

Dockets: 2014-90(IT)G,
2014-1171(IT)G

BETWEEN:

PHILIPPE D'AUTEUIL,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard concurrently and consecutive with the appeals of *Antoine Bérubé* (dockets 2014-123(IT)G and 014-461(IT)G) and of *Martin Fournier Giguère* (dockets 2014-1786(IT)G and 2014-1787(IT)G), on September 13, 14, 15, 16, 20, 21, 22 and 23, 2021, at Quebec City, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Danny Galarneau Bénédicte Dupuis
Counsel for the Respondent:	Grégoire Cadieux Sonia Bédard

JUDGMENT

The appeal from the reassessment made on November 1, 2013, regarding the 2008 taxation year is dismissed without costs in accordance with the attached reasons for judgment.

The appeals from the reassessments made on November 1, 2013, regarding the 2009, 2010, 2011 and 2012 taxation years are allowed in part without costs and the

assessments mentioned above are referred back to the Minister of National Revenue for reconsideration and reassessment in order to (1) reduce the appellant's taxable income for the 2009, 2010 and 2011 taxation years from \$305,661, \$3,550, and \$1,684, respectively; and to (2) allow a business loss of \$215,781 for the 2012 taxation year, all in accordance with the attached reasons for judgment.

Signed at Montreal, Quebec, this 25th day of January 2023.

"Réal Favreau"

Favreau J.

Translation certified true
on this 24th day of January 2024.
François Brunet, Revisor

Citation: 2023 CCI 3
Date: 20230125
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BETWEEN:

PHILIPPE D'AUTEUIL,

Appellant,

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HIS MAJESTY THE KING,

Respondent.

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REASONS FOR JUDGMENT

Favreau J.

[1] These are appeals from reassessments made under the *Income Tax Act*, R.S.C., (1985), c. 1 (5th Supp.), as amended, (the "Act") by the Minister of National Revenue (the "Minister") on November 1, 2013, for the appellant's 2008, 2009, 2010, 2011 and 2012 taxation years.

I. Assessment and appeal history

[2] After a request to the appellant that he produce his income statement for the 2008 taxation year went unanswered, the Minister made a first assessment for the 2008 taxation year on April 8, 2013. The appellant lodged a notice of objection in respect of the first assessment and provided additional information. In accordance with this first assessment, the Minister had added the following amounts to the appellant's income:

- Investment income = \$195
- Taxable capital gain = \$5,008
- Business income from his poker activities = \$700,000

[3] On November 1, 2013, the Minister made a reassessment for the 2008 taxation year in which \$167,688 was added to the appellant's income as business income from his poker activities and a penalty was charged under subsection 163(2) of the Act.

[4] The appellant did not object to this assessment prior to appealing it before this Court.

[5] On November 1, 2013, the Minister also reassessed the appellant for the 2009, 2010, 2011 and 2012 taxation years. Under these reassessments, the Minister had added the following amounts from the appellant's poker activities to his income and charged penalties under subsection 163(2) of the Act.

Taxation years	Additional income
2009	\$305,661
2010	\$1,410,320
2011	\$1,920,558
2012	\$736,848

[6] The reassessment from November 1, 2013, for the 2009 taxation year was made outside of the normal reassessment period.

[7] Following a consent reached before this Court regarding the part of the appellant's appeals that concerns the imposition of penalties laid out in subsection 163(2) of the Act under the reassessments dated November 1, 2013, with regard to the 2008, 2009, 2010, 2011 and 2012 taxation years, the appellant's appeals were allowed, without costs, by way of a judgment from June 23, 2015, and the reassessments were amended by the penalties being vacated under subsection 163(2) of the Act.

[8] Following a partial consent reached between the parties on September 13, 2021, under subsection 171(2) of the Act, the parties agreed that, in the event that this Court should decide to tax the appellant's poker earnings as business income, the judgement would be rendered so as to partially allow the appeals and to amend the reassessments in order to allow (1) the following deductible business expenses that were incurred by the appellant and to reduce his taxable income accordingly.

<u>Taxation year</u>	<u>Expenses</u>
2009	\$305,661
2010	\$3,550
2011	\$1,648

and (2) a business loss of \$215,781 for the 2012 taxation year.

II. Motion

[9] At the opening of the hearing, the respondent filed a motion under paragraphs 53(1)(c) and (d) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") in order to have quashed an application to bring documents attached to the notice of intention to call a Canada Revenue Agency ("CRA") employee, Mathieu Marois, to testify.

[10] The Notice of Intention served on August 3, 2021, called the CRA auditor who issued the notices of assessment at issue in the dockets of Philippe D'Auteuil (dockets 2014-90(IT)G and 2014-1171(IT)G), of Antoine Bérubé (dockets 2014-123(IT)G and 2014-461(IT)G) and of Martin Fournier Giguère (dockets 2014-1786(IT)G and 2014-1787(IT)G) ("the appellants") and requested that he bring with him the following information and documents:

1. The number of files of poker players processed by the Canada Revenue Agency, divided according to Canadian province, for all the taxation years from 2008 to the present;
2. The number of assessments made by the Canada Revenue Agency in relation to poker and divided according to Canadian province for all the taxation years from 2008 to the present;
3. The overall amount assessed by the Canada Revenue Agency in poker-related files, divided according to Canadian province, for all the taxation years from 2008 to the present;
4. The number of files of poker players in which the Canada Revenue Agency allowed business losses for losses related to poker activities, divided according to Canadian province, for all the taxation years from 2008 to the present;

5. The number of assessments made by the Canada Revenue Agency allowing a business loss to a poker player for his or her poker activities, divided according to Canadian province, for all years from 2008 to the present;
6. The overall amount assessed as business losses by the Canada Revenue Agency in poker-related files, divided according to Canadian province, for all the taxation years from 2008 to the present;
7. All work directives that are directly or indirectly connected to the files of poker players;
8. All internal Canada Revenue Agency documentation sent to Agency auditors in relation to the audits of poker players;

[11] After hearing the parties' submissions regarding the above-mentioned motion, this Court granted the motion and quashed the application to bring the documents and information requested on the grounds that they are clearly not relevant or useful for the purposes of resolving the matters in dispute in these appeals, which consist of determining whether the poker earnings of each of the appellants constituted business income over the course of the 2008, 2009, 2010, 2011 and 2012 taxation years. Only one set of costs attributable to this motion has been granted to the respondent.

III. Issue

[12] The only issue before this Court is whether the net earnings from Philippe D'Auteuil's poker game activities should be included as business income in computing his income under sections 3 and 9 of the Act for the 2008, 2009, 2010, 2011 and 2012 taxation years.

[13] As indicated above, the question of the net earnings issuing from Philippe D'Auteuil's poker activities is not in dispute before this Court.

IV. Positions of the parties

A. Appellant's position

[14] According to the appellant, this Court must determine whether poker is a game of chance (betting) or whether it constitutes a game of skill.

[15] If this Court finds that poker is a game of chance, it must allow the appeals and set aside the reassessments on the basis of paragraph 40(2)(f) of the Act.

