

Docket: 2005-472(IT)G

BETWEEN:

BBM CANADA
(FORMERLY BBM BUREAU OF MEASUREMENT),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 19 and 20, 2007, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: J. Gregory Richards
D. Keith Laushway
Nikiforos Iatrou

Counsel for the Respondent: André LeBlanc

JUDGMENT

The appeal is allowed, with costs, and the reassessment is vacated.

Signed at Ottawa, Canada, this 13th day of June 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008TCC341
Date: 20080613
Docket: 2005-472(IT)G

BETWEEN:

BBM CANADA
(FORMERLY BBM BUREAU OF MEASUREMENT)

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle, J.

[1] The issue in this case is whether the Appellant is a not-for-profit entity that is exempt from tax under Part I of the *Income Tax Act*.

[2] The Appellant is a non-share capital corporation set up to provide impartial and accurate audience measurement data to its members. Its voting members are Canadian television and radio broadcasters, advertising agencies, and representative advertisers. Its non-voting members are other entities wanting access to this data. The Appellant's income is virtually all derived from its members. Member fees are set in advance on a cost recovery basis having regard to the annual budget set for the upcoming year. Any surpluses realized as a result of actual performance in the year, or which are budgeted for, were reasonable in amount in the circumstances and were used or held for purposes related to the Appellant's activities. None of the Appellant's income was directly or indirectly distributed to, or available for distribution to, any of its members.

[3] The above paragraph summarizes the key facts upon which the Appellant and the Respondent agree. The parties disagree on whether the Appellant is a tax-exempt not-for-profit entity described in paragraph 149(1)(l) of the *Income Tax Act*. Canada Revenue Agency reassessed the Appellant's 1996 taxation year denying that exemption.

[4] Specifically, the only issue between the parties is whether BBM was organized and operated exclusively “for any other purpose except profit”. Prior to the hearing CRA and the Crown had also been of the view that (i) the Appellant’s surpluses were, at the time in question, unreasonably high and thus evidenced an unstated profit purpose of the Appellant, and (ii) that there had been indirect distributions to at least one of the Appellant’s members. However, the Crown abandoned these two arguments completely at the outset of trial. Simply put the Crown’s position is that an organization cannot be considered to be organized and operated exclusively for a purpose other than profit if the establishment or operations of the entity are related to the commercial or business activity of its members or of others. This is not how this provision has been applied (by CRA and the courts) to date. In its written submissions the Crown says that time has come for the Court to recognize such an objective requirement.

I. Law

[5] Paragraph 149(1)(l) reads as follows:

149(1) No tax is payable under this Part on the taxable income of a person for a period when that person was

[...]

Non-profit organizations

(l) a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder

149(1) Aucun impôt n’est payable en vertu de la présente partie, sur le revenu imposable d’une personne, pour la période où cette personne était :

[...]

Organisations à but non lucratif

l) un cercle ou une association qui, de l’avis du ministre, n’était pas un organisme de bienfaisance au sens du paragraphe 149.1(1) et qui est constitué et administré uniquement pour s’assurer du bien-être social, des améliorations locales, s’occuper des loisirs ou fournir des divertissements, ou exercer toute autre activité non lucrative, et dont aucun revenu n’était payable à un propriétaire, un membre ou un actionnaire, ou ne pouvait par ailleurs servir au profit personnel de ceux-ci, sauf si le propriétaire, le membre ou l’actionnaire était un cercle ou une

was a club, society or association association dont le but premier et la
the primary purpose and function fonction étaient de promouvoir le sport
of which was the promotion of amateur amateur au Canada;
athletics in Canada;

[6] While the French and English versions of paragraph 149(1)(l) differ in that the French version no longer expressly uses the concept of “*fins*”, and does not use the word “*but*”, the parties were in agreement that implicitly the French “... qui est constitué et administré uniquement pour... exercer toute autre activité non lucrative...” was the equivalent of the English “... organized and operated exclusively... for any other purpose except profit...”. The word “*but*” appears in the French marginal notes. I agree with the parties that there is no relevant inconsistency or difference between the two versions of paragraph 149(1)(l).

[7] This exemption first appeared, with essentially the same wording, as paragraph 5(g) of the *Income War Tax Act* of 1917.

II. Facts

[8] The parties filed a Partial Agreed Statement of Facts at the outset of trial, a copy which is attached as an appendix to these reasons. The Appellant called two witnesses. The Chief Executive Officer and the Chief Financial Officer of BBM testified over a period of two days. In addition, more than 250 documents were entered as exhibits.

[9] The Bureau of Broadcast Measurement was founded in 1944. BBM was incorporated as a federal non-share capital corporation in 1945 to carry on the activities of the Bureau of Broadcast Measurement. As described below, it was set up by representatives of the radio and television broadcast industry, together with advertisers and advertising agencies. Prior to the establishment of the Bureau of Broadcast Measurement, the Canadian broadcasting sector was faced with conflicting or inconsistent claims of listening or viewing audience or, in some markets, without any measure of listening or viewing audience. BBM was established as a research organization that would provide impartial, high quality and trusted audience estimates to its members. Many Canadians are familiar with BBM through their participation over the years in completing research survey cards tracking their actual television viewing or radio listening habits over a period of a week or more. Each year hundreds of thousands of such surveys are completed by Canadians of all ages from across the country. In recent years, paper diaries for television surveys have been replaced in major Canadian cities with electronic

monitoring tools. The traditional paper diaries remain in use in smaller centres and for radio research surveys. Canadians participate in these surveys on a voluntary basis, receiving a nominal \$2 or \$5 by way of thanks. BBM recruits volunteers from call centres it operates in Moncton, Montreal and Toronto where they have 200 to 400 part-time and full-time employees.

[10] The purposes and objects of BBM set out in its Letters Patent are:

- (a) to design and conduct surveys, to assemble statistical and other data, to do marketing research and other studies relating to radio and television broadcasting and other forms of advertising media and particularly relating to the number, distribution and listening, viewing and reading habits of persons who are or may be listening to or viewing programs of the various radio and television broadcasting stations or who are exposed to or may be influenced by other forms of advertising media at different times and from time to time;
- (b) to prepare reports, charts and other forms of information based on surveys and statistical and other data assembled as aforesaid and to print, publish and distribute the same to members.

[11] The Letters Patent also provide:

And it is further ordained and declared that the business of the Corporation shall be carried on without pecuniary gain to its members and that any profits or other accretions to the Corporation shall be used in promoting its objects.

[12] BBM has several classes of members and each are represented in a balanced fashion in its governance structures. BBM's Board of Directors and operating committees are filled by volunteers from its more than 600 members. BBM's three classes of voting members are Broadcasters, Advertisers and Advertising Agencies. The names are self-descriptive. In addition, there is an Associate Member non-voting class.

[13] BBM's survey information and results are only available to its members. Its data is not offered for sale or otherwise available to non-members. BBM's data is used by its members for a number of purposes. Broadcasters use it to make programming decisions and for program creation decisions. This includes both private and public broadcasters. BBM's broadcast members include non-commercial public broadcasters such as CBC Radio, TVO and TVQ. Private

broadcasters also use the data for pricing advertising. Broadcasters also use the data to account to broadcast regulators like the Canadian Radio-television and Telecommunications Commission or CRTC to demonstrate they are fulfilling their licence requirements, as well as to measure their performance and reach against actual ratings. Public broadcasters use the data to determine the extent to which they are fulfilling their publicly-funded mandate to Canadians. By way of example, BBM data contributed to getting local news back on CBC radio in recent years. Advertisers and advertising agencies use the information in making their advertising decisions concerning stations and pricing.

[14] Non-voting Associate Members are not broadcasters, advertisers or advertising agencies but need or want access to BBM's data. They include government agencies and departments, and colleges and universities. For example, Statistics Canada uses BBM's data for its Culture Statistics Program and publications. The CRTC uses the data for its public policy purposes of ensuring broadcasters are reflective of Canada as a whole, as well as to monitor the entry of unregulated "grey market" channels. The Canadian Television Fund provides direct funding to encourage the creation of Canadian programming and has BBM data available to evidence whether the type of programs produced are what Canadians choose to watch. Heritage Canada is an associate member, presumably for similar reasons. University and college members want to be able to use BBM data for educational research purposes.

[15] In the past two decades, competitive commercial businesses have only entered the television viewing survey business and only in select large Canadian city markets. Thus far the Canadian broadcast industry and BBM's other members have favoured BBM for its all markets, same pricing approach, which goes so far as to include any remote market with a broadcaster who wants or needs dependable measurement data.

[16] In 1992 BBM began doing custom research for members and non-members. This custom research work was pursued as part of a plan to utilize what would otherwise be down time at the call centres. This division was transferred to a taxable subsidiary corporation by the end of 1996. It had generated a loss in each of its years to 1996.

III. Positions of the Parties

[17] The Appellant's argument is that it meets all of the requirements of the exemption found in paragraph 149(1)(l), in particular:

- (a) In the opinion of the Minister, it is not a charity. This has been agreed to.
- (b) None of the income of BBM is available for distribution to its members. This has also been agreed to.
- (c) BBM was established and is operated “for any other purpose except profit”. The Appellant points out that the phrase “any other purpose except profit” is disjunctive from the list of specifically enumerated objects such as community improvement, recreation and social welfare. This is evidenced from the repetition of the word “for” in the phrase “or for any other purpose”. The Appellant maintains that, being disjunctive and given the use of the words “any other”, the phrase should not be read *ejusdem generis*, that is in a manner restricted to similar kinds of purposes. The Crown agrees that it should be read disjunctively and should not be interpreted *ejusdem generis*. However, the Crown does not agree that BBM was established or operated for any other purpose except profit.

[18] The Appellant argues that the absence of a profit purpose to BBM’s establishment and its activities are evident from the fact that it operates on a cost recovery basis and that its revenues are received from its members.

[19] In addition, BBM relies significantly on the decision of this Court in *Canadian Bar Insurance Association v. H.M.Q.*, 99 DTC 653. In that case Justice Mogan held that the CBIA qualified for the paragraph 149(1)(l) exemption for non-profit entities. It is clear from the reasons that CBIA made a broad range of insurance products available to the Canadian legal community at reasonable and stable rates and within the commercial and competitive insurance industry.

[20] The Respondent argues that the phrase “any other purpose except profit” means that the establishment and operations of the entity cannot be related to any commercial or business activity. Applying such a requirement, the Crown argues that the Appellant cannot meet it since it undertakes its audience measurement activities for the benefit of its members who use that information in their commercial businesses. The Crown stresses that it is not advocating that the phrase “or for any other purpose except profit” be read *ejusdem generis* with the preceding enumerated activities. Indeed to do so would ignore the words “any other”. The Crown’s proffered interpretation is not the basis that has been applied

by CRA or the courts to date in considering this provision. The Crown argues however that virtually all of the reported cases to date have considered situations where the purpose for which the organization was established and operated had some public benefit component and the activities in question were carried on to fund the social, community or public benefit purpose of the organization. The Crown acknowledges it is somewhat difficult to reconcile the *Canadian Bar Insurance Association* case with this newly proffered theory. As discussed later, I think it is also somewhat difficult to fully reconcile the decision of this Court in *Gulf Log Salvage Co-operative Association v. M.N.R.*, 60 DTC 239 with such an interpretation.

IV. Analysis

[21] The expression “... organized and operated exclusively... for any other purpose except profit...” must be read in context, according to its ordinary sense, harmoniously with the scheme of the *Act*, its object and the intention of Parliament. In other words, this Court should apply the exception as it is worded, provided that is consistent with the provision read in context and does not frustrate or do injustice to the purpose of the provision. See *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency*, 2007 DTC 5527 (S.C.C.) at paragraph 16 and *Klassen v. H.M.Q.*, 2007 DTC 5612 (F.C.A.) at paragraph 17.

[22] In considering whether the term profit can be read in such a way as the Crown suggests, I am conscious of the fact that profit has an ordinary commercial meaning and a meaning under the *Income Tax Act* that, as described below, in each case generally means net income realized after expenses are deducted.

[23] The *Canadian Oxford Dictionary* defines the noun “profit” as “1 financial gain; excess of returns over outlay. 2 an advantage or benefit.” The *Compact Oxford English Dictionary* defines it as “1 a financial gain, especially the difference between an initial outlay and the subsequent amount earned. 2 advantage; benefit.” The *Larousse de poche* defines “lucratif-ive” as “qui procure un gain”, that is which procures a gain. *Le Petit Robert* defines it as “qui procure un gain, des profits, des bénéfices”, that is which procures a gain, profits or benefits. These dictionary definitions do not make express reference to the gain being from an activity related to commerce or business.

[24] The most notable use of the term “profit” in the *Act* is in subsection 9(1) wherein a taxpayer’s income for a year from a business or property is defined to be his profit therefrom for the year, or in French “le bénéfice”. Profit is not defined in

the *Act* but has been consistently interpreted by the courts to mean the difference between the receipts in a period and the expenditures laid out to earn those receipts. See for example the Supreme Court of Canada in *Canderel Ltd. v. H.M.Q.*, 98 DTC 6100 and in *M.N.R. v. Irwin*, 64 DTC 5227, the Judicial Committee of the Privy Council in *M.N.R. v. Anaconda American Brass Ltd.*, 55 DTC 1220, and the Exchequer Court in *Associated Investors of Canada Ltd. v. M.N.R.*, 67 DTC 5096. In *Woodward's Pension Society v. M.N.R.*, 62 DTC 1002 it is clear (at 1004) that the Supreme Court of Canada gave profit just such a meaning in considering the predecessor of paragraph 149(1)(l). This is also evident from President Thorson's reasons in the Exchequer Court, 59 DTC 1253 at 1260.

[25] The commercial and accounting meaning of the term profit is to the same effect.

[26] Another textual consideration is that the Crown's suggestion that profit means for a non-commercial or non-business purpose, would also be using the term "business" in a different sense than as it is defined for purposes of the *Income Tax Act* in subsection 248(1). Business is defined to include an undertaking of any kind whatever. Thus, many tax-exempt entities have a business as defined.

[27] The final textual consideration is that the Crown's attempt to reconcile the existing paragraph 149(1)(l) jurisprudence with its position in this case by arguing that the decided cases all involved organizations having at least some public benefit would require an odd interpretation of the word "exclusively" in paragraph 149(1)(l) which clearly qualifies the purpose for which the entity is established and operated.

[28] Turning to a contextual consideration of the Crown's argument that "for any other purpose except profit" means unrelated to any commercial or business activity, I am mindful of the fact that the tax exemptions set out in section 149 and those for registered charities in section 149.1 contemplate tax exemptions for entities that are to some extent involved in commerce or business.

[29] Section 149.1 is clear and express when it wants to prohibit or restrict business activities. Section 149.1 permits a charitable organization to carry on a related business. A related business for this purpose is defined to include a business that is unrelated to the objects of the charity in certain circumstances.

[30] Similarly tax-exempt entities listed in subsection 149(1) include some whose activities relate to commerce or business. These include agricultural organizations,

boards of trade and chambers of commerce, housing corporations, labour organizations, mutual insurance corporations, farmers' and fishers' insurance corporations, trusts to provide business compensation or vacation pay, and fraternal benefit societies providing life insurance.

[31] There are at least two decisions of this Court that would be inconsistent with the Crown's position in this case that the purpose of an organization cannot include a purpose that is not for the public good or that is related to commerce or business.

[32] In *Canadian Bar Insurance Association* the organization was engaged in selling various insurance products to lawyers. These included life insurance and disability insurance, including coverage for business expenses during disability. It did this in a sector populated with commercial insurance companies and Justice Mogan said there was no doubt the CBIA engaged in a high level of commercial activity but held "that high level of commercial activity, by itself, does not prove that the Appellant operated for profit." He went on to conclude that the CBIA's attempt to provide insurance products at cost to the legal community was not a cloak to avoid payment of tax on a commercial enterprise but was the real purpose of the CBIA. In BBM's case there was no evidence to suggest its members were trying to create a scheme to avoid taxation on their commercial enterprises by paying deductible member fees or dues, nor on the operations of BBM itself. BBM's true purpose was as set out in its Letters Patent.

[33] In *Gulf Log Salvage* it is clear that one of the purposes for which the entity was established was to deter private profiteers from salvaging logs that had gone astray from log booms owned by mill companies and sell them for their own profit at the expense of the owners.

[34] In these two cases, there is no suggestion that in order for the "any other purpose except profit" requirement to be met, the entity cannot be engaged in an activity that is for a purpose that is related to a commercial or business activity of its members. Clearly that could not be met in either the *Canadian Bar Insurance Association* or *Gulf Log Salvage* cases.

[35] I am unable to give profit the strained and unnatural meaning advanced by the Crown when (i) there is no ambiguity or inconsistency in the language used, (ii) to do so would be contextually inappropriate, and (iii) the language used is capable of a reasonable application based on its ordinarily understood meaning as is evidenced by such cases as *Canadian Bar Insurance Association* and *Gulf Log Salvage*.

[36] The Crown questions why the *Income Tax Act* should provide an exemption for taxes for a non-profit entity whose purpose is related to the commercial business activities of its members. That may be a valid question to consider if the provision's language were ambiguous, inconsistent or unclear and, as a result, incapable of reasonable application. That is not the case here so I am unable to read a public purpose requirement into the provision that is not there. If the tax authorities are unable or unwilling to persuade the Department of Finance to propose a legislative change to Parliament, it should not come looking to this Court hoping that, in the guise of interpretation, this Court will usurp Parliament's sole jurisdiction to write the law.

[37] The Supreme Court of Canada consistently cautions against courts, under the guise of statutory interpretation, relying on or developing unexpressed notions of policy or principle when called upon to apply provisions of the *Income Tax Act*. To do so would lead to intolerable uncertainty in the application of the *Act* and should be left to Parliament. See, for example, *65302 British Columbia Ltd. v. H.M.Q.*, 99 DTC 5799 (S.C.C.) and *Shell Canada Limited v. H.M.Q.*, 99 DTC 5669 (S.C.C.). More recently in *Canada Trustco Mortgage Co. v. Canada*, 2005 DTC 5523, the Supreme Court of Canada wrote unanimously at paragraph 11:

Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

[38] In short, the Crown's position that it is time for this Court to adopt a new and different "interpretation" of the term "organized and operated exclusively... for any other purpose except profit" because the Crown does not think the Court's application of the provision makes good sense given the Crown's view of the purpose of the provision, faces a very high threshold which, in my view, it is unable to meet. The words used in the provision, especially "profit", are clear, have well-accepted meanings and the Courts have been able to apply them in similar cases.

[39] The Crown argues that the Appellant only finds itself subject to Part I tax under the *Act* for 1996 because it chooses to budget on an anticipated cost recovery basis. If instead, the Crown goes on, the Appellant could ensure it was operating on an exact cost recovery basis, effectively recouping costs in arrears, or on a loss basis, it would not have any Part I tax payable even if it should not qualify for the

paragraph 149(1)(l) exemption. I do not see how this observation helps the Crown's position. To some extent it underscores why the Court should not be attracted to the Crown's position that the Court should undertake or mandate a significant revision of how the non-profit organization exemption has been applied over the last 90 years by the Canadian revenue authorities and tax courts. The Crown's suggestion is that the Court should take a whole new approach even though it would make little if any difference to the Appellant or to the non-profit sector if they just do their budgeting and accounting differently.

[40] The Crown's position is that an entity will be established and operated for a purpose other than profit only if its income is used to advance a public purpose of some sort. It does not seem appropriate for the Court to add a destination of funds test or requirement to discern purpose as advocated by the Crown. The Federal Court of Appeal rejected a destination of funds test for discerning qualifying purposes of charitable organizations in *Earth Fund v. M.N.R.*, 2003 DTC 5016 (F.C.A.). Justice Bowman, as he then was, rejected a destination of funds test in *Otineka Development Corporation Limited v. H.M.Q.*, 94 DTC 1234 (T.C.C.), at 1237, for discerning qualifying purposes of not-for-profit entities. The Supreme Court of Canada had earlier done the same in *M.N.R. v. St. Catharines Flying Training School Ltd.*, 55 DTC 1145. See also *Gull Bay Development Corporation v. H.M.Q.*, 84 DTC 6040 (F.C.T.D.), and *Tourbec (1979) Inc. v. M.N.R.*, 88 DTC 1439 (T.C.C.). If a destination of funds test is not a bright line test to qualify for charitable purposes or to qualify for not-for-profit tax-exempt status, it is not obvious to me why it should be for disqualifying non-profit entities of tax-exempt status.

[41] There are a number of other Canadian non-profit organizations that operate in areas that relate in some way to business or commerce. Further, essentially the same meaning is given to "non-profit organization" under the GST legislation in the *Excise Tax Act*. I note that in the recent decision of Chief Justice Bowman in *Canadian Medical Protective Association v. Canada*, 2008 TFCC 33, [2008] T.C.J. No. 162 (QL), it is clear that the CMPA is an entity whose activities relate to business or commercial activities of others, yet the Crown's Agreed Statements of Facts in that case acknowledged it to be a "non-profit organization" for GST purposes and this is not questioned. Similarly, I see confirmation from the Federal Court of Appeal's recent decision in *M.N.R. v. Greater Montreal Real Estate Board*, 2007 DTC 5740 of the fact that real estate boards are also commonly set up as non-profit, non-share capital entities. I suspect numerous business improvement associations are similarly set up. All of this confirms that it would be unwise at this stage and in this case to undertake such a significant revision to the law as is

requested by the Crown. If the Crown believes such a revision is needed it should be left to a possible legislative change which would only be done after a review of the need for such a change was done by persons responsible for tax policy, aware of the depth and breadth of the sector beyond just a snapshot of this Appellant's 1996 taxation year, aware of all of the fiscal impacts beyond the application of paragraph 149(1)(l) of the *Income Tax Act*, and which would allow for the possibility of consultation. Canadians, Canadian society, the provinces and the non-profit sector deserve as much.

[42] While I do not accept the Crown's position that "profit" essentially means related to commerce or business, I do need to turn to deciding whether, on the facts of this case in evidence and agreed to by the parties, the Appellant meets the requirements of paragraph 149(1)(l). There are two key requirements set out in paragraph 149(1)(l). The first is that the organization be organized and operated exclusively for any purpose except profit. The second is that no part of its income be paid to or available for the personal benefit of any member, proprietor or shareholder. The Crown acknowledges that this second requirement is satisfied.

[43] The first requirement that the purposes for which it was established and is operated be exclusively non-profit sets a high threshold. Similarly, the provision requires a focus on the entity's purposes and not merely its activities.

[44] While these are very strict and rigid requirements, and potentially permit a very broad review or inquiry into an organization's purposes, the analysis can be considerably abbreviated by the fact that the statutory language does not mandate a qualifying purpose but permits the organization to have any purpose or purposes other than the one disqualifying purpose of profit.

[45] The jurisprudence to date is largely very consistent on when an entity will not satisfy the first requirement. It is clear from such cases as *Woodward's Pension Society*, *Otineka*, and *Tourbec* that an entity cannot qualify for the paragraph 149(1)(l) exemption if it is unable to accomplish the objectives for which it was established unless it realizes profits with which to do that. In *Woodward's Pension Society*, the entity could not help fund pension benefits unless it made a profit on its trading in securities. In *Tourbec*, the entity could not provide travel for students at less than cost unless it made a profit on its sales to others. In *Otineka*, the entity could not fund other native organizations unless it made profits on its real estate development activities. BBM is not in such a position and does not fail this threshold test.

[46] It has long been CRA's view, published in Interpretation Bulletin IT-496 "Non-Profit Organization", that some things, such as the realization of significant profits or the accumulation of unreasonable reserves can be evidence of an unstated profit purpose. Other relevant considerations set out in the Bulletin are whether the entity's activities are operated in a normal commercial manner, whether goods and services are sold to non-members, whether it is operated on a profit basis rather than a cost recovery basis and whether it operates in competition with taxable entities carrying on the same trade or business. I agree that, in appropriate cases, these may be reasonable and relevant considerations, though they cannot all be requirements, they must be weighed appropriately in the circumstances of each case, and none will be determinative. However, in this case their consideration does not lead me to conclude BBM has an unstated profit purpose.

[47] The Crown has conceded BBM's reserves over the years were reasonable in amount relative to the needs of their operations.

[48] BBM operates on a cost recovery basis over the medium and long term even though it does not operate on a cost recovery basis each year. If its reserves are reasonable in relation to its needs, this means the reserves will be spent within a reasonable period.

[49] If its reserves are reasonable and it operates on a cost recovery basis, it would be hard to say an organization realizes significant profits.

[50] BBM only sells its data to its members. It would be difficult to impute a profit purpose to an organization that only sells to members on a cost recovery basis.

[51] While there is evidence of some competitive commercial participants entering some markets after BBM's presence was already fully established, they have not ever tried to compete with BBM's truly national focus.

[52] Caution needs to be taken with the Bulletin's consideration of whether the operations are operated in a normal commercial manner. In this case the Crown emphasized BBM had produced several internal reports and memoranda in the 1990s that stressed the need to create a business environment within BBM and to conduct its activities in a business-like manner. With respect, that is not what I would consider sufficient to put an organization offside. This is the language of strategic planning reports and action plans. More recently the phrase "accountable

to our stakeholders” would be expected to be used. This is not language that is unique to business or commerce. Indeed, businesses rarely need to be reminded to be business-like in their practices. This is the language of government departments and agencies as well as court administrators. It is the public sector, governments and quasi-governments, and the non-profit and charitable sectors that need to be reminded they should be business-like in their operations and delivery of services.

[53] The operations of not-for-profit entities like BBM lack a significant attribute of commercial businesses. There is no opportunity for their shareholders, members or controlling persons to benefit financially by way of profits, distributions, unrestricted salaries, capital appreciation of the undertaking or its assets, or in similar fashion.

[54] Notwithstanding my rejection of the Crown’s position in this case, it is not surprising or unusual to see some degree of public benefit or purpose from the operations of many organizations that are exempt from tax under paragraph 149(1)(l). In the case of BBM, the value of its national measurement data to non-commercial, quasi-government and government members in particular identifies its significance to the proper implementation and regulation of Canadian broadcast policy objectives for Canada’s public airwaves. However, a public benefit or purpose is not a prerequisite to qualifying for the paragraph 149(1)(l) exemption. The existence of public purpose or benefit is at best debatable in the case of golf clubs and sports clubs, social and dining clubs, many of which are private, condominium corporations and homeowners’ associations, advocacy organizations and the myriad of similar Canadian organizations that rely on this exemption.

[55] I will be allowing the appeal with costs.

[56] The facts of the proceeding raise an interesting question of onus and burden upon which I should comment even though my decision has been reached without needing to give either party the benefit of the onus or burden on the other party. This appeal is from a reassessment of BBM’s 1996 taxation year. BBM objected to that assessment and CRA confirmed it. BBM proceeded to file its Notice of Appeal in this proceeding. CRA later reassessed several of BBM’s later taxation years. When BBM objected, CRA allowed its objections. Since the evidence in this case indicated nothing had changed in those years, one is left wondering what CRA is doing. It is common for CRA to assess a taxpayer favourably for years and then reassess unfavourably and there is no estoppel or other principle to prevent this, nor would one normally be appropriate. Similarly, it would not be surprising to

find CRA returns to assessing later years favourably since the issue may not be flagged for later years of the taxpayer. But here, CRA has assessed the later years unfavourably, and after considering the objections, allowed the objections and recognized BBM's not-for-profit tax exemption. It is my view that, at least as a practical matter, this can significantly shift the burden of persuasion or explanation on the Crown.

Signed at Ottawa, Canada, this 13th day of June 2008.

"Patrick Boyle"

Boyle, J.

APPENDIX

Court File No. 2005-472(TT)G

TAX COURT OF CANADA

BETWEEN:

BBM CANADA
(formerly BBM Bureau of Measurement)

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

PARTIAL AGREED STATEMENT OF FACTS

THE APPELLANT AND THE RESPONDENT by their respective solicitors hereby admit, for the purposes of this proceeding only, the following facts:

1. The Appellant, BBM Canada ("BBM"), is a federal corporation without share capital.
2. BBM was originally founded as the Bureau of Broadcast Measurement on May 11, 1944.
3. BBM became incorporated by letters patent on January 22, 1945.
4. BBM was founded by three sectors of the broadcast industry: (1) broadcasters; (2) advertisers; and (3) advertising agencies.
5. The three industry sectors founded BBM for the purpose of carrying out impartial measurements of the circulation, coverage and audiences of radio and, later, television stations in Canada.
6. The name of the organization was changed to BBM Bureau of Measurement on July 7, 1966. On that date, a new corporation was incorporated by Letters Patent issued under Part II of the *Canada Corporations Act*.

7. The purposes and objects of BBM, as stated in its Letters Patent, are:

- (a) to design and conduct surveys, to assemble statistical and other data, to do marketing research and other studies relating to radio and television broadcasting and other forms of advertising media and particularly relating to the number, distribution and listening, viewing and reading habits of persons who are or may be listening to or viewing programs of the various radio and television broadcasting stations or who are exposed to or may be influenced by other forms of advertising media at different times and from time to time; and,
- (b) to prepare reports, charts and other forms of information based on surveys and statistical and other data assembled as aforesaid and to print, publish and distribute the same to members.

8. The Letters Patent of BBM also state:

And it is further ordained and declared that the business of the Corporation shall be carried on without pecuniary gain to its members and that any profits or other accretions to the Corporation shall be used in promoting its objects.

9. On March 7, 2002, BBM Bureau of Measurement changed its name to BBM Canada.

10. In the opinion of the Minister, BBM is not a charity within the meaning assigned by subsection 149.1(1) of the *Income Tax Act*.

11. During its 1996 taxation year, BBM was not organized nor operated exclusively for:

- (a) social welfare;
- (b) the well-being of the community;
- (c) providing assistance to disadvantaged groups of the community;
- (d) the common good and general welfare of the community;
- (e) civic improvement;
- (f) the enhancement in value or quality of the community or civic life;
- (g) pleasure;

- (b) recreation;
- (i) providing a state of gratification or a means of refreshment or diversion to the community.

12. At all times material to this appeal, BBM's activities have been in furtherance of the purposes and objects set forth in its Letters Patent.

13. At all times material to this appeal, BBM has prepared reports, charts and other forms of information and surveys, and statistical and other data, assembled in accordance with paragraph (a) of its Letters Patent, and published and distributed the same to its members in accordance with paragraph (b) of its Letters Patent.

14. In order to obtain services from BBM, organizations from the broadcast industry (broadcasters, advertisers and advertising agencies) must become members of BBM and pay annual membership fees.

15. In accordance with section 4(a) of the BBM By-Laws, membership in BBM consists of four different groups, only one of which is non-voting. The three groups of voting members are (1) advertisers, (2) advertising agencies, and (3) radio and/or television broadcasters, each as defined in subsections 4(a)(i), (ii) and (iii), respectively, of BBM's By-laws. The one non-voting group is comprised of associate members as defined in subsection 4(a)(iv) of BBM's By-laws.

16. During the 1996 taxation year, BBM had 689 members.

17. BBM is governed by a volunteer Board of Directors drawn from its members.

18. The data provided by BBM to its members is one of the factors used by member broadcasters, advertisers, and advertising agencies in making their decisions.

19. Each year, BBM surveys hundreds of thousands of people of all ages, from across the country, to find out how often they watch television and listen to radio.

20. During the 1996 taxation year, BBM employed approximately 300 persons.

21. Among the aforesaid 300 employees, approximately 80 to 90 persons were full-time employees.
22. The remaining employees were part-time survey processing employees or part-time call-centre employees.
23. BBM performs its work as efficiently as possible, but not necessarily "at the lowest possible cost." Rather, the overarching imperative is to conduct objective, impartial and accurate research.
24. BBM is operated with a view to recovering anticipated costs (both direct costs and overhead costs) from its members in order to perform its work, and a surplus in a given fiscal year, if any, is used to further BBM's purposes and objects.
25. Nothing in the Letters Patent of BBM prohibits the making of surpluses.
26. BBM's fiscal year-end is August 31st.
27. As of June 4, 1997, BBM adopted a formal surplus policy allowing it to accumulate a surplus equivalent to 6 months regular operating expenses.
28. As of April 30, 1997, the accumulated surplus of BBM was \$6,907,000. BBM's regular operating expenses in fiscal 1997 were \$14,998,557.
29. The motion that was adopted by the BBM Board of Directors on June 4, 1997 stated as follows: "that BBM's surplus target be to accumulate 6 months of operating costs which, at the current level of operation would be approximately \$7,800M."
30. In its 1995 taxation year, BBM achieved an operating surplus of \$2,257,931 and in its 1996 taxation year, BBM achieved an operating surplus of \$2,181,902. In the taxation years before and after 1995 and 1996, BBM generated either much smaller surpluses, or deficits.
31. In its 1995 and 1996 taxation years, BBM's operating costs were approximately \$16 million per year.

32. The aforesaid operating surpluses generated by BBM in the 1995 and 1996 taxation years were used by BBM for the furtherance of its purposes and objects.

33. At all times material to this appeal, no part of BBM's income was payable to, or was otherwise available for the personal benefit of, any member of BBM.

34. BBM is the only organization in Canada that provides radio and television audience measurement service in every Canadian market upon request. From time to time, other organizations have offered to provide audience measurement services in a limited number of large Canadian markets, but BBM is the only organization that consistently offers audience measurement service in every Canadian market, including small and remote markets.

35. In the 1995 and 1996 taxation years, an entity using the name Nielsen was providing television audience measurement services in Canada, but only in a few large markets. The Nielsen entity provided no radio audience measurement services anywhere in Canada.

36. In the mid 1970s, BBM began investigating electronic measuring systems. At that time, Torpey Controls Ltd. developed a prototype for BBM using existing circuitry and vertical blanking interval for use in television. Although the test of the prototype was technically successful, there were practical implications and no costing of implementation was done.

37. Electronic measuring systems were an expensive and capital-intensive exercise for BBM.

38. In 1989, BBM was testing electronic measurement using a system being developed by Les Entreprises Vidéoway Ltée.

39. BBM abandoned the project referred to in the previous paragraph due to technological, financial and patent issues. As recorded in BBM's 1990 financial statements (Note 7), litigation was brought against it alleging patent infringement.

40. In 1989, CTV and CBC were members of BBM.

41. In 1993, BBM's Board of Directors and staff engaged in a strategic planning process. In the autumn of 1993, authorization was given to release the strategic plan to BBM's membership.

42. The aforesaid strategic plan assisted the Board of Directors and staff in achieving a shared understanding of what was important for BBM. A specific result of the strategic plan was the BBM Corporate Cost Reduction Program, including the "War on Waste".

43. The aforesaid strategic plan laid down the following 4 strategic objectives:

- (a) Continue leadership in radio audience measurement in Canada;
- (b) Establish and secure pre-eminence in television audience measurement in Canada;
- (c) Create a business environment within BBM;
- (d) Maintain and foster affinity of members with BBM.

44. In the 1990s, discussions between BBM and Nielsen took place with respect to the possibility of forming a joint venture to extend electronic measurement service for television from a national survey (a relatively small audience sample spread across the country) to surveys of local and regional broadcasting markets.

45. The aforesaid discussions, and review by the Competition Bureau, led to the execution of a "Specialization Agreement" (rather than a joint venture) on September 1, 1995 between BBM and a corporation of which Nielsen was a division. The Competition Bureau gave a favourable advisory opinion on the Specialization Agreement before it was signed. The Specialization Agreement related to television audience measurement, and provided that:

- (a) BBM would withdraw its diary-based service in Toronto and its diary-based service for the Quebec regional market;
- (b) Nielsen would be able to come into the Toronto and Quebec regional markets and launch a metered service;
- (c) Nielsen would withdraw its diary service from the rest of the country;
- (d) There would only be one diary-based technology or methodology and that would be delivered by BBM in the smaller markets across the country;

- (e) Nielsen could also expand with its metered service to other markets such as Vancouver and Montreal under certain conditions;
- (f) Once the aforesaid conditions were met, BBM would withdraw its diary service in Vancouver and Montreal.

46. In 1997, the aforesaid Specialization Agreement between BBM and Nielsen was terminated by BBM pursuant to section 4.3 of the agreement by reason of BBM coming to the view that Nielsen had not acted in accordance with the terms of the agreement.

47. The ComQuest Division of BBM was established in 1992 and operated through to the end of fiscal 1996. The Division generated a net loss in each of the five fiscal years in which it operated. In the 1996 taxation year, the ComQuest Division generated a net loss of \$24,000 and, over the five years it operated, the ComQuest Division suffered a cumulative net loss of \$889,000.

48. ComQuest Research Inc. is a wholly-owned, tax-paying subsidiary of BBM that was incorporated on July 3, 1996 and began operations on September 1, 1996 (fiscal 1997). Fixed assets of less than \$100,000 were transferred at book value from BBM's ComQuest Division to ComQuest Research Inc. on September 1, 1996.

49. In each year that it has earned a profit, ComQuest Research Inc. has paid income tax. At no time has ComQuest Research Inc. paid dividends to BBM.

DATED at the City of Toronto, Ontario, this 14th day of November, 2007.

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v. HER MAJESTY THE QUEEN

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