Docket: 2006-3850(IT)G

BETWEEN:

DEBORAH LECAINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 25, 2009, at Halifax, Nova Scotia

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Stan W. McDonald Melanie Petrunia

---

JUDGMENT

The appeal is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the net income of the Appellant for 2001 and 2002 related to Le Caine Enterprises, Data Entry Select and the property located at 135 Conrad Road is as follows:

Le Caine Enterprises

	2001	**2002**
Revenue:	$6,450	$0
Minus: Expenses	($14,224)	($8,691)
Net Income (Loss):	($7,774)	($8,691)

Data Entry Select

	2001	**2002**
Revenue:	$1,848	$0
Minus: Expenses	($2,028)	($51)
Net Income (Loss):	($180)	($51)

Property located at 135 Conrad Road – "Rental Property"

	2001	**2002**
Revenue:	nil	nil
Less: Expenses	nil	nil
Net Income:	nil	nil

Signed at Halifax, Nova Scotia, this 4th day of August 2009.

"Wyman W. Webb"

Webb, J.

Citation: 2009TCC382
Date: 20090804
Docket: 2006-3850(IT)G

BETWEEN:

DEBORAH LECAINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] In filing her income tax returns for 2001 and 2002 the Appellant claimed losses in relation to three different activities – Le Caine Enterprises, Data Entry Select and a rental property. The Appellant was reassessed to deny all of the expenses claimed in relation to Le Caine Enterprises and the rental property and all but $1,580 of the expenses claimed in relation to Data Entry Select. The issue is what expenses, if any, may be claimed by the Appellant in computing her income for 2001 and 2002 in relation to Le Caine Enterprises and Data Entry Select in addition to the wage expense of $1,580 that was allowed in relation to Data Entry Select and whether the rental property was a source of property income for the purposes of the *Income Tax Act* (the "*Act*"). The Appellant was reassessed on a limited basis. The impact that this will have on the determination of the expenses that may be claimed in this case is also an issue.

Le Caine Enterprises

[2] The Appellant was carrying on business as a sole proprietorship under the name Le Caine Enterprises. The Appellant provided her five bedroom house located at 141 Conrad Road in Lawrencetown, Nova Scotia to the Department of Community Services (Nova Scotia) ("Community Services") so that they could provide a place

for children with emotional problems to stay for a few days or weeks. In 2000 the Appellant had several meetings with one or more individuals from Community Services and she decided to make her home available. She had determined that her home could accommodate up to five individuals at one time with the crisis intervention team. She had also determined that if there were at least two children in the home, the revenue would cover the expenses and she could possibly make a small profit.

[3] In early 2001 the Appellant started to make the house ready. She put in smoke alarms and fire extinguishers and removed her personal belongings. Sometime during the first few months of 2001 the Appellant moved out of this house and moved in with friends. Later in July 2001 she moved into an apartment where she stayed until April 2002 at which time she again stayed with friends. The Appellant did not move back into the house until 2007. The Appellant could not be in the house at the same time as it was being used by Community Services.

[4] In May of 2001 the first children were accommodated in her house. The use of her house by Community Services continued through the summer of 2001 to November 1, 2001. She was only paid for the time that Community Services had children at the house. After November 1, 2001 Community Services did not use her house to accommodate children. She continued to maintain the premises so that the house would be available for use by Community Services. She tried to find out why Community Services stopped using her house but she was unsuccessful in obtaining an explanation. Although she continued to try to convince Community Services to use her house, they did not do so. In April 2002 she started considering whether the house could be used for some other business.

[5] The following are the amounts that were included as revenue and expenses in the Appellant's tax returns and the amount of the expenses that have been denied by the Canada Revenue Agency ("CRA") and the net affect of the reassessment:

	2001	2002
Revenue:	$6,450	$0
Expenses claimed by the Appellant:	($31,331)	($25,833)
Income (Loss) claimed by the Appellant:	($24,881)	($25,833)
Expenses Denied by CRA:	$31,331	$25,833
Income (Loss) following the reassessment:	$6,450	$0

[6] As a result of the denial by the Respondent of all of the expenses claimed in relation to Le Caine Enterprises, the income of the Appellant for 2001 is equal to the

reported revenue arising in relation to this activity in 2001. The Respondent is accepting that this activity was a source of business income, however the Respondent is not accepting that any expenses were incurred by the Appellant to earn this business income. It seems to me that given the nature of the business that it is only reasonable that the Appellant would have incurred some expenses in order to earn this income.

[7] The Appellant submitted a spreadsheet during the hearing that provided a breakdown of the expenses that she had claimed, which was the same breakdown as counsel for the Respondent included in written submissions filed before the commencement of the Hearing. This breakdown was as follows:

Item:	**2001**	**2002**
Delivery, freight & express	$368.72	
Insurance	$292.00	$534.00
Interest	$9,238.92	$7,438.54
Maintenance & Repairs	$2,852.41	$1,236.81
Office Expenses	$36.82	$67.83
Supplies	$832.67	$632.85
Property taxes	$1,193.69	$1,177.05
Travel	$3,036.80	
Telephone & Utilities	$10,225.26	$11,622.73
Capital Cost Allowance	$3,253.60	$3,123.46
Total:	$31,330.89	$25,833.27

[8] The Notice of Appeal that was filed does not disclose any facts related to the amounts claimed. The Material Facts as set out in the Notice of Appeal are as follows:

> Material Facts
>
> 4. The Appellant filed Income Tax Returns for the taxation year ended April 30, 2001 and an Income Tax Return for the taxation year ended April 30, 2002, claiming expenditures for business expenses related to Le Caine Enterprises (crisis intervention), Data Entry Select and a rental property at 135 Conrad Rd.
>
> Year 2001:
>
> Business Expenses (line 135) in the amount of $33,179.74

Rental Expenses (line 126) in the amount of $8001.22

Year 2002:

Business Expenses (line 135) in the amount of $25,874.97

Rental Expenses (line 126) in the amount of $8,143.46

5. By notice of Reassessment, the Respondent disallowed the Appellant's business & rental Expense claims for the Assessed Years of 2001 & 2002.

[9] In the Reply that was filed, the only assumptions that were made in relation to Le Caine Enterprises were the following:

8. In so assessing the Appellant and confirming the assessment, the Minister relied on the following assumptions:

a) the facts admitted above;

b) during the years under appeal, the Appellant owned two houses located 135 and 141 Conrad Road, West Lawrencetown, Nova Scotia;

c) the Appellant provided emergency housing for youth involved with the Nova Scotia Department of Community Services ("Community Services") using the trade name Le Caine Enterprises;

d) the Appellant used the house located 141 Conrad Road to provide emergency housing and received $50 when used by Community Services;

e) the Appellant ceased operating Le Caine Enterprises in 2002 and did not provide any emergency housing during the 2002 taxation year;

f) for the 2001 and 2002 taxation years the Appellant claimed the amounts of $31,330.89 and $25,833.27, respectively, as expenses of Le Caine Enterprises;

g) during the 2001 and 2002 taxation years the Appellant did not incur any expenses in respect of Le Caine Enterprises;

[10] The Respondent in the Reply only referred to paragraphs 18(1)(*a*) and subsection 230(1) of the *Act*. In the "Grounds Relied On" section of the Reply, the

Respondent submitted that the Appellant had not incurred "outlays or expenses for the purpose of gaining or producing income from business and property as required by paragraph 18(1)(*a*) of the *Act*". It appears that throughout the audit the Appellant was not fully cooperative and the lack of documentation provided by the Appellant led the auditor to a conclusion that the Appellant had not incurred the expenses that were claimed. This failure to provide documentation continued after the Notice of Appeal was filed. However it would appear that at some point prior to the hearing a significant number of receipts and other documentation were disclosed. These were submitted at the hearing as Exhibits on consent. As well counsel for the Respondent submitted a pre-hearing brief in which the various items claimed as expenses were identified and therefore the Respondent had knowledge of the various amounts that comprised the expenses that had been claimed.

[11] The focus of the Hearing was on whether the amounts had been incurred and if the amounts were incurred, whether such expenditures were incurred for the purpose of earning income from the business.

[12] Counsel for the Respondent in argument placed a great deal of emphasis on the onus of proof and that the Appellant had the onus of proving that the amounts had been incurred and for those amounts that had been incurred, that the Appellant had the onus of proving that such expenditures had been incurred for the purpose of earning income.

[13] In *del Valle* v. *Minister of National Revenue* [1986] 1 C.T.C. 2288, 86 DTC 1235, Justice Sarchuk made the following comments:

> 11 The *Johnston* case (*supra*), was considered in *Hillsdale Shopping Centre Limited* v. *Minister of National Revenue*, [1981] C.T.C. 322, 81 D.T.C. 5261 and at 328 (D.T.C. 5266) Urie, J. made the following comments:
>
> > If a taxpayer, after considering a reassessment made by the Minister, the Minister's reply to the taxpayer's objections, and the Minister's pleadings in the appeal, has not been made aware of the basis upon which he is sought to be taxed, the onus of proving the taxpayer's liability in a proceeding similar to this one would lie upon the Minister. This defect may be due to a number of reasons such as a lack of clarity on the part of the Minister in expounding the alleged basis of the taxability which could include an attempt by the Minister to attach liability on one of two or more alternative bases thus failing to make clear to the taxpayer the assumption upon which he relies.

> 12 I believe this is the approach which should be followed in the case at bar. In my view the respondent has failed to allege as a fact an ingredient essential to the validity of the reassessment. There is no onus on the appellant to disprove a phantom or non-existent fact or an assumption not made by the respondent.
>
> 13 While it was possible for the respondent to have alleged further and other facts the respondent did not choose to do so in this case but simply relied on the facts assumed at the time of the reassessments. I emphasize that if the respondent had alleged such further or other facts the onus would have been on him to establish them. (See *Minister of National Revenue* v. *Pillsbury Holdings Limited*, [1965] 1 Ex. C.R. 678, [1964] C.T.C. 294).
>
> 14 The facts relied upon do not support the reassessments. For these reasons the appeal is allowed and the matter is referred back to the respondent for reassessment on the basis that the sum of $5,100 was improperly added in computing the appellant's income in each of her 1980 and 1981 taxation years.

[14] In *Pollock v. The Queen*, [1994] 1 C.T.C. 3, 94 DTC 6050, Justice Hugessen, on behalf of the Federal Court of Appeal, made the following comments:

> It is, of course, the general rule that every party to litigation in this Court must plead the facts upon which he relies in such a way as to put his opponent fairly on notice of the case he has to meet. Where a party's pleadings are so inadequate as to disclose no case at all he runs the risk of having them struck out and of losing for that reason. That rule is quite irrelevant here. There is no question in the present case of the Minister's pleadings being inadequate or of the appellant not knowing clearly and beyond any possibility of doubt the basis upon which he was reassessed. That basis was and is that the appellant's dealings in shares of the companies in question constituted for him an adventure in the nature of trade so as to make the profits therefrom taxable as income.
>
> The special position of the assumptions made by the Minister in taxation litigation is another matter altogether. It is founded on the very nature of a self-reporting and self-assessing system in which the authorities are obliged to rely, as a rule, on the disclosures made to them by the taxpayer himself as to facts and matters which are peculiarly within his own knowledge. When assessing, the Minister may have to assume certain matters to be different from or additions to what the taxpayer has disclosed. While the Minister's assumptions, if any, are generally made in the pleadings, that is not always the case and we have seen, in this very record, an example of the taxpayer taking pains to demolish assumptions which the Minister had not pleaded. Where pleaded, however, assumptions have the effect of reversing the burden of proof and of casting on the taxpayer the onus of disproving that which the Minister has assumed. Unpleaded assumptions, of course, cannot have that effect and are therefore, in my view, of no consequence to us here.

> The burden cast on the taxpayer by assumptions made in the pleadings is by no means an unfair one: the taxpayer, as plaintiff, is contesting an assessment made in relation to his own affairs and he is the person in the best position to produce relevant evidence to show what the facts really were.
>
> Where, however, the Minister has pleaded no assumptions, or where some or all of the pleaded assumptions have been successfully rebutted, it remains open to the Minister, as defendant, to establish the correctness of his assessment if he can. In undertaking this task, the Minister bears the ordinary burden of any party to a lawsuit, namely to prove the facts which support his position unless those facts have already been put in evidence by his opponent. This is settled law

[15] Justice Rothstein in *The Queen* v. *Anchor Pointe Energy Ltd.* 2003 DTC 5512 stated that:

> [23] The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet.

[16] In *Loewen* 2004 FCA 146, Justice Sharlow, on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown. This is well explained in *Schultz* v. *R.* (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).

[17] Leave to appeal the decision of the Federal Court of Appeal in *Loewen* to the Supreme Court of Canada was refused (338 N.R. 195 (note)).

[18] In *Hickman Motors Ltd. v. Her Majesty the Queen*, [1997] S.C.J. No. 62, Justice L'Heureux-Dubé of the Supreme Court of Canada made the following comments in relation to an Appellant's onus of "demolishing" the Minister's assumptions:

> 92 ... The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd.* v. *Minister of National Revenue* (1959), 59 D.T.C. 1098 (Can. Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston* v. *Minister of National Revenue*, [1948] S.C.R. 486 (S.C.C.); *Kennedy* v. *Minister of National Revenue* (1973), 73 D.T.C.

> 5359 (Fed. C.A.), at p. 5361). **The initial burden is only to "demolish" the exact assumptions made by the Minister but no more**: *First Fund Genesis Corp.* v. *R.* (1990), 90 D.T.C. 6337 (Fed. T.D.), at p. 6340.
>
> (emphasis added)

[19] Therefore it is very important that the assumptions clearly and accurately state the facts assumed by the Minister as the initial burden on the Appellant "is only to "demolish" the exact assumptions made by the Minister and no more". Taxpayers should know the basis on which they have been reassessed. In this case the only assumption made that provides any basis for the denial of the expenses claimed was that "the Appellant did not incur any expenses". Therefore the initial burden on the Appellant was only to "demolish" this assumption and show that the expenses had been incurred. If an expense was incurred, then the Respondent, in this case, had the onus of proving that the expenditure was not incurred for the purpose of earning income since the only assumption that was made by the Respondent was that the amounts had not been incurred.

Le Caine Enterprises – Delivery, freight & express

[20] The amount claimed as "delivery, freight & express" is a portion of the amount that the Appellant paid for a new vehicle that she acquired. In the schedule that she had prepared she indicated that the following amounts had been charged to her in relation to the purchase of her vehicle:

Freight & delivery	$895.00
Gas Admin Fee	$99.00
Tire Tax	$15.00
Excise – Air Conditioning	$100.00
License, registration & transfer fee	$65.00
HST	$2,445.60
Total:	$3,619.60

[21] In the schedule she indicated that the amounts totaled $3,919.60 but these items only total $3,619.60. There was no explanation for this discrepancy of $300. Of this amount, the Appellant claimed $368.72 (which is approximately 10% of this total amount) as an expense in computing her income for 2001. I accept the Appellant's testimony that these amounts had been incurred but it seems obvious to me that these amounts would have been added to the capital cost of the vehicle if the vehicle was used in carrying on this business, and not claimed as an expense.

[22] The capital cost of a depreciable property is included in determining the undepreciated capital cost of that property. "Capital cost" is not defined in the *Income Tax Act* (the "*Act*"). In the text "Principles of Financial Accounting a Conceptual Approach" by Finney and Miller, 1968 it is stated at page 245 that:

> *Incidental costs.* The cost of an asset includes not only the basic, or purchase, price, but also related, incidental costs such as the following: costs of title searches and legal fees incurred in the acquisition of real estate; transportation, installation and breaking-in costs incident to the acquisition of machinery; storage, taxes and other costs incurred in aging certain kinds of inventories, such as wine; and expenditures made in the rehabilitation of a plant purchased in a run-down condition.

And at page 198:

> **Determination of cost.** As a general statement, it can be said that the cost of an asset is measured by, and is equal to, the cash value of the consideration parted with when acquiring the asset. As applied to fixed asset acquisitions, cost includes all expenditures made in acquiring the asset and putting it into a place and condition in which it can be used as intended in the operating activities of the business. Thus, the cost of machinery includes such items as freight and installation costs in addition to its invoice price.

[23] In "Accounting Standards in Evolution", 2nd ed., by Milburn and Skinner, 2001, it is stated at page 188 – 189 that:

> The majority of tangible capital assets are purchased from external sources. The chief element of cost, then, is the invoiced price less any applicable cash or trade discounts. The chief costing problem lies in ensuring that costs incidental to acquisition and costs of making the asset capable to serve are capitalized... With respect to equipment, costs include all customs duties and taxes, transportation inward, insurance in transit, foundations and installation costs, and other charges for testing and preparation.

[24] The cost of a capital asset should be determined for the purposes of the *Income Tax Act* in the same manner as it is for accounting purposes. The purpose of determining the capital cost of an asset for the purposes of the *Income Tax Act* is to determine the amount that should be added to the undepreciated capital cost and then amortized over time by claiming capital cost allowance ("CCA") in accordance with the *Income Tax Regulations*. There is no reason why the incidental costs (such as freight) would be added to the cost of a capital asset for accounting purposes but not included for the purpose of determining the capital cost of the asset for the purposes of the *Act*. In each case the objective is to determine the total cost of the asset that should be capitalized.

[25] The incidental costs listed above were incurred by the Appellant in acquiring the vehicle and should have been added to the cost of the vehicle.[1] If the vehicle was being used to earn income from the business, the appropriate percentage of the total cost of acquiring the vehicle, based on the percentage that the vehicle was being used in carrying on the business, could then have been used to claim CCA determined in accordance with the *Income Tax Regulations*. It was not appropriate to simply deduct these incidental costs as current expenses. In this case, the Appellant did not include the vehicle in the CCA schedule that she filed with her tax return for 2001 or 2002.

[26] However, this was not the basis upon which the Appellant was reassessed nor was this basis advanced at any time by the Minister. Therefore, it cannot form the basis of a reassessment of the Appellant. In *Pedwell* v. *The Queen*, 2000 DTC 6405, [2000] 3 C.T.C. 246, Justice Rothstein, writing on behalf of the Federal Court of Appeal, stated as follows:

> 15 While the parties referred to a number of older authorities on the issue, *Continental Bank of Canada* now makes it clear (subject to subsection 152(9) which applies to appeals disposed of after June 17, 1999 and is not relevant here in any event) that the Minister is bound by his basis of assessment. While this case does not involve the *Minister* advancing a different basis of assessment, I think the principle in *Continental Bank of Canada* is applicable to a *judicial determination* on a basis different from that in the notice of reassessment.
>
> 16 First, if the Crown is not able to change the basis of reassessment after a limitation period expires, the Tax Court is not in any different position. The same prejudice to the taxpayer results - the deprivation of the benefit of the limitation period. It is not open to that Court or indeed this Court, to construct its own basis of

[1] In this case, since the Appellant was not registered for HST purposes, the HST paid would be added to the cost of the vehicle regardless of whether she was carrying on a commercial activity.

> assessment when that has not been the basis of the Minister's reassessment of the taxpayer.
>
> 17 Second, while it is open to the Minister to change the basis of assessment before the limitation period expires, where he does not do so, in my respectful opinion, the Tax Court Judge is bound by the assessment at issue before the Court. Fairness requires that the taxpayer be given a reasonable opportunity to contest a new basis of assessment. If the Tax Court Judge decides on a basis of assessment not at issue during the court proceedings, the taxpayer is deprived of that opportunity.
>
> 18 Here, on his own motion, the Tax Court Judge, in his decision and after the completion of the evidence and argument directed to the Minister's basis of assessment, changed the basis of that assessment without the appellant having the opportunity to address the change. This is clear because the Tax Court judgment allowed the appellant's appeal, i.e. found that there was no appropriation of property which was the basis of the Minister's assessment, but then referred the matter back to the Minister to reassess on the basis that the Euler proceeds and the Landpark deposit were appropriated. What has taken place is tantamount to allowing the Minister to appeal his own reassessment.
>
> 19 I do not say that the Minister cannot assess in the alternative. However, that was not done here.

[27] While subsection 152(9) of the *Act* (to which Justice Rothstein refers) may have been available to the Minister to advance an alternative argument in support of the reassessment of the Appellant, this subsection is only available if the Minister advances such alternative argument. Since the Minister did not advance any alternative argument to deny these expenses on the basis that they should have been capitalized, it is not open for me to do so. However since I have concluded (as noted below) that the expenses related to the motor vehicle were not incurred for the purpose of earning income, these amounts are not deductible in computing her income for 2001.

