Docket: 2013-374(IT)G

BETWEEN:

ESTATE OF ZOLTAN KOKAI-KUUN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 16, 17 and 18, 2015,
at Vancouver, British Columbia

Before: The Honourable Justice K. Lyons

Appearances:

Agent for the Appellant:	Anthony Kokai-Kuun
Counsel for the Respondent:	Karen Truscott

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2008 taxation year is dismissed.

There will be no order as to costs.

Signed at Edmonton, Alberta, this 31st day of August 2015.

"K. Lyons"

Lyons J.

Citation: 2015 TCC 217
Date: 20150831
Docket: 2013-374(IT)G

BETWEEN:

ESTATE OF ZOLTAN KOKAI-KUUN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] The Estate of Zoltan Kokai-Kuun ("Zoltan"), the appellant, appeals the reassessment for the 2008 taxation year made by the Minister of National Revenue under the *Income Tax Act*. The Minister included into income a capital gain in the amount of $235,755.60 (the "Gain") from the sale of 40 acres of land situated at 211 Howards Road, Vernon, British Columbia (the "Land") and disallowed deductions for interest, carrying charges, property taxes and levies pertaining to the Land.[1] The Minister also denied that capital losses were realized in 2006, or any other year, that would be available for application in 2008.

[2] The issues are:

1. Whether the Minister correctly calculated the capital gain on the sale of the Land.

2. Whether capital losses are available for application against the capital gain in 2008.

[3] Anthony Thomas Kokai-Kuun ("Anthony"), son of Zoltan, is the executor and representative of the appellant and testified on its behalf. Lise Villeneuve, former spouse of Anthony, Magali Lariviиre, spouse of Anthony, Patrick

Kokai-Kuun ("Patrick"), son of Anthony, and Louis Plazzer, solicitor for Zoltan, also testified on behalf of the appellant.

I. Background

[4] Zoltan emigrated to Canada in 1961, moved to Vancouver in 1967 and worked on various projects including several parking garages for the Park Royal Shopping Centre in Vancouver. In 1975, he established Zoltan Kuun Associates, an engineering company. He was involved in ACK Holdings Ltd. ("ACK"), Vancouver Air Maintenance Ltd ("VAM") and was involved in various capacities in 489066 BC Ltd. ("489"), 527443 BC Ltd. ("527") and North Vancouver Airlines Ltd ("NVA"). Anthony referred to NVA, 489 and 527 as related, associated and sister companies (collectively the "Companies") and described several investments at the hearing, many of which lost money.

[5] Zoltan was diagnosed with prostate cancer in 1990 and it subsequently returned. From July 2008 to November 2009, he underwent a series of treatments. On January 21 2010, he passed away.

[6] In June 2010, Anthony was appointed the executor of Zoltan's Estate.

The Home

[7] In 1967, Zoltan had purchased a house located at 1095 West 21st Street, Vancouver, for $21,000 which was the family home (the "home") until he moved to a condominium. In 1990, he used the equity by re-mortgaging the home to procure investments. Initially, he did so via Canadian Imperial Bank of Commerce ("CIBC"), his bank for many years, where he held personal and business accounts including a line of credit.

[8] In 2004, Zoltan re-mortgaged the home at the Toronto Dominion Bank ("TD") by obtaining a (home equity) line of credit "to get some cash" whilst continuing to maintain his accounts at the CIBC as at 2004 when the letter was sent to Mr. Plazzer.[2] Anthony described the line of credit as a reverse mortgage. At the time of his death, $600,000 remained outstanding. Ms. Larivière said that she was aware of the re-mortgaging of the home because she picked up the statement from CIBC and TD offered a better rate.

[9] After his father's death, Anthony was tasked with removing the debris from the home to sell it; it was sold in May 2011 for $825,000. The house had two 12-

foot rooms and a large attic. The yard, which had two eight-foot tents, had not been maintained for 10 to 15 years. The house and tents contained archived documents that had accumulated since the 1980s. The home was rat-infested. He spent six to nine months reviewing the document collection. Some documents were retained, some were recycled. Anything before 2003 was to be shredded because it was wet and moldy; the debris filled four or five dumpsters.

