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BETWEEN:

JOHN S. STEWART. ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE. ..... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a) and (h), 13 and 139(1)(ae) and (p)—Farming carried on with reasonable expectation of profit—Farming—Farming loss—Personal or living expenses—Onus on taxpayer to establish that expense incurred to produce income from business.

The appellant, an advertising and display man, resides on a ten acre parcel of land outside of the Town of Aurora, Ontario, on which

there is a barn, a shed, a dog kennel and a home, and on which he operates the Crackerjack Kennels and breeds airedales, of which he had twenty-seven in the years 1957 and 1958. The appellant had deducted certain sums from his income for these two years as expenses incurred in raising the airedales. He had not sold a dog from 1956 to the date of the hearing of this appeal and testified that the dogs were not raised for that purpose. His revenue from the dogs from 1957 to 1961 amounted to about $500.00 of which more than $400.00 was in prize money. The appellant admitted he had done nothing to promote Crackerjack Kennels and that none of his many schemes to use the dogs in connection with his advertising and display business had materialized.

The appellant alleged that the sums of money spent on his dogs in 1957 and 1958 were proper deductions from his income for those years on the ground that the dogs were part and parcel of his advertising business, or, alternatively, that his kennel operation constituted a farm.

Held: That the evidence of appellant's unsuccessful efforts to use these dogs profitably is such that the only inference one can draw from such a long story of frustrations is that it is not possible for him to use these dogs with a reasonable expectation of profit and, therefore, these expenses would be "personal or living expenses" under s. 139(1) (*ae*) and undeductible.

2. That even if the appellant's kennels were part and parcel of his advertising business, these expenses would not be deductible under s. 12(1) (*a*) and having been made for the purpose of producing income from a business because that section of the Act requires the taxpayer to satisfy the Court as to the extent to which the outlay or expense was made for such purpose and the evidence is clear that the appellant had not in fact used the dogs at all in connection with his advertising business.

3. That even if the words "livestock raising or exhibiting" as used in s. 139(1)(*p*) include the raising or exhibiting of dogs, the words mean raising or breeding or exhibiting either for sale, exhibition or for service and the appellant has denied that such was his object, maintaining that his sole purpose was to qualify as many dogs as he could as champions for the purpose of using them in his advertising business. His kennel operation does not therefore constitute farming under s. 139(1)(*p*) of the Act, and the sums in issue are not farming losses under s. 13.

4. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Noël at Toronto.

Ross L. Kennedy for appellant.

T. Z. Boles and *M. Barkin* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

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NOËL J. now (January 16, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board[1] rejecting the taxpayer's appeal from the assessments for the years 1957 and 1958 whereby the sum of $1,736.16 and $2,589.61 were added to his income for the respective years.

These amounts are expenses incurred by the taxpayer in the raising of a number (27) of purebred airedales under the name of Crackerjack Kennels, which the appellant had deducted from his income for the taxation years 1957 and 1958 and the only issue here is whether they are deductible or not, as the parties agree that they have been properly computed.

The appellant describes himself as an advertising and display man which he has been since he left the Navy in 1945 and his contention is that these dogs are part and parcel of his business. This occupation entails taking different types of merchandise and bringing them to the notice of the public, by building backgrounds and suggesting means to sell them. He receives a fee for setting up the promotion and, in some cases, for building or supplying the props. A number of ads in Chatelaine magazine depicting old vintage cars, old icecream parlour chairs, old wire furniture, used at the turn of the century, all the property of the appellant and taken out of his games room, were used to sell dresses, shoes and accessories and exemplify the type of promoting and advertising he has been engaged in.

He has done a number of promotions, such as windows and interiors for Eatons, Simpsons, Hudson's Bay, Spencer's, Woodword's and one of his largest promotions was when he made Simpson's Christmas tree and it has been advertising as a Christmas tree store ever since. This was an artificial Christmas tree, which the taxpayer claims he dreamed up, that could be put on a pillar or used for display purposes in the store and is made of fibre twist wire. He also promoted a fashion colour window display for Simpsons called Victorian Red with papier-mache flowers and built the carriages that go with it.

He lives outside of the town of Aurora on Yonge Street, in the Township of Whitchurch on a ten acre parcel of land

[1] 28 Tax A.B.C. 174.

which he purchased in 1955 and on which there is a barn, a shed, a dog kennel and a home. He started breeding and running a kennel of airedales in February, 1956 and in the years 1957 and 1958 he had twenty-seven dogs. All of the taxpayer's time as well as that of his wife is devoted to looking after these dogs.

He bought a bitch in 1953 who went through to her championship very fast and, according to the appellant, proved she was the best airedale in Canada by far. In 1956 she had an extraordinary litter, out of which nine became champions, and they were very uniform. His original intention was to keep a puppy or a couple of puppies out of the litter and sell the rest of them, but as he put it, "when things started to turn out the way they did we could see the promotional value."

Since he started his kennel, he has had twenty champions and out of 101 shows his dogs have taken 100 prizes. They were shown in Canada from Ottawa through to Fredericton and in New York and Chicago. He started showing them as puppies in the fall of 1956 up until two years ago. He did not, however, raise these dogs to merely exhibit them as his main purpose was to qualify them and use them in his advertising business, as had he wanted, as he put it, to win awards for the best breeds, he did not need the number of dogs he had, but could have used his best bitch and taken everything with it.

According to the taxpayer, it is not possible to go on the market and buy twenty-seven comparable airedales, as they do not exist and if they did he would have to pay between $5,000 for the male and $3,500 for the female. However, he did not wish to sell his dogs, but as he stated, "Being in the business I was in I could see there was a background for promotion originally on dog food, . . ." adding, ". . . we then came up with a meatless diet for dogs," which, however, he has not marketed to this day, although he expects to eventually make profits from this dog food by having a dog food company take it over and market it.

The taxpayer's first promotional scheme with the dogs was when he attempted to use the bitch that had produced nine champions at the Sportsmen's Show. The idea was to set up the bitch with her nine champions outside of the Coliseum on a towing car which would create an interest to go in and see the rest of the dogs. However, this did not

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work out as the mother of the champions was let out and killed on the highway and the promotion was ruined as the important part of the show was the bitch.

It then took the taxpayer three years to reproduce the bitch and in the meantime these three years were lost as far as promoting was concerned.

The proposal here was that the Sportmen's Show would have supplied the space and a dog food company would have made it worth his while. The appellant stated that, "There was some talk of $15,000" which, however, would never have materialized even if the bitch had not been killed as the Master Dog Food Company involved turned the scheme down on the basis that this was not their type of promotion.

The taxpayer then lined up a promotion with Simpson's, "a dog-in-the-window of a pet store" type of display in Toronto. He explained here that what he wanted mostly was Simpson's window space which, from an advertising point of view, is exceptionally good and the moment he would have his dogs in the window, he would have a box of dog food with either the name of the food company or with just Crackerjack across it. A person would say, looking at this display, "This man has got twenty champions; this is what he feeds them". He admitted, however, that he never discussed this plan of his with any dog food producer, but states that he was going to.

Unfortunately, once again, this scheme did not work out either as it did not suit Simpson's, so he then discussed the possibility of doing something inside the store in the sporting goods section where they would deal with black and tan fashion colours for fall which would tie in with the airedales which were black and tan. This, however, did not work out either and was turned down by Simpson's General Merchandising Manager.

Another attempt was then made to use the dogs in connection with Simpson's House of Ideas which is a house inside the store built for promoting household goods such as furniture, stoves and curtains. It is furnished three times a year with a different setting each time and in 1961 the taxpayer had given it the name of "The home of a dog breeder in the country."

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His contribution to the above scheme appears, as far as the dogs were concerned, to hang some of their pictures around the House of Ideas with a painting of his kennels and dogs in the kitchen window and the hall was fitted with trophies and certificates of the dogs. Although he intended and he had made arrangements to trim live dogs in the house it appears that this was not done.

The budget for this promotion which was originally $5,000 was then reduced to $3,000 and from all this it appears that the taxpayer received $75 only which he explains by saying, "We have done a lot of jobs on television where we haven't made much money but others we have like the General Motors Show."

The taxpayer then stated that he envisaged some type of public exhibition of his dogs, but here again has not yet done this. In answer to a question of the Court as to why in seven years he did nothing with his dogs in this regard, he stated that the bitch was the important thing for exhibition purposes, although he finally admitted that nine champions was an extraordinary feat in itself even without the bitch.

His main idea, he states, is to set up a place called "Dogland" for instance where children can be taken and shown dogs and what dogs have done through the years. He thought of placing them on a treadmill which would also be good exercise for them. He even investigated the dog cart games. He also, he says, chatted with one of the dog food producers with the idea of taking the dogs to shopping centers to promote dog food but he says this takes a lot of money which he has not.

In connection with this dogland business, the taxpayer states that he would not confine himself to airedales but would use other breeds as well. He would set this up on his ten acres at Aurora, Ontario, and he proposes to put up a building where the dog shows can be held, together with a restaurant and a rest room and the adjoining field could be used for trials.

He states he has contacted Mr. Bunty Lewis, Manager of the Sportsmen's Dog Show and president of the Field Trials Association who told him that if he had the proper spot he would hold his shows and trials there.

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He has never sold a dog from 1956 to date, adding, "No, they were not raised for that purpose, not from the time we discovered we had these. If I had known what I know now I never would have, but I have something good and I am staying with it."

From 1957 to 1961 the revenue received by the taxpayer from the breeding of airedales amounts to, according to the taxpayer, between $700 and $800. He could not, however, substantiate more than $510, of which $200 in prize money in 1956, $235 in 1959 and $75 from Simpson's House of Ideas.

He maintains that it is possible to make a profit out of prize money from just showing dogs but states that it is not his intention to make money in this manner, nor has he sold any of his dogs and will only do so if he has a surplus over his needs and it, therefore, appears that he has made no profit from his kennels at all. Asked as to whether he had any idea when he will make a profit, he answered, "I hope it will be very shortly and I have a feeling it will be shortly."

The taxpayer has no office aside from his Aurora place where he claims he runs his business and where he pays a kennel tax but no business tax. He has done no advertising for his Crackerjack Kennels, is not listed in the telephone book as he has no telephone, has no letterhead showing Crackerjack Kennels, as a matter of fact he admits that there has been no promotional work done for the Crackerjack Kennels at all.

The uncertainty of his expectation of profits from his activities is reflected in the following answer:

> A. Yes, I had an idea it was going to be on the way three years ago but it didn't work out and prior to that it didn't work out. I have an idea it may be next month.

In his examination for discovery, the taxpayer was still more uncertain in answer to a question regarding his chances of making money with his dog business:

> Q. Have you any idea when you expect that picture to change?
>
> A. Well, you think you have good ideas and sometimes you sell them and sometimes you don't sell them.
>
> Q. But you don't know how soon?
>
> A. In this business no-one knows.

Mrs. Stewart, who with her husband, looks after the dogs, on a full-time basis, stated that perhaps two or three dogs might be a hobby, but maintains twenty-seven would not. She added that she liked and enjoyed working with them. She confirmed the evidence given by her husband and added that they would not go along as they are if they did not think something definitely was going to come out of it, admitting, however, that at times she got fed up with the dogs.

She stated that she and her husband did not start off with the intention of using the dogs for promotional purposes, but as she put it, ". . . we saw what we had and it was quite unusual and as we went along a little further and proved the quality of them and found that we were attaining something that was quite unusual, to have so many of such a uniform quality, that is when we really started to think that perhaps we could put this to some use."

The appellant submits that the money he spent on his dogs for the years 1957 and 1958 are proper deductions on either one of two alternative grounds: (1) these dogs are part and parcel of his advertising business; (2) even if these dogs are too unrelated from this endeavour, then the whole kennel operation constitutes a farm and under s. 13 of the *Income Tax Act*, the provisions limiting farm loss will apply.

There is no question that the appellant was in the advertising display field, although the evidence indicates that in recent years he had given up all other lines of activity to devote his, as well as his wife's, full-time to these dogs. The only question remaining is whether the dogs constitute a part of what could be considered as "a business carried on for profit or with a reasonable expectation of profit" under s. 139(1)(*ae*) of the Act which defines "Personal or Living Expenses" as follows:

> the expenses of properties maintained by any person for the use or benefit of the taxpayer or any person connected with the taxpayer . . . and not maintained in connection with a business carried on for profit or with a reasonable expectation of profit, . . .

and, of course, if they are personal or living expenses they would not be deductible as such under s. 12(1)(*h*) of the Act which reads as follows:

> In computing income, no deduction shall be made in respect of personal or living expenses of the taxpayer . . .

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Now the fact that farming losses are experienced year after year by one carrying on the business of farming has been held not to make them "personal or living expenses" disallowed by s. 12(1)(*h*) so long as farming is carried out in good faith with a reasonable expectation of profit.

Thorson P. stated in *McLaughlin Estate v. M.N.R.*[1] at p. 391:

> I am also satisfied from the evidence that he carried on his business as a farmer and cattle breeder *bona fide* for a profit. He was not merely indulging himself in an activity for pleasure.

The evidence of this taxpayer's unsuccessful efforts to use these dogs profitably is such that the only inference one can draw from such a long story of frustrations is that it is not possible for him to use these dogs with a reasonable expectation of profit and, therefore, these expenses would be "Personal or living expenses" under the above sections and undeductible.

Indeed, although in 1955 he came up with a meatless diet for dogs which seems to have assisted him in breeding his champions, he has not to this day marketed it, nor has he made arrangements with a dog food company to do it for him. His attempt to use his champion bitch with her nine champion pups at the Sportsmen's Show failed also because of her untimely death and he could not use the nine surviving champion pups, although that number in one litter was a feat in itself; it turned out also that even if the bitch had not died, his scheme would not have worked anyway as it was turned down by the proposed sponsor food company on the basis that this was not their type of promotion.

The appellant's "A dog in the window of a pet store" promotion with Simpsons in their display window did not work out either as it did not suit Simpsons, nor did the sporting goods promotion inside the store as it was turned down by their merchandising manager. The taxpayer's attempt to use his dogs in connection with Simpson's House of Ideas with his dogs being trimmed, did not materialize either, although here he managed to get the pictures of his dogs and trophies in the dream house as well as a painting of his kennel and dogs for which he received the amount of $75.

[1] [1952] Ex. C.R. 386.

Although he says he has envisaged public exhibition of his dogs (still maintaining however that it is not his intention to make money in this manner as we have seen (*supra*)) over a period of eight years he has not been able to do so and his idea of using his ten acre farm as a place to hold dog exhibitions, shows and trials with a restaurant and a rest room although contemplated has never been implemented.

Finally to confuse matters further with twenty-seven dogs, he claims his breeding program is not completed to date and he does not know when it will be, after which he maintains that he cannot handle any more dogs and that he has too many. From all this, there seems to be but one conclusion which is that although this may not be a hobby in the ordinary sense of the word, i.e., a favourite occupation pursued for amusement, it could well be considered, as in my opinion it is, an inordinate and unreasonable passion for the breeding of dogs.

There is, however, a further reason for disallowing these expenses in that, even if the appellant's kennels were part and parcel of his advertising business, these expenses are not outlays for the purpose of gaining or producing income from the business and are prohibited under s. 12(1)(*a*) of the *Income Tax Act* which reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

This section prohibits a deduction of any outlay or expense unless the taxpayer can satisfy the Court as to the extent to which the outlay or expense was made for the purpose of gaining or producing income from business or property.

Now the evidence here is clear that the appellant has not in fact used these dogs at all in connection with his advertising business.

Indeed in 1957 nothing came in by way of receipts from the operation of Crackerjack Kennels; the taxpayer's income tax return for that year indicates that there were certain receipts from appellant's Artland Studios, but none are shown from disbursements made in connection with his dogs. The same holds true also for the year 1958.

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This drives me to the conclusion that the expenses involved here are altogether too remote and were not "made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer" within the meaning of s. 12(1)(*a*) of the Act.

The only matter now remaining is appellant's second submission that if the dogs are too unrelated or remote from his advertising business, then the whole kennel operation would constitute a farm under s. 13 of the *Income Tax Act* which is known as the "hobby farming" limitation on loss deductions.

Now this section (which limits the deduction of expenses incurred in farming) will apply only if a taxpayer's chief source of income for a taxation year "is neither farming nor a combination of farming and other source of income" and it would seem that here (providing the raising, breeding or exhibiting of the taxpayer's dogs fall within the definition of farming under the Act, which is another matter with which I shall deal later) this taxpayer meets with this requirement, his chief source of income being other than farming or a combination of farming and some other source of income as for the years under review, his only receipts come from investment income in the sum of $3,174.48 for 1957 and $5,230.50 for 1958 and there are no receipts whatsoever from his kennel operations. Under the Act, as it stood in the years 1957 and 1958, this taxpayer, under s. 13 of the Act, would be entitled to half of his farming losses for 1957 and his entire farming losses for 1958 provided, however, his kennel operations fall within the definition of "farming" under the Act which (according to s. 139 (1)(*p*)) "includes tillage of the soil, livestock raising or exhibiting, maintaining of horses for racing, raising of poultry, fruit growing and keeping of bees . . .". Now the appellant never said that he was raising or breeding or exhibiting dogs either for sale, exhibition or for service which is what the words, "livestock raising or exhibiting" may mean in the above definition, if the word "livestock" comprises dogs. As a matter of fact he denied that this was his object maintaining right along that he did not breed these dogs to sell them, nor did he exhibit them for prize money, but that his sole purpose was to qualify as many dogs as he could as champions for the purpose of using

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them in his advertising business and he therefore, on this basis alone, cannot benefit from the deductions provided by s. 13 of the Act.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Judgment accordingly.