Docket: 2008-1121(IT)I

BETWEEN:

ALLAN JORGENSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together with the appeal of
Colleen Jorgensen, 2008-1122(IT)I
on November 26, 2008 at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:
Agent for the Appellant: Darrin Oremba

Counsel for the Respondent: Cam Regehr

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2002, 2003 and 2004 taxation years is allowed, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Truck was not a "passenger vehicle" as defined in subsection 248(1) of the *Act* and was used more than 90% of the time in the Appellant's business.

IT IS FURTHER ORDERED that the filing fee of $100 be refunded to the Appellant.

Signed at Ottawa, Canada, this 19th day of January, 2009.

"G. A. Sheridan"

Sheridan J.

Docket: 2008-1122(IT)I

BETWEEN:

COLLEEN JORGENSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together with the appeal of
Allan Jorgensen, 2008-1121(IT)I
on November 26, 2008 at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:
Agent for the Appellant: Darrin Oremba

Counsel for the Respondent: Cam Regehr

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2002, 2003 and 2004 taxation years is allowed, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Truck was not a "passenger vehicle" as defined in subsection 248(1) of the *Act* and was used more than 90% of the time in the Appellant's business.

IT IS FURTHER ORDERED that the filing fee of $100 be refunded to the Appellant.

Signed at Ottawa, Canada, this 19th day of January, 2009.

"G. A. Sheridan"

Sheridan J.

Citation: 2009TCC37
Date: 20090119
Dockets: 2008-1121(IT)I
2008-1122(IT)I

BETWEEN:

ALLAN JORGENSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

AND BETWEEN:

2008-1122(IT)I

COLLEEN JORGENSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellants, Allan and Colleen Jorgensen, are appealing the reassessment of their 2002, 2003 and 2004 taxation years. During that time, the Appellants were farming in partnership. The appeals were heard on common evidence under the Informal Procedure. It was acknowledged at the commencement of the hearing that the Informal Procedure monetary limits would apply.

[2] There are two unrelated issues under appeal: first, whether a ¾ ton diesel truck is a "passenger vehicle" and the extent to which it was used in the Appellants' business; secondly, whether land acquired following the sale of the Appellants' farm land is "replacement property" within the meaning of subsection 44(5) of the *Income Tax Act*.

The Passenger Vehicle Issue

[3] In each of the taxation years, the Appellants owned a ¾-ton extended cab diesel truck. The Appellants' practice was to purchase a new truck each year once the accumulated mileage had caused the warranty to expire. Thus, while the Appellants owned a different truck of the same type in each taxation year, for the purposes of this judgment, the various vehicles are considered globally as the "Truck" and the conclusions reached are equally applicable to each vehicle.

[4] In making his reassessment, the Minister treated the Truck as a "passenger vehicle" as defined in subsection 248(1) of the *Act* and as a Class 10.1 asset.

[5] By statutory definition, a "passenger vehicle" is an "automobile" acquired after 1987. It is common ground that the Truck meets the primary definition of automobile: "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"[1] [Emphasis added]. The issue is whether the Truck is excluded from that definition by the operation of either of the following exclusions to the definition of "motor vehicle":

> "automobile" means
>
> ….
>
> but does not include,
>
> …
>
> (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,

[1] Paragraph 248(1)(*a*).

> equipment or passengers in the course of gaining or producing income, or
>
> …

[6] The Respondent says that the Truck is not caught by either of these exclusionary clauses: in respect of subparagraph (i), it had a seating capacity for more than the driver and two passengers; in respect of subparagraph (ii), its use was not "all or substantially all" for the transportation of goods, equipment or passengers in the course of gaining or producing income.

[7] Turning first to subparagraph (i), the Appellants concede that the Truck, as purchased, came with a bench seat in the space behind the front passenger seat and doors on each side of the cab providing access to that seat. However, I accept Mr. Jorgensen's evidence that he modified the Truck for use in the Appellants' farming operation by affixing a custom-designed tool box in the rear area of the cab[2]. The toolbox was screwed into the floor so it would stay securely in place when the Truck was in motion, a sensible precaution for a vehicle travelling regularly between farm and field. Furthermore, to accommodate the toolbox, the rear bench was kept folded up against the back of the cab; because the toolbox ran the full width of the rear floor area, even if the seat had been pulled down, there would have been effectively no foot room for any would-be passengers. While there are doors giving access to this area, they are significantly narrower than the full-size doors to the front passenger seats.

[8] The Minister's assumption that the rear area was suitable for passengers was based on the auditor's report; the auditor, however, never viewed the Truck. Had he had the opportunity to inspect it, he might have formed a different view.

[9] Having said that, I agree with counsel for the Respondent that a review of the relevant case law shows quite a range of outcomes, the result no doubt of their dependency on the particular facts of each case. In my view, the facts in the present matter are more akin to those in *Muller v. Her Majesty the Queen*[3], a case cited by the Appellants, than the decisions relied upon by the Respondent[4]. I found the

---

[2] Exhibit A-1.

[3] 2004 TCC 562.

[4] *Donald Myshak v. The Queen*, 1997 CarswellNat 1275 (T.C.C.); *547931 Alberta Ltd. v. The Queen*, 2003 CarswellNat 826 (T.C.C.).

Appellants' evidence, particularly Mr. Jorgensen's description of the appearance and use of the Truck, quite compelling. Given the permanent nature of the adaptations to the rear area of the cab, I am satisfied that the Truck did not, in fact, have seating capacity for more than the driver and two passengers. It therefore falls within subparagraph (e)(i) and is excluded from the definition of "motor vehicle" and by consequence, from the definition of "passenger vehicle".

[10] Should I be in error in reaching this conclusion, I make the following findings in respect of subparagraph (e)(ii). The Minister concedes that the Truck was used for "transportation of goods and equipment" but says that not "all or substantially all" of its use was for that purpose. The Minister assumed a 75% business purpose use; this, says the Respondent, falls short of what is required to satisfy the meaning of "all or substantially all" within the meaning of subparagraph (e)(ii).

[11] In support of the Minister's conclusion, counsel for the Respondent points to the Appellants' evidence that Mr. Jorgensen sometimes used the Truck to drive himself to meetings pertaining to the Appellants' businesses, a use which does not fall under the rubric of the "transportation of goods, equipment or passengers". He also pointed to the fact that, contrary to the legislative requirement to keep adequate books and records, the Appellants had failed to keep a log to show the use of the Truck; accordingly, the Appellants could not substantiate the extent of the business use of the Truck.

[12] Certainly the Appellants would have been well advised to maintain a daily record of the Truck's use. However, the standard for records keeping is one of adequacy, not perfection. While the Appellants did not keep a formal log, they did maintain sufficient source records of their business activities to allow them, when requested to do so by the auditor, to reconstruct a reasonable diary[5] of the business use of the Truck. In respect of their farm machinery and equipment sales business, the records track their attendance at various auctions throughout rural Saskatchewan and in larger centers such as Regina, Calgary and Edmonton.

[13] While the log does not reflect the Truck's use in the farming operation, I accept the Appellants' evidence that its use was integral to the daily workings of the farm for such tasks as hauling fertilizer and water for the sprayer, picking up repairs, taking spare tires to the field and having tools at the ready for in-field repairs. The

---

[5] Exhibits A-5 and A-6.

materials transported are “goods and equipment” as contemplated by subparagraph e(ii).

[14] The Truck was rarely used for personal purposes: Mrs. Jorgensen said she almost never used the Truck because she had her own vehicle which was more fuel efficient, easier to drive and did not smell of diesel fuel. Mr. Jorgensen admitted that, on occasion, he used the Truck to attend meetings related to the farm business but the evidence also shows that such trips were often combined with tasks related to “transportation” as that term is used in subparagraph e(ii). Specifically, I accept Mr. Jorgensen’s explanation in respect of the Minister’s assumption that Mr. Jorgensen “…used the [Truck] to travel to Lethbridge, Alberta to visit his daughter”[6]: their daughter was studying in Lethbridge and they stopped in to see her while hauling auction purchases from their circuit in Alberta.

[15] On balance, I am satisfied that the use of the Truck for purposes other than the “transportation of goods, equipment or passengers in the course of gaining or producing income” was minimal. The evidence supports the conclusion that the Truck was used “all or substantially all” of the time for business purposes. Accordingly, the Truck was excluded from the definition of “motor vehicle” and therefore, from the definition of “passenger vehicle” as defined under subsection 248(1) of the *Act*. As for the percentage of its business use, the Truck was used in the taxation years more than 90% of the time in the Appellants’ farming operation and farm machinery and equipment sales business.

The Replacement Property

[16] The Minister’s reassessment was based on his conclusion that certain land acquired following the sale of the Appellants’ farm land was not “replacement property” within the meaning of subsection 44(5) of the *Act*.

[17] In 1998, the Appellants moved from Manitoba where they had been farming for several years and purchased land near Balcarres, Saskatchewan. They sold that property in 2002 and purchased 17 quarter sections of land south of Regina, referred to in the Reply as the “Regina South Farm”. The Regina South Farm was actively farmed to produce such crops as wheat, canola and flax.

[6] Reply to the Notice of Appeal of Allan Jorgensen, paragraph 14(p).

[18] In 2004 the Appellants sold the Regina South Farm for $2.3 million and in the same year, purchased a piece of land zoned "agricultural" consisting of approximately 70 acres near White City, Saskatchewan (the "White City Corner"). The purchase price was $175,000[7]. The Appellants subdivided the White City Corner (which, at the time of purchase, was a hay field/pasture land) into multiple parcels known as Blocks A, C, D, E and F[8]. Blocks A, C and D were rezoned from "Agricultural" to "Concentrated Commercial"; the Appellants built a shop on Block C for storing and repairing machinery and equipment used in their farming and equipment sales business. Some machinery from the farming operation was also stored there. Blocks E and F were rezoned from "Agricultural" to "Low Density Multi-Parcel Residential" and a residence was built on Block E. The Appellants lived in the residence until the house was sold in 2005.

[19] The question is whether under subsection 44(5), the White City Corner is "replacement property":

> For the purposes of this section, a particular capital property of a taxpayer is a replacement property for a former property of the taxpayer, if
>
> (a) it is reasonable to conclude that the property was acquired by the taxpayer to replace the former property;
> (a.1) it was acquired by the taxpayer and used by the taxpayer or a person related to the taxpayer for a use that is the same as or similar to the use to which the taxpayer or a person related to the taxpayer put the former property;
> (b) where the former property was used by the taxpayer or a person related to the taxpayer for the purpose of gaining or producing income from a business, the particular capital property was acquired for the purpose of gaining or producing income from that or a similar business or for use by a person related to the taxpayer for such a purpose;
> (c) where the former property was a taxable Canadian property of the taxpayer, the particular capital property is a taxable Canadian property of the taxpayer; and
> (d) where the former property was a taxable Canadian property (other than treaty-protected property) of the taxpayer, the particular capital property is a taxable Canadian property (other than treaty-protected property) of the taxpayer
>
> …

[7] Exhibit R-1.

[8] Exhibit A-3.

[20] Because subsection 44(5) is written conjunctively, a taxpayer seeking the benefit of the provision must satisfy all of its requirements. In the present matter, paragraphs 44(5)(*c*) and (*d*) are not in issue; accordingly, to succeed in this aspect of their appeal, the Appellants must show that the elements of paragraphs (*a*), (*a.1*) and (*b*) have been fulfilled; the evidence in respect of each is considered below.

[21] The Respondent argues first, that it cannot reasonably be concluded that the Appellants acquired a 70-acre property to replace one of 2,720 acres (17 quarters). It seems to me, however, that the reduction in size of the Appellants' landholdings does not, in itself, preclude the conclusion that the acquisition of the White City Corner was reasonable under paragraph 44(5)(*a*).

[22] However, paragraph 44(5)(*a.1)* is more problematic for the Appellants. The word "use" in that provision has been interpreted to mean actual, rather than intended, use[9]. In the present matter, the use to which the former property was put was as an active farm, growing a variety of crops for harvest and sale each year. The White City Corner was essentially pastureland. While there was some naturally occurring hay on the property, Mrs. Jorgensen described it as "thin" and for that reason, they chose not to treat it as a commercial crop. In at least one taxation year, the hay was baled and given away to a neighbour. This is a far cry from the full scale farming operation carried on at the Regina South Farm. While I accept the Appellants' contention that, in principle, hay has as much of an agricultural purpose as any other crop, the fact is that the pastureland was not used for the production of a commercial crop in the taxation years.

[23] According to Mrs. Jorgensen's evidence, the White City Corner was acquired primarily as a site for the farm machinery and equipment business; Mr. Jorgensen testified that when they purchased the White City Corner, he and his wife had decided to "scale down" the farming operation that they had been carrying on at the Regina South Farm. In respect of the farm machinery and equipment aspect of the Appellants' business, although there was a machinery shop at the Regina South Farm, it was not the large, well-equipped multi-purpose facility that was ultimately built on the White City Corner property. Finally, shortly after its purchase, the White City Corner was subdivided and parts of it sold to third parties. While I accept the Appellants' evidence that they had not intended to use the White City Corner property in this way, paragraph 44(5)(*a.1*) is not concerned with intentions; what matters is the actual use of the property once acquired. In these circumstances, it

---

[9] *Glaxo Wellcome Inc. v. Her Majesty the Queen*, 1996 CarswellNat 853 (T.C.C.), affirmed [1999] 4 C.T.C 371 (F.C.A.); *Klanten Farms Ltd. v. Her Majesty the Queen*, [2007] 5 C.T.C 2384 (T.C.C.).

cannot be said that the White City Corner was acquired for or put to the “same or similar” use as the Regina South Farm.

[24] Finally, under paragraph 44(5)(*b*), the question is whether the new property was acquired for the purpose of earning income from a business that was the same or similar to the business carried on at the former property. For the same reasons set out above, the evidence does not support the conclusion that the White City Corner was acquired for the purpose of gaining or producing income from the same or similar business as was carried on at the Regina South Farm. The business carried on at the Regina South Farm was full-scale crop production. The White City Corner was uncultivated pastureland. Though zoned “agricultural” at the time of its acquisition, the White City Corner was not acquired for the purpose of exploiting that aspect of the property; rather, it was acquired for the purpose of earning income from the farm machinery and equipment business.

[25] In my view, the evidence does not satisfy the elements in paragraphs 44(5)(*a.1*) or (*b*); accordingly, the White City Corner cannot be a “replacement property” within the meaning of subsection 44(5).

[26] For the reasons set out above, the appeals are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Truck was not a “passenger vehicle” as defined in subsection 248(1) of the *Income Tax Act* and was used more than 90% of the time in the Appellants’ business.

Signed at Ottawa, Canada, this 19th day of January, 2009.

"G. A. Sheridan"

Sheridan J.

CITATION:	2009TCC37
COURT FILE NOS.:	2008-1121(IT)I and 2008-1122(IT)I
STYLE OF CAUSE:	ALLAN JORGENSEN AND HER MAJESTY THE QUEEN AND BETWEEN COLLEEN JORGENSEN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	November 26, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	January 19, 2009

APPEARANCES:

Agent for the Appellants:	Darrin Oremba
Counsel for the Respondent:	Cam Regehr

COUNSEL OF RECORD:

For the Appellants:	
Name:	
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada