

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20130308**

**Docket: A-89-12**

**Citation: 2013 FCA 74**

**CORAM: NOËL J.A.  
GAUTHIER J.A.  
TRUDEL J.A.**

**BETWEEN:**

**RANDY J. OLLENBERGER**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Calgary, Alberta, on March 7, 2013.

Judgment delivered at Calgary, Alberta on March 8, 2013.

**REASONS FOR JUDGMENT BY:**

**NOËL J.A.**

**CONCURRED IN BY:**

**GAUTHIER, J.A.  
TRUDEL, J.A.**



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**BETWEEN:**

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**Respondent**

**REASONS FOR JUDGMENT**

**NOËL J.A.**

[1] This is an appeal from a decision of V.A. Miller J. of the Tax Court of Canada (the Tax Court judge) confirming a reassessment issued by the Minister of National Revenue (the Minister) denying the business investment loss (BIL) claimed by Randy J. Ollenberger (the appellant) with respect to his 2007 taxation year. The loss in question results from a loan in the amount of \$613,772 advanced by the appellant to AEF Corporation (AEF) which was never repaid. The Tax Court judge confirmed the reassessment on the basis that AEF did not carry on an “active business” and therefore was not a “small business corporation” at the relevant time.

[2] At issue is whether the Tax Court judge applied the proper legal test in confirming that the BIL had been properly denied, and whether the evidence supports the conclusion reached by the Tax Court judge when the proper test is applied.

[3] The provisions of the *Income Tax Act*, R.S.C. 1985, c. 1(5<sup>th</sup> supp.) (the Act) which are relevant to the discussion which follows are reproduced in the annex to this decision.

### **FACTUAL BACKGROUND**

[4] It is sufficient for present purposes to set out a brief account of the circumstances which led to the claimed loss based on the summary provided by the Tax Court judge.

[5] The appellant leads BMO Capital Markets' North America. In that capacity, he manages a group of professionals who analyze oil and gas companies in Canada and the U.S. in order to identify investment opportunities for professional investors (reasons, para. 4).

[6] AEF was incorporated in order to “acquire distressed, but producing oil and gas properties and to operate these properties or to sell them, whichever was most profitable” (reasons, para. 5).

[7] According to the appellant, Mr. Doug Djan, who testified on his behalf, contacted him on September 28, 2008. He represented himself as the President of AEF and alerted him to an investment opportunity in the context of an important acquisition of oil and gas producing assets (oil & gas assets) (reasons, para. 7).

[8] For the purpose of making this acquisition, AEF entered into a purchase and sale agreement which required a 10% deposit (*ibidem*). In order to find the deposit, it obtained a loan of \$600,000 from the appellant in exchange of a commission of \$100,000 (reasons, para. 10).

[9] The discovery of a defect in the title to the oil and gas assets in the days following the advance of the loan, led to the termination of the purchase and sale agreement and the forfeiture of the deposit on October 10, 2007 (reasons, para. 9).

[10] In filing his tax return for his 2007 taxation year, the appellant claimed a BIL equal to the amount loaned to AEF. The Minister initially took the position that no loss had been incurred. However, following the discovery process, the Minister acknowledged that a capital loss had been incurred, and the Reply to the Notice of Appeal was amended accordingly.

### **DECISION OF THE TAX COURT JUDGE**

[11] As a result of this concession, the only issue before the Tax Court judge was whether AEF was a “small business corporation” as defined in subsection 248(1) of the Act at the time when the loan was advanced. Looking at this definition more closely, the Tax Court judge indicates at the beginning of her reasons that this turns on whether AEF was an “active business” during the relevant period (reasons, para. 2).

[12] Addressing the meaning to be given to these words she says (reasons, para. 17):

I disagree with the Appellant's position that the definition of "active business" only means "business". The word "active" is used in this provision as an adjective and by its placement it is used to modify "business". Because it is meant to be descriptive of the word "business", this word should not be overlooked. See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Scarborough: Canada, 2011) at p.295.

[13] She goes on to state (reasons, para. 18):

Reading the definition as a whole, I conclude that an "active business" must be one which is "carried on". The question therefore is whether there is sufficient evidence before me that would allow me to conclude that AEF carried on such a business.

[14] The Tax Court judge then proceeds with a review of the evidence, including the extensive testimony of Mr. Djan, with respect to the "business of AEF" (reasons, para. 19). She finds Mr. Djan and "the evidence as a whole" not to be credible (*ibidem*), and concludes that the appellant failed to produce "credible evidence to support his position that AEF was an active business" (reasons, para. 34).

### **POSITION OF THE APPELLANT**

[15] The appellant is of the view that correctness is the standard of review to be applied to questions of law and that questions of mixed fact and law cannot be reviewed in the absence of an overriding and palpable error in the absence of an extricable question of law (appellant's memorandum, para.72).

[16] The appellant takes issue with the Tax Court judge's definition of "active business", which in his view imposes a test more onerous than that set out in the Act (appellant's memorandum, para.

85). Indeed, the definition of “active business” is found at section 248 which states that an “active business means any business carried on by the taxpayer other than a specified investment business or a personal service business”. Thus, when determining whether AEF was an “active business” the Tax Court judge was required to determine whether AEF is a business other than a specified investment business or a personal service business (appellant’s memorandum, para. 88). “[T]he Trial judge instead considered whether the activity of AEF was a particular type of business” (appellant’s memorandum, para. 86).

[17] According to the appellant, the evidence shows that the activity of AEF was “clearly” a business (appellant’s memorandum, para. 14). The statement of the Tax Court judge that “the only evidence before me with respect to the business of AEF was the document entitled the Business Summary and the testimony of Mr. Djan” (reasons, para. 19) constitutes a palpable and overriding error since there was other evidence which supported the appellant’s position (appellant’s memorandum, para. 91). Amongst other things, the Tax Court judge overlooked the admission made by the respondent in the reply to the Notice of Appeal to the effect that AEF actively pursued business ventures (appellant’s memorandum, paras.6 and 90).

[18] The appellant also takes issue with the Tax Court judge’s finding that Mr. Djan was not credible (appellant’s memorandum, paras. 92 to 94), but takes the position that the record establishes that AEF was carrying on an active business regardless of Mr. Djan’s evidence (appellant’s memorandum, para. 95).

## **POSITION OF THE RESPONDENT**

[19] The respondent agrees with the appellant that the determination of the proper test in the present case gives rise to a question of law reviewable on the standard of correctness (respondent's memorandum, para. 14).

[20] The respondent submits that the Tax Court judge properly held that AEF is not an "active business". In her view, the words "active business" must be interpreted within the "more fulsome" definition of "small business corporation" found in subsection 248(1) of the Act. According to the respondent the words "active business" are to be given their grammatical and ordinary sense harmoniously within the scheme of the Act (respondent's memorandum, para. 19). This approach coupled with the jurisprudence on point show that a "small business corporation" pursuant to subsection 248(1) of the Act contemplates more than "any business" (respondent's memorandum, para. 33).

[21] The respondent relies on the decisions of this Court in *Harquail v. Canada*, 2001 FCA 320 (*Harquail*) and *Boulanger v. Canada*, 2003 FCA 332 (*Boulanger*) which establish parameters outside of which a business cannot be said to be carried on either because the business has yet to begin operations or is dormant (respondent's memorandum, paras. 22 and 27). She argues that "active business" within the meaning of the "small business corporation" definition requires something more than preliminary steps (respondent's memorandum, para. 24). An analysis of the evidence leads to the conclusion that AEF falls short of that threshold (respondent's memorandum paras. 24, 35, 49 and 53).

## ANALYSIS AND DECISION

[22] I note at the onset that although the Tax Court judge states that she rejects the appellant's evidence "as a whole", neither party takes the position that this is what she effectively did. In particular, the respondent recognizes that the uncontested documentary evidence establishes that a business was in existence at the relevant time. Rather, the argument which she advances in support of the Tax Court judge's decision is that AEF's business was at a pre-inception state and the operations were not sufficiently advanced to support a finding that business was "carried on". In making this submission, the respondent relies on the decisions of this Court in *Harquail* and *Boulanger*.

[23] The difficulty with this submission is that the Tax Court judge did not adopt this view. Her reasons make no reference to either *Harquail* or *Boulanger* and do not address the question whether the operations of AEF were sufficiently advanced to allow for the conclusion that it was carrying on business. This is perhaps explained by the fact that the respondent admitted in her Amended Reply that:

AEF actively pursued ventures involving the acquisition of petroleum and natural gas assets in the Western Canadian Sedimentary Basin ...

[24] Given this admission, it is difficult to see how the Tax Court judge could have found that the business was at a pre-inception state even if she had wanted to, since the activity so described is at the core of AEF's business. Rather, the Tax Court judge appears to have rendered her decision on the basis that the word "active" in the expression "active business" must mean something because it



is meant to be descriptive of the word “business” (reasons, para. 17), and while AEF may have carried on business at the relevant time, it was not carrying on an “active business” (reasons, para. 18).

[25] In assessing the correctness of this approach, it is useful to consider the relevant definitions. The definition of “small business corporation” refers to “an active business carried on primarily in Canada”. The expression “active business” is defined in turn as “any business carried on by a taxpayer” other than specified exceptions which have no application in the present case.

[26] It follows that when the two definitions are read together, the term “active business” means “any business carried on by the taxpayer”. Contrary to what the Tax Court judge suggests at paragraph 12 of her reasons, this reading does not overlook the word “active” in the expression “active business” but simply takes into account the defined meaning given to these words.

[27] This reading is consistent with the legislative history surrounding the words “active business”. The notion was first introduced into the Act at the time of the 1972 reform. It was intended to distinguish corporations that generate income from business activity from those which generate so-called “passive” income. The purpose was to provide for the application of a more favorable tax rate on the former (see section 125, RSC 1952, c. 148, as amended by 1970-71-72, c. 63).

[28] However, as Sharlow J.A. pointed out in *Weaver v. Canada*, 2008 FCA 238 at paragraphs 19 and 20, the experience was not successful. Indeed, the Courts focused on the fact that by

definition, the carrying on of a business requires a minimum degree of activity with the result that most corporations, if not all, qualified.

[29] This is what brought the legislator to change course in 1984. At that time the definition of “active business” was first introduced (1984, c. 45, ss. 92(1) and 40(1)), and has since remained unaltered. The definition effectively recognizes that any business being carried on is an active business, but rather carves out of this definition particular businesses such as those which derive their income from property and do so without the need to employ a certain number of employees (see the definition of “specified investment business” in subsection 125(7)).

[30] The issue therefore is whether AEF was carrying on an “active business” as defined. When regard is had to this definition, AEF must be held to qualify if it was carrying on business at the relevant time. In this regard, the admission by the respondent that AEF was actively pursuing ventures involving the acquisition of oil and gas properties necessarily leads to the conclusion that this condition was met.

[31] In my view, the Tax Court judge erred when she held that more was required in order to conclude that AEF was carrying on an “active business”. As otherwise it is conceded that AEF had assets and that these assets were used exclusively in that pursuit – no other use is suggested – it follows that AEF was a “small business corporation” at the relevant time.

[32] For these reasons, I would allow the appeal with costs, set aside the decision of the Tax Court judge and giving the judgment which she ought to have given, I would refer the reassessment

back to the Minister for reconsideration and reassessment on the basis that AEF was a “small business corporation” at the relevant time.

“Marc Noël”

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J.A.

“I agree  
Johanne Gauthier J.A.”

“I agree  
Johanne Trudel J.A.”

## ANNEX

*Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> supp.) (the Act):

### 39(1)

...

(c) a taxpayer's business investment loss for a taxation year from the disposition of any property is the amount, if any, by which the taxpayer's capital loss for the year from a disposition after 1977

(i) to which subsection 50(1) applies, or

(ii) to a person with whom the taxpayer was dealing at arm's length of any property that is

...

(iv) a debt owing to the taxpayer by a Canadian-controlled private corporation (other than, where the taxpayer is a corporation, a debt owing to it by a corporation with which it does not deal at arm's length) that is (A) a small business corporation,

...

### 39(1)

[...]

c) une perte au titre d'un placement d'entreprise subie par un contribuable, pour une année d'imposition, résultant de la disposition d'un bien quelconque s'entend de l'excédent éventuel de la perte en capital que le contribuable a subie pour l'année résultant d'une disposition, après 1977:

(i) soit à laquelle le paragraphe 50(1) s'applique,

(ii) soit en faveur d'une personne avec laquelle il n'avait aucun lien de dépendance, d'un bien qui est :

[...]

(iv) soit une créance du contribuable sur une société privée sous contrôle canadien (sauf une créance, si le contribuable est une société, sur une société avec laquelle il a un lien de dépendance) qui est :

(A) une société exploitant une petite entreprise,

[...]

Definitions in subsections 125(7) and 248(1) of the Act provide:

**“small business corporation”**  
 « *société exploitant une petite entreprise* »

“small business corporation”, at any particular time, means, subject to subsection 110.6(15), a particular corporation that is a Canadian-controlled private corporation all or substantially all of the fair market value of the assets of which at that time is attributable to assets that are

(a) used principally in an active business carried on primarily in Canada by the particular corporation or by a corporation related to it,

...

**“active business carried on by a corporation”**

« *entreprise exploitée activement* »  
 “active business carried on by a corporation” means any business carried on by the corporation other than a specified investment business or a personal services business and includes an adventure or concern in the nature of trade;

**“active business”**  
 « *entreprise exploitée activement* »

“active business”, in relation to any business carried on by a taxpayer resident in Canada, means any business carried on by the taxpayer other than a specified investment business or a personal services business;

« **“société exploitant une petite entreprise”** « *small business corporation* ”

« société exploitant une petite entreprise » Sous réserve du paragraphe 110.6(15), société privée sous contrôle canadien et dont la totalité, ou presque, de la juste valeur marchande des éléments d’actif est attribuable, à un moment donné, à des éléments qui sont :

(a) soit utilisés principalement dans une entreprise que la société ou une société qui lui est liée exploite activement principalement au Canada;

...

« **entreprise exploitée activement** »  
 “*active business carried on by a corporation* ”

« entreprise exploitée activement »  
 Toute entreprise exploitée par une société, autre qu’une entreprise de placement déterminée ou une entreprise de prestation de services personnels mais y compris un projet comportant un risque ou une affaire de caractère commercial.

« **entreprise exploitée activement** »  
 “*active business* ”

« entreprise exploitée activement »  
 Relativement à toute entreprise exploitée par un contribuable résidant au Canada, toute entreprise exploitée par le contribuable autre qu’une entreprise de placement déterminée ou une entreprise de prestation de

services personnels.

**“business”**

« *commerce* »

“business” includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment;

« **commerce** »

**“business”**

« commerce » A le même sens que « entreprise ».

« **entreprise** »

**“business”**

« entreprise » Sont compris parmi les entreprises les professions, métiers, commerces, industries ou activités de quelque genre que ce soit et, sauf pour l'application de l'alinéa 18(2)c), de l'article 54.2, du paragraphe 95(1) et de l'alinéa 110.6(14)f), les projets comportant un risque ou les affaires de caractère commercial, à l'exclusion toutefois d'une charge ou d'un emploi.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-89-12

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE MILLER DATED FEBRUARY 16, 2012, DOCKET NUMBER 2009-3877(IT)G.**

**STYLE OF CAUSE:** RANDY J. OLLENBERGER and  
HER MAJESTY THE QUEEN

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** MARCH 7, 2013

**REASONS FOR JUDGMENT BY:** NOËL J.A.

**CONCURRED IN BY:** GAUTHIER J.A.  
TRUDEL J.A.

**DATED:** MARCH 08, 2013

**APPEARANCES:**

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