

Docket: 2003-1589(IT)I

BETWEEN:

ROBERT JAMES MITCHELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 27, 2004 at Kitchener, Ontario.

Before: The Honourable Justice Gerald J. Rip

Appearances:

Counsel for the Appellant: George G. Voisin

Counsel for the Respondent: Tracey L. McCann

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1998 taxation year is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant incurred a non-capital loss in the amount of \$27,102.50.

Signed at Ottawa, Canada, this 30th day of June, 2004.

"Gerald J. Rip"

Rip, J.

Citation: 2004TCC484
Date: 20040630
Docket: 2003-1589(IT)I

BETWEEN:

ROBERT JAMES MITCHELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rip, J.

[1] Mr. Robert Mitchell appealed his income tax assessment for 1998 on the basis that he incurred a bad debt of \$27,102.50 in 1998. During the course of the appeal it became clear that he did not incur a bad debt but may have incurred a non-capital loss of \$27,102.50; his notice of appeal was amended accordingly.

[2] In 1998 Mr. Mitchell was employed as a millwright, provided management services, owned some income properties and had a 50 per cent interest in an emu farm.

[3] One day in 1998 one Lou D'Alessandro, whom Mr. Mitchell had met through membership in a Kinsmen club, telephoned Mr. Mitchell to inquire whether he was interested in joining with him in a venture to purchase dry goods, i.e. end of runs of detergents, toothpaste and hygiene products. He and Mr. D'Alessandro would purchase the goods from a Mr. Hunter and then resell them immediately at a profit to "Mom and Pop" stores. Mr. D'Alessandro told Mr. Mitchell he knew Mr. Hunter from "other dealings".

[4] Mr. D'Alessandro represented that he had experience in such a venture. Mr. Mitchell would be a passive investor. Mr. Mitchell agreed to the proposal. The venture was called "Jim and Lou's".

[5] The order for the goods was placed with Mr. Hunter for about \$7,000 to \$8,000 but the order "did not come through". Mr. Hunter returned the money.

[6] Later on Mr. Hunter again approached Messrs. Mitchell and D'Alessandro to inform them he had overruns of detergent, coffee and toothpaste for sale. In June 1998 Messrs. Mitchell and D'Alessandro ordered these goods and paid Mr. Hunter \$64,205¹. The appellant stated he raised a portion of the money from a bank account he had for another business to pay his share.

[7] Messrs. Mitchell and D'Alessandro never received the products ordered from Mr. Hunter. They met with Mr. Hunter in Toronto and he informed them he did not have the goods and that they would have to wait. Mr. Mitchell and Mr. D'Alessandro then went to the Metropolitan Toronto Police and filed a charge of fraud against Mr. Hunter.

[8] Mr. Mitchell filed a copy of a letter dated June 26, 1998 that he and Mr. D'Alessandro sent to Constable Thomas Henderson of the Toronto Police. The letter described their relationship with Mr. Hunter and the venture to buy and sell the products. They claimed they were defrauded of \$64,205².

[9] As a result of the complaint to the Toronto Police Mr. Hunter was charged with fraud and on October 12, 2001 the Superior Court of Justice of Ontario issued a Restitution Order that Mr. Hunter pay to Mr. Mitchell the sum of \$27,102.50 at the rate of \$500 per month commencing January 1, 2001 for a period of 60 months, the "balance to be a freestanding restitution". So far, Mr. Mitchell has received nothing from Mr. Hunter.

¹ According to a letter of June 26, 1998, *infra*, Mr. Mitchell and Mr. D'Allessandro complained to the Toronto Metropolitan Police that they were defrauded by Mr. Hunter. They said that they deposited amounts of \$14,310 and \$35,595 to a bank account at the Royal Bank of Canada, Yonge and Eglinton Streets branch in Toronto, in respect of two of the purchases and \$14,300 was paid by cheque to Mr. Hunter in respect of the third purchase. Payments for the three products total \$64,205. Later on, Mr. Hunter issued a cheque in the amount of \$10,000, thus reducing the purported loss to the partnership to \$54,205. Mr. Mitchell's share of the loss, he claims, is \$27,102.50. The letter of June 26, 1998 was produced as evidence for the purpose only of confirming Mr. Mitchell reported a fraud committed by Mr. Hunter to the police. However, I have used the amounts paid for the purchases described in the letter to assist in clarifying how the amount of the purported loss was computed.

² See note 1, *supra*.

[10] In cross-examination Mr. Mitchell agreed there was no written partnership agreement between him and Mr. D'Alessandro for their ill-fated venture with Mr. Hunter. Nevertheless, Mr. Mitchell insisted a partnership with Mr. D'Alessandro did exist.

[11] When Mr. Mitchell filed his tax return for 1998, he included a Statement of Business Activities for "Jim and Lou's" for 1998 and claimed a bad debt of \$11,010, an amount disallowed by the Minister of National Revenue. During the appeal process the amount of the "bad debt" was increased to \$27,102.50. At trial the appellant's counsel agreed that the \$27,102.40 was not a bad debt but a loss, in his view, a non-capital loss.

[12] Mr. Mitchell also included in his 1998 tax returns Statements of Business Activities for the emu farm, of which he had a 50 per cent partnership interest, and Mitchell Management, a sole proprietorship. He reported a bad debt of \$15,950 for Mitchell Management in 1998. Ms. Gail Brooks, an officer of Canada Customs and Revenue Agency, confirmed that until the date of trial she and the Agency were of the view that Mitchell Management's bad debt claimed of \$15,950 and Jim and Lou's bad debt claimed of \$11,010 aggregated the \$27,000 (approximately) that Mr. Mitchell was claiming as a bad debt.

[13] Ms. Brooks testified that Mr. Mitchell had informed her that Mitchell Management's debt of \$15,590 was actually a bad debt of the emu farm. She stated Mitchell Management's income consisted of receivables from the emu farm. Mr. Mitchell could not shed any light whether the emu farm's bad debts were put through Mitchell Management. He said he did "not set up" the accounts; his wife does the bookkeeping. In any event the Agency allowed Mr. Mitchell's bad debt of \$15,950.

[14] Mr. Mitchell was unable to explain the reason why \$11,010 was claimed as his share of the "bad debt" of Jim and Lou's when he knew he lost \$27,102.50. He did say that originally he had hoped to settle with Mr. Hunter.

[15] As indicated earlier, when Ms. Brooks reviewed Mr. Mitchell's tax return she thought she was reviewing a bad debt. Ms. Brooks reviewed "write offs" by the appellant in 1998 totalling \$11,010; these included a loan on May 28, 1998 to a new business of \$7,209 and five "Power Line" loans totalling \$3,801. She did not doubt Mr. Mitchell lost money in his venture with Mr. Hunter. However, she was

of the view that there was inadequate documentation to support the deduction of the loss.

[16] I, too, am satisfied that Mr. Mitchell incurred a loss. I am also satisfied that the venture by Messrs. Mitchell and D'Alessandro to acquire products from Mr. Hunter for resale at a profit was a venture in the nature of trade and any loss incurred in this venture was a non-capital loss. There is no real dispute on these issues.

[17] What the Crown questions is whether the appellant proved on the balance of probabilities that he gave Mr. Hunter the amount of \$27,102.50. Respondent's counsel complains there are no cancelled cheques or other banking documents to corroborate the amount of cash raised for the products to be purchased from Mr. Hunter. If an amount was withdrawn from one of Mr. Mitchell's other business accounts, the supporting documents ought to have been presented in evidence, counsel argues. The source of the cash raised remains a mystery.

[18] Also, respondent's counsel argued the appellant called no corroborating witness that could assist me to make a finding whether \$27,102.50 was lost by Mr. Mitchell in 1998. There were apparently three witnesses to the exchange of money, she said. While it might not be appropriate to expect Mr. Mitchell to call Mr. Hunter as a witness, she suggested that there was no explanation why Mr. Mitchell did not call Mr. D'Alessandro on his behalf. She submitted that I should draw an adverse inference from his failure to do so in these circumstances.

[19] Counsel argued as well that if Mr. Mitchell lost \$27,102.50 (or more, given that some of his cash was returned at some point) in his transaction with Mr. Hunter as a result of a fraud relating to his business, it would have been consistent to have claimed this on his tax return for the year 1998. Mr. Mitchell owned several businesses and knew how to account for income and expenses or losses therefrom. This is evidenced by his 1998 tax return; he did in fact claim other expenses for his businesses for the 1998 taxation year. The \$11,005 claimed as his half share of the loss from "Jim and Lou's", counsel submitted, is inconsistent with the evidence before the Court and is not helpful in the quest to ascertain what exactly the facts are in this case. Mr. Mitchell provided no explanation for this, and the witnesses he claimed should be able to shed light on the issue were not called.

[20] Ms. McCann also complained that the Restitution Order does not indicate how the amount of the loss was arrived at. No copy of the indictment against

Mr. Hunter was produced. There is no transcript of the sentencing process that would support the facts as alleged by Mr. Mitchell. Mr. D'Allessandro was not called to establish that no other "side deals" were made between Mr. Mitchell and himself which could otherwise account for the equal allotment of the Restitution Order.

[21] Finally, respondent's counsel argues that although the facts in this case were uniquely within the knowledge and control of Mr. Mitchell, there was a paucity of information and a complete lack of corroboration of Mr. Mitchell's assertions. He has not proven a loss of any specific amount on the balance of probabilities.

[22] Mr. Mitchell did produce the Restitution Order that Mr. Hunter reimburse him the amount of \$27,102.50. I disagree with respondent's counsel that this is inadequate evidence to support Mr. Mitchell's loss. As I understand it, a restitution order is generally issued as part of a conditional sentence under section 738 of the Criminal Code. They are discretionary orders and are to be issued with restraint and caution³. Labrosse, J.A. summarized the case law regarding the objectives and factors that should influence the discretion of a judge when ordering restitution: *R. v. Devgan*.⁴ The amount subject to an order must be capable of ready calculation.

[23] A court may issue a restitution order if there is evidence capable of establishing with reasonable certainty the value upon which the compensation is based.⁵ If such reasonable certainty is lacking, no such order should be made. The order of the Ontario Superior Court of Justice that Mr. Hunter pay restitution to Mr. Mitchell was not appealed. There is no reason for me not to accept the restitution order as evidence that Mr. Mitchell lost the amount of \$27,102.50. I found Mr. Mitchell a credible witness and accept his evidence that he did pay Mr. Hunter the amount of \$32,102.50⁶ as his share of product that was never delivered.

[24] The appeal is allowed. However, Mr. Mitchell is not entitled to costs since in both the audit and objection stages, as well as in his notice of appeal, he referred to a "bad debt" of \$27,102.50. This caused the officials of the fisc to review his return

³ *R. v. Zelensky*, [1978] 2 S.C.R. 940, 960-963.

⁴ (1999) 44 O.R. (3d) 161 (Ont. C.A.) at 168-169. See also *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, 1012-14

⁵ *R. v. Milner*, [1986] B.C.J. 1383 (B.C.C.A.) per Esson, J.A. at para 10.

⁶ That is, \$27,102.50 plus \$5,000, Mr. Mitchell's share of the \$10,000 returned by Mr. Hunter.

on the basis of a bad debt claim, of which there was none. And during the hearing of the appeal, because the amount was described as a "bad debt" in the notice of appeal, needless time at trial was devoted to an issue that did not exist, that is, a bad debt. The appellant's pleading was misleading.

Signed at Ottawa, Canada, this 30th day of June, 2004.

"Gerald J. Rip"

Rip, J.

CITATION: 2004TCC484

COURT FILE NO.: 2003-1589(IT)I

STYLE OF CAUSE: Robert James Mitchell v. The Queen

PLACE OF HEARING: Kitchener, Ontario

DATE OF HEARING: April 27, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice Gerald J. Rip

DATE OF JUDGMENT: June 30, 2004

APPEARANCES:

 Counsel for the Appellant: George G. Voisin

 Counsel for the Respondent: Tracey L. McCann

COUNSEL OF RECORD:

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