Docket: 2005-1243(IT)G

BETWEEN:

CHRISTINE DOLBEC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 8, 2008, at Québec, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Marie Hélène Savard
Counsel for the Respondent:	Alain Gareau

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the assessment made under the *Income Tax Act* for the 2001 taxation year is allowed, with costs to the Appellant, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant was justified in claiming the amount of $180,000 as a capital loss that she incurred.

Signed at Montréal, Quebec, this 12th day of August 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 23rd day of September 2008.
Susan Deichert, Reviser

Citation: 2008 TCC 464
Date: 20080812
Docket: 2005-1243(IT)G

BETWEEN:

CHRISTINE DOLBEC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a decision of the Minister of National Revenue ("the Minister") to disallow the carry-over of a $245,000 capital loss incurred by the Appellant in 2002 and applied against a capital gain realized in 2001.

[2] The Minister declared that the capital loss was nil by virtue of subparagraph 40(2)(*g*)(ii) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended ("the Act"), because the information and documents provided by the Appellant did not show that the amounts paid to Yanick Berthiaume and/or 9103-3712 Québec Inc., operating as Berth-Tech, constituted a debt acquired for the purposes of gaining or producing income from a business or property.

[3] The capital loss in issue stems from amounts that the Appellant disbursed in September and November 2001 by means of bank drafts or cash investments in a virtual casino project promoted by Mr. Yanick Berthiaume. The amounts invested by the Appellant were paid on the dates and in accordance with the terms specified below:

(a) On September 7, 2001, the Appellant had a $20,000 bank draft, bearing the number 85427599-064 and dated September 7, 2001, issued to "Cash". Of that amount, $15,000 was transferred to S.S.C., a Berth-Tech group corporation, by bank draft.

(b) On September 19, 2001, the Appellant had a $30,000 bank draft, bearing the number 85428415-064 and dated September 19, 2001, issued to Berth-Tech.

(c) On September 19, 2001, the Appellant had a $150,000 bank draft, bearing the number 08034363 and dated September 19, 2001, issued to Berth-Tech.

(d) On September 20, 2001, the Appellant had a $25,000 bank draft, bearing the number 85428421-064 and dated September 20, 2001, issued to Berth-Tech.

(e) On November 30, 2001, the Appellant made a $20,000 cash payment to Berth-Tech from her personal bank account.

[4] The amounts contemplated above at subparagraphs (d) and (e) were first advanced by 2840-0810 Québec Inc., the corporation that belonged to the Appellant and that operated Cabaret Entre-Nous. The Appellant reimbursed that corporation the sum of $45,000 by cheque dated October 1, 2001, containing the memo [TRANSLATION] "Reimb. Johanne Advance" (Exhibit I-2). Johanne, the Appellant's daughter, also invested money in the virtual casino, whose operations were based in the Cayman Islands.

[5] The Appellant testified that the amounts advanced to Berth-Tech were short-term loans with an interest rate of 10% for 30 days. She said that she was not interested in gambling. According to the Appellant, the purpose of the amounts advanced to Berth-Tech was to finance the purchase of a new computer server.

[6] In a declaration that the Appellant filed in the Superior Court on October 9, 2002, under the simplified procedure set out in articles 481.1 *et seq*. of the *Code of Civil Procedure*, with a view to ordering Yanick Berthiaume to repay her $245,000, the Appellant made the following statements about the claim for the repayment of the funds advanced to Yanick Berthiaume:

> [TRANSLATION]
>
> 3. In mid-December 2001, the Plaintiff demanded C$245,000 from the Defendant in full reimbursement of all amounts invested by the Plaintiff in September 2001.
>
> 4. However, the Defendant had made an agreement with the Plaintiff to transfer this amount from a Costa Rican bank to the Defendant's bank in Canada, as shown in a bank transfer receipt, which the Defendant faxed to the Plaintiff and which is produced in support of this claim as Exhibit P-2. The Defendant is directed to produce the original of the said Exhibit, failing which the copy will serve as secondary evidence.
>
> 5. The Plaintiff checked with her bank and found that no amount was deposited into her account by the Defendant.
>
> 6. Furthermore, upon faxing this confirmation, the Defendant went to the trouble of contacting the Defendant to notify her that she would received an additional C$3,000 in cash in order to fully satisfy the debt. Obviously, the Defendant did not follow through on this.

[7] After the aforementioned declaration was filed, the Superior Court rendered a judgment on February 18, 2003, ordering the Defendant Yanick Berthiaume to pay the Appellant the amount of $245,000, plus costs, interest from the date of summons, and the additional indemnity contemplated in article 1619 of the *Civil Code of Québec*.

[8] At the hearing, counsel for the Appellant adduced Exhibit A-6, a photocopy of a demand note dated September 19, 2001, concerning the loan for the purchase of a server to be used in the operation of the virtual casino, and by which Yanick Berthiaume and/or Berth-Tech acknowledged receiving the amount of $225,000 from the lender, Christine Dolbec, repayable by December 31, 2001, with interest at a rate of 10%. In the event of late repayment, additional interest at a rate of 10% per month was to be paid, and any additional expenses incurred were payable by the lender. The note is signed by Yanick Berthiaume for Berth-Tech (and witnessed by Steve Blouin, a director of Berth-Tech) and by the Appellant personally and on behalf of Cabaret Entre-Nous.

[9] According to the Appellant, the photocopy of the note in question was given by Steve Blouin to her daughter Johanne in the week following the signing of the note by Yanick Berthiaume. Since it is merely a photocopy of the note, not the original, and since the note was not referred to in the Appellant's declaration, discussed above at paragraph 6, I will not be taking it into account for the purposes of the instant matter.

[10] By reason of the facts set out below, and the obvious insolvency of the promoter Yanick Berthiaume, the Appellant was completely unable to enforce the judgment against him.

> [TRANSLATION]
>
> (a) Mr. Berthiaume, the promoter, was also sued by three other investors, who obtained a judgment from the Superior Court ordering him to pay them the $470,000 that they had invested in a virtual casino network, but the investors were unable to have their judgment enforced.
>
> (b) On or about June 11, 2002, the said investors had already served on Mr. Berthiaume, and on the Attorney General of Quebec and the Sûreté du Québec, a garnishee in the proceedings, a writ of seizure by garnishment after judgment.
>
> (c) On July 16, 2002, a representative of the garnishees appeared on their behalf and solemnly declared that the garnishees were in possession of $129,040 taken in a search that had been carried out on May 1, 2002, at 839 Moreau Street in Sainte-Foy but that, under the *Criminal Code*, the garnishees could not divest themselves of these amounts, and that, moreover, the owner of the amounts remained unknown to date, and that the said amounts had already been the subject of a seizure after judgment.
>
> (d) Following the "Berth-Tech" virtual casino project venture, the promoter, Mr. Berthiaume, was, among other things, charged on several counts of fraud, and, in relation with that matter, two counts of premeditated murder for which he is now in preventive custody in a federal detention centre.

[11] Technically, the Appellant did not claim a $245,000 capital loss in her 2001 and 2002 income tax returns, never filed a request with the Minister for a determination of loss, and never made an election under section 50 of the Act. The Appellant's initial 2001 assessment was issued on June 17, 2002. On September 19, 2002, the Appellant made a request to apply, against her taxable income for the 2001 taxation year, the $62,209 loss from 1996 and the $242,000 loss on her investment in Berth-Tech, a corporation that appears to have become insolvent in late 2001. In response to a letter dated September 19, 2002, the Canada Customs and Revenue Agency (hereinafter "the Agency") confirmed, by letter dated December 23, 2002, that the request for an adjustment of the 2001 tax return had been accepted in relation to the carry-over of the $62,209 loss, but that, as far as the 2002 loss was concerned, the Appellant would have to claim the carry-back upon filing her 2002 return or upon receiving the notice of assessment in relation to the return for that year. Following that letter, a notice of reassessment for the 2001 year was issued on January 2, 2003; and another notice of reassessment for the 2001 year was issued on June 14, 2004, further to a letter from the Appellant dated March 17, 2004.

[12] The initial assessment for the Appellant's 2002 year was issued on April 14, 2003. In response to the Appellant's adjustment requests dated March 27, 2003 ($245,000 loss) and April 9, 2003 (property taxes), the Agency wrote a letter to the Appellant, dated September 23, 2003, requesting the following information about the $245,000 loss:

- if the amount was a loan, the original contract;
- proof of payment;
- document justifying the court proceeding; and
- the complete judgment of the Superior Court.

After analyzing the documents and information provided by the Appellant, the Agency confirmed, by letter dated March 17, 2004, that the carry-over of the $245,000 capital loss incurred by the Appellant in 2002 and applicable against her income for the 2001 taxation year was disallowed, and that the request for an adjustment of the property tax expense was allowed.

Analysis

[13] The Respondent alleges that the capital loss claimed is not a deductible loss because the outlays were not made for the purpose of gaining or producing income. The Respondent relies on subparagraph 40(2)(*g*)(ii) of the Act, which reads as follows:

> 40(2)(*g*) – a taxpayer's loss, if any, from the disposition of a property, to the extent that it is
>
> . . .
>
> (ii) a loss from the disposition of a debt or other right to receive an amount, unless the debt or right, as the case may be, was acquired by the taxpayer for the purpose of gaining or producing income from a business or property (other than exempt income) or as consideration for the disposition of capital property to a person with whom the taxpayer was dealing at arm's length,
>
> . . .
>
> is nil;

[14] It should first be specified that the copies of the bank drafts and of the Appellant's personal bank account statement submitted by the Appellant are, in my in my opinion, incontrovertible evidence of the payments that the Appellant made to Berth-Tech.

[15] The copy of the bank transfer receipt from Banco de Costa Rica dated December 13, 2001, which states that the Appellant is the transferee of $242,000, also constitutes such evidence. The document attests to the amount that the Appellant is entitled to receive, and shows that the Appellant's payments to Berth-Tech were neither gifts nor repayments of the Appellant's daughter's gambling debts. The proceedings commenced by the Appellant with a view to obtaining a judgment from the Superior Court also confirm that the Appellant was to be reimbursed the payments that she made.

[16] However, in order for the loss incurred by the Appellant to be an allowable capital loss, the Appellant must also show, on a balance of probabilities, that she truly intended to make an investment for the purpose of gaining or producing income from a business or property. The evidence in this regard essentially turns on the testimony of the Appellant, who said that the payments to Berth-Tech were short-term loans with an interest rate of 10% for 30 days. The note certainly exists, but I am required to exclude it because I do not know the circumstances under which it was obtained. The testimony of the individuals who signed the note, other than the Appellant, would have been extremely helpful.

[17] The Appellant is an experienced businesswoman who, like several other investors from the Québec region, fell victim to a fraud. I cannot imagine that experienced persons like the Appellant would invest such considerable sums of money over such a short period without intending to derive significant income from their investments.

[18] The Appellant's testimony is credible, and she says that she offered to the virtual casino's promoters to forgive the interest if the capital invested in Berth-Tech was reimbursed. Berth-Tech's offer to pay $3,000 in cash was never followed through and the Appellant never received this amount.

[19] In my view, the evidence submitted, which consists primarily of copies of bank drafts, of a bank account statement, and of a transfer receipt from a foreign bank, as well as explanations concerning the context and the circumstances surrounding the Appellant's outlays, is a sufficient basis on which to conclude that the requisite degree of probability exists. Consequently, the Minister was not justified in disallowing the capital loss incurred in the course of the 2002 taxation year. The arguments of counsel for the Respondent, to the effect that the Appellant's payments were intended to enable her daughter Johanne to recover the amounts that she had invested in the virtual casino, or the amounts that were payable to her, were not proven in any fashion.

[20] However, the amount of the capital loss incurred by the Appellant in 2002 must be limited to $180,000. This is necessary in order to exclude the payments to S.C.C., a corporation whose role was not specified, and in order to exclude the payments made by 2840-0810 Québec Inc. (Cabaret Entre-Nous), because the Appellant's reimbursement cheque contained the memo [TRANSLATION] "Reimb. Johanne Advance", which shows that the amounts paid by 2840-0810 Québec Inc. were used by the Appellant's daughter, not by the Appellant herself.

[21] The last question to be dealt with pertains to the Minister's refusal to allow, in whole or in part, the carry-over of the capital loss that the Appellant sought to apply against her capital gains from the 2001 taxation year. Although the Appellant did not comply with the Act's technical requirements to the letter, it is my opinion that the $180,000 allowable capital loss incurred by the Appellant must be applied against the Appellant's capital gains from 2001. The Agency considered the Appellant's adjustment requests despite the technical deficiencies and did not cite the failure to comply with the Act's technical requirements in the course of the review.

[22] For these reasons, I am allowing the appeal, with costs to the Appellant.

Signed at Montréal, Quebec, this 12th day of August 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 23rd day of September 2008.
Susan Deichert, Reviser

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APPEARANCES:

Counsel for the Appellant:	Marie Hélène Savard
Counsel for the Respondent:	Alain Gareau

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