Docket: 2011-538(IT)I

BETWEEN:

MICHEL BOUCHARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 20, 2013, at Montreal, Quebec.

By: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Valerie Messore

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2005, 2006 and 2007 taxation years is dismissed.

Signed at Kingston, Ontario, this 7th day of August 2013.

"Rommel G. Masse"

Masse D.J.

Citation: 2013 TCC 247
Date: 20130807
Docket: 2011-538(IT)I

BETWEEN:

MICHEL BOUCHARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

[1] This is an appeal from Notices of Reassessment disallowing business losses from a partnership for the 2005, 2006 and 2007 taxation years.

[2] The Appellant filed income tax returns for the taxation years 2005, 2006 and 2007 (the "taxation years"). In these returns, he claimed business losses from a partnership known as *Tennis Mania Limited Partnership* (the "partnership") in the amount of $25,047 for 2005, $20,085 for 2006 and $36,011 for 2007. Initially, these business losses were allowed by the Canada Revenue Agency (the "CRA"). Following an audit of the partnership, the CRA issued Notices of Reassessment on May 28, 2009, disallowing the business losses claimed. The Appellant filed a Notice of Objection and on November 18, 2010, the CRA confirmed the Reassessments. Hence the appeal to this Court.

Factual Context

[3] Eugénie Bouchard, who is now aged 19, is a tremendously gifted athlete. She started playing tennis at age five and she has worked very hard to hone her skills. Her hard work has been rewarded. She has become world renown and world ranked as a

junior tennis player and now as a professional player. She reached the pinnacle of her junior career in July 2012 when she won the Wimbledon junior girls' single and doubles titles. She was ranked second in the world in ITF (International Tennis Federation) junior rankings. She has since turned professional and is now enjoying a promising career. At the end of 2012, she enjoyed a WTA (Women's Tennis Association) professional ranking of 140th in the world. As of the date of this hearing, her ranking had improved to 123rd. This amazingly talented young woman will no doubt make all of Canada very proud for years to come as she pursues her professional career. Her father Michel Bouchard, the Appellant, is definitely Eugénie Bouchard's biggest fan and her biggest supporter. He is understandably very proud of her.

[4] Michel Bouchard noticed that from a very early age Eugénie had extraordinary talent. He recognized that Eugénie was one of those very rare players who had the potential to become a successful professional tennis player. However, it takes a lot of effort and money to develop a young but talented player into a world ranked professional player. It requires hard work and dedication on the part of the athlete. It requires many lessons, private one-on-one coaching, training camps in Florida, travel expenses, tournaments both in and out of Canada, equipment, fitness trainers and so much more. All of this is very expensive.

[5] The Appellant expended a lot of his personal resources in helping Eugénie realize her potential. From the time Eugénie was five years of age until age nine he paid for her development out of his own pocket. However, the Appellant is also an astute business man and he thought of a way how he could best finance and foster the development of Eugénie's talents as well as diminish the costs to himself. He conceived of a business venture whereby he would be able to attract investors with the promise of sharing Eugénie's income stream once she became a professional player. Consequently, he and another individual founded a partnership called "Tennis Mania LP". This other individual, François Gervais, was the parent of another young tennis player, Béatrice Gervais. The Appellant, Mr. Gervais and MGB Capital Inc., the Appellant's company, entered into a partnership agreement dated December 8, 2003 (see Exhibit A-1, Tab 13). The partnership was registered pursuant to the laws of the province of Québec as a limited partnership (see Exhibit A-1, Tab 14). The object of the partnership as indicated in paragraph four of the partnership agreement was, *" ... la promotion du tennis junior et l'assistance financière auprès de jeunes athlètes prometteurs."* In other words, the object was to promote junior tennis and support young promising athletes. At the beginning, there were only two athletes who were assisted by the partnership: Eugénie Bouchard and Béatrice Gervais. The partnership stopped funding Béatrice because she did not have the potential to make

it as a professional player. So then, the only real purpose of the partnership was to finance the development of Eugénie Bouchard as a professional tennis player. The contributions to the partnership and the equity in the partnership varied from year to year depending on the total funds individual partners had contributed.

[6] According to the Appellant, the deal was that investors would get a return on their investment once Eugénie turned professional, which would be several years in the future. It was understood that, once Eugénie turned pro, she would pay the investors 10% of her tennis earnings up until the time that the investors recouped all of their investment, plus a 10% per annum return on investment.

[7] Even though the purposes of the partnership was to promote junior tennis and financially assist promising young players, the Appellant candidly admits that the partnership's mission was to finance one athlete in particular, his daughter. The Appellant admits that they were searching for investors for just Eugénie and, for a while, Béatrice Gervais. If other young players were to be considered, then the parents of that young player had to find their own investors. As the Appellant stated, *"I'm not going to find investors for everyone else's kids."* No other young players were in fact assisted by the partnership.

[8] The workings of the venture can be briefly described. The Appellant contributed to the partnership the amount that was required for his own daughter's training during any particular year. For instance, during the 2005 taxation year, the Appellant had spent $25,000 of his own money to pay for Eugénie's tennis expenses. On December 6, 2005, the Appellant deposited $25,000 into the partnership bank account and a cheque in that same amount was immediately issued to him as a reimbursement for the expenses that he had incurred. The money was in and out of the partnership bank account practically the same day. It is clear that the money was funnelled through the partnership bank account in order to create a tax deductible expense for the Appellant which was equal to the amount that he had actually spent for his daughter's tennis expenses that year. This amount would then be claimed as a partnership business loss for that taxation year in the Appellant's income tax return. This resulted in significant tax savings to the Appellant and thus made it easier for him to finance Eugénie's burgeoning career. Mr. Gervais would do the same for all expenses related to his daughter, Béatrice.

[9] The only other investor that the partnership has been able to attract is Mr. Jacques Nolin who has known Michel Bouchard since the 1980's when they both worked at Wood Gundy. Mr. Nolin knew this was a risky venture and he would have to wait several years before realizing a return but he had a great deal of confidence in

Eugénie's talents, as well as in Mr. Bouchard's honour and integrity. He also felt that a return of 10% per annum was worth the risk. In addition, he was interested in the significant tax advantages that this arrangement immediately offered. Consequently, he invested into the partnership the sum of $10,000 for 2006 and $20,000 for 2007. He has not realized any return yet on his investment but he is hopeful and quite confident that he will as Eugénie's professional career takes off.

[10] The Appellant was successful in finding some sponsors for Eugénie. Equipment was provided by Head (see Exhibit A-1, Tab 9); Adidas agreed to pay her $75,000 for two years (see Tab 10); and there were also agreements entered into with 2K Sports, Inc. (see Tab 11) and Nike (see Tab 12). The benefits of these sponsorships went to Eugénie and not to the partnership.

[11] Other than banking charges, the partnership did not have any other operating expenses. From the time of establishing the partnership to the time of the hearing of this trial, almost ten years, the partnership has not made any return on its investment. Even though Eugénie has started to earn money as a professional tennis player, she has yet to pay any amount to the partnership, although her father is quite confident that she will. The partnership stopped funding tennis activities by the end of 2008 or the beginning of 2009 since by that time Eugénie was making enough money to pay her own expenses.

[12] At the time that the partnership was established, Eugénie was only nine years of age. There is simply no way that Eugénie could, at age nine, commit herself legally to share her future income stream if and when she turned professional. She was a minor. Eugénie was not a party to the partnership agreement and at no time did she enter into any legally binding agreement with her father or the partnership to pay back any money that was expended on her behalf for her development as a professional tennis player.

Theory of the Appellant

[13] The Appellant admits that the partnership expenses that have been incurred have a significant personal aspect; they were to advance the development of Eugénie's career as a tennis player. However, he argues that the fundamental basis upon which the partnership was established was to finance Eugénie's development as a tennis player and also earn a profit. The partners realized that this was a risky venture but they had the expectation that they would recoup all of their investment and make a profit of 10% per year on their investment until such time as they were completely reimbursed. The fact that no revenue has been earned yet is not

determinative since the investors are looking at future revenues as Eugénie becomes a more seasoned professional and begins to earn more money. The fact that Eugénie was under no obligation to pay and that she might refuse to pay anything at all is of no moment since that was a risk that the investors willingly took when they decided to invest in this scheme. The primary objective was to invest in a budding tennis star and to earn a return from her eventual success. While doing so, they simply found a tax-efficient structure within which to do this.

[14] The Appellant therefore prays that his appeal be allowed.

Theory of the Respondent

[15] The Respondent submits that the expenses here under consideration were completely personal in nature since the Appellant's daughter was the sole beneficiary of the enterprise. It is also argued that the expenses claimed are not deductible since the partnership did not have a source of income against which expenses can be deducted pursuant to the *Income Tax Act*, R.S.C., 1995, c. 1 (5th supp.) (the "*Act")*. It is argued that the Appellant's actions did not demonstrate a pursuit of profit and were not carried out in accordance with objective standards of businesslike behaviour. The goal of the enterprise was to fund the Appellant's daughter's development as a tennis player while at the same time creating a tax deduction for the Appellant. There was no reasonable expectation of profit. It is argued that this was not a true partnership since the Appellant was only in this enterprise to the extent that his daughter could be funded. It is submitted that the relationship between the partnership and Eugénie Bouchard was more in the nature of a loan than it was in the nature of a business venture and it was a loan which could not be legally enforced since there was no legal relationship and no enforceable contract between Eugénie and the partnership. It is also argued that there was no search for other talent to make the business grow; the partnership was focussing only on Eugénie Bouchard, the Appellant's daughter.

[16] The Respondent therefore submits that the appeal should be dismissed.

Legislative Provisions

[17] The relevant provisions of the *Act* are as follows:

> **3. Income for taxation year**.
>
> The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(*a*) determine the total of all amounts each of which is the taxpayer's income for the year ... from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each … business …

[…]

(*c*) determine the amount, if any, by which the total determined under paragraph (*a*) … exceeds the total of the deductions permitted by subdivision e in computing the taxpayer's income for the year (except to the extent that those deductions, if any, have been taken into account in determining the total referred to in paragraph (*a*)), and

(*d*) determine the amount, if any, by which the amount determined under paragraph (*c*) exceeds the total of all amounts each of which is the taxpayer's loss for the year from … [a] business … ,

9(1) Income. Subject to this Part, a taxpayer's income for a taxation year from a business … is the taxpayer's profit from the business … for the year.

9(2) Loss. Subject to section 31, a taxpayer's loss for a taxation year from a business … is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

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

(a) General limitation - ***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;***

[…]

(h) Personal and living expenses - ***personal or living expenses of the taxpayer***, …

96(1) General rules. Where a taxpayer is a member of a partnership, … the taxpayer's taxable income earned in Canada for a taxation year, … shall be computed as if

(*a*) the partnership were a separate person resident in Canada;

(*b*) the taxation year of the partnership were its fiscal period;

[...]

(*f*) the amount of the income of the partnership for a taxation year from any source or from sources in a particular place were the income of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer' share thereof; and

(*g*) the amount, if any, by which

(i) the loss of the partnership for a taxation year from any source or sources in a particular place,

exceeds

(ii) in the case of a specified member (within the meaning of the definition "specified member" in subsection 248(1) if that definition were read without reference to paragraph (*b*) thereof) of the partnership in the year, the amount, if any, deducted by the partnership by virtue of section 37 in calculating its income for the taxation year from that source or sources in the particular place, as the case may be, and

(iii) in any other case, nil

were the loss of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer's share thereof.

[Emphasis added]

Analysis

[18] In the final analysis, it is clear that the Appellant was the driving force in setting up this venture; without him, Tennis Mania LP would not exist. His motivation was to benefit his daughter and to help her realize her potential as a professional tennis player. It is also clear in my view that the Appellant meant to create a tax loss that could be deducted from his income thus resulting in significant financial benefits for the Appellant. As pointed out by the Appellant, a taxpayer can arrange his affairs in such a way as to minimize the payment of taxes. Even though a taxpayer enters an arrangement with the principal view of creating tax deductions, this does not mean that the arrangement was not for the purposes of earning revenue.

If the secondary purpose of the arrangement is the realization of a profit then the original losses are tax-deductible: see *Water's Edge Village Estates (Phase II) Ltd v Canada*, 2002 FCA 291, [2003] 2 FC 25. Indeed, a taxpayer can enter a partnership with the primary motivation of securing a tax loss but there must at least be an ancillary intention to carry on business in common with the view to profit: see *Witkin v Canada*, [2002] FCJ No. 703 (QL), at paragraph 15 (leave to appeal dismissed, [2002] SCCA No. 294 (QL)). Without such an intention, the tax losses are not deductible from income. This theme has been repeated by Justice Lamarre of this Court in *Carpentier v Canada*, [2005] TCJ No. 519 (QL), where she stated at paragraph 42:

> [42] Further, where it is established that the sole reason for the creation of a partnership was to give a partner the benefit of the tax loss, when there was no contemplation in the parties minds that a profit would be derived from carrying on the relevant business, the partnership could not in any real sense be said to have been formed "with a view of profit (see *Continental Bank*, *supra*, at paragraph 43).

[19] The key issue to be determined in this appeal is whether or not the partnership was carrying on business with a view to profit. This requires the Appellant to establish that his predominant intention was to make a profit from the partnership and that the partnership was carried out in accordance with objective standards of business like behaviour.

[20] In the case of *Stewart v Canada*, [2002] 2 SCR 645, the Supreme Court of Canada redefined the test that must be used to determine whether a taxpayer has a business source of income. The Court was of the view that the "reasonable expectation of profit", although a factor to be considered, was no longer the test to be applied. The Court stated as follows:

> 48 In our view, the determination of whether a taxpayer has a source of income, must be grounded in the words and scheme of the Act.
>
> […]
>
> 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: … 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. […]
>
> [Emphasis added]

[21] In the case at bar, having examined the activities of the partnership and also those of the Appellant within the framework of the partnership, it is obvious that the Appellant became involved in this venture strictly for personal reasons; the development of his daughter as a professional tennis player. I conclude that he was not looking at the partnership as a source of profit but was instead looking for a means to finance Eugénie's development as a tennis player, while at the same time creating a tax advantage in the form of a tax loss for himself. In so deciding, I have considered the test as set out in *Stewart, supra*, as well as the following factors, among others:

a) The objects of the partnership do not speak of profits. Paragraph 4 of the partnership agreement states that the activities of the partnership is the promotion of junior tennis and to provide financial assistance to promising young athletes. The partnership agreement makes no mention at all of a 10% return on

investment. The partnership declared no revenue at any time during its existence from 2003 up to the time of the hearing of this appeal, a period of almost ten (10) years.

b) The business losses claimed by the Appellant were completely personal to him and as such are not deductible pursuant to paragraph 18(1)(*h*) of the *Act*. The partnership was established to help raise funds to assist the Appellant in the training and development of Eugénie into a professional player. I find that these personal expenses were not incurred to earn income from a business.

c) The manner in which the partnership was operated was not for the purpose of earning income from a business activity; it was only operated in such a way as to create tax deductions. Had the Appellant paid these expenses directly, which he did, they would not have been tax deductible in his hands. Funds were deposited in the partnership bank account and then immediately taken out as a reimbursement. Flowing the funds "in and out" from the Appellant through the bank account of the partnership and then immediately back to the Appellant again cannot convert a non-deductible expense into a deductible expense.

d) The partnership's purported source of income was totally dependant on Eugénie's good will once she turned professional and only if she turned professional. Thus, whether viewed subjectively or objectively, the partnership had no reasonable expectation of profit and had no realistic source of profit. This, for the following reasons:

    i) Eugénie was only 9 years old when the partnership was formed. She did not have the legal capacity to commit herself to share her income stream once she turned professional.

    ii) Once Eugénie became an adult and turned professional, there was no way to oblige her to repay the partnership for the moneys that were expended on her behalf.

    iii) Even if Eugénie agrees to share some of her income stream

with the partnership, she is certainly not obliged to pay all of the money, or any of it. She was not a party to this arrangement and so she could pay whatever amount she chose. She could change her mind at any time and stop paying and the partnership would have no legal recourse.

iv) There is nothing to say that Eugénie would be willing to pay a 10% per annum return on the monies that were expended for her training; she may very well be of the view that another percentage would be more appropriate. She may not be willing to pay any percentage at all.

I am not suggesting for one moment that Eugénie would be capricious or cavalier in her dealings with her father once she turned pro, but the reality is that she was not a party to the venture and she cannot legally be obliged to provide the profits that the partnership was supposedly looking for – her money is her money and no one else's. Whether she chooses to share her money or not is her personal choice and the partnership is powerless to do anything about it. The partnership had no legal recourse against her if she refused to share her income stream with the partnership.

e) The partnership had no source of revenue since any future potential revenues would not be earned by the partnership but would be earned by Eugénie. Any potential revenues from competitions and sponsorships would not be revenues for the partnership but would instead be revenues gained by Eugénie Bouchard in her professional career as a tennis player.

f) Any equipment, financial support or winnings received by Eugénie during the taxation years were not reported as revenue by the partnership.

g) There was no effort made at all to sign up any other athletes to share their future income stream and to pay a return of 10%, or any other percentage per annum, on moneys paid into the partnership. There was no search for other talent even though the purpose of the partnership was the promotion of junior tennis. This is inconsistent with a view to earning profits from the

promotion of junior tennis.

h) The partnership had no operating costs other than banking expenses

Conclusion

[22] In conclusion, I am not satisfied that the Appellant has established that his predominant intention was to make a profit from the partnership activities. I find that the predominant purpose and intention was personal in nature and was clearly in relation to his daughter. A secondary but equally important purpose was the creation of a tax loss by using an "in and out" scheme of flowing money through the partnership bank account. These expenses could not be deducted by the Appellant himself and using this "in and out" scheme cannot convert non-deductible personal expenses into deductible business or partnership expenses. I am not satisfied that the activity that was being carried out was done so in a sufficiently commercial manner so as to constitute a source of income. When one looks at the commerciality of the activity, it is readily apparent that any hope of recouping investments and making a profit lay far in the future, at least a decade from the time of establishing the partnership. Any hope of recouping investments and making a profit was not dependant on the merits of a good business plan but was instead entirely dependant on the good will and willingness of Eugénie

Bouchard to voluntarily share the fruits of her hard earned success with the partnership; something she may not be willing to do, and something she cannot be forced to do.

[23] For all of the foregoing reasons, this appeal is dismissed.

Signed at Kingston, Ontario, this 7th day of August 2013.

"Rommel G. Masse"

Masse D.J.

CITATION:	2013 TCC 247
COURT FILE NO.:	2011-538(IT)I
STYLE OF CAUSE:	MICHEL BOUCHARD v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	March 20, 2013
REASONS FOR JUDGMENT BY:	The Hon. Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	August 7, 2013

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Valerie Messore

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	William F. Pitney Deputy Attorney General of Canada Ottawa, Canada