

Docket: 2008-710(IT)I

BETWEEN:

EDDIE GRAHAM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 6, 2008, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Laurent Bartleman  
Rishma Bhimji (Student-at-Law)

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**JUDGMENT**

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

Signed at Winnipeg, Manitoba, this 22<sup>nd</sup> day of October 2008.

"Patrick Boyle"

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Boyle, J.

Citation: 2008 TCC 580  
Date: 20081022  
Docket: 2008-710(IT)I

BETWEEN:

EDDIE GRAHAM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Boyle, J.**

[1] The business losses claimed by Mr. Graham in the years 2003 through 2005 from his musical performance and disc jockey business have been denied by the Canada Revenue Agency on the basis that his musical activities and pursuits did not constitute a business.

#### **I. Facts**

[2] Mr. Graham was a full-time employee of a major Canadian bank in the years in question.

[3] Mr. Graham has a long background in music and had played in a large and successful, and occasionally modestly profitable, band in the 80's and 90's. When that band broke up, he decided to start a solo musical performance career involving both disc jockey work and performing. He testified that between 1998 and 2002, after the band broke up and before beginning his solo endeavours, he had taken a break from his musical pursuits. For the years in question, he registered his business as a sole proprietorship, obtained a business licence, had a business phone and business cards. He wanted to market himself to the numerous Legion halls so he attended at a couple of them and even joined one Legion.

[4] In each of the years 2003, 2004 and 2005 Mr. Graham reported net losses from his business. His modest revenues declined each year reflecting his declining number of performances from five gigs to no more than two performances. He said he stopped pursuing his music business, even though his intention and expectation was that it would become profitable, once it was challenged by Revenue Canada. He explained this was because he was discouraged and frustrated and viewed it as pointless.

[5] Mr. Graham explained that his revenues and fortunes were adversely affected by the SARS outbreak in Toronto that had an impact on the hospitality business. As well, in 2004 he had injured a middle finger which required it to be in a splint for six months such that he could neither play the guitar nor lug the heavy sound equipment needed to perform.

[6] Some of the equipment, such as the sound boards and similar mixing equipment and perhaps even the speakers, appear to be of professional quality and, according to Mr. Graham, would not be expected to be owned by people pursuing music on their own outside of a business. Mr. Graham appears to have been a capable and qualified performer who was accomplished and who rehearsed regularly throughout the period in question.

[7] On the financial side, Mr. Graham said the amount he received per performance was targeted to be in the \$350 to \$500 range, but could be as little as \$200 per performance depending upon the success of the performance and the venue. He did not track his profits and losses personally. He did not ever consider how often he needed to perform in order to break even financially; he said he did not look at his activities that way.

[8] With respect to the expenses claimed by him in calculating his losses, he had claimed approximately \$12,000 in 2003, \$11,000 in 2004 and \$9,000 in 2005 of business-related expenses in each of those years. In his testimony, he acknowledged that upon reviewing the receipts he had given to the CRA auditor, which should have been the same as the receipts given to his accountant, only approximately \$2,300 of expenses was incurred each year. He said he did not know why his accountant would claim expenses that could not properly be claimed. In fairness, the evidence on this point left me unclear on whether only approximately \$2,300 of expenses were evidenced by receipts, or only \$2,300 was deductible in any event

## II. Analysis

[9] In circumstances such as these, I must first decide whether Mr. Graham's musical activity constituted a business pursued for profit in a commercial manner or whether it was a personal endeavour in the nature of a hobby or the like. This approach is mandated by the Supreme Court's 2002 decision in *Stewart v. Her Majesty the Queen*, 2002 D.T.C. 6969. In *Stewart*, the Supreme Court highlights some of the criteria, indicia of commerciality, and badges of trade that should be considered.

[10] In the circumstances, Mr. Graham has been unable to provide sufficient credible evidence to establish on a balance of probabilities that his musical pursuits were a business pursued for profit in a commercial manner. My concerns with the evidence presented are:

- (i) he testified that between 1998 and 2001 he took a break from his music business. However, in his 2007 letter to the Chief of Appeals, he describes himself expressly as carrying on the music business in those years successfully and without incurring a loss. He was unable to sensibly explain the difference between these positions;
- (ii) if Mr. Graham intended to make a profit and believed that he could and would make a profit from his musical pursuits, it does not make any sense that he would discontinue his business when prior years' losses were challenged by CRA. He could not explain this sensibly either;
- (iii) there is insufficient evidence of a business-like approach to pursuing performance contracts. The only evidence was that he pursued several Legion halls. There was no evidence that, when market conditions changed due to SARS, he adapted his marketing or business strategy in order to keep it going in a successful direction;
- (iv) his solo musical venture has never been profitable. His prior work with the band generated losses in most years and very modest profits in a couple of years. Indeed, its most successful year was 10 years prior to his solo pursuits and his profits were in the \$2,000 range. The profitable years were in the years 1989 to 1993;
- (v) while Mr. Graham did own expensive equipment that may well have been beyond what an amateur would be expected to own, his continued ownership of it in the years in question was consistent with

him having hung on to quality equipment previously purchased for his band work in the years long before those in question;

- (vi) I am troubled by his explanation that he never considered how many performances he needed to get in order to be profitable and begin making money from the venture. It is one thing not to have a formal written business plan in cases such as these; it is another to maintain one both believed and intended the pursuits to be profitable without ever considering the revenues needed to cover the expenses being incurred; and
- (vii) I am not satisfied with Mr. Graham's explanation of how his accountant appeared to have claimed a large number of expenses that should not have been claimed. I was not given sufficient details to decide whether that explanation was reasonable or credible.

[11] Mr. Graham's appeal is dismissed.

Signed at Winnipeg, Manitoba, this 22<sup>nd</sup> day of October 2008.

"Patrick Boyle"

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Boyle, J.

CITATION: 2008 TCC 580

COURT FILE NO.: 2008-710(IT)I

STYLE OF CAUSE: EDDIE GRAHAM v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 6, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: October 22<sup>nd</sup>, 2008

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Laurent Bartleman  
Rishma Bhimji (Student-at-Law)

COUNSEL OF RECORD:

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Name:

Firm:

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