

Docket: 2006-1880(IT)G
2006-2490(IT)G
2006-2580(IT)G
2006-2587(IT)G
2006-2879(IT)G
2006-3336(IT)G
2006-3337(IT)G

BETWEEN:

E.F. ANTHONY MERCHANT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on February 10 and 11, 2010, at Calgary, Alberta.

By: The Honourable Justice Brent Paris

Appearances:

Counsel for the Appellant: Curtis R. Stewart

Counsel for the Respondent: Mark Heseltine

JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the 1994, 1995, 1996, 1997, 1998, 1999 and 2000 taxation years are allowed, and the reassessments are referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment and Particulars of Settled Issues.

Signed at Ottawa, Canada, this 10th day of September, 2010.

“Brent Paris”

Paris J.

Citation: 2010 TCC 467
Date: 20100910
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REASONS FOR JUDGMENT

Paris J.

[1] These are appeals from reassessments of Mr. Merchant's 1994 to 2000 taxation years. While the Notices of Appeal raise many issues, the parties reached a settlement with respect to the majority of these matters prior to the hearing. Particulars of the settled issues are appended to these reasons.

Background

[2] Mr. Merchant is a lawyer and businessman and lives in Regina.

[3] Merchant (2000) Ltd. ("Merchant 2000") is a Canadian corporation, the shares of which are owned by Mr. Merchant and members of his family. Merchant 2000 was incorporated in the early 1980s.

[4] Merchant (2000) U.S. Inc. ("Merchant U.S.") is a U.S. corporation wholly owned by Merchant 2000. Merchant U.S. was incorporated in the mid-1980s.

Issues

[5] The issues remaining in appeal are:

1994

- i) whether the Appellant received a shareholder benefit of \$162,500 from Merchant 2000 in his 1994 taxation year within the meaning of subsection 15(1) of the *Income Tax Act*,¹ and if so,
- ii) whether the Minister was entitled to reassess the Appellant's 1994 taxation year beyond the normal assessment period to include the unreported amount;
- iii) whether the Minister properly imposed a penalty under subsection 163(2) of the *Act* on the unreported amount;

1995 to 1998 and 2000

- i) whether the Appellant's shareholder loan balance with Merchant 2000 was in a deficit balance at the end of his 1995 to 1998 and 2000 taxation years by the following amounts:

1995	\$325,781
1996	\$141,014
1997	\$153,750
1998	\$198,250
2000	\$20,000

thereby requiring him to include these amounts in income pursuant to subsection 15(2) of the *Act*, and requiring him to include deemed interest with respect to his outstanding shareholder loans as required by subsection 80.4(2) of the *Act*; and, if so;

- (ii) whether the Minister properly imposed subsection 163(2) penalties on the unreported amounts.

¹ R.S.C. 1985, c.1 (5th Supp.).

1994

[6] The reassessment of the shareholder benefit of \$162,500 in the Appellant's 1994 taxation year arose as a result of his receipt of this amount from Merchant U.S. on December 19, 1994. While the actual amount received by the Appellant was \$165,000, he returned \$2,500 to as an overpayment.

[7] The payment of \$165,000 was made by a transfer from an investment account belonging to Merchant U.S. at CIBC Wood Gundy to another CIBC Wood Gundy account owned by the Appellant. The Appellant directed CIBC Wood Gundy to make the transfer.

[8] Previously, on November 16, 1994 the Appellant had directed CIBC Wood Gundy to transfer \$162,500 from an account held by Merchant 2000 to the account of Merchant U.S. Before the transfer from Merchant 2000 to Merchant U.S., the balance in the latter's CIBC Wood Gundy account was \$325.48.

[9] The Respondent maintained that the Appellant did not give any consideration for the transfer to either Merchant U.S. or Merchant 2000 and that it was an appropriation by him from Merchant 2000 by means of an indirect transfer. Therefore he was required to include this amount in income pursuant to subsection 15(1) the relevant portions of which read:

15(1) Where at any time in a taxation year a benefit is conferred on a shareholder, or on a person in contemplation of the person becoming a shareholder, by a corporation ...

the amount or value thereof shall, except to the extent that it is deemed by section 84 to be a dividend, be included in computing the income of the shareholder for the year.

[10] The Appellant said that the payment from Merchant U.S. to the Appellant on December 19, 1994 was a partial repayment of loans he had made to Merchant U.S.

