Docket: 2018-626(IT)I

BETWEEN:

DAVID ROBINSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 19, 2019 at Calgary, Alberta; post-hearing Written Submissions of the Respondent received on April 26, 2019 and post-hearing Written Submissions of the Appellant received on May 3, 2019

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

Counsel for the Appellant:	Rami Pandher Christopher Johnston
Counsel for the Respondent:	Damon Park

AMENDED JUDGMENT

In accordance with the attached **amended** reasons for judgment:

1. Mr. Robinson's appeal of a reassessment made under the *Income Tax Act* of his 2011 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that (a) Mr. Robinson is not required to include in his income the amounts the Minister included as unreported income, and (b) Mr. Robinson is not liable for penalties under subsection 163(2) of the *Income Tax Act*;

2. Mr. Robinson's appeal of a reassessment made under the *Income Tax Act* of his 2012 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that (a) the only amount to be included in Mr. Robinson's income as unreported income is $4,313 relating to the unexplained deposit of that amount on November 29, 2012, and (b) Mr. Robinson is not liable for penalties under subsection 163(2) of the *Income Tax Act*;

3. Mr. Robinson's appeal of a reassessment made under the *Income Tax Act* of his 2013 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Robinson is not liable for penalties under subsection 163(2) of the *Income Tax Act*;

4. Mr. Robinson's appeal of a reassessment made under the *Income Tax Act* of his 2016 taxation year is dismissed; and

5. Each party shall bear their own costs.

This Amended Judgment is issued in substitution of the Judgment dated August 28, 2019.

Signed at Ottawa, Ontario, this 5th day of September 2019.

"K.A. Siobhan Monaghan"

Monaghan J.

Citation: 2019 TCC 181
Date: 20190828
Docket: 2018-626(IT)I

BETWEEN:

DAVID ROBINSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Monaghan J.

[1] David Robinson qualified as a lawyer in Alberta and Ontario and practised law for many years, first with a law firm and later with the Canadian Depository for Securities. However, several years ago he commenced working directly in the technology sector, work he describes as funding, financing and seeking investment for businesses in the information technology, advanced technology and environmental technology sectors. This activity resulted in Mr. Robinson incurring expenses which he deducted in computing business income.

[2] The Minister reassessed Mr. Robinson for his 2011, 2012 and 2013 taxation years on the basis that these expenses were not deductible. The Respondent's position is that because Mr. Robinson had no contracts under which he would earn income for his services, Mr. Robinson did not have a source of income and therefore the expenses he incurred are not deductible. The Respondent also suggests that the expenses were not Mr. Robinson's, but those of Diversecure Corporation, a corporation Mr. Robinson wholly owns. Alternatively, if Mr. Robinson was carrying on a business, the Respondent asserts that the expenses are not deductible because they were not incurred for the purpose of earning income or are capital expenditures.

[3] The expenses deducted by Mr. Robinson resulted in losses which Mr. Robinson sought to deduct in computing his income in 2016. Consistent with the position that the expenses are not deductible, and so no losses were incurred,

the Minister reassessed Mr. Robinson's 2016 taxation year to deny the deduction of the non-capital loss.

[4] The Canada Revenue Agency ("CRA") reviewed Mr. Robinson's financial records and certain of Mr. Robinson's wife's financial records and identified several deposits of unknown source. The Minister's reassessment of Mr. Robinson's 2011 and 2012 taxation years added to his income certain of the unknown deposits on the basis that they reflect unreported taxable income. Mr. Robinson claims that several of these amounts were not received by him and that those he did receive are not taxable.

[5] The Respondent concedes that the reassessment of Mr. Robinson's 2011 taxation year was issued after the normal reassessment period for that year, but claims that the reassessment is valid because Mr. Robinson's income tax return contained a misrepresentation that was attributable to neglect, carelessness, or wilful default. In addition, the reassessment imposes penalties under subsection 163(2) of the *Income Tax Act* (Canada) (the "Act"), typically referred to as gross negligence penalties, in the 2011, 2012 and 2013 taxation years. Mr. Robinson's position is that the reassessment of his 2011 taxation year is statute-barred, because his tax returns were correct, and that he is not liable for penalties under subsection 163(2) of the Act.

[6] Therefore the issues to be addressed in this appeal are:

1. Did Mr. Robinson have any unreported income in his 2011 or 2012 taxation years?

2. Were Mr. Robinson's activities in his 2011, 2012 and 2013 taxation years a source of income?

3. If yes, were the expenses Mr. Robinson incurred deductible in computing income from that source in his 2011, 2012 and 2013 taxation years? In answering this question, I must consider the following:

    a. What is the source of income?

    b. Were the expenses incurred for the purpose of earning income from that source?

    c. Were any of the expenses non-deductible by virtue of specific provisions of the Act?

d. Were any of the expenses capital in nature?

4. Is the reassessment of Mr. Robinson's 2011 taxation year valid notwithstanding that it was issued beyond the normal reassessment period for the 2011 taxation year?

5. Is Mr. Robinson liable for penalties pursuant to subsection 163(2) of the Act?

6. Does Mr. Robinson have a non-capital loss that he may deduct in computing his income in 2016?

1. Did Mr. Robinson have any unreported income in his 2011 or 2012 taxation years?

[7] In reassessing Mr. Robinson for the 2011 and 2012 taxation years, the Minister assumed that Mr. Robinson had unreported income in the amounts of $26,252 and $24,661, respectively, based on a net worth assessment. The CRA reviewed Mr. Robinson's bank accounts, credit card account statements and investment accounts as well as some of his wife's financial records. In the course of this review, the CRA identified several deposits of unknown origin in each of 2011 and 2012 and reassessed Mr. Robinson on the basis that these amounts were taxable income.

[8] Mr. Robinson has a number of what he described as personal accounts at RBC including an investment account, a tax free savings account (TFSA), a locked in account (LIF/LIRA), a registered retirement savings plan (RRSP), a line of credit and a personal bank account. He has a separate business account at RBC and a credit card that he uses only for business purposes. Mr. Robinson also has a personal bank account at BMO and a credit card for personal expenses.

[9] Mr. Robinson says the source of all his money during the relevant period was from investment accounts, cheques from his wife, or miscellaneous items such as a rebate from the Co-op, an insurance premium rebate, birthday gifts and funds from a neighbour to cover expenses Mr. Robinson incurred on the neighbour's behalf while the neighbour was out of the country.

[10] The unknown deposits identified by CRA in 2011 and 2012 were summarized by Mr. Robinson in Exhibits A-17 (2011) and A-18 (2012). The totals in those summaries exceed the amount the reassessment includes in Mr. Robinson's income in the 2011 and 2012 taxation years, on account of

unknown deposits, by approximately $9,500 and $11,850, respectively. No explanation for this discrepancy was offered by Mr. Robinson or counsel for the Respondent.

[11] One unknown deposit in 2012, in the amount of $15,143.68, was explained quite easily by Mr. Robinson, although he conceded he had not known the source of the funds until the day his appeal was heard. A $15,143.68 (USD) cheque, representing an inheritance, was received by Mr. Robinson's wife and shown in the CRA Audit Report as deposited in Mrs. Robinson's USD account. This deposit was identified by the CRA, albeit in Canadian dollars, as an unknown deposit.[1] I am satisfied that this amount should not be included in Mr. Robinson's income in 2012, as the amount was neither received by him nor a taxable receipt.

[12] However, the nature of the other unknown deposits identified by CRA is less readily explained.

[13] Mr. Robinson provided a list of cheques he received from his wife for 2011 and 2012, together with copies of the cheques.[2] While these cheques are consistent with his testimony that his wife provided funds to him, most of the cheques are irrelevant because, with one exception, none of those cheques are identified in the CRA Audit Report as unknown deposits.[3] The $950.39 cheque dated December 27, 2012 appears as an unknown deposit in 2012,[4] but is shown as clearing Mrs. Robinson's account in January 2013.[5] I accept that this is a transfer, not an unknown deposit. The $177.11 cheque dated November 15, 2012 appears in the Audit Report as a withdrawal,[6] not an unknown deposit. With those two

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[1] Exhibit A-16. The CRA Audit Report contains a description of activities in some of Mrs. Robinson's accounts. One account, described as a USD account, shows a deposit of $15,143.68 but that amount was carried over to the all data listing in the Audit Report as an unknown deposit, but in Canadian dollars.

[2] Exhibit A-20.

[3] Exhibit A-20 also includes cheques from 2013. While the reassessment of Mr. Robinson's 2013 taxation year does not add any unknown deposits to his income, with one exception, none of the 2013 cheques is treated as an unknown deposit in the CRA Audit Report. The one exception is a $200 cheque in September, 2013.

[4] Exhibit A-16 at WP/FT#904, at pages 16 and 17.

[5] *Ibid.*, at WP/FT#903, at pages 1 to 33.

[6] *Supra*, note 4, at p. 14/17.

exceptions, each of the 2011 and 2012 cheques received from Mrs. Robinson was treated by CRA as a transfer, not an increase to Mr. Robinson's net worth. Thus, this evidence is of little assistance to Mr. Robinson.

[14] Several of the unknown deposits were described in the Audit Report (and Mr. Robinson's summary of unknown deposits) as ABM deposits. Mr. Robinson said these fell within three categories: (i) cheques deposited at BMO, mostly written by his wife; (ii) transfers (in even dollars) from one of his RBC accounts to another, and (iii) amounts that were not deposited to his accounts and so not amounts he received. However, a closer look at these items suggests Mr. Robinson's evidence in this regard is too general. He did not provide specific enough evidence that all of the amounts in question qualify under those categories. In particular, the following amounts identified by the CRA as unknown deposits appear to have been deposited in Mr. Robinson's RBC personal or RBC business account,[7] but do not appear as withdrawals or transfers from another account in the CRA Audit Report:

2011		
January 5, 2011	$4,000	Deposited to RBC personal account
January 5, 2011	$2,000	Deposited to RBC personal account
February 5, 2011	$5,000	Deposited to RBC personal account
February 28, 2011	$2,189	Deposited to RBC personal account
2012		
November 29, 2012	$4,313	Deposited to RBC personal account

[15] The first three 2011 amounts are what Mr. Robinson describes as even dollar amounts, yet they do not correspond to withdrawals from his RBC investment account, TFSA or LIF/LIRA according to the CRA Audit Report.[8] Mr. Robinson

[7] Each of these deposits appears in Exhibit A-16 and Exhibit A-17 or A-18.

[8] See Exhibit A-16.

said even dollar amounts represented transfers between accounts, yet he provided no documentary evidence to support this claim in respect of these three amounts. This is troubling for two reasons. First, not all even dollar amounts deposited to his account are transfers he made from one account to another: Mrs. Robinson gave him a cheque for $5,000 for a trip to the Barbados.[9] Therefore, a sweeping statement that all even dollar amounts were transfers from one account to another is not very convincing. Secondly, the Audit Report correctly identifies several other even dollar amounts as transfers, suggesting that these three 2011 deposits were treated differently by the CRA because there was no evidence they were transfers. This leaves open the question as to whether these three even dollar amounts in 2011 might be from another source. That Mr. Robinson did not provide more specific documentary evidence regarding these amounts is somewhat surprising given the volume of documentary evidence he had relating to other matters, including the cheques received from his wife and receipts for his expenditures, many of which were for significantly lower amounts.

[16] The last two amounts in the list above, one from 2011 and the one from 2012, are not even dollar amounts. As the amounts appear to have been deposited to Mr. Robinson's personal bank account,[10] he cannot claim he did not receive them. Yet they were not explained by Mr. Robinson with any specificity. Neither of these two amounts falls into the three broad categories he described: cheques written by his wife as detailed in Exhibit A-20, even dollar amounts transferred between his accounts,[11] or amounts he did not receive. The Audit Report credits Mr. Robinson with funds for birthday gifts, rebates, and medical and dental reimbursements.[12] Accordingly, Mr. Robinson has not explained what they are, except to say they are not taxable.

[17] Several of the other 2012 deposits identified as unknown[13] are described in the Audit Report as deposits to one of Mrs. Robinson's accounts. Although their nature was not explained by Mr. Robinson, I accept his evidence that the amounts

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[9] See Exhibit A-20. This amount is treated by the CRA Audit Report as a transfer, not an unknown deposit.

[10] See Exhibit A-16.

[11] Mr. Robinson identified transfers between accounts as even dollar amounts.

[12] See Exhibit A-16 WP/FT#41, at page 5.

[13] These are summarized in Exhibit A-18.

deposited into his wife's account were not received by him and therefore are not income he failed to report.

[18] In conclusion, with the exception of the five amounts listed in paragraph 14 herein, Mr. Robinson has satisfied me that the unknown deposits should not be included in his income in 2011 and 2012. As far as the five amounts are concerned, Mr. Robinson's explanations regarding his sources of funds do not seem to apply to those amounts and he did not offer any other explanation otherwise than to say he received no unreported taxable amounts. Taking into account all of the evidence, Mr. Robinson has not convinced me that the Minister's assumption regarding these amounts is incorrect. Therefore, Mr. Robinson's unreported income in 2012 will be reduced to $4,313, representing the unexplained deposit to his RBC personal account in November 2012. As to the four unknown deposits in 2011, whether the reassessment to add those amounts to his income is valid turns on whether the reassessment in respect of those amounts is statute-barred. That issue is addressed below.

2. Were Mr. Robinson's activities in his 2011, 2012 and 2013 taxation years a source of income?

[19] In computing income in each of his 2011, 2012 and 2013 taxation years, Mr. Robinson deducted various expenses. Mr. Robinson described his activities in 2011, 2012, and 2013 as relating to the commercialization of, or efforts to find funding and investment for, a variety of businesses in technology. He described several specific initiatives including ones with Solar City (solar energy) based in California, Tabula (chip technology) based in California, and Webfilings (a US-based company involved in securities law filings). In each case, Mr. Robinson described his role with these entities as exploring opportunities to expand their businesses into Canada. He organized and attended meetings in Canada and the US related to these initiatives. It is not clear at whose initiative these meetings were held, but Mr. Robinson did not have contracts with any of these organizations and was not providing services to them for remuneration. He was clear that the source of funding for his activities was personal savings. Ultimately, none of these initiatives proceeded.

[20] Mr. Robinson also described various other initiatives he undertook, including putting together a patent portfolio for a system to remediate hydrocarbon contaminate waste. Ultimately, through field and lab tests, the process was proven viable, investment funding was obtained, and a corporation was formed in 2013 to carry on the business. Mr. Robinson was granted a 24% equity interest in that

corporation and continues to hold the necessary patents, registered in Canada and the U.S., personally. He hopes that these patents will be useful in other enterprises as well.

[21] Mr. Robinson's position is that he carries on business as a sole proprietor. The Respondent's position is that Mr. Robinson does not have a source of business income because none of the activities that gave rise to the expenses will result in business income. Both parties rely on *Stewart* v *The Queen.*[14]

[22] The parties agree that for a source of income to exist, Mr. Robinson must have an intention to profit from the activities in question. Mr. Robinson suggests that the fundamental question is whether the activity is commercial or personal in nature, and not whether any income is earned. The Respondent states that the fact that the activities are business-like (that is, they do not have a personal element) is not enough because Mr. Robinson's activities were not in pursuit of earning any income whatsoever. In particular, not only did Mr. Robinson not earn any income, but he had no revenue associated with his activities in any of 2011, 2012 or 2013 years.

[23] So what does the *Stewar*t case actually say? First, while it is clear that, following *Stewart,* Mr. Robinson does **not** need to have a reasonable expectation of profit from his activities for them to constitute a source of business or property income, the activities must be in pursuit of profit. Yet, in *Stewart,* the Supreme Court of Canada stated that the "pursuit of profit" source test will require analysis only where there is some personal or hobby element to the activity in question:

> [5] It is undisputed that the concept of a source of income is fundamental to the Canadian tax system; however, any test which assesses the existence of a source must be firmly based on the words and scheme of the Act. As such, in order to determine whether a particular activity constitutes a source of income, the taxpayer must show that he or she intends to carry on that activity in pursuit of profit and support that intention with evidence. The purpose of this test is to distinguish between commercial and personal activities, and where there is no personal or hobby element to a venture undertaken with a view to a profit, the activity is commercial, and the taxpayer's pursuit of profit is established. However, where there is a suspicion that the taxpayer's activity is a hobby or personal endeavour rather than a business, the taxpayer's so-called reasonable expectation of profit is a factor, among others, which can be examined to ascertain whether the taxpayer has a commercial intent.

[14] 2002 SCC 46.

[Emphasis added.]

and

> [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. . . . 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.
>
> [Emphasis added.]

and

> [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.
>
> [Emphasis added.]

[24] The *Stewart* analysis has been repeatedly quoted and applied in many cases considering whether there is a source of income. I am satisfied that any personal or hobby element to the activities Mr. Robinson undertook was peripheral, and certainly not a dominant feature of them. Therefore, applying the *Stewart* analysis, I must conclude that Mr. Robinson had a source of income. I need not decide at this stage whether the source was property or business.

3. If yes, were the expenses Mr. Robinson incurred deductible in computing income from that source in his 2011, 2012 and 2013 taxation years?

[25] While the deduction of expenses is dependent on a source of income, the existence of a source of income is not by itself sufficient to support deduction. Rather, what is important is the relationship between the expense sought to be deducted and the source to which it is purported to relate. The Act expressly states that, in computing income from a business or property, an outlay or expense is not deductible except to the extent that it was made or incurred for the purpose of earning income from the business or property.[15] While it is clear that the expense need not lead directly to income, the purpose in making the expenditure must be to earn income from the business or property.

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[15] Paragraph 18(1)(a).

(a) ***What is the source of income?***

[26] Applying the *Stewart* analysis, I have determined that Mr. Robinson had a source of income, but did not determine whether it was a business or property source. Mr. Robinson's view is that he was carrying on a business as a sole proprietor. He described himself as a consultant.[16] The expenses in question were deducted in computing income from a business in his income tax returns as reflected in his Statement of Professional Activities.[17]

[27] So what is the nature of Mr. Robinson's activity? During the relevant years, Mr. Robinson undertook a number of initiatives which he described as related to efforts to commercialize innovation. He described his involvement as working with groups that either had a concept or business, or intellectual property that they hoped to advance, but that did not know how or where to seek financing. Mr. Robinson described his role as assisting these groups with seeking investment capital, developing their intellectual property portfolio, preparing a business plan, applying for government funding and meeting with other parties to seek their sponsorship of a field trial or demonstration trial. However, although he identified himself as a consultant, Mr. Robinson clearly stated he was not providing services to anyone for a fee and admitted he had no contracts under which he would be paid for his services. In other words, he was working with others, not for others. While Mr. Robinson was incurring significant expenses in 2011, 2012 and 2013, he had no source of revenue in any of those years.

[28] Mr. Robinson described his business as follows:

> . . . participating as a principal in the development of the initiative . . . to participate in the outcomes from that initiative, the corporation that's created or the success that's generated from developing a funding program or an investment.[18]

And, as follows:

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[16] Transcript page 9, line 25.

[17] Exhibit A-3.

[18] Transcript, page 55.

> I was participating in the innovation development process. So it's not a consulting service where you're being paid a fee. It is an activity in which you earn an equity participation in the success of the venture.[19]

And,

> So what I did as Techknowledgey Group was to actually pull together the bits and pieces necessary to commercialize innovation.[20]

[29] The only successful venture in the relevant period was his assembling of a patent portfolio for a system to remediate hydrocarbon-contaminated waste. Demonstration trials and laboratory testing were conducted and investment was sought. Once the system was proven and investment obtained, a corporation, 3E Remediation Dynamics Corporation ("3E"), was incorporated in 2013 to carry on the business. Mr. Robinson was granted a 24% equity interest in 3E in exchange for the work he did in the three preceding years developing the remediation (patent) portfolio and methodology, undertaking the various funding applications, coordinating the efforts, conducting field demonstration trials, and sourcing the capital to enable creation of the enterprise. Mr. Robinson owns the Canadian and US patents personally and makes them available to 3E.

[30] Mr. Robinson said that a substantial portion of his activities and a very significant percentage of his expenses in the relevant period related to this initiative, including the expenses relating to the patent portfolio. That portfolio was necessary for that initiative, although he intends that it not be exclusively used in that business. He said the end goal of that initiative was "to earn an equity interest in the corporation that carried on that business [removal of waste and restoration of value in contaminated soils and bitumen] and then to earn revenue from the initiatives it carries on."[21]

[31] What is clear from Mr. Robinson's testimony is that if and when success is achieved, the successful activity is to be carried on by a corporation from which he hopes to earn income. Mr. Robinson described the typical innovation model as identifying a government funding program or an investment, receipt of which would lead to the establishment of a company to undertake the innovation work.

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[19] Transcript, page 54.

[20] Transcript, page 50.

[21] Transcript, page 51, lines 4-6.

This is what happened with 3E. Once the remediation process was proven successful, 3E was incorporated to carry on the business.

[32] Consistent with that approach, in 2011 Mr. Robinson incorporated a second company, Hydrocarbon Fluid Treatment Solutions Inc. ("Hydrocarbon Fluid"). It was incorporated in connection with a proposal to teach First Nations how to do mobile spill-site remediation along pipeline rights-of-way. Mr. Robinson explained that once funding was obtained, a corporation would be needed for the work and Hydrocarbon Fluid would be available for that purpose. Ultimately, funding was not obtained and Hydrocarbon Fluid remains an inactive shell owned by Mr. Robinson. But again, the idea was that any business would be conducted by a corporation.

[33] Having heard Mr. Robinson speak about his activities and his objectives in pursuing them, I am not convinced that Mr. Robinson was carrying on a business. His activities, as he described them, were focused on acquiring property from which he could earn a return (the patent portfolio and equity interests in other businesses) rather than carrying on a successful business himself. In my view, his activities are more consistent with the source of his income being property, not business.

[34] Expenses made or incurred to earn income from property may be deductible in computing income but only to the extent that they are incurred to earn income from the property and are not otherwise precluded from deduction by the Act. The only property Mr. Robinson identified is 3E shares and the patent portfolio.[22] On that view of the source of income, to be deductible, Mr. Robinson's expenses must have been incurred in order to earn income from the patent portfolio or the 3E shares.

[35] While it is possible that the acquisition of income-producing assets may be a business in itself,[23] I am not sure I would consider Mr. Robinson's acquisition of income-producing property in the manner he has described as a business.[24] In my view, his actions have more of the hallmarks of seeking an investment opportunity

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[22] I have ignored the share interests in Diversecure and Hydrocarbon Fluid as both are inactive.

[23] See *The Queen v. Rio Tinto Alcan Inc.*, 2018 FCA 124, at para 75, and *Morguard Corp. v. Canada*, 2012 FCA 30, at paras. 13-14.

[24] See *Neonex International Ltd. v. The Queen*, 1978 DTC 6338 (FCA), at paras. 31-32.

to earn income from property than business. He was clear he would not be earning income for his services. Nonetheless, as the Respondent did not suggest that the source was not business, for purposes of this case I will proceed on the basis that Mr. Robinson's activities could constitute a business.

(b) Were the expenses incurred for the purpose of earning income from that source?

[36] There is some confusion in the evidence regarding on whose behalf the activities were conducted. The Minister assumed that **Techknowledgey** Group was a division of Diversecure Corporation and that Mr. Robinson incurred the expenses on behalf of Diversecure in the years 2011, 2012 and 2013. Were this true, the expenses would not be deductible by Mr. Robinson.

[37] Diversecure appears to be the registered owner of the tradename Techknowledgey Group and Design,[25] notwithstanding that Mr. Robinson said that it was the name he used for his sole proprietorship. He conceded that Techknowledgey Group had been a business unit of Diversecure until 2005.

[38] Moreover, a number of invoices or receipts for expenses were issued in Diversecure's name, rather than Mr. Robinson's name.[26] And, several invoices have a handwritten notation indicating they were paid by a Diversecure cheque, suggesting they might not be Mr. Robinson's expenses.[27] Moreover, Mr. Robinson's expense records include expense statements identifying him as an employee, although the employer is not identified.[28] This seems a very unusual document for a sole proprietor to prepare.

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[25] See Exhibit A-4. Diversecure is identified as the registrant.

[26] See various invoices from FedEx in 2011, 2012 and 2013 in Exhibit A-14 , an invoice/receipt from Apple in Exhibit A-14 , a receipt from Symantec Corp in Exhibit A-14, receipts from the Hilton Hotel in Barbados in Exhibit A-10, and receipts for two events (Shastri Insititute and Centre for Innovation Studies), each of which describe Mr. Robinson as managing director of Diversecure, in Exhibit A-15. The Law Society of Alberta invoice/receipt for 2011 is also addressed to Mr. Robinson at Diversecure.

[27] See FedEx invoices in Exhibit A-14 and registry receipts from the Government of Alberta (Shawnessy Licence and Registry Ltd.) and from The Licensing Company in Exhibit A-15.

[28] See Exhibit A-10.

[39] Under cross-examination, Mr. Robinson said that while Diversecure previously carried on a number of activities, it became inactive in 2005. Prior to that time, its business included strategic planning, feasibility assessments, financing procurement and other matters relating to complex initiatives. Mr. Robinson said when Diversecure carried on business it was the method by which he carried on the business – in other words, he undertook activities as an employee or agent of Diversecure. When asked why Diversecure became inactive, Mr. Robinson candidly said that, because of the tremendous risk in innovation-related work, trapping the expenditures associated with that work in a corporate structure did not make any sense. In other words, if the expenses were not going to lead to a successful venture, it was better to have the expenses deducted by him personally. He conceded that was one of the reasons he did the work as a sole proprietor, work of the nature previously undertaken by Diversecure when it was the entity through which Mr. Robinson carried on business. While this raises potential issues of a transfer of value to, or appropriation of property (business opportunities) by, Mr. Robinson, this was not raised in the pleadings or addressed in evidence and I make no findings in that regard. It may well be that Mr. Robinson appropriately compensated Diversecure at the relevant time.

[40] However, Mr. Robinson's careless approach to record-keeping, and the change in the manner in which he conducted these activities, no doubt explains why the CRA suggested the expenses were not Mr. Robinson's. However, Respondent's counsel did not pursue this point with any particular vigour at the hearing and, despite this careless record-keeping, I accept Mr. Robinson's evidence that Diversecure was inactive in the relevant years and that he incurred the expenses personally, rather than on behalf of Diversecure or any other corporation.

[41] This brings me to the expenses themselves. Although most of the expenses claimed by Mr. Robinson were discussed only in general terms at the hearing, Mr. Robinson submitted copies of invoices for a significant number (if not substantially all) of the expenses.[29] The broad categories of expense are meals, travel, office expenses, memberships, subscriptions, and vehicle expenses, categories which are not obviously non-deductible. However, to be deductible, the expenses must be incurred for the purpose of earning income from the source against which Mr. Robinson seeks to deduct them. While this does not require that the expense lead to income, there must be some relationship between the expense and the source against which the expense is to be deducted.

[29] Exhibits A-9 to A-15, inclusive.

[42] Without the benefit of a detailed discussion of many of the claimed expenses, Mr. Robinson has met the burden of establishing that most of the expenses meet the test in paragraph 18(1)(a) – they were incurred for the purpose of earning income.[30] However, I make an exception for fees paid to the Law Societies of Alberta and Ontario. Mr. Robinson was not practising law at that time and in fact hired lawyers to perform legal services related to his activities. Mr. Robinson conceded that he probably should not have paid the Law Society fees but did so out of habit. I did not find Mr. Robinson's rationale for those being expenses related to his activities in 2011, 2012 and 2013 persuasive. Accordingly, in my view, the Law Society fees were not incurred for the purpose of earning income and are not deductible by Mr. Robinson in computing his income by virtue of paragraph 18(1)(a).

(c) Were any of the expenses non-deductible by virtue of specific provisions of the Act?

[43] A personal or living expense is not deductible in computing income from a business or property.[31] As noted above, while the particulars of many of the expenses deducted by Mr. Robinson were not addressed in detail at the hearing, in cross examination Mr. Robinson agreed that he deducted the cost of dry cleaning suits and other clothing used for what he described as business meetings. Mr. Robinson's documentary evidence includes copies of receipts for dry cleaning totalling hundreds of dollars. Dry cleaning has repeatedly been held to be a personal expense and therefore not deductible.[32]

[44] Mr. Robinson's documentary evidence also includes copies of receipts for watch repairs, analgesics and eye drops, a water conditioner, a surge suppressor and medical travel insurance. These are all clearly personal or living expenses and not deductible in computing income.

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[30] In stating this, I am cognizant that some of the expenses were personal expenses, some of which may also fail paragraph 18(1)(a). However, for reasons discussed below, they are in any case denied under paragraph 18(1)(h).

[31] Paragraph 18(1)(h) of the Act.

[32] See *Symes v. Canada*, [1993] 4 SCR 695; *Weber v. The Queen* 2003 TCC 482 (Inf.); *Perera* v. *The Queen* 2014 TCC 280 (Inf.); *Van Vlassellaer v. The Queen* Docket: 199-117-IT-G (2001-03-06); *Jacobesen v. The Queen* 2012 TCC 25; *Gaouette v. The Queen* Docket: 2000-5219-IT-I (2002-04-04); and *Arthurs v. The Queen* 2003 TCC 636 (Inf.).

[45] Similarly, a fine or penalty (other than a prescribed fine or penalty), imposed by a public body that has the authority to impose it, is not deductible in computing income.[33] Mr. Robinson conceded that he had deducted parking tickets. Exhibit A-12 includes a copy of a receipt for a Provincial Court fine paid in February 2011 and parking tickets in 2011, 2012 and 2013. None of these expenses are deductible in computing income.

(d) Were any of the expenses capital in nature?

[46] Capital expenses are not deductible except to the extent expressly permitted by the Act.[34]

[47] Whether an expense is a current expense or a capital expenditure is a question that has been addressed by many Courts. Three general tests for characterizing expenses as current or capital have emerged: recurring or single outlay, enduring benefit test, and purpose. However, because expenses may be incurred for many reasons, Courts have cautioned that each case must be determined on the basis of its own facts. In characterizing an expense, courts must apply a common−sense approach, taking into account the particular facts and circumstances surrounding the expense and considering what the expense is intended to accomplish from a practical and business standpoint.[35]

[48] The documentary evidence that Mr. Robinson provided includes an invoice in 2011 for services related to the incorporation of an Alberta corporation.[36] While this is clearly a capital expense, in the context of the total expenses claimed by Mr. Robinson, it is a relatively insignificant amount. But what about the other expenditures?

[49] The Respondent argues that all of the expenses Mr. Robinson incurred, if incurred for the purpose of earning income, were incurred on capital account and are not deductible. Mr. Robinson's position is that they are not capital expenditures, largely on the basis of the recurring outlay and enduring benefit tests.

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[33] Section 67.6 of the Act.

[34] Paragraph 18(1)(b) of the Act.

[35] *Rio Tinto,* 2016 TCC 172, at para 79, aff'd by FCA.

[36] Exhibit A-15.

That is, Mr. Robinson incurred the same kind of expenses year after year and for the most part gained no enduring benefit from them.

[50] But what was the purpose of the expenses? The activities Mr. Robinson carried out in 2011, 2012, and 2013 resulted in him acquiring two assets: a 24% equity interest in 3E and the patent portfolio. Mr. Robinson is not in the business of selling patents. Rather, he intends to make the patents available to others, presumably in consideration of a royalty or some other form of compensation. He makes the patents available to 3E. He testified that he received income from 3E in the 2014, 2015 and 2016 years, although the nature of those payments was not described.[37] Had the initiative with the First Nations succeeded, the patents would have been used by Fluid Hydrocarbons or another corporation that carried on that business. Expenses incurred to assemble the patent portfolio are therefore on capital account and form part of the cost of the patents. Similarly, the shares of 3E are assets from which he intends to earn income, not assets he intends to sell.

[51] I accept that Mr. Robinson considered and pursued several other potential opportunities with diligence and effort. However, his objective in doing so was to "earn an equity participation in the success of the venture" and then earn income. As Mr. Robinson's counsel put it, Mr. Robinson's purpose was "to create various income streams."[38] He was assembling the assets needed to earn income. To use the old adage, Mr. Robinson's expenses were to grow the trees that would bear fruit.

[52] In my view, Mr. Robinson's circumstances are strikingly similar to the circumstances in the *Neonex*[39] and *Firestone*[40] cases. In other words, the expenses were not incurred in the course of the operation or running of a business, but as part of the process of creating, or acquiring the assets for a business, the objective of which was to acquire investments in entities engaged in innovation from which he might derive income.

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[37] Was it salary, royalties for use of the patents, management fees, dividends or some combination of those.

[38] Paragraphs 21 and 24 of the Appellant's written submissions.

[39] *Supra*, note 24.

[40] *Firestone v. The Queen*, 97 DTC 5237 (FCA).

[53] Counsel for Mr. Robinson suggests that the *Neonex* and *Firestone* cases should not be relied upon because they were decided before *Ikea*.[41] I do not agree. While *Ikea* suggests that the approach, reasoning, and general legal conclusions set out in *Neonex* and *Firestone* must be regarded with care in light of the approach applied in *Ikea*, *Ikea* did not overrule *Firestone* or *Neonex*. Rather, it emphasized the purpose test.[42] *Ikea* was concerned with receipt of an amount, not the deduction of an expense, but the tenant inducements were found to be entirely related to Ikea's rent obligations, a current expense. The purpose was to reduce the rental expense. The Supreme Court has endorsed the principle that the underlying purpose of an expense must be considered in the context of the taxpayer's business.

[54] While I agree that neither *Neonex* nor *Firestone* stands for the proposition that the acquisition of income producing assets can never be a business, the question to be addressed under paragraph 18(1)(b) is the nature of the expenses in Mr. Robinson's case having regard to the purpose of the expenses: were the expenses he incurred on income or capital account. In my view, Mr. Robinson's activities are strikingly similar to those of the taxpayers in *Firestone* and *Neonex*, and his expenses similarly are on capital account.

[55] *Neonex* had been engaged in the electric sign and outdoor advertising business but, following a takeover, began to purchase companies engaged in a variety of businesses. As a parent corporation, it provided management services and expertise to the subsidiaries, as well as capital, and earned management fees, dividends and interest. By the end of the last of the taxation years under appeal, *Neonex* had more than 60 subsidiaries from which it was earning management fees and interest. One proposed acquisition failed and *Neonex* sought to deduct legal fees associated with that failed acquisition on the basis that they should be treated as current expenditures. Notwithstanding that *Neonex*, unlike Mr. Robinson, had many subsidiaries from which it was earning income, the fees were considered to be on capital account as they were associated with an investment transaction. Mr. Robinson's circumstances are less favourable than those in *Neonex*.

[56] Similarly, in *Firestone*, the taxpayer, a venture-capitalist, decided to pursue interests in distressed companies with the objective of assisting them in improving operations and earning fees. Mr. Firestone sought to deduct the expenses he

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[41] *Ikea Ltd. v. Canada*, [1998] 1 SCR 196.

[42] See *Rio Tinto* (FCA) at para 25.

incurred in exploring various potential investments. The costs Mr. Firestone incurred were considered capital expenses because they were incurred to acquire or create a business, not in the running of a business. In my view, the expenses Mr. Robinson incurred similarly were incurred to acquire or create his business, notwithstanding that a number of the initiatives he pursued were unsuccessful, as also was true of Mr. Firestone. As MacGuigan J. stated in the *Firestone* case:

> Counsel for the appellant acknowledged in the course of argument that the costs of the investigation of opportunities in relation to the four operating companies actually acquired were capital expenditures. . . . However, he submitted that the investigation costs of the other fifty-odd opportunities that did not lead to acquisitions must be regarded rather as expenditures of an operating nature.
>
> . . .
>
> I find it impossible to accept this contention. It seems to me that all of the expenditures relating to the investigation of opportunities must be considered on the same footing. They were the same kinds of expenses, and they were made for the same purpose. They were, in effect, all part of the same venture-capital business . . . All were equally part of the appellant's plan of assembly of business assets. It was only to be expected, and indeed was the premise of the appellant's investigative method, that some possibilities would on examination turn out to be good risks, others too poor to be proceeded with.[43]

[57] Like Mr. Firestone, Mr. Robinson may be described as a skilled and determined entrepreneur who embarked on a venture – in his case to acquire equity interests in businesses in the environmental technology, information technology and other innovative technology sectors. Like Mr. Firestone, he incurred expenses in exploring opportunities – in his case connected to innovation. But the expenses he incurred in pursuing that objective, put in the most favourable light,[44] are

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[43] *Supra*, note 40 at paragraphs 17 and 18.

[44] As noted above, I am not sure that I would conclude that the source of Mr. Robinson's income is a business source rather than a property source. Mr. Robinson repeatedly spoke of his objective being to acquire equity interests in successful ventures that commercialize innovation. Several times he stated his objective was not to earn a fee for his services. When asked when he would be taxed for the work he had undertaken, he suggested he would be taxed only if the value of the 3E shares went up and he realized a gain. While it was not clear whether he was suggesting it would be a capital or income gain, a gain from the disposition of capital property is not income from property or business. However, despite my hesitation on the point, as noted above, I proceeded on the basis that Mr. Robinson's source of income was a business source.

expenditures relating to the acquisition or creation of a business, not the running of a business.[45] Therefore, they are capital expenditures.

[58] In coming to that conclusion, I have considered *Whacky Wheatley's TV & Stereo Ltd*.[46] and *Rio Tinto*.[47] However, in my view, neither of those cases is comparable to Mr. Robinson's case. *Whacky Wheatley's TV & Stereo Ltd*. involved the characterization of expenses incurred to expand an existing operating business into a new jurisdiction. The operating business conducted by *Whacky Wheatley's TV & Stereo Ltd*. was already mature and had several years of successful operating history. Mr. Robinson is not in a similar situation. He was creating a business, not expanding an existing operation.

[59] *Rio Tinto* was concerned with expenses incurred by a large public company which had statutory obligations requiring it to incur expenses in connection with an acquisition and related divestiture. Certain of the expenditures, although incurred in the context of a capital transaction, were determined to be current expenditures, rather than capital expenditures. They were expenditures of a recurring nature in the context of a public company operating in an environment where shareholders have certain expectations and demands. The context was critical to the characterization of the expenses. The context surrounding the expenses incurred by Mr. Robinson is entirely different.

[60] Accordingly, the expenses incurred by Mr. Robinson in the 2011, 2012 and 2013 taxation years are on capital account and are not deductible in computing income.

4. Is the reassessment of Mr. Robinson's 2011 taxation year valid notwithstanding that it was issued beyond the normal reassessment period for the 2011 taxation year?

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[45] See also, *Caballero v. The Queen* 2009 TCC 390, at para.14.

[46] *Whacky Wheatley's TV & Stereo Ltd. v. MNR* 87 DTC 576 (TCC). See also *Bowater Power Co. Ltd. v. M.N.R.* 71 DTC 5469 which similarly addressed costs associated with exploring the feasibility of an expansion. Mr. Robinson was not exploring the feasibility of expansion of an existing running operation. He did not yet have a business operation to expand.

[47] *Supra*, note 35.

[61] Mr. Robinson's original notice of assessment for his 2011 taxation year was dated June 11, 2012. Mr. Robinson's 2011 taxation year was reassessed by a notice of reassessment dated May 31, 2016, more than 3 years after the original notice of assessment for that taxation year.

[62] Except in limited circumstances, the Act precludes the Minister from reassessing Mr. Robinson for a particular taxation year more than three years after the original assessment was issued for that year, referred to as the normal reassessment period. This is often referred to as statute-barring. In this case, the Minister alleges that, in filing his income tax return for the 2011 taxation year, Mr. Robinson made a misrepresentation attributable to neglect, carelessness or wilful default. If that is the case, the reassessment is not statute-barred.

[63] The onus to establish the misrepresentation and the neglect, carelessness or wilful default lies with the Respondent. While the standard is not a high one, the Respondent must present evidence to substantiate the misrepresentation and neglect, carelessness or wilful default.

[64] Moreover, where the Respondent establishes a misrepresentation attributable to neglect, carelessness or wilful default permitting a reassessment beyond the normal reassessment period, the reassessment is restricted to amounts related to the proven misrepresentation. The Minister is not able to reassess unrelated matters in that year on the basis of a misrepresentation.

[65] The reassessment of Mr. Robinson's 2011 year raises both unreported income and deduction of expenses. In assessing Mr. Robinson beyond the normal reassessment period, the Minister relied on a number of assumptions of fact, but called no witnesses and tendered no evidence to substantiate those facts. The Respondent relies on Mr. Robinson's evidence. Therefore, I must decide whether that evidence is sufficient to establish the misrepresentation and neglect, carelessness or wilful default.

[66] Mr. Robinson asserts that the unknown deposits in 2011 were not income. While he could not substantiate what they were, he is not required to do so because that would amount to placing the burden of proof on him. To establish a misrepresentation regarding those amounts, the Minister has the onus of establishing that those amounts were from an income source. In my view, the Respondent has not succeeded and thus has not established that there was a misrepresentation regarding the 2011 unknown deposits identified by CRA.

Therefore, the reassessment of Mr. Robinson's 2011 taxation year, insofar as it relates to unreported income associated with unknown deposits, is statute-barred.

[67] Mr. Robinson admitted that expenses he deducted in 2011 included the cost of dry cleaning; his vehicle expenses for 2011 include a court fine. For the reasons outlined above, expenses of this nature are not deductible in computing income. The 2011 invoices also include costs associated with incorporating an Alberta corporation, presumably Hydrocarbon Fluid. Incorporation costs are capital expenditures and not deductible. I have also found that none of the expenses deducted by Mr. Robinson in 2011 are deductible because they were on capital account. Thus, the Respondent has established that Mr. Robinson made a misrepresentation in his 2011 tax return with respect to expenses.

[68] Were these misrepresentations regarding expenses attributable to neglect, carelessness or wilful default? While I am not prepared to conclude that the misrepresentations were attributable to wilful default, I am satisfied that Mr. Robinson was careless or negligent in completing his returns. He is well-educated. While he has no specific tax expertise, he is a lawyer with significant commercial experience, including with a national law firm. Mr. Robinson prepared his own income tax returns. Having decided to prepare his own income tax returns, he is responsible for ensuring that his income tax returns comply with the law and for informing himself regarding that law. In my view, it does not require any particular expertise to know that personal expenses are not deductible in computing income and costs associated with incorporating a company or acquiring patents are capital expenditures.

[69] Moreover, were Mr. Robinson to listen to his own testimony, I have to believe that he would pause and ask himself whether what he described made sense – that he could spend thousands of dollars pursuing various initiatives, deduct all those expenses personally, and yet have any resulting successful activity carried on by a corporation such that he would not be subject to tax on the resulting success unless and until the shares of that corporation increased in value. Had he asked himself that question, he presumably would have, or at least should have, sought advice.

[70] I am satisfied that Mr. Robinson's misrepresentation in his 2011 income tax return regarding expenses is attributable to carelessness or neglect. Therefore, the Minister is entitled to reassess Mr. Robinson's 2011 taxation year beyond the normal reassessment period with respect to the deduction of expenses.

5. Is Mr. Robinson liable for penalties pursuant to subsection 163(2)?

[71] A taxpayer who knowingly, or under circumstances amounting to gross negligence, has made or participated in, assented to or acquiesced in the making of, a false statement or omission in a tax return filed in respect of a taxation year is liable to a penalty, typically referred to as a gross negligence penalty. The Respondent bears the burden of establishing the facts justifying the assessment of the penalty. While there are some similarities between the prerequisites to reassessment beyond the normal reassessment period and the prerequisites to the imposition of gross negligence penalties, the latter is a more difficult test to satisfy. It requires the Respondent to establish that Mr. Robinson knowingly made a false statement in his return or did so in circumstances amounting to gross negligence. Gross negligence requires a higher degree of neglect than a mere failure to take reasonable care. It is a marked or significant departure from what would be expected. It is more than carelessness or misstatement.[48]

[72] In my view, while this is a close case and there is little doubt Mr. Robinson was careless, the Minister has not established that Mr. Robinson knowingly, or under circumstances amounting to gross negligence, made a false statement or omission in his income tax returns for the 2011, 2012, or 2013 taxation years. Counsel for the Respondent did not ask Mr. Robinson questions addressing the conditions necessary to establish the conditions for imposition of gross negligence penalties, and in closing argument made no submissions regarding subsection 163(2) penalties. Accordingly, Mr. Robinson's appeal of the penalties imposed under subsection 163(2) of the Act for his 2011, 2012 and 2013 taxation years is allowed.

6. Does Mr. Robinson have a non-capital loss that he may deduct in computing his income in 2016?

[73] In computing his taxable income for his 2016 taxation year, Mr. Robinson claimed a non-capital loss of $8,117. Mr. Robinson's non-capital loss was based entirely on the expenses he deducted in the 2011, 2012 and 2013 taxation years. In other words, Mr. Robinson will have a non-capital loss to deduct in computing income for his 2016 taxation year only to the extent that he is successful in establishing that he has a loss from a business in his 2011, 2012 and 2015 taxation years.

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[48] See *Wynter v. Canada*, 2017 FCA 195 and *Zsoldos v. Canada*, 2004 FCA 338.

[74] Given my conclusion on the non-deductibility of the expenses in the 2011, 2012 and 2013 taxation years, Mr. Robinson's appeal in respect of the 2016 taxation year is dismissed.

CONCLUSION:

[75] For the foregoing reasons:

1. Mr. Robinson's appeal of a reassessment made under the *Income Tax Act* of his 2011 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that (a) Mr. Robinson is not required to include in his income the amounts the Minister included as unreported income, and (b) Mr. Robinson is not liable for penalties under subsection 163(2) of the Act;

2. Mr. Robinson's appeal of a reassessment made under the *Income Tax Act* of his 2012 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that (a) the only amount to be included in Mr. Robinson's income as unreported income is $4313, relating to the unexplained deposit of that amount on November 29, 2012, and (b) Mr. Robinson is not liable for penalties under subsection 163(2) of the Act;

3. Mr. Robinson's appeal of a reassessment made under the *Income Tax Act* of his 2013 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Robinson is not liable for penalties under subsection 163(2) of the Act;

4. Mr. Robinson's appeal of a reassessment made under the *Income Tax Act* of his 2016 taxation year is dismissed; and

5. Each party shall bear their own costs.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated August 28, 2019.

Signed at Ottawa, Ontario, this 5th day of September 2019.

"K.A. Siobhan Monaghan"

Monaghan J.

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