[OFFICIAL ENGLISH TRANSLATION]

2002-745(IT)I

BETWEEN:

ROBERT SÉGUIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on December 3, 2002, at Ottawa, Ontario by
the Honourable Judge Lucie Lamarre

Appearances

Counsel for the Appellant: Maxime Faille

Counsel for the Respondent: Nicolas Simard

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* ("the *Act*") for the 1995 and 1996 taxation years are allowed, with costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant was not required to pay income tax on taxable benefits of $9,430 in 1995 and $9,550 in 1996 under paragraphs 6(1)(*e*), 6(1)(*e*.1) and 6(1)(*k*) and subsection 6(2) of the *Act*, as amended.

Signed at Ottawa, Canada, this 10th day of January 2003.

"Lucie Lamarre"

J.T.C.C.

Translation certified true
on this 19th day of February 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

Date: 20030110
Docket: 2002-745(IT)I

BETWEEN:

ROBERT SÉGUIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre, J.T.C.C.

[1] These are appeals under the informal procedure from assessments made by the Minister of National Revenue ("the Minister") under the *Income Tax Act* ("the *Act*") for the appellant's 1995 and 1996 taxation years. By these assessments, the Minister added to the appellant's income taxable benefits of $9,430 for the 1995 taxation year and $9,550 for the 1996 taxation year, as standby charges for an automobile made available to him by his employer, under paragraphs 6(1)(*e*), 6(1)(*e.1)* and 6(1)(*k*) and subsection 6(2) of the *Act*, as amended.

[2] The appellant is the president and one of the six shareholders and directors of the corporation Émile Séguin & Fils Limitée ("the corporation"). The corporation operates a business specializing in building mechanics, plumbing and air conditioning. Although it accepts mainly commercial contracts, it also does some residential work. It is a family business that has been in existence for over 75 years and was incorporated a little over 12 years ago. The appellant has worked for the business for 45 years as a plumber and has been its president for 12 years. He holds 25 per cent of the shares of the corporation. Today, the corporation employs 60 employees; during the taxation years at issue, it had between 35 and 50 employees. Its average sales figures were $3.5 million during the taxation years at issue and are $7 million today. Half its employees are plumbers; six employees,

including the appellant, do administrative work. The business is operated from its head office, where a warehouse and ventilation system manufacturing shop are located.

[3] The appellant explained that he has had overall responsibility for the business since becoming its president. He works between five to six days per week, from 12 to 15 hours per day. His responsibilities include visiting the sites to make bids valued at less than $100,000 (two other shareholders are responsible for larger projects), making preparations on-site and issuing invoices. He co-ordinates the work on all the small sites and collects the accounts receivable.

[4] The names and home telephone numbers of all the shareholders appear in the telephone directory. The appellant explained that he responds to evening emergency calls rather than sending out employees whom he would have to pay overtime. The appellant is also the one who comes in the evening when the alarm system is triggered, which apparently happens fairly often. As well, the appellant regularly visits suppliers after leaving the office and drops by the sites the following day to deliver the supplies directly before heading to the office. Supplies are also delivered when work is done in the evening, for example under contracts with the government or hospitals.

[5] The corporation owns 11 automobiles for its employees, including a Jeep Grand Cherokee 4 x 4 ("the Jeep") that is made entirely available to the appellant. The appellant stated that he uses the Jeep solely for his work. When he is not working, the Jeep stays in the garage at his home. His spouse owns a Mazda MPV 4 x 4 van ("the Mazda") equipped with a 5,000-pound hitch. The appellant and his spouse use the Mazda for personal recreational travel. For example, they attend horse races in which the appellant participates by buying and selling horses. Delivery of the horses is taken directly at the race track and includes transportation, over which the appellant does not need to concern himself (see Exhibit A-2). Only occasionally have the appellant and his spouse had to transport horses by trailer to the veterinarian. On those occasions they used the Mazda since it is equipped to haul a horse trailer. The appellant has three children, including a daughter who lived at his home during the taxation years at issue. The daughter used her own car, a Toyota Celica.