[10] Ms. Larivière and Patrick indicated that in the last few years Zoltan lived in the condominium because the home needed a lot of work. They each testified that when Zoltan passed away, the home was rat-infested, filled with paper (including the tents and the attic) and there was a lot of "stuff" in the basement. Patrick described the home as condemned and moldy with the living room stacked to the ceiling with a "maze" of papers.

The Land - Capital Gain

[11] In July 1992, Zoltan purchased the Land for $110,000. Anthony indicated that Zoltan used the funds from the re-mortgaged home (CIBC line of credit) to purchase the Land. In March 2008, Zoltan sold it for $370,000 but did not report the sale in filing his income tax return. Anthony did not know why the disposition was not reported and said that Zoltan had many investments including penny stocks.

[12] Anthony testified that Zoltan purchased the Land as an investment but it had not borne fruit and was listed for sale in 2002 and 2003. He was over 80 and there was less revenue in 2002.

[13] In 2004, Zoltan lost primary access to the Land and gained access through the neighbour's property. That neighbor later sold their property and the new neighbour put a chain up. He had intended to try and purchase a sliver of land at the bottom of the Land. Ms. Villeneuve indicated that Zoltan wanted to sell it because of the problems with right-of-way access.

[14] Using simple interest, Anthony estimated that during the 16 years that Zoltan held the Land, he had incurred substantial interest and carrying charges (the "interest/charges") on the money borrowed from the CIBC and TD banks under a line of credit. He described the amount totalling $135,732.80 as a conservative amount. Anthony had prepared a "Spreadsheet of costs to hold land - 4.3 and 4.4" showing that as an estimated amount plus property taxes and levies ("property taxes") totalling $14,947.71 with documents substantiating the latter. At trial, he

revised the estimate for interest/charges, based on compound interest, to $179,391 (collectively the $179,391 and property taxes comprise "the Amounts").

[15] On August 2, 2006, Zoltan had paid a 5% deposit of the purchase price of $447,195 for a condominium in North Vancouver and had used $42,000 from the line of credit, $133,000 from the sale of the Land and $250,000 was paid by Zoltan by a bank draft dated June 9, 2008.

Capital losses

[16] By the late 1980s or early 1990s, Anthony, an airline pilot, had five years' experience in the airline industry

[17] In 1994, NVA, a family-owned company, was incorporated as it saw a niche in the market and provided sightseeing tours, charters and a scheduled service flying between Vancouver Island and Tofino plus other destinations. It used a Piper aircraft with two crew and capacity for eight passengers. In 1995, 489 was incorporated and the following year, 527 was incorporated.

[18] Ms. Villeneuve was the Chief Financial Officer and confirmed that Zoltan was her former business partner in the Companies and up to 2002, the shareholders were Zoltan, Anthony and Ms. Villeneuve, each of whom held separate shareholder loan accounts in each of the Companies. She did most of the entries and reviewed the numbers and noted that she could only comment on the inputs and outputs on the reconstructed "History of Shareholder Loans" spreadsheet ("loans spreadsheet"), prepared by Anthony for the period from 1994 to 2002.[3]

[19] The reconstructed loans spreadsheet reflects many transactions spanning the period from 1994 to 2011. Under each Companies' name, there is an add/subtract column and a "Cumulative" total column reflecting amounts by year allocable to each shareholder. The "Sum for Zoltan" column from 1994 onwards reflects a running total at the end of each year comprised of contributions of loans made by him and repayments made to him by the Companies when possible. Anthony and Ms. Villeneuve each explained, in detail, the historical composition including many transactions in arriving at the sum due to Zoltan, under the latter column. Several, but not all examples of the transactions described, are referred to below.

[20] During his testimony, he described the sum due to Zoltan in 2006 from 527 as involving transactions in respect of mostly NVA and 489 before those entities were "wrapped up" in 2004. At that juncture, the total amount of shareholder loans

due to Zoltan and him from NVA and 489 were transferred to each shareholder loan account in 527. The total sum due to Zoltan that was transferred was $233,751.79 which was then reduced by a transaction involving the repayment of $15,000 to Zoltan in 2006, resulting in the sum due to Zoltan of $218,751.79. Anthony admitted that Zoltan did not report the latter amount as a capital loss in the 2006 nor any other taxation year. According to the loans spreadsheet, that amount remains unpaid as at 2011.

NVA

[21] Zoltan was the President and a director of NVA until his resignation in 2000. He also owned 12,000 shares with an initial investment of $99,830 and a subsequent contribution of $45,314. According to Schedule 50 filed with one of its initial income tax returns, Zoltan was a 60% shareholder; this later decreased to 50% when he sold 4,000 shares in 2000.[4]

[22] Ms. Villeneuve was a Director, owned 4,000 shares and invested 45,577. On July 1, 2002, she sold her shares in the Companies (and in VAM) in equal amounts to Zoltan and Anthony as a result of her separation from Anthony (they later divorced) pursuant to the Share Purchase Agreement. Zoltan and Anthony also bought part of her shareholder's loans that were owed to her by NVA and 489 in the amount $120,000, which included the payout of shareholder loans.

[23] Ms. Larivière corroborated that Zoltan was a partner and investor as he had transferred a share to her because he had succumbed to illness and needed to settle his affairs; she confirmed that NVA owed money to Zoltan because she saw a statement of the indebtedness which later transferred to one of the numbered sister companies and said that NVA ceased because it was no longer profitable.

[24] In the first year, NVA leased a Piper. In the second year, it had two Pipers and realized a small profit. It did not have enough aircrafts for the work available. According to Exhibit A-1, Zoltan's shareholder loan increased by $16,000, $8,000 and $31,000 because of the need for cash flow for the three aircrafts.

[25] The fallout from 9/11 brought significant pressures on the airline industry. Insurance premiums tripled, the value of the aircrafts went down and banks called loans.

[26] Another example of one of the transactions was the repayment by Zoltan of part of a loan from the Royal Bank (which it had called) in which he issued a

$40,000 cheque dated October 1, 2001. Consistent with the loans spreadsheet, this increased his contribution shareholder loans amount by that amount from $103,105.91 as confirmed on the Balance Sheet in 2002. A further transaction is the insurance proceeds payout which enabled NVA to repay the three shareholder loans.

[27] In 2004, Zoltan was repaid $30,000 by NVA because of proceeds of sale of another aircraft which was around the same time it was winding down.

489

[28] The sole purpose of 489 was to lease an aircraft to NVA, for insurance and liability reasons. Zoltan, Anthony and Ms. Villeneuve invested to reduce the insurance liability. Zoltan made his initial investment of $32,147 in 1995 as the majority shareholder which she confirmed related to the first aircraft. This is consistent with the financial statements which show that amount as part of the cumulative total for shareholder loans.

[29] Another transaction was a contribution by Zoltan of $109,805 in 1996 when $500,000 in cash was expended for a Beech aircraft. According to Ms. Villeneuve, the transactions in 1996 through to 1998 confirm that $147,000 was due to Zoltan (and $91,000 each due to her and Anthony) consistent with his investments and his 50% shareholding. Page 19 of the general ledger indicates the cumulative amount for Zoltan's loan in 1998 is $148,813.97 with a total for all shareholders, including Zoltan, in the amount of $331,366. Further, the summary of accounts corroborates those amounts.

[30] She further testified that the list of entries is the interest that was compounded and added but she could not recall if the interest accrued subsequently and stated that it probably did. She then testified that the difference between the $331,000 and $355,000 is interest and that the $361,557 is probably correct including repayments and interest. She then said that she could not guarantee the difference on the shareholders' loans. In 1998, $22,000 is interest and possibly interest of $6,000 for previous years. In 1999, the $23,000 is most likely interest. In 2000, $3,000 was received by Anthony and $1,000 by Zoltan. She could not recall if interest was reduced. This is confirmed on the 1999 statement showing the same amounts due to shareholders. It is likely that the amounts of $49, $63 and $109 were likely interest.

[31] With respect to 527, she said that when looking after the accounting, the Companies reported the shareholders' interest on the loans because of the financial statements. She said that the minute books should contain agreements on the loans and the amounts of the interest charged but she could not recall if T5s had been issued.

[32] The assets of NVA and 489 were sold off to pay creditors, there were no funds to pay shareholder loans (except for Ms. Villeneuve) and in July 2004, the shareholder loans due to Zoltan and Anthony were transferred from NVA and 489 and reflected in 527's shareholder loans accounts.

527

[33] 527 was incorporated for the purpose of purchasing an aircraft which was needed because of a business need to fly large loaders. Zoltan had invested $32,147, $109,805 and $5,709.15 in 1995, 1996 and 1998, respectively. By 1998, Zoltan held 14 shares which increased to 24 in 2004. By March 31, 2002, the amount of $5,808.79 was due to Zoltan.

