Docket: 2005-1803(IT)G

BETWEEN:

2187878 NOVA SCOTIA LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on December 11 and 12, 2006 at Halifax, Nova Scotia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Bruce S. Russell, Q.C.
Counsel for the Respondent:	V. Lynn W. Gillis Cecil Woon

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Costs will be allowed as the appeals were substantially successful.

Signed at Ottawa, Canada, this 27th day of April 2007.

"Diane Campbell"

Campbell J.

Citation: 2007TCC249
Date: 20070427
Docket: 2005-1803(IT)G

BETWEEN:

2187878 NOVA SCOTIA LIMITED,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] In the Appellant's 2000 taxation year, it claimed an Extraordinary Expense in the amount of $4,962,446. This Extraordinary Expense was composed of cumulative accounting errors made by the Appellant's Controller in the financial statements over a number of years prior to the 2000 taxation year. It is clear from the evidence that the errors and misstatements were fully attributable to the Controller's fraud despite the due diligence of the Appellant to ensure its financial statements were accurate. When the Appellant discovered the errors in the 2000 taxation year, it carried the losses back to the 1997, 1998 and 1999 taxation years and forward to the 2002 taxation year.

[2] By Notices of Reassessment dated April 14, 2003, the Minister of National Revenue (the "Minister") allowed $527,187 as a proper expense for the Appellant's 2000 taxation year. The balance of the claimed Extraordinary Expense in the amount of $4,435,259 was denied which resulted in a denial of the non-capital losses being carried back from the 2000 taxation year to the prior years and forward to the 2002 taxation year.

[3] The years under appeal, as presented in the pleadings, were 1997, 1998, 1999, 2000 and 2002. One of the issues was whether the 1997 and 1998 taxation years were statute-barred; a valid waiver had been filed with respect to the 1999 taxation year only. At the outset of the hearing, Appellant counsel conceded that the 1997 and 1998 taxation years were before the Court only for the purpose of the loss carry back for the Appellant's 2000 taxation year and were "Statute barred in the usually understood sense under 152(4), more than three years have passed since date of initial assessment" (Transcript page 11). I will return to this issue later in my analysis.

[4] The primary issue is whether the Minister correctly reassessed the Appellant's 2000 taxation year by denying $4,435,259 of the reported Extraordinary Expense and consequently the denial of the resulting loss carry-back to 1997, 1998 and 1999 taxation years and the carry-forward to the 2002 taxation year.

[5] The Appellant relied on the evidence of Ernest Scarff, James Melvin, Michael Marshall and Gerald Archer. The Respondent called the auditor, Richard Aucoin.

[6] The Appellant operated an automobile sales and leasing business in Halifax, Nova Scotia under the trade name "City Mazda". The Appellant was owned by a holding company operated by Stephen and Patricia Scarff. Mr. Scarff was the Appellant's President and directing mind. Throughout his career Mr. Scarff has operated several car dealerships, employing 80 to 90 individuals. With a high school education, his expertise was in the area of sales and he admitted that he had minimal knowledge in accounting matters. As a result, Bill Fifield was hired in 1989 as the Appellant's Controller. His employment was terminated in 2000.

[7] The Appellant's financial institution also recommended that an external auditor be hired and Mr. Scarff readily complied with this suggestion by employing Douglas Morton, a chartered accountant. He was hired as the Appellant's external auditor for the fiscal years 1989 to 1993 and again for 1997 to 2000. For the years 1994 to 1996 the Appellant employed Charles Wackett as its external auditor. The external auditor attended at the Appellant's premises annually for a period of four to six weeks to prepare financial statements and income tax returns. Mr. Scarff's evidence was that car dealerships normally paid $7,000 to $8,000 annually for outside accounting services but that the Appellant paid approximately $25,000 annually to ensure that a complete audit was performed. According to Mr. Scarff "most of the money stayed in the business" largely due to

debt-equity ratio requirements. Prior to 2000, Mr. Scarff relied on Mr. Fifield and the external auditor and accepted the financial statements as presented to him because he was given no reason to question their work. Because the Appellant's books had always been regularly audited, the financial position had always been reported to be in good order.

[8] It was during the 2000 fiscal year that all of this changed. The tide of misfortune swept in and, as with most tides, it came unexpectedly, bringing disaster to the Appellant in its aftermath and leaving the Appellant ill-equipped to handle its residual carnage.

[9] The Appellant maintained a line of credit with its bank ranging between $4,000,000 and $5,000,000. The bank had agreed to do an audit of the vehicles ten times yearly. These audits consisted of "touching the cars" and then checking them off the list associated with the loans. In July 2000, when the bank's representative performed this "touching of cars" at the Appellant's premises, it discovered that 53 vehicles could not be physically "touched" and that therefore 53 new vehicle loans were in default. The Controller assured both Mr. Scarff that this vehicle count was incorrect and that he would address the problem. This Controller had been an employee of the Appellant for many years and Mr. Scarff had no reason to doubt his explanation.

[10] In August 2000, Mr. Scarff requested that the bank send a list of vehicles in inventory directly to his attention so he could complete his own count. The Controller intercepted this list upon its arrival at the Appellant's premises. He informed Mr. Scarff that he had personally performed the count and that all vehicles were properly accounted for.

[11] On September 6, 2000, while the Controller was absent from the dealership, Mr. Scarff personally completed his own inventory count of all new vehicles and discovered numerous irregularities when compared to the bank's inventory records. When Mr. Scarff tried to telephone the Controller at his home to discuss these irregularities, he refused to speak with Mr. Scarff. The Controller never returned to work and was eventually discharged. Subsequently the bank informed Mr. Scarff that their July 2000 inventory count was the first conducted since November 1999, at which time the inventory was out by 23 vehicles. According to Mr. Scarff, the bank never brought this discrepancy to his attention.

[12] Mr. Scarff looked to his external auditor, Mr. Morton, for assistance and requested that he conduct inquiries to ascertain the reasons for and the magnitude

of these accounting discrepancies. In late 2000, according to Mr. Scarff's evidence, Mr. Morton admitted that he had been "duped" by the Controller. This included reporting accounting errors, which encompassed overstatement of vehicle inventory and other asset accounts and revenue, as well as the understatement of salary and long-term debt expenses and bank loans. All of these errors translated to millions of dollars for the Appellant. Although legal action against Mr. Morton was commenced and he admitted liability for failure to perform adequate audit procedures, he was a sole practitioner who did not maintain sufficient insurance for claims of this size.

[13] Legal action was also commenced against the Controller but was later withdrawn in return for his answers to various questions (Exhibit A-4, Tab 5).

[14] In January 2001, the Appellant engaged Michael Marshall, a chartered accountant from Deloitte & Touche, to review the accuracy of financial statements prior to the 2000 taxation year. He was hired as a Controller for the day-to-day business operations and to "clean up the mess". Mr. Marshall gave evidence of the manner in which the former Controller, Mr. Fifield, perpetrated the fraud on the Appellant. For example, on one occasion when the bank faxed a loan confirmation worth $2,618,216 to Mr. Morton's attention but through Mr. Fifield's office, the loan amount was changed to $2,018,216 (the "6" changed to a "0") before being forwarded to Mr. Morton. On another occasion, a loan of $454,497.85 was completely eliminated before documentation was forwarded to Mr. Morton. Mr. Morton never noticed these accounting irregularities.

[15] In the spring 2001, Mr. Marshall met with other accountants at Deloitte & Touche seeking advice on how to properly treat this Extraordinary Expense which arose from the accounting irregularities discovered in 2000. A decision was made to deduct this expense in the year it was discovered based on a Canada Revenue Agency ("CRA") Information Bulletin on embezzlement and theft, which they felt was substantially similar to the Appellant's situation. As a result the Appellant's financial statements reflected this Extraordinary Expense as a net loss of $3,826,938 for accounting purposes for the 2000 fiscal period and reported a net loss of $2,928,664 for tax purposes. Mr. Marshall testified that he did not consider amending prior tax returns as he thought his job was to correct things on a go-forward basis. He also stated that since Mr. Fifield, the Controller, had worked for the Appellant for many years, it would be difficult to ascertain with any certainty the time period in which the misstatements actually occurred. On cross-examination, he did state that he began to examine three large expense items in an attempt to allocate them to prior years.

[16] In addition to Mr. Marshall, the Appellant hired Jim Melvin, an experienced chartered accountant with Levy Casey Carter McLean. His job was to make further inquiries concerning these accounting irregularities and to prepare the year end financial statements and tax returns for the 2000 taxation year. Although Mr. Scarff requested an audited report to obtain the highest level of assurance, Mr. Melvin was only able to complete a Review Engagement Report. He testified that he would not have been able to provide an unqualified audit report. His investigation uncovered inventory and revenue overstatements as well as expense and bank loan understatements. On cross-examination he was unable to correlate the losses to the exact years in which they occurred. He stated that the proper accounting classification of the claimed expense was "errors and misstatements in prior years" and that the proper method to account for this expense, in accordance with Generally Accepted Accounting Principles ("GAAP") and section 1506 of the Canadian Institute of Chartered Accountants Handbook ("CICA"), would be to restate the prior years in respect to the claimed expense. However he stated that the information necessary to do such a correction was lacking. He testified that amending prior tax returns was not a viable option because of the difficulty in quantifying the expense to prior years. It was also clear to him that the Appellant had paid tax on income that it never earned. On cross-examination, Mr. Melvin could give no assurance that the Appellant's financial statements were in accordance with GAAP or that they represented the financial position of the Appellant in the 2000 taxation year. In fact Mr. Melvin stated that the 2000 financial statements were not an accurate reflection of the Appellant's business in that year.

[17] Mr. Gerald Archer, also a Chartered Accountant, joined the Appellant as its Controller in 2004. Mr. Archer, while addressing this Extraordinary Expense, was able to allocate three of the larger expense items within this category to the prior years in which the errors occurred. These three expense items included bank charges and interest, salaries, wages and commission together with property and occupancy taxes. These underreported expenses identified to prior years amounted to $3,351,626 or roughly 75% of the total Extraordinary Expense. This process involved choosing those expenses from which he could verify the figures by independent documentation. Mr. Archer was adamant that allocation of the remaining portion of the Extraordinary Expense in the amount of $1,113,633 might be accomplished only through prohibitive expense and time to the Appellant. The CRA did not take issue with the numbers produced by Mr. Archer.

[18] Richard Aucoin, a Certified General Accountant, who was the appeals officer at the objection stage, testified on behalf of the Respondent. The main thrust of his evidence centered on GAAP and on the concept of "double taxation".

Appellant's Position

[19] The Appellant's position is that these discrepancies are the direct result of the Controller's cumulative misstatements of various items over a number of years prior to 2000. They occurred despite the Appellant's due diligence, including the additional expense of having yearly audited statements completed. Because these discrepancies could not be conclusively traced back to specific prior taxation years, the entire Extraordinary Expense should be deductible in the 2000 taxation year, the period in which the discrepancies were discovered. The Appellant relied on the case of *Montreal Bronze Limited v. M.N.R.*, 1962 CarswellNat 151, 29 Tax A.B.C. 345 and Interpretation Bulletin, Losses from Theft, Defalcation or Embezzlement (Consolidated) March 9, 2001 ("IT-185R") to support its claim that this expense should be deductible in the year it was discovered.