[6] The Jeep was purchased by the corporation in December 1993 for a purchase price of $31,275 including taxes. According to the appellant's testimony, the Jeep was a demonstrator that had already been driven 15,000 to 20,000 kilometres at the time of purchase. Also at that time, the Jeep had four passenger seats, but the

appellant immediately removed one seat completely so that he could use the space to store his stepladder, small supplies such as toilets and sinks, his toolbox, and his work equipment. The appellant adduced in evidence two photos of the interior of the Jeep showing the use he made of it (Exhibit A-4). These photos were taken after the Canada Customs and Revenue Agency ("CCRA") audited the corporation. However, the appellant stated that he always considered the Jeep his work truck, like the trucks that were formerly made available to him and like the truck he now owns. Indeed, the photos show use of the Jeep as a truck rather than as a recreational vehicle. The appellant himself chose a Jeep 4 x 4 because the corporation did not have one and it was a useful vehicle on-site. For example, when the corporation obtained a contract with the CBC at Camp Fortune in Gatineau Park, the appellant drove the workers to the site in the Jeep. As well, the Jeep, equipped with a hitch, was used to haul a lift to the sites.

[7] The Jeep was not permanently identified with the corporation's lettering. The appellant used magnetic lettering when he travelled to the sites. This procedure was preferable because it allowed the appellant to use the Jeep on bridges that were closed to commercial vehicles. The appellant stated that he drove the Jeep an average of 40,000 kilometres per year. This figure included travel between his home and office, a distance of approximately 12 kilometres (24 kilometres return) since he worked as much at home as he did at the office. He stated that he never spent an entire day at the office but was constantly on the road. He never kept a travel log, except for a short time when his accountant asked him to keep track of all his travel. However, he reiterated that he never made personal use of the Jeep, and thus there was no real need to keep a travel log. The Jeep was sold in 2002 for $100 and had 336,000 kilometres on the odometer.

[8] Ginette Belley Séguin, the appellant's spouse, also testified. She confirmed that her spouse used the Mazda when he was not working and that the Jeep was used only for the corporation's business. She also confirmed that they did not transport horses except on rare occasions when they used the Mazda.

[9] Réjean Tremblay, Chief of Appeals at the CCRA, testified in his capacity as the person who conducted the audit of the corporation in October 1997. He explained that, when he went to the location of the corporation's head office, he noticed on the lot a number of pick-up trucks and a Jeep, which, as he recalled, was dark green in colour and had a very clean exterior. During the audit, Mr. Tremblay noted that the corporation's employees used their own cars to run off-site errands for the corporation. In these instances, the corporation reimbursed the employees at a flat rate for the use of their vehicles for business purposes. Mr. Tremblay noted

that no employees had access to the Jeep, which was for the exclusive use of the appellant in his capacity as the president. Mr. Tremblay also realized that the appellant used the Jeep to travel to and from his home, and that the distance between the head office and the appellant's home was approximately 35 kilometres return. Mr. Tremblay therefore assumed that the appellant made personal use of the Jeep and, without investigating further, calculated a taxable benefit for the appellant. Under cross-examination, Mr. Tremblay acknowledged that the distance travelled between the appellant's home and the corporation's head office did not constitute personal use if the appellant dropped by a site or visited a supplier on the way. He simply stated that he considered it unlikely that the appellant, in his capacity as the president, would drop by the sites or do the work himself. Thus he did not ask the appellant any questions on this point or check the condition of the interior of the vehicle.

[10] The appellant testified once again, stating that his vehicle had always been blue in colour, as can be seen on the photos taken (Exhibits A-4), not dark green as Mr. Tremblay seemed to indicate. The appellant adduced in evidence the purchase contract for the Jeep, in which the colour of the vehicle is indicated as “teal” (Exhibit A-6).

[11] The appellant also stated that the shortest distance between his home and the corporation's head office was 12 kilometres (24 kilometres return), not 17.5 kilometres (35 kilometres return) as Mr. Tremblay seemed to indicate. According to the appellant, Mr. Tremblay might have taken another route than the one he himself usually takes.

Appellant's argument

[12] Counsel for the appellant argued, first, that the Jeep does not correspond to the definition of the word "automobile" set out in subsection 248(1) of the *Act*, as follows:

> **"automobile" —** "automobile" means
>
> > (*a*) a motor vehicle that is designed or adapted primarily to carry individuals on highways and streets and that has a seating capacity for not more than the driver and 8 passengers,
> >
> > but does not include
> >
> > ...

> *(e)* a motor vehicle of a type commonly called a van or pick-up truck or a similar vehicle
>
> > (i) that has a seating capacity for not more than the driver and 2 passengers and that, in the taxation year in which it is acquired, is used primarily for the transportation of goods or equipment in the course of gaining or producing income, or
> >
> > (ii) the use of which, in the taxation year in which it is acquired, is all or substantially all for the transportation of goods, equipment or passengers in the course of gaining or producing income;

[13] According to counsel for the appellant, the Jeep is a motor vehicle similar to a pick-up truck or van having a seating capacity for not more than three people, which in this case was used primarily for the transportation of goods or equipment in the course of gaining or producing income. Such a vehicle is not an automobile within the meaning of the *Act*. In fact, the Jeep's cargo space is large (79 cubic feet, according to Exhibit A-5) and the vehicle, adapted so as to have a seating capacity for three people, was used for the transportation of supplies to the sites. The Jeep was also used to haul a lift. Counsel for the appellant relied on *Servais v. The Queen*, [2002] T.C.J. No. 258 (Q.L.), in arguing that, although the vehicle might originally have had a seating capacity for four people, that did not exclude the possibility that the Jeep was transformed into a vehicle that was no longer an automobile within the meaning of the *Act*.

[14] Counsel for the respondent rebutted this argument, stating that the explanatory notes to the bill amending the *Act* concerning the definition of "automobile" clearly state that, for a vehicle to be excluded from the definition of "automobile", it must have been originally designed to carry not more than three people, if acquired primarily for the purposes of transporting goods or equipment in the course of earning income. The explanatory notes to the bill amending the *Act* concerning the definition of "automobile" set out in subsection 248(1) of the *Act*, published by Finance Canada in May 1991, read as follows:

> **248(1) "automobile"**
>
> ... "automobile" means a motor vehicle designed primarily to carry individuals on highways and streets and having a seating capacity of not more than nine people (including the driver) and a motor vehicle that is a station wagon or van if it is equipped to carry more than the driver and two passengers but not more than the driver and eight passengers. A van or pick-up truck designed to carry not more

than three people (including the driver) and acquired primarily for the purposes of transporting goods or equipment in the course of earning income is excluded from the definition....

« automobile »

Pour l'application de la Loi, le mot « automobile » désigne un véhicule à moteur principalement conçu pour transporter des particuliers sur les routes et dans les rues et comptant au maximum neuf places assises (y compris celle du conducteur) et un véhicule à moteur de type familial ou fourgonnette, s'il est équipé de manière à transporter quatre personnes au minimum et neuf personnes au maximum, conducteur compris. Les fourgonnettes ou les véhicules à moteur de type *pick-up* conçus pour transporter trois personnes au maximum (conducteur compris) et acquis principalement pour transporter des marchandises et du matériel en vue de gagner un revenu sont exclus de la définition....

[15] Counsel for the respondent argued that the Jeep was basically designed to carry five people (see the Jeep's characteristics, Exhibit A-5) and was therefore an automobile within the meaning of the *Act*.

[16] As an alternative argument, counsel for the appellant stated that no amount should have been added to the appellant's income under paragraphs 6(1)(*e*), 6(1)(*e.1*) and 6(1)(*k*) and subsection 6(2) of the *Act*, as amended, because during the taxation years at issue the Jeep was used only for business purposes.

[17] Those provisions, as applicable to the taxation years at issue, read as follows:

SECTION 6: Amounts to be included as income from office or employment.

(1) 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:

...

►6(1)(e)◄

(*e*) **Standby charge for automobile —** where the taxpayer's employer or a person related to the employer made an automobile available to 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 than 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(1)(e.1)◄

(*e*.1) **Goods and services tax —** the total of all amounts each of which is 7% of the amount, if any, by which

(i) an amount (in this paragraph referred to as the "benefit amount") that would be required under paragraph (*a*) or (*e*) to be included in computing the taxpayer's income for the year in respect of a supply, other than a zero-rated supply or an exempt supply, (within the meanings assigned by Part IX of the *Excise Tax Act)* of property or a service if no amount were paid to the employer or to a person related to the employer in respect of the amount that would be so required to be included

exceeds

(ii) the amount, if any, included in the benefit amount that can reasonably be attributed to tax imposed under an *Act* of the legislature of a province that is a prescribed tax for the purposes of section 154 of the *Excise Tax Act;*

►6(1)(k)◄

(*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 the "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; and

►6(2)◄

(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,

B is the product obtained when 1,000 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.

[18] Counsel for the appellant argued that, although these provisions create a taxable benefit when a vehicle is made available to a taxpayer by the employer, that taxable benefit may be reduced using the formula set out in subsection 6(2), if the taxpayer can establish that all or substantially all of the distance travelled with the vehicle concerned was travelled in the performance of the duties of the taxpayer's employment and that the taxpayer's personal use of the vehicle was less than 12,000 kilometres per year or 1,000 kilometres per month. Counsel for the appellant cited the analysis of the standby charge for an automobile that Hamlyn J.T.C.C. made in *Bekkers v. Canada*, [2001] T.C.J. No. 465 (Q.L.), at paragraph 12, as follows:

> 12 Paragraph 6(1)(*e*) provides for a standby charge for an automobile that is made available to a taxpayer by the taxpayer's employer or a person related to the employer in a given taxation year. The standby charge brings into income the value of the benefit derived by a taxpayer from a company car that is made available for the taxpayer's personal use. Subsection 6(2) provides a formula for determining the value of such benefit. The definition of "A" found in subsection 6(2) provides for a reduction in the standby charge that is to be included in a taxpayer's income, if certain conditions are met. In *The Queen v. Adams et al*., [See Note 1 below] Robertson J. reviewed the conditions required to qualify for a reduced standby charge. He stated at page 6271:
>
> ---
>
> Note 1: 98 D.T.C. 6266 (F.C.A.).
>
> ---
>
> 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 12,000 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.

[19] According to counsel for the appellant, the uncontradicted evidence has established that the appellant did not make personal use of the Jeep but used it solely for the corporation's business. The evidence has established that the Mazda was available to the appellant for his personal use. The evidence has also established that the appellant used the Jeep to respond to alarms, collect accounts receivable, visit the sites, transport supplies to the sites, transport plumbing equipment and respond to emergency calls, both during the day and in the evening. Clearly, in the appellant's view, the corporation made the Jeep available to him at all times for business purposes. The evidence has also established that the appellant's travel between his home and office was interspersed with travel for business purposes and that the appellant worked as much at home as he did at the office. In the circumstances, this travel is no longer considered personal use (see *Biermann v. M.N.R.*, [1989] 2 C.T.C. 2107).

[20] Also, in the circumstances, the absence of a travel log cannot be held against the appellant since he did not make personal use of the Jeep.

[21] Concerning this alternative argument, counsel for the respondent argued that the appellant has not established that the use of the Jeep was all or substantially all for business purposes. The evidence has established that the Jeep was made entirely available to the appellant at all times and not to any other employee. The corporation's lettering did not appear on the Jeep but did appear on the corporation's other vehicles. The appellant used the Jeep daily to travel to and from his home, a distance determined by the auditor to be 35 kilometres. Over a 48-week period, this travel alone between the appellant's home and office amounts to a distance of 8,400 kilometres. Out of the total of 40,000 kilometres travelled

during the year, this distance of 8,400 kilometres alone between the appellant's home and office accounts for 21 per cent and does not include other personal travel the appellant might have done during the year. During his brief visit to the corporation's head office, the auditor noted that the Jeep was a clean vehicle, compared with the corporation's other vehicles. The auditor concluded that the appellant could not be using the Jeep to visit the sites. The photos (Exhibit A-4) were taken after the audit. According to counsel for the respondent, it is unlikely that the president would have travelled in a dirty vehicle cluttered with tools and supplies. As well, the colour of the Jeep in the photo is not the same as the colour of the vehicle the auditor saw at the corporation's head office. Lastly, the absence of a travel log does not help the case of the appellant, who has the onus of establishing the use he made of the vehicle (see *Tremblay v. Her Majesty the Queen*, T.C.C. No. 98-711(IT)I, August 24, 2000 (2000 DTC 2414).

Analysis

[22] I do not consider the appellant's first argument unfounded. Subsection 248(1) defines "automobile" as a motor vehicle designed or adapted to carry individuals and having a seating capacity for not more than nine people, including the driver. Moreover, that same vehicle is excluded from the definition of "automobile" if it is a vehicle similar to a pick-up truck or van "having" a seating capacity for not more than three people including the driver and, in the taxation year in which it is acquired, is used primarily for the transportation of goods or equipment in the course of gaining or producing income. Also excluded from the definition of "automobile" is a vehicle similar to a pick-up truck or van, the use of which, in the taxation year in which it is acquired, is all or substantially all for the transportation of goods, equipment or passengers in the course of gaining or producing income.

[23] Counsel for the respondent has relied on a technical note in arguing that, if a vehicle similar to a pick-up truck or van is "designed" to carry more than three but not more than nine people, that vehicle then meets the definition of "automobile" (to the extent that its use is not all or substantially all for the transportation of equipment or passengers in the course of gaining or producing income). I note that this technical note uses the word "designed" but not the word "adapted", which nevertheless appears in black and white in the wording of the *Act*. In my opinion, the *Act* does not state that this type of vehicle must be originally designed for not more than three persons if it is to be excluded from the definition of "automobile". As well, the introductory paragraph in the definition of "automobile" refers to a motor vehicle designed or adapted to carry individuals and

having a seating capacity for not more than nine people, for a vehicle to correspond to the definition of "automobile". The word "adapt" is defined in *Webster's Third New International Dictionary* as follows:

> 1a: to make suitable or fit (as for a particular use, purpose, or situation): fit, suit ...
>
> b: to make suitable (for a new or different use or situation) by means of changes or modifications ...

[24] In my opinion, the choice of the words "designed or adapted" suggests that, if the vehicle was not originally designed to correspond to the definition of "automobile", it may subsequently be adapted to do so. The opposite is also true. Thus, even if a vehicle is designed to have a seating capacity for more than three people but is subsequently adapted to have a seating capacity for not more than three people and it meets the other conditions contained in the definition under subparagraph 248(1)(*d*)(i), it is not considered an automobile within the meaning of the *Act*.

[25] In the present case, the evidence that the appellant initially removed one of the seats in order to transport supplies has not been contradicted. From that point on, the Jeep had a seating capacity for only three persons. As well, the evidence supports the fact that, since being acquired, the vehicle has been used primarily for the transportation of equipment for the corporation in the course of gaining or producing income. The photos adduced in evidence have established this use of the Jeep. It is true that these photos were taken after the audit. It is also true that the auditor stated that on the lot he saw a clean vehicle that appeared green to him. However, the auditor acknowledged that he did not check the interior of the vehicle. As well, transporting supplies does not necessarily mean that the exterior of the vehicle will not be clean. A truck, pick-up truck, or similar vehicle is not necessarily always dirty. Concerning the colour of the vehicle, the purchase contract indicated "teal" as the colour. The word "teal" is defined in *The New Shorter Oxford English Dictionary*, Oxford University Press, 1996, as follows:

> **Teal**
>
> 1 Any of several small dabbling ducks of the genus *Anas* and related genera; esp. *A. crecca* (also *green-winged teal*), which breeds in Eurasia and N. America, the male of which has a chestnut head with a green stripe, and the N. American *A. discors* (in full *blue-winged teal*), the male of which has a grey head with a white crescent. ME.

> 2 The flesh of a teal as food. LME.
>
> 3 A dark greenish-blue colour resembling the colour of the teal's head and wing patches. E20.
>
> . . .
>
> Comb.: teal blue (of) a dark greenish-blue colour.

[26] The colour of the vehicle as it appears on the photos (Exhibit A-4) may very well correspond to this definition of the word "teal". As well, the auditor simply stated that he thought the vehicle was dark green in colour. Since the auditor did not actually investigate this vehicle and he decided to calculate a taxable benefit for the sole reason that the appellant was the president of the corporation and was thus unlikely to visit the sites with the Jeep, I see no reason to give more weight to the respondent's theory than to that of the appellant. Concerning the lettering, the appellant explained that he had magnetic lettering that he used when he travelled to the sites. On the highway, he removed this lettering so that he could use the bridges. I consider this explanation plausible and reasonable in the circumstances.

[27] In fact, I have no reason to doubt the credibility of the appellant and his spouse. The testimony of both of them did not waver under cross-examination, and I have no reason to doubt the truth of the appellant's statement that he used the Jeep solely for business purposes. He and his spouse both stated that they made personal use of the Mazda. The evidence on this point has not been contradicted and I do not consider it unreasonable. Furthermore, without an investigation by the Minister, additional facts, or further and more probative evidence that might impugn the appellant's version of the facts, I find it difficult to conclude otherwise. I therefore consider that the appellant has established, on a balance of probabilities, that he used the Jeep solely for business purposes. In my opinion, the fact that the appellant drove the vehicle home in the evening does not constitute personal use in the circumstances of this case. In fact, the corporation required that the appellant have the vehicle available to him at all times so that he could respond to emergency calls and deliver supplies to the sites in the evening. The appellant rarely spent an entire day at the office. He travelled from the office to the sites, visiting suppliers and clients on the way, both during the day and in the evening. He could be reached at his home at all times since his name appeared in the telephone directory under the corporation's name. Given the nature of the appellant's work, I do not believe that his travel using the Jeep can be described as personal use.

[28] In conclusion, I do not consider the absence of a travel log of fundamental importance in this case since the appellant has satisfied me that he did not make personal use of the Jeep.

[29] For these reasons, I am of the opinion that the appeals should be allowed on the grounds that, first, the appellant drove a vehicle that did not qualify as an automobile within the meaning of subsection 248(1) of the *Act*; and, second, the vehicle made available to the appellant by the corporation was used solely in the performance of the duties of his employment, as required by the corporation, and it was not used for personal purposes. The assessments are therefore referred back to the Minister for reconsideration and reassessment on the basis that the appellant was not required to pay income tax on taxable benefits of $9,430 in 1995 and $9,550 in 1996 under paragraphs 6(1)(*e*), 6(1)(*e*.1) and 6(1)(*k*) and subsection 6(2) of the *Act*.

Signed at Ottawa, Canada, this 10th day of January 2003.

"Lucie Lamarre"

J.T.C.C.

Translation certified true
on this 19th day of February 2004.

Sophie Debbané, Revisor