Date: 20081006

Dockets: A-536-07
A-537-07

Citation: 2008 FCA 299

CORAM: **LINDEN J.A.**
EVANS J.A.
TRUDEL J.A.

BETWEEN: **A-536-07**

RONALD CASEY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

BETWEEN: **A-537-07**

LAWRENCE J. LARAMEE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 6, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on October 6, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 6, 2008)

TRUDEL J.A.

Overview

[1] This appeal is a consolidation of two appeals from the amended judgment of Mr. Justice Miller of the Tax Court of Canada (2007 TCC 635) (the judge), dated November 5, 2007 (issued in

substitution for the judgment dated October 19, 2007), that dismissed an appeal from the decision by the Minister of National Revenue (the Minister) to disallow the appellants' claim of a business loss for the 2001 taxation year, allowing instead a business investment loss.

Issue

[2] The only issue in this appeal is whether the loans advanced by the appellants to companies in which they held trading assets via a holding company were part of an adventure in the nature of trade, or an investment of a capital nature.

[3] These appeals must be dismissed, substantially for the reasons offered in Miller J.'s judgment.

The facts

[4] The salient facts leading up to these appeals are straightforward. In 1999, Messrs. Laramee and Casey put up funds in a golf course development. According to them, they were interested in a quick profit within four or five years and had no interest in running the golf course.

[5] Through a Memorandum of Understanding (MOU), the appellants and two other parties unconcerned by these appeals, Robert Stevens and William Zaduk, structured their project plan in the following manner: the golf course was to be built and operated by Crosswinds Golf & Country

Club (Golfco), while the real estate was to be owned by Crosswinds Properties Ltd. (Propertyco), together "the golf companies".

[6] Although the four men were to hold an equal quarter-share each in both companies, Stevens' and Zaduk's shares were to be held in trust by the golf companies giving the appellants full effective control of all the shares (MOU, article 9, AB, p. 51).

[7] The appellants and a third party were also the shareholders of Caslar Capital Limited (Caslar), an investment holding company which held shares in and advanced funds to other corporations. Messrs. Casey and Laramee each held 50 shares of Caslar, the third party holding the remaining 4 of the 104 issued and outstanding shares of Caslar.

[8] At the suggestion of the appellants' lawyer, Caslar was to act merely as a funnel or a "single entry point to hold the security and to be the point where the monies were financed or advanced through" (at paragraph 15 of the appellants' memorandum of facts and law).

[9] With this structure in place, the appellants, through Caslar, arranged financing of Golfco and Propertyco by way of a personal loan by putting up $2,755,850 and $4,061,491, respectively, and a loan from the Toronto-Dominion Bank in the amount of $6 million with an additional $1.2 million.

[10] The loan agreements specified that personal funds were to be lent to Caslar at an interest rate of 6%. Caslar, in turn, entered a loan agreement with Golfco and Propertyco to lend the amounts as

development funds to Golfco and as a mortgage to Propertyco. The development funds were lent at an interest rate of 10% calculated and compounded monthly, to be accrued and compounded until July 2002, or until first receipt of revenue from the golf course. The mortgage was interest-free for two years, or until first receipt of rental revenue, after which the interest rate became 14%. The loan became due and payable if title was transferred.

[11] Although the golf course held one tournament in 2001, it was unprofitable. In early 2002, the golf course was sold to a third party, and the bank was repaid in full. However, there was no money to repay the loan that the appellants had advanced through Caslar. As stated earlier, the appellants claimed this amount as a business loss on their 2001 income tax returns. The Minister denied the deduction, allowing an allowable business investment loss. The judge agreed with the respondent. Hence the within appeal.

Analysis

[12] The judge cited *Easton v. The Queen* (*Easton*) 97 DTC 5464 (FCA), a decision of this Court, and restated again "the basic precepts underlying the tax treatment of advances and outlays made by shareholders" (*Easton, ibid* at page 5468).

[13] *Easton* reminded us that:

> "[a]s a general proposition, it is safe to conclude that an advance or outlay made by a shareholder to or on behalf of the corporation will be treated as a loan extended for the purpose of providing that corporation with working capital"

[14] It ensues that generally losses arising from such an advance or outlay will also be on capital account. We say generally because there are two notable exceptions to this accepted proposition.

[15] We need not describe the first exception as this case deals with the second exception as found in *M.N.R. v. Freud*, 68 DTC 5279 (SCC), and discussed in *Easton*, *supra* at page 5468:

> Where a taxpayer holds shares in a corporation as a trading asset and not as an investment then any loss arising from an incidental outlay, including payment on a guarantee, will be on income account. This exception is applicable in the case of those who are held to be traders in shares. For those who do not fall within this category, it will be necessary to establish that the shares were acquired as an adventure in the nature of trade. I do not perceive this "exceptional circumstance" as constituting a window of opportunity for taxpayers seeking to deduct losses. I say this because there is a rebuttable presumption that shares are acquired as capital assets: see *Mandryk v. The Queen*, 92 DTC 6329 (F.C.A.) at 6634.

[16] Although the judge found that the appellants' shares in Golfco and Propertyco were acquired as trading assets and not as long term investment of a capital nature, he also found that the financing of the golf companies through Caslar was not part of that adventure as an incidental outlay.

[17] The crux of his decision can be found at paragraphs 33, 35 and 36 of the reasons:

> **33** Had Mr. Laramee and Mr. Casey injected their funds directly into Golfco and Propertyco, then, given my finding that the acquisition of shares in Golfco and Propertyco was an adventure in the nature of trade, I would have had no difficulty applying the *Freud and Easton* principles to find the lending of money in such case was an incidental outlay of their adventure. But to reach that

same conclusion, when funds are channeled through a separate legal entity, which is not acting as an agent, but clearly creating its own rights and responsibilities, especially a company with a shareholder other than Messrs. Laramee and Casey, requires me to pierce the corporate veil and effectively ignore the very existence of Caslar. The Appellants argue they are not requesting a piercing of the corporate veil, but are simply asking me to consider the totality of the circumstances surrounding the use of the companies: they refer to Caslar as simply a red herring. I disagree.

35 Yes, the economic realities are that Messrs. Laramee and Casey lost their money. Their acquisition of Golfco and Propertyco shares was an adventure in the nature of trade. Why should monies put indirectly into the "project" not be considered part of that adventure, given that had they been put in directly they would be considered part of the adventure; or put another way, why should the introduction of an intermediary affect the nature of the monies from being on income account to being on capital account? Because the payment is no longer incidental to the share purchase: it is a separate loan transaction to a third party, Caslar, in which Messrs. Casey and Laramee are not the only shareholders, and which in turn makes a commercial loan to the project with the profit being solely the interest earned thereunder. The outlay is simply not incidental to the purchase of the company's shares as it is not made to the company. The fact Mr. Laramee and Mr. Casey only owned 100 of the 104 outstanding shares in Caslar certainly influences my decision. I cannot ignore Mr. Weber, or presume that he is part of Mr. Casey's and Mr. Laramee's adventure.

36 I find that Caslar's loan to Golfco and Propertyco is simply a capital investment and not incidental to Mr. Laramee's and Mr. Casey's adventure in the nature of trade: it will return the principal plus interest -- period. Its income is simply the determinable, calculated difference between the terms of borrowing and the terms of lending. There is nothing exceptional about this loan; if it had been repaid, Caslar would have received considerably more interest than it would have had to pay to Mr. Laramee and Mr. Casey and would have paid tax on that difference. The resulting after-tax profit would have been available for distribution to all common shareholders, not just Mr. Casey and Mr. Laramee. There is nothing so extraordinary about these loan arrangements to shift them from being on capital account to being on income account. As stated in *Freud*:

> It is, of course, obvious that a loan made by a person who is not in the business of lending money is ordinarily to be considered as an investment. It is only under quite exceptional or unusual circumstances that such an operation should be considered as a speculation.

[18] It is clear to us that the judge embarked on a thorough fact-driven analysis before deciding that the lending of money to Caslar for lending on to Golfco and Propertyco was not part-and-parcel of the adventure in the nature of trade, thereby concluding that the appellants did not meet their

burden, that is to establish that the loans to Caslar for the golf companies fell into one of the two exceptions described in *Easton*. There was evidence on the record to support his conclusion.

[19] The appellants have failed to show a palpable and overriding error on the part of the judge justifying this Court's intervention.

[20] The appeals will be dismissed with costs, the respondent being entitled to one bill of costs for both appeals.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-536-07
A-537-07

APPEAL FROM AN AMENDED JUDGMENT OF THE HONOURABLE MR. JUSTICE MILLER OF THE TAX COURT OF CANADA DATED NOVEMBER 5, 2007 (ISSUED IN SUBSTITUTION FOR THE JUDGMENT DATED OCTOBER 19, 2007), DOCKET NOS. (2006-2705(IT) G, 2006-921 (IT) G)

STYLE OF CAUSE: **Docket: A-536-07**

RONALD CASEY v. *HER MAJESTY THE QUEEN*

Docket: A-537-07

LAWRENCE J. LARAMEE v. *HER MAJESTY THE QUEEN*

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 6, 2008

REASONS FOR JUDGMENT OF THE COURT BY: (LINDEN, EVANS & TRUDEL JJ.A.)

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

APPEARANCES:

Matthew G. Williams Mark A. Barbour	FOR THE APPELLANTS
Martin Beaudry	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Thorsteinssons LLP Toronto, Ontario	FOR THE APPELLANTS
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT