

BETWEEN:

GILLES GAUTHIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 30, 2007, at Québec, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2002 taxation year is allowed without costs and the reassessment is vacated in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of October 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 22nd day of November 2007.

Brian McCordick, Translator

Citation: 2007TCC573
Date: 20071025
Docket: 2007-1252(IT)I

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GILLES GAUTHIER,

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from an assessment made under the *Income Tax Act* concerning the 2002 taxation year. The assessment pertains to a benefit derived from the personal use of an automobile.

[2] In making and confirming the reassessment of March 27, 2006, in respect of the 2002 taxation year, the Minister of National Revenue ("the Minister") relied on the following assumptions of fact:

[TRANSLATION]

- (a) For the taxation year in issue, Abbott Laboratories Limited made an automobile known as a Chevrolet Astro Van available to the Appellant.
(admitted)
- (b) During the taxation year in issue, the Appellant was a service technician.
(admitted)

- (c) The Appellant's work consisted in repairing diagnostic equipment that was sold to hospitals and CLSCs in the province of Quebec by one of the corporations within the Abbott Laboratories Limited group. **(admitted)**
- (d) The Appellant's employer had to offer Quebec hospitals and CLSCs emergency service seven days a week with a response time of four hours. **(admitted)**
- (e) The Appellant submitted his expense accounts for the Minister's audit. 8% of the expenses therein are allocated to personal travel:
- | | |
|------------------------------|------------------|
| (i) business-related driving | 55,465 km |
| (ii) personal driving | <u>4,875 km</u> |
| | <u>60,340 km</u> |
- (admitted)**
- (f) The following anomalies were discovered in the course of the expense account audit:
- (i) Based on expense accounts submitted, the Appellant entered approximate distances, and stated only the city or towns visited, and not the names and addresses of the customers visited. **(admitted)**
- (ii) The Appellant travelled to Trois-Rivières more than thirty (30) times, and the Minister noticed, using Maps & Streets software, that the Appellant entered excess distances for each of these trips, sometimes amounting to 70 km per trip. **(admitted)**
- (g) Since the odometer was not in issue, the Minister determined that the Appellant had concealed part of his personal travel by overestimating the distance driven on business trips. **(denied)**
- (h) In view of the irregularities detected, the Minister inferred that the personal use percentage attributable to the vehicle supplied by the employer was greater than 10%. **(denied)**

- (i) The Minister revised, as follows, the calculation of the taxable benefit in respect of the standby charge and operating expense of the vehicle supplied by the employer: **(admitted)**

<u>Standby charge</u>	<u>Vehicle 1</u>	
	\$28,222.64 x 2% x 7/12 =	\$3,951.17
	<u>Vehicle 2</u>	
	\$24,282.93 x 2% x 5/12 =	\$2,428.29
<u>Operating expense</u>		
	1000 km x \$0.16 x 7 mos. =	\$1,120.00
Revised value of benefit		\$7,499.46
Minus: value of benefit stated on initial T4 slip		\$2,428.29
Increase in benefit		<u>\$5,257.10</u>

- [3] The provisions of the Act that are relevant to this question read:

6(1)(a) **Value of benefits** — the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment, except any benefit

...

(iii) that was a benefit in respect of the use of an automobile;

...

6(1)(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(2) **Reasonable standby charge** -- For the purposes of paragraph 6(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

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

where

A is

(a) the lesser of 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 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 for 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 for 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) the loss of, or damage to, the automobile, or

(b) liability resulting from the use or operation of the automobile.

6(1)(k) Automobile operating expense benefit – where

(i) an amount is determined under subparagraph 6(1)(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, 1/2 of the amount determined under subparagraph 6(1)(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 6(1)(k)(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

248(1) "**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

(b) an ambulance,

(b.1) a clearly marked emergency-response vehicle that is used in connection with or in the course of an individual's office or employment with a fire department or the police;

(c) a motor vehicle acquired primarily for use as a taxi, a bus used in a business of transporting passengers or a hearse used in the course of a business of arranging or managing funerals,

(d) except for the purposes of section 6, a motor vehicle acquired to be sold, rented or leased in the course of carrying on a business of selling, renting or leasing motor vehicles or a motor vehicle used for the purpose of transporting passengers in the course of carrying on a business of arranging or managing funerals, and

(e) a motor vehicle

(i) of a type commonly called a van or pick-up truck, or a similar vehicle, that has a seating capacity for not more than the driver and two passengers and that, in the taxation year in which it is acquired or leased, is used primarily for the transportation of goods or equipment in the course of gaining or producing income,

(ii) of a type commonly called a van or pick-up truck, or a similar vehicle, the use of which, in the taxation year in which it is acquired or leased, is all or substantially all for the transportation of goods, equipment or passengers in the course of gaining or producing income, or

...

[4] The Appellant described the nature of his work. It consisted in maintaining and repairing extremely sophisticated equipment operated by hospitals and health professionals within a very large geographical area.

[5] Thus, the Appellant had to respond to emergency calls seven days a week, 24 hours a day. In order to do so, he had to travel great distances. He also had to travel to perform preventive maintenance.

[6] The employer provided him with a motor vehicle so that he could perform his duties. The vehicle underwent numerous modifications and additions which increased its weight considerably, but reduced the available space significantly.

[7] From a practical standpoint, only the two front seats were available, that is to say, the driver's seat and one passenger seat. The remaining space was taken up by tools, equipment, and parts stock.

[8] The employer had no special policy regarding the personal use of the vehicle in question. Essentially, the vehicle, with the exception of the cage containing the driver and passenger seats, was transformed; the remaining space was devoted to various devices, parts, instruments, tools, a kit, etc., that is to say, the supplies necessary for the maintenance and repair of the equipment sold and distributed by Abbott Laboratories Limited.

[9] Having learned that the personal use of the vehicle could be considered a taxable benefit in the event that the distance driven for personal purposes exceeded 10%, the interested parties, including the Appellant, used their appointment books to estimate the business-related distances driven, in relation to the distances driven for personal purposes.

[10] It is clear, simply from the method employed, that the appointment book used in lieu of a log was not capable of providing an accurate personal-use distance.

[11] First of all, the Appellant himself admitted that the method was not as reliable as one would like; and secondly, the annual distance was changed significantly when the Respondent showed, very clearly, that the employed calculation method was unreliable.

[12] Indeed, after notifying the employer that roughly 6% of the total distance driven by the vehicle was for personal purposes, the Appellant changed the personal-use estimate to 9.9%, a difference of 3.9%.

[13] This upward correction is certainly an admission that the Appellant's files were quite incomplete and were definitely not consistently reliable. If a true log book, based on the odometer, had been kept daily, only a clerical error would have been possible, and the discrepancy would certainly not have been so great.

[14] This is a very important aspect of the case, especially since the burden of proof was on the Appellant. The confusion, the lack of reliability, and even the absence of a log book are, in and of themselves, very important elements that must be analysed having regard not only to what is reasonable, but to what is plausible as well.

[15] The evidence disclosed certain elements that I must take into account. Firstly, I do not accept the Appellant's allegations that the people responsible for the file did not understand the way in which the Appellant operated or the type of vehicle that he used.

[16] Indeed, the Appellant himself was the subject of a more thorough investigation because he had submitted totally incoherent numbers. Under such circumstances, it was entirely reasonable to examine more carefully the information that the Appellant personally recorded and supplied.

[17] The audit resulted in the personal-use percentage being increased from 6% to 9.9%, a fact that was, in and of itself, amply sufficient to attract the Minister's auditors' attention.

[18] Admittedly, this was not a significant discrepancy, but it constitutes evidence that the method used to calculate the personal driving distance was inadequate and unreliable.

[19] In such a situation, the Court is faced with two possible scenarios. In the first scenario, since the Appellant did not keep a valid log, and he admitted to only a part of the personal use of the vehicle, his evidence is not reliable, and, since he has failed to discharge his onus of proof, the assessment would have to be confirmed on its merits.

[20] In the second scenario, the vehicle, which has undergone major modifications, was set up in such an unusual manner, and had such unusual contents, that it cannot have been used for personal purposes. This is the scenario propounded by the Appellant, since he compared the vehicle used for his work to an ambulance.

[21] When he was called upon to explain and describe the distance driven for personal purposes, he initially described it as marginal, and referred to small errands, trips to accommodate people, and short detours.

[22] While these explanations are not very convincing, I must take the type of vehicle involved — a vehicle that clearly was not very suited to personal use — into account.

[23] Indeed, this is not a vehicle that would make its user proud, or offer much useful space or advantages such as four-wheel drive.

[24] It was essentially a utility vehicle that was modified significantly, thereby depriving it of most of its suitability for personal use.

[25] Granted, the vehicle must have been used for personal purposes, and the Appellant admitted to this. To what precise extent, though? Only an adequately kept log book would have enabled us reliably to determine the true personal-use percentage.

[26] However, this was a very unusual vehicle that was not well-suited to touring and personal use; under the circumstances, considering the nature and type of vehicle, it was quite reasonable for a user to consider a log book to be of secondary importance, since the vehicle was rather unsuitable for personal use.

[27] The vehicle could conceivably serve personal purposes quite often, notably if the user had no personal vehicle, or if it were possible to empty its contents quickly.

[28] The Appellant admitted that the issues raised by the auditors were valid. However, he added that there were often all kinds of imponderables that made it very difficult to calculate exact distances, especially based on an appointment book that was not intended to keep a precise account of the distances driven.

[29] By way of illustration, he cited an emergency call that required him to take various detours, and certain errands which he had to do and which were unrelated to the hospitals, such as a trip to take possession of a piece of equipment from headquarters, and a trip to deliver something on behalf of a colleague. All of these things were in conjunction with his employment.

[30] It is clear that the Appellant would have avoided this litigation if he had kept a proper log book. It is just as clear that it was the Appellant's responsibility, as the user of the vehicle, to keep one.

[31] Even though the vehicle was highly atypical, it was indeed an automobile within the meaning of subsection 248(1) of the Act and of the analysis provided by the Honourable Justice Paul Bédard in *Stéphane Gariépy v. Her Majesty the Queen*, Docket 2007-35(IT)I, 2007TCC513.

[32] The special nature of this vehicle limited its personal use considerably; moreover, while the absence of a log was inexcusable, it was not fatal in the instant case given the nature of the vehicle. Under the circumstances, I find that the distance driven for personal purposes was very marginal, and was below the threshold at which a taxpayer must report a taxable benefit.

[33] In other words, due to the numerous unusual characteristics of the vehicle, I believe that the Appellant is in a veritable grey area.

[34] Why is a vehicle used for personal purposes? To go on private or personal trips. The temptation to use a company vehicle can be stronger when one does not have a personal vehicle. But in the case at bar, the Appellant had his own vehicle.

[35] If this had been a very comfortable, very luxurious, very safe (4 x 4), very roomy, very economical or very eccentric vehicle, it would have been difficult to believe that a reasonable person, having regard to the circumstances, would have refrained from using a vehicle that had such attributes, especially if one of the qualities in question were necessary and the employer did not prohibit such use.

[36] However, if a vehicle possesses none of those attributes, and is otherwise cumbersome, it is difficult to believe that it can be put to significant personal use.

[37] This valid aspect makes the Appellant's argument reasonable. Indeed, the Appellant's remarks are much more reasonable than the Respondent's assumptions, despite the lack of an adequate and reliable log book.

[38] For these reasons, I allow the appeal and vacate the assessment.

Signed at Ottawa, Canada, this 25th day of October 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 22nd day of November 2007.

Brian McCordick, Translator

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APPEARANCES:

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