Date: 20090415

Docket: A-388-07

Citation: 2009 FCA 111

CORAM: **EVANS J.A.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

PETER V. ABRAMETZ

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Saskatoon, Saskatchewan, on March 3, 2009.

Judgment delivered at Ottawa, Ontario, on April 15, 2009.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: EVANS J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal from a decision of Justice Sheridan of the Tax Court of Canada, dated June 5, 2007, dismissing an appeal by Mr. Peter V. Abrametz (the "appellant") against an assessment by the Minister of National Revenue (the "Minister"), pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA"), for the appellant's 1996 taxation year. Unless otherwise indicated, all statutory references in these reasons are to the corresponding provisions of the ITA that are applicable to the appellant's 1996 taxation year.

[2] The assessment disallowed a business investment loss, as defined in paragraph 39(1)(*c*) ("business investment loss"), in the amount of $249,999 that the appellant reported in his 1996 income tax return. He claimed that he had realized a business investment loss as a consequence of having made a payment pursuant to a guarantee arrangement in respect of certain indebtedness of Regent Plaza (1992) Inc. ("Regent"), a Saskatchewan incorporated corporation in which the appellant was a shareholder at the times that are relevant to this appeal.

[3] To sustain his claim, the appellant must establish that the requirements of the definition of business investment loss in paragraph 39(1)(*c*) have been met. In the circumstances of this appeal, the appellant must first show that as a consequence of having made a guarantee payment in respect of the indebtedness of Regent, he acquired a portion of that indebtedness. Secondly, the appellant must show that a deemed or actual disposition of the acquired debt occurred in 1996, and as a result of such disposition, he realized a capital loss in that year. Finally, the appellant must show that Regent qualified as a small business corporation, as defined in subsection 248(1) ("small business corporation"), at the time of the deemed or actual disposition of the acquired debt.

[4] For the reasons that follow, I am of the view that the appellant has not realized a business investment loss but may have realized a capital loss. To resolve that issue, I would allow the appeal and return the matter to the Minister for redetermination and reassessment.

APPLICABLE LEGISLATION

[5] The provisions of the ITA that bear upon the issues of this appeal are paragraphs 3(*b*) and (*d*), section 38, paragraph 39(1)(*c*), subsection 39(12), the definition of specified investment business in subsection 125(7) and the definitions of active business and small business corporation in subsection 248(1). Those provisions are reproduced in the appendix to these reasons.

BACKGROUND

[6] Two important factual matters are in dispute in this appeal. The appellant asserts that he made a guarantee payment in respect of the indebtedness of Regent in 1996 and that at the times that are relevant to the determination of whether Regent was a small business corporation, the income of Regent constituted income from an active business, as defined in subsection 248(1) ("active business"). These factual issues will be discussed in detail hereinafter. Otherwise, the essential facts are largely undisputed.

[7] Regent was incorporated under *The Business Corporations Act*, R.S.S. 1978, c. B-10 (the "SBCA") in the early 1990's and, at all times relevant to this appeal, was a Canadian-controlled private corporation, as defined in subsection 125(7). The appellant and Mr. Henri Paulhus, an individual who was not related to the appellant, were shareholders in, and the sole directors of, Regent.

[8] The appellant and Mr. Paulhus were also shareholders in, and the sole directors of, Placid Estates Holdings Inc. ("Placid"), a corporation that was incorporated under the SBCA in 1991.

According to the appellant, Placid was engaged in the business of condominium development in Prince Albert, Saskatchewan.

[9] In June of 1992, Regent acquired real property ("Regent Plaza") in Saskatoon, Saskatchewan, from Northwest Trust Company, which also provided the acquisition financing. Regent granted two mortgages on Regent Plaza to secure its indebtedness to Northwest Trust Company (the "Mortgage Holder"), a first mortgage in the amount of $1,632,870, and a second mortgage in the amount of $75,000.

[10] The record only contains guarantee documentation in relation to the first mortgage. In that instance, the guarantors were jointly and severally liable only to the extent of $500,000 of the indebtedness of Regent that was secured by the first mortgage.

[11] Shortly after the execution of the mortgages, the appellant and Mr. Paulhus entered into a document entitled "Indemnification Agreement" with Mr. Gary Gaudet and Mr. Gordon Davis. That agreement contemplated that each of Mr. Gaudet and Mr. Davis would acquire 25% of the shares of Regent and would indemnify the appellant and Mr. Paulhus for 25% of their potential liabilities under the guarantees of the indebtedness that was secured by the mortgages on Regent Plaza. Nothing in the record indicates that any shares of Regent were ever issued to Messrs. Gaudet and Davis.

[12] In late 1995, the Mortgage Holder commenced action to enforce the guarantees against the appellant and Mr. Paulhus as a consequence of payment defaults by Regent in relation to the indebtedness secured by the mortgages. Pursuant to an agreement, dated January 22, 1996 and executed February 6, 1996, among the appellant and Messrs. Paulhus, Gaudet and Davis (the "Payment Agreement"), a proposed settlement of the claims of the Mortgage Holder was agreed upon. The relevant portions of that agreement are as follows:

> AND WHEREAS HENRI PAULHUS has expended and will expend certain amounts in connection with the purchase of the said property and the North West Trust Company mortgages, which mortgages are now held by the Canadian Western Bank, including the following:
>
> a) the initial cash required to purchase the said property;
>
> b) legal costs in connection with the foreclosure proceedings arising from the said mortgages;
>
> c) $450,000.00 to effect settlement of the said foreclosure proceedings, the essence of which settlement is set forth in the attached Minutes of Settlement;
>
> d) payment of the line of credit account with Canadian Western Bank of approximately $40,000.00;
>
> all of which is referred to as "the Paulhus indebtedness";
>
> NOW THEREFORE the undersigned hereby acknowledge and agree as follows:
>
> 1. Each of the undersigned agrees to the settlement of the said foreclosure proceedings on essentially the terms and conditions set forth in the Minutes of Settlement attached hereto.
>
> 2. Each of PETER ABRAMETZ, GARRY GAUDET and GORDON DAVIS therefore acknowledge that they are indebted to HENRI PAULHUS for 25% of the Paulhus indebtedness.
>
> 3. PETER ABRAMETZ, GARRY GAUDET and GORDON DAVIS each acknowledges and agrees that he shall forthwith make arrangements with HENRI PAULHUS for payment of his share of the Paulhus indebtedness.
>
> 4. Settlement of Gordon Davis' and Peter Abrametz's obligations to Henri Paulhus for their shares of the Paulhus indebtedness shall be made in the following manner:

a) concurrent with the execution hereof Peter Abrametz shall transfer and assign to Henri Paulhus all of his shares, any shareholders loans and any other interest he has in that corporation known as Placid Estates Holdings Inc. provided, however, that Placid Estates Holdings Inc. shall transfer the condominium Unit 105 it holds in that property civically knows as 1804 15th Avenue East, Prince Albert, Saskatchewan to Peter Abrametz free and clear of all encumbrances;

b) upon the execution hereof Peter Abrametz shall forthwith resign as a director and officer of Placid Estates Holdings Inc.;

c) such shares and interests in Placid Estates Holdings Inc. shall be accepted by Henri Paulhus in full and final satisfaction of any claims whatsoever he may have against either Gordon Davis or Peter Abrametz howsoever arising from their dealings together in Regent Plaza (1992) Inc.;

5. The undersigned expressly acknowledge and agree that Sanderson and Wilkinson may execute the attached Minutes of Settlement on behalf of the Defendants, Regent Plaza (1992) Inc. and Peter Abrametz and that Sandstrom and Scott may execute the same on behalf of the Defendant, Henri Paulhus.

6. a) Upon the compliance of Peter V. Abrametz and Gordon Davis to Henri Paulhus with their respective obligations hereunder, each of the undersigned releases Peter V. Abrametz and Gordon Davis from any and all claims and demands howsoever arising up to the present time from their involvement together in the corporation, Regent Plaza (1992) Inc.

b) Upon compliance by Garry Gaudet with his obligations to Henri Paulhus, each of the undersigned releases Garry Gaudet from any and all claims and demands howsoever arising up to the present time from their involvement together in the corporation, Regent Plaza (1992) Inc.

[13] Pursuant to Minutes of Settlement, dated in early February of 1996, the claims of the Mortgage Holder against the appellant and Mr. Paulhus were settled. In exchange for payment of $450,000, which was initially secured by a letter of credit delivered by Mr. Paulhus to the Mortgage Holder, and consent to the sale of Regent Plaza, the Mortgage Holder released the appellant and Mr. Paulhus from their obligations under the guarantees.

[14] In his 1996 income tax return, the appellant claimed a business investment loss in the amount of $249,999 in respect of his loan guarantee. After reducing that amount by an amount determined under subsection 39(9) in respect of the capital gains exemption claimed by the appellant in 1988, as required by subparagraph 39(1)(*c*)(viii), the appellant determined that his business investment loss for 1996 was $163,721. The appellant then determined that his allowable business investment loss, as defined in paragraph 38(*c*) ("allowable business investment loss"), was three-quarters of his business investment loss for 1996 or $122,790.75, and deducted that amount in computing his income for 1996. In his income tax return for that taxation year, the appellant also reported a capital gain in the amount of $249,999 as a result of a disposition of shares of Placid.

[15] By notice of assessment, dated December 14, 1998, the Minister denied that the appellant realized a business investment loss in 1996. As a consequence, the Minister also denied the deduction of $122,790.75 that the appellant had claimed as an allowable business investment loss in his 1996 income tax return. However, the Minister did not reduce or otherwise adjust the $249,999 capital gain from the disposition of shares of Placid that the appellant reported in his 1996 income tax return.

[16] The appellant objected to the assessment, the Minister confirmed it and the appellant appealed to the Tax Court of Canada. In his notice of appeal, the appellant contended that if the guarantee payment did not give rise to an allowable business investment loss, it should nonetheless give rise to a capital loss.

THE DECISION OF THE TAX COURT OF CANADA

[17] The Tax Court Judge held that to qualify for an allowable business investment loss, the appellant was required to satisfy the requirements of each of the three paragraphs in subsection 39(12).

[18] In paragraph 13 of her reasons, the Tax Court Judge stated that subsection 39(12) "is written conjunctively which means that each of the legislative conditions must be fulfilled before eligibility is established". She held that the appellant failed to satisfy the requirements of each of paragraphs 39(12)(*a*), (*b*) and (*c*).

[19] In considering the requirements of paragraph 39(12)(*a*), the Tax Court Judge found that there was insufficient evidence to show that the appellant had paid an amount under the guarantees or to establish the quantum of any such payment. She found that if any amount was paid to the Mortgage Holder in respect of Regent's debt, it was paid by Mr. Paulhus and not the appellant. At paragraph 15 of her reasons, she stated:

> [15] In the normal course of things, proving the payment of a debt in a foreclosure action should be a fairly straightforward matter. Even allowing for the breakdown in good records keeping that may arise in the circumstances of a failing business, it strikes me as odd that the Appellant is without the corporate, banking or legal records to substantiate his claim. This lack, together with the weakness of the Appellant's testimony, leads to the inference that the Appellant did not pay "an amount … in respect of a debt of a corporation" within the meaning of paragraph 39(12)(*a*) of the that *Act*.

[20] In addition, in paragraph 16 of her reasons, the Tax Court Judge found that the fact that the appellant had not yet received the transfer of the condominium as required by clause 4(a) of the

Payment Agreement raised "further doubts about the entire transaction", which I take to mean doubts as to whether the appellant, in fact, transferred the Placid shares to Mr. Paulhus.

[21] Finally, the Tax Court Judge found that the appellant adduced no formal evidence with respect to the value of the Placid shares that were allegedly transferred to Mr. Paulhus.

[22] In considering the requirements of paragraph 39(12)(*b*), the Tax Court Judge concluded that any payment that the appellant may have made was to Mr. Paulhus who, as a "fellow shareholder", was not at arm's length with the appellant, as required by paragraph 39(12)(*b*).

[23] In considering the requirements of paragraph 39(12)(*c*), the Tax Court Judge held, in paragraph 17 of her reasons, that the appellant had

> … the onus of showing that Regent was in "active business" at the time Regent's debt was incurred and during the 12 months an amount became payable under the guarantee.

[24] The Tax Court Judge stated that she did not give this requirement a thorough analysis because she found that the essential requirements of paragraphs 39(12)(*a*) and (*b*) had not been met. She found that no evidence was tendered with respect to the business activities of Regent, other than the appellant's statement that described the business activities of Regent as "a mix of tenant – and Regent – operated enterprises including a business centre, muffin shop and restaurant". She therefore concluded that the appellant's assertion that Regent was in "active business" at the relevant times had not been established.

STANDARD OF REVIEW

[25] On an appellate review of a decision of the Tax Court of Canada, questions of law, including questions of the interpretation of provisions of the ITA, will be reviewed on the standard of correctness, while questions of fact or of mixed fact and law will not be overturned absent a palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at paragraph 36.

ISSUE

[26] The issue in this appeal is whether the appellant realized a business investment loss, or failing that, whether the appellant realized a capital loss, in 1996.

ANALYSIS

Introduction

[27] Section 3 provides rules with respect to the computation of the income of a taxpayer for a taxation year. Where a taxpayer disposes of a property in a taxation year and realizes a capital loss as a result of that disposition, the allowable portion of the capital loss for that taxation year, which is specified in paragraph 38(*b*), is generally only deductible against the taxable portion of any capital gains realized by the taxpayer in that year, which is specified in paragraph 38(*a*).

[28] A business investment loss of a taxpayer for a taxation year is a type of capital loss realized by the taxpayer in that year.

[29] An allowable business investment loss of a taxpayer for a taxation year is the portion of the taxpayer's business investment loss for that year that is specified in paragraph 38(*c*). The significance of an allowable investment loss is that the amount of this type of capital loss can generally be deducted in computing the income of the taxpayer for that year from all sources in accordance with paragraph 3(*d*), and is not limited to simply reducing taxable capital gains for that year in accordance with paragraph 3(*b*).

Subsection 39(12)

[30] The Tax Court Judge approached the question of whether the appellant realized a business investment loss in 1996 on the basis that in order to sustain his position, the appellant was required to satisfy all of the conditions specified in subsection 39(12). The selection of subsection 39(12) as the governing provision of the ITA in relation to the issue of whether the appellant realized a business investment loss in 1996 is a question of statutory interpretation in respect of which the standard of review is correctness.

[31] In my view, the approach taken by the Tax Court Judge in relation to this question is, with respect, incorrect and therefore constitutes an error of law. An approach similar to the one that I favour was taken by Campbell J. of the Tax Court of Canada in *Dietrich v. Canada*, 2005 TCC 326, a decision that neither party referred to in their submissions to this Court.

[32] It is the definition of business investment loss in paragraph 39(1)(*c*), rather than the provisions of subsection 39(12), that will determine whether the appellant recognized a business

investment loss in 1996. More particularly, subsection 39(12) has no direct relevance to the appellant's claim in the circumstances of this appeal. That said, a number of the elements of subsection 39(12) are similar to the elements of paragraph 39(1)(*c*).

[33] Subsection 39(12) was introduced into the ITA in 1991 to address a timing concern with respect to the small business corporation requirement in paragraph 39(1)(*c*) in situations in which a debt of a corporation is acquired by a taxpayer as a result of the taxpayer's having made a guarantee payment in respect of the debtor corporation. Thus, where the conditions of subsection 39(12) are met, the closing portion of that provision simply operates to deem a corporation to meet the small business corporation requirements of paragraph 39(1)(*c*) when it would not otherwise meet them. This is evident from the Department of Finance Technical Notes that were released when the proposed subsection 39(12) was introduced.

[34] The relevant excerpt from those Technical Notes, which may be found at pages 286-287 in David M. Sherman, ed., *Department of Finance Technical Notes: An Annotated Consolidation of Technical Notes and other Income Tax Commentary from the Department of Finance*, 20th ed. (Toronto: Carswell, Consolidated to October 15, 2008), reads as follows:

> *May 1991 TN*: New subsection 39(12) provides a special rule that applies for the purposes of the provisions relating to business investment losses. Paragraph 39(1)(c) defines a taxpayer's business investment loss for the year as his capital loss for the year from disposition of shares or debt of a small business corporation to an arm's length person or from a disposition to which subsection 50(1) applies. For the purposes of paragraph 39(1)(c), a small business corporation includes a corporation that was a small business corporation (as defined in subsection 248(1)) at any time in the 12-month period preceding the disposition of the shares or debt.

> In the case of a payment made by a taxpayer under a guarantee in respect of a corporation's liabilities, a debt does not arise between the corporation and the taxpayer until the payment is made. In such a case, the 12-month period may not allow sufficient time for the creditor to dispose of his debt or to establish that it has become bad so that it may be treated as having been disposed of by reason of subsection 50(1). For example, where the guarantor contests his liability under the guarantee or where the payments under the guarantee are to be made over a period of time, the corporation may no longer qualify as a small business corporation by reason of its having become inactive at the time the payment is made under the guarantee.
>
> New subsection 39(12) will treat a payment made by a taxpayer under an arm's length guarantee of the debts of a corporation as a debt owing by a small business corporation where the corporation was a small business corporation both at the time the debt in respect of which the payment was made was incurred and at the time an amount first became payable under the guarantee. Where these conditions are met, the taxpayer will be eligible to claim a business investment loss on any payments made under the guarantee even where the corporation has ceased to carry on an active business.

Subparagraph 39(1)(b)(iv)

[35] As indicated, I am of the view that the appellant may establish that a business investment loss has arisen out of circumstances involving the making of a guarantee payment without regard to the provisions of subsection 39(12). To do so, the appellant need only demonstrate that the relevant provisions of paragraph 39(1)(*c*) have been satisfied. In the circumstances of this appeal, the appellant must, in particular, satisfy the provisions of subparagraph 39(1)(*c*)(iv)**,** since there is no suggestion that the business investment loss that he claimed arose out of a disposition of shares. That provision reads as follows:

39.(1) For the purposes of this Act,	39.(1) Pour l’application de la présente loi :
. . .	[…]
(*c*) a taxpayer’s business investment loss for a taxation year from the	*c*) une perte au titre d’un placement d’entreprise subie par un contribuable,

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

. . .

(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

pour une année d'imposition, résultant de la disposition d'un bien quelconque s'entend de l'excédent éventuel de la perte en capital que le contribuable a subie pour l'année résultant d'une disposition, après 1977:

(i) soit à laquelle le paragraphe 50(1) s'applique,

(ii) soit en faveur d'une personne avec laquelle il n'avait aucun lien de dépendance,

d'un bien qui est :

[…]

(iv) soit une créance du contribuable sur une société privée sous contrôle canadien (sauf une créance, si le contribuable est une société, sur une société avec laquelle il a un lien de dépendance) qui est :

(A) une société exploitant une petite entreprise,

(B) un failli, au sens du paragraphe 128(3), qui était une société exploitant une petite entreprise au moment où il est devenu un failli pour la dernière fois,

(C) une personne morale visée à l'article 6 de la *Loi sur les liquidations* qui était insolvable, au sens de cette loi, et qui était une société exploitant une petite entreprise au moment où une ordonnance de mise en liquidation a été rendue à son égard aux termes de cette loi,

. . .	sur le total des montants suivants :
(viii) the amount determined in respect of the taxpayer under subsection 39(9) or 39(10), as the case may be.	[…] (viii) le montant calculé à l'égard du contribuable en vertu du paragraphe (9) ou (10), selon le cas.

[36] An essential condition of this provision is that the taxpayer must have disposed of a debt of a Canadian-controlled private corporation. A major point of contention in this appeal is whether the appellant ever acquired any of the debt of Regent to the Mortgage Holder.

[37] As indicated in the excerpt from the Department of Finance Technical Notes reproduced above, where a taxpayer makes a payment under a guarantee of indebtedness of a corporation, the taxpayer will generally be considered to have acquired the rights of the creditor in respect of that indebtedness at the time the payment is made.

[38] In this context, the appellant's position is presumably as follows:

(a) Mr. Paulhus paid $450,000 to the Mortgage Holder pursuant to the Minutes of Settlement, so as to obtain the release of his and the appellant's liability under the guarantee;

(b) the appellant made good his half of that payment obligation by transferring his Placid shares to Mr. Paulhus, in accordance with the Payment Agreement;

(c) as a consequence of the law of subrogation, Mr. Paulhus acquired the rights of the Mortgage Holder in respect of the indebtedness of Regent to the extent of the amount of the guarantee payment that was made to the Mortgage Holder; and

(d) by transferring his shares of Placid to Mr. Paulhus, the appellant acquired half of the indebtedness of Regent debt that Mr. Paulhus acquired from the Mortgage Holder.

[39] Thus, the initial question is whether the appellant acquired any rights in respect of any of the indebtedness that Regent owed to the Mortgage Holder as a consequence of the actions that he took pursuant to the Minutes of Settlement and the Payment Agreement.

[40] In the circumstances of this appeal, it is undisputed that the appellant made no payment directly to the Mortgage Holder. The payment to the Mortgage Holder that was required by the Minutes of Settlement was made by Mr. Paulhus. The Tax Court Judge made no findings with respect to the application of the law of subrogation to the transactions that were undertaken pursuant to that document or the Payment Agreement. Instead, she made a factual finding that the appellant had not established that he transferred his Placid shares to Mr. Paulhus in accordance with clause 4(a) of the Payment Agreement. Of course, if the appellant did not, in fact, make that payment, he could not have acquired any portion of the indebtedness of Regent to the Mortgage Holder that Mr. Paulhus may have acquired by virtue of the law of subrogation.

[41] The appellant urges the Court to find that the Tax Court Judge erred in finding that the appellant did not transfer his Placid shares to Mr. Paulhus. In paragraph 15 of her reasons, the Tax

Court Judge reached that conclusion “by way of inference”, having regard to the “weakness of the Appellant’s testimony” and the absence of seemingly simple legal documentation to substantiate the transfer of those shares. While it is undoubtedly true that the appellant’s testimony was considerably less than crystal clear, the record contains significant evidence, in addition to the appellant’s testimony, that points to the conclusion that the appellant transferred his shares of Placid to Mr. Paulhus.

[42] It is clear that the appellant was legally bound to transfer the Placid shares to Mr. Paulhus pursuant to clause 4(a) of the Payment Agreement. Moreover, the Crown acknowledged in its reply to the notice of appeal to the Tax Court of Canada that at some time during the period between August 31, 1995 and August 31, 1996, the appellant was removed as an officer and director of Placid and Mr. Paulhus became the sole shareholder of Placid.

[43] As of the date of the Payment Agreement, Mr. Paulhus was not the sole shareholder of Placid. Accordingly, he must have become the sole shareholder at some time after the execution of that agreement and before August 31, 1996. In addition, in making the assessment, the Minister accepted that the appellant disposed of the Placid shares in 1996.

[44] While it is true that the appellant failed to produce corporate documentation that unequivocally demonstrated that he had transferred the Placid Shares to Mr. Paulhus, he did testify to the effect that he completed that transaction and that he had not been sued by Mr. Paulhus for failing to have done so.

[45] With due respect to the Tax Court Judge, the provisions of clause 4(a) of the Payment Agreement obligating the appellant to transfer the Placid shares to Mr. Paulhus, the Minister's acknowledgment that Mr. Paulhus became the sole shareholder of Placid and the testimony of the appellant to the effect that he honoured his obligation to transfer the shares to Mr. Paulhus all lead to the conclusion that she misapprehended the entirety of the evidence on this issue, and therefore made a palpable and overriding error in drawing the inference that the appellant did not transfer his shares of Placid to Mr. Paulhus at some time in 1996 between the date of the Payment Agreement and August 31, 1996.

[46] The next step in the analysis is to determine whether the appellant acquired any of the indebtedness of Regent to the Mortgage Holder as a result of having transferred his Placid shares to Mr. Paulhus. This requires an initial determination of the property or rights, if any, that Mr. Paulhus acquired as a consequence of having made the $450,000 payment to the Mortgage Holder. Thereafter, a determination would have to be made as to whether the appellant acquired any property or other rights as a consequence of his having transferred his Placid hares to Mr. Paulhus. This analysis appears to be similar to that which was undertaken by the courts in *McHale v. Minister of National Revenue*, 92 D.T.C. 178 (T.C.C.), *Gordon v. R.*, [1996] 3 C.T.C. 2229 (T.C.C.), *The Cadillac Fairview Corporation Limited v. Her Majesty the Queen*, 97 T.T.C. 405 (T.C.C.), (1999) 53 D.T.C. 5121 (F.C.A.) and *Dietrich, supra*.

[47] Unfortunately, it does not appear that these questions were dealt with by the Tax Court Judge. In particular, she made no findings with respect to the legal or factual issues that are raised

by these questions. This is understandable, given the Minister's argument that the appellant did not transfer his Placid shares to Mr. Paulhus. In order to deal with these questions, this Court would be put in the position of making the parties' arguments with respect to such issues, rather than assessing the disposition of them by a judge at first instance. Accordingly, I would return the matter to the Minister for redetermination and reassessment on the basis that the appellant made a payment to extinguish his liability under the guarantee by transferring his Placid shares to Mr. Paulus.

[48] In order to limit the number of matters that will need to be reconsidered by the Minister, I will deal with the remaining two requirements of subparagraph 39(1)(*c*)(iv). For this purpose, I will assume that the appellant acquired a portion of the Regent indebtedness (the "Regent Debt").

[49] First, the appellant must have disposed of the Regent Debt. Since no actual disposition has been alleged, in accordance with subparagraph 39(1)(*c*)(i), the appellant must demonstrate that subsection 50(1) applies to deem a disposition of the Regent Debt to have occurred. At this point, I would merely observe that subsection 50(1) has been found to apply in circumstances that are similar to those under consideration: see *The Cadillac Fairview Corporation Limited*, *Gordon* and *Dietrich*.

[50] Whether the reporting of the appellant in the schedule to his 1996 income tax return entitled "ABIL WORKCHART" is sufficient to constitute a valid election under paragraph 50(1)(*a*) is a matter that the Minister should also consider. Nonetheless, I would make two observations. First, there is no prescribed form for the purposes of this election. Secondly, it appears to be reasonable to

conclude that immediately after the foreclosure by the Mortgage Holder, Regent had no assets of any material value and accordingly, the Regent Debt was worthless at all times thereafter, including December 31, 1996.

[51] The second remaining requirement that must be met before the appellant can claim that a business investment loss has resulted from a disposition of the Regent Debt relates to the status of Regent at the time of the disposition of that debt. For the purpose of considering this issue, I will assume that the appellant disposed of the Regent Debt by virtue of a valid election pursuant to paragraph 50(1)(*a*). The appellant does not argue that, at the time of such disposition, Regent was a bankrupt within the meaning of subsection 128(3) or a corporation referred to in section 6 of the *Winding-up Act*, as contemplated by clauses 39(1)(*c*)(iv)(B) and (C). However, the appellant does contend that at such time, Regent qualified as a small business corporation, as contemplated by clause 39(1)(*c*)(iv)(A).

[52] The definition of small business corporation is contained in subsection 248(1). In the circumstances of this appeal, that definition must be read in light of the other two definitions: active business, which is also found in subsection 248(1), and specified investment business, which is found in subsection 125(7) (“specified investment business”). The relevant portions of those definitions are reproduced in the appendix to these reasons.

[53] The closing portion of the definition of small business corporation makes it clear that to succeed on this issue, the appellant must show that Regent met the requirements of that definition at

any time during the twelve month period that precedes the time of the disposition of the Regent Debt. A disposition pursuant to subsection 50(1) occurs at the end of the taxation year in which the debt is established to have become a bad debt. In the circumstances, this means that the appellant must establish that Regent qualified as a small business corporation at any time within the twelve months preceding December 31, 1996.

[54] To that extent, the determination of the Tax Court Judge that the provisions of paragraph 39(12)(*c*) applied to this matter is technically incorrect, since the timing issue that subsection 39(12) seeks to address does not arise in the circumstances. Nonetheless, the factual conclusions reached by the Tax Court Judge with respect to the issue of whether Regent met the small business corporation requirements are apposite.

[55] The Tax Court Judge's conclusion that the appellant failed to adduce evidence that established that Regent ever engaged in an active business, as required by paragraph (*a*) of the definition of small business corporation, is fully supportable. To succeed on this issue, the appellant needed to adduce evidence demonstrating that at some time in 1996, all or substantially all, of the fair market value of the assets of Regent were of the types contemplated by the definition of small business corporation. In addition, the appellant would have had to provide evidence that established that the principal purpose of the business of Regent was not to derive income from property, such as rent. Otherwise, the business of Regent would have been properly classified as a specified investment business and therefore could not be classified as an active business. The record does not contain any evidence that meets these requirements. Accordingly, I am of the view that the Tax

Court Judge was correct when she found that the appellant failed to establish that Regent qualified as a small business corporation at any relevant time.

[56] Because the appellant has failed to demonstrate that Regent met the definition of small business corporation at any relevant time, it follows that the appellant has not established that by virtue of the payment that he made to Mr. Paulhus, he realized a business investment loss in 1996. Accordingly, the task of the Minister will be limited to a determination of whether, as a consequence of having made that payment, the appellant realized a capital loss in 1996 and if so, the amount of any such loss.

DISPOSITION

[57] For the foregoing reasons, the appeal will be allowed, with costs in this Court and in the Tax Court of Canada, the judgment of the Tax Court of Canada will be set aside and making the decision that the Tax Court Judge should have made, the assessment will be referred back to the Minister for reconsideration and reassessment in accordance with these reasons.

"C. Michael Ryer"
J.A.

"I agree
John M. Evans J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-388-07
(APPEAL FROM A JUDGMENT OF MADAM JUSTICE SHERIDAN OF THE TAX COURT OF CANADA, DATED JUNE 5, 2007 (2007 TCC 318))	
STYLE OF CAUSE:	PETER V. ABRAMETZ v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	SASKATOON
DATE OF HEARING:	MARCH 3, 2009
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	EVANS J.A. PELLETIER J.A.
DATED:	APRIL 15, 2009

APPEARANCES:

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Lyle Bouvier	FOR THE RESPONDENT

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