Docket: 2006-921(IT)G

BETWEEN:

LAWRENCE J. LARAMEE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Ronald Casey (2006-2705(IT)G)
September 17, 2007, at Toronto, Ontario
By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Matthew G. Williams Robert F. Madden
Counsel for the Respondent:	Marie-Therese Boris

JUDGMENT

The appeal from the assessment of tax made under the *Income Tax Act* for the 2001 taxation year is dismissed.

Signed at Ottawa, Canada, this 19th day of October, 2007.

"Campbell J. Miller"

Miller J.

Docket: 2006-2705(IT)G

BETWEEN:

RONALD CASEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Lawrence J. Laramee (2006-921(IT)G)
September 17, 2007, at Toronto, Ontario
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Appearances:

Counsel for the Appellant:	Matthew G. Williams Robert F. Madden
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JUDGMENT

The appeal from the assessment of tax made under the *Income Tax Act* for the 2001 taxation year is dismissed.

Signed at Ottawa, Canada, this 19th day of October, 2007.

"Campbell J. Miller"

Miller J.

Citation: 2007TCC635
Date: 20071019
Docket: 2006-921(IT)G

BETWEEN:

LAWRENCE J. LARAMEE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2006-2705(IT)G

AND BETWEEN:

RONALD CASEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Miller J.

[1] Mr. Laramee and Mr. Casey put a substantial amount of money into a golf course development, hoping for that elusive "hole-in-one". Instead, they were unsuccessful and lost everything that they put into the course. It is the nature of those losses at issue before me – were they on capital account, and allowed as an allowable business investment loss, as the Respondent contends, or were they on income account on the basis that Mr. Laramee and Mr. Casey were engaged in an adventure in the nature of trade, as the Appellants contend? The answer depends on the characterization of the arrangement whereby Messrs. Casey and Laramee lent money to a holding company, which in turn lent money to the golf course companies owned by Messrs. Casey and Laramee.

Facts

Background

[2] Mr. Laramee has had a number of business and employment experiences over the years. He spent nine years with Chrysler, laterally as a maintenance superintendent. He left Chrysler to become a private distributor for a glass business, but after a year he realized that he could start his own glass distribution business. He carried on that business successfully from the 1970s to 1989-1990, when he sold and retired – briefly.

[3] In 1991, Mr. Laramee got wind of Michelin looking to sell its facility in Kitchener. Around this time, Mr. Laramee had met Mr. Casey and they teamed up on this Kitchener project. Mr. Laramee negotiated with Michelin and with a Chinese delegation for a couple of years, which resulted in a deal in 1993. Messrs. Casey and Laramee set up a company which acquired the Michelin assets, sold equipment to the Chinese, retained some of the real estate, sold other parcels, retained some rubber mixing equipment and commenced a rubber mixing business under a new entity. Messrs. Casey and Laramee eventually sold the rubber mixing business, along with one of the larger former Michelin buildings. My impression was that Messrs. Casey and Laramee did very well from this Michelin deal.

[4] Both Mr. Casey and Mr. Laramee split their time equally between Canada and Florida. They enjoy golfing and were members of the Conestoga Golf Course. In the late 1990s, Mr. Laramee and Mr. Casey invested in mortgages, mainly private mortgages (approximately 20 or so) and one large commercial mortgage to the Conestoga Golf Course, owned by a Mr. Bill Zaduk. They looked for low risk mortgages. By 1998-1999, both gentlemen were receiving some significant annual income.

[5] In 1997, Messrs. Casey and Laramee set up Caslar Capital Limited (“Caslar”), a company which was to serve as a holding company for an investment in Dari-Serve, a soft ice cream company operated by Mr. Laramee’s wife. Caslar also invested, by way of loan, in an entertainment software development business called Mondo-Live. Both these investments appeared as investments in Caslar’s financial statements. Messrs. Casey and Laramee had 50 shares each in Caslar, while a third-party, Mr. Weber held four shares.

[6] Mr. Casey described Mr. Laramee as the brains and he was the brawn in their business relationship. Mr. Casey confirmed he first met Mr. Laramee in 1989-1990 when Mr. Casey was running a machine moving business. Mr. Casey's role in the Kitchener project was to "look after people on the floor". He confirmed Mr. Laramee's explanation of the substance of this project. Mr. Casey indicated that in the late 1990s, he had a comfortable stock portfolio and was financially secure.

Crosswinds Golf Project

[7] In 1998, Mr. Zaduk, the owner of Conestoga Golf Course, came across an opportunity to acquire 150 acres of farm property zoned appropriately for the development of a golf course. He interested his young superintendent, Mr. Stevens, in the project. Mr. Zaduk had a handshake deal with the owner of the project, Mr. Ulrich, for buying the property at $900,000. This was, according to Mr. Stevens' testimony, well under the fair value of other properties for the development of golf courses. Messrs. Zaduk and Stevens hired an engineering firm, an environmental consultant and an agricultural assessor to conduct some preliminary work on the property. There was some urgency to get municipal approval before the possibility of a zoning change became a reality, precluding a golf course development.

[8] Messrs. Stevens and Zaduk approached Mr. Laramee in the spring of 1999 and advised him of the potential golf course development, and inquired whether Mr. Laramee would be interested in funding it. Mr. Laramee was interested in a quick, profitable turn-around by putting up the money and selling out within four or five years. He expressed no interest in actually running a golf course. Mr. Casey testified in a similar vein: he felt he would be in and out in three years. His intention was to sell and make money. He did not want to leave his money in for the long term, as he believed it would take too long to recoup. He wanted to sell at the earliest possibility.

[9] In June 1999, Mr. Laramee met with his lawyer, Mr. Moon, who testified that, after his discussions with Mr. Laramee, he drew up a Memorandum of Understanding. The Memorandum of Understanding ("Memorandum"), was signed by Mr. Laramee, Mr. Casey, Mr. Zaduk and Mr. Stevens, although Mr. Stevens testified that the "Project Structure Plan" attached to the Memorandum was not the document he recalled having seen at the time of signing the Memorandum. He did not produce a copy of what he felt he had seen. Mr. Stevens felt the Project Structure Plan did not actually reflect his understanding that the golf course was to proceed on an ownership basis of a quarter interest each for Laramee, Casey, Zaduk and Stevens.

[10] The Project Structure Plan was described as a proposal for the acquisition and development of a golf course known as the Crosswinds Golf & Country Club. The golf course was to be built and operated by one company, Crosswinds Golf Course & Country Club Ltd. ("Golfco"); the real estate was to be owned by a second company, Crosswinds Properties Ltd. ("Propertyco") and leased to Golfco. Messrs. Laramee and Casey were to arrange for all the financing, both personally and from the bank. Caslar was intended to be the vehicle for funnelling money into the golf course development. It was to grant a mortgage on the acquisition of the real estate. One term of the Memorandum required that all aspects of the development of the golf course would be subject to Messrs. Laramee and Casey's approval as long as they directly or indirectly provided financing. Mr. Moon pointed out, given that Messrs. Laramee and Casey were providing all the financing, they should have complete control. Mr. Laramee emphasized this control was important to put him in a position to force a sale whenever appropriate.

[11] The Memorandum also dealt with the terms of financing. The Caslar mortgage was to be interest-free for the earlier of two years or until the golf course was generating revenue, after which interest would accrue at 14%. Mr. Laramee was clear he never expected to get interest. The terms were set up to encourage a sale as soon as possible. He recognized there was no way for the golf course to pay interest during development. Only on a sale did he anticipate getting any accrued interest.

[12] The Memorandum also called for Messrs. Laramee and Casey to arrange development financing. Any development funds supplied by Messrs. Laramee and Casey would be on a demand basis at 10% interest. The Memorandum included the following provision:

> Once the golf course is operational, term financing on conventional terms will be sought and the development financing will be returned.

Mr. Laramee stated the development financing would be retired once the golf course was sold. The Memorandum also described the security to be provided:

> General Security Agreement, Assignment of Lease, Cross Guarantees,

Mr. Laramee knew the security would have to be pledged to the bank. He arranged for the Toronto-Dominion Bank to provide an initial $6 million loan, with an

additional $1.2 million bump, as he called it. Messrs. Laramee and Casey arranged for all the money to flow through Caslar, whether from themselves or the bank. Mr. Laramee described Caslar as simply a funnel for the funds. He and Mr. Casey were consistently adamant that Caslar had no role as investor or otherwise in the golf course. It was simply a conduit of funds.

[13] The Memorandum described Mr. Stevens' role as General Manager. Neither he nor Mr. Zaduk were expected to put up any money. The corporate structure was described as an equal quarter-share in both companies to be held by Laramee, Casey, Zaduk and Stevens, though both Mr. Zaduk and Mr. Stevens had restrictions on their interests. Mr. Zaduk's shares were to be held in trust until Messrs. Laramee and Casey had been repaid in full, and until then Mr. Zaduk could not vote the shares. Mr. Stevens' shares were also to be held in trust on the same terms, with the additional provision that they would only be released six months after the golf course was generating revenue, and provided Mr. Stevens remained an employee of the golf course. Shares were issued on the basis of this quarter-interest each.

[14] The Memorandum also described terms of the proposed Shareholder Agreement, which included:

> If a shareholder sells shares, the shares of both companies must be sold together and may not be sold separately, unless the other shareholders agree.
>
> No shares may be sold or offered for sale for a period of three years.
>
> …
>
> If the shareholders receive a third party offer to purchase all the shares of the entire company, and one or more shareholders are prepared to accept the offer, the other shareholders may match the offer under the right of first refusal, and if they do not do so they will be obliged to sell to the third party.

[15] When a draft Shareholder Agreement was actually presented by Mr. Laramee, in Mr. Moon's office, to Mr. Zaduk and Mr. Stevens, they refused to sign, as they felt it did not reflect the deal they had envisaged. Mr. Laramee and Mr. Casey were effectively left to go it alone. At this point, they were 50–50 shareholders in each of Golfco and Propertyco.

[16] The development of the course proceeded on a fast-track basis, as Mr. Laramee and Mr. Casey wanted it in a saleable condition as soon as possible. Sod was put in place instead of seeding, mature trees were planted and club house construction started immediately. Messrs. Laramee and Casey injected $2,755,850 and $4,061,491, respectively, through Caslar into the golf course development. The Toronto-Dominion Bank advanced the initial $6 million and then some bump.

[17] The funds were lent by Messrs. Laramee and Casey to Caslar and formal loan agreements were entered into at a 6% interest rate, and a term of the earlier of June 30, 2005 or the sale of the golf course. Caslar, in turn, entered a loan agreement with each of Golfco and Propertyco, to provide development funds to Golfco and a mortgage to Propertyco. The interest rate on the development funds was 10% calculated and compounded monthly, to be accrued and compounded until July 2002 or "when revenue is first received from the operation of the golf course". The loan to Propertyco was interest free for two years, or until rental revenue was first received; thereafter interest was 14%. The loan became due and payable if title was transferred.

[18] Both Mr. Moon and Mr. Webb, Mr. Laramee's accountant, confirmed their understanding of Mr. Laramee's and Mr. Casey's intention to get a quick return on their money.

[19] Although not quite operational, the course held a tournament in the late 2001 season. Liens however had been filed against the property. By September 2001 the funds had dried up. By December 2001, the Toronto- Dominion Bank took steps to recover its loan. In early 2002, the golf course was sold to a third party and the Bank was paid out in full. There was no money, however, to repay any of the monies advanced by Messrs. Laramee and Casey through Caslar. In their 2001 income tax returns, they claimed a business loss which was denied by the Respondent, allowing instead an allowable business investment loss.

Issue

[20] Are Messrs. Laramee and Casey entitled to deduct $2,755,850 and $4,061,491, respectively, as business losses in computing their 2001 income? The questions to be answered in deciding this issue are as follows:

(a) Did Mr. Laramee and Mr. Casey acquire shares in Golfco and Propertyco as an adventure in the nature of trade?

(b) If so, was the financing, through Caslar, part of that adventure as an incidental outlay?

Analysis

[21] The Appellants' position is that there was an adventure consisting of the development and sale of a golf course. The advances made by Mr. Laramee and Mr. Casey were an incidental outlay to such adventure, and consequently, deductible as business losses. The Respondent's position is, firstly, that there was no adventure in the nature of trade as the Appellants had not proven it was their initial intention to sell at a profit. If there was an adventure, it was the acquisition of the shares of Golfco and Propertyco; the advances by Mr. Laramee and Mr. Casey to Caslar were not incidental to that adventure, but represented a normal injection of capital into their holding company for investment purposes.

Adventure in the Nature of Trade

[22] An adventure in the nature of trade must involve a scheme of profit-making. As put by the Supreme Court of Canada in *Friesen v. The Queen:*[1]

> The first requirement for an adventure in the nature of trade is that it involve a "scheme for profit-making". The taxpayer must have a legitimate intention of gaining a profit from the transaction.

I am satisfied that the profit, from Mr. Laramee and Mr. Casey's perspective, was to be derived from a quick turn-around sale of the golf course project. As the course was held through their ownership of shares in Golfco and Propertyco, I find such shares were trading assets.

[23] The Respondent argues that none of the documents in connection with the golf course project indicate any intention on the part of Mr. Laramee and Mr. Casey to flip the golf course at the first opportunity. The Memorandum talks in terms of the acquisition and development of the golf course; the draft Shareholder's Agreement makes no mention of selling. I do not find this persuasive, given the testimony of Mr. Laramee and Mr. Casey, both of whom I found to be credible and straightforward. I also find that their lawyer, Mr. Moon, and their accountant, Mr. Webb, support their version of their intent. I am satisfied neither Mr. Laramee nor Mr. Casey had any intention of running a golf course. They were both comfortably off, with steady retirement income. Their interest in

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[1] 95 D.T.C. 5551 (S.C.C.).

the golf course was entirely to profit on sale. This was consistent with the steps taken to fast track the development of the course for a quick sale.

[24] Further, neither Mr. Laramee nor Mr. Casey had any experience in running a golf course. Indeed, Mr. Casey was adamant that the headache of operating a golf course would be completely unwelcome, especially as he did not see recouping what he put into the project from the operation of the course, but only from a speedy sale.

[25] The profit-making scheme, the Appellants' intention and their lack of experience in running a golf course all point to a conclusion that the shares of Golfco and Propertyco were acquired as trading assets, not as a long term investment of a capital nature.

Financing Arrangements

[26] The more difficult issue is whether the lending of money to Caslar for lending on to Golfco and Propertyco was part-and-parcel of the adventure in the nature of trade, or as put by Justice Robertson in the decision of *Easton v. The Queen*,[2] an incidental outlay. It is worthwhile to review the *Easton* decision. In *Easton* the issue was whether an amount paid by a shareholder as a guarantor on funds borrowed by the shareholder's company was on capital or income account. The Federal Court of Appeal accepted that the property in question, real estate, was not purchased just for investment purposes. However the Court went on to state:

> As 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.
>
> …
>
> As the law presumes that shares are acquired for investment purposes it seems only too reasonable to presume that a loss arising from an advance or outlay made by a shareholder is also on capital account.
>
> …
>
> There are two recognized exceptions to the general proposition that losses of the nature described above are on capital account.

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[2] 97 D.T.C. 5464 (F.C.A.).

…

> The second exception is found in *Freud*. 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.

[27] This case deals with the second exception. In *Easton*, the Appellants were unable to convince the Court that the shares were held as trading assets.

[28] Justice McArthur applied the principles in *Freud*, referred to in *Easton*, in the case of *Greenberg v. Canada*,[3] to find that loans made by Mr. Greenberg to Zynex Systems Inc. were on income account. Justice McArthur found that Mr. Greenberg made the loans in the ordinary course of his business, and also

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[3] 2007 D.T.C. 124.

found that the Zynex shares were held as trading assets. He commented:

> Had Zynex redeemed its debt to the Appellant, and had the Appellant sold his founder's shares, the interest and the profit on the sale of those shares would also have been taxable on income account.

[29] The Appellants also rely on the Federal Court of Appeal case of *Becker v. The Queen*,[4] a case in which the Appellant acquired shares in a company and also lent money to the same company. The Court held that the purchase of shares and subsequent financing constituted an adventure in the nature of trade.

[30] The question is really what constitutes an incidental outlay. Are the loans made by Messrs. Laramee and Casey to Caslar an outlay incidental to their acquisition of the trading assets, the shares in Golfco and Propertyco?

[31] The distinction between the cases cited and the facts of Mr. Laramee's and Mr. Casey's venture are that Mr. Laramee and Mr. Casey did not lend money to the company whose shares they held; they lent money to Caslar, a holding company. Does this impact on the nature of the monies put into the golf project? No says the Appellant; yes says the Respondent.

[32] Had the shares been sold, the sale of shares would have yielded income to Messrs. Laramee and Casey. But what would have happened to the loans? Presumably, the new owner would have re-financed the debt owed to Caslar. So Caslar would have received the return of the principal plus accrued interest. Caslar then would have been in a position to repay to Messrs. Laramee and Casey their loan. But the interest arrangements in the loan agreements were such that there would have been a significant difference between what Caslar would have received from Golfco and Propertyco, and what Caslar would have been liable to repay Messrs. Laramee and Casey. This brings into question Mr. Laramee's assertion that Caslar was simply a funnel, that indeed there was never any intent that Caslar would profit. The loan documents demand that Caslar receive more than it has to pay. This is simply not the same as the *Freud* or *Becker* situations. As Justice Robertson noted in *Easton*:

> He succeeded because he was able to convince the Supreme Court that the outlay (loss) should receive the same tax treatment as would any profit or loss arising on the disposition of his shares. In other words, if a shareholder can establish that his or

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4 83 D.T.C. 5032 (F.C.A.).

> her shares were acquired as trading assets, and not for investment purposes, then any loss arising from an advance or outlay made by the shareholder to or on behalf of the corporation, including payments on a guarantee, will also be taxed on income account. In my view this is the true import of Freud.

Justice Robertson's comments are clearly directed at loans from the shareholder to the corporation, not to a holding company as an intermediary.

[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.

[34] In requesting a common sense, practical approach, the Appellants cited Chief Justice Bowman's comments in *Truscan Realty Ltd. v. The Queen*:[5]

> The conclusion must be based upon "a commonsense appreciation of all the guiding features…" (*M.N.R. v. Algoma Central Railway*, 68 DTC 5096), and upon "the practical and commercial aspects [of the transaction] (*Her Majesty the Queen v. F.H. Jones Tobacco Sales Co. Ltd.*), 73 DTC 5577, and upon "what the expenditure is calculated to effect from a practical business point of view rather than upon the juristic classification of the legal rights, if any, secured employed or exhausted in the process". (*Hallstroms Pty Ltd. v. Federal Commissioner of Taxation* (1946), 72 C.L.R. 634).

I am wholeheartedly in favour of common sense (an ardent fan even), and indeed consider it a judge's most valuable tool. I recoil at the suggestion that as a judge, I am enslaved to the juristic classification of legal rights. Yet surely these are not mutually exclusive concepts, but can and must operate in balance. It is that balancing act that is the judge's challenge.

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[5] 96 D.T.C. 1513 (T.C.C.).

[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.

[37] The Appellants chose to arrange their affairs in the manner they did on the advice of their professional advisors. It was not suggested that anyone was thinking in terms of catastrophic loss in providing such advice. The use of Caslar may have been for convenience, but the result of such arrangement has been to deny Mr.

Laramee and Mr. Casey the ability to fully deduct their economic loss. The appeal is dismissed, with costs.

Signed at Ottawa, Canada, this 19th day of October, 2007.

"Campbell J. Miller"

Miller J.

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APPEARANCES:

Counsel for the Appellants:	Matthew G. Williams Robert F. Madden
Counsel for the Respondent:	Marie-Therese Boris

COUNSEL OF RECORD:

For the Appellants:

Name:	Matthew G. Willams Robert F. Madden
Firm:	Thorsteinssons LLP.

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada