

Docket: 2008-4090(IT)G

BETWEEN:

PÊCHERIES YVON SAVAGE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on December 13, 2010, at Rimouski, Quebec.

Before: The Honourable Justice R  al Favreau

Appearances:

Counsel for the appellant:	Denis Tremblay
Counsel for the respondent:	Vlad Zolia

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**JUDGMENT**

The appeal from the reassessment under the *Income Tax Act* for the 2004 taxation year is dismissed with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, on this 12th day of October 2011.

“Réal Favreau”

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Favreau J.

Translation certified true  
on this 22nd day of December 2011.

Erich Klein, Revisor

Citation: 2011 TCC 477  
Date: 20111012  
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BETWEEN:

PÊCHERIES YVON SAVAGE INC.,

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**REASONS FOR JUDGMENT**

Favreau J.

[1] The appellant is appealing from the reassessment made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act), dated March 12, 2008, in respect of the 2004 taxation year.

[2] The issue is whether the appellant is eligible for an investment tax credit of \$6,581 for the 2004 taxation year—that is, \$1,913 applied to tax under Part I and \$4,650 that the appellant was reimbursed—in respect of restoration work on the fishing vessel *Marie-Ève II*. The work began in 2002 and continued intermittently into 2005.

[3] The facts relevant to this matter are set out by the Minister of National Revenue (the Minister) in paragraph 8 of the Reply to the Notice of Appeal. These facts are as follows:

[TRANSLATION]

- (a) The appellant is a corporation that operates a deep-sea shrimp-fishing business.
- (b) The appellant was founded on December 21, 1990.

- (c) The shareholders of the appellant are Yvon Savage, who holds 51% of the shares, and his spouse, Marie-France Curadeau, who holds 49% of the shares.
- (d) The appellant owns only one fishing vessel, the *Marie-Ève II*.
- (e) The appellant's fishing vessel was built in 1962 and began being used as soon as its construction was finished.
- (f) Neither the appellant, nor Yvon Savage, nor Marie-France Curadeau was the first owner of the vessel.
- (g) The vessel was bought used by the appellant.
- (h) Renovations and alteration work on, and inspections of, the appellant's vessel were done in 2002, 2003, 2004 and 2005.
- (i) From 2002 to 2005, the vessel was used between the renovation periods.
- (j) The renovations, alterations and inspections were necessary since the vessel no longer met Transport Canada standards.
- (k) The work involved repairs to the vessel's hull costing \$512,204 and the acquisition and installation of equipment, some of it used, costing \$107,020, for a total of \$619,224.
- (l) The renovations did not constitute a "complete restoration" of the vessel.
- (m) For example, only some parts of the hull of the vessel were replaced.
- (n) Moreover, some of the work involved only checking the state of certain components of the vessel, such as the motor, that was changed only in 2004 at a cost of \$116,260.
- (o) Other work involved only simple alterations to existing components, which were kept, such as the hydraulic system and hydraulic reservoir.
- (p) Sometimes the work involved nothing more than simply moving existing equipment, as in the case of the electrical panel.
- (q) Lastly, some of the equipment installed on the vessel was used, such as the hydraulic pump.
- (r) The renovations, alterations and inspections were not done to all of the component parts of the vessel: for example, the transmission was not changed, nor was all of the hull.
- (s) A new vessel of the same type as the appellant's vessel would cost between \$1,700,000 and \$2,000,000 to build.

- (t) Yvon Savage estimated that it would cost between \$2,000,000 and \$2,300,000 to build a new vessel.
- (u) The appellant's vessel was not insured as a new vessel.
- (v) A new vessel of the same type as the appellant's vessel would have a life expectancy of approximately fifty (50) years whereas that of the appellant's vessel, after the renovations, alterations and inspections, is estimated at only twenty (20) years.
- (w) A new vessel of the same type as the appellant's vessel would have electronic equipment worth an estimated \$80,000 to \$100,000, whereas the appellant only installed equipment worth approximately \$20,000 on its vessel.
- (x) When questioned by the Canada Revenue Agency auditor, the Transport Canada inspector who inspected the appellant's vessel upon completion of the work stated that it was impossible to describe the work as a complete restoration of the vessel.
- (y) In general, major changes were made only to the superstructure of the appellant's vessel, that is, to the part above the upper deck.
- (z) The part below the upper deck, specifically the fish holds, secondary motors, generators, transmission, ventilation, ducts, hydraulic circuits, reservoirs, rudders and propeller, only had minor work done on it.

### Position of the appellant

[4] The appellant submits that the work done on the vessel constituted a complete restoration of the vessel and, consequently, the investment tax credits should not have been refused.

[5] According to the appellant the vessel meets the criteria set out in the definition of "qualified property" in subsection 127(9) of the Act since the renovations done to the vessel are such that the vessel, after the renovations, can be considered completely restored.

[6] The appellant's claims are supported by the following documents:

- (a) a letter dated January 18, 2008, from Simon Pelletier, a marine safety inspector with Transport Canada, confirming the complete restoration of the fishing vessel;

- (b) an offer to guarantee a maritime loan from the Quebec Ministère de l'Agriculture, des Pêcheries et de l'Alimentation to a maximum amount of \$658,077 for repairs to the vessel's hull (\$512,204), the acquisition and installation of a ducted propeller, a hydraulic power unit, a winch, stabilizers and electronic equipment (\$107,020), and the refinancing of the hypothecary balance (\$100,775);
- (c) a description of major transformation work carried out by the Forillon shipyard as well as a breakdown of the costs (parts and labour) and photos of the vessel before and after the work;
- (d) Two invoices from November 2004 related to the removal of the motor and its replacement with a new motor purchased from Hewitt Équipement Limitée and invoices from Electro-Marine Inc. for electronic equipment.

[7] In support of its claims, the appellant also relies on the following facts:

- (a) The fishing vessel at issue was built in 1962 and was bought by the appellant on January 6, 1995. Since its purchase, the vessel has been used by the appellant for commercial fishing year-round. Following an inspection to check the thickness of its metal plates on November 6, 2000, the vessel was put in dry dock because it was not safe.
- (b) In the course of the work, (i) 50% of the metal plates in the hull were replaced, (ii) 100% of what was on the upper deck was replaced (the wheelhouse was moved, expanded and modernized, the fishing equipment was moved from the back to the side, anti-roll tanks were installed), (iii) the electrical, hydraulic and pumping systems were renovated, and (iv) the fish hold was completely renovated, the propeller was replaced and 30,000 pounds of cement was poured into the bottom of the vessel to improve stability.
- (c) After this work (i) the vessel was three feet longer, (ii) its gross tonnage increased from 128 to 149 tons, (iii) the vessel's waterline was 16 inches lower, (iv) the useful life of the vessel increased to 20 years, and (v) the vessel was insured for \$1,250,000.
- (d) Before it put to sea for fishing, the vessel had to pass stabilization tests at sea as would a new vessel. An inspection certificate was issued in 2002 for one year and in 2003 it was extended to 2006.

- (e) the name of the vessel was changed from the *Reine de la Mer* to the *Marie-Ève II*.

### Respondent's position

[8] The respondent submits that the appellant's vessel is not "qualified property" within the meaning of subsection 127(9) of the Act and that, consequently, the appellant could not claim an investment tax credit for the 2004 taxation year, either for the vessel or for the renovation of the vessel.

[9] The respondent also contends that, for the purposes of this dispute, the appellant's fishing vessel was not completely renovated, and in any event, the complete renovation of the vessel is not a relevant factor.

### Analysis

[10] The terms "investment tax credit" and "qualified property" are defined in subsection 127(9) of the Act as follows:

**"investment tax credit"** — "investment tax credit" of a taxpayer at the end of a taxation year means the amount, if any, by which the total of

(a) the total of all amounts each of which is the specified percentage of the capital cost to the taxpayer of certified property or qualified property acquired by the taxpayer in the year,

...

**"qualified property"** — "qualified property" of a taxpayer means property (other than an approved project property or a certified property) that is

(a) a prescribed building to the extent that it is acquired by the taxpayer after June 23, 1975, or

(b) prescribed machinery and equipment acquired by the taxpayer after June 23, 1975,

that has not been used, or acquired for use or lease, for any purpose whatever before it was acquired by the taxpayer and that is

(c) to be used by the taxpayer in Canada primarily for the purpose of

(i) manufacturing or processing goods for sale or lease,

(ii) farming or fishing,

...

[11] Prescribed machinery and equipment are described in subsection 4600(2) of Part XLVI of the *Income Tax Regulations*:

(2) Property is prescribed machinery and equipment for the purposes of the definition “qualified property” in subsection 127(9) of the Act if it is depreciable property of the taxpayer (other than property referred to in subsection (1)) that is

...

(d) a vessel, including the furniture, fittings and equipment attached thereto;

...

[12] The addition of the requirement after paragraphs (a) and (b) of the definition of “qualified property” that the property must not have been used for any purpose whatever before it was acquired by the taxpayer clearly indicates that the object of the Act is to encourage the purchase of new machinery and equipment.

[13] Counsel for the appellant called the Court's attention to the administrative practices set out in paragraphs 18 and 24 of Interpretation Bulletin IT-331R regarding used property and major renovations to property. Those paragraphs read as follows on the Bulletin's publication date, October 25, 1985:

“Used” Property

18. As indicated in 9, 10, 12 and 13 above, qualified property, qualified transportation equipment, qualified construction equipment, and certified property must be property which was not used for any purpose whatever before it was acquired by the taxpayer. The property must not only be new when acquired by the taxpayer but it must not have been acquired for use or lease or for any purpose whatever by any previous owner. As a result of these requirements, if a property that has been used or was acquired for a use (even though unused) is transferred to a new owner, eligibility for the investment tax credit is not transferable. In such a situation the former owner remains eligible for this credit provided the other requirements are satisfied. A piece of equipment that is used regularly for demonstration purposes (a "demonstrator") would not qualify; however, new equipment that is demonstrated to or "test" driven by, a prospective purchaser of that particular piece of equipment would not normally be considered to have been "used for a purpose".
24. Major renovations to . . . qualified machinery or equipment . . . that are capital in nature will normally be creditable investments providing the renovated equipment continues to satisfy the other eligibility conditions.

Where used equipment is renovated by a vendor and those renovations are so significant that the equipment, when acquired by a taxpayer can be said to be new, it will also constitute a creditable investment if the other eligibility conditions are met. However, where, subsequent to the acquisition of used equipment, a taxpayer carries out major renovations only the costs of the renovations may qualify.

[14] Counsel for the appellant also submitted two technical interpretations dealing with eligibility for the investment tax credit in respect of the costs of renovating a fishing vessel, one dated June 22, 1995, and the other dated November 13, 1997. The one dated November 13, 1997, is clearly subsequent to the cancellation of Interpretation Bulletin IT-331R, which occurred on an unspecified date in 1994 or 1995, because the author specifically refers to former Interpretation Bulletin IT-331R.

[15] The following excerpts from the technical interpretation of June 22, 1995, are particularly interesting:

[TRANSLATION]

6. In order for expenses to qualify for an ITC, the trawler must be “qualified property” within the meaning of this term under subsection 127(9) of the Act. Property is qualified property if, in particular, it has not been used, or acquired for use or lease, for any purpose whatever before it was acquired by the taxpayer. It is obvious that the trawler does not meet this criterion. Thus, it would not be qualified property.

7. However, paragraph 24 of Interpretation Bulletin IT-331R sets out the Department’s position with respect to major renovations:

Major renovations to . . . qualified machinery or equipment . . . that are capital in nature will normally be creditable investments providing the renovated equipment continues to satisfy the other eligibility conditions. Where used equipment is renovated by a vendor and those renovations are so significant that the equipment, when acquired by a taxpayer can be said to be new, it will also constitute a creditable investment if the other eligibility conditions are met. However, where, subsequent to the acquisition of used equipment, a taxpayer carries out major renovations only the costs of the renovations may qualify.

It is the first sentence of this paragraph that applies to the situation under consideration. The Department is prepared to allow an ITC if

(a) major renovations are made to a taxpayer's qualified machinery,

(b) the renovations are capital in nature,

(c) the renovated equipment continues to satisfy the other eligibility conditions.

In our opinion, “other eligibility conditions” means all conditions of application except the requirement that the property not have been used, or acquired for use or lease, for any purpose whatever before it was acquired by the taxpayer.

...

9. It is possible that a court would uphold an assessment refusing the ITC on the basis that the property is not property that has never been used. (The Act never speaks of new property, but refers to property that has never been used.) Although the trawler has undergone major changes, it is still the same trawler.

10. In our opinion, refusing the ITC claimed would be contrary to a position set out in an interpretation bulletin and that is favourable to the taxpayer. Such a situation does not seem desirable to us.

[16] The technical interpretation of November 13, 1997, is to the same effect as that of June 22, 1995, despite the fact that the interpretation bulletin had been cancelled a few years earlier. The following are a few excerpts from that technical interpretation:

[TRANSLATION]

In general, the Department is prepared to allow an ITC for the cost of renovations made by a taxpayer when the following conditions are met:

(a) the renovations are major and are made to qualified property,

(b) the renovations are capital in nature,

(c) the renovated property continues to satisfy the other eligibility conditions with respect to the ITC.

The issue of whether major renovations have been made to qualified property is a question of fact that must be resolved in light of all the circumstances and particularities of each case.

Consequently, we are of the opinion that if a taxpayer acquires a new motor to install in his vessel that is qualified property, the cost of the new motor could qualify for an ITC if the installation of this motor constitutes a major renovation and, once the motor is installed, the vessel continues to satisfy the other ITC eligibility conditions. Whether the new motor was installed the same year that the vessel was acquired or several years later is not relevant for the purposes of the ITC provided that the vessel is qualified property.

Moreover, the Department is also prepared to allow an ITC for the cost of major renovations made by a taxpayer after acquiring property that has already been used provided that the renovations are significant enough for the property to be considered completely restored. The issue of whether the installation of a new motor in a used vessel is a renovation significant enough for the property to be considered completely restored is a question of fact that must be resolved in light of all the circumstances and particularities of each case.

With respect to your last question, we would like to remind you that, to be eligible for the ITC, the vessel must not have been used for any purpose whatever before it was acquired by the taxpayer. Thus, the vessel must not have been acquired for use or lease, for any purpose whatever by a previous owner. Consequently, if property that has been used or was acquired for use (even though unused) is transferred to a new owner, eligibility for the ITC is not transferable with the property. However, if the company makes major renovations to the vessel, it is possible that the renovation costs would qualify for the ITC provided that the renovations are significant enough for the property to be considered completely restored.

[17] The above-quoted technical interpretations and Interpretation Bulletin IT-331R are broader and more generous than the provisions of the Act, but they can in no way be binding on the Court, or on the Minister for that matter. The qualification made by the author of the technical interpretation of June 22, 1995, at paragraph 9—namely, that a court could uphold an assessment refusing an ITC on the basis that the property is not property that has never been used—was completely accurate and justified under the circumstances.

[18] The tax authorities are not bound by their own administrative positions and they may at any time decide to go against their administrative position in making an assessment. In such a case, the taxpayer has no recourse before the courts. In *Redclay Holdings Ltd. v. R.*, [1996] 2 C.T.C. 2347, the Tax Court of Canada confirmed an assessment made by the Minister that went against his own administrative policy.

[19] The courts generally refer to interpretation bulletins, even though they do not have the force of law, in cases where the Act is ambiguous or susceptible of different interpretations. Interpretation bulletins and budget documents may also be useful as an indication of Parliament's intent. However, I strongly doubt that the courts would be willing to refer to an interpretation bulletin that, as in this case, has been cancelled and not replaced by another bulletin.

[20] In my opinion, the appellant cannot make an equity argument in this case because at the time when the appellant had the work done, Interpretation Bulletin IT-331R had been cancelled for several years already and the technical interpretations, to the extent that the appellant was aware of them at the time, were already a few years old. I do not believe that the appellant relied on the administrative position set out in Interpretation Bulletin IT-331R in planning the renovations to its fishing vessel.

[21] In any event, counsel for the respondent tried to demonstrate at the hearing that the renovations to the vessel did not constitute a complete restoration because only 50% of the hull was new and used equipment worth over \$300,000 was kept. Moreover, he noted the fact that a new fishing vessel similar to the appellant's vessel would have cost between \$1.9 and 2 million while the total cost of the renovations was only around \$722,505.

[22] Lastly, counsel for the respondent argued that the appellant could likely avail itself of the accelerated depreciation provisions with respect to the conversion cost for the vessel, under subsection 13(14) of the Act and paragraph 1100(1)(v) of Part XI of the *Income Tax Regulations*.

[23] For all these reasons, the appeal is dismissed with costs.

Signed at Ottawa, Canada, on this 12th day of October 2011.

“Réal Favreau”

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Favreau J.

Translation certified true  
on this 22nd day of December 2011

Erich Klein, Revisor

CITATION: 2011 TCC 477

COURT FILE NO.: 2008-4090(IT)G

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HER MAJESTY THE QUEEN,

PLACE OF HEARING: Rimouski, Quebec

DATE OF HEARING: December 13, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: October 12, 2011

APPEARANCES:

Counsel for the appellant:	Denis Tremblay
Counsel for the respondent:	Vlad Zolia

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