Docket: 2013-3552(IT)I

BETWEEN:

OSBORNE G. BARNWELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 8, 2015, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Rita Araujo

JUDGMENT

The appeal from an assessment made under the *Income Tax Act* for the 2011 taxation year by notice dated November 13, 2012 is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of April 2015.

"J.R. Owen"

Owen J.

Citation: 2015 TCC 98
Date: 20150421
Docket: 2013-3552(IT)I

BETWEEN:

OSBORNE G. BARNWELL,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Owen J.

[1] This is an appeal by Mr. Osborne G. Barnwell of an assessment of his 2011 taxation year by notice dated November 13, 2012. The assessment denied a deduction claimed by Mr. Barnwell of an allowable business investment loss ("ABIL") in the amount of $39,150.

[2] The Appellant is a certified general accountant and a lawyer and he represented himself in this appeal. The Appellant himself and Mr. Nicholas Austin testified on behalf of the Appellant. At the commencement of the hearing, the Appellant advised the Court that he was revising his claim for an ABIL downward to an amount of $36,500 based on aggregate loans of $73,000.

[3] The Appellant is from the island of St. Vincent and came to Canada in 1974. He initially lived in London, Ontario, but moved to Toronto in 1980.[1] As a certified general accountant, he worked for the Canada Revenue Agency as an auditor for a number of years before returning to school to obtain a law degree so that he could specialize in tax law.[2] The Appellant was called to the bar in 1993.[3]

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[1] Lines 5 to 8 of page 7 of the Transcript.
[2] Lines 8 to 11 of page 7 of the Transcript.
[3] Lines 9 and 10 of page 8 of the Transcript.

[4] The Appellant testified that he met Mr. Austin in the early 1980s.[4] Mr. Austin was also from the island of St. Vincent and the two developed a relationship. At that time, Mr. Austin was operating a business called Carib-Can, which was a publisher of children's books located on College Street in Toronto. The Appellant stated that Mr. Austin was well known in the local West Indian community and that he was committed to and passionate about his work. He also stated that the relationship developed around activities such as volunteering for literacy programs at a local school board.

[5] At some point in the early 2000s, Mr. Austin indicated to the Appellant that he wanted to publish a travel magazine that would be targeted at passengers on commercial airlines. In or around 2004, Mr. Austin approached the Appellant to co-sign for a loan from a bank to fund the new business venture. The bank ultimately declined to make the loan. After failing to raise funds elsewhere, Mr. Austin eventually approached the Appellant to fund the new business. By this point in time, a corporation called Whitesand Group of Companies Inc. had been incorporated by Mr. Austin. The Appellant stated:

> . . . I was approached by Mr. Austin to re-inquire as to whether I would invest in his business, and just my disposition, my background as it is is [*sic*] I consider myself quite blessed and fortunate, so I felt, given his passion, given his commitment, I would invest in the business Whitesand.[5]

[6] Mr. Austin indicated to the Appellant that the timeline to build the business was two to three years, but not more than three years. The Appellant recognized that it was a difficult business and that he was making a commitment for a period of years, and stated that he would monitor how Mr. Austin was doing.

[7] The Appellant testified that there was no formal agreement with Mr. Austin regarding the loans. However, to the best of his recollection, every time he advanced money, he would ask Mr. Austin to attend at his office to sign a promissory note.[6] The Appellant entered into evidence as Exhibit A-2 four unsigned promissory notes. Each note stated that it was signed, sealed and delivered at Toronto on a particular date, and the blank signature line had Mr. Austin's name under it. The four dates are the 31st day of August, 2007, the 15th day of November 2007, the 29th day of April 2008 and the 21st day of May 2009.

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[4] Lines 12 to14 of page 7 of the Transcript.
[5] Lines 17 to 22 of page 10 of the Transcript.
[6] Lines 11 to 14 of page 11 of the Transcript.

[8] The Appellant also entered into evidence, as Exhibit A-1, a redacted printout from his law firm's computer system indicating that the promissory notes were last modified on the dates stated on the notes. The name of each note on the printout is "PROMISSORY NOTE nicholos" followed by the date of the note.

[9] In the body of the note dated August 31, 2007, it is stated:

> I, Nicholos Austin, of the City of Toronto, in the Province of Ontario, for valuable consideration, do hereby promise to repay Osborne G. Barnwell, Barrister & Solicitor, the amount of $10,300.
>
> The commencement of the repayment of this amount shall not be later than fifteen (15) months of [*sic*] the date of the signing of this agreement. The exact repayment schedule shall be determined at that time.

[10] In the body of the note dated November 15, 2007, it is stated:

> I, Nicholos Austin, of the City of Toronto, in the Province of Ontario, for valuable consideration, do hereby promise to repay Osborne G. Barnwell, Barrister & Solicitor, the amount of $16,000.
>
> The commencement of the repayment of this amount shall not be later than fifteen (15) months of [*sic*] the date of the signing of this agreement. The exact repayment schedule shall be determined at that time.

[11] In the body of the note dated April 29, 2008, it is stated:

> I, Nicholos Austin, of the City of Toronto, in the Province of Ontario, for valuable consideration, do hereby promise to repay Osborne G. Barnwell, Barrister & Solicitor, the amount of $65,000. This amount [is] comprised of previous loans of $40,000 plus $25,000 given on this date.
>
> The commencement of the repayment of this amount shall not be later than July 30, 2008.

[12] In the body of the note dated May 21, 2009, it is stated:

> I, Nicholos Austin, of the City of Toronto, in the Province of Ontario, for valuable consideration, do hereby promise to repay Osborne G. Barnwell, Barrister & Solicitor, the amount of $80,000. This amount [is] comprised of previous loans of $71,000 plus interest.

[13] The Appellant stated that at the time Mr. Austin was signing the notes, he knew that Mr. Austin had incorporated a company, as that was required in order to

obtain grants. With respect to the mention of interest in the May 21, 2009 note, the Appellant explained that at the time the arrangement was struck there was an expectation that he would receive 15% of any contract that was secured with an airline for the travel publication.[7] This arrangement was not committed to writing.

[14] As of May 2009, things were not going well. The Appellant described the situation as follows:

> So in May of 2009, and I will get to that in a moment, in May of 2009 things seemed to be going here or there because of a failed -- there was a fail situation in 2009 with I think U.S. Air, and I will explain that. And so I said to Nicholas that, well, if this doesn't work out, let's agree as to how much interest you will owe me on the money I have given you. So we agreed on $9,000 back in May 2009. That is why you see the interest amount. But it wasn't that I expected him to pay me interest all along; it was a culminating amount given the situation in May 2009.[8]

[15] The Appellant entered into evidence as Exhibit A-3 a series of photocopies of cancelled cheques for varying amounts and one cheque stub for a certified cheque in the amount of $25,000. The first cheque in the series is dated June 29, 2007 and the last cheque is dated September 10, 2010. The certified cheque stub is dated April 29, 2008.

[16] Of 18 ordinary cheques, in four cases, the "Re" line of the cheque indicates either "Whitesand" or "magazine" or "Whitesand magazine". However, all of the ordinary cheques are made out to Nicholos Austin or Nicholas Austin or N. Austin and the certified cheque stub indicates that the payee is Nicholos Austin. When asked why this was the case, the Appellant stated:

> Because he was the signing officer for the -- that is how I -- okay. So Nicholas was the face of Whitesand, so he was the signing officer for Whitesand. And that was how he advised me to write the cheques, to him, because he was using the money for the Whitesand business. That is why I tried to put what -- just as a reminder what the loan was for, the Whitesand business.[9]

[17] The Appellant went on to state:

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[7] Lines 19 to 25 of page 13 of the Transcript.
[8] Lines 26 to 28 of page 13 and lines 1 to 7 of page 14 of the Transcript.
[9] Lines 24 to 28 of page 15 and lines 1 and 2 of page 16 of the Transcript. The assertion that Mr. Austin asked for the cheques to be made out to him is repeated by the Appellant in cross-examination at line 17 of page 42 of the Transcript.

> He [Mr. Austin] is the director of Whitesand. I knew that was the case. And again, it's the sort of -- I would say, Your Honour, sort of the factual context at that time. So I knew that he had incorporated Whitesand. I knew that he tried to get monies through the arts council on behalf of Whitesand to do the publishing business. So my relationship with him was predicated -- the money relationship, that is, was predicated on the basis of Whitesand.[10]

[18] To further corroborate the amounts of the loans, the Appellant entered into evidence as Exhibit A-5 a copy of the General Bank Journal for his law firm. The excerpt showed a series of loans totalling $75,600. Each entry is described by payment method (cheque), a date, the name of the payee (Nicholas Austin or N. Austin), an entry number, an explanation (the word "Loan" or, in one case, "Loan to Nicholas Austin") and an amount.

