Docket: 2005-123(IT)G

BETWEEN:

ED DYCK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *Lori Dyck, 2005-124(IT)*G, on October 16, 2006, at Vancouver, British Columbia

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant:	David Christian
Counsel for the Respondent:	Susan Wong

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 1997 taxation year is dismissed.

On consent of the parties, the appeal from the reassessment made under the *Act* for the 1998 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant had a taxable capital gain in the amount of $37,504.18.

The Respondent is entitled to one set of costs in respect of these appeals and appeals 2007-124(IT)G.

Signed at Ottawa, Canada, this 8th day of August, 2007.

E.A. Bowie

Bowie J.

Docket: 2005-124(IT)G

BETWEEN:

LORI DYCK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *Ed Dyck, 2005-123(IT)*G, on October 16, 2006, at Vancouver, British Columbia

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant:	David Christian
Counsel for the Respondent:	Susan Wong

JUDGMENT

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On consent of the parties, the appeal from the reassessment made under the *Act* for the 1998 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant had a taxable capital gain in the amount of $37,504.18.

The Respondent is entitled to one set of costs in respect of these appeals and appeals 2007-123(IT)G.

Signed at Ottawa, Canada, this 8th day of August, 2007.

E.A. Bowie

Bowie J.

Citation: 2007TCC458
Date: 20070808
Docket: 2005-123(IT)G
2005-124(IT)G

BETWEEN:

ED DYCK and LORI DYCK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] The appeals of these two appellants from assessments under the *Income Tax Act* (the *Act*) proceeded together on common evidence. In each case, the Minister of National Revenue reassessed the appellant for income tax in 1997 to include in income a shareholder benefit under subsection 15(1) of the *Act* in the amount of $48,107, and in 1998 to include a taxable capital gain in the amount of $67,496 in respect of the disposition of a gasoline service station owned jointly by the appellants. The appellants took the view that the proper computation of that taxable capital gain was $38,906. At the trial, counsel advised me that the parties now agree that the amount of the taxable capital gain to be attributed to each of the taxpayers is $37,504.18. The appeals for the taxation year 1998 will be allowed, and the reassessments remitted to the Minister to reassess on that basis.

[2] There remains the issue between the parties as to the assessment of a shareholder benefit to each appellant. The appellants are husband and wife. Ed Dyck has worked for most of his life in the retail oil industry, first as an employee, and later as an owner and operator of gasoline stations. By the early 1970s he had built up a very successful business, and he decided that it was time to incorporate it, which he did under the name Ed Dyck Ltd. (ED). He and Lori Dyck each owned 50% of the shares. The business continued to prosper, and in 1991 a major oil company bought

the assets of the business from ED and Ed Dyck retired. His retirement proved to be short-lived, and he was soon back running another service station.

[3] The issue in these appeals relates to the assets of ED after the time of the sale of its service station. The appellants for some time had had three investment accounts with the brokerage firm Nesbitt Burns. Each of the appellants had an RRSP account, and they also had a joint account, No. 805-17361, in their two names. Following the sale of the business in 1991, the Dycks closed out the bank account of ED and transferred all the funds to an investment account, No. 845-01468, with Nesbitt Burns.

[4] Early in the year 1997, Mr. Dyck's then accountant advised him that it would be in their best interests to consolidate their personal joint account and the account of ED into one investment account which could produce better returns on the combined funds. Mr. Dyck asked his broker, Mr. Young, to do this. Mr. Young recognized the tax implications of such a move and cautioned against it, but in the end Mr. Dyck, for reasons that were never made clear to me, preferred the accountant's advice and insisted that Mr. Young transfer the balance in account No 845-01468 to account No. 805-17361, which he reluctantly did on February 19, 1997. The amount of that balance was $96,245.02. Mr. Dyck gave Mr. Young no special instructions as to the investment of these funds, other than that they were to be added to the balance in the joint account.

[5] In the early months of 2000, the accountant, perhaps having understood the consequences of his earlier advice, advised Mr. Dyck that it would be wise to reverse the consolidation of the accounts. Mr. Dyck so instructed Mr. Young, who was pleased to comply with this instruction by opening a new account in the name of ED. Unfortunately, the copy of the document pertaining to this account that was entered as an exhibit is totally illegible, but it is not in dispute that this new account was opened on March 29, 2000, and funds were transferred to it from account No. 805-17361 in an amount that was intended to restore the *status quo ante*. The appellants did not withdraw any funds from the joint investment account between the dates of the initial transfer to it and the later transfer back of the balance formerly in the ED account. Mr. Dyck had an income adequate for their needs from his latest venture, and the funds in the investment accounts were simply being accumulated to provide for their retirement.

[6] By the reassessments under appeal, the Minister treated the transfer of the funds in the account of ED to the joint account of the two appellants as a transfer of funds to them falling within subsection 15(1) of the *Act*. That subsection reads:

15(1) **Where at any time in a taxation year a benefit is conferred on a shareholder**, or on a person in contemplation of the person becoming a shareholder, by a corporation otherwise than by

(*a*) the reduction of the paid-up capital, the redemption, cancellation or acquisition by the corporation of shares of its capital stock or on the winding-up, discontinuance or reorganization of its business, or otherwise by way of a transaction to which section 88 applies,

(*b*) the payment of a dividend or a stock dividend,

(*c*) conferring, on all owners of common shares of the capital stock of the corporation at that time, a right in respect of each common share, that is identical to every other right conferred at that time in respect of each other such share, to acquire additional shares of the capital stock of the corporation, and, for the purpose of this paragraph,

(i) where

(A) the voting rights attached to a particular class of common shares of the capital stock of a corporation differ from the voting rights attached to another class of common shares of the capital stock of the corporation, and

(B) there are no other differences between the terms and conditions of the classes of shares that could cause the fair market value of a share of the particular class to differ materially from the fair market value of a share of the other class,

the shares of the particular class shall be deemed to be property that is identical to the shares of the other class, and

(ii) rights are not considered identical if the cost of acquiring the rights differs, or

(*d*) an action described in paragraph 84(1)(*c*.1), 84(1)(*c*.2) or 84(1)(*c*.3),

the amount or value thereof shall, except to the extent that it is deemed by section 84 to be a dividend, **be included in computing the income of the shareholder for the year.**

The words in bold above are those that the Minister relies on to support the assessments.

[7] In paragraphs 10 and 11 of their Notices of Appeal the appellants plead:

> 10. It was determined in 1997 that a maximum return would be achieved for all parties if the funds in the Corporate Account were consolidated with the personal joint account of the Appellant and his [her] spouse, account #805-17361 (the "Joint Account").
>
> 11. The Appellant and his spouse entered into an agreement with the Company whereby it was agreed that $98,215 of the funds in the Corporate Account (the "Funds") be consolidated with the funds in the Joint Account and that the Appellant and his [her] spouse would act as bare trustees with respect to those funds placed in the Joint Account from the Corporate Account.

There is no evidence before me that could be said to support the theory advanced in those paragraphs, and so I will say no more about it.

[8] Counsel for the appellants argued that I should not conclude that a benefit was conferred on the appellants by the February 19, 1997 transfer, because the appellants did not withdraw or otherwise use any funds from the joint account and therefore did not obtain a benefit from the increase in its balance. He finds support for this argument in the decisions in *Franklin v. The Queen*,[1] *Wagar v. The Queen*,[2] *Poushinsky v. The Queen*,[3] *Chopp v. The Queen,*[4] *9100-2402 Québec Inc. v. The Queen*[5] and *The Queen v. Robinson.*[6] *Chopp* exemplifies a class of case that may be described as bookkeeping error cases. In those cases, generally a bookkeeping entry is made by someone who does not properly understand the transaction being recorded, with the result that the books of account do not properly reflect the transaction. Typically, the error results in an increase in the balance of a shareholder loan account, because the bookkeeper wrongly assumes that that is what was intended. It is clear that in such cases the shareholder is entitled to have a correcting journal entry made, restoring the balance of the shareholder loan

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1 [2000] 4 C.T.C. 2332; aff'd. [2002] 2 C.T.C. 88 (F.C.A.).

2 99 DTC 25.

3 2005TCC463.

4 95 DTC 527; aff'd. [1998] 1 C.T.C. 407 (F.C.A.).

5 2006TCC302.

6 2000 DTC 6176.

account to what it would have been had the erroneous entry never been made. *Wagar*, *9100-2402 Québec Inc., Robinson*, and of course *Chopp* itself, are all cases of that sort. In argument, Mr. Christian made it clear that he did not rely on the *Chopp* principle, because there is nothing in the evidence in this case that would support such an argument.

[9] In *Wagar*, the Court found that erroneous bookkeeping entries had had the effect of inflating the credit balance in the loan account of one of the two shareholders, totally without any complicity by the shareholder. The judge, as I understand it, applied the *Chopp* principle to conclude that there had been no shareholder benefit conferred. In the course of his Reasons, however, he appeared to rely not only on the bookkeeping error, but also on the fact that the shareholder had never withdrawn the funds involved. He said of the loan account balance:

> It has been a bookkeeping entry and he has never got any money from it to this date.
>
> …
>
> They were just book entries that didn't mean anything to the Wagars.

[10] Two years later, in *Franklin*, this Court held that no shareholder benefit arose where the taxpayer, again the person that controlled the corporation's affairs, sold an asset owned by the company and took the proceeds for his own use. Because he did not tell the bookkeeper about the transaction at all, the decrease in the company's assets was not recorded, nor was any reduction in the company's debt to the shareholder recorded. The decision of this Court, affirmed by a majority in the Court of Appeal, seems to proceed on the basis that it is no benefit to a shareholder to overstate the company's debt to him, so long as the loan account remains in credit balance. In affirming the decision, Rothstein J.A., writing for himself and Sexton J.A., said:

> The asset and shareholder's loan accounts of HVSL did not accurately reflect these transactions. However, that does not justify ignoring the fact that no benefit was conferred on the [shareholder] and assessing tax on the basis of financial statements which have been found to be in error.

It was an agreed fact before the trial judge in that case that the proper entries had been made to correct the company's books of account, but not until the facts had been brought to light during the Minister's audit of the company. The *Chopp* principle, therefore, seems to have been extended to permit the erroneous overstatements of shareholders' credit loan balances to be reversed without adverse tax consequence at any time, so long as the account has remained in credit balance, even though the shareholder was responsible for the failure to record the

transaction correctly. These cases were distinguished by Margeson J. in *Poushinsky*, apparently on the basis that the taxpayer in that case actually made personal use of the funds that had been diverted to him.

[11] On the basis of these cases Mr. Christian argues that the transfer of the balance of the corporate account at Nesbitt Burns into the joint account of the Appellants should be ignored for tax purposes, because they withdrew nothing from the account during the period between February 19, 1997 and March 29, 2000, and therefore, he argues, they received no benefit. I do not accept this characterization of the two transactions that took place roughly three years apart. This is not a case in which events were either incorrectly recorded, as in *Chopp*, or not recorded at all, as in *Franklin*, until some time later when the books were adjusted to reflect the real transactions. In this case the Dycks, acting on extraordinarily bad advice, entered into a transfer to themselves of the assets of the corporation. That was a real transaction that took place. The transaction in March 2000 was another real transaction. The taxpayers did not do what they did in 2000 in order to properly reflect an earlier transaction that had been wrongly recorded. Unfortunately taxpayers cannot undo history, or create it *ex post facto*, when it turns out that they have made a mistake, except in a very limited class of cases where the applicable legislation specifically sanctions it.[7] When the balance in the corporate account was transferred to the appellants' joint account the funds became the property of the appellants. That fact is not changed by the fact that they did not make any withdrawals from the investment account. They owned it; it was being put to use for their benefit by Nesbitt Burns; any accretions to the account were for their benefit; had they chosen to do so, they could have withdrawn any or all of the funds in the account and put them to any purpose they wished.

[12] The 1997 appeals are dismissed and the 1998 appeals are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the taxable capital gain of each taxpayer is $37,504.18. The Respondent is entitled to one set of costs.

Signed at Ottawa, Canada, this 8th day of August, 2007.

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[7] See, for example, *Dale v. Canada*, [1997] 3 F.C. 235 (F.C.A.).

E.A. Bowie

Bowie J.

CITATION:	2007TCC458
COURT FILE NO.:	2005-123(IT)G and 2005-124(IT)G
STYLE OF CAUSE:	ED DYCK and LORI DYCK and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 16, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
DATE OF JUDGMENT:	August 8, 2007

APPEARANCES:

Counsel for the Appellant:	David Christian
Counsel for the Respondent:	Susan Wong

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