

Docket: 2011-3547(IT)I

BETWEEN:

DANNY MICHAUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on February 13, 2014, at Prince George, British Columbia.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Gergely Hegedus

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**JUDGMENT**

The appeal from the reassessments made under the *Income Tax Act* for the 2007 and 2008 taxation years is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 17<sup>th</sup> day of March 2014.

“Robert J. Hogan”

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Hogan J.

Citation: 2014 TCC 83  
Date: 20140317  
Docket: 2011-3547(IT)I

BETWEEN:

DANNY MICHAUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Hogan J.**

[1] The Appellant claimed business losses of \$13,525 and \$22,931 in respect of his 2007 and 2008 taxation years. According to the Appellant these losses were incurred in respect of mining activities which constituted a business.

[2] The Minister of National Revenue (the “Minister”) disallowed the losses on the grounds that the Appellant’s mining activities had a strong personal element and were not conducted in a sufficiently commercial manner to constitute a business. In the alternative, the Respondent argues that if the mining activities do constitute a business, the Appellant’s losses should be limited to \$8,426 for the 2007 taxation year and \$14,068 for the 2008 taxation year on the ground that the expenses claimed in excess of those amounts were not incurred for the purpose of earning income.

[3] During the relevant period the Appellant was employed by Lomak Bulk Carriers as a truck driver. He drove an open box bed truck that hauled gold ore for the Kemess gold mine in Northern British Columbia. His normal work schedule was four consecutive days of work followed by four consecutive days off.

[4] The Appellant acquired a Free Miner Certificate in March 2000 and began reporting expenses in connection with his mining activities in 2002. He commenced prospecting for gold and other precious metals shortly after receiving his licence.

[5] The Appellant began to acquire mineral claims under the provincial claim registry system. By 2007 he had acquired claims in Phillips Creek and Bella Coola. In 2008 he added claims in Manson Creek.

[6] The Appellant describes his mining activities in 2007 and 2008 as consisting of prospecting for precious metals, particularly placer gold. He explained that he first used gold pans to find gold in creeks or streams located on his mining claims. Generally speaking, if gold is found in a watercourse there is a greater chance that it will also be discovered on the adjacent land. If gold is not present in the sediment in the watercourse there is a high likelihood that no viable deposits will be found on the claim.

[7] While this was not relevant for the taxation years under review, the Appellant testified that his prospecting activities were successful. Having discovered commercially viable gold deposits on one of his claims he now plans to begin commercial mining operations on that claim next year. To date he has invested over \$300,000 in equipment to exploit the claim and anticipates spending a similar additional amount to begin mining operations next year. His evidence was not contradicted by the Respondent on this point.

[8] The Appellant explained that British Columbia's mining legislation requires a claim owner to perform a specified minimum amount of work on his claim in order to maintain it in good standing. The claim owner must file with the regulatory authorities a work schedule showing performed work and the hourly rate at which the work including that performed directly by the claim owner, is credited towards the required minimum amount.

[9] Jillian Graham, the Canada Revenue Agency auditor (the "CRA auditor") who disallowed the Appellant's losses, testified that she believed that the Appellant made no more than four weekend prospecting trips in each of the years under review.

[10] The Appellant disputes this allegation. According to the Appellant, his practice was to report the minimum amount of work required to maintain his claim in good standing. He claims that he did more work than he reported to the mining authorities. The CRA auditor appears to have based her findings solely on the written reports filed by the Appellant.

[11] It also appears that the CRA auditor failed to take into account the Appellant's follow-up activities in his home laboratory. The Appellant testified that after each field trip he brought back earth samples. These samples were subjected to sophisticated laboratory testing to determine levels of gold concentration.

[12] The CRA auditor noted that the Appellant had custody of his two school-aged children on his days off. This meant that the Appellant could undertake mining field trips only on weekends in late spring, or during the summer months when the children were not in school. Because the Appellant's children accompanied him on his field trips, the CRA auditor suspected that the Appellant's mining activities were more in the nature of a personal pursuit or hobby. The fact that the Appellant used the mining field trips as an opportunity to camp with his children appears to have influenced the CRA auditor in her decision to disallow the losses. She concluded that, ultimately, the Appellant was not engaged in a business because he was not digging up earth on a significant enough scale to produce gold in sufficient quantities to constitute a viable mining operation.

[13] My review of the evidence has satisfied me that the Appellant was engaged in gold prospecting in a commercial manner in 2007 and 2008. The Appellant's testimony reveals that he has acquired significant knowledge in the fields of precious metal prospecting and mine development.

[14] Much of this knowledge appears to have been acquired from the Appellant's interaction with personnel of the Kemess mine. The Appellant has a well-defined business plan which has put him on the cusp of undertaking gold production on one of his claims. The Appellant has invested significant effort and capital in his mining activities. I also take comfort from the fact that the CRA auditor acknowledged that she failed to consider whether the Appellant was engaged in gold prospecting in a commercial manner. Her conclusion that he was not carrying on a business activity appears to have been motivated by the fact that the Appellant's mining activities had not matured to the point of actual gold production on a commercial scale. Prospecting is a first step that precedes investment in the commencement of mining operations. Ore must be found in sufficient quantities before capital will be committed to mine development and to production. More often than not, prospecting activities are not successful. A great deal of time may pass between the prospecting, mine development and actual production stages. In the case of the Appellant, the presence of his children on his field trips did not interfere with his gold prospecting activities, which have led to the discovery of commercially viable deposits on one of his claims.

[15] I must now consider the Respondent's alternative argument. The CRA auditor conducted a detailed and thorough analysis of the expenses claimed by the Appellant with respect to his mining activities. For 2007, the CRA auditor disallowed expenses of \$5,099 on the basis that they were personal in nature and did not relate to the Appellant's mining activities. For 2008, the auditor disallowed expenses of \$8,863 for the same reason. I can find no error in the CRA auditor's analysis. More importantly, the Appellant has failed to convince me that the disallowed expenses were not personal in nature. Therefore, I accept the Respondent's alternative argument and conclude that the Appellant's business losses from his mining activities were \$8,426 for the 2007 taxation year and \$14,068 for the 2008 taxation year.

Signed at Ottawa, Canada, this 17<sup>th</sup> day of March 2014.

"Robert J. Hogan"

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Hogan J.

CITATION: 2014 TCC 83

COURT FILE NO.: 2011-3547(IT)I

STYLE OF CAUSE: DANNY MICHAUD v. HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Prince George, British Columbia

DATE OF HEARING: February 13, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: March 17, 2014

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Gergely Hegedus

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney  
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Ottawa, Canada