[19] The Appellant submitted copies of excerpts from three issues of *Whitesand magazine* (Exhibit A-4) and stated that the magazines represented the only evidence he had that Whitesand Group of Companies Inc. was carrying on an active business.[11] On page 3 or 4 of each issue, Mr. Austin is identified as the publisher of the magazine. On the same page there also appear the name, address, website information and contact details for "Whitesand Group of Companies, Inc.". After referencing these pages, the Appellant stated:

> As far as I was concerned, Your Honour, Whitesand being managed by Nicholas Austin was producing a product, a magazine as he wanted to do, to get onto the destination with tourists, and tourism and so on.[12]

[20] The Appellant testified that Mr. Austin pursued opportunities to distribute the magazine with a couple of major airlines, but that it was clear by 2010 that the loans would not be repaid. However, because of the ongoing communications he had with Mr. Austin, there was no need to send a demand letter.[13]

[21] In cross-examination, the Respondent entered into evidence a copy of a corporation profile report for Whitesand Group of Companies Inc. (Exhibit R-2) issued by the Ministry of Government Services (Ontario). The report listed Mr. Austin as a director and officer[14] of the company commencing May 12, 2004 (the date of incorporation). The report listed two other individuals as directors and officers (president and treasurer) of the corporation commencing July 10, 2005.

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[10] Lines 14 to 22 of page 16 of the Transcript.
[11] Lines 22 to 28 of page 23 and lines 1 to 3 of page 24 of the Transcript.
[12] Lines 25 to 28 of page 20 of the Transcript.
[13] Lines 4 to 19 of page 24 of the Transcript.
[14] Mr. Austin's title was "executive director".

[22] In cross-examination, the Appellant stated that he viewed Mr. Austin as being Whitesand, that he trusted Mr. Austin implicitly and therefore did not feel the need for due diligence, and that he was in constant communication with Mr. Austin and therefore did not need to demand repayment even after the time limits set out in the first three promissory notes had expired. The testimony also revealed that the Appellant had little or no knowledge of Whitesand outside of what Mr. Austin had told him.

[23] With respect to the ledger entries, cheques and promissory notes, the Appellant acknowledged that they identified the debtor as Mr. Austin, but he reiterated his position that Mr. Austin was Whitesand:

> . . . Nicholas Austin, again, forgive me for repeating, Nicholas Austin was Whitesand. Nicholas Austin owned Whitesand. He epitomizes Whitesand. Whitesand was incorporated by Mr. Austin as part of what was required for publication purposes. It was Nicholas Austin's Whitesand that was running, was developing a publication business. So yes, I know after the fact I understand your concerns and I'm just testifying today that Nicholas Austin was Whitesand.[15]

[24] The Appellant acknowledged in cross-examination that he had made loans to another corporation in 2010 and that the cheques in that case were made out to the corporation and not to an individual. The cheques were entered into evidence by the Respondent as Exhibit R-1.

[25] Mr. Austin testified that he first came into contact with the Appellant in 1994 when the Appellant invested in Carib-Can, which published a book that was sold to a local school board.[16] With respect to that investment, Mr. Austin stated that his partner at the time paid back her half of the investment but that he did not pay back his half.[17]

[26] Mr. Austin testified that he left Canada in 2000 and returned in 2005. He stated that the idea for Whitesand was "hatched" at the Appellant's home with another individual, who was the editor of the magazine at that time. Mr. Austin described the launch of the magazine at an event in Yorkville.

[27] Mr. Austin testified that 10,000 copies of the magazine were produced in 2007 and that the magazine was shown at book fairs in Toronto and New York as

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[15] Lines 19 to 27 of page 36 of the Transcript.
[16] Lines 20 to 26 of page 48 of the Transcript. This date varies from the date provided by the Appellant, who testified that he first met Mr. Austin in the 1980s.
[17] Lines 9 to 13 of page 49 of the Transcript.

well as at different real estate symposiums. He described the talks and meetings he held over a period of months with a major US airline regarding a potential purchase of 250,000 copies of *Whitesand magazine*. The meetings were held in Miami. The airline would not provide any upfront funding for the magazines and in the end did not purchase any magazines. Mr. Austin also referred to an e-mail from a Canadian carrier expressing some interest in the magazine, but ultimately no sales resulted.

[28] The Appellant asked Mr. Austin to explain the circumstances surrounding the issuance of the cheques in his name:

> Q. Is there a reason why -- how did it happen, sir, that cheques were made out to you, if you can recall? Can you take us back to -- did you have a conversation with me at all as to who the cheque should be made out to?
>
> A. Basically you told me that I would be responsible, I'm personally responsible for monies when Jo Lena and myself approach you. You said, I'm holding you responsible for anything at all with regards to. So it was my responsibility, and consequently you had me sign documents -- I don't have it here with me -- in terms of payments and how it would be paid, things that you mentioned to me.[18]

[29] With respect to the promissory notes, Mr. Austin testified that he signed the notes in the Appellant's law office and that he recognized that the monies were not gifts to him but had to be paid back.[19] With respect to the arrangement with the Appellant for repayment, Mr. Austin stated:

> Q. And what was your -- can you recall what was -- the conditions of us [*sic*] to how you were going to repay me?
>
> A. One of them being is the terms of the contractual arrangements. If I made any contractual arrangement to sell books, you know, you have -- you basically would have to have your monies paid back. And there was a certain percentage, and I don't have it here in terms of what the per cent was. And you would basically -- if I may be correct -- I may -- I think it's about 15 per cent. I'm not sure what the figure was, but I know there was a percentage attached to it.[20]

[18] Lines 7 to 19 of page 53 of the Transcript.
[19] Lines 27 and 28 of page 53 and lines 1 to 8 and 21 to 23 of page 54 of the Transcript.
[20] Lines 9 to 20 of page 54 of the Transcript.

[30] Mr. Austin testified that soon after the collapse of Whitesand, he was unable to repay the people to whom he owed money and that, because of his circumstances, any records he had for Whitesand were lost or destroyed.[21]

[31] Mr. Austin stated that the amounts advanced to him after 2009 were not loans but were for advertising purchased by the Appellant in another publication of Mr. Austin's. Upon hearing this testimony, the Appellant promptly withdrew these amounts from his claim for an ABIL.[22]

[32] In cross-examination, Mr. Austin acknowledged that his LinkedIn profile made no reference to Whitesand, but it did say that he was the owner of "Festivals in Buffalo" from February 2008 to August 2014.[23] Mr. Austin also acknowledged that he had no documentary evidence to show that he was the sole shareholder of Whitesand Group of Companies Inc.,[24] that the corporation had never filed an income tax return in Canada but did file one GST return, which showed no revenue,[25] and that the majority of the cheques written to him by the Appellant in 2007 were deposited in his personal bank account.[26]

[33] In re-examination, Mr. Austin stated that the expenses paid in 2009 were paid from his personal bank account.[27] Mr. Austin also stated that he was the sole shareholder of Whitesand Group of Companies Inc. and that, at the time he was operating Whitesand, he was a resident of Canada.[28]

[34] The Respondent made a number of assumptions of fact in paragraph 9 of the Reply, including the following:

> n. the appellant never made a loan in the amount of $78,300 to Whitesand;
>
> o. in the alternative, if a loan was made in the amount of $78,300 by the appellant to Whitesand, it was not made for the purposes of earning income; and
>
> p. if a loan was made, it did not bear any interest.

I. The Appellant's Position

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[21] Lines 22 to 28 of page 57 and lines 1 to 28 of page 58 of the Transcript.
[22] Lines 1 to 28 of pages 66 and 67 and lines 1 to 8 of page 68 of the Transcript.
[23] Lines 25 to 28 of page 76 and lines 1 to 9 of page 77 of the Transcript.
[24] Lines 10 to 24 of page 77 of the Transcript.
[25] Lines 25 to 28 of page 77 and lines 1 to 11 of page 78 of the Transcript.
[26] Lines 3 to 28 of page 75 and lines 1 to 14 of page 76 of the Transcript.
[27] Lines 23 to 28 of page 79 and lines 1 to 3 of page 80 of the Transcript.
[28] Lines 1 to 12 of page 82 of the Transcript.

[35] The Appellant commenced his argument with the following proposition:

> So there are, in the normal course there are four driving underlying principles to claiming the debt as an ABIL. The debt obviously has to be incurred by the Appellant. The debt was acquired for gaining or producing income; the business has to be an active business; it has to be a CCPC, Canadian-controlled private corporation. And the debt has to be realized in the year of the claim.[29]

[36] The Appellant submitted that the evidence supported the conclusion that Whitesand Group of Companies Inc. was a Canadian-controlled private corporation that carried on an active business in Canada. With respect to the assumption of fact in paragraph 9 n. of the Reply, the Appellant stated:

> In the amount of 78,300 to Whitesand. The loan was made to Whitesand. My evidence as I have given it, Your Honour, and I would submit to you that what is important here in terms of evidence is assessing whether the witness has been credible. I have no grounds, no reason to make a false presentation to this court. The monies were paid to Mr. Austin. Mr. Austin was seen as Whitesand, and he's correct. The point was he was possible [*sic*] and he directed me to make the cheques to him, because he is responsible. Plain and simple. The bank account shows activity. It is not on the level of activity that one would expect, given the loans, but the monies were based on the representations made to me to [*sic*] Mr. Austin cheques were written in favour of Whitesand.[30]

[37] The Appellant cited the decision of the Tax Court of Canada in *Sunatori v. The Queen*, 2010 TCC 346 for the proposition that a loan may yield an ABIL even if it bears no interest, and the decision of the Federal Court of Appeal in *Rich v. The Queen*, 2003 FCA 38, [2003] 3 F.C. 493 for the propositions that it is for the creditor to honestly and reasonably determine if the debt is bad, and that it is not necessary for a creditor to exhaust all possible recourses for collection in order to conclude that a debt is bad.

II. The Respondent's Position

[38] Counsel for the Respondent submitted that the decision in *Rich* lists in paragraph one the requirements to be met in order to claim an ABIL, which counsel summarized as follows:

> . . . At paragraph one the Federal Court of Appeal lists the requirements that need to be made which my friend previously noted, and that is: whether a debt was

[29] Lines 13 to 20 of page 84 of the Transcript.
[30] Lines 11 to 24 of page 96 of the Transcript.

> owed by a Canadian-controlled private company to the taxpayer; whether the debt was incurred for the purposes of gaining of [*sic*] producing income; whether the Canadian-controlled private company was an eligible small business in the year of claims [*sic*] the ABIL, and that means whether they had substantially all or all of their assets in their active business in Canada.[31]

[39] In addition, counsel noted that, under the definition of "small business corporation" in subsection 248(1) of the *Income Tax Act* (the "ITA"), the business has to have been active in the 12 months prior to the claim of the loss.

[40] The Respondent submitted that the Appellant had not met any of the requirements described in *Rich* that must be satisfied in order to claim an ABIL.

III. The Statutory Rules

[41] Paragraph 3(*d*) of the ITA allows a taxpayer to deduct an ABIL in computing the taxpayer's income. That paragraph states:

> 3. Income for taxation year — The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:
>
> . . .
>
> (*d*) determine the amount, if any, by which the amount determined under paragraph (*c*) exceeds the total of all amounts each of which is the taxpayer's loss for the year from an office, employment, business or property or the taxpayer's allowable business investment loss for the year,

[42] Under paragraph 38(*c*) of the ITA, a taxpayer's ABIL is one half of the taxpayer's business investment loss for the year:

> 38. Taxable capital gain and allowable capital loss — For the purposes of this Act,
>
> . . .
>
> (*c*) [allowable business investment loss] — a taxpayer's allowable business investment loss for a taxation year from the disposition of any property is ½ of the taxpayer's business investment loss for the year from the disposition of that property.

[31] Lines 25 to 28 of page 106 and lines 1 to 6 of page 107 of the Transcript.

[43] A taxpayer's business investment loss is described in paragraph 39(1)(*c*) of the ITA as follows:

> (*c*) a taxpayer's business investment loss for a taxation year from the disposition of any property is the amount, if any, by which the taxpayer's capital loss for the year from a disposition after 1977
>
> (i) to which subsection 50(1) applies, or
>
> (ii) to a person with whom the taxpayer was dealing at arm's length
>
> of any property that is
>
> (iii) a share of the capital stock of a small business corporation, or
>
> (iv) a debt owing to the taxpayer by a Canadian-controlled private corporation (other than, where the taxpayer is a corporation, a debt owing to it by a corporation with which it does not deal at arm's length) that is
>
> (A) a small business corporation,
>
> (B) a bankrupt (within the meaning assigned by subsection 128(3)) that was a small business corporation at the time it last became a bankrupt, or
>
> (C) a corporation referred to in section 6 of the *Winding-up [and Restructuring] Act* that was insolvent (within the meaning of that Act) and was a small business corporation at the time a winding-up order under that Act was made in respect of the corporation,
>
> exceeds the total of
>
> (v) in the case of a share referred to in subparagraph (iii), the amount, if any, of the increase after 1977 by virtue of the application of subsection 85(4) in the adjusted cost base to the taxpayer of the share or of any share (in this subparagraph referred to as a "replaced share") for which the share or a replaced share was substituted or exchanged,
>
> (vi) in the case of a share referred to in subparagraph (iii) that was issued before 1972 or a share (in this subparagraph and subparagraph (vii) referred to as a "substituted share") that was substituted or exchanged for such a share or for a substituted share, the total of all amounts each of which is an amount received after 1971 and before or on the disposition of the share or an amount receivable at the time of such a disposition by
>
> (A) the taxpayer,

