Docket: 2007-2652(IT)G

BETWEEN:

SERGE TURBIDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 5 and 6, 2009, at Montreal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Pierre Archambault
Counsel for the respondent:	Dany Leduc

JUDGMENT

According to the attached Reasons for Judgment, the appeal from the assessments made pursuant to the *Income Tax Act* for the 2001, 2002 and 2003 taxation years is allowed, with costs in accordance with Tariff B of Schedule II of the *Tax Court of Canada Rules (General Procedure)* and the case is referred back to the Minister of National Revenue for reconsideration and reassessment; it will be taken into consideration that the farming losses the appellant may deduct from his other income are not limited by section 31 of the *Income Tax Act*.

Signed at Ottawa, Canada, this 27th day of July 2011.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 28th day of October 2011.

François Brunet, Revisor

Citation: 2010 TCC 371
Date: 20100727
Docket: 2007-2652(IT)G

BETWEEN:

SERGE TURBIDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Jorré J.

[1] This is an appeal from assessments for the 2001, 2002 and 2003 taxation years, in which the appellant claimed a deduction for farming losses.

[2] The Minister of National Revenue (Minister) made assessments pursuant to section 31 of the *Income Tax Act* (ITA) and restricted the amount of the losses the appellant could deduct from his other income.

[3] The appellant works in construction for the company "Les Entreprises Fondatechnique, Inc." (Fondatechnique) in which he holds 98% of the capital shares.

[4] The appellant was also active in horse racing, and it is admitted that is a business. However, notwithstanding that admission, the respondent submits that there is a personal element.

[5] The parties also agree that this is a farming business.

[6] As a result, the issue herein is whether section 31 of the ITA applies, limiting the amount of farming losses that can be deducted from other income or whether the

appellant may deduct the total amount of the farming losses. There is no dispute as to the amount.

[7] The relevant part of section 31 is:

> 31(1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, for the purposes of sections 3 and 111 the taxpayer's loss, if any, for the year from all farming businesses carried on by the taxpayer shall be deemed to be the total of…

[8] As we will see below, the appellant's chief source of income was not derived mainly from farming. As a result, section 31 will not apply if the evidence shows that: the taxpayer's chief source of income was not farming.

[9] For the following reasons, I find that section 31 does not apply.

Applicable Law[1]

[10] Section 31 of the ITA is controversial. It has generated a rich case law, which has recently been evolving. In *Moldowan v. The Queen*[2] the Supreme Court of Canada laid down the basic principles governing the application of section 31. Subsequently, those principles underwent an evolution with *Gunn v. Canada*, a Federal Court of Appeal case[3]. Hershfield J. of the Tax Court of Canada conducted a thorough analysis of the situation in *Craig v. The Queen*[4], which was affirmed by the Federal Court of Appeal.[5]

[11] Hershfield J.'s analysis can be found at paragraphs 41 to 72 of *Craig*, part of which is reproduced:

> **The *Moldowan* Classification of Farmers**
>
> 49 It would be helpful to set out an expanded reiteration of the guiding principles in *Moldowan* that formulate three classes of farmers:

[1] The parties have cited the following case law: *Moldowan v. The Queen,* [1978] 1.S.C.R. 480; *R. v. Robinson,* [1996] 1 S.C.R. 683; *Canada v. Donnelly,* [1977] F.C.J. No. 1351 (QL); *Walters v. Canada* [1998] T.C.J. No. 978 (QL); *Entreprises L. Clancy Inc. v. Canada*, [1998] T.C.J. No. 513 (QL); *Abouantoun v. Canada*, [2001] T.C.J. No. 653 (QL); *Stewart v. Canada*, 2002 SCC 46; *Neal v. The Queen*, 2004 TCC 21; *Grenier v. Canada*, 2004 FCA 148; *Gunn v. Canada*, 2006 FCA 281; *Stackhouse v. The Queen*, 2007 TCC 146; *Falkener v. The Queen*, 2007 TCC 514; *Loyens v. The Queen*, 2008 TCC 486.

[2] See footnote 1 above.

[3] See footnote 1 above.

[4] 2009 TCC 617.

[5] 2011 FCA 22. (The Supreme Court of Canada granted the application for leave on June 30, 2011.)

(i) the class (1) farmer is, in today's terms, one who meets the *Stewart* test for income from a business and who has met the further criteria set for farmers who can claim their farm losses on an unrestricted basis. They are farmers "…for whom farming may reasonably be expected to provide the bulk of income or the centre of work routine." [emphasis added]. They look to farming for their livelihood even though there are years in which they sustain losses;

(ii) the class (2) farmer is one who passes the *Stewart* test but who has not met the additional class (1) criteria;

(iii) in *Moldowan*, the class (2) farmer is "the taxpayer who does not look to farming, or to farming and to some subordinate source of income, for his livelihood but carried on farming as a sideline business." In this description, the second source is described as "subordinate" even though quantitatively it would have to be the higher source of income. If farming is merely a sideline activity then, relatively, the other source will not be a "subordinate" activity (source of income) and cannot be used in the combination test to prop up the sideline farming business as being part of the two sources that together comprise a chief source;

(iv) this has been taken to mean that only one of two sources can be predominant and that this source must be farming to avoid the application of section 31 restricted loss treatment. While it is necessary to appreciate that such predominance cannot be determined simply by dollar amounts, it is this application of the combination test that would render it sterile if applied strictly;

(v) the class (3) farmer does not meet the *Stewart* test and is denied all losses under *Moldowan*.

50 Of importance in this reiteration of the *Moldowan* classes of farmers is that it recognizes limits to the combination test being used as the vehicle whereby a profitable source can be used to prop up an unprofitable farming source so as to add it to the already identified class (1) group of farmers. It is restrictive and seemingly, if not clearly, directs that farming must be *the* chief source even in the combination test.

The *Gunn* Approach

51 In determining whether the farming activity is to be part of the combination formula, we are instructed in *Gunn* at paragraph 83 to consider that:

> … the combination question should be interpreted to require only an examination of the cumulative effect of the aggregate of the capital invested in farming and a second source of income, the aggregate of the income derived from farming and a second source of income, and the aggregate of the time spent on farming and on the second source of income, considered in the light of the taxpayer's ordinary mode of living, farming history, and future intentions and expectations. …

52 My reading of this formulation of the combination test is that it requires that the chief source factors being examined in respect of farming, including potential profitability, be considered relative to the chief source factors being examined in respect of the second source being included in the combination. This is consistent with the directive in *Moldowan* that profitability be assessed relatively.

53 The challenge in *Gunn* is to assess how material the farming source contribution must be to the aggregation formula. Other authorities suggest that the contribution need not be quantitatively substantial (as held in *Taylor v. Canada* and *Kroeker*). However, in my view, it is implicit in *Gunn* that the farming source must make a meaningful contribution to the aggregation formula so as to suggest that farming is or has the potential to be a chief source.

The *Gunn* Construction vs. The *Moldowan* Construction

54 Drawing from my reading of *Gunn*, it is clear to me that in the combination test there is never a need to establish that farming will ever provide the bulk of a taxpayer's income or even that it will ever need to be the predominant business or work activity of the taxpayer. As recognized in *Gunn*, this invokes a more generous test than the *Moldowan* suggestion that farming must be *the* chief source even in the combination test. Recognizing that the tests in these cases are different, this Court has already expressed conflicting views on whether *Gunn* is a binding authority in the face of *Moldowan*.

