Docket: 2015-2318(IT)G

BETWEEN:

SAMUEL TWENEBOAH,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeals heard on May 30 and 31, 2023, at Toronto, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Angela Slater

JUDGMENT

The appeals of the reassessments for the Appellant's 2008, 2009, 2010, and 2011 taxation years are dismissed with costs in accordance with Tariff B of Schedule II of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Toronto, Ontario, this 16th day of August 2023.

"David E. Spiro"

Spiro J.

Citation: 2023 TCC 121
Date: 20230816
Docket: 2015-2318(IT)G

BETWEEN:

SAMUEL TWENEBOAH,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Spiro J.

[1] In computing income for his 2008, 2009, 2010, and 2011 taxation years the Appellant deducted business losses of $55,728 for 2008, $37,975 for 2009, $41,229 for 2010, and $17,779 for 2011.[1] In reassessing the Appellant for those years, the Minister of National Revenue (the "Minister") disallowed the claimed losses on the basis that the Appellant had no source of income and, therefore, no business.

[2] The main issue was whether the Appellant had a source of income in respect of the two activities that gave rise to his claimed business losses – his website and his painting and cleaning activities.

[3] The other issue flows from the Minister reassessing the Appellant's 2008 taxation year beyond the normal reassessment period. The Respondent had to prove, on a balance of probabilities, that the Appellant made a misrepresentation in filing his return for that year and that the misrepresentation was attributable to neglect, carelessness, or wilful default.

[4] The Appellant has a B.Sc. and is a certified quality engineer. During the years in issue, he lived in Brampton, Ontario with his wife and four of their five children. From 2008 to 2011, he worked as a quality engineer at various suppliers to the auto industry. His employment duties began at 8:00 a.m. and ended at 5:00

p.m. every weekday. In 2008, he commuted to and from his job in Oakville, Ontario for about an hour each way. This meant he would leave for work around 7:00 a.m. and would return around 6:00 p.m.

Issue #1: Did the Appellant have a "source of income" during the taxation years at issue?

[5] In order to deduct a business loss in computing income for a taxation year under section 9 of the *Income Tax Act* (the "Act"), the taxpayer must have a source of income. In *Stewart v Canada*, 2002 SCC 46 [*Stewart*], the Supreme Court of Canada laid out the guidelines to be followed:

> 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.
>
> 51 Equating "source of income" with an activity undertaken "in pursuit of profit" accords with the traditional common law definition of "business", i.e., "anything which occupies the time and attention and labour of a man for the purpose of profit": *Smith*, *supra*, at p. 258; *Terminal Dock*, *supra*. As well, business income is generally distinguished from property income on the basis that a business requires an additional level of taxpayer activity: see Krishna, *supra*, at p. 240. As such, it is logical to conclude that an activity undertaken in pursuit of profit, regardless of the level of taxpayer activity, will be either a business or property source of income.
>
> 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. The Queen*, 94 D.T.C. 6280 (F.C.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.

[6] More recently, in *Canada v Paletta*, 2022 FCA 86 [*Paletta*],[2] the Federal Court of Appeal held that an activity without any personal element must be conducted with a view to profit in order to constitute a source of income:

> [36] *Stewart* teaches that, in the absence of a personal or hobby element, where courts are confronted with what appears to be a clearly commercial activity and the evidence is consistent with the view that the activity is conducted for profit, they need go no further to hold that a business or property source of income exists for purposes of the Act. However, where as is the case here, the evidence reveals that, despite the appearances of commerciality, the activity is not in fact conducted with a view to profit, a business or property source cannot be found to exist.

[7] Most recently, in *Brown v Canada*, 2022 FCA 200 [*Brown*], the Federal Court of Appeal confirmed that an activity without any personal element must be conducted in pursuit of profit in order to constitute a source of income:

> [24] In *Canada v. Paletta Estate*, 2022 FCA 86 there was no suggestion that there was any hobby or personal element to the activity in question. This Court confirmed that the activity still had to be carried out in pursuit of profit in order to be a source of income. There are undoubtedly many activities which do not have a hobby or personal element. The person undertaking these activities will not have a source of income unless that person is pursuing profit in carrying out these activities.

Findings of fact with respect to the Appellant's website activities

[8] The Appellant called his website activities the "Web Commerce Company". Respondent's counsel asked what made him want to start the business:

> A. Because I realize my -- I need a business for myself. I'm interested in having my own private business, to be frank with you, and with the job that I was doing, that was the easiest one I can do after my job. Because I can work on it at any time, night or day, any time, and I can respond anytime. And if I do it well, I can go into automation to get it respond for me. So it was the easiest on my part.[3]

[9] The Appellant's children were deeply involved in building the website, doing the data entry, distributing flyers, and putting up posters promoting the website. One of the Appellant's children, Kwasi Tweneboah, testified about his own involvement and the involvement of his siblings in a myriad of web-related activities.

[10] Through the website, the Appellant intended to provide a platform for individuals to market their homes and personal items. When asked what he did to help make the website profitable, the Appellant said that he:

(a) introduced "Forever Living" vitamin products to the website in 2011;[4]

(b) planned to modify the website to allow it to be viewed on social media and mobile devices; and

(c) increased his advertising.

[11] Notwithstanding his unbroken string of losses, the Appellant was confident that "there will be a time – a time to become profitable business."[5] The basis for the Appellant's optimism remains unexplained, particularly since he had claimed a continuous series of losses on his tax returns as far back as 1993.[6] The Appellant closed his website in 2017 without having experienced a single profitable year.

Findings of fact with respect to the Appellant's painting and cleaning activities

[12] The Appellant called his painting and cleaning activities the "Samtee Cleaning and Painting Company". Respondent's counsel asked the Appellant why he started that business:

> Well that started when at the weekend I realized that I have some free time to do something, and that is when I started my free time like that. And I was doing that with a friend who was also interested.[7]

[13] When asked what he did to help make these activities profitable, he replied that he distributed flyers and engaged in promotional activities. The Appellant conceded that his painting and cleaning activities were not very active. Whatever they consisted of, those activities ended in 2010.

Conclusion with respect to "source of income"

[14] I find that both of the Appellant's activities had personal elements. Because the Appellant's children were deeply involved in building the website, doing the data entry, distributing flyers, and putting up posters promoting the website, those activities offered the Appellant's family an opportunity to spend time together in a common activity. And because his painting and cleaning activities were intended to occupy the Appellant's free time, they were personal as well. There was no

evidence that either activity was conducted with sufficient commerciality to constitute a source of income.

[15] But even if I found that neither activity had a personal element, I would have concluded that neither was conducted in pursuit of profit as required by *Stewart*, *Paletta* and *Brown*. The question would then have been whether the taxpayer had demonstrated, on a balance of probabilities, that each activity was undertaken in pursuit of profit. In this regard, much depends on the evidence adduced at trial. As Brian Arnold has noted:

> . . . *Stewart* establishes that the first stage of the source of income test is whether the activity is carried on with an intention to make a profit and *is there evidence to support that intention* (para. 54, emphasis added). *Paletta* indicates that all the evidence must be considered because what may appear to be commercial activity may not in fact be conducted with the intention of making a profit: "where . . . the evidence reveals that, despite the appearances of commerciality, the activity is not in fact conducted with a view to profit, a business or property source cannot be found to exist." (para. 36).[8]

[16] In this case, the Appellant led no evidence of how he intended to profit from either activity. How many web-based real estate listings would he need each year to turn a profit? How many homes would he need to paint or clean each year to cover his expenses? Those fundamental questions, among others, remain unanswered.

[17] The absence of answers to any of the following questions strongly suggests that the Appellant did not conduct his activities in pursuit of profit:

<u>The revenue side</u>

- How did he decide to charge for his goods or services? Did he charge by time, by task, or by some other method?
- How did he assess whether his charging method was appropriate?

<u>The expense side</u>

- How did he track how much he spent during the year? Did he categorize and organize his expenses? If so, how?
- How did he assess whether he was spending too much or not enough on each category of expense?

How did the Appellant intend to turn a profit?

- What financial problem(s) did he experience and why?
- How did he determine the source(s) of each problem?
- What strategies did he consider to deal with each problem?
- Which of those strategies did he adopt? Why?
- Did his chosen strategy work? If not, why not? What did he do next?

[18] For all of these reasons, the Appellant had no source of income from any of his activities in his 2008, 2009, 2010, and 2011 taxation years with the result that the losses claimed are not deductible in computing his income under section 9 of the Act.

Issue #2: Is the 2008 reassessment statute-barred?

[19] The Minister reassessed the Appellant's 2008 taxation year beyond the normal reassessment period. Under subparagraph 152(4)(a)(i) of the Act, the Crown must demonstrate, on a balance of probabilities, that the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default or committed fraud in filing his 2008 tax return:

> 152(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (a) the taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or
>
> (ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

[20] Determining whether the Minister was entitled to reassess the Appellant beyond the normal reassessment period is a two-step process. First, the Respondent must prove that the Appellant made a misrepresentation in filing his 2008 return. Second, the Respondent must prove that the misrepresentation was attributable to

neglect, carelessness, or wilful default or that the Appellant committed fraud in filing his return. The Respondent has made no allegation of wilful default or fraud.

[21] During the first day of trial, Respondent's counsel drew the Appellant's attention to his claims for motor vehicle expenses. In his return of income for 2008, the Appellant claimed that 49,000 kilometres were driven that year for his website and that 31,000 kilometres were driven that year for his painting and cleaning activities.

[22] In light of the Appellant's full-time employment in 2008, any claim that a total of 80,000 kilometres were driven for his website and painting and cleaning activities in 2008 is absurd. In 2008, the Appellant left for work at 7:00 a.m. and returned at 6:00 p.m. each weekday. Claiming what were primarily personal automobile expenses as business expenses is clearly a misrepresentation. The only question is whether the misrepresentation was attributable to neglect or carelessness.

[23] In *Paletta*, the Federal Court of Appeal made it clear that "neglect" refers to a lack of reasonable care. The Court's discussion of what constitutes "reasonable care" informs the second step of the analysis:

> [65] Neglect under subparagraph 152(4)(a)(i) refers to a lack of reasonable care. The duty of reasonable care is met if the taxpayer has "thoughtfully, deliberately and carefully assesse[d] the situation and file[d] on what [he] believe[d] bona fide to be the proper method"; in other words, "in a manner that the taxpayer truly believe[d] to be correct" (*Regina Shoppers Mall Ltd. v. Canada*, [1990] 2 C.T.C. 183, 90 D.T.C. 6427 (F.C.T.D.); aff'd in *Regina Shoppers Mall Ltd. v. Canada* (1991), 126 N.R. 141, 91 D.T.C. 5101 (F.C.A.); see also *Canada v. Johnson*, 2012 FCA 253, 435 N.R. 361). This test is not disputed by the parties. The Court may also draw inferences of negligence from an omission to verify the validity of a taxpayer's belief (*Robertson v. Canada*, 2016 FCA 303, 2016 D.T.C. 5131, paras. 5 and 6).

[24] The Respondent has demonstrated that the Appellant did not thoughtfully, deliberately, and carefully assess how many kilometres were driven in 2008 for each of his alleged businesses. He claimed that he maintained an automobile logbook, but failed to bring it to Court on the first day of trial. He could have brought the logbook with him on the second day of trial but chose not to do so. This strongly suggests that no logbook exists.

[25] The Minister was fully justified in reassessing the Appellant's 2008 taxation year beyond the normal reassessment period as the Respondent demonstrated that the Appellant made a misrepresentation in filing his 2008 return and that the misrepresentation was attributable to neglect or carelessness.

Conclusion

[26] For all of these reasons, the appeals of the reassessments for the Appellant's 2008, 2009, 2010, and 2011 taxation years will be dismissed with costs in accordance with Tariff B of Schedule II of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Toronto, Ontario, this 16th day of August 2023.

"David E. Spiro"

Spiro J.

CITATION:	2023 TCC 121
COURT FILE NO.:	2015-2318(IT)G
STYLE OF CAUSE:	SAMUEL TWENEBOAH AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 30 and 31, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Spiro
DATE OF JUDGMENT:	August 16, 2023

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Angela Slater

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada

[1] The Appellant also claimed a net commission loss of $2,186 for 2011.
[2] Application for leave to appeal to the Supreme Court of Canada was dismissed on March 16, 2023.
[3] Transcript of May 30, 2023, page 86, lines 10 to17.
[4] This multi-level marketing scheme caused a commission loss of $2,186 in 2011.
[5] Transcript of May 30, 2023, page 18, lines 9-10.
[6] Transcript of May 30, 2023, page 151, lines 11-14.
[7] Transcript of May 30, 2023, page 92, lines 21-24.
[8] Brian J. Arnold, "The Source of Income – The Source of Much Confusion: The *Brown* Case", The Arnold Report, No. 251 (February 21, 2023), Canadian Tax Foundation website.