Docket: 2008-2161(IT)I

BETWEEN:

LOUIS MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 15, 2009, at Montréal, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant:	Christopher Mostovac
Counsel for the Respondent:	Antonia Paraherakis

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 2003 and 2004 taxation years is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of April 2009.

"Alain Tardif"

Tardif J.

Translation certified true
on this 9th day of June 2009.

Brian McCordick, Translator

Citation: 2009 TCC 152
Date: 20090424
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LOUIS MARTIN,

Appellant,

and

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REASONS FOR JUDGMENT

Tardif J.

[1] This appeal pertains to the 2003 and 2004 taxation years.

[2] The issues for determination, for the 2003 and 2004 taxation years, are

(a) whether the amounts of $25,704 and $11,675, deducted by the Appellant on account of "client fees and disbursements" for those respective taxation years, constitute "eligible capital property", and

(b) whether the Minister was justified in disallowing the amounts of $25,704 and $11,675, deducted by the Appellant for those respective taxation years on account of "client fees and disbursements", and

(c) whether the Minister was justified in including the amounts of $25,704 and $11,675, deducted by the Appellant on account of "client fees and disbursements" for those respective taxation years, in computing the "cumulative eligible capital".

[3] In order to justify the assessments under appeal, the Respondent relied on the following assumptions of fact:

[TRANSLATION]

(a) During the taxation years in issue, the Appellant operated a chartered accountancy firm (hereinafter "the business").

(b) The business had roughly 10 workers.

(c) The Appellant has been a chartered accountant for roughly 20 years.

(d) The Appellant's main clients were charities.

(e) During the taxation years in issue, the business was located at 655 32nd Avenue, Lachine, Quebec.

(f) During the taxation years in issue, the business also provided bookkeeping, consulting, and tax return preparation services.

(g) During the taxation years in issue, the Appellant personally did the accounting for his business.

(h) The Appellant claimed the amounts of $174,274 and $114,734 on account of "client fees and disbursements" for the taxation years 2003 and 2004, respectively.

(i) The Appellant's file was audited by one of the Minister's auditors (hereinafter "the auditor").

(j) During his audit, the auditor analysed the contracts under which the Appellant acquired clients from other accounting firms.

(k) After analysing these contracts, the auditor determined that their acquisition procured a future lasting benefit.

(l) The client purchase contracts stated that in order to facilitate the transition of clients, the Appellant had to hire, for a period of 12 months, the person from whom he was purchasing clients.

(m) In certain client purchase contracts, the Appellant agreed to retain the services of certain employees of the seller's business.

(n) In certain contracts, the Appellant purchased furniture and equipment and work in progress; and he sometimes even kept the seller's place of business.

(o) The auditor therefore disallowed the amounts of $25,704 and $11,675 claimed by the Appellant on account of "client fees and disbursements" for the 2003 and 2004 taxation years, respectively, and included them in computing the "cumulative eligible capital" of the business.

[4] As far as the evidence is concerned, the Court heard the testimony of the Appellant Mr. Martin and that of Claude Gravel, a chartered accountant who is now retired. The Appellant explained that he opened his accounting firm in the 1970s.

[5] After some time, the Appellant noticed that his firm's structure and work capacity required him to increase his volume of business, so he undertook various efforts to increase his clientele.

[6] In furtherance of this objective, he made certain acquisitions by contracts under which his firm effectively expanded its number of clients. The instant matter pertains to these agreements.

[7] In his Notice of Appeal, the Appellant makes the following arguments:

[TRANSLATION]

14. The Appellant submits that the Assessments and the decision on the objection are not well-founded in facts and in law for the following reasons, *inter alia*.

15. The Appellant submits that the offers to serve the Accountants' clients were in no way accessory to the purchase of other assets held by the Accountants (although the Appellant may have inappropriately asserted the contrary in one case in order to reach a settlement with the Respondent.).

> 16. The Appellant submits that he only offered to serve the Accountants' clients, and nothing more.
>
> 17. The Appellant further submits that the amounts paid to the Accountants were never established in advance, but were always contingent on the services rendered by the Appellant.
>
> 18. Lastly, the Appellant submits that the offers to serve the Accountants' clientele were made for the purpose of earning income.
>
> 19. In light of the foregoing, the Appellant submits that the commissions paid to the Accountants were current expenses, fully deductible from his income for the 2003 and 2004 taxation years.
>
> 20. The Appellant therefore submits that the Assessments should be vacated and that new notices of assessment should be issued, allowing the commission expenses that he paid to the Accountants and claimed.

[8] The Appellant explained in detail how he proceeded with the various accountants with whom he entered into agreements, and he adduced almost all those agreements in evidence. Under the agreements, which allowed the Appellant to work for new clients and obtain fees from them, the Appellant paid the transferring accountants a commission that varied based on the agreement in question. The amount paid to the transferring accountants was based essentially on the amount of fees collected and not on the amount of fees billed.

[9] The agreements contained a fee payment schedule, which spread out the payments on a percentage basis. The schedule varied from one agreement to another.

[10] The Appellant explained that the differences between the agreements reflected the specific requirements of each accountant, and the quality of the accounts to be transferred to the Appellant.

[11] For example, he said that for some clients whose accounts were transferred, the work consisted essentially in preparing a year-end tax return, while other accounts involved far more complex work that was much more attractive (notably in terms of client loyalty) and generated much higher fees.

[12] The evidence discloses that two types of contract were used for these agreements. Initially, a notarial contract for what was characterized as a [TRANSLATION] "sale of a business" was used, and subsequently, a private writing drawn up by the Appellant and entitled [TRANSLATION] "Offer to Purchase Your Clientele" was used.

[13] Both forms of contract contained a percentage-based arrangement. I will reproduce the contents of each of these arrangements:

Notarial contract

> [TRANSLATION]
>
> . . .
>
> In connection with accounting clients, review engagements, and clients for whom the Seller's services consist in preparing income tax returns, but not including special mandates, the Purchaser agrees to make quarterly payments to the Seller, the amount of which shall be 20% of the fees collected. These payments shall be made for a period of five (5) years, effective February 1, 1998.

Private writing entitled [TRANSLATION] "Offer to Purchase Your Clientele"

> 3. For accounting services, financial statement preparation and income tax return preparation, the amounts that we offer you shall be paid quarterly and shall be equal to 22.5% of fees collected during the quarter, for a period of two (2) years. The quarterly payments shall be made on the anniversary of the date on which the files are transferred. The selling price is thus subject to adjustment based on the fees collected.

[14] Certain aspects could vary from one contract to another. The agreements with Jean-Serge Gervais and Albert Kassis specifically provided for the purchase of furniture. They also provided that the sellers would continue to work, subject to certain conditions which generally gave the sellers a great deal of flexibility, clearly with a view to developing the new clients' loyalty to the Appellant's firm. Some accountants saw these agreements as an opportunity to retire gradually.

[15] Although there was no specific and set price for the "purchase" of the clientele, and there were no non-competition or penalty clauses, these contracts were clearly for the "purchase" of clientele, and this is consistent with the title of the contract and its ultimate objective, admitted to by the Appellant, of increasing his firm's business.

[16] The Appellant submits that the accountants Kassis and Gervais considered the amounts paid to be income.[1]

[17] The Appellant stated that the amounts paid were considered income for the transferring accountants. Mr. Gravel was the only person to testify in this regard.

[18] Mr. Gravel was of the opinion that the Appellant would continue to serve his clients well. Although the title of the letter of agreement was [TRANSLATION] "Offer to Purchase Your Clientele", Mr. Gravel says that he never sold anything; he merely transferred his clients' files to Mr. Martin's business.

[19] In consideration for this, Mr. Gravel received a fee equal to 22.5% of the fees from each client who was formerly his but was now billed by Martin & Cie. He treated these fees as income and reported them as such in his income tax returns.

[20] Mr. Martin asserted that the vast majority of the "purchased" clients remained clients of Martin & Cie.[2] The retention rate varied from firm to firm, but Martin & Cie could expect to keep at least 30% of the clients of the firms in question (and he kept more than 80% of one particular firm's "purchased" clientele).

[21] The Appellant unequivocally admitted that his intent was to obtain a lasting benefit for his business. This is a significant element that militates against the argument that the expenses were current in nature.

[22] As for the commission on or percentage of fees collected, the Appellant submitted that this approach, namely paying or receiving a commission, was a very common practice among professionals, including lawyers. The Appellant, an accountant by training, said that he consulted certain tax specialists to ensure that the accounting treatment of the fees was proper, that is to say, that the fees were current expenses for the Appellant and employment income in the sellers' hands.

[23] In tax matters, the wording and content of an agreement, the intention of the parties to the agreement, the circumstances, the context, the knowledge of the parties and many other elements are important and can even be determinative.

[24] The Appellant referred to the numerous insurability-related decisions in which the courts have noted the importance of a more thorough analysis of an employment

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[1] Transcript, page 20, lines 17-20.
[2] Transcript, page 37, line 15.

agreement – an analysis that goes beyond the words and the intent expressed by the parties and examines whether the facts are consistent with the wording.

[25] I agree completely with this approach, though I would add that the courts have nonetheless neither dismissed nor disregarded the importance of the contractual document or documents, especially when the parties have highly relevant skills and knowledge. The ideal situation in these matters is of course when all the facts are consistent with the wording of the agreements.

[26] Although the Appellant is not a legal professional, he is, by virtue of his professional training, no novice in the field of taxation. And although his training does not make him an expert in legal terminology, the Appellant was nonetheless able to understand the tax consequences of the choice or choices made.

[27] Generally speaking, the sellers could continue doing professional work in exchange for hourly compensation. This was a sort of transitional arrangement that would eventually lead to a complete cessation of their activities. That remuneration had nothing to do with the commission on the fees billed to and paid by the new clients.

[28] The agreements marked the end or cessation of the business of the accountants who transferred their clients to the Appellant. If the seller wished to continue working, he could do so under an agreement that had nothing to do with the contracts contemplated by the instant appeal. Such agreements were *ad hoc* agreements that reflected the interests of both parties.

[29] For the Appellant, these *ad hoc* agreements made it possible to achieve a smoother client transition and retain a higher percentage of clients transferred from other firms. The arrangement enabled the transferring accountants to stay active, but have fewer responsibilities, until they gradually retired altogether.

[30] In order to accept the Appellant's argument, one would have to exclude from the analysis all the documents, the context and the circumstances, and consider only one element, namely the commission percentage. And even then, one could not take into account the term of the agreements, which discredits the Appellant's interpretation.

[31] The theory that this is a very widespread practice, the existence of which the Court acknowledges, has absolutely nothing to do with the Appellant's

modus operandi. Indeed, there are numerous situations in which a commission can be paid and justified.

[32] I do not believe that the commission arrangement chosen can, in and of itself, be decisive as to the nature of the expense in the case at bar. In fact, the duration, the terms and conditions, and the context argue much more strongly in favour of the theory that this was a staggered payment of a selling price than the theory that it was a current operating expense such as a salary.

[33] In light of the evidence, it appears that most of the facts support the Respondent's position and the assessments. I would cite the following, for example:

- The unambiguous and very telling contents of the notarial deeds.

- The Appellant's admission that he agreed with the Respondent's interpretation of certain transactions.

- The clear and, once again, unambiguous wording of the agreements under private writing prepared by the Appellant, who was not a tax law specialist, but was nonetheless a chartered account, a significant part of whose work has tax connotations.

- The context, subject, circumstances, purpose and effect of the writings point to a single objective: a lasting expansion of clientele.

[34] It seems to me that the Appellant's intention in the case at bar was very clearly identified in the agreements that he drafted and was a party to. Granted, he did want the tax consequences to be different, and this led him to the idea of a percentage-based commission for periods of varying duration.

[35] This approach is suspect even on its face and loses all validity when the term of the agreements, which ranges from two to five years, is taken into account.

<u>Statutory provisions</u>

[36] The Appellant cites several provisions of the *Income Tax Act* (ITA), namely sections 3, 4, 9, 13, 14, 18, 20, 52, 53, 54 and 67 and subsection 248(1) of the ITA. The Appellant stresses paragraphs 22, 23 and 24 of his Response, as well as subsection 14(5), paragraph 18(1)(*b*) and section 54 of the ITA.

[37] Subsection 14(5) is a definition, which reads as follows:

> "eligible capital expenditure" of a taxpayer in respect of a business means the portion of any outlay or expense made or incurred by the taxpayer, as a result of the transaction occurring after 1971, on account of capital for the purpose of gaining or producing income from the business, other than any such outlay or expense
>
> > (*a*) in respect of which any amount is or would be, but for any provision of this Act limiting the quantum of any deduction, deductible (otherwise than under paragraph 20(1)(*b*)) in computing the taxpayer's income from the business, or in respect of which any amount is, by virtue of any provision of this Act other than paragraph 18(1)(*b*), not deductible in computing that income,
> >
> > (*b*) made or incurred for the purpose of gaining or producing income that is exempt income, or
> >
> > (*c*) that is the cost of, or any part of the cost of,
> >
> > > (i) tangible property of the taxpayer,
> > >
> > > (ii) intangible property that is depreciable property of the taxpayer,
> > >
> > > (iii) property in respect of which any deduction (otherwise than under paragraph 20(1)(*b*)) is permitted in computing the taxpayer's income from the business or would be so permitted if the taxpayer's income from the business were sufficient for the purpose, or
> > >
> > > (iv) an interest in, or right to acquire, any property described in any of subparagraphs (i) to (iii),
>
> but, for greater certainty and without restricting the generality of the foregoing, does not include any portion of
>
> > (*d*) any amount paid or payable to any creditor of the taxpayer as, on account of or in lieu of payment of any debt or as or on account of the redemption, cancellation or purchase of any bond or debenture,

(*e*) where the taxpayer is a corporation, any amount paid or payable to a person as a shareholder of the corporation, or

(*f*) any amount that is the cost of, or any part of the cost of,

(i) an interest in a trust,

(ii) an interest in a partnership,

(iii) a share, blonde, debenture, mortgage, hypothecary claim, note, bill or other similar property,

(iv) an interest in, or right to acquire, any property described in any of subparagraphs (i) to (iii).

[38] The Appellant referred to the decision in *Burian,*[3] where the Minister did not want to allow the deductions claimed by the appellants because he felt that they were related to a capital expenditure. In addition, the Appellant cites the fact that the appellants in *Burian* went to see an accountant to obtain a valuation of the custom, which was not done in the case at bar.

[39] In *Burian*, the Court held that the purchase of the client list belonging to accountants was a capital expenditure:

> In my opinion . . . the plaintiffs were in reality acquiring, or endeavouring to acquire, an opportunity for potential future custom or business . . . The purpose . . . was to bring into the existing business a further asset or advantage with the expectation of lasting benefit. The transaction . . . was to strengthen and expand the plaintiffs' business entity, the profit-yielding subject. It therefore affected the capital structure, and the expenditure of $20,000 was rightly treated as an outlay of capital.[4]

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[3] *Walter J. Burian v. The Queen*, [1976] F.C.J. No. 910 (QL).
[4] *Ibid.*, at paragraph 21.

[40] The Appellant also cites the decision of the Federal Court of Appeal in *Gifford*.[5] At first instance, the Tax Court of Canada judge held that the purchase of a client list was a current expenditure. The Federal Court of Appeal reversed this decision on the ground that the judge below did not take binding precedent into account.

[41] As a criterion for determining whether a client list is a current expenditure or a capital expenditure, the Federal Court of Appeal relied on the decision in *Johns-Manville Canada*,[6] which expounded on the question of whether a payment should be considered a current or capital expenditure.

[42] One of the most important passages from *Johns-Manville* reads:

> At one time, the test applied by the courts in discriminating as between revenue and capital was the "once and for all" test. This test was adopted by Viscount Cave L.C. in *British Insulated and Helsby Cables, Ltd. v. Atherton*, [1926] A.C. 205, at p. 213. Viscount Cave observed that the finding of revenue or capital was a question of fact, but then concerned himself with the answer to the question because of an imprecise finding below. The test he adopted at p. 213 was "to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year", although he recognized that this test was not "to be, a decisive one in every case". Later on at pp. 213-14 the Lord Chancellor elaborated:
>
>> ...where an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is a very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.[7].
>
> [Emphasis added.]

[43] The approach to be undertaken is these matters is not an essentially mathematical one; there is no hard-and-fast test, and it is absolutely essential to take all the facts into consideration.

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[5] *The Queen v. Thomas Gifford,* [2002] 4 C.T.C. 64 (F.C.A.).
[6] *Johns-Manville Canada Inc. v. The Queen*, [1985] 2 S.C.R. 46.
[7] *Infra*, paragraph 23.

[44] In *Gifford*, the Federal Court of Appeal analysed the cases concerning the tax treatment of client lists. According to the Federal Court of Appeal, the authority on the subject is the decision in *Cumberland Investments*.[8]

[45] There, the appellant paid $150,000 for a list of clients and sought to deduct it as a current expense. The Appellant in the case at bar also referred to that case, stressing that it involved a single payment.

[46] At paragraph 4 of the decision in *Cumberland Investments*, the following is stated:

> . . . There is the fact that the payment is of the once and for all kind. To buy out competitors was not a recurring need or constant demand of the appellant's operation of receiving applications and writing insurance. But that is what the expenditure was for. It was a lump sum payable to a competitor to persuade him to yield up his business and goodwill and thus not an ordinary expense incident to the insuring process as were, for example, the commissions allowed to agents for their services. And if it be assumed . . . that the advantage to be gained was for the benefit of the appellant's business operation . . . it seems to me that it was not anticipated that it would be a short lived advantage but must have been expected to be one that would be of enduring benefit to the business.[9]

[47] A little farther on, the following is added:

> The advantage sought in this instance, it seems to me, was twofold; (1) to enlarge the income earning structure of the Appellant by gaining access to a number of new sub-agents capable of diverting applications for insurance to it and (2) to eliminate a competitor.[10]

[48] In the end, the Federal Court of Appeal held that the amount paid should be considered a capital expense. The Appellant in the case at bar submitted that serious reservations should be expressed as to the relevance of that decision, because the client lists in the case at bar had no pre-determined value.

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[8] *Cumberland Investments Ltd. v. Canada*, [1975] F.C.J. No. 511.
[9] ***Ibid.***, par. 4.
[10] ***Ibid.***, par. 19.

[49] The Appellant also argued that the decision of the Supreme Court of Canada in *Shell Canada Ltd.*[11] supported his position as to the desired and manifest intent of the parties.

[50] The Appellant specifically cites paragraph 45 of that judgment:

> 45 However, this Court has made it clear in more recent decisions that, absent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. This issue was specifically addressed by this Court in *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795, at para. 88, *per* Iacobucci J. See also *Neuman v. M.N.R.*, [1998] 1 S.C.R. 770, at para. 63, *per* Iacobucci J. The courts' role is to interpret and apply the Act as it was adopted by Parliament. *Obiter* statements in earlier cases that might be said to support a broader and less certain interpretive principle have therefore been overtaken by our developing tax jurisprudence. Unless the Act provides otherwise, a taxpayer is entitled to be taxed based on what it actually did, not based on what it could have done, and certainly not based on what a less sophisticated taxpayer might have done.

[51] In the case at bar, the Appellant and the sellers were not novices; while they were perhaps not tax experts, they were most certainly better informed and better advised than the average taxpayer.

[52] It is well-known that accountants, unlike other taxpayers whose work does not touch upon such matters, are familiar with certain important aspects of tax law, and their profession would be difficult to practice without at least some knowledge of taxation.

[53] Consequently, the argument that the Appellant should not be penalized owing to the fact that he is not a tax expert is not particularly persuasive, especially since the tax treatment of a transaction or its consequences is essentially based on the relevant facts, not the taxpayer's knowledge.

[54] The Appellant submits that the fees are expenses only if they are collected. In his submission, there was no sale, but rather an agreement to serve clients in exchange for a commission.

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[11] *Shell Canada Ltd. v. The Queen*, [1999] 4 C.T.C. 313.

[55] By way of example in support of his argument, the Appellant cites referrals between lawyers and other professionals who exchange certain clients. This was neither helpful nor relevant, because remuneration in the form of a commission can be used in a multitude of situations.

[56] In fact, the example can be disregarded for the sole reason that, in such a case, the commission is payable only once and the payment received in exchange occurs only once or for each mandate.

[57] A referral between lawyers does not necessarily procure an enduring benefit for the lawyer's business, whereas in the instant case, several payments were made so that the clients "purchased" from the firms would remain with Martin & Cie.

[58] In fact, I believe that lawyers hesitate to refer one of their clients to a competitor who has a form of expertise that they lack, for fear of losing their client to that competitor, thereby creating an enduring and permanent benefit in which subsequent mandates generate no commissions.

[59] *Johns-Manville* established a fundamental test in determining whether an outlay is current or capital in nature. The test is whether or not the outlay procures an enduring benefit to the business concerned.

[60] In the instant case, the Appellant stated that the retention rate for the acquired clients varied from 30% to 80%, depending on the type of file. In this regard, it is clear that the benefit would be less attractive in certain situations; however, the longevity or duration of the benefit was nonetheless something tangible.

[61] In fact, the retention rate does not strike me as important, as long as there is a certain percentage, however minimal, especially since the percentage in question was the principal criterion for determining the consideration. Moreover, the responsibility as to loyalty essentially rested on the Appellant's ability to keep the new clients obtained under the agreement. As far as the question of consideration is concerned, this element is not decisive of the nature of an expense.

<u>Conclusion</u>

[62] To sum up, the Appellant's arguments are centered on the fact that there was not just one payment, but several payments, for the client lists. Under some of the

case law, there may be a presumption of sorts that the existence of several payments points to a current expense, not a capital outlay.

[63] In addition to this argument, the Appellant repeatedly stressed that there was no pre-determined amount for the acquisition of a client list. When the Appellant's accounting firm did accounting work for the other party's client, and the fees billed for the work were collected, the agreed commission was paid.

[64] The only truly compelling argument raised by the Appellant was regarding the agreed terms of payment, under which payments were staggered. At first glance, this approach would appear to support a finding that the expenditure is current in nature. However, once the analysis goes beyond mere form, this initial perception changes, and a different conclusion emerges.

[65] In conclusion, the Appellant's arguments, which are based essentially on form, must be rejected in favour of an analysis of all the facts, which shows that there is a marked discordance between form and substance. The enduring benefits from the various transactions were, in fact, derived outside the usual course of the Appellant's business. The fact that the payments spanned a two-year period, and were not determinate, does not in any way change the ultimate objective, which was undeniably to obtain an enduring benefit.

[66] The Appellant merely staggered the payment of a capital expense over several months. He argued that the payment was recurring and was therefore a current expense. The staggering of payments did not change the ultimate objective, which was essentially to obtain a lasting benefit.

[67] Using the statements that the Appellant made to the Minister upon objecting to the assessment, one can see that Mr. Martin considered the expenses to be capital in nature (Exhibit I-1, tab 5) and that his intention was to acquire the [TRANSLATION] "purchased" clientele of the firms (Exhibit I-1, tab 7). These documents demonstrate the Appellant's intent upon drafting them, and contradict the arguments that he is making in Court.

[68] The Respondent submitted, correctly in my view, that the transactions which gave rise to the assessment were not current in nature, or within the usual parameters of the business's activities. Indeed, there is a great difference between the delivery of accounting services to the public and the making of an agreement for the purpose of expanding one's clientele.

[69] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 24th day of April 2009.

"Alain Tardif"

Tardif J.

Translation certified true
on this 9th day of June 2009.

Brian McCordick, Translator

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