Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110629

Docket: A-330-10

Citation: 2011 FCA 218

CORAM: **SHARLOW J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

WAYNE BOWDEN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on June 23, 2011.

Judgment delivered at Ottawa, Ontario, on June 29, 2011.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: TRUDEL J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] Mr. Bowden is appealing the judgment of the Tax Court of Canada (2010 TCC 424) dismissing his appeal of an assessment under the *Excise Tax Act*, R.S.C. 1985, c. E-15. The assessment rejected Mr. Bowden's claims for input tax credits for the period July 1, 2007 to December 31, 2008.

[2] Mr. Bowden had claimed the input tax credits in the period specified above, but he says that the payments of goods and services tax (GST) for which the input tax credits were claimed were actually paid by him in 2003 and subsequent years. He says that during those years he carried on

more than one business. One of his businesses was a financial services business (or investment business), and Mr. Bowden now accepts that he is not entitled to input tax credits in relation to that business. However, he argues that he is entitled to input tax credits in relation to his other businesses, computer consulting, home renovation and home staging. The purpose of his appeal to the Tax Court, as he understood it, was to establish his entitlement to input tax credits in relation to those other businesses.

[3] Mr. Bowden did not succeed in the Tax Court because the judge agreed with the argument of the Crown that the other businesses of Mr. Bowden did not fall within paragraph (a) of the definition of "commercial activity" in subsection 123.1 of the Act, which reads as follows (my emphasis):

123. (1) In section 121, this Part and Schedules V to X,	**123.** (1) Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X.
…	[…]
"commercial activity" of a person means	« activité commerciale » Constituent des activités commerciales exercées par une personne :
(*a*) a business carried on by the person (<u>other than a business carried on without a reasonable expectation of profit</u> 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.	*a*) l'exploitation d'une entreprise (<u>à l'exception d'une entreprise exploitée sans attente raisonnable de profit</u> par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées.

[4] Mr. Bowden, in his memorandum of fact and law, argued that the judge erred in law because he failed to apply the principles from *Stewart v. Canada*, [2002] 2 S.C.R.645, 2002 SCC 46, and *Walls v. Canada*, [2002] 2 S.C.R. 684, 2002 SCC 47. He argues that those cases establish that for tax purposes, the "reasonable expectation of profit" test is relevant only to distinguish between business and personal activities, and since there is no personal or hobby element in his computer consulting, home renovation and home staging activities, the judge should have determined that those activities were businesses and therefore were "commercial activities" within the statutory definition.

[5] The difficulty with Mr. Bowden's analysis is that it extends the reach of *Stewart* and *Walls* too far. Those cases dealt with a judge made rule that was once applied in determining whether, for income tax purposes, a particular activity or venture of a taxpayer was a "source of income", and therefore a business (see *Moldowan v. The Queen*, [1978] 1 S.C.R. 480 at page 485). In *Stewart* and *Walls*, the Supreme Court of Canada held that the reasonable expectation of profit test could not be used for that purpose.

[6] After *Stewart* and *Walls*, the general principle is that for income tax purposes, a venture or activity of a commercial nature is to be considered a business even if there is no reasonable expectation of profit, unless there is a personal or hobby element. If there is such a personal or hobby element, then the reasonable expectation of profit test may be used to determine whether the activity is nevertheless a business. In cases where it is necessary and appropriate to apply the reasonable expectation of profit test, the factors to be taken into account in determining whether

there is a reasonable expectation of profit are as stated in *Moldowan* (at page 486) and the many cases decided after *Moldowan*. It is not necessary to list all of the relevant factors here. It is necessary to point out only that one of the relevant factors is the profit and loss experience of years before and after the year of assessment, as well as anticipated future profits.

[7] Having said that, however, I am compelled to conclude that the *Stewart* and *Walls* limitation does not assist Mr. Bowden, even if I were to accept his submission that his computer consulting, home renovation and home staging activities have no personal or hobby element (I express no opinion on that factual point as it is not necessary to do so.) The argument of Mr. Bowden based on *Stewart* and *Walls* has no merit because the entitlement of a taxpayer to input tax credits does not depend upon whether the taxpayer has paid GST in relation to a "business". Rather, it depends upon whether the taxpayer has paid GST in relation to a "commercial activity".

[8] In this context, the phrase "commercial activity" does not bear its ordinary meaning. It is specifically defined for GST purposes to mean a business that is carried on with a reasonable expectation of profit (see the definition quoted above). This definition implicitly recognizes that a business may exist without a reasonable expectation of profit, but it states that a business without a reasonable expectation of profit is not a "commercial activity". It follows that, assuming Mr. Bowden carried on businesses other than a financial services business during the relevant period, he is entitled to input tax credits in respect of those other businesses only if he carried them on with a reasonable expectation of profit.

[9] Generally, the factual findings made by a judge in determining whether the reasonable expectation of profit test is met in a particular case must stand in the absence of palpable and overriding error. The judge in this case considered the relevant factors and in my view, his factual findings were reasonably open to him, given the documentary evidence and testimony presented. However, that does not resolve this appeal. That is because the record discloses a more fundamental issue as to whether the application of the statutory definition of "commercial activity" was properly before the judge at all.

[10] In that regard, it is necessary to recount the procedural history of this matter. It appears from the record that when the Minister (i.e., the Canada Revenue Agency acting for the Minister) issued the notice of assessment that led to Mr. Bowden's tax appeal, the Minister was of the view that Mr. Bowden was carrying on only one business, a financial services business. Mr. Bowden objected to the assessment on the basis that the input tax credits he had claimed related to his other businesses. Indeed, that is all his notice of objection said.

[11] The Minister did not confirm the assessment or reassess within the statutory 180 day period, and so Mr. Bowden exercised his right to appeal directly to the Tax Court, choosing the informal procedure. His notice of appeal as filed in the Tax Court is very short and reads as follows:

> On two (2) prior occasions, the Canada Revenue Agency (CRA) has been supplied with detailed information about what constituted the input tax credits (ITC's) claimed by me on the G.S.T. Returns for Registrants and obviously has chosen to completely ignore the facts presented to them and still make the assertion that ALL the ITC's claimed by a business collecting and remitting G.S.T. are to be denied.

[12] The Minister's reply to the notice of appeal is also short. The Minister's assumptions are found in paragraph 5 of the reply and read as follows:

> a) the appellant was registered for GST purposes;
> b) the appellant claimed ITC's of $4,419.71 for the period July 1, 2007 to December 31, 2008; and
> c) the appellant operated an investment business from July 1, 2007 to December 31, 2008.

[13] The judge read the third assumption as implicitly including the assumption that the appellant operated only an investment business during the relevant time. In my view, that is a fair interpretation of the Minister's pleading. It is consistent with the fact that the Minister had not concluded his review of the issues raised in Mr. Bowden's notice of objection when Mr. Bowden filed his notice of appeal in the Tax Court.

[14] Based on the circumstances as revealed in the record, the Minister had been informed of the basis upon which Mr. Bowden objected to the assessment. Specifically, the Minister was informed that Mr. Bowden was asserting that the input tax credits were claimed in relation to businesses other than his financial services business.

[15] However, nothing in the Minister's reply informed Mr. Bowden that the Minister would take the position in the Tax Court that any business activity of Mr. Bowden apart from his financial services business would fall outside the statutory definition of "commercial activity". In my view, that lack of notice in the Minister's reply caused significant prejudice to Mr. Bowden, because it deprived him of notice that the success of his appeal could depend on evidence relating to the

reasonable expectation of profit test. The most striking example of this prejudicial omission was the absence of a full history of his various businesses for a period of time much longer than the period covered by the input tax credit claims in issue. Mr. Bowden asserted in this Court that he had such evidence and he could have produced it if he had known it would be relevant.

[16] The judge noted this deficiency in the Minister's pleadings, but in the end concluded that Mr. Bowden was not prejudiced by the deficiency. He explains why at paragraph 10 of his reasons:

> 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.

[17] In my respectful view, it was not reasonably open to the judge, based on the spreadsheets to which he referred, to conclude that Mr. Bowden had sufficient notice that the Minister would rely on the reasonable expectation of profit test. It is apparent that the spreadsheets were aimed at proving the allocation of input tax credit claims relating to Mr. Bowden's various business activities, which is clearly what Mr. Bowden thought would be in issue based on his notice of objection, his notice of appeal, and the Minister's reply. The spreadsheets do not disclose relevant evidence about the profit and loss history of Mr. Bowden's businesses for the full period of time that could be taken into account in a reasonable expectation of profit analysis.

[18] The Minister argued that the Mr. Bowden did not complain of any such prejudice in his memorandum of fact and law, but raised this issue only in oral argument, not giving the Minister a reasonable opportunity to respond. It is true that Mr. Bowden did not refer to this issue in his written submissions. However, the relevant facts are abundantly clear from the record and were known to the Minister, and the legal implications of those facts are readily apparent. Counsel for the Minister, to his credit, candidly admitted that when the debate in the Tax Court evolved into a discussion of the reasonable expectation of profit test, he should have applied to amend the pleadings (which undoubtedly would have led the judge to consider whether an adjournment was in order).

[19] For these reasons, I have concluded that Mr. Bowden's appeal should be allowed and the judgment of the Tax Court set aside.

[20] I have considered whether this matter should be returned to the Tax Court for a new trial, or whether the merits of Mr. Bowden's appeal should be determined by this Court on the record as it now stands. In view of the fact that the amount of tax involved is less than $5,000, I have concluded that the interests of justice would be best served by dealing with the merits of appeal in this Court.

[21] The Minister assumed as a fact that Mr. Bowden carried on only one business during the relevant period, a financial services business in respect of which input tax credits could not be claimed. That assumption must be accepted as fact unless it is rebutted by the evidence. Mr. Bowden adduced evidence that is capable of establishing that he was engaged in a business activity during the relevant time that was not a financial services business. That evidence is not challenged

and is sufficient to rebut the Minister's principal factual assumption. Since the application of the statutory definition of "commercial activity" was not properly raised on the pleadings, Mr. Bowden's appeal should not be determined on that basis.

[22] The only remaining issue is the allocation of the claimed input tax credits as between Mr. Bowden's financial services business and his other business. Mr. Bowden submitted a spreadsheet establishing that allocation. It appears from the transcript that the judge had it in mind that if he had concluded that Mr. Bowden was entitled to some input tax credits, the proceedings would be adjourned to permit the Minister to determine the allocation based on an audit. That would necessarily involve an indefinite delay in a matter that has already consumed considerable time and resources. In light of the small amounts involved, I would direct the Minister to reassess on the basis that Mr. Bowden's spreadsheet be accepted as accurate (see spreadsheet, Appeal Book, Tab 10, at page 85).

[23] I would allow this appeal, set aside the judgment of the Tax Court and, giving the judgment that should have been given, I would allow Mr. Bowden's tax appeal and refer the GST assessment back to the Minister for reassessment in accordance with these reasons.

[24] Mr. Bowden is entitled to his costs in this Court. As he is self represented, his costs are essentially limited to his disbursements relating to his appeal in this Court. In the interest of saving time and resources, I would fix the costs in this Court at $800. As the proceedings in the Tax Court

were commenced under the informal procedure, Mr. Bowden is not entitled to the costs of the Tax Court proceeding.

"K. Sharlow"

J.A.

"I agree
Johanne Trudel"

"I agree
David Stratas"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-330-10
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE BOWIE, DATED JULY 15, 2010, DOCKET NO. 2010-467 (GST) I)	
STYLE OF CAUSE:	WAYNE BOWDEN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 23, 2011
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	TRUDEL J.A. STRATAS J.A.
DATED:	June 29, 2011

APPEARANCES:

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