Federal Court of Appeal | Cour d'appel fédérale

Date: 20260501

Docket: A-384-24

Citation: 2026 FCA 84

2026 FCA 84 (CanLII)

CORAM: **GLEASON J.A.**
MONAGHAN J.A.
GOYETTE J.A.

BETWEEN:

S. ROBERT CHAD

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on March 9, 2026.

Judgment delivered at Ottawa, Ontario, on May 1, 2026.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: GLEASON J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

I. Overview

[1] In late 2011, the appellant, Robert Chad, began trading in foreign exchange forward contracts using a straddle-trading strategy that resulted in a loss in 2011 in excess of $22 million, but a nearly identical aggregate gain in 2012. The appellant deducted approximately $9.6 million

of the loss in computing income in his 2011 taxation year. He deducted approximately $4,900,000 of the remaining loss as a non-capital loss in 2013 and 2014.

[2] The Minister of National Revenue reassessed the appellant's 2011 taxation year to deny the loss, asserting the appellant's trades were a sham, were not legally effective, and were not a source of income. This led the appellant to appeal the reassessment to the Tax Court of Canada.

[3] The Tax Court concluded that the trading transactions were not a sham and were legally effective. However, it found that the appellant's trading activities were not a source of income, relying on two recent decisions of this Court, *Canada v. Paletta (Estate)*, 2022 FCA 86 [*Paletta Estate*], leave to appeal to SCC refused, 40325 (16 March 2023), and *Brown v. Canada*, 2022 FCA 200 [*Brown*]. Those cases confirm that an activity that has no personal or hobby element nonetheless must be undertaken in pursuit of profit to constitute a source of income: *Paletta Estate* at paras. 35–36; *Brown* at paras. 24–25.

[4] While satisfied that the appellant's trading activity was not a personal endeavour or hobby, the Tax Court concluded that the appellant undertook that activity in pursuit of loss, not profit. Therefore, it found that the appellant did not have a source of income and any loss he incurred in 2011 from the trading activity was not from a source of income. Accordingly, the Tax Court confirmed the Minister's reassessment and dismissed the appellant's appeal: *Chad v. The King*, 2024 TCC 142 (*per* Sommerfeldt J.). (For clarity, I add that only the 2011 reassessment was at issue before the Tax Court.)

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[5] The appellant now appeals that decision to this Court. He submits that the Tax Court erred in law by following *Paletta Estate* which, he argues, is incompatible with the governing jurisprudence of the Supreme Court of Canada (*i.e.*, *Stewart v. Canada*, 2002 SCC 46 [*Stewart*] and *Walls v. Canada*, 2002 SCC 47 [*Walls*]). He urges this Court to apply *Stewart* and clarify the source of income test. In the alternative, if *Paletta Estate* governs, the appellant submits that the Tax Court erred in its application of the pursuit of profit test.

[6] I disagree.

[7] The Tax Court was bound by *Paletta Estate*, which itself follows *Stewart* and *Walls*. Moreover, I see no reviewable error in the Tax Court's application of the pursuit of profit test. Accordingly, I would dismiss the appeal.

II. Analysis

[8] In this appeal, the appellate standards of review apply to all issues. Accordingly, questions of law are reviewed on a correctness standard; questions of fact and mixed fact and law are reviewed on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

[9] I turn now to address the appellant's submissions and my reasons for rejecting them. While I considered all the arguments in the appellant's memorandum of fact and law, I find those not addressed at the hearing of the appeal to be without merit. Accordingly, in these reasons I focus on the submissions made at the hearing.

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A. *The Tax Court did not err in following* Paletta Estate

[10] The appellant's first argument is that the Tax Court erred in following this Court's decision in *Paletta Estate*—a case he asserts reformulated the source of income test in a manner "wholly incompatible with the Supreme Court's direction in *Stewart* and *Walls*" and irreconcilable with other Supreme Court jurisprudence. The Tax Court was satisfied his trading activity had no personal element. Accordingly, the appellant submits that, had the Tax Court applied *Stewart* as it should have, it would have found his trading activity was a source of income. He contends that, under *Stewart*, a pursuit of profit analysis "is required ***only*** where there is some personal or hobby element", and that no additional inquiry is necessary "[w]here the *nature* of the *activity* is clearly commercial (i.e., the activity itself contains no personal or hobby element)". The appellant says *Paletta Estate* was wrong to state otherwise. (Quotations in this paragraph are from the appellant's memorandum of fact and law with emphasis in original.)

[11] The appellant further submits that *Paletta Estate* effectively resurrected "reasonable expectation of profit" as the source of income test, notwithstanding that the Supreme Court expressly rejected it in *Stewart* and *Walls*. The appellant goes so far as to suggest that in *Paletta Estate* this Court "selectively relied on certain propositions [from] *Stewart*" to impose "the pursuit of profit inquiry as a precondition for *every* activity (irrespective of whether it is clearly commercial or contains some hobby or personal element)".

[12] For these reasons, the appellant says *Paletta Estate* is "manifestly wrong" and should not be followed.

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[13] I reject the appellant's submissions for three reasons.

[14] First, to conclude *Paletta Estate* is manifestly wrong this Court must be satisfied that *Paletta Estate* overlooked a relevant statutory provision or a case that ought to have been followed: *Tan v. Canada (Attorney General)*, 2018 FCA 186 at para. 31, citing *Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 10. The appellant has not identified any such provision or case. To the contrary, *Paletta Estate* expressly considered both *Stewart* and *Walls* and explained that they too are premised on pursuit of profit as an essential feature of a source of income: *Stewart* at paras. 5, 50, 51, 53, 58, 62, 68.

[15] The appellant's disagreement with this Court's interpretation of *Stewart* and *Walls* falls far short of meeting the "manifestly wrong" threshold. *Paletta Estate* is not a departure from *Stewart* and *Walls*.

[16] To suggest that *Stewart* means that any activity without a personal element is a source of income requires (i) reading paragraphs 50 and 53 of that decision in isolation, (ii) ignoring that stage one of *Stewart*'s two-stage approach expressly contrasts a "personal endeavour" and an "activity undertaken…in pursuit of profit" (at para. 50), and (iii) ignoring that, in the paragraph immediately following the description of the two-stage approach, the Supreme Court expressly equates "an activity undertaken 'in pursuit of profit'" with "source of income". In my view, it is the appellant who selectively relies on certain statements from *Stewart*.

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[17] Turning to the other Supreme Court cases raised by the appellant, none concerns whether a source of income exists: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, 1984 CanLII 20 (SCC) (which was addressed in *Paletta Estate*); *Canada v. Antosko*, [1994] 2 SCR 312, 1994 CanLII 88 (SCC); *Neuman v. M.N.R.* [1998] 1 S.C.R. 770, 1998 CanLII 826 (SCC); *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, 1999 CanLII 647 (SCC); *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51.

[18] Second, *Paletta Estate* did not reinstate the reasonable expectation of profit test. An intention to pursue profit and a reasonable expectation of profit are different concepts: *Stewart* at para. 60; *Paletta Estate* at paras. 34–35, 44; *Brown* at para. 36. While the former is required for a source of income, the second is not. That said, the second may be relevant to determining whether an activity is a source of income, but it is neither the only nor a conclusive factor: *Stewart* at paras. 5, 55; *Brown* at para. 30; *Fournier-Giguère v. Canada*, 2025 FCA 112 at para. 50 [*Fournier-Giguère*].

[19] Third, while not determinative, I observe that the Supreme Court dismissed the application for leave to appeal *Paletta Estate*.

[20] For these reasons, the appellant's first submission fails. *Paletta Estate* is not manifestly wrong. Not only is there no reason to depart from it, but I agree with it. Simply put, the Tax Court was bound to follow *Paletta Estate* and did not err in doing so.

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B. *No clarification of the source of income test is necessary*

[21] In oral argument before this Court, the appellant urged us to clarify the test for a source of income. He submitted that *Paletta Estate* and *Brown* have led to significant confusion in the tax community about what the correct test is for a source of income. In support of this, the appellant points not only to the Tax Court decision under appeal, but to several other Tax Court decisions and articles commenting on *Paletta Estate* and *Brown*, including *Stackhouse v. The King*, 2023 TCC 156, at paras. 103–109, aff'd but not on this point 2025 FCA 175; *Tweneboah v. The King*, 2023 TCC 121 at para. 15; *Preston v. The King*, 2023 TCC 136 at para. 21; *ExxonMobil Canada Resources Company v. The King*, 2026 TCC 42 at paras. 322–345; Caroline Saunders & Geoffrey S. Turner, "Source of Income after Paletta", in *2023 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2023) 12:1; Philip Friedlan, "Chad v. The King: The Source-of-Income Test and Tax-Motivated Transactions", in *Tax for the Owner-Manager* (Toronto: Canadian Tax Foundation, 2025) 25:1–33; and Brian J. Arnold, "Federal Court of Appeal Reverses *Paletta Estate*", in *The Arnold Report* (14 June 2022) 232, online (newsletter): <https://ctf.ca/EN/Publications/Newsletters/Arnold_Report/EN/Newsletters/The_Arnold_Report/BArnold_Archive.aspx>.

[22] The appellant contends that *Paletta Estate* undermined the policy objectives *Stewart* sought to achieve and created uncertainty and inconsistency. He observes that in *Fournier-Giguère* this Court cited *Stewart*, but neither *Paletta Estate* nor *Brown*, and considers this too is suggestive of confusion.

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[23] I am not persuaded any clarification of the source of income test is necessary.

[24] For decades courts have struggled with the concept of a source of income, a statutorily undefined concept that nonetheless is fundamental to our system of income tax. In *Stewart* the Supreme Court clearly established that a source of income is not premised on a reasonable expectation of profit: an activity with no reasonable expectation of profit may be a source of income. In that same decision, the Supreme Court sought to clarify the test for a source of income. Yet, since then, courts and others have grappled with the parameters of the *Stewart* test.

[25] On the one hand, the two-stage approach *Stewart* describes, coupled with select other statements in that case, can be interpreted as meaning that the absence of a personal or hobby element to an activity is determinative—that it ends any further inquiry about whether the activity is a source of income. The appellant advances this position (see the passage from the appellant's memorandum of fact and law in paragraph 10 above), and he is not alone.

[26] On the other hand, in the same decision, the Supreme Court both equates business with the pursuit of profit (*Stewart* at para. 51) and indicates that the presence of a personal or hobby element may not always end the inquiry:

> [5]…[I]n order to determine whether a particular activity constitutes a source of income, the taxpayer must show that he or she intends to carry on that activity in pursuit of profit and support that intention with evidence. The purpose of this test is to distinguish between commercial and personal activities, and where there is no personal or hobby element **to a venture undertaken with a view to a profit**, the activity is commercial, and the taxpayer's pursuit of profit is established.
>
> [60]…Where the activity contains no personal element **and** is clearly commercial, no further inquiry is necessary.

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> [61]… As well, where an activity is clearly commercial **and** lacks any personal element, there is no need to search further. Such activities are sources of income.
>
> [Emphasis added.]

[27] In *Paletta Estate*, this Court explained the Supreme Court's teachings. Importantly, *Paletta Estate* did so by carefully reading and analyzing *Stewart* and *Walls*—companion decisions released at the same time—together. Through that exercise, this Court demonstrated that those decisions preclude an activity pursued with no purpose other than loss from being a source of income.

[28] Here, as this Court did in *Paletta Estate*, I return to *Moloney v. Canada*, 92 D.T.C. 6570, 1992 CanLII 15332 (FCA) [*Moloney*]. There this Court explained (at 6570):

> While it is trite law that a taxpayer may so arrange his business as to attract the least possible tax…, it is equally clear in our view that the reduction of his own tax cannot by itself be a taxpayer's business for the purpose of the *Income Tax Act*…
>
> [Emphasis added.]

In *Walls* the Supreme Court distinguished *Moloney* but made no suggestion *Moloney* is wrong, nor did it offer any criticism of it. To the contrary, the Supreme Court quoted this same passage from *Moloney* with identical emphasis: *Walls* at para. 21.

[29] Thus, *Walls* and *Stewart* recognized that the absence of a personal element by itself is not determinative. *Paletta Estate* reiterates this point:

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> [36] *Stewart* teaches that, in the absence of a personal or hobby element, where courts are confronted with what appears to be a clearly commercial activity and the evidence is consistent with the view that the activity is conducted for profit, they need go no further to hold that a business or property source of income exists for purposes of the Act. However, where…the evidence reveals that, despite the appearances of commerciality, the activity is not in fact conducted with a view to profit, a business or property source cannot be found to exist.
>
> [Emphasis added.]

[30] The activity at issue in *Paletta Estate* is an example of one that lacked a personal element but, despite the appearance of commerciality, was not undertaken in pursuit of profit. Rather, "the sole purpose of the trading each year was the realization of the target loss for that year" to permit Mr. Paletta "to claim non-capital losses that he could use to offset his taxable income": *Paletta Estate v. The Queen*, 2021 TCC 11 at paras. 70, 227.

[31] The same is true in this case. "[D]espite the appearances of commerciality, the [foreign exchange trading] Activities were not, in fact, conducted with a view to profit": Tax Court reasons at para. 168. Rather, "the intention of [the appellant] and Mr. Hodgins, in implementing the Trades, was…to incur a loss for 2011 of approximately $22,000,000": Tax Court reasons at para. 169. In the appellant's own words, "I … described to [Mr. Hodgins] my desire for a loss": Tax Court reasons at para. 8. In other words, like Mr. Paletta, the appellant's goal was a "target loss" to offset his taxable income.

[32] Simply put, an activity of that nature, *i.e.*, "an activity that is aimed exclusively at avoiding one's tax", cannot be a source of income: *Paletta Estate* at para. 52; see also, *Moloney* at 6570; *Walls* at para. 21.

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[33] It is true that *Brown* (at para. 25) rephrased the approach to be taken to determine whether a person has a source of income. But there can be no question that *Brown* follows *Paletta Estate.* The *Brown* reasons expressly summarize *Paletta Estate*'s governing principles in the paragraph that immediately precedes the rephrased approach. *Brown*'s rephrasing is just that; it does not reflect a change in approach. The point *Brown* makes is that personal motivation—the reason for conducting an activity—*alone* cannot ground a conclusion that an activity has a personal or hobby element: *Brown* at paras. 29–30.

[34] *Fournier-Giguère* concerned whether poker playing—an activity with a personal or hobby element—was a source of income. Given neither *Paletta Estate* nor *Brown* concerned activities with a personal element, it is hardly surprising that *Fournier-Giguère* does not refer to them. Why would they be relevant?

[35] Nor do I accept the appellant's suggestion that *Brown* and *Paletta Estate* require every taxpayer to lead evidence to establish that they have an intention to profit for every activity. As this Court put it, further inquiry is warranted where "the evidence reveals that, despite the appearances of commerciality, the activity is not in fact conducted with a view to profit": *Paletta Estate* at para. 36.

[36] To put it in the language of the Supreme Court, in the absence of a personal element we might ask "[f]or what purpose would the taxpayer have spent his time and money in this activity if not for profit?": *Stewart* at para. 62. In most cases the obvious answer will be "for no other purpose", therefore no further inquiry will be warranted, and "the appellant [will satisfy] the test

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for source of income": *Stewart* at para. 62. However, in some (although I expect not many) cases, like *Moloney*, *Paletta Estate* and here, the evidence will lead the Tax Court to respond to that question, "for the resulting loss". In those cases, the taxpayer will not satisfy the test for a source of income.

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[37] Finally, I consider it neither necessary nor prudent to describe which factors are relevant to determining whether an activity is undertaken in pursuit of loss rather than profit. In each case the Tax Court, just as it did in Mr. Paletta's case and here, will have to consider the activities at issue and the totality of the evidence before it to determine whether the taxpayer has a source of income.

C. *The Tax Court made no reviewable errors in applying* Paletta Estate

[38] The appellant's alternative submission is relevant only because I have rejected his first. He submits that if *Paletta Estate* governs, the Tax Court failed to properly apply it. He raises several arguments in support of this submission.

[39] First, the appellant argues that he carried out the trading activity in a commercial manner, pointing to the Tax Court's findings that the transactions were not a sham and were legally effective. Second, he contends, the Tax Court relied on two transactions for its conclusion he had no intention to profit, effectively requiring contemporaneous documentation evidencing that he had a pursuit of profit purpose for each transaction. Had the Tax Court considered his entire course of conduct, he submits, it would have found he intended to profit from the trading. Third,

the appellant says, the Tax Court inappropriately failed to consider the correct objective factors when examining his intention to profit and inappropriately "fixated" on the $240,000 fee the appellant paid to the broker assisting him with his trading activity.

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[40] None of these arguments is persuasive.

[41] As *Paletta Estate* illustrates, legally effective transactions and the absence of a sham do not preclude finding that activities, which on their face appear commercial, nonetheless are not a source of income. Although satisfied the appellant's activities did not have a personal element, in view of evidence suggesting his intention was otherwise than pursuit of profit, the Tax Court turned to the evidence to determine his intention.

[42] The Tax Court could not rely solely on the appellant's subjective statements. Therefore, as the jurisprudence it referenced requires, the Tax Court also considered objective manifestations of the appellant's stated intention: Tax Court reasons at paras. 127–130, citing *Symes v. Canada*, [1993] 4 S.C.R. 695 at 736; *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, at para. 54; *MacDonald v. Canada*, 2020 SCC 6, at paras. 43, 56; and *Van der Steen v. Canada*, 2020 FCA 168 at paras. 29–31. Those objective manifestations included the admitted facts, contemporaneous correspondence between the appellant and his broker and others, and the matters addressed in that correspondence.

[43] I also reject the appellant's contention that the Tax Court did not consider his entire course of conduct but instead relied on two transactions in finding the appellant was pursuing

loss. That is not a fair reading of the Tax Court's reasons. The Tax Court's reasons devote several pages to reviewing the appellant's trading activities: Tax Court reasons at paras. 3–22, 131–142 (paragraph 142 spans ten pages), 148–160.

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[44] Finally, there is no merit to the appellant's assertions regarding the fee and the Tax Court's alleged failure to consider relevant objective factors when assessing his intent.

[45] As I read the Tax Court's reasons, it considered the appellant's disinterest in, and lack of attention to, the fee (once the amount was agreed upon) not as determinative, but as relevant to its overall assessment of the evidence concerning the appellant's intention to pursue loss.

[46] The Tax Court did not ignore the evidence of experts concerning the possibility of profit: Tax Court reasons at paras. 24–34, 52–61. And, it considered the very factors the appellant says are missing from the analysis—the appellant's knowledge of foreign exchange before he started to trade (Tax Court reasons at para. 132(a)), his subsequent application of his learning from the trading activities (Tax Court reasons at paras. 133–139), and the way he undertook the trading activities and the parties contracted (Tax Court reasons at paras. 80–88, 99–106, 142, 164–167).

[47] Having regard to all the evidence, the Tax Court concluded that evidence "does not support the proposition that [the appellant] intended to profit from the [foreign exchange trading] Activities": Tax Court reasons at para. 170. Rather, the appellant's intention "in implementing the [trades] was…to incur a loss": Tax Court reasons at paras. 168–169. These are findings of fact.

[48] The appellant asks us to reweigh the evidence and come to our own conclusions. Absent a palpable and overriding error, that is not something we can do. The appellant has not identified any such error, and I see none.

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III. Conclusion

[49] The Tax Court did not err in following *Paletta Estate*. Nor has the appellant persuaded me that the Tax Court made any reviewable error in concluding that, in pursuing his foreign exchange trading activities, the appellant's intention was to incur a loss and so he had no source of income.

[50] Accordingly, I would dismiss the appeal with costs.

"K.A. Siobhan Monaghan"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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