Respondent's Position

[20] The Respondent's position is that the Extraordinary Expense is not properly deductible in the 2000 taxation year because it represents an accumulation of omissions and errors relating to prior taxation years. The inclusion of the Extraordinary Expense in the calculation of the Appellant's profit in the year 2000 is not consistent with GAAP or with section 1506.28 of the CICA handbook. It therefore follows that such an inclusion in the Appellant's 2000 taxation year is also inconsistent with well-accepted business principles and would lead to an inaccurate picture of the Appellant's income for the 2000 taxation year.

Analysis

[21] I want to begin by first addressing the double taxation issue which was argued by both counsel. Mr. Aucoin testified that double taxation means "taxed on the same income" twice. While arguing there was no double taxation in the circumstances of this appeal, Respondent counsel conceded that the Appellant did pay tax on non-existent income:

> There's only one effect flowing from that and that is that the taxpayer, the Appellant continues to pay tax on the non-existent income. So he's only taxed once. He's not

> taxed twice, even in the street sense. … He's only taxed once which is the tax on the non-existent income in the prior years. (Transcript page 102)

I find this argument as incomprehensible as that of the Appellant's counsel, who argued there was "a very real double taxation aspect to this situation". Double taxation means taxing income twice when it should only be taxed once. If I follow the Respondent's argument, taxing phantom income, that should not be taxed in the first place, is somehow not a version of double taxation. Essentially the Respondent is arguing that due to the unforeseeable Controller's fraud, the Appellant paid too much tax and since there is only one level of taxation on this phantom income there is no double taxation. The result, according to the Respondent, is that this is less offensive and somehow qualitatively different. There is certainly no double taxation here, as the Appellant would have me believe. The fact that the amounts involved are substantial does not convert the payment of tax to this category. However I do not think that the Respondent's argument is any more credible. It is ludicrous to argue that because there is no double taxation, as the Appellant paid tax only once on non-existent income, this payment is somehow legitimate. Surely the *Act* was never designed to extort tax from a taxpayer in this manner.

[22] I will now turn to the Respondent's argument on GAAP. The Appellant argued that the Respondent should be prevented from raising this argument, since the Reply did not contain an Assumption of Fact specifically referencing GAAP. I do not believe that the Appellant should be totally surprised that one of the issues would center around GAAP. One of the Assumptions in the Reply stated that this Extraordinary Expense was not an expense in 2000 and in addition the Reply references reliance on section 9 of the *Income Tax Act* (the "*Act*"). The Appellant should have been aware that GAAP would be an issue when the appeal involved the proper method of computing the Appellant's income in the 2000 taxation year. However, if this was the basis of the Minister's assessment, the Reply should have contained a specific assumption of fact referencing GAAP. In fact, the Respondent relied on the evidence of Gerald Archer, who testified that one of the reasons for the reassessment was the conclusion that including the Extraordinary Expense in the 2000 taxation year was not consistent with GAAP as per the CICA handbook. Yet the Minister's pleadings contained no explicit factual reference to this conclusion. The Respondent explained its lack of full disclosure of the precise findings of fact by stating that the Crown can simply assume the onus of proving GAAP and present sufficient evidence at the hearing for the Court to make its finding on a balance of probabilities.

[23] Generally, a person who asserts a fact in litigation bears the onus of proving it.[1] However, that is not how things work in tax litigation where the Respondent has the right to plead unproved assumptions that reverse the onus to an Appellant.[2] I do not believe that it is fair to saddle an Appellant with the additional burden of demolishing findings of fact that the Minister neglected to fully disclose in the Assumptions of Fact. Even though I believe that the Appellant should have been aware that GAAP would play some part in this appeal, if the Minister had properly pleaded this as an Assumption of Fact, the Appellant would have been put on proper notice of the case it had to meet. As a result the Appellant may have called an expert witness to address this issue or addressed it by some other method. It is not for me to speculate on what the Appellant's approach might have been if the Reply had been more explicit respecting the basis for the assessment.

[24] I cannot overemphasize the importance of proper drafting of the Assumptions of Fact in a Reply. These Assumptions establish the material facts that the Appellant must overcome or demolish. If the Respondent's presentation of these Assumptions is sloppy or omits crucial findings of fact that formed part of the basis of the assessment, then of course that leaves it open to this Court to draw unfavourable inferences from such pleadings.

[25] The Respondent's witness, Mr. Aucoin, referenced section 1506.28 of the CICA handbook and its applicability to this appeal. This section states:

> The correction of an error in prior financial statements is excluded from the determination of net income for the current period. The correction is accounted for by restating the financial statements of the prior periods presented for comparative purposes.

Mr. Aucoin is a General Certified Accountant and even if he did have the requisite expertise in this area, he was not presented as an expert. On cross-examination of the Appellant's witnesses, Respondent counsel obtained concessions respecting the inaccurate picture of profit in the 2000 taxation year produced by claiming the Extraordinary Expense in that year. Although none of the Appellant's witnesses were qualified as experts either, the evidence was clear that the Appellant's method of deducting the entire Extraordinary Expense in this year is inconsistent with GAAP. However, despite my finding in respect to the apparent inconsistencies

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[1] See the discussion of Chief Justice Bowman in *Cadillac Fairview Corporation Limited v. The Queen*, 97 DTC 405 (T.C.C.) at footnote 2; aff'd. 99 DTC 5121 (F.C.A.).

[2] *Anchor Pointe Energy Ltd. v. The Queen*, 2006 T.C.C. 424, 2006 DTC 3365 at para. 31.

with GAAP, I do not believe it can be used in the circumstances of this appeal to dictate the outcome.

[26] The Supreme Court of Canada in *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147 stated that the goal is to obtain an accurate picture of a taxpayer's profit for any given year. However, in its unanimous decision the Court made it abundantly clear that GAAP is never determinative. At paragraph 53 of that decision, the Court stated:

> Well-accepted business principles, which include but are not limited to the formal codification found in GAAP, are not rules of law but interpretive aids. To the extent that they may influence the calculation of income, they will do so only on a case-by-case basis, depending on the facts of the taxpayer's financial situation.

[27] GAAP, together with well-established business principles, are clearly useful accounting tools, but I believe that they must be applied to the particular facts of a case within the confines of reasonableness and common sense. I would have the same comments respecting section 1506.28 of the CICA handbook. Both the Appellant and the Respondent agreed that there is no specific provision in the *Act* or jurisprudence that is directly on point to allow or disallow the Extraordinary Expense in the year it is discovered.

[28] In *M.N.R. v. Benaby Realties Limited*, [1968] 1 S.C.R. 12, the Court considered the timing of recognition of income from an expropriation of land. At page 15 the Court concluded:

> The application of this decision to the *Canadian Income Tax Act* is questionable. This decision implies that accounts can be left open until the profits resulting from a certain transaction have been ascertained and that accounts for a period during which a transaction took place can be reopened once the profits have been ascertained.
>
> There can be no objection to this on the properly framed legislation, but the *Canadian Income Tax Act* makes no provision for doing this. For income tax purposes, accounts cannot be left open until the profits have been finally determined.

The Court went on at page 16 to express its concern over the fact that the tax system does not allow taxpayers to go back and reopen taxation years once particular amounts have been ascertained:

> My opinion is that the *Canadian Income Tax Act* requires that profits be taken into account or assessed in the year in which the amount is ascertained.

This statement was quoted with approval at paragraph 34 of the Supreme Court's decision in *Ikea Limited v. The Queen*, [1998] 1 S.C.R. 196. Citing *Benaby* as support, Chief Justice Bowman in *K.L. Svidal v. Canada*, [1995] 1 C.T.C. 2692 at page 2699 stated:

> … Our fiscal system does not, except in specific circumstances set out in the *Income Tax Act*, permit the reopening of prior years to take into account events occurring in later years: ...

[29] In the present appeal several qualified Chartered Accountants testified that they were unable to sufficiently recreate financial statements for prior taxation years at the time of the required filing of the Appellant's 2000 corporate tax returns. Although several were hired from different accounting firms, none could easily or adequately complete the task due to time constraints, costs and evidentiary and documentary problems. In 2001 it was the belief of these experienced accountants that allocating the expenses to the prior years was simply not feasible. Because of the Controller's fraud over a period of time, the business was in crises and on the verge of bankruptcy and the documentation was in a state of disarray. There is no doubt that the Appellant exercised care and due diligence in conducting its business affairs throughout the years leading up to the 2000 taxation year. It hired an experienced Controller and on the bank's recommendation employed an external auditor. The Appellant always paid the many additional thousands of dollars yearly to obtain audited financial statements. When the problem surfaced, the Appellant hired a number of qualified accountants and an internal auditor. An investigative company, operated by former R.C.M.P. officers, was also hired and determined that the Controller was not guilty of any actual theft from the Appellant's business. Although the evidence on this point was hearsay, the Respondent did agree that it could be admitted to prove that the Appellant took active steps in an attempt to remedy the problems.

[30] The circumstances in this appeal were described by several of the accountants, who were hired to "clean up the mess", as "unusual", "bizarre" and a "once in a lifetime" occurrence. If I accepted the Respondent's argument, I would be advocating a result that would be as absurd as the "bizarre" circumstances leading up to the Minister's assessment. Due to the fraud perpetrated by the Controller, the Appellant paid tax on income that never existed. Essentially if I

were inclined to disallow the Extraordinary Expense, which I am not, it would be tantamount to permitting the Minister to confiscate tax that was never owed by the Appellant. In circumstances such as these, I conclude that the drafters of the *Act* could never have contemplated that a taxpayer, such as this Appellant, would be required to pay tax on "phantom income". Although the method employed by the Appellant does not comply with GAAP or reflect an accurate picture of income for the 2000 taxation year, the *Act* is determinative and I am prepared to permit the Appellant to deduct a portion of the Extraordinary Expense in the year 2000 when it was ascertained and discovered.

[31] I cannot overemphasize that the circumstances giving rise to this appeal are unique. It is beyond doubt that the taxpayer exercised a standard of due diligence above and beyond what would be expected of a reasonable person in similar circumstances, both prior to and subsequent to the fraud being uncovered. Despite the hiring of several professionals, the business was in disarray and on the verge of bankruptcy. At the deadline for the filing of the corporate tax returns, it was practically impossible for the Appellant to allocate the expenses to the prior years and restate the financial statements due to the time constraints and costs, together with the evidentiary and documentary problems. However, given the extra time over a period of months, the Appellant was able to verify $3,351,626 of the Extraordinary Expense. I am prepared to allow this amount as a proper deduction in the 2000 taxation year.

[32] The remaining $1,113,633 of the Extraordinary Expense was not verified. The Minister's Assumption (m) in the Reply to the Notice of Appeal stated that the Extraordinary Expense consisted of misstatements in the accounting records but that "these errors could not be verified". Consequently, the burden was on the Appellant to adduce positive evidence to substantiate the $1,113,633 outstanding amount. This was not done.

[33] The Appellant did not allocate this outstanding amount to a specific year or to a specific expense item. While the Respondent accepts that the $3,351,626 amount was properly supported by the evidence produced by Mr. Archer, that evidence did not relate to the $1,113,633 outstanding amount.

[34] The Appellant, by its own submissions, concedes that this outstanding amount "cannot be accounted for". As well, Mr. Marshall testified that while there may have been other expenses that were understated, there was almost no way to tell if the accounting records for those expenses were accurate as they were paid to numerous sources. Mr. Archer thought he could find other overstated expenses if he continued his work on verifying other expenses. The fact that he "may" have been able to

substantiate other amounts does not prove on a balance of probabilities that the amounts have been substantiated.

[35] As such, $1,113,633 of the Extraordinary Expense will not be allowed as a proper deduction in the 2000 taxation year.

[36] Although the Appellant placed a great deal of reliance on the *Montreal Bronze* case and IT-185R, both deal with losses from theft, defalcation and embezzlement and therefore have no application to the facts in this appeal. Accountants advised the Appellant that its situation was closest to that described in IT-185R and accorded a similar tax treatment. However the Appellant's loss was not the result of theft, defalcation or embezzlement because the investigative company hired by the Appellant found that the Controller "never took five cents" (Exhibit A-4, Tab 13). In any case IT-185R represents the opinion of the Minister and is not determinative. The *Montreal Bronze* decision is distinguishable for a number of reasons but the primary one is that the loss arose from the defalcation of an employee. In this appeal the Appellant never suffered a loss of money or property due to theft, defalcation or embezzlement in respect to the Extraordinary Expense. Although it was never clear from the evidence, it may have been that the Controller tampered with the financial statements, via cumulative overstatements, understatements and misstatements of expenses, loan amounts, revenue and inventory, for inflated bonus amounts that he might be eligible to receive. Neither the *Montreal Bronze* case nor the Interpretation Bulletin are essential to or in any way assist me with my reasons and conclusions.

[37] The final item to be addressed is the rather puzzling one concerning statute barred years. At the outset, the Appellant conceded that the 1997 and 1998 taxation years were before the Court for the purpose only of the loss carry back from the Appellant's 2000 taxation year. Pursuant to subparagraph 152(4)(a)(ii) of the *Act*, the Appellant filed a valid waiver with respect to the 1999 taxation year only. At the hearing both parties agreed that $838,055 of the Extraordinary Expense could be specifically allocated to the 1999 taxation year. Toward the end of the oral submissions I sought clarification respecting the Appellant's position on this issue contained in paragraph 19 of the Notice of Appeal which stated:

> The alternative issue is whether any portions of the denied portion of the extraordinary expense item claimed in 2000 are deductible in the 1997, 1998 and 1999 taxation years of City Motors.

[38] The following exchange occurred:

> **MR. RUSSELL:** I've had my -- I've had an opportunity to further discuss this with my client, My Lady, and in so far as losses can be claimed only seven years forward the only losses that are now attractive to my client would be any recognized in the year 2000 given this is late 2006. And therefore my instructions are confirmed that we are not proceeding with the alternative issue as expressed. And we hope that the -- we know the Court will seriously consider our representations that we've already provided with respect to our -- the 2000 taxation year matter.
>
> **HER HONOUR:** All right. So we're not pursuing then, the second -- for the '97, '98 and '99 that's issue No. 2. I'm looking at ---
>
> **MR. RUSSELL:** That would be correct.

Respondent counsel subsequently advised the Court that, since this issue was not being pursued by the Appellant, pages 17 to 19 of his written submissions dealing with this very issue did not apply.

[39] In light of this exchange, I am not required to make any finding in respect to this issue.

[40] The appeals are allowed to permit the Appellant to claim $3,351,626 as an expense in the 2000 taxation year. Costs will be allowed as the appeals were substantially successful.

Signed at Ottawa, Canada, this 27th day of April 2007.

"Diane Campbell"

Campbell J.

CITATION:	2007TCC249
COURT FILE NO.:	2005-1803(IT)G
STYLE OF CAUSE:	2187878 Nova Scotia Limited and Her Majesty the Queen
PLACE OF HEARING:	Halifax, Nova Scotia
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DATE OF JUDGMENT:	April 27, 2007

APPEARANCES:

Counsel for the Appellant:	Bruce S. Russell, Q.C.
Counsel for the Respondent:	V. Lynn W. Gillis Cecil Woon

COUNSEL OF RECORD:

For the Appellant:

Name:	Bruce S. Russell, Q.C.
Firm:	McInnes Cooper Halifax, Nova Scotia

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada