

Docket: 2007-4740(IT)G

BETWEEN:

GERALD MERKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on March 14, 2011, at Winnipeg, Manitoba

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Cameron S. Regehr  
Brooke Sittler

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**AMENDED JUDGMENT**

In accordance with the attached **Amended** Reasons for Judgment, the appeals of the 2003 and 2004 taxation years are allowed, without costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment based on the following adjusted amounts:

**For the 2003 Taxation Year**

**Merke Business:**

Opening Inventory (as reported)	\$ 419,440
Purchases (conceded)	\$ 2,723,382
Closing Inventory (as reported)	\$ 513,670
Overhead Expenses without CCA (conceded)	\$ <b>118,197</b>

**Merke Farm:**

Expenses without CCA (conceded) **\$ 158,546**

**For the 2004 Taxation Year**

**Merke Business:**

Opening Inventory (as reported) \$ 513,670

Purchases (conceded) \$ 2,033,684

Closing Inventory (as reported) \$ 98,680

Overhead Expenses without CCA (conceded) **\$ 35,545**

**Merke Farm:**

Expenses without CCA (conceded) **\$ 144,856**

**This Amended Judgment and Amended Reasons for Judgment is issued in substitution for the Judgment and Reasons for Judgment issued the 20<sup>th</sup> day of May, 2011.**

Signed at Ottawa, Canada, this 22<sup>nd</sup> day of **June** 2011.

“G. A. Sheridan”

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Sheridan J.

Citation: 2011TCC273  
Date: 20110622  
Docket: 2007-4740(IT)G

BETWEEN:

GERALD MERKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**AMENDED REASONS FOR JUDGMENT**

Sheridan J.

[1] The Appellant, Gerald Merke, is appealing the reassessment by the Minister of National Revenue of his 2003 and 2004 taxation years disallowing certain business and farming expenses.

[2] In 2003, the Appellant was a 50% partner in a fertilizer business known as Merke Bros. (“Merke Business”) and in 2004, the sole proprietor of that enterprise. In both years, the Appellant was also engaged in farming (“Merke Farm”). The Minister denied the expenses claimed by the Appellant because he had not provided any supporting documentation for them. Accordingly, the Minister assumed a ‘nil’ amount for opening and closing inventory, purchases of goods sold and overhead expenses without CCA. The details of the Minister’s reassessments are set out in Schedules A and B of the Reply to the Notice of Appeal.

[3] The only issue in these appeals is whether the Appellant can justify the expense amounts claimed. The Appellant represented himself and was the only witness to testify. As was the case at the audit stage, the weakness of the Appellant’s evidence was his failure to substantiate the claims made with documentation.

[4] By way of background, the Appellant was audited in 2006 and appealed the resulting reassessment in 2007 under the Informal Procedure. Because the amounts involved were well in excess of the monetary limits under the Informal Procedure, the Court granted the Respondent's request to "bump up" the appeals to the General Procedure. As a self-represented litigant, the Appellant had some difficulty complying with the General Procedure Rules' more onerous requirements, in particular, with meeting procedural deadlines. He arrived in Court the morning of the hearing with a bundle<sup>1</sup> of cheques, bank statements, financial statements and some hand-written summaries<sup>2</sup> of their contents. These were meant to be in response to the undertakings given to the Respondent on examination for discovery, the deadline for which had long since passed. While counsel advised that the Respondent had not had the opportunity to review these documents, the Appellant claimed that many of the cheques and bank statements, at least, had already been disclosed in his Book of Documents<sup>3</sup>.

[5] After hearing from the parties on how best to deal with this material, the Court granted the Respondent's request for a recess to permit counsel and the Canada Revenue Agency auditor to go through the various documents with the Appellant in the hope of resolving at least some of the matters in dispute. Court resumed at 1:30. Counsel for the Respondent advised the Court that following their review of Exhibit A-1 with the Appellant, the Crown was prepared to concede that the appeals of the 2003 and 2004 taxation years ought to be allowed and the matters referred back to the Minister of National Revenue for reconsideration and reassessment only in respect of those expenses which the Appellant had been able to verify. These were summarized in the auditor's hand-written notes, entered as Exhibit A-4.

