Docket: 2006-1779(IT)G

BETWEEN:

ROBERT MARCON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 4, 2008, at Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Anne Poirier

JUDGMENT

The appeal from the notice of reassessment made under the *Income Tax Act*, dated March 22, 2004 and relating to the Appellant's 1999 taxation year, is dismissed without costs in accordnace with the attached Reasons for Judgment.

Signed at Ottawa, this 21st day of February 2008.

"Real Favreau"

Favreau, J.

Translation certified true
on this 10th day of April 2008.

Brian McCordick, Translator

Citation: 2008TCC116
Date: 20080221
Docket: 2006-1779(IT)G

BETWEEN:

ROBERT MARCON,

Appellant,

et

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau, J.

[1] This is an appeal from a notice of reassessment made under the *Income Tax Act*, R.S.C. 1985, c. 1, 5th Supp., as amended (the "*Act*") and dated March 22, 2004, by which the Minister of National Revenue ("the Minister") added to the Appellant's income, for the 1999 taxation year, an amount of $75,000 as income from a business in connection with the sale of a fish farm.

[2] A waiver of the normal reassessment period for the 1999 taxation year relating to the tax consequences resulting from the sale of the fish farm was signed by the Appellant's agent on June 5, 2003.

[3] In issuing and confirming the notice of reassessment of March 22, 2004 for the 1999 taxation year, the Minister relied in particular on the following findings and assumptions of fact:

a) In 1999, the Appellant sold his fish farm and certain other assets for a total amount of $327,000 but he did not report this sale in his income tax return for the 1999 taxation year.

b) After an audit of the documents relating to the sale of the fish farm, the auditor made the following changes to the Appellant's income:

i) a capital gain of $46,590 realized on the sale of the capital property of the fish farm was added;

ii) a deduction for capital gains on eligible agricultural property of $34,942 was allowed;

iii) a recovery of $1,360 on the sale of the capital property was added; and

iv) a profit of $75,000 was added relating to the sale of the inventory.

Only this last point was contested and is in dispute in this appeal.

c) In this type of business, as the costs incurred to bring the fish to maturity are totally deductible as expenses, the entire amount of $75,000 was included in the Appellant's income.

d) The sale of the fish farm was made between unrelated parties dealing with each other at arm's length and the assessment was issued in relation to the amounts set out in the notarized contract of sale, namely $75,000 for the inventory.

e) The Appellant did not supply any document which could show the cost of the inventory and never produced any balance sheets throughout the years of operation of the fish farm.

f) In July 2003, the taxpayer's agent, François Vien, submitted a worksheet indicating that the inventory had been sold at a price of $75,000 and that the cost of this inventory was $40,000.

g) After the issuance of the draft assessment, the Appellant told the auditor that, contrary to what was specified in the contract of sale, the inventory did not amount to $75,000, but rather to $12,000, and that the difference represented goodwill.

h) On their balance sheets, the purchasers treated the entire amount of $75,000 as inventory.

i) The low income reported by the Appellant during the five years preceding the sale of the fish farm indicates that the goodwill was not very significant.

j) The Appellant failed to adduce any evidence to show that the value of the goodwill was $75,000 and the following factors were considered to show that the goodwill was worthless:

i) the Appellant's net income is minimal or negative and the cost of the capital property is high;

ii) customers of this type of business tend to follow the service provider rather than the place of operation so that had the Appellant decided to conduct the same type of business in the surrounding area, most of his clients would have remained with him;

iii) the purchasers would not have paid $327,000 for a net income after tax of about $2,820 per year because they would have earned almost no return on their investment;

iv) according to the average after-tax income of the last five years, the value of the business was about $15,000 to $30,000, which indicates that what the purchasers acquired for $327,000 were the facilities.

[4] On December 24, 2007, counsel for the Respondent filed with the Court Registry a certificate relating to an expert's report under Rule 145(1)(*b*), to which was attached the expert's report (index) of Alexandre Lacombe-Lavigne, M.Fin. and Bic Thu Thi, EEE, dated December 21, 2007. Their mandate was to provide an index of the true market value of the goodwill of Pisciculture de Namur Enr. as at March 17, 1998. Ms. Bic Thu Thi testified and explained why she and her colleague concluded that the goodwill was non-existent and had zero value. The conclusions of the report are set out at page 6 as follows:

> [TRANSLATION]
>
> Valuation of goodwill
>
> Considering that goodwill is the difference between going concern value and the sum of the net tangible assets, and that these values have been respectively assessed at $0 and $199,500, we assign a value of $0 to the goodwill.
>
> Corroboration
>
> Investing $199,500 to obtain $6,700 annually, before adjusting for salaries, represents a rate of return of about 3.36%. If we disregard the amount invested in inventory, $75,000, we obtain a return of 5.38%. By comparison, the rate of return on long-term Canadian government bonds was 5.73% on March 18, 1998 (according to Bank of Canada data).
>
> In buying a small private business, an investor would normally require a return greater than the risk-free return (Canada bonds) so as to take account of various risks tied to the market, the size of the business, etc. In this case, the company's rate of return, which is not greater than the risk-free rate, leads us to conclude that the goodwill is non-existent.

The value of the net tangible assets of the business was determined as $199,500 after deducting the value of assets not directly employed in the operation of the business.

[5] Robert Marcon and his agent, François Viens, an accountant to whom Mr. Marcon is related, testified and in particular provided the following explanations:

a) The operating licence for the fish farm was for a fishing pond so that the sale of farmed fish was prohibited.

b) The sale of the fish farm was not reported by the Appellant in his 1999 income tax return because he thought the $500,000 capital gains exemption for the disposition of an agricultural business applied to the sale.

c) The fact that the Appellant abandoned the fish farm on March 29, 1998 while the sale was notarized only on January 29, 1999 led to some confusion as to the year of disposition of the fish farm for tax purposes.

d) The delay in notarizing the sale was due to the difficulties experienced by the purchasers in obtaining financing.

e) After an independent evaluation of the tangible assets of the fish farm and the other assets sold, the sale price was reduced from $350,000 to $327,000 and the goodwill was removed as an element of the sale price because this type of asset could not be financed by the lending institution.

f) Their valuation of the inventory was notional because it was based on estimates of fish growth without the purchase of new eggs.

[6] As regards the breakdown of the $350,000 proceeds of the disposition of Pisciculture de Namur Enr., the Appellant's agent admitted sending the notary handling the transaction a letter dated October 25, 1998 in which $45,000 was allocated for inventory and $65,000 for goodwill, whereas in a similar letter dated November 17, 1998, the new breakdown of the $350,000 disposition proceeds allocated $45,000 for inventory and $40,000 for goodwill.

[7] The contract of sale of January 29, 1999 refers to a pre-contract entered into on December 16, 1998 which was accepted by the vendor on the same date. Aside from some inconsistencies, the parties confirmed the agreements contained therein which were not reproduced in the contract of sale of January 29, 1999. This pre-contract was not filed in Court.

[8] Considering that the contract for the sale of the fish farm was concluded between parties dealing at arm's length with each other and that no simulation or subterfuge was involved in this case, the Appellant has the burden of proving that the breakdown of the sale price in the contract is unrealistic and that his own breakdown is reasonable in the circumstances.

[9] On the basis of the two letters addressed to the notary in October and November 1998, it is clear that the contracting parties had the opportunity to negotiate the breakdown of the sale price set out in the contract.

[10] The Appellant was unable to show that the breakdown of the sale price accepted by the Minister was unrealistic or unreasonable. The notional method he used to value the inventory is, at the least, very imprecise and unreliable. No document was filed that could establish the cost of the inventory at the time of the sale except for a suggested price list for the sale of seed trout in Quebec.

[11] In addition, the Appellant was unable to show the existence of a significant goodwill for his business and was unable to contradict the conclusions of the expert's report filed by the Respondent.

[12] The contradictory positions taken by the Appellant and his agent during the audit (see paragraphs 3(f) and 3(g) above) and the letters from the Appellant's agent in the days preceding the signing of the contract of sale clearly establish that the breakdown supported by the Appellant is unreasonable in the circumstances and not based on reliable data.

[13] The appeal is dismissed without costs.

Signed at Ottawa, Canada, this 21st day of February 2008

"Réal Favreau"

Favreau, J.

Translation certified true
on this 10th day of April 2008.

Brian McCordick, Translator

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STYLE OF CAUSE:	Robert Marcon and Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	February 21, 2008

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Anne Poirier

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada