Docket: 98-3126(IT)I

BETWEEN:

JEAN-GUY BRILLON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard with the appeals of *Denis Hamilton* **(98-3185(IT)I)**, *Marcel Lalonde* **(98-3292(IT)I** and **2004-1372(IT)I)**, *Serge Paquin* **(98-3561(IT)I** and **2004-2937(IT)I)** and *Gabrielle Clapin, executrix of the estate of Roger Clapin* **(98-3595(IT)I)**
on August 4 and 5, 2005 and November 24, 2005, at Montréal, Quebec.

Before: The Honourable Louise Lamarre Proulx J.

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Anne-Marie Boutin Dany Leduc

JUDGMENT

The appeal from the assessment issued under the *Income Tax Act* in respect of the 1989 taxation year is dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 9th day of February 2006.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 5th day of May 2006.

Monica F. Chamberlain, Revisor

Citation: 2006TCC76
Date: 20060209
Dockets: 98-3126(IT)I
98-3185(IT)I
98-3292(IT)I
2004-1372(IT)I
98-3561(IT)I
2004-2937(IT)I
98-3595(IT)I

BETWEEN:

JEAN-GUY BRILLON,
DENIS HAMILTON,
MARCEL LALONDE,
SERGE PAQUIN,
GABRIELLE CLAPIN, EXECUTRIX OF THE ESTATE OF
ROGER CLAPIN,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] These appeals were heard on common evidence based on the evidence of the Respondent.

[2] The basis for the assessment is the concept of "specified member" within the meaning of the definition in subsection 248(1) of the *Income Tax Act* (the "Act").

[3] The expression "specified member" is defined as follows in subsection 248(1) of the Act:

> "*specified member*" of a partnership in a fiscal period or taxation year of the partnership, as the case may be, means
>
> (*a*) any member of the partnership who is a limited partner (within the meaning assigned by subsection 96(2.4)) of the partnership at any time in the period or year, and
>
> *(b)* any member of the partnership, other than a member who is
> (i) actively engaged in those activities of the partnership business that are other than the financing of the partnership business, or
>
> (ii) carrying on a similar business as that carried on by the partnership in its taxation year, otherwise than as a member of the partnership,
>
> on a regular, continuous and substantial basis throughout that part of the period or year during which the business of the partnership is ordinarily carried on and during which the member is a member of the partnership.

[4] It is subparagraph (*b*)(i) that is at issue here. In the interests of clarity and brevity we may refer to the specified member as a (silent) specified member.

[5] Paragraph (*a*) of the definition of "investment tax credit" in subsection 127(9) of the Act reads as follows:

> "investment tax credit" of a taxpayer at the end of a taxation year means the amount, if any, by which the total of
>
> ...
>
> (ii) a qualified expenditure made by the taxpayer in the year,
>
> ...

[6] The definition of "qualified expenditure" is found in subsection 127(9) of the Act. It is an expenditure incurred by a taxpayer in respect of scientific research and experimental development ("SR&ED").

[7] Paragraph 127(8)(*a*) of the Act reads as follows:

> 127(8) **Investment tax credit of partnership.** Where, in a particular taxation year of a taxpayer who is a member of a partnership, an amount would, if the partnership were a person and its fiscal period were its taxation year, be determined in respect of the partnership, for its taxation year ending in that

particular taxation year, under paragraph (*a*), (*b*) or (*e.*1) of the definition "investment tax credit" in subsection (9), if

(*a*) paragraph (*a*) of that definition were read without reference to subparagraph (*a*)(iii) thereof, and

(b) in the case of a taxpayer who is a specified member of the partnership in the taxation year of the partnership,
(i) paragraph (*a*) of that definition were read without reference to subparagraph (*a*)(iii) thereof.

[8] According to subsection 127(8) of the Act, which concerns the investment tax credit of a partner, if the taxpayer is a (silent) specified member, it is not necessary to take subparagraph (*a*)(ii) of this definition of investment tax credit ("ITC") into account in calculating the ITC. This subparagraph concerns a qualified expenditure that the taxpayer has incurred during the year.

[9] As the Minister of National Revenue (the "Minister") felt that the Appellantswere (silent) specified members, the investment tax credit that the Appellantshad claimed was refused because the claim for this credit was based exclusively on the amount of the expenditure.

[10] In the year following the year of their engagement in the partnership, the taxpayers disposed of their share. A capital gain resulted from the disposition of the shares because, in light of paragraph 53(2)(*c*) of the Act, the adjusted cost base ("ACB") of the interest must be reduced by the amount of the partnership loss claimed. Some claimed a capital gains deduction pursuant to subsection 110.6(3) of the Act. The fact that the taxpayers are considered to be (silent) specified members has an impact on the cumulative net investment losses ("CNIL"), which limited their entitlement to the capital gains deduction. The Minister refused this deduction for those who had claimed it. In the case of the taxpayers who had reported the capital gain, the gain was maintained and it was taxed for those who had not reported it.

[11] The business loss was allowed under paragraph 96(1)(*g*) of the Act. It was taken into account in the following year as an "investment expense", which is defined in subsection 110.6 (1) of the Act, on the basis of paragraph (*c*) of the definition. The definition of CNIL is also found in subsection 110.6(1) of the Act. The CNIL affects the capital gains deduction.

[12] According to the Respondent, there was also another question with respect to the 1990 year, although it was not clearly expressed in the notices of appeal,

namely that the Minister taxed a Quebec tax credit that the people had received. This tax credit was taxed under paragraph 12(1)(*x*) of the Act.

[13] The main issue out of which the various aspects of the calculation of the assessments on appeal arise is the concept of (silent) specified member. It is this concept that was relied on by the Appellants and it is this concept that will be the subject of these reasons. This was in fact the sole point raised by the Appellants.

[14] The first witness for the Respondent was Marie-Andrée Beaudry. She invested in E.C.T. Systems Enrg. ("E.C.T. Systems"), that is the partnership involved in this case. She stated that her colleagues at work had spoken to her about the tax benefits linked to investments in SR&ED projects. She went with them to presentations concerning the project. These were computer projects. Following one or more meetings, she signed some documents: a loan and some cheques.

[15] Counsel for the Respondent filed as Exhibit I-1 the documents that Ms. Beaudry sent to Revenue Canada when she accepted the settlement proposal in December 1995. These are documents showing her investment and her income tax returns for the years 1989 and 1990.

[16] Her investment amounted to $20,000 or 20 shares of $1,000 each. On November 8, 1989, she signed a cheque in the amount of $10,000 and obtained a personal loan in the amount of $10,000 from a company, Diasware Inc. ("Diasware"). On February 19, 1990, she made out a cheque in the amount of $225 to the order of Diasware to cover the amount of the interest referred to in the loan form. On January 24, 1990, she received from Glenrock Investments Ltd. ("Glenrock") an offer to purchase all her shares in E.C.T. Systems at the price of $500 per share. This offer was valid until February 28, 1990.

[17] Again in Exhibit I-1, we find a letter sent to the partners of E.C.T. Systems dated February 5, 1990, not signed but with an indication that it came from the secretary. It reads as follows:

> [TRANSLATION]
> Please find enclosed a cheque made out to you that we would ask you to endorse (sign on the back) in order to pay your loan from DIASWARE INC. and to return it to us as soon as possible. This cheque represents the purchase of your shares in E.C.T. Systems.
>
> When we receive your cheque, duly endorsed, we shall credit your loan. ...

[18] The amount of Ms. Beaudry's loan was $10,000. The amount of her investment was $20,000. Her whole investment was redeemed for the amount of the loan, namely $10,000, which was then cancelled.

[19] She stated that there were no further discussions concerning the redemption of the shares and reimbursement of the loan. She received the papers and signed them.

[20] There were three meetings at most, and they lasted approximately one hour each. E.C.T. Systems was presented as being a computer project. If her memory served, it involved programs or the development of software that would help other programmers. She did not know the researchers personally. As far as she was concerned, this investment was an investment in a tax shelter.

[21] In Exhibit I-2, which was an income tax return for Ms. Beaudry, we find a "Statement of partnership income" prepared for the partner Beaudry. The partnership is E.C.T. Systems. In this statement, we see a business loss in the amount of $19,558 and an investment tax credit in the amount of $3,915. She claimed both amounts in her income tax return for 1989. The business loss was allowed. The investment tax credit was refused.

[22] The next witness was Michel Beaudry, an auditor with the Canada Customs and Revenue Agency ("CCRA"). In late 1991, he audited the E.C.T. Systems partnership. His task was to audit the SR&ED expenses and the related tax credits.

[23] He also audited other SR&ED partnerships. Their head offices were at the same address as E.C.T. Systems and they were administered by the same individuals. They were Kat-Vades for 1989 and 1990, C.I.D. Systems for 1989 and 1990, G.E.T. Systems for the same years, Société Arbus-486 for 1990, F.T.N. and C.T.N. for 1990. What these partnerships had in common was the fact that they had the same promoter Zuniq Property Ltd., which belonged to Hien Vohoang. He also again saw the names of Anh Nguyen, Mr. Vohoang's wife, and of Vo Thi Thang Nguyen, his sister.

[24] Exhibit I-3 is a book of documents divided into 71 tabs. At tab 2 is a declaration of E.C.T. Systems, made in Alberta on September 28, 1989. The two persons referred to are Chau H. Nguyen and Tom Nguyen. According to this declaration, the partnership began on September 28, 1989, and as of that date, these two individuals were the only members of the E.C.T. Systems partnership.

[25] At tab 3 we find the partnership agreement for E.C.T. Systems. The tax shelter number is indicated there. This partnership agreement was concluded between Chau H. Nguyen, Modesto, California, and Tom Nguyen, Modesto, California. It is dated October 20, 1989. Article 15 of this agreement indicates that [TRANSLATION] "*... this agreement shall be governed by the laws of the province of Ontario*". According to this agreement, the two individuals are from Modesto, California, whereas in the partnership declaration, their address was given as being in Calgary. The partnership's address is in Rosemeade, California.

