

Docket: 2008-2715(IT)I

BETWEEN:

DONALD T. ROBERTS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 30, 2009, at Vancouver, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Laura Zumpano

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of January, 2010.

“G. A. Sheridan”

Sheridan J.

Citation: 2010TCC52
Date: 20100127
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BETWEEN:

DONALD T. ROBERTS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] Donald Roberts is an Indian under section 2 of the *Indian Act*. In 2004, he was working as a commercial fisherman in the coastal waters of British Columbia. He did not report his fishing income for that year on the basis that it was exempt from taxation by operation of paragraph 87(1)(b) of the *Indian Act* and paragraph 81(1)(a) of the *Income Tax Act*. The Minister of National Revenue reassessed to include his earnings from fishing in his 2004 income.

Preliminary Matter

[2] Mr. Roberts represented himself at the hearing and along with his wife, Arlene Roberts, testified on his own behalf. My impression was that he also drafted his Notice of Appeal. It does not conform to the usual format and apart from the statement on the last page that he was "... a coastal sea and river Fisherman ...", the Notice of Appeal contains few allegations of fact. Instead, it catalogues snippets, from various sources, of legal opinions and historical review regarding, among other things, the traditional use by Indians of the waters where Mr. Roberts fished. This, together with certain representations made by Mr. Roberts during the hearing led to the inference that he intended to challenge the constitutionality of the *Income Tax Act* and/or the *Indian Act*. After hearing the submissions of Mr. Roberts and counsel for the Respondent on this point, including the affidavit of Pamela Then, I was satisfied that if, indeed, it had been Mr. Roberts's intention to launch a constitutional

challenge, he had not served a Notice of Constitutional Question on the Attorneys General of Canada and the provinces as required under section 19.2 of the *Tax Court of Canada Act*. In these circumstances, I ruled¹, on the basis of *Bekker v. Her Majesty the Queen*² and *Dumont v. Her Majesty the Queen*³, that it was not open to Mr. Roberts to make that argument at the hearing of his appeal and proceeded to hear the case on the sole issue of whether Mr. Roberts's fishing income in 2004 was exempt from taxation.

Legislation

[3] Throughout his testimony, Mr. Roberts described himself as a self-employed "commercial fisherman". As such, unless the exemption under paragraph 87(1)(b) of the *Indian Act* applies, the profits realized from the fish caught⁴ are business income under section 9 of the *Income Tax Act*. Paragraph 87(1)(b) of the *Indian Act* must be read in conjunction with paragraph 81(1)(a) of the *Income Tax Act*:

Indian Act

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation;

- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
- (b) the personal property of an Indian or a band situated on a reserve.

Income Tax Act

81(1) Amounts not included in Income.

There shall not be included in computing the income of a taxpayer for a taxation year,

- (a) **Statutory exemptions** - an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or

¹ Transcript, page 27, lines 6-19.

² [2004] 3 C.T.C. 183, 2004 DTC 6404. (F.C.A.).

³ 2005 TCC 790; affirmed 2008 FCA 32, [2008] 2 C.T.C. 249. (F.C.A.).

⁴ *Ballantyne v. Her Majesty the Queen*, 2009 TCC 325, 2009 DTC 1024.

receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada;

Jurisprudence – The Connecting Factors Test

[4] In *Williams v. Canada*⁵ the Supreme Court of Canada established the “connecting factors test” to determine whether unemployment insurance benefits received by an Indian taxpayer amounted to property of an Indian situated on a reserve. Following that decision, in *Southwind v. Minister of National Revenue*⁶, the Federal Court of Appeal further refined the connecting factors as they apply to business income earned by an Indian:

- (1) the location of the business activities,
- (2) the location of the customers (debtors) of the business,
- (3) where decisions affecting the business are made,
- (4) the type of business and the nature of the work,
- (5) the place where the payment is made,
- (6) the degree to which the business is in the commercial mainstream, (As noted above although this is listed as a factor, the question will be whether the connecting factors lead to a conclusion that Mr. Roberts's business was in the commercial mainstream.)
- (7) the location of a fixed place of business and the location of the books and records, and
- (8) the residence of the business' owner.⁷

[5] Of these factors, the Federal Court of Appeal held in *Recalma v. Her Majesty the Queen*⁸ that the most weight should be given to where the work was done and where the source of income was located⁹.

[6] Turning, then, to the present case, notwithstanding the vagueness of the Notice of Appeal, Mr. Roberts’ testimony provided a clear, credible and detailed explanation of his commercial fishing activities in 2004. He began by showing on large maps¹⁰

⁵ [1992] 1 S.C.R. 877.

⁶ [1998] 1 C.T.C 265. (F.C.A.).

⁷ Above, at paragraph 12.

⁸ [1998] 2 C.T.C. 403. (F.C.A.).

⁹ Applied in *Giguere, Ballantyne*.

¹⁰ Exhibits A-1 and A-2.

which he had brought along for that purpose, the location of the areas where he was fishing in 2004. He noted that while these are identified by the Department of Fisheries as Areas 3, 4 and 12, both he and the members of his community know them by their traditional Indian names. Pointing out these locations, Mr. Roberts said he spent most of his time in Areas 3 and 4, located off the coast of Prince Rupert, and occasionally in Area 12, situated much farther south, closer to Vancouver. While acknowledging that neither the city of Prince Rupert nor these waters are reserves, Mr. Roberts told the Court that he viewed them as traditional fishing grounds.

[7] In 2004, Mr. Roberts lived on the Kitsumkalum Reserve near Port Essington, approximately 70 kilometers from Prince Rupert, British Columbia. He maintained a business office in his home and kept his records there. He stored much of his fishing gear on the reserve, including nets, various tools and about \$10,000 worth of electronic equipment used on his boat, the *Ocean Stalker*. When not fishing, he worked on the reserve repairing nets and maintaining other equipment as well as planning and preparing for fishing expeditions. There was a post office on the reserve where Mr. Roberts received some cheques in payment for his catch. Because it was too large to navigate the channel to Port Essington, the *Ocean Stalker*, was moored in Prince Rupert.

[8] The Department of Fisheries issued fishing licences to Mr. Roberts and the Kitsumkalum band. It also determined where and when fishing could be carried on in British Columbia's coastal waters. When on the reserve, Mr. Roberts accessed such information via the internet and when at sea, by radio communication.

[9] Thus, on days when the Department of Fisheries announced an opening for fishing in a particular area, Mr. Roberts would make the 70-kilometer drive from Port Essington to Prince Rupert to set out in the *Ocean Stalker*. Once at sea, he would revise the fishing plan, as required, depending on the weather, tides, navigating conditions and where the fish were running. The fish were sometimes dressed on the boat, depending on the quantity caught and price on any given day.

[10] Dressed or not, all of the fish Mr. Roberts caught were delivered directly to Ocean Fisheries Limited and Sea Fresh Fish (referred to collectively as "Ocean"). Mr. Roberts said the head office of Ocean Fisheries Limited was in Vancouver; he did not know where Sea Fresh Fish was located but in any event, there is no evidence that either of them had offices on Mr. Roberts's or any other reserve. He delivered the fish to Ocean's packing boats in the waters off Prince Rupert or to their packing plants on shore.

[11] Mr. Roberts had an arrangement with Ocean whereby the company would maintain records of the amounts due to him for the fish as well as his expenses in respect of the catch. Mr. Roberts was pleased with this practice because it meant he got this aspect of his accounting done “for free” and it relieved him of the burden of having to do it himself. These payment records were maintained off reserve, most likely at the plant in Prince Rupert.

Analysis

[12] In my view, when these facts are considered in light of the factors listed above, the evidence falls short of establishing the necessary connection between Mr. Roberts’s fishing income and his reserve.

1. Location of a Fixed Place of Business, Location of Books and Records, and Residence of the Business Owner

[13] There is no question that Mr. Roberts lived on a reserve and maintained a business office and equipment-storage facilities there. These factors clearly establish a connection between his business and the reserve.

2. Type of Business and Nature of the Work, Location of Business Activities and Customers, and Where Business Decisions Made

[14] It is equally beyond dispute that Mr. Roberts was in the business of commercial fishing. While certain aspects of that business were carried on at the reserve, the core of the business was the catching of fish aboard the *Ocean Stalker* in the off-reserve coastal waters of British Columbia. But for that activity, the on-reserve tasks of net repair, expedition planning and records keeping would not have been necessary.

[15] The fish caught never made the 70-kilometer journey back to the reserve; they were taken directly from the sea to the fish packing boats or plants in Prince Rupert. Thus, the product of the business; its largest and most important piece of equipment, the *Ocean Stalker*, and its only customers were all located off-reserve.

[16] As for business decisions, certainly, some of these were made on reserve. I accept completely Mr. Roberts evidence that a lot of thought and preparation goes into a commercial fishing expedition and that this occurred when he was on the reserve; however, decisions were also made on the *Ocean Stalker*. While the on-reserve preparation was crucial to his success, so, too, was his capacity, while at

sea, to interpret new information regarding fishing and weather conditions and to adjust his plans accordingly.

[17] Given the importance placed in *Recalma* on where the work of the business was done and the location of the source of the income it generated, the evidence pertaining to these factors points strongly to a lack of connection between the business and the reserve.

3. Place of Payment

[18] Ocean paid Mr. Roberts for his catch, off the reserve, in its Prince Rupert office by directly crediting his account for the amount due. Indeed, he chose, for reasons of convenience and good fiscal management, to have Ocean perform bookkeeping work that he could have done himself in his on-reserve office. However, he also received some payments by cheques at the post office on the reserve.

[19] Given the little weight accorded in the jurisprudence to the location of payment, this factor is, at best, neutral but if pressed, I would say that it leans more in the direction of a lack of connection to the reserve.

4. Degree to which Business was Integral to Life on the Reserve or “In the Commercial Mainstream”

[20] In the recent decision of *Horn v. R.*¹¹ the Federal Court of Appeal reiterated the principle in *Recalma* that “... whether employment income is earned in the “commercial mainstream” is a conclusion to be drawn from an examination of the connecting factors, and not a reason in itself for concluding that employment income is not situated on a reserve ...”¹² Mr. Roberts’ contended that because the Kitsumkalum band had traditionally fished (commercially or otherwise) in Areas 3, 4 and 12 and still thought of them in terms of their native place names and traditional uses, the business activity was connected to the reserve. First of all, apart from Mr. Roberts’ assertions to that effect, there was no evidence of the historical or traditional use of Areas 3, 4 and 12. Even if there had been, it would not, in itself, have been sufficient under the connecting factors test to convert the work of a commercial

¹¹ 2008 D.T.C. 6743.

¹² Above, at paragraph 10.

fisherman in off-reserve waters into a business that is integral to the life of a reserve¹³.

[21] Mr. Roberts was, by his own admission, a “commercial fisherman”, meaning he was engaged in the business of catching fish for profit in British Columbia’s coastal waters. Just like any other Canadian involved in that pursuit, he was obliged to conform to the requirements of the Department of Fisheries, including obtaining a fishing licence, respecting boundaries of designated fishing areas and adhering to quota, size and species directives for the fish caught. The fact is he fished in non-reserve waters and sold his catch to non-Indian, off-reserve customers.

[22] There were similar facts in the *Ballantyne* case cited above. In concluding that the taxpayers’ fishing income was not exempt from taxation, Webb, J. quoted the following passage from *Walkus (sub nom Bell) v. Minister of National Revenue*¹⁴ in response to an argument similar to that made by Mr. Roberts:

45 The short answer to the appellants' contention is, in my view, that it runs contrary to the decisions of the Supreme Court of Canada in *Williams and Mitchell*, supra, where the Court held that those Indians who acquire, hold and deal with property "in the commercial mainstream" must do so on the same terms as their fellow citizens. Happily or not, in our modern society and context, income obtained from commercial fishing in the commercial mainstream is taxable. Section 87 of the Act ought not to be given an expansive scope by ascribing an overly broad purpose to it: see *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)* (1998, 227 N.R. 92 (S.C.C.), at page 115 (S.C.C.); see also *R. v. Lewis*, [1996] 1 S.C.R. 921 (S.C.C.) where the phrase "on the reserve" was given a narrow interpretation as the Court held that it did not mean "adjacent to", but in or within the boundaries of the Reserve, and that it should receive the same construction wherever used within the Act.

46 In the end, I am satisfied, as the Tax Court judge was, that the appellants' property, derived from commercial fishing with a private company in the commercial mainstream had, to use the words of La Forest J. in *Mitchell*, supra, at page 137, no "immediate and discernable nexus to the occupancy of reserve lands".

[23] The same conclusion must be drawn in the present case. As counsel for the Respondent correctly submitted, the phrase “on a reserve” has been construed very

¹³ *Dumont* (F.C.A.) at paragraph 7; *Giguere* (T.C.C.) at paragraph 12.

¹⁴ [2000] 3 C.T.C. 181, 2000 DTC 6365.

narrowly¹⁵ to mean “in or within the boundaries of a reserve”. I am persuaded by her carefully researched and well-presented argument that the Minister correctly assessed Mr. Roberts’ 2004 income; accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, this 27th day of January, 2010.

“G. A. Sheridan”

Sheridan J.

¹⁵ *The Queen v. Lewis*, [1996] 1 S.C.R. 921. (S.C.C.).

CITATION: 2010TCC52

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PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 30, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

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APPEARANCES:

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