[OFFICIAL ENGLISH TRANSLATION]

Date : 20030108
Docket: 2001-2193(IT)I

BETWEEN:

JEAN-PIERRE BLACKBURN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on August 28, 2002, at Chicoutimi, Quebec

Before: The Honourable Judge Louise Lamarre Proulx

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Annick Provencher

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1998 and 1999 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of January 2003.

"Louise Lamarre Proulx"

J.T.C.C.

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REASONS FOR JUDGMENT

Lamarre Proulx, J.T.C.C.

[1] These are appeals under the informal procedure concerning the 1998 and 1999 taxation years.

[2] The point for determination is whether the appellant used, for personal purposes, the vehicle of a corporation of which he was the sole shareholder in a proportion of 15 percent of the total use of the car or whether all or substantially all of the distance travelled by the automobile was travelled in connection with or in the course of the taxpayer's office or employment.

[3] The facts on which the Minister of National Revenue (the "Minister") relied in making his reassessments are stated in paragraph 6 of the Reply to the Notice of Appeal (the "Reply") as follows:

> [TRANSLATION]
>
> (a) during the taxation years in issue, the appellant had a Chevrolet Blazer (hereinafter, the "vehicle") at his disposal for his personal use;
>
> (b) the vehicle was leased by Blackburn Communication Inc. (hereinafter, the "corporation");

(c) the corporation prepares business plans for businesses;

(d) during the taxation years in issue, the appellant was an employee of the corporation;

(e) during the audit conducted by the Minister's auditor, the Minister determined with the appellant that the percentage of personal use of the corporation's vehicle during the taxation years in issue was 25 percent, in view of the fact that:

(i) the appellant used the vehicle to make a return trip from his residence to his office once a day;

(ii) the appellant admitted to the Minister's auditor that the round trip alone amounted to 10 percent of the vehicle's use;

(iii) the appellant often went home at noon;

(iv) the appellant often used the vehicle to go to work at the office on weekends;

(v) the appellant used the vehicle for a number of other personal trips;

(vi) the appellant's spouse owned a Chevrolet Cavalier;

(vii) the appellant's son, who was 20 years old at the time, used the vehicle of the appellant's spouse;

(f) in addition, the appellant kept no record of his travels using the vehicle;

(g) the Minister determined that the amount of the benefit arising from the personal use of the corporation's vehicle for each of the appellant's 1998 and 1999 taxation years was $5,421 (see details in schedules);

(h) at the objection stage, the Minister agreed to a personal use figure of 15 percent with respect to the automobile operating expense benefit, and this represents a reduction of $205 for each of the taxation years in issue (see details in schedules); and

(i) consequently, the Minister added an additional amount of $5,216 for each of the appellant's 1998 and 1999 taxation years in respect of a benefit arising from the personal use of the corporation's vehicle.

[4] The appellant admitted subparagraphs 6(a) to (c), 6(e)(vi) and (vii) and 6(f) of the Reply.

[5] The appellant is the sole shareholder of the corporation. He stated that the corporation had two areas of activity: business development and public relations. The corporation's office is located outside the appellant's residence. The appellant did not consider himself an employee of the corporation. The corporation did not pay him a salary; it occasionally paid him dividends.

[6] The appellant admitted that, when the auditor came to see him, he had accepted the 25 percent figure for his personal use of the corporation's car. At the objection stage, the figure was reduced to 15 percent. The appellant claims, however, that his personal use did not exceed 10 percent. He had not realized that a difference between 25 percent or 15 percent and 10 percent could result in such a difference in the computation of income. He would have examined the personal use he had made of his car more carefully.

[7] As to subparagraph 6(e)(i), the appellant explained that, very often in the morning, he did not leave his residence to go to the office but went directly to business meetings.

[8] The distance between his residence and the office is approximately two kilometers. He admitted subparagraphs 6(e)(iii) and (iv). As to subparagraph 6(e)(v), the appellant did not find the words "for a number" appropriate.

[9] The appellant's children are now 21 and 23 years old. They were insured for their mother's car. The appellant explained that his wife is a nurse and has her own vehicle. It was that vehicle that was used for house-related matters.

[10] With respect to social outings, the appellant explained that he and his wife did most of their entertaining at home. He said his sport was hunting, and he did that on the Cyriac River approximately 40 kilometers away, about a half-hour drive from the house. On those occasions, the appellant used the corporation's car, but the hunting outings were not frequent (twice a year). Otherwise, the appellant said that he liked to go on long motorcycle rides on weekends. In 1998 and 1999, the appellant owned a Harley Davidson motorcycle, which he disposed of in the fall of 1999.

[11] Nancy Tremblay, an auditor, testified for the respondent party.

[12] She stated that the total kilometrage of the car in question was 14,000 kilometers a year. She explained that the round trips from the office to the residence in the morning and evening constituted 10 percent of the kilometrage. That did not include the round trips for lunches eaten at the house or the round trips to the office on weekends. In addition, two 80-kilometer fishing trips must be added.

[13] The auditor also observed that the appellant had provided no record of his travels.

[14] The appellant argued that his personal use of the car was very limited, that the 15 percent figure was not much higher than 10 percent, and yet, in the first case, a benefit of $4,910.22 was added to his income whereas, in the second case, a benefit of approximately $500 would have been added. The schedules to the Reply show that the calculation of a reasonable standby charge did not change even though the personal use figure was reduced by 25 percent or 15 percent. The charges that were reduced were those in respect of the operation of the car described in paragraph 6(1)(*k*) of the *Act*.

[15] Counsel for the respondent referred to subsection 6(2) of the *Income Tax Act* (the "*Act*"). She explained that the calculation of a reasonable standby charge provided for in subsection 6(2) of the *Act* does not take into account the personal use percentage of total kilometrage except where the employer requires the taxpayer to use the automobile in connection with or in the course of a taxpayer's office or employment and if all or substantially all of the distance travelled by the automobile is in connection with or in the course of the office or employment. The second condition applies here.

[16] She contends that the Minister correctly interpreted the *Act* when he considered that all or substantially all of the distance travelled for business purposes meant at least 90 percent of the total number of kilometers and that the percentage for personal use meant at most 10 percent. She referred on this point to the decision by the Federal Court of Canada in *Canada v. Adams (C.A.)*, [1998] 3 F.C. 365, particularly paragraph 15:

> The so-called "minimal personal use" exception is contained within the definition of "A" set out in subsection 6(2). Essentially, the exception enables an employee to obtain a reduction in the amount of the standby charge, otherwise applicable, if the following conditions precedent are satisfied. First, the employer must require the employee to use the automobile in the performance of his or her

duties of employment. Second, "all or substantially all" of the distance travelled by the automobile during the time it was made available to the employee must be in connection with or in the course of his or her employment. In this regard, the Minister has adopted the policy that at least 90% of the automobile's use must be for employment purposes: see IT-63R4. Third, personal use of the automobile must be less than 12000 km per year. Thus, employees who use an employer's automobile exclusively for business purposes are not required to include in income a standby charge. This is so because "A" will equal zero. Employees who make personal use of their employer's automobile are entitled to a reduction in the standby charge, provided that such use is minimal; that is to say all three conditions precedent are met. The reduction comes about because the "A/B" quotient is no longer deemed to be "1". Rather it is a fraction thereof, which fraction varies depending on the number of personal use kilometres travelled. For purposes of deciding this appeal, it is important to note that the reduction is calculated on the basis of actual kilometres travelled in regard to both personal and business usage. It is actual usage which is of significance not whether an employee had unrestricted or exclusive use of an employer's automobile. It is also important to note that actual usage only becomes relevant within the context of the minimal personal use exception articulated in subsection 6(2).

Analysis

[17] The relevant part of subsection 6(2) of the *Act* reads as follows:

6(2) Reasonable 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 the lesser of

> (*a*) 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 total available days, and
>
> (*b*) the value determined for B for the year under this subsection in respect of the standby charge for the automobile during the total available days,
>
> except that the amount determined under paragraph (*a*) shall be deemed to be equal to the amount determined under paragraph (*b*) unless
>
> (*c*) the taxpayer is required by the employer to use the automobile in connection with or in the course of the office or employment, and
>
> (*d*) all or substantially all of the distance travelled by the automobile in the total available days is in connection with or in the course of the office or employment;
>
> . . .

[18] Section 6 of the *Act* applies to the computation of the income that a taxpayer earns from an office or employment. In the instant case, if the appellant was not an employee of the corporation, he undoubtedly held an office. Section 6 therefore applies. I have pointed this out, even though it is not the main issue, because the appellant stated during the hearing that he was not an employee. In any case, under subsection 15(5) of the *Act*, a shareholder is treated the same way with respect to the benefit derived from the use of an automobile.

[19] The passage from the decision in *Adams* cited above in paragraph 16 of these reasons clearly explains that actual personal use is important only in the case of minimal use. Whether personal use is 25, 15 or 40 percent, that is of no significance with respect to the calculation of the reasonable standby charge for an automobile made available to a taxpayer by his employer. This provision taxes the availability of an automobile, not its personal use, unless that use is virtually non-existent. However, it should be noted that that decision does not address the calculation of the minimal use figure of 10 percent. It merely outlines the terms and conditions of application.

[20] In connection to that percentage, reference must be made to a decision by our Court in *McDonald v. Canada*, [1998] T.C.J. No. 621 (Q.L.), rendered by

Judge Rip, in which he appears to have accepted that an 85-percent figure may be sufficient to represent all or substantially all of the distance travelled by the automobile in connection with or in the course of the office or employment.

[21] However, according to the facts stated in that case, the automobile was identified as a vehicle of the Municipality of Metropolitan Toronto. The taxpayer had not used it for personal errands because he wanted to avoid the adverse publicity that might have resulted if someone had seen him use the automobile for personal purposes. He had therefore used it to travel from his residence to the various places of work and to his office at City Hall. It was on the basis of that kilometrage between those places of work, his office and his residence that the Minister had determined his use at 15 percent of the total use of the automobile. At his employer's request, the taxpayer kept a travel log. The judge concluded therefrom that personal travel had not exceeded 10 percent, but he added that, if he had erred in reaching that figure, he had to consider the meaning of the words "all or substantially all". He concluded that, in the circumstances of that case, a 15-percent personal use figure would not result in disallowing the application of the minimal use exception.

[22] As to the personal use percentage in the instant case, I find that the evidence clearly showed that it is in fact at least 15 percent. Does that 15 percent figure make it possible to say, as in Judge Rip's decision in *McDonald*, *supra*, that all or substantially all of the distance travelled was in connection with or in the course of the appellant's office or employment? I do not believe so.

[23] In *McDonald*, *supra,* the taxpayer had to keep a record of his travels, which were subject to audit by his employer. The employer was not a corporation of which he was the sole shareholder. It was a municipality. It is doubtful, for example, that he could have used the vehicle put at his disposal by the municipality for fishing trips or other personal errands. He surely did not have the same freedom with respect to the use of the automobile as did the appellant.

[24] In my view, the personal use proportion of 10 percent or less in the appellant's circumstances corresponds to what is required by one of the two conditions set out in subsection 6(2) of the *Act*, that *all or substantially all of the distance travelled by the automobile . . . is in connection with or in the course of the office or employment* of the taxpayer.

[25] I therefore conclude that the Minister's interpretation in that respect is consistent with the *Act*. The appeals are accordingly dismissed.

Signed at Ottawa, Canada, this 8th day of January 2003.

"Louise Lamarre Proulx"

J.T.C.C.