

LexisNexis® Agricultural Law *NetLetter*

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditor rights, animals, grain, import/export and other matters in an agricultural context.

Agricultural Law NetLetter(TM)

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Issue 348

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HIGHLIGHTS

- * The Tax Court of Canada has dismissed the appeal of an economist and a naturopathic doctor who maintained that they had established a 10 acre Christmas tree farm on a quarter section near Calgary with a "reasonable expectation of profit", and were therefore carrying on a commercial activity which would entitle them to claim income tax credits against GST relating to roads, fences, wells, the construction of a barn, greenhouse and other work preparatory to the establishment of the tree farm. Only a portion of the 10 acre parcel had been planted for trees, and no trees had ever been sold. The Court reviews the law with respect to the concept of "reasonable expectation of profit" for start up businesses, and concluded that there was no clear intention to commence a commercial enterprise or any steps taken in support of this intention. (Living Friends Tree Farm v. Canada, [CALN/2016-013](#), [\[2016\] T.C.J. No. 92](#), Tax Court of Canada)

NEW CASE LAW

Living Friends Tree Farm v. Canada;

[CALN/2016-013](#),

Full text: [\[2016\] T.C.J. No. 92](#);

[2016 TCC 116](#),

Tax Court of Canada,

Campbell T.C.J.,

May 11, 2016.

GST/HST -- Whether Expenses Incurred in Connection with a Proposed Farming Operation were without a Reasonable Expectation of Profit -- Income Tax Credits for Farming Expenses.

Agnes Dahl and Eldon Dahl, carrying on business as a partnership named Living Friends Tree Farm (the "Dahls") appealed from a July 25, 2013 assessment denying them income tax credits ("Tax Credits") in the amount of \$15,689.00 for the period June 29, 2009 to December 31, 2009.

The Dahls had filed a return for this period claiming nil GST/HST collected, Tax Credits of \$15,689.00, and a resulting net tax credit of \$15,689.00.

Mrs. Dahl was an economist with degrees in economics, early childhood development and teaching who worked full time for a German banking conglomerate.

Mr. Dahl worked full time as a doctor of naturopathic.

Mrs. Dahl testified that she and her husband moved from Vancouver to Alberta in 2007 and purchased 160 acres in Rockyview (near Calgary) in 2009. She wanted to work and live in an area surrounded by trees which would provide oxygen to the environment and shelter for wildlife. Their plans included the construction of a greenhouse, a barn and a house. Their aim was to construct them in an environmentally green manner. They purchased a windmill and solar panels.

The Dahls proposed to set aside 10 of the 160 acres for a Christmas tree farm. They planned to use 30 of the remaining 150 acres to grow hay and alfalfa.

In 2009, they constructed roads, fences and gates, did soil testing and preparation, drainage, drilled three wells and started constructing the barn.

In March of 2010, the Dahls were informed there were deficiencies with respect to the barn. A stop work order was issued. There were several lawsuits with subtrades.

Mrs. Dahl testified that as a result of being preoccupied with these disputes, only 15 tree samplings were planted in the tree farm in the spring of 2010. Thirty to 50 were planted in subsequent years except 2014 when none were planted.

The saplings were not purchased, but had been foraged.

By the time of the tax assessment hearing, less than half of the 10 acres had planted the Christmas trees and no Christmas trees had been sold because it takes many years for them to reach maturity.

The Tax Credits claimed by the Dahls related primarily to the construction of the barn, roads, walls, soil sampling, utilities and legal costs. Their partnership reported no income or losses.

Decision: Campbell, J. dismissed the Dahls' appeal [at para. 25]. Campbell, J. summarized the provisions of the Excise Tax Act with respect to the definition of "commercial activity" as well as jurisprudence involved in determining whether or not business activities were carried on with a "reasonable expectation of profit", as follows [at para. 16 to 19]:

[16] Whether a taxpayer will be entitled to ITCs is dependent upon whether GST was paid in relation to a "commercial activity". The term "commercial activity" is defined in subsection 123(1) of the ETA:

"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.

(b) an adventure or concern of the person in the nature or trade (other than an adventure or concern engaged in 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 adventure or concern involves the making of exempt supplies by the person, and

(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

[17] With respect to this definition, Favreau J. in *Bowden v. The Queen*, [2011 TCC 418](#), [\[2011\] TCJ No. 346](#), at paragraphs 20 and 21, stated the following:

[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*, [\[1977\] S.C.J. No. 55](#), [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.

[18] Despite the uncertainty and difficulty surrounding the application of the "reasonable expectation of profit" test, the Supreme Court of Canada in *Stewart v Canada*, [2002 SCC 46](#), [2002] 2 SCR 656, acknowledged the objective criteria listed by Dickson J. in *Moldowan v The Queen*, [\[1977\] S.C.J. No. 55](#), [\[1978\] 1 SCR 480](#), as the basis for determining whether an activity is being conducted in a businesslike or commercial manner. The Supreme Court, in *Stewart*, referred to those criteria as "indicia of commerciality" or "badges of trade" and, although not exhaustive, that list includes:

1. the profit and loss experience in past years;
2. the taxpayer's training;
3. the taxpayer's intended course of action; and
4. the capability of the venture to show a profit.

[19] According to the definition of commercial activity contained in subsection 123(1) of the ETA, a business endeavour must be conducted in a commercial manner with a view to gaining a profit and exhibit those badges of trade that would generally be associated with an undertaking of that nature and extent. In *Land & Sea Enterprises Ltd. v The Queen*, [2011 TCC 101](#), [\[2011\] TCJ No. 70](#), at paragraph 14, I stated the following in respect to business activities conducted in the initial 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.

Campbell, J. concluded that while the Dahls may have had an intention to commence a Christmas tree growing operation when they purchased the property in 2009, these plans were intermingled with a lifestyle which envisioned them being surrounded by nature, particularly trees and wildlife. The Dahls had failed to establish a clear intention to

commence a commercial enterprise and actual steps taken in support of that intention. Campbell, J. could not conclude that there existed a commercial endeavour with a goal of actively pursuing profit, and concluded that the Tax Credits could not be allowed where, where the totality of the relevant facts, there is "no evidence of the indicia of commerciality" [at para. 22 and 23].

CREDITS

This NetLetter is prepared by Brian P. Kalief, Q.C. of Miller Thomson LLP, Edmonton, Alberta.



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