Docket: 2008-22(IT)G

BETWEEN:

ALLEN HAYTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 26 and 27, 2010, at London, Ontario,

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	M. Paul Downs
Counsel for the Respondent:	Suzanie Chua

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2005 taxation year is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim a non-capital loss of $905,785.45 with respect to the Laptop Deal and a capital loss of $161,250 with respect to the Television Deal.

There shall be no order as to costs.

Signed at Ottawa, Canada, this 7th day of May 2010.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2010 TCC 255
Date: 20100507
Docket: 2008-22(IT)G

BETWEEN:

ALLEN HAYTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] This is an unusual appeal by the Appellant against the inclusion of $864,000 of Other Employment Income in his 2005 tax return as filed by the Appellant. The Appellant objected to the assessment issued by the Minister of National Revenue (the "Minister") based on his as filed tax return on the basis his accountant erroneously charged investments by his corporation, A.G Hayter Contracting Ltd. (the "Corporation"), totalling $574,045 against his shareholder account and then bonused the sum of $864,000 to clear out such shareholder loan receivable which sum included $383,704 as a gross up to cover tax and payroll liabilities. Accordingly, for 2005 the Appellant's tax return totalled $893,400, made up of the $864,000 bonus or management fee, depending on how one wishes to characterize it, together with his normal salary of $29,400. It should be noted at the outset, there were inconsistencies in the above amounts and there are adjustments based on the evidence. It should be noted that the Appellant claims in the alternative that if the Court finds the funds were invested by him personally then he should be entitled to claim an allowable business investment loss in connection with same as they are business investment losses, or in further alternatives, ordinary business losses then capital losses in declining order. The investments pertain to the proposed purchase at a discount and resale for profit of laptop computers which will be discussed in

more detail later and which I will refer to as the “Laptop Deal” and the Appellant alleges the funds were advanced by way of loan to FLC Holdings Ltd.(“FLC”).

[2] The Appellant also claims he invested $361,104 of his personal funds in FLC for the Laptop Deal and claims an allowable business investment loss, or in the alternative, another form of loss for same which is contested by the Respondent as well.

[3] Finally, in a separate investment, the Appellant claims he invested the sum of $148,000 in a joint venture with another individual for the purchase of televisions at a discount and their resale for profit, which failed when the partner or co-venturer was arrested for fraud and the televisions were never delivered. I will refer to this transaction hereafter as the “Television Deal”.

Laptop Deal

[4] The Appellant was a farmer and contractor who testified he had a grade eight education and who either owned 100% of the Corporation, as was pleaded and admitted by the Respondent, or controlled the Corporation with some shares allocated to his two sons. The Appellant, however, testified he was the controlling mind or man in charge so the issue of exact ownership is not pertinent to the appeal per se. The Corporation was involved in drainage, sewer and water main and demolition contracting as well as involved in some investments in related corporations. The Corporation has a year-end of March 31.

[5] In early summer of 2004, the evidence is that one Robert Solleveld approached the Appellant for funds to inject in a venture which involved buying 1,000 laptop computers at a discount price and reselling them at a large profit. The transaction to purchase them was through one Mr. Kanti Bahl, who was described as a merchant banker, who had arranged contact with SCQ Enterprises (“SCQ”), the Seller. It should also be noted at this time that an individual by the name of Steven Venditello appears to have encouraged Mr. Solleveld to enter into the transaction and was the party who was to arrange sale of the laptops. Mr. Venditello appears to have a role or presence throughout both the Laptop Deal and the Television Deal. Mr. Solleveld testified he had invested more than $1,000,000 in the transaction at the outset starting in January 2004, and, as the Seller demanded further funds, sought the assistance of the Appellant to participate. The Appellant was interested in raising funds for the purchase of equipment and saw this Laptop Deal as a means to do so. The Appellant admitted he had no knowledge of computers or the other parties and trusted Mr. Solleveld

entirely in dealing with his funds. It should be noted that the Appellant's Notice of Appeal describes the funds supplied by the Appellant as a loan with interest of 5% expected but no evidence was tendered to back either the loan claim or the interest payment. The evidence suggested the nature of the investment was more in keeping with a joint venture in which the Appellant intended to share in the profits of the sale as well as recoup his initial investment although the Respondent submits it was more in keeping with the Appellant helping a friend out, i.e., Mr. Solleveld when he was in trouble.

[6] The evidence is that from July 5, 2004 until December 7, 2004, the Appellant provided a combination of cheques, bank drafts and cash advances through credit card cash withdrawals all totalling $544,681.45. These payments were made to various payees, including Mr. Bahl, National Bank of Canada, Casino de Montreal, Mr. Solleveld's lawyer and others, all, according to the Appellant, on the direction and guidance of Mr. Solleveld, who wrote out many of the cheques given or arranged delivery of all the funds to Mr. Bahl or SCQ and even to Mr. Venditello who the evidence shows took physical delivery of a payment on behalf of SCQ. All of the funds came from the bank accounts or credit cards of the Corporation. While it seems extraordinary that the Appellant trusted Mr.Solleveld to such extent, the evidence does show that all funds were acknowledged by the Seller at one point, in an Agreement signed by Mr. Solleveld as trustee, so it appears there is no issue the funds reached their intended destination, towards the purchase price of the laptop computers. The laptop computers were never delivered and the evidence suggests the Appellant and Mr. Solleveld were victims of fraud.

[7] It should be recalled that the initial investment claimed was $574,000 but the Appellant's evidence was that $24,000 represented a management fee from Oakland Acres Ltd., the Appellant's related farm corporation, so the reduction would place the actual amount at $550,000. Since the Appellant provided evidence of actual fund payments for $544,681.45 and took the position this is the amount claimed, I accept it as the amount claimed and will refer to it henceforth. From this amount, there were further adjustments of negative $91,691.60 and positive $3,306.48 representing personal loans and miscellaneous items made by the Appellant from company funds, leaving approximately $456,296, which together with the gross up previously mentioned of $383,704 would place the total bonus in error at $840,000, all as confirmed in the year-end adjustments set out by the accountant for the Corporation.

[8] The position of the Appellant is that the funds totalling $544,681.45 were advanced by the Corporation and not him personally and hence the alleged bonus in error of $840,000 was improperly recorded in the financial statements and tax return of the Corporation for the March 31, 2005 year-end and in his personal tax return for 2005. The Appellant's evidence is that his bookkeeper of 28 years or so prepared all the ledgers and information and recorded these payments by the Corporation in its investment ledger and forwarded them to the accountant to prepare the financial statements and tax returns based on the ledgers. The Appellant testified no such management fee or bonus was approved by the Board or actually paid and that the error was his accountant's. In addition, the evidence was that the Corporation did not historically ever pay any bonuses or management fees, at least since 2001 although based on the adjustments discussed above, it is clear that the Corporation did so in 2005 pertaining to the Oakland Acres Ltd. management fee and the other adjustments to the due from shareholders account. Moreover, he testified that he had no knowledge of accounting and his return was filed electronically, as it had been for years, and that he just relied on his accountant and never even looked at the return or even the corporations return when he signed it in a brief meeting with his accountant. He only discovered the error when he received his assessment showing a large sum of taxes due and immediately fired his accountant and retained a new one who recommended he hire a tax lawyer. Oddly enough, the evidence is conclusive that no amended tax return or financial statements were filed by the Corporation or the Appellant to correct the error. The Appellant testified he just relied on his professionals and effectively assumed the appeal would resolve the issue.

[9] The first and major issue to be determined is whether the bonus was in error as not reflecting the actual transaction as the Appellant pleads. The Appellant takes the position the payments by the Corporation reflect investment by the Corporation in FLC, or to parties on its behalf. While I agree there is strong evidence that the payments were made by the Corporation, I cannot agree they were made to FLC. There is only one cheque made payable to FLC of the bunch and the balance reflecting the large majority of the funds were paid either to Mr. Solleveld, Mr. Bahl, SCQ or the National Bank or Casino de Montreal on behalf of SCQ. FLC was a corporation owned by Mr. Bahl which did not show any revenue in its 2005 or 2006 tax returns. Moreover, an agreement entered as evidence shows SCQ effectively giving the Purchaser, Mr. Solleveld in Trust as represented by George Monoyios, full credit for all the funds. The Appellant's own testimony on discovery acknowledges he knew the funds were going to SCQ. There being no other documentary evidence given, I cannot agree the monies were loaned or otherwise invested in FLC. It appears the monies were made payable to whatever

party Mr. Solleveld dictated and the Appellant's testimony that he left Mr. Solleveld to take care of the investment signifies more of a joint venture or partnership with Mr. Solleveld to purchase the laptops and resell them, which I will also discuss later herein, as opposed to an even or investment in FLC.

[10] The next question to be determined is whether the funds were invested by the Corporation or the Appellant. The Appellant has provided evidence that funds were drawn on the account of the Corporation but the evidence is also that no attempt was made to restate the financial statements of the Corporation reversing the management fee or bonus or file amended tax returns for the Corporation or the Appellant. The evidence is that the Accountant of the Corporation who charged these payments to the due from shareholders account of the Appellant had prepared the financial statements and tax returns on this basis and sent a letter of adjustments with DVD containing the adjustments to the Corporation for inputting which the bookkeeper testified he entered without really looking at them. Having regard to the size of the due shareholders loan account and the letter, I find it incredible that the bookkeeper did not raise this at the time. There is also evidence of other adjustments to the due from shareholders account for personal investments which are consistent with this Laptop Deal investment also being a personal one by the Appellant who withdrew company money to his credit to pay for it. As the Corporation received a deduction for the management fee or bonus, it would be simply inappropriate to reverse the bonus from the Appellant's perspective and leave the corporation the same tax treatment being a deduction for the management fee or bonus which gave rise to substantial losses for that year. I do not find an error was made in the recording of the transaction and find that the actual economic reality was that a bonus was paid to the Appellant of $840,000 to clear out his due from shareholders account as above referred to and that the Appellant invested personally in the Laptop Deal.

[11] The Appellant argues that the economic reality of the transaction was that the Corporation was the investor but I agree with the Respondent that the Supreme Court of Canada in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, made it clear that the economic realities of a situation, as pleaded by the Appellant, should not be used to recharacterize a taxpayer's *bona fide* legal relationship. In paragraph 39, McLachlin J., as she then was, stated:

> 39 … To the contrary, we have held that, absent a specific provision of the *Act* to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only

> permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect: …

[12] Here, the taxpayer filed a corporate tax return with financial statements prepared by its accountant and signed by the Appellant as a director showing the management fee of $840,000 and, notwithstanding their subsequent disagreement with them, made no effort to amend the return or restate the financial statements. As for the Appellant's counsel's position that the reality is the Corporation did not pay the management fee or remit the portion of the management fee grossed up to reflect the Appellant's payroll obligation pursuant thereto, the fact is the Appellant did receive a credit against his due from shareholders loan account and hence did receive the benefit of the management fee. As for the Corporation not having remitted the tax and payroll obligations on his behalf, he, particularly as its controlling mind, can enforce its obligation to do so. It seems the label attached to the taxpayer when filing the transactions indeed gave rise to the consequences that flowed from it. The Appellant now wishes to recharacterize the transaction to effect a preferred tax treatment by attaching a new label to it.

[13] The Appellant's personal investment then includes both the amount of $544,681.45 which flowed to his credit through the Corporation, discussed in detail above, together with his admitted personal investment of $361,104 for which the Appellant provided proof of investment by cheques or money orders or payment through his solicitor's trust account from a mortgage advance which I accept were paid directly or indirectly to Mr. Bahl on account of the Laptop Deal. The total of his personal investment in the Laptop Deal then is $905,785.45. Although the Respondent has pointed out the total amounts of the investments have been inconsistent from various evidence of the Appellant, in my view, the amounts accepted by me reflect the hard evidence of payments shown in evidence for which the Appellant has provided sufficient detail and documentary evidence thereof.

[14] The next question to determine is what is the tax treatment of the Appellant's loss in the Laptop Deal venture. The Appellant claims the loss in a business investment loss, and in the alternative, an ordinary business loss or, in the further alternative, a capital loss. The Respondent claims the extreme opposite; that the loss is nil since it was not incurred to gain or produce income from a business.

Law

[15] Paragraph 39(1)*(c)* of the *Income Tax Act* (the "*Act*") defines a Business Investment Loss as follows:

> 39(1) For the purposes of this *Act*, …
>
> (*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 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 39(1)(*c*)(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 39(1)(*c*)(iii) that was issued before 1972 or a share (in this subparagraph and subparagraph 39(1)(*c*)(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 39(1)(*c*)(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 39(9) or 39(10), as the case may be.

[16] As confirmed by the Federal Court of Appeal in *Abrametz v. Canada*, 2009 DTC 5083 (F.C.A.), the taxpayer must show that the requirements of the definition of business investment loss in paragraph 39(1)*(c)* have been met; that he acquired a debt, there was a deemed or actual disposition of the debt as a result of which the taxpayer realized a capital loss and that the debtor (who must also be a Canadian Controlled Private Corporation) qualified as a Small Business Corporation as defined in subsection 248(1) of the *Act* at the time of the deemed or actual disposition. It should be noted as above that paragraph 39(1)*(c)* of the *Act*

contemplates a deemed disposition for nil proceeds where the taxpayer files an election under subsection 50(1)*(a)* of the *Act* and evidence in the pleadings show the election by the taxpayer as having been filed which was not disputed by the Respondent.

[17] As to the first requirement, I am not satisfied the investment by the Appellant was a loan to FLC as pleaded. There was no evidence of loan documents, interest claimed or paid or any other document that would support the position a debt was created with FLC, and as I said earlier, I do not find that the funds were advanced to FLC but rather to or on behalf of SCQ, and not as a loan but as a purported payment for the laptop computers.

[18] As stated in *Mountwest Steel Ltd. v. Canada*, 1994 CarswellNat 74, [1994] G.S.T.C. 71 in paragraph 9:

> 9 … For a debt to be a bad debt there must be a debt extant in the first place.
> …

[19] In addition, the loss cannot possibly be a Business Investment Loss under paragraph 39(1)*(c)* since, as I stated, it does not qualify as a debt owing to the taxpayer by any party, let alone by a Canadian Controlled Private Corporation that is a Small Business Corporation. While I find that the investment was not property that was a debt, I should also add that no evidence was given as to the shareholdings of FLC to evidence it was a Canadian Controlled Private Corporation pursuant to subsection 125(7) of the *Act* nor was there any evidence that the Corporation carried on any business activity so as to qualify it as a Small Business Corporation pursuant to subsection 248(1) of the *Act*. In fact, the Respondent provided strong evidence that FLC did not have any revenue in its tax returns for 2005 or 2006, the only years for which it filed tax returns, and accordingly, FLC did not have any business activity. None of the requirements confirmed in the *Abrametz* case above as required under paragraph 39(1)*(c)* have been met.

[20] The Appellant has pleaded in the alternative that the investment lost should be treated as an ordinary business loss as advances in a partnership and/or joint venture. The Respondent took the position in its “Grounds Relied on and Relief Sought” provisions of its Reply that the Appellant did not incur a business loss in 2005 taxation from the operation of a business or an adventure in the nature of a trade, but I note relied on no assumptions in its pleading with respect to same.

[21] In determining the nature of the transaction, the evidence is clear that when the Appellant was approached to participate in a transaction Mr. Solleveld had initiated but had not completed due to the requirement for more funds, the Appellant agreed to participate in order to make money to apply to a contemplated project he had in mind. The two men were aware the transaction, originally introduced to them by Mr. Venditello, was that there would be container loads of Toshiba laptop computers containing 1,000 laptop computers from an entity in Montreal and through the efforts or contacts of Mr. Venditello would resell them at a profit. At the time of the Appellant's involvement, the purchase price for the computers had gone up from that originally told to Mr. Solleveld, thus the reason for the opportunity for the Appellant's involvement in the first place. The evidence suggested that the price for the 1,000 laptops when the Appellant became involved was about $1,502,000 which, as was the pattern throughout the transaction, was raised until it reached $1,875,000 plus taxes. The evidence was further that Mr. Venditello represented he could resell these computers for a profit, and indeed, there was evidence given by the Appellant that a Future Shop in the Toronto area and a foreign buyer expressed interest in their purchase. There was no written agreement between the Appellant and Mr. Solleveld but the evidence was that they acted in common in that both contributed funds, both attended meetings with Mr. Bahl, the merchant banker who apparently was brokering the deal, at his home and at a restaurant on a few occasions, that the Appellant met with Mr. Venditello at times, and that the two men travelled to Montreal in an attempt to see the containers without success and also to meet with the solicitor for the Vendor on the deal in the presence of Mr. George Monoyios of Tascan Financial Inc. who was retained to loan the Appellant some further funds and assist in bringing the transaction to fruition. The fact is the transaction was never completed as, while the funds were paid, the laptops were never delivered and the parties came to the realization they had been defrauded.

[22] Subsection 248(1) of the *Act* defines a "business" as follows:

> "business" includes a profession, calling, trade, manufacture or undertaking of any kind … an adventure or concern in the nature of trade …

[23] In *Stewart v. Canada*, [2002] 2 S.C.R. 645, the Supreme Court of Canada said at page 679:

> 61 … whether or not a taxpayer has a source of income from a particular activity is determined by considering whether the taxpayer intends to carry on the activity for profit, and whether there is evidence to support that intention. …

[24] The Respondent argued that there was no requisite evidence of the requirements or terms from which a court could derive the existence of a partnership or joint venture. I respectfully disagree with the Respondent. As stated above, the parties clearly entered into the transaction and fulfilled their obligations thereunder by paying for the laptops in full. There is evidence of their direct involvement in meetings with each other, the final seller of the laptops, the solicitors for the supplier of the laptops, a third party financier who was retained to assist in completing the transaction and that they borrowed funds from third party individuals and corporate lenders to make the payments. While I agree there was no conclusive evidence as to what percentage of the profits each would share, there was some evidence, albeit vague, that the Appellant would obtain at least 25%.

[25] I do agree with the Respondent that there is no evidence that the Appellant and Mr. Solleveld intended to form a partnership, since no evidence was given of the formation of a partnership under the requisite *Partnerships Act* of Ontario, no partnership agreement was entered into and there is no evidence the business contemplated was to be carried out as a continuing activity, as contemplated by *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367, and relied on by the Respondent. I do note that many of the requisite elements required in the *Backman* case above to evidence a partnership were present; namely, a business carried out in common with a view to profit, notwithstanding that all the requisite elements were not.

[26] In my view, the business was more in the nature of a joint venture being an adventure in the nature of trade contemplated by subsection 248(1) of the *Act*. The Appellant and Mr. Solleveld often referred to the transaction as a venture and it is clear they were participating, each with funds and a common purpose to complete the transaction. The Appellant, as stated above, made cheques or provided funds mainly to parties on the direction of Mr. Solleveld whom he described as trusting completely.

[27] The Respondent has taken the position that since the transaction was never completed, i.e., the laptops were never delivered, that same is evidence there was no business and relies on *Vankerk v. Canada*, 2006 FCA 96, [2006] 3 C.T.C. 53 (F.C.A.). In that case, however, the investors purchased units in partnerships that were found not to have carried on any business activity, with their investments siphoned off by the two individuals who perpetrated a scheme to defraud investors

and Government by soliciting investments in fake partnerships. In paragraph 3 of the appeal, Sharlow J.A. stated:

> 3 … This is a case where, in fact, there was no business. There were no business expenses. There is no factual foundation for any of the deductions claimed by the appellants. …

[28] In the case at hand, the funds were not being used to invest in a purportedly existing partnership. There was no partnership with SCQ or those behind it. The funds were advanced to a joint venture partner who paid the funds for the acquisition of laptops and did not misappropriate them.

[29] The Respondent also relied on *Kleinfelder v. The Minister of National Revenue*, 91 DTC 913, where the Appellant, who was in the business of buying and selling real estate, agreed to participate in a joint venture with a party and advanced funds to start a business of buying Mercedes automobiles from estates and reselling them at a profit, to be split 50-50. In paragraph 28 thereof, Hamlyn J. stated:

> 28 The transaction of buying the automobiles never took place, marketing never took place and the evidence about how the actual business was to be carried on was vague and imprecise. The infusion of capital by the appellant was to start the business but that business operation never started. The moneys were not expended by the partnership for the purpose of gaining or producing income in that, the other partner Mr. Gee misdirected the funds.

[30] This case is distinguishable from the *Kleinfelder* case above in that the funds advanced to the joint venture were in fact paid towards the purchase price of the laptop computers and were not misdirected by Mr. Solleveld. The joint venture, in fact, took all steps to meet its obligations to acquire the laptop computers and the only misappropriation was by the Seller or its underlying principals. There was also correspondence and agreements evidencing the terms of the purchase, notwithstanding that they changed from time to time as part of the Seller's scheme to extract a higher and higher purchase price.

[31] The Respondent also made reference to *Longerich v. Canada*, 2004 TCC 485, 2004 DTC 2980, which denied a taxpayer an allowable business investment loss on the basis he could not prove the debtor corporation carried on an active business in Canada and hence was a small business corporation, in addition to failure to comply with the other requirements of paragraph 39(1)*(c)* of the *Act*, including making the election to deem the proceeds of the bad debt nil

under subsection 50(1). That case has no application to the determination as to whether the Appellant himself carried on a business.

[32] The Respondent also brought to the Court's attention the case of *Johnston v. Canada*, 2001 FCA 122, 2001 DTC 5300 (F.C.A.) in which the court accepted the taxpayer was a victim of a fraud scheme by a corporation to solicit parties to enter into a joint venture for the purpose of buying bankruptcy inventory or surplus and selling it at a profit and granted the taxpayer an allowable business investment loss. The Appellant, in that case, advanced loans which were never repaid as the funds were embezzled by the other joint venture partner and the court found that the activities of the other joint venturer were criminal as being in the business of defrauding investors and hence qualified the investor as having invested in a business. That case is obviously distinguishable as the court found in favour of granting the Appellant an allowable business investment loss, which is not the issue at this juncture of the matter as I have already denied same here.

[33] What is relevant from *Johnston v. Her Majesty the Queen*, 2000 DTC 1864, is that the Tax Court of Canada found, whose findings were obviously accepted by the Federal Court of Appeal, that the taxpayer himself was not entitled to deduct his losses as business losses on the basis the taxpayer was not in business within the meaning of subsection 248(1) of the *Act*. In paragraph 57, Bell J. expressed his concern that the Appellant in that case simply invested funds without any inquiry and had no active role at all in the venture:

> 57 … The Appellant made no enquiries about the acquisition, acquisition cost, sale cost or indeed with respect to any other aspect of the alleged venture. He had no knowledge of the contribution of WSL [the other joint venture partner] and made no enquiry of WSL about the absence from the agreement of any amount to be contributed by it. … The Appellant did not seek financial statements from WSL and provided no assistance to the joint venture and made no enquiries as to why he was not called upon to do so…."

[34] The case at hand is distinguishable in at least two main ways. Firstly, it is not the Appellant's co-venturer who defrauded the Appellant as funds were paid to the Seller of the product, and secondly, the Appellant and the co-venturer were not mere passive participants, but were aware of each other's contributions, attended meetings with the Seller's representatives, lawyer and their own ultimate seller and accordingly were not mere passive investors.

[35] I should also like to make some comment on the issue of fraud. The Respondent made reference in argument that if the Court found the Appellant

lost all its investments there was no evidence that FLC Holdings was in the business of fraud. This was a reference to the *Johnston* case above where the Court allowed the taxpayer's claim for an allowable business investment loss on the basis the debtor corporation was conducting an active business, namely the criminal business of defrauding investors. This finding would only be relevant if I had found the Appellant had incurred debts under paragraph 39(1)(c) above which I did not.

[36] The issue of fraud does however have relevance to the issue as to whether the Appellant lost his investment. I would submit the evidence is conclusive in this regard as there is no dispute the laptops were not delivered. The Appellant on the other hand did prove that payment was made and that his investment was used for the purposes of making those payments. In fact, on the balance of probabilities, it appears the fraud was perpetrated by or at least with the assistance of Mr. Steven Venditello. He introduced the deal to Mr. Solleveld in the first place, he was to be the ultimate seller once the laptops were acquired, there is evidence he was the recipient of at least one payment directly handed over by Mr. Solleveld to the tune of $83,250 accepted on behalf of SCQ and the evidence is that he had a gambling problem and that some of the payments were directed to Casino de Montreal to the credit of a Platinum Player's card. The evidence from the Appellant on Discovery was that Steven Venditello controlled the laptops, after the Appellant had come to that realization and even the Respondent acknowledged his role in stating in paragraph 21 of its written submissions that the Appellant did not exercise prudence when:

> 21 … He knew at all times that money was paid over to the Casino de Montreal and that Steve had a gambling problem. …

[37] Having regard to the above and the Appellant's evidence that he is not likely to recover any amount from Mr. Venditello, I accept that further attempts to do so would only have been futile and that the investment was satisfactorily lost.

[38] In summary , I find the Appellant was in a valid business, an adventure in the nature of a trade, to acquire and sell the laptops for a profit and accordingly is entitled to treat his entire investment of $906,785.45 lost as an ordinary non-capital loss as requested.

<u>Television Deal</u>

[39] As for the Television Deal, the Appellant takes the position that he was in a 50-50 joint venture with Mr. Venditello to buy 1,250 Panasonic High Definition Televisions from a supplier in Europe and resell them at a profit. The Appellant's evidence is that he advanced $175,000 to Mr. Venditello and never saw the televisions. The Appellant testified that Mr. Venditello in effect had complete charge and control over the transaction and was to keep books, do the accounting, arrange to buy and take delivery of and sell the televisions. There is no evidence submitted that the Appellant played any further role other than provide funds which were provided to or on behalf of his joint venture partner. The only documentary evidence supplied by the Appellant is an invoice from an undisclosed party issued to the Appellant's corporation, A.G. Hayter Contracting, dated December 20, 2005 showing the cost per unit of $5,000 and the total cost of $6,750,000 inclusive of GST and surcharges which were unexplained. There is also a document purporting to be an Agreement between Tascan Financial in Trust, the Appellant and Steve Venditello, unsigned by Mr. Venditello, which had blanks and purported to engage the services of Tascan Financial to assist in the financing of the purchase of the televisions and distribute a profit of 33% to each of the Appellant and Mr. Venditello but was otherwise very vague in content. The Appellant testified this latter agreement was not completed in any event. The Appellant testified that Mr. Venditello was arrested while in his presence by police for fraud and that was in fact the end of the Television Deal, which of course never came to conclusion and accordingly he lost his investment.

[40] As mentioned earlier, of the $175,000 funds advanced, there is evidence that $13,750 was advanced to a Mr. Cribari with no explanation and accordingly such amount cannot be considered advanced in this deal. The Appellant pleaded that he advanced “at least $148,000” and so if the evidence establishes he did advance more, the door was left open to prove same. Having regard to his wording of “at least” he will not be limited to $148,000 if successful in his claim.

[41] The Respondent in argument pointed out the inconsistent evidence of the Appellant on this matter in that the Appellant was claiming a loss but also agreed on discovery that funds were advanced by his Corporation, A.G. Hayter Contracting Ltd, which were his source of funds. On re-examination, the Appellant testified that the Corporation had nothing to do with the deal and he does not know why the invoice was issued in its name. There is no evidence, like in the Laptop Deal, that the funds were bonused to the Appellant by the Corporation nor even any evidence of an assessment of same, which would have occurred in the 2006 taxation year. Since, of course, the Appellant is claiming these advances as his own personally in his pleadings, then the only logical explanation is that the funds as evidenced by the transaction records were from his personal accounts or consistent with his use of the corporation’s funds in the Laptop deal where he withdrew monies against his due from shareholder account, the tax consequences of which are his to deal with.

[42] Assuming the Appellant is the source of the funds invested, the only issue is whether the Appellant suffered a non-capital loss from the loss of his investment.

[43] Unlike the case of the Laptop transaction, the Appellant has provided no evidence a business existed. The only evidence is that the Appellant gave his monies to his joint venture partner who, as per his evidence, defrauded him of it.

[44] In the *Kleinfelder* case above, a case of similar fact, the Court decided that the funds were not used to purchase the Mercedes vehicles, having been misdirected by the Appellant’s joint venture partner, and accordingly, the business was never started. Hamlyn J. stated in paragraph 28 that:

> 28 … The moneys were not expended by the partnership for the purpose of gaining or producing income in that, the other partner Mr. Gee misdirected the funds.

[45] Likewise in the *Vankerk* case above, the Federal Court of Appeal held, in fraudulent circumstances involving the misdirection of funds by a co-venturer, that there was no business and no factual foundation for any of the deductions claimed.

[46] In addition, as alluded to in the *Johnston* case above as well as in the *Kleinfelder* case above, the fact the Appellant played no active role or had no knowledge of the details of the transaction, also suggest there was no indicia of a business.

[47] I have no doubt the Appellant again succumbed again to the fraudulent activities of Mr. Venditello, however, cannot find that the funds were advanced for the purpose of gaining or producing income from business or property.

[48] Finally, since the funds were a capital expenditure that were not incurred for the purpose of gaining or producing income from business or property, the tax treatment that should be accorded the Appellant is that of a capital loss in accordance with the treatment provided in the *Kleinfelder* case above by the Minister.

Conclusion

[49] The Appeal is allowed on the basis that the Appellant shall be allowed a non-capital loss of $905,785.45 from the Laptop Deal and a capital loss of $161,250 from the Television Deal and the matter referred back to the Minister for Reassessment on that basis. While the Appellant was partially successful in this matter, it was unsuccessful in its main argument, and accordingly, I do not find this a case to be deserving of costs to any party. There shall be no costs award herein.

Signed at Ottawa, Canada, this 7th day of May 2010.

"F.J. Pizzitelli"

Pizzitelli J.

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