

Docket: 2005-85(IT)I

BETWEEN:

VAN DUMONT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 1, 2005 at Vancouver, British Columbia

Before: The Honourable Justice G. Sheridan

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Nadine Taylor Pickering

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2001 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of December, 2005

"G. Sheridan"

Sheridan, J.

Citation: 2005TCC790

Date:20051221

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BETWEEN:

VAN DUMONT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Van Dumont, is a registered Indian who fishes for a living off the coast of British Columbia. He is appealing the reassessment by the Minister of National Revenue of his 2001 taxation year. His reassessment was held in abeyance pending the outcome of *Benoit v. Canada*¹. By notice dated July 29, 2004, the Minister confirmed his reassessment of December 2, 2002 on the following assumptions of fact:

- a) the Appellant is a Registered Indian residing off the reserve;
- b) in 2001, the Appellant was a fisherman engaged in making a catch on the vessel Dream Weaver;
- c) the Appellant's fishing activities were for income earning purposes in the commercial mainstream;
- d) the Appellant's fishing activities took place off the reserve;
- e) the Appellant earned self-employed fishing income in the amount of \$27,176.00 for the 2001 taxation year;
- f) the Appellant incurred fishing expenses \$13,370.00 in 2001; and

¹ [2003] F.C.J. No. 923 (F.C.A.).

(Application for leave to appeal dismissed, [2003] S.C.C. A. No. 387 (S.C.C.).

- g) the Appellant's EI benefits received in the 2001 taxation year were based on income from his fishing activities.

[2] The Appellant represented himself at the hearing. The Court advised him of the hearing procedure and that he had the onus of proving wrong the assumptions upon which the Minister based his reassessment. The Appellant's response was that he had no quarrel with the facts assumed by the Minister; his disagreement with the reassessment was based solely on his interpretation of Treaty 8 and certain provisions of the Royal Proclamation of 1763. According to the Appellant, these documents deprive the federal government of any authority to tax his income in 2001 or any other year. He further asserted that the province of British Columbia and all of Canada's coastal waters are Indian land. While this argument suggests a challenge to the constitutionality of the *Income Tax Act*, the Appellant had not given the required notice²; accordingly, the issue of whether his 2001 income is exempt from taxation has been considered in the context of paragraph 81(1)(a) of the *Income Tax Act* and subsection 87(1) of the *Indian Act*, the provisions upon which the Minister's reassessment was based.

[3] The Respondent's position is that the Appellant's 2001 income was properly reassessed in that:

- a) Treaty 8 did not exempt the Appellant's income from taxation; and
- b) his 2001 income was not "the personal property of an Indian situated on a reserve" so as to be exempt from taxation under section 87 of the *Indian Act* and paragraph 81(1)(a) of the *Income Tax Act*.

Treaty 8 Issue

[4] Turning first to the Treaty 8 issue in *Benoit v. Canada*³, the Federal Court of Appeal held that the Aboriginal signatories of Treaty 8 did not understand the Treaty Commissioners to be promising them exemption from taxation. The Appellant's only response to *Benoit* was that he disagreed with it and urged this Court to reject the decision. As explained to the Appellant at the hearing, the Tax Court of Canada is bound by the decisions of the Federal Court of Appeal; accordingly, his argument that Treaty 8 shelters his income from taxation is without merit.

² Section 57 of the *Federal Courts Act*.

³ *Benoit v. Canada* [2003] F.C.J. No. 923 at paragraph 116.

Statutory Exemption: Section 81 of the *Income Tax Act*

[5] The Appellant earned his 2001 income "off-reserve" fishing in the waters along the British Columbia coast. That income may be exempt from taxation under paragraph 81(1)(a)⁴ if the Appellant can establish that it was earned in circumstances that render it the "personal property of an Indian situated on as reserve" under subsection 87(1)⁵.

[6] In making this determination, the Court must consider the evidence in light of the "connecting factors" test established by the Supreme Court of Canada in *Williams v. Canada*⁶ as further refined by Linden, J.A. in *Southwind v. Canada*⁷:

1. the location of the business activities;
2. the locations of the customers (debtors) of the business;
3. where decisions affecting the business are made;
4. the type of business and the nature of the work;
5. the place where the payment is made;
6. the degree to which the business is in the commercial mainstream;
7. the location of a fixed place of business and the location of the books and records; and
8. the residence of the business' owner.

[7] The Appellant accepts the Minister's assumptions of fact as set out in the Reply to the Notice of Appeal. In his evidence and on cross-examination, he provided some additional information regarding the nature of his income-producing activities. Analyzed in light of the connecting factors test, I find the following: he

⁴ *Income Tax Act*.

⁵ *Indian Act*.

⁶ [1992] 1 S.C.R. 877 (S.C.C.)

⁷ [1998] 1 C.T.C. 265 (F.C.A.).

lives and works "off-reserve" on the *Dream Weaver*, a fishing vessel he docks in Vancouver. He fishes in an area four to ten miles off the coast of British Columbia between Vancouver and Prince Rupert. No evidence was presented to show that this is reserve land. His catch is sold to "anyone who wants to buy it", mainly to "packer boats" in the coastal waters. His business decisions are made on the *Dream Weaver* or in conducting his business with Arrow Trading, the company with whom he generally deals. The Appellant explained that Arrow Trading is owned by a Japanese man named Mr. Moon. Its head office is in Vancouver; its books and records are kept in Vancouver or Prince Rupert. The business of fishing is common to both Indian and non-Indian communities. There was no evidence of where the Appellant's books and records are kept.

[8] Taken as a whole, the evidence shows that the Appellant's income is not property on a reserve so as to render it exempt from taxation under section 87 of the *Indian Act* and paragraph 81(1)(a) of the *Income Tax Act*. Accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, this 21st day of December, 2005.

"G. Sheridan"

Sheridan, J.

CITATION: 2005TCC790
COURT FILE NO.: 2005-85(IT)I
STYLE OF CAUSE: Van Dumont v. H.M.Q.
PLACE OF HEARING: Vancouver, British Columbia
DATE OF HEARING: December 1, 2005
REASONS FOR JUDGMENT BY: The Honourable Justice G. Sheridan
DATE OF JUDGMENT: December 21, 2005

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Nadine Taylor Pickering

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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