

[OFFICIAL ENGLISH TRANSLATION]

1999-3873(IT)G

BETWEEN:

PHILIPPE FILLION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of:
Charles Fillion (1999-3874(IT)G), *Jean-Marc Fillion* (1999-3875(IT)G),
Pierrette Racine (1999-3876(IT)G) and
Services Financiers Fillion & Associés inc. (1999-3877(IT)G)
on February 7 and 8, 2002, at Québec, Quebec, by

the Honourable Judge Alain Tardif

Appearances

Counsel for the Appellant:

Gaétan Drolet

Counsel for the Respondent:

Johanne M. Boudreau

JUDGMENT

Upon preliminary application by counsel for the respondent for an order;

and upon hearing what was alleged by the parties;

the application is granted and the purported appeals from the assessments made under the *Income Tax Act* for the 1993, 1994 and 1995 taxation years are set aside, in accordance with the attached Reasons for Judgment.

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Signed at Ottawa, Canada, this 6th day of December 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 28th day of January 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

1999-3874(IT)G

BETWEEN:

CHARLES FILLION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of:
Philippe Fillion (1999-3873(IT)G), *Jean-Marc Fillion* (1999-3875(IT)G),
Pierrette Racine (1999-3876(IT)G) and
Services Financiers Fillion & Associés inc. (1999-3877(IT)G)
on February 7 and 8, 2002, at Québec, Quebec, by

the Honourable Judge Alain Tardif

Appearances

Counsel for the Appellant:

Gaétan Drolet

Counsel for the Respondent:

Johanne M. Boudreau

JUDGMENT

Upon preliminary application by counsel for the respondent for an order;

and upon hearing what was alleged by the parties;

the application is granted and the purported appeals from the assessments made under the *Income Tax Act* for the 1993, 1994 and 1995 taxation years are set aside, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of October 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 28th day of January 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

1999-3875(IT)G

BETWEEN:

JEAN-MARC FILLION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of:
Philippe Fillion (1999-3873(IT)G), *Charles Fillion* (1999-3874(IT)G),
Pierrette Racine (1999-3876(IT)G) and
Services Financiers Fillion & Associés inc. (1999-3877(IT)G)
on February 7 and 8, 2002, at Québec, Quebec, by

the Honourable Judge Alain Tardif

Appearances

Counsel for the Appellant:

Gaétan Drolet

Counsel for the Respondent:

Johanne M. Boudreau

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1993, 1994 and 1995 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of December 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 28th day of January 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

1999-3876(IT)G

BETWEEN:

PIERRETTE RACINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of:
Philippe Fillion (1999-3873(IT)G), *Charles Fillion* (1999-3874(IT)G),
Jean-Marc Fillion (1999-3875(IT)G) and
Services Financiers Fillion & Associés inc. (1999-3877(IT)G)
on February 7 and 8, 2002, at Québec, Quebec, by

the Honourable Judge Alain Tardif

Appearances

Counsel for the Appellant:

Gaétan Drolet

Counsel for the Respondent:

Johanne M. Boudreau

JUDGMENT

Upon preliminary application by counsel for the respondent for an order;

and upon hearing what was alleged by the parties;

the application is granted and the purported appeals from the assessments made under the *Income Tax Act* for the 1993, 1994 and 1995 taxation years are set aside, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of December 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 28th day of January 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

1999-3877(IT)G

BETWEEN:

SERVICES FINANCIERS FILLION
& ASSOCIÉS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of:
Philippe Fillion (1999-3873(IT)G), *Charles Fillion* (1999-3874(IT)G),
Jean-Marc Fillion (1999-3875(IT)G) and *Pierrette Racine* (1999-3876(IT)G)
on February 7 and 8, 2002, at Québec, Quebec, by

the Honourable Judge Alain Tardif

Appearances

Counsel for the Appellant:

Gaétan Drolet

Counsel for the Respondent:

Johanne M. Boudreau

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1994 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of December 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 28th day of January 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

Date: 20021206
Docket: 1999-3873(IT)G
1999-3874(IT)G
1999-3875(IT)G
1999-3876(IT)G
and 1999-3877(IT)G

BETWEEN:

PHILIPPE FILLION,
CHARLES FILLION,
JEAN-MARC FILLION,
PIERRETTE RACINE and
SERVICES FINANCIERS FILLION & ASSOCIÉS INC.,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Tardif, J.T.C.C.

[1] The Court has before it five appeals, which are being heard on common evidence at the parties' request.

[2] The assessments being appealed from were made on the basis of the following assumptions of fact:

Docket: *Philippe Fillion* (1999-3873(IT)G) and
Charles Fillion (1999-3874(IT)G)

[TRANSLATION]

- (a) On January 1, 1993, Jean-Marc Fillion, his spouse Pierrette Racine, and their sons Charles and Philippe Fillion formed a general partnership, "Société en nom collectif J.M.F." ("the general partnership");
- (b) the capital invested by each member of the general partnership is \$100;
- (c) the purposes of the general partnership are to do business development, to seek out clients, to do public relations work, and to sell financial products;
- (d) during the taxation years at issue, Jean-Marc Fillion was the only partner who held an insurance broker's licence;
- (e) Jean-Marc Fillion is the only partner authorized to manage the general partnership;
- (f) during the taxation years at issue, Charles and Philippe Fillion were full-time students and did no work for the general partnership;
- (g) Pierrette Racine did very little work for the general partnership;
- (h) the income of the general partnership is derived almost exclusively from the company "Services Financiers Fillion et Associés Inc." ("Services Financiers");
- (i) during the taxation years at issue, Jean-Marc Fillion was the only shareholder in Services Financiers;
- (j) the main activity of Services Financiers is selling insurance products;
- (k) there is no set method for allocating income between Services Financiers and the general partnership;
- (l) the general partnership uses an annual, comprehensive-amount invoicing system;

- (m) Jean-Marc Fillion cashes all professional fees invoiced by the general partnership, regardless of the work allegedly performed by the other members of the general partnership or the distribution of profits among the members;
- (n) during the taxation years at issue, the general partnership had no bank account;
- (o) according to the income tax returns of Jean-Marc Fillion and the other partners, the percentage used to divide income among the partners varies from one year to another;
- (p) given the capital invested and the work each partner performed in the general partnership, the allocation of income from the general partnership among Jean-Marc Fillion and the other members of the general partnership was not reasonable;
- (q) it was not established that the general partnership performed any operations during the taxation years at issue;

Docket: *Jean-Marc Fillion (1999-3875(IT)G)*

[TRANSLATION]

- (a) On January 1, 1993, Jean-Marc Fillion, his spouse Pierrette Racine, and their sons Charles and Philippe Fillion formed a general partnership, "Société en nom collectif J.M.F." ("the general partnership");
- (b) the capital invested by each member of the general partnership is \$100;
- (c) the purposes of the general partnership are to do business development, to seek out clients, to do public relations work, and to sell financial products;
- (d) during the taxation years at issue, Jean-Marc Fillion was the only partner who held an insurance broker's licence;
- (e) Jean-Marc Fillion is the only partner authorized to manage the general partnership;

- (f) during the taxation years at issue, Charles and Philippe Fillion were full-time students and did no work for the general partnership;
- (g) Pierrette Racine did very little work for the general partnership;
- (h) the income of the general partnership is derived almost exclusively from the company "Services Financiers Fillion et Associés Inc." ("Services Financiers");
- (i) during the taxation years at issue, Jean-Marc Fillion was the only shareholder in Services Financiers;
- (j) the main activity of Services Financiers is selling insurance products;
- (k) there is no set method for allocating income between Services Financiers and the general partnership;
- (l) the general partnership uses an annual, comprehensive-amount invoicing system;
- (m) Jean-Marc Fillion cashes all professional fees invoiced by the general partnership, regardless of the work allegedly performed by the other members of the general partnership or the distribution of profits among the members;
- (n) during the taxation years at issue, the general partnership had no bank account;
- (o) according to the income tax returns of Jean-Marc Fillion and the other partners, the percentage used to divide income among the partners varies from one year to another;
- (p) given the capital invested and the work each partner performed in the general partnership, the allocation of income from the general partnership among Jean-Marc Fillion and the other members of the general partnership was not reasonable;
- (q) it was not established that the general partnership performed any operations during the taxation years at issue;

Limited partnership "Société en commandite Gestion Fillion" ("the limited partnership")

- (r) according to the financial statements of the limited partnership, Jean-Marc Fillion holds 20 per cent of the shares of the partnership, and his spouse Pierrette Racine holds 80 per cent of the shares;
- (s) in adding additional income of \$14,606 to Jean-Marc Fillion's income for the 1995 taxation year, the Minister of National Revenue relied on the same assumptions of fact as those set out in subparagraphs (b) to (q) of this document given the scarcity of available information about the limited partnership;

Business investment loss

- (t) in his income tax return for the 1993 taxation year, Jean-Marc Fillion claimed a deduction of \$22,500 as a business investment loss;
- (u) that loss refers to an investment of \$30,000 by Jean-Marc Fillion in "Les Mines diatissan Ltée";
- (v) that investment was used almost exclusively to acquire assets in Mali;
- (w) Jean-Marc Fillion did not establish that this loss resulted from the disposition of shares of the capital stock of a small business corporation in accordance with paragraph 39(1)(c) of the *Income Tax Act*.

Docket: *Pierrette Racine* (1999-3876(IT)G)

[TRANSLATION]

- (a) On January 1, 1993, Jean-Marc Fillion, his spouse Pierrette Racine, and their sons Charles and Philippe Fillion formed a general partnership, "Société en nom collectif J.M.F." ("the general partnership");
- (b) the capital invested by each member of the general partnership is \$100;

- (c) the purposes of the general partnership are to do business development, to seek out clients, to do public relations work, and to sell financial products;
- (d) during the taxation years at issue, Jean-Marc Fillion was the only partner who held an insurance broker's licence;
- (e) Jean-Marc Fillion is the only partner authorized to manage the general partnership;
- (f) during the taxation years at issue, Charles and Philippe Fillion were full-time students and did no work for the general partnership;
- (g) Pierrette Racine did very little work for the general partnership;
- (h) the income of the general partnership is derived almost exclusively from the company "Services Financiers Fillion et Associés Inc." ("Services Financiers");
- (i) during the taxation years at issue, Jean-Marc Fillion was the only shareholder in Services Financiers;
- (j) the main activity for Services Financiers is selling insurance products;
- (k) there is no set method for allocating income between Services Financiers and the general partnership;
- (l) the general partnership uses an annual, comprehensive-amount invoicing system;
- (m) Jean-Marc Fillion cashes all professional fees invoiced by the general partnership, regardless of the work allegedly performed by the other members of the general partnership or the distribution of profits among the members;
- (n) during the taxation years at issue, the general partnership had no bank account;
- (o) according to the income tax returns of Jean-Marc Fillion and the other partners, the percentage used to divide income among the partners varies from one year to another;

- (p) given the capital invested and the work each partner performed in the general partnership, the allocation of income from the general partnership among Jean-Marc Fillion and the other members of the general partnership was not reasonable;
- (q) it was not established that the general partnership performed any operations during the taxation years at issue;

Limited partnership "Société en commandite Gestion Fillion" ("the limited partnership")

- (r) according to the financial statements of the limited partnership, Jean-Marc Fillion holds 20 per cent of the shares of the partnership and his spouse Pierrette Racine holds 80 per cent of the shares;
- (s) in adding additional income of \$14,606 to Jean-Marc Fillion's income for the 1995 taxation year, the Minister of National Revenue relied on the same assumptions of fact as those set out in subparagraphs (b) to (q) of this document given the scarcity of information available about the limited partnership;

Docket: *Services Financiers Fillion & Associés inc.* (1999-3877(IT)G)

[TRANSLATION]

- (a) during the taxation years at issue, the main activity of the appellant company was selling insurance products;
- (b) during the taxation years at issue, Jean-Marc Fillion was the only shareholder in the appellant company;
- (c) during the taxation years at issue, only Jean-Marc Fillion held an insurance broker's licence;
- (d) according to the financial statements of the limited partnership "Société en commandite Gestion Fillion" ("the limited partnership"), Jean-Marc Fillion holds 20 per cent of the shares of the partnership and his spouse Pierrette Racine holds 80 per cent of the shares;
- (e) the income of the limited partnership comes exclusively from the appellant company;

- (f) there is no set method for allocating income between the appellant company and the limited partnership;
- (g) during the taxation years at issue, the limited partnership had no bank account;
- (h) all the alleged management fees of \$19,100 were paid to Jean-Marc Fillion;
- (i) to justify the management fees expenditure, the appellant company submitted only two invoices dated December 31, 1994, that were issued by the limited partnership to Services Financiers J.M.F. Inc. for \$14,300 and \$4,800;
- (j) the appellant company provided no details about the work performed by the limited partnership that would justify the invoicing of these management fees;
- (k) it was not established that the limited partnership performed any operations during the taxation years at issue;
- (l) the appellant company did not establish that it had incurred the management fees in order to produce business income during the 1994 taxation year;
- (m) the appellant company did not establish that the amount of the management fees was reasonable in the circumstances.

[3] At issue are the following points:

Docket: *Philippe Fillion* (1999-3873(IT)G)

[TRANSLATION]

At issue is whether the Minister of National Revenue was right in reducing the income of Philippe Fillion by \$3,000 and \$6,000 and adding these amounts to the income of Jean-Marc Fillion, the father of the appellant Philippe Fillion, for the 1993 and 1994 taxation years.

Docket: *Charles Fillion* (1999-3874(IT)G)

[TRANSLATION]

At issue is whether the Minister of National Revenue was right in reducing the income of Charles Fillion by \$6,000 and \$5,953 and adding these amounts to the income of Jean-Marc Fillion, the father of the appellant Charles Fillion, for the 1993 and 1994 taxation years.

Docket: *Jean-Marc Fillion* (1999-3875(IT)G)

[TRANSLATION]

1. At issue is whether the Minister of National Revenue was right in adding the additional amounts from the partnerships of \$15,000, \$16,594 and \$33,739 to the income of Jean-Marc Fillion for the 1993, 1994 and 1995 taxation years respectively.
2. At issue is whether the Minister of National Revenue was right in disallowing the deduction claimed by Jean-Marc Fillion as a business investment loss on his income tax return for the 1993 taxation year.

Docket: *Pierrette Racine* (1999-3876(IT)G)

[TRANSLATION]

At issue is whether the Minister of National Revenue was right in reducing the income of Pierrette Racine by \$6,000 and \$1,314 and adding these amounts to the income of Jean-Marc Fillion, the spouse of the appellant Pierrette Racine, for the 1993 and 1994 taxation years.

Docket: *Services Financiers Fillion & Associés inc.* (1999-3877(IT)G)

[TRANSLATION]

At issue is whether the Minister of National Revenue was right in disallowing the management fees expense of \$19,100 claimed by the appellant company for the 1994 taxation year.

[4] I shall therefore dispose of the preliminary application by the respondent concerning lack of jurisdiction of this Court.

[5] The respondent first raised a point of law, arguing that the Court did not have jurisdiction regarding the 1993 and 1994 taxation years in the cases of *Pierrette Racine* (1999-3876(IT)G), *Charles Fillion* (1999-3874(IT)G) and *Philippe Fillion* (1999-3873(IT)G) on the ground that no income tax was payable by those persons for those taxation years.

[6] This issue is relatively simple to decide since the case law has very clearly stated this Court's jurisdiction on this point. Referring to *Bowater Mersey Paper Co. v. Canada (FCA)*, [1987] F.C.J. No. 427, and *Canada v. Consumer's Co.*, [1987] 2 F.C. 60, and agreeing with the findings of these two decisions, I allow the respondent's application and find that this Court does not have jurisdiction to hear the appeals of *Pierrette Racine* (1999-3876(IT)G), *Charles Fillion* (1999-3874(IT)G) or *Philippe Fillion* (1999-3873(IT)G) concerning the January 30, 1997, reassessments for the 1993 and 1994 taxation years since those reassessments do not indicate any income tax payable.

Facts

[7] Jean-Marc Fillion has worked in the field of insurance and financial services for many years. In the early 1970s, business was not very brisk and Jean-Marc Fillion's spouse did the bookkeeping, provided secretarial services and answered the telephone, without pay.

[8] They had two sons: Charles in 1975 and Philippe in 1980. The place of business was located in the family home. Starting in 1977, Jean-Marc Fillion's professional work was performed for and on behalf of Services Financiers Fillion et Associés inc., incorporated on May 20, 1977.

[9] The appellant requested the co-operation of Daniel Massé, a tax consultant, to set up one or more vehicles that would enable him to include the members of his family in the financial activities generated by his work.

[10] In January 1993, the appellant Jean-Marc Fillion set up a general partnership called "Société en nom collectif J.M.F." Setting up this general partnership was part of a plan to ultimately interest his two sons in taking over the business and to show his appreciation for his spouse's significant contribution on a volunteer basis when the business was starting up. The members of the general partnership were Jean-Marc Fillion, his spouse Pierrette Racine, and their two sons Charles and Philippe. The members each invested only \$100 in the new general partnership.

[11] In February 1994, a limited partnership called "Société en commandite Gestion Fillion" was set up and had the same purpose.

[12] There again, the unpaid contribution and support of Pierrette Racine were taken into account and she was given 80 per cent of the shares of the limited partnership, and her spouse Jean-Marc Fillion was given 20 per cent of the shares.

[13] Pierrette Racine was the general partner and her spouse Jean-Marc Fillion was the limited partner.

[14] In providing and explaining reasons for the plan he set up on the advice of Mr. Massé, Jean-Marc Fillion said that he wanted to express his appreciation and gratitude for his spouse's significant contribution to the business and to make preparations for the continuance of the business by involving his sons, so that they would become interested in the development and continuance of the family business.

[15] Business continued to expand. In order to meet the needs of an increasing number of clients and the various requirements of a general agency contract with the company "La Maritime" (La Maritime), Jean-Marc Fillion opened a second office in Charlesbourg; a third party, Ms. Long, was responsible for providing secretarial services at this new office.

[16] Under the contract with La Maritime, Jean-Marc Fillion had hired agents, who made financial investments with La Maritime. Jean-Marc Fillion earned a commission on all transactions performed by himself and by the agents with whom he had subcontracted.

[17] Contracts underwritten by La Maritime accounted for approximately 90 per cent of business. How and in what proportion were commissions paid out? Did La Maritime absorb the cost of certain expenditures incurred by the appellant? Were

the various agents who were hired by the appellant paid directly by La Maritime, or by the appellant? What was the appellant's administrative burden in managing the commissions paid out by La Maritime? These and many other questions remained unanswered, and the few responses obtained did not significantly clarify things.

[18] According to the testimony of the appellant Jean-Marc Fillion and his tax consultant, setting up the various entities made it possible to achieve two major objectives: to show appreciation for the contribution and the very significant co-operation of Jean-Marc Fillion's spouse and to allow Jean-Marc Fillion to prepare for and strengthen the reality of the family business in anticipation of having his sons, who were quite young when the two new entities were set up, get involved at some point.

[19] The professional fees generated by Jean-Marc Fillion's work were paid either to himself or to the management company "Services Financiers Fillion & Associés inc." In this way, all income from Jean-Marc Fillion's work was transferred to certain entities on various terms and conditions, in respect of which very few explanations were provided: the appellants merely stated, repeated and insisted that the amounts indicated had indeed been paid to and received by the recipients, who had performed work that fully justified the various amounts received.

[20] All the transfers were made through the appellant Jean-Marc Fillion by means of cheques made out to him that he endorsed and cashed; he remitted the cash to the various recipients in the amounts indicated on their income tax returns. In providing and explaining reasons for his omnipresence in these transactions, Jean-Marc Fillion said that he acted as a duly authorized person, that is, as a mandatary, a manager, a trustee or an administrator. No documentary evidence or accounting records establishing consistency and plausibility were adduced.

[21] In proving that the payments were made and received and in explaining why they were made, the appellants essentially fell back on the various income tax returns filed with the respondent for the taxation years at issue.

[22] Nearly all the financial transactions were made using the same bank account, often by means of cash payments supposedly made in exchange for work performed, the quality and quantity of which were never actually established.

[23] Although Jean-Marc Fillion's spouse and two sons timidly stated that they took part in decision-making, the explanations provided were certainly not determinative on this point since the balance of the evidence shows that all the decisions were unequivocally made by Jean-Marc Fillion. Nor was Jean-Marc Fillion able to rationally explain the criteria used to distribute the various payments and transfers.

[24] Jean-Marc Fillion was the directing mind; he alone made all the decisions about the partnerships with the co-operation of his advisor Mr. Massé. A number of highly relevant questions were directed to Jean-Marc Fillion in order to ascertain the criteria, reasons, or bases relied on in determining the allocations and transfers.

[25] The responses given in answer to these nonetheless fundamental questions did not provide any objective or rational formula. These responses referred for example to appreciation for past services, motivation, encouragement, family solidarity, and the continuance of the business. Work actually performed was never the main criterion; moreover, the responses concerning the work were vague, confused and very imprecise. Here again, there were no payroll records or records of any sort to establish the extent of the work or when it was performed.

[26] It would nonetheless have been very easy to explain each person's workload and how the work performed was remunerated by given amounts, particularly since it could have been expected that the appellants would eventually be called on to provide reasons for their involvement.

[27] The evidence adduced never established why or, more importantly, how the allocations were determined. Reference was made to support, co-operation, and solidarity as evidenced by a high degree of availability in answering the telephone, running errands, doing cleaning and helping with certain mailings, but no explanations were provided about any of these duties. Moreover, no specific details were provided about when any of these duties were carried out or how much of this work was performed.

[28] In substance, I did not believe the explanations given. In my opinion, everything was orchestrated to minimize the tax burden. The evidence adduced, which is essentially testimonial, neither reflected nor supported the information the appellants gave to the respondent.

[29] It is important to briefly note some deficiencies.

- There was no evidence of payment of the capital outlays, notwithstanding the fact that these were quite small.
- There was no evidence of a bank account.
- There was no evidence concerning when, how and why the appellants Philippe Fillion and Charles Fillion received the amounts indicated on their income tax returns and in what form they received them.

[30] The facts were related so as to reflect the information sent to Revenue Canada. Brief and vague explanations, hesitations and confusion are not very effective means of discharging the burden of proof that lay on the appellants.

[31] In order to substantiate their claims, the appellants would have had to establish on the balance of evidence that the income generated by Jean-Marc Fillion's professional work had been divided in an objective, rational and plausible manner in accordance with the work performed by the recipients of the amounts of money transferred.

[32] Concerning the quality and quantity of the work, it was not sufficient to state that the work had been performed and remunerated. Given the nature of these cases, it was essential to establish in a plausible manner that the work had been performed and reasonably paid for, that it was useful and relevant in light of the purposes of the business, and that the remuneration had actually been paid.

[33] In assessing reasonableness, it is necessary if not indispensable to be able to rely on a minimum of information from which one or more conclusions may be drawn. Although assessing reasonableness is a subjective exercise, it calls for and indeed demands the consideration of objective factors that will form the basis of the analysis.

[34] In addition, none of the recipients were able to give an acceptable explanation that there was consistency between the work supposedly performed and the amounts received. The only evidence adduced concerning the payments was that everything had been declared to the respondent; that evidence is not very convincing, particularly since the amounts recorded were very advantageous for the members of the Fillion family.

[35] In this case, could the payments and transfers be described as or determined to be reasonable? Subsection 103(1.1) of the *Income Tax Act* ("the *Act*") provides as follows:

Agreement to share income, etc., so as to reduce or postpone tax otherwise payable

103. (1) Where the members of a partnership have agreed to share, in a specified proportion, any income or loss of the partnership from any source or from sources in a particular place, as the case may be, or any other amount in respect of any activity of the partnership that is relevant to the computation of the income or taxable income of any of the members thereof, and the principal reason for the agreement may reasonably be considered to be the reduction or postponement of the tax that might otherwise have been or become payable under this Act, the share of each member of the partnership in the income or loss, as the case may be, or in that other amount, is the amount that is reasonable having regard to all the circumstances including the proportions in which the members have agreed to share profits and losses of the partnership from other sources or from sources in other places.

Agreement to share income, etc., in unreasonable proportions

(1.1) Where two or more members of a partnership who are not dealing with each other at arm's length agree to share any income or loss of the partnership or any other amount in respect of any activity of the partnership that is relevant to the computation of the income or taxable income of those members and the share of any such member of that income, loss or other amount is not reasonable in the circumstances having regard to the capital invested in or work performed for the partnership by the members thereof or such other factors as may be relevant, that share shall, notwithstanding any agreement, be deemed to be the amount that is reasonable in the circumstances.

[36] Subsection 103(1.1) of the *Act* applies to the members of a partnership who are **not dealing with each other at arm's length**. The income shared among these partners **must be in respect of an activity of the partnership**. In addition, the share must be reasonable and must meet certain criteria, such as the capital invested in or work performed for the partnership or such other factors as may be relevant.

[37] In this case, it is difficult if not impossible to conclude that the "shared" amounts were in respect of an activity of the partnership, since it was not possible

to establish clearly what the activities or purposes of each partnership were. That evidence was essential, not secondary as the appellants, at least on the basis of the evidence they adduced, appear to believe.

[38] Although the respondent argued that the expression "reasonable in the circumstances" refers to an objective test, I consider it difficult if not impossible to assess reasonableness using an essentially objective approach. On the other hand, the respondent is right to challenge the essentially subjective approach used by Mr. Massé.

[39] Mr. Massé explained the fact that Pierrette Racine was given less money than her sons, even though the general partnership's income increased from year to year, by stating that Jean-Marc Fillion relied more on his sons than on his spouse for the continuance of the business.

[40] Mr. Massé also argued that valuation of Pierrette Racine's work should be based on Jean-Marc Fillion's valuation of the work of his sons. I found it very surprising to hear someone make such statements after it was argued that Pierrette Racine had been involved as a very high-level partner whereas the age of one of her sons discredits any claim that his work was strategic or indeed essential.

[41] According to Mr. Massé, the amount of income distributed should not exceed 15 per cent to 20 per cent because the reasonableness test might not be met. This approach is inappropriate and arbitrary, and one can readily imagine a host of situations in which this sharing formula would produce absurd results.

[42] Mr. Massé's testimony shows that Jean-Marc Fillion's criteria for dividing the partnerships' incomes were based, not at all on the capital invested by each member or the work performed for the partnership, but on Jean-Marc Fillion's personal assessment for the purpose of achieving his own objectives, which were clearly to divide his income among the members of his family and therefore minimize the tax burden. If this were not his objective, evidence proving that should have been adduced, and this was not done.

[43] Clearly, the real objective was a tax saving, which in itself was not at all irregular. However, the facts would have had to be consistent and plausible.

[44] I am satisfied that the only criterion taken into account was the recipients' tax rate and that the work performed had absolutely no bearing on the income

sharing. Rather than share the amounts on the basis of work actually performed and compute the income tax afterwards, it appears that the available income was distributed so as to minimize the family tax burden by involving each family member. After sharing the income and declaring it on the recipients' income tax returns, the appellants tried to explain that the income earned was justified, reasonable and had been received.

[45] Tax planning calls for complete compliance with all the applicable legislative provisions and hinges on practical, plausible, reasonable facts. In other words, it is not enough to set up a model, an organizational chart, or a series of items, the amounts of which are essentially the result of accounting transactions.

[46] Amounts entered in accounting items must reflect reality. In this case, the facts are quite simple; the balance of evidence has established that the only source of income during the taxation years at issue was the activity of Jean-Marc Fillion. The income was then transmitted to various partnerships that redistributed all of it among the appellants in exchange for their work. The evidence has established that the quantity, quality and relevance of the paid work were less than secondary.

[47] Determining whether a transaction or share amount is reasonable suggests that one or more comparisons can be made with one or more similar, comparable situations. The evidence has not made such comparisons possible.

[48] Nor has there been any evidence regarding the consequences of that work. Was the work essential? Did it benefit the partnerships? Was it, or could it have been performed differently? What were the purposes of the partnerships? What were the partnerships' expectations of the recipients of the income? Responses to all these questions were indeed not essential, but they would have made possible some kind of analysis that could have determined whether the entire setup had been reasonable.

[49] Jean-Marc Fillion and his advisor Mr. Massé clearly set up and arranged various legal vehicles in order to lower the tax payable on the income generated solely by the professional work of Jean-Marc Fillion. In itself, this planning was legitimate and theoretically acceptable, particularly since it could reflect entirely laudable and acceptable objectives: remunerating work actually performed at its fair value and making it possible for the family business to expand.

[50] Theoretically, the entire setup could be law-abiding and legal. However, the facts, procedure, transactions, accounting, transfers and various allocations would have had to reflect unequivocally a factual, reasonable reality. Where was the evidence to this effect?

[51] I assign no probative value to the evidence for the following reasons in particular:

- The December 31, 1994, invoice for management fees of \$19,100 contains few details, is unsupported by documentation, and was prepared and issued in the last few hours of the fiscal year.
- All the persons concerned and involved were members of the same family; they were not dealing with each other at arm's length. Their self-interested testimony should have been supported, completed and confirmed by satisfactory evidence.
- The transfers were made by cheques issued to Jean-Marc Fillion personally who distributed all these amounts in accordance with his own assessment.
- The appellants completely refused to co-operate with the person responsible for the audit and, in particular, refused to provide the agreements and financial statements of the limited partnership. Jean-Marc Fillion also did not allow the auditor to visit the place of business located in the family home.
- The business relations between the limited partnership and the management company were never described or explained, except in unsupported statements that Pierrette Racine had worked and continued to work hard and had earned what she had received.
- Jean-Marc Fillion and his spouse were never able to describe, in even a rudimentary way, the work performed by Pierrette Racine. They claimed that work had been performed and remunerated. For whom? When? How? The answers to these questions did not seem important since this was never established; more importantly, the appellants repeatedly showed impatience and frustration with the questions aimed at obtaining these answers.

- Although theoretically the members of the family were supposed to be key players, the situation was in fact quite the opposite; these persons had absolutely no say in management or administration. How can Jean-Marc Fillion's omnipresence in all the transactions be explained? He argued that he acted *inter alia* as an agent, a representative, a mandatary and a trustee. On what basis was he authorized to act in that capacity? The evidence did not answer this question.
- Mr. Massé argued that the amount of income allocated should not exceed 15 to 20 per cent, adding that section 103 of the *Act* provided for two approaches—one objective and the other subjective. On this point, he stated as follows:

[TRANSLATION]

" ... subjective in the sense that when the work of one partner is to take over from the father, the father has greater responsibilities and motivation to interest the son. I mean, if the father wants his son, because he has a talent for sales, to be a salesperson and not an accountant, the father will likely pay the son more to encourage him to continue along that path."

- As was the case with all the percentages he referred to, the approach by Mr. Massé was essentially arbitrary.
- Quite regularly during the hearing, Jean-Marc Fillion made general statements about fundamental aspects of the appeals, without ever documenting those statements or supporting them with information that was nonetheless essential. I refer in particular to the source of the income and the description of the work performed by the family members.
- The partnerships set up under the plan had no bank accounts and were not registered in a way that would enable a third party to be aware of their existence.

[52] There is no doubt that the facts adduced in support of the appeals do not meet the reasonableness test. Everything was thrown together without distinction, and the only criterion was without a doubt the tax bite.

[53] I do not doubt that the members of the Fillion family occasionally performed work, but it would have been important to establish what work they did and, most importantly, for which entity they did it. Each time the Court tried to find out or obtain the answers to these questions, the standard answer was given: "They worked; they were paid; they received the money as declared on their income tax returns."

[54] The amounts of income paid to the family members were usually lower than the basic personal exemption and obviously ensured that no income tax was payable on those amounts of income.

[55] There is no doubt in my mind that Jean-Marc Fillion split his income by means of the partnerships. Exhibit A-3 is quite revealing about the complete lack of consistency. Indeed, the income of the limited partnership increased each year; as well, although all the appellants strongly emphasized that Pierrette Racine made a phenomenal contribution, it appears that her income for the 1994 and 1995 taxation years was lower than the income of her sons, then aged 14 and 19.

[56] As for the 1993 taxation year, in which the favourable treatment resulting from Pierrette Racine's considerable involvement when the family business was starting up was strongly emphasized, it appears that she was given the same amount as was her son Charles. Exhibit A-3 also shows that, during the 1994 and 1995 taxation years, Philippe, then aged 14 or 15, received as much as did his brother, who was then 18.

[57] According to Jean-Marc Fillion and his financial advisor, at year end the partnership's income was distributed in a fair and reasonable manner, with no records or documents to guide in the nature or amounts of the shares. At each year-end, all income was withdrawn from the partnerships.

[58] The evidence has established that the criteria used by Jean-Marc Fillion did not meet the test set out in subsection 103(1.1) of the *Act*.

[59] Although the reasonableness test is not a simple mathematical exercise and suggests that a number of factors will be taken into consideration, it must nevertheless have an acceptable and reasonable basis in operations that are comparable to generally recognized economic activities.

[60] On the issue of what is "reasonable", in *Archbold v. Canada*, [1995] T.C.J. No. 111, the Honourable Judge Lamarre Proulx wrote as follows, at paragraph 8:

The share of the profits and of the losses which may appear reasonable for a husband who draws his income from an employment and wishes to help his wife start a family business is not reasonable within the meaning of subsection 103(1.1) of the Act. In the context of the Income Tax Act, reasonable means reasonable business wise.

[61] The transfers made by Jean-Marc Fillion were not reasonable; they were generous and characterized by appreciation and may have shown family solidarity, but they were certainly not reasonable within the meaning of subsection 103(1.1) of the *Act* and, more importantly, they were not warranted by the evidence adduced.

[62] In *The Queen v. Friedberg*, [1991] F.C.J. No. 1255 (Tab H), the Federal Court of Appeal made the following comment:

In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *The Queen v. Irving Oil*, 91 D.T.C. 5106, per Mahoney J.A.). If a taxpayer fails to take the correct formal steps, however, tax may have to be paid. If this were not so, Revenue Canada and the courts would be engaged in endless exercises to determine the true intentions behind certain transactions. Taxpayers and the Crown would seek to restructure dealings after the fact so as to take advantage of the tax law or to make taxpayers pay tax that they might otherwise not have to pay. While evidence of intention may be used by the Courts on occasion to clarify dealings, it is rarely determinative. In sum, evidence of subjective intention cannot be used to 'correct' documents which clearly point in a particular direction.

[63] Jean-Marc Fillion claimed a business investment loss in 1993.

[64] That claim is the result of an outlay of \$30,000 to purchase shares in the company "Les Mines diatissan Ltée". The appellant provided very little information about the nature of his outlay, mainly emphasizing that he had taken

advantage of information according to which the experiment would prove to be successful financially speaking. He clearly knew little about the company.

[65] The relevant facts were established by the testimony of Jocelyn Duchesne, an auditor with the Canada Customs and Revenue Agency (C.C.R.A.), who conducted an investigation and carried out an exhaustive analysis of the file of Les Mines diatissan Ltée. The following uncontradicted facts emerged from his investigation:

- The investors were divided into two groups: the first was made up of persons who had invested under a joint venture arrangement; the second, including the appellant, was made up of investors who had purchased capital shares of the company.
- The only fixed assets of Les Mines diatissan Ltée were located in Mali. All the company's activities were carried on in that foreign country.

[66] On the basis of these facts, can we conclude that the appellant was eligible to claim a business investment loss?

[67] First, it is appropriate to refer to the relevant provisions of the *Act*, that is, paragraph 39(1)(c), which refers to section 248 of the *Act*:

Meaning of capital gain and capital loss

39. (1) For the purposes of this Act,

...

(c) a taxpayer's business investment loss for a taxation year from the disposition of any property is the amount, if any, by which the taxpayer's capital loss for the year from a disposition after 1977

(i) to which subsection 50(1) applies, or

(ii) to a person with whom the taxpayer was dealing at arm's length

of any property that is

(iii) a share of the capital stock of a small business corporation, or

(iv) a debt owing to the taxpayer by a Canadian-controlled private corporation (other than, where the taxpayer is a corporation, a debt owing to it by a corporation with which it does not deal at arm's length) that is

(A) a small business corporation,

(B) a bankrupt (within the meaning assigned by subsection 128(3)) that was a small business corporation at the time it last became a bankrupt, or

(C) a corporation referred to in section 6 of the Winding-up Act that was insolvent (within the meaning of that Act) and was a small business corporation at the time a winding-up order under that Act was made in respect of the corporation,

exceeds the total of

(v) in the case of a share referred to in subparagraph 39(1)(c)(iii), the amount, if any, of the increase after 1977 by virtue of the application of subsection 85(4) in the adjusted cost base to the taxpayer of the share or of any share (in this subparagraph referred to as a "replaced share") for which the share or a replaced share was substituted or exchanged,

(vi) in the case of a share referred to in subparagraph 39(1)(c)(iii) that was issued before 1972 or a share (in this subparagraph and subparagraph 39(1)(c)(vii) referred to as a "substituted share") that was substituted or exchanged for such a share or for a substituted share, the total of all amounts each of which is an amount received after 1971 and before or on the disposition of the share or an amount receivable at the time of such a disposition by

(A) the taxpayer,

(B) where the taxpayer is an individual, the taxpayer's spouse or common-law partner, or

(C) a trust of which the taxpayer or the taxpayer's spouse or common-law partner was a beneficiary

as a taxable dividend on the share or on any other share in respect of which it is a substituted share, except that this subparagraph shall not apply in respect of a share or substituted share that was acquired after 1971 from a person with whom the taxpayer was dealing at arm's length,

(vii) in the case of a share to which subparagraph 39(1)(c)(vi) applies and where the taxpayer is a trust referred to in paragraph 104(4)(a), the total of all amounts each of which is an amount received after 1971 or receivable at the time of the disposition by the settlor (within the meaning assigned by subsection 108(1)) or by the settlor's spouse as a taxable dividend on the share or on any other share in respect of which it is a substituted share, and

(viii) the amount determined in respect of the taxpayer under subsection 39(9) or 39(10), as the case may be.

Definitions

248. (1) In this Act,

...

"**small business corporation**", at any particular time, means, subject to subsection 110.6(15), a particular corporation that is a Canadian-controlled private corporation all or substantially all of the fair market value of the assets of which at that time is attributable to assets that are

(a) used principally in an active business carried on primarily in Canada by the particular corporation or by a corporation related to it,

(b) shares of the capital stock or indebtedness of one or more small business corporations that are at that time connected with the particular corporation (within the meaning of subsection 186(4) on the assumption that the small business corporation is at that time a "payer corporation" within the meaning of that subsection), or

(c) assets described in paragraphs 248(1) "small business corporation" (a) and 248(1) "small business corporation" (b),

including, for the purpose of paragraph 39(1)(c), a corporation that was at any time in the 12 months preceding that time a small

business corporation, and, for the purpose of this definition, the fair market value of a net income stabilization account shall be deemed to be nil;

[68] The appellant's loss cannot be determined as a business investment loss because the investment was essentially used to make acquisitions in Mali and, as a result, all or substantially all of the fair market value of the assets was not attributable to assets used principally in an active business carried on primarily in Canada by the particular corporation or by a corporation related to it.

[69] Essentially, in order to substantiate his claim of loss, the appellant stated that he made the investment knowing that, although highly risky, it was likely to make him a millionaire quickly. This type of motivation or explanation is certainly not sufficient to conclude that his claims are correct. Therefore, the business investment loss in the amount of \$22,500 should be disallowed.

Management fees

[70] Counsel for the appellant Jean-Marc Fillion argued strenuously that disallowing the management fees expenditure of \$19,100 for the 1994 taxation year resulted in double taxation.

[71] Stating that the disallowance of the \$19,100 expense constitutes double taxation first requires proof of the soundness of the premise that the expenditure was allowable.

[72] In order to claim an expense, it is not enough to make an accounting entry backed by a vague invoice. In order to deduct an expense from income, it must be established that the evidence was real, fully supported and justified and, moreover, that the expenditure was incurred in order to produce business income in accordance with paragraph 18(1)(a) of the *Act*.

[73] As was the case with the other aspects of the appeals, the appellant was unable or simply unwilling to explain the relevance of the nonetheless significant expense of \$19,100. He simply stated that to earn money you had to spend money, a statement that in itself is not necessarily false, but is certainly not sufficient to establish that this was a genuine expenditure.

[74] If the appellant had provided certain details, explained why and how he arrived at this amount and, at the same time, had connected it in some way to his

income, the Court might have been able to make certain corrections but the evidence was so deficient that it is not possible to make any correction, if only to confirm that it was appropriate to disallow the management fees expense established by the appellant at \$19,100.

[75] It seems appropriate to reproduce the provisions of section 67 and paragraph 18(1)(a) of the *Act*, which read as follows:

General limitation re expenses

67. In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under this Act, except to the extent that the outlay or expense was reasonable in the circumstances.

General limitations

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

General limitation

(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;

[76] The burden of proof was on the appellants. The assessments that were appealed from were made on the basis of many assumptions of fact. In order to win their case, it was not enough for the appellants to simply deny these assumptions of fact. They had to establish, on the basis of documented evidence and reasonable, plausible explanations, the merits of their respective claims.

[77] In this case, the evidence was not only completely deficient and unsupported by objective documents or facts; it was also essentially made up of general, often confused and even contradictory explanations. None of the appellants gave specific, explicit testimony about the facts forming the basis for the assessments that are the subject of these appeals.

[78] Indeed, the appellants indicated their disagreement, stated their frustrations and criticized the conclusions reached by the respondent; but they never rebutted

those conclusions by adducing in evidence any information that was justified, justifiable or, most importantly, that was reasonable.

[79] I must dispose of the appeals on the basis of the evidence, the burden of which was on the appellants. It is not possible to make any corrections whatsoever to the assessments made by the respondent on the basis of the evidence adduced.

[80] For all these reasons, the appeals are dismissed. Since the appeals were heard on common evidence, the respondent will have her costs on the basis of one case alone, that of the appellant *Jean-Marc Fillion* (1999-3875(IT)G).

Signed at Ottawa, Canada, this 29th day of October 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 28th day of January 2004.

Sophie Debbané, Revisor