[OFFICIAL ENGLISH TRANSLATION]

97-3621(IT)I

BETWEEN:

THOMAS DASTOUS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on August 6, 2002, at Montréal, Quebec, by the Honourable Judge Lucie Lamarre

Appearances

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1992, 1993 and 1994 taxation years are dismissed.

Signed at Ottawa, Canada, this 28th day of October, 2002.

"Lucie Lamarre"
J.T.C.C.

Translation certified true
on this 6th day of January 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

Date: 20021028
Docket: 97-3621(IT)I

BETWEEN:

THOMAS DASTOUS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre, J.T.C.C.

[1] These are appeals under the informal procedure from assessments made by the Minister of National Revenue ("Minister") under the *Income Tax Act* ("*Act*") concerning the appellant for the 1992, 1993 and 1994 taxation years.

[2] In computing his income from his professional occupation as a notary for the 1992 taxation year, the appellant deducted a bad debt of $56,435, a deduction that was disallowed by the Minister. As for the 1993 and 1994 taxation years, the appellant deducted non-capital losses of previous years of $22,631 and of $3,998 respectively. Those losses were also disallowed by the Minister.

[3] The appellant now contends that the bad debt claimed in 1992 against his professional income should have been claimed as an allowable business investment loss ("ABIL") under paragraph 38(*c*) of the *Act*, which gave rise to a carry-over of losses in subsequent years in accordance with subsection 111(8) and paragraph 111(1)(*a*) of the *Act*.

[4] The Minister contends that the amount of $56,435 was never included in the appellant's professional income and that the appellant accordingly may not claim that amount as a bad debt against his professional income under paragraph 20(1)(*p*) of the *Act*. He further contends that the amount does not constitute a bad debt within the meaning of paragraph 50(1)(*a*) of the *Act* giving rise to an ABIL. In the respondent's view, the amount of $56,435 is a valuation of the income the appellant could have claimed from Maxi/Mar Inc. ("corporation") for legal services rendered to that corporation. In fact, the appellant never billed the corporation for his services and accordingly was never remunerated. The respondent therefore contends that the appellant did not invest the sum of $56,435 in the corporation and thus did not incur a tax loss granting entitlement to a deduction under the *Act*.

[5] The facts may be summarized as follows. In the years from 1984 to 1986, the appellant, who was a young notary, and the notary Yves Bérard (a family friend with a number of years' experience as a notary) provided legal services to the corporation in the context of the housing development "Les Serres de Gatineau". From December 1984 to April 1985, the appellant billed for his services and was remunerated accordingly. In July 1985, the corporation began to experience certain cash flow problems and proposed (through its sole shareholder, Jacqui Jacquot) to sign an agreement with the notary Yves Bérard, with whom it was doing business, whereby Yves Bérard would agree to provide legal services, assisted by the appellant, in exchange for a 25 percent share in the corporation's profits. That agreement was signed on September 1, 1985 (Exhibit A-1, tab 6). It was specified, however, that the agreement did not constitute [TRANSLATION] "a waiver by Yves Bérard, assisted by [the appellant], of his rights to his professional fees." The corporation also agreed that [TRANSLATION] "Yves Bérard, assisted by the appellant, [could] waive the benefit of this agreement and bill reasonable professional fees by simply notifying [the corporation] to that effect." The corporation also accepted the fact that the agreement [TRANSLATION] "did not [replace] the agreement on professional fees to be entered into between the parties."

[6] Even though the appellant's name appears in the agreement, he was not a signatory to it. Nor did he sign any written agreement with Yves Bérard respecting his involvement in that agreement.

[7] The appellant testified that, at the time the agreement was signed, the project was financed by the St-René Goupil Caisse Populaire of Gatineau, Quebec ("Caisse Populaire"). The appellant understood that he was investing his time by supplying his legal services in a project that entailed minimal risk for him and for which he would receive his share of profit at a given time.

[8] On January 25, 1986, the corporation gave the Caisse Populaire a hypothecary security of $2,500,000 (Exhibit A-1, tab 12).

[9] According to the appellant's testimony, the Caisse Populaire called in its loan three months later and, after sending a 60-day notice, took back possession of the immovable project. It was the Caisse Populaire that carried out the project. On October 10, 1986, it resold the 24 condominium units completed and the remaining land for the sum of $1,986,000 (Exhibit A-1, tab 13). In the meantime, the corporation had filed for bankruptcy on June 25, 1986 (Exhibit A-1, tab 4, page 2).

[10] Five years later, on July 24, 1991, the notary Yves Bérard brought an action before the Superior Court of Quebec against the Caisse Populaire, claiming the sum of $209,970 plus interest. He alleged that the Caisse had benefited from legal acts he had performed for the corporation between August 24, 1984, and April 3, 1986, and that it was jointly and severally liable with the corporation under the *Notarial Act* for payment of that account.

[11] On March 2, 1992, the appellant and Yves Bérard signed an agreement under which Mr. Bérard undertook to remit 20 percent of the amounts received from the Caisse Populaire if he won his case against it (Exhibit A-1, tab 10, page 177).

[12] Yves Bérard was denied his action as a result of the Caisse populaire’s motion to dismiss, which was allowed by the Superior Court of Quebec on May 6, 1992 (Exhibit A-1, tab 4). It appears from that judgment that Yves Bérard had submitted a bill of fees and disbursements totalling $282,175 for professional services rendered to the corporation during the aforementioned period but during which he had not billed the corporation. According to the appellant's testimony, that bill of fees was prepared within the legal action Mr. Bérard brought against the Caisse Populaire. The breakdown of that bill of fees is provided in Schedule A of the Reply to the Notice of

Appeal within the calculation of the bad debt claimed by the appellant in the instant case and is as follows:

[TRANSLATION]

Schedule "A"

Thomas Dastous v. Her Majesty The Queen
Calculation of the Bad Debt

Professional fees billed by Mr. Bérard to the corporation to July 28, 1986	$ 74,792.65
Professional fees billed by Mr. Bérard to the St-René Goupil Caisse Populaire to August 13, 1991	$ 62,911.61

Professional fees billed	$137,704.26
Plus: interest incurred to July 28, 1991 at 24% per annum calculated on the first amount	$ 144,471.35

Total amount receivable	$282,175.61
Appellant's share (20%)	$56,435.12

[13] It also appears from the judgment of the Superior Court of Quebec that on July 27, 1986, Yves Bérard filed a proof of claim totalling $74,792 with the trustee in the corporation's bankruptcy but that he did not receive any payment or dividend from the trustee in the bankruptcy (Exhibit A-1, tab 4, pages 2 and 7).

[14] As a result of the fact that the Superior Court of Quebec dismissed the action brought by Yves Bérard against the Caisse Populaire, in computing his income for 1992, the appellant claimed a bad debt of $56,435 representing 20 percent of the bill of professional fees and disbursements claimed by Yves Bérard in his action, that is, 20 percent of $282,175.

[15] It is that amount that is in issue before this Court. In actual fact, the Minister disallowed the deduction of that amount since the appellant had never included that

amount in computing his income for the purposes of the *Act*. The appellant explained that he was not required to include that amount since he had elected to exclude his work in progress from his income as permitted under section 34 of the *Act*. Since the appellant had never billed his fees to the corporation, he never included them in his income.

[16] The appellant acknowledged that he had never invested money in the corporation, whereas Yves Bérard had apparently disbursed approximately $35,000 in that venture (Exhibit A-1, tab 10, page 67). The appellant never billed the corporation for his services after July 1985 (having regard to the agreement between Yves Bérard and the corporation) and never filed a claim as a credit or in the corporation's bankruptcy. The trustee in the bankruptcy was released from the corporation's assets on May 22, 1996 (Exhibit A-1, tab 5).

