2017 TCC 88
2016-3196(IT)I

BETWEEN:

ANDRAY RENAUD,

APPELLANT,

AND

HER MAJESTY THE QUEEN,

RESPONDENT.

[OFFICIAL ENGLISH TRANSLATION]

EDITED VERSION OF TRANSCRIPT

OF REASONS FOR JUDGMENT

Let the attached edited transcript of the Reasons for Judgment delivered from the Bench on April 28, 2017 at Ottawa, Ontario, be filed.

Let a copy of the original version of the transcript also be sent to the parties.

Signed at Ottawa, Ontario, this 26th day of May, 2017.

"Gaston Jorré"

Jorré J.

2017 TCC 88
Docket: 2016-3196(IT)I

TAX COURT OF CANADA

ANDRAY RENAUD

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

[OFFICIAL ENGLISH TRANSLATION]

*** * * * ***

HEARING HELD AT THE

Tax Court of Canada
Ottawa, Ontario

Friday, April 28, 2017

*** * * * ***

BEFORE:

The Honourable Justice Gaston Jorré

APPEARANCES:

Andray Renaud	For the appellant
Cédric Renaud-Lafrance	For the respondent
Craig Munro	Court registrar

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Ottawa, Ontario

EDITED VERSION OF TRANSCRIPT OF REASONS FOR JUDGMENT[1]

--- The hearing started on Friday, April 28, 2017 at 8:57 a.m.

MR. MUNRO: All rise.

Before the Court... This sitting of the Tax Court of Canada in Ottawa has now commenced. Before the Court, the decision in docket 2016-3196(IT)I between Andray Renaud and Her Majesty the Queen. For the appellant, Andray Renaud; for the respondent, Cédric Renaud-Lafrance.

Your Honour.

JUSTICE JORRÉ: Thank you. Good morning, Ms. Renaud; good morning...

MS. RENAUD: Good morning.

JUSTICE JORRÉ: Good morning, Mr. Renaud...

MR. RENAUD-LAFRANCE: Good morning.

JUSTICE JORRÉ: ... Mr. Renaud-Lafrance.

I will now render my decision.

The appellant is a lawyer; she was admitted to the Barreau du Québec in 1996. Among other things, she ran her own full-time law practice in Repentigny before moving to the national capital region in the fall of 2000.

I believe that her situation before she moved to the national capital region was different enough

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1 Judge's note: I have edited this version of the reasons; I made minor changes to improve style and clarity and to correct minor errors. There are no corrections on the merits. I also asked the Registry to send the parties a copy of the original version of the transcript with this edited version.

In my review of the reasons delivered from the Bench, I will be guided by Ontario Court of Appeal Justice Rouleau's comments in *R. v. Wang*, 2010 ONCA 435, at paragraphs 8 to 13.

and that her professional situation before then really has no impact on the issue to be decided here. And specifically the fact that during the period before she moved she had started a full-time law practice and incurred losses in the first three years of it is irrelevant here. It was a start-up period.

The appellant moved to the national capital region when she got a non-legal job with the Government of Canada in the fall of 2000. In 2005 she was hired as counsel by the Canadian Transportation Agency, where she still works and where she practises in a very specialized area of law. The appellant has also had a private law practice since she moved. She does not practise in the area of law in which she is employed full time. Her private practice has been part-time since she moved. Lastly, she has had a third law-related activity, but only since 2013. She teaches law part time at the University of Ottawa.

The issue is the following: During the years 2011, 2012, 2013 and 2014, was the part-time private practice a source of income? This is the issue because the Minister of National Revenue reassessed the appellant and denied losses claimed by her in each of the four years at issue.

In paragraph 7(h) of the Reply to the Notice of Appeal, there is a chart of gross income and net losses with regard to the private practice; this chart is not in dispute. And as I said, I do not believe that what happened before the move is relevant.

Whereas before the move it was a full-time practice, after the move, as I said, it was a part-time practice. I do not intend to read this chart, but losses were claimed every year from 2001 to 2014. From 2001 to 2014, only losses were reported, ranging from $1,956 in 2003 to $15,680 in 2012. And the gross income reported throughout that period was quite low. During that period the maximum gross income reported was $3,850. No income was reported for three years: 2005, 2009 and 2010.

In the four years at issue, the income, expense and loss amounts were as follows: in 2011, gross professional income of $2,500 and business expenses of $15,113 were reported, for a loss of $12,613. In 2012, gross income of $850 and expenses of $16,530 were reported, for a loss of $15,680. In 2013, gross income of $850 and business expenses of $4,864 were reported, for a loss of $4,014. In 2014, gross income of $3,850 and expenses of $10,512 were reported, for a net loss of $6,662.

The appellant testified that in her private practice, she made sure that the jobs she accepted would not take more time than she had available, given that she practised part time and had a full-time job. Obviously, she also made sure that there was no conflict with her full-time job and that she was qualified in that area of law.

Her private practice is relatively varied; she practises family, civil, administrative and criminal law. She does consultations, gives legal advice, and participates in negotiations. She handles cases before the

Régie du logement. She does municipal law. In this area, there is a practical advantage for her: hearings are held in the evening.

Her hours are quite variable, but on average, they can be five to 10 per week,[2] which is an average for the entire year. Her full-time job gives her some flexibility regarding when she has to put in full-time hours. This sometimes makes her private practice easier.

When the appellant was asked about how many clients and cases she had, her answers were not very specific. She testified that she received requests every week. I assume that by "request," she means people who come to her for legal services. She testified that she could handle five to 10 different things in a month, but that they could be the same things that she handled the following month.

In general, she does not bill clients for her time before deciding whether she will represent them. She will refer a potential client to legal aid if they qualify for it. She does not take legal aid cases.

When deciding what she will charge when she takes a case, she takes the person's income into account and adjusts her rates accordingly.

In cross-examination, the appellant was asked whether she accepted cases at a loss. She said no;

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2 Judge's note: I note that I say "five to 10 hours" twice in this transcript. That is what I said, but I misspoke when I said "10." According to the appellant's position in her notice of appeal and to her testimony regarding the number of hours, which I accepted, it was quite clear that the average was five to 15 hours. On the basis of paragraph 12 of *R. v. Wang*, 2010 ONCA 435, I leave "10" in but I add this note.

she always covered her travel expenses and her time for the case, but not all her expenses. If a client does not pay the amount billed, she will not take him or her on a second time.

The appellant says that she does her job in a professional manner, but does not work on a volunteer or *pro bono* basis; she adjusts her rates to a client's situation. The appellant does not advertise her services, as she already has enough clients who come to her through word-of-mouth to take up the time that she has to conduct her private practice.

She intends to teach more law courses and recently she looked into the possibility of teaching a course at the Université du Québec en Outaouais. She also plans to do a bit of advertising in the horse community, in which she is active. She already has a few clients from this community.

As I already said, in 2013, the third year at issue here, the appellant started teaching law at the University of Ottawa. That year she received $1,000 from the university. In 2014 she taught more semesters and received $3,000 from the university. Although she included these sums of $1,000 and $3,000 in her income, she did not include them in the gross income from her private practice, so the numbers that I just read a few moments ago do not include those two amounts.

I will briefly discuss these expenses later, but I will now consider the law on the source issue,

especially *Stewart v. Canada*, which is the fundamental case regarding this issue. This is a 2002 decision of the Supreme Court of Canada, neutral citation 2002 SCC 46. It is a case that deals with losses in a real estate project, but this case lists basic principles for the source issue.

In paragraphs 48 to 61 of the decision, the Supreme Court examines these principles to determine whether or not a source exists. I will read certain portions, starting with the last part of paragraph 50.

> "50 [...] The first stage of the test assesses the general question of whether or not a source of income exists; the second stage categorizes the source as either business or property.
>
> 51 Equating "source of income" with an activity undertaken "in pursuit of profit" accords with the traditional common law definition of "business", i.e., "anything which occupies the time and attention and labour of a man for the purpose of profit": *Smith*, supra, at p. 258; *Terminal Dock, supra*. As well, business income is generally distinguished from property income on the basis that a business requires an additional level of taxpayer activity. [...] As such,

it is logical to conclude that an activity undertaken in pursuit of profit, regardless of the level of taxpayer activity, will be either a business or property source of income.

52 The purpose of this first stage of the test is simply to distinguish between commercial and personal activities, and, as discussed above, it has been pointed out that this may well have been the original intention of Dickson J.'s reference to "reasonable expectation of profit" in *Moldowan*. Viewed in this light, the criteria listed by Dickson J. are an attempt to provide an objective list of factors for determining whether the activity in question is of a commercial or personal nature. These factors are what Bowman J.T.C.C. has referred to as "*indicia* of commerciality" or "badges of trade": *Nichol, supra*, at p. 1218. Thus, where the nature of a taxpayer's venture contains elements which suggest that it could be considered a hobby or other personal pursuit, but

> the venture is undertaken in a sufficiently commercial manner, the venture will be considered a source of income for the purposes of the Act.
>
> 53 We emphasize that this "pursuit of profit" source test will only require analysis in situations where there is some personal or hobby element to the activity in question. With respect, in our view, courts have erred in the past in applying the REOP test to activities such as law practices and restaurants where there exists no such personal element: see, for example, *Landry, supra; Sirois, supra*; *Engler v. The Queen* [...]. Where the nature of an activity is clearly commercial, there is no need to analyze the taxpayer's business decisions. Such endeavours necessarily involve the pursuit of profit. As such, a source of income by definition exists, and there is no need to take the inquiry any further."

I will come back to this paragraph and to the reference to law practices later.

Where there is a personal element, the factors stated by the Supreme Court in paragraphs 54 and 55 of the decision must be considered. The Supreme Court goes on to say in paragraphs 56 to 58 that the fact that personal expenses may or may not have been deducted should not change the nature of the source or... rather its existence or non-existence.

The Supreme Court then summarizes what it said. I will read two passages, starting with the first part of paragraph 60 of the decision.

> "In summary, the issue of whether or not a taxpayer has a source of income is to be determined by looking at the commerciality of the activity in question. Where the activity contains no personal element and is clearly commercial, no further inquiry is necessary. Where the activity could be classified as a personal pursuit, then it must be determined whether or not the activity is being carried on in a sufficiently commercial manner to constitute a source of income. However, to deny the deduction of losses on the simple ground that the losses signify that no business (or property) source exists is contrary to the words and scheme of the Act.

> Whether or not a business exists is a separate question from the deductibility of expenses. [...]"

Lastly, I note paragraph 61, which repeats the same summary a bit differently.

> "As stated above, whether or not a taxpayer has a source of income from a particular activity is determined by considering whether the taxpayer intends to carry on the activity for profit, and whether there is evidence to support that intention. As well, where an activity is clearly commercial and lacks any personal element, there is no need to search further. Such activities are sources of income."

So the underlying principle behind all this in paragraph 51 is: Is this an activity undertaken in pursuit of profit? We first have to ask ourselves whether the activity is clearly commercial. If so, then the considerations described by the Court in paragraphs 54 and 55 do not have to be analyzed.

I will now come back to paragraph 53 because, according to the appellant, given what is said there, law practices are clearly commercial and can never be questioned. Obviously she is referring to when the Supreme Court states:

> "[...] With respect, in our view, courts have erred in the past in applying [...]," and I am jumping ahead a bit, "[...] the REOP test to activities such as law practices [...]."

What is the scope of this passage? This passage must be understood in the context of the principles set out by the Supreme Court, namely that to constitute a source of income an activity must be undertaken in pursuit of profit. Obviously the Court must not substitute its judgment on the conduct of the business for that of the business person or professional.

And obviously law practices, and the other example given, restaurants, are normally operated in pursuit of profit. Normally, these activities do not warrant further inquiry. But normally does not mean never. The sentence in question in paragraph 53[3] is an *obiter,* and it is useful to recall the principles that apply to Supreme Court of Canada *obiters*.

A brief history lesson: There was a time when people quoted Lord Halsbury's famous words about a case being an authority only for what it actually decides. That time has clearly long since passed. Moreover, the Supreme Court stated in *Sellars v. The Queen*, [1980] 1 SCR 527, that lower Courts should take a Supreme Court decision

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3 Judge's note: The transcript says "54." I do not know whether I inadvertently said "54" instead of "53" or if this is a transcription error, but I believe that in the context, it is clear enough that it is a reference to paragraph 53.

very seriously even if it is *obiter*. *Sellars* has been relied on quite heavily. More recently, the Supreme Court felt the need to provide further explanation of the scope of *Sellars*.

It did so in *R. v. Henry*, 2005 SCC 76. At paragraph 57, the Supreme Court states:

> "The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense

> the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience."

This means that the sentence in paragraph 53 of *Stewart* must not be read in an absolute sense and does not automatically apply regardless of the status of a law practice or restaurant.

In this case I believe that factually we are in a rather exceptional situation. Let us examine the facts. I am satisfied that the appellant's private practice is quite simply not undertaken in pursuit of profit. I find this for the following reasons. To begin with, there is gross income. The appellant says that she works five to 10 hours a week on average in her private practice throughout the year.[4] So at most 10 hours a week. To make the math easier I will assume 50 work weeks, which means at most 500 hours a year.

In the four years at issue, the appellant

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4 See note 2.

reported gross incomes of $2,500, $850, $850, and $3,850 in 2011, 2012, 2013 and 2014, respectively. Mathematically this equals gross income of $5 per hour in 2011, $1.70 per hour worked in 2012, the same in 2013, and $7.70 per hour for each hour worked in 2014. That is not even minimum wage. Even with the best management in the world, it is impossible to generate net earnings in a law practice with this level of income. I also note that in 2009 and 2010 no income was reported. This is not at all like a law practice as normally understood, even in the widest sense. With such a level of income, this cannot be undertaken in pursuit of profit.

Moreover, in the evidence there is no mention of cases that could be highly profitable down the line but in the short term could not be invoiced, for instance a case taken on a contingency basis. The evidence does not show that during the period at issue, the appellant sought to change her billing practices significantly or to make some changes to her client base to increase income.

At the hearing the appellant said that she wanted to teach more courses; that seems recent. However, I would note that teaching law is a source that is separate from that of the law practice. The appellant also said at the hearing that she planned to advertise in the horse community, as I just read. However, moments before that, she said she did not do any advertising because she already had enough clients to take up her time. But if she is not

looking to slightly increase her income one way or another, I fail to see how it can be said that her activity is undertaken in pursuit of profit.

The appellant says she does no volunteer or *pro bono* work, as she charges all her clients something, though occasionally some do not pay, but she does not take them on as clients again. This may not be volunteering, strictly speaking, but it is very close to it. I would also point out that *pro bono* work can very well be part of a law practice, but normally the purpose of such a practice is to make a profit. That does not always happen. Lawyers try to start practices and, sometimes, their efforts fail, but they were undertaken in pursuit of profit.

Therefore, in light of the facts before me, I fail to see how I cannot find that what the appellant seeks in her private practice is to try to help people with modest incomes while working professionally and trying to somewhat reduce what it is costing her to carry out this activity. That is commendable, very, very commendable, but I fail to see how that can be clearly commercial. Consequently, I fail to see how there could be a source of income. Without such a source, losses are not deductible, so I must dismiss the appeal.

Before I finish, let me briefly discuss expenses. At the hearing the respondent tried to prove that some of the expenses claimed regarding the private practice were not legitimately deductible as expenses related to the practice or were personal. On the one hand, I am not sure

that this issue was validly raised in the Reply to the Notice of Appeal.

According to the reply, the basis of assessment was that there was no source of income. None of the facts assumed argue that some of the expenses claimed were not related to the practice or were of a personal nature. There are no such allegations in part A of the reply, either. Only in the last part of the arguments are personal expenses raised as an alternative.

On the other hand, even if I were to disregard that, when I reread the evidence and considered whether the respondent had proven that some expenses were not legitimately related to the law practice, I noticed that given how everything was presented, it was impossible for me to make such a determination because what I noticed was that both bundles of the receipts submitted totalled more than the amounts claimed.

Without documents showing what had been claimed, I fail to see how I could make a finding one way or another regarding expenses, because even if an expense in both bundles was personal, I have no way of knowing whether it is part of the expenses claimed. Therefore, I do not believe that for these two reasons, the Court can really review the expenses in this case.

I have another observation to make regarding expenses. The appellant brought to my attention Justice Hershfield's decision in *Spearing v. The Queen*, [2001] T.C.J. No. 32 (QL), particularly paragraph 29. I read

this paragraph carefully and I can understand the difficult situation that Justice Hershfield faced in *Spearing*, but in that decision I fail to see any rule of law that has any impact on the case before me. He expresses no rule of law that states that the Minister must verify the expenses before wondering about the existence of a source of income. He expresses the difficulties that this caused in the case before him and that it could cause in other cases.

I would also note that the Minister of National Revenue, though he has a lot of employees in relation to his responsibilities as Minister, in the end his available resources are modest. The *Income Tax Act* does not require him to verify everything. It is entirely normal, given the modest resources in relation to his duties, for him to selectively choose to verify some things. Moreover, I think this is a given with what is basically a self-assessment system. I will also add that nothing prevents taxpayers from, if necessary, letting the Minister know in their return about a correction to their income. In any case, I just wanted to make these comments regarding expenses.

However, to get back to the basic issue, for the reasons that I stated a few moments ago, I find that there is no source of income and, therefore, the appeal must be dismissed.

Thank you.

MR. MUNRO: All rise.

MS. RENAUD: May I just ask one question?

Are there any costs? Do I have to...

JUSTICE JORRÉ: There are no costs.

MS. RENAUD: Okay.

JUSTICE JORRÉ: This is an informal proceeding and there are normally no costs. There are exceptions, but no, in this case there are no costs.

MS. RENAUD: Perfect. Thank you.

MR. MUNRO: This sitting of the Tax Court of Canada in Ottawa is now concluded.

--- The hearing was adjourned at 9:41 a.m.

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STYLE OF CAUSE:	ANDRAY RENAUD v. THE QUEEN
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