Docket: 2012-4355(GST)I

BETWEEN:

BERNARD YEVZEROFF,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 11, 2013, at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Alisa Apostle

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, the notice of which is dated September 2, 2011, is dismissed.

Signed at Montreal, Quebec, this 27th day of August 2013.

"Lucie Lamarre"

Lamarre J.

Citation: 2013 TCC 268
Date: 20130827
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BETWEEN:

BERNARD YEVZEROFF,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from an assessment made by the Minister of National Revenue (**Minister**) on September 2, 2011 under Part IX of the *Excise Tax Act* (**ETA**), denying the appellant input tax credits (**ITCs**) in the amount of $2,462 for the period from January 1, 2011 to March 31, 2011.

[2] The ITCs were disallowed on the basis that (1) the appellant did not carry on any commercial activity; (2) the appellant did not acquire or import any property or services for consumption, use or supply in the course of a commercial activity; (3) the appellant failed to produce adequate receipts, invoices and other records in support of the disallowed ITCs and claimed ITCs in respect of expenses that were personal in nature; and (4) the expenses were not incurred for the purpose of making taxable supplies (Reply, subparagraphs 10 j) to m)).

[3] In court, the appellant admitted that he filed goods and services tax (**GST**) returns on a quarterly basis but denied all the following assumptions of fact that were made by the Minister, and that are set out in subparagraphs 10 b), c), d), e), h) and i) of the Reply, in reaching the above-stated decision. These facts read as follows:

10. In so determining the Appellant's net tax for the Period, the Minister made the following assumptions of fact:

    . . .

    b) the Appellant became a GST registrant on September 26, 2000 and remained a registrant throughout the Period;

    c) at all relevant times, the Appellant operated Andomeda Capital as a sole proprietorship;

    d) the appellant claimed to be operating a business since the year 2000 as a stock trader;

    e) the appellant had a quarterly reporting period beginning on January 1, 2011 and ending on March 31, 2011 for GST purposes;

    . . .

    h) the Appellant did not provide stock trading services for clients in the Period;

    i) the Appellant did not receive any compensation from clients for stock trading services performed in the Period.

[4] The appellant said that the Minister had not challenged the payment of ITCs since he became a registrant in 2000 and that he does not understand why they should be refused to him now. He said that the fact that he did not receive any compensation from clients for stock-trading services performed or that he did not provide stock-trading services to clients during the period at issue is irrelevant. In his notice of appeal, he states that his "commercial activity changed to consulting collectables purchased from Auctioneers" and he stated in court that all he was claiming were the ITCs for the work he did representing clients in tax and collection matters.

[5] As proof of his new commercial activity, he filed as part of Exhibit A-1 excerpts from two decisions of this Court in cases in which he had appeared as agent for the taxpayers. The first case was *Lewis Hsu v. The Queen*, 2005-758(GST)I, 2006 TCC 304, heard by Little J. on January 19, 2006, and the second was *Clarence Maquito v. The Queen*, 2010-2892(GST)I, 2011 TCC 123, which was heard by V.A. Miller J. and in which reasons for judgment were issued on February 23, 2011. The appellant also filed various invoices issued during the period at issue. Two of them were issued by Mandarin and total approximately $750. Another invoice is for an amount of $50,901.99 for the purchase of a software package and follow-up service support. The appellant also filed five invoices from Beaches Para Legal Services issued between April 2010 and August 2010 totalling approximately $1,500 and one issued in October 2011 for almost $1,000. The appellant did not really explain those invoices, but under the heading "description" on the invoices it is indicated that

Beaches Para Legal Services was charging the appellant for such things as attending a settlement conference, preparing a claim and motions, and attending trials in proceedings before the Newmarket and Toronto Small Claims Courts for what I understand were four different clients. Lastly, the appellant filed two invoices from Canada Post for the rental of a postal box for a 12-month period, the first expiring in June 2010 and the second expiring after the period at issue, in June 2013.

[6] With regard to income, the appellant produced a cheque for $200 dated August 5, 2011 from one individual. He also provided a chart of his gross and net income from 2000 through 2010. According to that chart, starting in 2006 and up until 2009 he incurred net losses varying between $5,665 and $ 41,823, and he earned a small net income of $120 in 2010. The chart corresponds to the figures appearing on the summary of information found in the tax returns filed by the appellant for those years (Option C documents) and entered in evidence by the litigation officer for the Canada Revenue Agency (**CRA**) as Exhibit R-9. From those documents it can be seen that the gross business income decreased every year from 2005 to 2009 ($64,543 in 2005, $15,673 in 2006, $3,109 in 2007, $960 in 2008, nil in 2009). It then rose to $987 in 2010, and for 2011 it appears that the appellant declared gross business income of $2,645 and net business income of $288 (as per the Income Tax Return Information-Regular from the CRA provided by the appellant in his documents filed as Exhibit A-1). The appellant stated that in 2006 he had a gain of $29,560 and in 2008 a gain of $3,908 that should be taken into account so as to reduce his business losses. He also said that he claimed capital cost allowance (**CCA**) in 2006, 2007 and 2008 that should not be considered in determining the profit or loss from his business activities. As for the gains, I do not see in the Income Tax Return Information summaries (Exhibit R-9) that any such gains were declared. With respect to CCA, the appellant did not file any statement of revenue and expenses for the years in question.

[7] In a letter sent to the appellant on August 16, 2011 (Exhibit R-3), the CRA made reference to the two cases referred to above in which the appellant had acted as agent for the taxpayers. The CRA asked the appellant to provide all client billings, including detailed invoices regarding taxable services being provided to each client, along with proof of payment. In that letter, the CRA stated that there was no record of any revenue pertaining to his work on the *Maquito* file having been reported, as could be seen from the GST return filed.

Analysis

[8] The issue is whether the appellant carried on a commercial activity during the period at issue so as to be entitled to ITCs.

[9] The term "commercial activity" is defined in subsection 123(1) of the ETA as follows:

> **DIVISION I — INTERPRETATION**
>
> **123. (1) Definitions** — In section 121, this Part and Schedules V to X,
> . . .
> **"commercial activity"** of a person means
>
> (*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,
>
> (*b*) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
>
> (*c*) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;
>
> [My emphasis.]

[10] Counsel for the respondent referred to the case of *Bowden v. Canada*, 2011 TCC 418, [2011] T.C.J. No. 346 (QL), in which Favreau J. of this Court stated the following regarding the definition of "commercial activity", at paragraphs 20 and 21:

> **20** This definition clearly establishes that a business carried on without a reasonable expectation of profit is not a "commercial activity" for GST purposes.
>
> **21** In *Moldowan v. The Queen*, 77 DTC 5213, at page 5215, the Supreme Court of Canada made the following comment concerning the meaning of the expression "reasonable expectation of profit":
>
> > There is a vast case literature on what reasonable expectation of profit means and it is by no means entirely consistent. In my view, whether a taxpayer has a reasonable expectation of profit is an objective determination to be made from all of the facts. The following criteria should be considered: the profit and loss

> experience in past years, the taxpayer's training, the taxpayer's intended course of action, the capability of the venture as capitalized to show a profit after charging capital cost allowance. The list is not intended to be exhaustive. The factors will differ with the nature and extent of the undertaking. . . .

[11] In *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645, the Supreme Court of Canada (**SCC**), after referring to the range of uses and interpretations of the phrase "reasonable expectation of profit" by the courts and the corresponding uncertainty this has created for taxpayers, acknowledged the numerous practical difficulties which may arise in the application of this test (at paragraph 43). As an example, the SCC indicated that it is unclear whether the capacity for profit should be determined after taking into account depreciation and, if so, whether capital cost allowance or accounting depreciation should be used (at paragraph 44).

[12] Nevertheless, the SCC recognized that the criteria listed by Dickson J. in *Moldowan v. The Queen*, [1978] 1 S.C.R. 480, 77 DTC 5213, and referred to by Favreau J. in the above-quoted excerpt from *Bowden*, *supra*, are an attempt to provide an objective list of factors for determining whether the activity in question is of a commercial nature, or in other words, whether the activity shows "indicia of commerciality" or "badges of trade" (paragraph 52).

[13] Although in *Stewart*, *supra*, the SCC emphasized that, where the nature of an activity is clearly commercial, there is no need to undertake an analysis based on the "pursuit of profit" source test as such endeavours necessarily involve the pursuit of profit (paragraph 53), the situation is different where such a test is based on the wording and scheme of the legislation. In the present case the definition of "commercial activity" in the ETA requires that a business be carried on with a reasonable expectation of profit by an individual. That being so, in order for it to be determined that a particular activity constitutes a source of income, the taxpayer must show that he intends to carry on that activity in the pursuit of profit and support that intention with evidence. This requires the taxpayer to establish that his predominant intention is to make a profit from the activity and that the activity has been carried on in accordance with objective standards of businesslike behaviour (paragraphs 5 and 54).

[14] The SCC explicitly declined to expand the list of objective factors set out by Dickson J. in *Moldowan*, *supra*, namely: (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. The SCC reiterated 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. The SCC stressed, however, that the overall assessment to be made is whether or not the taxpayer was carrying on the activity in a commercial manner, which means that it is the commercial nature of the taxpayer's activity that must be evaluated, not his business acumen (paragraph 55).

[15] In the present case, it is my understanding that the appellant does not base his claims for ITCs for the period at issue on the stock-trading activities that he carried on in the past. Rather, the appellant maintains that he reoriented his commercial activities toward the provision of paralegal, and collection services.

[16] According to the appellant's own figures provided to the CRA, his gross business income dropped considerably after 2005, and he continued incurring business losses during the years 2005 through 2009. In 2010 and 2011, the appellant reported gross business income of $987 and $2,645 respectively, and a small net business income of $120 and $288 respectively. No statement of income and expenses was provided for those years.

[17] The appellant claimed $49,240 in expenses for the period at issue (January to March 2011) for GST purposes.

[18] It would appear from the evidence — although this is not clear — that the appellant represented perhaps five or six clients in 2010 and 2011 and one in 2006. I infer this from the invoices from Beaches Para Legal Services and the two judgments issued in cases in which the appellant represented the taxpayers. However, the appellant did not provide any bills issued to any clients during those years. The appellant is not a lawyer and it is unclear what role exactly he played in the paralegal activities.

[19] Furthermore, the appellant did not provide any evidence as to what his intended course of action was during those years, or as to whether there was any capability for his new venture to show a profit.

[20] The appellant tried to explain that the income and loss figures reported by him over the years did not provide an accurate picture of the profits and losses from his new paralegal activities. He said, for example, that capital cost allowance should not be taken into account in the determination of profit. However, he did not provide anything tangible that would help me reach the same conclusion.

[21] The Minister relied on figures reported by the appellant himself. The appellant must maintain and possess detailed information and documentation in support of his claims (see *Njenga v. The Queen*, 96 DTC 6593, [1997] 2 C.T.C. 8 (FCA)).

[22] Without such documentation, especially in the present case, where the appellant wants to modify his own reported figures, it is difficult for me to determine that the appellant had a reasonable expectation of profit from his paralegal or collection activities, even though he reported a very small net business income of $120 in 2010 and $288 in 2011.

[23] Furthermore, even if I were to find that there was a source of income in 2011, the expenses of $49,240 claimed in order to receive $2,462 in ITCs are excessive and unreasonable in relation to the so-called source of income (see subsection 170(2) of the ETA).

[24] I therefore conclude that the Minister was right in disallowing the ITCs for the period at issue.

[25] The appeal is dismissed.

Signed at Montreal, Quebec, this 27th day of August 2013.

"Lucie Lamarre"

Lamarre J.

CITATION:	2013 TCC 268
COURT FILE NO.:	2012-4355(GST)I
STYLE OF CAUSE:	BERNARD YEVZEROFF v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 11, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	August 27, 2013

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Alisa Apostle

COUNSEL OF RECORD:

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Firm:	
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