Docket: 2008-1865(IT)I

BETWEEN:

SCOTT OKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 9, 2009, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Susan Tataryn
Counsel for the Respondent:	Ricky Tang

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years are dismissed.

Signed at Ottawa, Canada, this 7th day of August 2009.

"Campbell Miller"

C. Miller J.

Citation: 2009 TCC 386
Date: 20090804
Docket: 2008-1865(IT)I

BETWEEN:

SCOTT OKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] Mr. Scott Oke appeals, by way of Informal Procedure, the assessments of the Minister of National Revenue of the 2003, 2004 and 2005 taxation years. The Minister applied the provisions of the *Income Tax Regulations* 1100(15), (17), (17.2) and (17.3) in restricting the capital cost allowance (CCA) claimed by Mr. Oke on his recreational vehicle. The issue revolves around whether the activity Mr. Oke engaged in with respect to his RV was the rental of leasing property, to which the restriction on CCA applies, or whether it was, in accordance with *Regulation* 1100(17.3) "property used in a business carried on by the individual in which he is personally active on a continuous basis... ."

Facts

[2] During 2003 - 2005, Mr. Oke was the senior point man, as he put it, for Abbott Pharmaceutical in promoting the sale of drugs to the Province of Ontario. This was a full-time job. He also performed with and managed a band, which occupied him a couple of weekends a month, other than during the winter months. In these two

activities, Mr. Oke used his considerable business skills in dealing with contracts and business-related issues.

[3] Through a friend, who knew how much Mr. Oke enjoyed RVing, Mr. Oke became aware of the possibility of buying and renting out recreational vehicles. Mr. Oke testified that he saw an opportunity for some retirement planning, by getting out of the drug business and relying on income from the rental of a few recreational vehicles.

[4] He learned through Mr. Clements, the owner of Coast-to-Coast RV Inc., which had a fleet of 30 to 40 RVs (owned by several individual owners), that limiting the market of renting to movie production studios was the way to go as it was possible to get longer term leases (12, 14 or 16 weeks). Mr. Clements rented exclusively to movie producers. Mr. Oke found this attractive as, with a full-time job, it would not require a lot of daily chores or activities.

[5] Mr. Clements initially was not interested in another RV owner joining his fleet, but Mr. Oke satisfied him that he would personally maintain his unit. It was clear that Mr. Oke was interested in the business. Mr. Oke planned his purchase of a recreational vehicle in conjunction with a long term rental Mr. Clements had obtained with a movie producer.

[6] Mr. Oke was true to his word. He took an active interest in his unit. In fact, he took a keen interest in Mr. Clements' business. They became friends. Mr. Clements did not have the business acumen of Mr. Oke, and would have Mr. Oke review Coast-to-Coast's contracts with movie studios. It was Mr. Clements, however, who had the contacts with the movie industry, and negotiations for the rental of part of his fleet (including Mr. Oke's unit) were always conducted between Mr. Clements and the movie studio.

[7] Mr. Oke's unit remained at Coast-to-Coast's premises with the rest of the fleet. If it could be rented to the movie industry for 16 to 18 weeks a year, that was a good and profitable year. Mr. Clements would obtain a contract from a movie producer for a number of recreational vehicles. He would then enter a one-page agreement with Mr. Oke, or the other owners, with respect to their particular recreational vehicle setting out the rate, usually $100.00 a day, and the term of the rental. The agreement provided:

> The vehicle must be insured by the owner and it is the owner's responsibility to inform his insurance company of rental dates. The production company will also provide blanket coverage for the unit while under contract.
>
> The owner is responsible for general maintenance and wear and tear costs. Coast-to-Coast RV Inc. will notify the owner of repairs over $100.00 (eg. brakes) before commencing. We will endeavour to keep the vehicle on production and earning.

[8] This was the same form used for all owners of RVs in Mr. Clements' fleet. Obviously Mr. Clements charged something greater to the movie studio than he paid to the owners. I noted that a couple of these contracts referred to Mr. Oke as well as his wife as owners of the RV. Neither party made anything of this point.

[9] Mr. Oke did take more of an interest in the business than other owners. Mr. Oke would look after the maintenance of his RV, while other owners would leave that to Mr. Clements. If an immediate problem came up while the RV was in use, Mr. Clements would have to deal with it directly without waiting for Mr. Oke, as Mr. Clements would always be the point of contact for the clients. Mr. Oke would go to Coast-to-Coast's yard to help Mr. Clements. Mr. Oke would attend "show and tells" where the movie producers would come and check out the RVs. Mr. Clements testified that Mr. Oke had a more businesslike appearance or manner about him that helped at such events. Mr. Oke would also assist in shuttling RVs to and from the movie sites.

[10] In the first year of his ownership, Mr. Oke tried renting privately and had two short-term leases. He found the wear and tear was greater on the RV and that it was "not worthwhile". He determined to stick with Mr. Clements, limiting rental of his RV through Coast-to-Coast to movie studios.

[11] It was interesting to note how Mr. Oke referred consistently to "we", as in "we would determine if we had enough RVs for a particular job". Indeed, Mr. Clements testified he valued Mr. Oke's help and would consider bringing him in as a partner.

[12] Mr. Oke covered the insurance for the RV while in the yard, though obtained the coverage through Mr. Clements who was able to get less expensive coverage for the fleet.

[13] Over the three years, Mr. Oke's RV was leased out through Coast-to-Coast approximately 12 times. Mr. Oke would have attended most, but not all, of the "show and tells" Coast-to-Coast would have had to obtain those contracts.

[14] Mr. Oke had gross rental income of $14,700.00, $12,795.00 and $19,425.00 and expenses, before CCA, of $9,405.00, $7,384.00 and $3,260.00 in 2003, 2004 and 2005, respectively. Mr. Oke claimed CCA in those years of $35,018.00, $27,513.00 and $22,259.00. In its assessment, Canada Revenue Agency limited the CCA to $5,295.00, $5,411.00 and $16,165.00.

Analysis

[15] The *Regulations* in issue read as follows:

Income Tax Regulations
C.R.C., c. 945
DIVISION I DEDUCTIONS ALLOWED

PART XI CAPITAL COST ALLOWANCES
SECTION 1100.

1100(1) For the purposes of paragraphs 8(1)(*j*) and (*p*) and 20(1)(*a*) of the *Act*, the following deductions are allowed in computing a taxpayer's income for each taxation year:

Leasing Properties

(15) Notwithstanding subsection (1), in no case shall the aggregate of deductions, each of which is a deduction in respect of property of a prescribed class that is leasing property owned by a taxpayer, otherwise allowed to the taxpayer under subsection (1) in computing his income for a taxation year, exceed the amount, if any, by which

(*a*) the aggregate of amounts each of which is

- (i) his income for the year from renting, leasing or earning royalties from, a leasing property or a property that would be a leasing property but for subsection (18), (19) or (20) where such property is owned by him, computed without regard to paragraph 20(1)(a) of the *Act*, or
- (ii) the income of a partnership for the year from renting, leasing or earning royalties from, a leasing property or a property that would be a leasing property but for subsection (18), (19) or (20) where such property is owned by the partnership, to the extent of the taxpayer's share of such income,

exceeds

- (*b*) the aggregate of amounts each of which is

- (i) his loss for the year from renting, leasing or earning royalties from, a property referred to in subparagraph (a)(i), computed without regard to paragraph 20(1)(a) of the Act, or
- (ii) the loss of a partnership for the year from renting, leasing or earning royalties from, a property referred to in subparagraph (a)(ii), to the extent of the taxpayer's share of such loss.

[…]

(17) Subject to subsection (18), in this section and section 1101, "leasing property" of a taxpayer or a partnership means depreciable property other than

- (a) rental property,
- (b) computer tax shelter property, or
- (c) property referred to in paragraph (w) of Class 10 or in paragraph (n) of Class 12 in Schedule II,

where such property is owned by the taxpayer or the partnership, whether jointly with another person or otherwise, if, in the taxation year in respect of which the expression is being applied, the property was used by the taxpayer or the partnership principally for the purpose of gaining or producing gross revenue that is rent, royalty or leasing revenue, but for greater certainty, does not include a property leased by the taxpayer or the partnership to a lessee, in the ordinary course of the taxpayer's or partnership's business of selling goods or rendering services, under an agreement by which the lessee undertakes to use the property to carry on the business of selling, or promoting the sale of, the taxpayer's or partnership's goods or services.

(17.2) For the purposes of subsections (1.11) and (17), gross revenue derived in a taxation year from

- (*a*) the right of a person or partnership, other than the owner of a property, to use or occupy the property or a part thereof, and
- (*b*) services offered to a person or partnership that are ancillary to the use or occupation by the person or partnership of the property or the part thereof

shall be considered to be rent derived in the year from the property.

(17.3) Subsection (17.2) does not apply in any particular taxation year to property owned by

- (*b*) an individual, where the property is used in a business carried on in the year by the individual in which he is personally active on a continuous basis throughout that portion of the year during which the business is ordinarily carried on; or

[16] The Respondent argues that Mr. Oke had a rental activity involving leasing property and is therefore restricted in the CCA he can claim. Further, that he cannot rely on the saving provision of Regulation 1100(17.3) as the recreational vehicle was not property used in a business carried on by Mr. Oke in which he was personally active on a continuous basis. The Appellant's position is that Mr. Oke was active on a continuous basis in the business of renting the recreational vehicle.

[17] Both parties relied on Justice Brulé's two decisions in *Stephens v. Her Majesty The Queen*[1] and *Phillips v. Her Majesty the Queen*[2], regarding the application of these *Regulations* in connection with recreational vehicles. In *Phillips,* Justice Brulé summarized the *Regulations* as follows:

> 13 Therefore, in summary subsection 1100(17) defines 'leasing property' as depreciable property, other than real property, used by the taxpayer principally for the purpose of gaining or producing gross revenue that is rent or leasing revenue. Subsection 1100(17.2) includes as rent, gross revenue incurred from the right of a person other than the owner to use the property and gross revenue incurred from services offered to a person that are ancillary to the use by the person of the property. The changes that occurred in regards to subsection 1100(17) in 1986 are explained by H. Stikeman in TaxPartner as follows:
>
> - "For the 1986 and subsequent taxation years, the definition of "leasing property" in respect of property acquired by a taxpayer or partnership is in effect expanded by the addition of subsection 1100(17.2). Along with subsection 1100(14.1), this brings into effect the proposals announced in the May 1985 budget intended to prevent individuals from sheltering other income with losses created by capital cost allowance in respect of property such as yachts, recreational vehicles, hotels, and nursing homes used in businesses that offer services with the use of such property. Revenue derived from the right of a person or partnership (except the owner) to use or occupy the property, and revenue from services offered that are ancillary to such use or occupation, are considered to be rent."
>
> 14 An exception to subsection 1100(17.2) is provided for under subsection 1100(17.3). In other words, subsection 1100(17.2) does not apply to property

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1 [2000] 1. C.T.C. 2360.

2 [2000] 1. C.T.C. 2314.

> owned by an individual where the property is used by a business carried on in the year by the individual in which he is personally active on a continuous basis. In the appellant's case, he must have been actively involved in the business on a continuous basis.

[18] It is clear there are two elements of *Regulation* 1100(17.3) that Mr. Oke must prove to take advantage of that saving provision:

> (i) The property must be used in a business carried on by Mr. Oke.
>
> (ii) Mr. Oke must personally be active in the business on a continuous basis throughout that portion of the year during which business is ordinarily carried on.

The parties appear to have jumped to the second element too quickly.

[19] Income from business and income from property are, under the *Income Tax Act*, two separate and distinct sources of income. There has been considerable jurisprudence on what is meant by business and carrying on a business, but little about being personally active on a continuous basis in the business. But let us not put the cart before the horse.

[20] Mr. Oke's recreational vehicle was used in a business. I have concluded, however, that the business in which it was used was the business of Coast-to-Coast, the business of renting RVs to movie studios for several-week terms. Mr. Oke's recreational vehicle was simply one of many in a fleet operated by Coast-to-Coast. Mr. Clements negotiated the deals with movie studios, he managed insurance for the RVs (though owners paid), he provided emergency maintenance for all vehicles and regular maintenance for all but Mr. Oke's, who looked after that himself. Were there two businesses at play? Coast-to-Coast and Mr. Oke's? No, only one - the business of Coast-to-Coast.

[21] What did Mr. Oke do over and above what other owners did that constituted the renting of his recreational vehicle to Coast-to-Coast as a business? He suggested that he did the following:

> (i) Planned business strategies. With respect, Mr. Oke tried briefly two short-term leases and quickly fell back onto Mr. Clements' strategy of longer-term leases to the movie industry. This is no greater a strategy plan than any other owner.

(ii) Determined contracts to pursue. Mr. Oke pursued one client - Coast-to-Coast. It was Mr. Clements who pursued the movie industry clients.

(iii) Negotiated and reviewed rental contracts. Yes, Mr. Oke looked at Mr. Clements' contracts with the movie studios, but that was part of Mr. Clements' business not Mr. Oke's. Further, he admitted he was not involved in negotiations with the studios.

(iv) Bookkeeping. Mr. Oke acknowledged bookkeeping was minimal.

(v) Filed quarterly GST returns. Mr. Oke never registered a business name.

(vi) Scheduled and delivered the recreational vehicle for regular maintenance and warranty work and contracted with the dealer for the same.

(vii) Negotiated and purchased recreational vehicle insurance. This overstates my understanding of the evidence which was that Mr. Oke simply bought into the insurance that Mr. Clements was able to arrange for the fleet.

(viii) Secured licences and clean air tests.

(vix) Researched and negotiated the purchase of the recreational vehicle. Again, my impression was that he was guided very much by Mr. Clements, and, in any event, this would be no more than any owner would do.

[22] These factors have not convinced me that Mr. Oke was carrying on a business. What I see is in an individual with a keen interest in recreational vehicles, hoping to learn as much about the business as possible. He assisted Mr. Clements in Mr. Clements' business as much as he could, and as time permitted. Mr. Clements was appreciative, to the point of considering Mr. Oke as a potential partner. But that all relates to Mr. Clements' business, not Mr. Oke's rental of his one recreational vehicle to Coast-to-Coast. Mr. Oke is astutely learning the business, and his one RV is a toehold into that training process. Yes, he spends more time than other owners. Indeed he has become a friend to Mr. Clements because of that, but there are far too few indices of carrying on a business to satisfy me that Mr. Oke's source of income

was business, and not simply property. He was engaged in renting a leasing property and is properly caught by the restriction in *Regulation* 1100(15).

[23] The Appellants' counsel argued that it was not open to me to decide on this basis, as the Respondent specifically addressed only the element of whether Mr. Oke was personally active on a continuous basis. I disagree. All of the relevant regulations were before me and I cannot ignore their import. The Appellant in his own Appeal drafted the issue as to whether the Minister properly relied on the exemption in 1100(17.3) of the *Regulations*. This clearly captures the requirement for a business. Further in the Minister's Reply to the Notice of Appeal, the Minister states:

> "7. By Notices of Reassessment dated February 2, 2007, the Minister reassessed the Appellants tax liability for the 2003, 2004 and 2005 taxation years by considering business venture as rental activity, and therefore, disallowing the business losses.
>
> 10.(c) The Appellants activity involves the rental of his RV to television and film industry and the general leisure market
>
> 11. The issue is whether the Appellant had a rental activity and not a rental business."

I conclude that the issue of the business was very much put before the Court by both parties, and it is open to me to decide on that basis.

[24] Having reached this conclusion, it is unnecessary to consider the issue of whether Mr. Oke was personally active on a continuous basis. The appeal is dismissed.

Signed at Ottawa, Canada, this 7th day of August 2009.

"Campbell Miller"

C. Miller J.

CITATION:	2009 TCC 386
COURT FILE NO.:	2008-1865(IT)I
STYLE OF CAUSE:	SCOTT OKE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 9, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT:	August 7, 2009

APPEARANCES:

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