Docket: 2012-2746(IT)I

BETWEEN:

TAMER SALLOUM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Tamer Salloum 2012-2750(GST)I and *Melissa Morton* 2012-2748(IT)I
on October 2, 2014, at Vancouver, British Columbia.

Before: The Honourable Justice John R. Owen

Appearances:

Agent for the Appellant:	Nuha Nancy Salloum
Counsel for the Respondent:	Shankar Kamath

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2006, 2007 and 2008 taxation years by notices dated January 17, 2011 is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of December 2014.

"J.R. Owen"

Owen J.

Docket: 2012-2750(GST)I

BETWEEN:

TAMER SALLOUM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Tamer Salloum 2012-2746(IT)I and *Melissa Morton* 2012-2748(IT)I
on October 2, 2014, at Vancouver, British Columbia.

Before: The Honourable Justice John R. Owen

Appearances:

Agent for the Appellant:	Nuha Nancy Salloum
Counsel for the Respondent:	Shankar Kamath

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the reporting period from January 1, 2005 to December 31, 2005 by notice dated January 11, 2011 is allowed, without costs, and the reassessment is vacated in accordance with the attached Reasons for Judgment.

The appeal from the reassessments made under the *Excise Tax Act* for the reporting periods ending between January 1, 2006 and December 31, 2008 by notice dated January 11, 2011 is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of December 2014.

"J.R. Owen"

Owen J.

Docket: 2012-2748(IT)I

BETWEEN:

MELISSA MORTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Tamer Salloum 2012-2746(IT)I and 2012-2750(GST)I
on October 2, 2014, at Vancouver, British Columbia.

Before: The Honourable Justice John R. Owen

Appearances:

Agent for the Appellant:	Nuha Nancy Salloum
Counsel for the Respondent:	Shankar Kamath

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year by notice dated January 17, 2011 is allowed, without costs, and the reassessment is vacated in accordance with the attached Reasons for Judgment.

The appeal from the reassessments made under the *Income Tax Act* for the 2006 and 2007 taxation years by notices dated January 17, 2011 is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of December 2014.

"J.R. Owen"

Owen J.

Citation: 2014 TCC 366
Date: 20141212
Dockets: 2012-2746(IT)I
2012-2750(GST)I

BETWEEN:

TAMER SALLOUM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2012-2748(IT)I

AND BETWEEN:

MELISSA MORTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] These reasons address the appeal by Mr. Tamer Salloum from income tax reassessments for the 2006, 2007 and 2008 taxation years and from GST reassessments for the period from January 1, 2005 to December 31, 2008, court file numbers 2012-2746(IT)I and 2012-2750(GST)I. In addition, these reasons address the appeal by Ms. Melissa Morton from income tax reassessments issued for the 2005, 2006 and 2007 taxation years, court file number 2012-2748(IT)I. These three appeals were heard together on common evidence.

[2] The issue in Mr. Salloum's appeals is whether he carried on a business known as Speedpro High Performance at any time during 2005, 2006, 2007 or 2008. The issue in Ms. Morton's appeal is whether she carried on that same

business in partnership with Mr. Salloum at any time during 2005, 2006 or 2007. If the answer in either case is in the affirmative then it will be necessary to consider whether, and to what extent, the deductions from income and the input tax credits claimed by Mr. Salloum and the deductions from income claimed by Ms. Morton are to be allowed.

II. Facts

[3] Mr. Salloum, Ms. Morton and Mr. Salloum's mother, Mrs. Nancy Salloum, each testified on behalf of the Appellants and Mrs. Salloum presented the case for the Appellants. Mr. Salloum testified that he has always had a strong interest in performance automobiles and started attending the local drag strip while he was in high school. Although he did not take automotive courses in high school, he did take carpentry and described himself as someone who liked to work with his hands. He also said he knew his way around a car by the end of high school in 2000.

[4] After high school, Mr. Salloum had a number of odd jobs for a short period of time to support his personal lifestyle. In 2001, he conceived an idea to pursue a business venture involving the modification and customization of automobiles and automobile parts with a general view to enhancing their performance. A business plan was prepared and a sole proprietorship was created and registered with the British Columbia Ministry of Finance and Corporate Relations Corporate and Personal Property Registries on October 29, 2001 under the name "Speedpro High Performance". The line of business was described on the registration form as "mobile auto mechanic services".

[5] From the time of registration until late in 2008, Mr. Salloum did not have the certification required to offer auto mechanic's services to the public and he testified that for liability and other reasons he offered no such services to the public until after he became a qualified automotive service technician with the Red Seal endorsement. The lists of expenses claimed by Mr. Salloum in 2006, 2007 and 2008 and by Ms. Morton in 2005, 2006 and 2007 show that no advertising or promotional expenses were incurred and Mr. Salloum confirmed that fact in cross-examination.

[6] A corporation was created in 2010 called Speedpro High Performance Services Inc. ("Speedpro Inc."); Mr. Salloum is its Chief Executive Officer and Mrs. Salloum is its Chief Financial Officer. According to Mr. Salloum and his mother, Speedpro Inc. secured financing by amalgamating with another

corporation shortly after its incorporation and has operated a very successful performance-oriented automotive services business since that time. Mr. Salloum testified that Speedpro Inc. is held out as, among other things, able to build any kind of car for any kind of racing.

[7] In furtherance of the plan he formulated in 2001, Mr. Salloum pursued a formal education as an automotive services technician funded, for the most part, by monies received in 2002 from Human Resources and Skills Development Canada (now Employment and Social Development Canada). In 2001, he enrolled in a six-month entry level technical training program at the British Columbia Institute of Technology ("BCIT"), which included an unpaid "pre-apprenticeship" with a local Toyota dealership. The pre-apprenticeship required Mr. Salloum to be mentored by a licensed mechanic for a few weeks but not to work on any automobiles.

[8] In December 2004, Mr. Salloum started a two-year program at the Burnaby campus of BCIT that was called "Automotive Service Technician – Ford ASSET Option". That program led to an Automotive Service Technician ("AST") Diploma in September 2006. Mr. Salloum described this as a book intensive course that did not itself lead to Red Seal endorsement as an automotive service technician. Rather, after the course, Mr. Salloum was required to accumulate additional practical experience as an apprentice mechanic after which he could obtain his Red Seal endorsement. He accumulated these hours primarily at a local Ford dealership and, in late 2008, he achieved his goal of becoming an automotive service technician with Red Seal endorsement.

[9] Mr. Salloum testified that the formal education program and apprenticeship that he completed did not provide all the knowledge and skills required to succeed in the performance automotive services industry. To address this, Mr. Salloum undertook to teach himself everything he could about that industry. In particular, Mr. Salloum testified that he needed to learn: how to build performance engines and powertrains; how to modify auto parts to enhance performance; how to ensure that these parts worked together in a reliable way; what potential competitors were doing; what the demand for high performance auto parts and services was likely to be and how it could be improved; and, what others in the industry were doing to satisfy that demand. Mr. Salloum also noted that the performance automotive services market in Canada was ten to twenty years behind the U.S. market and that he also wanted to understand how that might be changed.

[10] To learn how to build and modify performance engines, powertrains and parts, starting in 2003, Mr. Salloum acquired used cars as well as new and used

auto parts to experiment on in his parents' garage. He stored the cars and parts in the garage, basement and backyard of his parents' house. The general objective of his research was to acquire and hone his skills at modifying and combining parts to achieve optimum performance while maintaining reliability such that any engine he built or modified would operate reliably. In that respect, Mr. Salloum stated that he spent a great deal of his time and available money developing a reliable high performance engine that could be used for, among other things, drag racing.

[11] Mr. Salloum testified that he had developed a specially modified V-8 engine as early as 2003 but that he continued to work on improving that engine and developing other powertrain components that would work with the engine to this day. Mr. Salloum candidly acknowledged that the engine has never been marketed as such but may one day be used in a race car sponsored by Speedpro Inc. The engine is currently used by Speedpro Inc. for promotional purposes. Mr. Salloum also explained that neither the engine nor the modified parts were patented as the components already had patents secured by the original manufacturer and it would therefore be difficult to secure patents for the modified parts.

[12] Mr. Salloum worked on his automotive projects throughout the period that he was completing his formal studies and his full-time apprenticeship. During his full-time apprenticeship, he would work on his automotive projects after he finished work at 5:00 p.m. and on the weekends. The process conducted by Mr. Salloum involved a lot of trial and error as he figured out which modifications would work and how specific parts would fit together in a reliable way. Mr. Salloum candidly conceded that he was not undertaking any marketing activity or pursuing sales during 2005, 2006, 2007 or 2008 and that during those years he could not legally hold himself out as a mechanic. In addition, he was not insured and the risk of liability by providing mechanic's services before he obtained his Red Seal designation was too high. Mr. Salloum also testified that no one was going to approach him and give him thousands of dollars worth of parts and say "we want you to figure this out." In short, Mr. Salloum needed to have obtained his Red Seal designation and also needed to convince potential customers that he knew what he was doing. To accomplish the latter, he needed to practice his chosen calling in his parents' garage.

[13] Mr. Salloum testified that, to gain knowledge of the industry, he would attend racing events, car shows and similar venues to: network with enthusiasts and others in the industry; determine what competitors were doing; and, generally to learn as much as he could about what was out there in the high performance automobile services market in Canada. Prior to 2007, his girlfriend from 2003 to

2006, Ms. Morton, would accompany him to these events when her work schedule permitted.

[14] Mrs. Salloum was a strong supporter of her son's activities and dealt with all of the financial matters, including the raising of capital for the undertaking and the preparation of all financial records and tax returns. Mrs. Salloum kept detailed records and painstakingly allocated expenditures to the activities she believed to be of a business nature. Occasionally, the accounting software she used led her astray, for example, by categorizing expenses as the cost of goods sold even though there was no inventory, but she was clearly diligent and was firmly convinced that the activities undertaken by Mr. Salloum after 2002 were of a business nature.

[15] Apart from the monies received from Human Resources and Skills Development Canada in 2002, Mr. Salloum's activities from 2003 to the end of 2008 were funded, for the most part, through loans or lines of credit secured by the family home, an inheritance and proceeds from an accident claim. Mr. Salloum also contributed from his salary as an apprentice mechanic and Ms. Morton purchased parts and covered travel expenses from time to time prior to their split at the end of 2006. Ms. Morton was reimbursed in 2007 for the expenses incurred by her and Mrs. Salloum testified that she and her husband traded the debt secured by their home for shares in Speedpro Inc. in 2010. Mrs. Salloum sought out third-party financing on behalf of Mr. Salloum as early as 2003 but did not secure such financing until the second half of 2010, after the creation of Speedpro Inc.

[16] Mrs. Salloum testified that Mr. Salloum carried on business in partnership with Ms. Morton throughout 2003 to 2006 and that the business related deductions claimed in Mr. Salloum's and Ms. Morton's T1 returns for 2005 and 2006 reflected their respective 51% and 49% interests in the partnership. Mrs. Salloum conceded that the sole proprietorship registration was not amended to reflect a partnership and that there was no written partnership agreement. Mrs. Salloum also testified that the deduction allocated to Ms. Morton in 2007 was done so in error as the partnership terminated in 2006.

[17] Ms. Morton testified that during 2005 and 2006, she worked full-time for McDonald's in management. She stated that she would assist Mr. Salloum as best she could when she was not working by helping out in his parents' garage and by traveling with him to as many of the industry events as her work schedule allowed. She would also pick up car parts for Mr. Salloum from time to time using her own automobile.

[18] Ms. Morton testified that at the industry events they would describe the activity of Speedpro High Performance as the modification of or the creation of engines but that they would not try to sell anything at the events. Ms. Morton stated that she did not hold herself out as a representative of Speedpro High Performance but that people knew that she was attending with Mr. Salloum.

[19] Ms. Morton testified that she would give the receipts for gas, meals, travel expenses and parts that she paid for to Mrs. Salloum but she could not recall the amount of the expenses in 2005 and 2006. Ms. Morton stopped paying expenses after the break-up in late 2006 and renounced any interest she may have had in Mr. Salloum's activities. In her view, Mr. Salloum had worked hard to get where he is today.

[20] Mrs. Salloum testified that Ms. Morton was living in the family home in 2003 and 2004 and that she expected Mr. Salloum and Ms. Morton to marry at some point in the not too distant future. She described Ms. Morton as a very supportive girlfriend and explained that, because she was in a common-law relationship, she was entitled to half of everything.

[21] Mr. Salloum testified that Ms. Morton was always there for him, that the family wanted her to participate in the venture and that she made a small contribution to the financing of the venture.

[22] Mr. Salloum and Ms. Morton were not able to explain or describe how the various expenses were accounted for or how they were allocated to the various activities as they relied on Mrs. Salloum to deal with all such matters.

A. The Appellants' Position

[23] Mrs. Salloum argued on behalf of Mr. Salloum and Ms. Morton. The crux of the argument is that Mr. Salloum was pursuing his education and conducting substantial and costly research in the 2005, 2006, 2007 and 2008 taxation years toward a business objective, with the support of his parents, his friends and the community. He achieved that objective in 2010 when Speedpro Inc. was incorporated and successfully financed. Mrs. Salloum referred to her son as a born mechanic who has become a well-known and successful businessman in the community.

[24] Mrs. Salloum cited subsection 9(2) of the *Income Tax Act* (the "*ITA*"), under which, she argued, a business may be operated at a loss. She also referred to the test for the existence of a business in *Stewart v. Her Majesty the Queen*, 2002 SCC 46 and the observations of Cy Fien as to the early meaning of the word "business" as "anything which occupies the time and attention and labour of a man for the purpose of profit . . ." found at page 1296 of his article *To Profit or Not to Profit: A Historical Review and Critical Analysis of the "Reasonable Expectation of Profit" Test* (1995), Vol. 43, No. 5, Canadian Tax Journal.

[25] In reply to the Respondent's arguments, Mrs. Salloum stressed that the studies pursued by Mr. Salloum were not a personal endeavour but a means of achieving his ultimate objective, which was to make money in the future. She also stated that Mr. Salloum did not race for a hobby but attended the race track to learn everything he could about engines; he never intended to race a car but to reach a point for his future career.

[26] With respect to the purported partnership with Ms. Morton, Mrs. Salloum argued that Mr. Salloum and Ms. Morton were in a common-law relationship and that they were therefore partners in everything. The 51-49 business partnership was simply a reflection of that state of affairs at the time.

[27] Finally, Mrs. Salloum asked that Mr. Salloum be allowed to claim a provincial tuition tax credit on $2,709.76 identified as a business deduction on Schedule "A" to the Respondent's Reply in appeal 2012-2746(IT)I under the heading "Other" (to the extent that the credit had not already been given by the province).

B. The Respondent's Position

[28] The Respondent raised the following question: were Mr. Salloum's activities prior to and during the years in issue undertaken with a view to profit or were they a personal endeavour? The Respondent argued that the activities undertaken by Mr. Salloum were not undertaken for profit; his objective was to become a better automobile mechanic and to learn about the industry in general. Granted, Mr. Salloum was not a dreamer or a schemer, but he was a student in training.

[29] The Respondent cited the test in *Stewart* for the existence of a business and then referred to *Walsh v. Her Majesty The Queen*, 2011 TCC 341, in which our Court stated:

> 19 While referring me to several other cases including Tax Court of Canada cases *Coome v. Canada*, *Dreaver v. Canada*, and *Gartry v. Canada*, counsel for the Respondent also referred me to my 2005 decision in *McNeil v. Canada* at paragraph 12 where, in that case, I referred specifically to a person who had been working on investment models and strategies to enable himself to carry on an investment activity for his family which I found was not yet a business activity. While in that case the taxpayer did not show the same background as the Appellant in the case at bar, and never demonstrated that he had ever developed a strategic planning model as Mr. Walsh seems to have done, the issue is the same - preparations leading to creating a business activity are not themselves yet a business. Reference might also be made to earlier decisions of this court in *Sherman McClure and June N. McClure v. The Minister of National Revenue* and *Cunningham v. Canada*, essentially coming to similar conclusions that underline that educating oneself as a preparation to the start-up of a business is essentially a personal activity and not a business activity.
>
> 20 The Appellant argued that he had the background to pursue, with the necessary degree of sophistication, the trading business that he has carried out since 2004. He acknowledged that his work was devoted largely to determining the entry strategies given the small amount of capital he had to put at risk but, nonetheless, they were simply preliminary steps which were a part of a business. That is, as recognized in Interpretation Bulletin IT-364, preliminary steps are inherently part of a business. Every business must start with taking a preliminary step.
>
> 21 Nonetheless, I have to agree with the Respondent in this case. Subjectively, Mr. Walsh has admitted throughout his testimony that during the subject years he was at a pre-exploitation stage of the subject activity. This was not a case of preliminary exploitation steps. It is clearly subjectively and objectively pre-exploitation. He was researching the technology involved to start a business, he was researching the strategy steps that he needed to take to start a business employing his capital. He was taking courses, doing demonstration trades and getting a feel for a business that he felt he could yet pursue. I cannot

> find in such circumstances that the business had yet commenced in the subject years. Accordingly, the appeals will be dismissed.

[30] The Respondent further argued that some of the expenses claimed, such as life insurance premiums, were clearly personal in nature and that Mr. Salloum admitted a love of cars and drag racing from an early age, all of which raised a suspicion that the activities had a personal element. The Respondent argued that the fact that Mrs. Salloum maintained detailed records and meticulously allocated expenses to what she perceived to be a business activity did not in and of itself cause the expenses to be incurred in pursuit of a business. The issue remains whether a business existed in the years that were reassessed and the existence of detailed records or journal entries does not call for a positive answer.

[31] With respect to the activities of Ms. Morton and the purported partnership, the Respondent argued that Ms. Morton was nothing more than a supportive girlfriend and was not carrying on any business in common or otherwise. The Respondent cited *Diflorio v. Her Majesty The Queen*, 2014 TCC 67, and argued that none of the indicia of partnership identified by the Court in paragraph 31 of that judgment existed in this case. The Respondent also noted that if Mr. Salloum's activities were personal in nature, there could be no business that could be carried on in common with Ms. Morton with a view to profit.

[32] Finally, the Respondent submitted with respect to the input tax credits claimed by Mr. Salloum that the definition of "commercial activity" in subsection 123(1) of the *Excise Tax Act* (the "*ETA*") excludes, in the case of an individual or a partnership of individuals, a business carried on without a reasonable expectation of profit. The Respondent argued that this amounted to a higher standard for a commercial activity to exist than the one for the existence of a business found in section 9 of the *ITA*. The Respondent also cited paragraph 22 of the decision of this Court in *173122 Canada Inc. v. Her Majesty The Queen*, 2007 TCC 17, for the proposition that since Mr. Salloum reported no sales or revenues during the reporting periods in issue, one may reasonably infer that Mr. Salloum was not engaged in commercial activities during those periods and, therefore, that he is not eligible for input tax credits for those periods.

[33] I note that *Walsh*, *Diflorio* and *173122 Canada Inc.* are cases decided under the informal procedure.

III. The Law

[34] The Supreme Court of Canada in *Stewart* described the test used to determine whether a business exists as follows:

> 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.

...

60 In summary, the issue of whether or not a taxpayer has a source of income is to be determined by looking at the commerciality of the activity in question. Where the activity contains no personal element and is clearly commercial, no further inquiry is necessary. Where the activity could be classified as a personal pursuit, then it must be determined whether or not the activity is being carried on in a sufficiently commercial manner to constitute a source of income. However, to deny the deduction of losses on the simple ground that the losses signify that no business (or property) source exists is contrary to the words and scheme of the Act. Whether or not a business exists is a separate question from the deductibility

> of expenses. As suggested by the appellant, to disallow deductions based on a reasonable expectation of profit analysis would amount to a case law stop-loss rule which would be contrary to established principles of interpretation, mentioned above, which are applicable to the Act. As well, unlike many statutory stop-loss rules, once deductions are disallowed under the REOP test, the taxpayer cannot carry forward such losses to apply to future income in the event the activity becomes profitable. As stated by Bowman J.T.C.C. in *Bélec, supra*, at p. 123: "It would be ... unacceptable to permit the Minister [to say] to the taxpayer 'The fact that you lost money ... proves that you did not have a reasonable expectation of profit, but as soon as you earn some money, it proves that you now have such an expectation.'"

IV. Analysis

[35] The first question raised in view of the *Stewart* test is whether Mr. Salloum's activities in 2005, 2006, 2007 and 2008 are of a purely commercial nature or contain a personal element. The difficulty that Mr. Salloum faces in addressing this question is that, by his own admission, he was not pursuing a profit by offering or marketing goods or services for sale in those years. Rather, he was seeking to educate himself through his attendance at BCIT, his apprenticeship, his activities in his parents' garage and his attendance at various industry events.

[36] While Mr. Salloum's ultimate goal in undertaking these activities was to pursue a profit in the future, he did not start a business in 2005, 2006, 2007 or 2008 because he did not have the qualifications required to offer mechanic's services to the public until the end of 2008. In fact, it is clear from Mr. Salloum's candid testimony that the high performance automotive services business was not operated in earnest until 2010 with the incorporation of Speedpro Inc. and the securing of third-party financing by the corporation later that year. The fact that the business undertaken by Speedpro Inc. has proven successful, while a great credit to the dedication and perseverance of Mr. Salloum and his family, does not alter the nature of the activities that were conducted by Mr. Salloum in 2005, 2006, 2007 and 2008, which were educational and not commercial.

[37] Mr. Salloum recognized that during 2005, 2006, 2007 and 2008, he could not actually offer mechanic's services to the public as that would have exposed him to a significant risk of liability because he was not certified. Hence, he could not pursue a profit in those years. Mr. Salloum also recognized that, from a practical perspective, he could not offer his particular brand of performance-oriented services to the general public in exchange for payment until he could show that, in addition to the required credentials, he had the necessary knowledge

and skill to perform those services. The fact that Mr. Salloum built, at significant cost, a performance automobile engine in the course of securing that knowledge and skill does not make his self-education activities a commercial activity. The engine itself was not marketed or offered for sale and only recently has been used as a promotional tool for Speedpro Inc.

[38] The creation of an initial business plan and the registration of a business name in 2001 do not alter the reality that during 2005, 2006, 2007 and 2008 Mr. Salloum did not offer to the public "mobile auto mechanic services," the activity described on the registration, because he did not obtain the Red Seal endorsement until the end of 2008. In *Gartry v. Her Majesty The Queen*, 94 DTC 1947, our Court stated at paragraph 16:

> . . . In determining when a business has commenced, it is not realistic to fix the time either at the moment when money starts being earned from the trading or manufacturing operation or the provision of services or, at the other extreme, *when the intention to start the business is first formed*.
>
> (Emphasis added)

[39] While Mr. Salloum no doubt undertook a laudable course of action in order to secure the necessary credentials and to develop his knowledge and skills in the performance automotive services field, his activities do not relate to the pursuit of profit but rather constitute the completion of an inherently personal activity – securing an education - so that he could pursue a profit in the future using that education.

[40] The distinction to be drawn here is that the pursuit of an education by an individual in order to be able to pursue a profit in the future is different from the current pursuit of a profit that leads to a profit in the future. In the former case, there is only a personal element to the education – the improvement of the individual – even if the ultimate objective is to pursue a profit at some future point in time by exploiting the credentials, knowledge and skills obtained through that education. Here, Mr. Salloum pursued a personal endeavour with the financial and other support of his family and, for a period, Ms. Morton, but, in my view he did not conduct an automotive services business in 2005, 2006, 2007 or 2008 as he did not, and could not, pursue a profit from such a business in those years. There is also no evidence that any other business was carried on in those years.

[41] The absence of a business in 2005, 2006, 2007 and 2008 is relevant to the reassessments of Mr. Salloum under both the *ITA* and the *ETA*. Generally, in the

former case, there must be a business; only then can Mr. Salloum deduct any outlay or expense made or incurred for the purpose of gaining or producing income from that business (see subsection 9(2) and paragraph 18(1)(*a*) of the *ITA*). In the latter case, there must a commercial activity, which, for an individual, is essentially a business carried on with a reasonable expectation of profit; only then can Mr. Salloum claim input tax credits in respect of that commercial activity. As Mr. Salloum did not carry on a business in 2005, 2006, 2007 and 2008, Mr. Salloum's claim in 2006 to 2008 for business related deductions and in 2005 to 2008 for input tax credits must fail.

[42] The finding that Mr. Salloum was not carrying on a business in 2005, 2006, 2007 and 2008 is also relevant to the income tax deductions claimed by Ms. Morton for her 2005, 2006 and 2007 taxation years. Section 2 of the *Partnership Act* (British Columbia) states that "partnership is the relation which subsists between persons carrying on business in common with a view of profit". Simply stated, if there is no business to carry on in common, there can be no partnership.

[43] The evidence establishes that Ms. Morton was very supportive of Mr. Salloum and that during 2005 and 2006 she was helping him pursue his various educational activities as best she could. However, Ms. Morton was not qualified to provide automotive services of any kind, she and Mr. Salloum did not undertake marketing or pursue sales at any time and Ms. Morton did not hold herself out as a representative of Speedpro High Performance. In addition, there was no partnership agreement, the business registration for Speedpro High Performance was not modified to reflect a partnership and there was no apparent dissolution of a partnership after Ms. Morton broke up with Mr. Salloum at the end of 2006. In the circumstances, Ms. Morton's role is best described as that of a supportive girlfriend rather than a business partner. Accordingly, consistent with the finding that Mr. Salloum was not carrying on a business in 2005, 2006, 2007 or 2008, I find that there was no partnership between Mr. Salloum and Ms. Morton and that Ms. Morton's claim for business related deductions in 2005 to 2007 must fail.

[44] The foregoing conclusions do not end the matter however. Paragraph 5 of the Reply (the "ETA Reply") in Mr. Salloum's appeal under the *ETA* states that Mr. Salloum filed a return under the *ETA* for the reporting period ending December 31, 2005 on July 4, 2006. Paragraph 7 of the ETA Reply states that Mr. Salloum was reassessed for that reporting period by notice dated November 22, 2006 to reduce the input tax credit to $1,508.95, which is the

amount in issue in this appeal. Paragraph 9 of the ETA Reply states that Mr. Salloum was again reassessed for that reporting period by notice dated January 11, 2011 (the "2005 ETA Reassessment") to reduce the input tax credit to zero. Mr. Salloum objected to and then appealed the 2005 ETA Reassessment.

[45] Subsection 298(1) of the *ETA* states that an assessment of net tax for a reporting period may not be made more than four years after the later of the day the return was due and the day the return was filed. The 2005 ETA Reassessment was made more than four years after the return for the period was filed. Subsection 298(4) of the *ETA* states that an assessment in respect of any matter may be made at any time where the person to be assessed has, in respect of that matter, made a misrepresentation that is attributable to the person's neglect, carelessness or wilful default.

[46] Paragraph 8 of the Reply (the "ITA Reply") in Ms. Morton's appeal under the *ITA* states that she was initially assessed under the *ITA* for the 2005 taxation year by notice dated March 30, 2006. Paragraph 9 of the ITA Reply states that the Minister reassessed the 2005 taxation year by notice dated January 17, 2011 (the "2005 ITA Reassessment"). Ms. Morton objected to and then appealed the 2005 ITA Reassessment.

[47] Paragraph 152(4)(*a*) of the *ITA* states that an assessment, reassessment or additional assessment of a taxation year may be made after the taxpayer's normal reassessment period in respect of the year only if the taxpayer or person filing the return has made any misrepresentation that is attributable to neglect, carelessness or wilful default. Under subsection 152(3.1) of the *ITA*, the normal reassessment period for an individual for a particular taxation year is three years after the day of sending an original assessment or notification that no tax is payable for the year. The 2005 ITA Reassessment was made more than three years after the initial assessment of Ms. Morton's 2005 taxation year.

[48] The Respondent set out assumptions of fact relating to the out of time issue in paragraph 13 of the ETA Reply and the ITA Reply and identified the issue of whether the two reassessments were issued out of time in paragraph 14 of the Replies. In paragraph 19 of the ETA Reply and in paragraph 18 of the ITA Reply, the Respondent stated the grounds relied on as follows:

> 19. He submits that the Minister correctly reassessed the Appellant's reporting period ending December 31, 2005 pursuant to paragraph 298(4)(a) of the Act as

> the Appellant, in filing his claim for ITCs, made a misrepresentation attributable to neglect, carelessness or wilful default.
>
> …
>
> 18. He further submits that the Minister properly reassessed the Appellant's 2005 taxation year pursuant to subsection 152(4) of the Act, as the Appellant in filing her return for that year, made a misrepresentation attributable to neglect, carelessness or wilful default.

[49] In the Notices of Appeal, the Appellants did not challenge the 2005 ETA Reassessment or the 2005 ITA Reassessment on the basis that they were made out of time. As well, the Appellants and the Respondent did not address this issue during the trial. However, the Respondent did raise the out of time issue in the Replies and should be commended for this even-handed approach. It is also implicit in an out of time assessment that there is an allegation of misrepresentation or fraud (*The Queen v. Canadian Marconi Company*, [1992] 1 F.C. 655 (FCA)).

[50] The Respondent does not have a duty to plead or establish misrepresentation where the Appellant does not raise the issue (see *Naguib v. The Queen*, 2004 FCA 40 and *The Queen v. Last*, 2014 FCA 129). However, in this case, assumptions of fact were made, the issue was identified and grounds were set out in the ETA Reply and the ITA Reply. Accordingly, the issue is before me even if the Appellant did not expressly raise the issue in the Notices of Appeal or at the trial. I also note that these are appeals under the informal procedure which mandates that I deal with the appeals as informally and expeditiously as the circumstances and considerations of fairness permit (see subsection 18.15(3) of the *Tax Court of Canada Act*). Fairness dictates that I not ignore this issue simply because it was not explicitly raised by the Appellant.

[51] To accept the Respondent's position regarding the validity of the out of time reassessments, I must conclude, first, that Mr. Salloum made a misrepresentation in his GST return for the reporting period ending December 31, 2005 and, second, that the misrepresentation was attributable to neglect, carelessness or wilful default. Similarly, I must conclude, first, that Ms. Morton made a misrepresentation in her income tax return for 2005 and, second, that the misrepresentation was attributable to neglect, carelessness or wilful default (see, generally, *Boucher v. The Queen*, 2004 FCA 46).

[52] I found the testimony of Mr. Salloum and Ms. Morton to be straightforward and credible. Based on this testimony, I have no doubt that Mr. Salloum and

Ms. Morton had a *bona fide* belief that they were carrying-on a business together in 2005 known as Speedpro High Performance. While I have found that no such business existed in 2005, that finding does not in and of itself support a finding that Mr. Salloum made a misrepresentation in his GST return for the period ending December 31, 2005 that was attributable to neglect, carelessness or wilful default by claiming input tax credits in respect of activities that he viewed as business activities. Nor does it support a finding that Ms. Morton made a misrepresentation in her 2005 income tax return attributable to neglect, carelessness or wilful default by claiming business deductions for her 2005 taxation year in respect of activities that she viewed as business activities conducted in partnership with Mr. Salloum.

