Docket: 2008-681(IT)I

BETWEEN:

JOSEPH L.J. THOMPSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 13, 2008, at Fredericton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	The Appellant himself
Counsel of the Respondent:	Kendrick Douglas

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 20th day of August 2008.

« François Angers »

Angers J.

Citation: 2008TCC392
Date: 20080820
Docket: 2008-681(IT)I

BETWEEN:

JOSEPH L.J. THOMPSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from an assessment by the Minister of National Revenue (the "Minister") for the appellant's 2003, 2004 and 2005 taxation years. For those three years, the appellant reported net professional income of $13,253, $14,485 and $16,310 respectively. That income and the related expenses are not the subject of this appeal. The appellant also claimed for the three taxation years in question business losses, which the Minister disallowed on the basis that the appellant was not carrying on a business and that, if he was, the expenses claimed were not incurred for the purpose of gaining or producing income or, alternatively, were not reasonable.

The business losses claimed by the appellant are as follows:

Year	Gross Business Income	Expenses	Net Loss
2003	$315	$8,289	($7,974)
2004	$218	$4,687	($4,469)
2005	$283	$5,603	($5,320)

The details of the expenses claimed by the appellant for each taxation year are as follows:

	2003	2004	2005
Gross Business Income Reported	$315.71	$218.13	$283.90
Expenses Claimed on Return			
Advertising	1,240.14	692.49	762.75
Business Taxes	397.39	142.70	158.15
Delivery, Freight	140.40	37.77	34.56
Non Motor Vehicle Fuel	80.02	0.00	0.00
Meals & Entertainment (50%)	72.73	34.73	83.67
Motor Vehicle Expenses	1,767.09	757.82	1,152.66
Office Expenses	103.38	35.86	26.81
Supplies	944.88	1,014.33	1,094.19
Travel	1,978.52	1,151.18	1,384.49
Telephone & Utilities	236.42	44.95	239.27
Other Expenses	66.00	32.43	16.43
Vehicle Capital Cost Allowance	1,263.33	743.35	651.72
Total Expenses	$8,290.30	$4,687.61	$5,604.70
Net Business Income (Loss)	($7,974.59)	($4,469.48)	($5,320.80)

[2] The evidence also reveals that the Quixtar products were purchased for personal use and that most of the appellant's clients are family members. The appellant has been retired for over nine years after a career in education as a school teacher and school administrator. A few months before his retirement, he registered as a Quixtar independent business owner, and he operated the business out of his home. He also continued working in the area of education as a facilitator and consultant, this work constituted his professional activities. In August 2004, the appellant began a gardening operation and he started selling natural products in October 2005.

[3] According to the appellant, Quixtar may be defined as a business consisting in the sale of consumable goods, with earnings based on volume of sales. He further described the business, in a questionnaire that he filled out for the purpose of the Canada Revenue Agency audit, as consisting in the sale of consumable products for home care and personal care and the sale of multivitamins and supplements. The appellant sold the products at his cost with -as he put it - product income based upon volume of sales versus retail profit. The evidence also reveals that the Quixtar products were purchased by him for personal use and that most of his clients were family members. He used the Internet to network with those who perhaps wished to establish their own home businesses. Neither in the three

taxation years under appeal nor in previous years did the appellant succeed in recruiting any Quixtar independent business owners, but he continued to attempt, and still does attempt, to recruit. In fact, it is acknowledged by the auditor that the appellant went out to meet people and spent time with them in order to explain the business and recruit potential business owners. The appellant kept a day book of his activities, indicating as well the number of presentations he made to these potential recruits. He was simply not successful in recruiting anyone.

[4] As for the gardening operations, which started in 2004, the appellant grows beets, which he sells to a local Polish restaurant, and blue potatoes specially for one customer. The natural health products business, which was carried on for only 2 months in the 2005 taxation year, consists of selling these products by offering them to independent pharmacists and other health stores.

[5] The appellant admits that he did not do any advertising for his activities in newspapers, newsletters, the yellow pages or other print publications, or on television or radio. He pointed out that the Quixtar corporation did not allow public advertising by independent business owners, as the business grows by networking through face-to-face and telephone contacts as well as through showing the business plan regularly. The appellant admitted that the advertising expenses claimed in relation to Quixtar included the cost of products he purchased and consumed personally. In answering the questionnaire referred to above, he stated as the reason for the losses he incurred the fact that he sold his goods at his cost rather than at the retail price; he added that he intended in future to charge his new Quixtar customers retail prices and increase his customer base and develop his business that way. The questionnaire was filled out in March of 2007.

[6] A summary of his gross business income from 1998 to 2005 shows a total of $2,274 for an average of $284 a year, with expenses of $48,318, for an average of $6,039 a year. His net business losses total $46,044 for an average of $5,755 a year.

[7] The Supreme Court of Canada in *Stewart v. Canada.*, [2002] 2 S.C.R. 645, adopted a new approach regarding the application of the reasonable expectation of profit test. Paragraphs 60 and 54 of that decision best summarize this new approach.

> [60] In summary, the issue of whether or not a taxpayer has a source of income is to be determined by looking at the commerciality of the activity in question. Where the activity contains no personal element and is clearly commercial, no further inquiry is

> necessary. Where the activity could be classified as a personal pursuit, then it must be determined whether or not the activity is being carried on in a sufficiently commercial manner to constitute a source of income. . . .
>
> [54] It should also be noted that the source of income assessment is not a purely subjective inquiry. Although in order for an activity to be classified as commercial in nature, the taxpayer must have the subjective intention to profit, in addition, as stated in *Moldowan*, this determination should be made by looking at a variety of objective factors. Thus, in expanded form, the first stage of the above test can be restated as follows: "Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?" This requires the taxpayer to establish that his or her predominant intention is to make a profit from the activity and that the activity has been carried out in accordance with objective standards of businesslike behaviour.

[8] In *Raghavan v. R.*, [2007] 2 C.T.C. 232, the Federal Court of Appeal worded this two-step approach as follows in paragraphs 8 and 9:

> 8 First, a court must determine if the taxpayer has a source of income from a business for the purpose of section 9 of the *ITA*. The ultimate objective of this part of the test is to distinguish between commercial and personal activities (para. 51), in accordance with the methodology prescribed by the Court, especially at paras. 52-56, and 60.
>
> 9 Second, having found a source of income, a court must determine if the expenses claimed by the taxpayer may be deducted pursuant to subsection 18(1) from the income earned from the business. If they can, the expenses will be allowed, but only to the extent that they are "reasonable" under section 67: at para. 57. The Court emphasized (at para. 60):
>
> > Whether or not a business exists is a separate question from the deductibility of expenses.

[9] It is therefore incumbent on the appellant to establish, on a balance of probabilities, that the primary objective of his activities is the pursuit of profit and that what he does to reach that objective is done by him in a serious businesslike manner, acting as would a serious business person.

[10] In this instance, the evidence does disclose that the appellant did spend time attempting to recruit independent Quixtar business owners, at least according to a record he kept of that activity. Unfortunately, he was unable to recruit any, not only during the three taxation years under appeal but in all the time since he joined Quixtar in 1998. What the evidence does not disclose is why these endeavours were unsuccessful for so many years and what the appellant proposes to do to

change the results. The evidence is unclear as to the importance of recruiting independent business owners and I can only assume that the appellant would have benefited from their respective sales. That seems to be an important part of the Quixtar earning structure and the appellant has failed to provide clarification with respect thereto; this is a particularly significant point when one considers the number of years spent by the appellant attempting to recruit.

[11] Moreover, it is disturbing to find out that the appellant was selling his Quixtar products at cost, thereby eliminating any possibility of profit, and that he himself and family members were his only clients. In addition, some of the appellant's personal purchases were claimed as advertising expenses with respect to promotion of the products. The evidence is clearly insufficient to permit this court to find that the Quixtar operations as conducted by the appellant were such that their primary objective was the pursuit of profit.

[12] In my opinion, the appellant has also failed to establish, on a balance of probabilities, that his gardening activity, and the sale of health products in 2005, were conducted in a serious, businesslike manner in pursuit of profit. Not only do we not know what each activity generated in terms of gross revenues for 2004 and 2005, but the evidence does not disclose, as regards the gardening business, how it was conducted, whether the appellant has any expertise in that area, the size of the garden, the quality and quantity of the products being offered for sale, to whom they were offered and in what market conditions, and whether any of these products met government standards in terms of consumable goods. All the evidence discloses is that the appellant was growing beets and blue potatoes and had one client for each product. The evidence does not show the cost to produce versus potential sales, thus making it impossible to conclude that the appellant in fact had the pursuit of profit as his objective or was conducting his gardening activity in a serious, businesslike manner.

[13] The evidence is also insufficient in terms of the sale of health products to independent pharmacists and health stores. Although this activity began in October of 2005 and was in its early stages, the evidence does not reveal any business plan or any sales projections showing the activity's viability. Other than being told that the products were health products, the court was provided with no evidence to show how the appellant was actually conducting the activity in terms of where he bought the products, in what quantities, his cost and mark-up, his inventory, the time spent on actually selling the products or his projections in this regard, or potential or actual sales and profits, at least for 2005. The evidence is simply

insufficient for this court to conclude that this activity was conducted in a businesslike manner in 2005.

[14] The appellant appears to me to be a very honest person with many passions and who greatly enjoys what he does, and I admire that in him. The activities described may have a business aspect but they carry a far greater personal element in the case of an appellant who seeks to occupy his leisure time, who enjoys what he does and has little concern for profit. In my opinion, the appellant's activities do not constitute a source of income as contemplated by section 9 of the *Act*. The evidence is insufficient for me to conclude that they were conducted in the pursuit of profit.

[15] The appeal is dismissed.

Signed at Edmundston, New Brunswick, this 20th day of August 2008.

« François Angers »

Angers J.

CITATION:	2008TCC392
COURT FILE NO.:	2008-681(IT)I
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kendrick Douglas

COUNSEL OF RECORD:

For the Appellant:	
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