[6] The appeals then proceeded in respect of the Appellant's entitlement to the balance of disallowed expenses. The Appellant's position was that the appeals ought to be allowed based on the amounts claimed in the Merke Business financial statements prepared by his accountant and reported along with the Merke Farm expenses in his 2003 and 2004 income tax returns<sup>4</sup>. The Appellant's main concerns were, in respect of Merke Business, further deductions for bank charges and interest, gas and oil expenses, and a bad debt; in respect of Merke Farm, interest expenses.

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<sup>1</sup> Exhibit A-1.

<sup>2</sup> Exhibit A-3.

<sup>3</sup> Exhibit A-2.

<sup>4</sup> Exhibits R-1 and R-2 are reproductions of the 2003 and 2004 income tax returns; the financial statements are part of the Appellant's bundle of documents in Exhibit A-1.

[7] The Appellant had the onus of proving his entitlement to these additional amounts. Unfortunately, instead of availing himself of the opportunity to do so, the Appellant used a good part of his testimony to criticize the shortcomings in the Minister's conclusions – but without showing how they were wrong.

[8] Turning, first, to a consideration of the persuasiveness of his testimony, the Appellant contended that the Court should accept the expenses as claimed in his returns<sup>5</sup> because they had been prepared by his longtime accountant who accurately reported the information the Appellant provided to him. However, his accountant was neither called as a witness nor present to assist the Appellant in marshalling his evidence at the hearing. The Appellant's answer to this was that he ought to be given time to consult his accountant to review the amounts conceded by the Respondent, saying he would get back to the Court in due course. Even if the Court had been disposed to grant such an unreasonable request, based on the Appellant's own testimony, it might have proven difficult for him to implement this plan: he initially tried to justify the unavailability of certain supporting documents by saying his accountant had sold his business and moved to British Columbia. He later said that for some time the accountant's whereabouts were unknown but then mentioned having spoken with him by phone in preparation for the hearing.

[9] The other difficulty with the Appellant's testimony was his belligerent attitude: whether this was just his nature or the result of frustration with the legal and taxation process was difficult to assess. However, concerned with his failure to refer the Court to specific documents in support of his contentions, before writing these Reasons for Judgment I carefully went through the voluminous materials in Exhibits A-1 and A-2 to see if there might be some link between his oral evidence and those documents.

[10] The Appellant personally kept track of the day-to-day business and farm expenses by writing cheques to his suppliers and creditors; at tax time, he gave the cancelled cheques and bank statements to his accountant along with his instructions as to how the expenditures represented by the cheques were to be categorized. Unfortunately, he did not maintain a general ledger or even an informal log of the expenditures for either Merke Business or Merke Farm.

[11] Nonetheless, like the materials in the Book of Documents, the materials that made up Exhibit A-1 were reasonably well sorted by category and by date. The one exception was a bundle of moisture-damaged TD Canada Trust envelopes, some empty, some containing bank statements for "Merke Bros. Trust". The Appellant testified that the handwritten summaries and attached cheques in Exhibit A-1 were

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<sup>5</sup> Exhibits R-1 and R-2.

only a “sample” of his total expenses but further details could be found in the Book of Documents. His position was essentially that even if his records were incomplete, the annual totals could be extrapolated from reviewing the documents as a whole.

[12] In my view, that would require a rather strenuous evidentiary leap. Having carefully reviewed the Appellant’s materials, it seems to me that if there had been additional documents to support his claims, the Appellant would have produced them. A good example is his claim for gas and oil expenses for Merke Business. In 2003 and 2004, Merke Business claimed \$65,404 and \$97,370<sup>6</sup>, respectively for gas and oil; at the hearing, based on the cheques produced in Exhibit A-1, the Crown conceded only \$20,534 and \$32,370, respectively, of these amounts. The Appellant argued he should be allowed the full amount because, briefly paraphrased, anyone with any sense would know he could not operate his business on the small amounts conceded by the Minister.

[13] I must say that given the volume of business done by Merke Business, the Appellant might be right. The problem is that, despite being reminded many times that it was for him to justify his entitlement to additional amounts, the Appellant did not provide the Court with enough evidence to find in his favour. He did not, for example, explain why gas and oil in such quantities would have been necessary to run Merke Business. Nor did he direct the Court to any supporting documentation. My review of the gas and oil cheques from Exhibit A-1 (cross-referenced with the cheques and bank statements in the Book of Documents) revealed that in October of 2003 and 2004, Merke Business made a one-time payment of \$20,000 and \$30,000, respectively to “Merke Bulk Fuels” as well as a few other miscellaneous purchases at various gas stations throughout each year. Given the number of documents in Exhibit A-2 and their rather tidy organization, I can only wonder why - if there were other documents showing additional gas and oil purchases sufficient to bridge the gap between the amounts conceded by the Minister and claimed by the Appellant - they were not included. Or if they were included, I was unable to identify them without the Appellant’s explanatory evidence. And given the size of the discrepancy and the Appellant’s “hands-on” approach to cheque writing, I would have thought that absent the necessary documents, he would at least have explained in what circumstances Merke Business had incurred the additional amounts; for example, the name of the fuel dealer(s), an estimate of the amounts and so on.

[14] The same can be said of the Appellant’s claims for “Bank Charges and Interest” for Merke Farm in 2003. According to Schedule A of the Reply, the amount

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<sup>6</sup> Exhibit A-1, The Taylor Group Tax Consultants/Public Accountants, Merke Bros. Fertilizers Expense Schedule for the period ended: December 31, 2004.

disallowed was \$10,596. The Appellant argued that these charges could be found in the bank statements in his Book of Documents. The Appellant had every opportunity at the hearing to direct the Court's attention to the appropriate document(s) but preferred instead to rail against the Minister's methods. On my review of the bank statements in Exhibit A-2, however, I saw nothing but service charges averaging \$15 to \$20 per month. The Appellant dismissed as insufficient counsel for the Respondent's concession during final submissions to allow a further amount to reflect these minor charges.

[15] The Appellant also claimed entitlement to a bad debt expense for Merke Business of \$9,500 as shown in the Financial Statement. However, he provided no documentation in support of this claim; nor did he offer any description as to how such a debt might have arisen.

[16] In light of the general unhelpfulness of the Appellant's testimony, his failure to link any particular expense with its supporting record and his overall attitude of expecting others to do what he ought to have done himself, the Appellant has not met his onus of proving his entitlement to any amount in excess of the expenses already conceded by counsel for the Respondent.

[17] In accordance with the **Amended** Reasons for Judgment, the appeals of the 2003 and 2004 taxation years are allowed, without costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment based on the amounts conceded by the Respondent<sup>7</sup> at the hearing:

**For the 2003 Taxation Year**

**Merke Business:**

Opening Inventory (as reported)	\$ 419,440
Purchases (conceded)	\$ 2,723,382
Closing Inventory (as reported)	\$ 513,670
Overhead Expenses without CCA (conceded)	\$ <b>118,197</b>

**Merke Farm:**

Expenses without CCA (conceded)	\$ <b>158,546</b>
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**For the 2004 Taxation Year**

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<sup>7</sup> Exhibit A-3.

**Merke Business:**

Opening Inventory (as reported)	\$ 513,670
Purchases (conceded)	\$ 2,033,684
Closing Inventory (as reported)	\$ 98,680
Overhead Expenses without CCA (conceded)	\$ <b>35,545</b>

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**This Amended Judgment and Amended Reasons for Judgment is issued in substitution for the Judgment and Reasons for Judgment issued the 20<sup>th</sup> day of May, 2011.**

Signed at Ottawa, Canada, this **22<sup>nd</sup>** day of **June** 2011.

“G. A. Sheridan”

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Sheridan J.



CITATION: 2011TCC273  
COURT FILE NO.: 2007-4740(IT)G  
STYLE OF CAUSE: GERALD MERKE AND  
HER MAJESTY THE QUEEN  
PLACE OF HEARING: Winnipeg, Manitoba  
DATE OF HEARING: March 14, 2011  
REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF **AMENDED**  
JUDGMENT: **June 22, 2011**

APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Cameron S. Regehr  
Brooke Sittler

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan  
Deputy Attorney General of Canada  
Ottawa, Canada