[53] The question of whether a business exists in a particular set of circumstances has given rise to a large body of jurisprudence essentially because the issue is often difficult to resolve at the margins. The import of this sort of legal and factual milieu in the context of paragraph 152(4)(a) of the *ITA* was recognized in *Petric v. The Queen*, 2006 TCC 306, where the Court said (at paragraph 38):

> To the extent that we can reconcile the above decisions, it is my view that the present case resembles the situation in *Regina Shoppers Mall Limited* and *1056 Enterprises Ltd.* more than that in *Nesbitt*. The matter of fair market value is a controversial issue, to be settled on the basis of the interpretation of the facts in evidence, as is the question of whether proceeds of disposition should be characterized as income or as a capital gain (*Regina Shoppers Mall Limited*) or of whether corporations are associated (*1056 Enterprises Ltd.*). The mathematical error in *Nesbitt*, by contrast, is a clear-cut issue, which even the taxpayer in that case conceded to be non-controversial.

[54] Here, as in *Petric*, the type of question to be resolved echoes that in *The Queen v. Regina Shoppers Mall Ltd.*, 126 N.R. 141 (FCA) and *1056 Enterprises Ltd. v. The Queen*, 27 F.T.R. 307 (FCTD). This is not a case in which the Appellants failed to report something that they should have reported or attempted to disguise the true nature of their activities but a case in which the Appellants undertook activities that they genuinely believed to constitute a business because the goal was to earn a profit in the future.

[55] The Appellants had a not unreasonable argument to make that a business did exist based on the research conducted and the significant monies expended to further a future business endeavour that ultimately was very successful. As well, there is no doubt that in 2005 Mr. Salloum and Ms. Morton carried on together the activities they mistakenly viewed as a business. Mrs. Salloum fervently believed that the activities conducted by Mr. Salloum and Ms. Morton in 2005 constituted a

business carried on together in partnership. As noted by the Respondent at the commencement of argument, the issue in this case is very factual.

[56] While a claim for deductions and input tax credits where no business is found to exist may constitute a misrepresentation in the broad sense of that word adopted in *Minister of National Revenue v. Taylor*, [1961] Ex. C.R. 318 and *Nesbitt v. The Queen*, 206 N.R. 188 (FCA), the misrepresentation stems from a not unreasonable mistake in judging when the business commenced. The requirement to act as a wise and prudent person in filing a tax return is not a standard of perfection: wisdom is not infallibility and prudence is not perfection. Where a taxpayer thoughtfully, deliberately and carefully assesses the situation and files on what he or she believes *bona fide* to be the proper method there can be no misrepresentation as contemplated by paragraph 152(4)(*a*) of the *ITA* (*The Queen v. Johnson*, 2012 FCA 253 at paragraph 55).

[57] In light of all the circumstances, I find that Mr. Salloum did not make a misrepresentation attributable to neglect, carelessness or wilful default in claiming input tax credits for the reporting period ending December 31, 2005. I also find that Ms. Morton did not make any misrepresentation attributable to neglect, carelessness or wilful default in her 2005 income tax return by claiming business deductions for that year. Accordingly, the 2005 ETA Reassessment and the 2005 ITA Reassessment were issued outside the time limits found in paragraph 298(1)(*a*) of the *ETA* and paragraph 152(4)(*a*) of the *ITA*, respectively, and are therefore void.

[58] One final matter to be addressed is the proper treatment of the $2,709.76 identified by Mrs. Salloum in argument. Mrs. Salloum noted that Mr. Salloum should have claimed this amount as eligible for the tuition tax credit available under section 4.6 of the *British Columbia Income Tax Act*, RSBC 1996, Chapter 215. Unfortunately, this Court does not have jurisdiction to decide whether Mr. Salloum is entitled to a tax credit that is provided for in a provincial income tax statute.

[59] For the forgoing reasons:

1. Mr. Salloum's appeal of the 2005 ETA Reassessment is allowed, without costs, and the reassessment is vacated;

2. Ms. Morton's appeal of the 2005 ITA Reassessment is allowed, without costs, and the reassessment is vacated;

3. Mr. Salloum's appeal of the reassessments made under the *ETA* for the reporting periods ending between January 1, 2006 and December 31, 2008 by notice dated January 11, 2011 is dismissed without costs;

4. Mr. Salloum's appeal of the reassessments made under the *ITA* for the 2006, 2007 and 2008 taxation years by notices dated January 17, 2011 is dismissed without costs; and

5. Ms. Morton's appeal of the reassessment made under the *ITA* for the 2006 and 2007 taxation years by notices dated January 17, 2011 is dismissed without costs.

Signed at Ottawa, Canada, this 12th day of December 2014.

"J.R. Owen"

Owen J.

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