> (B) where the taxpayer is an individual, the taxpayer's spouse or common-law partner, or
>
> (C) a trust of which the taxpayer or the taxpayer's spouse or common-law partner was a beneficiary
>
> as a taxable dividend on the share or on any other share in respect of which it is a substituted share, except that this subparagraph shall not apply in respect of a share or substituted share that was acquired after 1971 from a person with whom the taxpayer was dealing at arm's length,
>
> (vii) in the case of a share to which subparagraph (vi) applies and where the taxpayer is a trust referred to in paragraph 104(4)(*a*), the total of all amounts each of which is an amount received after 1971 or receivable at the time of the disposition by the settlor (within the meaning assigned by subsection 108(1)) or by the settlor's spouse or common law partner as a taxable dividend on the share or on any other share in respect of which it is a substituted share, and
>
> (viii) the amount determined in respect of the taxpayer under subsection (9) or (10), as the case may be.

[44] Subsection 39(9) of the ITA addresses the case of an individual taxpayer who has claimed a deduction under section 110.6 of the ITA:

> (9) Deduction from business investment loss — In computing the business investment loss of a taxpayer who is an individual (other than a trust) for a taxation year from the disposition of a particular property, there shall be deducted an amount equal to the lesser of
>
> (*a*) the amount that would be the taxpayer's business investment loss for the year from the disposition of that particular property if paragraph (1)(*c*) were read without reference to subparagraph (1)(*c*)(viii), and
>
> (*b*) the amount, if any, by which the total of
>
> (i) the total of all amounts each of which is twice the amount deducted by the taxpayer under section 110.6 in computing the taxpayer's taxable income for a preceding taxation year that
>
> (A) ended before 1988, or
>
> (B) begins after October 17, 2000,
>
> (i.1) the total of all amounts each of which is

> (A) 3/2 of the amount deducted under section 110.6 in computing the taxpayer's taxable income for a preceding taxation year that
>
> (I) ended after 1987 and before 1990, or
>
> (II) began after February 27, 2000 and ended before October 18, 2000, or
>
> (B) the amount determined by multiplying the reciprocal of the fraction in paragraph 38(*a*) that applies to the taxpayer for each of the taxpayer's taxation years that includes February 28, 2000 or October 18, 2000 by the amount deducted under section 110.6 in computing the taxpayer's taxable income for that year, and
>
> (i.2) the total of all amounts each of which is 4/3 of the amount deducted under section 110.6 in computing the taxpayer's taxable income for a preceding taxation year that ended after 1989 and before February 28, 2000
>
> exceeds
>
> (ii) the total of all amounts each of which is an amount deducted by the taxpayer under paragraph (1)(*c*) by virtue of subparagraph (1)(*c*)(viii) in computing the taxpayer's business investment loss
>
> (A) from the disposition of property in taxation years preceding the year, or
>
> (B) from the disposition of property other than the particular property in the year,
>
> except that, where a particular amount was included under subparagraph 14(1)(*a*)(v) in the taxpayer's income for a taxation year that ended after 1987 and before 1990, the reference in subparagraph (i.1) to "3/2" shall, in respect of that portion of any amount deducted under section 110.6 in respect of the particular amount, be read as "4/3".

[45] Paragraph 40(2)(*g*)(ii) of the ITA deems a loss on a disposition of a debt to be nil if the debt was not acquired for the purpose of gaining or producing income from a business or property or as consideration for a disposition of property to an arm's length person:

> (g) [various losses deemed nil] — a taxpayer's loss, if any, from the disposition of a property (other than, for the purposes of computing the exempt surplus or

> exempt deficit, hybrid surplus or hybrid deficit, and taxable surplus or taxable deficit of the taxpayer in respect of another taxpayer, where the taxpayer or, if the taxpayer is a partnership, a member of the taxpayer is a foreign affiliate of the other taxpayer, a property that is, or would be, if the taxpayer were a foreign affiliate of the other taxpayer, excluded property (within the meaning assigned by subsection 95(1)) of the taxpayer), to the extent that it is
>
> . . .
>
> > (ii) a loss from the disposition of a debt or other right to receive an amount, unless the debt or right, as the case may be, was acquired by the taxpayer for the purpose of gaining or producing income from a business or property (other than exempt income) or as consideration for the disposition of capital property to a person with whom the taxpayer was dealing at arm's length,

[46] Subsection 50(1) of the ITA is an elective provision that will deem a disposition of a debt for nil proceeds in certain circumstances:

> 50. (1) Debts established to be bad debts and shares of bankrupt corporation — For the purposes of this subdivision, where
>
> > (*a*) a debt owing to a taxpayer at the end of a taxation year (other than a debt owing to the taxpayer in respect of the disposition of personal-use property) is established by the taxpayer to have become a bad debt in the year, or
>
> . . .
>
> and the taxpayer elects in the taxpayer's return of income for the year to have this subsection apply in respect of the debt or the share, as the case may be, the taxpayer shall be deemed to have disposed of the debt or the share, as the case may be, at the end of the year for proceeds equal to nil and to have reacquired it immediately after the end of the year at a cost equal to nil.

[47] Subsection 248(1) defines "active business" and "small business corporation" for the purposes of the ITA:

> 248. (1) Definitions — In this Act,
>
> "active business", in relation to any business carried on by a taxpayer resident in Canada, means any business carried on by the taxpayer other than a specified investment business or a personal services business;
>
> . . .

> "small business corporation", at any particular time, means, subject to subsection 110.6(15), a particular corporation that is a Canadian-controlled private corporation all or substantially all of the fair market value of the assets of which at that time is attributable to assets that are
>
> > (*a*) used principally in an active business carried on primarily in Canada by the particular corporation or by a corporation related to it,
> >
> > (*b*) shares of the capital stock or indebtedness of one or more small business corporations that are at that time connected with the particular corporation (within the meaning of subsection 186(4) on the assumption that the small business corporation is at that time a "payer corporation" within the meaning of that subsection), or
> >
> > (*c*) assets described in paragraphs (*a*) and (*b*),
>
> including, for the purpose of paragraph 39(1)(*c*), a corporation that was at any time in the 12 months preceding that time a small business corporation, and, for the purpose of this definition, the fair market value of a net income stabilization account shall be deemed to be nil;

IV. Analysis

[48] In order to claim an ABIL in respect of a debt, a number of conditions must be satisfied. One such condition that is found in the description of a "business investment loss" in paragraph 39(1)(*c*) is that the debt must be "a debt owing to the taxpayer by a Canadian-controlled private corporation".

[49] The evidence in this case is that the Appellant earnestly believed that he was advancing funds to Mr. Austin as the alter ego of Whitesand Group of Companies Inc. so that the corporation could pursue the publication of *Whitesand magazine*. I do not doubt the Appellant's subjective belief in that regard, but the documentary evidence is clear in identifying the actual debtor as Mr. Austin and not Whitesand Group of Companies Inc.

[50] The cheques by which the advances were made are all made out to Mr. Austin personally. The promissory notes that evidence the debt, which Mr. Austin says he signed in the office of the Appellant, all state:

> I, Nicholos Austin, of the City of Toronto, in the Province of Ontario, for valuable consideration, do hereby promise to repay Osborne G. Barnwell, Barrister & Solicitor . . .

[51] In addition, the General Bank Journal for the Appellant's law firm describes the amounts as loans to Mr. Austin. Although the "Re" line on one of the cheques references "Whitesand" and another two cheques reference "magazine" and still another references "Whitesand magazine", that does not alter the fact that the payee named on each of the cheques is Mr. Austin. It also appears from Mr. Austin's testimony that a majority of the cheques issued in 2007 were deposited by him in his personal bank account.

[52] Mr. Austin appears to have understood that the amounts advanced to him were debts owed by him personally. In examination in chief, he stated:

> A. Basically you told me that I would be responsible, I'm personally responsible for monies when Jo Lena and myself approach you. You said, I'm holding you responsible for anything at all with regards to. So it was my responsibility, and consequently you had me sign documents -- I don't have it here with me -- in terms of payments and how it would be paid, things that you mentioned to me.[32]

[53] The Canadian income tax jurisprudence is clear that, in order to achieve a particular income tax result for a transaction, the form of the transaction matters. In *Friedberg v. Minister of National Revenue*, 135 N.R. 61,[33] the Federal Court of Appeal stated at paragraph 4:

> In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *Irving Oil Ltd. v. Minister of National Revenue*, (1991), 126 N.R. 47; 91 D.T.C. 5106, per Mahoney, J.A.). If a taxpayer fails to take the correct formal steps, however, tax may have to be paid. If this were not so, Revenue Canada and the courts would be engaged in endless exercises to determine the true intentions behind certain transactions. Taxpayers and the Crown would seek to restructure dealings after the fact so as to take advantage of the tax law or to make taxpayers pay tax that they might otherwise not have to pay. While evidence of intention may be used by the courts on occasion to clarify dealings, it is rarely determinative. In sum, evidence of subjective intention cannot be used to "correct" documents which clearly point in a particular direction.

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[32] Lines 12 to 19 of page 53 of the Transcript.

[33] An appeal of the Crown to the Supreme Court of Canada was dismissed from the bench without this point being addressed: [1993] 4 S.C.R. 285.

[54] The form of a transaction must be determined under the law of the jurisdiction in which the transaction is consummated:

> 46 In determining whether a legal transaction will be recognized for tax purposes one must turn to the law as found in the jurisdiction in which the transaction is consummated. Often that determination will be made without the aid of guiding precedents which are on point and, hence, the effectiveness of a transaction may depend solely on the proper application of general common law and equitable principles. In some instances it will be necessary for the Tax Court to interpret the statutory law of a province. As for the Minister, he must accept the legal results which flow from the proper application of common law and equitable principles, as well as the interpretation of legislative provisions. This leads me to the question of whether the Minister is bound by an order issued by a superior court, which order has its origins in the interpretation and application of the provisions of a provincial statute.[34]

[55] The taxpayer is not, however, held to a standard of perfection:

> 45 There is also little doubt that the courts have been diligent in requiring adherence to legal formalities imposed at law or by statute if certain tax advantages are to be accorded. I am not suggesting that the standard to be met by the taxpayer is best described as one of "perfection". In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, the Supreme Court of Canada acknowledged that certain deficiencies may be found to be inconsequential. In that case there had been, among other things, a failure to ensure that the buyer of the appellant's business held a licence under the *Excise Act* [R.S.C. 1952, c.99] in conjunction with that business. Despite that omission, it was held that the contract of purchase and sale of the business was complete and the associated tax reduction scheme valid.[35]

[56] Here, the Appellant is not asking this Court to overlook a mere deficiency in the form of the transaction but rather to ignore entirely the legal steps that were in fact taken to put into place the loans in issue. Those steps involved the issuance of cheques by the Appellant in the name of Mr. Austin and the execution by Mr. Austin of promissory notes evidencing that the debt in issue was a debt owed by Mr. Austin to the Appellant.

[57] The Appellant testified that Mr. Austin was the alter ego of Whitesand Group of Companies Inc. — in effect, the physical representation of the company — and urged me to consider the circumstances in play at the time.

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[34] *Dale v. Canada*, [1997] 3 F.C. 235 at paragraph 46.
[35] *Dale*, *supra*, at paragraph 45.

[58] Mr. Austin was a director and officer of Whitesand Group of Companies Inc. However, an Ontario corporation is a legal entity that has a legal personality separate and apart from its directors, officers and shareholders.[36] There is no suggestion on the face of the cheques or the promissory notes that Mr. Austin was acting in his capacity as a director or officer of Whitesand Group of Companies Inc. when he received the cheques or signed the promissory notes, and in his testimony Mr. Austin did not suggest that he was acting in any such capacity. There was no agency agreement and Mr. Austin did not suggest in his testimony that he received the cheques as an agent on behalf of Whitesand Group of Companies Inc. In fact, as already noted, Mr. Austin stated that he accepted that he was personally responsible for the debt.

[59] Under the circumstances, this Court cannot simply ignore the legal form and substance of the transactions that did in fact take place in favour of the Appellant's subjective appreciation of events. The documentation and the testimony of Mr. Austin clearly indicate that the loans in respect of which the Appellant is claiming an ABIL were made by the Appellant to Mr. Austin personally. Accordingly, the loans did not create "a debt owing to the taxpayer by a Canadian-controlled private corporation" as required by the description of a business investment loss in paragraph 39(1)(*c*) of the ITA.

[60] For the foregoing reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 21st day of April 2015.

"J.R. Owen"

Owen J.

[36] Section 15 of the *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 15 and *Salomon v. Salomon & Co.*, [1897] A.C. 22 (HL).

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Rita Araujo

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada