

Docket: 2020-2180(GST)I

BETWEEN:

MURRAY STROUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 28 and 29, 2022, at Toronto, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant: Adam Serota
Counsel for the Respondent: Christopher Ware

JUDGMENT

The appeals of assessments made under the *Excise Tax Act* in respect of the quarterly reporting periods ended March 31, 2017, June 30, 2017, and September 30, 2017, are dismissed without costs.

Signed at Ottawa, Canada, this 28th day of July 2022.

“David E. Spiro”

Spiro J.

Citation: 2022 TCC 86
Date: 20220728
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BETWEEN:

MURRAY STROUD,

Appellant,

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Respondent.

REASONS FOR JUDGMENT

Spiro J.

[1] The Appellant, Mr. Murray Stroud, has owned a horse farm since the 1990s. The farm is called “Stroud’s Lane Farm”. The Appellant bred and raced horses during that period, but has consistently lost money doing so. The question is whether the Appellant carried on Stroud’s Lane Farm with a “reasonable expectation of profit”.

I. The Issue

[2] The legal issue is whether the Appellant is entitled to Input Tax Credits (“ITCs”) in computing net tax for GST purposes for three quarterly reporting periods in 2017 under Part IX of the *Excise Tax Act* (the “Act”). The ITCs claimed are \$9,155.25, \$7,607.65, and \$13,279.30, for the reporting periods ended March 31, 2017, June 30, 2017, and September 30, 2017, respectively. The Minister of National Revenue disallowed the ITCs claimed for each of those reporting periods.

[3] Whether the Appellant is entitled to the ITCs claimed depends on whether he made supplies in those reporting periods “in the course of a commercial activity”. Whether he made supplies in the course of a commercial activity depends on whether the Appellant carried on his farm business with a “reasonable expectation of profit”.¹ If so, the appeals should be allowed. If not, they should be dismissed.

[4] There is no dispute between the parties that, at all relevant times, the Appellant carried on a business with many horses and at least four full-time employees on his farm in Florida in the United States of America.² The only question is whether he was doing so with a reasonable expectation of profit.

[5] Although one of the Appellant's friends testified briefly, the only witness to provide any relevant evidence at trial was the Appellant. I have concluded that he has fallen short of demonstrating, on a balance of probabilities, that he operated the farm with a reasonable expectation of profit.

II. The Legal Test for "Reasonable Expectation of Profit"

[6] In *Moldowan v The Queen*, [1978] 1 SCR 480 [*Moldowan*], the Supreme Court of Canada listed four criteria that courts should consider in determining whether a taxpayer had a "reasonable expectation of profit":

There is a vast case literature on what reasonable expectation of profit means and it is by no means entirely consistent. In my view, whether a taxpayer has a reasonable expectation of profit is an objective determination to be made from all of the facts. The following criteria should be considered: the profit and loss experience in past years, the taxpayer's training, the taxpayer's intended course of action, the capability of the venture as capitalized to show a profit after charging capital cost allowance. The list is not intended to be exhaustive. The factors will differ with the nature and extent of the undertaking. One would not expect a farmer who purchased a productive going operation to suffer the same start-up losses as the man who begins a tree farm on raw land.³

[7] I will address each factor in turn.

The Appellant's Profit and Loss Experience in Past Years

[8] The following table, reproduced in part from paragraph 9(j) of the Reply, reflects the income of the Appellant as reported to the Minister of National Revenue for income tax purposes for his 2007 to 2015 taxation years. Both parties agreed on the accuracy of those amounts.⁴ The Appellant's professional income arose from his practice of law, while his farming income arose from the horse farm.

[9] The Appellant testified that certain horses were "profitable" and that he enjoyed a profit of \$76,343 USD in 2012 from his U.S. operation.⁵ Even taking all of that into account, there was still a consistent history of farm losses:

Taxation Year	Gross Professional Income	Net Professional Income	Gross Farming Income	Net Farming Income
2007	\$371,849	(\$219,352)	-	(\$8,750)
2008	\$480,066	\$72,897	-	(\$8,750)
2009	\$565,247	\$75,232	\$264,575	(\$8,750)
2010	\$417,051	\$56,920	\$361,950	(\$1,281,358)
2011	\$449,973	\$75,229	\$1,900,744	(\$786,717)
2012	\$546,150	\$227,830	\$2,304,428	(\$477,077)
2013	\$408,227	\$59,768	\$3,385,547	(\$122,534)
2014	\$431,783	\$120,508	\$1,407,098	(\$1,053,698)
2015	\$492,107	\$293,084	\$3,299,235	(\$333,529)

[10] The Appellant offered no oral or documentary evidence regarding the elements of any of the amounts in the last two columns. For example, what was his greatest expense in any particular year? Was it interest?⁶ Was it salary and wages of employees? Was it general and administrative expenses? Was it maintenance and repair? Was it losses due to fraud?⁷ After hearing all of the evidence, the Court has no idea.

[11] The most important aspects of the table are (a) the history of losses from farming and (b) the cumulative losses from farming — a total of over \$4 million of losses over six years alone (2010 to 2015). Such a record is not supportive of any future expectation of profit, reasonable or otherwise.

[12] Why does the table not reflect any information after 2015? The answer is simple — the last time the Appellant filed an income tax return was for his 2015 taxation year. But the Appellant's problem is more serious than that. The Appellant's problem is that his farming business continued to suffer losses, yet he never prepared any financial statements or similar documents — not even a simple profit and loss statement — with a view to diagnosing and treating the underlying financial issues at the farm.

[13] I accept all of the Appellant's evidence, as far as it goes — but it did not go far enough. Why not? Because most of his answers to important financial questions ranged from meandering at best to evasive at worst. For example, here is a particularly confusing answer to his counsel's question about what led to losses from 2013 to 2015:

A. Well, the big loss was in 2015, and the reason was when we bought our first farm in Florida it was at that time in 2008 when the market just dropped right after the car dealerships, everything in the world was upside down with the car

dealerships. And I had bought the farm just prior to that. And then I sold that one to downsize to make -- try to make it more profitable. And so when we downsized I lost a million dollars. So we really didn't lose \$1,121,000, we did only because of the -- the actual sale of the farm loss of money. It wasn't so much the farming of the horse operation as much as it was just in the land depreciation of 2008 to 2015 on that particular farm. So that's when I moved over to the current farm that I just sold this year, and that's where the -- where, you know, in 2016 we were on the second farm in Florida.⁸

[14] The Appellant's horses raced primarily at the track at Woodbine, Ontario. His counsel asked him whether that racing led to profit. The Appellant's answer is a model of obfuscation:

A. Let's put it this way, if -- depending on the cost of the training, there would have been. But depending on how many horses you have there training, it could have been. I have to sit down now, you know -- but every time -- like *Sent From Heaven* we thought was going to win a lot of money. There's no question about that. And there was -- you know, I should have sold it for \$250,000, and I didn't. *You Can't Catch Her* is another one that (inaudible) valued at \$700,000. I mean, I've got the paper somewhere in all my paperwork, but she wouldn't -- didn't even get claimed for \$10,000, so that shows you how people that are in the business for a long time can really lead you astray and then they could -- horse is worth a lot of money because she was a half sister to *You Can't Catch Me*. So it's -- you know, there's I guess a certain amount of luck, but there's a lot of bad luck too. I mean, I've had horses break their legs. I mean, its incredible.⁹

[15] The Appellant's opaque responses to important financial questions continued in cross-examination:

Q. And do you have a breakdown of your total expenses and revenue for 2016 and 2017?

A. Yes.

Q. Do you have it with you today?

A. Well, they're in a big file -- I had the accountant -- but he couldn't do anything until after June 30th, he was -- had all these corporate returns, and I only just -- because I've just gotten some of the money from my family, that I was able to hire him. I didn't have the money to pay him, I didn't have the money to pay anybody to do the HST returns. I always had somebody -- my secretary always did my HST returns in my office, and always had somebody do everything for me. And I'm not inclined to computer with -- everybody thinks you can file that stuff online on a computer, and I don't know anything about computers.

Q. Right.

A. I'm just -- I'm counting on (inaudible) when it comes to that. I don't like technology. I like to see everything in black and white.

Q. So what was your total revenue for 2016?

A. I don't know.¹⁰

[16] In cross-examination, the Appellant was asked how much money he spent on trainers in 2017. It took three pages of transcript for the Appellant to admit that he had no idea.¹¹

[17] Although the Act does not require the Appellant to prepare financial statements,¹² the absence of any financial statements, or similar records, for any period of operation of the farm from the 1990s to the present causes the Court to draw two inferences that weigh heavily against the Appellant's position that he had a reasonable expectation of profit from the farm:

(a) he was unable to objectively discern the root cause(s) of the farm's lack of profitability; and

(b) he was unable to objectively assess the effect of any efforts he made to stem the rising tide of farm losses.

The Appellant's Training

[18] The Appellant's training is in the law. He testified that he found law school exceedingly difficult due to dyslexia. He persevered and practiced real estate law in Pickering, Ontario from 1977 until his practice concluded with his disbarment in 2017.

[19] The Appellant never attended business school. He has no training in operating a business in general or a horse farm in particular. He testified that he came from a farming family (though not a horse farming family) and tried his hand at other businesses including a golf course, a restaurant, and an art gallery.

The Appellant's Intended Course of Action

[20] The Appellant was asked by his counsel how he attempted to make the farm profitable. Here is his answer:

A. Well, first off I got rid of everything in Florida, finally, and that was a battle in itself because people they back out of deals down there like -- there was no liability, it was unfortunate. But anyway, I moved my whole operation to Canada. Right now, I still have -- I board them out and pay HST on everything that board right now. I'm building my facility. I bought a farm here in Canada and I'm building a facility to house everything. And hopefully, I'm going to make some money on it, because if I don't I'll be on the street with everyone else. I put my whole life, heart, soul, and savings, everything into this, my family and everything have suffered as a result of my trying to make this successful, and part of it's my -- I just believe I can make it work, I think I -- I'm positive I can make it work. And I'm just determined to make it work. And I'm stubborn to make -- you know try to make it happen. I mean, I -- when I went through law school -- I'm just very very dyslexic, I am so dyslexic I was told I could never make it through law school, and I stuck with it, and the worst three years of my going through law school and trying to read all that stuff when you're dyslexic, it was tough. And the same thing here, I'm persistent knowing -- that I really believe in my heart that this can be successful.

Q. So, sorry, I'm just going back to how you've changed things. You said you -

A. Well, I gave 50 per cent ownership over *Speightstown* -- by *Speightstown* to the trainer, so that no bills were incurred, but he gets 50 per cent of everything going forward as well. So we're hoping that that's going to happen. And I'm doing that with every horse that (inaudible) right now.

Q. So when you say no bills, what would be an example of no bills that you don't have to pay for anymore?

A. I don't pay for any vet bills, I don't pay for any shoeing, I don't pay for any daily training --

Q. Sorry, what's shoeing? Shoeing, what's that?

A. Putting shoes on the horse.

Q. Okay.

A. I don't pay for any transportation, anything. I don't pay for anything to do with the horse after I give them 50 per cent. But I get 50 per cent of everything that it wins, 50 per cent on the sale prices.¹³

[21] The Appellant explained this new arrangement with the trainers earlier in his evidence:

And how I did it -- I gave it -- so at my expenses, I cut everything so that I could make profit, I did a deal, I gave him 50 per cent ownership of the horse, and you get 50 per cent of the earnings with no bills to me. I don't want to pay any bills on

any horse at the racetrack. So I could make deals with the trainers, give them 50 per cent ownership, so that way I don't have any further bills going forward.¹⁴

[22] The amount of annual farm expenses before and after this new arrangement was not in evidence nor was it made clear when this new arrangement began. One wonders whether receiving one-half of race winnings, rather than all race winnings, diminished the farm's potential for profit in the long term. There is no telling whether the benefit of reducing certain unquantified farm expenses outweighed the cost of foregoing one-half of all future race winnings. How vital were those foregone race winnings to the potential profitability of the farm? No one knows.

[23] The Appellant also began transporting his horses across the Canada-U.S. border himself:

A. Yeah, I trucked these horses myself. And I do most of the trucking myself, because you hire people it costs a lot of money, but apart from that they don't look after the horse as well as I do. And because I make sure they're well watered and lots of hay and everything else. I've had horses, unfortunately, in the past shipped from Woodbine to Florida. *Bear Treasure* was one of them that I talked about. Unfortunately, got sick, I wound up with a vet bill of \$5,000 because (inaudible) had shipped it from Woodbine directly to Miami to race, and I incurred a vet bill of \$5,000, and I was just furious about it. And I wanted to truck it myself, but he had a whole load going down, he said, "You know, it'll be better if they all ride the same time that way..." and whatnot, so I went along with it. But, unfortunately, I like to truck my own horses because I know I do a better job than they do, than any of the truckers.

Q. Just as a -- because you mentioned a trip from Woodbine to Miami, how much would it cost to pay a third party to do that, just roughly?

A. Roughly, it's -- depending on whether you're taking a stall sawed in half or box stall. So the prices are different. But generally speaking, to go to Florida is \$1,500 to \$3,500 depending on how you -- what size stall you take.¹⁵

[24] The amount of annual transportation costs before and after this new arrangement was not in evidence nor was it made clear when this new arrangement began.

[25] Even after the Appellant took each of these steps, the question remains — why did the Appellant's losses continue? The Appellant offered no oral or documentary evidence of the amount he intended to save, or the amount he did save, as a result of any of those steps.

The Capability of the Venture as Capitalized to Show a Profit

[26] The Appellant did not produce a balance sheet, or any similar record, to show how the farm was capitalized. Because I have no idea how the Appellant capitalized his farm, I cannot draw any inference in favour of the Appellant about the capability of the business, as capitalized, to show a profit. For example, I do not know how much money the Appellant paid in interest each year on funds he borrowed to finance the farm. Perhaps that amount grew over time and became the main source of his losses, but there was simply no written or oral evidence on the point.

[27] In argument, counsel for the Appellant suggested that the Appellant's income from his practice of law subsidized his farm losses. Relying on his practice of law to subsidize his farm losses is no evidence of the farm's capability to produce profit as capitalized, particularly after the Appellant was disbarred in 2017.¹⁶

Other Relevant Factors

[28] The Appellant blamed his erstwhile farm manager for giving him bad advice. But I have no evidence to support the Appellant's allegation that if the farm manager had properly advised him "he would have likely made profit in a number of years."¹⁷ There was no oral or documentary evidence that sheds any light on the question of how much profit the Appellant would likely have made — and when he likely would have made it — but for his farm manager's bad advice.

[29] With respect to the unfortunate loss of three horses euthanized due to injury, the Appellant alleged that the loss of those horses caused him to lose "hundreds of thousands in value".¹⁸ Once again, there was no oral or documentary evidence in respect of the quantum of those losses or when they were incurred.

[30] To the extent that time spent on the farm business is a factor, I have no doubt that the Appellant spent most, if not all, of his available time on it particularly after having been disbarred in 2017. This is the only factor that favours the Appellant's position.

III. Conclusion

[31] I have no doubt that the Appellant is passionate about horses, genuinely cares about them, and takes pleasure in being around them. He has an encyclopedic

knowledge of horses and is intimately familiar with their race records and bloodlines. He testified that he put his whole life, heart, soul, and savings into the farm. I believe him.

[32] But unless he had the tools to diagnose the underlying cause or causes of his farm losses, the Appellant could not reasonably expect to stem those losses. The Appellant's expectation of profit must have been "reasonable". A mere hope or desire for profit is insufficient to meet the "reasonable expectation of profit" test.

[33] A review of the farm's financial statements, or similar records, would have been necessary for the Appellant to (a) understand why the business continued to lose money and (b) take the steps necessary to make the business profitable. It was impossible for the Appellant to diagnose and treat the problem without the appropriate financial tools.

[34] Having applied the criteria set out by the Supreme Court of Canada in *Moldowan*, I find that each factor (other than time spent), weighs heavily in favour of the conclusion that the Appellant did not carry on his farm business with a reasonable expectation of profit.

[35] For all of these reasons, I conclude that the Appellant has failed to demonstrate, on a balance of probabilities, that he carried on the business of Stroud's Lane Farm with a reasonable expectation of profit. His farm business was, therefore, not a "commercial activity" within the meaning of subsection 123(1) of the Act and, as a result, the Appellant is not entitled to the ITCs claimed under subsection 169(1) of the Act for the quarterly reporting periods ended March 31, 2017, June 30, 2017, and September 30, 2017.

[36] The appeals are, therefore, dismissed without costs.

Signed at Ottawa, Canada, this 28th day of July 2022.

"David E. Spiro"

Spiro J.

CITATION: 2022 TCC 86
COURT FILE NO.: 2020-2180(GST)I
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PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: June 28, 2022
REASONS FOR JUDGMENT BY: The Honourable Justice David E. Spiro
DATE OF JUDGMENT: July 28, 2022

APPEARANCES:

Counsel for the Appellant: Adam Serota
Counsel for the Respondent: Christopher Ware

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¹ Under subsection 169(1) of the Act, ITCs are available to registrants that acquire a property or service for use in a commercial activity. Under subsection 123(1) of the Act, a “commercial activity” does not include a business carried on by an individual without a reasonable expectation of profit.

² Although the farm was located in Florida, all of the ITCs at issue arose from the Appellant’s payment of GST in respect of supplies made during the 2017 racing season at Woodbine, Ontario.

³ *Moldowan* at 485-486.

⁴ Transcript, page 103, line 25 to page 104, line 10.

⁵ In respect of the latter, see page 4 of Exhibit R-1.

⁶ See page 118 of the transcript, at line 28 where the Appellant testified in cross-examination that he paid “a lot of interest”. The evidence does not get any more specific than that. For example, the Appellant was unable to say how much interest he paid in 2015 (see page 119 of the transcript at line 6 to page 120, line 20).

⁷ The Appellant maintained during his evidence that was defrauded by his erstwhile farm manager.

⁸ Transcript, page 33, line 26 to page 34, line 12.

⁹ Transcript, page 92, lines 4-20.

¹⁰ Transcript, page 122, lines 3-24.

¹¹ Transcript, page 124, line 22 to page 127, line 22.

¹² Subsection 286(1) of the Act imposes a general requirement on every person that carries on a business or is engaged in a commercial activity to “keep all records that are necessary to enable the determination of the person’s liabilities and obligations under this Part”.

¹³ Transcript, page 100, line 22 to page 102, line 9.

¹⁴ Transcript, page 63, lines 18-25.

¹⁵ Transcript, page 80, line 23 to page 81, line 19.

¹⁶ Transcript, page 110, line 24 to page 111, line 2. The Appellant testified that he was disbarred because he borrowed money from clients for his farm operation.

¹⁷ Paragraph 11 of the Notice of Appeal.

¹⁸ Paragraph 13 of the Notice of Appeal.