Citation: 2010 TCC 291
Date: 20100531
Docket: 2009-3942(IT)I

BETWEEN:

PAUL LUBEGA-MATOVU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on April 30, 2010 in Toronto, Ontario)

Campbell J.

[1] These appeals are in respect to the Appellant's 2004 and 2005 taxation years. In computing income in these years, the Appellant deducted both rental expenses and business expenses. The rental expenses were deducted in respect to a property located at 3909 Rippleton Lane in Mississauga, which he purchased in 1999. He resided in this property with an individual by the name of Rose, together with her young son.

[2] According to the Appellant, Rose assisted him with his business activities, as she was otherwise unemployed. He stated that she rented a room contained within the property for $350 monthly and, eventually, her son had his own small room within the property for which the Appellant charged Rose an additional $100 monthly.

[3] According to the Appellant, he allowed Rose, in some months, to offset the rent against the hours she worked for his businesses, although, like

much of his evidence, it was unclear how he tracked her hours. Rose was not called as a witness.

[4] In respect to the business activities, the Appellant, although not incorporated, engaged in five different business endeavours for which he claimed business expenses.

[5] With respect to the first business activity, Panelform Technology, the Appellant, together with Rose and her son, travelled to Uganda in 2004 respecting start-up activities. This business was involved with obtaining contracts with government and builders in various African regions for the sale of panels for building houses. This activity was commenced in 2003 and, to date, the business has earned no income.

[6] The Appellant's evidence again was vague respecting his use of an agent or agents in Africa. At the end of the day, it remained unclear how many people the Appellant actually employed, how they were paid or how he tracked their activities. He alluded to receiving reports over the Internet but made no effort to show how those were tracked, what the contents were, who they were from or how much, if any, compensation would be paid for such reports.

[7] In the second business venture, the Appellant made attempts to sell generators in Uganda to provide electricity. According to the Appellant, his travel to Uganda was at the request of the company that supplied these generators. He stated that he travelled to Uganda in 2003 and 2004 to acquire an agent to work on his behalf in the sale of the generators.

[8] Again, the evidence was unclear but in respect to one or both of these business ventures, Panelform Technology and the generator sales, the Appellant claimed that he refinanced his home and took out a second mortgage. There was, however, no paper trail or evidence that supported or linked these mortgage funds to either of these business ventures.

[9] The third business venture involved the sale of vitamin and mineral products in liquid form. These products were supplied by a company called Market America. The Appellant submitted a folder containing various communications, invoices and shipping orders between himself and Market America in both 2004 and 2005. However, none of these documents contained any invoices, shipping orders or other documentation to support

that any of these products were in fact sold by the Appellant to customers. Although the auditor requested that the Appellant provide a customer list, he never did provide one to her, nor did he produce one at the hearing of his appeal.

[10] The fourth business venture, Midtown Market, involved the sale of hip-hop clothing. According to the Appellant, he rented a stall at a flea market but was unsuccessful in selling the clothing, either at the flea market or to retail stores. According to the auditor, the only evidence of a clothing sale was a $30 receipt and, based solely on this, the Appellant apparently ordered a second shipment of clothes.

[11] The final venture which the Appellant pursued in these years involved the sale of insurance, as an agent for a company called Primerica. Again, it was difficult to piece together the entire story based on what the Appellant told me. With respect to the expenses claimed in this business activity, he testified in cross-examination that he kept all of his expense documentation in a shoebox and that he did not allocate expenses properly among the various businesses. He also claimed approximately $17,000 in commission losses in 2004, but stated that they would not necessarily be related to Primerica and the sale of insurance because his practice was to simply allocate expenses from the shoebox seemingly randomly to the various business activities.

[12] In respect to these businesses, he claimed large amounts of vehicle expenses. He applied 70 per cent in 2004 and approximately 66 per cent in 2005 for business use of the Camry vehicle. As I understand his evidence, he totalled all gas receipts and applied these percentages to all gas and other related vehicle expenses. He provided supporting documentation that he incurred these expenses, but he did not go the step further to make any attempt to show that the vehicle business use was between 66 and 70 per cent in these years. There was no customer list for his insurance customers or the customers for whom he purchased vitamin products, or the locations and dates on which he travelled to meet the customers or to attend meetings, except some reconstructed summaries. Without any of these pieces of the puzzle, I cannot come to a conclusion with respect to even the reasonableness of the percentages he chose for business use of his vehicle.

[13] The auditor, Nellie Cheng, testified that in completing the audit she did not dispute that the Appellant spent the amounts he claimed or that he

drove the number of kilometres that he claimed. However, she was unable to discern the exact amounts that would be related to the business activities. Although CRA made requests, the Appellant never provided customer lists to assist in supporting his claims that he had meetings with a client base.

[14] In addition, although he provided accounts or bills, he would not provide proof of payment. Instead, he gave the auditor an explanation or a story behind the expense but nothing further to support the story that the expenditures related to a business activity.

[15] For example, in respect to the hip-hop clothing venture, the Appellant did not supply proof of payment of the shipments of the clothing and, in fact, the shipment documentation supplied did not contain the Appellant's name.

[16] In addition, the Appellant never provided specific rental information on the flea market stall he supposedly rented and, as he seemed inclined to do with much of his evidence, he instead supplied general promotional information on the cost to rent a stall.

[17] The type of issues in this appeal are generally straightforward; they are certainly not complicated legal issues. Such appeals generally involve a taxpayer providing the documentation they have in their possession to support the expenses they are claiming. When there are missing links in the documentation, the taxpayer may provide oral testimony to substantiate the claims.

[18] The present hearing lasted a full day and I must confess that, at the end of the hearing, I was left with the impression that I had only partial truths, conflicting evidence and still not a particle of proof from the Appellant to substantiate that these expenditures were actually related to his business activities.

[19] The Appellant's tendency on cross-examination was to provide a lengthy response when he was asked an “either/or” question. The more questions that the Appellant was asked, the greater the likelihood became that the response differed from an earlier one. The Appellant's attempts to establish his expenses consisted primarily of introducing very general promotional material, communications and proof of payment of various general expenses but without any evidence on what portions belonged to the

businesses, as opposed to personal, and to which of the five businesses they in fact belonged.

[20] In addition, the Appellant had little, if any, specific knowledge concerning how the expenses would be incurred for business activities. The recordkeeping consisted literally of a shoebox. By the Appellant's own admission, he was lazy about keeping records. While he was attempting to get five different businesses off the ground, he did not even maintain five different shoeboxes. Instead, he thought it sufficient to fire whatever he had into one box and hand it over to CRA, which the auditor referred to as a "jumble of documents". When asked how he tracked his business activities, he responded that he had a "scheme in his head".

[21] If there was some sort of scheme or structure to this whole mess, it actually did not translate into the evidence he provided which, instead of clarifying some of the expenses, simply contributed to muddying the waters a little further.

[22] The Appellant told me he could not afford to have an expensive accounting system to track his business activities. However, a simple journal for each business, tracking customers' names, dates of meetings, sales, kilometres travelled, et cetera, would have sufficed. Instead, the Appellant kept no records and could not provide credible testimony respecting any of this, when he did get to Court.

[23] The lack of records, coupled with the Appellant's blasé attitude toward his activities, is appalling enough, but the situation only gets bleaker when I view all of this in light of his educational background and his full-time career. The Appellant has not only been an accountant with advanced training for many years, but he has been a CRA auditor for the last twenty-five. As Respondent counsel pointed out, the Appellant works for the very government entity entrusted with the proper administration of the *Income Tax Act*.

[24] It is difficult to believe that an auditor would approach his own business activities in this manner when the very information I expect him to provide to me is what he would be looking for in auditing other taxpayers conducting business activities in this country.

[25] He did state that, and I quote: "We don't do business the way you do," referring, I believe, to the activities conducted in Africa. I do not even pretend to understand this statement, particularly when the Appellant should have first-hand knowledge of the precise requirements of the *Act*. He resides in Canada, he was conducting business from this country and he was attempting to deduct expenses under the *Income Tax Act* in this country. I cannot comprehend how he expects some type of allowance in accordance with such a preposterous statement.

[26] I was referred to a number of cases by the Respondent, the leading case being the Supreme Court decision in *Stewart v. Canada*, 2002 D.T.C. 6979, which set aside the test of reasonable expectation of profit and replaced it with a multifaceted inquiry. The *Stewart* decision refers to the use of objective factors listed by Justice Dickson in *Moldowan*, that is:

1) the profit and loss experience in prior years;

2) the taxpayer's training;

3) the taxpayer's intended course of action; and

4) the capability of the venture to show a profit.

[27] At paragraph 54 of the *Stewart* decision, the Supreme Court nevertheless still makes reference to the subjective intent to profit, coupled with these objective factors. In other words, where there is a subjective intent to make a profit from an activity, there must be evidence, having reference to the *Moldowan* objective factors, to support the taxpayer's subjective intent.

[28] There is no doubt the Appellant intends and wants to turn a profit with these activities, but he has failed to meet the objective criteria because the evidence does not support that his activities have been carried out in a businesslike manner, applying what Justice Bowman in *Kaye* referred to as "commercial common sense."

[29] I have evidence, explanations and stories, much of which is contradictory and which is not sufficiently coherent for me to draw conclusions; I have intermingling of five business ventures; I have lack of

relevant documentation and general lack of straightforward, coherent and forthcoming testimony, none of which support a conclusion that the Appellant was conducting his business affairs as one would expect a businessperson to do.

[30] With respect to the rental expenses, the potential corroborating evidence of Rose would have assisted the Appellant. Without it, I am left with the lack of commerciality in this so-called "arrangement" between the Appellant and Rose.

[31] Applying factors established in the *Stewart* and *Moldowan* decisions, the evidence does not support that the Appellant intended to earn a profit from the rent charged to Rose. In fact, in some months where she could not pay the rent, she worked it off by assisting the Appellant with his business activities.

[32] Finally, with respect to penalties, I believe the Respondent has met the onus which is upon the Minister pursuant to 163(2) of the *Act*, of establishing gross negligence as opposed to ordinary negligence. The imposition of penalties is supported by:

1) the magnitude of the omission by the Appellant;

2) his educational background;

3) his knowledge of the importance of proper recordkeeping because, as an auditor, he himself applies these very same principles to other taxpayers; and

4) armed with this knowledge, he should have been aware of the potential problems a lack of such recordkeeping would cause him.

[33] In summary, we live in a self-monitoring system in which each taxpayer has an obligation to account for expenditures if he expects to make a claim for these. A taxpayer cannot come to this Court with incomplete records, intermingling of records and vague and unconvincing testimony in respect to the specifics of the alleged expenses and expect to be successful.

[34] In addition, this Appellant's educational background as an accountant and CRA auditor are very relevant factors in looking at the approach he took towards his own recordkeeping.

[35] For all of these reasons, the appeals are dismissed without costs.

Signed at Ottawa, Canada, this 31st day of May 2010.

"Diane Campbell"

Campbell J.

CITATION:	2010 TCC 291
COURT FILE NO.'S:	2009-3942(IT)I
STYLE OF CAUSE:	Paul Lubega-Matovu and Her Majesty The Queen and
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 30, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF ORAL JUDGMENT:	April 30, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Khashayar Haghgouyan

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada