Docket: 96-4635(IT)I

BETWEEN:

CAMIL ROULEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 7, 8, 9, 10 and 11, 2007, at Québec, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Pierre Cossette Simon Petit

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1992 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Georgeville, Quebec, this 17th day of September 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 12th day of October 2007.

Brian McCordick, Translator

Citation: 2007TCC338
Date: 20070917
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REASONS FOR JUDGMENT

Archambault J.

[1] In 1992, Camil Rouleau and Richard McKeown were among the 83 investors in Cablotel Enr. ("Cablotel"), a tax-shelter partnership created in order to finance a scientific research and experimental development ("R&D") program. Like Mr. Rouleau, Mr. McKeown filed an appeal before this Court. In both their cases, the Minister of National Revenue ("the Minister") had disallowed the deduction of a business loss consisting entirely of R&D expenses, and had disallowed the investment tax credit ("ITC") attributable to those expenses, on the basis that the Cablotel partners were limited partners for income tax purposes.

[2] Mr. McKeown's appeal was filed under the general procedure and he was represented by counsel at the hearing, which was held before the late Chief Judge Garon and spanned 33 days in 1998 and 1999.[1] On March 12, 2001, Chief Judge Garon dismissed Mr. McKeown's appeal, both with respect to his investment in Commu-Sys Enr. ("Commu-Sys") in 1991 and his investment in Cablotel in 1992. To summarize succinctly, the Chief Judge held: (i) that those partnerships were not

[1] Many witnesses were heard — at least ten, based on the witnesses referred to in the headings of the decision reported at [2001] 4 C.T.C. 2197, and 2001 DTC 511 (French).

validly formed, notably because the only objective pursued by the investors was to obtain tax deductions, and not to carry on a business; (ii) that Mr. McKeown was a specified member of a partnership and a limited partner, which meant that he was not entitled to deduct the R&D tax losses or to the ITC; and (iii) that he was a silent specified member of the partnership and was therefore not entitled to the ITC.

[3] Surprisingly, Mr. Rouleau's appeal, which was filed on December 12, 1996, under the informal procedure, was heard more than ten years later, and six years after the decision in *McKeown v. The Queen*. According to my understanding, the appeals of five other Cablotel investors and two Commu-Sys investors were to be heard at the same time as Mr. Rouleau's appeal, but all those other investors dropped their appeals at the last minute. Thus, Mr. Rouleau was the last Cablotel investor whose appeal was heard by this Court.

[4] In addition to a disallowance of the tax deductions, the Minister seeks the penalty contemplated in section 179.1 of the *Income Tax Act*, and costs for abuse of process. No other penalty is in issue.

Facts

[5] The hearing of Mr. Rouleau's appeal lasted five days, and four witnesses were heard. In addition to testifying himself, Mr. Rouleau adduced the testimony of Daniel Bédard, the advisor who suggested that he invest in Cablotel, and Michel Cusson, a fellow investor who, unlike Mr. Rouleau, accepted a 1995 settlement offer that the Minister made to him as well as hundreds of other investors who had acquired the same kind of tax shelter. As for the Respondent, she called Gabriel Caponi, the Minister's auditor, as a witness.

[6] At paragraph 38 of the Reply to the Notice of appeal, the Minister sets out the following factual assumptions underpinning his assessment:

> [TRANSLATION]
>
> (a) The CABLOTEL partnership ("the Partnership") was created on January 16, 1992. (**admitted**)[2]
>
> (b) Before the Appellant joined the Partnership on November 11, 1992, the Partnership and Omzar Technologies Inc. ("Omzar") signed a document entitled [TRANSLATION] "Service Contract" stating that Omzar would

[2] The admissions were made by Mr. Rouleau at the hearing.

perform work described as scientific research and experimental development. **(established)**[3]

(c) Omzar incorporated on November 27, 1990, for the purpose of doing work held out to be research and development; it was to carry out a variety of work, and, to this end, nine partnerships ("the Partnerships") were created.[4]

1990	Dreyfus Bio-Systems			
1991	Bio-Systems 1	Ersol	VCA Commu-sys	
1992	Bio-Systems	Solarix	Cablotel	Communicab

(**admitted**)

(d) The actual proponent and organizer of the Partnerships was Omzar and its directing mind, Abdel Jabbar Abouelouafa ("Jabbar"). (**not contradicted, and considered established)**[5]

(e) For its fiscal year ended December 31, 1992, the Partnership recorded a $2,000,108 loss, of which the amounts of $740,000 and $1,260,000 were, respectively, posted as research expenses within the meaning of subparagraph 37(1)(*a*)(i) and paragraph 37(1)(*b*) of the *Income Tax Act*. **(established)**

(f) Toward the end of 1992, the Appellant gave the Partnership a sum of money representing 50% of his total interest in the Partnership. (**admitted)**[6]

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[3] I consider this fact established, in view of the production of the [TRANSLATION] "Service Contract" dated April 2, 1992 (Exhibit I-2, at tab B-3). Strangely, that document refers to the Cablotel partnership as a corporation.

[4] I will call these the "Omzar tax shelters."

[5] Since this assertion was not contradicted ("demolished") by Mr. Rouleau, I will regard it as established.

[6] Having regard to the fact that he paid by cheque. In addition to the fact already admitted by Mr. Rouleau, I would note that the payment was made on November 13, 1992, as shown by Exhibit A-2, tab 8.

(g) as for the balance, the Appellant had no obligations to anyone **(not established)**[7]

(h) Under the purchase plan, every investor, without exception, was to have the benefit of financing for 50% of his share. Thus, every member who invested money was out-of-pocket for only 50% of the price of his partnership interest. (**established)**[8]

(i) Noreco Inc. financed each member of the Partnership without making any credit inquiries. (**uncontradicted and established**)

(j) IPF Finance Inc., Loron Inc., and Noreco Inc. ("the Financing Companies") were not at arm's length from Omzar or Jabbar. (**established)**[9]

(k) Based on the documents submitted to the Minister of National Revenue, the loan, which bore an interest rate of 10%, was repayable in 120 monthly instalments over a period of 10 years, commencing one year after the date of the investment, that is to say, in late 1993. (**admitted)**[10]

(l) Based on documents which were provided to the Minister of National Revenue, but which do not reflect reality, the loans were repaid by means of the assignment of shares in 1994. (**admitted)**[11]

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7 Based on Exhibit A-2, tab 7, I am satisfied that Mr. Rouleau obtained a loan from Noreco covering half of the cost of his investment, and that he agreed to repay that loan. However, with respect to the period following Noreco's buyback of the shares, I consider that fact established.

8 I consider this an established fact based on Exhibit I-1, tab 306, and on Mr. Caponi's testimony.

9 I consider this an established fact based on the evidence as a whole, and the evidence adduced by Mr. Rouleau did not contradict it.

10 See Exhibit A-2, tab 7.

11 I consider the first part of the sentence to be established, but not the part that reads: [TRANSLATION] "but which do not reflect reality." I would add that the assignment of the shares took place on February 16, 1994. For his part, Mr. Rouleau refused to sign the contract of assignment because it was not signed by Noreco, the ultimate purchaser, beforehand, and because he felt uneasy about signing it without being certain that Noreco would do so. In addition, he said that he was worried about the idea of selling his interest in Cablotel when he was unsure that he would get his [TRANSLATION] "tax refund". He said that he would have agreed to sell 50% of his shares if he would get his [TRANSLATION] "tax refund".

(m) The Appellant knew, based on the presentation made at the solicitation, that his share would be bought back in the short term for the amount presented as being financed. (**admitted**)[12]

(n) The Appellant had a commitment from the proponents that his share would quickly be bought back at a price determined in advance. (**not established as written**)[13]

(o) All the members of the Partnership assigned their shares to Noreco Inc. for an amount equal to 50% of their shares (the "financed" amount). (**not established as written**)[14]

(p) The payment was always made by setting off a debt equal to the "financed" amount granted by the Financing Company. Based on the assignment agreement document, the payments were to be made by "[TRANSLATION] "reduction, by way of compensation, of a loan made" by the Financing Corporation: the amount to be paid exceeded the fair market value of his share at the time of the disposition. (**established)**[15]

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[12] Exhibit A-2, at tab 5, is a description of a scenario prepared by Mr. Bédard, his investment advisor. The scenario refers to the future buyback of the shares, in that it states that there would be a repayment of $7,500. Moreover, the testimony of Mr. Cusson corroborates the fact that the Cablotel shares were to be bought back.

[13] Mr. Rouleau said that he did not secure any commitment from the proponent. I accept his testimony. Consequently, I do not consider this an established fact. In addition, Mr. Cusson testified that he did not get a guarantee that their shares would be bought back. However, both men had good reasons to believe that there would be a buyback, as there had been with other Omzar tax shelters. Moreover, in order to continue to raise funds, Omzar had to follow the same approach adopted with the other shelters.

[14] This is based on information obtained by Mr. Caponi, the auditor, from Ms. Bouffard, an Omzar employee, to the effect that all the Cablotel partners had assigned their shares for an amount equal to 50% of their interests. Also, in the contract between Noreco and Omzar, Noreco said that it owned all the shares of Cablotel, with the exception of a single share owned by Michel Loranger (Exhibit I-1, tab 197, page 2). According to the auditor's report, the auditor was unable to find a dozen assignment contracts in Omzar's records (Exhibit I-1, tab 135). As for Mr. Rouleau, he declared, under oath, that he refused to sign the contract sent to him on September 23, 1993, for the reasons that I have set out above (Exhibit A-2, tab 13).

[15] Mr. Rouleau adduced no evidence, and, in particular, no evidence about the FMV of the Cablotel shares, to contradict this fact. The auditor's factual determination that the price offered for the shares exceeded their fair market value strikes me as reasonable under the circumstances; in fact I would add that it is more plausible based on the totality of the evidence adduced at the hearing. One noteworthy fact is that Omzar, the corporation that supposedly carried out the different R&D projects, told its accountant that the Cablotel project was only 10% complete on November 30, 1993. And yet, a few weeks later, on

(q) Since Noreco Inc. gave all the members of the Partnership financing in an amount equal to 50% of their interest, Noreco Inc. had nothing to disburse. (**established)**[16]

(r) Consequently, Noreco Inc. acquired the shares for a total of $1,000,000 and cancelled the $1,000,000 in loans repayable to it by the members. (**established**)[17]

(s) As far as the proponents and members of the Partnership were concerned, the use of the buyback/financing scheme described above was an essential characteristic of the "tax shelter" in respect of which they were reciprocally vendors and purchasers. (**admitted**)[18]

(t) The cash amounts (50%) received from the members were deposited into the Partnership's bank account, whereupon the Partnership immediately made a payment to Omzar. (**established**)

(u) Thus, in reality, Omzar only had 50% of the funds available to perform the obligations set out in the document entitled "Service Contract" **(established)**

February 15, 2004, almost all the Cablotel investors sold their shares to Noreco, and the payment was made by way of compensation (set-off) against the amount of the loan obtained from Noreco, namely 50% of the share cost. How, then, can one affirm, as stipulated in the contracts of assignment, that the specified amount represented [TRANSLATION] "to the best of the parties' knowledge, the fair market value of the shares sold"? The same question arises more forcefully when one realizes that, year after year, the buyback price paid to the investors of the other Omzar tax shelters, whose R&D projects had progressed to different stages, was always 50% of the cost of these shelters, regardless of the progress made or the results obtained. Each shelter is quite unlikely to have yielded identical results. Thus, it would have been difficult for the FMV of each Omzar tax shelter to be the same. (See Exhibit I-1, tabs 27 and 28.)

