Dockets: 2010-128(IT)G
2009-3619(GST)G

BETWEEN:

EDWARD KLEMEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on April 28, 2014, at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Sanjaya R. Ranasinghe
Counsel for the Respondent:	Cynthia Isenor

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2004 and 2005 taxation years are allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment and the concessions indicated therein.

The appeals from the assessments made under the *Excise Tax Act* for the reporting periods of January 1, 2004 to December 31, 2004 and January 1, 2005 to December 31, 2005 and for the reporting periods of January 1, 2006 to December 31, 2006 and January 1, 2007 to December 31, 2007 are allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment and the concessions indicated therein.

The parties have thirty days to agree on costs, failing which each party is to submit submissions on costs, not to exceed five pages, at the expiration of the aforementioned time.

Signed at Magog, Quebec, this 29th day of July 2014.

"Robert J. Hogan"

Hogan J.

Citation: 2014 TCC 244
Date: 20140729
Dockets: 2010-128(IT)G
2009-3619(GST)G

BETWEEN:

EDWARD KLEMEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Overview

[1] In 2004 and 2005, Edward Klemen (the "Appellant") transferred oilfield equipment (the "Equipment") to Canadian Hydrex Limited ("CHL"), a company with which he did not deal at arm's length. As consideration for the Equipment, CHL credited $135,000 and $38,500 to the Appellant's shareholder loan account in CHL's taxation years ending September 30, 2004 and 2005 respectively. The Appellant did not report any income from the transfer of the Equipment for his 2004 taxation year, claiming that the proceeds of disposition equalled the Equipment's adjusted cost base ("ACB"). For his 2005 taxation year, the Appellant reported a capital gain of $43,500. The Appellant did not collect or remit goods and services tax ("GST") in respect of the transfer of the Equipment in either taxation year. The Minister of National Revenue (the "Minister") issued in respect of the transfer a series of assessments for unreported business income, unremitted GST, and shareholder benefits conferred, including one assessment issued outside the normal reassessment period. These assessments are the subject of these appeals.

[2] Prior to trial, the parties settled the issue of the assessment of shareholder benefits and made concessions on certain other issues, some of which are detailed

in a letter dated April 17, 2014 addressed to the Court and some of which are described below (the "Concessions"). However, four issues remain before the Court. The first issue is whether the Minister was entitled to assess the Appellant outside the normal reassessment period. The second issue is whether the proceeds of disposition from the transfer of the Equipment were on capital or on income account. The third issue concerns the determination of the ACB of the Equipment. The final issue is what amount of GST, if any, the Appellant is liable for in respect of the transfer.

II. Factual Background

[3] The parties filed an Agreed Statement of Facts which, along with the facts adduced at trial, is summarized below.

[4] Beginning in the 1980s, and throughout a lengthy career in the oil patch, the Appellant acquired various pieces of oilfield equipment, some of which is the Equipment involved in these appeals.

[5] He acquired the Equipment in various ways. Some of it he purchased second-hand, and some he claims he received in lieu of payment of various debts owed to him. However, the Appellant has no documentation detailing the acquisition of the Equipment. The Appellant testified that he destroyed his inventory records sometime in 1999. On cross-examination, the Appellant admitted that he did not know how much he had paid for the Equipment.

[6] He testified that he acquired some of the Equipment through Edge Energy Ltd. ("Edge Energy"), which he co-owned with his brother, George Klemen. Edge Energy had been an oil production company. The Appellant claims that he received some of the Equipment as payment for an outstanding shareholder loan. He asserts that the financial statement of Edge Energy details the transfer of that equipment.

[7] The Appellant used the Equipment in various business ventures. Typically, he would refurbish the Equipment and rent it to junior oil companies at approximately one tenth of the Equipment's cost. He also used some of the Equipment in his own oil production companies, including Edge Energy and Free West Energy.

[8] One of the Appellant's many business ventures was CHL. During the relevant period, the Appellant was the sole shareholder and director of 328859 Alberta Inc., which wholly owned CHL. The Appellant was a director, officer and indirect shareholder of CHL.

[9] CHL was in the business of purchasing, refurbishing and selling oilfield equipment, cleaning up oil spills and tearing down plants. The Appellant was the only person carrying on the business activities of CHL. Prior to the relevant period, the Appellant allowed CHL to use the Equipment in its business operations. The Appellant testified that he did not collect rent from CHL for the use of the Equipment because he did not want any liability associated with the Equipment.

[10] In 2004 and 2005, the Appellant transferred the Equipment to CHL. He testified that he transferred the Equipment to distance himself from personal liability associated with its use.

[11] In consideration for the transfer of the Equipment in 2004, CHL credited $135,000 to the Appellant's shareholder loan account. The Appellant had estimated that amount as equalling his cost of the Equipment.

[12] In 2005, the Appellant transferred the remaining Equipment to CHL. For that year, he reported a capital gain as follows:

	2005 ($)
Proceeds of Disposition	73,500
Cost of Goods Sold (GST incl.)	(30,000)
Capital Gain	**43,500**

CHL credited $38,500 to the Appellant's shareholder loan account.

[13] For 2004 and 2005, CHL reported capital gains from the sale of the Equipment to third parties as follows:

	2004 ($)	**2005 ($)**
Proceeds of Disposition	154,099.54	405,300.00
Cost of Goods Sold (GST incl.)	(100,000)	(153,500)
Capital Gain	**54,099.54**	**251,800.00**

It is worthy of note here that CHL reported the combined ACB of the Equipment transferred in the two taxation years in question as being $253,000. That amount is $80,000 more than the Appellant claims to have received in credits to his shareholder loan account. In her oral submissions to the Court, the Respondent's counsel argued that the Appellant received $80,000 in cash from CHL, although no one testified as to this.

[14] As regards income tax, the Minister initially assessed the Appellant for the 2004 and 2005 taxation years on May 5, 2005 and May 11, 2006 respectively. On February 26, 2008, the Minister reassessed the Appellant's 2004 and 2005 taxation years (together, the "First Reassessment") to include unreported income and shareholder benefits as follows:

	2004 ($)	**2005 ($)**
Unreported Net Income	126,154	110,734
Unidentified Bank Deposits		10,096
Office in Home Rental Income	3,000	3,000
Shareholder Benefits	68,873	32,533
Reversal of Taxable Capital Gain		(21,750)
Total Adjustments	**198,027**	**134,613**

[15] The Minister assumed that the purchase and sale of the Equipment was an adventure in the nature of trade such that the Appellant earned business income from the transactions. Additionally, the Minister assumed that the Appellant had purchased the Equipment for a nominal aggregate price of $30.00.

[16] The Appellant duly filed Notices of Objection in respect of the First Reassessment. Subsequently, the Minister made further adjustments for the Appellant's 2004 and 2005 taxation years by Notices of Reassessment dated October 8, 2009 (together, the "Second Reassessment"). The Second Reassessment made the following adjustments:

	2004 ($)	**2005 ($)**
Unreported Net Income	90,093	
Shareholder Benefits	(3,210)	(3,210)
Total Adjustments	**86,883**	**(3,210)**

[17] The Second Reassessment was issued on the basis that the fair market value of the Equipment was the price at which CHL sold it to third parties. The result was an upward assessment of $90,093 pursuant to section 69 of the *Income Tax Act* (the "Act"), representing the difference between (a) the value at which the Equipment was transferred to CHL, and (b) the value at which it was resold to third parties. The Second Reassessment was issued outside the normal 3-year reassessment period. As a preliminary matter, the Appellant submits that the Second Reassessment is statute-barred. Only the upward adjustment of $90,093 in

respect of the Appellant's 2004 taxation year is at issue with respect to the Second Reassessment.

[18] With regard to the GST appeal, the Appellant did not report any GST collected or collectible in respect of the transfer of the Equipment. The Minister subsequently reassessed the Appellant for failing to collect GST on the consideration he received from CHL for the Equipment. Specifically, the Appellant was assessed for having failed to collect $22,889 for the reporting periods from January 1, 2004 to December 31, 2005 (the "2004-2005 Reporting Period") and $13,748.92 for January 1, 2006 to December 31, 2007 (the "2006-2007 Reporting Period").

[19] The Minister originally assessed the Appellant for unreported net tax in respect of the 2004-2005 Reporting Period by a Notice of Assessment dated January 18, 2008. By a Notice of Reassessment dated August 19, 2009, the Minister subsequently varied that assessment through an upward adjustment.

[20] At the commencement of the trial, the Respondent conceded that, in respect of the GST appeals, section 155 of the *Excise Tax Act* (the "ETA") would not apply to deem the disposition of the Equipment to have taken place at fair market value. This nullifies the upward adjustment made by the Reassessment dated August 19, 2009. The effect of this concession is to reduce the alleged GST collectible by $6,307 in respect of the 2004-2005 Reporting Period, which now totals $16,582.

[21] Also at trial, the Respondent's counsel argued that, in addition to the $38,500 credit to his shareholder loan in 2005, the Appellant received $80,000 in cash from CHL. While this position was not specifically pleaded nor was it addressed by the Respondent's witness, the Minister submits that it was implicit in the amount of net tax the Appellant was assessed for in the 2004-2005 Reporting Period.

III. Analysis

(1) Preliminary Matter: Statute of Limitations

[22] As a preliminary matter, the Appellant submits that the Second Reassessment should be vacated because it was issued beyond the normal reassessment period and the conditions set out in subsection 152(4) of the Act have not been met. The Respondent argues that the limitations stated in subsection

152(4) of the Act do not apply to the Second Reassessment because it was issued following the Minister's consideration of the Appellant's Notice of Objection filed in respect of the First Reassessment. The Respondent relies in this regard on the wording of subsection 165(5) of the Act, which reads as follows:

> **165(5) Validity of reassessment** − The limitations imposed under subsections 152(4) and 152(4.01) do not apply to a reassessment made under subsection (3).

[23] I disagree with the Respondent's interpretation of subsection 165(5) of the Act. While I acknowledge that the provision, if read literally, could support the Respondent's argument, in *The Queen v. Anchor Pointe Energy Ltd.*,[1] the Federal Court of Appeal (the "FCA") stated that reassessments issued beyond the normal reassessment period, following the consideration of a taxpayer's Notice of Objection, cannot increase the taxpayer's tax payable unless the limitations set out in subsection 152(4) of the Act are respected. With regard to the scope of subsections 165(3) and 165(5) of the Act, Justice Rothstein commented as follows:[2]

> I am unable to agree with Rip J. that the expiry of the normal reassessment period is stayed or is extended until the Minister takes action under subsection 165(5). The implication of such an interpretation is that because a taxpayer files a Notice of Objection, the Minister has an unlimited time to reassess the taxpayer to increase tax payable after the normal reassessment period.
>
> . . .
>
> In my opinion, subsection 165(5) allows the Minister to reassess after expiry of the normal reassessment period where a Notice of Objection has been filed but not to include in the taxpayer's income amounts that were not included in an assessment or reassessment made within the normal reassessment period.
>
> [Emphasis added.]

[24] The Minister added an additional $90,093 of unreported income by way of the Second Reassessment on the basis that the fair market value of the equipment was greater than the consideration received by the Appellant from CHL. Under the principles recognized in *Anchor Pointe*, the Second Reassessment must be vacated unless it can be shown that the conditions laid down in subsection 152(4) of the Act have been met.

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[1] 2003 FCA 294 ("*Anchor Pointe*").
[2] *Ibid*. at paras. 33 and 35.

[25] There are two conditions for the application of subsection 152(4) of the Act, and the Minister bears the onus of establishing, on a balance of probabilities, that both have been satisfied. The first condition is that the taxpayer have made a misrepresentation. The second condition is that the misrepresentation be attributable to neglect, carelessness or wilful default.[3]

[26] Although it is unclear, the Respondent's counsel, in her oral and written submissions, appears to suggest that the Second Reassessment is valid because the evidence shows that the Appellant made a misrepresentation by failing to report the income arising from the sale of equipment to CHL and that this misrepresentation was attributable to negligence on his part. I note that this position was not put forward in the Respondent's Reply to the Notice of Appeal (the "Reply"). In fact, paragraphs 26 and 27 of the Reply state that the reassessments are not statute-barred for the following reasons:[4]

> The Appellant's 2004 income tax return was initially assessed by the Minister on May 5, 2005, and the Appellant's 2005 income tax return was initially assessed by the Minister on May 11, 2006. The Minister reassessed the Appellant's 2004 and 2005 taxation years for the first time on February 26, 2008, and was well within the "normal reassessment period" as defined by s.152(3.1) of the *Act*. Therefore, any submission with respect to those reassessments being statute barred is without merit.
>
> The Appellant then filed objections to the February 26th, 2008, reassessments on March 17, 2008. In response to the objections filed, the Minister issued reassessments pursuant to subsection 165(3) of the *Act* on May 5, 2008. Pursuant to subsection 165(5) of the *Act*, the limitations imposed by subsections 152(4) and (4.01) do not apply to a reassessment made under subsection 165(3). Therefore, any submission with respect to the reassessments dated May 5, 2008 being statute barred is without merit.
>
> [Emphasis added.]

[27] Counsel for the Appellant directed me to *Bibby v. The Queen*[5] as authority for the proposition that parties cannot raise arguments that they have failed to plead. There, the Minister had assessed the appellant solely on the basis that there was a shareholder benefit, pursuant to section 15 of the Act. In her reply, the Respondent did not plead the issue of unreported income under either section 5 or 6 of the Act. At trial, the respondent made an alternative argument that the

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[3] *Boucher v. The Queen*, 2004 FCA 46, leave to appeal denied.
[4] Respondent's Reply to the Notice of Appeal.
[5] 2009 TCC 588.

appellant failed to report income in the form of management fees pursuant to section 5 or 6 of the Act. Justice Bowie held that, having failed to identify the issue of unreported income in the pleadings, it was not open to the Minister to rely on that alternative basis of assessment. At paragraph 23, Justice Bowie held:

> Subsection 49(1) of the *General Procedure Rules* requires that every Reply shall state:
>
> (a) the statutory provisions relied on; [and]
>
> (b) the reasons the respondent intends to rely on
>
> The purpose of these requirements is to ensure that the issues are properly defined for the purposes of discovery and trial, and so that the appellant will know what arguments he must meet, and so that he will be able to marshal and lead his evidence accordingly. This is not a mere formality that may be overlooked when it has not been complied with; it is a core component of the trial process, and to ignore non-compliance would undermine the integrity of that process: see *Glisic v. The Queen*.

[28] It is clear that the Respondent failed to plead in her Reply the argument that she invites me to consider. For procedural fairness reasons alone, I cannot accept this argument at this late stage of the proceedings.

[29] In any event, the Respondent led no evidence to show that the failure to report the income from the sale of the Equipment was attributable to the Appellant's negligence. It is not sufficient to show that the Appellant misrepresented his income for 2004. The Respondent must show that this misrepresentation is attributable, *inter alia*, to the Appellant's negligence. As the Respondent has failed to meet her onus in this regard, the Second Reassessment, which increased the Appellant's income by an additional $90,093 of unreported income for the 2004 taxation year, must be vacated.

(2) Income Versus Capital

[30] The Respondent contends that the gain realized by the Appellant on the transfer of the Equipment to CHL was on account of income because the Appellant intended to sell the Equipment at a later point when the market for such equipment improved. The Respondent accepts that, in the interim, the Appellant intended to either rent out the Equipment or use it in one of his other business ventures.

[31] Both parties cite a long list of cases in support of their opposing positions on the income versus capital question. These cases are, for the most part, fact-specific. In *Continental Bank of Canada v. The Queen*,[6] Judge Bowman (as he then was) adopts the criteria enunciated by Justice Rouleau in *Happy Valley Farms Ltd. v. The Queen*[7] for the purpose of deciding whether a gain is on income or on capital account:

> 1. The nature of the property sold. [Is the property customarily a capital asset, or is it a commodity that is bought and sold?]
>
> 2. The length of period of ownership. [Inventory is generally disposed of shortly after acquisition, while capital assets are not.]
>
> 3. The frequency or number of other similar transactions by the taxpayer. [Does the taxpayer routinely sell such property?]
>
> 4. Work expended on or in connection with the property realized. [If the taxpayer completes steps to improve the property for resale, it is more likely inventory.]
>
> 5. The circumstances that were responsible for the sale of the property. [Was this a routine disposition, or were there overriding business considerations?]
>
> 6. Motive. [Why did the particular disposition occur?]

[32] Linden J.A. identified the following additional factors in considering on appeal the *Continental Bank* decision:[8]

> (a) The intention of the parties;
>
> (b) Whether the conduct of the vendor was similar to that of an ordinary trader;
>
> (c) The nature and quantity of the property in question;
>
> (d) Whether the transactions were isolated ones; and
>
> (e) The uniqueness of the transactions when compared to the taxpayer's normal activities.

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[6] [1995] 1 C.T.C. 2135 (TCC); affirmed [1998] 2 S.C.R. 358; affirmed [1996] 3 C.T.C. 14 (FCA.) ("*Continental Bank*").

[7] 86 DTC 6421 (F.C.T.D.) at pp. 6423-24.

[8] *Supra* note 6 at p.18 (FCA).

[33] Weighing all of the above factors, I conclude that the Appellant's gain in each of the 2004 and 2005 taxation years was on account of capital. First of all, the evidence shows that the Equipment was used by the Appellant in his various business ventures over a very long period of time. It was acquired at the beginning in the 1980s and then sold to CHL in 2004 and 2005. There is no evidence to show that the Appellant sold similar equipment in earlier taxation periods. The Appellant did allow CHL and other corporations that he held an interest in to use the Equipment in their business ventures. There is no evidence to show that the Appellant modified or altered the equipment for the purpose of realizing a higher price.

[34] The evidence shows that there was a strong upswing in the oil service industry beginning around 2001 and that the Appellant sold the equipment to CHL in order to benefit from the resulting unexpected significant rise in prices for used oil service equipment.

[35] From all of the above I infer that the Appellant acquired the Equipment for the purpose of using it in his various business ventures. The circumstances surrounding the long holding period corroborate the Appellant's declaration that he purchased the Equipment to earn income either directly or indirectly therefrom.

(3) Adjusted Cost Base of the Equipment

[36] The Minister assumed that the ACB of the Equipment was $15.00 per year. The Appellant's argument is that the Minister's assumption is not reasonable. However, he was unable to offer any reliable evidence to show what his cost of the Equipment was. He admits that he has no documentation detailing the acquisition of the Equipment. He admits as well that he cannot identify how much he paid for the Equipment.[9]

[37] With regard to the burden of proof, the Appellant must rebut, on at least a *prima facie* basis, the Minister's assumption that his cost of goods sold was $15.00 per taxation year.[10] The Appellant has failed to provide any credible evidence that succeeds in demolishing that assumption.

[38] At trial and in written submissions, counsel for the Appellant invited the Court to make the inference that the ACB of the Equipment was at least

[9] Transcript at p. 68, lines 20-23.
[10] Respondent's Reply to the Notice of Appeal, at para. 13(t).

$76,243.86, that is the value of the shareholder loan on the books of Edge Energy in 1999. The Appellant claims that he took some of the Equipment in lieu of repayment of the shareholder loan. The Equipment was consideration in satisfaction of the loan. Counsel for the Appellant submitted that $76,243.86 is likely well below what the Appellant actually paid to acquire the Equipment, but however the Appellant "would be happy with receiving credit for the $76,000 in shareholder loan as ACB".[11]

[39] The Appellant's evidence in support of this amount was a balance sheet of Edge Energy as at September 30, 1999.[12] In 1998, the balance sheet showed $76,244 as a shareholder loan due to the Appellant. In 1999, the shareholder loan was written off with no loan shown as owing to the Appellant. However, as counsel for the Respondent points out, there is no evidence, other than the Appellant's vague testimony, to corroborate the claim that he actually did take any equipment. There is nothing that supports a finding that the Appellant had actually made that loan or that he had contributed any capital assets to Edge Energy. In short, the Appellant's evidence as to the ACB of the Equipment is insufficient to rebut the Minister's assumption that it was $15.00 per taxation year.

(4) GST

[40] The final issue concerns the quantum, if any, of GST the Appellant was liable to collect in respect of the transfer of the Equipment to CHL.

[41] During the 2004-2005 Reporting Period, subsection 165(1) of the ETA required that every recipient of a taxable supply pay GST in respect of that supply calculated at 7% of the value of the consideration received for the supply.

[42] At trial and in written submissions, counsel for the Appellant made two alternative arguments regarding the Appellant's GST appeal. The first was that the Appellant owed no GST. In counsel's view, the transfer of the Equipment was not a "taxable supply" because it was not made in the course of a "commercial activity", each as defined in the ETA. The Appellant relies on a carve-out in the ETA for individuals operating a business without a reasonable expectation of profit. Section 123 of ETA defines a "commercial activity" as:

> (a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership,

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11 Transcript at p. 130, lines 19-20.

12 Joint Book of Documents, Tab 42.

> all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,
>
> (b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
>
> (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply.
>
> [Emphasis added.]

[43] The Appellant submits that, although he had a rental business, he did not have a reasonable expectation of profit since the Equipment was rented to related corporations, which did not have a legal obligation to pay rent to the Appellant.

[44] That argument is contradicted by the Appellant's testimony. On cross-examination, the Appellant testified that "[m]y intention when I acquired the equipment was to make money with it."[13] On the basis of his own testimony, it is clear the Appellant carried on a business with a reasonable expectation of profit. Therefore, the transfer of the Equipment was a "taxable supply" made in the course of a "commercial activity". Given that conclusion, the Court must then determine how much GST was collectible.

[45] The Appellant's alternative argument concerns the amount of consideration actually received from CHL for the Equipment. The Appellant submits that the consideration he received was the credit to his shareholder loan account with CHL, and nothing more. In contrast, the Minister's position is that the Appellant's shareholder loans formed only part of the consideration for the supplies of the Equipment. The Appellant is alleged to have received an additional consideration of $80,000 in cash.

[46] The Minister's position is based upon the fact that CHL reduced its cash on hand by $80,000 in 2005. The general ledger of CHL shows an entry whereby cash on hand was reduced by $80,000 to correct for the purchase amount of assets sold for $195,000 in June 2005.[14] In addition, when CHL reported a capital gain on the

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13 Transcript at p. 56, lines 13-14.

14 Joint Book of Documents, Tab 2 at p. 33.

sale of the Equipment to third parties, it claimed an ACB equal to the amount of the shareholder loans credited to the Appellant's account plus an additional $80,000. The inference that counsel for the Respondent invites the Court to make is that the Appellant received an additional $80,000 as consideration for the supply of the Equipment. Thus, the total consideration the Appellant received would have been $135,000 in his 2004 taxation year and $118,500 in his 2005 taxation year. Consequently, the Appellant is alleged to have failed to account for a total of $16,582 of tax collectible in respect of the 2004-2005 Reporting Period.

[47] Counsel for the Appellant points out that the Respondent's own Reply clearly shows that the sale of the Equipment to CHL occurred for credits to the Appellant's shareholder loan account in the amounts of $135,000 and $38,500 in 2004 and 2005 respectively. Furthermore, nowhere in the Reply has the Minister assumed that the Appellant received the alleged $80,000 in cash. Therefore, the onus is on the Minister to establish, on a balance of probabilities, that the Appellant actually did receive that cash. I believe the Minister has failed to establish that fact.

[48] The only evidence at trial that corroborates the theory that the Appellant received $80,000 in cash is the financial statements of CHL. However, there is no annotation stating, or any indication, that the Appellant received that amount. The evidence does not support the inference that the Appellant actually received $80,000 in cash. The evidence only illustrates what CHL calculated the ACB to be for the sale of the Equipment to third parties. Hence, there is no credible evidence that contradicts the Appellant's assertion that he received nothing more than a credit to his shareholder loan account in the 2004-2005 Reporting Period. The actual consideration received by the Appellant for the Equipment was the amounts credited to his shareholder loan account: $135,000 and $38,500 in 2004 and 2005 respectively.

IV. Conclusions

[49] In conclusion, the appeals should be allowed on the following basis. First, the Second Reassessment is vacated as the Minister did not plead and was unable to demonstrate that the conditions in subsection 152(4) of the Act were met. Specifically, he was unable to show that the Appellant's misrepresentation was attributable to neglect, carelessness, or wilful default.

[50] Second, the transfer of the Equipment to CHL was made on capital account. The length of time for which the Appellant held the Equipment and his stated

intent to earn income from it support the Appellant's position that it was a capital asset, and not inventory as the Minister has assumed.

[51] Third, the Appellant failed to demolish the Minister's assumption that the ACB of the Equipment was $15.00 for each of the relevant taxation years. The evidence does not support the inference that the Appellant received some of the Equipment in satisfaction of his shareholder loan to Edge Energy. There is no reliable evidence to corroborate any amount other than that assumed by the Minister.

[52] Finally, the Appellant is liable to pay GST in respect of the consideration he actually received for the transfer of the Equipment, which was the amount credited to his shareholder loan account. The Minister's inference that the Appellant received $80,000 in cash is unsupported by any evidence.

[53] For these reasons, the appeals are allowed.

Signed at Magog, Quebec, this 29th day of July 2014.

"Robert J. Hogan"

Hogan J.

CITATION:	2014 TCC 244
COURT FILE NOS.:	2010-128(IT)G 2009-3619(GST)G
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PLACE OF HEARING:	Edmonton, Alberta
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APPEARANCES:

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