Docket: 2006-1125(IT)G

BETWEEN:

MICHAEL R. KAISER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on January 11, 2008, at Calgary, Alberta

By: The Honourable Justice Campbell J. Miller

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | Douglas Roberts |
| Counsel for the Respondent: | Margaret McCabe |

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**JUDGMENT**

The appeals from the reassessments made under the *Income Tax Act* for the 1999 and 2000 taxation years are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is not taxable on any amounts arising as a result of the journal entries made in January 2003.

Further, the parties have agreed that the Appellant's 2000 taxable income is to be reduced by a further $2,116 to take into account the impact of the $44,196 advance made by the Appellant to Innovage Technologies Inc.

Costs are awarded to the Appellant.

Signed at Ottawa, Canada, this 6th day of February, 2008.

"Campbell J. Miller"

Miller J.

Citation: 2008TCC84
Date: 20080206
Docket: 2006-1125(IT)G

BETWEEN:

MICHAEL R. KAISER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Miller J.

[1] This case highlights the difficulties that can arise in applying provisions of the *Income Tax Act* (the "*Act*") to transactions intended to be effective retroactively. Mr. Kaiser directed some after-the-fact accounting due to the breakdown of a common-law relationship with Christina Seymour. This involved deciding in 2003 to make certain journal entries in two companies of which he and Christina were shareholders, Innovage Technologies Inc, ("ITI") and Innovage Microsystems Inc., ("IMI"). The journal entries were to effect a shift of certain debts in 1999 and 2000 owed by the companies to Mr. Kaiser to Ms. Seymour. The Respondent assessed Mr. Kaiser on the basis that such amounts were to be viewed as a transfer of capital property (the debt owed to Mr. Kaiser) from Mr. Kaiser to Ms. Seymour effective in 1999 and 2000, and the combination of section 73 of the *Act* and the attribution rules in section 74.2 of the *Act* would therefore operate to bring the capital gains arising on the disposition of the debt by Ms. Seymour into Mr. Kaiser's hands.

[2] At trial the Respondent also argued that such amounts represented shareholder loans to Mr. Kaiser alone, and any reduction of such loans was a disposition of capital property in his hands, resulting in a taxable capital gain to him only.

[3] Mr. Kaiser's position was that no such amounts were actually withdrawn in 1999 and 2000, or alternatively, that there was a transfer of capital property from Mr. Kaiser to Ms. Seymour, but it was not effective in 1999 and 2000, but only in 2003, at a time when Mr. Kaiser and Ms. Seymour were separated, so attribution rules could not apply.

[4] The parties provided an Agreed Statement of Facts which I have attached as Schedule "A" to these Reasons. I will however summarize the significant facts as follows:

I. Mr. Kaiser and Ms. Seymour were common-law spouses in 1999 and 2000, but ceased that relationship in 2001.

II. Mr. Kaiser and Ms. Seymour were both shareholders of ITI and IMI (the "Companies").

III. Mr. Kaiser acquired shareholder's loans of other shareholders in the Companies in 1996, representing $1,974,675 of loans in ITI for $4 and representing $1,677,951 of loans in IMI for $4 (the "Loans").

IV. Both Mr. Kaiser and Ms. Seymour withdrew amounts from the Companies in 1999 and 2000, which were allocated and debited to their respective shareholder loan accounts in draft financial statements prepared in the fall of 2002.

V. In January 2003, Ms. Seymour's counsel claimed Ms. Seymour was entitled to 50% of the Loans by virtue of certain matrimonial property rights.

VI. As a result, Mr. Kaiser, as a director of the Companies, directed the Companies to make journal entries which debited Mr. Kaiser's shareholder loan account and credited Ms. Seymour's shareholder loan

account in the following amounts:

| 1999 | 2000 |
|---|---|
| ITI - $74,149 | $240,660 |
| IMI - $87,800 | $23,419 |

VII. The Companies and Mr. Kaiser filed their 1999 and 2000 tax returns in February 2003, after the journal entry adjustments. Mr. Kaiser's returns were nil returns.

Issues

[5] The parties framed the issues differently. The Respondent premises its issue on the understanding that Mr. Kaiser withdrew the shareholder loans at issue (i.e, the amounts subject to the journal entry decreases) from both Companies in 1999 and 2000. The Respondent therefore states that the issue is whether the Minister was correct to reassess Mr. Kaiser:

(a) to include in his income tax for capital gains the amounts of $90,089.24 and $128,678.34 as a result of the disposition of capital property, being the withdrawals from the shareholder loan accounts of ITI and IMI, respectively in the 1999 taxation year; and

(b) to include in his income tax for capital gains the amounts of $257,363.44 and $80,813.59 as a result of the disposition of capital property, being the withdrawals from the shareholder loan accounts of ITI and IMI, respectively in the 2000 taxation year.

[6] I note that this does not reflect the Canada Revenue Agency's ("CRA") assessing position as set forth in its letter of November 3, 2005 where CRA accepted there was a transfer of property, being the loans, from Mr. Kaiser to Ms. Seymour, but effective in each of 1999, 2000 and 2001. CRA applied subsection 73(1) and section 74.2 of the *Act* such that any gain arising from Ms. Seymour's adjustment to the shareholder loan account would be attributed back to Mr. Kaiser in 1999 and 2000, as he and Ms. Seymour were still together. There would be no attribution in 2001 as they had separated by that point.

[7] The Appellant's position is that the journal entry decreases did not involve any amounts actually being withdrawn and therefore did not trigger any disposition

of capital property as contemplated by the Respondent. The Appellant goes on to frame the issues as follows:

> Whether the decreases in the balances owing by ITI and Innovage Microsystems Inc. ("IMI") (collectively the "Corporations") to the Appellant under the Appellant's shareholder loan accounts with the Corporations (collectively the "Loans") resulting from:
>
> 1. the following journal entries made to the Corporations' accounts on or after January 31, 2003, but purporting to be effective as of October 31, 1999, ought to be included in calculating the amount of capital gains realized by the Appellant in 1999:
>
>    (a) a debt of $74,149 against the Appellant's shareholders loan account with ITI and a corresponding credit to Ms. Seymour's shareholders loan account with ITI (the "1999 ITI Journal Entry"); and
>
>    (b) a debt of $87,800 against the Appellant's shareholders loan account with IMI and a corresponding credit to Ms. Seymour's shareholders loan account with IMI (the "1999 IMI Journal Entry"),
>
>    (collectively the "1999 Journal Entries"); and
>
> 2. the following journal entries made to the Corporation's accounts on or after January 31, 2003, but purporting to be effective as of October 31, 2000, ought to be included in calculating the amount of the capital gains realized by the Appellant in 2000:
>
>    (c) a debt of $240,660 against the Appellant's shareholders loan account and a corresponding credit to Ms. Seymour's shareholders loan account (the "2000 ITI Journal Entry"); and
>
>    (d) a debit of $23,419 against the Appellant's shareholders loan account and a corresponding credit to Ms. Seymour's shareholders loan account (the "2000 IMI Journal Entry"),
>
>    (collectively the "2000 Journal Entries").

[8] The question that begs to be answered is whether the journal entries made in 2003 are effective for tax purposes in 1999 and 2000. If they are, then one of two interpretations follow, both of which lead to the journal entry amounts constituting a capital gain in Mr. Kaiser's hands. The first interpretation, suggested by the Crown, is that because only Mr. Kaiser could withdraw funds from the shareholder loan accounts, only he can be found to have withdrawn funds in 1999 and 2000. The second interpretation is that the journal entries constituted a transfer of part of

the loans from Mr. Kaiser to Ms. Seymour, which she immediately redeemed. Section 73 of the *Act* would operate such that the transfer would be at Mr. Kaiser's cost, a nominal amount, and when Ms. Seymour coincidentally redeemed the loans as a result of the journal entries, she triggered a capital gain, attributable back to Mr. Kaiser as a common-law spouse pursuant to section 74.2 of the *Act*. This latter interpretation would be my preferred interpretation if I were to find the journal entries were effective for tax purposes in 1999 and 2000.

[9] In determining the timing of the effectiveness of the journal entries, I must first address the question of whether Mr. Kaiser is estopped from arguing the journal entries were not effective in 1999 and 2000. Both parties relied on Chief Justice Bowman's comments in *King v. R.*, [1] to address this matter of estoppel. In *King*, accounting entries were made in 1988 to effect a credit to Mrs. King's shareholders loan account in 1987. Mrs. King filed as though the credit was made in 1987 and the assessor assumed as much. At the time of trial the 1988 taxation year was statute-barred. Chief Justice Bowman stated:

> … Even if I had held that a capital gain had been realized, but that it was attributable to Mr. King under section 74.2, it would mean putting the taxable capital gain into a statute-barred year of Mr. King. To do so would not disturb me particularly in a case where the Minister had a choice between two years and deliberately and knowingly chose one that turned out to be the wrong one. Here however the Minister acted on the basis of a representation of fact by the appellant in her 1987 tax return that the relevant transactions, whatever their ultimate legal effect, occurred in 1987. While it is trite law that there is no estoppel against the terms of a statue, we have here a classic case of estoppel with respect to a matter of fact. The Crown sometimes argues - - erroneously in my view - - that whenever a taxpayer changes his or her position from that taken in a return of income or in some other document he or she somehow "estopped". Estoppel by conduct is a much narrower concept. It is a rule that prohibits a person who has made a statement of fact upon which another party had relied and has acted to his or her detriment from denying the truth of that statement as against that other party. That is precisely what happened here. The time at which an event takes place is purely a matter of fact and the Minister, in assessing 1987 on the basis of the statement that the events took place in 1987 and in not assessing 1988, acted in reliance on that statement to his detriment. Accordingly the appellant is estopped from now taking the position that the taxable event took place in 1988.[2]

[2] I should not wish to be taken as condoning the practice of some accountants of recording, by making "year-end adjustments", as transactions in a prior year events that were not even thought

[1] 95 DTC 11.

> of in that prior year. This case is somewhat unusual in that it gives rise to a pure example of estoppel by conduct. There is a difference between reflecting, after a year-end, a quantification of taxable benefits for a prior year of manager/shareholder of a corporation - - a practice albeit somewhat artificial has at least the virtue of long-standing entrenchment and apparent acceptance by the tax department - - and creating out of airy nothing transactions in a prior year that in that year were not even a gleam in anybody's eye. It never ceases to amaze me how some accountants think they can retroactively create reality by a subsequent moving of figures around on a piece of paper.

[10] At the time Mr. Kaiser directed the journal entries in January 2003, he did not believe, as evident from filing a nil tax return, that he was subject to tax on amounts he actually withdrew in 1999 and 2000 as against his shareholder's loan, let alone any amounts that were the subject of the journal entries. It appears neither did Ms. Seymour's counsel. In a letter dated January 10, 2003, Mr. Dunphy, acting for Ms. Seymour, wrote to the chartered accounting firm of Czechowsky and Graham:

> Further, it is our position that the shareholder's loans of Michael Kaiser that are in a credit balance are matrimonial property and belong 50% to Christina Seymour and accordingly, we are of the view that you may file the tax return of Christina Seymour without having regard to any debit balance in her shareholder's loan account because we are of the view that it is set-off by the credit balance in the other loan.

[11] So it is not Mr. Kaiser's filing of a return that can be the conduct, or statement of fact, upon which CRA relied, as a nil return is not indicative that the journal entries were intended to be effective in 1999 and 2000. The conduct, for estoppel purposes, can only be the Companies' financial statements that reflect the journal entries, that CRA received in 2003. Mr. Kaiser's counsel argues that these are not Mr. Kaiser's statements, and therefore estoppel is not applicable. Yet clearly, from a review of the minutes authorizing the journal entries, it was Mr. Kaiser's conduct that directed such entries. CRA did rely on those entries to assess Mr. Kaiser, knowing that the journal entries were not recorded until 2003. But what statement is Mr. Kaiser allegedly now denying the truth of? He is certainly not denying the journal entries were made. He is arguing that, for tax purposes, the journal entries were not effective in 1999 and 2000 for purposes of triggering attribution rules. This is a conclusion of law, not a denial of a statement of fact. CRA took a different view and maintained, knowing all the circumstances, that attribution applied in 1999 and 2000, but not in 2001. They have suffered no detriment due to any misstatement of fact by Mr. Kaiser. I find the principle of estoppel does not operate in these circumstances to preclude my consideration of the retroactive effect for tax purposes of the journal entries.

[12] The question then is whether the retroactive transfer of property of common-law spouses, due to a breakdown of the relationship, triggers attribution rules for the period between the purported effective date of the transfers and the actual date of the decision to transfer (long after the couple had separated). Or, in the words of Chief Justice Bowman, was the Appellant "creating out of airy nothing transactions in a prior year that in that year were not even a gleam in anybody's eye?" Transferring the Loans in 1999 and 2000 was not in anyone's contemplation in 1999 and 2000 – airy nothing, as it were.

[13] I find this conclusion consistent with comments made by Justice Bonner in the case of *Wood v. Minister of National Revenue*:[2]

> 13 The portion of Article 79 which requires that a resolution "…be held to relate back to any date therein stated to be the date thereof …" does not operate to require persons other than the company and its shareholders to treat an event as having taken place before it in fact took place. Subsection 29(1) of the *Companies Act* of Alberta provided:
>
> > 29(1) The memorandum and articles, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, and in the case of a corporation, its successors to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.
>
> Nothing in the wording of the statute makes the Articles binding on persons other than the company and its members. They do not bind the respondent who is a stranger to them.[5] I find unacceptable the notion that a company and its shareholder are entitled, for purposes affecting the rights of third parties to rewrite history, that is to say, treat imaginary events as having happened. A legislature has the power to enact deeming provisions. Others do not.

[14] This is exactly what these journal entries were – a re-writing of history, that are not binding on third parties, in this case CRA. CRA cannot pick and choose which imaginary events are taxable and which are not. For purposes of the determination of Mr. Kaiser's tax liability, the loans could not have been transferred until he decided to do so, and that was in 2003: a stroke of the accountant's pen cannot alter that fact.

[15] If the journal entries were not effective for tax purposes in 1999 and 2000, what was Mr. Kaiser's tax position in those years. He is certainly responsible for

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[2] 88 DTC 1180.

tax on the gains arising from his actual withdrawals against his shareholders loans in those years. He is not responsible for tax arising on any monies Ms. Seymour took out of the Companies in those years, however they might have subsequently agreed to treat them due to the breakdown of their relationship.

[16] I am reinforced in my conclusion by the application of logic and common sense. The evidence is clear that the journal entries were made to effect a splitting of the capital property (Loans) as a result of rights Ms. Seymour had to property arising from the common-law relationship with Mr. Kaiser. Section 74.2 of the *Act* is clear that attribution only arises during the period the parties are common-law partners. It is illogical that a decision to transfer property due to the breakdown of a relationship could create any attribution. Otherwise, what a great deal for the recipient: not only does she get her rightful entitlement to 50% of the property, but her ex remains on the hook for the tax arising on the capital gains on the disposition of such property. Barring any estoppel argument, this is not sensibly how the attribution rules are to operate. Couples who are at the stage of splitting property are no longer in the attribution period, being the period when they remained common-law partners.

[17] I allow the appeal and refer the matter back to the Minister for reconsideration and reassessment on the basis that Mr. Kaiser is not taxable on any amounts arising as a result of the journal entries made in January 2003. Further, the parties have agreed that the Appellant's 2000 taxable income is to be reduced by a further $2,116 to take into account the impact of the $44,196 advance made by the Appellant to ITI.

[18] Costs are awarded to the Appellant.

Signed at Ottawa, Canada, this 6th day of February, 2008.

"Campbell J. Miller"

Miller J.

Schedule A

10046-001-20071220

2006-1125(IT)G

TAX COURT OF CANADA

BETWEEN:

MICHAEL R. KAISER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS

The parties hereto, by their respective solicitors, hereby admit the following facts, provided that such admission is made for the purpose of this Appeal only and may not be used against either party on any other occasion or by another party.

1. During the years in question, being 1999 and 2000, as well as at all other relevant times, the Appellant:

   (a) resided at Bragg Creek, Alberta;

   (b) was a shareholder, director and officer of Innovage Technologies Inc. ("ITI"), a corporation incorporated in the Province of Alberta; and

   (c) was a shareholder, director and officer of Innovage Microsystems Inc. ("IMI"), a corporation incorporated in the Province of Alberta.

2. During the years in question:

   (a) the Appellant and Ms. Christina Brokate, formerly Seymour ("Ms. Seymour"), lived as common-law spouses;

   (b) as well as at all other relevant times, Ms. Seymour resided at Bragg Creek, Alberta;

(c) Ms. Seymour was a shareholder, director and officer of both ITI and IMI (collectively the "Corporations"); and

(d) the Appellant and Ms. Seymour were the only shareholders, directors and officers of the Corporations.

3. Prior to the years in question:

(a) the Appellant had bought out all of the other shareholders of the Corporations pursuant to an agreement dated May 29, 1996, which provided for the purchase by the Appellant of:

(i) all of their shares of the Corporations for stated consideration of $1,000;

(ii) all of the shareholder loans owed to them by ITI, under which the balances owing at that time totalled approximately $1,974,675 (the "ITI Loans"), for stated consideration of $4; and

(iii) all of the shareholder loans owed to them by IMI, under which the balances owing at that time totalled approximately $1,677,951 (the "IMI Loans"), for stated consideration of $4; and

(b) the total amount of the ITI Loans was credited to the Appellant's shareholder loan account with ITI, and the total amount of the IMI Loans was credited to his shareholder loan account with IMI.

4. The ITI Loans and the IMI Loans were capital property to the Appellant.

5. During 1999, 2000 and 2001 the Appellant and Ms. Seymour both withdrew amounts from the Corporations and had personal amounts paid on their behalf by the Corporations (collectively the "Personal Amounts").

6. On August 1, 2000 the Appellant advanced the sum of $44,196 to ITI (the "Advance").

7. During the period from August 1 to October 17, 2000, inclusive, the Appellant's Personal Amounts from ITI totalled $12,696.

8. The Appellant and Ms. Seymour permanently ceased to be common-law spouses in or about June 2001, and both subsequently retained legal counsel concerning the division of matrimonial property.

9. Draft financial statements for the Corporations' fiscal years ended October 31, 1999, October 31, 2000 and October 31, 2001 were finally prepared in the fall of 2002 (the "Draft Statements"), in the course of which:

   (a) the Personal Amounts were allocated and debited to the Appellant's and Ms. Seymour's respective shareholder loan accounts; and

   (b) the Advance was erroneously credited to a separate loan account between the Appellant and ITI.

10. As the balances in Ms. Seymour's ITI and IMI shareholder loan accounts as at November 1, 1998 were both nil, the allocation and debiting of Personal Amounts to those accounts in the course of preparing the Draft Statements resulted in those accounts having negative balances as at the Corporations' October 31, 1999, October 31, 2000 and October 31, 2001 fiscal year-ends.

11. On January 10, 2003 legal counsel for Ms. Seymour faxed a letter to the Corporations' accountant claiming that Ms. Seymour was entitled to 50% of the Appellant's shareholder loan balances with the Corporations (collectively the "Loans") by virtue of her matrimonial property rights arising from her former common-law relationship with the Appellant, and requesting that the negative fiscal year-end balances in Ms. Seymour's shareholder loan accounts be set-off against her share of the Loans.

12. On January 31, 2003, in response to Ms. Seymour's demands and in partial satisfaction of her matrimonial property rights, the Appellant authorized the Corporations to reduce the negative fiscal year-end balances in Ms. Seymour's shareholder loan accounts by making the following journal entries:

   (a) for ITI:

(i) effective as of October 31, 1999, a debit of $74,149 against the Appellant's shareholders loan account and a corresponding credit to Ms. Seymour's shareholders loan account (the "1999 ITI Journal Entry");

(ii) effective as of October 31, 2000, a further debit of $240,660 against the Appellant's shareholders loan account and a corresponding credit to Ms. Seymour's shareholders loan account (the "2000 ITI Journal Entry"); and

(iii) effective as of October 31, 2001, a further debit of $225,398 against the Appellant's shareholders loan account and a corresponding credit to Ms. Seymour's shareholders loan account (the "2001 ITI Journal Entry"), and

(b) for IMI:

(i) effective as of October 31, 1999, a debit of $87,800 against the Appellant's shareholders loan account and a corresponding credit to Ms. Seymour's shareholders loan account (the "1999 IMI Journal Entry");

(ii) effective as of October 31, 2000, a further debit of $23,419 against the Appellant's shareholders loan account and a corresponding credit to Ms. Seymour's shareholders loan account (the "2000 IMI Journal Entry"); and

(iii) effective as of October 31, 2001, a further debit of $201,163 against the Appellant's shareholders loan account and a corresponding credit to Ms. Seymour's shareholders loan account (the "2001 IMI Journal Entry"),

(collectively the "Journal Entries").

13. As a result of the Journal Entries, the adjusted net debits and balances for the Appellant's and Ms. Seymour's respective shareholder loan accounts with the Corporations were as follows:

| ITI | Appellant | Ms. Seymour |
|---|---|---|
| Shareholder Loan Balances as at Oct 31/98 | $1,946,352 | $0 |
| Net Debits Nov 1 to Dec 31/98 | 3,001 | (8,172) |
| **Shareholder Loan Balances as at Dec 31/98** | **$1,949,353** | **$(8,172)** |
| Net Debits Jan 1 to Oct 31/99 | (40,498) | (65,978) |
| 1999 ITI Journal Entry | (74,149) | 74,149 |
| Adjusted Shareholder Loan Balances as at Oct 31/99 | $1,834,706 | $(1) |
| Net Debits Nov 1 to Dec 31/99 | (5,449) | (13,936) |
| **Adjusted Shareholder Loan Balances as at Dec 31/99** | **$1,829,257** | **$(13,937)** |
| Net Debits Jan 1 to Oct 31/00 | (220,856) | (270,919) |
| 2000 ITI Journal Entry | (240,660) | 240,660 |
| Adjusted Shareholder Loan Balances as at Oct 31/00 | $1,367,741 | $(44,196) |
| Net Debits Nov 1 to Dec 31/00 | (1,714) | (27,211) |
| **Adjusted Shareholder Loan Balances as at Dec 31/00** | **$1,366,027** | **$(71,407)** |
| Net Debits Jan 1 to Oct 31/01 | (138,048) | (198,221) |
| 2001 ITI Journal Entry | (225,398) | 225,398 |
| Adjusted Shareholder Loan Balances as at Oct 31/01 | $1,002,581 | $(44,230) |
| Net Debits Nov 1 to Dec 31/01 | (41,192) | (19,588) |
| **Adjusted Shareholder Loan Balances as at Dec 31/01** | **$961,389** | **$(63,818)** |

| IMI | Appellant | Ms. Seymour |
|---|---|---|
| Shareholder Loan Balances as at Oct 31/98 | $1,972,534 | $0 |
| Net Debits Nov 1 to Dec 31/98 | (17,436) | (14,041) |
| **Shareholder Loan Balances as at Dec 31/98** | **$1,955,098** | **$(14,041)** |
| Net Debits Jan 1 to Oct 31/99 | (80,805) | (74,420) |
| 1999 IMI Journal Entry | (87,800) | 87,800 |
| Adjusted Shareholder Loan Balances as at Oct 31/99 | $1,786,493 | $(661) |
| Net Debits Nov 1 to Dec 31/99 | (2,957) | (2,400) |
| **Adjusted Shareholder Loan Balances as at Dec 31/99** | **$1,783,536** | **$(3,061)** |
| Net Debits Jan 1 to Oct 31/00 | (103,144) | (21,020) |
| 2000 IMI Journal Entry | (23,419) | 23,419 |
| Adjusted Shareholder Loan Balances as at Oct 31/00 | $1,656,973 | $(662) |
| Net Debits Nov 1 to Dec 31/00 | (811) | (811) |
| **Adjusted Shareholder Loan Balances as at Dec 31/00** | **$1,656,162** | **$(1,473)** |
| Net Debits Jan 1 to Oct 31/01 | (3,536) | (200,351) |
| 2001 IMI Journal Entry | (201,163) | 201,163 |
| Adjusted Shareholder Loan Balances as at Oct 31/01 | $1,451,463 | $(661) |
| Net Debits Nov 1 to Dec 31/01 | (2,692) | (13,089) |
| **Adjusted Shareholder Loan Balances as at Dec 31/01** | **$1,448,771** | **$(13,750)** |

14. The impact of the Journal Entries on the Appellant's decreasing shareholder loan balances with the Corporations can be summarized as follows:

| ITI<br>Decrease in Appellant's Shareholder Loan Balance | Excluding Journal Entries | Including Journal Entries | Difference |
|---|---|---|---|
| During 1999 | $45,947 | $120,096 | $74,149 |
| During 2000 | $222,570 | $463,230 | $240,660 |
| During 2001 | $179,240 | $404,638 | $225,398 |

| IMI<br>Decrease in Appellant's Shareholder Loan Balance | Excluding Journal Entries | Including Journal Entries | Difference |
|---|---|---|---|
| During 1999 | $83,762 | $171,562 | $87,800 |
| During 2000 | $103,955 | $127,374 | $23,419 |
| During 2001 | $6,228 | $207,391 | $201,163 |

15. Following the amendment of the Draft Statements to reflect the Journal Entries, corporate income tax returns for the Corporations' 1999, 2000 and 2001 fiscal years and personal income tax returns for the Appellant's 1999, 2000 and 2001 taxation years were filed with the Canada Revenue Agency (the "CRA") on February 5, 2003.

16. The personal income tax returns filed by the Appellant for the 1999, 2000 and 2001 taxation years failed to include in income taxable capital gains arising from the partial dispositions of the Loans.

17. No elections were made by the Appellant under subsection 73(1) of the Income Tax Act (Canada) in respect of any transfers of capital property from the Appellant to Ms. Seymour.

18. A matrimonial property action between the Appellant and Ms. Seymour was commenced in 2003 in which, inter alia, Ms. Seymour asserted a claim for the balance of her interest in the Loans, which action is still outstanding.

19. On August 5, 2004 CRA issued letters to the Appellant proposing to, inter alia, treat the full amounts by which the balances of the Loans decreased during 1999, 2000 and 2001, including all decreases attributable to the Journal Entries, as capital gains realized by the Appellant in those years on dispositions of shareholder loans with an adjusted cost base of $4.

20. Pursuant to Notices of Reassessment issued on February 10 and April 19, 2005 (collectively the "2005 Reassessments"), CRA reassessed the Appellant to include, inter alia, the following taxable capital gains in his income:

| Taxation Year | Gain on ITI Loans | Gain on IMI Loans |
|---|---|---|
| 1999 | $90,089 | $128,671 |
| 2000 | $279,461 | $80,814 |
| 2001 | $211,464 | $103,695 |

21. The Appellant filed Notices of Objection to the 2005 Reassessments on April 27, 2005 and made supplemental written submissions to the CRA Appeals Division in support thereof dated August 31, September 29 and November 16, 2005.

22. Pursuant to Notices of Reassessment issued on January 16, 2006, CRA further reassessed the Appellant to, inter alia:

(a) confirm the inclusion in the 1999 gain calculation of the decreases in the balances of the Loans attributable to the 1999 ITI Journal Entry and the 1999 IMI Journal Entry, on the basis that the Appellant and Ms. Seymour were still in a common-law relationship as at October 31, 1999;

(b) confirm the inclusion in the 2000 gain calculation of the decreases in the balances of the Loans attributable to the 2000 ITI Journal Entry and the 2000 IMI Journal Entry, on the basis that the Appellant and Ms. Seymour were still in a common-law relationship as at October 31, 2000;

(c) give the Appellant credit for the Advance by reducing the 2000 amount of taxable capital gains by $22,093, being 50% of the amount of the Advance; and

(d) exclude from the 2001 gain calculation the decreases in the balances of the Loans attributable to the 2001 ITI Journal Entry and the 2001 IMI Journal Entry, on the basis that the Appellant and Ms. Seymour were no longer in a common-law relationship as at October 31, 2001.

DATED at the City of Calgary, in the Province of Alberta, this 11th day of January, 2008.

Douglas E. Roberts, Legal Counsel
Solicitor for the Appellant

Per: _____
Douglas E. Roberts
Counsel for the Appellant

DATED at the City of Calgary, in the Province of Alberta, this 11th day of January, 2008.

John H. Sims, Q.C.
Solicitor for the Respondent

Per: _____
Margaret McCabe
Counsel for the Respondent

| | |
|---|---|
| CITATION: | 2008TCC84 |
| COURT FILE NO.: | 2006-1125(IT)G |
| STYLE OF CAUSE: | Michael R. Kaiser v. The Queen |
| PLACE OF HEARING: | Calgary, Alberta |
| DATE OF HEARING: | January 11, 2008 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Campbell J. Miller |
| DATE OF JUDGMENT: | February 6, 2008 |

APPEARANCES:

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|---|---|
| Counsel for the Appellant: | Douglas Roberts |
| Counsel for the Respondent: | Margaret McCabe |

COUNSEL OF RECORD:

For the Appellant:

| | |
|---|---|
| Name: | Douglas Roberts |
| Firm: | |

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| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Canada |