

Docket: 2004-4291(GST)I,

BETWEEN:

HUBERT J. WILEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Hubert J. Wiley (2004-4375(IT)I) and
Joanne P. Wiley (2004-4376(IT)I), on
September 1, 2005, at Cranbrook, British Columbia, by
The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:

The Appellant himself

Counsel for the Respondent:

Pavanjit Mahil

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated December 19, 2003, and numbered 12261001844, is dismissed.

Signed at Ottawa, Canada, this 12th day of October, 2005.

"Campbell J. Miller"

Miller J.

Docket: 2004-4375(IT)I

BETWEEN:

HUBERT J. WILEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Hubert J. Wiley (2004-4291(GST)I) and *Joanne P. Wiley (2004-4376(IT)I)*
on September 1, 2005, at Cranbrook, British Columbia, by
The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:

The Appellant himself

Counsel for the Respondent:

Pavanjit Mahil

JUDGMENT

The appeal from the assessment of tax made under the *Income Tax Act* for the 2000 taxation year is dismissed.

The appeals from assessments of tax made under the *Income Tax Act* for the 2001 and 2002 taxation years are allowed and the assessments are 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 12th day of October, 2005.

"Campbell J. Miller"

Miller J.

BETWEEN:

JOANNE P. WILEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Hubert J. Wiley (2004-4291(GST)I) and *(2004-4375(IT)I)*
on September 1, 2005, at Cranbrook, British Columbia, by
The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant: Hubert J. Wiley
Counsel for the Respondent: Pavanjit Mahil

JUDGMENT

The appeal from the assessment of tax made under the *Income Tax Act* for the 2001 taxation year is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

The purported appeals from assessments of tax made under the *Income Tax Act* for the 2000 and 2002 taxation years are quashed.

Signed at Ottawa, Canada, this 12th day of October, 2005.

"Campbell J. Miller"

Miller J.

Citation: 2005TCC659
Date: 20051012
Docket: 2004-4291(GST)I,
2004-4375(IT)I,
2004-4376(IT)I,

BETWEEN:

HUBERT J. WILEY,
and JOANNE P. WILEY,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Miller J.

[1] The Appellants, Hubert and Joanne Wiley, were partners in the retirement seminar business in 2000, 2001 and 2002. Mr. Wiley acquired a motorhome in 1999 for \$170,000, which he indicated was intended for use in that business. The Wileys conducted their business in Canada and the United States. They travelled south in the winter in their motorhome promoting their business, scheduling seminars and actually giving a limited number of seminars. They claimed 100% of their motorhome costs in connection with their business.

[2] The Respondent assessed Mr. Wiley pursuant to the *Excise Tax Act* denying him an input tax credit (ITC) of \$11,823 on the purchase of the motorhome, on the basis that it was not acquired for use primarily in commercial activity, as required by subsection 199(2) of that *Act*. In the alternative, if I find it was acquired for use primarily in commercial activity, the Respondent argues that such commercial activity was that of Mr. and Mrs. Wiley's partnership, a separate entity under that *Act*, and therefore no ITC should be available to Mr. Wiley.

[3] The Respondent also assessed both Mr. and Mrs. Wiley in 2001 and 2002 pursuant to the *Income Tax Act*, limiting their business expenses primarily in

connection with the motorhome to 5% of the expenses claimed. The Minister of National Revenue (the Minister) also restricted capital cost allowance (CCA) on the motorhome in 2000 and 2002 to 5% of Mr. Wiley's claim. Finally, the Minister also restricted CCA on certain other assets of the partnership in 2002.

Facts

[4] In October 1999, Mr. Hubert Wiley purchased a motorhome, which had been advertised for \$240,000 for approximately \$170,000 plus goods and services tax (GST) of \$11,823. Mr. Wiley took out a mortgage on his principal residence in Creston, British Columbia, to fund this purchase. He remortgaged in 2001 incurring a penalty charge of \$6,995. Mr. Wiley acquired the motorhome in his own name, claiming he intended to lease it to a business which he proposed to operate through a company, or in partnership with his soon-to-be wife, Joanne. Mr. Wiley had a GST registration number. He reported the acquisition as a purchase by him as a proprietor on the basis he would lease the property out. In September 1999, Mr. Wiley also incorporated an Alberta company, Full Life Seminars Inc., which he never used in the retirement seminar business. He ultimately decided that a partnership was the preferred form of organization. He never leased the motorhome to the partnership, nor contributed the motorhome to the partnership.

[5] The motorhome sat idle until April 2000 when the Wileys used it for a one-week trip to Edmonton, where they worked with a graphic designer to design materials for their retirement seminar business. During late 1999 and into 2000, the Wileys were planning and organizing their business. The motorhome was to be an essential part of that business. Mr. Wiley explained that the business of giving seminars to retirees and potential retirees required considerable travel to go where the market might yield results. Mr. Wiley believed that the southern United States in the winter was a significant market for retirees. The Wileys had the motorhome equipped to carry considerable materials, such as handbooks and exercise books for their seminars. They also modified the motorhome to provide a form of office equipped with a computer as well as providing additional storage space. They added a hitch and acquired a standard Subaru that could be towed. Their plan was to stay in Recreational Vehicle (RV) parks and interview retirees, assembling information for their seminars.

[6] The Wileys spent the summer of 2000 primarily in Alberta using the motorhome as a base. They had family in Calgary and Edmonton and had both lived and worked there, so felt they could rely on those areas as a good source of contact. Throughout this time, they worked on designing their website, as well as

advertising through posters at various locations in towns including retail stores and libraries. They continued to work on seminar materials. Mr. Wiley took steps to obtain his U.S. citizenship.

[7] Mr. Wiley testified that they used the motorhome for 166 days in 2000 for business. The company reported no income from their business in 2000, but claimed partnership expenses of \$30,653. The Wileys drove the motorhome in November 2000 into the southern U.S. where they remained until March 2001. Both Mr. and Mrs. Wiley testified that they worked approximately 50-hour weeks on their seminar business, specifically when living out of their motorhome. To be clear, this was not actually presenting seminars but in researching the subject, writing materials, establishing a website, arranging dates, attending activity fairs and making calls.

[8] Mr. Wiley also claimed CCA on the motorhome of \$12,000 in 2000 but allocated that to his professional counselling business, which he carried on in 2000, but not in 2001 nor in 2002. In January to March 2001, the Wileys attempted to organize seminars, contacting several RV parks and resorts in the U.S. In fact, throughout 2001 they only held two seminars – one in the U.S. and one in Canada. They made several contacts however and appeared to remain optimistic on their return to Canada. The lack of response did lead them to a decision to write a book about change. For the balance of 2001 and into 2002 Mr. Wiley worked on this book, ultimately published under the title "Dancing with Change" in the summer of 2002. The Wileys estimated using the motorhome for 90 days in 2001 and 76 days in 2002.

[9] In July and August 2002, the Wileys used their motorhome to promote their book in Saskatchewan, Alberta and British Columbia, though not all their promotion tours involved the motorhome.

[10] In early December 2002, the Wileys again headed to the U.S., but with a shift of emphasis to the promotion of the book.

[11] I find the Wileys' website of interest. Exhibit R-2 was their website entitled "Welcome to Full Life Seminars". Parts of their website read as follows:

The Beginning

The concept of Full Life Seminars was developed over 1999 as we, Hugh and Joanne, met as single people and started our relationship. We both wanted an

adventure that would use our talents, test our professional skills and provide growth in our lives. We wanted to challenge ourselves and move into that exciting and thrilling zone of the unknown.

With Joanne, a nurse, and Hugh, a psychologist, we both have teaching experience, group leading experience and realized we thrive on being with others. We wanted to travel and therefore the idea of travelling, coaching and presenting workshops was born.

...

June - July, 2000

.... June and July passed quickly in this fashion as we travelled in our motor coach, learning how to live as RVers and we quickly became accustomed to this new and exciting way of life and travel. ...

January – March, 2001

We have had a glorious time here in Arizona this winter. The environment is fantastic. The desert was in bloom and very beautiful. We enjoyed quite a bit of hiking.

...

We headed back to Creston about the end of March and enjoyed the areas of San Joachim Valley, the beautiful Sacramento area, then through Oregon, Washington and Idaho.

There are also two pages in the website devoted to motorhome living as a retirement choice.

[12] With respect to the income tax issues, the Minister assessed the Wileys on the basis that only 5% of the use of the motorhome was for business purposes. The Minister did allow other business expenses in each of the years under appeal. The effect of the Minister's basis for assessment was to significantly reduce CCA in 2000 and 2002 for Mr. Wiley, as well as limiting motorhome-related expenses in 2001 and 2002. The Minister also denied grocery expenses in 2001 and 2002, and reduced meals expenses in 2001 to half the cost claimed. The Appellants conceded these food-related items.

[13] The auditor for Canada Revenue Agency (CRA), Catherine Mary Gilmore, testified that the basis for assessing at the 5% level was twofold. Firstly, the auditor

determined the motorhome was used for only 44 of 365 days in the first year, which represents a usage of 12%. She then further determined the motorhome, when used at all, was used eight hours out of 24 for business, and she therefore roughly divided the 12% by one-third to come to an approximate 5% usage for business purposes. The other basis she testified she relied upon was the Wileys' suggestion to her that they made only 17 business contacts in 150 days, which again worked out roughly to a 12% ratio, again roughly divided by one-third.

Analysis

[14] Before turning to the specific income tax and GST issues, I must deal with a couple of preliminary issues relating to Mrs. Wiley's appeals. Firstly, with respect to the 2000 taxation year, the evidence was that Mrs. Wiley never filed a Notice of Objection. This is not surprising as there does not appear to have been an issue regarding Mrs. Wiley's 2000 taxation year. In any event, on the basis of the absence of a Notice of Objection, I quash Mrs. Wiley's appeal of her 2000 taxation year.

[15] Secondly, with respect to Mrs. Wiley's 2002 taxation year, the evidence was that she received a nil assessment of her 2002 taxation year. It is well settled (see for example the case of *Bruner v. R.*¹) that no appeal lies from a nil assessment. I therefore also quash Mrs. Wiley's appeal of her 2002 taxation year.

[16] The issues therefore are:

(A) Income Tax Act

- (i) Are Mr. Wiley, with respect to 2001 and 2002, and Mrs. Wiley, with respect to 2001, entitled to deduct expenses in excess of amounts allowed by the Minister?
- (ii) Is Mr. Wiley entitled to claim CCA in 2000 and 2002 beyond the amounts allowed by the Minister?

(B) Excise Tax Act

- (i) Is Mr. Wiley entitled to claim an ITC on his purchase of the motorhome?

¹ 2003 FCA 54.

(A) Income Tax Act

[17] With respect to the business expenses issue, the Minister's position is that firstly, any expenses beyond the amounts allowed are personal or living expenses and not deductible pursuant to paragraph 18(1)(h) which reads:

18(1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

...

- (h) personal or living expenses of the taxpayer, other than travel expenses incurred by the taxpayer while away from home in the course of carrying on the taxpayer's business;

Also the definition of "personal or living expenses" reads:

248(1) In this Act,

"personal or living expenses" includes

- (a) the expenses of properties maintained by any person for the use or benefit of the taxpayer or any person connected with the taxpayer by blood relationship, marriage or common-law partnership or adoption, and not maintained in connection with a business carried on for profit or with a reasonable expectation of profit,

[18] The expression "expenses of properties not maintained" is awkward. I presume the legislators did not mean that there is some expense in connection with not maintaining property, but intended that personal or living expenses are not expenses of property maintained in connection with a business. So, there is a two-pronged test to meet the "personal or living expense" definition *vis-à-vis* properties:

- (a) were expenses incurred on properties maintained for the benefit of the taxpayer?
- (b) were expenses incurred on properties maintained in connection with a business carried on for profit or with a reasonable expectation of profit?

To be considered personal or living expenses, one must answer yes to the first question and no to the second. In considering the Wileys' expenses on their motorhome, I have no difficulty in answering the first question in the affirmative. The motorhome was indeed their home and was used for their personal benefit. The Respondent has acknowledged, in allowing considerable business expenses, that the Wileys were carrying on a business. The Respondent has also acknowledged the motorhome was used in connection with that business, but only to the extent of 5%. So, the Government accepts that at least some of the motorhome-related expenses were expenses incurred on property maintained in connection with a business carried on with a reasonable expectation of profit.

[19] It appears that the expenses incurred in connection with the motorhome serve a dual purpose; the legislators have addressed a similar dilemma in regards to the consumption of food by enacting section 67.1, deeming cost of food to be 50% of either the amount paid or the amount that would be reasonable in the circumstances. There is no such deeming provision for the costs of living in a motorhome, which serves both a personal and business purpose. In such circumstances it is necessary to consider paragraph 18(1)(h) in conjunction with section 67 of the *Income Tax Act* – what are reasonable expenses in the circumstances?

[20] Clearly, the Wileys have chosen motorhome living as one of their retirement choices, although they have gone further than that. They have integrated the concept of motorhome living into their business of advising on retirement. They want me to accept that this involvement of the motorhome is so completely integrated into their business that 100% of its use, and therefore all of its expenses, should be considered business-related. The Minister did not accept this proposition and neither do I. It is not reasonable.

[21] The Respondent assessed on the basis that only 5% of such expenses were reasonable. There are a number of ways in which to allocate between business and personal use of a property; hours used or space used are just a couple. The Respondent however chose two methods which are at best innovative, and at worst irrelevant. While I have some sympathy for an auditor whose task is, in some respects, to create something from nothing due to the lack of records or uncooperative taxpayers, that is not the situation here. The Wileys' story is not confusing; they are not uncooperative. They believe that because they conduct their business from their motorhome, all expenses in connection therewith are legitimately deductible. The Minister, while agreeing the Wileys carry on a business and do so from their motorhome, have limited those deductions to 5%.

[22] The Minister's first basis for the 5% allocation is the number of days (44) the Minister determined the motorhome was in use as a percentage of days in the year. This may well be appropriate if there is any evidence to support the fact the motorhome was used solely personally for the balance of the year. The evidence was however that for the balance of the year the motorhome sat idle. To bestow any meaning on the Minister's ratio, I would have to conclude that a motorhome sitting idle is somehow a personal use. This is not supportable. This basis is inappropriate for determining the reasonableness of the expenses.

[23] The second basis the auditor described was the calculation of the number of business contacts made in the purported number of days worked (17 contacts in 150 days). While this calculation does yield a percentage, I find it has no meaning whatsoever *vis-à-vis* reasonableness of expenses. The auditor did go on to break down the Wileys' days, while living in the motorhome, into eight hours on average of a work nature, and 16 hours on average of a personal nature. This approach does have some merit and is supported by the Wileys' own evidence. They both testified that their work days were longer than eight hours, yet I take into account weekends and also consider the Wileys' lifestyle and the nature of their activities, as outlined in their very own website, and I conclude that the Respondent's assessment of one-third of the Wileys' time in the motorhome was devoted to business is a reasonable assessment.

[24] The consequences of that finding is that in 2001, I allow Mr. and Mrs. Wiley one-third of the claimed interest expense, diesel expense, maintenance expense, insurance expense, supplies, parking fees and electricity. They are entitled to 50% each of that one-third. A schedule is attached indicating the amounts.

[25] Similarly, in 2002, Mr. Wiley is allowed half of one-third of the expenses claimed for interest, parking fees, diesel, maintenance, insurance, supplies and propane. Again see the attached schedule.

CCA

[26] Mr. Wiley claimed CCA in 2000 and 2002 as a deduction against his counselling business. The evidence established that Mr. Wiley did not use the motorhome in such business. The motorhome was used by the partnership in the retirement seminar business, though without paying any rent to Mr. Wiley. Curiously, the Minister allowed Mr. Wiley 5% of the CCA claimed by him, on the

same basis of allocation as for the other motorhome-related expenses in connection with the partnership.

[27] Crown counsel recognized that Mr. Wiley was facing a technical dilemma, compounded by the Respondent allowing Mr. Wiley some CCA on the motorhome. Mr. Wiley never suggested the motorhome was his capital contribution to the partnership. On the contrary, he filed on the basis that only he was entitled to CCA on the motorhome and, not as a claim against partnership income, but as against counselling income, notwithstanding there was no evidence the motorhome was used in his counselling business. I have no doubt Mr. Wiley's affairs could have been structured more efficiently. It is not for me to do so after the fact.

[28] To allow Mr. Wiley to claim CCA on the motorhome at the same 30% rate that I am allowing the other motorhome-related expenses would be to ignore the legal reality. The partnership actually incurred those other motorhome-related expenses, because Mr. Wiley let the partnership use the motorhome. Mr. Wiley was not in the commercial leasing business. I find he is not entitled under these circumstances to claim any more CCA on the motorhome than already allowed by the Minister.

[29] With respect to CCA in connection with other capital assets in 2002, I heard no argument from the Wileys disputing the Minister's assessing position.

B. Excise Tax Act

[30] I turn now to the GST issue: is Mr. Wiley entitled to claim an ITC of \$11,823 in connection with his purchase of the motorhome; only if he falls within the ambit of subsection 199(2) which reads:

199(2) Where a registrant acquires or imports personal property or brings it into a participating province for use as capital property,

- (a) the tax payable by the registrant in respect of the acquisition, importation or bringing in of the property shall not be included in determining an input tax credit of the registrant for any reporting period unless the property was acquired, imported or brought in, as

the case may be, for use primarily in commercial activities of the registrant; and

- (b) where the registrant acquires, imports or brings in the property for use primarily in commercial activities of the registrant, the registrant is deemed, for the purposes of this Part, to have acquired, imported or brought in the property, as the case may be, for use exclusively in commercial activities of the registrant.

[31] Did Mr. Wiley acquire the motorhome for use primarily in commercial activities? Mr. Wiley claims he did; indeed, Mr. Wiley claims that he acquired the motorhome exclusively for use in commercial activities. I do not accept his claim in this regard. Mr. Wiley claims to have acquired the motorhome to lease to a company, which he incorporated but never used. As was clear from his testimony, he opted for the use of the partnership form of business organization to carry on the retirement seminar business. Yet he never transferred the motorhome to the partnership, nor did he ever lease the motorhome to the partnership. He personally retained ownership of the motorhome, and he and his wife used the motorhome as previously described, partly for commercial activity and partly for personal benefit. The partnership never owned the motorhome. A partnership is an entity as defined in subsection 123(1) of the *Excise Tax Act*. But in this case it is not the partnership seeking the ITC. It is only Mr. Wiley.

[32] So, prior to asking whether Mr. Wiley bought the motorhome for use primarily in commercial activity, I have to ask whether, given his actions, he acquired the motorhome for use at all in commercial activity, as he, as the registrant, as opposed to the partnership, did not carry on any commercial activity for which he used the motorhome. He simply let the partnership use it. He did carry on some counselling activity but he never suggested that the motorhome was acquired for purposes of his professional counselling business. I find Mr. Wiley could not have acquired the motorhome personally for use in a commercial activity, let alone primarily for use of commercial activity.

[33] While I could leave the matter there, I want to more fully complete the analysis for Mr. Wiley's benefit in two respects. First, had I been convinced that Mr. Wiley's true reason for acquiring the motorhome was to commercially lease it to a company, I find that very soon after he did acquire the motorhome his intended use changed to one of personal benefit. This would bring into play subsection 200(2) of the *Excise Tax Act* which would have the same effect as denying Mr. Wiley the ITC in the first place. The Respondent did not raise subsection 200(2) and I simply raise it to illustrate to Mr. Wiley that it is still

necessary to consider his actual use, not simply intended use. In so doing, I reach the same result.

[34] Finally, Mr. Wiley should appreciate that if I had to resort to the question of whether the motorhome was acquired primarily for use in commercial activity by the partnership, I would have found that it was not, as I find as a fact the Wileys neither intended to use, nor in fact did use the motorhome any greater than one-third of its overall use in commercial activity. This falls below the standard of "for use principally in commercial activities" as required in section 199 of the *Excise Tax Act*. This would have been fatal to Mr. Wiley's claim for the ITC.

Conclusion

[35] I dismiss Mr. Wiley's GST appeal. I dismiss Mr. Wiley's 2000 income tax appeal. I quash Mrs. Wiley's appeals for 2000 and 2002. I allow Mrs. Wiley's 2001 income tax appeal and Mr. Wiley's 2001 and 2002 income tax appeals on the basis set out in the attached schedule.

Signed at Ottawa, Canada, this 12th day of October, 2005.

"Campbell J. Miller"

Miller J.

Schedule "A"

2001

In 2001, Mr. and Mrs. Wiley are allowed:

Interest at 1/3 of \$15,736.76 or	\$5,246
Diesel at 1/3 of \$1,342 or	447
Maintenance at 1/3 of \$3,079 or	1,026
Insurance at 1/3 of \$269 or	90
Supplies at 1/3 of \$907 or	302
Parking fees at 1/3 of \$1,892.28 or	631
Electricity at 1/3 of \$115.95 or	<u>39</u>
	\$7,781 ÷ 2 = \$3,890 each

2002

In 2002, Mr. Wiley is allowed:

Interest at 1/3 of \$5,941	\$1,980
Parking Fees at 1/3 of \$946	\$315
Diesel at 1/3 of \$895	\$298
Maintenance at 1/3 of \$1,191	\$397
Insurance at 1/3 \$2,226	\$742
Supplies at 1/3 of \$1,143	\$381
Propane at 1/3 of \$57	<u>\$19</u>
	\$4,132 ÷ 2 = \$2,066

CITATION: 2005TCC659

COURT FILE NO.: 2004-4291(GST)I, 2004-4375(IT)I and
2004-4376(IT)I

STYLE OF CAUSE: Hubert J. Wiley and Joanne P. Wiley and
Her Majesty the Queen

PLACE OF HEARING: Cranbrook, British Columbia

DATE OF HEARING: September 1, 2005

REASONS FOR ORDER BY: The Honourable Justice Campbell J. Miller

DATE OF ORDER: October 12, 2005

APPEARANCES:

For the Appellants: Hubert J. Wiley

Counsel for the Respondent: Pavanjit Mahil

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm: N/A

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