[11] According to the Appellant's evidence, he had loaned money directly to Merchant U.S. and Merchant 2000 on an ongoing basis since their incorporation to fund various business ventures in which those companies were involved. He stated that he had kept a record of the loans he had made to Merchant U.S. and Merchant 2000. These records consisted of tally sheets, partly handwritten and partly typed, recording loans and repayments by date and a brief note regarding the nature of the

payment. The loan tally sheets presented by the Appellant at the hearing included an entry dated November 20, 1994 showing a repayment of \$162,500 from Merchant U.S. to the Appellant. According to the loan record,² the \$162,500 repayment reduced indebtedness of Merchant U.S. to the Appellant from \$320,800 to \$158,400. (It was admitted by the Appellant that the correct balance should have been \$158,300.)

[12] The Appellant said that the Merchant U.S. repaid the amount to the Appellant out of the proceeds received by Merchant U.S. from a sale of property by it to Merchant 2000.

[13] Merchant U.S., along with a group of investors organized by Mr. Eli Flutter, a friend and business associate of the Appellant, had purchased a number of real estate interests in the U.S. Merchant U.S. was apparently a passive investor in these deals, providing cash as required to purchase and maintain the properties. At some point prior to 1993, Merchant U.S. had acquired a 75% interest in an agreement for sale of property in Phoenix, Arizona (the Phoenix property). The Appellant said that Merchant U.S. had sold three-quarters of the 75% interest to Merchant 2000 in 1993 for \$650,000. The Appellant said that the remaining one-quarter of Merchant U.S.'s original interest was the property that was sold to Merchant 2000 in 1994 for \$162,500, and the payment by Merchant 2000 to Merchant U.S. on November 16, 1994 was the consideration for that purchase.

[14] The Appellant referred to a letter he wrote to CIBC Wood Gundy dated January 30, 1995 in which he stated:

Merchant (2000) U.S. Inc. sold the remaining portion of its ownership of property in Phoenix to Merchant (2000) Ltd. Merchant (2000) was to have paid \$162,500 in connection with the sale. As a result of my mistake, \$165,000 was paid. Please transfer \$2,500 from my account to the account of Merchant (2000) Ltd.

The Appellant also presented documents referring to a subsequent sale of the Phoenix property by Merchant 2000 to a related company, Merchant Arizona (2000) Ltd., for \$625,000 in 1995. Finally, the Appellant also produced a copy of Merchant 2000's tax return for its 1995 taxation year in which it reported a disposition of the Phoenix property for \$625,000. It showed its cost of the property as \$812,500, and claimed a capital loss of \$187,500.

² Exhibit A-1, tab 2890.

[15] Later, in 1998, Merchant 2000 sought to amend this return on the basis that the sale to Merchant Arizona did not proceed, and submitted revised capital loss schedules to the CRA. Those schedules and the capital loss amendment were apparently accepted by the CRA. The Appellant said that he and his accountant had decided to “unwind” the transaction because Merchant 2000 could not use the capital loss.

[16] Respondent’s counsel submitted that the Appellant’s explanation for the \$162,500 transfer from Merchant U.S. to the Appellant was not credible. He said that the Court should not accept the Appellant’s evidence that Merchant U.S. owed the Appellant money or that it transferred an interest in the Phoenix property to Merchant 2000. Counsel said that the Appellant refused to provide any documents from Merchant U.S. to the Canada Revenue Agency (CRA) auditor during the course of the audit which led to the reassessments before the Court, which should affect the weight given to the Merchant U.S. loan tally sheet presented by the Appellant.

[17] Furthermore, the Respondent counsel argued that the Appellant’s evidence that Merchant U.S. transferred an interest in the Phoenix property to Merchant 2000 for \$162,500 was inconsistent with the Appellant’s statement in a letter to the CRA auditor in May 2000 that suggested that the property had always been owned by Merchant U.S. In that letter, the Appellant was responding to a CRA demand for information from Merchant Arizona. One of the CRA’s requests was that Merchant Arizona provide “all documentation regarding the acquisition and disposal of the Phoenix property”. The Appellant, on behalf of Merchant Arizona, wrote back that:

If you have some case authority for the proposition that Merchant Arizona (2000) Ltd., now defunct, has some responsibility to produce information regarding an American company owned by the same shareholders, and in particular the affairs of the American company regarding ownership of property in Phoenix, Arizona, in the United States, I would be interested in that authority and may change my mind but I can not imagine that there is anything that supports the proposition that you advance. I care about the principle. You are not entitled to documents from Canadian companies or individuals about property purchased by a US Company and always owned by that US company.

The Appellant told the Court that the representation that the Phoenix property had always been owned by a U.S. company was incorrect, but offered no explanation for what he wrote.

[18] On the balance of the evidence, I am satisfied that the \$162,500 payment from Merchant U.S. to the Appellant in 1994 was a repayment of money owing to him by

Merchant U.S. I accept the Appellant's evidence that the loan tally sheets are an accurate statement of loans he made to Merchant U.S., and of the repayments from Merchant U.S. to him. There is nothing that would lead me to conclude that the loan record sheets or entries on those sheets were fabricated by the Appellant.

[19] It is not clear whether the Appellant ever gave these documents to the CRA auditor. At the hearing, he said he did not recall if he had, and the auditor was not called as a witness. The Respondent asked that I infer that the documents were not provided, on the basis of the Appellant's refusal to comply with the auditor's request to Merchant Arizona to produce documents relating to the acquisition and disposition of the Phoenix property, and the Appellant's statement that the CRA did not have authority to demand documents from a U.S. corporation. I am not prepared to do so in the absence of evidence from the auditor that the loan records for Merchant U.S. were not given to him or in the absence of any evidence of a specific request and a specific refusal by the Appellant to provide them.

[20] While it is not necessary to decide the question, the \$162,500 payment from Merchant 2000 to Merchant U.S. immediately prior to this transfer of the same amount by Merchant U.S. to the Appellant, I find that this was consideration for the sale of Merchant U.S.'s remaining interest in the Phoenix property. This is supported by the contemporaneous reference to the sale in the Appellant's January 30, 1995 letter to CIBC Wood Gundy. It is also supported by Merchant 2000's recording of its cost of the Phoenix property in its 1995 tax return. The cost shown, \$812,500, is consistent with the acquisition of the interest in two stages: a three-quarter interest for \$650,000 in 1993 and a one-quarter interest for \$162,500 in December 1994. Merchant 2000 was also represented as the owner of the Phoenix property in the documents relating to what I will refer to as the aborted sale of the property to Merchant Arizona. The documents dating from the time when the transfer was alleged to have occurred are, in my view, the best indicators of what, in fact, took place.

[21] The Appellant's representation in his May 13, 2000 letter that the property was always owned by Merchant U.S. was inconsistent with the earlier documentary evidence, and was, as far as I can determine, not accurate. By itself, however, this misrepresentation is not a sufficient basis to find that the evidence given by the Appellant at the hearing was not reliable.

[22] Before I leave the issue of the ownership of the Phoenix property, I would also note that the assumptions on this point, as pleaded in paragraph 18 of the Reply to Notice of Appeal relating to the 1994 taxation year are contradictory. Subparagraphs 18(g), (h) and (i) state:

- (g) on July 27, 1993, Merchant (2000) Ltd. purchased an interest in land in Phoenix Arizona legally described as:
 - SE 1/4 of NE ¼ of section 21
 - Township of North Range 1
 - East Maricopa County, Arizona

[hereinafter the “Phoenix Property”]

from Merchant (2000) U.S. Inc. for \$650,000;
- (h) on July 28, 1993, the Appellant loaned \$650,000 to Merchant (2000) Ltd.;
 - (i) on July 28, 1993, Merchant (2000) Ltd. paid \$650,000 to Merchant U.S. (2000) Inc. in consideration for the interest in the Phoenix Property;

Subparagraphs (u) and (v) read:

- (u) in 1998, Merchant (2000) U.S. Inc. sold the Phoenix Property to an arm's length party;
- (v) the Phoenix Property was purchased by and was always owned by Merchant (2000) U.S.

And subparagraphs 18(z), (aa), (bb) and (cc) read:

- (z) Merchant (2000) Ltd. purchased the Phoenix Property for \$812,500;
- (aa) the Appellant credited his shareholder account with Merchant (2000) Ltd. by \$650,000 in August 1993;
- (bb) in December 1994, the Appellant directed the transfer of \$162,500 from Merchant (2000) Ltd. to himself through Merchant (2000) U.S. Inc
- (cc) the sum of the shareholder's loan credit described in paragraph 18(aa) and the transfer described in paragraph 18(bb) is \$812,500, the original purchase price of the Phoenix Property described in paragraph 18(z).

[23] The Minister's assumption that Merchant 2000 purchased the property for \$812,500 in two transactions (for \$650,000 and \$162,500) and his assumption that Merchant U.S. always owned the property are clearly inconsistent. In *Loewen v. The Queen*,³ the Federal Court of Appeal, per Sharlow JA stated:

³ 2004 FCA 146.

9 It is the obligation of the Crown to ensure that the assumptions paragraph is clear and accurate. For example, the Crown cannot say that the Minister assumed, when making the assessment, that a certain car was green and also that the same car was red, because it is impossible for the Minister to have made both of those assumptions at the same time: *Brewster v. R.* (1976), 76 DTC 6046, [1976] C.T.C. 107 (Fed. T.D.).

[24] Since the Appellant has shown that the \$162,500 payment from Merchant U.S. to the Appellant in 1994 was a repayment of amounts owing by Merchant U.S. to the Appellant and was not an appropriation from Merchant 2000, it is not necessary for me to decide what effect pleading of inconsistent assumptions would have on the onus of proof in this case. However, it would seem logical that the onus would shift to the Respondent to prove the basis of the assessment where the assumptions that are pleaded are contradictory and effectively cancel each other out.

[25] Given my findings above, there is no need to consider the submissions relating to subsection 152(4) or subsection 163(2) of the *Act* as they relate to the Appellant's 1994 taxation year.

1995 to 1998 and 2000

[26] The next question to be determined is whether the Appellant was indebted to Merchant 2000 at the end of the 1995, 1996, 1997, 1998 and 2000 taxation years by the following amounts:

1995	\$325,781
1996	\$141,014
1997	\$153,750
1998	\$198,250
2000	\$20,000

If he was, he would be required by subsection 15(2) of the *Act* to include the amount he owed to the corporation in his income and would be required by subsection 80.4(2) to include a deemed interest benefit in respect of the outstanding debt. The relevant parts of those provisions read as follows:

15(2) Where a person ... is ... and the person ... has in a taxation year received a loan from or has become indebted to the particular corporation, ...the

amount of the loan or indebtedness shall be included in computing the income for the year of the person or partnership ...

80.4(2) Where a person ... was

(a) a shareholder of a corporation,

...

and by virtue of that shareholding that person ... received a loan from or otherwise incurred a debt to, that corporation...the person ... shall be deemed to have received a benefit in a taxation year equal to the amount, if any, by which

(d) all interest on all such loans and debts computed at the prescribed rate on each such loan and debt for the period in the year during which it was outstanding

exceeds

(e) the amount of interest for the year paid on all such loans and debts not later than 30 days after the later of the end of the year and December 31, 1982.

[27] The auditor made two adjustments to the Appellant's shareholder loan account with Merchant 2000 which resulted in the Appellant owing the corporation the amounts set out above. The first adjustment was to correct an alleged adding mistake of \$85,996 in the Appellant's favour in respect of an entry to the account dated November 9, 1984. The auditor also reversed a credit of \$650,000 in the shareholder loan account dated August 8, 1993 on the basis that the Appellant did not loan this amount to the corporation.

Adding Error

[28] In examining the shareholder loan account register, the CRA auditor found what appeared to be four adding errors in the following amounts:

November 9, 1984	\$85,996
1986	(500)
1987	(600)
1991	<u>1,400</u>
Total	\$86,296

The Appellant is only challenging the adjustment relating to the alleged error of \$85,996.

[29] The shareholder loan register showed a loan of \$38,000 by the Appellant to the company on November 9, 1984. The previous entry in the register showed that Merchant 2000 owed the Appellant \$100,494. After the \$38,000 loan, the balance in the account was recorded as \$224,490 owing to the Appellant. On its face, this was an \$85,996 overstatement of the amount owing to the Appellant.

[30] The Appellant testified that the shareholder loan record was incomplete for the period prior to November 9, 1984 and that the November 9, 1984 balance of \$224,940 owing to him was supported by a memo he wrote on November 6, 1984. That memo referred to the purchase by Merchant 2000 of his spouse's and mother's interest in certain Phoenix properties for \$363,678 of which \$186,490 was paid by the Appellant and treated as a loan to the company. The memo states that "the balance remaining due to [the Appellant] as an interest free loan to the company is \$186,490." This amount, along with the \$38,000 he advanced to Merchant 2000 on November 9, 1984 made up the total shareholder loan credit of \$224,490 recorded on that date.

