Federal Court of Appeal | Cour d'appel fédérale

Date: 20101217

Docket: A-395-09

Citation: 2010 FCA 350

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

SCOTT OKE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 13, 2010.

Judgment delivered at Ottawa, Ontario, on December 17, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: SHARLOW J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] Mr. Scott Oke purchased a recreational vehicle (RV) and put it into a pool of RVs leased to the movie industry through a third party. He claimed a substantial deduction for capital cost allowance in relation to his RV for the 2003, 2004 and 2005 taxation years but the Minister disallowed the deductions by applying the limiting rule in subsection 1100 (15) of the *Income Tax Regulations*, C.R.C., c. 945 (the Regulations). Mr. Oke argued that the rule did not apply to him because, as provided in subsection 1100(17.3) of the Regulations, his activities with his RV amounted to a business in which he was personally active on a continuous basis. The Tax Court of Canada, in a decision reported as *Oke v. Canada*, 2009 TCC 386, [2009] T.C.J. No. 297 (Reasons),

found that Mr. Oke was not doing business using his RV and dismissed his appeal. Mr. Oke now appeals to this Court from that decision.

[2] For the reasons which follow, I would dismiss the appeal.

FACTS

[3] At all material times, Mr. Oke was successfully employed as a senior sales executive. He became aware of the possibility of earning additional income by buying and renting RVs. He came into contact with Mr. Clements, the principal in Coast-to-Coast RV Inc., an RV management and rental company which rents its fleet of RVs to movie production companies. Mr. Clement was initially reluctant to accept Mr. Oke's RV into his fleet but he relented when Mr. Oke satisfied him that he would look after the routine maintenance of his RV.

[4] Mr. Oke was as good as his word and took an active role in the upkeep of his RV, a problem which most other owners of RVs in the pool left to Mr. Clements. Mr. Clements still had to attend to emergency repairs simply because he was the contact person for Coast-to-Coast's customers. Mr. Oke also made sure that his RV was insured though he took advantage of the more advantageous rates which Mr. Clements was able to obtain.

[5] Mr. Oke took an active interest in Mr. Clements' business and took on several tasks related to the rental of the RVs, including his own. He participated in "show and tell" sales events where Mr. Clements would "pitch" his fleet to movie producers. He assisted in shuttling RVs from the

Coast-to-Coast's yard to the filming location. He also reviewed contracts between Coast-to-Coast and movie producers. However, Mr. Clements personally negotiated those contracts, without any assistance from Mr. Oke.

[6] The following table shows Mr. Oke's gross revenues related to his RV, expenses before capital cost allowance, capital cost allowance claimed and capital cost allowance allowed by the Minister in the assessment of Mr. Oke's income for the 2003, 2004 and 2005 taxation years:

Year	Gross Revenue	Expenses	CCA Claimed	CCA Allowed
2003	$14,700	$9,405	$35,018	$5,295
2004	$12,795	$7384	$27,513	$5,411
2005	$19,425	$3,260	$22,259	$16,165

As can be seen, the application of the limiting rule in subsection 1100(15) prevented Mr. Oke from using capital cost allowance to create a loss in a taxation year.

LEGISLATION

[7] The scheme of the legislation is as follows. Subsection 1100(15) of the Regulations limits the amount of capital cost allowance which may be claimed on account of "leasing property", a term defined at subsection 1100(17). That definition turns on whether the property is used "principally for the purpose of gaining or producing gross revenue that is rent, royalty or leasing

revenue…". To determine whether revenue is rent, one looks to subsection 17.2 which provides as follows:

(17.2) For the purposes of subsections (1.11) and (17), gross revenue derived in a taxation year from	(17.2) Pour l'application des paragraphes (1.11) et (17), est considéré comme un loyer dérivé d'un bien au cours d'une année d'imposition le revenu brut dérivé, au cours de cette année :
(*a*) the right of a person or partnership, other than the owner of a property, to use or occupy the property or a part thereof, and	*a*) du droit d'une personne ou société de personnes (à l'exclusion du propriétaire du bien) d'utiliser ou d'occuper le bien ou une partie de ce bien;
(*b*) services offered to a person or partnership that are ancillary to the use or occupation by the person or partnership of the property or the part thereof shall be considered to be rent derived in the year from the property.	*b*) de services offerts à une personne ou société de personnes qui sont accessoires à l'utilisation ou à l'occupation du bien ou d'une partie de ce bien par la personne ou société de personnes.

[8] There is an exception to this deeming provision at subsection 17.3 of the Regulations:

(17.3) Subsection (17.2) does not apply in any particular taxation year to property owned by	(17.3) Le paragraphe (17.2) ne s'applique pas, au cours d'une année d'imposition donnée, à un bien qui appartient
…	…
(*b*) an individual, where the property is used in a business carried on in the year by the individual in which he is personally active on a continuous basis throughout that portion of the year during which the business is ordinarily carried on; or	*b*) à un particulier, dans le cas où le bien est utilisé dans une entreprise que le particulier exploite dans l'année et dont il s'occupe personnellement de façon continue, tout au long de la partie de l'année où l'entreprise est habituellement exploitée;
…	…

[9] The result is that if subsection 17.3 applies, the revenue derived from an undertaking involving the use of property is not considered to be rent; if it is not rent, then the property is not one which is used principally for the purpose of producing rent and therefore, the property is not a leasing property. If it is not a leasing property, the limiting rule in subsection 1100(15) does not apply.

THE DECISION UNDER APPEAL

[10] After setting out the facts and the applicable portions of the Regulations, the Tax Court Judge, Mr. Justice C. Miller, began his analysis by noting that in order to come within subsection 1100(17.3), Mr. Oke had to meet two conditions. He had to carry on a business in which the RV was used and he had to be active in that business on a continuous basis for that portion of the year during which the business is ordinarily carried on. The argument before the Tax Court Judge focused on the extent of Mr. Oke's involvement in the RV rental business. The Tax Court Judge thought that the parties had jumped too quickly to the second condition and had not addressed the first question, specifically whether Mr. Oke carried on a business using the RV.

[11] The Tax Court Judge concluded that the RV was used in a business but that it was not Mr. Oke's business - it was Mr. Clements' business, Coast-to-Coast. After noting that Mr. Oke's RV was but one in a fleet of thirty or more RVs managed by Mr. Clements, that only Mr. Clements negotiated the terms of rental contracts with movie producers, that Mr. Clements provided emergency repairs for all the RVs and regular maintenance for all the RVs other than Mr. Oke's, the Tax Court Judge asked himself: "Were there two businesses at play? Coast-to-Coast and

Mr. Oke's?" The Tax Court Judge answered his question unequivocally: "No, only one – the business of Coast-to-Coast": Reasons at para. 20.

[12] The Tax Court Judge then reviewed each of the elements which Mr. Oke invoked in support of his argument that he was carrying on business. That review showed that, for the most part, the things which Mr. Oke did were things which any other RV owner in the pool would do. For example, Mr. Oke claimed that he determined the contracts to pursue. The Tax Court Judge found that Mr. Oke pursued one client, Coast-to-Coast. Mr. Clements was the one who pursued the movie industry clients.

[13] In the end result, the Tax Court Judge was not persuaded that Mr. Oke was carrying on a business. He acknowledged that Mr. Oke's situation varied somewhat from that of other owners in the pool but concluded that, overall, "there are far too few indices of carrying on a business to satisfy me that Mr. Oke's source of income was business and not simply property," Reasons at para. 22.

[14] Having concluded that Mr. Oke was not carrying on a business, the Tax Court Judge did not need to consider whether the latter was personally active in a business on a continuous basis. Mr. Oke's appeal was therefore dismissed.

MR. OKE'S SUBMISSIONS

[15] Mr. Oke's appeal to this Court was based on the argument that the Tax Court Judge erred in applying an unduly restrictive view of what constitutes a business for purposes of the *Income Tax Act* R.S.C. 1985 c. 1(5th Supp.) (the Act).

[16] Mr. Oke began by setting out the definition of "business" which appears at subsection 248(1) of the Act:

> "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and, except for the purposes of paragraph 18(2)(c), or section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure in the nature of trade but does not include an office or employment.

[17] Mr. Oke then turned to the jurisprudence. He quoted the definition of business found in a number of cases in support of his position that the threshold for a business is very low. In particular, he referenced the English Court of Appeal's statement that "[a]nything which occupies the time and attention and labour of a man for purpose of profit is business," *Smith v. Anderson,* (1880) 15 Ch. D. 247 (Eng. C.A.) at p. 258. This definition of a business has been referenced by the Supreme Court of Canada as the origin of the test to distinguish between business and property income, see *Stewart v. Canada*, [2002] 2 S.C.R. 645, 212 D.L.R. (4th) 577 at para. 51 (*Stewart*).

[18] The appellant also referred to the case of *Drumheller v. Minister of National Revenue,* [1959] C.T.C. 275 (Ex. Ct.), to support his proposition. In that case, the Exchequer Court of Canada stated:

> "In particular, the expression an undertaking of any kind appears to me to be wide enough by itself to embrace any undertaking of the kinds already mentioned in the definition; that is

> to say, trades, manufactures, professions, or callings, and any other conceivable kinds of enterprise as well."

[19] After referring to cases where, on the facts, certain activities were found to fall within the definition of business, Mr. Oke invoked the decision of the Supreme Court of Canada in *Stewart,* above. In that case, the Supreme Court of Canada set aside the "reasonable expectation of profit" as a test of whether a taxpayer's activities constitute a source of income for tax purposes. The taxpayer in that case purchased four rental properties which he leased to parties with whom he dealt at arm's length for the purpose of producing rental income. Unfortunately, he did not realize a profit from this activity due to high interest rates.

[20] The Supreme Court set out a two part test to determine whether a taxpayer's activity constitutes a source of income. The first step is to determine if the activity is undertaken for profit or if it is personal in nature. If the activity is not personal in nature, then the next question is whether the source of the income is business or property, *Stewart,* above at para. 50.

[21] In this case, there was no suggestion that Mr. Oke's involvement in leasing his RV had a personal element. It was undertaken with a view to profit. Mr. Oke argues that there was therefore a source of income, and since it fell within the words "an undertaking of any kind", the Tax Court Judge ought to have found that it was a business. Even if Mr. Oke's objective was to learn the RV leasing business, this would still qualify as an adventure in the nature of trade, and thus a business.

[22] Mr. Oke then went on to examine the nature of his involvement in his business so as to show that he met the second leg of the test set out at subsection 1100(17.3) of the *Regulations*. In light of the conclusion to which I have come on the first leg, it is not necessary to pursue this aspect of the matter.

STATEMENT OF ISSUES

[23] This appeal turns on whether Mr. Oke can establish that his activities relating to the rental of his RV constitute a business. *Stewart* teaches us that even where there is commercial activity, it does not necessarily follow that the activity is a source of business income. It could be income from property. In this case, the commercial activity involved the leasing of property. The question in this appeal is not whether Mr. Oke's activity was a business rather than a mere personal activity but rather whether Mr. Oke's commercial activity was a business (generating business income) or whether it simply generated income from property.

ANALYSIS

[24] This is an appeal from a decision of a trial judge, reached after the trial of an issue. The standard of review is therefore that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness for errors of law, palpable and overriding error for questions of fact and questions of mixed fact and law. Where an extricable error of law can be found in a question of mixed fact and law, the standard of correctness applies to that question of law.

[25] In this case, the question of whether Mr. Oke's activities were sufficient to constitute a business is a question of mixed fact and law. Determining the test to be used to decide what is a business or business income as opposed to income from property is a question of law.

[26] As noted above, there is a distinction between commercial activity and personal activity. As between these two alternatives, the threshold for business is very low, as demonstrated by the statutory definition which refers to "an undertaking of any kind whatsoever." When the issue is the characterization of a given commercial activity, the test is somewhat more demanding. In *Stewart*, above at para. 51, the Supreme Court of Canada, briefly touched upon the relevant considerations:

> Equating "source of income" with an activity undertaken "in pursuit of profit" accords with the traditional common law definition of "business", i.e., "anything which occupies the time and attention and labour of a man for the purpose of profit": *Smith, supra*, at p. 258; *Terminal Dock, supra*. As well, business income is generally distinguished from property income on the basis that a business requires an additional level of taxpayer activity: see Krishna, supra, at p. 240.

[27] The focus on the level of activity is reflected in a line of jurisprudence dealing with real estate rental properties: *Wertman v. M.N.R.* , [1964] C.T.C. 252, 64 D.T.C. 5158 (Ex. Ct.); *Walsh v. M.N.R.*, [1965] C.T.C. 478, 65 D.T.C. 5293 (Ex. Ct.); *Burri v. The Queen*, [1985] 2 C.T.C. 42, 85 D.T.C. 5287 (F.C.T.D.) – and the case *Canadian Marconi Co. v. The Queen*, [1986] 2 S.C.R. 522, [1986] 2 C.T.C. 465, 86 D.T.C. 6526 (S.C.C.) [*Canadian Marconi*] which applied this line of reasoning more broadly.

[28] The cumulative effect of these cases was summarized by Peter W. Hogg, Joanne E. Magee and Jinyan Li, Hogg *et al.*, *Principles of Canadian Income Tax Law*, 7th ed. (Toronto: Carswell, 2010) at 160:

> *Prima facie*, of course, the rents derived from letting an apartment building, office building or shopping centre, are income from property. The rents are paid for the use of the property, not services provided by the landlord. The difficulty arises from the fact that a landlord will often supply to tenants, in addition to the right to occupy the rented premises, services of various kinds. Where the services supplied consist of only those services which are of a kind customarily included with rented premises, for example, maintenance of building, heating, air conditioning, water, electricity, and parking, the rent is still regarded as income from property. But if the services supplied go beyond those which are customary for an office building or apartment building or shopping centre (or whatever the property is), it becomes more plausible to characterize the owner's operation as a business rather than the mere letting of property. Services provided by an apartment building that would be indicative of a business classification would include services normally provided by a hotel, i.e., housekeeping, laundry service, restaurant and room service, etc. The extreme case is, of course, a hotel, where the extent of the services supplied to guests makes it obvious that it is a business. Where the range of services supplied by the landlord falls below hotel level, it becomes a question of degree whether the nature and extent of the services makes it appropriate to characterize the income as earned from a business.

[29] This line of cases supports a comparative approach to the question of whether income is generated by a business or arises from the use of property. The higher the level of activity, the more likely it is that one is engaged in a business; the lower the level of activity the more likely it is that the income derives from the use of property.

[30] In this case, the Tax Court compared Mr. Oke's level of activity relative to other RV owners in Coast-to-Coast's pool and found that Mr. Oke's level of activity relative to his own RV did not differ significantly from that of other (admittedly passive) owners. In my view, this was the correct

test. At the conclusion of that analysis the Tax Court Judge found that "there are far too few indices of carrying on a business to satisfy me that Mr. Oke's source of income was a business and not simply property," Reasons at para. 22. As this question is one of mixed fact and law, the requisite standard of review has been met.

[31] This is consistent with the Tax Court's Judge's earlier conclusion that there was only one business in this scenario and it was Coast-to-Coast's.

CONCLUSION

[32] Mr. Oke's argument was, in essence, that he was engaged in commercial activity. The Tax Court Judge correctly identified the issue as whether that commercial activity was a business or whether it was simply the use of property to generate income.

[33] The Tax Court judge applied the correct test to differentiate between business income and income from property and arrived at a conclusion which cannot be challenged as being unreasonable.

[34] For these reasons, I would dismiss this appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
K. Sharlow J.A."

"I agree.
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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