[34] Anthony stated that a new partner was needed. Shawn Cole wanted to fly, provided funds and became the majority shareholder. Subsequently he resigned, wanted his money and Zoltan bought his shares, thereby increasing his shareholding. This was corroborated by Ms. Villeneuve who also said that Zoltan did not have a lot of money after paying out Mr. Cole.

[35] In 2003, Zoltan was repaid $115,058 because of an incident with an aircraft and pilot fill reserve; both engines cost $250,000 to overhaul. The insurance proceeds from the claim were used to repay Zoltan and other shareholders. Zoltan then reinvested $67,523 in NVA because Ms. Villeneuve and Anthony had separated and Zoltan and Anthony bought Ms. Villeneuve out of the company.

[36] In July 2004, the shareholder loans were transferred to 527 and the following month, Anthony became the sole director. According to the loans spreadsheet, by 2005, the outstanding amount due to Zoltan totalled $233,751.79 and that reduced to $218,751.79 as at 2006 after a $15,000 repayment was made to Zoltan.

[37] On June 20, 2006, Zoltan sold his 24 shares to Ms. Larivière but retained his shareholder loans.

II. Analysis

[38] All statutory references in these reasons are to the provisions of the *Income Tax Act* and for the 2008 taxation year unless otherwise stated.

Capital Gain

[39] The appellant's position is that the *Act* is meant to be a tax of true economic gains and the Canada Revenue Agency's ("CRA") refusal to allow the additional Amounts to increase the adjusted cost base ("acb") of the Land is a perverse result and a fault in the taxation system. In support of that, the appellant relied on an opinion expressed in relation to the tax policy.[5]

[40] The appellant urged the Court to find that the estimated interest/charges totalling $179,391.43 relates to the funds from the re-mortgaging of the home, initially via CIBC and later via TD, was to purchase and hold the Land as an investment. As such, the Amounts should be taken into account as part of the acb, which would reduce or eliminate the amount of the taxable capital gain.

[41] The difficulty with the appellant's stance is that it runs counter to the criteria in paragraph 20(1)(*c*) and in subsection 18(2), is inconsistent with the principle established in the decision of *The Queen v Stirling*, 85 DTC 5199 (FCA) [*Stirling*] and is based on an opinion, not law.

[42] Paragraph 20(1)(*c*) and subsection 18(2) are the relevant provisions. The applicable excerpts read:

20.(1) Notwithstanding paragraphs 18(1)(*a*), 18(1)(*b*) and 18(1)(*h*), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto

…

(*c*) **Interest** - an amount paid in the year or payable in respect of the year … pursuant to a legal obligation to pay interest on

(i) borrowed money used for the purpose of earning income from a business or property …

…

18.(2) Notwithstanding paragraph 20(1)(*c*), in computing the taxpayer's income for a particular taxation year from a business or property, no amount shall be deductible in respect of any expense incurred by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,

(*a*) interest on debt relating to the acquisition of land, or

(*b*) property taxes (not including income or profits taxes or taxes computed by reference to the transfer of property) paid or payable by the taxpayer in respect of land to a province or to a Canadian municipality,

unless, having regard to all the circumstances (including the cost to the taxpayer of the land in relation to the taxpayer's gross revenue, if any, from the land for the particular year or any preceding taxation year), the land can reasonably be considered to have been, in the year,

(*c*) used in the course of a business carried on in the particular year by the taxpayer, …

(*d*) held primarily for the purpose of gaining or producing income of the taxpayer from the land for the particular year, …

[43] Applying the criteria in paragraph 20(1)(*c*) that to be deductible the mortgage interest must be paid or payable on borrowed money used for the purpose of earning income from business (not in issue in this appeal) or from property. For the reasons that follow, the evidence falls far short of that.

[44] The evidence established that the Land was purchased as an investment to sell it at a higher price because of its proximity to a golf course. Anthony admitted that during the 16 years that Zoltan owned it, he did not use it in business nor produce income from it. Rather, Zoltan and Agnes, his spouse since 1997, visited the Land once or twice per year.[6] Similar to Anthony's testimony, Ms. Villeneuve, Ms. Lariviиre and Patrick also said that the Land was purchased for investment purposes with the hope that it would increase in value. Patrick said that Zoltan had described it as a "gold mine."

