Docket: 2019-3529(IT)I

BETWEEN:

BILLY LIANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 21, 2022, at Toronto, Ontario

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Mike Chen

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2014, 2015 and 2016 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Kingston, Canada, this 7th day of June 2022.

"Rommel G. Masse"

Masse D.J.

Citation: 2022 TCC 55
Date: 20220607
Docket: 2019-3529(IT)I

BETWEEN:

BILLY LIANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

[1] The Appellant appeals reassessments made against him by the Minister of National Revenue (the "Minister") under the *Income Tax Act*, R.S.C 1985, c.1 (5th Supp.), (the "*Act*"), for 2014, 2015 and 2016 (the "taxation years").

A. BACKGROUND

[2] The Appellant claimed deductions of $30,000 as "Other Deductions" on line 232 of his returns for each taxation year with respect to his investment in a tax shelter that he himself had set up pursuant to s. 237.1 of the *Act*. The Appellant also claimed business losses and expenses ranging from $18,876 to $20,967 throughout the taxation years.

[3] The Minister initially assessed the Appellant's tax liability for the taxation years as filed. Subsequently, the Minister reassessed the Appellant for the taxation years by way of Notices of Reassessment dated August 10, 2018, so as to:

a. disallow the Other Deductions claimed on line 232 of the returns in the amount of $30,000 for each of the taxation years;
b. disallow business expenses claimed in the amount of $19,706 for 2014, $19,276 for 2015, and $21,367 for 2016;

[4] The Minister was of the view that there was no valid tax shelter within the meaning of s. 237.1 of the *Act* and thus the claimed deductions did not relate to a valid tax shelter.

[5] Regarding the claimed business expenses, the Minister disallowed them on the basis that they were not incurred to earn business income, the expenses claimed were for personal living expenses and/or they were unreasonable.

[6] The Minister reassessed the Appellant for 2014 beyond the normal reassessment period pursuant to subsection 152(4) of the *Act* and also assessed gross negligence penalties for each taxation year pursuant to subsection 163(2) of the *Act*.

[7] The Appellant filed a Notice of Objection to the reassessments. The Minister confirmed the reassessments by Notice of Confirmation dated July 4, 2019. Hence, the appeal to this Court.

B. THE ISSUES

[8] The following issues present themselves for resolution by the Court:

1). Was the Appellant entitled to deduct $30,000 as other deductions for each taxation year?
2). Was the Appellant entitled to claim the business losses/expenses that he did for each of the taxation years?
3). Did the Minister properly assess the Appellant for the 2014 taxation period beyond the normal reassessment period, pursuant to subsection 152(4) of the *Act*?
4). Did the Minister properly assess penalties for gross negligence pursuant to subsection 163(2) of the *Act* for the taxation years?

C. THE TAX SHELTER

[9] The Appellant is an elderly gentleman who will soon by 87 years old in August of this year[1]. He is an intelligent well-educated man who has worked his entire professional life of 40 years as an architect. He retired about 22 years ago.

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[1] Mr. Liang speaks English with a strong accent. However, he expresses himself in writing quite well as is demonstrated in his Notice of Appeal, his 12-page Answer to the Reply which he titled "Clarification" and his Reply to the Respondent's Arguments which he titled "Reply to Respondent's Transcript".

Mr. Liang is also hard of hearing. At the end of the arguments of the Respondent's counsel, he indicated to the Court that he had not heard the arguments. Consequently, the Court had to accommodate him. The Court ordered that a copy of a transcript of the Respondent's arguments be provided to him and that the Appellant could provide the Court with his written arguments by May 4th. He did so.

[10] Upon his retirement, he wanted to find something interesting and challenging to do that was exciting for him and fostered his creativity. He has always had a passion for the movie industry. To that end, on January 5, 2005, he incorporated a limited company, Pony Pictures Inc. ("Pony"), for the purpose of financing, producing and distributing a feature motion picture. The Appellant is Pony's only shareholder, director and investor. The Appellant has written a screenplay for this movie titled ***"White Rosebud Burning"*** (see Ex. A-4), which he has been revising since 2006. He has done all of the work so far on this project. It gives him pleasure and it is an artistic outlet for him.

[11] Pony applied for and obtained a Tax Shelter Identification Number pursuant to ss. 237.1(2) of the *Act* for each taxation year. The Appellant withdrew $30,000 from his Registered Retirement Income Fund ("RRIF"), each year since incorporating Pony for a total of $390,000 over 13 years. These were mandatory withdrawals, taxable in the hands of the Appellant. He invested these funds with a professional financial management company, ABC Funds. This money was earmarked for Pony's movie-making project. However, the money was held separately by him since, as he says, if he had it in the corporation, it would be the corporation's money, not his.

[12] Pony filed *Form T5004 – "Claim for Tax Shelter Loss or Deductions"* in the amount of $30,000 for each of the taxation years. In addition, Pony filed and issued *Form T5003 – "Statement of Tax Shelter Information"* to the Appellant as the sole investor indicating a loss or deduction amount of $30,000 for each taxation year. There was no such loss or deduction at any time. In fact, Pony reported a $30,000 increase in its short-term investments and total assets for each taxation year.

[13] In computing his income for the taxation years, the Appellant claimed $30,000 on his returns as "Other Deductions" on line 232 for each year, in keeping with the *Form T5003* and *Form T5004* that Pony issued.

[14] In cross-examination, the Appellant admits that he incorporated Pony for the purpose of shielding his RRIF withdrawals from taxation. It is noteworthy that, since incorporation, Pony has never reported any income or expenses other than $400 per year paid to the Appellant pursuant to an agreement between him and Pony (Ex. A-1, Tab-7). The mutual funds are being managed professionally by ABC Funds and they remain in the Appellant's account since Pony does not have its own corporate bank account or any account for that matter.

[15] Pony has never produced or made any movies since its incorporation and has never done any work to start production, other than the aforementioned script. The Appellant cannot say when any work would be done to produce a movie. Pony has not spent any of the funds that were invested with it since its incorporation in relation to the making of or production of movies. In addition, the Appellant has not incurred any losses from his investment over the years in Pony's tax shelter.

Analysis

(1) Was Pony a Valid Tax Shelter?

[16] What constitutes a valid "tax shelter" is set out in s. 237.1 of the *Act*, which provides:

> "tax shelter" means
>
> (a) …
>
> (b) … a property (including any right to income) … in respect of which it can reasonably be considered, having regard to statements or representations made or proposed to be made in connection with … the property, that, if a person were to … acquire an interest in the property, at the end of a particular taxation year that ends within four years after the day on which … the interest is acquired,
>
> (i) the total of all amounts each of which is
>
> (A) an amount, or a loss in the case of a partnership interest, represented to be deductible in computing the person's income for the particular year or any preceding taxation year in respect of the interest in the property (including, if the property is a right to income, an amount or loss in respect of that right that is stated or represented to be so deductible), or
>
> (B) any other amount stated or represented to be deemed under this Act to be paid on account of the person's tax payable, or to be deductible in computing the person's tax payable under the Act, for the particular year or any preceding taxation year in respect of the interest in the property, other than an amount so stated or represented that is included in computing a loss described in clause (A),
>
> would equal or exceed
>
> (ii) the amount, if any, by which

> (A) the cost to the person of the interest in the property at the end of the particular year, determined without reference to section 143.2,
>
> would exceed
>
> (B) the total of all amounts each of which is the amount of any prescribed benefit that is expected to be received or enjoyed, directly or indirectly, in respect of the interest in the property, by the person or another person with whom the person does not deal at arm's length.

[17] A promoter of a tax shelter must apply for and be issued an identification number for the tax shelter (ss. 237.1(2)). However, a tax shelter identification number does not vest the so-called tax shelter with validity; its purpose is administrative only.

[18] The statutory definition of a valid tax shelter is, on its face, somewhat labyrinthine. In *Canada v. Baxter*[2], Justice Ryer of the Federal Court of Appeal provided a lengthy description of what constituted a tax shelter within the meaning of s. 237.1. He stated:

> 6. The definition of tax shelter essentially poses a question in relation to a hypothetical or assumed acquisition of property by a hypothetical or prospective purchaser (a "prospective purchaser"). If there is an affirmative answer to the question, then the property will constitute a tax shelter and a number of consequences will flow from that characterization. The question is to be answered in advance of any actual sale of the property.
>
> 7. The question posed by the definition of tax shelter is relatively simple, once one gets to it. However, getting to it is not a simple matter. A number of preliminary matters must be determined.
>
> 8. The property contemplated by the definition of tax shelter is each and every property that is offered for sale to prospective purchasers. However, not every property that is proposed to be sold will constitute a tax shelter.
>
> 9. The definition requires that statements or representations must be made, at some time, in connection with the property that is offered for sale. If no statements or representations have ever been made in connection with a property, then that property cannot constitute a tax shelter. Because the property that is contemplated by the definition of tax shelter is a property that is assumed to have been acquired by the prospective purchaser and the statements or representations are required to

[2] *Canada v. Baxter*, 2007 FCA 172.

have been made in connection with that property, it follows that the statements or representations must have been made prior to any actual sale of the property that is offered for sale. Further, while the definition does not specify to whom or by whom the statements or representations must be made, in my view they must be made to the prospective purchasers of the property by or on behalf of the person who proposes to sell the property.

10. The subject matter of the statements or representations is essentially a description of an amount that the prospective purchaser would be able to deduct, in computing income in respect of the property, as a consequence of an assumed acquisition of the property, that is to say, if the prospective purchaser had actually acquired the property, whether the amount constitutes the acquisition cost of the property, a cost incurred in order to obtain the property (e.g., a drilling cost incurred to acquire an interest in an oil and gas property in a farm-out transaction) or an amount allocated to the holder of the property (e.g., a loss allocated to partner holding a partnership interest).

11. The definition of tax shelter does not specify the form that the statements or representations must take or the manner in which they must be made. It is clear that there must be a communication to prospective purchasers which would inform them that a deductible amount would become available to each of them as a consequence of an acquisition by any of them of the property that is offered for sale. Nothing in the definition indicates that the requisite communications must be made in writing.

12. The definition provides no specificity as to whether the communication of the statements and representations must be for any particular purpose or must have any particular effect. It seems obvious that in making the statements or representations, directly or through agents, the prospective vendor of the property would be motivated to encourage or induce prospective purchasers to become actual purchasers. However, because the question that is posed by the definition is to be answered before any actual sale takes place, the impact of the statements and representations on the prospective purchasers is indeterminable and of no relevance.

13. Finally, the question posed by the definition of tax shelter requires the determination of a period of time that ends within four years after the date upon which the prospective purchaser is assumed to have acquired the property.

14. Having regard to these elements, the question posed by the definition of tax shelter is whether, in light of the statements or representations that have been communicated to the prospective purchaser, it may reasonably be considered, that is to say, objectively determined, that at the end of any particular taxation year of the prospective purchaser that ends within the four-year period, the amount that has been announced or communicated to be deductible to the prospective purchaser as a consequence of the prospective acquisition of the property equals or exceeds the cost to the prospective purchaser of the property, determined at the end of the

> particular taxation year in question, less the amount of all "prescribed benefits" expected to be received or enjoyed, directly or indirectly, in respect of that property by the prospective purchaser. This mathematical determination is to be undertaken a maximum of four times, each of which will be at the end of each taxation year of the prospective purchaser that falls within the four-year period. If, at any of those times, the answer is determined to be affirmative, then the property will constitute a tax shelter. However, if the answer is negative at all four of those times, then the property will not constitute a tax shelter.

[19] My colleague, Justice Hogan, has recently provided a much simplified description of a tax shelter. At para. 254 of *Paletta v. The Queen*[3], Justice Hogan states that on a textual, contextual and purposive interpretation of section 237.1 of the *Act*, the following conditions must be satisfied for a property to constitute a tax shelter:

i. There must be a property in respect of which statements and representations are made or proposed to be made;
ii. The statements and representations must be made by a "promoter";
iii. It must be reasonable to consider, having regard to the statements or representations, that there is an amount that is represented to be deductible in respect of the property; and
iv. The amount represented to be deductible must exceed or be equal to the investor's cost in the property less "prescribed benefits".

[20] On considering all of the foregoing, as I understand it and at the risk of being unduly repetitive, a valid tax shelter under the *Act* is an investment in property where it is reasonable to expect, based on statements or representations made by a promoter to a purchaser in relation to the property that, at the end of any particular taxation year that ends within four years after the acquisition of the property by the purchaser, a purchaser of the property will be able to deduct an amount represented to be deductible in computing his/her income as a consequence of the acquisition of the property, which amount would be equal to or exceed the acquisition cost of the property at the end of the particular taxation year (less any prescribed benefits). A tax shelter does not include flow-through shares or certain prescribed properties.

[21] In my view, there are two elements in the definition of a tax shelter that, in the instant case, are not met and that are therefore fatal to the position of the

[3] *Paletta v. The Queen*, 2019 TCC 205.

Appellant: 1) the Statements or Representations requirement, and 2) the Mathematical Determination requirement.

(i) Statements or Representations

[22] The existence of statements or representations in connection with a property is a necessary condition for a valid shelter. A property cannot constitute a tax shelter if no statements or representations are ever made with respect to the amount that a prospective purchaser would be able to deduct in computing income. However, the mere existence of tax representations is not sufficient to cause a property to be a tax shelter.

[23] The statements or representations are required to be made by a promoter of the tax-sheltered property to the prospective purchasers of the property. In the case at bar, the promoter and the purchaser are one and the same person – the Appellant. It is conceptually difficult to see how an individual can make representations to himself. Usually, the promoter of a tax shelter will use some offering document and marketing material to induce potential investors to purchase the tax-sheltered property. The offering document and marketing material often include a tax opinion from an accounting or law firm indicating that certain amounts should be deductible. The offering document and marketing material often form the basis of the prospective investor's decision as to whether or not to invest.

[24] The Appellant has provided a book of documents that is before the court as Exhibit A-1. Among other things, this book of documents contains an undated "Executive Summary" for a feature movie titled "White Rosebud Burning" at Tab-1. Tab-2 contains a "Private Investment Memorandum" dated January 2006, describing the project. This Memorandum clearly indicates that the purchase of interests in the project will entail a high degree of risk[4]. The Memorandum also clearly indicates that the contents of the Memorandum are not to be construed by any prospective purchaser of an interest in the corporation as business, legal, or tax advice. The Memorandum neither purports to be an offer to sell nor a prospectus but is merely informational in nature. The Memorandum also indicates that the anticipated date for completion of the movie is December 2008[5]. The total anticipated capital required is $500,000. Any distribution to be made will be by way

[4] In reality, the risk was zero since there has been no loss whatsoever since Pony was incorporated.
[5] That never happened. No movie whatsoever has ever been produced by Pony since the time of its incorporation. No funds have been expended towards the production of such a movie.

of dividends when there are profits[6]. Tab-3 is an "Offering Memorandum" that bears no date. Item 6 of this "Offering Memorandum" indicates that the type of securities offered are tax sheltered and that the purchaser may be able to claim unspecified tax shelter losses and deductions; there is no mention of a four-year time frame. Item 6.1 of the "Offering Memorandum" suggests that any investors should consult their own professional advisors in order to obtain advice on the income tax consequences applicable to the investor. It offers no tax opinion whatsoever. Tab-5 is a document entitled "Risk Acknowledgement" which every investor is expected to sign. The Appellant, as the sole investor, is the only person to have signed it.

[25] The Appellant submits that the tax-sheltered property that he obtained is an interest in Pony's movie-making venture at a cost of $30,000 each and every year. The required Statements and Representations made by him as promoter on behalf of Pony, to himself as investor/purchaser, are contained in the agreement entered into between Pony and the Appellant that is reproduced at Ex. A-1, Tab-7. This is a short, one paragraph, undated document that purports to have been revised on September 20, 2019. It simply states:

> "Pony Pictures Inc. will pay Billy Liang an annual fee of $400.00 for any work, facilities, living and other expenses for some amount on the fees of management and consultation businesses, and any amount exceeding this will be deferred."

[26] The Appellant argues that this document is a representation to the effect that if he were to acquire an interest in the property, then at the end of any taxation year that ends within four years of acquiring the tax-sheltered property, the entire amount of $30,000 would be deductible in computing his taxable income for that year. Nowhere in this document are there any such statements or representations as to the deductibility of any losses, tax credits, or other deductions that will be equal to or greater than the net cost of the investment within four years of purchasing the investment. In valid tax shelters, there is usually an opinion provided by a firm of tax lawyers or tax accountants regarding the tax consequences of investing in the project. This is not a requirement but it certainly constitutes good practice. In the instant case, there was no such letter of opinion.

[27] In the case at bar, the requirement of Statements or Representations has not been met since nowhere in the documentation are there any statements or representations as to the deductibility of any losses, tax credits, or other deductions

[6] There never were any profits.

that will be equal to or greater than the net cost of the investment within four years of purchasing the investment.

(ii) The Mathematical Determination

[28] If I am wrong in my conclusion as to Statements and Representations, then I would have to go on and consider the Mathematical Determination. As stated by Justice Ryer in *Baxter*, a valid tax shelter involves a mathematical determination. That is, that at the end of any particular taxation year that ends within four years after the date upon which the purchaser acquires the property, the amount that has been represented to be deductible from income equals or exceeds the cost to the purchaser of the property, determined at the end of the particular taxation year in question, less the amount of all "prescribed benefits" expected to be received or enjoyed, directly or indirectly, in respect of that property by the prospective purchaser.

[29] In the case at bar, Pony was created for the purported purpose of making and producing movies. Ever since Pony came into existence, there has been no activity whatsoever in respect to the making and producing of any films or movies – ***nothing***! Pony has not used any of the funds that were invested by the Appellant and has not incurred any losses or earned any profits in relation to the making or production of any movies. The Appellant has withdrawn $30,000 every year from his RRIF then moved the funds to another account in his personal investment account earmarked for Pony – but there is no evidence that the funds are actually transferred to Pony and Pony does not have any bank account of its own. The funds remain under the Appellant's personal control. He then takes a $30,000 deduction on line 232 of his personal tax returns. The Appellant freely admits that he set up this scheme in order to avoid paying taxes or to pay as little tax as possible on his RRIF withdrawals. The Appellant has not incurred any losses from his $30,000 yearly investment. It is apparent that the Pony tax shelter has been used by him as a vehicle to create a tax deduction on his T1 return without incurring any risk.

[30] The Appellant could not reasonably consider, having regard to any statements or representations made by himself to himself that he would incur any tax deductible losses that would exceed the cost of purchase of the mutual funds, possibly ever and certainly not within the first four years of each of his investments. He has not incurred any losses. In fact, the mutual funds have probably appreciated in value over the years. The Appellant has expressed only a vague thought that someday, Pony would use the funds for the purpose of making a movie.

[31] This is not a tax shelter – it is really just the Appellant purchasing financial instruments using an alter ego in order to avoid or delay the payment of taxes on his RRIF withdrawals.

[32] In the instant case, the cost of acquiring the tax-sheltered property is $30,000 each year; the amount paid for the mutual funds. The amount by which any purported losses, deductions or tax credits exceeded the cost minus prescribed benefits was zero. Consequently, the mathematical criteria required for a valid tax shelter has not been met.

Conclusion

[33] In conclusion, Pony was not operating a valid tax shelter as defined under section 237.1 of the *Act*. Consequently, the Minister was justified in disallowing the $30,000 deduction claimed on line 232 for each taxation year.

D. BUSINESS EXPENSES & LOSSES

[34] The Appellant reported business income of only $400 per year from Pony, his exclusive client, for each taxation year. This was pursuant to an undated and unsigned contract between him and Pony (Ex. A-1, Tab-7). He was also to be paid deferred benefits for *"any work, facilities, living and other expenses for some amount on the fees of management and consultation businesses, and any amount exceeding this will be deferred"*[7].

[35] So far, no money has been spent either by the Appellant or Pony towards the realization of a movie. He is the only person working for Pony either as employee, agent, contractor, officer or director. He claimed business expenses of $19,706, $19,276 and $21,367 for the 2014, 2015 and 2016 taxation years respectively against annual income of $400. This resulted in considerable tax savings.

[36] The Respondent takes the position that these activities were entirely personal in nature and were not carried out in a sufficiently commercial manner to constitute a source of business income. Therefore, the expenses claimed were not incurred for the purposes of earning income and thus are not deductible.

[7] This is the wording employed in the contract which is reproduced at para. 25 of these Reasons for Decision.

[37] The Appellant takes the position that he was carrying on a business activity and all of the claimed expenses were legitimately incurred for the purpose of earning business income.

Was there a source of business income?

[38] The first issue to be determined is whether or not the Appellant was carrying on a business? In *Stewart v. Canada*[8], the Supreme Court of Canada adopted a "pursuit of profit" test to distinguish between commercial and personal activities. This consisted of a two-stage test for identifying the source of income:

a. Is the activity undertaken in pursuit of profit, or is it a personal endeavour?
b. If it is not a personal endeavour, is the source of the income a business or property?

[39] The first stage of the test assesses the general question of whether or not a source of income exists. Its purpose is simply to distinguish between commercial and personal activities. The second stage categorizes the source as either business or property.

[40] Where the taxpayer's activities are strictly commercial and in the pursuit of profit, then the source of income is from a business or property and not from personal activities. No further inquiries are required. However, where the nature of a taxpayer's activities contains elements that suggest that the activities could be considered a hobby or other personal pursuit, the venture will be considered a source of business income for the purposes of the *Act* if it is undertaken in a sufficiently commercial manner[9]. In the case at bar, the Appellant admits that movie making is his passion. He finds it exciting and challenging. When he retired, he decided to pursue his passion. He admits that for him, making a movie was exciting.

[41] I consider that the Appellant's activities contain elements that strongly suggest that his activities were in the nature of a hobby or personal pursuit. The Court must therefore consider whether the Appellant was carrying on this activity in a sufficiently commercial manner so as to be considered a source of business income.

[8] *Stewart v. Canada*, [2002] 2 S.C.R. 645.
[9] *Stewart*, *ibid*, at para. 52.

[42] At paragraph 54 of *Stewart*[10], the Supreme Court stated:

> [54] … in order for an activity to be classified commercial in nature, the taxpayer must have the subjective intention to profit, in addition, … this determination should be made by looking at a variety of objective factors … This requires the taxpayer to establish that his or her predominant intention is to make a profit from the activity and that the activity has been carried out in accordance with objective standards of businesslike behaviour.
>
> [Emphasis added]

[43] The "reasonable expectation of profit," which was the test prior to *Stewart*[11], must, of course, be considered if there is some personal or hobby element to the activity in question. But it is no longer the only factor. The overall assessment to be made is whether or not the taxpayer is carrying on the activity in a commercial manner. In paragraph 55 of *Stewart*[12], the Court adopted the objective standards of businesslike behaviour listed by Dickson J. in *Moldowan v. Minister of National Revenue*[13], at page 486. These are:

1) The profit and loss experience in past years;
2) The taxpayer's training;
3) The taxpayer's intended course of action; and,
4) The capability of the venture to show a profit.

[44] These factors are not intended to be exhaustive and the factors will differ with the nature and extent of the undertaking.

[45] In answering the question *"does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?"*[14] the taxpayer needs to establish that his predominant intention was to make a profit from the activity and carry out the activity in accordance with businesslike behaviour.

[46] In the case at bar, the Appellant's business activity has never shown any profit whatsoever in more than a decade. In fact, he claims that the business activity has suffered losses approaching $20,000 each year as against a revenue of $400. This has been the situation ever since Pony was created in 2005. This profit and loss

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[10] *Stewart, ibid* at para. 54.
[11] *Supra*, footnote 6.
[12] *Ibid*, at para. 55.
[13] *Moldowan v. Minister of National Revenue*, [1978] 1 S.C.R. 480 (S.C.C.).
[14] *Stewart, supra*, at para. 61

experience is not sustainable for any business and thus contraindicates that the Appellant was carrying on a business activity in accordance with businesslike behaviour.

[47] The Appellant has taken some college-level courses in filmmaking and audio and visual techniques. I find that these were personal interest courses. He has yet to be involved in producing a feature movie. His efforts at producing a feature movie through Pony have not yielded any success at all since 2005 when Pony was created. In his pleadings, he claims that he has made some "shorts" but none of them were of a commercial nature.

[48] The Appellant was unable to clearly articulate a plan of action to make his movie. He has written a script but that is as far as his efforts have gone.

[49] The venture has never earned a profit and will likely never be able to do so. It is simply not engaging in any activity that can be described as businesslike. Viewed through an objective lens, the venture is dormant and has done nothing to achieve its goal of producing a movie. It simply acts as a repository for the Appellant's RRIF withdrawals.

[50] The Appellant quite frankly admitted that making a movie was exciting for him and any profit made was simply a side effect of the venture. It can fairly be said that this was his avocation. He has not convinced me that his predominant intention was to make a profit from his business activities. He was in it for the love of moviemaking. In addition, he has not persuaded me that he conducted his activities with a level of commerciality sufficient to constitute a business source of income. All that can be said is that he was engaged in a scheme designed to maximize to the utmost any deductions that he could so as to pay as little taxes as possible.

[51] Consequently, the claimed business expenses were not incurred for the purpose of earning income from business and therefore are not deductible. The Minister was therefore justified in disallowing the claimed business expenses.

Business expenses/losses

[52] In the event that I am wrong in concluding that there was no source of business income, I would have to go on and consider whether the claimed business expenses/losses are otherwise properly deductible. Mr. Liang's claimed business expenses are only legitimate if he can establish that the claimed expenses were incurred for the purpose of gaining or producing income from the business

(s. 18(1)(a) of the *Act*)[15] were not incurred for personal or living expenses of the taxpayer (s. 18(1)(h) of the *Act*) and were reasonable in the circumstances (s. 67 of the *Act*).

[53] The claimed income, expenses and losses are summarized in the following table:

Statement of Business or Professional Activities

	2014	**2015**	**2016**
Business Income	400.00	400.00	400.00
Expense:			
Meals and entertainment	1,093.25	399.27	293.00
Insurance	-	788.40	895.00
Interest	786.96	-	-
Office Expenses	1,022.66	1,825.90	-
Supplies	-	351.78	1,989.00
Professional Fees	-	-	96.00
Maintenance & Repairs	1,108.40	2,113.33	1,497.00
Property Taxes	4,515.58	4,611.66	4,749.00
Telephone & Utilities	4,871.11	4,803.56	4,400.00
Motor Vehicle Expenses	2,672.69	2,563.01	2,782.00
Capital Cost Allowance (CCA)	3,400.00	1,025.85	2,796.00
Other Expenses	253.39	793.57	1,866.00
Total Business Expenses	19.707.04	19,276.33	21,367.00
Net Business Income (Loss)	**(19,306.04)**	**(18,876.33)**	**(20,967.00)**

[54] The Respondent submits that the claimed expenses were personal living expenses and therefore not deductible pursuant to paragraph 18(1)(h) of the *Act*. The expenses were also unreasonable and thus not deductible pursuant to s. 67 of the *Act*.

[55] The Appellant produced Exhibit A-5 in support of his claimed expenses for the taxation years. There are unexplained discrepancies between the amounts claimed in the Appellant's tax returns and the amounts set out in the lists of Ex. A-5. However, these discrepancies are of a minor nature.

[15] This he has failed to do as discussed in paras. 38 through 50 of these Reasons for Decision.

[56] Exhibit A-5 consists of lists of claimed expenses. He has not produced any source documents such as receipts or invoices to back up his claims. This presents a difficulty for the Appellant since, without source documents, it is not possible to verify the validity and accuracy of the information contained in these lists.

Personal vs. Business

[57] What is most concerning about many of these claimed expenses is the fact that they are obviously for personal living expenses. For example, for 2014, he claimed expenses totalling $360.82 for Revitive (an analgesic), a neck massage and Oral-B (a dental care product). He claimed $83.36 for a watch and Long Johns. He claimed $1,339.88 for groceries and meals. For 2015, he claimed $2,113.22 for repairs and maintenance[16]. He claimed $421.00 for money paid to a doctor, hearing aid batteries, money paid to a dentist for a tooth extraction, a clinic in Oshawa and physiotherapy. He claimed $285.24 for a library fine, rubber shoes and OHIP medicine. He again claimed $1,322.79 for meals and groceries. For 2016 he claimed $1,451.87 for meals and groceries. Under miscellaneous, he claimed expenses incurred at Phillips Pharmacy, the Medicine Shoppe, and a gun license renewal. I fail to see how pharmaceuticals, medicines and a gun license are necessary to run a business dedicated to moviemaking. The Appellant does not explain how the expenditures for meals and groceries relate to the operation of the business and he has not produced any receipts justifying such expenditures. He argues that he has to eat to stay alive because if he was not alive he would not be able to operate his business. That is a ludicrous argument.

Work space in the home

[58] He has claimed expenses for work space in the home with respect to his residence on Hawley Cres, in Whitby. His home is about 2000 square feet. He has not indicated what percentage of his living area is dedicated to his business activities. It is his position that his entire home is his work space. The Appellant admits that all property taxes, telephone and utilities[17], insurance, maintenance & repairs expended for the upkeep of his personal residence were claimed 100% as business expenses. He claims that his entire house is his place of business. He categorically states that he works 24/7 on his business activities and he even works in his sleep – that is when he gets inspiration from his dreams. He argues that any kind of expenses that may appear to be personal living expenses are in fact business related. He reasons that he

[16] This expense was $650 for tree removal, $598 for fridge and $866 for washer and dryer repair. This was all in relation to his personal residence.

[17] The total of utilities and expenses was quite high ranging from a low of $4,400 in 2016 to a high of $4,611 in 2015.

needs to eat, sleep, shelter himself and that he needs to keep himself alive in order to conduct his business activities. He states there is no way he can divide expenses into personal and business.

[59] I am not inclined to allow any expenses for the work space in the home. They are all personal living expenses. In any event, subsection 18(12) (b) of the *Act* specifies that the work space in home deductions cannot exceed the taxpayer's income from the business for the year and that income is only $400. Therefore, if I were to allow any expense for work space in the home, it would be limited to only $400 per year.

Automobile expenses

[60] The Appellant claimed motor vehicle expenses of $2,672.69[18] for 2014 together with Capital Cost Allowance ("CCA") of $3,400.00. For 2015, he claimed $2,563.01 for motor vehicle expenses and $1,025.85 for CCA. For 2016, he claimed $2,782.00 for motor vehicle expenses and $2,796.00 for CCA. He alleges that the acquisition cost of his vehicle, a used 2010 Matrix, was $13,200. However, he has not produced any documentation, such as a bill of sale, in support of this contention. Again, it is apparent that he is trying to deduct 100% of all vehicle expenses and depreciation. This is simply not reasonable. He must certainly have used his personal vehicle for personal use. The Appellant has not produced any logs indicating the trips he took for business purposes, how far he went, where he went and for what purpose. Consequently, the Court has no idea the percentage distance travelled for business purposes as opposed to personal use. He contends that he does not use his vehicle for personal use purposes. I do not accept that contention. It is the responsibility of the Appellant do clearly establish, with convincing evidence, what percentage of motor vehicle expenses is attributable to business activities and what percentage is for personal use. This, he has not done.

Conclusion

[61] In conclusion, I am of the view that the Minister was justified in disallowing the sums of $19,306 as a business loss for 2014, the sum of $19,276 as business expenses for 2015 and the sum of $21,367 as business expenses for 2016. On the entirety of the evidence, I find that these amounts claimed as business expenses were

[18] This includes $143.60 for a trailer hitch. The Appellant does not explain how a trailer hitch for his car can reasonably be used for business purposes.

not incurred in order to earn income, they were in large part incurred as personal living expenses and many of them were simply unreasonable.

E. THE STATUTE BARRED YEARS

[62] The Respondent contends that the Appellant was liable to reassessment of his return for the 2014 taxation year beyond the normal reassessment period pursuant to subsection 152(4) of the Act.

[63] In order to provide some level of certainty and finality to taxpayers, there are time limits applicable to the Minister's ability to reassess taxpayers for previous years. The normal assessment period is three (3) years (s. 152(3.1)(b)). Therefore, in the instant case, 2014 is statute barred.

[64] The *Minister* can assess a taxpayer in respect of a matter at any time pursuant to s. 152(4)(a)(i) of the *Act* if it is shown by the Minister that there was a misrepresentation that is attributable to neglect, carelessness or wilful conduct on the part of the taxpayer. Subsection 152(4) provides:

> s. 154(4) ... an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (a) the taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filling the return or in supplying any information under this Act, …

[65] The onus of proving that there was a misrepresentation and that the misrepresentation was attributable to neglect, carelessness or wilful conduct is on the Minister on the balance of probabilities.

[66] In the case at bar, I am of the view that there was a misrepresentation regarding the Appellant's personal income tax return. He has clearly misstated or misrepresented the amounts that he could deduct as a tax shelter deduction and he has also misstated the amounts that he could lawfully claim as business expenses. The misrepresentations are not of a minor nature such as might occur in the case of a simple mistake or an arithmetical error. They are very significant and of a nature that the Appellant must have known that the information provided was simply not correct and in accordance with the law.

[67] I am also of the view that this misrepresentation is attributable to a wilful default on his part. The Appellant is an intelligent, well-educated man who knew what he was doing. He took steps to inform himself about tax shelters and the requirement to apply for a tax shelter ID number. He knew to cause Pony to complete and file *Form T5004 – "Claim for Tax Shelter Loss or Deductions"* and *Form T5003 – "Statement of Tax Shelter Information"* in the amount of $30,000 for each of the taxation years. He was aware of the relevant provisions of the *Act*. He knew the essential elements of a contract. I do accept that he had a passion for making movies and he has dabbled in moviemaking in the past. However, he and Pony took no steps to produce his feature movie. I conclude that the major reason that he set up Pony and his tax shelter scheme was in order to shield his RRIF withdrawals from taxation. I find that the Appellant knew or ought to have known that he was not entitled to claim $30,000 per year as "Other Deductions" on line 232 of his tax returns regarding his investment in the tax shelter since neither he nor Pony suffered any losses at all since the time Pony was incorporated because Pony never undertook any activities. There were no losses, deductions or tax credits available to him arising out of the activities of the tax shelter. I find that he could not reasonably consider that he would have available any losses, deductions or tax credits available to him based on statements and representations allegedly made by him to himself since he was the one controlling Pony's activities.

[68] He must also have known that he could not deduct 100% of his personal living expenses as a business expense. He also knew or must have known that many of these claimed expenses had no relation to his alleged business activities and they were unreasonable. His explanation for doing so is simply disingenuous and ludicrous. The tax shelter deductions and the business expenses and losses claimed were significant. He was the one who maintained the books and records for Pony and himself and he was the one who prepared all of the income-tax returns. Thus he cannot claim ignorance.

[69] Consequently, I conclude that the Minister has established that there were material misrepresentations on the Appellant's tax returns that are attributable to wilful conduct and therefore the Minister was justified in reassessing the Appellant for the statute barred taxation year of 2014 beyond the normal reassessment period pursuant to subsection 152(4) of the *Act*.

F. GROSS NEGLIGENCE PENALTIES

[70] Subsection 163(2) of the *Act* provides that the Minister can assess gross negligence penalties on a taxpayer where the taxpayer knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of false statements or omissions in his or her returns. The subsection provides:

> s. 163 (2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making-of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty ….

[71] The onus on proving gross negligence is on the Minister on the balance of probabilities.

[72] All of the same points raised with respect to the ss. 152(4) reassessment beyond the normal reassessment period applies to the gross negligence penalties.

[73] I am of the view that a false statement or omission was knowingly made, by the Appellant in his returns for the taxation years. Again, the Appellant is an intelligent, well-educated man who knew what he was doing. He knew or ought to have known that he was not entitled to claim $30,000 per year as "Other Deductions" on line 232 of his tax returns but yet he did. He knew or he ought to have known that he could not deduct 100% of his personal living expenses as a business expense, but yet he did. The amounts claimed were significant. He maintained the books and he prepared all the tax returns for both Pony and himself.

[74] His motivation to set up the corporation was to shield from taxation his mandatory withdrawals from his RRIF. He has been doing so for a decade. He consistently claimed nearly $20,000 of business expenses each year against business revenue of $400 per year. The business expenses claimed were substantial and unrealistic and he knew they were personal living expenses and thus not deductible. He has intentionally not complied with or has shown an indifference to the law.

Conclusion

[75] I therefore conclude that the Minister was justified in assessing penalties against the Appellant pursuant to ss. 163(2) of the *Act* for knowingly making a false statement or omission in his tax returns.

G. DISPOSITION

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

Signed at Kingston, Canada, this 7th day of June 2022.

"Rommel G. Masse"

Masse D.J.

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Mike Chen

COUNSEL OF RECORD:

For the Appellant:

Name:	Billy Liang
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada