

Docket: 2010-2350(IT)I

BETWEEN:

MARILYN I. DICKSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 7, 2011, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Sarah Repka (student-at-law)
Thang Trieu

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* with respect to the Appellant's 2005, 2006 and 2007 taxation years are dismissed in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 10th day of March 2011.

"Patrick Boyle"

Boyle J.

Citation: 2011 TCC 153
Date: 20110310
Docket: 2010-2350(IT)I

BETWEEN:

MARILYN I. DICKSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] This is an informal appeal heard in Toronto in respect of denied business losses. Ms. Dickson is a retired elementary school teacher and teachers' association official. In the years in question she drew a pension from those activities. The years in question are 2005 through 2007. Ms. Dickson is now over 65 years old.

[2] Ms. Dickson represented herself and was her only witness. She produced detailed written records in support of her position including detailed calendars and expense summaries. She acknowledged that the "invoices" she had prepared for her organist work were not delivered to those for whom she played the organ.

[3] Ms. Dickson engaged in flight instruction, church organist and book-writing activities and endeavours in respect of which she claimed losses in the years in question. The Canada Revenue Agency ("CRA") reassessed her to deny the deduction of those losses. The issue in these appeals is which if any of those activities constituted a business activity of hers in these particular years.

[4] At the opening of the hearing the Crown brought a motion to strike her 2007 appeal to this Court on the basis that she had not brought it in time. She had filed an objection to her initial 2007 reassessment in timely fashion. However, when that year was further reassessed thereafter, she did not file an appeal to this Court within the

90 days permitted by section 169. The further one-year period in which to bring a request for late-filing of such an appeal has long since expired.

[5] The taxpayer, representing herself, also complained that the audit had also focused on her 2004 taxation year. She said this wasted her time and the CRA's since it was not reassessed following the audit. She had claimed losses in 2004 and several prior years from some of these activities. These years are statute-barred and not before this Court, the CRA having decided following the audit that her claiming of losses in prior years did not amount to a negligent, reckless or wilful understatement of her income.

[6] In circumstances such as Ms. Dickson's, I must first decide whether any or all of these activities constitute a business pursued for profit in a commercial manner during the years in question, or whether they were personal endeavours, such as hobbies or the like. This approach is mandated by the Supreme Court of Canada's 2002 decision in *Stewart v. Canada*, 2002 SCC 46, 2002 DTC 6969. In *Stewart*, the Supreme Court of Canada highlights some of the criteria, indicia of commerciality and badges of trade that should be considered.

[7] A related legal question in circumstances where someone seeks to convert a personal interest or hobby into a commercial business activity is to determine at what time the person's pursuit with a view to starting up a business gives rise to the existence of a business. The approach to determine that question is guided by the approach taken by this Court in such earlier cases as *Gartry v. The Queen*, 94 DTC 1947, and *Kaye v. The Queen*, 98 DTC 1659.

[8] In *Kaye*, former Chief Justice Bowman described the test to be applied simply as "Is there or is there not truly a business?" Of this he went on to write:

5 . . . One must ask "Would a reasonable person, looking at a particular activity and applying ordinary standards of commercial common sense, say 'yes, this is a business'?" In answering this question the hypothetical reasonable person would look at such things as capitalization, knowledge of the participant and time spent. He or she would also consider whether the person claiming to be in business has gone about it in an orderly, businesslike way and in the way that a business person would normally be expected to do.

. . .

7 Ultimately, it boils down to a common sense appreciation of all of the factors, in which each is assigned its appropriate weight in the overall context. One must of course not discount entrepreneurial vision and imagination, but they are hard to

evaluate at the outset. Simply put, if you want to be treated as carrying on a business, you should act like a businessman.

[9] As a general rule, in the case of a personal endeavour, pursuit or hobby which is intended to be converted into a business, the business does not necessarily begin when that decision is taken or when the pursuit is commenced but only once it is being pursued in a sufficiently commercial manner. Similarly, once converted into a business, it may later cease to be pursued in a commercial manner and revert to being a hobby or personal endeavour.

I. Flight Instruction Activity

[10] In her business questionnaire submitted to the CRA as part of the audit, Ms. Dickson wrote:

“Flight instructing is not considered by pilots to be a money-making occupation. For most instructors it is an entry-level position in which they slowly build hours until they have enough experience to apply for the “real job”. I have been a teacher for most of my life, first teaching children and then adults. My gratification comes from sharing knowledge and skills with others, for example, in seeing students fly their first solo and knowing that I taught them to that degree of competence. My short-term goal was to share my love of flying with others.

Initially my long-term goal was to build more hours and experience myself so that I would become a more competent pilot in order to start a “Fear of Flying” consultancy, to help people who had to fly for business purposes overcome their fear of flying. I felt that building hours and experience as an instructor would give me more credibility and experience in this consultancy.”

[11] Ms. Dickson confirmed in her testimony that flight instruction of itself is generally not a profitable activity given the high costs associated with obtaining and maintaining a commercial pilot licence and a flight instructor licence along with related instrumentation and multi-engine credentials.

[12] It was clear from Ms. Dickson’s evidence that she has yet to commence, or even decide definitively to commence, a “Fear of Flying” consulting business.

[13] In her testimony, consistent with her comments in her business questionnaire, Ms. Dickson spoke generally of pilots with commercial and flight instruction credentials not being able to engage in flight instruction on a profitable basis but doing flight instruction to build their credentials for a commercial pilot job. She

spoke in generalities however, given her particulars, she was unable to make that particular case for herself. However, she assured the Court that she had many years of work ahead of her and yet to decide whether or not to open a “Fear of Flying” consultancy, or perhaps even write a book on the topic.

[14] It was also her testimony that, given her book-writing emphasis in the years in question, she was unable to devote as much time as usual to her flight instruction activities and that explained the increased losses.

[15] Ms. Dickson reported losses throughout the period from 1998 through 2007 except for the year 2002 in which she reported a modest net income of \$2,200. Her losses ranged from \$800 to \$11,500. In the six years prior to the years in question, her reported losses from her flight instruction activities exceeded \$40,000. Her flight instruction activities have not been profitable since the years in question either.

[16] There is no doubt that in the years in question, the taxpayer was devoting little time to her flight instruction activities. She did not subcontract her former clients and flight schools to others. She did very little to look for more clients whether flight schools or private students. She did limited advertising beyond making herself available and promoting herself in conversation with others interested in flying. While she testified that the circumstances of 9/11 changed people’s flight habits and their attitudes and anxiety towards flying or towards learning to become a pilot, there was no evidence that her approach changed to developing, marketing or pursuing her flight instruction activities after 9/11.

[17] She was entirely unable to explain how her flight instruction activities would be able to become profitable within her remaining working career nor was there any evidence that she was building up a valuable business for sale upon retirement. In the years in question, its connection to a possible “Fear of Flying” pursuit, whether consultancy or book, still remained a mere possibility.

[18] I can only find that Ms. Dickson’s aviation pursuits were not being pursued in a commercial manner or business-like fashion in the years in question.

[19] I can add that some of her expense categories, such as rallies, while they may relate to the business of other commercial pilots, appear to have been personal to her. Even if Ms. Dickson had commenced to convert her aviation pursuits into a commercial activity, I am not satisfied that her expenses were reasonable to the extent they exceeded her revenues from those activities.

II. Church Organist

[20] In the years in question, Ms. Dickson was also a church organist. She did that at a church near her second home in Durham approximately 160 kilometres from her Toronto home. She was paid \$50 for each service. She claimed losses in her 1998, 1999 and 2000 years of approximately \$2,000 in the aggregate. In the 2005 year, she claimed a loss of \$700 and in 2006, a loss of approximately \$1,300. In 2007, she reported net revenue of approximately \$65. Her annual revenues in the years in question range from \$650 to \$1,550. She played at the one church half the time, that is approximately 26 Sunday services a year. In addition she played at a number of local funerals, either at that church, at the local funeral home that she became familiar with from funerals at that church, or at other churches where that funeral home was involved.

[21] In her business questionnaire, Ms. Dickson says that she partly sees her church organist activities as an opportunity to provide service to bereaved families.

[22] The majority of her expenses consisted of her commute from her Toronto home to her Durham home.

[23] There is no doubt in the circumstances that her church organist activities, while they may have generated some additional revenues for her to fund her related musical and travel expenses, in much the same way as her flight instruction revenues reduced her costs of maintaining her commercial pilot licence and related credentials, were not at any time in the years in question being pursued in a commercial or business-like manner. There was no evidence that she did any advertising of her availability. There was no evidence she had any other plans nor that she made any effort to find any other clients with a view to making this activity a business carried on in a commercial-like manner.

[24] Again, even if her church organist activity were to be considered a business, her expenses claimed could not in any way be considered reasonable to the extent they exceeded her modest revenues from her activities.

III. Book-writing

[25] It has been recognized by this Court that, in the case of creative artists such as painters, authors, musicians and sculptors, a broader range of criteria and a broader

contextual view reflective of the reality of the particular industry may be needed than might be in more traditional commercial pursuits when trying to establish whether a taxpayer has yet commenced to carry on his or her planned creative business. See, for example, *Harrison v. The Queen*, 2007 TCC 19, 2007 DTC 377 (book publishing), *Malltezi v. The Queen*, 2009 TCC 149, [2009] T.C.J. No. 104 (QL) (product development), *Li v. The Queen*, 2008 TCC 175, 2008 DTC 3039 (product development), *Janitsch v. The Queen*, 2004 TCC 378, [2004] G.S.T.C. 70 (artist), *Arseneault v. The Queen*, 2006 TCC 42, 2008 DTC 2224 (film production), *Cossette v. R.*, [2003] 1 C.T.C. 2359 (visual artist) and *Tramble v. R.*, [2001] 4 C.T.C. 2160 (painter). This is also recognized by the CRA in its Interpretation Bulletin IT-504 on “Visual Artists and Writers”.

[26] Ms. Dickson set out beginning in 2003 to write a biography on Vi Milstead Warren, an early female aviation pioneer who delivered military planes during World War II and was also one of Canada first female bush pilots. Ms. Dickson has taken courses on writing as well as on getting published.

[27] Between 2003 and 2007, the taxpayer claimed losses exceeding \$16,000 on her book-writing activity. In 2006, she received a US\$6,000 grant to conduct some of the research into her book which she did not record as revenue but simply used to offset expenses. How she accounted for the grant would not have affected her 2006 loss number. She has continued to claim losses each year since 2007.

[28] It is now 2011 and there is still no book. It is not written yet. She has not yet made a submission to any publisher. She has completed an outline. When pushed, she indicated that by the end of the period in question most of the research had been done and about one-quarter of the book had been written in a first draft. By now, when pushed, she would estimate the book to exist in its first draft to the extent of about three-quarters. Her first draft, to the extent it exists, is approximately 160 pages long. She has been pursuing this for almost eight years. That is a pace of approximately 20 pages of initial draft per year.

[29] I do not in the least doubt Ms. Dickson’s sincere intention to write a book about something of interest to her and perhaps to many similarly minded Canadians, and in doing so to bring this Canadian woman’s role to light. She chose a topic tied into her flying interest, a person whom she became aware of and got to know as part of her flying interest, and a person about whom there had been little already written. She has promoted the recognition of this woman and of her book and has published local newspaper articles on the topic.

[30] In her testimony Ms. Dickson said she hopes to make a profit from her book-writing activity but acknowledges that was not what she had set out to do. In her business questionnaire, Ms. Dickson says she considers “writing [this] biography to be making a contribution to preserving a small but important part of Canada’s history.”

[31] She did not know what a book of this nature would sell for but guessed that it would perhaps be in the \$20 to \$25 range. She said that since she began her writing, she found out that authors only receive about 10% of sales. This would be about \$2 a book. She is unable to estimate how many thousand or tens of thousands of books she would have to sell based on her ‘guesstimates’ to make this a profitable venture. (Similarly, she was unable to estimate how much flight instruction she would need to provide or how many church services and funerals at which she would need to be the organist, in order for those pursuits to become profitable.)

[32] Even after having regard to the unique and more liberal approach to be taken when considering art-related businesses and creative pursuits, the evidence does not support Ms. Dickson’s position that her book-writing activity had in the years in question or since been pursued in a reasonably commercial manner sufficient to be a business activity.

[33] My overall assessment of the evidence and Ms. Dickson’s testimony was influenced somewhat by the fact that she was very guarded in giving her answers, was not always readily forthcoming in her answers to questions on key issues, and tried to avoid responding to some at all. For example, she would only answer how flight instruction could lead to a profitable related aviation business in the context of pilots generally. I had to ask her to focus on her particular circumstances and how it would lead to profitability within her remaining working lifetime. She would not provide any estimate of how many pages of her book had been written in the years in question or to date until I took her back to the question previously asked. It is also noteworthy that her testimony differed significantly in some respects from the business questionnaire she had previously completed for the CRA at the audit stage.

[34] The appeals are dismissed. In the circumstances, the Crown’s motion regarding 2007 not being properly before the Court does not need to be decided.

Signed at Ottawa, Canada, this 10th day of March 2011.

"Patrick Boyle"

Boyle J.

CITATION: 2011 TCC 153

COURT FILE NO.: 2010-2350(IT)I

STYLE OF CAUSE: MARILYN I. DICKSON v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 7, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: March 10, 2011

APPEARANCES:

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