

BETWEEN:

DENIS BEAUREGARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on common evidence with the appeals of *Valérie Pelchat* (2011-2654(IT)I), on June 5, 2013, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the appellant: the appellant himself  
Counsel for the respondent: Mounes Ayadi

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**JUDGMENT**

The appeals from the reassessments made by the Minister of National Revenue under the *Income Tax Act* dated July 19, 2010, in respect of the 2007 taxation year and May 27, 2011, in respect of the 2008 taxation year are allowed and the matter is referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment so that

- (a) the amount of deductible expenses for 2007 be set at \$8,163; and
- (b) the amount of deductible expenses for 2008 be set at \$5,344.

Signed at Ottawa, Canada, this 20th day of September 2013.

“Réal Favreau”

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Favreau J.

BETWEEN:

VALÉRIE PELCHAT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on common evidence with the appeals of *Denis Beauregard* (2011-2652(IT)I), on June 5, 2013, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the appellant: the appellant herself  
Counsel for the respondent: Mounes Ayadi

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**JUDGMENT**

The appeals from the reassessments made by the Minister of National Revenue under the *Income Tax Act* dated July 19, 2010, in respect of the 2007 taxation year and May 27, 2011, in respect of the 2008 taxation year are allowed and the matter is referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment so that

- (a) the amount of deductible expenses for 2007 be set at \$8,163; and
- (b) the amount of deductible expenses for 2008 be set at \$5,344.

Signed at Ottawa, Canada, this 20th day of September 2013.

“Réal Favreau”

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Favreau J.

Citation: 2013 TCC 287

Date: 20130920

Docket: 2011-2652(IT)I

BETWEEN:

DENIS BEAUREGARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

BETWEEN:

Docket: 2011-2654(IT)I

VALÉRIE PELCHAT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

## **REASONS FOR JUDGMENT**

Favreau J.

[1] These are appeals heard on common evidence under the informal procedure rules from reassessments made by Minister of National Revenue (the Minister) under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act), dated July

19, 2010, in respect of the 2007 taxation year and May 27, 2011, in respect of the 2008 taxation year.

[2] In making these reassessments, the Minister disallowed the male and female appellants' business losses of \$11,995 for the 2007 taxation year and of \$6,420 for the 2008 taxation year and added to the appellants' income an undeclared taxable capital gain of \$12,651.

[3] In determining the income tax payable, the Minister relied on the following findings and assumptions of fact, namely:

[TRANSLATION]

- (a) During the years at issue, the male appellant worked full-time for Cirque du Soleil Inc; (admitted)
- (b) during those same years, the male appellant claimed business losses, but did not declare any gross income from said business; (admitted)
- (c) On March 1, 2007, the male appellant acquired, holding equal interest with his spouse, Valérie Pelchat, vacant land known and designated as lot (97-44) of the official cadastre of the [TRANSLATION] "Parish of Saint-Luc" in the land registration division of Saint-Jean; (admitted)
- (d) the male appellant stated having acquired the land for the purpose of gaining or producing income from a business by eventually building an office building on it; (admitted)
- (e) the land's acquisition price was \$98,000; (admitted)
- (f) the male appellant stated having incurred certain expenses prior to the project's completion, *inter alia*, for architectural plans and to ensure commencement of construction work; (admitted)
- (g) based on the statement of business activities, the male appellant claimed the following amounts as operating expenses: (admitted)

	<b>2007</b>	<b>2008</b>
Interest fees	\$6,726	-
Delivery and transportation costs	\$ 284	-
Management and administration fees	\$ 80	\$ 228
Eligible capital expenditure deduction	\$5,145	-
Member fees	\$2,518	\$2,150
Property taxes	\$2,400	\$1,069

Advertising	\$ 180	\$ 103
Maintenance and repair fees	\$ 900	\$ 651
Professional fees	\$ 4,677	\$ 8,637
Supplies	\$ 1,079	-
TOTAL	\$23,989	\$12,838
Male appellant's share (50%)	\$11,995	\$ 6,420

- (h) owing to unfavourable economic conditions, the appellant abandoned the project's completion; (admitted)
- (i) on September 25, 2008, the land was sold for \$172,755, resulting in a taxable capital gain of \$12,651 that was calculated as follows: (admitted)

Proceeds of disposition: \$172,755

Less:

Acquisition cost	\$98,000
GST and QST paid	\$13,671
Transfer tax	\$ 730
Commission	\$ 9,750
Capital gain	\$50,604
Share (50%)	\$25,302
Taxable capital gain	\$12,651

- (j) the sales contract indicated that the disposition of the land was not business - related; (admitted)
- (k) business losses were disallowed because the male appellant failed to demonstrate that he had made or incurred expenses for the purpose of income from a business or property. (neither admitted nor denied)

[4] Mr. Beauregard and Ms. Pelchat testified at the hearing and explained that at the time of the land's acquisition, they did not have expertise in real property. Their mutual intention was to build on the land, which was zoned "commercial", a health centre on two floors that would include a chiropractor, psychologists and the social worker professional activities of Ms. Pelchat.

[5] The commercial land was acquired on March 1, 2007, and the \$98,000 purchase price was financed by a hypothec from the Caisse Desjardins de la Chaudière. A joint business account was opened to that end on March 1, 2007, with the Caisse Desjardins de la Chaudière. Mr. Beauregard and Ms. Pelchat stated that they submitted a business plan to the Caisse Desjardins which included a summary appraisal of the building to be erected and an estimate of future income for the

purpose of obtaining the necessary funding to acquire the land. Said business plan was not filed with the Court.

[6] Mr. Beauregard and Ms. Pelchat mentioned that they requested and obtained a goods and services tax/harmonized sales tax (GST/HST) account number and their registration became effective on February 26, 2007 (Exhibit A-1, tab 12).

[7] Mr. Beauregard and Ms. Pelchat also stated that they had architectural plans prepared for the construction of an office building on the land they had acquired. Preliminary plans were obtained on September 10, 2007, and technical plans to apply for a building permit were obtained on October 30, 2007. The witnesses introduced in evidence the two (2) invoices from the architect, the three (3) pages of the architectural plans and the application for a building permit dated January 25, 2008.

[8] Mr. Beauregard and Ms. Pelchat contacted three (3) construction companies to obtain bids for the construction of the office building. They accepted the bid of Construction Systec dated December 17, 2007, for \$495,682.50 (taxes included) and on February 14, 2008, they paid the construction company a \$5,000 deposit to start the work. The bid and invoice were filed as Exhibit A-2 and Exhibit A-1, tab 6, respectively.

[9] On January 23, 2008, and February 6, 2008, Mr. Beauregard and Ms. Pelchat put an advertisement in the local newspaper “Le Canada Français” to lease office space in the building to be built. The two (2) invoices for the advertisement were filed as Exhibit A-1, tab 5.

[10] Mr. Beauregard and Ms. Pelchat mandated the firm Baillargeon Bergeron Deneault and Associés Inc. for the purpose of obtaining a market value appraisal of the building to be built on lot 97—44 Saint-Luc Boulevard, Saint-Jean-sur-Richelieu. The chartered appraisal firm expressed the considered opinion that as of April 28, 2008, the market value appraisal of the building to be built was \$532,000. The appraisal report was filed as Exhibit A-1, tab 1, whereas the invoice for fees from the appraisal firm dated May 14, 2008, in the amount of \$1,241.63 was filed as Exhibit A-1, tab 7.

[11] Following receipt of said appraisal report, Mr. Beauregard and Ms. Pelchat realized that the office building had to be leased in its entirety to be profitable. They said they were concerned by the looming economic crisis and by the fact that, despite their advertising, no firm lease for office space in the building had been signed. Furthermore, the chiropractor who was supposed to take the building’s entire first

floor backed out in February 2008. None of their leasing efforts proved fruitful and the Caisse Desjardins was not prepared to fund the construction costs of the building, estimated at \$500,000, without any firm lease commitments.

[12] Mr. Beauregard and Ms. Pelchat mandated the Sutton-Millénia Group in early summer 2008 to sell the land and it was sold on September 25, 2008, for \$172,755. Mr. Beauregard and Ms. Pelchat paid the Sutton-Millénia Group a commission of \$9,749.86 (taxes included).

[13] In the deed of sale of the land, the sellers stated as follows with respect to the goods and services tax (GST) and the Quebec sales tax (QST):

[TRANSLATION]

The seller stated that the immovable [as rendered in English in *An Act respecting the Québec sales tax*] or real property [as rendered in English in the *Excise Tax Act*] was not immediately before the signing of this deed of sale OR immediately before the date of possession by the recipient, a capital property used primarily in the business carried on by the seller, that the sale has not been made in the course of a business of the seller, and that the seller has not filed and does not undertake to file the election in prescribed form by the authorities concerned, under paragraph 9(b)(ii), Part I of Schedule V of the *Excise Tax Act*, and paragraph 102(2)(b) of *An Act respecting the Québec sales tax*.

Accordingly, this sale is exempt under the provisions of the *Excise Tax Act* and *An Act respecting the Québec sales tax*.

### Position of the parties

[14] According to Mr. Beauregard and Ms. Pelchat, they made significant, serious and ongoing efforts to complete their project. All those steps were made for the purpose of earning income from a business or property.

[15] For the respondent, the Minister was justified in disallowing the business losses of \$11,995 for the 2007 taxation year and of \$6,420 for the 2008 taxation year because the appellants did not carry on a business. the building was never built and no income was ever generated by appellants' activities.

### Analysis and conclusion

[16] The term “business” is defined in subsection 248(1) of the Act as follows:

“**business**” includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment;

[17] Basic rules for computation of the income or loss from a business or property are found in section 9 of the Act, which reads as follows:

9.(1) Subject to this Part, a taxpayer’s income for a taxation year from a business or property is the taxpayer’s profit from that business or property 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 the taxpayer’s 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 with such modifications as the circumstances require.

(3) In this Act, “income from a property” does not include any capital gain from the disposition of that property and “loss from a property” does not include any capital loss from the disposition of that property.

[18] The general limitation on the deductibility of expenses for the purpose of computing the income of a taxpayer from a business or property is set out in paragraph 18(1)(a) of the Act as follows:

18.(1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

[19] For section 9 of the Act to apply, the taxpayer must first show that he or she has a source of either business or property income.

[20] In *Stewart v. Canada*, 2002 SCC 46, Justices Iacobucci and Bastarache suggested that the two-stage approach with respect to the source question can be employed:

**50** . . .

- (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.

[21] At paragraph 52 of *Stewart, supra*, the Court specified that the “pursuit of profit” source test will only require analysis in situations where there is some personal or hobby element to the activity in question, which is not the case in these appeals. The appellants’ activities related to the acquisition, development and sale of the land were undertaken in a sufficiently commercial manner in pursuit of profit in accordance with objective standards of businesslike behaviour, for the activities to constitute a source of income for the purpose of application of the Act. It should be noted here that the appellants (i) had construction plans prepared for the office building (ii) submitted an application for a building permit to the municipality concerned (iii) hired a builder and gave him a \$5,000 deposit, (ix) incurred advertising expenses to find tenants; and (v) had an appraisal of the building to be built prepared to obtain the necessary funding to pay for the building’s construction costs.

[22] Based on the testimonies of Mr. Beauregard and Ms. Pelchat, I do not believe that the sole purpose of the acquisition of the land was a subsequent sale of the property. In my view, the appellants truly intended to build and operate an office building. When the appellants realized they could not find tenants and that, without tenants, they could not obtain funding for the building’s construction costs, they had no alternative but to sell the land less than twenty (20) months after having acquired it. In such a context, it should be considered that the purchase and subsequent sale of the land amounted at the very least to an adventure or concern in the nature of trade. The lack of financial resources and the start of an economic recession led the appellants to setting a new intention, that is, the sale of the land, and abandoning their initial intention.

[23] According to the appellants’ testimonies, the statement in the deed of sale of the land to the effect that the sale was exempt pursuant to the provisions of the *Excise Tax Act* and the *An Act respecting the Québec sales tax* was incorrect and resulted from an error on the part of the notary and real estate agent who performed the sale. The transaction was taxable and the taxes should have been collected.

[24] As for the deductibility of the expenses claimed by the appellants in respect of the 2007 and 2008 taxation years, it should be noted here that the deductibility of the expenses presupposes the existence of a source of income. The following passage

from paragraph 57 of the Supreme Court of Canada decision in *Stewart, supra*, is, for present purposes, relevant:

. . . If the deductibility of a particular expense is in question, then it is not the existence of a source of income which ought to be questioned, but the relationship between that expense and the source to which it is purported to relate. The fact that an expense is found to be a personal or living expense does not affect the characterization of the source of income to which the taxpayer attempts to allocate the expense, it simply means that the expense cannot be attributed to the source of income in question. ...

[25] Of the expenses claimed by the appellants, who prepared their tax returns themselves, the eligible deduction for capital expenditures of \$5,145 in 2007 should be subtracted as by the appellants' own admission it was an error, as should the [TRANSLATION] "member fees" of \$2,518 in 2007 and \$2,150 in 2008 because the appellants were unable to explain the exact nature of that expense.

[26] The addition of a taxable capital gain of \$12,651 to each of the appellants' income for the 2008 taxation year, from the sale of the land, was not challenged by the appellants at the hearing.

[27] For these reasons, the appellants' appeals are allowed and the matter is referred back to the Minister for reconsideration and reassessment so that

- (a) the amount of deductible expenses for 2007 be decreased by \$7,663 and be set at \$16,326 in total, that is, at \$8,163 for each of the appellants; and
- (b) the amount of deductible expenses for 2008 be decreased by \$2,150 and be set at \$10,688 in total, that is, at \$5,344 \$ for each of the appellants.

Signed at Ottawa, Canada, this 20th day of September 2013.

“Réal Favreau”

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Favreau J.

CITATION: 2013 TCC 287

COURT FILE NO.: 2011-2652(IT)I  
2011-2654(IT)I

STYLE OF CAUSE: Denis Beauregard and Her Majesty The Queen  
Valérie Pelchat and Her Majesty The Queen

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 5, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: September 20, 2013

APPEARANCES:

For the male appellant: the appellant himself  
For the female appellant: the appellant herself  
Counsel for the respondent: Mounes Ayadi

COUNSEL OF RECORD:

For the appellant:

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