[26] It should be noted that the agreement was signed on October 20, 1989. However, it was registered on September 28, 1989, with an indication that it had existed since September 28, 1989.

[27] Some 215 members invested in this partnership. The names of the investors and the amounts invested are indicated at tab 5 of Exhibit I-3. The total amount of the investments was $3,474,900. This was the total of the amounts borrowed from a bank and from Diasware.

[28] At tab 10 of Exhibit A-3 we find an income tax return of Diasware. The address of Diasware's head office is in Calgary but its mailing address is 2035 Côte de Liesse, Ville St-Laurent. The person who signed as the officer authorized to sign for the corporation was Anh Nguyen, the wife of the promoter, Mr. Vohoang.

[29] At tab 13 we find the financial statements of E.C.T. Systems for the year ending December 31, 1989. It reads in part:

Partners' contributions	$3,474,900
Net loss	($3,474,709)
Closing balance	$191

[30] Mr. Beaudry stated that he tried to follow the amount spent through the contracts for services awarded by the partnership to the many corporations hired to conduct the research. This was not possible. These contracts are found at tabs 17 to 33. They involve companies almost all of whose addresses are given as 2035 Côte de Liesse and whose officers are the same as those mentioned earlier.

[31] It would be tiresome and impossible to reproduce these agreements. In their testimony, each of the Appellants admitted that they were not aware of these agreements and that they were seeing them for the first time.

[32] The Appellants followed the scheme described above in Ms. Beaudry's testimony. They acquired their shares in late 1989 and sold them in early 1990.

[33] At tab 42 we find an assignment of shares form. The investor referred to is not one of the Appellants but a partner in the same partnership. He sold, assigned and transferred to Glenrock at a cost of $10,000 the shares he held as of December 31, 1989, namely 20 shares acquired at a cost of $20,000. The complete redemption in 1990, according to the list provided by the accountant for E.C.T. Systems, was for the amount of $1,635,620 (tab 43). In the list of redemptions we find the name of each of the Appellants. The redemption price was one-half of the price of the investment.

[34] Mr. Beaudry testified that the audit of the scientific aspect of this case was conducted by Claude Papion. The scientist felt that the project was eligible. When Mr. Vohoang submitted the scientific documents, he attached certain documents, namely questionnaires, that were supposed to show the active engagement of the partners. The auditor asked the scientist to examine these documents to determine whether the work of the various partners corresponded to what was in the project. The scientist concluded that the contents of these questionnaires had nothing to do with the project. According to Mr. Beaudry, it was at this point that he concluded that these were silent partners, partners who were not actively engaged in the partnership on a regular, continuous and substantial basis, as required by the definition of specified member. Most of the letters received from the investors concerning their involvement in the scientific research were completely or almost identical and this was true of all the partnerships referred to earlier, namely E.C.T. Systems, Kat-Vades, C.I.D., G.E.T., Arbus-486, F.T.N. and C.T.N.

[35] To continue with this search to determine the nature of the Appellants' involvement in the partnership, Mr. Beaudry wrote on July 8, 1993, to Ms. Houle, the administrative assistant with E.C.T. Systems, stating: [TRANSLATION] "... *in order to clarify the interest of the partners in the above-mentioned partnerships, we would request that you provide us with the following documents: records of attendance by the partners at the various activities of the partnership, minutes and the decisions made, whether in the form of resolutions or otherwise, at the meetings held by the said partnerships with respect to their various research projects*...." (tab 57). The reply arrived on September 3, 1993,

stating [TRANSLATION]: *"In reply to your inquiry dated July 8, 93 ... it is unfortunately impossible for us to provide you with the records of attendance of the partners at various activities. In fact, we have not been able to locate these documents mentioned by Mr. Vohoang at a meeting he had with you shortly before he died...."* (tab 58).

[36] Nevertheless, she enclosed with her letter certain resolutions claiming to indicate certain decisions made by the partners during the year of their involvement. These were resolutions drafted in advance by E.C.T. Systems, in the formulation of which the Appellants were not involved in any way.

[37] The Appellants were reassessed and the investment tax credit refused because they were (silent) specified members in 1989. For those whose 1990 taxation year is at issue, there was a capital gain because the adjusted cost base of the interest became zero as a result of paragraph 53(2)(*c*) of the Act. The partnership's business loss was classified as an investment expense within the meaning of paragraph (*c*) of this definition in subsection 110.6(1) of the Act. This had an effect on the amount of the cumulative net investment losses and a ricochet effect on the amount of the capital gains deduction. The Quebec tax credit was taxed.

[38] The auditor's report dated July 22, 1994, is located at tab 60. At tab 61, we find another auditor's report, that on the T2020.

[39] To a question asked by the Appellant Paquin concerning the use of the money invested, Mr. Beaudry replied that he had examined the partnership's bank account. The only disbursement he saw related to the first contract. As far as the other contracts were concerned, it was not possible to follow the trail taken by the money.

[40] The next witness was Ahn Nguyen. In 1989, she worked for Mr. Vohoang. She started working in 1988 and left the company in 1994. Her workplace was 2035 Côte de Liesse in Ville St-Laurent. She was an accounting clerk. She prepared the redemption cheques. The amount to be indicated on each redemption cheque was 50% of the amount invested.

[41] Counsel for the Respondent referred the witness to tab 39 in Exhibit I-3. The witness stated that Huyen Anh Nguyen is Mr. Vohoang's wife. She herself, whose given name is Ahn, said that she is not related to the other individuals named Nguyen mentioned in tab 39, except for Tan Dung Nguyen, who is the witness's

husband. Chau Huyen Nguyen is Ms. Vohoang's sister. At tab 40, she did the same thing; Dzung T. Nguyen is the person who, following Mr. Vohoang's death, continued the company. Isabelle Vohoang is Mr. Vohoang's daughter. At tab 42, there is the assignment form for Glenrock, and the signature is that of Marjorie Lauger. The witness stated that Ms. Luger was Mr. Vohoang's secretary.

[42] The next witness was Hélène Deshaies, an appeals officer with the CCRA. Her report is at tab 69. She first became involved with these cases in 1997. She confirmed that all the sub-contractor companies had the same address, namely 2035 Côte de Liesse. She contacted the banking institutions with which Glenrock did business. At tab 63 was a letter dated June 23, 1997, from National Trust replying to her concerning Glenrock's bank account: the date on which this account was opened was December 28, 1989, the name of the person opening it was Hien Vohoang, the company's address was in Calgary, the names of the signatories for this account were Hien Vohoang and Marjorie Lauger and the account was closed on November 11, 1993. She sent the same type of letter to the General Trust of Canada and received the following reply: the date the account was opened was May 27, 1992, the names of the persons opening it were Nhu Co Le and Than Nguyen Vo, the company's address was 2035 Côte de Liesse, the signatories were the people who had opened it and the account was closed on April 27, 1994.

[43] Serge Huppé was the next witness. He filed as Exhibit I-5 a table bearing the title "Table of partnerships in the Zuniq Group used as SR&ED tax shelters for the taxation years from 1989 to 1992". He stated that during their research, they established that there was a group of 19 partnerships that were very similar to one another and linked to the Zuniq Group. Concerning the settlement offer made to the Appellants in 1995, he explained that the interest was cancelled from May 1, 1990, to the date of the assessment leading to the settlement, provided that the settlement was agreed to not later than December 29, 1995.

[44] Claude M. Papion testified as an expert. As we noted in paragraph 34 of these reasons, he was the scientific adviser who, at the Minister's request, examined the Damdes project of E.C.T. Systems. His report was filed as Exhibit I-6. He also examined the scientific projects of C.I.D. and G.E.T. He had concluded that the projects as described were eligible projects. However, concerning the involvement of the partners, he stated the following on May 21, 1992 at tab 1 of Annex A to Exhibit I-6:

> [TRANSLATION]

…

3. NATURE OF PARTNERS' INVOLVEMENT

> The ample documentation provided concerning the involvement of the partners shows the following characteristics:
>
> - in the three cases, although the projects deal with subjects that are fundamentally different from each other, the documentation provided is strictly identical and bears not the slightest relevance to the subject of the project in which the partner invested funds,
>
> - each file contains an annual report on the activities in which the partners participated in 1989;
>
> the partners were not asked to examine the documentation prepared for them until 1990, as can be seen in the survey of the work of several partners dated 1990 corresponding to the period during which they made their subscription;
>
> - finally, the questionnaire to which the partner was asked to respond, is identical in all three cases and makes no mention of the subject of the research project to which the partner is supposed to contribute.
>
> The purpose of this documentation is accordingly still a mystery.

[45] Some investors, who are not Appellants, subsequently wrote to the auditors setting out the nature of their involvement. Mr. Papion wrote the following on October 27, 1993 at tab 2 of Exhibit I-6:

> [TRANSLATION]
> …
>
> The activities in which the persons mentioned participated relate to the handling of elementary software used by colleges in order to teach the rudiments of computer science: Rocky's boots, SM Verbes (conjugation of verbs), MS DOS (basic elements), Getting Started (first contacts with a micro-computer), Word Perfect (a popular word-processing system), Lotus 123 (the most common spreadsheet).
>
> Such activities have absolutely no connection with the subject of the DAMDES project and make no contribution to the work done by several academics recruited for the project, who are very familiar with the technologies underlying the

> software examined in the feasibility study. Such software also requires complete mastery of computer technology, far more demanding than the “beginner”-level activities in computer science to which ECT Systems thought fit to invite the four persons mentioned.

[46] Marcel Lalonde was the first Appellant to testify. His appeal related to two years, namely 1989 and 1990. His interest amounted to $14,000, paid in November 1989. He disposed of it for $7,000 in February 1990.

[47] Concerning his involvement in E.C.T. Systems, I shall quote some extracts from his testimony at pages 100, 101, 103, 105 and 106 of the transcript:

> [TRANSLATION]
> A. That’s it. Then there was involvement that was required. Moreover, it was stated very clearly at the meeting, I remember; they said: we require, we shall require that people be actively engaged. You will have to devote some of your time. That does not mean that it will be from 9 to 5; we understand that. Most people have jobs, but you will have to contribute some time. You will have to conduct analyses. You will have to submit reports to us. And then, you will be invited to meetings where all this will be questioned, the information cross-checked, to validate those reports, to approve them and to reach a consensus.
>
> The part that was ... Obviously, if I had been forced to work in the central group, I would have said no because, first of all, there were certain areas of expertise that I simply do not have. ...
>
> The standard questionnaire did not surprise me at all. Moreover, that was said by the ... It’s in the testimony here. There was a questionnaire in three businesses. Now that questionnaire was effectively a standard questionnaire. I did not find it surprising that other companies were using it too.
> ...
> The meetings that we had later, I submitted reports and the meetings consisted precisely of attempts to achieve consensus among the people who were there. For example, it involved saying: now in item 4, number 3, everyone is stuck. You all said that there was a problem. Eighty-two per cent (82%) said that they found that very difficult. What’s the problem? And then they attempted to identify what those problems were. And if you are all stuck there, then there must certainly be a problem; what is it that is not working?
> ...
> Q. And that was ...
>
> R. That was in the fall of 89.

> Q. In the fall of 89, was that?
>
> R. Yes, it started in ... I received the documents a few days later. The first documents transferred were issued in the month of November. ...

[48] As Exhibit A-3, he (Lalonde) filed the documents concerning his interest that he received accompanied by a letter dated November 3, 1989. I quote the first two paragraphs of this letter:

> [TRANSLATION]
> I have just received your membership documents and I would like to welcome you to the partnership. As the secretary of ECT Systems, it is my responsibility to register you as a full member of the Partnership.
>
> Please find enclosed a copy of the membership documents and the working documents. In fact, you have an opportunity to participate in an interesting research project. Your participation in the task of validating the prototype will greatly assist our research team. Therefore, please complete the document entitled "Participation Form" and return it to us indicating the name of the software used for your analysis. You may select any of the four software packages including in this mailing.

[49] The Appellant himself stated that the documents were standard forms.

[50] He did not know any of the other participants in the partnership. He did not know the officers. He was not aware of the documents constituting the partnership. He did not know which was the E.C.T. Systems bank, who was entitled to sign the cheques or where the books and records were located. He did not know what property E.C.T. Systems owned. He was not involved in the decision to award research contracts to the sub-contractors. He went three or four times to 2035 Côte de Liesse. He did not remember exactly how he had paid for his interest. Counsel for the Respondent showed him at tab 7 in Exhibit I-3 the deposits made by E.C.T. Systems. Two deposits are shown there relating to the Appellant, one from a bank and the other from a loan obtained from Diasware.

[51] Mr. Lalonde's income tax return for 1989 was filed as Exhibit I-7. The amount of the business expense is $13,691 and the ITC is $2,741. It can be seen there that the loan of $7,000 was obtained from the Société d'Épargne Métropolitaine de Montréal Inc.

[52] The income tax return for 1990 was filed as Exhibit I-8. We see there that the lender for the second part of the loan was indeed Diasware.

[53] The Appellant, Serge Paquin, filed a book of documents as Exhibit A-2. His interest amounted to $15,000. He stated that the loan of $15,000 was obtained in two parts from the Société d'Épargne de la Montérégie on December 9, 1989. At tab 7, however, we see a deposit made in his name by Diasware and in the income tax return for 1989, a statement of interest paid by the Appellant to Diasware. He disposed of his interest in February 1990 for a sum of $7,500.

[54] He stated that with his colleagues, he had discussed the tax reductions provided by the federal government and this was how he came to attend a meeting concerning the Damdes project.

[55] In his book of documents was an explanation of his reassessments. Since I believe that it was most probably identical for all the Appellants, I shall quote from it in the interests of an understanding of the dispute:

> [TRANSLATION]
> ...
>
> The documents submitted by ECT Systems SNC and your letter dated 25/05/93 did not establish that you took part on a regular, continuous and substantial basis in the activities of the partnership during the fiscal year ending December 31, 1989.
>
> Consequently, the following changes will be made in calculating your tax payable for 1989 and any other year that may be concerned:
>
> - the tax credit earned in connection with your interest in the partnership is refused;
> - the business loss from this partnership, which you deducted, represents investment expenses that must be included in calculating the cumulative net investment loss. This loss has an effect on the calculation of the capital gains exemption, and
> - the provincial tax credit is included in income for the year in which it was received.

[56] Exhibit I-11 is a resolution of E.C.T. Systems appointing Ms. Lauger as project manager. Her signature appears on the document dated November 13, 1989. He admitted not having taken part in this decision. He did not know this person. He also readily admitted that he did not know the managers of E.C.T.

Systems and had not taken part in the partnership's decisions. His only involvement had been to comment on the software.

[57] The following are some extracts from his testimony at pages 22, 70, 77 and 78 of the transcript:

> [TRANSLATION]
> ...
> It was then mentioned to us that the government had accepted this project as part of its program and had assigned a project number. No mention was made of a temporary number by way of admission. I went to negotiate a loan of $15,000 with the Société d'épargne de la Montérégie and I accordingly invested in the project. Like several others, I had to give my opinion on basic software such as Word Perfect, Lotus 123, etc.
> ...
>
> A. Well, what interested me about that project was a, the tax benefit; it was really enticing. If I invested in any other projects involving research and development at that time, there was no tax reduction for investment. In this one, it was one hundred per cent at that time. It was for sure that it interested me. The second thing, since I was part of a group that was developing software, then I could relate to that in virtually all the details; I was interested in looking for that information in order to move our Pathfinder project forward. That was it.
>
> ...
>
> Q. Was it easy to complete the questionnaire?
>
> A. Yes.
>
> Q. Very easy?
>
> R. Very easy.
>
> Q. Did you participate in other activities of the partnership...
>
> R. No.

[58] The Appellant Jean-Guy Brillon stated that he invested at the suggestion of his accountant, who had spoken to him about a tax reduction. His appeal related to the 1989 year. The income tax returns for 1989 and 1990 were filed as Exhibit I-13.

[59] The following are a few extracts from his testimony (pages 91 and 106 of the transcript):

> [TRANSLATION]
> ...
>
> A. Well, he told me that it was for research and development. And then, by investing in that, I could obtain tax exemptions and he advised me to get involved in that, if you will.
>
> Q. Hum, hum. Because it could be profitable?
>
> A. It could be profitable and I was saving money. And since I was a manager as well, I was also interested in computers, but I did not have a computer at that time and I wanted to learn, well, research and development concerning software and all that. He convinced me to get involved in that.
>
> ...
>
> Q. Monsieur Brillon, during the 1989 year, if you had to summarize your interest in the partnership, what, besides investing $10.000 in that company, did your interest consist of?
>
> A. What part did I play?
>
> Q. Your interest.
>
> R. I do not recall having participated very much in anything else.

[60] Denis Hamilton invested $17,000. The year in question was 1989. The income tax returns for 1989 and 1990 were filed as Exhibit I-14.

[61] On December 1, 1989, he borrowed $8,500 from the Société d'Épargne Métropolitaine de Montréal, Exhibit I-17. The other half was borrowed from Diasware. In early February 1990, he received a cheque from Glenrock for $8,500, which he endorsed and returned. The financial institution, for its part, was reimbursed when he received the tax refund.

[62] The following are some extracts from his testimony (pages 116, 128-9, 156 and 157 of the transcript):

> [TRANSLATION]
> ...

Q. Yes. And your interest in the partnership occurred...

A. As mentioned earlier, we received the documentation; we received software. I had a computer. And then it was on software. That was it. Lotus 1 2 3, Microsoft DOS and ... Was it Word Perfect at that time? I think it was Word Perfect. I had to conduct tests; after that, I had to make comments, things like that. Software that we tried out at home. We received documentation as well as all the diskettes; then we had to follow the manual and try out various things.

...

Q. What was interesting about that kind of investment then?

A. The tax shelter.

Q. The tax shelter.

A. Tax. That was ... That was the primary goal, that was certain. There was no one who ... I had three young children. I was not trying to throw my money out of the window. The little that I had, I tried to invest it in things that made sense. I had blocks that I was convinced over time, at the start, that it was a good investment. It worked well. So I decided to go and see what was involved in the research and development project. Naturally, when I saw that it was clear anyway, that it was participatory, and then that it was one hundred per cent deductible, on the condition that you participated, then it was, as I said, in an area with which I was very, very familiar, so that was the reason why I decided to get involved. I do not remember whether it was the first meeting or the second. It was certainly not the first, because that is not the way I do things.

Q. You did not lose money by investing in that?

A. No.

...

A. ... Our role was not to do the engineering in all that, but it was to conduct tests and then to provide our comments.

...

Q. Aside, then from what you have just described, answering the questionnaires, making comments, what was the nature of your interest in the partnership?

A. Well, that … and so, I don't know; I do not remember whether we had a meeting in January or February. I do not believe so. I think that was the only involvement for us in that regard.

Q. Okay.

A. I do not recall being given other tasks or things like that. Because I redeemed my shares in February.

Q. February.

A. That means that …

Q. So, in short, in terms of the partnership, you did not make a decision as such in terms of management or...

A No.

Q. ... research within the partnership?

A. No. It was a share in the development project. I was not the person who was running the company.

[63] I noted at the beginning of these reasons the applicable legislative provisions, as referred to by counsel for the Respondent. I shall now reproduce extracts from the pleadings of each Appellant:

Mr. Lalonde (pages 202-203):

[TRANSLATION]
... If I had been asked to participate for eight hours a day, five days a week, or twelve hours a day, five days a week, I would have answered no because I was a consultant at that time. Moreover, my C.V. establishes that fact.

So I went along with what I was asked to do. Here is the list of activities that we expect of you; here is what we are asking and here is what we shall require; here are the tools you will be given. It is obvious that the tools that we were given were clearly specified; they were basic documents. They were not research documents on which ... We were in any case not supposed to change them. They were simply to help us …

I was very surprised afterwards when we received an assessment; you were not very active. I had completed everything that was set out in the prospectus; everything that we had been asked, everything we had been told we were supposed to do.

Mr. Paquin (pages 208-209-212)

[TRANSLATION]

... Then all that I could take away from that was the expressions used in the Act such as a regular, continuous and substantial basis. To what extent was it a regular, continuous and substantial basis?

...

I work five days a week and I give a little more time every day. It was obvious that I could not go to ECT Systems. ...

...

So what I asked myself was why the government had said that it was offering small investors a chance to obtain tax relief by investing in that, which was addressed to me; I work and perhaps it was more for unemployed people if you had to be involved on a regular, continuous and substantial basis, which was what was talked of throughout that period.

The expression “specified member”. Could I have asked a Revenue Canada employee to explain to me what specified member means? The answers I received in the letter from Michel Beaudry in Ottawa, who stated, who asked, before I assess these people, can you provide me with explanations? There was already a dispute on that point. I asked myself in 1989 how could a Revenue Canada employee have explained to me exactly what the expression “specified member” meant.

... So Revenue Canada did not do everything in its power to protect me against greedy promoter who failed to comply with the law. It should have set up a process to review the different projects before they even asked investors or provided this tax relief or this ... I cannot call it a “thing”, but ... in any event, this tax relief.

A project number should never have been given to the promoter, even if it was given only for administrative purposes ...

Mr. Brillon (page 215)

> [TRANSLATION]
> ... So I participated in that project as a …, I was in agreement with that, but it was on a voluntary basis, I agree, but I was aware and I actually believed in that project because I had been told that the government accepted it; I had been shown newspaper articles indicating that it was genuine.
>
> ... It was recommended to me by my accountant, my tax adviser, who had looked after my affairs for quite a long time. So I thought in good faith, and I can tell you this, I acted in perfectly good faith when I got involved in that …

Mr. Hamilton (page 217)

> [TRANSLATION]
> ...
>
> As members of the public, we participate democratically in the elections and then also in setting up a government, one of the responsibilities of which is to assure the public that laws and regulations are put in place in order to protect these members of the public against strategic geniuses whose goal is to exploit the weaknesses in the system set up by that same government.
>
> That very same government promotes this and then encourages taxpayers to invest in research and development projects. However, it did not make much effort to protect the members of the public by making the people who were responsible for the very early stages of these projects aware of the publicity by means of which taxpayers were urged to invest.
>
> In our case here, after two years and ten months, the government woke up and then, seven weeks before the end of the normal reassessment period, announced to us that the law can change and that the interpretation was no longer the same.

Analysis and conclusion

[64] As was indicated at the beginning of these reasons, the question giving rise to the various aspects of the assessments for the years 1989 and 1990 depends on the concept of specified member. Were the Appellants in 1989 specified members within the meaning of the definition in subsection 248(1) of the Act? I shall reproduce this definition again:

> "*specified member*" of a partnership in a fiscal period or taxation year of the partnership, as the case may be, means
>
> (*b*) any member of the partnership, other than a member who is
>
> (i) actively engaged in those activities of the partnership business that are other than the financing of the partnership business, or
>
> ...

[65] Some of the Appellants complained about the fact that the Minister did not act to protect small investors [TRANSLATION] "against greedy promoters who failed to comply with the law". Some complained about the fact that the Minister issued a tax shelter number to the project. They felt that this was misleading since it suggested that the project had the Minister's approval. One Appellant stated that these tax shelters were mentioned in the newspapers and that no warning had been given by the Minister in response to the articles promoting this kind of investment. Did the Minister not have a duty to be vigilant? Another Appellant mentioned that the Minister encouraged SR&ED projects and that, as a small, investor, he had wanted to participate in the research while seeking a tax benefit.

[66] It is a historical fact that the reassessments of many investors in SR&ED projects have led to many complaints from taxpayers. This led the Minister to make an overall settlement proposal in 1995. That was a very rare event. I do not wish to comment on the reasons that led the Minister to make this proposal. The Appellants did not accept it. When I asked them why, they replied that they had done so on the advice of their tax advisers.

[67] The role of a Court is to interpret the law as it is written. Were the Appellants specified members within the meaning of this definition in subsection 248(1) of the Act? This was the basis on which they were reassessed and on this I must render a decision.

[68] What do the words "actively engaged in those activities of the partnership business" mean for a partner and what do the words "on a regular, continuous and substantial basis" mean? Parliament excluded from this meaning the act of participating in funding the partnership's business.

[69] I feel that I should refer to three decisions of this Court that have considered the concept of (silent) specified member. In *McKeown v. Canada*, [2001] T.C.J. No. 236 (QL), Garon C.J. stated the following:

> 424 It is also my view that he was a specified member under paragraph (*b*) of the definition. It is true, as the Appellant argued, that a member is not a specified member just because he or she is not personally engaged in scientific research and experimental development activities, especially where that work is entrusted to a subcontractor. Paragraph (*b*) of the definition of "specified member" expressly states that an individual is a specified member if he or she is not actively engaged in the activities of the partnership business. On the basis of subparagraph (*b*)(i) of that definition, it can be concluded that an individual is a specified member where he or she does not monitor the research work, inquire about the work's progress and advancement and any fairly important administrative problems that may arise in carrying out the research, or participate in any way in decisions concerning those matters. That is indeed the case of the Appellant here. His participation in the activities of the two alleged partnerships was purely symbolic and artificial. Moreover, at the relevant time, he was not carrying on a business that satisfied the criterion set out in subparagraph (*b*)(ii) of the definition of "specified member".

[70] In *Bastien v. Canada*, [2003] T.C.J. No. 771 (QL), Dussault J. stated the following:

> 28 Thus, when an opinion simply refers to “actively engaged in those activities of the partnership business,” three important words have been forgotten, namely “regular, continuous and substantial.” I do not believe that three meetings, two of which relate somewhat to financing, and answering two questionnaires that were also submitted as evidence, even though a serious attempt was made to answer them, as well as a few telephone communications are sufficient elements to meet the conditions set out in the definition of “specified member.” However, as I said earlier, I do not think that we need to go that far.

[71] In *Maslanka v. Canada*, 2004 TCC 158, Archambault J. stated the following:

> 23 In addition to being specified members as a result of their status as limited partners, they were specified members because they were not actively engaged on a regular, continuous and substantial basis in the activities of Incotel. Their only interest was to attend two meetings at which, in a ridiculous attempt to establish that they took an active part in the activities of Incotel, they were asked to fill out a questionnaire that Ms. Maslanka was not even able to recognize. I do not hesitate to conclude, as did Chief Justice Garon in *McKeown*, at paragraph 424, that the Appellants' participation in the alleged company *"was purely symbolic and artificial."* Furthermore, since the Appellantshad practically no knowledge of Incotel's activities, they were unable to admit almost all of the facts related to this alleged company, which were assumed by the Minister in his reply to the Notice of Appeal.

[72] The active engagement in the activities of a business must be considered in light of the status of a partner. We are not dealing with the engagement of an employee, of a person under contract of any kind or of a volunteer. We are dealing with the involvement of a partner in the activities of the partnership of which he or she is a member.

[73] A partner may be actively engaged in the activities of the business of the partnership of which he or she is a member only if he or she has a certain role to play in terms of the partnership's decisions. In a business, there is usually a division between administration and operations. One partner may be confined to administration and another to operations. However, they participate in the decisions and keep each other mutually informed.

[74] Normally, a partner makes a detailed examination of the partnership agreement before joining the partnership and considers the role assigned to him or her as a partner. He or she specifically accepts the role. Here, the Appellants were not familiar with the documents creating the partnership and all the actions of the partnership, step by step, had been decided ahead of time without any consultation with or information for the partners.

[75] Moreover, this was how the resolutions they signed were drafted for them without their having participated in making the decisions concerning these resolutions.

[76] The Appellants participated in the financing. This role was excluded by the definition of specified member. The task assigned to each and every partner was to complete the questionnaires, which were identical for all the partnerships in the Zuniq Group. They did not take participate in this decision in any way. Some of the Appellants devoted very little time to this task while others devoted more and yet others did not have the necessary training to do so. This cannot constitute active engagement in a partnership.

[77] A partner who is not actively engaged cannot be considered a partner who is actively engaged in the activities of the business of a partnership to which he or she belongs.

[78] Even if, as active partners, the Appellants could be considered to have been actively engaged, it would also be necessary for me to determine whether this active engagement occurred on a regular, continuous and substantial basis.

[79] It did not occur on a regular and continuous basis. It consisted of an isolated task in the sense that the Appellants had to perform only this task. It had to be performed in a short time because each of the Appellants had his or her own work and had little time to spend on the task of completing a questionnaire.

[80] Concerning the substantial nature of this task, the scientific adviser examined its role and came to the conclusion that it was not substantial in the work relating to the research project.

[81] I must accordingly conclude that the Appellants were not actively engaged in the activities of the partnership business on a regular, continuous and substantial basis throughout the part of the year in which the partnership carried on its business.

[82] It might even be asked whether the Appellants were partners within the meaning of the law governing partnerships. However, I can certainly conclude that if they were partners, they were (silent) specified members. Since this was the only issue and the other points in the assessments for 1989 and 1990 arose from this concept, it is my opinion that the Appellants were assessed in accordance with the facts and the Act.

[83] The appeals are dismissed.

Signed at Ottawa, Canada, this 9th day of February 2006.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 5th day of May 2006.

Monica F. Chamberlain, Revisor

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STYLES OF CAUSE:	JEAN-GUY BRILLON, DENIS HAMILTON, MARCEL LALONDE, SERGE PAQUIN, GABRIELLE CLAPIN, EXECUTRIX OF THE ESTATE OF ROGER CLAPIN v. HER MAJESTY THE QUEEN
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