[16] According to section 3 of the Act, a taxpayer's source of income must be identified in order to determine how this income will be treated for fiscal purposes.

[17] A taxpayer's gambling-related activities may be taxable income if they constitute a source of income. As a general rule, earnings from games of chance are not taxable as they do not come from a source of income.

[18] In order to determine whether a taxpayer's activities constitute a source of income from a business or not, the Supreme Court of Canada propounded a two-stage approach in *Stewart v. Canada*, 2002 SCC 46 ("Stewart").

[19] The first stage consists of determining whether the poker activity is undertaken in pursuit of profit or whether it is a personal endeavour. This first inquiry is only relevant when the activity contains personal elements, as when the taxpayer's activity is not in any way personal in nature, a source of income within the meaning of the Act is inevitably present.

[20] If the taxpayer's activity can be both a pastime and a business, it must be determined whether the taxpayer undertook this activity in a sufficiently commercial manner—with the subjective intention of making a profit—as documented by objective evidence of serious businesslike behaviour (paragraph 54 of *Stewart*).

[21] When analyzing this subjective intention to make a profit, it is important to consider all the facts surrounding the taxpayer's activity in the light of a variety of factors. In *Moldowan v. The Queen*, [1978] 1 S.C.R. 480 ("Moldowan"), the Supreme Court of Canada set out the following four criteria in order to objectively determine if a taxpayer has a reasonable expectation of profit:

- a) the profit and loss experience in past years;

- b) the taxpayer's training;
- c) the taxpayer's intended course of action; and
- d) the capability to show a profit.

[22] These criteria do not constitute an exhaustive list of the criteria to be considered, however. The overall assessment to be made is whether or not the taxpayer is carrying on the activity in a commercial manner. For instance, the case law has introduced into the analysis of a taxpayer's undertaking of a business the criterion of risk minimization. In effect, courts consider that taking risks is an inherent trait of any income-generating activity and that it is the minimization or management of risk that is liable to transform such an activity into a source of income.

[23] The presence of profit-seeking activities is not enough to lead to a finding that the taxpayer is operating a business. All the criteria must be analyzed within the context of the specific game in the given case because, obviously, all players intend to make a profit when they engage in activities or games of this type.

[24] According to *Cohen v. The Queen*, 2011, TCC 262 ("Cohen"), there must be more than the mere hope or desire to win. There must be a planned and reasonable expectation of profit. The gambling winnings of a taxpayer who intends to win but who is not carrying out activities in a businesslike manner will not generally be taxable.

[25] The second stage of the approach propounded by the Supreme Court of Canada in *Stewart*—that it must be determined whether the source of the income is a business or property—does not apply in the present case if the taxpayer's activity does not represent a personal endeavour and if it is determined that the taxpayer had a subjective intention to profit. The appellant admits that this would be business income.

[26] According to counsel for the appellant, applying the criteria established by the case law to the specific facts relative to the appellant shows that:

- a) poker is an activity of a personal nature;
- b) the appellant's poker activities were only used to generate funds for recreational activities and were not intended to maximize his income;

- c) before 2008, the appellant engaged in poker in a recreational and social manner; The appellant testified that he learned to play poker with his father using [TRANSLATION] "fake money" and with friends at around the age of 16 years old. When he became an adult, the appellant signed up on Internet sites, such as PartyPoker and PokerStars. When questioned on this matter, the appellant stated that he did not study poker except to watch movies like *Rounders* or consult specific forums dedicated to poker sometimes. All told, the appellant had never attended or received any specific, relevant or significant poker training;
- d) The appellant did not intend to set out on the path of becoming a poker player as if he were carrying on a business. The respondent had not demonstrated that the appellant had a long-term intention to carry on a business. On the contrary, the appellant's testimony showed, rather, that he took an interest in the world of business. Over the course of 2009, the appellant working for Clément Gagnon, a financial expert for the company CGE Capital Inc. In 2012, the appellant substantially reduced the time he was devoting to playing poker and he enrolled in a bachelor's degree program in economics at Université Laval, completing this degree in 2020;
- e) The appellant's testimony demonstrated that, above all, he was seeking competition, adrenaline and the "thrill". The appellant would challenge players who were considered very good at heads-up poker, a highly risky game wherein the bets are very high. Tens of thousands of dollars can be lost very quickly in this game. According to the appellant, this behaviour is risky, reckless and very irrational. When he would lose large sums of money, the appellant would try to make it up by playing high-stake games;
- f) the appellant testified that he did not have any form of bookkeeping or accounting and that he has no strategies for developing a viable business nor any business plan. The fact that the appellant's earnings from poker games accounted for his main financial resource in no way means that he was carrying on a business. The appellant's situation was more akin to a pathological gambling problem than a business plan. A gambling addiction should not be confused with reasonable businesslike behaviour with an expectation of profit.
- g) Even though the appellant won more than he lost during the years at issue, his capacity for making a profit was unpredictable and unstable. The appellant

could not control the outcomes of the poker games because ultimately, chance determines who wins and who loses;

- h) the appellant's behaviour did not make it possible for him to minimize risk. The appellant was regularly playing high stakes, often under the influence of alcohol, sometimes under the influence of drugs and at all hours of the day and night. The appellant was not interested in low bets because these did not give him the "thrill" he was seeking. Although there are various Internet sites and software programs available to find out the statistics of other players, the appellant testified that he only used these sites and programs marginally;
- i) the appellant did not choose his opponents, and would access those tables that were available to him. He gave himself over to playing at multiple tables simultaneously (up to 12 tables at a time) to the point that he lost control;
- j) the fact that the appellant was playing online frequently and over an extended period of time is of no significance. The number of games and their frequency point to compulsive behaviour and a dependency disorder more than they attest to the commercialization of an activity.

[27] Counsel for the appellant argued that gambling games do not have the inherent characteristics that are essential for a determination that the appellant was undertaking a commercial activity capable of generating a taxable income.

[28] It was demonstrated at the hearing that excerpts found on Internet forums or blogs cannot be attributed much reliability or credibility. This is why the respondent withdrew nearly three quarters of the exhibits from the appellant's file, exhibits which had been consulted for the purposes of writing the appellant's audit report and the expert report of Randal D. Heeb, Doctor of Economics, which were submitted to the appellant's file. It is suggested that if the passages from the audit report and Dr. Heeb's expert report refer to the exhibits which were withdrawn and not proven at the hearing, the audit report and the expert report would be tenuous, even factually unfounded.

[29] Counsel for the appellant attacked the report by the expert Dr. Heeb, who was retained by the respondent, on several fronts:

- a) as he is a doctor of economics, Dr. Heeb does not possess the in-depth knowledge or sophisticated and technical understanding that an expertise in mathematics and statistics requires in order to determine with some degree of scientific certainty whether poker is a game of chance or of skill;

- b) Dr. Heeb, mentioned having testified as an expert in five trials in the United States and one trial in Canada (*Cohen v. Canada (Citizenship and Immigration)* 2015 FC 1192). Contrary to what the expert would have the Court believe, his findings about poker have never been analyzed, much less endorsed or affirmed, by any court in Canada. On the other hand, in the United States, a trial judge held that poker is a game in which skill predominates over chance, but the appeal court in the same case reversed the trial judgment (see *United States v. Di Cristina*, 12-3720 [726 F.3d 3292]) and the United States Supreme Court refused to hear the appeal made by the defendant *Di Cristina*, thereby ending the controversy;
- c) the expert's evidence resembled more the testimony of a fact witness proclaiming himself to be a professional poker player than that of an impartial and independent expert in economics. During his testimony, the expert referred to his own playing habits, inferred conclusions about the behaviour of players although he does not possess the required qualifications to do so, and made general statements without any supporting sources. In terms of the expert's overall testimony, he did not adduce an objective opinion to the Court and he does not possess the degree of independence and credibility required for his opinion and expertise to be retained.

[30] Counsel for the appellant tabled two counter-expertise reports. The first report is from Mathieu Dufour, who holds a doctorate in mathematics and wrote his doctoral thesis on game theory. The purpose of Dr. Dufour's report is to analyze and determine the role of chance in the results of Texas Hold'em-style poker games. According to this expert, there are two conclusions to be drawn:

- a) the outcome of a game of poker clearly depends both on chance—because of the distribution of the cards—and on the skill of the players;
- b) describing game theory, chance always predominates over skill. According to his statistical analysis of the appellant's results, Mr. D'Auteuil's results are not better than the average.

[31] The expert, Dr. Dufour, expressed several criticisms regarding Dr. Heeb's reports, including the following:

- a) the tests that were carried out were not independent;
- b) a scientific and logical error was committed in that he showed that skill plays a role in poker, but he did not show the preponderance of skill; and

- c) the [TRANSLATION] "skill contribution measure" that was developed does not meet any of the necessary criteria of a robust and reliable statistical measure.

[32] The second counter-expertise report is that of Dr. Jeffrey Rosenthal, who holds a doctorate in statistics. The purpose of this report is to determine the relative contributions of chance and skill in online poker games and to determine whether the statistical tests carried out by the expert, Dr. Heeb, adhere to the required statistical conventions.

[33] This expert, Dr. Rosenthal, concluded with certainty that it is not possible to determine, based on the tests and analyses carried out by Dr. Heeb, that skill predominates over chance in poker. According to him, it is not possible to determine the degree of importance of either chance or skill in poker, and it is irrefutable that skill does not predominate over chance, regardless of the hundreds of hands that might be played. He rejected outright the conclusion drawn by Dr. Heeb that after only 3,000 hands, skill eclipses chance.

B. Position of the respondent

[34] The respondent pointed out the very broad meaning bestowed on the definition of the word [TRANSLATION] "business" in subsection 248(1) of the Act: includes a profession, calling, trade, manufacture or undertaking of any kind whatever and . . . an adventure or concern in the nature of trade

[35] According to the analysis in *Cohen*, when a taxpayer's activities involve a personal element (as in this case), the Court must determine if this activity is undertaken in a sufficiently commercial manner so as to be classified as a venture and considered to be a source of income for the purposes of the Act.

[36] According to *Stewart*, 2002 SCC 46, in order for a taxpayer's activity to be classified as commercial in nature, the taxpayer must have the subjective intention to make a profit. This determination should be made based on objective factors, and the relevant activity must have been carried out in accordance with objective standards of businesslike behaviour.

[37] The commercial nature of an activity is characterized by the existence of an organized system with the purpose of managing or minimizing risk. The absence of such a system distinguishes an inveterate player from a professional one (see *Balanko v. MNR*, 81 DTC 887).

[38] Applying the criterion of subjective intention to profit from gambling or betting earnings "is to try to see what is the man's own dominant objective -- whether it was to conduct an enterprise of a commercial character or whether it was primarily to entertain himself" (see *MNR v. Mordern*, 61 DTC 126 at page 1267).

[39] In *Moldovan*, the following objective factors were used to determine the subjective intention to profit:

- a) the profit and loss experience in past years;
- b) the taxpayer's training;
- c) the taxpayer's intended course of action; and
- d) the capability of the venture to show a profit.

[40] The list of factors set forth in *Moldovan* is not exhaustive and other factors can be considered.

[41] Applying these criteria to the facts in the present case shows that:

The profit and loss experience in past years:

- according to the appellant's game records on the FullTiltPoker website, on January 5, 2008, the appellant had \$160,654 in his account ("bankroll") and, according to his game records on the PokerStars website, on January 1, 2008, the appellant had \$166,731 in his account ("bankroll").

Training:

- the appellant is an autodidact and learned to play poker with his father. He studied poker hands published on forums and watched television shows that broadcast poker games on the sports network TSN.

The taxpayer's intended course of action:

- According to the appellant's testimony, Mr. D'Auteuil had no medium-or long-term plan, but had the intention of playing as long as he was earning enough to allow him to meet his needs. He was dedicating between 10 and 30 hours per week to playing poker and, between 2008 and 2012, he had only one other paying job, from May 1, 2009, to April 29, 2010, which paid him \$16,000 in 2009 and \$8,000 in 2010.

Capability to show a profit:

- the appellant's earnings from his poker-related activities amounted to \$867,688 in 2008, \$305,661 in 2009, \$1,410,320 in 2010, \$1,920,558 in 2011 and \$736,948 in 2012;
- according to Dr. Heeb, his earnings showed a very high level of skill and an expectation of per-hand profit of \$0.91;
- according to the counter-expertise report from the expert, Dr. Rosenthal, the appellant's probability of gain was 91.5% after 92,653 hands were played.

Management or minimization of risk according to the objective standards of businesslike behaviour:

- the appellant adapts his game based on the amount of available money in his accounts ("bankroll"). By way of example, at the beginning of 2012, the appellant played at high-stake tables after recovering frozen assets in his account on the FullTiltPoker website and making large winnings at the end of 2011. In April 2012, after a string of losses, the appellant settled down and reduced the amount that he was betting because he had less money in his accounts. Another example of the appellant adapting his game took place in 2008. After losing a number of times while playing [TRANSLATION] "one on one", the appellant started playing several six-player tables;
- the appellant played a lot online and on several tables at one time. Based on sampling conducted in 2008, he was playing a weekly average of 21.67 hours on 6.97 tables simultaneously. On the PartyPoker and FullTiltPoker websites, the appellant played 289 days in 2008, 261 days in 2009, 292 days in 2010 and 255 days in 2011;
- the appellant sold percentages of the tournaments in which he took part and he bought percentages in tournaments in which Martin Fournier Giguère was participating;
- the appellant bought and used the Hold'em Manager software program, which made it possible for him to identify specific opponents and obtain statistics about how they played. This software also allowed him to check the state of his earnings and losses and to verify the accuracy of the transactions that were

carried out on the websites on which he was playing, and to do so every two weeks;

- the appellant exchanged his money on the PartyPoker website with other players for money on other websites for reasons of efficiency and speedy transactions, and to avoid the delays incurred by transferring money through his own bank account;
- the appellant considered the possibility of selling, at a discount, the balance of his account on the FullTiltPoker website, which had been frozen.

Analysis of the category of players set out by Justice Bowman in *Leblanc v. The Queen*, 2006 TCC 680 ("Leblanc")

- The gambling cases fall into three broad categories:
 - a) [T]he gamblers for whom gambling is a pleasurable pursuit . . . are not taxable even though they do it regularly, even compulsively and with some sort of organization or system . . . ;
 - b) Gambling gains have been held to be taxable where the gambling was an adjunct or incident of a business carried on, for example by a casino owner who gambles in his own casino . . . ;
 - c) Gambling gains have also been held to be taxable where a person uses his own expertise and skill to earn a livelihood in a gambling game in which skill is a significant component
- Given the facts in relation to the appellant's poker game, it must be concluded that the appellant's poker activities are not merely a pleasurable pursuit and that he was using his expertise and skills to earn his living at poker, a game in which skill plays an important role.

[42] Dr. Heeb's expert report concluded that:

- skill predominates over chance in poker and the appellant demonstrated his superior level of skill;
- the appellant's level of skill is consistent with his earnings;
- this advantage explains the profit that the appellant made insofar as he plays often and has done so over a long period of time;

- good players can improve their probability of potential gain through the decisions they make. The optimal strategy means maximizing the probability of winning (this statement is consistent with the conclusions of the expert, Dr. Dufour);
- poker players can use their skills to increase their probability of winning and if they play often, they will increase their expectation of profit over the long term. A player has an expectation of long-term profit to the extent that they have a probability of gain exceeding 50%, which is true in the appellant's case (this statement is consistent with the conclusions of the expert, Dr. Rosenthal).

V. **Philippe D'Auteuil's testimony (pseudonym "Takechips")**

[43] Philippe D'Auteuil testified at the hearing to explain how he became interested in poker and to describe his activities over the course of the years between 2008 and 2012.

[44] The appellant started playing poker in 2003 when he was 16 years old. At that time, he was playing with his father over the Internet, using fake money. At 17, he was playing with his father using real money. At that time, he was living with his parents in Rimouski.

[45] In July 2006, he moved to Quebec City to pursue his education at the Université Laval (bachelor's degree in administration). He then opened his own account on the PartyPoker website. At that time, he was living in an apartment with two friends.

[46] He said that in December 2006, he was playing poker between 15 and 25 hours a week as well as playing online video games (e.g., NHL). He had already dropped out of university because he had blown the engine of his car during a trip to Chicoutimi.

[47] In January 2007, he went on a trip to Europe with Martin Fournier Giguère (a friend he had met in Rimouski) and two other friends. The trip lasted two to three months and he visited France, Spain (Barcelona) and the Netherlands (Amsterdam). During this trip, he was playing poker online and he was introduced to drugs.

[48] When he came back from the trip, he lived in his apartment in Quebec City with friends who did not play poker. He was playing poker on his laptop in the

afternoons and evenings. Given that he was earning money playing poker, he and his housemates were always partying.

[49] In January 2008, he went on a trip to Australia with Martin Fournier Giguère and four other friends, also poker players. In two months, he had won \$170,000 by playing about twenty hours per week.

[50] In June 2008, he and Martin Fournier Giguère became co-owners of a single-family house in Sainte-Foy, of which Mr. D'Auteuil owned 40% and Mr. Fournier Giguère owned 60% and which cost \$525,000, paid for by bank draft, which was obtained without funding. Two other housemates who did not play poker were also living at the residence. The appellant and Martin Fournier Giguère had many friends and numerous pool parties took place at their residence. The appellant described the rhythm of his life. He would get up at around 11 o'clock, then he would order his meals from a restaurant, he would play poker for between 15 to 20 hours per week and he was going to bars every evening.

[51] In October 2008, the appellant went to London to participate in two tournaments over a three-week period. Each tournament lasted five days. He came fifth in the second tournament and won \$342,000.

[52] At the beginning of 2009, the appellant went to the Bahamas to take part in a tournament and then he went on several other trips which yielded a net profit of zero.

[53] In 2009, the appellant was employed at CGE Capital Inc. and his job was to identify clients in order to sell them tax shelters in the mining sector. He held this job from May 1, 2009, to April 29, 2020, and he earned employment income from CGE Capital Inc. in the amounts of \$16,000 and \$8,000 for the 2009 and 2010 taxation years, respectively.

[54] In 2010, the appellant began the year in the Bahamas where he was playing at tables of \$5,000 to \$10,000. In March and April, he continued to win and was playing \$20,000 to \$40,000 tables. In 2010, the appellant experienced a great deal of stress as a result of the financial problems of the Hold'em Poker website. At the time, the appellant had a "bankroll" (i.e., the money in the appellant's account on this website) in the amount of \$950,000. The website was acquired by PokerStars and the appellant was able to recover all of his earnings.

[55] The appellant did not report whether he travelled outside of Canada in 2011. The appellant described how he won \$400,000 in August playing \$100,000 to

\$200,000 tables. At the end of October, he won the biggest jackpot of his life: \$900,000 in all.

[56] At the beginning of 2012, the appellant went to the Bahamas. He was playing a lot online. In January and February, the appellant won \$700,000, but he lost \$800,000 in March and April, and \$150,000 at the end of the year.

[57] Between 2008 and 2012, the appellant had accumulated a lot of money and had no need for another source of income. He was playing high stakes and had no family obligations. He had accepted a job at CGE Capital Inc. out of an interest in the financial sector. In 2012, the appellant enrolled in courses in order to obtain a bachelor's degree in economics.

[58] From 2008 to 2012, the appellant reported having played approximately 20 hours per week in 2008 and 2009, and approximately 15 hours a week over the course of 2010, 2011 and 2012. According to him, his number of playing hours is based on the number of hands he played during those years.

[59] During the cross-examination of the appellant, the respondent stated that a player's number of playing hours is recorded by the poker websites. The files contain the hours of play of each table for every day and all the transactions carried out during the day by each player. The "bankroll" of each player is also visible.

[60] During the audit, the CRA obtained the PokerStars game records for all of 2010. The information obtained from PokerStars does not contain any information regarding the number of hands played at each table. However, it is generally acknowledged that a player who is playing on eight tables at a time can play 1,000 hands per hour. According to the appellant, the norm would actually be one hand per minute on each six-player table.

[61] Again, during the appellant's cross-examination, the respondent highlighted the many transfers of money between poker players and questioned the appellant at length about these transfers. The appellant stated that these transfers were often loans or repayments of debts and that he kept a record of the loans made to other players if a loan was not repaid quickly. According to the appellant, the vast majority of the money transfers were related to poker.

[62] During the appellant's cross-examination, there was also discussion of an interview that he gave on MSN during his trip to Australia and the Fiji islands, where he was very successful, and of a book published by a Simon Gravel in which it was

reported that the appellant liked to defy his opponents, and that he liked to play against the best players, placing the largest bets.

[63] The appellant was also cross-examined in respect of his use of the Hold'em Manager software program, which provides statistics on poker players. The appellant reported having acquired this software in 2009 following a long string of losses, and that his main motivation was to track his own results, given the number of hands he had played. The appellant said that he rarely consulted this software to find out his opponents' statistics.

[64] At the end of his testimony, the appellant explained what is meant by the words "stake" and "rakeback". The word "stake" refers to the purchase of percentages in the participation of a player who is playing in a live tournament. This allows the player to share his or her risk, which is mainly the cost of registering for the tournament. Naturally, if the player wins, he or she must share a portion of the earnings. The "rakeback" is the portion of costs deducted by the gambling websites from each pot, which is paid back to the players in order to retain them. The costs deducted by the gambling websites and the portion of these costs that are repaid vary from one website to another.

[65] The appellant often acquired "stake" in Martin Fournier Giguère's big tournaments.

VI. Auditor's testimony

[66] Mathieu Marois testified on behalf of the CRA as the auditor of the appellant's file. He is an expert business valuator and he has a bachelor's degree in business administration and a certificate in accounting, C.G.A., C.B.V., and E.E.E.

[67] The audit report, dated September 20, 2013, was entered into evidence and the facts stated therein were not contested, except with regard to the conclusions that were drawn based on excerpts from various online forums and blogs available on the Internet, which the respondent had not entered into evidence. The audit period covers the 2008 to 2012 taxation years.

[68] The appellant had responded to a questionnaire about his gambling habits at the commencement of the audit, but it was not possible for an initial interview to be carried out as his counsel at the time opposed the meeting and all direct communication with the appellant.

[69] According to the information provided by the appellant, he mainly carried out his activities on the following online poker websites: PokerStars, FullTilt Poker, PartyPoker and Ultimatebet. He also participated in live poker tournaments, including the World Series of Poker in Las Vegas, the PokerStars Caribbean Adventure in the Bahamas and the PokerStars EPT in London.

[70] As part of the audit, the appellant provided records for two of the four big sites on which he played online poker games, FullTiltPoker and PokerStars. The appellant's playing habits and the earnings he made from his poker activities could be determined from the records of two of the four big websites on which the appellant played online poker games and from the appellant's personal bank records. Only the amounts that were known, reliable and certain were assessed.

[71] The auditor explained that, on the basis of the records from the FullTiltPoker and PokerStars websites, he had carried out a sampling of three months per year for the years between 2008 and 2011 in order to identify the appellant's playing habits. From this analysis it emerged that the appellant was playing online poker games for approximately 93 hours per month and for close to 22 hours per week. Moreover, when the appellant would begin a session, he would play an average of 3 hours and 45 minutes, and play at around 7 tables simultaneously. The appellant was making an average profit of \$72,193 per month.

[72] An analysis of the FullTiltPoker and PokerStars records revealed that appellant was visiting online poker sites on a near-daily basis and that he visited one of the two sites, and often both sites, on 289 days, 261 days, 292 days and 255 days during 2008, 2009, 2010 and 2011, respectively, yielding an average of 274 days per year. Over this same period, the appellant was able to deposit more than 5 million dollars into his personal bank accounts.

[73] The deposits made into the appellant's bank accounts mainly came from online poker sites, such as PokerStars and PartyPoker, and were earnings that he made at live poker tournaments as well as cheques from other poker players, including Martin Fournier Giguère. The regularity and scale of these poker-related deposits show that poker was the appellant's main source of income.

[74] Over the course of the audit period, the appellant was employed by CGE Capital Inc. as an account executive for one year. The appellant was not subject to a fixed schedule and was free to carry out his duties when he wished. The appellant's T4 slips for 2009 and 2010 show the amounts of \$16,000 and \$8,000,

respectively, from CGE Capital Inc. This income is the appellant's only income that did not come from his poker activities during the audit period.

[75] The analysis of the appellant's RBC Royal Bank credit card statements showed that, even when the appellant was outside of the country on trips, he visited online gambling websites almost every day while he was travelling.

[76] Even when he was not playing, the appellant devoted a great deal of time to poker activities. In order to stay competitive, the appellant kept himself informed of general trends in online poker; he would review and analyze the hands in which he had taken part and would watch shows about poker. According to the appellant's assessment, he was dedicating about two hours per week to watching poker-related shows. Similarly in order to improve his playing, the appellant paid \$155.55 on two separate occasions to a company called Poker Analytics Services to subscribe to an online poker site offering consultation and teaching services, and services to help develop one's poker game.

[77] The appellant confirmed that he used the Hold'em Manager software while playing online poker. Among other things, this software made it possible to retain his game statistics, his game history and a lot of other data relevant to his poker activities. Although the appellant mentioned in his correspondence of May 13, 2013, that he would provide the statistics contained in this software program, these statistics were never provided by the appellant.

[78] The Hold'em Manager software also retains information about the players against whom the appellant played, making it possible for the appellant to respond better when he faced them again. Using this software, the appellant was able to identify specific players against whom it was more profitable for him to play, and others whom he was better off avoiding.

VII. Expert reports submitted by the respondent

[79] The expert called by the respondent was Randal D. Heeb, PhD (Economics), a consulting economist and partner at Bates White LLC, an economic consulting firm. The Court recognized Dr. Heeb as an expert in economics and game theory. He is a professional poker player in the United States and he has been successfully playing poker for over 25 years, both live and online. He has testified and written reports in five cases, including one in Canada, *Cohen v. The Queen*, 2011 TCC 262.

[80] His mandate was to summarize and update the opinions that he expressed in the case entitled *United States v. Di Cristina*, which was heard in 2012 before the US District Court of the Eastern District of New York, 2012 U.S. Dist. Lexis 118037, in an initial expert report dated July 5, 2012, in a supplemental expert report dated August 13, 2012, and in a statement dated August 20, 2012, all of which addressed the question as to whether skill predominates over chance in no limit Texas Hold'em-style poker games played online.

[81] The expert, Dr. Heeb, wrote an initial report dated August 21, 2020, to which he attached the reports written in the *Di Cristina* file. Following an analysis of the data provided by PokerStars, representing 415 million hands of no limit Poker Texas Hold'em cash games played on the PokerStars website (the PokerStars Data) in this American litigation, and following an analysis of the data obtained from HandHQ, an independent data source representing observational data of over 170 million hands of poker from PokerStars for the same period, that is to say from April 2010 to March 2011, at the same level as the PokerStars Data games (it must be understood here that this data is essentially data that underlies the PokerStars Data, as observed from an independent source), Dr. Heeb concluded that poker is a game in which both skill and chance play a role, but that the skill of the poker player predominates over chance in this game.

[82] His opinion is based, among other things, on the following factors:

- poker is a game that involves a considerable number of complex decisions which can have an impact on the results;
- many people live off poker and win on a regular basis;
- successful players regularly win more than less successful players, and this is the case with virtually all opening hands;
- the skill-level of the players based on the statistical analysis of the PokerStars Data, taking into account the many variables related to statistics and the tactics used by the players, is a good indicator of outcomes (i.e., how much money a player will win for each game played);
- the techniques of the Monte Carlo Simulation have shown that the most skilled players dominated the least skilled players at every level of the game. The purpose of this inquiry was to determine how many hands it would take for a skilled player to dominate a less-skilled player in at least 90% of the cases (i.e., winning more money or losing less money);

- several other independent tests, each of which purported to show that skill predominated over chance in poker, resulted in a great deal of confidence in this conclusion;
- the analysis of the online no limit Texas Hold'em cash games—played at tables of no more than six players at the levels of \$0.50/\$1 to \$10/\$20—led the expert to formulate his opinion that poker is a game wherein skill predominates over chance, as it does for a number of other similar poker games;
- a player's skill is even more important in live games as players must [TRANSLATION] "read" their opponents and deduce which cards their opponents have in their possession;
- in response to a question from the Court in *Di Cristina*, Dr. Heeb stated that in his opinion, the ratio of skill relative to chance in poker is at least 81% for skill and 19% for chance, after 300 hands of play. After 3,000 hands, skill clearly dominates over chance;
- in response to the arguments and observations made by the expert who was retained by the American government, Dr. David DeRosa, in *Di Cristina*, Dr. Heeb explained that more players lose rather than win money because of the fees required by the operator of the poker game, commonly referred to as the "rake", which is calculated based on a small percentage that is deducted from each pot that is won;
- in his statement dated August 20, 2012, which was in response to a letter from the American government dated August 17, 2012, Dr. Heeb—among other things—refuted the government's argument to the effect that a poker player's skill should be measured in terms of each hand that is played rather than over a longer period of time that would reflect the actual number of hands played.

[83] In the last part of his report, Dr. Heeb provided an overview of the academic literature that addresses the question of skill and chance in poker. The most interesting study was the one conducted in 2019 by computer science experts from the Carnegie Mellon University who demonstrated that Pluribus, an artificial intelligence bot, was capable of beating an elite group of five professional players at a six-player table playing no limit Texas Hold'em over the Internet. The study, which examined a sequence of 10,000 hands, showed that Pluribus clearly dominated the professional players.

[84] Dr. Heeb wrote a second report dated September 8, 2020, in response to a mandate from the respondent to assess whether the appellant showed great skill in poker (if possible, what level of skill) and whether the appellant's poker earnings obtained over the course of 2009, 2010 and 2011 corresponded with his skill level. To carry out his mandate, the expert consulted his reports in relation to the *Di Cristina* case as well as public documents, including Simon Gravel's book entitled *Les Maîtres du poker*, interviews, excerpts from discussion forums and several other documents and videos on the Internet and data from HandHQ regarding the bets from \$0.50/\$1 to \$10/\$20.

[85] According to the HandHQ data, the appellant played 92,653 hands only taking into account his games with bets in the amount of \$10/\$20, and won \$84,299, for an average of \$0.91 per hand over the course of the period covering April 2010 to March 2011. Dr. Heeb compared these results to those of three comparison groups, those being the [TRANSLATION] "total population" which consisted of all the players, the [TRANSLATION] "recreational players" which consisted of all the players who had played fewer than 1,000 hands and half the players who had played more than 1,000 hands, and the [TRANSLATION] "very skilled players" which consisted of half of the players who played more than 1,000 hands but who were excluded from the "recreational players" and who made a per-hand profit that was above the average in the first two-thirds of their hands. The "recreational players" category represented 90.8% of the players who had played in \$10/\$20 games and 88.8% of the players who had played \$5/\$10 games. As a result, the "very skilled players" category represented 9.2% of the players who had played \$10/\$20 games and 11.2% of the players who had played \$5/\$10 games.

[86] Dr. Heeb's comparisons between the appellant's results and those of the various groups of players enabled him to conclude that:

- after 92,653 hands, the average per-hand results for the players in the "total population" category was negative at \$0.18 per hand;
- it was very likely that, after 92,653 hands, the appellant would obtain more profitable results than a player in the "total population" category;
- on a yearly basis, 37.5% of the players in the "very skilled players" category, who played the same number of hands and with the same combination of games with \$5/\$10 and \$10/\$20 bets as the games played by the appellant, had an expectation of making a profit and the most skilled players in this category were able to win on a regular basis and earn a living playing poker;

- after 92,653 hands, the players in the "very skilled players" category were 93.14% more likely to get better results than the "recreational players";
- the appellant is a very skilled player whose profit-per-hand results exceed not only those of players in the "recreational players" category, but also most of the results obtained by players in the "very skilled players" category;
- the players who make up the "recreational players" category have a negative expectation of profit at \$0.99 per hand whereas the appellant had a real positive result of \$0.91 per hand, which places the appellant in the 99.99th percentile among the players of this category for the anticipated profit outcomes. A player in this category has only a 0.01% chance of winning as much as the appellant after 58,946 hands, which translates to four players out of the 10,000 players in this category;
- compared to the players in the "very skilled players" category, the appellant is in the 95th percentile of players in terms of earnings.

[87] The expert retained by the respondent also wrote a counter-expertise report dated November 25, 2020, following the report by Jeffrey Rosenthal, one of the two experts retained by the appellant. After reviewing Dr. Rosenthal's report, Dr. Heeb adhered to the opinions he had voiced in his two previous reports. According to Dr. Heeb, poker is a game in which the skill of the players predominates over chance as a factor in determining the outcomes of the games. Moreover, the expert reconfirmed that the appellant was a very skilled poker player as, based on his per-hand earnings, he was in the 98.16th percentile among the players in the "total population" category and in the 99.99th percentile among the players in the "recreational players" category.

[88] Dr. Heeb also estimated that the appellant had a 91.5% probability of earning an average annual salary for an American entrepreneur, USD50,000, and that he had a 99.8% probability of earning an annual net profit, assuming he committed to playing poker on a full-time basis.

[89] On July 14, 2021, Dr. Heeb wrote a separate counter-expertise report in response to the report by Dr. Mathieu Dufour, who was one of the two experts retained by the appellant. After carrying out an exhaustive review of Dr. Dufour's report, Dr. Heeb still maintained that poker is a game of skill in the sense that skill is a more important factor than chance in determining the results of poker. Contrary to the opinion expressed by Dr. Dufour, Dr. Heeb was of the opinion that the

appellant is a very skilled player and that his substantial and repeated financial successes in the game of poker are consistent with his high level of skill.

[90] Dr. Heeb first addressed and refuted the three main areas of disagreement brought up by Dr. Dufour, namely:

- that the various criteria of skill used are not independent;
- that the proposed criteria and analyses are actually criteria that make it possible to determine whether the degree of skill in poker is above zero, not whether skill plays a greater role than chance;
- the measure of the degree of skill lacks a reliability index (i.e., a margin of error), has no clear definition, does not measure the intended concept—skill—and does not produce consistent results.

[91] Next, the expert clarified several items that could be sources of confusion, including the criterion of skill, how the number of hands played was calculated and the rate at which a professional poker player plays online. With regard to this last point, Dr. Heeb discussed three possible sources of confusion.

[92] The first source of confusion has to do with the number of live games played by professionals. According to Dr. Heeb, the rate at which a professional plays live is about 30 hands per hour, which is to say 300 hands during a daily 10-hour session and 1,500 hands during a 50-hour week, while professional online players will normally play 50 hands per hour at each table at which they are playing.

[93] The second source of confusion has to do with the number of online tables at which a player can simultaneously play. According to Dr. Heeb, experienced players can easily play at four tables simultaneously and some players can even play at up to 12 tables or more at the same time. A player who is playing at 4 tables simultaneously for 10 hours per day, 5 days per week will have played 10,000 hands in a week (that is to say 50 hands an hour x 4 tables x 10 hours a day x 5 days a week).

[94] The third source of confusion relates to the appellant's annual rate of play because the experts only focused on the data obtained from HandHQ, which refers to only one game platform (PokerStars) and only for bets of between \$.50/\$1 and \$10/\$20 over a period of 12 months, ending in March 2011. In the appellant's case, only 92,653 hands were taken into account despite the fact that he acknowledged

having played intensely on at least two other sites, Full Tilt Poker and PartyPoker. As a result, the number of hands played by the appellant that were taken into account represents only a minuscule portion of the number of hands he actually played over the course of a year.

[95] Dr. Heeb provided details regarding the commission rate required on the PokerStars website (the "rake") because Dr. Dufour had alleged that this rate was 5% of the bets. According to Dr. Heeb, this rate is incorrect and has the effect of skewing the impact of the "rake" substantially. The real "rake" rate charged by the PokerStars website is about 5%, up to a maximum of \$3 for bets of \$5/\$10 and \$10/\$20. After the pot of a game reaches \$60, there is no added rake. The effect of the rake per hand per player for the period for which the PokerStars data are available is \$0.18 per hand per player for bets of \$10/\$20 and \$0.16 per hand per player for bets of \$5/\$10.

VIII. Expert reports submitted by the appellant

[96] The first expert mandated by counsel for the appellant was Jeffrey S. Rosenthal, who holds a BSc in mathematics and physics and in computer science from the University of Toronto (1988) and a doctoral degree in mathematics from Harvard University (1992). Since 1993, he has been a professor of statistics at Toronto University.

[97] His mandate consisted of assessing the relative contributions of skill and chance as factors for online poker players and, specifically, to review and comment on the various reports produced and conclusions drawn by the expert Dr. Heeb in the litigation between the appellant and the CRA. Dr. Rosenthal produced a report dated October 19, 2020, and he testified at the hearing. To carry out his mandate, Dr. Rosenthal had access to Dr. Heeb's various reports from the *Di Cristina* case and from the appellant's case, and the reports from the cases of Martin Fournier Giguère and Antoine Bérubé, as well as financial files and emails regarding the appellant's gains and losses from his online gambling and the detailed data on the 187 million games played online on the PokerStars website over the course of the period from April 2020 to March 2011.

[98] Essentially, Dr. Rosenthal's position is that Dr. Heeb's conclusions—that the appellant is an extremely skilled player and that this skill greatly predominates over chance after several thousand hands—are not sufficiently borne out and are even contradicted by the real results obtained by the appellant, which show high probabilities of losing and long periods of substantial losses.

[99] Dr. Rosenthal observed a circularity in Dr. Heeb's analysis in that the players were selected for various categories and assessed using the same data from that year. The same procedure was carried out in order to measure the betting model statistics and the poker earnings that were made.

[100] In the specific case of the appellant, Dr. Rosenthal observed that his skill percentage, calculated according to Dr. Heeb's formula, was estimated to be 0%, 45.5% (on a monthly basis), 33.3% (on an annual earnings basis) and 82.9% of total annual earnings for the year the data were from. Over the course of the period for which there was available data, the appellant went through a long losing streak which is not consistent with the models of earnings designed by Dr. Heeb for the most skilled players. At the recommended level of 3,000 hands, the appellant's estimated skill percentage did not exceed 19.4%.

[101] The second expert mandated by counsel for the appellant is Dr. Matthieu Dufour, who holds a doctoral degree in mathematics from the Université de Montréal and is a member of the Society of Actuaries. Since 2001, Dr. Dufour has been a professor of actuarial science in the Department of Mathematics at the Université du Québec à Montréal and has published a number of articles on game theory.

[102] His mandate, as an independent expert in mathematics, game theory, probability theory and actuarial science, was to analyze and determine the role of chance in the outcomes of Texas Hold'em-style poker games and to establish whether it is possible to play this game with the hope of making positive gains over the long term.

[103] Dr. Dufour wrote a report, dated June 11, 2021, as well as an answer, dated August 11, 2021, to Dr. Heeb's response to his report. To carry out his mandate, Dr. Dufour had access to the notices of appeal and the responses to the notices of appeal relative to the appellant, and to all the expert reports produced by Dr. Heeb and by Dr. Rosenthal in the appellant's file.

[104] Dr. Dufour testified at the hearing. His testimony and his report emphasized three main areas of disagreement with Dr. Heeb's conclusions. These areas of disagreement were the following:

- Dr. Heeb's assessment criteria are not independent and they are all variations of the same single criterion, i.e. the observation that on average, the better players within his sample did better than the less good players. A player's skill

may explain a certain portion of their success, but Dr. Heeb's graphics-based demonstration is flawed because the same types of graphs are obtained with purely random results caused entirely by chance;

- at no point did Dr. Heeb demonstrate that skill outweighs chance in poker;
- [TRANSLATION] "the measure of the contribution of the [poker player's] skill," as described by Dr. Heeb, does not meet any of the necessary criteria of a robust and reliable statistical measure, namely that of an unambiguous definition, the presence of a confidence interval (margin of error), the capacity to measure the intended object and consistent results (negative values);
- Dr. Dufour also concluded that an analysis of the appellant's results, during the period from April 2010 to March 2011, of \$0.91 per hand yielded an a priori probability of 8.5% of ending the year with at least the winnings that he did obtain, which is absolutely unremarkable and in no way stands out from the average;
- in his answer to Dr. Heeb's response, Dr. Dufour addressed the following issues, among others:
 - the confusion surrounding the conclusions to the effect that [TRANSLATION] "[p]oker involves skill" (short conclusion) and [TRANSLATION] "[i]n poker, skill predominates" (flawed conclusion);
 - the assessment criteria of the [TRANSLATION] "measure of skill"; and
 - a seasoned player's capacity to take advantage of their opponents' weaknesses in an online game.

[105] Regarding the [TRANSLATION] "predominance of skill", Dr. Dufour pointed out that Dr. Heeb did not clearly define the meaning of this concept.

[106] Regarding the assessment criteria of the [TRANSLATION] "measure of skill", Dr. Dufour argued that this test does not meet the minimum standards of credibility for a statistical test, namely due to the absence of any kind of confidence interval to validate it.

[107] Regarding a seasoned player's capacity to take advantage of their opponents' weaknesses in an online game, Dr. Dufour stated that, based on mathematical theorems from game theory, chance far outweighed skill in terms of a player's

success and that, for this reason, many hands are required for a player who is much better than another player to win a convincing victory. According to him, it had not been shown that the appellant had a particular talent for detecting whether or not his online opponents were bluffing.

IX. Relevant statutory provisions

[108] The provisions of the Act that are applicable to this litigation are paragraph 3(a), subsection 9(1), paragraph 40(2)(f) and subsection 248(1).

[109] Paragraph 3(a) provides that, in computing their income, taxpayers must include income from a source inside or outside Canada, including income from a business. Subsection 9(1) provides that a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year. Paragraph 40(2)(f) provides that a taxpayer's gain or loss from the disposition of a chance to win a prize or bet, or a right to receive an amount as a prize or as winnings on a bet is nil. Subsection 248(1) clarifies that the definition of the word "business" includes a profession as well as an undertaking of any kind whatever and an adventure or concern in the nature of trade.

[110] These provisions of the Act read as follows:

Income for taxation year

3 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 (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

Income

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

Loss

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that

source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

...

40(2)(f) a taxpayer's gain or loss from the disposition of

- (i) a chance to win a prize or bet, or
- (ii) a right to receive an amount as a prize or as winnings on a bet,

in connection with a lottery scheme or a pool system of betting referred to in section 205 of the Criminal Code is nil;

...

248(1) business includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment; (*commerce*)

X. Analysis and conclusion

[111] There is no doubt that no limit Texas Hold'em-style poker is a game of chance and of skill. The experts who were retained by the parties agree on this. The disagreement between the experts pertains to, in essence, the conclusions that were drawn by Dr. Heeb to the effect that skill predominates over chance.

[112] This question, while very interesting, is not really relevant for determining whether the appellant was operating a business during the years at issue because, contrary to the appellant's submissions, poker is not a game of the [TRANSLATION] "bet[ting]" type as defined in paragraph 40(2)(f) of the Act. The right to receive an amount as winnings on a bet is not earned in connection with a lottery scheme or a pool system of betting referred to in section 205 of the Criminal Code. Moreover, we would like to state here that section 205 of the Criminal Code was abolished by the Act of 1985, R.S.C., c. 52 (1st Supp.) a.1 assented to on December 20, 1985.

[113] In general, the parties agree on the criteria to be used to determine whether the appellant was operating a business or not (see paragraphs 18 to 25 and paragraphs 35 to 40). Where they diverge is in how these criteria should be applied to the particular facts in the appellant's case.

[114] Over the course of 2008, 2009, 2010, 2011 and 2012, the appellant's poker activities were much more than a pleasurable pursuit. He played poker to earn a living; in this sense, he was a professional poker player. He played poker in a non-recreational manner for the purpose of making a profit. He organized his life around poker. He even played while on vacation and would pay for his trips with his poker winnings.

[115] The appellant's poker playing activities represented his main source of income during the years at issue. His sole other source of income was employment income in the amounts of \$16,000 and \$8,000 from CGE Capital Inc. for 2009 and 2010.

[116] According to the audit report, the reconciliation of the total earnings made by the appellant exclusively on the PokerStars and FullTiltPoker websites, when added to the deposits made from the PartyPoker website and the earnings made at tournaments, shows that the appellant's income was at least \$5,241,025 for the years from 2008 to 2012.

[117] Concretely, the appellant was devoting almost all his time to playing poker. An analysis of the FullTiltPoker and PokerStars records revealed that the appellant was visiting online poker sites on a near-daily basis and that he visited one of the two sites, and often both sites, on 289 days, 261 days, 292 days and 255 days during 2008, 2009, 2010 and 2011, respectively, yielding an average of 274 days per year.

[118] In addition to the hours spent playing, the appellant estimated that he dedicated around two hours per week to watching television and other shows about poker with the aim of staying competitive and informed about the general trends affecting online poker. In order to improve his playing, the appellant subscribed to a website of the company Poker Analytics Services, which provides consultation and teaching services, and services to help develop one's poker game.

[119] The appellant also confirmed that he used the Hold'em Manager software while playing online poker. This software is used to retain his game statistics, his game history and a great deal of other data relevant to his poker activities, while also providing information regarding the players against whom the appellant has played. Using this software, the appellant was able to identify players against whom it was more favourable not to play, and others against whom it was more profitable for him to play.

[120] Despite his unconventional lifestyle and his propensity to always want to play at tables with high bets, the appellant behaved in a businesslike manner. He played

poker to win. He avoided playing against certain opponents and adapted his game based on his "bankroll" to avoid situations that were too perilous. The appellant adopted objective standards of risk management and minimization. When he participated in live tournaments, he would share and sell percentages to other players based on the cost of entry to the tournaments. He would also on occasion acquire stakes in tournaments in which Martin Fournier Giguère was participating for amounts of between \$100,000 and \$150,000.

[121] Using his earnings from poker, the appellant was able to acquire two large capital assets, namely co-ownership (40%), with Martin Fournier Giguère, of a residence acquired in 2008 for a total cost of \$525,000, paid in cash, as well as a motor vehicle that cost \$37,500, also paid for in cash.

[122] The appellant also reinvested a portion of his earnings in poker by acquiring stakes in the tournaments in which Martin Fournier Giguère was participating. This type of operation made it possible for the appellant to diversify his investments and maximize his income options.

[123] With the level of earnings made by the appellant over such a long period of time, I am convinced that the appellant could reasonably expect to be able to earn his living by playing poker and even to launch a career as a professional player.

[124] Based on the foregoing, I have arrived at the conclusion that, according to the balance of probabilities, the appellant had the subjective intention of making a profit by engaging in poker activities, and that he was using his expertise and his abilities to earn his living through poker, a game of chance in which ability plays a key role.

[125] For all these reasons, (a) the appeal from the reassessment dated November 1, 2013, in respect of the 2008 taxation year is dismissed without costs and, (b) the appeals from the reassessments dated November 1, 2013, in respect of the 2009, 2010, 2011 and 2012 taxation years are partially allowed, without costs, and the said assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in order to (1) reduce the appellant's taxable income for the 2009, 2010 and 2011 taxation years by \$305,661, \$3,550 and \$1,684, respectively; and (2) allow a business loss of \$215,781 for the 2012 taxation year.

Signed at Montreal, Quebec, this 25th day of January 2023.

"Réal Favreau"

Favreau J.

Translation certified true
on this 24th day of January 2024.
François Brunet, Revisor

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DATE OF JUDGMENT: January 25, 2023

APPEARANCES:

Counsel for the Appellant: Danny Galarneau
Bénédicte Dupuis

Counsel for the Respondent: Grégoire Cadieux
Sonia Bédard

COUNSEL OF RECORD:

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