Le Caine Enterprises – Insurance

[28] The amount claimed for insurance in the amount of $292 for 2001 relates to insurance on the house used in carrying on this business. The only invoice that the Appellant submitted in relation to the insurance on the premises used in carrying on the Le Caine Enterprises business was the invoice dated June 2, 2002 for the period from August 8, 2002 to August 8, 2003. While the Appellant also submitted copies of statements for several different bank accounts, it is impossible to tell from the bank statements whether a particular payment was for the insurance on this property.

[29] This claim illustrates the lack of documentation supplied by the Appellant. There is no invoice and no cancelled cheque to show that insurance was paid for any part of 2001 or the first seven months of 2002 or the amount of the insurance for any part of 2001 or the first seven months of 2002. The only period covered by the one invoice that was submitted for the insurance on this property is for the period commencing in August 2002.

[30] In *Wainberg* v. *The Queen* [2004] 1 C.T.C. 2417, 2003 D.T.C. 1395, Justice Bowie made the following comments:

> 3 Counsel for the Respondent referred me to the decision of the Federal Court of Appeal in *Njenga* v. *The Queen*. That case held that a taxpayer who ignores the requirement under the Act to maintain and have available detailed information and documentation to support the claims that they make should expect to have considerable difficulty discharging the burden of proving those claims. The need to support oral testimony with documents is certainly not absolute, however. If the taxpayer is a credible witness, the case may be made simply on oral evidence, if it is sufficiently convincing.

[31] In *The Continental Insurance Company v. Dalton Cartage Company Limited*, [1982] 1 S.C.R. 164, Chief Justice Laskin stated as follows:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. So this Court decided in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154. There Ritchie J. canvassed the then existing authorities, including especially the judgment of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458, at p. 459, and the judgment of Cartwright J., as he then was, in *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312, at p. 331, and he concluded as follows (at p. 164):
>
> > Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the "balance of probabilities".
>
> It is true that apart from his reference to *Bater v. Bater* and to the *Smith and Smedman* case, Ritchie J. did not himself enlarge on what was involved in proof on a balance of probabilities where conduct such as that included in the two policies herein is concerned. In my opinion, Keith J. in dealing with the burden of proof could properly consider the cogency of the evidence offered to support proof on a balance of probabilities and this is what he did when he referred to proof commensurate with the gravity of the allegations or of the accusation of theft by the

> temporary driver. There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in *Bater v. Bater*, supra, at p. 459, as follows:
>
> > It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
>
> **I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.**
>
> (emphasis added)

[32] In *Hickman Motors Limited v. The Queen*, [1997] 2 S.C.R. 336, Justice L'Heureux-Dubé stated as follows:

> 92 It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd. v. Minister of National Revenue*, [1966] S.C.R. 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Pallan v. M.N.R.*, 90 D.T.C. 1102 (T.C.C.), at p. 1106.

[33] In the recent decision of the House of Lords of *In re Doherty*, [2008] UKHL 33, Lord Carswell stated as follows:

25. The phrase "degree of probability" was picked up and repeated in a number of subsequent cases – see, for example, *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455, *Blyth v Blyth* [1966] AC 643, 669 and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 113-4 – and may have caused some courts to conclude that a different standard of proof from the balance of probabilities or a higher standard of evidence was required in some cases. In so far as such misunderstanding has occurred, it should have been put to rest by the frequently-cited remarks of Lord Nicholls of Birkenhead in *In re H (Minors)*. Immediately after the passage which I have quoted from his opinion, he went on at pages 586-7:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. **It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established** … No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability."

…

27. Richards LJ expressed the proposition neatly in *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, 497-8, para 62, where he said:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability

> required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than an explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegation being unfounded, as I explain below.

> 28. **It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard.** The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established.
>
> (emphasis added)

[34] In the recent decision of the House of Lords of *In re B (Children)*, [2008] UKHL 35, Lord Hoffmann stated as follows:

> 14. Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said, in the passage I have already quoted, that —
>
> > "the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

> 15. I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. **Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.**
>
> (emphasis added)

[35] And in the same case Baroness Hale of Richmond stated as follows:

> 70. …Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. **The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.**
>
> (emphasis added)

[36] It seems to me that these cases are consistent and the issue in a civil case (which will include the current appeal) will be whether the evidence as presented is sufficient to satisfy the trier of fact, on a balance of probabilities, that the person who has the burden of proof has established what is required of him or her. In analyzing the evidence that has been presented, the probability or improbability of the event that is in issue is a factor that can be taken into account. The more improbable the event the stronger the evidence that would be required. Conversely it would also seem to me that a person may be able to establish, on a balance of probabilities, that a highly probable event occurred based on weaker evidence than would be required to establish that an improbable event had occurred.

[37] In this case it seems logical that the Appellant would have insured the property used in carrying on the Le Caine Enterprises business in 2001. Since the annual insurance cost was $534 in 2002 this amount will be used for 2001. The Appellant was living in the property located at 141 Conrad Road for the first few months of 2001. The exact date that she vacated these premises so that they could be used by Community Services is not clear. The Appellant submitted copies of the stubs from the cheques for the payments made by Community Services for the use of the house. Since the earliest reference on any of the stubs is to the period from May 13 – May 20, 2001, it would appear that the property was first used during this week of May 13 – 20, 2001. As a result the Appellant must have vacated the house prior to that week and therefore I find that the Appellant had vacated the house by April 30, 2001.

[38] As a result, it seems to me that the insurance costs for the period from January 1, 2001 to April 30, 2001 would have been for the period while the Appellant was

still using the house as her residence. As a result, the insurance costs for this period would have been personal expenditures and not incurred for the purpose of earning income.

[39] Based on the stubs from the payment cheques, the house was used by Community Services for the following periods in 2001:

Time Period	**Amount Received**
May 13 – May 20	$400
May 21 – May 27	$350
May 28 – June 3	$350
June 4 – June 10	$350
June 11 – June 17	$350
June 18 – June 24	$350
June 25 – July 1	$350
July 2 – July 8	$350
July 16 – July 22	$350
July 20 – July 22	$150
July 23 – July 29	$350
July 30 – August 1	$150
July 30 – August 3	$250
September 6 – September 9	$200
September 10 – September 16	$350
September 17 – September 20	$200
September 17 – September 23	$350
September 24 – September 30	$350
October 1 – October 7	$350
October 8 – October 14	$350
October 15 – October 21	$350
October 22 – October 28	$350
October 29 – November 1	$200
Total:	$7,150

[40] The total of the cheques received by the Appellant for the use of her property at 141 Conrad Road exceed the amount included by her as revenue by $700. No explanation was provided for this discrepancy nor was this discrepancy even noted by either party. It appears that no one took the time to calculate the total of the amounts as stated in the cheque stubs. Since the Respondent cannot appeal the

reassessment[2], the income of the Appellant cannot be increased as a result of her appeal and therefore no adjustment will be made to reflect this discrepancy of $700.

[41] The last period that the house was used by Community Services was the period from October 29 to November 1, 2001. The Appellant attempted to find out if they were planning to use her house again but she was unsuccessful in arranging for Community Services to use her house after November 1, 2001. By April of 2002, the Appellant had started to consider other uses for the house. Since there were some gaps in the periods that it was being used (one week in July (July 9 – 15) and most of the month of August), it seems to be that the Appellant could still be considered to be carrying on business for some time after November 1, 2001 but by the end of April of 2002 (which would have been 6 months since it had last been used by Community Services and which would indicate that the failure to use the property was not simply based on the winter season), it would be reasonable to assume that Community Services were no longer interested in using this property. Since the only activity of this business was providing the house to Community Services, once it became clear that Community Services would no longer be using this house, the business ceased to be carried on.

[42] While it is not possible to ascertain an exact date that the business of Le Caine Enterprises ceased (and hence the amount spent on the house insurance would then not be an amount incurred for the purpose of earning income) it seems to me that the business of Le Caine Enterprises should be considered to have continued until the end of April 2002. In the Reply it was assumed that the business ceased operating in 2002 and it seems logical that the business continued at least for a few months in 2002. While the Appellant stated that she started considering other uses for the house in April 2002, she did not take any steps in relation to any alternate use of the house. It seems to me that the fact that she was considering alternate uses for the house in April 2002 indicates that she realized at that time that Community Services would no longer be using this house and therefore April 30, 2002 will be date that this business ceased to be carried on by the Appellant.

[43] Therefore the home insurance expense for the period from May 1, 2001 to April 30, 2002 will be allowed as an expense, allocated as follows:

	2001	2002
Insurance	$356	$178

[2] *Harris v. Minister of National Revenue* [1964] C.T.C 562 (Ex. Ct.), affirmed on other grounds, [1966] C.T.C 226 (S.C.C.).

[44] As a result, the amount allowed for insurance for 2001 is greater than the amount claimed by the Appellant. There is no prohibition on increasing the amount allowed as an expense (and hence decreasing the tax liability) beyond the amount claimed by the taxpayer.[3]

Le Caine Enterprises - Interest

[45] The Appellant had several bank accounts and it is not entirely clear which account was used for Le Caine Enterprises. It appears from the bank statements that were submitted as Exhibits that the cheques that she received from Community Services were deposited into the same bank account as her pay from her employment. The Appellant had two jobs in 2001 – she worked full time for the Bank of Nova Scotia and part time at Loomis. It also appears that transfers were made from this account to another account.

[46] Interest charges on the various bank accounts and her credit cards were claimed as an expense. The Appellant's explanation was that she would not have incurred the interest charges if she would not have been carrying on this business. If she would not have been carrying on the business she would have had sufficient funds to cover her personal expenditures. However since she had incurred expenses to prepare the house for Community Services and in living at another location, she no longer had sufficient funds to cover her personal expenditures and she incurred interest charges in relation to her bank accounts and her credit cards. However it would appear that these interest charges relate to her personal expenditures and not business expenditures. The indebtedness was incurred to pay for personal expenditures and therefore the interest was not incurred for the purpose of earning income. The direct use to which the borrowed funds were put was to pay for personal expenditures.

[47] Although paragraph 20(1)(c) of the *Act* was not referred to by either party, it seems to me that this paragraph must have been relied on by the Appellant in deducting her interest expense and therefore the application of this section must be examined even though there was no direct reference to this section.

[48] In *The Queen* v. *Bronfman Trust* [1987] 1 S.C.R. 32, then Chief Justice Dickson, on behalf of the Supreme Court of Canada stated that:

---

[3] *Cross* v. *The Queen* 2007 D.T.C. 1635, [2007] G.S.T.C. 137

> 21 The interest deduction provision requires not only a characterization of the use of borrowed funds, but also a characterization of "purpose". Eligibility for the deduction is contingent on the use of borrowed money for the purpose of earning income. It is well established in the jurisprudence, however, that it is not the purpose of the borrowing itself which is relevant. What is relevant, rather, is the taxpayer's purpose in using the borrowed money in a particular manner: *Auld* v. *Minister of National Revenue*, 62 D.T.C. 27 (T.A.B.). Consequently, the focus of the inquiry must be centered on the use to which the taxpayer put the borrowed funds.
> …
>
> 27 As I have indicated, the respondent Trust submits that the borrowed funds permitted the Trust to retain income-earning properties which it otherwise would have sold in order to make the capital allocations to the beneficiary. Such a use of borrowings, it argues, is sufficient in law to entitle it to the interest deduction. In short, the Court is asked to characterize the transaction on the basis of a purported indirect use of borrowed money to earn income rather than on the basis of a direct use of funds that was counter-productive to the Trust's income-earning capacity.
>
> 28 In my view, neither the Income Tax Act nor the weight of judicial authority permits the courts to ignore the direct use to which a taxpayer puts borrowed money. One need only contemplate the consequences of the interpretation sought by the Trust in order to reach the conclusion that it cannot have been intended by Parliament. In order for the Trust to succeed, s. 20(1)(c)(i) would have to be interpreted so that a deduction would be permitted for borrowings by any taxpayer who owned income-producing assets. Such a taxpayer could, on this view, apply the proceeds of a loan to purchase a life insurance policy, to take a vacation, to buy speculative properties, or to engage in any other non-income-earning or ineligible activity. Nevertheless, the interest would be deductible. A less wealthy taxpayer, with no income-earning assets, would not be able to deduct interest payments on loans used in the identical fashion. Such an interpretation would be unfair as between taxpayers and would make a mockery of the statutory requirement that, for interest payments to be deductible, borrowed money must be used for circumscribed income-earning purposes.

[49] In the subsequent decision of the Supreme Court of Canada in *The Queen* v. *Singleton* [2001] 2 S.C.R. 1046, [2002] 1 C.T.C. 121, 2001 DTC 5533, (which followed the decision of the Supreme Court of Canada in *Shell Canada Ltd.* v. *The Queen* [1999] 3 S.C.R. 622), Justice Major, writing on behalf of the majority, stated that:

> 29 It is now plain from the reasoning in *Shell* that the issue to be determined is the direct use to which the borrowed funds were put. "It is irrelevant why the borrowing arrangement was structured the way it was or, indeed, why the funds were borrowed at all" (*Shell*, *supra*, para. 47).

[50] It appears that the direct use of the borrowed funds was to finance personal expenditures and it is not relevant that she had to borrow these funds because she had spent money to prepare the house and to relocate herself and her daughter so that the house could be available for Community Services.

[51] As a result the interest incurred in relation to the overdrafts on her bank accounts and her credit cards is not deductible.

[52] The Appellant also indicated that she was paying interest on a house loan of $24,600 (in addition to the mortgage on the property). The house loan was used to pay down the mortgage on the property. The interest incurred in relation to this debt for the period from May 1, 2001 to April 30, 2002[4] is deductible. Therefore the Appellant will be entitled to claim a deduction of $638.62 in computing her income for 2001 and a deduction of $305.97 in computing her income for 2002.

[53] There was also a mortgage on the property located at 141 Conrad Road. The Appellant, together with her brother and her sister, inherited this property from their mother. The Appellant bought out her siblings' interest in the property. As noted above, this house was used by the Appellant as her residence for the first part of 2001 and, although the exact date is not known, it appears that she ceased to occupy this house as her residence by the beginning of May, 2001. The interest incurred on the mortgage on the property, which presumably was incurred to buy out her siblings' interest in the property, for the period from May 1, 2001 to April 30, 2002 would be deductible in computing her income.

[54] The mortgage statements submitted as Exhibits only indicate the total amount paid as interest for 2001 and 2002 (which would decrease for each month during the year as the principal amount is reduced). The total amount paid as interest for 2001 was $4,597.15 and for 2002 was $4,136.58. There was also a significant principal payment of $24,600 in 2001 (from the housing loan) which would reduce the interest for the period after this payment was made. It appears that the housing loan was incurred (and the principal payment on the mortgage was made) before May 1, 2001 (before the Appellant had vacated the house). Since the maturity date of the mortgage was April 1, 2006, the same rate of interest would have been applicable in 2001 and 2002. The total interest paid in 2002 (which would reflect interest paid after the principal reduction of $24,600) will be used as an estimate of the annual interest paid (after the principal reduction of $24,600 is taken into account). Based on this, the

[4] This is the period, as determined above, during which the property located at 141 Conrad Road is considered to be used in carrying on the business.

amount of interest that would be deductible for 2001 would be 66.7% of $4,137 or $2,758 and for 2002 would be 33.3% of $4,137 or $1,379.

[55] As a result the total amount that will be deductible as interest in computing the Appellant's income for 2001 and 2002 is:

	2001	**2002**
Interest on Housing Loan	$639	$306
Interest on Mortgage	$2,758	$1,379
Total:	$3,397	$1,685

Le Caine Enterprises – Maintenance & Repairs

[56] The items included in maintenance and repairs were the following:

	2001	**2002**
Mobile Wash (washing the siding)	$161.00	
Sears carpet & upholstering cleaning services	$376.05	
PCO Services	$258.75	
Cole Harbour Glass	$25.87	
Gas for lawn tractor, mower & snipper	$180.00	
Surround shower installed in bathroom – faucets replaced	$535.00	
Terrell Clyke labour – cutting grass, shoveling driveway	$1,250.00	$600.00
Miscellaneous items – vacuum cleaner belt, bags, weather stripping	$65.74	
Items purchased at Canadian Tire and Wal-Mart		$663.79
	$2,852.41	$1,263.79

[57] I accept the Appellant's testimony that she incurred all of the amounts listed above for 2001 and the amount for Terrel Clyke's labour for 2002. The business was the provision of the house located at 141 Conrad Road to Community Services for its use as a temporary place of lodging for young adults. The cleaning (washing the siding and Sears cleaning services) and pest control services would be incurred for the purpose of earning income as the house would have to be clean and pests would have to be controlled. The grounds would also have to be maintained to make the

property presentable or accessible (the grass would have to be cut during the spring, summer and fall and the driveway shoveled in the winter). The amount incurred for the surround shower would be an amount incurred to prepare the house for use by Community Services.

[58] The amount paid to Terrell Clyke for labour included an amount paid for a basketball camp for his brother. The Appellant indicated that both Terrell Clyke and his brother provided labour (mowing the lawns and shoveling the snow). Therefore the payment for the basketball camp was either payment for the labour provided by either Terrell Clyke or his brother and was part of their compensation. The amount paid to Terrell Clyke (and presumably his brother) in 2002 was slightly less than one-half of the amount paid to them in 2001. Since the property is considered to be used in carrying on the business for twice as long in 2001 as it was in 2002, the full amount of $600 will be allowed for 2002 as the quantum of the payments to them correlates to the amount of time that the property was considered to be used to earn income in these years.

[59] The assumptions of fact as set out in the Reply do not include any assumption that any of the amounts were unreasonable or that the amount incurred for the surround shower was on account of capital nor was any argument advanced that any of the amounts should be disallowed on the basis that they were not reasonable or were on account of capital. The only arguments (and hence the bases for the reassessment) were that the amounts had not been incurred or if incurred, the expenditures were not made for the purpose of earning income. Since I find that these amounts were incurred for the purpose of earning income, the reasonableness of these amounts or whether they were on account of capital are not matters that can be considered since the Minister did not base the reassessment on a finding or an argument that the amounts were not reasonable or were on account of capital nor did the Respondent raise these issues.

[60] However, it is not clear what items were purchased at Canadian Tire and Wal-Mart in 2002. There is a separate claim for cleaning supplies so either these items are not cleaning supplies or there was a duplicate claim. The Appellant has not established that she incurred these costs in addition to the amounts claimed for cleaning supplies and therefore the amounts claimed for items purchased at Canadian Tire and Wal-Mart in 2002 cannot be claimed as an expense by the Appellant in computing her income for 2002.

[61] As a result the following amounts are allowed as expenses for maintenance and repairs in computing the Appellant’s income for 2001 and 2002:

	2001	**2002**
Maintenance and Repairs	$2,852	$600

Le Caine Enterprises – Office Expenses

[62] The amounts claimed for office expenses for 2001 and 2002 were small. It seems reasonable that some office expenses would be incurred and therefore the amounts of $37 for 2001 and $68 for 2002 will be allowed as a deduction in computing her income for 2001 and 2002 respectively.

Le Caine Enterprises - Supplies

[63] The amount claimed as supplies for 2001 includes two amounts identified as Business Depot for $160.10 and $126.52. I accept the Appellant's testimony that she incurred these amounts. Since a business will require some supplies these amounts will be allowed as a deduction.

[64] The balance of the amount claimed for supplies for 2001 ($546.05) was identified as amount paid for miscellaneous cleaning supplies. Since the house was occupied by different individuals in 2001, it seems obvious that the house would have to be kept clean and that cleaning supplies would be purchased. Therefore the full amount claimed of $546.05 will be allowed as an expense in computing her income for 2001.

[65] For 2002, the total amount claimed of $632.85 was identified as cleaning supplies. It is not clear why the cost of cleaning supplies was greater in 2002 when no one was occupying the house than it was in 2001 when the house was being used by Community Services. Since the house is to be considered to be used in the business for one-third of 2002, approximately one-third of this amount or $210 will be allowed for cleaning supplies for 2002.

Le Caine Enterprises – Property taxes

[66] The assumptions made in the Reply included the assumptions that the Appellant owned the property located at 141 Conrad Road, the Appellant used this house to earn income by providing emergency housing to Community Services and this business did not cease until 2002. The only assumption that indicates any reason for denying the expenses (which would include the property taxes) was that the expenses were not incurred. It is not logical to assume that a person would own

property in Nova Scotia and not incur property taxes. It seems obvious to me that property taxes were incurred and the amount incurred for property taxes for the period from May 1, 2001 to April 30, 2002 will be allowed as a deduction. As a result, 66.7% of $1,193.69 or $796 will be allowed as an expense for property taxes for 2001 and 33.3% of $1,177.05 or $392 will be allowed as an expense in 2002.

Le Caine Enterprises - Travel

[67] The amount claimed as travel represented the estimated cost of the Appellant traveling to and from the property in Lawrencetown. However, this travel would be from her home to 141 Conrad Road or perhaps on occasion from her place of employment to 141 Conrad Road and then to her home. In any event, it appears that this travel is travel to this work location from her home or from this work location to her home. In *Mott* v. *The Queen* [1988] 2 C.T.C. 127, 88 D.T.C. 6359 a taxpayer had claimed the costs related to his airplane that he used to commute from his home to his farm. Justice Denault of the Federal Court Trial Division stated as follows:

> The Court now turns to the deductibility of the aircraft expenses for the years 1980 and 1981. The plaintiff charged 75% of the operating expenses of the aircraft as a deduction in his income. The Minister disallowed $9,820.67 in 1980 and $5,317.36 in 1981. The plaintiff purchased the aircraft in the fall of 1979 for the specific purposes of travelling more quickly and efficiently to and from his orchard. He used it until 1983 to commute from his residence (Summerland) or his office (Penticton) to his orchard (Keremeos). The years 1982 and 1983 are not in dispute since on the advice of his accountant he did not claim these expenses as deductions in those years, even though he still owns and uses the aircraft. In the material years, particularly in 1981, the plaintiff claimed $5,317.36 in his statement or orchard operations but they were entirely disallowed by the Minister.
>
> According to section 18(1) of the Act, no expense is deductible unless it is incurred for the purpose of gaining or producing income from the business. It is now well established that travelling expenses incurred for the purpose of commuting between one's place of residence and his place of business is not deductible (*Henry* v. *M.N.R.* 72 D.T.C. 6005 (S.C.C.)). So to the extent that the aircraft expenses were incurred for the purposes of travelling from the plaintiffs home in Sumerland, B.C. to his orchard, they clearly fall in the class of commuting expenses to go to a place of business and therefore are not deductible.
>
> Moreover, the expenses of travelling between one's residence and his business en route to another business, and back, are also not deductible (*Sargent* v. *Barnes*, [1978] 1 W.L.R. 823). Consequently, the aircraft expenses incurred for purposes of travelling between the plaintiffs place of business, namely his law practice in Penticton and his other place of business, namely the farm, are also not deductible because it involved commuting between two different businesses and the residence.

[68] In this case the travel costs appear to be the costs of routine travel to the work location from her residence or from the work location to her residence. As a result, no amount will be allowed for travel costs.

Le Caine Enterprises – Telephone & Utilities

[69] The Appellant was paying the bills for a number of cell phones, land lines and a pager. The Appellant was unable to match the account statements that were submitted for the cell phones with any particular cell phone. Based on the copies of the invoices that were submitted the following appear to be the phones for which amounts were claimed:

Phone Company	Type	Period of Time	Notes
MTT – 464-1884	Land line	July 24, 2001 – July 15, 2002	Phone at Horizon Court Apt.
MTT – 434-3847	Land line	January 3, 2001 – September 6, 2002	Although the address is 135 Conrad Rd this appears to be the phone at 141 Conrad Road
MTT Mobility	Cell phone	January 10, 2001 – June / July 2002	
Rogers AT&T	Pager	April 4, 2001 – October 4, 2002	
Rogers AT&T	Cell Phone	August 15, 2001 – September 15, 2002	Basic charge appears to be $22.68 / month
Rogers AT&T	Cell Phone	April 22, 2001 – September 22, 2002	Monthly charges vary from $45.10 to $118.28

[70] Two of the cell phones were provided to Terrell Clyke and his brother. They mowed the lawn in the spring, summer and fall and shoveled snow during the winter. There is no indication that they were related to the Appellant. The Appellant stated that she only claimed the basic monthly charge for these phones and that Terrell and his brother were instructed that they could only use the phones for their own use when the calling was free (evenings and weekends). The Appellant would call them on these phones to arrange for them to mow the lawn or shovel the driveway.

[71] It seems to me that the provision of the cell phones to Terrell and his brother was simply part of their compensation for mowing the lawns and shoveling the driveway. The difficulty in this case is determining the amount that should be allowed as the Appellant was unable to identify which account was for the cell phones that were provided to Terrell and his brother. Since it seems logical that these two phones would be acquired at the same time, since the charges for the last phone listed above appear to indicate that the bill was for two phones (only the first page of each invoice was submitted), and since the timing of the acquisition of these phones coincides approximately with the time that the Appellant vacated the premises located at 141 Conrad Road, I will assume that the last item identified above represents the account for the two phones that were the ones for Terrell and his brother.

[72] The monthly charges for these phones vary significantly from $45.10 to $118.28 (excluding HST). No explanation was provided for the variance in the charges or whether the Appellant deducted the excess charges from the amounts that were otherwise paid to Terrell and his brother. Since they were only to use the phones for their own personal use during the times that the calls were free, presumably the Appellant could have recovered the excess charges by deducting the amount of such charges from the amounts that would otherwise be paid to them. As a result the amount that will be allowed will be $45.10 + $6.77 (HST) = $51.87 per month for the period from May 1, 2001 to April 30, 2002 or $415 for 2001 and $207 for 2002.

[73] The Appellant submitted various account statements for the land line phone located at 141 Conrad Road. The following table lists the amounts as shown on the statements that were submitted and the amounts that will be allowed as a deduction in computing the Appellant's income for 2001 and 2002:

Bill Date	**Amount on the Statement**	**Amount Allowed for 2001**	**Amount Allowed for 2002**
May 6, 2001	$51.12	$10.22	
June 6, 2001	$48.34	$48.34	
July 6, 2001	$49.22	$49.22	
August 6, 2001	$39.48	$39.48	
September 6, 2001	$41.18	$41.18	
October 6, 2001	$51.14	$51.14	

November 6, 2001	$46.08	$46.08	
December 6, 2001	$36.46	$36.46	
January 6, 2002	$39.36	$31.74	$7.62
February 6, 2002	$36.51		$36.51
March 6, 2002	$44.37		$44.37
April 6, 2002			$36.51
May 6, 2002			$29.21
Total:		$353.86	$154.22

[74] The invoices for April 6, 2002 and May 6, 2002 were not included but there was an invoice for August 6, 2002 which indicates that the telephone was still connected. The amounts for April and May, 2002 are estimated based on the lowest monthly amount of $36.51. Since the basic monthly charge (including HST) was $35.21 in the invoice dated February 6, 2002 and the same amount of $35.21 was the amount charged in the invoice dated March 6, 2002, this amount did not vary based on the number of days in the month. The invoices dated May 6, 2001, January 6, 2001 and May 6, 2002 were prorated based on the number of days in the relevant time period. Since it was a condition imposed by Community Services that a land line be available at the house (which seems like a logical and reasonable condition given the nature of the use of the house by a crisis intervention team and emergency housing for young individuals), the cost of the land line located at 141 Conrad Road will be allowed as a business expense.

[75] The Appellant used the pager in the business. She indicated that she needed the pager so that Community Services could contact her at any time if they needed to use the house. If Community Services needed the house they would need it on short notice. The pager costs incurred for the period from May 1, 2001 to April 30, 2002 will be allowed. The charges for the pager were $13.74 per month (including HST). Therefore the amount that will be allowed will be 8 x $13.74 = $109.92 for 2001 and 4 x $13.74 = $54.96 for 2002.

[76] One of the other cell phones (either the MTT Mobility phone or the Rogers AT&T phone) was held by the Appellant's son. It is not clear how he was involved in the business. The Appellant indicated that she provided him with a phone so that she could contact him if she needed him to check on the property. However there was no indication of how often that would happen. As well, while the Appellant indicated that the property located at 135 Conrad Road (which was adjacent to the property located at 141 Conrad Road) was rented to the Appellant's son and his girlfriend, the Appellant indicated that he would not stay there very often. It seems to me that the

cell phone was provided to the Appellant's son because he was her son and so that she could contact him wherever he might be and not for the purposes of earning income. As a result no amount will be allowed for this cell phone.

[77] The land line for the apartment was claimed as part of the expenses related to Data Entry Select and no amount will be allowed for this phone in determining the income related to Le Caine Enterprises.

[78] This still leaves one cell phone that has not been accounted for (either the MTT Mobility phone or the Rogers AT&T phone). Since the Appellant was unable to explain how this other cell phone was used to earn income and since all of the phones and the pager used in relation to the business have been accounted for, no amount will be allowed for this phone.

[79] In the schedule prepared by the auditor for the CRA, certain amounts were listed as amounts for propane and oil for the property located at 141 Conrad Road. The following table lists the amounts as shown on the schedule prepared by the CRA auditor and the amounts that will be allowed as a deduction for the period from May 1, 2001 to April 30, 2002:

Date	**Item**	**Amount Shown on the CRA Auditor's Schedule**	**Amount Allowed for 2001**	**Amount Allowed for 2002**
June 21, 2001	Propane	$136.09	$136.09	
September 13, 2001	Propane	$200.96	$200.96	
December 6, 2001	Propane	$175.82	$175.82	
May 9, 2002	Propane	$273.11		$273.11
May 9, 2001	Oil	$198.49	$85.07[5]	
June 11, 2001	Oil	$176.63	$176.63	
July 27, 2001	Service Charge	$3.48	$3.48	
August 18, 2001	Oil	$52.04	$52.04	
October 27, 2001	Oil	$146.45	$146.45	
November 20, 2001	Oil	$220.40	$220.40	
December 31, 2001	Oil	$201.25	$201.25	

[5] The previous bill for oil was dated April 18, 2001. Assuming uniform usage, 9 / 21 of the amount would have been used from May 1 to May 9, 2001.

January 2, 2002	Oil	$234.90		$234.90
January 17, 2002	Oil	$202.71		$202.71
January 28, 2002	Service Charge	$3.97		$3.97
January 31, 2002	Oil	$186.92		$186.92
February 14, 2002	Oil	$251.33		$251.33
February 27, 2002	Service Charge	$12.68		$12.68
February 15, 2002 – April 30, 2002				$700.00
Total:			$1,398.19	$1865.62

[80] Since as noted above, the assumptions made in the Reply included assumptions that the property was used to earn income from Community Services it is not at all clear why these expenses were denied since the auditor for CRA acknowledged that the amounts listed in the third column of the table above had been incurred. These amounts will be allowed as noted above. As well, it seems logical that oil would have been used to heat the house for the period from February 15, 2002 to April 20, 2002. In 2001 the amount incurred for oil during March and April was over $1,000. In March and April 2002 the house was unoccupied so the amount should be less. The amount that will be allowed for oil for the period from February 15, 2002 to April 30, 2002 will be $700.

[81] The Appellant also submitted copies of invoices from Nova Scotia Power for the property located at 141 Conrad Road. These invoices indicated the following charges for electricity:

Service Period	**Amount**	**Amount Allowed for 2001**	**Amount Allowed for 2002**
April 9, 2001 – June 8, 2001	$99.62	$65[6]	
June 8, 2001 – August 10, 2001	$124.17	$124	
December 11, 2001 – February 11, 2002	$69.67	$24	$46

[82] There are significant gaps in the periods covered by the electricity bills as presented. However it is not logical to assume that there was no electricity at the house while it was being used. The bill for the period from June 8, 2001 to August

[6] Assuming uniform usage of electricity over the 60 day period covered by the bill, the amount for the period from May 1, 2001 to June 8, 2001 would be 39 / 60 x $99.62 = $64.75.

10, 2001 includes a connect charge of $18.00 (which would be $20.70 including HST). Deducting this from the bill leaves a charge for electricity of $103.47. As a result, it appears that when the house was occupied, the average monthly charge for electricity was approximately $50 (including HST). Therefore for the period from August 10, 2001 to November 1, 2001, the amount of $135 will be allowed. The bill for the period from December 11, 2001 to February 11, 2002 indicates that the average monthly charge for the time when the house was unoccupied was approximately $35. Therefore the amount of $46 will be allowed for the period from November 1, 2001 to December 10, 2001 and $90 will be allowed for the period from February 11, 2002 to April 30, 2002.

[83] The only other item included in telephone and utilities were charges for accessing the internet. I accept that the Appellant used the internet in carrying on her business as she used the internet to pay the bills related to the business. The Appellant's teenaged daughter also lived with her during these years. I do not accept that her teenaged daughter did not also use the internet. In the schedule prepared by the Appellant she indicated that the monthly charges for accessing the internet were $26 until November 2001 and then were $17. Since it seems more likely than not that the internet would have been used mainly for personal purposes by either the Appellant or the Appellant's daughter, in this case I will allow 25% of the costs of accessing the internet as a business expense.

[84] The Appellant stated that she lived with friends after she vacated the property located at 141 Conrad Road in 2001 until she moved into the apartment located at Horizon Court. She moved into this apartment in late July 2001. It seems to me that it is more likely than not that while the Appellant was living with her friends the Appellant did not incur charges for the internet so no amount will be allowed for the months of May to July 2001 for internet charges.

[85] As a result, for internet charges, 25% x $26 x 3 months = $20 will be allowed for the months of August to October 2001 and 25% x $17 x 2 months = $8 will be allowed for the months of November and December 2001 (for a total deduction of $28 for 2001) and 25% x $17 x 4 months = $17 will be allowed as a deduction for 2002.

[86] The following amounts will therefore be allowed as a deduction for Telephone & Utilities in computing the Appellant's income for 2001 and 2002:

Item	**Amount Allowed for 2001**	**Amount Allowed for 2002**
Cell Phone – Terrell Clyke and his brother	$415	$207
Land line – 141 Conrad Road	$354	$154
Pager	$110	$55
Propane & Oil	$1,398	$1,866
Electricity – May 1 – June 8, 2001	$65	
Electricity – June 8 – August 10, 2001	$124	
Electricity – August 10 – November 1, 2001	$135	
Electricity – November 1, 2001 – December 10, 2001	$46	
Electricity – December 11 – December 31, 2001	$24	
Electricity - January 1 – February 11, 2002		$46
Electricity – February 11 – April 30, 2002		$90
Internet	$28	$17
Total for Telephone & Utilities	$2,699	$2,435

Le Caine Enterprises –CCA

[87] Given the assumptions made in the Reply, there is no logical basis for denying the CCA claimed by the Appellant for 2001. Since it was assumed that the Appellant owned the building, the building was used to earn income, and the business did not cease until 2002, on what basis was the CCA claimed for 2001 denied? It seems obvious to me that once these assumptions were made that CCA should have been allowed. No assumptions were made that the capital cost of the building should have been a different amount than was used by the Appellant. Simply referring to an assumption that the amount was not incurred does not imply that the fair market value of the property (as of the time of the application of the change in use rules in subsection 13(7) of the *Act)* was not equal to the capital cost of the building as stated by the Appellant. There is no reference in the Reply to subsection 13(7) of the *Act* nor is there any reference to the change in use rules and there is nothing to indicate that the Appellant was reassessed on the basis that the fair market value of the property (as of the time of the application of the change in use rules in subsection 13(7) of the *Act)* was not equal to the capital cost of the building as stated by the Appellant. Therefore this cannot form the basis of a reassessment of the Appellant.

[88] There is also no reference in the Reply to subsection 1100(2) of the *Income Tax Regulations*. It is obvious from the evidence presented at the hearing that the Appellant was living in the property located at 141 Conrad Road at the beginning of 2001 and changed the use of this property to a business use. As noted above, although the exact date that the Appellant moved out of the property is not known, it was obviously before May 13, 2001. This change in use from a personal residence to a business use (to gain or produce revenue) would have resulted in a deemed disposition of the property pursuant to subsection 13(7) of the *Act*. Since the property would then be deemed to be acquired during the 2001 taxation year, the rules in subsection 1100(2) of the *Income Tax Regulations* would be applicable and the amount that would be allowed for CCA would be one-half of the amount that would otherwise be applicable[7].

[89] In my opinion the failure of the Respondent to refer at all to subsection 1100(2) of the *Income Tax Regulations* precludes the application of this section in determining the amount of CCA that the Appellant may claim. Since the reduction of the CCA that may be claimed would arise as a result of the application of a provision of the *Income Tax Regulations* that was not considered by the Minister, this would form a new basis for the reassessment and since the Minister did not raise this basis, I cannot raise it[8]. The Reply does not disclose any logical reason for denying CCA and the assumptions lead to a conclusion that CCA should be allowed. To apply the half year rule to deny one-half of the CCA claimed for 2001 would be applying an alternative basis that was not advanced by the Minister.

[90] As a result the provisions of subsection 1100(2) of the *Income Tax Regulations* will not be applied and the amount of CCA that will be allowed for 2001 will be $3,254.

[91] Subsection 1100(3) of the *Income Tax Regulations* limits the amount of CCA that may be claimed if the taxation year is less than 12 months. Since the Appellant is an individual, if the fiscal period for Le Caine Enterprises does not coincide with the calendar year then pursuant to subsection 1104(1) of the *Income Tax Regulations* the reference to taxation year in subsection 1100(3) of the *Income Tax Regulations* will be read as the fiscal period. Therefore if the fiscal period of Le Caine Enterprises is less than 12 months in 2001, the CCA claim would be based on the number of days in the fiscal period. However, again this subsection of the *Income Tax Regulations*

---

[7] The property was not depreciable property while the Appellant occupied the property as her home and therefore the exception to this half-year rule in subsection 1100(2.2) of the *Income tax Regulations* will not be applicable.
[8] *Pedwell, supra.*

was not raised by the Minister as a basis for the reassessment and therefore cannot be applied to support the reassessment or any part of the reassessment.

[92] In any event, in this case, it would appear that even if this subsection would have been raised that it may not have affected the outcome. In *Harquail v. The Queen*, 2001 FCA 320, 2001 DTC 5630, [2002] 1 C.T.C. 25, Justice Desjardins of the Federal Court of Appeal made the following comments on behalf of the Federal Court of Appeal.

> 62 It is not easy to delimit the content of the concept of carrying on business. One can see two outside parameters where the carrying on of business does not occur: on the one hand, when a company, which has been incorporated, has not actually commenced operation and, on the other hand, when a company has become dormant and is only holding annual meetings and filing its returns so as to avoid the forfeiture of its charter. There are, in between, some activities, however, which are signs that a company is operating and which should fall within the spectrum of the concept of carrying on business, even though, for example, the activities are carried on for the purpose of reaching an agreement which eventually is not reached or even though they do not result in the earning of income.
>
> 63 In this line of reasoning, I find helpful the comments made by Jackett J. in *Canada Starch Co. v. Minister of National Revenue* (1968), 68 D.T.C. 5320 (Can. Ex. Ct.), at 5324 -25. While this case turns on the notion of deductible business expenses or capital outlay, the following, which throws some light on the issue of carrying on business, was said:
>
> > [. . .] Similarly, in my view, <u>expenses of other measures taken by a businessman with a view to introducing particular products to the market-such as market surveys and industrial design studies</u>-are also current expenses. They also are expenses laid out while the business is operating as part of the process of inducing the buying public to buy the goods being sold.
> >
> > [emphasis added by Justice Desjardins]
>
> 64 Again, in *Bowater Power Co. v. Minister of National Revenue* (1971), 71 D.T.C. 5469 (Fed. C.A.), at 5481, a case dealing also with deductible business expenses and capital outlay, Noël, A.C.J. stated:
>
> > [. . .] While the hydroelectric development, once it becomes a business or commercial realty is a capital asset of the business giving rise to it, <u>whatever reasonable means were taken to find out whether it should be created or not may still result from the current operations of the business as part of the every day concern of its officers in conducting the operations of the company in a business-like way</u>. I can, indeed, see no difference in principle between all of these cases.

> [emphasis added by Justice Desjardins]
>
> 65 In my view, Hall River was carrying on business without interruption since 1978. It was constantly on the look-out for a market to develop its hydroelectric potential. Hall River, therefore, meets the requirement of subsection 110.6(1) of the Act, both in terms of "active business" and in terms of the relevant period, namely "throughout that part of the 24 months immediately preceding the determination time while it was owned by the individual".

[93] In this case it appears that the Appellant may have started the business in the fall of 2000 when she had discussions with representatives from Community Services about using her property. As a result, it appears that the limitations in subsection 1100(3) of the *Income Tax Regulations* may not have been applicable if the Minister would have raised this argument.

[94] Subsection 1100(11) of the *Income Tax Regulations* also limits the amount of CCA that may be claimed if the property is a rental property. Subsection 1100(14) of the *Income Tax Regulations* provides as follows:

> (14) In this section and section 1101, "rental property" of a taxpayer or a partnership means
>
> > (a) a building owned by the taxpayer or the partnership, whether owned jointly with another person or otherwise, or
> >
> > …
>
> if, in the taxation year in respect of which the expression is being applied, the property was used by the taxpayer … principally for the purpose of gaining or producing gross revenue that is rent...
>
> (14.1) For the purposes of subsection (14), gross revenue derived in a taxation year from
>
> > (a) the right of a person or partnership, other than the owner of a property, to use or occupy the property or a part thereof, and
> >
> > (b) services offered to a person or partnership that are ancillary to the use or occupation by the person or partnership of the property or the part thereof
>
> shall be considered to be rent derived in that year from the property.
>
> (14.2) Subsection (14.1) does not apply in any particular taxation year to property owned by

> …
>
> (b) an individual, where the property is used in a business carried on in the year by the individual in which he is personally active on a continuous basis throughout that portion of the year during which the business is ordinarily carried on; or
>
> …

[95] In this case, even though counsel for the Respondent described the property as a rental property in his pre-hearing submissions, no reference was made to these subsections of the *Income Tax Regulations* nor were any arguments made in relation to these provisions. As a result these provisions cannot be used to support the reassessment of the Appellant.

[96] In any event it appears that the Appellant was personally active in the business on a continuous basis and therefore that the provisions of subsection 1100(14.1) of the *Income Tax Regulations* would not apply and since the amount paid to the Appellant would be for the use of her property and ancillary services (cleaning etc.), the restrictions in subsection 1100(11) of the *Income Tax Regulations* would not be applicable.

[97] For 2002, as noted above, it appears that the Appellant ceased to carry on business as of the end of April 2002. It is not clear why CCA was denied for 2002.

[98] Subsection 1100(1) of the *Income Tax Regulations* provides, in part, as follows:

> 1100. (1) For the purposes of paragraphs 8(1)(j) and (p) and 20(1)(a) of the Act, the following deductions are allowed in computing a taxpayer's income for each taxation year:
>
> > (a) subject to subsection (2), such amount as he may claim in respect of property of each of the following classes in Schedule II not exceeding in respect of property
> >
> > > (i) of Class 1, 4 per cent,
> >
> > …

> of the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

[99] As a result of the provisions of subsection 20(1.1) of the *Act*, the definitions in subsection 13(21) of the *Act* apply to these Regulations. The definition of undepreciated capital cost is in subsection 13(21) of the *Act* and without an actual or a deemed disposition of the property in 2002 this property would still be part of the undepreciated capital cost of property of Class 1 of Schedule II as of the end of 2002 and therefore the Appellant would be entitled to claim CCA in relation to this property[9]. As well the provisions of subsection 1102(1) of the *Income Tax Regulations* do not result in this property not being included in Class 1 as of the end of 2002 since the property was acquired (as a result of the provisions of paragraph 13(7)(*b*) of the *Act*) in 2001 for the purpose of gaining or producing income.

[100] However, the basis of the reassessment was that the amounts had not been incurred. There is no reference anywhere to the deemed disposition rules in subsection 13(7) of the *Act*. As a result the potential application of the deemed disposition rules cannot form the basis of the reassessment. Since there was no actual disposition of the property in 2002, without a deemed disposition the property would remain as part of Class 1 of Schedule II.

[101] In any event, the deemed disposition rules in subsection 13(7) of the *Act* require that the taxpayer use the property for another purpose. Paragraph 13(7)(*a*) of the *Act* provides as follows:

> (7) Subject to subsection 70(13), for the purposes of paragraphs 8(1)(j) and (p), this section, section 20 and any regulations made for the purpose of paragraph 20(1)(a),
>
> (a) where a taxpayer, having acquired property for the purpose of gaining or producing income, has begun at a later time to use it for some other purpose, the taxpayer shall be deemed to have disposed of it at that later time for proceeds of disposition equal to its fair market value at that time and to have reacquired it immediately thereafter at a cost equal to that fair market value;

[102] In this case it appears that the Appellant did not use the property for any other purpose in 2002 and continued to hold it in anticipation of finding some other business use for this property as she was considering other business options for this property in 2002.

---

[9] This property was the only property included in Class 1 of Schedule II.

[103] In *Hewlett Packard (Canada) Ltd.* v. *The Queen* 2004 D.T.C. 6498, Justice Noël of the Federal Court of Appeal stated that:

> 28 I agree with the reasoning of the Tax Court Judge. It seems clear that a change of use pursuant to paragraph 13(7)(a) requires that the asset in issue be used "for some other purpose", and no such other purpose was evidenced in this case.

[104] Since the property was not used for any other purpose in 2002, it appears that the change in use rules in paragraph 13(7)(*a*) of the *Act* would not apply in any event, even if the Minister had raised this as a basis for the reassessment.

[105] As a result the Appellant will be allowed to claim CCA for 2002 in the amount of $3,123.

Le Caine Enterprises - Summary

[106] As a result, the following amounts will be allowed as deductions for expenses in determining the Appellant's income related to Le Caine Enterprises in 2001 and 2002:

	2001	**2002**
Insurance	$356	$178
Interest	$3,397	$1,685
Maintenance & Repairs	$2,852	$600
Office Expenses	$37	$68
Supplies	$833	$210
Property taxes	$796	$392
Telephone & Utilities	$2,699	$2,435
CCA	$3,254	$3,123
Total Expenses Allowed:	$14,224	$8,691

Data Entry Select

[107] The following table summarizes the revenue reported, expenses claimed, expenses denied by CRA and the result of the reassessment related to Data Entry Select:

	2001	2002
Revenue:	$1,848	$0

Expenses claimed by the Appellant:	($3,429)	($42)
Income (Loss) claimed by the Appellant:	($1,581)	($42)
Expenses Denied by CRA:	$1,849	$42
Income (Loss) following reassessment:	$268	$0

[108] The only assumption of facts in the Reply related to Data Entry Select that indicates the facts that were assumed that led to the denial of these expenses was that the Appellant did not have any business expenses in addition to the amount that was allowed for wages. In the "Grounds Relied On" section of the Reply the Respondent stated that the Appellant was "not entitled to deduct additional business expenses in 2001 and 2002 in respect of Data Entry Select because she did not incur outlays or expenses for the purpose of gaining or producing income from business and property as required by paragraph 18(1)(*a*) of the *Act*".

[109] Data Entry Select was a sole proprietorship through which the Appellant provided training for people to provide data entry services and provided data entry operators to Loomis. The Appellant was working full time at a bank and also working part time at Loomis. She recognized a need at Loomis for data entry operators. She provided data entry operators to Loomis until Loomis decided to have this service provided in Ontario and her service contract with Loomis was terminated in August 2001. After August 2001 the Appellant did not have any customers for Data Entry Select and the only activity related to Data Entry Select was that the Appellant would approach people if the opportunity arose, about the possibility of providing data entry services. The Appellant was unable to identify how often that would occur but did make it clear that since she was working full time at the bank and had another job (in addition to Le Caine Enterprises) that she did not have the time to do anything in relation to Data Entry Select.

[110] It is not clear when the business of Data Entry Select commenced. The largest amount claimed that is in dispute was $1,248.52 for telephone and utilities. The Appellant claimed these in relation to the apartment that she had at Horizon Court. She indicated that the office for this business was in this apartment. She included charges for electricity related to this apartment for the period from April – June 2001. However based on her testimony and the fact that the telephone for the apartment was not connected until July 24, 2001, she did not move into the apartment until late July 2001.

[111] The Certificate of Registration issued under the Partnerships and Business Names Registration Act (Nova Scotia) shows that the date of registration of the business name was June 4, 2001. The Appellant claimed $96 which included the cost

of the NUANS search (to determine if the name would be available for the Appellant) and the cost of registration as deductible expenses. Since these are clearly not personal costs, there is no basis for denying the deduction for these costs. Since the Minister did not advance any argument that these may be on account of capital, this cannot form the basis of the reassessment and these amounts ($96 in total) will be allowed as an expense in determining her income for 2001.

[112] The Appellant had opened a bank account for Data Entry Select on July 5, 2001. The Appellant incurred service charges of $38.40 in relation this account for the period from July 5, 2001 to December 31, 2001 and $50.90 in 2002. Since this account was set up for this business, these amounts will be allowed as an expense in determining her income for 2001.

[113] The Appellant claimed 50% of certain meal expenses. There were three separate charges for $15.12, $24.82 and $38.41 for a total of $78.35 of which one-half or $39.17 was claimed by the Appellant. I accept the testimony of the Appellant that these were related to the business of Data Entry Select as she was meeting with representatives of Loomis to discuss the possibility of providing data entry services to Loomis and therefore the amount as claimed will be allowed as an expense in determining her income for 2001.

[114] The Appellant claimed the cost of tax software ($32.84) as a deductible expense. The Appellant did not have the receipt for this purchase. The tax return for 2001 was submitted as an Exhibit and it appears obvious that this return was prepared using tax software. As a result I accept that the Appellant incurred this amount. Since the software was used to prepare the income statement for this business (as well as the income statement for Le Caine Enterprises), it seems to me that this was not a personal expense. Since the only basis for the reassessment of the Appellant was that the Appellant did not have any business expenses in addition to the amount that was allowed for wages and since the Respondent only referred to paragraph 18(1)(a) of the *Act*, this amount will be allowed as an expense.

[115] The Appellant stated that she incurred $133.31 in purchasing supplies such as file folders, T4 envelopes, invoice forms, paper etc. I accept her testimony and I will allow $133.31 as an expense for office supplies.

[116] The Appellant claimed 75% of the cost of traveling to Sydney, Nova Scotia to attend a funeral as a business expense. A Loomis employee who was only 27 years of age died following a massive heart attack. It seems to me that the decision to attend any funeral is a personal decision and the reason that a person attends a funeral will

depend on the relationship or connection of that person to the deceased. Some people who had a direct connection or relationship with the deceased would presumably attend the funeral to grieve or for closure. Others who had an indirect connection would presumably attend to express condolences and show support for family and friends of the deceased and others may attend to show respect. It does not seem to me that a person would (or should) attend a funeral to solicit business. It would be little comfort to the family of the deceased to learn that any person attended the funeral for the purpose of earning income. The Appellant is not entitled to deduct these travel costs in computing her income

[117] The amount claimed for telephone and utilities include amounts for electricity for the apartment (including estimated electricity costs for the period before she moved into the apartment), telephone costs, internet charges and rent for 9 months. Since the Appellant did not move into the apartment until late July 2001, none of these costs for any period prior to that time may be claimed as they were not incurred.

[118] The Minister did not argue that the Appellant's principal place of business was not the office in the apartment nor did the Respondent, in the Reply or at any time, refer to subsection 18(12) of the *Act*. Therefore the restrictions contained in subsection 18(12) of the *Act* cannot form the basis of the resassessment. I accept the Appellant's testimony that she maintained an office in the apartment and that it was used for the purpose of carrying on this business. I also accept the Appellant's submission that the office represented 10% of the space. However, it seems to me that once the contract with Loomis was terminated in August 2001 and the sole activity related to this business was the Appellant discussing the possibility of providing data entry services with individuals as and if the occasion arose, I do not accept that the office in the apartment was used for the purpose of earning income after August 2001 and therefore the costs related to the office incurred after August 2001 are not deductible.

[119] Therefore only the costs incurred for one month will be allowed. The cost of electricity for August appears to be $26.26 and the rent for August was $855. Therefore 10% of these costs will be allowed or $88.

[120] With respect to the telephone and internet charges, it seems to me that the telephone would be used personally as well as for the business. Since, after the contract with Loomis was terminated in August 2001, the Appellant was only discussing the business with people she met, if the occasion arose, the telephone would not be used in the business at all any time after the end of August 2001. As a

result I will allow 50% of one month's phone bill or 50% x $41.95 = $21 as an expense for the telephone. It appears to me that the charges for the internet were considered as part of the expenses for Le Caine Enterprises and no additional amount will be allowed for Data Entry Select.

Data Entry Select - Summary

[121] As a result, the following amounts will be allowed as a deduction for expenses in determining the Appellant's income related to Data Entry Select in 2001 and 2002:

	2001	**2002**
Wages (Allowed by CRA)	$1,580	
NS Companies Office fees	$96	
Bank Service fees	$38	$51
Meal & Entertainment	$39	
Office Expenses – tax software	$33	
Supplies	$133	
Home office	$88	
Telephone	$21	
Total Expenses Allowed:	$2,028	$51

Rental Property

[122] The following table summarizes the revenue reported, expenses claimed, expenses denied by CRA and the result of the reassessment related to the property located at 135 Conrad Road:

	2001	2002
Revenue:	$1,100	$4,600
Expenses claimed by the Appellant:	($8,001)	($8,143)
Income (Loss) claimed by the Appellant:	($6,901)	($3,543)
Expenses Denied by CRA:	$8,001	$8,143
Income (Loss) following reassessment:	$1,100	$4,600

[123] The rental property was adjacent to the property of the Appellant which was used in the business carried on by Le Caine Enterprises in Lawrencetown. The property was rented to the Appellant's son and his girlfriend. It would appear that the Appellant's son did not stay at these premises the entire time. There are also some concerns related to the property itself and in particular in relation to the well. The

water could not be consumed. As well the carpets had to be replaced and the back step had separated from the house. The Appellant stated that the property could not be rented to anyone else.

[124] The Appellant indicated that her son would pay for certain expenses related to the property in lieu of paying rent. However there is no indication that these amounts that were spent by the Appellant's son or his girlfriend on the property were treated by the Appellant as part of the rent. If a tenant pays an expense related to the property in lieu of paying rent, it seems to me that it is the same as paying rent to the landlord and should be accounted by the landlord in the same manner as if the rental cheque was written directly to the landlord. The monthly rent was $800. However the total rental income reported by the Appellant for 2001 was only $1,100. The Appellant's son and his girlfriend moved into this house in January 2001 and therefore the rental income for the year should have been approximately $9,600 (depending on when they moved in during January). The amount reported for 2001 was less than two month's rent. For 2002, the rental income reported was only $4,600 or less than 6 months rent.

[125] With respect to the rental property the Respondent raised an additional argument that since the property was rented to family that it was a cost sharing arrangement or personal and the expenses were not incurred for the purpose of earning income. However if the Respondent accepts that the Appellant had a source of income in relation to the rental property then it seems to me that the expenses incurred in order to earn income from that source must be allowed. If the Respondent is arguing that for the purpose of determining whether the expenses are deductible there was no source of property income then the revenue received should not have been included in income. If the rental of the property is not a source of property income then neither the revenue nor the expenses would be claimed by the taxpayer. If the rental of the property is a source of income then the revenue and the related expenses would be claimed by the taxpayer.

[126] In *Stewart* v. *The Queen*, [2002] 3 C.T.C. 439, 2002 DTC 6983, the Supreme Court of Canada stated as follows:

> 5 It is undisputed that the concept of a "source of income" is fundamental to the Canadian tax system; however, any test which assesses the existence of a source must be firmly based on the words and scheme of the Act. As such, in order to determine whether a particular activity constitutes a source of income, the taxpayer must show that he or she intends to carry on that activity in pursuit of profit and support that intention with evidence. The purpose of this test is to distinguish between commercial and personal activities, and where there is no personal or hobby

element to a venture undertaken with a view to a profit, the activity is commercial, and the taxpayer's pursuit of profit is established. However, where there is a suspicion that the taxpayer's activity is a hobby or personal endeavour rather than a business, the taxpayer's so-called reasonable expectation of profit is a factor, among others, which can be examined to ascertain whether the taxpayer has a commercial intent.

…

21 It well-accepted that the Canadian tax system adopted the concept of "source" from the English taxation statutes, and that the Act has always referred to income from various "sources"…

…

48 In our view, the determination of whether a taxpayer has a source of income, must be grounded in the words and scheme of the Act.

49 **The Act divides a taxpayer's income into various sources.** Under the basic rules for computing income in s. 3, the Act states:

> 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year determined by the following rules:
>
> > (a) determine the aggregate of amounts each of which is the taxpayer's income for the year . . . *from a source* inside or outside Canada, including, without restricting the generality of the foregoing, *his income for the year from each office, employment, business and property*; . . . [Emphasis added.]

With respect to business and property sources, the basic computation rule is found in s. 9:

> 9.(1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year.
>
> (2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of his loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source *mutatis mutandis*.

50 **It is clear that in order to apply s. 9, the taxpayer must first determine whether he or she has a source of either business or property income.** As has been pointed out, a commercial activity which falls short of being a business may nevertheless be a source of property income. **As well, it is clear that some taxpayer endeavours are neither businesses nor sources of property income, but are**

mere personal activities. As such, the following two-stage approach with respect to the source question can be employed:

> (i) **Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavour?**
>
> (ii) If it is not a personal endeavour, is the source of the income a business or property?

The first stage of the test assesses the general question of whether or not a source of income exists; the second stage categorizes the source as either business or property.

…

52 The purpose of this first stage of the test is simply to distinguish between commercial and personal activities, and, as discussed above, it has been pointed out that this may well have been the original intention of Dickson J.'s reference to "reasonable expectation of profit" in Moldowan. Viewed in this light, the criteria listed by Dickson J. are an attempt to provide an objective list of factors for determining whether the activity in question is of a commercial or personal nature. These factors are what Bowman J.T.C.C. has referred to as "indicia of commerciality" or "badges of trade": Nichol, supra, at p. 1218. Thus, where the nature of a taxpayer's venture contains elements which suggest that it could be considered a hobby or other personal pursuit, but the venture is undertaken in a sufficiently commercial manner, the venture will be considered a source of income for the purposes of the Act.

53 We emphasize that this "pursuit of profit" source test will only require analysis in situations where there is some personal or hobby element to the activity in question. With respect, in our view, courts have erred in the past in applying the REOP test to activities, such as law practices and restaurants, where there exists no such personal element: see, for example, Landry, supra, Sirois, supra, Engler v. R. (1994), 94 D.T.C. 6280 (Fed. T.D.). Where the nature of an activity is clearly commercial, there is no need to analyze the taxpayer's business decisions. Such endeavours necessarily involve the pursuit of profit. As such, a source of income, by definition, exists, and there is no need to take the inquiry any further.

54 It should also be noted that the source of income assessment is not a purely subjective inquiry. Although in order for an activity to be classified as commercial in nature, the taxpayer must have the subjective intention to profit, in addition, as stated in Moldowan, this determination should be made by looking at a variety of objective factors. Thus, in expanded form, the first stage of the above test can be restated as follows: "Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?" This requires the taxpayer to establish that his or her predominant intention is to make a profit from the activity and that the activity

> has been carried out in accordance with objective standards of businesslike behaviour.
>
> 55 The objective factors listed by Dickson J. in Moldowan at p. 486 were (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. As we conclude below, it is not necessary for the purposes of this appeal to expand on this list of factors. As such, we decline to do so; however, we would reiterate Dickson J.'s caution that this list is not intended to be exhaustive, and that the factors will differ with the nature and extent of the undertaking. We would also emphasize that although the reasonable expectation of profit is a factor to be considered at this stage, it is not the only factor, nor is it conclusive. The overall assessment to be made is whether or not the taxpayer is carrying on the activity in a commercial manner. However, this assessment should not be used to second-guess the business judgment of the taxpayer. It is the commercial nature of the taxpayer's activity which must be evaluated, not his or her business acumen.
>
> …
>
> 60 In summary, the issue of whether or not a taxpayer has a source of income is to be determined by looking at the commerciality of the activity in question. Where the activity contains no personal element and is clearly commercial, no further inquiry is necessary. Where the activity could be classified as a personal pursuit, then it must be determined whether or not the activity is being carried on in a sufficiently commercial manner to constitute a source of income.
>
> (emphasis added)

[127] In this case since the property in question was not in a state where it could be rented to an arm’s length person, it was rented to the Appellant’s son and his girlfriend, and the reported rental income only represented less than thirty percent (30%) of the rental income that should have been collected for the months for which the house was purportedly rented, it appears to me that this arrangement was a personal pursuit. As a result, it does not constitute a source of income and therefore the revenue should not have been included in the Appellant’s income and the amounts incurred in relation to this property are not deductible. Therefore the net income from the rental property should be nil.

Conclusion

[128] The appeal is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the net income of the Appellant for 2001 and 2002 related to Le Caine Enterprises, Data Entry Select and the property located at 135 Conrad Road is as follows:

Le Caine Enterprises

	2001	**2002**
Revenue:	$6,450	$0
Minus: Expenses	($14,224)	($8,691)
Net Income (Loss):	($7,774)	($8,691)

Data Entry Select

	2001	**2002**
Revenue:	$1,848	$0
Minus: Expenses	($2,028)	($51)
Net Income (Loss):	($180)	($51)

Property located at 135 Conrad Road – "Rental Property"

	2001	**2002**
Revenue:	nil	nil
Minus: Expenses	nil	nil
Net Income:	nil	nil

Signed at Halifax, Nova Scotia, this 4th day of August 2009.

"Wyman W. Webb"

Webb, J.

CITATION:	2009TCC382
COURT FILE NO.:	2006-3850(IT)G
STYLE OF CAUSE:	DEBORAH LECAINE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	May 25, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	August 4, 2009

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Stan W. McDonald Melanie Petrunia

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada