

[OFFICIAL ENGLISH TRANSLATION]

2002-488(IT)I

BETWEEN:

STEVEN MILLER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 20, 2002, at Trois-Rivières, Quebec, by

the Honourable Judge Alain Tardif

Appearances

Agent for the Appellant: Jean Fournier

Counsel for the Respondent: Alain Gareau

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1997 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 18th day of December 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 9th day of February 2004.

Sophie Debbané, Revisor

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Date: 20021218
Docket: 2002-488(IT)I

BETWEEN:

STEVEN MILLER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Tardif, J.T.C.C.

[1] This is an appeal concerning the 1997 taxation year.

[2] The issue is whether, in computing the Appellant's income, the Minister of National Revenue (the "Minister") correctly disallowed a deduction of \$12,145 for a business investment loss for the 1997 taxation year.

[3] In making the reassessment for the year at issue, the Minister assumed the following facts:

[TRANSLATION]

- (a) the appellant is the spouse of Andrée Jean, who was the sole shareholder of the company "Les Enfants de Victor & Ann inc.";
- (b) the company "Les Enfants de Victor & Ann inc." operated a boutique that sold children's clothing;

- (c) the company “Les Enfants de Victor & Ann inc.” ceased its activities on May 18, 1997, and the company was dissolved on July 17, 1997;
- (d) the liquidation balance sheet for the company “Les Enfants de Victor & Ann inc.” at May 18, 1997, showed the following liabilities, *inter alia*:
- | | | |
|------|------------------------|------------------------|
| (i) | bank loan | \$12,145 |
| (ii) | owing to an individual | <u>\$11,000</u> |
| | | <u>\$23,145</u> |
- (e) for the 1997 taxation year, the appellant claimed a deduction of the gross amount of \$23,145 for a business investment loss, which can be broken down as follows:
- | | | |
|------|---|------------------------|
| (i) | advance–company
“Les Enfants de Victor & Ann inc.” | \$11,000 |
| (ii) | suretyship – line of credit
“Les Enfants de Victor & Ann inc.” | <u>\$12,145</u> |
| | | <u>\$23,145</u> |
- (f) the claim for the amount of \$12,145 referred to in paragraph (e) is derived from the following:
- (i) a contract of suretyship dated February 20, 1995, in which the appellant guaranteed a line of credit up to a maximum of \$40,000 by the National Bank of Canada for the company “Les Enfants de Victor & Ann inc.”,
- (ii) confirmation on May 29, 1997, by the National Bank of Canada of the receipt of the amount of \$12,145.50 paid by the appellant, a release for which was given for the endorsement on the line of credit in the name of the company “Les Enfants de Victor & Ann inc.”;
- (g) the deduction for the \$12,145 loss in the 1997 taxation year was disallowed for the following reasons:
- (i) the suretyship was not given in order to earn income,
- (ii) the appellant was not a shareholder of the company “Les Enfants de Victor & Ann inc.”.

[4] These facts summarize the situation that gave rise to the assessment. In my view, the text of the contract of suretyship should be reproduced: (Exhibit A-8)

[TRANSLATION]

CONTRACT OF SURETYSHIP entered into at Drummondville, in the judicial district of Drummond, province of Quebec, on this 20th day of February 1995.

BETWEEN: LES ENFANTS DE VICTOR & ANN INC., a corporation duly incorporated according to the *Companies Act* of Quebec, having its head office at 205 Lionel Groulx, in the city of Drummondville, in the judicial district of Drummond, province of Quebec, represented by Andrée Jean, its president, duly authorized for the purposes hereof pursuant to a borrowing by-law;

HEREINAFTER CALLED "**THE BORROWER**";

AND: STEVEN MILLER, a physician, domiciled and residing at 205 Lionel-Groulx, in the city of Drummondville, in the judicial district of Drummond, province of Quebec, J2C 6E1

HEREINAFTER CALLED "**THE SURETY**".

The parties declare as follows:

WHEREAS THE BORROWER has, on February 20, 1995, taken out a line of credit with the National Bank of Canada, a corporation having its head office in the city of Drummondville, province of Quebec (hereinafter called "**THE LENDER**");

WHEREAS the said authorized line of credit amounts to \$40,000 DOLLARS (hereinafter designated "**THE LINE OF CREDIT**");

WHEREAS THE SURETY has guaranteed the **LINE OF CREDIT** to a maximum of \$40,000 and in return for proper consideration;

WHEREAS IN ADDITION the parties hereto have agreed to reduce the terms and conditions of the said suretyship to a writing under private seal; and

WHEREAS the parties want this writing to be interpreted as a contract by mutual agreement.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1.00 CONSIDERATION

THE BORROWER promises to pay THE SURETY, in consideration of his suretyship for the LINE OF CREDIT or a part thereof, an annual rate of interest equal to ONE HALF OF ONE PER CENT (0.5 per cent) on the amount of the LINE OF CREDIT guaranteed. The interest shall be calculated annually and shall be payable on the last day of January of every year.

2.00 FAILURE OF THE BORROWER

Where the failure of THE BORROWER results in an obligation for THE SURETY to make the payment for THE LINE OF CREDIT on behalf of THE BORROWER, THE SURETY shall be subrogated to the rights of THE LENDER in order to recover the amounts advanced to THE BORROWER.

3.00 END OF THE CONTRACT

This contract shall end upon the extinction of THE LINE OF CREDIT of THE BORROWER or the extinction of the obligations of THE SURETY to THE LENDER.

4.00 TRANSMISSION

This contract is binding on and is enforceable against the Parties and their legal representatives.

IN WITNESS WHEREOF, THE PARTIES HAVE SIGNED AT DRUMMONDVILLE, THIS 20TH DAY OF FEBRUARY 1995.

THE BORROWER

(Andrée Jean)

THE SURETY
(Dr. Steven Miller)

[5] The issue of whether there is a relationship between the taxpayer claiming a business investment loss and the potential earnings of the debtor company is a question of fact that must be evaluated on a case by case basis.

[6] In the case at bar, the suretyship provided for an essentially symbolic rate of interest. The appellant's object and purpose were clearly not to obtain future profits; it basically amounted to indirect financial support for the sole purpose of enabling his spouse to start up her small business.

[7] The Honourable Judge Sarchuk of this Court provided a good summary of the situation in a similar case in *Lowery v. M.N.R.*, [1986] T.C.J. No. 740 (Q.L.):

[TRANSLATION]

...

The court concludes that the appellant did not incur the guarantee for the purpose of gaining or producing income from a business or property. The losses are therefore not deductible. The appellant did not act with a business purpose. According to the court, it is not sufficient to make a general allegation that the appellant anticipated some participation in the profits of his son's business at some unstated time in the future and on that basis to argue that some consideration for the guarantee existed. There was no agreement, oral or written, setting out the terms and conditions of the appellant's participation in the future profits of the business. Moreover, when the appellant was called upon by the bank to pay the debt, none of the normal commercial considerations were given by the appellant to collecting the debt. The court is of the opinion that the risk in guaranteeing the debt had its justification only in the fact of the father/son relationship. For these reasons, the court dismisses the appeal.

...

[8] In the case at bar, the appellant showed definite interest in the success of his spouse's new business. This involved acts and supportive behaviour in respect of his spouse's initiative. It in no way involved a business decision for the purpose of

directly receiving income or dividends—at least in the light of the evidence submitted.

[9] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 18th day of December 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 9th day of February 2004.

Sophie Debbané, Revisor