

BETWEEN:

CYRUS DRIVER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on September 16, 2011 at Ottawa, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: K.E. Koshy

Counsel for the Respondent: Joanna Hill

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**AMENDED JUDGMENT**

The appeal with respect to assessments made under the *Income Tax Act* for the 2003 and 2004 taxation years is allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. the appellant is entitled to additional deductions for motor vehicle expenses (including insurance) in the amounts of \$2,944 for the 2003 taxation year and **\$2,630** for the 2004 taxation year; and
2. property described as “cutlery, crockery & utensils” and “linen, furnishings & presentation” should be classified as Class 12 assets for purposes of capital cost allowance.

Each party shall bear their own costs. The Registry is directed to reimburse the Court's filing fee to the appellant.

**This Amended Judgment is issued in substitution for the Judgment dated September 22, 2011.**

Signed at Toronto, Ontario this 5<sup>th</sup> day of October 2011.

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"J. M. Woods"

Woods J.

Citation: 2011 TCC 444

Date: 20111005

Docket: 2007-828(IT)I

BETWEEN:

CYRUS DRIVER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**AMENDED REASONS FOR JUDGMENT**

**Woods J.**

[1] This appeal concerns the deductibility of expenses incurred by Cyrus Driver in 2003 and 2004 in connection with a restaurant business operated by him in Saudi Arabia. Mr. Driver was a resident of Canada during this period.

[2] In income tax returns for the 2003 and 2004 taxation years, Mr. Driver reported net income from the restaurant business in the amounts of \$14,667 and \$27,596, respectively.

[3] Reassessments were issued under the *Income Tax Act* to increase net income by \$20,302 and \$20,057, for each year respectively. The additions to income are comprised of two items: (1) disallowance on account of personal use of 34 percent of motor vehicle expenses claimed; and (2) a reduction in the deduction for depreciation to conform with the capital cost allowance provisions of the *Act*.

[4] By way of background, in the 1980s Mr. Driver opened a restaurant called The Grill in Saudi Arabia; at the time he resided there. When he moved to Canada in 1993, Mr. Driver continued to operate the restaurant and he spent several months each year in Saudi Arabia.

[5] There were others who had interests in the business as well. Prince\Mishari Abdullah Abdul Aziz Al-Saud was described as the Sponsor of the business. He had legal title to the assets and control over major decisions. In the relevant period, Mr. Driver had a 74 percent share of the profits of the business. A family who lived in Great Britain had the remaining 26 percent.

[6] Mr. Driver left Canada in 2007. He was not able to obtain a visa to attend the hearing and he provided oral evidence by way of teleconference.

#### Deduction of motor vehicle expenses

[7] Mr. Driver claimed a deduction for expenses for five motor vehicles. Two of the vehicles were used to transport the restaurant's 27 employees to and from work and there is no dispute as to the deductibility of the expenses for these two vehicles.

[8] The remaining three vehicles are described as a 85 Mazda Station Wagon, a 92 Lexus, and a 99 Dodge Intrepid. Mr. Driver said that he used only the Lexus and that his personal use was about 14 percent.

[9] The main difficulty that I have with Mr. Driver's testimony is that I have no way of knowing how accurate it is. The testimony is self-interested and it was not detailed enough for me to be satisfied as to its reliability. A log book is generally recognized as the appropriate way to establish business use of a vehicle. Mr. Driver had been in Canada for about 10 years before the taxation years at issue. He had adequate time to be advised as to the necessity of keeping a log book for Canadian tax purposes.

[10] I also have difficulty with the Crown's position because it attributed minimal business use to the three vehicles. This seems inappropriate considering that extensive business use of vehicles would likely be required in the day to day operation of the restaurant. In addition, it came out for the first time at the hearing that Mr. Driver owned another vehicle that was used by his family. That was not taken into account by the Crown.

[11] In the circumstances, the best that can be done is to provide a rough estimate. I propose to reduce the disallowed amounts by one-half. Accordingly, additional deductions will be allowed in the amounts of \$2,944 for the 2003 taxation year and **\$2,630** for the 2004 taxation year.

#### Depreciation

[12] In the income tax returns for the 2003 and 2004 taxation years, Mr. Driver deducted depreciation on the same basis that was claimed in the financial statements which were prepared by an accounting firm in Saudi Arabia. There was no attempt to apply the capital cost allowance provisions of the *Act*.

[13] For purposes of the reassessments, the CRA auditor attempted to use the provisions of the *Act* to the extent possible, using the description of the assets provided to her by Mr. Driver.

[14] At the hearing, the representative for Mr. Driver made several submissions in support of the deductions claimed in the tax returns. Some of these are:

- Mr. Driver is an employee of the Prince;
- it is too complicated to apply the provisions of the *Act*;
- the Minister used the incorrect foreign exchange rate for the cost of assets;
- the Minister used the wrong CCA classification for cutlery and linens;
- the Minister should have allowed a deduction as a running expense for renovations and pre-start up costs.

[15] I would first comment that these arguments were made for the first time at the hearing, which put the Crown at a significant disadvantage. The arguments should have been made in the notice of appeal so that the Crown could have considered them prior to the hearing.

[16] In reply to the arguments, counsel for the Crown quickly conceded that a mistake had been made in classifying cutlery and linens. An adjustment should be made, therefore, to change the classification of these assets from Class 8 to Class 12. The change appears to be significant in terms of the total amount at issue.

[17] No other adjustment is warranted in my view. In brief, I would comment:

- there is insufficient evidence that Mr. Driver was an employee;
- even if the application of Canadian law is complicated, no relief can be provided by this Court on this basis alone;
- as for the exchange rate, there was insufficient evidence as to what the appropriate exchange rate is; and
- there was insufficient evidence to justify changing the classification of renovation costs and pre-start up costs.

Conclusion

[18] In the result, the appeal will be allowed to provide for the following adjustments: (1) additional deductions may be claimed for motor vehicle expenses (including insurance) in the amounts of \$2,944 for the 2003 taxation year and **\$2,630** for the 2004 taxation year; and (2) items described as “cutlery, crockery & utensils,” and “linen, furnishings & presentation” should be classified as Class 12 assets for purposes of capital cost allowance.

[19] As for costs, I have concluded that each party should bear their own. Although Mr. Driver was partially successful in the appeal, I am not satisfied that he took satisfactory steps to make his position known to the Crown prior to the hearing. If that had been done, there might have been fruitful settlement discussions, or at least the Crown could have properly prepared for the hearing.

**These Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment dated September 22, 2011.**

Signed at Toronto, Ontario this 5<sup>th</sup> day of October 2011.

“J. M. Woods”

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Woods J.

CITATION: 2011 TCC 444

COURT FILE NO.: 2007-828(IT)I

STYLE OF CAUSE: CYRUS DRIVER and HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 16, 2011

REASONS FOR JUDGMENT BY: Hon. J.M. Woods

DATE OF AMENDED  
JUDGMENT: October 5, 2011

DATE OF AMENDED  
REASONS FOR JUDGMENT: October 5, 2011

APPEARANCES:

Agent for the Appellant: K.E. Koshy

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