

Docket: 2005-1062(IT)G,

BETWEEN:

JONAS FABER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 29, 30 and 31, 2007 and
November 1 and 2, 2007 at Kelowna, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant: The Appellant himself and
 Diane Henderson

Counsel for the Respondent: Nadine Taylor Pickering

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2000 and 2001 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 3rd day of July 2008.

“L.M. Little”

Little J.

Citation: 2008 TCC 403
Date: 20080703
Docket: 2005-1062(IT)G

BETWEEN:

JONAS FABER,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Little J.

A. Facts

[1] The Appellant is a self-taught Inuit artist who creates sculptures in soapstone and other natural media (i.e., antlers, bone, ivory and other minerals).

[2] The Appellant also designs jewellery and works on archaeological projects.

[3] The Appellant's art business was a sole proprietorship.

[4] The Appellant and his family live in Summerland, British Columbia.

[5] The Appellant was represented at the hearing by his spouse, Diane Henderson.

[6] When the Appellant prepared his income tax returns for the 2000 and 2001 taxation years he claimed a number of expenses.

[7] The Minister of National Revenue (the “Minister”) issued Notice of Assessment. Some of the expenses claimed by the Appellant were allowed and some expenses were disallowed.

[8] The Reply filed by the Department of Justice contains Schedule A. Schedule A outlines the expenses that were claimed, allowed and disallowed. Schedule A reads as follows:

	2000			2001		
	<u>Claimed</u>	<u>Allowed</u>	<u>Disallowed</u>	<u>Claimed</u>	<u>Allowed</u>	<u>Disallowed</u>
Gross Revenue	78,975.00	78,975.00	-	94,817.00	94,817.00	-
Cost of Goods Sold	-	-	-	<u>25,925.92</u>	<u>8,935.41</u>	<u>16,990.51</u>
Gross Profit	<u>78,975.00</u>	<u>78,975.00</u>	-	<u>68,891.08</u>	<u>85,881.59</u>	<u>16,990.51</u>
Expenses:						
Advertising	350.00	172.42	177.58	259.39	165.58	93.81
Other	-	-	-	8,194.70	2,950.49	5,244.21
Insurance	356.00	-	356.00	-	-	-
Maint & Rep	-	-	-	151.85	-	151.85
Meals & Ent	5,545.28	1,213.35	4,331.93	2,781.82	725.93	2,055.89
Motor Vehicle	12,883.93	5,238.32	7,645.61	14,396.89	5,645.22	8,751.67
Office	3,403.58	2,887.01	516.57	71.40	71.40	-
Supplies	12,452.12	8,360.35	4,091.77	-	-	-
Leg & Acctg	192.60	192.60	-	192.60	192.60	-
Rent	7,800.00	-	7,800.00	-	-	-
Salaries/Ben	13,587.00	-	13,587.00	-	-	-
Travel	15,310.79	11,178.23	4,132.56	12,994.71	6,167.23	6,827.48
Phone & Util	4,425.23	577.61	3,847.62	2,803.77	545.36	2,258.41
Capital Cost Allowance	<u>3,059.49</u>	<u>1,177.87</u>	<u>1,881.62</u>	<u>2,722.34</u>	<u>1,264.76</u>	<u>1,457.58</u>
Total Expenses	<u>79,366.02</u>	<u>30,997.76</u>	<u>48,368.26</u>	<u>44,569.47</u>	<u>17,728.57</u>	<u>26,840.90</u>
Net Income (loss)	<u>-391.02</u>	<u>47,977.24</u>	<u>48,368.26</u>	<u>24,321.61</u>	<u>68,153.02</u>	<u>43,831.41</u>
Business use of Home	-	<u>4,846.38</u>	<u>-4,846.38</u>	<u>5,938.82</u>	<u>4,949.02</u>	<u>989.80</u>
Net Income:	<u>-391.02</u>	<u>43,130.86</u>	<u>43,521.88</u>	<u>18,382.79</u>	<u>63,204.00</u>	<u>44,821.21</u>
Business use of Home Carryforward	-	-	-	-	-	-
Closing Inventory - Silver	-	-	-	-	2,212.76	2,212.76

[9] The Appellant filed Notices of Objection to the Reassessment and the Minister confirmed the Reassessments.

[10] The Appellant filed Notices of Appeal to the Tax Court.

B. Issue

[11] The issue is whether expenses in excess of the amount allowed by the Minister were incurred by the Appellant for the purpose of gaining or producing income from a business.

C. Analysis and Decision

[12] The appeals were heard in Kelowna, British Columbia. At the conclusion of the hearing Counsel for the Respondent filed a schedule outlining the concessions agreed to by the Appellant and by the Respondent. The Concession Schedule reads as follows:

CONCESSIONS – APPELLANT and RESPONDENT

2000

<u>EXPENSE</u>	Claimed	Allowed	Resp. concedes add'l amt. to be allowed	Disallowed	Appellant concedes amt. <u>should have been disallowed</u>
Advertising	350.00	172.42	-	177.58	-
Other	-	-	-	-	-
Insurance	356.00	-	-	356.00	-
Maintenance & Repairs	-	-	-	-	-
Meals & Entertainment	5,545.28	1,213.35	-	4,331.93	-
Motor Vehicle	12,883.93	5,238.32	-	7,645.61	129.52
Office	3,403.58	2,887.01	-	516.57	-
Supplies	12,452.12	8,360.35	127.08 (tape, chain saw)	4,091.77	845.12
Legal & Accounting	192.60	192.60	-	NOT IN DISPUTE NOW	-

Rent	7,800.00	-	-	7,800.00 (see bus. use home)	-
Salaries/Benefit.	13,587.00	-	-	13,587.00	-
Travel	15,310.79	11,178.23	-	4,132.56	-
Phone & utilities	4,425.23	577.61	720.85	NOT IN DISPUTE NOW	-
Capital cost allowance	3,059.49	1,177.87	ignore allowed amt. and allow % bus. use of motor veh. X 3,059.49	1,881.62	-
Business use of home	-	4,846.38	-	NOT IN DISPUTE NOW	-

2001

<u>EXPENSE</u>	Claimed	Allowed	Resp. concedes add'l amt. to be allowed	Disallowed	Appellant concedes amt. should have been disallowed
Cost of goods sold	25,925.92	8,935.41	359.60 (totes, tape, coolers, vacuum)	16,990.51	-
Advertising	259.39	165.58	-	93.81	-
Other	8,194.70	2,950.49	-	5,244.21	-
Insurance	-	-	-	-	-
Maintenance & Repairs	151.85	-	-	151.85	-
Meals & Entertainment	2,781.82	725.93	-	2,055.89	-
Motor Vehicle	14,396.89	5,645.22	1,126.32	8,751.67	151.20

Office	71.40	71.40	-	0: NOT IN DISPUTE	-
Supplies	-	-	-	-	-
Legal & Accounting	192.60	192.60	-	0: NOT IN DISPUTE	-
Rent	-	-	-	-	-
Salaries/Benefit	[claimed under cost of goods sold: 13,955; all disallowed]	-	-	-	-
Travel	12,994.71	6,167.23	561.01	6,827.48	246.92
Phone & utilities	2,803.77	545.36	482.79	NOT IN DISUPUTE NOW	-
Capital Cost Allowance	2,722.34	1,264.76	70.23 + ignore allowed amt. and allow % bus. use of motor veh. X 2,141.64	1,457.58	-
Business use of home	5,938.82	4,949.02		NOT IN DISPUTE NOW	

[13] The Appellant claimed a number of expenses that were treated by the Minister as non-deductible personal expenses.

1. Expense for trip to Fort Nelson, British Columbia:

The Appellant and a friend took a hunting trip to Fort Nelson, British Columbia. The Appellant claims that he obtains his inspiration for his art from hunting trips and “going out in nature”. The Appellant deducted the cost of the hunting trip as a business expense and the Minister disallowed all of the expense on the basis that it was a personal expense.

Mrs. Taylor Pickering, Counsel for the Respondent asked the following questions:

- Q. ... Were you a recreational hunter prior to becoming an artist?
- A. Being a hunter in the Arctic is not recreational, it's life. It's part of the culture. (Transcript p. 86, l. 24-25 and p. 87, 1-2)
- Q. Now, you said in the past in the courtroom that you get your inspiration from hunting?
- A. From hunting and going out in nature. I go out and hunt nature all year round. I can only hunt during the hunting season, but in my mind I still go out and pretend I'm hunting all year round. But I cannot legally hunt outside the hunting season. I'm not allowed that. (Transcript p. 89, l. 7-14)
- Q. And it's your position, isn't it, that you derived this inspiration from hunting?
- A. From hunting. It's very -- it's a very important part of my culture to hunt, and I execute my culture in my artwork. So hunting is completely a part of it, and I'm constantly out -- I'm always hunting in my mind. (Transcript p. 91, l. 18-24)
- Q. (Mrs. Taylor Pickering) ... photos of petroforms had nothing to do with the business of your Inuit art in 2000 and 2001.
- A. I don't know -- my whole life is my art. When I go out I cannot separate what is art and not art. This is my whole life. I'm an artist 24 hours a day. When I go out and see nature with the eyes of an artist, and I see something different and I discover. (Transcript p. 101, l. 22-25 and p. 102, l. 1-4)
- Q. Was there a trip into nature ... that you would not see as a business related?
- A. Business was not -- it's my life, and if you see -- it's extremely difficult to survive as an independent artist. You have to absorb everything around you. I am an artist 24 hours a day, and I tell that to my students. I have told them, I said, when you start to think about art 24 hours a day, you are there and you are an artist. (Transcript p. 103, l. 17-25 and p. 104, l. 1-4)

Q. (Ms. Taylor Pickering) ... So the question was just where did you go in order to hunt in 2000 and 2001, and you were saying Fort Nelson; correct?

A. I would go around Princeton; I would go up to central B.C.

...

... I need to go out, and that's where I get my inspiration from to be out, and it's not just only at hunting season. (Transcript p. 124, l. 19-22 and p. 125, l. 4-6)

Q. (Ms. Taylor Pickering) ... so you were taking a hunting trip.

A. Hunting, yeah.

Q. Based out of Fort Nelson?

A. It was a hunting and gathering trip for antlers... (Transcript p. 125, l. 14-19)

Q. (Ms. Taylor Pickering) It was a hunting and gathering trip for antlers as well as for inspiration.

A. I don't go to conferences as most other people do. These are my conference trips. I go out in nature. (Transcript p. 126, l. 3-8)

Q. How are these clothes related to your business? Is it clothing that you use for hunting or what do you use them for?

A. The hunting is only, like, two months of the year, but I go out in nature all year round.

...

... But I'm out all year round, and I buy clothes for that, and it's a very intricate part of my life as an artist, as a successful artist. (Transcript p. 128, l. 19-24 and p. 129, l. 8-11 – (Underling added))

In the course of explaining her husband's art business and where he gets his inspiration for his art, Ms. Henderson said:

...Hunting and family are central to Inuit traditions, and Jonas makes his living from expressing his culture in art. (Transcript p. 232, l. 20-23.)

Ms. Henderson also said:

...It's a rare gift to be able to turn a lifeless piece of stone into a work of beauty and joy, and it's a rare gift to be able to turn stone into money. Jonas' gift is in his heart, his mind, his hands and his children. He's a little less gifted in his bookkeeping, but he's been correcting that. (Transcript p. 237, l. 16-21)

From an examination of the Appellant's testimony and the evidence of Ms. Henderson I have concluded that 50% of the expenses in connection with the trip to Fort Nelson, British Columbia should be allowed as business expenses. I have reached this conclusion because I believe the Appellant when he stated that he gets his inspiration from being out in nature.

2. Expense of Walkie Talkies:

Purchase of "Walkie Talkies".

Ms. Henderson examined the Appellant on this point.

Q. How do you use the walkie talkies when you're on a business trip?

A. ... we could always get in touch with each other when we are in a big town. (Transcript p. 135, l. 21-25 and p. 136 l. 1.)

Q. ... how would you use them (i.e. the walkie-talkies) ... when you have a driver ...

...

A. ... I would give him one too, (Transcript p. 136, l. 2-8)

I am satisfied that the Appellant used the Walkie Talkies for business purposes and the expense of purchasing the Walkie Talkies should be allowed as a business expense.

3. Salaries and Benefits

2000

\$13,587.00

2001

\$13,955.00

The Appellant claimed that he hired a number of people to assist him in his carving. The Appellant also claimed that he provided meals to his employees. However, the Appellant did not maintain a payroll record. He did not report the salaries that he paid to the workers. He did not use a bank account and there are no banking records, no voucher, no T-4 slips, and no cancelled cheques. The money was paid to the employees in cash. Since there are no records on this issue I have concluded that the claim for salaries paid to workers should be dismissed. I have also concluded that the Appellant is not entitled to deduct the cost of meals provided to workers.

4. Family Meals: 2000 - \$2,054.82

The Appellant deducted what the Auditor (Mrs. Kristen) concluded were family meals. The sum of \$2,054.82 was deducted in the year 2000. There is no breakdown of deduction in 2001. I am not convinced on the evidence presented that these claims should be allowed.

5. Expenses incurred in Operating Motor Vehicles

For the year 2000 the Appellant's accountant claimed 83.3% of the expenses for the Suzuki and the Recreational Vehicle ("R.V."). (Transcript p. 158)

For the year 2001 the accountant claimed 100% of the expenses for both vehicles. (Transcript p. 159)

Ms. Henderson maintains that both vehicles (the Suzuki and the R.V.) were used for business purposes. (Transcript p. 159)

The Minister allowed the Appellant to claim 48.5% of the expenses related to the R.V. and 48.5% of the expense of the Suzuki.

I have carefully considered the testimony regarding the use of the vehicles and I have concluded that the Appellant should be allowed to claim the following motor vehicle expenses.

	<u>2000</u>	<u>2001</u>
Recreational Vehicle	75%	75%
Suzuki	70%	70%

The above percentages also apply to capital cost allowance on the vehicles.

6. Cost of Barbeque Propane (Gas)

The evidence indicates that the propane was used for the R.V. The Appellant should be allowed to deduct 75% of this cost.

7. Car Wash

The Appellant claimed the following amounts for car wash expenses for the two vehicles:

<u>2000</u>	<u>2001</u>
\$208.00	\$208.00

The Minister did not allow anything in this category.

I have concluded that 70% of the above amounts should be allowed.

8. Amounts paid for Photographs

<u>2000</u>	<u>2001</u>
\$343.49	\$259.39

The Appellant maintained that he took photographs of his art to show to customers, potential customers and art galleries.

The Minister did not allow the Appellant to claim any expense in this category. Officials of the Canada Revenue Agency (CRA) determined that since a number of the photographs of the Appellant's art also included pictures of his children, the costs of the photographs were personal expenses.

Based on the testimony I have concluded that photographs of art are a very important and necessary part of the Appellant's artistic business. I am convinced on the evidence presented that the Appellant should be allowed to deduct 85% of the amount paid for photographs. I reject the position taken by the Auditor that

since the Appellant's children were included in some of the photographs this would be a personal expense.

9. Spouses Expenses in Ontario (Transcript page 167)

The Appellant claimed the expenses of visiting Ontario as a business expense. This trip also included a trip to the Museum of Civilization in Ottawa (i.e. Gatineau, Québec) plus visits to Art Galleries in Ontario and Québec. The Minister treated this as a personal expense and did not allow any deduction.

The evidence indicated that this was mainly a business expense. I have concluded that 75% of the expense related to this trip should be allowed. (Transcript p. 173 and 177)

10. Work clothes; Farmer John Suit

The evidence indicated that the Appellant purchased a Farmer John suit. The suit was used by the Appellant while carving out of doors and also for hunting or taking trips in nature.

The Appellant also purchased a knife which he used in carving and when he was hunting.

I have concluded that 50% of these expenses should be allowed as business expenses.

11. Bicycle \$226.07

The Appellant claimed this as a business expense because he used the bicycle to drive to his storage unit in Sumas, Washington State.

The Minister treated this as a personal expense.

The evidence indicated that the bicycle was used by the Appellant entirely for business purposes. I allow 100% as a business expense. (Transcript p. 188)

12. Miscellaneous expenses

Clock Radio \$39.91

Range Finder	\$387.94	
Borax	\$30.19	(Transcript p. 190)

Based on the evidence I have concluded that the cost of the Range Finder is a personal expense. The other expenses are 100% business related and are deductible.

13. Trip to Ontario and Québec
(Ottawa, Québec and Montreal) (Transcript p. 194)

The evidence was that the Appellant, his wife and children visited art galleries, customers and potential customers in Ontario and Québec.

The evidence was that this trip included 11 straight days of travelling and selling and visiting customers and a few days off. (Transcript p. 196)

I allow 75% of the expense as business expenses.

14. Business trip to Washington D.C. – Art Show

The evidence indicated that the Appellant, his wife and children went to Washington, D.C. for an art show that displayed the art created by the Appellant. The evidence indicated that several sales of art were made by the Appellant.

I have reviewed the evidence carefully and I have concluded that the Appellant's wife, Diane Henderson, is an integral and important part of the Appellant's business. I have concluded that the trip to Washington was primarily a business trip. I would allow 85% of all expenses as deductible business expenses.

15. Trip to San Francisco (Transcript p. 218)

The Appellant claimed all of the expenses of this trip and the Minister disallowed a significant portion of the expenses.

In my opinion the Appellant should be allowed to deduct 85% of the costs of this trip.

16. Various Trips made by the Appellant from Princeton, British Columbia (his home at the time)

The evidence indicated that in the years 2000 and 2001 the Appellant claimed expenses for 30 trips between Princeton and Vancouver. The Auditor allowed expenses for 15 trips and disallowed expenses for 15 trips. The Appellant and his wife testified that all of the trips to Vancouver were business related and should not be treated as personal. I have concluded that 85% of the expenses to Vancouver should be allowed.

[14] In determining income for the 2001 taxation year, the Minister included the amount of \$2,212.76 in the Appellant's income as the value of the silver inventory in his business.

[15] Subsection 10(6) of the *Income Tax Act* (the "Act") provides that artists may elect to value their inventory at NIL. I refer to subsection 10(6) of the *Act* plus the decision of Associate Chief Justice Bowman in *Tramble v. The Queen*, [2001] T.C.J. No. 522.

[16] In my opinion the Appellant may take the position that the value of his silver inventory was NIL.

[17] Based on the evidence presented I am not convinced that any further expenses should be allowed.

[18] During the hearing, Counsel for the Respondent made the following comment:

.... I have one further comment, no matter what the result of your judgment, the Respondent would like to be able to make submissions in respect to costs.
(Transcript p. 314, l. 2-5)

[19] I would be pleased to have a conference call with the parties to discuss costs. Ms. Henderson and Counsel for the Respondent should call the Registrar in Vancouver to arrange a conference call.

[20] Before closing I wish to note that many of the problems encountered by the Appellant were caused by his poor record keeping. It was only because of the effort made by the Auditor and the testimony of the Appellant and Ms. Henderson that we could clarify the issues. I urge the Appellant to maintain proper records to avoid problems of this nature in the future.

[21] The appeal is allowed and the Minister should reassess the Appellant's 2000 and 2001 taxation years to make the adjustments referred to above. I will discuss the question of costs during the conference call with the parties.

Signed at Vancouver, British Columbia, this 3rd day of July 2008.

“L.M. Little”

Little J.

CITATION: 2008 TCC 403

COURT FILE NO.: 2005-1062(IT)G

STYLE OF CAUSE: Jonas Faber
and Her Majesty the Queen

PLACE OF HEARING: Kelowna, British Columbia

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REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: July 3, 2008

APPEARANCES:

For the Appellant: The Appellant himself and
Diane Henderson

Counsel for the Respondent: Nadine Taylor Pickering

COUNSEL OF RECORD:

Counsel for the Appellant:

Name:

Firm:

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