[31] In argument, the Respondent did not challenge the authenticity of the November 6, 1984 memo referring to the shareholder loan balance of \$224,490 owing to the Appellant, and agreed that the document appeared to account for the discrepancy in issue. Counsel expressed surprise, though, that this memo had not been included with the shareholder loan register.

[32] In my view, the Appellant has provided sufficient evidence that his shareholder loan balance in Merchant 2000 was not overstated by \$85,996 in 1984. The explanation provided by the Appellant is plausible, given the documentary proof he has provided. The figures from the November 6, 1984 memo tie in exactly to the shareholder loan balance at November 9, 1984 and provide a basis for that entry. It should also be kept in mind that the audit which led to these reassessments occurred in 2000, some 16 years after the day of the entry. In these circumstances, I find that the memo provides *prima facie* evidence that the correct shareholder loan balance was \$224,490 on November 9, 1984.

\$650,000 Entry

[33] The next question to be determined is whether the Appellant loaned \$650,000 to Merchant 2000 on August 8, 1993.

[34] The evidence shows that on July 27, 1993 Merchant 2000 entered into a written agreement to purchase an interest in the Phoenix property from Merchant U.S. for \$650,000. The Appellant testified that Merchant U.S. repaid him \$650,000 of the money it owed him, and he loaned these funds to Merchant 2000 to enable it to pay Merchant U.S.

[35] The tally sheet of the Appellant's loans to Merchant U.S. shows an entry on July 28, 1993 indicating a repayment of \$650,000 to the Appellant. The Appellant's shareholder loan account in Merchant 2000 was credited in the amount of \$650,000 on August 8, 1993 with the notation "lent by me (Phoenix property)."

[36] While no money changed hands between the parties, there was an offsetting of funds owing by Merchant U.S. to the Appellant, by the Appellant to Merchant 2000, and by Merchant 2000 to Merchant U.S.

[37] The Appellant maintains that the entries in the Appellant's Merchant U.S. loan account and his Merchant 2000 shareholder loan account are consistent with the Appellant's evidence and intention. Counsel submitted that the reduction of the Appellant's loan balance with Merchant U.S. was valid consideration for the increase to his shareholder loan to Merchant 2000. There was no net change to the aggregate amount owing to him by the two companies as a result of the transactions relating to the purchase of the Phoenix property.

[38] The Respondent's position is that there was no transfer of an interest in the Phoenix property to Merchant 2000 in 1993 and that there was no proof that Merchant U.S. ever owned such an interest in the first instance. The Respondent asserts, therefore, that there was no loan made by the Appellant to Merchant 2000 on August 8, 1993 because there was no property purchased by Merchant 2000 from Merchant U.S. at that time.

[39] My first observation is that in reassessing the Appellant, the Minister appears to have accepted that Merchant U.S. owned an interest in the Phoenix property. At subparagraph 18(v) of the Reply to the Notice of Appeal from the reassessment of the Appellant's 1995 taxation year, it is pleaded that the Minister assumed that:

- (v) the Phoenix Property was purchased by and was always owned by Merchant (2000) U.S. Inc.

[40] The issue would be then whether the Appellant has shown that a part of this interest was transferred to Merchant 2000 in 1993. The Appellant produced a copy of an executed written agreement stating that Merchant U.S. was transferring 75% of its

interest in the Phoenix property to Merchant 2000 for consideration of \$650,000. This agreement, along with Merchant 2000's tax filings as outlined earlier in these reasons, all treat the property as having been transferred to Merchant 2000 in two stages in 1993 and 1994, and I accept that it was transferred in that manner.

[41] Although no money was exchanged at the time of the sale in 1993, the accounting by the parties between themselves for the amounts owing that arose from the transaction are consistent with description of the transaction given by the Appellant and corroborated by the loan records kept by him, and by the sale agreement between Merchant U.S and Merchant 2000. Parties may agree to set off amounts due rather than pay money back and forth, and the set off will constitute payment and receipt of the amounts, respectively. (see for example: *Armstrong v. Minister of National Revenue* 88 DTC 1015).

[42] I find that the offsetting of the amount the Appellant was owed by Merchant U.S. against the amount due from Merchant 2000 to Merchant U.S. for the purchase of the Phoenix property was valid consideration for the \$650,000 credit to the Appellant's shareholder loan account with Merchant 2000.

[43] The Respondent's counsel also submitted that the Appellant had not shown that the value of the interest in the Phoenix property was equal to \$650,000 at the time of the transfer. This position, though, was not raised in the Reply and no application to amend the pleadings was made. Therefore it is not properly before the Court and it is not necessary to analyse this submission.

[44] Given my finding in favour of the Appellant with respect both adjustments made by the auditor to the shareholder loan account, it follows that the subsection 80.4(2) deemed interest benefit and the gross negligence penalties should also be reversed.

Conclusion

[45] The appeals will therefore be allowed, in part, in accordance with these reasons and in accordance with the partial settlement between the parties set out in the appendix to these reasons. The Appellant's counsel requested the opportunity to make further representations regarding costs, and dates will be set by the Registrar of the Court to allow the parties to do so.

Signed at Ottawa, Canada, this 10th day of September, 2010.

“Brent Paris”

Paris J.

APPENDIX A

PARTICULARS OF SETTLED ISSUES

TAX COURT OF CANADA COUR CANADIENNE DE L'IMPÔT		
N O M B R E	MERCHANT	EXHIBIT PIÈCE
	HHTG	A-2
DATE: Feb. 10/10 DUNCAN BULL		
COURT REGISTRAR - GREFFIER DE LA COUR		
N°		

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TAX COURT OF CANADA

BETWEEN:

E. F. ANTHONY MERCHANT

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS

The parties agree to the following facts for the purpose of these appeals only and this agreement may not be used against either party on any other occasion or by any other party. In particular, the parties agree that based on the underlying facts the appeals in respect of the following matters be disposed of as set out below.

1995 Taxation Year

1. The adjustments made by the Minister in the 1995 year can be summarized as:

1995

Interest benefit on loan	3,278	P
Loan debit balance not repaid (15(2))	325,781	P
Taxable capital gain not reported (stocks)	41,755	P
Taxable capital gain not reported (art)	10,800	P
Appropriation of art	3,200	P
Donations not allowed (art)	56,975	P

(a) Taxable Capital Gains (stocks)

2. The taxable capital gains included by the Minister in the amount of \$60,572.94 (taxable capital gain of \$41,755) relate to stock transactions in the following; Enerplus Resources Fd TU,

Fidelity Partnership IV – 1992, Fidelity Partnership IV – 1993, Fidelity International Portfolio Fund and shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(b) Taxable Capital Gains (Art)

3. The taxable capital gain in the amount of \$10,800 included by the Minister in regards to the donation of various pieces of art by the Appellant during 1995 shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(c) Donations Not Allowed (Art)

4. The donations amounts the Minister denied related to various pieces of artworks to charitable organizations in the amount of \$56,975 shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(d) Shareholder Appropriation (Art)

5. One half, being \$1,600, of the amount of \$3,200 reassessed on the basis that Merchant (2000) Ltd. purchased paintings from Mr. Joe Olah shall be removed from income.

6. One half, being \$1,600, of the amount of \$3,200 reassessed on the basis that Merchant (2000) Ltd. purchased paintings from Mr. Joe Olah shall remain in income. Gross negligence penalties assessed on this amount shall be removed.

1996 Taxation year

7. The adjustments made by the Minister in the 1996 year can be summarized as:

<u>1996</u>		
GST refund from 1995	2,203	
Shareholder benefit (s.15(1))	125,000	
Shareholder indebtedness (s.15(2))	141,014	P
Shareholder indebtedness interest benefit (s.80.4)	33,799	P
Capital Gains (stocks)	2,755	P
Capital Gains (art)	77,944	P
Denial of donation credit (art)	1,740	P
Denial of deduction of professional expenses	26,575	P

(a) Shareholder Loan Issues – 15(1)

8. The subsection 15(1) inclusion of \$125,000 shall remain as assessed.

(b) Capital Gains - Art

9. The Minister assessed a capital gain in the amount of \$103,925 (taxable capital gain \$77,944) in regards to the donation of various pieces of art by the Appellant during 1996. These amounts shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(c) Denial of Donation Credits - Art

10. In the 1996 year, the Appellant claimed donation credits totaling \$189,125. The Minister disallowed \$6,000 of the amounts claimed. The disallowed amount of \$6,000 claimed as a donation credit shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(d) Capital Gains - Stocks

11. The Minister included in income for 1996 a capital gain in the amount of \$6,491.50. The amounts related to stock transactions involving Falconbridge Ltd., First Australia Prime and BPI Cdn. Opp. RRSP Fund. The amount shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(e) Denial of Expense Deductions

12. Business expenses totaling \$26,575.14 were denied in relation to various expenditures incurred while earning professional income (i.e., legal services). These denied amounts shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

1997 Taxation Year

13. The adjustments made by the Minister in the 1997 year can be summarized as follows:

<u>1997</u>		
RSP deduction not allowed	6,082	P
Unreported taxable capital gain (stocks)	47,053	P
Unreported taxable capital gain (art)	40,913	P
Shareholder loan debt not repaid (15(2))	153,750	P

<u>1997</u>		
Denial of deduction of professional expenses	20,127	P
Investment expense deduction not allowed	9,968	
Limited Partnership losses not allowed	62,800	

(a) Capital Gains - Stocks

14. The Minister included in the Appellant's income for 1997 a taxable capital gain in the amount of \$60,000.00 (gross amount = \$80,000). The amounts shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(b) RSP Deductions

15. The Minister denied an RRSP deduction in the amount of \$6,082. The amount shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(c) Capital Gains - Artwork

16. The Minister assessed a capital gain in the amount of \$54,550 (\$40,913 taxable) in regards to the donation of various pieces of art by the Appellant during 1997. The amounts shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(d) Denial of Expense Deductions

17. Business expenses totaling \$20,126,82 were denied in relation to various expenditures incurred while earning income. The denied amounts shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(e) Denial of Investment Expense Deduction and Denial of Limited Partnership Losses

18. The amounts of investment expense deduction and limited partnership losses which were not allowed by the Minister shall remain as assessed.

1998 Taxation Year

19. The adjustments made by the Minister in the 1998 year can be summarized as follows:

<u>1998</u>		
Unreported taxable capital gains (stocks)	20,665	P
Unreported taxable capital gains (art)	10,939	
Shareholder benefits (15(1))	515,435	P (partial)
Denial of Deduction of Business expenses	13,946	P

Denial of RSP deduction 7,412

(a) Shareholder Loan Issues – 15(1)

20. CRA included the amount of \$515,435 income pursuant to subsection 15(1). The amount can be broken down as follows:

- (i) \$226,541 which the Minister asserted were amounts received by the Appellant;
- (ii) \$8,505 which the Minister asserted were travel expenses which were personal to the Appellant;
- (iii) \$21,877 which were amounts related to Susan Swierkos;
- (iv) \$60,282 which was an amount related to Marcos Pizza/Paul Beke;
- (v) \$198,250 which related to the Minister's assertion that the Appellant was indebted to Merchant (2000) Ltd. at the end of the year.

21. The amount of \$226,541 which the Minister included in income pursuant to subsection 15(1) of the Act was in regards to seven cheques written by Merchant (2000) Ltd. Of these amounts the amount of \$200,000 shall remain in income pursuant to subsection 15(1) of the Act and the remaining \$26,541 shall be removed from income. Gross negligence in regards to the \$200,000 shall be removed.

22. The amount of \$8,504 included in income pursuant to subsection 15(1) shall remain as assessed. Gross negligence penalties assessed on this amount shall be removed.

23. The amount of \$21,877 included in income pursuant to subsection 15(1) of the Act related to payments by cheques written from the company during 1998 to Susan Swierkos shall be removed from income.

24. The amount of \$60,262 included in income pursuant to subsection 15(1) in regards to a repayment of a loan originally made by Merchant (2000) Ltd. to Marcos Pizza – Paul Beke shall remain as assessed. Gross negligence penalties assessed on this amount shall be removed.

(b) Capital Gains – Stocks

25. The Minister's inclusion of a taxable capital gain in the 1998 year in the amount of \$20,665 relates in part to the disposition of 16,000 shares in Magin Energy Inc. by the Appellant. The taxable capital gain shall be reduced by attributing an ACB to such shares as determined by the parties. Gross negligence penalties assessed on these amounts shall be removed.

(c) Capital Gains – Art

26. The Minister calculated a taxable capital gain of \$10,939.00 pertaining to the donation of eight works of art. The amounts shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(d) Denial of Expense Deductions

27. Business expenses totaling \$13,947 were denied in relation to various expenditures incurred while earning professional income (i.e., legal services). These amounts shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(e) RSP Deduction

28. An RRSP carryforward of \$7,412 was denied as a result of the Minister's position in respect of the 1997 taxation year (i.e. the year in which the RRSP was purchased). The denial of the amount of the carryforward shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

1999 Taxation Year

29. The adjustments made by the Minister in the 1999 taxation year can be summarized as follows:

<u>1999</u>		
Unreported rental income	4,988	P
Unreported taxable capital gains	3,190	
Unreported stock dividends (gross up amount)	73,252	
Denial of deduction of professional expenses	9,871	
Shareholder benefit (s.15(1))	86,547	P
Unreported taxable capital gains (Art)	4,725	

(a) Capital Gains - Stocks

30. The Minister calculated capital gains in the amount of \$4,255 (taxable portion = \$3,191) which were related to Triax Resource Limited Partnership and disposition of shares in BPI Global Opportunities II Fund ("BPI"). The amount shall remain as assessed.

(b) Capital Gains - Art

31. CRA has assessed a capital gain in the amount of \$6,300 in regards to the donation of various pieces of art by the Appellant during 1999. The amount and shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

(c) Rental Income

32. The Minister added rental income of \$4,988 to the Appellant's income that pertains to a 1% interest held in Pineridge Greene Apartments. The amount shall remain as assessed. Gross negligence penalties on this amount shall be removed.

(d) Stock Dividend

33. The Minister assessed a stock dividend in the amount of \$58,602 in regards to 2,404 shares of BPI Global Opportunities Fund. The amount shall remain as assessed.

(e) Shareholder Issues – 15(1)

34. The Minister included \$86,546.79 in the Appellant's income pursuant to subsection 15(1) on the basis that there was a debt owing by an arms length company, Beacon Lands (2000) Ltd. to Merchant (2000) Ltd. which debt was reduced by \$86,547. The amount shall be removed from income.

(f) Denial of Expense Deductions

35. Business expenses totaling \$9,872 were denied in relation to various expenditures incurred while earning professional income as a lawyer. The amounts denied shall remain as assessed.

2000 Taxation year

36. The adjustments made by the Minister in the 2000 taxation year can be summarized as follows:

<u>2000</u>	<u>Amount</u>	<u>Penalty</u>
Denial of deduction of professional expenses	17,100	
Unreported stock dividends (gross up amount)	37,136	
Unreported Rental Income	14,374	P
Overstated Partnership Income	4,043	
Shareholder debt (s.15(2))	20,000	
Shareholder appropriation (15(1))	18,443	P

(a) Shareholder Appropriation

37. The Minister included in income the amount of \$18,443 in regards to a cheque for that amount from Fraser Milner (lawyers) that was issued to Merchant (2000) Ltd. but that was deposited into the Appellant's personal account in error. Gross negligence penalties assessed on these amounts shall be deleted.

(b) Denial of Business Expenses

38. Business expenses totaling \$17,100 were denied in relation to various expenditures the Appellant incurred while earning professional income as a lawyer. The denied amount shall remain as assessed.

(c) Stock Dividends

39. The Minister assessed two stock dividends in the amount of \$14,982 in regards to 551 shares of BPI Global Opportunities Fund (888) and \$14,727 in regards to 1,412 shares of BPI Global Opportunities II Fund. The amount shall remain as assessed.

(d) Rental Income

40. The Minister added rental income of \$5,274 in regards to a 1% interest held by the Appellant in Pineridge Greene Apartments and \$9,100 of rental income in regards to an interest held in the H.A. Roberts General Partnership. The amount shall remain as assessed. Gross negligence penalties assessed on these amounts shall be removed.

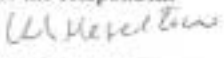
DATED at the City of Calgary, in the Province of Alberta, this 9th day of February 2010.

BENNETT JONES LLP
Solicitors for the Appellants

Per: 
Curtis Stewart

DATED at the City of Edmonton, in the Province of Alberta, this 9th day of February 2010.

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

Per: 
Mark Heseltine

ACTION NO: 2006-1880(IT)G
2006-2490(IT)G
2006-2580(IT)G
2006-2587(IT)G
2006-2879(IT)G
2006-3336(IT)G
2006-3337(IT)G

TAX COURT OF CANADA

BETWEEN:

E. F. ANTHONY MERCHANT Appellant

-and-

HER MAJESTY THE QUEEN Respondent

AGREED STATEMENT OF FACTS

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CITATION: 2010 TCC 467

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STYLE OF CAUSE: E.F. ANTHONY MERCHANT and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATES OF HEARING: February 10 and 11, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: September 10, 2010

APPEARANCES:

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Counsel for the Respondent: Mark Heseltine

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