

Docket: 2011-1804(IT)I

BETWEEN:

PETER BENEDICT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 10, 2012 at Toronto, Ontario

By: The Honourable J.M. Woods

Appearances:

Agent for the Appellant: Graham Mudge

Counsel for the Respondent: Leslie Ross
 Craig Maw

JUDGMENT

The appeal with respect to assessments made under the *Income Tax Act* for the 2008 and 2009 taxation years is allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to claim non-capital losses in the amounts of \$41,545.62 and \$16,034.50 for the 2008 and 2009 taxation years, respectively. Each party shall bear their own costs.

Signed at Toronto, Ontario this 18th day of May 2012.

“J. M. Woods”

Woods J.

Citation: 2012 TCC 174
Date: 20120518
Docket: 2011-1804(IT)I

BETWEEN:

PETER BENEDICT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Peter Benedict, acquired a 43 acre property from his parents around 1994 and established a fish farm operation on the property. The property was sold in 2007 for \$750,000.

[2] Mr. Benedict claimed a terminal loss in respect of depreciable property relating to the farming operation in 2007, and non-capital losses in 2008 and 2009 in respect of the unused portion of the terminal loss.

[3] This appeal concerns assessments made under the *Income Tax Act* which denied the non-capital losses in full. It is not clear whether the terminal loss was also denied as the 2007 taxation year is not part of the appeal. It appears that a dispute relating to the capital gains exemption for that year is outstanding.

[4] The appellant submits that he incurred a terminal loss in the amount of \$74,250.59 relating to the fish farm when the property was sold and the business was discontinued. The amounts that were claimed were \$16,670.47 for 2007, \$41,545.62 for 2008, and \$16,034.50 for 2009.

[5] The respondent raises two arguments in support of the assessments.

[6] The first is that there are no non-capital losses to carryover because Mr. Benedict only claimed a terminal loss in 2007 in the amount of \$16,670.47.

[7] The argument is based on a technicality and I do not accept it. Under s. 20(16) of the *Act*, a taxpayer is required to claim the full amount of a terminal loss incurred, which is the balance of the undepreciated capital cost of a class for the year in which there is no property in the class. The provision reads:

20(16) Terminal loss. Notwithstanding paragraphs 18(1)(a), (b) and (h), where at the end of a taxation year,

(a) the total of all amounts used to determine A to D in the definition “undepreciated capital cost” in subsection 13(21) in respect of a taxpayer’s depreciable property of a particular class exceeds the total of all amounts used to determine E to J in that definition in respect of that property, and

(b) the taxpayer no longer owns any property of that class,

in computing the taxpayer’s income for the year

(c) there shall be deducted the amount of the excess determined under paragraph (a), and

(d) no amount shall be deducted for the year under paragraph (1)(a) in respect of property of that class.

[8] This is not an elective provision, unlike capital cost allowance which allows a taxpayer to choose the year in which the deduction is claimed.

[9] The aggregate amount of the terminal loss to be claimed was clear from the capital cost allowance schedule attached to Mr. Benedict’s income tax return for the 2007 taxation year. That amount was \$74,250.59. A deduction was not claimed for the full amount in the return but this is not fatal to the carryover. The carryover is based on the terminal loss deduction required by the legislation and not what has been claimed by the taxpayer.

[10] I now turn to the respondent’s second argument.

[11] The respondent submits that Mr. Benedict has failed to establish the essential elements of s. 20(16). It is submitted that he failed to establish (1) when the depreciable assets were acquired, (2) their original cost through proper invoices, (3) that the depreciable classes had no assets in 2007, (4) the manner of disposition, and (5) the fair market value of the assets.

[12] I am satisfied by Mr. Benedict's evidence regarding the first four elements. The fifth element is more problematic.

[13] I would first comment that there is nothing in the evidence before me that suggests that Mr. Benedict did not properly account for the expenditures incurred relating to the farming operation. His tax returns, both income tax and GST, were handled by Graham Mudge, an accountant who also represented Mr. Benedict at the hearing. The 2007 tax return was introduced into evidence in full, and excerpts of other returns were provided.

[14] There is nothing in the evidence which suggests any irregularity with either the expenses or the capital cost allowance schedules. There was also entered into evidence a listing of invoices prepared by Mr. Mudge in connection with GST refunds claimed. The expenditures appear to have been meticulously recorded and appear to be reasonable.

[15] In these circumstances, if the balance of the undepreciated capital cost for 2007 is to be challenged, there should be some further basis for doing so. I would agree that the appellant should have introduced some of the invoices, but in my view this should not be fatal in this case since most the expenditures were incurred much earlier.

[16] As for the manner of disposition of the assets, Mr. Benedict provided detailed and cogent testimony as to this at the hearing. I accept the testimony. It would, of course, have been preferable to have more supporting documentation. However, the testimony was sufficiently detailed to be reasonably reliable.

[17] It is unlikely that the assets of the business had much value when the business was discontinued. For the most part, the depreciable assets consisted of structures and old equipment that were left on the property. Mr. Benedict testified that he sold a tractor for \$10,000 to a third party and that he gave an old vehicle to an employee. I accept this testimony.

[18] It is the fifth element that is more problematic for Mr. Benedict. Most of the assets relating to the fish farm were left on the property when it was sold. They were acquired by the buyer of the property but the purchase and sale agreement did not provide an allocation of the purchase price to them.

[19] Mr. Benedict testified that the buyer did not want to carry on the fish operation. This testimony is consistent with the evidence as a whole. Mr. Benedict disposed of a vehicle and tractor, and in the purchase and sale agreement Mr. Benedict was permitted to remove items in a shed and in the basement. If the farming operation were to continue, some of these items likely would have been purchased by the buyer of the property.

[20] However, even if the buyer did not propose to operate the fish farm, some of the chattels may have been desired for the general upkeep of the property. It might be reasonable to allocate some of the purchase price to these items.

[21] I have decided that it is appropriate to give Mr. Benedict the benefit of the doubt on this issue. I am satisfied that the amount that would be allocated to depreciable assets would be small.

[22] I would also comment that the Reply by the respondent failed to state any assumptions with respect to the assessment of the 2009 taxation year. As a result, the respondent should bear the burden of proof for this year. Mr. Benedict did not want the burden of proof to shift on account of a technicality, but in my view it is appropriate to take this into account in giving the benefit of the doubt to Mr. Benedict.

[23] The appeal will be allowed, and the assessments will be referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Benedict is entitled to claim non-capital losses in the amounts of \$41,545.62 and \$16,034.50 for the 2008 and 2009 taxation years, respectively.

[24] As for costs, it is appropriate in my view for each party to bear their own costs. It appears that the representative of the appellant did not prepare documentation to support the case until a day or two prior to the hearing. If the documentation had been prepared earlier, it may have been possible to resolve this matter without a hearing.

Signed at Toronto, Ontario this 18th day of May 2012.

“J. M. Woods”

Woods J.

CITATION: 2012 TCC 174
COURT FILE NO.: 2011-1804(IT)I
STYLE OF CAUSE: PETER BENEDICT v. HER MAJESTY
THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: May 10, 2012
REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods
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APPEARANCES:

Agent for the Appellant: Graham Mudge
Counsel for the Respondent: Leslie Ross
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COUNSEL OF RECORD:

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