Docket: 2015-10(IT)G

BETWEEN:

CLAUDIO GRUBNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of Ruben Grubner (2015-9(IT)G) on June 20, 2017, at Vancouver, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Frank W. Quo Vadis
Counsel for the Respondent:	Karen A. Truscott

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2012 taxation year is dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Montreal, Quebec, this 23rd day of February 2018.

"Patrick Boyle"

Boyle J.

Docket: 2015-9(IT)G

BETWEEN:

RUBEN GRUBNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of Claudio Grubner (2015-10(IT)G) on June 20, 2017, at Vancouver, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Frank W. Quo Vadis
Counsel for the Respondent:	Karen A. Truscott

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2012 taxation year is dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Montreal, Quebec, this 23rd day of February 2018.

"Patrick Boyle"

Boyle J.

Citation: 2018 TCC 39
Date: 20180223
Dockets: 2015-10(IT)G
2015-9(IT)G

BETWEEN:

CLAUDIO GRUBNER,
RUBEN GRUBNER,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] Claudio and Ruben Grubner have claimed allowable business investment losses ("ABILs") of $606,000 with respect to amounts that they paid directly to the Canada Revenue Agency ("CRA") in respect of the unremitted GST/HST and source deductions of a corporation of which they had each been or were a director.[1]

The Evidence

[2] Claudio and Ruben are brothers and each owned 25% of Bavara Auto Haus Inc. ("Bavara") which operated an automotive body shop in the lower mainland of British Columbia. They were each directors since 2007. They may have resigned as directors in 2011. The other 50% was owned by an arm's length person, Sean Dawson, who was described by them as the managing director and the active shareholder.

[3] In June 2012, the brothers received letters from CRA that it was considering assessing them personally as directors for Bavara's unremitted GST/HST and source deductions. The brothers testified they were unaware of the failures to remit

[1] These appeals were heard together and argued in Vancouver. Written submissions from the Appellants were received in August 2017.

and contacted their accountant. The accountant suggested they pay CRA directly in the circumstances. The Grubners did not call their accountant to testify so I do not know the reasons for that suggestion. Claudio says they paid CRA directly because they were unaware of the source of the company's financial difficulties and were unsure they could trust Mr. Dawson.

[4] Each brother paid one-half of the unremitted amounts directly to CRA. It is their position that this was a loan made to Bavara with advances made to CRA, which would make it a debt owing to them by Bavara. Claudio said it was recorded as such on Bavara's 2012 financial statements. The 2012 financial statements do show an increase in Due to Related Parties of an amount greater than that advanced by the brothers. The financial statements do not describe what that increase was made up of. I note that the August 31, 2012 financial statements are dated October 2013, being a few months after the objections were filed and within a week or so of the brothers transferring their shares to Mr. Dawson according to corporate registers.

[5] The terms of the indebtedness were not evidenced in any written agreement or document. Claudio testified that Mr. Dawson and he intended and acknowledged the payments by the brothers to CRA of the unremitted withholdings as a loan to Bavara. Mr. Dawson was not called to testify.

[6] In a July email Claudio sent to Mr. Dawson, it is clear that Claudio sought to lend the money directly to Bavara and have Bavara immediately pay down the unremitted amounts, and to evidence this in writing as a loan by the brothers to Bavara. For whatever reason, this did not happen. It may be that Mr. Dawson refused to let Bavara borrow the money, but the Appellants did not call Mr. Dawson to testify nor even describe his response to this email from Claudio.

[7] Bavara did not have an obligation to pay interest to the brothers on this amount. Claudio testified that their return was to be by way of recovery of a higher purchase price than $606,000 on a sale of Bavara (or its business). Claudio described this as his belief and his intention, and his brother described it as his hope. Claudio described it as an expectation at one point but resiled somewhat and gave little to support it.

[8] Claudio described the debt as being repayable on demand. When the brothers demanded payment in October 2012, Bavara responded in a November letter signed by Mr. Dawson "as you know, the company is not in a position to repay those funds to you . . . that's the reality". Claudio's demand letter does not

describe the amount demanded as an outstanding loan amount but as "the more than $600,000 that we, as Directors, were made to pay on behalf of the company". That language is more consistent with the company's obligation being a statutory right in the *Income Tax Act* ("ITA") or the *Excise Tax Act* or a subrogated indebtedness than a loan to Bavara. In their tax returns, both brothers described it as "Shareholder Loan-CRA assessed", which is not factual in at least one respect.

[9] There was scant evidence to conclude that the brothers' belief, hope and intention, or even possible expectation, to receive a greater amount on a sale of Bavara or its business was realistic or reasonable. While Claudio described discussions with a third party, he testified they did not reach the stage of being written down, and they did not get beyond discussing what a letter of intent might look like, and they never established or agreed upon a price.

[10] The interested third party, Mr. Van Pykstra, in his email to Claudio of late July 2012 says he would like to sit down with Claudio and go over an offer he worked on and explain how the offer was arrived at. They agreed to meet the next day at Mr. Van Pykstra's office. Obviously, strategy and plans may have changed, but it is hard to read the email exchange as being limited to a planned discussion of assets versus shares. My best interpretation of the testimony, and the lack of other evidence, is that price or value was discussed, at least in ranges, and the two parties were far apart.

[11] Mr. Van Pykstra's September 2012 email talks about specific changes to some of the numbers in the letter of intent as requested by Claudio; the numbers mentioned in this email total a small fraction of $1,000,000. Claudio continued to deny there was a letter of intent, saying he only got to look at the other side's working papers. I was not told by Claudio or anyone else what was offered by Mr. Van Pykstra, and Claudio was evasive and deflective when the issue of discussions of price or value with Mr. Van Pykstra came up in his questioning.

[12] Claudio says he was hoping to ask for $900,000 to $1,100,000. Claudio's uncorroborated testimony was that these discussions started in February 2012 and continued until the summer, that the CRA payments by the brothers were disclosed, and that Mr. Van Pykstra did not want to buy shares. Claudio thought discussions were positive and hopeful in the summer but had turned sour by October. He said they talked numbers but never put anything on paper. That seems at odds with the earlier email from Mr. Van Pykstra referring to specific numbers. Claudio did not say what numbers were discussed between the parties, nor what he proposed to Mr. Van Pykstra or vice versa. Mr. Van Pykstra was not called by the brothers to testify. Ruben said that he was only aware that discussions had been held but did not participate and did not know of any valuations. The discussions appear not to have gone much further and this may have been because the related party did not see the value Claudio attributed to Bavara's business. That appeared to be what Claudio was referring to when he compared it to a bank's appraisal on your house — where you see it large and the bank sees it small.

[13] There was little evidence that the debt became uncollectible in 2012 even though the business was still carried on. Frankly, if it were reasonable to conclude it had become uncollectible by the end of 2012, that would seem to run somewhat contrary to the hope of selling Bavara or its business for $1,100,000, or even for enough to repay the $606,000 plus some greater amount as a return thereon. Perhaps if more evidence had been submitted regarding the value of Bavara after the amount was paid to CRA, or regarding the uncollectibility of this particular obligation to the brothers, this apparent paradox could be explained away or be shown to not exist.

[14] According to the July 2013 objections, Bavara had operated at a loss since its inception, and the brothers were already in discussions with Mr. Dawson for an orderly shutdown of the business. The 2012 loss was significantly greater than the 2011 loss. It was two and a half times the size.

[15] Claudio Grubner's testimony regarding a loan being made to Bavara, the existence of a letter of intent with Mr. Van Pykstra, and the numbers proposed and discussed with Mr. Van Pykstra, appears somewhat inconsistent with some of the written evidence on key points.

[16] Given the significant limitations to the evidence I received, all of which came from the two Appellants who have an interest in the outcome, little of which was corroborated with documents, some of which appeared inconsistent with the documents or with other testimony, I am unable to conclude on a balance of probabilities that the debt or other obligation owed by Bavara to Claudio and Ruben Grubner was acquired by them for the purpose of earning income.

[17] It had no interest payable on it and I am unable to conclude on a balance of probabilities that it was realistic or reasonable to expect a greater return on a sale of Bavara's shares or business at the time they paid CRA these amounts. That is fatal to the possible success of these appeals given that subparagraph 40(2)(*g*)(ii) of the ITA deems their loss to be nil on a disposition of a debt or other right unless it was acquired for an income earning purpose. This alone is sufficient to dismiss these appeals. If the loss was nil, there can be no ABIL.

[18] In order for the Appellants to successfully claim an ABIL, it would be necessary to have established that their rights against Bavara were a debt obligation and not some other right, such as one of statutory entitlement to recovery under the federal GST or income tax legislation or perhaps a right of subrogation. I am unable to conclude that under applicable law, which I am prepared to assume would be British Columbia, this would be characterized as a debt obligation. Paragraph 39(1)(*c*) of the ITA requires expressly that an ABIL can only be recognized with respect to a debt obligation. Further, for there to have been an ABIL, the debt obligation must have been disposed of in order to recognize that loss. The Appellants are relying upon a deemed disposition under the bad debt rule in section 50 of the ITA which also expressly only applies to debts and not to other rights or obligations. These are also fatal to the possible success of these appeals.

[19] In conclusion, the Appellants have not provided the Court with sufficient credible, consistent or corroborated evidence to establish on a balance of probabilities the facts needed to support their ABIL claims. In addition, the Appellants have not established that their claims against Bavara were debts which is required by the deemed disposition rule for bad debts and by the definition of an ABIL.

[20] The appeals are dismissed with costs.

Signed at Montreal, Quebec, this 23rd day of February 2018.

"Patrick Boyle"

Boyle J.

CITATION:	2018 TCC 39
COURT FILE NOS.:	2015-10(IT)G 2015-9(IT)G
STYLE OF CAUSE:	CLAUDIO GRUBNER, RUBEN GRUBNER, v. THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 20, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	February 23, 2018

APPEARANCES:

Counsel for the Appellants:	Frank W. Quo Vadis
Counsel for the Respondent:	Karen A. Truscott

COUNSEL OF RECORD:

For the Appellants:	Frank W. Quo Vadis
Firm:	Koffman Kalef LLP Vancouver, British Columbia
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada