

Docket: 2016-277(GST)I

BETWEEN:

JANE GIBB,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 19, 2016, at Lethbridge, Alberta

By: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant: David Lowry

Counsel for the Respondent: Peter Basta

JUDGMENT

The Appeal from the reassessment made under the *Excise Tax Act* for the reporting periods covering January 1, 2010 to December 31, 2011, by Notice of Reassessment dated August 15, 2013, is dismissed.

Signed at Ottawa, Canada, this 3rd day of November 2016.

“Campbell J. Miller”

C. Miller J.

Citation: 2016 TCC 249
Date: 20161103
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JANE GIBB,

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and

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REASONS FOR JUDGMENT

C. Miller J.

[1] Ms. Gibb appeals the assessment by the Minister of National Revenue (the “Minister”) pursuant to the *Excise Tax Act* (the “ETA”) for the reporting periods of 2010 and 2011. The Minister denied Ms. Gibb’s claims for Input Tax Credits (“ITC’s”) on the basis she was not engaged in a commercial activity.

[2] Commercial activity is defined in section 123(1) of the *ETA* as a business carried on by the person “other than a business carried on without a reasonable expectation of profit by an individual.” What is implicit in this definition is that there can be two types of businesses: one with a reasonable expectation of profit and one without, the latter being precluded from claiming ITC’s. To be clear, this is not a matter of whether Ms. Gibb was or was not in a business, but a matter of whether it was a business with or without a reasonable expectation of profit. This is not an income tax case where the issue might be framed as a distinction between business and hobby, but a GST case where the legislation specifically excludes from commercial activity a business without a reasonable expectation of profit. The case thus revolves around the reasonable expectation of profit test described by the Supreme Court of Canada in the case of *Moldowan v HMTQ*:¹

¹ [1978] 1 SCR 480 (SCC).

There is a vast case literature on what reasonable expectation of profit means and it is by no means entirely consistent. In my view, whether a taxpayer has a reasonable expectation of profit is an objective determination to be made from all of the facts. The following criteria should be considered: the profit and loss experience in past years, the taxpayer's training, the taxpayer's intended course of action, the capability of the venture as capitalized to show a profit after charging capital cost allowance. The list is not intended to be exhaustive. The factors will differ with the nature and extent of the undertaking: *The Queen v. Matthews*. One would not expect a farmer who purchased a productive going [sic] operation to suffer the same start-up losses as the man who begins a tree farm on raw land.

[3] I will address Ms. Gibb's endeavour in line with the factors enumerated by the Supreme Court of Canada.

I. Past Profit and Loss

[4] Ms. Gibb claims to have been in the horse breeding and horse racing business for 30 years, starting in school when her husband-to-be introduced her to the horse domain. It was when she and her husband moved to Lethbridge in 1993 the operation started to grow. It is only, however, for the years 2000 forward for which I had evidence of profits and losses. Ms. Gibb reported losses in her personal returns for the years 2000, 2001, 2002, 2004, 2005, 2007, 2009, 2010, 2011 and 2012. In 2003, she reported net farming income of \$1,250 and in 2008 she reported nil net farming income. In 2013, Ms. Gibb testified that the operation shifted into a corporation. The profit and loss track record is not supportive of any future expectation of profit, reasonable or otherwise.

[5] In the years in question, Ms. Gibb reported expenses of \$144,000 in 2010 and \$216,000 in 2011, with income in the latter year of \$108,000 (approximately \$92,000 from horse sales, \$10,000 from race earnings and \$5,000 in a breeder's bonus). These results arose from a stable of between 20 and 30 horses. Ms. Gibb properly pointed out that there are no guarantees in the horse racing business. This struck me as an admission that the expectation for profit, if any, was not going to arise from horse breeding and sales, but only with success at the racetrack. And that this could be a long time coming. Ms. Gibb suggested it takes many years to develop a successful, profitable horse breeding and racing business. Yet, she has been in the business many many years and there is no sign yet.

[6] I find Ms. Gibb is passionate about her horse business even to the point of acknowledging she would carry on even if there was no profit, which appears to be exactly the situation. This all suggests to me her expectation can best be described

as a faint hope, a wish perhaps, but hardly a reasonable expectation of profit based solely on the numbers. Do the other factors suggested by the Supreme Court of Canada overcome this clear conclusion based on profit and loss history?

II. Training

[7] Ms. Gibb has been in the horse business for three decades. She has family involved in similar businesses. She has a clear passion for the work. Though she has had no personal education, she described in detail the work she personally undertook in dealing with foals, feeding, haying, arranging trainers, arranging vets, shipping horses to the United States of America and researching lineage; indeed, every element of the business. She knows the business, though that did not translate into knowing how to effectively run a business. She presented no financial statements, no budgets, no formal plan. Her stated goal was to improve the quality of her stable as well as the quantity, but she provided me with no breakdown of an optimal balance between broodmares and race horses, any calculation of numbers of possible breakeven points, even a conservative estimate of race earning results. It all seemed something of a wing and a prayer.

[8] Yes, she had some years' experience or training, but I am not convinced that equipped her to create and manage a profitable business.

III. Ms. Gibb's intended cause of action

[9] As mentioned, Ms. Gibb intended to increase the inventory of horses and the quality of those horses. She spent considerable time researching matches of studs for her broodmares. She testified that today she has horses that could fetch \$20,000 to \$50,000 each. But, again, she did not provide me with projections to illustrate how this might now turn into a profit, nor any evidence of sales of this ilk. She intended, and did, improve the farm environment by installing lighting to ensure some consistency and timing of breeding. She also intended to, and did, hire a full-time farmhand.

[10] These actions do support a finding she was carrying on business, but do they assist in proving possible profitability? Somewhat. The help of a farmhand and the efficiency of consistent breeding time encouraged by improved lighting, while causing an increase in costs, could also cut down on other costs, such as having to send the mares elsewhere. This course of action is some support for improved efficiency and therefore expectation of profitability.

IV. Capability of Venture as Capitalized to Show a Profit

[11] How was this venture capitalized? Again, Ms. Gibb showed me no financial statement to help me in this regard. She testified, however, that her husband, a physician who operated a clinic, financially supported the venture, whether this was by way of loan, gift or whatever was not made clear. Certainly, however the venture was structured financially, it had not managed to achieve profitability.

[12] Ms. Gibb presumably also invested some of her \$45,000 annual employment income, from her husband's clinic, amounts earned for keeping the books (though interestingly she claims to rely on an accountant to keep books for the horse business). I have little evidence to fully assess this factor but do not find that relying on family finances is an indication of any capability to produce a profit as capitalized.

V. Any Other Factors

[13] The determination of a reasonable expectation of profit must be done objectively. Stepping back and appraising Ms. Gibb's business dispassionately, rather than from Ms. Gibb's clear passionate view of the business, I conclude that on balance there are not sufficient *indicia* supporting a reasonable expectation of profit. Ms. Gibb's training and her intended course of actions do speak to the operation of a business, but frankly not a business with a reasonable expectation of profit. On balance, I do not weigh these other factors to overcome the stark reality of a business chronically losing money with no reasonable expectation of profit in the foreseeable future. Until Ms. Gibb comes up with a plan of how this operation, as capitalized, can ultimately turn the corner it is difficult to conclude that she was in a business with a reasonable expectation of profit. Therefore, for purposes of the *ETA* she cannot be considered to be in a commercial activity and consequently not entitled to ITC's.

[14] The Appeal is dismissed.

Signed at Ottawa, Canada, this 3rd day of November 2016.

“Campbell J. Miller”

C. Miller J.

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STYLE OF CAUSE: JANE GIBB AND HER MAJESTY THE QUEEN
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APPEARANCES:

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