[17] The appellant therefore claimed an ABIL since he considered that he held a capital claim against the corporation, a claim which had become a bad debt in 1992.

[18] The appellant contended that he had advanced amounts of money to the corporation in the form of legal services and that the time invested by him constituted an expense and thus a debt for the corporation, which had agreed to assign to the appellant, through Yves Bérard, a portion of its profits in consideration of services rendered. He therefore considered that he had a claim against the corporation. The word "claim" not defined in the *Act*, the appellant referred to the definition in the dictionary, *Le Nouveau Petit Robert*, Paris, Dictionnaires Le Robert, 2000, which reads as follows: [TRANSLATION] "[3.] Right by which a person (creditor) may require (something) from someone, particularly a sum of money."

[19] Moreover, the appellant argued that a representative of the respondent had previously admitted that the economic loss incurred by the appellant could constitute a capital loss giving rise to an ABIL. However, that same representative deemed that the ABIL was nil because he had established the tax cost of the appellant's claim as nil given that no amount of money had been invested by the appellant and the appellant had never included the amount of the professional fees with which his claim was connected in computing his income for any taxation year (see letter from the Canada Customs and Revenue Agency ("CCRA") to the appellant dated September 12, 1996, Exhibit A-1, tab 7).

[20] The appellant contends that the respondent erred in distinguishing between an economic loss and a tax loss. He contended that his claim, when it became a bad

debt, had a cost and that the cost was the value attributed to the professional services he had rendered and for which he had never been paid.

[21] In his view, even though those amounts were never included in his income, his economic loss nevertheless entitled him to a tax loss since he had incurred a loss on an investment, in the nature of time, true enough, but that was at the basis of the enforceability of his claim. He reiterated that the amount of his claim had not been included in his income because, as permitted by section 34 of the *Act*, he had elected to exclude his work in progress from his income.

[22] Lastly, the appellant argued that the Minister made the assessments in appeal on the basis of information obtained from the Quebec Ministère du Revenu. The appellant said that he had not authorized the transfer of that information. Furthermore, he contended that the communication of a number of documents thus obtained was not permitted by the [TRANSLATION] "Agreement on the exchange of information between the ministère du Revenu du Québec and the Minister of National Revenue" ("Agreement") or under paragraph 241(1)(c) of the *Act*, which reads as follows:

> **ARTICLE 241: Provision of information.**
>
> **(1)** Except as authorized by this section, no official shall
>
> . . .
>
> *(c)* knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.

[23] The appellant moreover contends that the Agreement that was adopted on August 24, 1988, pursuant to paragraph 241(4)(*b*) of the *Act* and section 3000 of the Income Tax Regulations ("Regulations"), as amended, became null and void after section 3000 of the Regulation was repealed on December 2, 1993. The appellant accordingly considers that the assessments must be vacated as a result.

[24] With respect to the transmission of information to the Minister from Quebec's Ministère du Revenu, counsel for the respondent states that the appellant filed a complaint before the Commission d'accès à l'information du Québec ("Commission") (which has jurisdiction to hear this kind of complaint) and that his complaint was dismissed on March 15, 2002 (that judgment was filed by counsel for the respondent

in his argument and was thus not filed as an exhibit in the record). The only reference in the copy filed in court is the following: *Thomas Dastous c. Ministère du Revenu du Québec*, PP 99 22 64, decision published on the Internet at http://www.cai.gouv.qc.ca/fra/biblio_fr/bib_dec_03_02_fr.htm. In that judgment, it was held that Quebec's Ministère du Revenu was authorized to transfer the documentation in question to the CCRA under the *Act respecting the ministère du Revenu* and the Agreement. The Commission found as follows at page 8 of the copy of the judgment filed by counsel for the respondent:

> [TRANSLATION]
>
> As a result of the foregoing, the Commission finds that the information provided to Revenue Canada was necessary to the performance of the duties of the respondent responsible for administering the *Act respecting the ministère du Revenu* and the said agreement. The information that the respondent provided to Revenue Canada concerning the complainant was transmitted in accordance with the statutory provisions, as stated above.

