

Docket: 2005-1804(IT)G

BETWEEN:

JOLLY FARMER PRODUCTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by conference call on February 25, 2008 at Ottawa, Ontario.

Before: The Honourable D.G.H. Bowman, Chief Justice

Appearances:

Counsel for the Appellant: John Townsend

Counsel for the Respondent: Cecil Woon

AMENDED REASONS FOR ORDER

These reasons for order signed on February 27, 2008 should be amended as follows:

At page 4 of the Reasons for Order, paragraph 11, the citation order should read as follows: “See *Orly Automobiles Inc. v. R.*, [2004] G.S.T.C. 57 (T.C.C.), *aff’d*. [2005] G.S.T.C. 200 (F.C.A).”

Signed at Ottawa, Canada, this 19th day of March 2008.

“D.G.H. Bowman”

Bowman, C.J.

Citation: 2008TCC124
Date: 20080319
Docket: 2005-1804(IT)G

BETWEEN:

JOLLY FARMER PRODUCTS INC.,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Bowman, C.J.

[1] This motion was heard by conference call. Lengthy affidavits and authorities were submitted.

[2] The appellant seeks to have certain assumptions in the Reply to the Notice of Appeal struck out. The facts as stated in the pleadings (and they may differ from those proved at trial) are that the appellant owned land in Northampton in New Brunswick. It carried on a farming and greenhouse operation. It had about 80 shareholders and upwards of 200 non-shareholder employees.

[3] On the appellant's property was, apparently, a "Village" and a building called the "Commons" which contained a number of amenities. The principal issue is whether the appellant is entitled to deduct capital cost allowance on the Village, the Commons and the equipment in the Commons as well as certain land clearing costs.

[4] The Crown's position is that the property was not acquired for the purpose of gaining and producing income, and that the cost of land clearing was not an expense laid out for income earning purposes. This is strictly a factual issue.

[5] The paragraphs that the appellant wants to strike out are the following:

- (m) all shareholders of the Appellant are required to be members of a Christian community who lead a strict spiritual and temporal life (the “Church”);
- (n) all shareholders of the Appellant are required to follow the rules/teachings of the Church;
- (p) all shareholders of the Appellant are required to live a simple, basic life and to be as self-sufficient as possible;
- (q) a shareholder of the Appellant can be dismissed and the Appellant has the right to redeem the shares of a shareholder of the Appellant who does not follow the rules/teachings of the Church or live on the Appellant’s premises;
- (r) at all relevant times, George Eversfield was the leader of the Church;
- (ddd) at all relevant times, the Village, the Farmhouse, the Commons and the outdoor farm operation enabled the shareholders of the Appellant to live in accordance with the rules/teachings of the Church; and
- (eee) at all relevant times, the Village, the Farmhouse, the Commons and the outdoor farm operation enabled the shareholders of the Appellant to live in a community based on a set of common religious values including the values referred to in paragraph (p);

[6] The grounds for the motion for striking out the subparagraphs are:

- a. The assumptions in the subparagraphs may prejudice or delay the fair hearing of the appeal;
- b. The assumptions in the subparagraphs are scandalous, frivolous and vexatious;
- c. The assumptions in the subparagraphs are an abuse of the process of the Court;
- d. The assumptions in the subparagraphs are neither material nor relevant to the matters in issue;
- e. The assumptions in the subparagraphs are the opinion of an assessor;
- f. The assumptions in the subparagraphs are so irrelevant that to allow them to stand would involve useless expense and would prejudice the appeal by involving the parties in a dispute that is wholly apart from the issues;

- g. Such further and other grounds as Counsel may advise; and
- h. The Appellant will rely on Rule 53 of the *Tax Court of Canada Rules (General Procedure)* (the Rules).

[7] Mr. Woon opposed the motion on behalf of the respondent. He argued that the appellant had taken a fresh step after the Reply was filed and that under section 8 of the *Tax Court of Canada Rules (General Procedure)* the appellant could not attack the pleading without leave of the Court. There is merit in this position but I prefer not to base my decision on this ground.

[8] Mr. Townsend argues that if the impugned paragraphs stand it will add substantially to the length of the case as he would have to put in evidence of the religious beliefs and practices of the shareholders of the appellant. Frankly, I doubt it. The assumptions in question strike me as somewhat innocuous. Even if they were admitted it would seem that they neither detracted from the appellant's case nor enhanced the respondent's.

[9] Having said in a number of cases that it is wrong for the Crown to fail fully to plead all assumptions made on assessing, I would be reluctant to strike out assumptions on a preliminary motion on the basis that they are irrelevant. Indeed, it would be unfortunate if the Crown were to decide, unilaterally, to fail to disclose an assumption because they considered it irrelevant. What may seem irrelevant to the drafter of the Crown's reply may be highly relevant to an appellant. Moreover, if the Minister bases an assessment upon an irrelevant fact an appellant may wish to argue that this in itself is a relevant fact in considering the correctness of the assessment. In other words, if an important basis of an assessment is an irrelevancy this may go a considerable way in casting doubt on the assessment itself.

[10] Mr. Woon argues that the religious practices and beliefs of the shareholders are a relevant consideration in the context of the assumptions considered in their entirety. I am not at present persuaded of their relevancy. How the religious beliefs of the shareholders of the appellant can affect the determination whether the cost of building or acquiring a piece of property or of clearing land has an income earning purpose is not readily apparent to me on the material filed on this motion. However, the relevance may emerge in the context of the evidence as a whole and I prefer to leave the question of relevancy to the trial.

[11] Mr. Townsend also argued that the "religious assumptions" as he described them were not disclosed to the appellant before the assessment was made. I do not

think that this justifies their being struck out or results in the respondent having cast upon her the onus of proving something that is peculiarly within the knowledge of the appellant. See *Orly Automobiles Inc. v. R.*, [2004] G.S.T.C. 57 (T.C.C.), *aff'd*. [2005] G.S.T.C. 200 (F.C.A.).

[12] The motion is therefore dismissed. The matter of costs will be left for determination after the trial, which is set for hearing at 9:30 a.m. on Monday, June 23, 2008 at the Tax Court of Canada, Westmorland Place, 82 Westmorland Street, Fredericton, New Brunswick.

Signed at Ottawa, Canada, this 19th day of March 2008.

“D.G.H. Bowman”

Bowman, C.J.

CITATION: 2008TCC124

COURT FILE NUMBER: 2005-1804(IT)G

STYLE OF CAUSE: Jolly Farmer Products Inc. v.
Her Majesty The Queen

PLACE OF HEARING:
(CONFERENCE CALL) Ottawa, Ontario

DATE OF HEARING: February 25, 2008

REASONS FOR ORDER BY: The Honourable D.G.H. Bowman,
Chief Justice

DATE OF ORDER AND
REASONS FOR ORDER: February 27, 2008

DATE OF AMENDED ORDER &
REASONS FOR ORDER: March 19, 2008

APPEARANCES:

 Counsel for the Appellant: John Townsend

 Counsel for the Respondent: Cecil Woon

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