

Dockets: 2016-3463(IT)I
2016-3536(IT)I

BETWEEN:

CAROLYN D. SAVAGE and JOHN A. SAVAGE,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on December 1, 2017, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellants: The Appellants themselves
Counsel for the Respondent: Hye-Won (Caroline) Ahn

JUDGMENT

The Appeals of Carolyn D. Savage from the reassessments made under the *Income Tax Act* with respect to the 2010 and 2011 taxation years are dismissed.

The Appeals of John A. Savage from the reassessments made under the *Income Tax Act* with respect to the 2010, 2011 and 2012 taxation years are dismissed.

Signed at Ottawa, Canada, this 7th day of December 2017.

“Campbell J. Miller”

C. Miller J.

Citation: 2017 TCC 247
Date: 20171207
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BETWEEN:

CAROLYN D. SAVAGE and JOHN A. SAVAGE,

Appellants,

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REASONS FOR JUDGMENT

C. Miller J.

[1] John Savage appeals the assessment by the Minister of National Revenue (the “Minister”) of his 2010, 2011 and 2012 taxation years and Carolyn Savage appeals the Minister’s assessment of her 2010 and 2011 taxation years, in both cases denying the Savages losses they claimed arose in the carrying on of a dog kennel business. The Minister concluded they were not engaged in a business but that the dog kennel operation was nothing more than a hobby. The Minister went on to indicate that if I found there was a business then not all of the expenses claimed were business expenses. The Savages were unprepared to address this second issue, believing, incorrectly, that the only issue was whether or not the losses were incurred in a business. It was agreed that I would hear their testimony and arguments on this first issue, and if I found that the losses were business losses, I would resume the trial to hear evidence and argument in connection with the expenses explicitly. As I have determined the Savages were not carrying on a business but only a hobby, this second stage of the trial is unnecessary.

[2] Both Mr. and Ms. Savage work full-time in areas not connected to the dog kennel business, and they have been doing so for many years. In 1999, they made a decision that it was necessary to plan to augment their retirement income and they could do so through the operation of a dog kennel, as they had cared for dogs for many years and clearly had a passion for dogs. This was no more evident than when Mr. Savage emotionally tried to describe the possible benefits of having a

championship dog, which he felt they had with their dog, Maverick, who unfortunately succumbed to illness.

[3] The first eleven years (1999-2010) of the Savages' efforts to establish the dog kennel business took place in Pickering, Ontario. They operated under the name Jenberly Kennels; they provided a copy of a 2003 registration of Jenberly Kennels with the Canadian Kennel Club. Mr. Savage acknowledged that he had no formal education with respect to dog training, while Ms. Savage had taken several courses in that regard. Mr. Savage had also taken a bookkeeping course.

[4] Mr. Savage described their mission statement was to build a successful kennel business to supplement their retirement income. The business was to breed, train and board dogs as well as dog sit. The training was handled by Ms. Savage. Mr. Savage acknowledged that Ms. Savage trained dogs for him for hunting.

[5] There were two time periods addressed by the Savages in describing their operation. The period from 1999 to 2010, while living in Pickering, and the period from 2010 on after they moved to Huntsville, Ontario. Two things happened in 2010. First, for employment reasons, the Savages moved from Pickering to Huntsville and second, they lost Maverick. Mr. Savage described Maverick as the type of dog that, like a championship thoroughbred horse, could make the owner considerable money. As he put it, they needed to find another Maverick. They have been unable to do so.

[6] Mr. Savage explained that they would travel to a few shows a year, not always showing, but often to simply make contacts in the field. This was not as necessary in Pickering, as they had developed some regular customers and contacts. Mr. Savage did not produce any documents of customer lists, suppliers etc. He also did not give details of the kennel layout acknowledging simply that they owned two dogs.

[7] Unfortunately, the two dogs that they had acquired shortly after Maverick's death were not registered: the dogs could not be shown unless they were registered. They had no success in tracking down the registration.

[8] Mr. Savage acknowledged there was no formal business plan as such, but they simply were good at dog breeding and anticipated building up their business over 15 years to provide income in retirement. He explained that initially that was to be around now, but with the move to Huntsville, they have had to adjust that plan to age 75, another eight years from now.

[9] Revenues from their operation arose from training, boarding and up to 2010, breeding. Ms. Savage explained some of the charges: \$140 for a five-week training course and \$45 per day or \$125 a week for boarding, though with their own two dogs they only had capacity for two more dogs. Since 2010, they have attempted to switch to a dog stud service. Mr. Savage was somewhat vague in trying to allocate revenues amongst these different areas. He produced no financial records illustrating from whence revenues were derived, no financial statements, no ledgers, no customer lists nor advertising materials. He testified that advertising was through the use of business cards, contacts at dog shows and flyers, though he did not provide any examples of the latter.

[10] The following is a schedule of the losses over the years:

	Gross business income	Net business loss for the Savages
1999	\$1200	\$12460
2000	\$1200	\$12546
2001	\$1200	\$10604
2002	\$3600	\$17240
2003	\$3600	\$7656
2004	\$3600	\$6558
2005	\$3600	\$13442
2006	\$4800	\$8178
2007	\$4800	\$8032
2008	\$1050	\$29384
2009	\$0	\$28974
2010	\$1750	\$13394
2011	\$2500	\$21,438
2012	\$1600	\$15890
2013		\$4000*
2014		\$2500*
2015		\$1900*
2016		\$1600*
* Unclear whether this was for each of Mr. & Ms. Savage or the total losses.		

[11] It was evident from Mr. Savage's testimony he considered the move in 2010 and the loss of Maverick created a virtual recommencement of the operation, an operation which he maintained, like the horse business, could take years to establish. This was made more difficult by the different nature of clientele in the

Muskoka region compared with Pickering. In Huntsville, the Savages are required to travel more to re-establish a new network. It was difficult given they both worked full-time to network as fully as was necessary; that is, establishing relationships with suppliers, vets and customers alike.

[12] Was the Savages' operation a business or a hobby? The leading case in this type of appeal is the Supreme Court of Canada decision in *Stewart v Canada*.¹ In that case, the Supreme Court of Canada tweaked the reasonable expectation of profit test that had been relied on for many years in resolving the business versus hobby issue, concluding the following:

52. The purpose of this first stage of the test is simply to distinguish between commercial and personal activities, and, as discussed above, it has been pointed out that this may well have been the original intention of Dickson J.'s reference to "reasonable expectation of profit" in *Moldowan*. Viewed in this light, the criteria listed by Dickson J. are an attempt to provide an objective list of factors for determining whether the activity in question is of a commercial or personal nature. These factors are what Bowman J.T.C.C. has referred to as "indicia of commerciality" or "badges of trade": Nichol, *supra*, at p. 1218. Thus, where the nature of a taxpayer's venture contains elements which suggest that it could be considered a hobby or other personal pursuit, but the venture is undertaken in a sufficiently commercial manner, the venture will be considered a source of income for the purposes of the Act.
53. We emphasize that this "pursuit of profit" source test will only require analysis in situations where there is some personal or hobby element to the activity in question. ...
54. It should also be noted that the source of income assessment is not a purely subjective inquiry. Although in order for an activity to be classified as commercial in nature, the taxpayer must have the subjective intention to profit, in addition, as stated in *Moldowan*, this determination should be made by looking at a variety of objective factors. Thus, in expanded form, the first stage of the above test can be restated as follows: "Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?" This requires the taxpayer to establish that his or her predominant intention is to make a profit from the activity and that the activity has been carried out in accordance with objective standards of businesslike behaviour.

¹ 2002 SCC 46.

55. The objective factors listed by Dickson J. in *Moldowan*, at p. 486, were: (1) the profit and loss experience in past years; (2) the taxpayer's training; (3) the taxpayer's intended course of action; and (4) the capability of the venture to show a profit. As we conclude below, it is not necessary for the purposes of this appeal to expand on this list of factors. As such, we decline to do so; however, we would reiterate Dickson J.'s caution that this list is not intended to be exhaustive, and that the factors will differ with the nature and extent of the undertaking. We would also emphasize that although the reasonable expectation of profit is a factor to be considered at this stage, it is not the only factor, nor is it conclusive. The overall assessment to be made is whether or not the taxpayer is carrying on the activity in a commercial manner. However, this assessment should not be used to second-guess the business judgment of the taxpayer. It is the commercial nature of the taxpayer's activity which must be evaluated, not his or her business acumen.

[13] So, if I find there is a personal element then I turn to the badges of trade or indicia of commerciality to determine if it was carried on in a sufficiently commercial manner to constitute a business. It is at this stage it remains open to consider the reasonable expectation of profit test as one factor in such an evaluation. The court outlined the following factors indicating this is not exhaustive:

- 1) Profit and loss of past years;
- 2) Training;
- 3) Intended course of action;
- 4) Capability to show a profit.

[14] I would add to this a review of all the trappings that tend to go hand-in-hand with a business venture, that is, the commercial nature of the activity.

[15] It is clear that there was a personal element to the Savages' endeavour. Their love of dogs lead them down this path. Their own two dogs were trained by Ms. Savage to assist Mr. Savage when he went hunting. Their emotional ties to their dogs was very evident throughout their testimony. Given this personal element, it is necessary to examine the pursuit of profit test to determine if the venture was undertaken in a sufficiently commercial manner to be considered a source of income.

[16] Before assessing their operation addressing the previously mentioned factors, I will review a couple of cases that specifically address similar operations. In *Huber v Canada*,² the facts were strikingly similar to the case before me, though in one year Mr. Huber actually made a small profit. McArthur J. concluded:

13. In the present case the appellant's attempts to create a profit in 1992 by drastically reducing expenses are suspect and further, he was left in December 1993 with but one show dog after four or five years of operation, having commenced in 1988 with what he believed were two dogs of economic quality.
14. The volume of cases provided lead to the conclusion that each case depends on its own factual circumstances. I find the appellant to have a sincere affection for German Shepherds, but not an expert in the dog breeding business. He had a desire to make money with his venture, but, in no manner whatsoever, did he rely on it for his living needs. He was a full-time employee of a potash mining company and he spent more of his off work hours on his wood working business than on his dog breeding operation. His efforts and course of action are not sufficient to take it beyond the scope of a hobby interest. Given all of the evidence, the appellant failed to establish that he had a reasonable expectation of profit for the years under review.

[17] In the case of *White v Canada*,³ again the facts were similar in that the appellant worked full-time elsewhere and had yet to produce a profit. Teskey J. concluded:

19. The venture as structured in each of the years before me could not have produced a profit. There simply were not enough female dogs producing enough puppies to bring in enough income to make a profit. There does not appear to be a valid reason why the appellants did not have sufficient puppies at least in 1991 and 1992 if they had desired. Thus, I am drawn to the conclusion at least up to the end of 1992, the dog venture was a hobby and as structured in those years, could not have produced a profit.

[18] While these cases were decided prior to the *Stewart* decision, it is clear the expectation of profit is a significant consideration, though now only one factor in determining commerciality.

[19] With respect to the past profit and loss, it is not a favourable picture for the Savages. They have yet to produce a profit and, while Mr. Savage points out they

² [1994] 1 CTC 2127.

³ [1996] 1 CTC 2634.

are getting close to breakeven in the last two or three years, he realistically views possible profit a few years down the road yet, when retirement looms and more time can be devoted to the kennels. This factor weighs heavily against an objective finding of commerciality, even considering the impact of the move to Huntsville.

[20] A factor in their favour is that Ms. Savage did testify she had some training in dealing with dogs, though did not produce any detail in that regard. The testimony was, however, that dog training did not make up a significant part of the business. Although, it was never clear exactly what the breakdown of revenue was among breeding, training, boarding and dog sitting.

[21] With respect to the intended course of action, no real plan was provided, certainly no written business plan, though Mr. Savage acknowledged several things they needed to do: create different strategies for marketing, build on insurance regulations to protect ourselves from liability “once we become full-time”, acquire a bookkeeping system, create a customer agreement form and “once we retire, we would also be looking at fostering animals, rescues and seniors to help build the success of the business”.

[22] Mr. Savage concluded that “due to our restructuring of the business since moving in 2010 and our anticipation of at least semi-retirement within a few years, the time we can dedicate to the kennel business should increase the profitability to a successful level”.

[23] While all these suggestions sound like appropriate methods of moving forward, none of them appear to have been put in motion and it is now many years past the years in issue. The overall sense I get from the Savages is that this would all come to fruition when Mr. Savage retires in another seven or eight years. So, while I accept there is some thought to the future course of action, it does not appear to be based on making any profits for some period to come. I do not find this factor supports the commerciality of the venture in the years at issue.

[24] Regarding the capability to make a profit, the Savages produced no financial forecast setting out projections of revenue from the different branches of the kennel operation. They gave no concrete plans on how expenses might be trimmed or revenues increased. I was left with no appreciation of how, in its current form, the operation could possibly make a profit.

[25] Yes, there were some badges of trade, a business card for example, but I was provided with no copies of advertising materials or their frequency of distribution,

no financial records, no customer lists, no list of shows attended and contacts made. I conclude the Savages have every intention of pursuing this endeavour more fully down the road, but for the years in question and up to the present, I could at best describe them as dabbling, which certainly smacks more of a hobby than a business.

[26] I conclude there was no business, and I therefore dismiss their Appeals. There is no need to continue the trial to examine any of the expenses in more detail.

Signed at Ottawa, Canada, this 7th day of December 2017.

“Campbell J. Miller”

C. Miller J.

CITATION: 2017 TCC 247

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STYLE OF CAUSE: CAROLYN D. SAVAGE and JOHN A. SAVAGE AND HER MAJESTY THE QUEEN

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REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

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APPEARANCES:

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