The appellant did not appeal from that decision.

[25] Counsel for the respondent further contends that paragraph 241(1)(*c*) of the *Act* specifically allows the Minister to use confidential information in the administration of the *Act*. Confidential information may be admissible as evidence if that does not bring the administration of justice into disrepute (see *Donovan v. The Queen*, [2000] 4 F.C. 373). Nonetheless, counsel for the respondent argues that in any event the information could have been obtained through a CCRA audit and that the appellant would have been required to provide it. He therefore contends that the transfer of information was made legally and that in this case it did not bring the administration of justice into disrepute.

[26] As to the opinion of a CCRA representative, that he acknowledged the existence of a capital transaction (letter from the CCRA to the appellant dated September 12, 1996, Exhibit A-1, tab 7), counsel simply contends that, according to the confirmation of the assessments in appeal, the Minister did not recognize the existence of an ABIL. Furthermore, the Minister is not bound by a prior interpretation of one of his officials (see *Hawkes v. Canada*, [1996] F.C.J. No. 1694 (F.C.A.) (Q.L.)).

[27] As to the question of merit, counsel for the respondent submits that the appellant may not claim a loss under the *Act* without having previously included some benefit in computing his income. Thus, since the value the appellant assigned

to the professional services rendered to the corporation never entered into his tax picture, he may not claim a deduction for the purpose of computing income tax. Moreover, even though the appellant rendered legal services and received no remuneration as consideration, this does not mean that there was a transfer of funds from the appellant's assets to those of the corporation. The time he invested does not constitute an investment in fiscal terms. Furthermore, since the appellant did not include the value of the fees attached to his services in computing his income, he therefore assumed no tax cost in respect of those professional services.

[28] According to the respondent, the agreement signed between Mr. Bérard and the corporation was an agreement that granted entitlement to a percentage of income in exchange for legal services. That agreement established a right to income. As a result, it could not be an agreement of a capital nature, particularly since the appellant never invested money in the corporation.

[29] Lastly, counsel for the respondent submits that the appellant did not prove that he had a bad debt in 1992. He never billed for his services, never filed a claim with the trustee in bankruptcy, and the trustee had not yet been released from the corporation's assets in 1992.

Analysis

[30] As to the issue of the means used by the Minister to obtain the evidence on which the assessments were made, I share the view of counsel for the respondent that the appellant's claims cannot be allowed. The question was previously decided by the Commission d'accès à l'information du Québec, which had jurisdiction to hear the appellant's complaint with respect to the legality of the transfer of the documents in question to the CCRA by Quebec's Ministère du Revenu under the *Act respecting the ministère du Revenu* and the Agreement (the Commission d'accès à l'information draws its jurisdiction from the *Act respecting access to documents held by public bodies and the protection of personal information*, R.S.Q., c. A-2.1).

[31] As to the Agreement itself, it was adopted on August 24, 1988 (Exhibit A-1, tab 14) under the relevant sections of the *Act respecting the ministère du Revenu* and paragraph 241(4)(*b*) of the *Act* and section 3000 of the *Regulations*, as amended. At the time, paragraph 241(4)(*b*) and section 3000 read as follows:

Income Tax Act

(4) *Other exceptions.* An official or authorized person may,

. . .

(*b*) under prescribed conditions, communicate or allow to be communicated information obtained under this Act or the *Petroleum and Gas Revenue Tax Act*, or allow inspection of or access to any written statement furnished under this Act or the *Petroleum and Gas Revenue Tax Act*, to the government of any province in respect of which information and written statements obtained by the government of the province, for the purpose of a law of the province that imposes a tax similar to the tax imposed under this Act or the *Petroleum and Gas Revenue Tax Act*, are communicated or furnished on a reciprocal basis to the Minister;

Income Tax Regulations

s. 3000. For the purposes of subsection 241(4) of the Act, an official or authorized person referred to in that subsection may communicate information or allow inspection of or access to a written statement to the government of a province on condition that

(*a*) the information furnished or obtained will not be communicated to any person except an officer or servant of that government; and

(*b*) the information will not be used for any purpose other than the administration or enforcement of a provincial law that provides for the imposition of a tax payable to the province or the evaluation or formulation of the province's tax policy.

[32] Subsection 241(4) was amended by S.C. 1994, c. 7, Sched. VIII, subsection 137(1), effective June 10, 1993. It is now subparagraphs 241(4)(*d*)(iii) and (iv) that provide for the provision of confidential information to a provincial official. Those subparagraphs read as follows:

(4) Where taxpayer information may be disclosed. An official may

. . .

(*d*) provide taxpayer information

. . .

> (iii) to an official solely for the purposes of the administration or enforcement of a law of a province that provides for the imposition or collection of a tax or duty,
>
> (iv) to an official of the government of a province solely for the purposes of the formulation or evaluation of fiscal policy,

[33] Section 3000 was subsequently repealed by that legislative amendment since its content is now included in subparagraphs 241(4)(*d*)(iii) and (iv) of the *Act*.

[34] The repeal of section 3000 of the *Regulations* thus does not alter the power of a federal official to provide information to the government of a province since that power is now incorporated into subsection 241(4) of the *Act*. Therefore, the repeal of section 3000 of the *Regulations* had no impact on the Agreement, which was always applicable during the years in issue.

[35] Lastly, paragraph 241(1)(*c*) of the *Act* allows a federal official to use confidential information in the course of the administration or enforcement of the *Act*. That is precisely what was done here since the documents in issue were used solely in making assessments concerning the appellant with respect to the tax treatment of the bad debt claimed by the appellant in computing his income. Moreover, I concur in the opinion of counsel for the respondent that the use of confidential information obtained from the Quebec Ministère du Revenu for the purpose of making the assessments in appeal did not bring the administration of justice into disrepute.

[36] I therefore reject the argument raised by the appellant that the Minister incorrectly based the assessments on confidential information purported to be illegally provided by the Quebec Ministère du Revenu. That was clearly not the case.

[37] As to the question of merit, I also share counsel for the respondent's view that the appellant did not establish his right to deduct a bad debt in computing his income for the years in issue.

[38] On the one hand, the debt in question was never included in his income and, as such, could not be deducted under paragraph 20(1)(*p*), which reads in part as follows:

SECTION 20: Deductions permitted in computing income from business or property.

> **(1)** Notwithstanding paragraphs 18(1)(*a*), (*b*) and (*h*), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:
>
> . . .
>
> **(p) Bad debts** – the total of
>
> (i) all debts owing to the taxpayer that are established by the taxpayer to have become bad debts in the year and that have been included in computing the taxpayer's income for the year or a preceding taxation year, . . .

[39] Second, the claim was also not a bad debt of a capital nature giving rise to an ABIL under section 50 and paragraphs 38(*c*) and 39(1)(*c*) of the *Act*.

[40] To deduct an ABIL, the appellant must above all show that he has incurred a capital loss in the year resulting from the disposition of a debt owing to the taxpayer by a Canadian-controlled private corporation (paragraph 39(1)(*c*) of the *Act*).

[41] In my view, the appellant did not show that he had incurred a capital loss. The loss incurred was the income foregone from professional services rendered and not paid. If the appellant had been remunerated for his services, either at an hourly rate or on the basis of percentage of profits, that remuneration would clearly have constituted income and not a capital payment. According to the agreement contemplated (Exhibit A-1, tab 6), Yves Bérard and the appellant did not waive their professional fees but agreed to receive a 25 percent share in the corporation's profits in consideration for services rendered. Fees for services rendered, regardless of the manner in which they are calculated, constitute gross income. In *Prince Rupert Hotel (1957) Ltd. v. The Queen*, [1995] F.C.J. No. 492 (F.C.A.) (Q.L.), cited by counsel for the respondent, Strayer J. of the Federal Court of Appeal wrote for the majority as follows at paragraphs 9, 10 and 12:

> 9 . . . Instead I believe the trial judge was obliged, as he did, to have regard to the conventional jurisprudence which has developed to help characterize, as either capital or income, payments received in lieu of business advantages that the taxpayer has somehow lost or failed to gain. . . . As I understand it, it requires that the trial judge determine as best he can from the evidence for what the compensation was paid. If it was paid in lieu of money which the recipient would

> otherwise have received were it not for the loss of the business advantage, then it must be determined whether that money if received as originally contemplated would have been an income receipt or a capital receipt. . . .
>
> 10 This jurisprudence demonstrates, in my view, that the duty of the trial judge is to determine as a matter of fact what the compensation is to replace: income or capital. . . .
>
> . . .
>
> 12 On the other hand, there was ample evidence to support the trial judge's view that the compensation paid was in respect of lost management fees. I understood counsel for the appellant to argue that these "management fees" in part represented payment for the use of the general partner's property as well as payment for their services. Even if this is so it is difficult to characterize money paid in lieu of such revenues as being other than income, whether it be income from property or from services.

[42] Hugessen J., dissenting on the finding of fact concerning the particular question that was raised in this case, concurred with the majority on the principle. He held as follows at paragraph 31:

> 31 In my view, the appellant properly places great emphasis on this admission. It will be recalled that the appellant's interest as general partner was wholly represented by its right to receive a management fee calculated on the basis of 25% of gross room revenue. The general partners had no other participation in profits or in the break-up value of the property in the event of liquidation. Where a partner's interest is stated as being solely a share in the revenue of a business it is by no means self-evident that such an interest is of a capital nature. . . .

[43] In my view, the facts stated in the instant case and the documents filed in evidence do not make it possible for me to conclude that the appellant would have received a capital payment if the corporation had paid him the expected income. Rather, the evidence shows that the money that would have been received, according to what was initially contemplated, was in the nature of income that would have been taxable under section 9 and paragraph 12(1)(*b*) of the *Act*, not as a capital gain under sections 38 *et seq.* of the *Act*.

[44] The appellant implicitly acknowledged this fact since he elected under section 34 not to include in his income the work in progress relating to the exercise of his notarial profession.

[45] Thus, the loss of income resulting from the non-payment of his professional fees cannot at the same time give rise to a capital loss under sections 38 *et seq.* of the *Act*. Under paragraph 20(1)(*p*) of the *Act*, it may only be deducted in computing the appellant's business income and only to the extent that the income was previously included in the appellant's income, which was not the case. Since the appellant did not incur a capital loss, accordingly he may not claim an ABIL under paragraphs 38(*c*) and 39(1)(*c*). It is therefore not necessary to determine whether the debt was a bad debt in 1992 within the meaning of section 50 of the *Act*.

[46] Lastly, the fact that a CCRA representative suggested in previous correspondence that the appellant had incurred a capital loss cannot serve his case here. It is well established that the Minister may not incorrectly administer the *Act* simply because officials have given incorrect opinions (see *M.N.R. v. Inland Industries*, [1972] C.T.C. 27, at page 31). Furthermore, that opinion was given prior to the position adopted by the Minister at the time he confirmed the assessments in appeal, that is, that he did not recognize the existence of an ABIL.

[47] Since the appellant did not show that he was entitled to a business loss or to an ABIL for 1992, needless to say he was not entitled to any carry-over of losses for 1993 and 1994.

[48] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 28th day of October 2002

"Lucie Lamarre"

J.T.C.C.

Translation certified true
on this 6th day of January 2004.

Sophie Debbané, Revisor