Federal Court of Appeal  Cour d'appel fédérale

Date: 20190521

Docket: A-226-17

Citation: 2019 FCA 154

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

ANDRAY RENAUD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montreal, Quebec, on December 11, 2018.

Judgment delivered at Ottawa, Ontario, on May 21, 2019.

REASONS FOR JUDGMENT: NADON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] The appellant is appealing from a decision made by Justice Jorré (the Judge) of the Tax Court of Canada (the TCC) on April 28, 2017 (2017 TCC 88) dismissing her appeal against the notices of assessment issued by the Minister of National Revenue (the Minister) in respect of her 2011, 2012, 2013 and 2014 taxation years (the years at issue).

[2] More specifically, for the years at issue, the Minister disallowed the amounts the appellant claimed as a business loss. According to the Minister, the appellant was not entitled to claim the amounts because her law practice was not a source of income pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[3] The question we must answer is whether the Judge erred in finding that the legal services the appellant rendered did not constitute a source of income. Consequently, the issue is whether the Judge correctly interpreted the principles set out by the Supreme Court in *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645 [*Stewart*] and whether he correctly applied those principles to the facts of the case.

[4] In my opinion, the Judge committed no error in reaching the conclusion that he did, and I would therefore dismiss the appeal.

II. The facts

[5] A brief summary of the facts will assist in understanding the issue in the appeal.

[6] The appellant is a lawyer and she has been a member of the Barreau du Québec since 1996. Since 2005, she has been employed by the Canadian Transportation Agency (CTA), where she is a full-time lawyer in its legal department. The appellant is also a lecturer with the Civil Law Section of the Faculty of Law at the University of Ottawa. In addition to her employment with the CTA, the appellant provides legal services to clients who are in need of a lawyer. It is those legal services that are in dispute.

[7] The appellant states that she practises primarily in the areas of family, criminal, civil and administrative law. At paragraph 13 of her memorandum of fact and law, she describes her services as follows:

> [TRANSLATION]
>
> The professional acts performed in this regard consist primarily of consultation, legal advice, dispute facilitation, out-of-court settlement negotiations, work on Régie du Logement disputes, pardon requests, criminal record suspension applications, administrative requests, the drafting of contracts under private writing, etc.;

[8] According to the appellant, the time she spends on her cases, that is, an average of five to 15 hours per week, varies depending on the complexity, urgency and specifics of each case.

[9] With regard to the professional fees for her legal services, the appellant testified that she requires payment for her disbursements and that she bills clients at an hourly rate that is adjusted to reflect their financial situation. The appellant also stated that she does not accept any cases from clients eligible for Legal Aid, that she does not do *pro bono* work, and that she does not accept any work from clients who had failed to pay a previous invoice.

[10] For the years at issue, the appellant reported the following gross professional income:

$2,500	(2011)
$850	(2012)
$850	(2013)
$3,850	(2014)

For those years, she also claimed the following business expenses:

$15,113	(2011)
$16,530	(2012)

$4,864 (2013)
$10,512 (2014)

[11] Therefore, for the purposes of the years at issue, the relevant data is as follows:

Taxation year	**2011**	**2012**	**2013**	**2014**
Gross professional income	$2,500	$850	$850	$3,850
Business expenses	$15,113	$16,530	$4,864	$10,512
Net business losses	($12,613)	($15,680)	($4,014)	($6,662)

III. The Tax Court of Canada decision

[12] After summarizing the relevant facts, the Judge considered the principles set out by the Supreme Court in *Stewart* to determine whether the appellant had a source of income. More specifically, he considered the principles set out in paragraphs 48 to 60 of that decision. In light of those principles, he concluded that the appellant's law practice did not constitute a source of income.

[13] Firstly, because the appellant's law practice involved aspects of a personal nature, the Judge was of the opinion that he was entitled to apply the factors set out at paragraph 55 of *Stewart* to the facts in this case, namely: (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. That inquiry led him to conclude "that the appellant's private practice is quite simply not undertaken in pursuit of profit" (Transcript of Judge's Reasons delivered at the hearing on April 28, 2017, at page 13 (the Reasons)).

[14] Why did the Judge arrive at this conclusion? He noted, in light of the gross income reported by the appellant and her hours of work, that she was working for a salary below minimum wage. According to the Judge, "[w]ith such a level of income, this cannot be undertaken in pursuit of profit" (Reasons, at page 14).

[15] The Judge also noted that there was no mention of cases that could be highly profitable for the appellant down the line or of cases she took on a contingency basis.

[16] The Judge also stated that the appellant's job teaching law at the University of Ottawa is a separate source of income and therefore cannot be used to support her claims.

[17] Moreover, the Judge noted that there was no attempt by the appellant to advertise to attract clients.

[18] In response to the appellant's argument that she did not volunteer or do *pro bono* work and that she did not accept work from clients who had failed to pay their invoices, the Judge stated that he was of the view that "[t]his may not be volunteering, strictly speaking, but it is very close to it" (Reasons, at page 15).

[19] At page 15 of his Reasons, the Judge concluded the following:

> Therefore, in light of the facts before me, I fail to see how I cannot find that what the appellant seeks in her private practice is to try to help people with modest incomes while working professionally and trying to somewhat reduce what it is costing her to carry out this activity. That is commendable, very, very commendable, but I fail to see how that can be clearly commercial. Consequently,

> I fail to see how there could be a source of income. Without such a source, losses are not deductible, so I must dismiss the appeal.

[20] Subsequently, the Judge addressed the expenses the appellant claimed, which led to the following findings. In his opinion, the matter of expenses had not been "validly raised" (Reasons, at page 16) by the Minister in the Reply to the Notice of Appeal. He also concluded that, in light of the evidence, it was impossible for him to determine whether the expenses were allowable. Because of these findings, the Judge did not rule on the deductibility of the expenses the appellant claimed.

[21] Consequently, the Judge concluded that the appellant's appeal from the Minister's notices of assessment had to be dismissed. He dismissed the appeal without costs because the case was governed by the informal procedure of the TCC.

IV. *The Stewart decision*

[22] One of the issues before the Supreme Court in *Stewart* was whether the criterion of "the reasonable expectation of profit" (the REOP test), as described in *Moldowan v. The Queen*, [1978] 1 S.C.R. 480 [*Moldowan*], was the appropriate test for determining whether a taxpayer had a source of income from a business or property, within the meaning of section 9 of the Act.

[23] In *Stewart*, the Supreme Court answered the question in the negative in the following manner at paragraph 47:

> To summarize, in recent years the *Moldowan* REOP test has become a broad-based tool used by both the Minister and courts in any manner of situation

> where the view is taken that the taxpayer does not have a reasonable expectation of profiting from the activity in question. From this it is inferred that the taxpayer has no source of income, and thus no basis from which to deduct losses and expenses relating to the activity. The REOP test has been applied independently of provisions of the Act to second-guess *bona fide* commercial decisions of the taxpayer and therefore runs afoul of the principle that courts should avoid judicial rule-making in tax law: see *Ludco*, *supra*; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Canderel*, *supra*; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. As well, the REOP test is problematic owing to its vagueness and uncertainty of application; this results in unfair and arbitrary treatment of taxpayers. As a result, "reasonable expectation of profit" should not be accepted as the test to determine whether a taxpayer's activities constitute a source of income.
>
> [My emphasis.]

[24] Given that response, the Supreme Court developed a different approach (referred to as the "two-stage approach" at paragraph 50 of *Stewart*) to be used to determine whether a source of income exists. The approach is the following.

[25] First, consideration must be given to whether the activity of the taxpayer is undertaken in pursuit of profit or whether it is a personal endeavour. According to the Supreme Court, the purpose of this first stage of the test is simply to distinguish between commercial and personal activities (*Stewart*, at paragraph 50).

[26] Second, if the activity of the taxpayer is not a personal endeavour, the source of the income is either a business or property (*Stewart*, at paragraph 51).

[27] With regard to the first stage of the test, where the nature of the taxpayer's activities is clearly commercial, there is no need, according to the Supreme Court, to "analyze the taxpayer's business decisions" (*Stewart*, at paragraph 53). Put another way, if the taxpayer's activities are

clearly commercial, they necessarily involve the pursuit of profit and, consequently, the existence of a source of income is established.

[28] Moreover, according to the Supreme Court, even if an inquiry of the taxpayer's activities reveals that there is some personal element to the taxpayer's endeavor, these activities can still be considered a source of income if "the venture is undertaken in a sufficiently commercial manner" (*Stewart*, at paragraph 52). In this context, it will be open to the Court, for the purposes of determining whether the taxpayer's activities are undertaken in a sufficiently commercial manner, to apply the "pursuit of profit" source test (the "pursuit of profit" source test) (in French, "critère de l'existence d'une source « en vue de réaliser un profit »") (*Stewart*, at paragraph 51) and, consequently, to use the factors set out in *Moldowan*, keeping in mind that the exercise should not be limited to these factors and that they are not conclusive. According to the Supreme Court, the purpose of the exercise is to make an overall assessment of "whether or not the taxpayer is carrying on the activity in a commercial manner" (*Stewart*, at paragraph 55).

[29] At paragraph 55 of *Stewart*, the Supreme Court reiterated the REOP factors set out in *Moldowan*, factors which are considered relevant when applying the "pursuit of profit" source test. Before doing so, the Supreme Court restated the first stage of the new approach at paragraph 54:

> 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.

[30] The Supreme Court therefore imposes on the taxpayer, when there is a personal element to his or her activities, the burden of establishing that "his or her predominant intention" in carrying out the activities is to "make a profit from the activity", and that the activity has been carried out in accordance with "objective standards of businesslike behaviour" (*Idem.*).

[31] Subsequently, the Supreme Court took care to reiterate that the "pursuit of profit" source test is to apply only in situations where the taxpayer's activities contain a personal element. The Supreme Court also took care to state that determining a source of income is a separate exercise from determining whether the deductions claimed by the taxpayer are allowable. On this point, the Court wrote the following at paragraph 56 of *Stewart*:

> An attempt by the taxpayer to deduct what is essentially a personal expense does not influence the characterization of the source to which that deduction relates.

[32] In other words, the deductibility of the expenses claimed by the taxpayer presupposes the existence of a source of income. Consequently, the unreasonableness of an expense, for example, cannot and must not have any bearing on the source of income assessment.

V. Appellant's arguments

[33] The appellant started her arguments by stating that, according to the methodology prescribed by the Supreme Court in *Stewart*, the first step of the Judge's analysis was to determine whether there was a personal or hobby element to her activities. Thus, the appellant argues that, unless the evidence showed that her activities contained a personal or hobby

element, there was no need to consider whether she had the intention of carrying out her activities in pursuit of profit (*Stewart*, at paragraph 53).

[34] Given the unequivocal directions from the Supreme Court, the appellant argues that the Judge erred when he considered, at page 10 of his Reasons, whether her activities were clearly of a commercial nature instead of considering whether her activities contained a personal or hobby element. Consequently, the Judge erroneously applied the *Moldowan* factors to her law practice. Because her activities contained no personal or hobby element, there was no need to apply those factors. Put another way, the fact that there was no personal or hobby element meant that the commercial nature of her activities had been established and that, consequently, the analysis under section 9 of the Act was complete.

[35] Therefore, to conclude on this point, the appellant argues that the Judge misinterpreted the principles set out in *Stewart* and, therefore, committed an error that warrants the intervention of this Court.

[36] Alternatively, the appellant argues that even if this Court were to find that the Judge implicitly concluded that her activities contained a personal or hobby element, the evidence in the record in no way supports that conclusion. According to the appellant, such a conclusion by the Judge, in light of the evidence, constitutes a palpable and overriding error.

[37] In support of this argument, the appellant refers to the evidence and particularly to her testimony before the TCC during the hearing, which she summarizes as follows:

- She teaches at the University of Ottawa; her income from teaching is included in her gross income and her teaching expenses are an integral part of the expenses she claims for her law practice;

- There is no doubt that her teaching is a commercial activity;

- She is a member in good standing of the Barreau du Québec, registered as a "practising advocate", and fulfils all of the obligations of the professional order and the code of ethics;

- She devotes an average of five to 15 hours per week to her profession and accepts cases based on her availability and areas of expertise;

- There is no pastime, personal or hobby element to her practice;

- Her testimony to the effect that she performs no volunteer or *pro bono* work is uncontradicted;

- The advertising for her law practice is done by word of mouth and, given her availability, she receives a sufficient number of cases;

- She bills her clients in the following manner: reimbursement for the disbursements incurred and an hourly rate adjusted to reflect the client's financial situation. In addition, she does not take any cases at a loss. According to the appellant, this aspect of her testimony is not contradicted by the evidence;

- Because she is a member of the Barreau du Québec, she was required, *inter alia*, to assume fixed costs not related to her cases, namely the liability insurance premium,

mandatory training, expenses related to cell phone lines and the cost of office supplies and furniture;

- She has practised law on a part-time basis since at least 2000, when she moved to Ottawa.

[38] Considering her uncontradicted testimony, the appellant argues that there can be no doubt that there is no personal or hobby element to her law practice. Consequently, a contrary finding by the Judge can only be a palpable and overriding error. According to the appellant, the Judge concluded that her activities were not commercial in nature by establishing a connection with the making of a profit, which, in her opinion, is not a relevant criterion. More specifically, the appellant argues that the Judge erred in finding that her law practice could not be considered as being carried out to make a profit given the little time she devotes to it, the gross income it generates and the conduct of her practice in general. Thus, the Judge erred by not properly understanding the principles set out in *Stewart*. In other words, according to the appellant, the Judge substituted his opinion for hers regarding the conduct of her business.

[39] The appellant also takes issue with the Judge's conclusion that the following passage from paragraph 53 of *Stewart* was *obiter* and, therefore, was not binding on him:

> 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 [reasonable expectation of profit] 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.

[My emphasis.]

[40] According to the appellant, the only possible interpretation of the passage underlined above is that a law practice generally involves no personal or hobby element. Thus, the Judge erred in treating the passage of *Stewart* as an *obiter* that is not binding on him.

[41] The final part of the appellant's argument concerns the Judge's conclusion in respect of the expenses claimed. According to the Judge, because the appellant's law practice was not, during the years at issue, a source of income, the expenses she claimed were not allowable. In addition, the Judge concluded, in the alternative, that the evidence did not make it possible for him to determine whether the expenses the appellant claimed were allowable.

[42] Since I am of the view that the Judge did not err in law and did not commit a palpable and overriding error in finding that the appellant's law practice was not a source of income, there is no need for us to determine whether the expenses the appellant claimed are allowable.

VI. Analysis

A. *Standard of review*

[43] The parties agree that the standards of review set out by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, apply in this case. In *Oke v. Canada*, 2010 FCA 350, [2010] F.C.J. No. 1627, at paragraph 24, this Court, per Justice Pelletier, set out the standards as follows:

> . . . correctness for errors of law, palpable and overriding error for questions of fact and questions of mixed fact and law. Where an extricable error of law can be found in a question of mixed fact and law, the standard of correctness applies to that question of law.

B. *Response to the appellant's arguments*

[44] First, the appellant challenged the Judge's understanding of the principles set out in *Stewart* and, more specifically, of the first stage of the applicable method, when he stated the following at page 10 of his Reasons:

> So the underlying principle behind all this in paragraph 51 [of *Stewart*] is: Is this an activity undertaken in pursuit of profit? We first have to ask ourselves whether the activity is clearly commercial. If so, then the considerations described by the Court in paragraphs 54 and 55 [of *Stewart*] do not have to be analyzed.
>
> [My emphasis.]

[45] As explained earlier, according to the appellant, the question the Judge should have asked was whether her activities contained a personal or hobby element and not whether her activities were clearly commercial.

[46] In my opinion, the Judge's remarks at page 10 of his Reasons contain no errors. Put another way, by asking whether the appellant's activities were clearly commercial in nature, the Judge necessarily had to try to determine whether the appellant's activities contained a personal or hobby element. In my view, the Judge was restating, in his own words, the excerpt from paragraph 53 of *Stewart*, where the Supreme Court states the following: "[w]here the nature of an activity is clearly commercial, there is no need to analyze the taxpayer's business decisions".

[47] Consequently, I am of the opinion that the Judge did not misunderstand the first stage of the method set out in *Stewart*.

[48] Second, the appellant claims, in the alternative, that the Judge erred in finding that her activities contained a personal or hobby element. In her opinion, such a conclusion is contrary to the evidence in the record. To support that claim, the appellant refers to her testimony, which she describes as [TRANSLATION] "uncontradicted".

[49] In my opinion, the Judge did not err in finding that the appellant's activities contained a personal element. I would go further and say that there is no doubt that the conclusion is well founded in light of the evidence in the record.

[50] To support this view, it is important to note that the appellant had a full-time job with the CTA and, therefore, devoted little time to her law practice, namely five to 15 hours per week. It is also relevant to note that she billed her clients for the expenses related to their cases as well as fees adjusted to reflect her clients' ability to pay and that her primary goal was to practise in a conscientious and professional manner without necessarily making money. The following excerpts from the appellant's testimony clearly illustrate, in my view, that there was a personal element to her law practice:

> [TRANSLATION]
>
> Mr. RENAUD-LAFRANCE [counsel for the respondent]: OK. So when you determine fees, you do take into consideration the person's ability to pay?
>
> Ms. RENAUD [the appellant]: When . . . when I am going to take on a case . . . yes, I cons- . . . I give some consideration to the person's income.

Mr. RENAUD-LAFRANCE [counsel for the respondent]: Mm.

Ms. RENAUD [the appellant]: So, if the person makes minimum wage, is not eligible for Legal Aid, then I will adjust my fees accordingly.

(Transcript of the hearing on January 31, 2017, Appeal Book, Vol. I, page 119, lines 10 to 20.)

[TRANSLATION]

Mr. RENAUD-LAFRANCE [counsel for the respondent]: So, what is important to you then, is that the person receives assistance. That is what I understand.

Ms. RENAUD [the appellant]: That's not what I said.

Mr. RENAUD-LAFRANCE [counsel for the respondent]: OK, it's a question.

Ms. RENAUD [the appellant]: Ah, OK. It's because . . .

Mr. RENAUD-LAFRANCE [counsel for the respondent]: <Laughs>

Ms. RENAUD [the appellant]: OK. Look, what is . . . I am a lawyer and I am proud of that. I like the profession, I like practising it too, and I like being able to do so in the manner that I do. I definitely want to help, but I don't necessarily want to do volunteer work.

Mr. RENAUD-LAFRANCE [counsel for the respondent]: Mm-hmm.

Ms. RENAUD [the appellant]: There's a fine line between doing your job professionally by covering certain expenses, but . . . and performing an act of . . . doing it on a *pro bono* basis.

Mr. RENAUD-LAFRANCE [counsel for the respondent]: Mm-hmm.

Ms. RENAUD [the appellant]: I don't do *pro bono*.

Mr. RENAUD-LAFRANCE [counsel for the respondent]: Mm-hmm.

Ms. RENAUD [the appellant]: But it's true that I adjust my services to the situation and based on what the client needs too, and if it's . . . it's things that . . . again, if it's things that demand a huge amount of time and I will have to take two, three weeks off, then, I probably won't do it because on the salary that I am paid . . .

[*Ibid*., page 121, lines 19 to 29; page 122, lines 1 to 19.]

[51] Consequently, I cannot conclude that the Judge erred in finding that there was a personal element to the appellant's law practice. In making this conclusion, I want to reiterate the statements of the Supreme Court in *Stewart*, at paragraph 60, in which the Court stated the following: "[w]here 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" (my emphasis). In my opinion, there is no doubt that the appellant's law practice, when the relevant circumstances are considered as a whole, could certainly be classified as having a personal element.

[52] Lastly, the appellant argues that the Judge erred in analyzing the commercial nature of her activities by substituting his own method regarding the conduct of her law practice. In my view, the Judge did not err in this regard.

[53] Having found that there was a personal element to the appellant's activities, the Judge analyzed the services she offered to determine whether they were undertaken in pursuit of profit. At paragraph 54 of *Stewart*, which I reproduced at paragraph 29 of my reasons, the Supreme Court, for the purposes of determining whether there was a source of income, restated the first stage of the new approach and imposed on the taxpayer the burden of demonstrating that in carrying out the activities, his or her predominant intention was to make a profit.

[54] To determine whether the appellant's law practice, during the years at issue, was carried out in order to make a profit, the Judge considered the factors set out in *Stewart* at paragraph 55. First, the Judge noted that from 2001 to 2014, the appellant's activities generated only net losses,

which varied from $1,956 to $15,680. Furthermore, he noted that during the taxation years 2005, 2009 and 2010, the appellant's activities generated no income. He also noted that based on the hours that the appellant stated that she spent on her practice, she apparently billed her clients at an hourly rate of $5 in 2011, $1.70 in 2012 and 2013 and $7.70 in 2014. At page 16 of his Reasons, the Judge concluded the following:

> This [the appellant's law practice] is not at all like a law practice as normally understood, even in the broadest sense. With such a level of income, this cannot be undertaken in pursuit of profit.

[55] As the respondent points out at paragraph 44 of her memorandum of fact and law, the appellant was aware that her law practice did not allow her to make a profit and refers us to the transcript of the appellant's testimony, which contains the following passage:

> [TRANSLATION]
>
> Mr. RENAUD-LAFRANCE [counsel for the respondent]: My question does not concern . . . it does not concern that. I apologize for interrupting. In fact, all I'm asking, is when I look at your income and your net losses for those years, after you saw that you were realizing losses year after year, did you say "ah, I have to change the way I do things" or "I should change my approach for my private activities to try to turn things around"?
>
> Ms. RENAUD [the appellant]: <u>No, because you have to remember that what I also do to . . . indirectly, to subsidize, is that I work for the government, where I work full time, call it</u> . . .
>
> (Transcript of the hearing on January 31, 2017, Appeal Book, Vol. I, page 129, lines 24 to 28; page 130, lines 1 to 8.)
>
> [My emphasis.]

[56] In concluding as he did, the Judge also noted that the appellant's cases did not enable her to generate a higher income in the long term and that she did not try to change how she billed her

clients in order to increase her income, which led the Judge to conclude as follows at pages 14 and15 of his Reasons:

> But if she is not looking to slightly increase her income one way or another, I fail to see how it can be said that her activity is undertaken in pursuit of profit.

[57] In my view, considering the evidence, the Judge's conclusion that the appellant's activities during the years at issue were not carried out in order to make a profit is unchallengeable and thus contains no errors. The burden was on the appellant to demonstrate, to the Court's satisfaction, that in carrying out her law practice as she did during the years at issue, her predominant intention was to make a profit and, therefore, that she was carrying out her legal activities "in accordance with objective standards of businesslike behaviour" (*Stewart*, at paragraph 54). I find that the appellant did not meet this burden.

[58] I may add that the record does not contain any of the invoices the appellant apparently sent to her clients during the years at issue. Therefore, it is impossible for us to know how many cases she handled, what services were rendered, who her clients were and at what rates her clients were billed. In my opinion, this information would have been highly relevant to the exercise the Judge had to engage to determine whether the appellant was carrying out her legal activities in order to make a profit. At the very least, the invoices would have been very helpful in gaining a better understanding of the appellant's practice.

[59] I need only address one final point, that is, the appellant's argument concerning paragraph 53 of *Stewart*, in which the Supreme Court states that activities such as law practices and restaurants have no personal element and are therefore commercial in nature. According to

the appellant, the Judge erred in finding that the Supreme Court's statement was simply an *obiter* that was not binding on him.

[60] According to the respondent, the passage at paragraph 53 of *Stewart* is indeed an *obiter* that is not binding on the Judge. The respondent is of the opinion that the Supreme Court's statement must be read in its entirety. More specifically, the respondent argues that the examples given by the Court, that is, law practices and restaurants, are qualified by the words that follow, that is, activities "where there exists no such personal element . . . .". In other words, according to the respondent, to the extent that activities such as law practices and restaurants have no personal element, they must be considered as clearly commercial.

[61] Consequently, the respondent argues that where a personal element exists, as is the case here, the Judge was in no way bound by the Supreme Court's statement at paragraph 53 of *Stewart*.

[62] I agree with the respondent's position. In my view, the Supreme Court's comments at paragraph 53 of *Stewart* cannot be read in an absolute manner as suggested by the appellant. Put another way, in so far as the law practice in question has no personal element, it follows that the Court should conclude that the practice is clearly commercial in nature. Furthermore, if the law practice being examined has a personal or hobby element, it will be open to the Court to apply the *Moldowan* criteria, as set out at paragraph 55 of *Stewart*, to determine whether the taxpayer was able to demonstrate that his or her predominant intention, in carrying out the activities, was to make a profit. I find that the appellant did not meet this burden of proof.

[63] From this perspective, I cannot accept that the Judge necessarily had to conclude that the appellant's activities were commercial in nature simply because she practised law. In my opinion, it is not possible to accept that the passage in paragraph 53 of *Stewart* was intended to declare that all law practices must be classified as clearly commercial in nature, regardless of the circumstances relevant to the exercise of that activity.

[64] Consequently, I cannot conclude that the Judge erred in failing to interpret the passage in paragraph 53 of *Stewart* as being an absolute statement on the commercial nature of any law practice.

VII. Conclusion

[65] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Mary J.L. Gleason J.A."

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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