Citation: 2010 TCC 424
Date: 20100818
Docket: 2010-467(GST)I

BETWEEN:

WAYNE BOWDEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

For the appellant: The appellant himself
Counsel for the Respondent: Darren Prevost

–

REASONS FOR JUDGMENT

**(Delivered orally from the bench
on July 15, 2010, in Toronto, Ontario.)**

Bowie J.

[1] I dismissed these appeals from the bench on July 15, 2010, and at that time I gave my reasons for doing so orally. The appellant has requested written reasons for judgment, and under section 18.23 of the *Tax Court of Canada Act* I deem it advisable to give the reasons in writing. What follows is the reasons that I gave at that time, edited slightly for syntax and to correct some minor errors in the transcript.

[2] The appeals before me are in respect of the appellant's claims for input tax credits with respect to the periods from July 1, 2007 up to and including September 2009. The appellant takes the position that he operated during that time period three business, one of which it is common ground is a financial services business and

therefore one whose product is not subject to GST, and whose expenses do not generate input tax credits.

[3] The claim for input tax credits pertains to the appellant's other activities, which fall into two areas which he described as first, a computer consulting business and second, a home renovation and home staging business. It is the appellant's position that he is entitled to claim, and has claimed, and is entitled to receive input tax credits in respect of amounts expended in connection with those latter two activities.

[4] There is a preliminary point to be decided with respect to availability of an appeal in respect of the periods, and these are quarterly periods, from January 1, 2009 to September 30, 2009. The respondent moves to quash the appeal in respect of those periods on the basis that the appellant did not file a Notice of Objection in response to the Notice of Reassessment covering those periods.

[5] The respondent filed an affidavit of one Teresa D'Sa, whose evidence in that affidavit was to the effect that she had examined the appropriate records, looking for a notice of objection in respect of the reassessments pertaining to the periods, January 1, 2009 to September 30, 2009, which were reassessed by Notices of Reassessment dated January 21, 2010. She was unable to find any such notice of objection.

[6] The appellant produced a copy of a notice of objection pertaining to those periods, dated February 5, 2010. His evidence was that he mailed it that day, or within a day or two thereafter, and that he therefore had filed a valid notice of objection.

[7] However, it is also common ground that that Notice of Objection has not as of today's date resulted in either a notice of confirmation or a notice of reassessment. One hundred and eighty days not having elapsed since its filing, the precondition for an appeal of the 2009 periods has not been satisfied. The appeal in respect thereof will therefore be quashed.

[8] The appellant will of course at some future time have a right either by the passage of time or as a result of action on the Minister's part to either reassess or confirm, to pursue an appeal in respect of 2009. For today's purposes, what is validly under appeal is limited to the periods comprised of the calendar years 2007 and 2008.

[9] The Minister's position with respect to those years is that the appellant was not carrying on a commercial activity in respect of computer consulting or a commercial activity in respect of home renovation and home staging. Home staging, for the

benefit of the uninitiated, is the practice of improving, if I can call it that, the cosmetic appearance of one's home while it is for sale on the real estate market for the purpose of making it appear more attractive to potential buyers than it otherwise might.

[10] Initially, I had some concern whether the Minister's position in this respect was adequately revealed by the reply, and whether the appellant was sufficiently apprised of the issues that he had to meet. However, as the evidence developed it became apparent to my satisfaction that the appellant indeed understood the issues from the outset and was in no way taken by surprise. Indeed, he had prepared spreadsheets specifically intended to demonstrate the extent of his commercial activities with respect to computer consulting, home renovation and home staging.

[11] This being an informal appeal, and the appellant not being taken by surprise, I have no hesitation in dealing with this matter on the issues as they developed during the course of the hearing.

[12] Without going into great detail about the scheme of the goods and services tax provisions found in Part IX of the *Excise Tax Act*,[1] it is sufficient to say that people in business who collect and remit goods and services tax are entitled to offset against that as input tax credits, the goods and services tax that they have paid in respect of expenditures they have made for the purpose of generating the revenue stream of their businesses. There are of course numerous exceptions. The financial service industry essentially operates outside the scheme in the sense that financial services are not subject to goods and services tax. Those who provide financial services are not entitled to input tax credits in respect of their expenditures that are properly inputs to the financial services business.

[13] Consideration of the matters before me today is confined to those aspects of the appellant's activities that pertain to the non-financial service activities that he carries on in the realms of computer consulting and home renovation and home staging.

[14] In order to be entitled to input tax credits, one has to have made the expenditures that give rise to them in the course of a commercial activity. Commercial activity is an expression that is given a specific definition in the *Excise*

---

1 R.S.C. 1995 cE-15.

Tax Act, section 123(1). That definition is divided in three parts. The first part of it reads:

> "Commercial activity" means a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership all of the members of which are individuals) except to the extent to which the business involves the making of exempt supplies by the person …

[15] Parliament has specifically provided that an individual who carries on a business that has no reasonable expectation of profit is not carrying on a commercial activity, with the result that they are not able to recover input tax credits. There is no need for me to go into the policy considerations that underlie that provision, but it is generally fairly well understood that value-added taxes potentially give rise to very significant areas of abuse. One of those is in respect of input tax credits. This provision is a provision that is intended to eliminate potential abuse.

[16] The major question before me, and it was certainly the major subject of the evidence before me this morning, is whether or not the appellant, who carries on all of these businesses as proprietorships, had a reasonable expectation of profit from his activities in the areas in question.

[17] In Exhibit A-2, he prepared a summary to show the goods and services tax that he had collected and remitted over the period beginning January 2003 and ending at the end of the third quarter of 2009, and to show as well in summary form his GST returns for the quarters within that period and the input tax credit claims.

[18] From 2006 through September 2009, the GST collected is $15, none of it, I may say, within the period that is actually under appeal here; $10 of it pertains to the second quarter of 2009 and $5 to the third quarter of 2009. There apparently were no sales whatsoever in the businesses (I use the word "businesses" only in the sense that it describes the activities that the appellant says are commercial activities giving rise to ITCs) during 2006 and 2007 and 2008. There was one transaction in the second quarter of 2009 that apparently generated revenues for the appellant of $200, which he charged to affix a wall bracket for a television for a customer and, in the third quarter of 2009, he apparently took care of a computer virus for another customer and charged $100, giving rise to $5 in GST collected for that period.

[19] That seems to be the sum total of business activity, at least when viewed from the perspective of the generation of revenues for a period of some three-and-a-bit years.

[20] The appellant does have some qualification in the area of computers by way of studies at a community college. His expertise in home renovation and staging seems to be self-taught, beginning, he said, at the age of 14 when he started doing home renovations. He didn't have any business plan for either of these activities. He apparently had no projections of probable sales. He does not appear so far as I can tell from the evidence to have given consideration to the revenues required in order to generate profits, but has simply, to put it in the vernacular, hung out a shingle and looked for work.

[21] The computer consulting business, he said, began in 1987 and the home renovation and staging business in about 2006. The appellant's explanation of the absence of revenues in the period that we are concerned with here was that his time was so fully occupied dealing with Revenue Canada auditors that he had little or no time left to devote to his business activities. Secondly, he said that his business ethic required him, when talking to potential customers, to reveal to them that he was having disagreements, if I can put it that way, with Revenue Canada, that his businesses were the subject of audit, and that this discouraged people from doing business with him.

[22] I find both of those suggestions to be fatuous.

[23] In my view, when one considers all of the factors referred to by Justice Dickson, as he then was, in *Moldowan v. The Queen*[2] that were considered by the Court at that time to be appropriate indicia of the probability of profit and therefore of the existence of a business, there is little here to suggest that we are dealing with a business or two businesses, that had any expectation of profit in 2007 and 2008; I will not refer to 2009 because it may become the subject of other proceedings at some later point. Certainly within the time frame that I am concerned with here I see little to suggest that any anticipation of profit from these activities would be at all reasonable.

[24] Indeed, even ignoring for the moment the more stringent test that is made applicable by the definition of commercial activity in the *Excise Tax Act*, and

---

2 77 DTC 5213.

applying the Supreme Court of Canada's more recent test for the existence of a business as found in *Stewart v. The Queen*,[3] one would be hard pressed to say that these were businesses, there being little if any indication that they are carried on in a businesslike manner.

[25] The appellant's evidence of course was that he expected to make a profit, but expectations are not necessarily reasonable expectations. What is important here is not what the appellant's subjective expectations may have been, but viewed objectively, what is a reasonable expectation. In my view, there is no reasonable expectation, here, of profit.

[26] Accordingly, the appeals in respect of the periods from January 1, 2009 to September 30, 2009 will be quashed. The appeals in respect of the periods July 1, 2007 to December 31, 2008 will be dismissed.

Signed at Ottawa, Canada, this 18th day of August, 2010.

"E.A. Bowie"

Bowie J.

3 2002 SCC 46.

CITATION:	2010 TCC 424
COURT FILE NO.:	2010-467(GST)I
STYLE OF CAUSE:	WAYNE BOWDEN and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 15, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
DATE OF JUDGMENT:	July 19, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Darren Prevost

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	N/A
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada