

Docket: 2010-2666(GST)I

BETWEEN:

WAYNE BOWDEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on May 13, 2011, at Toronto, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Alisa Apostle

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**JUDGMENT**

The appeals from the reassessments dated January 21, 2010 made under Part IX of the *Excise Tax Act* for the period from January 1, 2009 to September 30, 2009 are dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 26th day of September 2011.

"Réal Favreau"

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Favreau J.

Citation: 2011 TCC 418  
Date: 20110926  
Docket: 2010-2666(GST)I

BETWEEN:

WAYNE BOWDEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Favreau J.

[1] The Appellant has appealed by way of the informal procedure the reassessments dated January 21, 2010 made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the "Act"), for the period from January 1, 2009 to September 30, 2009 (the "period").

[2] The Appellant claimed input tax credits ("ITCs") and reported sales and other revenue, goods and services tax ("GST") collectible and net tax for the period as follows:

<b>Period</b>	<b>Sales / Other Revenue</b>	<b>GST Collectible</b>	<b>ITCs Claimed</b>	<b>Net Tax</b>
01-01-2009 to 31-03-2009			\$508.34	\$-508.34
01-04-2009 to 30-06-2009	\$200.00	\$10.00	\$214.40	\$-204.40
01-07-2009 to 30-09-2009	\$100.00	\$5.00	\$325.84	\$-320.84

[3] By a reassessment dated January 21, 2010, the Minister of National Revenue (the "Minister") disallowed the ITCs claimed by the Appellant for the quarterly periods from January 1, 2009 to June 30, 2009 and reassessed the Appellant for net tax and arrears interest as follows:

<b>Period</b>	<b>Net Tax</b>	<b>Arrears Interest</b>	<b>Total Assessment</b>
01-01-2009 to 31-03-2009	* \$508.34	\$17.99	\$526.33
01-04-2009 to 30-06-2009	** \$214.40	\$5.17	\$219.57
<b>Total</b>	\$722.74	\$23.16	\$745.90

\* refund paid

\*\* refund not paid

[4] By another reassessment dated January 21, 2010, the Minister disallowed the ITCs claimed by the Appellant for the quarterly period from July 1, 2009 to September 30, 2009 and reassessed the Appellant for net tax and arrears interest in the amounts of \$5.00 and \$0.05 respectively.

[5] The only issue to be decided is whether the Minister properly disallowed the ITCs in the aggregate amount of \$1,048.58 for the period. The ITCs claimed by the Appellant were in respect of new residential rental property rebates (\$266.88), the home renovation and home staging business (\$136.39) and the computer consulting business (\$645.31).

[6] In determining the Appellant's net tax for the period, the Minister made the following assumptions of fact set out in paragraph 6 of the reply to the notice of appeal:

- a) the Appellant was registered for GST purposes; **(admitted)**
- b) the Appellant claimed ITCs and reported sales and other revenue, GST collectible and net tax for the Period as set out in paragraph 2 above; **(admitted)**

- c) during the Period the Appellant did not have a business enterprise for which he claimed the ITCs; **(denied)**
- d) the Appellant did not provide any evidence to enable the amount of the claimed ITCs to be determined. **(denied)**

[7] Mr. Bowden testified at the hearing. He provided information concerning the revenues generated by the computer consulting business from December 1994 to June 2009. From December 1994 to September 1997, that business generated substantial revenues, but from October 1997 to September 2000, only \$400 in revenues was generated. Revenues then recovered from October 2000 to September 2002. No revenues were generated from October 2002 to September 2005 except for \$350 from July 2003 to September 2003 due to the development of a commercial software package. From October to December 2005, the Appellant's computer consulting business generated revenues of \$7,700. From January 2006 to March 2009, no revenues were generated from the business and only \$200 was generated from April to June 2009.

[8] Mr. Bowden also provided information concerning the revenues generated by the home renovation and home staging business from January 2006 to December 2010. None were generated from January 2006 to March 2009. From April 2009 to December 2009, that business generated \$300 in revenues. From January 2010 to December 31, 2010, \$3,755 was generated from the Appellant's home renovation and home staging business.

[9] Mr. Bowden further explained that he claimed the GST residential rental property rebates as a result of the purchase of a rental property located in the City of Toronto in 2009. In 2009, Mr. Bowden owned four rental properties while in 2007 and 2008 he owned three rental properties. According to Mr. Bowden's tax returns filed for the 2007, 2008 and 2009 taxation years, the rental properties generated the following gross rents and net income (loss) after adjustments:

<b>Years</b>	<b>Gross Rents</b>	<b>Net Income (Loss)</b>
2009	\$59,667.50	\$10,857.32
2008	\$57,572.90	(\$8,427.82)
2007	\$22,514.82	(\$40,136.12)

Mr. Bowden stated that the management of the rental properties does not require any of his time because a property manager is doing it for him.

[10] In his testimony, Mr. Bowden explained that no employees work for him in his various businesses and that he does not subcontract any of the work to be performed for his clients. He further stated that he does not record the number of hours he spends on each of his businesses. He estimated that he spent approximately 20 hours per week on his home renovation and home staging business and from 15 to 20 hours per week on his computer consulting business. He said that his hourly rate for his computer consulting business varies from \$50 to \$75 and that his hourly rate for his home renovation and home staging business is \$50. He always provides invoices for the services rendered to his clients and stated that his computer consulting services are always paid for by cheque while the home renovation and home staging services are paid for half of the time by cheque and half of the time in cash.

[11] Mr. Bowden acknowledged that he has no formal business plan for any of his businesses and stated that he does not need any financing from external sources to carry on his businesses. He advertises his computer consulting services on a web site and he uses an e-mail address to correspond with his actual and potential clients. His home renovation and home staging services are offered through the web sites of the management companies which administer each of his rental properties. His name is simply added to the pool of providers of various services to the owners of those companies.

[12] When cross-examined by counsel for the Respondent, Mr. Bowden admitted that his primary business in the last five years had been his investment business. He was trading in stocks and options on his own account from his home, using one GST registration number for his three businesses. The rental income generated by the four rental properties had been reported as income from property in Mr. Bowden's tax returns and not as business income. All of Mr. Bowden's businesses are grouped together under the business name The 3x Resource Centre. All business income is consolidated in the Statement of Business or Professional Activities filed each year with his tax return. For the 2009 taxation year, Mr. Bowden's businesses generated gross sales of \$300 and a net loss of \$101,013.85. For the 2008 taxation year, the businesses generated gross sales of \$11,890.93 and a net loss of \$7,223.67. For the 2007 taxation year, there were no gross sales and a net loss of \$571,951.64. The net losses that were generated in 2009 and 2007 were mostly attributable to the investment business.

[13] During his cross-examination, Mr. Bowden also acknowledged that in his 2009 tax return he reported employment income in the amount of \$71,844.19 and filed a T4 slip from RR Enterprises Ltd. He explained that he had been hired in May 2009 as a computer programmer on the basis of 35 hours per week and that, at

the hearing date, he still was an employee of that company. He further explained that he is a full-time employee working 5 days a week and that he has to commute almost every working day to Mississauga where the offices of the company are located.

#### The Appellant's position

[14] The Appellant alleged that in 2009, he carried on two distinct businesses with a reasonable expectation of profit. The computer consulting business has been in existence for 24 years and had been profitable in prior years; the home renovation and home staging business has been carried on by the Appellant only since January 2006. From January 2006 to September 30, 2009, that business was in the development stage and it became profitable in the year 2010.

[15] The Appellant further alleged that there was no personal element in, nor was any benefit derived from, the business activities carried on by him, and that they represent genuine commercial activities carried on in a bona fide businesslike manner with a bona fide expectation of profit.

[16] Finally, the Appellant argued that the Respondent is in effect proposing the application of the definition of "commercial activity" on a yearly basis.

#### The Respondent's position

[17] Counsel for the Respondent contended that the Appellant had no reasonable expectation of profit given the way in which he carried on his computer consulting activities and his home renovation and home staging activities. The Appellant had no business plan and no tangible objectives. He had no organized business activities except for advertising on web sites. In 2009, the Appellant had full-time employment and he had to spend a lot of time on his investment business. In addition, he spent 20 hours per week on his home renovation and home staging activities and 15 to 20 hours per week on his computer consulting activities. Finally, he had to devote some time to the four rental properties that he owns.

[18] The statements of business or professional activities filed by the Appellant with his tax returns for the 2007, 2008 and 2009 taxation years showed that the Appellant's businesses generated adjusted gross revenues of only \$300 in 2009, \$11,890.93 in 2008 and zero in 2007, and incurred significant net losses in each of those years, namely: \$101,013.85 in 2009, \$7,223.67 in 2008 and \$571,951.64 in 2007.

## Analysis

[19] The entitlement of a taxpayer to ITCs depends upon whether the taxpayer has paid GST in relation to a "commercial activity". The expression "commercial activity" is specifically defined in subsection 123(1) of the *Act*, which reads in part as follows:

123.(1) In section 121, this Part and Schedules V to X,

...

"commercial activity" of a person means

- (a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person.

...

[20] This definition clearly establishes that a business carried on without a reasonable expectation of profit is not a "commercial activity" for GST purposes.

[21] In *Moldowan v. The Queen*, 77 DTC 5213, at page 5215, the Supreme Court of Canada made the following comment concerning the meaning of the expression "reasonable expectation of profit":

There is a vast case literature on what reasonable expectation of profit means and it is by no means entirely consistent. In my view, whether a taxpayer has a reasonable expectation of profit is an objective determination to be made from all of the facts. The following criteria should be considered: the profit and loss experience in past years, the taxpayer's training, the taxpayer's intended course of action, the capability of the venture as capitalized to show a profit after charging capital cost allowance. The list is not intended to be exhaustive. The factors will differ with the nature and extent of the undertaking. . . .

## The application of the reasonable expectation of profit test to the computer consulting activities

[22] The Appellant is a knowledgeable person and an experienced businessman. The evidence clearly establishes that he had the qualifications and necessary training to carry on the computer consulting activities as a business. He now holds full-time

employment as a computer programmer. The problem is that since January 2006 he has not devoted enough time to the consulting activities to generate revenue. In the 39-month period beginning in January 2006 and ending in March 2009 no revenue was generated and no GST collected, but the Appellant claimed in respect of that period ITCs in the amount of \$7,434.10. In fact, the only revenue earned in 2009 from the computer consulting activities was during the period from April to June 2009 and it amounted to only \$200 in respect of which \$10 in GST was collected.

[23] The Appellant alleged that the decline in or absence of revenue from the computer consulting activities for the period from January 2006 to March 2009 was attributable to the income tax audit of his affairs that began in April 2006 and which severely curtailed the time he had available to dedicate to his computer consulting activities. The same situation prevailed for the rest of 2009 because the Canada Revenue Agency initiated a GST audit in April 2009 and, I would add, because the Appellant began full-time employment with RR Enterprises Ltd. in May 2009.

[24] Considering the circumstances described above, I do not see how a reasonable person looking at the computer consulting activities of the Appellant and applying ordinary standards of commercial common sense could conclude that the Appellant had, in 2009, a reasonable expectation of profit in respect of his computer consulting activities. Since January 2006, the Appellant had not devoted any time or attention to his computer consulting activities and that business appeared to me to be inactive or in a dormant state. The Appellant did not act in an orderly, businesslike fashion or in the way that would normally be expected of a business person.



The application of the reasonable expectation of profit test to the home renovation and home staging activities

[25] No revenue was generated from the home renovation and home staging activities from the start of those activities in January 2006 to March 2009 (39 months), and only \$300 was earned from April to December 2009, in respect of which \$15 in GST was collected. For the period from January 2006 to December 2009, the Appellant claimed ITCs in the amount of \$466.23. In 2010, the home renovation and home staging activities generated revenues of \$3,755.

[26] The Appellant alleged that the absence of revenue for the period from January 2006 to March 2009 and the low level of revenue (\$300) for the period from April to December 2009 was attributable to the fact that the activities in question were in the start-up phase and attributable as well to the income tax audit that began in April 2006 and the GST audit that began in April 2009.

[27] In *Land and Sea Enterprises Ltd. v. Canada*, 2011 TCC 101, Madam Justice Campbell of this Court made the following comment concerning business activities in the start-up phase:

14. It is clear that an activity may be considered a commercial activity well in advance of the stage of profitability. It will always be a question of fact. Expenditures giving rise to ITCs in the start-up phase of a commercial activity may be eligible provided that there is clear intention to commence a business and that measurably significant and fundamental steps and actions have been put into place.

[28] The evidence when looked at in its totality reveals an extremely low level of activities from January 2006 to December 2009. The Appellant was not able to devote any time or attention to the home renovation and home staging activities before 2010. He was not properly trained to carry on those activities as a business. His only training was as an apprentice to his father in Ireland many years ago. In summary, it is not clear from the evidence that the Appellant had the intention to commence a business back in January 2006 or that “measurably significant and fundamental steps and actions have been put into place” to achieve the start-up. Consequently, I am of the view that no start-up phase business activities were being conducted and that, during the period, there was no reasonable expectation of profit.

The rental property tax rebates

[29] I do not think it is necessary for me to consider this issue as the revenues generated from the rental activities were reported by the Appellant as income from property in his 2009 tax return.

Conclusion

[30] For these reasons, I have concluded that Mr. Bowden's appeals should be dismissed.

[31] On June 29, 2011, the Federal Court of Appeal rendered a judgment (2011 FCA 218) in Mr. Bowden's appeal from a judgment of this Court (2010 TCC 424). Mr. Bowden's appeal was allowed and his claims for ITCs with respect to his computer consulting services and his home renovation and home staging services for the period from July 1, 2007 to December 31, 2008 were accepted.

[32] In my respectful view, I am not bound by that Federal Court of Appeal decision. That was a case in which there was a deficiency in the Minister's reply at the Tax Court level: Mr. Bowden was not informed that the Minister would be taking the position in the Tax Court that any business activity of Mr. Bowden, apart from his financial services business, fell outside the statutory definition of "commercial activity". Madam Justice Sharlow rightly pointed out at the end of paragraph 15 of her reasons that:

. . . The most striking example of this prejudicial omission was the absence of a full history of his various businesses for a period of time much longer than the period covered by the input tax credit claims in issue. Mr. Bowden asserted in this Court that he had such evidence and he could have produced it if he had known it would be relevant.

[33] Madam Justice Sharlow allowed Mr. Bowden's appeal for the following reason stated at the end of paragraph 21:

. . . Since the application of the statutory definition of "commercial activity" was not properly raised on the pleadings, Mr. Bowden's appeal should not be determined on that basis.

[34] In this case, the "commercial activity" issue was raised and has been carefully examined.

Signed at Ottawa, Canada, this 26th day of September 2011.

"Réal Favreau"

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Favreau J.

CITATION: 2011 TCC 418  
COURT FILE NO.: 2010-2666(GST)I  
STYLE OF CAUSE: Wayne Bowden v. Her Majesty the Queen  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: May 13, 2011  
REASONS FOR JUDGMENT BY: The Honourable Justice R  al Favreau

DATE OF JUDGMENT: September 26, 2011

APPEARANCES:

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COUNSEL OF RECORD:

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