

Docket: 2014-4251(IT)I

BETWEEN:

HOWARD BERGER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 3, 2015, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant: Brad Burgess
Counsel for the Respondent: Adam Gotfried

JUDGMENT

The Appeals from the reassessments made under the *Income Tax Act* for the 2011 and 2012 taxation years are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis the Appellant was carrying on a business entitled to business losses as claimed other than the meal expenses of \$1,100, which are not deductible.

Signed at Ottawa, Canada, this 19th day of June 2015.

“Campbell J. Miller”

C. Miller J.

Citation: 2015 TCC 153

Date: 20150619

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HOWARD BERGER,

Appellant,

and

HER MAJESTY THE QUEEN,

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REASONS FOR JUDGMENT

C. Miller J.

[1] Mr. Howard Berger appeals by way of the Informal Procedure the Minister of National Revenue's (the "Minister") assessments of his 2011 and 2012 taxation years. The Minister denied Mr. Berger the business losses he claimed in those years of \$26,540 and \$37,866 on the basis Mr. Berger did not conduct any business activities - in tax parlance he had no source of income.

[2] Mr. Berger studied journalism at Humber College for one year of a three-year program as he landed a job with the Etobicoke Guardian. His passion was clearly in sports journalism and he engaged in some freelance work in that regard before being lured in 1988, at the age of 29, by a radio station in Toronto known as the Fan 590, at that time owned by Telemedia. In 1992, FAN 590 became an all sports station and Mr. Berger, though initially covering all sports, became by 1994 a hockey, and specifically a Maple Leafs, reporter. He had a regular twice a day slot reporting on FAN 590 and developed a sports fan following for his insights into hockey and the Maple Leafs. Part of his job as an employed sports reporter was to follow the team at both games and practices, including attending their away games. He developed significant contacts with media relations personnel on teams across the National Hockey League.

[3] In 2002, Rogers took over FAN 590 and after the economic downturn in 2008 a new management team was introduced which, according to Mr. Berger, had a different approach. Senior personnel were laid off and travel budgets were cut,

including Mr. Berger's. He testified that he grew increasingly apprehensive about his future prospects remaining with FAN 590.

[4] Since 2006 part of his job with FAN 590 had been to write 3 or 4 blogs a week for the FAN 590 website: indeed, he described this as becoming an important part of his job. Given his ongoing concern about his future with FAN 590 he devised a plan that, if he lost his job, he would continue to write a hockey sports blog and make a living doing so. His plan was simple: he would write a quality hockey blog that would attract sufficient readership that sponsors would want to advertise on his site.

[5] The inevitable occurred on June 1, 2011 when Mr. Berger was indeed let go by FAN 590. He started his first blog that same month and has been blogging ever since.

[6] His research in the early days suggested the cheapest way to blog was on Google through something called Blogspot.com, which he did just to get the site up and going.

[7] After a couple months, however, he decided he should have a more professional website created, and in September 2011 he hired Rank Xpress to devise a more professional site, which they did. He established his own website, Bergerbytes.ca.

[8] Mr. Berger continued to travel with the Maple Leafs to their away games, relying on his connections with directors of media relations with the various NHL teams to provide access, as he no longer had the media accreditation that he had had with FAN 590. He described the ability to travel with the team as the gold standard in the sports journalism industry. The following is a schedule of his income and the expenses he incurred in 2011-2012:

	2011
Gross Income/Revenue Reported	\$0
Expenses Claimed	
Air flights & Auto Rentals	16,279
Hotels	8,107
Blog Design	\$1,500
To Reconcile to Loss Claimed	654
Total Business Expenses	26,540

Net Income before Adjustments	(26,540)
Less: Business Use of Home	0
Net Income (Loss)	(26,540)

	2012
Gross Income/Revenue Reported	7,500
Expenses Claimed	
Air Flights & Auto Rentals	19,110
Hotels	14,759
Meals (\$2,200 * 50%)	1,100
Motor Vehicle Expenses	2,897
Total Business Expenses	37,866
Net Income before Adjustments	(30,366)
Less: Business Use of Home	3,000
Net Income (Loss)	(33,366)

[9] Clearly, the travel expenses are the vast majority of Mr. Berger's costs. He testified that he relied on funds from his severance package to finance these costs, though acknowledged that the fund has since been depleted. Recently he has determined such amount of travel is no longer economically viable.

[10] Mr. Berger maintained that he concentrated on a quality blog, believing to this day this would increase readership and attract sponsors. He has not approached potential sponsors directly. The sole sponsorship that he has acquired over the years came from a lawyer, Mr. Bogoroch, who he had met at a party in July 2011. Mr. Bogoroch emailed Mr. Berger in July 2011 intrigued by his idea and suggested a meeting. Mr. Berger did not feel he had sufficient readership and wanted to improve his site, which he did in September, so he did not get back to Mr. Bogoroch until December. Mr. Bogoroch was prepared to pay \$7,500 to have his logo on Berger Bytes throughout the 2012 Stanley Cup Playoffs, requesting Mr. Berger attend the games directly. Mr. Berger has sought no other sponsors in 2011 or 2012, or since.

[11] Mr. Berger did email about 500 contacts, including the likes of Don Cherry and Ron MacLean to advise them of his blog.

[12] Mr. Berger not only wrote the blogs but included photos of players and arenas, and news conferences as well as shots of sights in the cities visited, even

including several pages of photos taken from an airplane window. He had taken photos for the FAN 590 blog previously.

[13] While Mr. Berger claimed readership showed a general trend upwards, he was unable to provide any detailed numbers. There was one exhibit of the number of daily visits to the site for a brief period in 2014, which showed an average of just over 5,000 visits a day. He acknowledged there would have been less in 2011 and 2012.

[14] Mr. Berger agreed that his approach did not pay him to report: he was not in fact selling subscriptions. Revenue was to come from sponsors who would see his site as attracting a significant number of readers, potential customers for the sponsor.

[15] Mr. Berger did not prepare a formal business plan, nor a formal budget or any financial projections. As he put it, his full effort went to content, a process still underway.

[16] The Parties agreed that the expense numbers were not in issue, other than \$1,100 claimed for meal expenses. The sole issue was whether Mr. Berger had a source of income, in other words, was he operating a business?

[17] Both Parties referred me to the seminal case of *Stewart v R.*,¹ the 2002 decision of the Supreme Court of Canada knocking the former “reasonable expectation of profit” test on the head and instituting a new process for addressing this type of issue.

[18] Under the Supreme Court of Canada’s guidance the first inquiry is whether the nature of the activity is clearly commercial, in which case there is no need to analyse the taxpayer’s business decisions. Second, if there is a personal element, did the taxpayer intend to carry on the activity for profit, and is there evidence to support that intent? The Supreme Court of Canada points out that even where there is a personal pursuit, if it is undertaken in a sufficiently commercial manner, the venture will be considered a source of income. The court stipulated in this analysis that “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

¹ 2002 SCC 46.

accordance with objective standards of businesslike behaviour”. It goes on to cite the objective factors to be considered as:

1. the profit and loss experience in past years;
2. the taxpayer’s training;
3. the taxpayer’s intended course of action;
4. the capability of the venture to show a profit; and
5. any other factors.

[19] Mr. Burgess, counsel for Mr. Berger, argued that I need look no further than the first inquiry, that this venture is clearly commercial and that there is no personal element. Mr. Gotfried, counsel for the Crown, suggests otherwise, that a sports fan such as Mr. Berger travelling across North America following a hockey team is indicative in and of itself of a strong personal element.

[20] Mr. Burgess argued that the activity for which I must determine its commerciality is solely the blogging. With respect, I disagree. It is the venture: everything that comprises the alleged commercial enterprise. The Supreme Court of Canada gave two examples of clear commercial activities: a law practice and a restaurant. The court implies that it is unreasonable that such types of commercial activity would be practiced on a hobby basis. Mr. Berger’s venture was not blogging in isolation, but attending games, practices, conferences, taking photos, blogging reports and photos, attracting readers and selling advertising: that was the activity in question. And, while I recognize the commercial aspect of these activities taken together, I also conclude that for a sports fan like Mr. Berger to be travelling to New York City, for example, to watch the Maple Leafs play the Rangers, does have a personal element, as does the blogging itself. Indeed, while presented with no evidence in this regard, common sense suggests “blogging” is by its nature as much a recreational pastime as possibly a commercial practice. I conclude that there is a personal element to Mr. Berger’s activities: they are not clearly commercial as that concept is defined by the reasoning in *Stewart*. That case is clear that there does not have to be a strong personal element: the weight of the personal versus commercial aspect of the venture arises in the next stage of the analysis. As already indicated, sufficient badges of commerciality can outweigh the personal element and still lead to a finding of a source of income.

[21] Proceeding then to the second aspect of the analysis, and referencing the Supreme Court of Canada's test, did Mr. Berger establish his predominant intention was to make a profit from the activity, and has it been carried out in accordance with objective standards of businesslike behaviour?

[22] Mr. Burgess quite rightly pointed out that this stage of the analysis is not intended to be an attack on the taxpayer's business acumen: making bad business decisions does not mean one is not in business. I agree with that position but at the same time, I am directed by the Supreme Court of Canada to address objective standards of businesslike behaviour. It can be a fine line between poor commercial decision making and failure to meet those objective standards. In effect, are decisions so weak that no reasonable business person on an objective standard of businesslike behaviour would have made them? In Mr. Berger's case this would be a harsh judgment for someone just 18 months into a venture. More on that shortly.

[23] I will address the factors identified by the Supreme Court of Canada in assessing Mr. Berger's businesslike behaviour.

Profit and loss experienced in past years

[24] This is not a significant factor for the obvious reason there are no past years to address. The years in issue, 2011 and 2012, represent the first 18 months of Mr. Berger's activities, and in 2011 the hockey season he covered was for just four months. In commercial terms, Mr. Berger was in a start-up phase and the nature of the activity was such that immediate profits in this media-type business would be unlikely. Like a struggling artist (singer, dancer, writer...) in the early stages of a career, some businesses inherently take time.

Taxpayer's training

[25] This is not the case of a hockey fan believing he could be a sportswriter. This is the case of a professional sportswriter believing he could be a businessman. Mr. Berger's training, while limited from an educational perspective, is vast from an experiential perspective. For over 20 years he got paid for reporting on sports stories, mainly in connection with the Maple Leafs (I cannot resist adding that it is taking immense internal restraint to not comment on the ongoing Leafs "legacy"). The Respondent would hasten to remind me, however, that Mr. Berger was not selling his sports reports, there were no subscriptions as such. He made money from selling advertising on his blog. Mr. Berger would counter that he could only

attract the advertising if he had sufficient readers, which he would only get if he produced outstanding sports reporting.

[26] I certainly take the Respondent's point that, while Mr. Berger had significant sports reporting "training", he had no education or experience on selling advertising or running a media business. I find, however, that this is not fatal. Mr. Berger has taken a commercial activity, sportswriting, for which he got paid for 20 years and used that experience to attempt to continue to get paid. As indicated earlier, this is not just a sports enthusiast having a crack at making money from his passion. Mr. Berger has some impressive credentials to suggest his approach.

Intended course of action

[27] First, put Mr. Berger's intended course of action into context: here is someone in his 50's, who could see that his job was in jeopardy and who had relied on his ability to earn income from sportswriting for 20 plus years. He gained some experience blogging, while still with FAN 590, and when the inevitable happened he made the decision to use his strength, sportswriting, to earn a living.

[28] What was his plan? Mr. Berger testified that his plan was simple, to continue to follow the Leafs, write a quality blog, gaining sufficient readers that he could then attract sponsors to pay to advertise on his blog. He did not write a formal business plan nor make any financial projections. He concentrated on the product, and indeed after a short spell on Blogspot.com he paid to have a professionally created website. He sent out 500 emails to major players in the hockey media industry advising of his blog.

[29] The Respondent concentrated on what Mr. Berger's intended course of action did not include: no active plans for soliciting advertisers and no financial planning. He just carried on doing what he had done, paying for it out of his severance package with a hope that advertisers would come to him. That is not, according to the Respondent, a businesslike course of action. The only revenue Mr. Berger received came through no active effort on his part.

[30] The first factor was neutral. The second factor favoured Mr. Berger operating a business. This factor is where the dilemma arises between judging Mr. Berger's business acumen versus simply comparing his actions to objective standards of businesslike behaviour. And the businesslike behaviour specifically to be addressed is the soliciting of sponsors. He did nothing in the hopes that the product would effectively sell itself. And, in the first 18 months at issue before me,

what happened? A sponsor did indeed fall into his lap, in effect bearing out his view that a good idea well-presented would have sponsors knocking on his door. I heard no evidence as to what is the norm when it comes to selling “blog advertising” but I am swayed by two factors: first, this was the very early stages of a fledgling “business” and concentrating on a quality product to attract readers (which concentration is evidenced by paying for help to get a professional website) is a businesslike decision with some foundation. Second, Mr. Berger’s idea and his product did result in attracting a sponsor. While I might view his intended course of action (or inaction) as poor business judgment, it is not so devoid of commercial reasoning to conclude the venture was personal and nothing more. On balance, I find Mr. Berger did intend to pursue profit and did take, in those 18 months, commercial steps to do so. There will come a time, however, where continuing on this course without any sponsors knocking on his door can only lead to a conclusion that a commercial expectation has been overtaken by personal dreams. I do not have years after 2012 in front of me.

Capability of venture to show a profit

[31] Mr. Berger fails in this regard to have provided me with any projections, comparisons, readership numbers, anything at all frankly to allow me to accurately assess the venture’s capability to make a profit. It is all conjecture. No solid data, just a suggestion his readership numbers were trending upwards. This factor works against Mr. Berger’s position that this was not a hobby but a business. Businesses are out to make money and generally have an idea of how much and how feasible the money-making venture is. Mr. Berger does not seem to have a handle on this. It leaves me to guess whether a steady readership in the few thousands is sufficient to attract sponsors to cover expenses of \$30,000-\$40,000 a year.

[32] I conclude the lack of evidence on this aspect, while not helpful to Mr. Berger, is also not fatal. I simply have not been convinced one way or the other that this venture is capable of showing a profit. But, given the very early stage of his venture, and taken together with the other factors, I find that the activity does go beyond hobby. I conclude Mr. Berger had a predominant intention to make a profit, and in the first 18 months behaved in a reasonable businesslike manner to pursue that end. As I hope I have made clear to Mr. Berger, my view is limited to the short term start-up phase of his venture.

[33] The Appeals are allowed and the matters are referred back to the Minister for reassessment and reconsideration on the basis that Mr. Berger was carrying on

a business entitled to business losses in 2011 and 2012 as claimed other than the meal expenses of \$1,100, which the Parties have agreed are not deductible.

Signed at Ottawa, Canada, this 19th day of June 2015.

“Campbell J. Miller”

C. Miller J.

CITATION: 2015 TCC 153
COURT FILE NO.: 2014-4251(IT)I
STYLE OF CAUSE: HOWARD BERGER AND HER MAJESTY THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: June 3, 2015
REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT: June 19, 2015

APPEARANCES:

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