

Docket: 2011-3871(IT)I

BETWEEN:

HASSAN YAZDANI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on July 4, 2012, at Vancouver, British Columbia

Before: The Honourable Justice R  al Favreau

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Jonathan Wittig

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2002 and 2003 taxation years are dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 19th day of October 2012.

"R  al Favreau"

Favreau J.

Citation: 2012 TCC 371
Date: 20121019
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BETWEEN:

HASSAN YAZDANI,

Appellant,

and

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REASONS FOR JUDGMENT

Favreau J.

[1] These are appeals under the informal procedure from reassessments made under the *Income Tax Act*, R.S.C. 1985, c. 1. (5th Supp.), as amended (the "Act"), by the Minister of National Revenue (the "Minister") with regard to the Appellant's 2002 and 2003 taxation years.

[2] The issues are:

(a) whether the Appellant is entitled to claim with respect to an investment called the investment in RTI (the "Investment") deductions in the amounts of \$27,510 and \$8,873 for the 2002 and 2003 taxation years respectively;

(b) whether the Appellant, in reporting his income and expenses and in filing his income tax returns for the 2002 and 2003 taxation years, made a misrepresentation attributable to neglect, carelessness or wilful default with respect to those years.

Background information

[3] In filing his income tax returns for 2002 and 2003, the Appellant claimed on the income and expense statements submitted for the Investment deductions in the amounts of \$27,510 and \$8,873 respectively. More specifically:

a) on April 14, 2003, the Appellant filed an unsigned 2002 personal income tax return claiming a refund in the amount of \$13,480.45; and

b) on March 9, 2004, the Appellant filed a signed 2003 personal income tax return claiming a refund in the amount of \$12,525.97.

[4] The Minister initially assessed the Appellant's 2002 and 2003 income tax returns as filed and allowed the deduction claimed with respect to the Investment by notices dated May 5, 2003 and April 14, 2004 respectively.

[5] The Appellant was reassessed on October 7, 2010 (the "October 2010 Reassessments") for the 2002 and 2003 taxation years. The reassessments disallowed the deduction claimed for the Investment.

[6] The 2002 and 2003 taxation years were reassessed beyond the normal reassessment period.

[7] The Appellant objected to the October 2010 reassessments by serving a Notice of Objection postmarked on December 8, 2010 and received by the Minister on December 9, 2010.

[8] The Minister negotiated a settlement with the Appellant, and on September 22, 2011:

a) with agreement, the Minister varied the reassessment for the 2003 taxation year, allowing a capital loss of \$25,250 and an allowable net capital loss of \$12,625; and

b) the Minister issued a notification of confirmation for the 2002 taxation year.

Assumptions of fact made by the Minister

[9] In determining the Appellant's liability for the 2002 and 2003 taxation years, the Minister relied on the following assumptions of fact set out in paragraph 8 of the Reply to the Notice of Appeal:

In determining the Appellant's tax liability for the 2002 and 2003 taxation years, the Minister made the following assumptions of fact:

- a) the facts as stated and admitted above;

The Appellant

- b) the Appellant's professional background is that of a machinist;
- c) during 2002 and 2003, the Appellant received \$62,518 and \$58,135, respectively, from an employer named Richmond Machine Works Ltd. ("Machine Works");

The Self-Employed Business

- d) during 2002 and 2003, the Appellant operated a sole proprietorship under the business name Yazdani Enterprises ("Enterprises"), providing services to clients in the greater Vancouver, British Columbia lower mainland area;
- e) the stated nature of Enterprises was machining;
- f) Enterprises was operated:
- i) after the Appellant completed his regular employment duties with Machine Works; and
 - ii) from the Appellant's principal residence, located in Coquitlam, British Columbia;
- g) Enterprises operated from January 1 to December 31, in both 2002 and 2003;

Gross Business Income

- h) the Appellant earned gross business income from Enterprises of \$12,692 and \$10,481 in 2002 and 2003, respectively;

Enterprises Expenses

- i) the Appellant incurred cost of goods sold and business expenses in the amounts of \$24,704 and \$42,224 in 2002 and 2003, respectively, as detailed in the attached Schedules "A" and "B";
- j) the expenses claimed in excess of those allowed by the Minister for 2002 and 2003 in respect of Enterprises, as detailed in the attached Schedules "A" and "B", respectively, were not incurred or if they were incurred, they were not incurred to earn business income or were capital expenditures;

The Actual RTI Investment

- k) during 2001, the Appellant paid his former accountant, Samir Fawaz ("Fawaz") a total of \$31,000 for the Investment;
- l) the invested amount was forwarded to Sawaz [sic] for an interest in either a:
 - i) tax cab leasing business; and/or
 - ii) training school;
- m) the Investment was known as:
 - i) Regions Co of Shipping;
 - ii) Regions Company of Shipping Transport & Clearing;
 - iii) Regions Training Institute; and
 - iv) RTI;
- n) during the 2001, 2002 and 2003 taxation years, the Appellant was not directly involved with the operations of Regions;
- o) during the 2002 taxation year, the Appellant received back from Regions the following payments on the following dates:
 - i) \$1,750 on January 7, 2002;
 - ii) \$2,000 on June 7, 2002;
 - iii) \$2,000 on September 30, 2002; and
 - iv) \$1,200 on December 19, 2002;

- p) in total, the Appellant received back \$6,950 from his investment in Regions;
- q) the residual amount not returned by either Regions or by Sawaz [*sic*], during the 2002 or the 2003 taxation year was \$24,050;
- r) the Minister, in error, determined that the residual amount not returned was \$25,250 (the "Loss");
- s) the Appellant had not previously included the Loss as a source of business income in either the 2002 or 2003 taxation years or in other years;
- t) the Loss was not a bad debt; and
- u) the Loss was on account of capital.

[10] In determining that the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default or fraud in filing his returns for the 2002 and 2003 taxation years, the Minister relied on the following facts set out in paragraph 9 of the Reply to the Notice of Appeal:

- a) the facts already stated and admitted in this Reply;
- b) when interviewed by Yang and a second investigator on January 4, 2010, the Appellant could not recall making the Investment;
- c) the Appellant testified in detail about Regions with respect to his wife's Tax Court of Canada appeals, which are Court Numbers 2007-2655(EI) and 2007-2656(CPP);
- d) the Appellant knew that Regions had a cash flow problem; and
- e) the Appellant's claimed losses of \$27,510 in 2002 and \$8,873 [in 2003] from the Investment represented 44 percent and 18 percent, respectively, of his before tax income in those taxation years and were, therefore, material.

[11] The Appellant testified at the hearing and he confirmed that his tax returns for the 2002 and 2003 taxation years were prepared by his former accountant, Fawaz, who was using fraudulent practices to obtain investments from his clients. The Appellant told the Court that Fawaz had used his business numbers to qualify another person for employment insurance.

[12] The Appellant was first contacted on April 29, 2009 by Ms. Jane Yang of the Canada Revenue Agency ("CRA"), who was conducting a criminal investigation into the tax affairs of Fawaz, and in a letter dated May 1, 2009, she asked the Appellant to submit to an interview, on a voluntary basis, because she had reason to believe that he might have information that would assist in the investigation. Although Ms. Yang clearly stated in that letter that the Appellant and his company were not under audit or investigation, the points for discussion specifically referred to were the following: (i) the Investment, as claimed in his 2002 and 2003 tax returns; (ii) the payments made to or received from Fawaz and/or his companies; and (iii) the Appellant's business dealings with Fawaz and/or his companies. At the interview, which took place on January 4, 2010, the Appellant informed the CRA's investigators that (i) he trusted his accountant and did not read his income tax returns, (ii) he did not remember making the Investment, (iii) he never bought losses from Fawaz or from his companies, and (iv) he had never been involved in any of Fawaz's businesses. In addition, the Appellant undertook to check his records to provide explanations concerning the losses that he had claimed.

[13] In his testimony, the Appellant stated that he was cheated by the CRA and by his former accountant. He never agreed to the September 22, 2011 settlement with the CRA whereby his business losses for 2002 and 2003 were disallowed and a capital loss of \$25,250 was allowed for 2003, without any gross negligence penalty. He also asserted that he had made no misrepresentation in his tax returns for the 2002 and 2003 taxation years.

[14] Ms. Yang also testified at the hearing, explaining that she gave the Appellant eight months to provide any documents explaining the Investment. She never received such documents from him, and in September 2010, a final letter was sent to the Appellant disallowing the losses. Subsequently, the Appellant called her and said that he could not provide the documents because the CRA had seized all his records for the purposes of the Fawaz investigation. Ms. Yang informed the Appellant that the documents seized were not related to his 2002 and 2003 taxation years and that they contained no evidence that would suggest that he had made payments to RTI.

[15] In her testimony, Ms. Yang told the Court that the Appellant's spouse, Sherry Pai, worked for Regions from May 6 to October 18, 2002 and that the Appellant had testified in detail about Regions in his spouse's Tax Court of Canada appeals (2008 TCC 456). Considering his testimony in those appeals, the Appellant knew that Regions had a cash flow problem, and he could not explain why he made additional investments in RTI in those circumstances.

[16] The documents regarding the Investment were submitted to the CRA on June 2, 2011 during the review of the Appellant's notices of objection. Among those documents were two agreements, namely:

- (a) a "lease agreement of four airport cabs" dated March 23, 2001 entered into between Regions Company for Shipping Transport & Clearing and the Appellant and his spouse, and involving an investment of \$11,391.10; and
- (b) a loan agreement dated October 12, 2001 between the Appellant and Fawaz relating to an investment in Regions Training Institute of \$35,000.00, which represented 9% of the business. The loan was to be repaid in monthly amounts of \$1,750.00 starting in December 2001, and the agreement could be cancelled on sixty days' written notice by either party. No interest rate was specified in the agreement.

[17] The loan agreement was in effect a consolidation of all the investments made by the Appellant, as the airport cab leasing venture was not doing well, but the total amount of the investments made was limited to \$31,000.00.

Analysis

[18] The provisions of the *Act* that are relevant in these appeals are paragraphs 3(a) and (b), subparagraph 20(1)(p)(i), paragraphs 38(a) and (b), paragraph 50(1)(a), and subparagraphs 152(4)(a)(i) and 152(4.01)(a)(i). Those provisions read as follows:

3. Income for taxation year -- The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

(b) determine the amount, if any, by which

(i) the total of

(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and

(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,

exceeds

(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

20 (1) Deductions permitted in computing income from business or property --

Notwithstanding paragraphs 18(1)(a), (b) and (h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:

...

(p) **Bad debts** -- the total of

(i) all debts owing to the taxpayer that are established by the taxpayer to have become bad debts in the year and that have been included in computing the taxpayer's income for the year or a preceding taxation year, and

38. Taxable capital gain and allowable capital loss -- For the purposes of this Act,

(a) [taxable capital gain—general] -- subject to paragraphs (a.1) and (a.2), a taxpayer's taxable capital gain for a taxation year from the disposition of any property is 1/2 of the taxpayer's capital gain for the year from the disposition of the property;

...

(b) [allowable capital loss] -- a taxpayer's allowable capital loss for a taxation year from the disposition of any property is 1/2 of the taxpayer's capital loss for the year from the disposition of that property; and

50. (1) Debts established to be bad debts and shares of bankrupt corporation -- For the purposes of this subdivision, where

(a) a debt owing to a taxpayer at the end of a taxation year (other than a debt owing to the taxpayer in respect of the disposition of personal-use property) is established by the taxpayer to have become a bad debt in the year, or

152. (4) Assessment and reassessment [limitation period] -- The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or

notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

...

(4.01) Assessment to which par. 152(4)(a) or (b) applies -- Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(a) or (b) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,

(a) where paragraph (4)(a) applies to the assessment, reassessment or additional assessment,

(i) any misrepresentation made by the taxpayer or a person who filed the taxpayer's return of income for the year that is attributable to neglect, carelessness or wilful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this Act, or

...

[19] The evidence reveals that only \$6,950 has been recovered by the Appellant on his \$31,000 investment, and there is no indication as to whether or not the amount of \$6,950 represents interest or capital or a combination of interest and capital. The documents submitted by the Appellant as evidence of his investment do not appear to be genuine as they contain numerous deficiencies and inconsistencies. Fawaz was charged with income tax evasion and criminal fraud for allegedly selling business losses to individual taxpayers.

[20] On the other hand, the Appellant convinced the CRA that he really did make the \$31,000 investment in Fawaz's business, and that explains why the CRA has allowed a capital loss of \$25,250 for the 2003 taxation year pursuant to paragraph 50(1)(a) of the *Act*. The Appellant has not been able to recover the balance of his investment because Fawaz declared bankruptcy.

[21] The Appellant was not entitled, in computing his income for the taxation year from a business, to deduct the amount of his loss pursuant to subparagraph 20(1)(p)(i) of the *Act* because he was not carrying on a money-lending business. The loss was therefore on account of capital. Furthermore, the loss incurred by the Appellant was not a bad debt that was included in computing his income for the year or a preceding taxation year, as required by subparagraph 20(1)(p)(i) of the *Act*.

[22] Concerning the power of the Minister to reassess with respect to the 2002 and 2003 taxation years of the Appellant, I have concluded that the Appellant made in filing his returns of income for the 2002 and 2003 taxation years and in supplying information under the *Act*, a misrepresentation that was attributable to neglect, carelessness or wilful default, and that it was open to the Minister to reassess the Appellant's tax for those taxation years.

[23] During the January 4, 2010 interview with the CRA's investigators, the Appellant said that he did not recall making any investment in Fawaz's alleged businesses. This was clearly false information considering the documents that were subsequently provided by the Appellant's counsel and the Appellant's testimony in his spouse's appeals to the Tax Court of Canada.

[24] During his testimony herein, the Appellant clearly stated that he signed papers without reading them; thus, he necessarily did so without verifying the information in them. The Appellant did not sign his 2002 return, but he did sign his 2003 return.

[25] The loss of \$27,510 claimed by the Appellant in respect of the Investment in his tax return for 2002 represents 44% of his income before tax for that year and the loss of \$8,873 claimed by the Appellant in respect of the Investment in his tax return for 2003 represents 18% of his income before tax for that year. The losses claimed were substantial in the circumstances.

[26] In light of the evidence, I am satisfied that the Appellant was negligent in filing his tax returns for the 2002 and 2003 taxation years and in supplying relevant information under the *Act* to the CRA's investigators. In arriving at that conclusion I applied the following statement made by Justice Strayer in *Venne v. The Queen*, 84 DTC 6247 at page 6251:

I am satisfied that it is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(a)(i) of the *Act* to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such

negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the word[s] “misrepresentation that is attributable to neglect” must mean, particularly when combined with other grounds such as "carelessness" or "wilful default" which refer to a higher degree of negligence or to intentional misconduct. . . .

[27] For the foregoing reasons, the appeals from the reassessments made under the *Act* for the 2002 and 2003 taxation years are dismissed.

Signed at Ottawa, Canada, this 19th day of October 2012.

"Réal Favreau"

Favreau J.

CITATION: 2012 TCC 371
COURT FILE NO.: 2011-3871(IT)I
STYLE OF CAUSE: HASSAN YAZDANI v. HER MAJESTY
THE QUEEN
PLACE OF HEARING: Vancouver, British Columbia
DATE OF HEARING: July 4, 2012
REASONS FOR JUDGMENT BY: The Honourable Justice R  al Favreau
DATE OF JUDGMENT: October 19, 2012
APPEARANCES:

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Counsel for the Respondent: Jonathan Wittig

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