

Federal Court of Appeal



Cour d'appel fédérale

Date: 20141201

**Dockets: A-65-14
A-66-14**

Citation: 2014 FCA 281

**CORAM: DAWSON J.A.
STRATAS J.A.
NEAR J.A.**

BETWEEN:

**MICHAEL COVELEY AND SOLBYUNG
COVELEY**

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 27, 2014.
Judgment delivered from Ottawa, Ontario, on December 1, 2014.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

**DAWSON J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellants, husband and wife, appeal from the judgments of the Tax Court of Canada (*per* Justice D'Auray): 2013 TCC 417. The Tax Court dismissed their appeals of assessments concerning the taxation years 2005 and 2006.

[2] In their returns for the 2005 taxation year, both appellants claimed an allowable business investment loss ("ABIL"). In their returns for the 2006 taxation years, both appellants claimed

against their incomes a non-capital loss carry-forward arising from their ABIL claims in 2005.

The Minister disallowed the appellants' claims on the ground that they did not meet the requirements for claiming an ABIL under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[3] The Tax Court confirmed the rejection of the appellants' ABIL claims for two main reasons:

- 1) Both appellants had failed to establish a prerequisite under subsection 50(1) of the Act for their ABIL claim, namely that debts owing to them had become bad in 2005.
- 2) In the case of the appellant Mr. Coveley, his ABIL claim was barred under subparagraph 40(2)(g)(ii) of the Act for another reason: he did not incur the debt owing to him for the purpose of gaining or producing income from a business or property. This was because he was not a shareholder of the debtor company, cStar Technologies Inc.

The appellants appeal on both issues and this Court has consolidated the appeals.

[4] It is only necessary to deal with the first issue.

[5] In finding that the debts had not become bad in 2005, the Tax Court applied this Court's decision in *Rich v. Canada*, 2003 FCA 38, [2003] 3 F.C. 493 to the evidence before it. All parties in this Court accept *Rich* as the governing authority. In my view, the Tax Court did not misstate or misapply the principles in *Rich* in any way.

[6] Broadly speaking, *Rich* provides that taxpayers claiming that a debt has become bad must show among other things, that they honestly and reasonably determined that their debt had become bad during the taxation year in question. *Rich* enumerates several factors to be considered in making this determination. In this case, the Tax Court assessed the evidence before it using these factors and held that the appellants had failed to show that they honestly and reasonably determined that their debts had become bad during 2005.

[7] This is a finding of mixed fact and law suffused by factual appreciation. Therefore, in these circumstances, the appellants must persuade this Court that the finding is vitiated by palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Under this standard, it is not this Court's task to reweigh the evidence. Rather, our primary task under this standard is to determine whether there was evidence upon which the Tax Court could make the finding it did.

[8] The Tax Court had evidence before it supporting its finding. It noted that as of the end of the 2005 taxation year, the appellants continued to hold out hope that the debtor company could pay the debts. Among other things, the Tax Court relied upon an assessment made by Ms. Coveley in an email that 2006 was going to be a "great year" for the company, the company had just launched a successful pilot project, and the company had emerging business prospects with several notable organizations including Bell Canada, Coca-Cola, Sunnybrook Hospital and the US Department of Homeland Security (at paragraphs 56-60 and 114). Throughout 2005, the company continued to buy equipment for delivery in 2005 and 2006, the appellants continued to advance funds to the company, and the company was "was not [in] a better or in a worse position

on December 31, 2005” compared to previous years (at paragraph 126). Far from giving up hope that the company could repay the debts, Mrs. Coveley admitted that it had “great assets, intellectual property [and]... innovative solutions” that may be a “little bit too advanced for the market” but “someday...will be there” (at paragraph 129). Further, renovations to the company’s premises took place in 2006 following tornado and flood damage (at paragraphs 55, 127 and 128). The Tax Court also had concerns about the credibility of the appellants’ testimony (at paragraphs 77, 104 and 151).

[9] There was evidence supporting a different conclusion (see, *e.g.*, at paragraphs 46 and 52-56) but weighing all of the evidence, the Tax Court made the finding it did. As I have said above, it is not open to this Court, reviewing for palpable and overriding error, to reweigh the evidence before the Tax Court.

[10] In oral submissions, the appellants emphasized that as matters turned out, the business prospects did not pan out and matters got worse for the company. But the relevant time for assessment is the end of the 2005 taxation year, December 31, 2005. The Tax Court held that in the circumstances existing at that time, the appellants did not reasonably view the debts as bad.

[11] In my view, for the foregoing reasons, the Tax Court did not commit any palpable and overriding error.

[12] Therefore, despite the able submissions of Ms. Somerville Taylor, I would dismiss the appeals with costs. I would direct that a copy of these reasons be placed in both files A-65-14 and A-66-14.

"David Stratas"

J.A.

"I agree

Eleanor R. Dawson J.A.:"

"I agree

D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:

A-65-14 AND A-66-14

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE
D'AURAY OF THE TAX COURT OF CANADA DATED DECEMBER 20, 2013,
DOCKET NOS. 2008-3796(IT)G AND 2008-3797(IT)G.**

STYLE OF CAUSE:

MICHAEL COVELEY AND
SOLBYUNG COVELEY v. HER
MAJESTY THE QUEEN

PLACE OF HEARING:

TORONTO, ONTARIO

DATE OF HEARING:

NOVEMBER 27, 2014

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

DAWSON J.A.
NEAR J.A.

DATED:

DECEMBER 1, 2014

APPEARANCES:

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FOR THE APPELLANTS

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FOR THE RESPONDENT

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