

Docket: 2010-1587(IT)G

BETWEEN:

PATRICK E. NICHOLLS,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Appeal heard on January 11, 2013, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the appellant: The appellant himself
Counsel for the respondent: Iris Kingston

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1998 taxation year is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 24th day of June 2013.

“Robert J. Hogan”

Hogan J.

Citation: 2013 TCC 166
Date: 20130624
Docket: 2010-1587(IT)G

BETWEEN:

PATRICK E. NICHOLLS,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] This is an appeal from a loss determination made by the Minister of National Revenue (the “Minister”) in respect of the appellant’s 1998 taxation year.

II. Summary of Facts

[2] The appellant filed his tax return for the 1998 taxation year on September 12, 2006. In that return, the appellant claimed a capital loss of \$354,830 and an allowable business investment loss (“ABIL”) of \$266,123.

[3] The Minister assessed the appellant’s late-filed return and issued a nil assessment. The Minister also disallowed the ABIL claimed by the appellant.

[4] The appellant wrote several letters to the Canada Revenue Agency (the “CRA”) requesting that they reconsider their decision to disallow the ABIL claimed by him.

[5] The Minister advised the appellant that he could not object to the assessment issued for his 1998 taxation year because it was a nil assessment. The Minister

further advised the appellant that he should file a request for a loss determination if he wished to contest the Minister's initial decision.

[6] The Minister issued a notice of determination dated February 1, 2010. The Minister determined that the appellant's net capital loss and ABIL for the 1998 taxation year were both nil.

[7] The appellant objected to the determination on February 9, 2010. The appellant filed an appeal on May 17, 2010, as he was entitled to do because the CRA did not respond to his objection within 90 days.

[8] In the reply to the appellant's notice of appeal, the respondent acknowledges that the appellant was entitled to claim a capital loss of \$354,830 for the 1998 taxation year but denies the appellant's ABIL claim.

[9] The appellant testified that he transferred 244,711 shares of Mpack Immedia, a Canadian public corporation, to the Nicholls (Children) Family Trust (the "Trust") in 1997. According to the appellant, he received from the Trust as consideration for the transferred shares, a promissory note (for an amount corresponding to \$354,830).

[10] The appellant alleged that the Trust became insolvent in 1998, which prompted him to claim a loss for the promissory note on the basis that it became a bad debt in that year.

[11] It is clear from the evidence that the appellant did not have an ABIL in 1998. Paragraph 39(1)(c) of the *Income Tax Act* specifies, *inter alia*, that an ABIL can only be claimed if a taxpayer incurs a loss in connection with the disposition either of shares of the capital stock of a small business corporation or of debt owing to the taxpayer by a Canadian-controlled private corporation. The appellant claimed the capital loss in respect of the Trust's promissory note.

III. Conclusion

[12] The respondent requests costs on the grounds that she was the successful party in this appeal. I disagree. The loss determination against which the appellant lodged his appeal was incorrect. The respondent acknowledged that the appellant was entitled to claim a capital loss of \$354,830. For this reason, the appeal is allowed in part and the matter is referred back to the Minister for redetermination on the basis that the appellant incurred a capital loss of \$354,830 for his 1998 taxation year. There will be no award of costs.

Signed at Ottawa, Canada, this 24th day of June 2013.

“Robert J. Hogan”

Hogan J.

CITATION: 2013 TCC 166

COURT FILE NO.: 2010-1587(IT)G

STYLE OF CAUSE: PATRICKE. NICHOLLS AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 11, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: June 24, 2013

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Iris Kingston

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada