



[2022] 1 F.C.R. D-19

INCOME TAX

INCOME CALCULATION

Capital Gains and Losses

Appeal from Tax Court of Canada (T.C.C.) decision (2020 TCC 123) dismissing appellant's appeal from reassessments made under *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (Act) in relation to his 2011, 2012, 2013 taxation years — Appellant deciding to open art gallery — Owning 51 percent of common shares of numbered company formed for purpose of operating gallery; spouse owning 49 percent — In 2010, spouse fell ill, became pregnant — In 2011, directors of numbered company passed resolution to retain appellant to provide number of management services to company — Compensation to be paid to appellant management fee equal to 20 percent of amount by which gallery's annual revenue exceeded \$100,000 — Appellant provided management services to gallery during years in question, each year gallery not having sufficient revenues to trigger payment to him — Claimed non-capital losses for years in question — T.C.C. applying two-stage approach from *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645 to determine if taxpayer having source of income; if so, whether source business or property — Finding that appellant only began providing management services because of spouse's health issues — Concluding there was personal element to management services during all of said taxation years — Whether T.C.C. erred in finding that appellant's personal reasons for providing management services to the numbered company resulted in this being personal endeavour as contemplated by Supreme Court in *Stewart* — T.C.C. erred in law in interpreting *Stewart* by focusing on appellant's personal reasons for providing management services — Supreme Court noted that activities clearly commercial in nature not requiring any further analysis to determine if person having source of income — If there is personal or hobby element present to activity, further analysis required to determine if it is being carried on in sufficiently commercial manner to make it source of income — In this case, activity management services — Question therefore was whether there was any personal or hobby element to management services provided by appellant — Appellant's decision to provide these management services as result of his wife's inability to continue to manage gallery not meaning there was a personal or hobby element to his management services activity, as contemplated by Supreme Court — Person's personal motivation or reason for conducting activity cannot, in and of itself, result in there being personal or hobby element to activity — This cannot be what Supreme Court intended in *Stewart* — In this case, no indication of any personal or hobby element to management services — Since no basis to find any personal or hobby element to management services activity, appellant having source of income, provided appellant pursuing profit in carrying on management services activity — Absence of provision in arrangement requiring direct reimbursement of expenses appellant claiming not necessarily leading to conclusion that he was not pursuing profit — Question whether, in providing management services, appellant pursuing profit, not whether having reasonable expectation of profit or whether different business model could have been chosen — By providing management services that allowed gallery to continue to operate, appellant's intent was to allow gallery to generate revenue which, in turn, would generate management fees payable to him, profit for his management services activity — Matter sent back to T.C.C. to determine amount of the capital losses for purposes of Act, if any, from appellant's management services business — Appeal allowed.

BROWN C. CANADA (A-317-20, 2022 FCA 200, Webb J.A., reasons for judgment dated November

23, 2022, 18 pp.)