[45] In *Stirling*, the Federal Court of Appeal held that interest on money borrowed to acquire property for the purpose of making a capital gain, rather than an income-earning purpose, is precluded, on disposition, from forming part of the cost of the property and cannot be added to the acb.

[46] I find that the purpose of the money borrowed to acquire the Land was not to earn income from a business or property and the appellant fails to meet the criteria under paragraph 20(1)(*c*) in that there was no evidence of an income-earning purpose in order that the interest/charges could be deducted.

[47] While that basis alone is suffice, the other difficulty facing the appellant is that it was not possible to identify from either line of credit the funds allocable for the borrowing pertaining to purchasing and holding the Land. Anthony used the best estimate he could, as well as an estimate of the interest rate, based on what he could piece together on information that he was able to locate but it was not based on interest actually paid.[7]

[48] Zoltan was involved in several business endeavours and many investments including penny stocks would have required financing. Some of Zoltan's business endeavours included cash infusions for NVA and 489 to refurbish planes, payouts to Ms. Lariviere and Mr. Cole for their shares, the dispute with Bombardier and the fallout from 9/11 with the pressures from the banks, skyrocketing insurance premiums and the reduction in value in the planes. No doubt the various financial pressures culminated in NVA and 489 ceasing to operate. After Zoltan paid Mr. Cole, Zoltan had little money left and his letter to Mr. Plazzer in 2004 refers to a need for cash. I reject Anthony's evidence that the estimated interest/charges

amounts to $179,391.43 as allocable to the Land, which includes the lower amount shown on the costs spreadsheet as claimed in the Notice of Appeal. I infer as more plausible that Zoltan used the funds from the remortgaging for multi-purposes, including possibly amounts allocable to the Land, to deal with the pressures especially in 2002 at a time when less revenue was available. However, it was impossible from the evidence to ascertain what amounts of interest, if any, are allocable to the Land.

[49] Subsection 18(2) further restricts mortgage interest and property taxes for undeveloped land used in the course of business in the particular year by the taxpayer and held primarily for the purpose of gaining income of the taxpayer from the land. Albeit I accept that the property taxes appear to have been paid, this does assist the appellant because the evidence was that Zoltan did not use the Land in business and no income was produced from it.[8] Although Anthony alluded to an intent to improve the Land, no improvements were made even though it had been held for many years and the Land had not been subdivided. I find that the Land cannot reasonably be considered to have been used in the course of a business nor held primarily for the purpose of gaining or producing income in the particular year.

[50] Since the Minister's assumptions in paragraphs 11 (b) to (d) and (e) of the Reply remain undisturbed, and the Land remained vacant without any income-earning purpose, the combination of paragraph 20(1)(*c*) and subsection 18(2) ultimately precludes the appellant from adding the Amounts to the acb.

Capital Loss

[51] The appellant's position is that the Minister's assumptions have been demolished and it is entitled to claim the capital loss in the amount of $218,751.79, based on the testimony and Exhibits A-3 to A-8 (the general ledger, financial statements and other documentation), relating to investments by Zoltan in the Companies and the shareholder loans owed to him became uncollectible in 2006.[9] While Zoltan could and should have claimed the capital loss in 2006, he should not be penalized. Consequently, the appellant is entitled to claim the capital loss in the 2008 taxation year pursuant to paragraph 38(*b*) and section 39 with respect to that amount which became uncollectible.[10]

[52] Based on the voluminous amount of documentary evidence, supported by the witness testimony, I agree with the appellant and find that the Minister's assumption that Zoltan was not a shareholder has been demolished.

[53] A fundamental difficulty facing the appellant is that before the capital loss provisions in sections 38 and 39 can operate, it must satisfy the conditions in the governing paragraph 50(1)(*a*), as contended by the respondent, which deals with debts established to have become bad. Paragraph 50(1)(*a*) reads:

> 50.(1) For the purposes of this subdivision, where
>
> (a) a debt owing to a taxpayer at the end of a taxation year (other than a debt owing to the taxpayer in respect of the disposition of personal-use property) is established by the taxpayer to have become a bad debt in the year,
>
> …
>
> and the taxpayer elects in the taxpayer's return of income for the year to have this subsection apply in respect of the debt or the share, as the case may be, the taxpayer shall be deemed to have disposed of the debt or the share, as the case may be, at the end of the year for proceeds equal to nil and to have reacquired it immediately after the end of the year at a cost equal to nil.

[54] Under paragraph 50(1)(*a*), the conditions that must be satisfied, relating to the debt, before losses can be claimed are:

1. it must be owing to a taxpayer at year-end;

2. it was established that it became bad during the year; and

3. the taxpayer elects in his return of income for the year to have the subsection apply.

[55] In *Harris v The Queen*, 2005 TCC 501, 2005 DTC 1179, Sheridan J. found that the failure by Ms. Harris to file an election in her return was fatal to her eligibility to be able to claim $15,000 invested in a business as well as another loan in respect of shares. At paragraph 3, the Court stated "To be eligible to claim either of the amounts as a deduction, Mrs. Harris must have complied with subsection 50(1) of the *Income Tax Act*."[11]

[56] In the present case, a letter dated July 1, 2006, was sent to Zoltan by 489, signed by Anthony, stating that all of the assets of 489 had been "liquified," the proceeds were used to pay its debts and those of VAM and NVA. Therefore, 489 was not in a position financially to repay his shareholder loan in the amount of $162,372.80.

[57] It is undisputed that in the 2006 taxation year Zoltan did not claim capital losses of any investments in the Companies in his income tax return nor was there evidence he had claimed such losses in any other taxation year. Anthony was unsure why he did not claim the losses and said that he had invested in ACK and lost money on other investments. In 2006, Zoltan was repaid $15,210 resulting in shareholder's loans owed to him in the amount of $218,757 which continued to remain outstanding when he died. Anthony indicated that the remaining debt and shareholder's loans were placed into 527 and are still active at the time of the hearing.

[58] Given the appellant failed to make an election in 2006, or any other year, as required under paragraph 50(1)(*a*), the appellant cannot succeed as it is imperative to claim that a capital loss is available for application in 2008.[12]

[59] While I accept Anthony's and Ms. Villeneuve's testimony that Zoltan had invested some funds and received repayments over the course of his involvement with the Companies, I do not accept, despite Anthony's valiant efforts, that the amount of $218,751.79 was due to Zoltan on the loans spreadsheet in 2006 because it is based on the best reconstructed information that he could put together from the evidence he could locate. I accept the testimony of Anthony, Ms. Larivière and Patrick that the home was full of moldy paperwork and that there was an infestation problem. Anthony said that the documentation had already been destroyed when the CRA had asked for it, thus finding bank statements and cheques was not possible and an unrealistic request from the CRA especially when Zoltan was deceased.

[60] Whilst some numbers on the reconstructed loans spreadsheet reconciled with some information, such as the general ledger that was available for only some years, some explanations placed into question the accuracy and reliability of the amounts on the loans spreadsheets. For example, Anthony testified that Zoltan had received $30,000 from a bank in 2003, but then wondered if it was an error, queried if it was another amount and questioned which account it belonged to.[13] There was also some confusion relating to interest and whether the amounts reflected on the loans spreadsheet were due to Zoltan. There was testimony that Zoltan assisted family and friends but did not charge NVA interest because of the burden on NVA which at times needed cash infusions as did 489. However, Ms. Villeneuve said that interest amounts were blended in and repayments were recycled and thus reflected on the loans spreadsheet but she seemed at times hesitant and went back and forth on some aspects. Absent other evidence such as

bank statements and cheques, I do not accept the loans spreadsheet as having shown a flow of funds to establish the amount owed to Zoltan.

[61] I find that the appellant's failure to satisfy the condition to make an election in 2006, or any other year, as required under paragraph 50(1)(*a*) is fatal to its claim to avail itself of a capital loss for application in 2008 and it cannot succeed.

Fairness Relief

[62] Since the appellant failed to elect in the return to claim the capital loss, its remedy is to file an application to the Minister under section 220 of the *Income Tax Act* which allows the Minister discretion to extend the time for a taxpayer to apply for a late-filed election (and other matters dealing with penalties and interest are also available on a discretionary basis).

[63] The appellant described his dealings with Ms. Tran, a CRA official, as difficult and frustrating. In his view, refiling was not an option because the CRA would not accept the evidence as sufficient. He said that in July 2011, he became aware that the CRA was planning to reassess the appellant for capital gains. He summarized his communications with the CRA officials between that date and up to November 2012 and expressed consternation at the CRA's requests for documentation including cancelled cheques and bank statements and said that inadequate time extensions had been granted to him but records were unavailable because he had thrown away Zoltan's belongings.[14]

[64] According to the evidence, by letter dated November 23, 2011, the CRA notified the appellant that its request to apply a capital loss was disallowed because Zoltan had not reported any capital losses in his returns in 2008, nor any other year and inadequate documentation had been provided to establish that capital losses had been realized. Further, "An amended return may be filed for that year along with a request of a late election as per subsection 220(3.2) of the *Income Tax Act*."

[65] On December 5, 2011, the Minister reassessed. The appellant objected and the Minister issued a Notice of Confirmation.

[66] In response, by letter dated August 27, 2012, Anthony informed the CRA that:

> 8. Capital Losses from previous years of $162,372.80. My accountant and I will file a Form T1 Adjustment Request for my Father's 2006 taxation tax year along

> with form RC4288 (Request for Taxpayer Relief, re: Section 220(3.2)) in order to have this loss accounted for. We will apply under subsection 220(3.2) for the extension for making an election under subsection 50(1). If you could please provide information to assist us with this process that would be much appreciated. In order to do this we will also require a copy of his 2006 return since to date I have not been able to find a copy in his archives.

[67] Despite this, no application was made by the appellant to the Minister under the fairness relief provisions. This Court has no jurisdiction with respect to those provisions.

[68] No doubt Zoltan was a man of exemplary character and a visionary with an entrepreneurial spirit as described by Anthony. There is also no doubt that Anthony had a daunting task and made a concerted effort, as best he could, under very challenging circumstances in organizing a voluminous amount of information and is to be commended. Despite those efforts, the appellant failed to meet the statutory requirements.

III. Conclusion

[69] For the foregoing reasons, I conclude that the Amounts cannot be added to the acb of the Land and the Minister correctly included a capital gain of $235,755.60 pursuant to paragraph 39(1)(*a*), resulting in a taxable capital gain of $117,877.80 pursuant to paragraph 38(*a*) of the *Act* . Further, having failed to make an election, the appellant did not realize capital losses with respect to investments in the Companies in the 2006 taxation year, or any other taxation year, pursuant to paragraph 39(1)(*c*) of the *Act* (nor net capital losses pursuant to section 111) available to be applied to the 2008 taxation year.

[70] The appeal is dismissed.

[71] The appellant spent a significant amount of time and effort providing that Zoltan was a shareholder of each of the Companies. It was clear from the documentation that he was. It could have been conceded by the respondent in advance of the hearing. As such, there will be no order as to costs.

Signed at Edmonton, Alberta, this 31st day of August 2015.

"K. Lyons"

Lyons J.

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[1] The Minister reassessed on December 5, 2011 and the Gain resulted in a taxable capital gain in the amount of $117,877.80. This is arrived at by reducing the proceeds of $370,000 by the purchase price of $110,000, allowing expenses of $24,244 to increase the adjusted cost base and divide by 50%.

[2] Exhibit A-12 - Letter from Zoltan dated April 11, 2004 to Louis Plazzer, who did some legal work for Zoltan, recalled receiving the letter, confirmed that there was a re-mortgaging of a larger amount but was unaware what was done to the Land and that it was listed for sale. He presumed that Zoltan intended to use the Land for personal and business.

[3] Exhibit A-1 - Positive amount indicates that a loan was given by a shareholder to the company. Negative amount indicates a repayment to the shareholder.

[4] The Companies' accountant had made errors in describing some of the shareholdings relating to Zoltan.

[5] Hache opines in a Canadian Tax Foundation publication that the policy of capitalization should be denied only if there is personal consumption.

[6] Exhibit A-17 shows the mortgage Deposit Account History, page 1, on April 8, 2000 and $441,336.57 was the payout of the CIBC mortgage by TD and then re-mortgaged. Anthony provided extensive details relating to the line of credit and Ms. Larivière said that she saw the statements of the mortgage. The amount outstanding to the TD on the line of credit per Exhibit A-17 is $602,636.01 in May 2011. Anthony said that this shows that Zoltan had compound loans where interest only is added to the annual balance for 15 years in 1992 through to 2008 and totals $179,391. If placed in two interest-bearing accounts and interest and financed at the rate of 4%, it would be $289,000.

[7] Exhibits A-12 and A-16, Tab 25, page 4.3 show that Zoltan paid $14,974.71 in property taxes.

[8] In 1992, his former spouse died after a debilitating illness.

[9] Exhibits A-3 to A-9, A-12, A-13 and A-16 – Exhibit A-3 - Excerpts from the 489 minute book and share certificates; Exhibit A-4 – Financial Statements 2 to 11 for 489; Exhibit A-5 – No. 12 containing Certificate of Incorporation and various documents relating to

NVA; Exhibit A-6 – 13 to 22 various documents with respect to NVA; Exhibit A-7 – Document 23 Certificate of Incorporation and various documents relating to 527443 BC Ltd.; Exhibit A-8 – Document 24 to 38 Financial Statements and other documents relating to 527443 BC Ltd.; Exhibit A-9 - #40 General ledger account and copy of cheque with notations; Exhibit A-12 - #43 Letter dated April 11, 2004; Exhibit A-13 - #44 division of shares and share purchase agreement and Exhibit A-16 - Respondent's Book of Documents.

10 Paragraphs 38(*a*) and 39(1)(*a*) and (*c*) and subsection 111(1) provide:

> 38. For the purposes of this Act,
>
> (*a*) subject to paragraphs (*a.1*) to (*a.3*), a taxpayer's taxable capital gain for a taxation year from the disposition of any property is ½ of the taxpayer's capital gain for the year from the disposition of the property;
>
> …
>
> 39. (1) For the purposes of this Act,
>
> (*a*) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(*a*) and without reference to paragraph 3(*b*), be included in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer …
>
> …
>
> (*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 (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.

…

111.(1) **Losses deductible** – For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's

…

(*b*) **net-capital losses** – net capital losses for taxation years preceding and the three taxation years immediately following the year;

11 In that case, the appeal was allowed with respect to subsection 163(2) penalties only. In the present case, no penalties have been levied against Zoltan.

12 Anthony had misconstrued paragraph 50(1)(*a*) and tried to argue that there was a debt relating to the share and a bankrupt corporation and inadvertently referenced the conditions in paragraph 50(1)(*b*) as applicable to his situation. However, that paragraph and those conditions have no bearing on the issue in this appeal as we are not dealing with a debt of the share. We are dealing with money loaned to the Companies recorded in the shareholder loan accounts. We are not dealing with conditions in subparagraphs 50(1)(*b*)(i), (ii) or (iii) and clauses (A) to (D) apply to shares in paragraph 50(1)(*b*).

13 The total was $47,315.07 – Exhibit A-4. This shows that Zoltan paid $30,000 and is related to 489 as it is shown as a credit in 489 and debit to Zoltan's account in that amount.

14 On July 19, 2011, the appellant refuted the amount of $260,000 plus that the CRA proposed to assess as a capital gain in its letter of July 13, 2011. It asserted that costs relating to holding the Land and capital losses (of $162,372.80) exceeded the proposed capital gain. On November 23, 2011, the CRA responded without addressing all the expenses. On December 5, 2011, the Minister reassessed and the appellant responded on December 12, 2011. On December 23, 2011, Anthony asked the CRA for an extension. On January 18, 2012, the CRA appraisal division indicated it was planning to review the file. On July 18, 2012, the CRA sent a letter to the appellant. On August 27, 2012, the appellant sent a letter to the CRA refusing the CRA's position and indicated there was inadequate time. On October 1, 2012, he sought legal advice. On October 5, 2012, the deadline was extended. On November 6, 2012, the CRA issued a Notice of Confirmation. On November 14, 2012, he consulted with an accountant. On February 4, 2013, he filed an appeal with this Court. He said that he had a few more exchanges with the CRA in July to September 2013.

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COURT FILE NO.:	2013-374(IT)G
STYLE OF CAUSE:	ESTATE OF ZOLTAN KOKAI-KUUN and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 16, 17 and 18, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice K. Lyons
DATE OF JUDGMENT:	August 31, 2015

APPEARANCES:

Agent for the Appellant:	Anthony Kokai-Kuun
Counsel for the Respondent:	Karen Truscott

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

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