[OFFICIAL ENGLISH TRANSLATION]

1999-4717(IT)I

BETWEEN:

YVON BEAUCHESNE,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

Appeals heard on July 12, 2000, at Trois-Rivières, Quebec, by

the Honourable Judge Louise Lamarre Proulx

Appearances

Counsel for the Appellant:	Patrick Poulin
Counsel for the Respondent:	Diane Lemery

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1995 and 1996 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 9th day of August 2000.

"Louise Lamarre Proulx"

J.T.C.C.

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Date: 20000809
Docket: 1999-4717(IT)I

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REASONS FOR JUDGMENT

Lamarre Proulx, J.T.C.C.

[1] This is an appeal under the informal procedure for the 1995 and 1996 taxation years.

[2] The issue is whether, during those years, the appellant was carrying on a commercial activity operating as "Mini-Excavation Y.B. Enr.".

[3] The facts on which the Minister of National Revenue ("the Minister") relied in making his reassessments are set out in paragraph 10 of the Reply to the Notice of Appeal ("the Reply"), as follows:

(a) during the years at issue, the appellant worked as a welder;

(b) during the years at issue, the appellant carried on an activity as sole proprietor operating as "Mini-Excavation Y.B. Enr.";

(c) during the years at issue, the appellant carried on an activity as sole proprietor operating as "Mini-Excavation Y.B. Enr.";

(d) in 1993, the appellant purchased a Kubota brand tractor with a front-end loader, a backhoe, a tiller, a brush cutter, a snow blower, a post-hole digger and a trailer, for a total value of $25,000;

(e) during the years at issue, the appellant did not spend many working hours at his activity since he was working full time (40-hour weeks);

(f) in anticipation of retirement in 2001, the appellant intends to work as a welder for as many hours as possible so that he can have a full pension;

(g) during the years from 1993 to 1997, the appellant completed only 16 contracts in carrying on his activity;

(h) more specifically, the Minister calculated the following numbers of hours the appellant worked in carrying on his activity:

i) 72 hours billed in 1995,
ii) 0 hours billed in 1996,
iii) 28 hours billed in 1997;

(i) the appellant does not have an apprentice's (operator's) card or an excavation contractor's licence;

(j) the appellant's activity continually generated losses:

i)	1993	$5,025
ii)	1994	$8,480
iii)	1995	$6,897
iv)	1996	$11,553

v) 1997 $51;

(k) annual sales from the appellant's activity were as follows:

i)	1993	$205
ii)	1994	$3,635
iii)	1995	$1,843
iv)	1996	$0
v)	1997	$1,120;

(l) following the theft of the Kubota tractor in 1996, the appellant waited 14 months before purchasing replacement equipment;

(m) the appellant, believing he was covered by his home insurance policy, did not carry commercial insurance on the Kubota tractor and was paid no compensation;

(n) the loss in 1995 is mainly the result of the capital cost allowance of $6,654 that was claimed;

(o) in 1996, a terminal loss of $11,186 was computed because of the loss of the Kubota tractor;

(p) in 1997, the appellant purchased a John Deere brand excavator for approximately $16,000;

(q) no advertising (posters or signs) was posted at the appellant's residence, where the equipment was located throughout the years at issue;

(r) the appellant had no reasonable expectation of profit from carrying on his activity;

(s) for the years at issue, the losses claimed from the appellant's activity were personal expenses.

[4] The facts in support of the appellant's arguments are described in paragraphs 6 to 19 and 22 of the Notice of Appeal and read as follows:

...

6. In fact, for the years at issue, the appellant worked mainly in the construction industry and wanted to start up a business to generate additional income.

7. As a result, one of the appellant's friends, knowing that the appellant was interested in machinery, suggested that he submit a tender on a project to excavate a path, which the appellant did.

8. To that end, the appellant purchased a tractor for light excavation work.

9. Unfortunately, the appellant's friend did not obtain the contract, but the appellant nevertheless decided to start up his business.

10. Consequently, the appellant first contacted the Commission de la construction du Québec, in order to ascertain the extent of work he was legally authorized to perform.

11. Then, in order to comply with the municipal bylaws, the appellant registered his business and place of business with the town of Bécancour.

12. The appellant also had a series of business cards printed in order to promote his business.

13. In order to give his business a good start, the appellant then conducted a promotional campaign in the Bécancour area, in particular by taking out advertising space on notepads distributed in the area, on menus for trailside restaurants for snowmobile riders, and on various other documents distributed throughout the area he wanted to cover.

14. The appellant also registered his business for the purposes of the Goods and Services Tax (GST) and the Quebec Sales Tax (QST).

15. In 1995, the appellant had gross income of one thousand eight hundred forty-three dollars ($1,843) and expenditures of nine thousand four hundred forty dollars ($9,440), including a claimed capital cost allowance of six thousand six hundred fifty-four dollars ($6,654) from his business.

16. In 1996, the appellant had a loss of eleven thousand five hundred fifty-three dollars ($11,553) because he had no business income following the theft of his tractor.

> 17. Thus, eleven thousand one hundred eighty-five dollars ($11,185) or ninety-six point eight per cent (96.8%) of that loss resulted from the terminal loss because of the theft of the tractor.
>
> 18. The appellant was unable to recover any money from his insurers.
>
> 19. The theft of the tractor was an accident that the appellant could not reasonably have foreseen and was the main cause of the loss incurred that year.
>
> ...
>
> 22. As well, the appellant purchased another tractor in 1997 and has continued to operate his business to this day.
>
> ...

[5] The appellant testified on his own behalf. Mr. Robert Gaudreau, an auditor at Revenue Canada, testified on behalf of the respondent.

[6] The appellant admitted the assumptions in paragraphs 10(a) to 10(d) and 10(j) to 10(p) of the Reply.

[7] The appellant is a welder and a member of a union—local 144. He obtains work as a welder through this union.

[8] The appellant is a member of that union's pension plan. In 1993, he was 42 years old. At age 50, he would be eligible to retire with a reduced pension. At age 55, he would be eligible for a full pension. He explained that he began excavation work in order to supplement his pension.

[9] A stamp indicating the business's name, telephone number, and GST and QST registration numbers was produced (Exhibit A-1) as evidence in support of the claim in paragraph 14 of the Notice of Appeal. Although this point is not crucial to my decision, in my opinion the appellant's correspondence with the government authorities in obtaining these registrations would have been the best evidence.

[10] Exhibit A-2 is a business card with a photo of the tractor purchased in 1993. There is no invoice showing the date of purchase of the business cards. The business card indicates work with a mini-backhoe and a rototiller as activities.

[11] Exhibit A-3 is an April 19, 1995 contract to purchase advertising. On this contract is a note indicating that the following is to be added to what is written on the business card: post-hole digger, brush cutter, garden tilling a specialty. The cost of the contract appears to be $250. Exhibit A-4 appears to be the result of this contract: a notepad with various advertising spaces, including one for "Mini-Excavation Y.B. Enr."

[12] Exhibit A-6 consists of two receipts from Club Motoneige Riv-Bec Inc., each for $25. Those receipts for advertising are signed by the appellant, who explained that he was the Club's president at the time. Exhibit A-5 is the result of this advertising purchase: a snowmobile trail map on the back of which are a number of business cards, including that of "Mini-Excavation Y.B. Enr."

[13] Exhibit A-7 is a February 28, 1995, document from the town of Bécancour: an authorization for a home business office, specifying that the backhoe was not to be stored on the residential lot, which was zoned as agricultural land.

[14] In testifying, the appellant reiterated the facts described in paragraphs 6 to 9 of the Notice of Appeal. Concerning the wording of paragraph 10 of the Notice of Appeal, he stated that the Commission de la construction du Québec ("the CCQ") had informed him that he was authorized to dig house foundations. No documentation confirmed this statement and, in any case, the appellant obtained no contracts for this type of work.

[15] Concerning the theft of the tractor in April 1996, the appellant explained that it had been stolen while he was inside the garage. He purchased an excavator shovel in 1997; at the time of this purchase, the excavator shovel had needed repairs, which the appellant had done.

[16] In cross-examination, the appellant stated that during the years at issue he worked as a welder, doing maintenance work on equipment for Prometal in Bécancour. As a result, he was available only evenings and weekends. In addition, it was in his interest to accumulate as many hours as possible in anticipation of his retirement, a point that is confirmed by paragraphs 10(e) and 10(f) of the Reply. In other years, he might be called upon to work in outlying areas.

[17] The appellant admitted the assumptions in paragraph 10(i) of the Reply. The appellant did not have either an apprentice's (operator's) card or an excavation contractor's licence. He is not authorized to work on a construction site. Before 1993, he had no training or experience in excavation, earthwork, or snow removal.

[18] The appellant admitted that from 1993 to 1997 he had obtained only 16 contracts, as is pointed out in paragraph 10(g) of the Reply, which had been denied at the beginning of the hearing. Of those 16 contracts, only four came from persons who were not immediate family members or friends of the appellant. His hourly rates were between $25 and $30 when he worked with the tractor, and $40 when he worked with the excavator.

[19] Although the appellant had denied paragraph 10(h) of the Reply, he admitted that it was accurate. On the basis of a normal seven-hour working day, he would have worked 10 days in 1995, no days in 1996, and four days in 1997. The appellant did not challenge these figures.

[20] Concerning the fact that the first tractor was not insured, the appellant explained that he had been negotiating with an insurance agent but had found the premium too high. The excavator is now apparently insured for $600 or $700 annually against theft, fire and liability.

[21] The appellant admitted that he had used the tractor for personal purposes. His son, who was trying to register for courses in heavy equipment operation, used the tractor to practice.

[22] The appellant submitted that he had operated the business at a profit in 1998 and 1999.

[23] Robert Gaudreau explained that in determining whether there was a reasonable expectation of profit, the facts of the case, not the element of personal use, were considered: little effort and little profit. Throughout the years at issue, the appellant obtained only 16 contracts and worked only a few days. There was no sign at his home indicating the activity. Had the appellant continued to claim a capital cost allowance from 1997 to 1999, the loss would have been $2,601 in 1997, $4,384 in 1998, and $3,035 in 1999. Furthermore, during those years the appellant hardly claimed any further expenditures: for example, the cost of insurance was not included in his expenditures.

[24] Counsel for the appellant pointed out the appellant's knowledge of construction, the fact that his was a small business that needed time to establish profitability, and the fact that it had nearly been profitable since 1997. He also noted that no one was obliged to claim the capital cost allowance and that, if the appellant did not claim it in 1997, this was his right. He pointed out that the appellant had obtained information from the CCQ. The appellant's decision not to take out insurance might have been an error in judgment, but it had been a business decision since the appellant had decided that the cost of insurance was too high. The appellant could not be blamed for the theft of the tractor, which was an event beyond his control. The appellant had made efforts to adjust by reducing his expenditures.

[25] Counsel for the respondent noted that the appellant spent little effort on his activity and that, in fact, the efforts were instead those that would be made to pursue a hobby. The appellant apparently worked at his activity for 14 days from 1995 to 1997, and for two days in 1998. Clearly, that activity was not a business. The appellant had no employees and was not available during the day. Although reference was made to a reduction in expenditures since 1997, the only statement of expenditures available for those years does not show the expenditures that were made, insurance for example. If profits were made in subsequent years, they are artificial. The appellant has neither the training nor the licensing required for this type of business.

Conclusion

[26] From 1993 to 1995, the very small number of days worked, the minimal gross income from the activity, the appellant's absence of training, and the resulting absence of the licences required to operate the business make it impossible to conclude that the appellant was carrying on a commercial activity. Clearly, the appellant did not devote himself to his business as would have a person wanting to make the business a livelihood. It is especially odd that the appellant did not take out insurance—theft and especially liability insurance— for his activities with the tractor. It is unlikely that a person could operate a business without this type of insurance; even if that were possible, it is certainly not characteristic of a commercial activity. In fact, the evidence in this case has shown no characteristics of a commercial activity seeking profitability and efficiency.

[27] I therefore conclude that, in refusing to allow the business losses that were claimed in 1995 and 1996, the Minister's decision was right in fact and in law, because the appellant did not operate a business within the meaning of that term under sections 3, 9 and 18(1)(*a*) of the *Income Tax Act*. The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 9th day of August 2000.

"Louise Lamarre Proulx"

J.T.C.C.