Docket: 2003-3638(IT)G

BETWEEN:

GARY FIDYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on April 11, 2006 at Saskatoon, Saskatchewan

Before: The Honourable Justice G. Sheridan

Appearances:

Counsel for the Appellant:	Grant Carson
Counsel for the Respondent:	Penny L. Piper

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2001 taxation year is quashed. The appeals from the reassessments made under the *Income Tax Act* for the 1998 and 1999 taxation years are allowed, with costs, and the reassessments are referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment on the basis that:

1. the Appellant incurred legal fees of $14,094 in the 2001 taxation year for the purpose of disposing of his interest in Reed Drilling Ltd. and 590201 Saskatchewan Ltd. and they are deductible under subparagraph 40(1)(*b*)(i) of the *Act*;

2. in 2001, Reed Drilling Ltd. and 590201 Saskatchewan Ltd. were indebted to the Appellant in the amount of $90,024 for advances he made to the companies;

3. as of July 18, 2001, the Appellant was not indebted in any amount to Reed Drilling Ltd. or 590201 Saskatchewan Ltd.

Signed at Sudbury, Ontario, this 21st day of July, 2006.

"G. Sheridan"

Sheridan J.

Citation: 2006TCC418
Date: 20060721
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BETWEEN:

GARY FIDYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Gary Fidyk, is appealing the reassessments by the Minister of National Revenue of his 1998, 1999 and 2001 taxation years. The Minister disallowed the Appellant's claim of an allowable business investment loss in 2001 which he had deducted as a non-capital loss in his 1998 and 1999 taxation years. The Appellant had claimed some $183,000 for amounts he had advanced to Reed Drilling Ltd. and 590201 Saskatchewan Ltd.[1] between 1989 and 1999 and which, as of 2001, remained unpaid. The basis for the Minister's disallowance was the Appellant's lack of conclusive evidence of the companies' indebtedness to him. The 2001 reassessment resulted in a "nil" assessment[2]; with no non-capital losses to carry back, the amounts claimed for 1998 and 1999 were also disallowed.

The 1998 and 1999 Appeals

[2] Reed Drilling Ltd. and 590201 Saskatchewan Ltd. were started by the Appellant's uncle Dale Reed. The Appellant began working as a jack-of-all trades in Reed Drilling Ltd. in 1982; in 1992, he purchased shares in Reed Drilling Ltd. and later, in 590201 Saskatchewan Ltd. On the understanding that he would someday buy-out his uncle's interest in the companies, the Appellant contributed both time and

[1] Both are Canadian controlled private corporations as defined by subsection 125(7) of the *Act*.

[2] At the hearing, counsel for the Respondent brought an motion to quash the 2001 appeal on the ground that there can be no appeal from a nil assessment. This issue is dealt with at the end of these Reasons for Judgment.

money to build up the businesses that would someday be his. By 1999, however, the Appellant had lost faith that this goal would ever be fulfilled. The businesses were faltering. Despite his continuing contributions, the Appellant was not advancing his position; meanwhile, control of the companies remained the exclusive domain of the increasingly unforthcoming Mr. Reed.

[3] In March 1999, things came to a head and the Appellant ceased to be employed with the companies. In 2001, he brought an oppressive shareholder application under the *Business Corporations Act* (Saskatchewan) against Mr. Reed to recover his interest in the businesses[3]. The matter was ultimately settled. Pursuant to the settlement agreement dated July 18, 2001[4], the Appellant received $70,000 in "full satisfaction of all share and shareholder loan interests held in Reed Drilling and 590201 Sk Ltd.[5]" He transferred all of his shares in the companies to Mr. Reed.

[4] The issue in this appeal is what amounts, if any, the Appellant advanced to the companies for business purposes. In my view, the answer lies somewhere between the approximately $34,000 (for Reed Drilling Ltd.) and $14,000 (for 590201 Saskatchewan Ltd.) accepted by the Minister, and the $183,000 claimed by the Appellant. Given the factual nature of this determination, the credibility of the witnesses is of primary importance.

[5] I found the Appellant and his accountant, Mr. Bulmer, well-informed, straight-forward in the presentation of their evidence and entirely credible.

[6] The Crown called Mr. Bradley, the appeals officer who handled the Appellant's objection to the Minister's reassessments and Mr. Reed, the Appellant's uncle and guiding force behind Reed Drilling Ltd. and 590201 Saskatchewan Ltd. The weak link was Mr. Reed. Not only was he the source of the scant and reluctantly furnished records relied upon by Mr. Bradley and the auditor[6], but his testimony showcased the sort of bullying and obstructive temperament that undoubtedly drove the Appellant, notwithstanding his significant investment in the companies, to cease his involvement. Mr. Reed tended to edit his testimony to show himself in his best

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[3] It was in respect of this action that the Appellant incurred legal costs of $14,094.

[4] Exhibit A-1, Tab 5.

[5] Exhibit A-1, Tab 5.

[6] No longer in the employ of the Canada Revenue Agency at the time of the hearing.

light; I have no reason to think he took any different approach to corporate records keeping. I was further troubled by the fact that some of the financial records he withheld from the Appellant and which were "unavailable" during the audit, were suddenly[7] located at his residence. Thus, except to the extent that it corroborated the Appellant's evidence of his uncle's treatment of him while in his employ, Mr. Reed's evidence was not at all convincing.

[7] In making his assessment, the Minister assumed that the Appellant's shareholder loan balance in Reed Drilling Ltd. stood at $34,916; in 590201 Saskatchewan Ltd., at $14,488[8]. It was further assumed that the Appellant owed Reed Drilling Ltd. $13,787. These figures had as their source the companies' balance sheets which contained no information explaining what was included in these figures; as Mr. Bradley explained on redirect "… all [the accountant] would really have used is the general ledger printouts for each year and that she did not have any working papers further analyzing the shareholders loan account"[9]. Nor were any source documents made available to the auditor in respect of the $34,916[10]. While conceding that "[this figure] wasn't verified", Mr. Bradley went on to explain that "…the risk was viewed to be low that the number was incorrect because it was created by an accountant and reviewed externally by an accountant each year."[11]

[8] Counsel for the Respondent argued, quite correctly, that the taxpayer has the onus of proving on a balance of probabilities that the Minister erred in making his assessment[12]. She argued that on the evidence presented, the Appellant had failed to establish the allowable business investment loss claimed. What the taxpayer must do to meet this onus, however, was discussed by Chief Justice Bowman in the recent case of *Benjamin v. The Queen*[13]:

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[7] Coincident with a subpoena from the Minister just days before the hearing.

[8] Reply to the Notice of Appeal, subparagraphs 16 (g) and (i).

[9] Transcript p. 226, lines 9-12.

[10] Transcript p. 213, lines 16-18.

[11] Transcript p. 211, lines 21-24. This justification for accepting Mr. Reed's numbers without testing is repeated at Transcript p. 212, line 5-9 and Transcript p. 212, lines 9-15.

[12] *Kornelow v. Canada (Minister of National Revenue-M.N.R.)* 91 DTC 431; see also *Johnston v.(Minister of National Revenue - M.N.R.)* [1948] S.C.R. 486.

[13] 2006 DTC 2265 (T.C.C.).

...

> [6] Whatever may be the policy of the CRA to require documentation to support an expense, a payment or a deduction, it is not the policy of this court, unless the taxing statute specifically requires it (as for example, in the case of charitable donations). If a taxpayer in court can demonstrate through credible oral testimony that a payment was made or an expense incurred, the court must make a finding based on that evidence and give effect to it. The court cannot avoid its responsibility to base its conclusions on the evidence adduced by saying in effect "It doesn't matter how credible your testimony is, if you don't have a piece of paper you must necessarily lose."
>
> [7] The cases referred to by the respondent do not support the proposition advanced by the respondent. They say merely that if an appellant lacks documentary evidence he or she has a more difficult task in meeting the onus of proof. If the appellant has made out a *prima facie* case by credible oral testimony and it is unrefuted, the appellant should win. The cases in which an appellant has lost were ones in which both paper and credibility were lacking.
>
> [8] In *Bullas v. R.*, [2002] 3 C.T.C. 467, Evans J.A. speaking for the Federal Court of Appeal in dismissing an appeal from the judgment of Brulé, J. said:
>
> > ... As the Judge indicated to when dismissing Mr. Bullas' appeal, a taxpayer is obliged by law to keep records to support claimed deductions and puts himself in a very difficult position if he fails to do so. Nonetheless, the Tax Court may accept other evidence in place of documentary records. However, it is for the Tax Court Judge, as the trier of fact, to consider the totality of the evidence and to assess its credibility in determining whether the taxpayer has demonstrated that the Minister was in error in disallowing the claimed deductions.

[9] In the present case, notwithstanding the roadblocks put in his path by his uncle, prior to filing his 2001 income tax return, the Appellant spent several months searching his personal records for documentation pertaining to the companies. Everything he found was duly handed over to Mr. Bulmer for his use in the preparation of the Appellant's 2001 income tax return. Such a stickler is Mr. Bulmer that on his advice, the Appellant chose not to include certain amounts for which he could not obtain source documents. When the audit was launched, the Appellant and Mr. Bulmer responded promptly to the auditor's request for substantiation of his claims. The auditor was informed of their requests for additional information made to the companies' accountant and their limited success in this endeavour. He was referred to Mr. Reed who, to put it politely, declined to assist him in his efforts. In spite of all this, the auditor and ultimately, the appeals officer rejected the Appellant's

claims on the basis of the shareholder loan balances shown in the companies' balance sheets. In his report, the auditor wrote that "[t]he probable reason for the discrepancy between the total investment information provided by Mr. Fidyk, and the Shareholder Loan account balances is that Mr. Fidyk did not indicate any withdrawals from his shareholder loan account"[14]. Yet on cross-examination, Mr. Bradley, the appeals officer, had this to say with regard to the basis of the auditor's statement:

> **Q** Now, what evidence was presented to you by Mr. Fidyk or the accountant for the company or anyone to suggest that Mr. Fidyk ever took a withdrawal out?
>
> *A* I was not presented with any evidence of that nature.
>
> **Q** If that's the case, then why didn't you accept that what Mr. Fidyk told you was the truth based upon what Mr. Connery found? Don't you see that if you accept that statement and you had no evidence of withdrawals, you have to sort of accept what Mr. Fidyk said, don't you?
>
> *A* If there was a withdrawal by Mr. Fidyk from his shareholders loan account, that would lower the amount owing to him by the company.
>
> **Q** Yes.
>
> *A* So that would lower what is owed to him by the company.
>
> **Q** But absent any evidence of a withdrawal, how could you conclude that that was the reason for the discrepancy between the 34,000 and the 183,016?
>
> *A* I saw no evidence that there was or was not a withdrawal, so I can't make any assumptions on that.
>
> **Q** But somebody must have made those assumptions, right?
>
> *A* We saw no evidence of the withdrawal so – of any withdrawals.[15]

This is consistent with Mr. Reed's evidence on cross-examination that:

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[14] Exhibit R-1, Tab 20.

[15] Transcript p. 219, lines 10-25 to p. 220, lines 1-13.

Q Well, tell me this: If that statement is accurate, what are the withdrawals that we – that we haven't been told about? You tell me what the withdrawals are that account for the discrepancy.

A All the withdrawals –- now, what are we talking about, numbered company or Reed Drilling?

Q Well, either one.

A The withdrawals on Reed Drilling on the credit card was taken off by salaries. If it wasn't taken off the salary, it was taken off shareholders loan. As far as numbered company, I don't know any withdrawals.

Q Mr. Reed, are you able to point to a single item of withdrawal by Mr. Fidyk from either of these companies other than his salary and his expense reimbursement?

A Yes

Q Tell me what it is.

A Fishing trips, a boat tarp, travel.

Q Is that it?

A Some of it. I'd have to go back through the books. It goes back a lot of years.

Q Do you have any documents that you can produce to say that these were withdrawals taken on his shareholders loan, anything you can produce right now?

A No, I don't.[16]

[10] The net effect of the department's treatment of the Appellant was to put him in the unusual situation of being penalized for making every effort to provide records that he, as a shareholder and employee, could not reasonably be expected to prepare and to which, he was denied access by the very person responsible for compiling them. The standard of records-keeping imposed on a taxpayer under the *Act* is adequacy; in these circumstances, the Appellant has more than satisfied that requirement. On the basis of the documentation he was able to produce, and his and Mr. Bulmer's testimony, I am satisfied that the Appellant has successfully proven that he made loans for business purposes to Reed Drilling Ltd. and 590201 Saskatchewan Ltd.

[16] Transcript p. 174, lines 14-25 to p. 175 lines 1-16.

[11] The specific amounts claimed by the Appellant in his 2001 income tax return are set out in paragraph 16(l) of the Reply to the Notice of Appeal:

Date	Amount	Source per Appellant
June 1989	$ 25,000	CIBC
February 1990	$ 33,000	CIBC
Dec. 1991 – Dec. 1992	$ 6,101	Personal funds
August 1992	$32,000	Royal Bank
August 1992	$ 7,000	Personal funds
March 1994	$25,000	Personal funds
November 1994	$20,992	Credit Union
October 1995	$30,000	Scotia Bank
June 1999	$ 3,923	Royal Bank
Total:	$ 183,016	

[12] At the hearing, counsel for the Respondent conceded the $3,923 claimed by the Appellant for the Royal Bank loan in June 1999. The Respondent also conceded the Appellant's claim for legal fees of $14,094 in 2001. The $32,000 and $7,000 loans in 1992 were for the acquisition of the Appellant's shares in Reed Drilling Ltd.

[13] Of the remaining amounts set out above, I find that the companies' were indebted to the Appellant in 2001 in the following amounts:

1. $15,000 of the $25,000 CIBC loan, June 1989: the Appellant personally borrowed $25,000[17] and advanced this amount to 590201 Saskatchewan Ltd. to permit that company to purchase shares in an Alberta oil company known as "Pioneer Inc. of Alberta". Following the disposition of some or all of those shares, in March 1994 590201 Saskatchewan Ltd. paid $35,000 to the Appellant, $25,000 of which was immediately advanced to Mr. Reed personally to advance to Reed Drilling Ltd.[18]. There is no evidence to show that the remaining $10,000 was not retained by the Appellant personally; thus, that amount must be offset against the $25,000 advanced by the Appellant in 1989, leaving an unpaid balance of $15,000;

[17] Exhibit R-1, Tab 27.

[18] Exhibit R-1, Tab 31 and Exhibit R-2, Tab 44.

2. the full amount of $25,000 advanced from the Appellant's personal funds, March 1994: I am satisfied that the $25,000 advanced to Reed Drilling Ltd. through Mr. Reed was not repaid to the Appellant;

3. the full amount of $6,101 advanced from the Appellant's personal funds, December 1991 to December 1992: the Appellant advanced this amount as sundry cash advances, as required, to 590201 Saskatchewan Ltd.[19] and these amounts were not repaid;

4. the full amount of $30,000 borrowed from Scotia Bank, October 1995: the Appellant personally took out a loan, co-signed by his wife, for this amount to shore up the unsatisfactory loan ratios of Reed Drilling Ltd. and it was not repaid.

[14] As for the two remaining amounts of $33,000 (February 1990) and $20,992 (November 1994), I find the following:

1. in respect of the $33,000 amount claimed, there is insufficient evidence to establish that the Appellant personally borrowed the $33,000 to enable 590201 Saskatchewan Ltd. to purchase the shop used in the business. I do, however, accept his evidence that he personally put $5,000 into that company for repairs and revamping of the shop and this amount was not repaid. Although counsel for the Respondent argued that the Appellant should not be entitled to claim this amount at this stage of the proceedings, I am of the view that justice is better served in this case by following the approach taken in *Benjamin*[20]. Even without considering the $5,000 cancelled cheque[21] produced at the hearing, I accept the Appellant's testimony that he paid this amount in the manner stated and that it was never repaid; and

2. in respect of the $20,992, I accept the Appellant's evidence that because of the fiscal woes of Reed Drilling Ltd., a decision was made to finance the purchase of the 1993 Chev 4X4 in the

[19] Exhibit A-1, Tab 21.

[20] *Supra.*

[21] Exhibit A-1, Tab 20.

> Appellant's name. While I am satisfied that the Appellant personally paid the $5,000 down payment and this amount was not repaid to him, there is insufficient evidence that he paid the remaining balance of $13,917[22]. The Appellant was not able to refute the Minister's assumption that the monthly payments of approximately $440 were reimbursed to the Appellant. Accordingly, Reed Drilling Ltd. was indebted to the Appellant for $5,000 in respect of the 1993 Chev 4X4.

[15] One further matter is the Minister's inclusion in the calculation of the Appellant's non-capital loss of $13,787, assumed by the Minister to be an amount owed by the Appellant to Reed Drilling Ltd. I accept the submission of counsel for the Appellant that this amount was not properly offset against the amounts owed by Reed Drilling Ltd. to the Appellant. This debt, if it existed[23], was satisfied in full by the terms of the settlement agreement of July 18, 2001. Accordingly, this amount ought not to have been deducted from the amounts owed to the Appellant by the companies.

[16] For all of these reasons, I am satisfied that as of 2001, Reed Drilling Ltd. and 590201 Saskatchewan Ltd. were indebted to the Appellant in the amounts determined above.

The 2001 Appeal

[17] I accept the Crown's submission that because the reassessment of the 2001 taxation year resulted in a "nil" assessment, no appeal may be made in respect of that year. Counsel for the Respondent submitted that if the Appellant were to be successful on his appeal of the 1998 and 1999 appeals, his recourse (in the event the Minister does not undertake a reassessment as a result of this Judgment) is to seek a loss determination from the Minister under subsection 152(1.1) of the *Act*. She referred the Court to *Aallcann Wood Suppliers Inc. v. Canada*[24] in which Bowman, T.C.J. (as he then was) reviewed the workings of this provision:

> One preliminary procedural or possibly jurisdictional point should be disposed of at the outset. Originally the appellant asked that this court make a

[22] Exhibit A-1, Tab 19.

[23] And given the incomplete nature of the companies' books, I am not at all convinced it did.

[24] 94 DTC 1475 at p. 1475.

determination of its loss for 1988 as the size of that loss affected its taxable income for 1985, 1986 and 1987. The respondent took the position that in the appeals for 1985, 1986 and 1987 the appellant could not challenge the Minister's computation of the loss for 1988 because the appellant had not requested a determination of loss for 1988.

The appellant acceded to this position and requested a loss determination for 1988 under subsection 152(1.1) of the *Income Tax Act*. A determination was made by the Minister, an objection was filed, the determination was confirmed and an appeal was brought to this court from the loss determination for 1988.

The Minister's position in the original reply to the notice of appeal that the Minister's ascertainment of a loss for a particular taxation year is immutable unless a loss determination is made under subsection 152(1.1) is, however, wrong. It is true that this court cannot make a formal loss determination under subsection 152(1.1). That is the Minister's function. If such a loss determination is made it is valid and binding unless challenged by way of objection or appeal and, if it is sustained on appeal, it stands. The purpose of subsection 152(1.1) is to permit a taxpayer to have its loss for a year determined definitively and, if necessary, to have the Minister's determination reviewed by the court. One of the reasons for the enactment of subsection 152(1.1) was that no appeal lies from a nil assessment. In the absence of a binding loss determination under subsection 152(1.1), it is open to a taxpayer to challenge the Minister's calculation of a loss for a particular year in an appeal for another year where the amount of the taxpayer's taxable income is affected by the size of the loss that is available for carry-forward under section 111. In challenging the assessment for a year in which tax is payable on the basis that the Minister has incorrectly ascertained the amount of a loss for a prior or subsequent year that is available for deduction under section 111 in the computation of the taxpayer's taxable income for the year under appeal, the taxpayer is requesting the court to do precisely what the appeal procedures of the *Income Tax Act* contemplate: to determine the correctness of an assessment of tax by reviewing the correctness of one or more of the constituent elements thereof, in this case the size of a loss available from another year. This does not involve the court's making a determination of loss under subsection 152(1.1) or entertaining an appeal from a nil assessment. It involves merely the determination of the correctness of the assessment for the year before it.

[18] Accordingly, the appeal from the reassessment made under the *Income Tax Act* for the 2001 taxation year is quashed. The appeals from the reassessments made under the *Income Tax Act* for the 1998 and 1999 taxation years are allowed, with costs, and the reassessments are referred back to the Minister for reconsideration and reassessment on the basis that:

1. the Appellant incurred legal fees of $14,094 in the 2001 taxation year for the purpose of disposing of his interest in Reed Drilling Ltd. and

590201 Saskatchewan Ltd. and they are deductible under subparagraph 40(1)(*b*)(i) of the *Act*;

2. in 2001, Reed Drilling Ltd. and 590201 Saskatchewan Ltd. were indebted to the Appellant in the amount of $90,024 for advances he made to the companies;

3. as of July 18, 2001, the Appellant was not indebted in any amount to Reed Drilling Ltd. or 590201 Saskatchewan Ltd.

Signed at Sudbury, Ontario, this 21st day of July, 2006.

"G. Sheridan"

Sheridan J.

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COURT FILE NOS.:	2003-3638(IT)G
STYLE OF CAUSE:	GARY FIDYK AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Saskatoon, Saskatchewan
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REASONS FOR JUDGMENT BY:	The Honourable Justice G. Sheridan
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APPEARANCES:

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