Date: 20080529

Docket: A-601-06

Citation: 2008 FCA 196

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
BLAIS J.A.

BETWEEN:

BRIAN JENNER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on May 1, 2008.

Judgment delivered at Ottawa, Ontario, on May 29, 2008.

REASONS FOR JUDGEMENT BY: DESJARDINS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] The appellant is appealing against a decision of the Tax Court of Canada (*Jenner v. The Queen*, 2007 TCC 141, Archambault J.), in which his appeal of a decision of the Minister of National Revenue was dismissed. The Minister determined that the input tax credit (ITC) to which the appellant was entitled according to section 201 of the *Excise Tax Act*, R.S.C. (1985), c. E-15 (the ETA) was limited to the prescribed sum of $30,000, because the vehicle in question, a Land Rover, was a "passenger vehicle" within the meaning of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the ITA). The Minister dismissed the arguments of the appellant, who submitted that the determination should be made on the basis of the vehicle's retail price, namely, $83,000.

[2] Both parties recognized from the start, as noted by the trial judge (paragraph 3 of the reasons), that the resolution of the case depended on whether or not the Land Rover was acquired in the course of carrying on a "business" of renting or leasing vehicles.

RELEVANT LEGISLATIVE PROVISIONS

[3] The relevant legislative provisions of the ETA are section 201 and subsection 123(1) (*passenger vehicle*), which read as follows:

> S. 201. **Value of passenger vehicle**
>
> For the purpose of determining an input tax credit of a registrant in respect of a passenger vehicle that the registrant at a particular time acquires, imports or brings into a participating province for use as capital property in commercial activities of the registrant, the tax payable by the registrant in respect of the acquisition, importation or bringing in, as the case may be, of the vehicle is deemed to be the lesser of
>
> (a) the tax that was payable by the registrant in respect of the acquisition, importation or bringing in, as the case may be, of the vehicle; and
>
> (b) the amount determined by the formula
>
> (A x B) - C
>
> where
>
> A is the tax that would be payable by the registrant in respect of the vehicle if the registrant acquired the vehicle at the particular time
>
> (i) where the registrant is bringing the vehicle into a participating province at the particular time, in that province, and
>
> (ii) in any other case, in Canada
>
> for consideration equal to the amount deemed under paragraph 13(7)(g) or (h) of the *Income Tax Act* to be, for the purposes of section 13 of that Act, the capital cost to a taxpayer of a passenger vehicle to which that paragraph applies,
>
> …
>
> C is … zero.
>
> **123. Definitions** – (1) In section 121, this Part and Schedules V to X,
>
> …

> "**passenger vehicle**" has the meaning assigned by subsection 248(1) of the *Income Tax Act*[.]
>
> [Emphasis added.]

[4] With regard to the terms "automobile" and "passenger vehicle", subsection 248(1) of the ITA provides, *inter alia*, as follows:

> "**passenger vehicle**" means an automobile acquired after June 17, 1987 (other than an automobile acquired after that date pursuant to an obligation in writing entered into before June 18, 1987) and an automobile leased under a lease entered into, extended or renewed after June 17, 1987
>
> "**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
>
> …
>
> (*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,
>
> …
>
> [Emphasis added.]

[5] Paragraph 13(7)(*g*) of the ITA provides as follows:

> S. 13. Recaptured depreciation
>
> …
>
> (7) **Rules applicable** – Subject to subsection 70(13), for the purposes of paragraphs 8(1)(*j*) and 8(1)(*p*), this section, section 20 and any regulations made for the purpose of paragraph 20(1)(*a*),
>
> …
>
> (*g*) where the cost to a taxpayer of a passenger vehicle exceeds $20,000 or such other amount as is prescribed, the capital cost to the taxpayer of the vehicle shall be deemed to be $20,000 or that other prescribed amount, as the case may be;
>
> [Emphasis added.]

[6] According to subsection 7307(1) of the *Income Tax Regulations*, C.R.C., c. 945, the amount prescribed for the application of this paragraph for a car acquired after 2000 is $30,000.

[7] In addition, the terms “commercial activity” and “business” are defined in subsection 123(1) of the ETA:

"commercial activity" **« activité commerciale »** **"commercial activity"** of a person means	« **activité commerciale »** **"commercial activity"** **« activité commerciale »** Constituent des activités commerciales exercées par une personne :
(*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,	*a*) l'exploitation d'une entreprise (à l'exception d'une entreprise exploitée sans attente raisonnable de profit par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées; (1997, ch. 10, art. 1(2).)
…	[…]
"business" **« entreprise »** "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;	**« entreprise »** **"business"** «entreprise » Sont compris parmi les entreprises les commerces, les industries, les professions et toutes affaires quelconques avec ou sans but lucratif, ainsi que les activités exercées de façon régulière ou continue qui comportent la fourniture de biens par bail, licence ou accord semblable. En sont exclus les charges et les emplois.

The term “business” is also defined in subsection 248(1) of the ITA:

"business"	**« entreprise »**

« commerce » "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment;	**"business"** «entreprise » Sont compris parmi les entreprises les professions, métiers, commerces, industries ou activités de quelque genre que ce soit et, sauf pour l'application de l'alinéa 18(2)c), de l'article 54.2, du paragraphe 95(1) et de l'alinéa 110.6(14)f), les projets comportant un risque ou les affaires de caractère commercial, à l'exclusion toutefois d'une charge ou d'un emploi.

THE FACTS

[8] The appellant, who is registered for Goods and Services Tax (GST) purposes, is president and chief executive officer of the Helicopter Association of Canada (HAC). He is also an employee of the HAC. On October 16, 2003, he acquired a Land Rover utility vehicle for the price of $83,000. He already owned one vehicle, that is a Monaco brand automobile, The Executive model. On January 1, 2004, the appellant leased the two vehicles to the HAC for a five-year period, from January 1, 2004, to December 31, 2008. Under the lease, the vehicles were to be registered and insured under the joint names of the HAC and the appellant. For the duration of the lease, the HAC was responsible for operating costs and minor repairs. The appellant was responsible for major repairs. The appellant held a three-year guarantee from the manufacturer in case of major breakdowns. The HAC paid the appellant rental fees, and the appellant collected GST from the HAC.

APPEAL DECISION

[9] The trial judge dismissed Mr. Jenner's appeal. He explained the applicable principles of law as follows:

[7] The Court, without hesitation, finds that Mr. Jenner's activities did not constitute the operation of a business and that the passages Mr. Jenner relied on to justify his position, the comments of L'Heureux-Dubé J. in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, 1997 CarswellNat 3046[2], were taken out of context and are of no use to him.

…

[9] The comments by L'Heureux-Dubé J. are not helpful for determining whether the rent Mr. Jenner earned should be considered as business income or as property income. The case law adopts the following statements by Iacobucci J.[3] who, regarding paragraph 144 of *Hickman Motors* on the distinction between the two types of income, cites professor Vern Krishna and summarizes his statements as follows: "He distinguishes between the two on the basis that "business" connotes some kind of activity." He also cites from the same paragraph, the following by Peter W. Hogg and Joanne E. Magee in *Principles of Canadian Income Tax Law* (1995), at page 195: "A gain acquired without systematic effort is not income from a business. It may be income from property, such as rent, interest or dividends." As Iacobucci J. stated, at the end of paragraph 144: "Unless the taxpayer actually uses the asset "as part of a process that combines labour and capital" (Krishna, supra, at p. 276), any income earned therefrom does not qualify as income from a business, but rather falls into the category of income from property."

[10] In my opinion, the decision rendered by the Supreme Court in *Hickman Motors* does not modify this approach. Income from property is income that can be mainly attributed to this source. It does not require important work to exist, whereas income from a business generally requires two elements: work and capital. Sometimes there is little or no capital. However, work (for example, service provision) is necessary to the production of business income. We will use the example of a doctor carrying out his medical profession with minimal capital of $1,000, as was the case in *Grenier v. The Queen*, 2003 DTC 227, [2005] 2 C.T.C. 2210, para. 3. A doctor carrying out his profession in a hospital may very well carry out a business with very little of his own capital. However, in general, a business requires the combination of capital and work. This approach has allowed the courts to distinguish between income from property and income from a business.

[10] When applying the law to the facts of this case, the trial judge concluded:

[12] Once the Land Rover was acquired, he no longer had much to do as lessor, other than cash in the rental fees every month or every year. It was as the lessee's employee that he drove the vehicles and took care of the running maintenance. I restate that under the terms of the lease, Mr. Jenner had no obligation to provide anything other than the use of the Land Rover and the camper. Considering he had only one client and the maintenance of these vehicles did not require any intervention by him as lessee, except if there was a major repair—and the evidence did not show that such an expense was incurred—he cannot be considered as having operated a rental business.

[13] I see absolutely no distinction between Mr. Jenner's activity as a lessor who makes a profit from property and that of all the building owners who rent them out and take the financial risk associated with doing so, particularly in cases where there are repairs to be made and when there is non-payment of rent and collection measures must be taken. Mr.

> Jenner is in the same situation as these building lessors, and maybe even in a better position, since it is his employer/lessee who is responsible for the maintenance of the vehicles. The owners of buildings are recognized by the case law as earning property income.

APPELLANT'S ARGUMENTS

[11] The appellant argues that he is carrying out a commercial activity within the meaning of the definition of this term in the ETA and that the ETA's rather than the ITA's definition of the term "business" applies in this case. He adds that Parliament did not adopt the ITA's definition of "business" for the ETA, only that of "passenger vehicle". The trial judge therefore erred in law, in his opinion, when he concluded that the ITA's definition of the term "business" was the one that applied.

[12] The appellant argues that the ETA's definition of the term "business" expressly includes activities that involve the supply of property by way of lease and that neither the ITA's nor the ETA's definition of the term "business" refers to the notion of an active or passive income.

[13] The appellant submits that in *Canadian Marconi v. R.*, [1986] 2 S.C.R. 522 (*Canadian Marconi*), it was recognized that a commercial activity does not require the use of many resources for it to constitute a "*business*" and that, even if there is no business risk, a commercial activity can still constitute a business if there is a "minimum level of activity."

[14] In the appellant's view, it was also recognized by the majority of the Supreme Court of Canada in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 (*Hickman Motors*) that assuming the risk of being obliged to respect the obligations of a rental agreement can be sufficient basis for

concluding that a business is being carried on. The appellant states that he was assuming a business risk in that he might be called upon to replace a defective engine, given that the guarantee was valid for only three years while the lease agreement was valid for five, or be subject to an action in damages following a road accident outside of Quebec. As in *Hickman Motors*, in the event of bankruptcy, he risked losing his entire assets and income.

[15] The appellant also argues that the trial judge erred in relying on the principles developed by Iacobucci J. in *Hickman Motors*, given that Iacobucci J. represented the minority opinion, not the majority.

[16] According to the appellant, the trial judge erred in law by applying case law related to property owners. In his view, this case law has ceased to apply to cases such as his since the decision in *Hickman Motors*, which addressed business risk.

[17] The appellant submits that the Land Rover that he owns and leases to his company, the HAC, is not a passenger vehicle according to the definition in subsection 248(1) of the ITA, because it falls under the exclusion the definition provides for vehicles acquired in the course of carrying on a business of renting or leasing motor vehicles.

RESPONDENT'S ARGUMENTS

[18] The respondent explained to the Court that the appellant is collecting GST from the HAC in addition to his leasing expenses because he is carrying on a "commercial activity" within the meaning of the ETA by making a supply of property. He therefore received a registration number.

[19] Under section 169 of the ETA, registrants can claim an ITC for a property or service they have acquired if the property or service was acquired for consumption, use or supply in the course of their *commercial activities*, a term defined in the ETA. The respondent therefore acknowledges that the appellant is entitled to claim an ICT under section 169 of the ETA.

[20] That said, the respondent argues that the Land Rover is subject to the rules of section 201 of the ETA for determining the ITC and to subsection 123(1) of the ETA for the applicable definitions.

[21] The respondent adds that the term *commercial activity* is defined in subsection 123(1) of the ETA as, *inter alia*, a business carried on by a person. Moreover, the definition of the term *business* provided in subsection 123(1) of the ETA differs from the one provided in subsection 248(1) of the ITA. Although both definitions use words such as "*profession*", "*trade*", "*manufacture*" and "*undertaking*" and exclude "*an office or employment*", there are differences between the two, including the following:

a. The ETA's definition includes "*any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement*";

b. Income from the supply of property by way of lease, licence or similar arrangement is treated as business income under the ETA, while such an income is generally treated as income from property under the ITA.

[22] The respondent argues that the trial judge did not commit an error in law in examining whether the appellant was carrying on a business of renting or leasing motor vehicles within the meaning of the ITA rather than within the meaning of the ETA. Furthermore, as the Land Rover

was not leased as part of a rental vehicle business, it is deemed to be a passenger vehicle. In that respect, the ICT is, according to section 201 of the ETA, limited to the prescribed value, that is, $30,000 at the time in question.

STANDARD OF REVIEW

[23] The question of whether a taxpayer is carrying on a business of renting or leasing motor vehicles, as opposed to earning a rental income, is an essentially factual question:

> It is trite law that the characterization of income as income from a business or income from property must be made from an examination of the taxpayer's whole course of conduct viewed in the light of surrounding circumstances …
>
> [*Canadian Marconi*, paragraph 12]

[24] Thus, the Court may intervene only if it concludes that the conclusion reached by the trial judge is tainted by a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[25] Moreover, every error in law must be assessed based on the standard of correctness.

ANALYSIS

1. Reading of relevant legislation

[26] Section 201 of the ETA establishes that to determine an ITC of a registrant in respect of a "passenger vehicle", the tax payable in respect of the acquisition of the vehicle is deemed to be the lesser of

a) the tax that was payable by the registrant in respect of the acquisition of the vehicle,

b) the result of a formula, the variables of which are described in section 201 (reproduced above).

[27] The term “passenger vehicle” defined in subsection 123(1) of the ETA refers the reader to section 248 of the ITA.

[28] Subsection 248(1) of the ITA defines the term “passenger vehicle” as “an automobile acquired after June 17, 1987”.

[29] The term “automobile”, also defined in the ITA, means “a motor vehicle that is designed … primarily to carry individuals on highways … but does not include … a motor vehicle acquired to be … rented or leased in the course of carrying on a business of … renting or leasing motor vehicles …”.

[30] The term “business” in subsection 248(1) of the ITA must be read according to its definition in the same act, namely, the ITA, which defines it as follows:

> “**business”**. - **“business”** includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment[.]
>
> [Emphasis added.]

[31] The trial judge found that, in light of the evidence, the lease agreement entered into between the appellant and the HAC involved the simple leasing of a vehicle. The appellant had only one client. The regular maintenance of the vehicle required no involvement on his part. Mr. Jenner was,

of course, responsible for “all running maintenance and operating costs of the vehicle” according to the lease signed between him and the HAC. The evidence, however, did not reveal that the appellant had incurred any such expenses, and, according to the trial judge, the appellant could therefore not be considered to be carrying on a business of renting or leasing vehicles. His case was similar to that of a landlord earning income from property (paragraphs 12 and 13 of the trial judge’s reasons).

[32] The decisions to which the appellant refers to justify his position are interpreted out of context and do not assist him. *Hickman Motors*, *South Behar Railway Company Ltd. v. Commissioners of Inland Revenue*, [1925] A.C. 476, and *Canadian Marconi* dealt with cases involving corporations. The fact that these corporations had been formed to carry on a business was a foregone conclusion, and the rebuttable presumption according to which a corporation’s income is income from a business was not overturned (see, *inter alia*, paragraph 41 of the reasons of Justice L’Heureux-Dubé in *Hickman Motors*). There is no presumption in the appellant’s favour.

[33] In addition, the trial judge did not commit an error in law by reading from some passages of the reasons of Justice Iacobucci. Justice L'Heureux-Dubé, who wrote one of the two majority opinions, herself recognized at paragraph 39 of her reasons that Justice Iacobucci and she agreed on how the law should be interpreted. They differed only as to how it was applied to the facts in *Hickman Motors*.

[34] I could find no error in fact or law that would justify the Court’s intervention.

CONCLUSION

[35] I would dismiss this appeal without costs, the respondent having waived them.

"Alice Desjardins"
J.A.

"I concur.
Gilles Létourneau J.A."

"I concur.
Pierre Blais J.A."

Certified true translation
Johanna Kratz

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FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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DATED:	MAY 29, 2008

APPEARANCES:

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Louis Cliche	FOR THE RESPONDENT

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