Docket: 2008-3468(IT)G

BETWEEN:

DINO BERTUCCI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 29 and 30, 2010, at Toronto, Ontario.

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Ricky Tang

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2000, 2001, 2002, 2003 and 2004 taxation years is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of November 2010.

"Paul Bédard"

Bédard J.

Citation: 2010 TCC 597
Date: 20101124
Docket: 2008-3468(IT)G

BETWEEN:

DINO BERTUCCI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] This appeal pursuant to the general procedure was heard at Toronto, Ontario, on March 29 and 30, 2010.

[2] Paragraphs 10 to 18 inclusive of the Reply to the Notice of Appeal outline the matters in dispute. They read as follows:

> 10. In his returns of income for the Taxation Years, the Appellant reported and computed business losses relating to the artist management services as follows:

	2000	2001	2002	2003	2004
Fees (Income)	$2,000.00	Nil	Nil	Nil	Nil
Expenses:					
Advertising	$1,400.00	1,400.00	1,500.00	1,600.00	1,650.00
Meals & Entertainment (50%)	2,194.33	4,437.37	1,803.14	617.78	2,228.07
Motor Vehicle	8,771.53	13,973.00	6,548.36	11,397.10	6,885.64
Office Expenses	165.58	1,041.72	694.48	Nil	482.04
Supplies	1,028.50	1,141.64	1,278.63	1,342.56	1,979.43
Travel	17,551.17	25,654.39	8.940.00	8,260.44	13,042.04
Salaries	1,700.00	Nil	Nil	Nil	Nil
Telephone, Utilities	1,153.42	1,522.83	1,347.03	1,320.49	Nil
Education Materials	165.00	175.00	1,590.40	2,325.00	638.91
Maintenance & Repairs	Nil	Nil	Nil	Nil	200.00
CCA (on Vehicle)	1,464.86	1,003.45	463.27	12,448.64	11,484.49
Total Expenses	$35,894.39	$50,349.40	$24,165.31	$39,312.01	$38,590.62
Net Loss	**($33,894.39)**	**($50,349.40)**	**($24,165.31)**	**($39,312.01)**	**($38,590.62)**

11. In assessing the Taxation Years, the Minister disallowed the deduction of the foregoing expenses claimed by the Appellant and, accordingly, disallowed the reported business losses in full.

12. In determining the Appellant's tax liability for the Taxation years, the Minister made the following assumptions of fact:

    a) the Appellant's primary source of income was from employment as a teacher at Seneca College;

    b) the Appellant also worked as a marketing sales manager at Pink Triangle Press @ Xtra Magazine;

    c) the Appellant also worked as a fitness instructor at Oxygen Fitness;

    d) in his returns of income for the Taxation Year, the Appellant claimed business expenses and reported business losses from his artist management services, the particulars of which are set out in paragraph 10 above;

    e) the Appellant reported a combined gross revenue of $2,000 and a combined business loss of $186,311.73 during the relevant Taxation Years in relation to artist management services;

    f) in none of the years between 2000 and 2004 did the artist management services generate a profit;

g) the amounts claimed by the Appellant as business expenses were not incurred in relation to any business activity of the Appellant;

h) the Appellant provided artist management services for personal enjoyment and not to carry on a business activity to gain or produce income;

i) the amounts claimed by the Appellant as business expenses were personal expenses of the Appellant;

j) the amounts claimed by the Appellant as business expenses were not reasonable under the circumstances.

B. ISSUE TO BE DECIDED

13. The issues are:

a) whether the Appellant's activities pertaining to the artist management services constituted a source of income;

b) whether the expenses claimed by the Appellant in his Taxation Years were incurred for the purpose of gaining or producing income from a business;

c) whether the expenses claimed by the Appellant in his Taxation Years were the personal or living expenses of the Appellant; and

d) whether the expenses claimed by the Appellant in his Taxation years were reasonable in the circumstances.

C. STATUTORY PROVISIONS, GROUNDS RELIED ON, AND RELIEF SOUGHT

14. He relies on sections 3, 4 and 9, paragraphs 18(1)(a) and 18(1)(h), section 67, and subsection 248(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the "*Act*").

15. The Appellant undertook the artist management services as a personal endeavour and did not conduct his activities in a sufficiently commercial manner or in pursuit of a profit. Accordingly, the artist management services did not constitute a source of income for purposes of section 9 of the *Act* and the Minister properly disallowed the Losses claimed by the Appellant in relation to the said activity.

16. In the alternative, the claimed business expenses were not incurred to gain or produce income from a business. Therefore, the deduction of the expenses was correctly disallowed by the Minister pursuant to section 9 and paragraph 18(1)(a) of the *Act*.

17. Further to the paragraph above, certain of the expenses were "personal or living expenses" of the Appellant, as defined in subsection 248(1) of the *Act* and the deduction of such amounts is specifically precluded by paragraph 18(1)(h) of the *Act*.

18. In the further alternative, he submits that if this Honourable Court finds that during the Taxation Years the Appellant did carry on a business with respect to the artist management services which the Minister specifically puts into issue, the Appellant is not entitled to deduct any amount of expenses in the determination of the business under subsections 9(1) and 9(2) of the *Act*, in those Taxation years unless the amounts are reasonable in the circumstances, in accordance with section 67 of the *Act*.

[3] Assumptions 12a), b), c), d) and f) were not refuted by any evidence.

[4] The Appellant and Teresa D'sa, a CRA litigation officer, were the only witnesses.

Appellant's testimony

[5] The Appellant's testimony was essentially the following:

i) The Appellant had no intention of starting an opera singer management business until Catherine McKeever (an opera singer he met through his brother, also an opera singer), who had been impressed by his sales and marketing acumen, commented that he should start an artist management business. The Appellant explained that he was intrigued and quickly saw that he could immediately overcome one of the hurdles in that he would have some contacts in the business who might lead him to opera singers to promote. The Appellant explained that he decided (after completing research on the subject and doing pro-forma income and expense forecasts) to start an opera singer management business under the name of BSG Artist Management ("BSG") – even though he had neither a fondness for nor a particular interest in opera – since he had the training, education, and business experience to make such a venture

successful. I would point out immediately that the evidence revealed that the Appellant's research on opera consisted essentially in a discussion with Catherine McKeever and in the reading of three books (see Exhibit A-2), one of which is a career guide for singers published in 1994. I would also point out that the Appellant explained that he did not buy a recent edition of the career guide for singers (the cost of which was $300) because it was too expensive. Finally, the Appellant added that he learned from his research that his business endeavour would require years of dedication and investment in order to become successful and profitable. The Appellant also explained that he found out from his research that the largest artist management company in Canada had only been able to reach a successful and profitable level of operation after five years of continued losses, even though it had received grants in each of the first five years of operation.

ii) The Appellant was the sole proprietor of BSG and his duties were essentially to contact opera singers and attempt to get them hired by opera companies.

iii) The Appellant personally funded BSG's operations during its 5½ years of existence.

iv) BSG's office or principal place of business was located in his apartment.

v) BSG provided the following services:

a) Providing qualified candidates for auditions being held by opera companies. The Appellant explained that this service involved contacting hiring managers and presenting the resumes and biographies of opera signers he represented. In support of this testimony, the Appellant filed e-mails and letters he had exchanged with opera companies (see Exhibit A-1);

b) Recruiting opera singers. The Appellant explained that in order to recruit opera singers he attended various auditions and events at which singers were present. I would point out

immediately that the Appellant's testimony was silent with regard to the names of the singers he allegedly met at those auditions and events and with regard to the places and dates of the alleged meetings. The Appellant also testified that over BSG's 5½ years of existence he had put under contract eight singers, six of them under written contracts. In support of this testimony, the Appellant filed on the first day of the hearing an artist management contract entered into on June 29, 2000 between Catherine McKeever and BSG (see Exhibit A-5) (the "McKeever contract"). The Appellant also filed, on the second day of the hearing, two artist management contracts, one entered into on January 5, 2000 between Dominic Bertucci (the Appellant's brother) and BSG (see Exhibit A-7) (the "Bertucci contract") and the other entered into on March 14, 2000 between Melinda Enns and BSG (the "Enns contract"). I would point out immediately that the Appellant did not specify when the three other written contracts were signed or the circumstances in which they were signed. The Appellant's testimony was also silent with regard to the length of those contracts. I would point out as well that the Appellant's hesitancy in naming, and the amount of time he took to name, the two signers that were allegedly under oral contract with BSG raised doubts in my mind with respect to his credibility. Finally, the fact that the signature of Dominic Bertucci appearing on the Enns contract and on the Bertucci contract is completely different from his signature appearing on the McKeever contract also raised serious doubts in my mind with respect to the Appellant's credibility.

c) Matching singer type with roles for which opera companies were casting. The Appellant explained that this activity involved reading through the various hiring/audition lists on a regular basis to see what operas were being produced and what roles he could fill with his clients.

d) Researching operas to find out what singers were required for them. The Appellant testified that research was done by

using various books on operas which listed information about the productions, including the number and types of voices required. The Appellant filed the three books he consulted (see Exhibit A-2) in support of his testimony.

e) Recording and producing compact disks of singers' performances. The Appellant filed only one disk, which he allegedly produced himself (see Exhibit A-1), in support of his testimony in this regard.

f) Creating a website for promotional purposes.

g) Creating and printing resumes and biographies using BSG letterhead.

h) Travelling to events, including performances and auditions, to try to meet audition managers and also to meet with singers for the purpose of signing them with BSG. The Appellant explained that he also travelled to auditions to provide moral support for his clients during the auditions. I would point out that the Appellant's testimony was silent with regard to the names of the audition managers he met and with regard to the places and the dates of their alleged meetings. The Appellant testified that during the relevant period he travelled 32 times to auditions outside Canada (in Europe and the USA) with his clients. The evidence (Exhibit A-1, Tab 12) also revealed that the average cost of that travel was around $2,000 and that the trips were unsuccessful since they never led to any of BSG's clients signing a contract with an opera company and since BSG never signed any new singers as clients. The Appellant also explained that his clients (singers allegedly under contract) paid their own travel expenses. The summary of auditions and travel dates filed by the Appellant in support of his testimony (see Exhibit A-1, Tab 12) reveals that Melinda Enns travelled 12 times with the Appellant to auditions outside Canada, his brother eight times, Karyn Hanson 12 times, Katherine McKeever twice, Justin Spears four times and David Vabarjad 3 times. It is really hard to imagine second-class

opera singers who earned no money from their profession during the relevant period repeatedly travelling outside Canada and consequently incurring huge costs in order to find secondary roles in which they might be cast by non-Canadian opera companies. It would have been interesting to hear the testimony of those singers who allegedly travelled to auditions outside Canada or the testimony of the audition managers that the Appellant allegedly met during those alleged auditions.

vi) The Appellant did not obtain any licence to operate BSG. However, he did register with the Province of Ontario (see Exhibit A-1, Tab 5).

vii) The Appellant did not have a separate bank account for BSG because that would have been too expensive.

viii) The Appellant's primary source of income was from employment as a marketing teacher at Seneca College. The Appellant testified that he was devoting an average of 25 hours a week to that employment in the period from September to April. The Appellant also worked (from the year 2003) as a salesman (selling advertising) and as a sales manager at Xtra - Pink Triangle Press. The Appellant explained that he was devoting an average of 20 hours a week to that activity, mainly in the afternoon. The Appellant also worked as a fitness instructor at Oxygen Fitness. He added that he was devoting two hours a week to that activity. The Appellant testified that he still had a great deal of time to devote to performing his duties for BSG, considering the numerous days off from teaching he had during the relevant period and considering that the industry has cycles such that sometimes you work many hours, and sometimes none at all, in any given week. Finally, the Appellant added that sometimes his fellow teachers replaced him when he had to travel to auditions outside Toronto. It would have been interesting to hear the testimony of those teachers who so kindly replaced the Appellant during the relevant period.

ix) All the meal and entertainment expenses claimed by the Appellant were business expenses. The Appellant explained that

> those meals were in fact business meetings with singers and industry people at which he discussed opera companies, performances being staged, plans for future performances and where to scout for new talent. I would point out immediately that the names of the people he allegedly met during those business meals are not shown on the meal invoices. The Appellant's testimony was also silent with regard to the people he met and the places and dates of the meetings. Furthermore, the evidence revealed that most of the restaurants where those meals allegedly took place were in the neighbourhood of his residence and that the amounts spent were very often particularly small. The Appellant incurred huge meal and entertainment expenses during the relevant period without convincing a single singer to sign on with BSG and without convincing a single opera company to hire one of his clients. It is really hard to believe that those meals were really business meals.

Analysis and Conclusion

[6] The Supreme Court of Canada in *Stewart v. The Queen*, 2002 DTC 6969, set out a two-stage approach for determining if an activity may be considered a source of income:

a. Is the taxpayer's activity undertaken in pursuit of profit, or is it a personal endeavour?

b. If it is not a personal endeavour, is the source of the income a business or property?

According to the Supreme Court of Canada, the first stage of the test is only relevant when there is some personal or hobby element to the activity. Where the nature of an activity is clearly commercial, the taxpayer's pursuit of profit is established and there is no need to take the inquiry any further by analyzing the taxpayer's business decisions. However, where the nature of the taxpayer's venture contains elements which suggest that it could be considered a hobby or other personal pursuit, the venture will be considered a source of income only if it is undertaken in a commercial manner. In order for an activity to be classified as commercial in nature for these purposes, the taxpayer must have a subjective intention to profit and there must be evidence of businesslike behaviour that supports that intention. A reasonable expectation of profit is no more than a single factor, among a number of others, to be

considered at this stage of the analysis. In the *Stewart* decision, the Supreme Court of Canada summarized the relevant criteria as follows at 6980:

> … 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.
>
> The objective factors listed by Dickson, J. in *Moldowan* at p. 486, were: (1) the profit and loss experience in past 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. As we conclude below, it is not necessary for the purposes of this appeal to expand on this list of factors. As such, we decline to do so; however, we would reiterate Dickson, J.'s caution that this list is not intended to be exhaustive, and that the factors will differ with the nature and extent of the undertaking. We would also emphasize that although the reasonable expectation of profit is a factor to be considered at this stage, it is not the only factor, nor is it conclusive. The overall assessment to be made is whether or not the taxpayer is carrying on the activity in a commercial manner. However, this assessment should not be used to second-guess the business judgment of the taxpayer. It is the commercial nature of the taxpayer's activity which must be evaluated, not his or her business acumen.

Once it has been determined that an activity is a source of income, the deductibility inquiry is undertaken according to whether the expenses claimed fall within the words of the relevant deduction provisions of the *Income Tax Act*. Even if we conclude that the expenses claimed by the taxpayer were incurred for the purpose of gaining or producing income from a business or property, we still will have to determine whether those expenses were reasonable in the circumstances.

[7] So the Appellant first has the onus of satisfying the Court that the activity he undertook was clearly commercial in nature.

[8] The Appellant’s evidence in this regard consisted essentially of his own testimony, which was not supported by adequate documentation or by credible testimony from other witnesses. Consequently, the assessment of the Appellant's credibility played an important role in my decision.

[9] It is true that the testimony of a single person may be sufficient to meet one’s persuasive burden. That being said, the Appellant must understand that a judge does not have to believe an uncontradicted witness. Indeed, the uncontradicted account can be determined to be implausible in light of the circumstances revealed by the

evidence or on the basis of common-sense principles. In the present case, the Appellant's testimony that his activity was clearly commercial in nature is clearly implausible given the circumstances revealed by the evidence. In fact, the evidence revealed, *inter alia*, that the alleged business activity carried on by the Appellant during BSG's 5½ years of existence did not generate any a profit. Moreover, the alleged business activity did not generate any income (except for an amount of $2,000 that generated a $300 profit, which was wrongly declared in the Appellant's 2000 taxation year since it was actually earned in his 1999 taxation year) during those 5½ years, even though, according to the Appellant's testimony, eight artists were under exclusive contracts with BSG, which contracts provided that BSG was to receive 15% of those eight artists' gross earnings related to their careers as opera singers. This means that those artists under contract with BSG did not earn any income (related to their careers as opera singers) during BSG's 5½ years of existence. It is also really hard to imagine second-class opera singers who earned no money from their profession during the relevant period repeatedly travelling outside Canada and consequently incurring huge costs in order to find secondary roles in which they might be cast by non-Canadian opera companies (see paragraph 5v)h) above). In other words, it seems to me implausible that the taxpayer's activity was undertaken in pursuit of profit.

[10] The Appellant must also understand that it is even more difficult to believe a witness who is content to make general and unverifiable comments and who provides evasive explanations. Moreover, I would say that the hesitancy of the Appellant, the amount of time he took to answer questions, his attitude, and the gaps in his memory (see, *inter alia*, paragraph 5v)b) above) raised even more doubts in my mind with respect to the Appellant's credibility. I would also point out that the fact that the signature of Dominic Bertucci appearing on the Enns contract and on the Bertucci contract is completely different from his signature appearing on the McKeever contract also raised serious doubts in my mind with respect of the Appellant's credibility.

[11] Finally, in assessing the evidence provided by the Appellant, the Court must also comment on the Appellant's failure to call as witnesses certain persons (namely the Appellant's brother, the opera singers that were allegedly under contract with BSG, the hiring managers he allegedly met over the years, the artists the Appellant tried to recruit, the teachers who so kindly replaced the Appellant during the relevant period) who could have confirmed the Appellant's statements. In *Huneault v. Canada*, [1998] T.C.J. No. 103 (QL), 98 DTC 1488, my colleague Judge Lamarre referred, at paragraph 25, to remarks made by Sopinka and Lederman in *The Law of*

Evidence in Civil Cases which were cited by Judge Sarchuk of this Court in *Enns v. M.N.R.*, 87 DTC 208, at page 210:

> In *The Law of Evidence in Civil Cases*, by Sopinka and Lederman, the authors comment on the effect of failure to call a witness and I quote:
>
> > In *Blatch v. Archer*, (1774), 1 Cowp. 63, at p. 65, Lord Mansfield stated:
> >
> > > It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.
> >
> > The application of this maxim has led to a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.
> >
> > In the case of a plaintiff who has the evidentiary burden of establishing an issue, the effect of such an inference may be that the evidence led will be insufficient to discharge the burden. (*Lévesque et al. v. Comeau et al.*, [1970] S.C.R. 1010, (1971), 16 D.L.R. (3d) 425.)

[12] For these reasons, I am of the opinion that the Appellant undertook the artist management services enterprise as a personal endeavour and did not carry on his activities in pursuit of profit. Accordingly, the artist management services did not constitute a source of income for the purposes of section 9 of the Act and the Minister properly disallowed the losses claimed by the Appellant in relation to that activity. Consequently, it is not necessary to examine whether the claimed business expenses were incurred to gain or produce income from a business or whether those business expenses were reasonable in the circumstances. Accordingly, the appeal from the reassessments made under the Act for the 2000, 2001, 2002, 2003 and 2004 taxation years is dismissed, with costs.

Signed at Ottawa, Canada, this 24th day of November 2010.

"Paul Bédard"

Bédard J.

CITATION:	2010 TCC 597
COURT FILE NO.:	2008-3468(IT)G
STYLE OF CAUSE:	DINO BERTUCCI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 29 and 30, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	November 24, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Ricky Tang

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

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