55 Still, the factors considered in *Gunn* also form part of the analysis in *Moldowan*. At page 4, Dickson J. (as he then was) noted:

> …The distinguishing features of 'chief source' are the taxpayer's reasonable expectation of income from his various revenue sources and his ordinary mode and habit of work. These may be tested by considering, *inter alia* in relation to a source of income, the time spent, the capital committed, the profitability both actual and potential…

56 That is, the criteria or factors considered in identifying a chief source in *Moldowan*, including, but not limited to profitability, are not dissimilar from those relied on in the *Gunn* articulation of the aggregation formula. In both cases the time spent, the capital committed, the potential profitability and the taxpayer's ordinary

> mode and habit of work are the criteria for determining whether farming is more than a sideline business.
>
> 57 If that were the end of the comparison of the two cases, one could conclude that *Gunn* is not at odds with *Moldowan*. That, however, as noted, is not the end of the comparison. Contrary to *Moldowan*, *Gunn* suggests that the activity propping up the farming income need not be subordinate to farming but rather it suggests that the farming activity, relative to the other source, must make a relevant or meaningful contribution to the aggregation formula assessed by using the *Moldowan* criteria.
>
> …
>
> 72 I am suggesting then that the test is whether the taxpayer's mode of operation has sufficient commitment and commerciality and profit potential to be recognized as *a* chief source applying the *Moldowan* commitment and profitability criteria. Looking at time spent, capital invested, and a meaningful profit potential arising from a dedication to profitability, the question of whether the taxpayer is recognizable as a committed, viable commercial player in a genuine economic sector of the economy should be readily answered. Such a test will not put recreational farmers in an advantaged position.
>
> [Footnotes omitted.]

[12] In view of the Tax Court of Canada and the Federal Court of Appeal decisions in *Craig*, and the Court of Appeal decision in *Gunn*[6], the applicable principles are summarized in paragraph 83 of *Gunn*, per Sharlow J.:

> 83 …the combination question should be interpreted to require only an examination of the cumulative effect of the aggregate of the capital invested in farming and a second source of income, the aggregate of the income derived from farming and a second source of income, and the aggregate of the time spent on farming and on the second source of income, considered in the light of the taxpayer's ordinary mode of living, farming history, and future intentions and expectations. This would avoid the judge-made test that requires farming to be the predominant element in the combination of farming with the second source of income, which in my view is a test that cannot stand with subsequent jurisprudence. It would result in a positive answer to the combination question if, for example, the taxpayer has invested significant capital in a farming enterprise, the taxpayer spends

---

[6] The respondent submitted I should not rely on *Gunn*, which marks a change in the law in view of *Moldowan*, which was decided by the Supreme Court of Canada: the decisions of that court are authoritative (see *Robinson*, para. 79). See also *Falkener*, para. 13 (footnote 1, above).
However, since the hearing of this case, the Federal court of Appeal has rendered their decision in *Craig*, and considering the comments of that court on the import of *Gunn* on paragraphs 7 to 22 of *Craig*, I do not see how I could avoid following *Gunn* and *Craig*.
I would add that the evolution represented by *Gunn* and *Craig* seems relatively important to me, and the result of this appeal might have been different in the absence of *Gunn* and *Craig.*

> virtually all of his or her working time on a combination of farming and the other principal income-earning activity, and the taxpayer's day to day activities are a combination of farming and the other income-earning activity, in which the time spent in each is significant.

The facts

[13] The appellant testified, as did Maximilien Bradette, racehorse trainer, and René Dufour, auditor for the Canada Revenue Agency.

[14] The parties agree that the total cumulative[7] amounts the appellant invested are:

Year	Race-horse business	Fondatechnique
2001	$4,202	$10,000
2002	$106,600	$10,000
2003	$237,069	$10,000

[15] From 1994 to 2003, the appellant received wages, dividends from Fondatechnique and gross and net income from the race-horse business, as listed in the following table[8]:

Year	Fondatechnique		Race-horse business	
	Employment income	Non-grossed-up dividends	Gross income	Net income
1994	$49,547	—	—	—
1995	$2,900	$20,000	—	—
1996	$28,000	$20,000	—	—
1997	$61,819	$40,000	—	—
1998	$83,890	$25,000	—	($3,482)
1999	$62,400	—	$3,094	($3,801)
2000	$61,200	$22,725	$69,361	($12,747)
2001	$39,600	$68,600	$193,166	($4,202)
2002	$63,600	$15,000	$301,063	($102,397)

[7] March 5, 2009, transcript, pages 4 and 5. The amount invested in the racehorse business is the cumulative total of the losses.

[8] Figures from paragraphs 30(*z*) and (*aa*) of the Reply to the Notice of Appeal, admitted with corrections. See March 5, 2009, transcript, page 7.

The losses from the racehorse business in 1998, 1999 and 2000 do not seem to have been included in the amounts invested, although logically, they should be. This could be an oversight. At any rate, the difference is too small to have an impact.

2003	62 400 $	—	206 792 $	(130 469 $)

[16] The racehorse business began in 1998.

[17] In 2002, Fondatechnique had a gross income of around $804,000 and operating costs of around $650,000, for a difference of around $150,000. In 2003, the gross income was $840,000, and operating costs around $675,000, for a difference of around $165,000.[9]

[18] The table below[10] shows the distribution of income from the race-horse business and the amounts of the horse purchases:

Race-horse business	2001	2002	2003
Income other than sales	$58,741	$169,500	$137,427
Sales	$134,425	$131,562	$69,364
Horse purchases	$175,000	$273,687	$179,822

[19] Fondatechnique's sales figures were:

Year	Sales figures
2000	$580,070
2001	$711,350
2002	$804,505
2003	$853,899

As a result, the sales figures exceeded $1,000,000.[11]

[20] Fondatechnique operates a drain-installation and building-waterproofing business. The company also receives income from installing garage floors.[12]

---

[9] Exhibit I-5, pages 12 and 24. Fondatechnique's financial records were not submitted to evidence, but the appellant's notice of objection (Exhibit I-9) states at paragraph 30 that its gross income was $711,350 in 2001, $804,505 in 2002 and $853,899 in 2003.

[10] These figures are from the following exhibits: I-6, page 16; I-7, page 1; I-8, page 13.

[11] See Reply to Notice of Appeal, paragraph 30(*y*), March 5, 2009, transcript at page 7 and question 283.

[12] See Exhibit I-5.

[21] The appellant has been active in the drains and waterproofing industry since the early 80s.

[22] As the above-noted figures indicate, Fondatechnique has been very successful.

[23] The appellant's brother-in-law had many racehorses and it was through his brother-in-law that the appellant became interested in racehorses.

[24] The appellant commenced his farming activities with the purchase of a horse jointly with his brother-in-law in 1998.

[25] In 2000/2001, the appellant began investing more significant amounts in racehorses.

[26] The evidence is somewhat vague about the number of horses the appellant owned, because the number varied not only from year to year but also during the year. Moreover, he was the co-owner of some horses.

[27] According to the appellant, at some point, he had up to 15 horses. During discovery, in response to written questions, the appellant answered that he had 11 horses in 2002-2001, 12 in 2001-2002 and 8 in 2002-2003. He did not specify whether these numbers were the minimum, maximum or average for the year.[13]

[28] Nevertheless, the appellant owned many horses and, according to Mr. Bradette, the appellant was known, at one point, as being one of the five or six most important horse owners in Montréal.[14]

[29] During the period in question and later, the appellant hired Mr. Bradette to train his horses.

[30] Mr. Bradette has had a long experience in the horse industry. In the course of his career, he has done almost everything in the industry; for instance, he has been an owner and a driver. For a while, he was the director of the Quebec Trotting and Pacing Association.

---

[13] The evidence does not indicate whether it was the number of horses in which the appellant had an interest as sole owner or as co-owner, or whether they it was the total of the appellant's interests. See March 5, 2009, transcript, questions 54, 523 to 526, 698 and 699.

[14] March 5, 2009, transcript, question 18.

[31] Amongst the tasks Mr. Bradette carried out for the appellant, he trained the horses, conditioned them and ensured that they were in good physical condition, veterinary care, liaised with veterinarians, fed them and organized their travel.

[32] Mr. Bradette hired other persons to carry out some of the duties. As a trainer, he provided his services to other clients, in addition to the appellant.

[33] The appellant acquired his knowledge of horses and racehorses through discussions with his brother-in-law, Mr. Bradette and others. He also did research, in particular from electronic sources. The appellant made major decisions in consultation with Mr. Bradette (for example, as to the purchases of horses and the selection of drivers).

[34] The most disputed facts in the evidence are those regarding the appellant's time commitments to Fondatechnique and the racehorse business.

[35] Mr. Bradette testified that the appellant spent around 50 hours a week working for his racehorse business, including work at home.[15]

[36] The morning of the trial,[16] the appellant gave an estimate of the time he devoted to the racehorses including time helping at races, travelling for races outside Montreal and the time spent working from home. He estimated that he worked an average of 47.5 hours per week, on an annual basis.[17] In winter, he spent more time on the horses than in summer.

[37] At the hearing, he estimated that he worked 40 hours a week for Fondatechnique, except in winter when he worked only two hours a week.[18]

[38] However, the appellant provided different figures before the trial. In discovery, the written answers state that between 30 and 40 hours a week were spent working for the race-horse business[19] and around 30 hours a week for Fondatechnique, except in winter when this number dropped to around 10 hours.[20]

[39] The auditor testified that the appellant told him he devoted 60 some hours a week to Fondatechnique during the summer season from the end of March to

---

[15] March 5, 2009, transcript, question 20.
[16] *Ibid*, question 252.
[17] *Ibid*, questions 252 to 257.
[18] *Ibid*, questions 257 to 259.
[19] March 5, 2009, transcript, questions 670 to 682.
[20] *Ibid*, question 682.

November, and 30 some from November to March. According to the auditor, the appellant told him he spent four hours a day (28 hours a week) on the racehorse business in the summer season, and a little more between November and the end of March.[21]

[40] Nobody kept a record of the appellant's work hours and there is no clear evidence of the number of hours he spent on Fondatechnique and the racehorse business.

[41] However, since the appellant gave his statements about the hours to the auditor in December 2004, which is much closer to the years in question than the hearing of this case, I am satisfied that his memory was more reliable at that time and I grant more weight to the statements made then.

[42] I find that, except during the period of November to March, the appellant spent decidedly more time on Fondatechnique than the racehorse business. However, from November to March, he spent more time on the racehorse business.

[43] Overall, for the entire year, he devoted more effort to Fondatechnique than to the racehorse business. However, he did allocate significant time to the horse business, on average 30 hours a week annually.

Analysis

[44] Since it was admitted that the appellant had a farming business, all that is left is the global assessment of the indicia. The appellant's cash investment in the race-horse business was much greater that his investment in Fondatechnique.[22] Although the sales figure for the horse business was between a quarter and a third of that of Fondatechnique, it is still an average of more than $230,000 per year. Over the three years in question, the appellant regularly spent time on the farming business throughout the year and this time, an average of around 30 hours a week, is significant.

[45] In these circumstances, according to the criteria in *Gunn*[23], the section 31 restriction does not apply.[24]

---

[21] *Ibid*, questions 720 to 726.
[22] $237,000 v. $10,000 in 2002
[23] See paragraph 12 above.
[24] I would add that I do not doubt there was a personal element for the appellant (see, among others, the March 5, 2009, transcript, question 10), but as soon as the *Gunn* criteria are met, section 31 no longer applies.

Conclusion

[46] As a result, the appeal is allowed with costs in accordance with Tariff B of Schedule II of the *Tax Court of Canada Rules (General Procedure),* and the whole is referred back to the Minister for reconsideration and reassessment, taking into consideration the farming losses the appellant may deduct from his other income are not limited by section 31 of the *Income Tax Act*.

Signed at Ottawa, Ontario, this 27th day of July 2011.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 28th day of October 2011.

François Brunet, Revisor

CITATION:	2011 TCC 371
COURT FILE NO.:	2007-2652(IT)G
STYLE OF CAUSE:	SERGE TURBIDE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	March 5 and 6, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	July 27, 2011

APPEARANCES:

Counsel for the Appellant:	Pierre Archambault
Counsel for the Respondent:	Dany Leduc

COUNSEL OF RECORD:

For the appellant:

Name:	Pierre Archambault
Firm:	Dunton Rainville Montreal (Québec)
For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario