandez, para. 7). Approximately 350 employees were potentially affected.

[7] The CRA concluded that the Authorization with respect to executives and senior managers was no longer valid due to changed circumstances and it issued assessments to Mr. Szymczyk and others for the 2008 and 2009 taxation years.

[8] Mr. Szymczyk filed notices of objection to the assessments and instituted an appeal to this Court before the objections were dealt with by the CRA. As far as I know, Mr. Szymczyk is the first GMCL employee to have an appeal heard on this issue.

[9] Prior to instituting this appeal, GMCL and Mr. Szymczyk each commenced judicial review applications in the Federal Court with respect to assessments for the 2008 taxation year. Mr. Szymczyk sought a declaration that the assessment issued to him was invalid and unenforceable *(General Motors of Canada Limited v Canada (National Revenue)*, 2013 FC 1219, at para. 4 and 32).

[10] In the Federal Court, GMCL and Mr. Szymczyk accepted that it was open to the CRA to re-evaluate the Authorization and adopt a different approach on a going-forward basis. However, they objected to assessments being issued on a retroactive basis since the Authorization had been relied on.

[11] The Federal Court applications were dismissed by Justice Mactavish for lack of jurisdiction. As for Mr. Szymczyk, his application was dismissed on the basis that the Tax Court of Canada had the exclusive jurisdiction to give the relief that he was seeking. Justice Mactavish also stated *in obiter* that if the Tax Court concludes that the assessment is correct, "the Minister's conduct cannot serve to relieve [Mr. Szymczyk] of his statutory obligation to pay" (at para. 108 and 118).

[12] GMCL and Mr. Szymczyk have appealed the Federal Court decision. As I understand it, the appeal is being held in abeyance pending this decision.

II. Background facts

A. *GMCL's Product Evaluation Program*

[13] In general, executives and senior managers of GMCL are required to participate in a program under which a vehicle is assigned on conditions designed to enable the vehicle to be evaluated and marketed by the employee. The program is called "Product Evaluation Program," or PEP.

[14] Some of the terms of PEP in the relevant taxation years are set out below.

- Subject to availability and any job-related needs for a particular vehicle, an employee is permitted to select a GM vehicle that is available for purposes of the program. In practice, employees choose among the vehicles that are available at the time of turnover, although the intention is that employees have exposure to a broad range of vehicles.

- Vehicles are to be changed at least every three months or 12,000 kilometres, whichever is earlier.

- Employees are required to evaluate the vehicles and report any deficiencies.

- Employees are encouraged to promote the vehicles to neighbours, etc.

- GMCL maintains the vehicles and pays for gas, except gas purchased during weekends or vacation.

- Vehicles must be driven to work and be available for use for "short business travel" by other employees during work hours. In practice, vehicles may be loaned for longer periods for particular needs.

- Employees are required to purchase another GM vehicle for their spouses. However, spouses and adult children are permitted to drive the assigned vehicles during non-work hours.

[15] During the relevant taxation years, Mr. Szymczyk participated in PEP and was assigned four automobiles each year.

B. *The Authorization*

[16] On November 7, 1982, the Authorization was issued to GMCL by W.J. Massel, Director, Accounting and Collections Division of Revenue Canada, Taxation.

[17] The relevant part of the Authorization reads:

> Executive Pool Vehicles
>
> The issues raised during our two meetings as well as the comments included in your submission have been considered with regard to the proposed legislation and its effect upon the administration of your executive pool.
>
> As we understand it, these vehicles are assigned to your executives for business, marketing and personal use. The vehicles are pooled during the day for use by any authorized employee; they are driven to and from work and are available to their assigned drivers on week-ends.
>
> Due to the manner in which these vehicles are made available and the frequency of turn over (5,000 kms or 3 months), this Department recognizes that there are administrative difficulties in accurately establishing the stand-by charge benefit for each employee. For that reason, we are prepared to allow the use of an "average cost" for the calculation of the stand-by charge. It is understood that the calculation will be based upon the maximum 2% per month of this cost for every employee in this group. We are also prepared to allow the "average cost" be that of all passenger vehicles sold by GM in Canada.
>
> As the federal sales tax must be paid by the manufacturer before the vehicle can be put on the road, it is our official position that federal sales tax must be included in determining the "average cost".
>
> Although it is the intent of the Income Tax Act that operating expenses reflect individual use, we are prepared, in this instance, to accept an amount obtained by applying a percentage of personal/business uses to the average cost of operating the vehicles in this pool. However, your proposed split of 70% business, 30% personal is not, in our opinion, realistic. After considering the information available to us and further to consultation with our field staff, we are prepared to accept a 50% personal, 50% business split.
>
> […]

> If our position is agreeable to GM, this letter will serve as your authority to proceed accordingly.

[18] GMCL followed the Authorization in preparing T4 slips for employees in the PEP program.

C. *CRA audit*

[19] In 2010, the CRA commenced an audit of GMCL with respect to automobile benefits for employees subject to PEP. Judging from the lengthy correspondence that was exchanged during the audit, it appears that both sides dug in on the issue as to whether the Authorization should be followed for the 2008 and 2009 taxation years.

[20] At one point in the process, a senior official of the CRA informed GMCL that the CRA honours administrative agreements provided that the facts and circumstances remain unchanged (Ex. A-1, Tab H).

[21] The CRA was of the view, however, that the facts and circumstances had materially changed since the Authorization was granted. Its position was summarized in a letter dated August 30, 2011 from the Director, Toronto East Tax Services Office (Ex. A-1, Tab J). It listed many alleged changed circumstances, including the following:

> (i) the turnover of vehicles is much less frequent,
>
> (ii) the number of vehicles in the program is significantly reduced,
>
> (iii) employees can normally select a specific vehicle,
>
> (iv) vehicles are assigned exclusively to one individual, and
>
> (v) determining the cost of particular vehicles is not a significant administrative burden.

D. *The relevant assessments*

[22] The aggregate amount of automobile benefits reported by Mr. Szymczyk for the 2008 and 2009 taxation years is $8,280 and $5,317, respectively. No

breakdown was provided between the standby charge and the automobile expense benefit.

[23] The Minister assessed benefits to Mr. Szymczyk in the amounts of $16,269 and $13,966 for the 2008 and 2009 taxation years, respectively.

[24] The Reply provides a breakdown between the two types of benefits assessed. The amounts of $11,468 and $9,165 were included in Mr. Szymczyk's income for the standby charge, and $4,800 was included in income each year for the operating expense benefit.

III. Applicable legislative scheme

[25] In the taxation years under appeal, the *Act* required two income inclusions for employer-supplied automobiles, a standby charge for the supply of an automobile and an operating expense benefit for the payment of operating costs.

A. *Standby charge*

[26] The standby charge is calculated as a percentage of the cost of the automobile to the employer. The income inclusion is generally 2 percent of the cost of the vehicle for each month that the automobile is available, subject to a reduction if the vehicle is used primarily for employment and personal use is limited (i.e., less than 1,667 kilometres per month).

[27] The relevant provisions are paragraph 6(1)(e) and subsection 6(2) of the *Act*, which are reproduced below.

> **6.(1) Amounts to be included as income from office or employment** – 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:
>
> […]
>
> (e) **standby charge for automobile** – where the taxpayer's employer or a person related to the employer made an automobile available for the taxpayer, or to a person related to the taxpayer, in the year, the amount, if any, by which

(i) an amount that is a reasonable standby charge for the automobile for the total number of days in the year during which it was made so available

exceeds

(ii) the total of all amounts, each of which is an amount (other that an expense related to the operation of the automobile) paid in the year to the employer or the person related to the employer by the taxpayer or the person related to the taxpayer for the use of the automobile;

6.(2) Reasonable [automobile] standby charge – For the purposes of paragraph (1)(e), a reasonable standby charge for an automobile for the total number of days (in this subsection referred to as the "total available days") in a taxation year during which the automobile is made available to a taxpayer or to a person related to the taxpayer by the employer of the taxpayer or by a person related to the employer (both of whom are in this subsection referred to as the "employer") shall be deemed to be the amount determined by the formula

$$\frac{A}{B} \times [2\% \times (C \times D) + \frac{2}{3} \times (E - F)]$$

where

A is (a) the lesser of the total kilometres that the automobile is driven (otherwise than in connection with or in the course of the taxpayer's office or employment) during the total available days and the value determined for the description of B for the year in respect of the standby charge for the automobile during the total available days, if

(i) the taxpayer is required by the employer to use the automobile in connection with or in the course of the office or employment, and

(ii) the distance travelled by the automobile in the total available days is primarily in connection with or in the course of the office or employment, and

b) the value determined for the description of B for the year in respect of the standby charge for the automobile during the total available days, in any other case;

B is the product obtained when 1,667 is multiplied by the quotient obtained by dividing the total available days by 30 and, if the quotient so obtained is not a whole number and exceeds one, by rounding it to the nearest whole number or, where that quotient is equidistant from two consecutive whole numbers, by rounding it to the lower of those two numbers;

> C is the cost of the automobile to the employer where the employer owns the vehicle at any time in the year;
>
> D is the number obtained by dividing such of the total available days as are days when the employer owns the automobile by 30 and, if the quotient so obtained is not a whole number and exceeds one, by rounding it to the nearest whole number or, where that quotient is equidistant from two consecutive whole numbers, by rounding it to the lower of those two numbers;
>
> E is the total of all amounts that may reasonably be regarded as having been payable by the employer to a lessor for the purpose of leasing the automobile during such of the total available days as are days when the automobile is leased to the employer; and
>
> F is the part of the amount determined for E that may reasonably be regarded as having been payable to the lessor in respect of all or part of the cost to the lessor of insuring against
>
> (a) loss of, or damage to, the automobile, or
>
> (b) liability resulting from the use or operation of the automobile.

B. *Operating expense benefit*

[28] An operating expense benefit is required to be included in income if an employer pays all or part of the operating expenses of an automobile that is subject to a standby charge. The rate that applies for purposes of this appeal is 24 cents per kilometre driven for personal use.

[29] An alternative computation of the benefit is available if the automobile is used primarily in connection with employment. In this case, the employee may designate that the benefit is one-half of the standby charge. In order to make the designation, the employee must notify the employer before the end of the year.

[30] The relevant provision is paragraph 6(1)(k) of the *Act*, which is reproduced below. The designation to use one-half the standby charge is imbedded in clause (iv).

> **6.(1) Amounts to be included as income from office or employment** – 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:
>
> […]

(k) **automobile operating expense benefit** – where

(i) an amount is determined under subparagraph (e)(i) in respect of an automobile in computing the taxpayer's income for the year,

(ii) amounts related to the operation (otherwise than in connection with or in the course of the taxpayer's office or employment) of the automobile for the period or periods in the year during which the automobile was made available to the taxpayer or a person related to the taxpayer are paid or payable by the taxpayer's employer or a person related to the taxpayer's employer (each of whom is in this paragraph referred to as "payor"), and

(iii) the total of the amounts so paid or payable is not paid in the year or within 45 days after the end of the year to the payor by the taxpayer or by the person related to the taxpayer,

the amount in respect of the operation of the automobile determined by the formula

A - B

where

A is

(iv) where the automobile is used primarily in the performance of the duties of the taxpayer's office or employment during the period or periods referred to in subparagraph (ii) and the taxpayer notifies the employer in writing before the end of the year of the taxpayer's intention to have this subparagraph apply, ½ of the amount determined under subparagraph (e)(i) in respect of the automobile in computing the taxpayer's income for the year, and

(v) in any other case, the amount equal to the product obtained when the amount prescribed for the year is multiplied by the total number of kilometres that the automobile is driven (otherwise than in connection with or in the course of the taxpayer's office or employment) during the period or periods referred to in subparagraph (ii), and

B is the total of all amounts in respect of the operation of the automobile in the year paid in the year or within 45 days after the end of the year to the payor by the taxpayer or by the person related to the taxpayer;

[31] To complete the picture, the applicable prescribed rate described in clause (v) is 24 cents per kilometre pursuant to s. 7305.1 of the *Income Tax Regulations*.

IV. Positions of parties

[32] The position of Mr. Szymczyk is reproduced below from the notice of appeal.

> 20. The Minister's direction on the manner in which GMCL was to compute the benefit in issue together with her continuous course of conduct since September 7, 1982 gives rise to an estoppel that prohibited the Minister from issuing the 2008 and 2009 Reassessments.
>
> 21. The Minister gave GMCL (and by extension, Mr. Szymczyk and the other employees) explicit direction on the manner of determining the taxable benefits at issue. The Minister did so on the understanding and expectation that GMCL, Mr. Szymczyk and the other employees would rely upon and follow that direction, and on the understanding that no reassessments would issue contrary to that direction. GMCL, Mr. Szymczyk and the other employees relied on that direction and the Minister was estopped from reassessing in a manner contrary to her direction.
>
> 22. In the alternative, the key assumptions on which the 2008 and 2009 Reassessments are founded – namely that non-business use for each and every employee was 20,004 kilometres in each year and that the cost of the automobiles was other than the average cost of all vehicles sold by GMCL in Canada – are arbitrary, capricious and not founded on any facts. They were simply made to maximize the amount of taxable benefit and tax. The assumptions are not reliable and cannot be a basis to impose tax.
>
> 23. In the further alternative, the Minister erred in applying section 6 of the Act in raising the 2008 and 2009 Reassessments. Among other things, the Minister incorrectly deprived Mr. Szymczyk of the reduced standby charge and incorrectly determined the amount of the operating expense benefit.

[33] The position of the Crown is reproduced from the reply.

> 12. The *Act* requires taxpayers to include automobile benefits in computing their taxable income. In particular, paragraph 6(1)(e) and subsection 6(2) of the *Act* require taxpayers to include "a standby charge" for automobiles made available to them by their employer during a taxation year. The formula legislated in subsection 6(2) of the *Act* dictates the exact amount of standby charge to be included in income. The formula does not allow for flexibility in the calculation of taxable automobile benefits.

13. In computing income for his 2008 and 2009 taxation years, the appellant underreported the automobile standby charge and his operating expense benefits.

14. Applying the formula legislated in subsection 6(2) of the *Act*, the appellant's automobile standby charges were $11,468.06 in 2008 and $9,165.76 in 2009. The appellant's operating expense benefit was $4,800.96 for each of the 2008 and 2009 taxation years.

15. There is no discretion in relation to whether to include an automobile benefit in income, nor in relation to the computation of the value of that benefit. In this case, the Minister determined that the appellant had failed to report the correct amount of automobile benefits and was not in compliance with the *Act*. The Minister's actions to reassess tax that she determines is due in accordance with the *Act* cannot give rise to estoppel.

V. Analysis

[34] The analysis below follows the order of Mr. Szymczyk's submissions.

A. *Estoppel*

[35] Mr. Szymczyk submits that the Crown should be estopped from assessing contrary to the Authorization.

[36] His submission relies on two distinct branches of estoppel: estoppel by convention and estoppel by representation. It is sufficient for purposes of these reasons to refer to the brief description of the two branches provided in *Ryan v Moore*, 2005 SCC 38:

> 4 Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G.H.L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption, then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (G.S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp.7-8).
>
> 5 Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation

> should be permitted to dispute its truth, or do anything inconsistent with it (*Page v. Austin* (1884), 10 S.C.R. 132, at p. 164).

[37] In the context of this appeal, it should be kept in mind that estoppel will not apply if an approval given by a tax authority is contrary to law. This was addressed in *MNR v Inland Industries Ltd.*, 72 DTC 6013 (SCC) where Pigeon J. wrote on behalf of the Court (at 6017):

> […] it seems clear to me that the Minister cannot be bound by an approval given when the conditions prescribed by the law were not met.

[38] Although the Minister cannot be bound if an approval is contrary to law, in my view, an approval should not be set aside by courts too readily on grounds that it is contrary to law. Latitude should be given to the approval unless it is clearly not supportable by the law. The administration of the tax system would be significantly adversely affected if this were not the case.

[39] As for the Authorization, I do not think that its application to employees subject to PEP was contrary to law when it was issued. PEP was intended to provide benefits to GMCL as well as employees and it was difficult to distinguish between personal and business use. The intent of the Authorization, in my view, was to provide for a reasonable determination of benefits that were supportable under the legislation and yet were not burdensome to administer.

[40] The relevant parts of the Authorization are reproduced above. It allowed standby charges to be computed based on the average cost of passenger automobiles sold by GMCL in Canada, provided that the standby charge was not reduced by limited personal use. As for the operating expense benefit, the Authorization permitted the benefits to be determined based on the average operating expenses of automobiles in the program and based on a 50/50 split of personal/business use.

[41] In my view, the Authorization provided for a reasonable determination of employee benefits under the relevant legislation. The overall amount of the income inclusion was reasonable given that the business use was significant, and there is no reason for courts to interfere simply because the method by which the amounts were determined is different from that set out in the *Act*.

[42] Although the Authorization was reasonable, the circumstances underlying the Authorization changed.

[43] The Authorization does not expressly state that it is valid only if there are no material changes in the law or facts, but this is implicit in the Authorization. GMCL and Mr. Szymczyk cannot reasonably have expected that the Authorization would be valid if the material circumstances changed.

[44] In my view, both the law and the facts did materially change, such that the Authorization is no longer valid in the taxation years at issue.

[45] First, there was a material change in the law with respect to the operating expense benefit.

[46] When the Authorization was issued in 1982, the *Act* contained no specific provision dealing with operating expenses. Rather, the benefit was computed in accordance with the general employee benefit provision in paragraph 6(1)(a), which required an income inclusion for "the value of board, lodging and other benefits of any kind […]."

[47] The law was changed effective in 1993 by the enactment of paragraph 6(1)(k) to provide a specific rule for operating expenses. For Mr. Szymczyk in the relevant taxation years, the income inclusion is 24 cents per kilometre driven otherwise than in connection with employment.

[48] This change to the legislation is material and in my view invalidated the Authorization.

[49] There was also a material change in the factual circumstances that were the basis for the Authorization. Revenue Canada stated in the Authorization that it was being issued partly because the vehicles turned over frequently, every 5,000 kilometres or 3 months. In the relevant taxation years, the PEP policy had changed to 12,000 kilometres or 3 months, whichever is earlier. In my view, this is also a material change that invalidates the Authorization.

[50] The Crown suggests that there are several other material changes in the facts. It is difficult to confirm this because the Authorization does not set out in detail the facts on which it is based. However, one does not need a multitude of material changes to invalidate the Authorization.

[51] For these reasons, I would conclude that the Authorization cannot be relied on with respect to the computation of automobile benefits to Mr. Szymczyk in the

2008 and 2009 taxation years. The Minister is not estopped from issuing the assessments that are under appeal.

B. *Assumptions and onus of proof*

[52] Mr. Szymczyk submits that the onus of proof should be reversed with respect to the factual assumptions stated in the Reply, and refers in particular to the assumption with respect to the cost of automobiles, and the assumption with respect to kilometres driven for personal use.

[53] The principle is well-established that the Court may require the Crown to bear the burden of proof with respect to pleaded assumptions on grounds of fairness: *Transocean Offshore Ltd. v The Queen*, 2007 FCA 104, at para. 35.

[54] Mr. Szymczyk submits that it is unfair for him to bear the burden of proof because the Authorization dispensed with detailed record keeping.

[55] The problem with this submission is that the Authorization was not valid for the relevant taxation years. Material circumstances had changed since 1982, and GMCL chose not to attempt to obtain a new Authorization. This decision put both GMCL and its employees at risk that the CRA would not follow the Authorization.

[56] Since the Authorization was not valid, it is fair for Mr. Szymczyk to bear the usual burden of proof.

[57] Mr. Szymczyk further submits that the onus of proof should be reversed because two key assumptions are "arbitrary, capricious and not founded in any facts." He also submits that the Minister did not contact him prior to issuing the assessments.

[58] I agree with Mr. Szymczyk that the assumed facts are partly arbitrary, but this is not a reason for the Crown to bear the burden of proof. The burden of proof with respect to pleaded assumptions is placed on taxpayers because the facts are usually within the taxpayers' knowledge or control. It is not unfair for Mr. Szymczyk to bear the burden of proof simply because some assumptions are arbitrary.

[59] With respect to the failure of the CRA to contact Mr. Szymczyk prior to issuing the assessments, the issue is one of fairness. In my view, it is not unfair for

Mr. Szymczyk to bear the burden of proof simply because he was not contacted prior to the assessments being issued.

[60] For these reasons, I reject the submissions of Mr. Szymczyk regarding shifting the onus of proof. However, I will have more to say about assumptions below.

C. *Are assessments in accordance with Income Tax Act?*

[61] Mr. Szymczyk submits that the Minister made several mistakes in computing the benefits for purposes of the assessments.

[62] I would comment at the outset that the submissions on behalf of Mr. Szymczyk emphasized problems with the assessments rather than providing a justification for the amounts reported in the income tax returns. Mr. Szymczyk's counsel acknowledged at the hearing that it would be difficult to prove that the income tax returns were in strict compliance with the *Act*.

[63] Mr. Szymczyk was not called as a witness by his counsel at the hearing and he relied for the most part on the evidence in the Federal Court which I agreed could be introduced for purposes of this appeal. It is important to note that the Federal Court matter was a judicial review and it was not concerned with whether Mr. Szymczyk's income tax returns complied with the *Act*.

[64] I turn now to consider whether the amounts assessed are in accordance with the *Act*.

(1) Standby charge

[65] Mr. Szymczyk raises many grounds for disputing the Minister's determination of the standby charge. He submits that the Minister's determination of the cost of the automobiles is inaccurate, that the Minister incorrectly ignored the pooling of automobiles, and that the Minister's determination of personal use is contrary to the evidence.

[66] It is not necessary for me to consider these submissions because there is another problem with the Crown's position. The difficulty is that one of the pleaded assumptions does not support the Minister's determination of the standby charge.

[67] The relevant assumption is reproduced below.

> e) the total number of kilometres driven by the appellant for personal use in the 2008 and 2009 taxation years was deemed to be 20,004 per year.

[68] I would first comment concerning the use of the term "deemed" in the assumption because it sticks out like a sore thumb. The legislation does not contain a deeming rule for personal use, although previous versions of the legislation had done so. Although the choice of the term "deemed" is unfortunate, nothing turns on this.

[69] The real problem is that the stated assumption does not support the standby charge that was assessed.

[70] Mr. Szymczyk had four automobiles assigned to him in each of 2008 and 2009, each with a different assumed cost. In this case, the legislation requires that personal use be calculated separately for the periods that each automobile was made available. The problem is that there is no assumption as to personal use for each of these periods.

[71] To illustrate, the pleaded assumption was that personal use was 20,004 kilometres per year. If this use occurred entirely by one of the assigned automobiles, then according to the formula in s. 6(2) there is no income inclusion with respect to the other assigned automobiles. This is obviously an unlikely factual scenario, but it illustrates the point that personal use has to be determined for a period of use of each automobile.

[72] What is the result of this? The burden of proof with respect to these relevant facts must be shifted to the Crown. In *The Queen v Loewen*, 2004 FCA 146, at paragraph 11, Justice Sharlow stated:

> [11] […] If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown. This is well explained in *Schultz v. Canada*, [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (F.C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4).

[73] As a final matter, it is troubling that neither party raised this as an issue. If the appeal were heard under the general procedure, it would be appropriate to seek submissions from the parties. However, the appeal was heard under the informal procedure, it involves a small amount of tax, and it does not have precedential effect. It is not in the interests of justice to prolong this appeal for this reason.

[74] Accordingly, I would conclude that the Crown has the burden to establish the personal use of each automobile that was assigned, and that this burden has not been satisfied.

[75] For this reason, the appeal will be allowed with respect to the standby charges.

(2) Operating expense benefit

[76] Pursuant to s. 6(1)(k) of the *Act*, the operating expense benefit to Mr. Szymczyk is computed at the rate of 24 cents per kilometre of personal use. The Minister determined the benefit to Mr. Szymczyk based on the assumption that personal use was 20,004 kilometres per year.

[77] One of Mr. Szymczyk's submissions is that the Minister failed to establish, by assumption or evidence, that the amounts determined by the Minister were greater than Mr. Szymczyk's determination.

[78] I fail to see how this justifies allowing Mr. Szymczyk's appeal. However, in any event this is Mr. Szymczyk's appeal. The amounts determined by the Minister are stated in the Reply. If there is an issue that the amounts reported by Mr. Szymczyk are in excess of the Minister's determination, Mr. Szymczyk should have satisfied himself on this.

[79] I turn now to the central issue which is whether Mr. Szymczyk has established a *prima facie* case as to personal kilometres driven. In my view, Mr. Szymczyk's evidence in this regard falls short.

[80] As mentioned earlier, Mr. Szymczyk was not called to testify at the hearing by his counsel, and for the most part he relied on the evidence presented in the Federal Court judicial review application.

[81] The Crown did call Mr. Szymczyk and asked him some questions regarding personal use. However, at no time did Mr. Szymczyk provide an estimate of the total number of personal use kilometres that he drove. Mr. Szymczyk has not satisfied the burden.

[82] Mr. Szymczyk also submits that he should be permitted to designate the benefit based on one-half the standby charge. The problem is that the designation

was not made in the relevant year as required by s. 6(1)(k). It would not be appropriate to ignore this requirement.

[83] The Minister's determination of the operating expense benefit will be upheld.

VI. Conclusion

[84] The appeal will be allowed on the basis that standby charges should be determined based on Mr. Szymczyk's income tax returns.

[85] If there is difficulty in determining these amounts, the parties may arrange a conference call with the Court. I would note that the Affidavit of Norman Fernandes, at paragraph 11, states that the standby charge for the 2008 taxation year was underreported by $6,583.06.

[86] As for costs, I would be inclined to grant costs to Mr. Szymczyk in accordance with the tariff. However, the Crown has requested that the parties be given an opportunity to speak to costs. Accordingly, either party may file written submissions on costs within 3 weeks of the date of this decision.

Signed at Ottawa, Ontario this 30th day of December 2014.

"J.M. Woods"

Woods J.

CITATION:	2014 TCC 380
COURT FILE NO.:	2014-60(IT)I
STYLE OF CAUSE:	RICHARD SZYMCZYK and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 2 and August 14, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Judith Woods
DATE OF JUDGMENT:	December 30, 2014

APPEARANCES:

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