

Docket: 2010-2766(IT)I

BETWEEN:

PETER WOLOSHYN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 16, 2011, at Calgary, Alberta.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Robert Neilson

JUDGMENT

The appeal from the loss determination made under the *Income Tax Act* in respect of the 2007 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Montreal, Quebec, this 13th day of July 2011.

"François Angers"

Angers J.

Citation: 2011 TCC 306
Date: 20110713
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BETWEEN:

PETER WOLOSHYN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from a loss determination made by the Minister of National Revenue (the "Minister") for the appellant's 2007 taxation year.

[2] The appellant and his wife were shareholders of 781426 Alberta Ltd. (the "business"), which was sold in 2002. At the time of the sale a dispute existed, and had existed since 1998, between the business and one Jack Carter, who sold vans to the business for customizing purposes. The appellant was unable to explain fully and in detail how Jack Carter obtained a lien on the business's inventory, but that lien had not been removed at the time of the sale of the business, and the appellant, through his lawyer, personally settled the claim in 2007 by paying Jack Carter \$30,600. The appellant incurred legal fees of \$9,981 with respect to that matter.

[3] In 2004, Canada Trust claimed payment under a personal guarantee given by the appellant in relation to the business. The claim was settled in 2006 by the appellant's paying Canada Trust \$3,500. The legal fees he incurred in that regard amounted to \$500.

[4] After these two issues were settled, a T1 Adjustment Request for the 2002 taxation year was filed requesting a business investment loss for the payments made under both personal guarantees, including the legal fees incurred.

[5] For his 2007 taxation year, the appellant did not claim an allowable business investment loss (ABIL) and his return was initially assessed as filed on May 5, 2008. He was later reassessed by the Minister for his 2007 taxation year as a result of the T1 Adjustment Request referred to above and was allowed an ABIL of \$15,325.

[6] In response to the same T1 Adjustment Request, the Minister also reassessed the appellant, on February 20, 2009, for his 2001, 2002 and 2006 taxation years. The appellant filed a notice of objection for each of those taxation years. He was advised by the Minister that the notices of objection were invalid for 2006 and 2007 as the reassessments for both years were nil assessments and that the notices of objection with respect to the 2001 and 2002 taxation years were also invalid as they were in respect of discretionary reassessments under the taxpayer relief legislation. The appellant requested from the Minister a loss determination for his 2007 taxation year, which determination is the subject of this appeal.

[7] The appellant is in agreement with the Minister that he incurred an ABIL of \$15,325, but disagrees that it was incurred in the 2007 taxation year. He also agrees that the ABIL was incurred with respect to payments under personal guarantees to Jack Carter and Canada Trust and that the legal fees (\$10,481 in total) were incurred to determine the amount owing under the said personal guarantees. He therefore disagrees with the Minister's assertion that the legal fees were not incurred to earn income from a business or property.

[8] The issues to be decided are whether the ABIL was correctly allowed for the 2007 taxation year, whether the legal fees of \$10,481 should form part of the ABIL allowed for the 2007 taxation year, and whether the appellant has a valid appeal for the 2001, 2002 and 2006 taxation years.

[9] The appellant's position is that the ABIL allowed for 2007 should apply to his 2002 taxation year. He bases his argument on the fact that since a shareholder loan was increased for the 2002 taxation year by virtue of the settlement, the ABIL on that settlement should also be allowed for that year.

[10] Paragraph 38(c) and subparagraph 39(1)(c)(iv) of the *Income Tax Act* (the "Act") indicate that an ABIL is treated as a capital loss and is deductible in the year in which the disposition of property that caused the loss occurred. This applies to property that is a debt, as in Mr. Woloshyn's case. The facts also clearly reveal that the disposition of the debt did not occur until the year 2007. In *McNeill v. The Queen*, 2000 DTC 6211, the Federal Court of Appeal held that damages payable are not

deductible until the quantum thereof and the obligation to pay damages are final and determined.

[11] In the present fact situation, although we are dealing with a debt arising out of personal guarantees, the appellant was not able to deduct the amount of the debt until the amount was finally determined and the appellant was liable to pay it, which in this case was in 2007.

Legal Fees

[12] In order for the appellant to deduct legal fees incurred in settling the two personal guarantees, he must show that they were incurred to maintain profits in the normal course of income-earning operations. In *Thiele Drywall Inc. v. R.*, [1996] 3 C.T.C. 2208, Judge Rip (as he then was) observed that the courts have allowed the deduction of legal expenses when these were incurred to preserve the taxpayer's ability to earn income in the normal course of the taxpayer's business. Justice Linden of the Federal Court of Appeal, in *Tonn et al. v. The Queen*, 96 DTC 6001, said at page 6005:

To be deductible according to paragraph 18(1)(a), an expense must have incurred with the intention of producing profit. In other words, the expense must have incurred within a business framework, bearing some relation to the income earning process.

[13] We must remember that in the fact situation here, the appellant sold his business in 2002 and that the settlement and payment under the personal guarantees occurred long after the business had been sold. The payment of these debts was not for the purpose of preserving the ability to earn income in the normal course of operations or continuing to produce profits for the business. The dispute over the personal guarantees and the amount owing thereunder was a personal one and, under paragraph 18(1)(h) of the *Act*, expenses of a personal nature are not deductible. See also *Bourget v. The Queen*, 2010 TCC 642. The legal fees do not form part of the ABIL.

[14] On the last issue of whether appeals are available to the appellant for his 2001, 2002 and 2006 taxation years, I will simply say that subsection 165(1.2) of the *Act* prevents a taxpayer from objecting to an assessment made under subsection 152(4.2) of the *Act*, that is, an assessment in a case where the taxpayer has applied for a reassessment of tax within 10 years after the end of a particular taxation year. As for the 2006 taxation year, subsection 169(1) only allows a taxpayer to appeal an assessment. A notice that no tax is owed, i.e. a nil assessment, cannot be appealed.

[15] The appeal is therefore dismissed.

Signed at Montreal, Quebec, this 13th day of July 2011.

"François Angers"

Angers J.

CITATION: 2011 TCC 306
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PLACE OF HEARING: Calgary, Alberta
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REASONS FOR JUDGMENT BY: The Honourable Justice François Angers
DATE OF JUDGMENT: July 13, 2011

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Robert Neilson

COUNSEL OF RECORD:

For the Appellant:

Name:

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