16 In order to better understand the meaning of this statement, the words "upon the buyback" must be added to the end of the paragraph. I consider the fact established once this is done.

17 In my view, this statement has been established. Noreco never asked Mr. Rouleau to repay his loan because, in all likelihood, it felt that it had repurchased his share in consideration of the forgiveness of that debt. In fact, Noreco said that it held all the investors' shares, save one share owned by one of the initial proponents. I also find that Mr. Rouleau behaved as if he had sold his share, notably in that he never repaid or tried to repay his loan, and never undertook any effort to obtain his share of the proceeds of the Cablotel's sale, to Omzar, of its rights to the results of the R&D. Assuming that he had been a Cablotel partner (on the basis that he did not sell his share), he would have claimed his share of the price paid by Omzar. In addition, Mr. Rouleau says that he lost interest in the results of the R&D when the Minister started disallowing the tax deductions. Thus, Mr. Rouleau's interest was limited to the tax deduction aspect.

18 If the word "scheme" is replaced by "arrangement".

(v) Starting in November 1992, as soon as the funds were received from the Partnership, Omzar immediately advanced them to one of the "Financing Companies", which re-used the funds to "finance" other investors. (**established)**[19]

(w) The Financing Companies never repaid these advances to Omzar; rather, the advances were annulled in a transaction between Omzar and the Financing Company involved. (**established)**[20]

(x) According to a document dated February 15, 1994, between Omzar and Noreco Inc, Noreco Inc. owed Omzar $3,755,500. (**established)**[21]

(y) This amount consists of the following advances by Omzar to Noreco Inc.:

Solarix ($2,447,000 X 50%)	$1,223,500
Cablotel ($2,000,000 X 50%)	$1,000,000
Communicab ($2,017,000 X 50%)	$1,008,500
Bio-Systems II ($1,047,000 $ X 50%)	$523,500
Total advances:	$3,755,500 (**established)**[22]

(z) The document dated **February 15, 1994** also states that Noreco Inc. owns the shares of the Solarix, Cablotel, Communicab and Bio-Systems II Partnerships; those four Partnerships assigned their rights (in the "research" results and work) to Omzar, and, in consideration of this assignment, Omzar fully released Noreco Inc. for the $3,755,500 in advances. Based on the documents submitted to the Minister of National Revenue, the assignment of the Partnership's members' shares is dated **February 16, 1994** (**established**)[23]

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19 I consider this established, at least with respect to the vast majority of the funds collected by Omzar. This is based on the auditor's testimony and work sheets.

20 I base this, *inter alia*, on Exhibit I-1, at tabs 197 and 34.

21 *Ibid.*

22 *Ibid.*

23 See Exhibit I-1, at tabs 157 to 172.

(aa) The Appellant was entitled to receive an amount that was granted to it for the purpose of reducing the impact, in whole or in part, of a loss sustained by reason of being a member of the Partnership. (**established**)[24]

(bb) The Appellant benefitted from an arrangement for the disposition of his interest in the Partnership, and one of the main purposes of this arrangement can reasonably be considered to be to attempt to avoid the application of subsection 96(2.4) of the *Income Tax Act*.[25]

(cc) According to Omzar's financial statements, most of its expenses consist of management expenses and professional and legal fees: these expenses are not substantiated by supporting documents, and many of them are accounted for by year-end entries in respect of which Omzar's accountant remained very "evasive". (**established)**[26]

(dd) Omzar's income came solely from the aforementioned partnerships. (**established**)[27]

(ee) All of Omzar's so-called expenses are grouped together and there is no way to determine the specific partnership for which they were incurred. (**established**)[28]

(ff) Several of the expenses that Omzar purportedly incurred were paid to corporations that were not at arm's length from Omzar and Jabbar. (**established)**[29]

(gg) A tiny portion of Omzar's expenses went toward the performance of the service contracts with the partnerships. (**established)**[30]

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[24] I will come back to this statement in my analysis below.

[25] In view of my reasons for this decision, it is not necessary for me to make such a finding, just as Chief Judge Garon held that it was unnecessary to make such a finding in *McKeown*, *supra*, at paragraph 416 of his decision.

[26] I consider this statement established, except that the more accurate conclusion is that the expenses were not substantiated by supporting documents or by documents describing the services rendered to Omzar.

[27] I base this on Mr. Caponi's testimony.

[28] *Ibid.*

[29] In view of the evidence as a whole, it is reasonable to believe that there was indeed a non-arm's length relationship.

[30] Based on Mr. Caponi's analysis (particularly Exhibit I-1, tab 308), roughly 19% of the expenses were R&D expenses, though it is obviously difficult to ascertain the precise nature of these expenses.

(hh) The only reason that the Appellant became a member of the Partnership was to reduce his tax payable under the *Income Tax Act*. (**established**)

(ii) the members of the Partnership do not know each other and do not work actively in the Partnership. (**established**)[31]

(jj) The Partnership had no reason for existing other than to be a vehicle for tax refunds and a financing tool for Omzar. (**established**)

(kk) The Appellant was a member of a partnership other than a member who, on a regular, continuous and substantial basis throughout the year during which the business of the Partnership was ordinarily carried on, was actively engaged in the activities of the Partnership or was carrying on a business similar to that carried on by the Partnership. (**established**)

[7] In his testimony, Mr. Rouleau disclosed that he held a Bachelor's degree in applied sciences, which was awarded to him by Université Laval in 1984. His program was computer engineering. On December 27, 1984, after a brief teaching stint at CEGEP de Thetford Mines, Mr. Rouleau accepted a job as a computer engineer with UBM 2001 Inc. at a salary of $20,000 per annum, which was increased to $21,000 a few months later. He left this job in 1985 because of his employer's uncertain future and his low salary, and he began working for the Quebec public service, initially as a casual employee and later as a permanent employee. He was employed by several government departments, including the Ministère des Finances, where he worked from 1992 to 1998.

[8] Mr. Rouleau declared approximately $46,000 in income for the 1992 taxation year. His tax return stated that his only other source of income was interest from Revenue Canada and Revenu Québec. On cross-examination, he acknowledged that he did not invest any money in the stock market. He did not have a secondary house or residence either. His car was purchased with money from his mother. For the year 1993, his only sources of income were employment (roughly $53,000), interest from Revenu Québec, and a $57.63 retiring allowance.

[9] Mr. Rouleau found out about the Omzar tax shelters when he learned that his father had invested in Commu-Sys in 1991. Mr. Bédard, a colleague of his father's, had proposed this investment to Mr. Rouleau. The Cablotel tax shelter was the one that piqued Mr. Rouleau's interest because of the area of research involved. The project was to design and develop a prototype telematic system in order to optimize the servicing of televisual information broadcasting networks in outlying

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[31] If the word "generally" is added before the words "do not know each other".

areas. Mr. Rouleau signed the Cablotel subscription form on November 10, 1992. (See Exhibit A-3.)

[10] To finance the $15,000 cost of acquiring his interest in Cablotel, Mr. Rouleau obtained a $7,500 loan from the Caisse populaire des fonctionnaires du Québec [Quebec public service credit union] on November 13, 1992. That loan financed his $7,500 outlay. The other $7,500 was from a loan granted by Noreco. That loan was secured by a pledge of Mr. Rouleau's Cablotel shares. (See Exhibit A-2, tab 7.) Mr. Rouleau repaid the credit-union loan promptly.

[11] The documentation concerning the shelter emphasized the importance of investor participation, and Mr. Rouleau expected to be able to participate. However, there was practically no participation on his part. In December 1992, Mr. Rouleau had received no news from Cablotel, so he contacted Mr. Bédard to find out if the project had begun. Mr. Bédard told him that everything was proceeding normally and that there was no need to worry. From January to July 1993, Mr. Rouleau's involvement was limited to one or two telephone calls per month. Mr. Rouleau said that he contacted Mr. Bédard to avoid long-distance charges, since he lived in Québec and Cablotel and Omzar's offices were in Montréal. During one of these calls, Mr. Rouleau was told that a progress report would be submitted to him. He only received that report on October 20, 1993. (See Exhibit A-2, tab 11.) Naturally, Cablotel sent Mr. Rouleau the financial statements and information slips necessary to fill out his 1992 income tax return.

[12] Mr. Rouleau confirmed that he did not participate in any general meetings of the Cablotel partners, and was not aware of whether there had been any such meetings. He also said that he was not consulted about the decision to move Cablotel's establishment from Hamel Boulevard in Québec to the Metropolitan Boulevard in Montréal on February 12, 1993. Mr. Rouleau also acknowledged that he did not know the other Cablotel associates.

[13] Mr. Rouleau appears to have gone to the Omzar laboratory in Montréal only once. This visit only took place on February 28, 1994, after Noreco's acquisition, on February 16, 1994, of almost all the Cablotel shares.[32] The visit coincided with a skiing weekend that Mr. Rouleau spent at Mont-Tremblant. Mr. Rouleau discussed the Cablotel project for only one hour during the visit. He was shown certain pieces of equipment, but a demonstration of the results obtained from the R&D program

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[32] The visit is certified by a written declaration by Mr. Rouleau dated February 28, 1994 (see Exhibit A-2, tab 12).

was not possible, supposedly because a computer was out of order. After his February 1994 visit, Mr. Rouleau tried to contact Omzar again, but was unsuccessful because he no longer had that company's telephone number.

[14] Mr. Rouleau produced a printout, dated May 6, 2007, of a CIDREQ sole proprietorship data record obtained from the Quebec registrar of businesses. The printout states that Mr. Rouleau operated a computer services business. The business name is given as Micro Arc-en-ciel, and the business is said to have begun on September 14, 1989, and to have ended on December 31, 1989. The legal status information on the printout states that Mr. Rouleau is no longer in business. The explanations that Mr. Rouleau provided at the hearing do not establish that he was operating a business in 1992. In fact, the only data pointing to the existence of a business that can be found in his 1992 income tax return pertain solely to Cablotel (Exhibit A-5, at page 1 of the return, and the attached T5013 slip).

Analysis

[15] First of all, a few general comments should be made about the quality of the testimony of the different witnesses, and certain excerpts from this testimony should be pointed out.

[16] I find Mr. Caponi's testimony similar to the testimony considered by the late Chief Judge Garon in *McKeown*. I was impressed by the scope of Mr. Caponi's audit and his knowledge of the file. He analysed Omzar's bank accounts and accounting records, and, based on the various funds transfers that he was able to trace, he found that the money from the people who invested in the nine Omzar tax shelters went through "financing companies" that were tied to Omzar, and was used to finance half the cost that the investors needed to pay to acquire an interest in those tax shelters. Actually, the investors' money went into a tax shelter such as Cablotel, which then submitted it to Omzar, which, in turn, advanced the vast majority of it to the financing companies, notably Noreco. These financing companies lent the money to other investors. The money obtained by one partnership in 1992 made it possible to complete the financing of the R&D that another partnership had started in 1991. The principle at work was similar to a pyramid sales scheme: in order to finish an R&D project, it was absolutely essential to continue raising funds using other partnerships, or else there would not be enough cash to finance the R&D project fully. In January 1993, when the tax authorities discovered what had occurred, the entire scheme crumbled. It is not surprising to learn that Omzar went bankrupt. (See the statement of affairs of the bankrupt, which is dated July 6, 1995, and can be found at tab 20 of Exhibit I-1.)

[17] It should also be mentioned that several hundred documents were tendered in evidence. Mr. Caponi's audit revealed how little attention had been devoted to the planning of these R&D programs and to the completion of the operations by the proponent Omzar and by its salaried staff and some of the professionals whose services had been retained. For example, some documents were signed by people who apparently had no authority to do so. In addition, certain transactions seem to have taken place before the prerequisites thereto. For example, Noreco declared that it held all the Cablotel shares, save one, on February 15, 1994, at the time that Cablotel sold Omzar all of its rights to the results of the R&D work done "from January 1993 to January 1996",[33] but those shares were only acquired the following day, that is to say, on February 16, 1994.[34] To cite another example, the subscription form signed by Mr. Rouleau on November 10, 1992 is attached to a copy of the partnership agreement that bears the signature of the two initial partners and is dated November 10, 1992, even though, in all likelihood, the agreement must have been signed on January 16, 1992.[35]

[18] Mr. Cusson, who testified at Mr. Rouleau's request and was one of his fellow investors in Cablotel, straightforwardly acknowledged that the only thing that interested him about Cablotel was getting tax deductions, that he was not at all interested in R&D, and that he did not expect to derive commercial benefits from this activity. His investment, like that of Mr. Rouleau, was $15,000. He said that he would not have tolerated that much exposure in such a risky business. He knew that his interest would be bought back for $7,500 a few months later —naturally, this was not a certainty, but it had happened to him before — and that this would cancel his $7,500 loan from Noreco. He would then realize his profit by obtaining a tax refund greater than his own net outlay.

[19] Mr. Cusson had participated in such tax shelters from 1989 to 1993. He not only obtained his tax refund, but also had his interest in the tax shelters bought back at a price agreed upon in advance. It should be noted that in his first investment, which dates back to 1989, Mr. Cusson laid out 100% of the cost of the investment in December 1989, but then went to collect a cheque in connection with a buyback for 50% of that cost a few weeks later in January 1990.

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33 Exhibit I-1, tab 197, at page 3.

34 Naturally, this does not necessarily mean that those transactions are legally invalid. It is possible to sell property that one does not possess if one acquires it thereafter.

35 See subparagraph 38(a) of the Reply to the Notice of Appeal.

[20] Mr. Cusson did not know the other Cablotel partners, aside from a few colleagues from his office who had also invested in the shelter. He was not involved in any decision-making at Cablotel's partnership meetings. Mr. Loranger's appointment as manager of Cablotel freed Mr. Cusson and the other partners from managerial duties. Mr. Cusson acknowledged that he did not visit the laboratory of Omzar, to which Cablotel had entrusted the $2 million that it obtained.

[21] Mr. Cusson said that he filled out a very short questionnaire that the proponents had partners fill out in order to show that they were engaged in the activities of the partnership on a continuous, regular and substantial basis, but he was not certain whether he had received the questionnaire after the contract of assignment for the buyback of his shares in September 1993. He commented: [TRANSLATION] "Nothing about that project surprises me anymore." It must be added that the welcoming letter sent to the Cablotel partners was only sent out in July 1993, some eight or nine months following the subscription.[36]

[22] Mr. Cusson did not check how Cablotel or Omzar spent the money, nor did he verify whether the buyback price, equal to 50% of the subscription cost, represented the FMV of his interest in Cablotel. However, he acknowledged that he never thought that the buyback price could be worth more than the offered price, and did not negotiate it. Mr. Cusson accepted the Minister's 1995 settlement offer, and he acknowledged that he was naive and careless when he invested in Cablotel.

[23] Mr. Rouleau had the same information as Mr. Cusson about the buyback of his shares. He produced, as Exhibit A-2, tab 5, the scenario that Mr. Bédard, his investment advisor, proposed to him. Here is an excerpt from this scenario:

> [TRANSLATION]
>
> | | |
> |---|---|
> | Assuming an investment of | $15,000 |
> | The following amount will be returned as a right of first refusal | $ 7,500 |
> | If there is a loan, the interest cost until May '93 will be | $ 313 |
> | Net cost, including borrowing cost: | $ 7,813 |

[36] The welcoming letter addressed to Mr. Rouleau is dated July 15, 1993, and was produced as Exhibit A-2, at tab 10.

The tax savings will be:	$10,434
+ a federal tax credit of: that can be carried back to previous years	$0
Tax refund	$10,434
Profit, with no loan	2,934
Profit, with loan	2,622

[24] Mr. Bédard himself had invested in one of the Omzar tax shelters, namely Dreyfus Bio-Systems, in 1990. His interest in that partnership was bought back, as planned prior to his investment. He said that he was only interested in the tax refund, not in the results of the R&D. He could not have cared less about the commercial aspect. Mr. Bédard received a 3% commission on the sale of Cablotel shares. He also confirmed that Noreco granted loans to all the Cablotel investors. He says that no one was denied a loan.

[25] In light of the findings of fact set out above, I will adopt, in very large part, the approach of the late Chief Judge Garon in *McKeown*. There, the Chief Judge asked the following initial question: was Cablotel a partnership? He answered this question in the negative, because "the investors in question were merely seeking substantial tax benefits and never demonstrated any intention of working together to undertake scientific research and experimental development activities. In short, they had no intention of forming a genuine partnership." (paragraph 393 of his reasons). In my opinion, this question requires greater thought before I can decide it. However, as Chief Judge Garon held at paragraphs 394 *et seq*., I find that Cablotel did not carry on any business:

> **[394]** In addition, no business was carried on either by the appellant or by Commu-Sys Enr. and Cablotel Enr. in relation to the carrying out of the research work. This case is similar to *Bendall v. The Queen*, *supra*, in which Judge Bonner stated the following:
>
> > The issue here is whether the appellant carried on a "business" within the meaning of the *Income Tax Act* ("Act"). That word is to be given its ordinary meaning and that meaning does not include a tax avoidance scheme which is nothing more than a pale imitation of a business. The appellant was not involved in a commercial activity either directly or through Omni as his agent. The objective evidence

> regarding the manner in which the scheme operated and the actions and inaction of the parties point clearly to a conclusion that both the appellant and the promoters of the scheme were indifferent to the marketing of the speed reading course and to the earning of profits from that activity. There can be no doubt that what was sought was a tax deduction which would result in a refund part of which was to go to enrich the promoters of this scheme and the remainder of which was to go to the appellant.
>
> [Footnote omitted.]

> **[395]** In the case at bar, no steps or requests whatsoever were taken or made to ensure that the project would be profitable. I cannot find anything suggesting that the groups in question could have been profitable. No market research survey had been done. No marketing plan had been developed. Moreover, the structure put in place was set up solely for tax purposes, as shown by the "participation program" that was established only to create the illusion that the government's criteria were being met.

[26] I would also add these comments, which I made in *Waxman v. Canada*, [1996] T.C.J. No. 1689 (QL), [1997] 2 C.T.C. 2723, at paragraphs 47-50, and which apply in a similar manner to the case at bar:

> **47** Ferme Rompré clearly had an interest in obtaining the R&D findings in order to improve the management of its own livestock. I have no doubt that the R&D program, if conducted by Ferme Rompré, would have been oriented towards its business. It seems to me that Agriboeuf's sole object was to carry out R&D projects and to pass its costs on to the limited partners so that they could deduct them in computing their incomes for tax purposes. The Act provides for R&D incentives and it is possible for a limited partnership to incur R&D expenditures for which deductions may be claimed by the limited partners. However, and this is an important proviso, all the conditions of the Act must be met and those who set up such financing arrangements must ensure that they comply not only with the spirit but also the letter of the Act.
>
> **48** I do not believe that the limited partners intended, through Agriboeuf, to operate a farming business or to share in the proceeds of the sale of the R&D findings. In any case, it is not certain that there was a market for the results of this kind of research. The limited partners were not interested in anything other than the deduction of the R&D expenditures for tax purposes and the $150-per-share selling price of their interests.
>
> **49** If it had been established that Agriboeuf did not operate a business, not only would the R&D expenditures not have been qualified expenditures for the purposes of section 37 and thus for the purposes of the investment tax credit, but there would also be the possibility that the limited partnership had not been validly constituted.

> One of the conditions essential to the formation of a partnership is that the partnership "should be for the common profit of the partners" (art. 1830 *Civil Code of Lower Canada*). In this instance, it may be questioned whether the partnership really intended to make a profit for its partners. For an example relating to a limited partnership established in a common law province, see the decision rendered by the Federal Court of Appeal in *Continental Bank Leasing Corporation and Continental Bank of Canada v. The Queen*, 96 D.T.C. 6355.
>
> **50** In conclusion, it is possible that Agriboeuf did not operate a farming business in 1987. However, since the Minister admitted in his reply that Agriboeuf had operated a farming business, the appellants did not have to adduce any evidence to convince me that Agriboeuf did actually operate such a business. It is therefore not appropriate in the circumstances to conclude that Agriboeuf did not operate a farming business. The appellants have thus succeeded in discharging their onus of establishing that the R&D expenditures that Agriboeuf incurred and that the Minister disallowed were all or substantially all attributable to R&D.

[27] In order for a taxpayer to be entitled to the R&D deductions under section 37 of the Act,[37] the taxpayer must be carrying on a business, and the R&D expenses

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[37] That provision states, *inter alia*, as follows:

> 37(1) **Scientific research and experimental development** — Where a taxpayer carried on a business in Canada in a taxation year and files with the taxpayer's return of income under this Part for the year a prescribed form containing prescribed information, there may be deducted in computing the taxpayer's income from the business for the year such amount as the taxpayer may claim not exceeding the amount, if any, by which the total of
> (*a*) the total of all amounts each of which is an expenditure of a current nature made by the taxpayer in the year or in a preceding taxation year ending after 1973
> (i) on scientific research and experimental development carried on in Canada, directly undertaken by or on behalf of the taxpayer, and related to a business of the taxpayer,
> (ii) by payments to
> (A) an approved association that undertakes scientific research and experimental development,
> (B) an approved university, college, research institute or other similar institution,
> (C) a corporation resident in Canada and exempt from tax under paragraph 149(1)(*j*),
> (D) a corporation resident in Canada, or
> (E) an approved organization that makes payments to an association, institution or corporation described in any of clauses (A) to (C)
>
> . . .
>
> [Emphasis added.]

must be related to a business of the taxpayer. But Cablotel was not carrying on any business because it was created solely to transfer R&D tax deductions to investors, and had no intention to carry on a business, whether by operating a cable system, reselling its technology at a profit, or licencing others to use it in exchange for royalties. And Mr. Rouleau did not personally carry on any business either.

[28] Mr. Rouleau's submission that Cablotel operated a business in 1992 is incorrect, because Omzar's conduct with respect to the various tax shelters that it put in place year after year from 1990 to 1992 was always the same. The investors' interests in the shelters were automatically bought back, without regard to FMV, even before the R&D programs were finished. In my opinion, the Omzar tax shelters, including Cablotel, never had any intention to resell, in an ordinary business context, the rights that they might have obtained as part of their R&D programs. This was simply a mechanism for transferring tax deductions to the investors while leaving the R&D results to the entity (perhaps Omzar) that might have a commercial interest in them. Consequently, Cablotel has not met the conditions that must be met under section 37 of the Act in order to be able to claim R&D expenses; its partners had no right to deduct tax losses attributable to those expenses because of paragraph 96(1)(*g*) of the Act;[38] and, as far as the ITCs are concerned, they were not

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[38] This paragraph provides as follows:

> 96. (1) General Rules — Where a taxpayer is a member of a partnership, the taxpayer's income, non-capital loss, net capital loss, restricted farm loss and farm loss, if any, for a taxation year, or the taxpayer's taxable income earned in Canada for a taxation year, as the case may be, shall be computed as if
> . . .
> (*g*) the amount, if any, by which
> (i) the loss of the partnership for a taxation year from any source or sources in a particular place,
> exceeds
> (ii) in the case of a specified member (within the meaning of the definition "specified member" in subsection 248(1) if that definition were read without reference to paragraph (b) thereof) of the partnership in the year, the amount, if any, deducted by the partnership by virtue of section 37 in calculating its income for the taxation year from that source or sources in the particular place, as the case may be, and
> (iii) in any other case, nil
> were the loss of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the

entitled to them by reason of subsection 127(8) of the Act,[39] which computes the ITC of a partner based on the "eligible expenses" of the partnership, that is to say, the R&D expenses contemplated in paragraph 37(1)(*a*) or subparagraph 37(1)(*b*)(i) of the Act.

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taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer's share thereof.

[Emphasis added.]

[39] That subsection stated, *inter alia*, as follows during the relevant period:

127(8) Investment tax credit of partnership. Where, in a particular taxation year of a taxpayer who is a member of a partnership, an amount would, if the partnership were a person and its fiscal period were its taxation year, be determined in respect of the partnership, for its taxation year ending in that particular taxation year, under paragraph (a), (b) or (e.1) of the definition "investment tax credit" in subsection (9), if (*a*) paragraph (a) of that definition were read without reference to subparagraph (a)(iii) thereof, and
(b) in the case of a taxpayer who is a specified member of the partnership in the taxation year of the partnership ,
(i) paragraph (a) of that definition were read without reference to subparagraph (a)(ii) thereof, and
(ii) . . .
the portion of that amount that may reasonably be considered to be the taxpayer's share thereof shall be added in computing the investment tax credit of the taxpayer at the end of that particular taxation year.

During the period in issue, subsection 127(9) provided, *inter alia*, as follows in the definition of ITC:
"investment tax credit" of a taxpayer at the end of a taxation year means the amount, if any, by which the total of
(*a*) the total of all amounts each of which is the specified percentage of
. . .
(ii) a qualified expenditure made by the taxpayer in the year, or
. . .

[Emphasis added.]

Subsection 127(9) defined a "qualified expenditure" as follows:

"an expenditure in respect of scientific research and experimental development incurred by a taxpayer after March 31, 1977, that qualifies as an expenditure described in paragraph 37(1)(a) or subparagraph 37(1)(b)(i) but does not include . . .
. . .

[Emphasis added.]

[29] Even if I have erred in law in finding Cablotel carried on no business, and even if one assumes that Cablotel is a genuine partnership, Mr. Rouleau's appeal still cannot succeed because he was a limited partner within the meanings of subsections 96(2.2) and (2.4) of the Act. Once again, I adopt the same analysis that Chief Judge Garon adopted in *McKeown*:

> [403] Based on the parties' arguments and the evidence, the appellant cannot be considered to have been a limited partner in the two partnerships in question under the *Income Tax Act* unless subsection 96(2.4) of the *Act* is applicable to him. That subsection reads as follows:
>
> > (2.4) For the purposes of this section and sections 111 and 127, a taxpayer who is a member of a partnership at a particular time is a limited partner of that partnership at that time if his partnership interest is not an exempt interest at that time (within the meaning assigned by subsection (2.5)) and if, at that time or within three years after that time,
> >
> > (*a*) by operation of any law which governs the partnership arrangement, the liability of the taxpayer in his capacity as a member of the partnership, is limited;
> >
> > (*b*) the taxpayer or a person with whom the taxpayer does not deal at arm's length is entitled to receive an amount or obtain a benefit that would be described in paragraph (2.2)(*d*) if it were read without reference to subparagraphs (ii) and (vi) thereof;
> >
> > (*c*) one of the reasons for the existence of the taxpayer who owns the interest
> >
> > (i) may reasonably be considered to be to limit the liability of any other person with respect to that interest, and
> >
> > (ii) may not reasonably be considered to be to permit any person who has an interest in the taxpayer to carry on his business (other than an investment business) in the most effective manner; or
> >
> > (*d*) there is an agreement or other arrangement for the disposition of an interest in the partnership and one of the main reasons for the agreement or arrangement may reasonably be considered to be to attempt to avoid the application of this subsection to the taxpayer.
>
> [404] First of all, a person who has an exempt interest is not a limited partner. It was not argued that the interest the appellant may have had in the partnerships was an exempt interest within the meaning of subsection 96(2.5) of the *Act*. Paragraphs (*a*), (*b*), (*c*) and (*d*) of subsection 96(2.4) of the *Act* are the only provisions that may be applicable to the appellant.

[405] It follows that a member is a limited partner at a particular time if one or more of the conditions set out in paragraphs 96(2.4)(*a*), (*b*), (*c*) and (*d*) of the *Act* are met at that time or within three years after that time.

[406] Here, in view of the facts of this case, it seems to me that only the application of paragraph 96(2.4)(*b*) need be considered. That paragraph refers to paragraph 96(2.2)(*d*) but states that it must be read without reference to subparagraphs (ii) and (vi) thereof.

[407] The relevant part of paragraph 96(2.2)(*d*) of the *Act* reads as follows:

> 96(2.2) For the purposes of this section . . . the at-risk amount of a taxpayer, in respect of a partnership of which he is a limited partner, at any particular time is the amount, if any, by which the aggregate of
>
> . . .
>
> exceeds the aggregate of
>
> . . .
>
> (*d*) where the taxpayer . . . is entitled, either immediately or in the future and either absolutely or contingently, to receive or obtain any amount or benefit, whether by way of reimbursement, compensation, revenue guarantee or proceeds of disposition or in any other form or manner whatever, granted or to be granted for the purpose of reducing the impact, in whole or in part, of any loss that the taxpayer may sustain by reason of being a member of the partnership or by reason of holding or disposing of an interest in the partnership, the amount or benefit, as the case may be, that the taxpayer . . . is or will be so entitled to receive or obtain, except to the extent that . . . the entitlement arises
>
> . . .
>
> (iv) by virtue of an agreement under which the taxpayer may dispose of the partnership interest for an amount not exceeding its fair market value, determined without reference to the agreement, at the time of the disposition.

It follows from paragraphs 96(2.4)(*b*) and 96(2.2)(*d*) (subject to the restriction I have just referred to in the case of the latter) that a member is a limited partner where, at the time in question or within three years after that time, the member is entitled to receive or obtain, in any form or manner whatever, any amount or benefit referred to in paragraph 96(2.2)(*d*) if that amount or benefit is granted or to be granted "for the purpose of reducing the impact, in whole or in part, of any loss that the taxpayer may sustain by reason of being a member of the

partnership or by reason of holding or disposing of an interest in the partnership".

[408] According to the respondent, the appellant had such an entitlement because it [TRANSLATION] "was anticipated and planned, at least tacitly, that the investors would dispose of their shares for a fixed amount exceeding their fair market value, which amount was determined in advance without reference to the value at the time of the disposition". However, the appellant asserted that no representation was made to him—either before or at the time he purchased his shares in Commu-Sys Enr. and Cablotel Enr.—that his shares would be redeemed. He also testified that, at the end of the summer of 1993, he received an offer from Loron Inc. to buy his shares in Commu-Sys Enr. and an offer from Noreco Inc. to buy his shares in Cablotel Enr. The agreements by which the appellant transferred the shares in question to Loron Inc. and Noreco Inc. are dated December 20, 1993, and February 16, 1994, respectively. I am reproducing below the main clauses of the transfer agreement between the appellant and Loron Inc., the appellant's transfer agreement with Noreco Inc. being for all practical purposes identical:

> [TRANSLATION]
>
> TRANSFER AGREEMENT ENTERED INTO THIS 20TH DAY OF DECEMBER 1993
>
> . . .
>
> 1. I, the undersigned, a member of Commu-Sys (hereinafter "the partnership"), hereby sell, assign and transfer to:
>
> Loron Inc., 6555 Boulevard Métropolitain est, Suite 502, St-Léonard, Quebec H1P 3[*sic*] 3 (the transferee), 250 shares in the partnership, representing all my rights and interest as a member of the partnership, including but not limited to all rights in the intellectual property arising out of the research and development project carried out for the partnership and the right to exploit and market any result of the project, and I agree and undertake to sign and give to the transferee any document that is necessary or useful to effect a valid transfer of the said shares and any rights associated therewith.
>
> 2. This sale is being made in consideration of the sum of twelve thousand five hundred dollars ($12,500.00), which represents, to the best of the parties' knowledge, the fair market value of the shares sold, the said consideration being payable as follows:
>
> - reduction, by way of compensation, of a loan made by the transferee to the transferor, the said loan having been evidenced in writing in a document dated December 20, 1991.

> 3. Transferor's declaration and warranty
>
> The transferor declares and warrants to the transferee that he is the sole owner of the shares transferred hereunder and that he holds a clear and absolute title to the shares by virtue of which title he is able to transfer them to the transferee free and clear of any option, pledge or other security whatsoever.
>
> 4. . . .
>
> 5. . . .

[409] Given the facts of this case, I must determine whether, in the case of the redemption of the appellant's shares in Commu-Sys Enr. and Cablotel Enr. by Loron Inc. and Noreco Inc., the consideration for the share transfer—which consideration consisted in the cancellation of the appellant's debts resulting from the loans made to him by those two finance companies—could have been an amount or benefit for him under paragraphs 96(2.4)(*b*) and 96(2.2)(*d*) of the *Act*. The extinguishment of the appellant's debts to the two finance companies could have constituted a benefit for him if it was possible that his shares in Commu-Sys Enr. and Cablotel Enr. were worth less than the debts in question.

[410] However, there are exceptions to the rule set out in paragraph 96(2.2)(*d*) of the *Act*. The Court's attention was drawn only to subparagraph (iv) of that paragraph, which I cite here again for ease of analysis:

> (iv) by virtue of an agreement under which the taxpayer may dispose of the partnership interest for an amount not exceeding its fair market value, determined without reference to the agreement, at the time of the disposition

[411] It is therefore necessary to determine whether the transfer agreement dated December 20, 1993, between the appellant and Loron Inc. and the one dated February 16, 1994, between the appellant and Noreco Inc. were agreements under which the appellant could dispose of his shares in Commu-Sys Enr. and Cablotel Enr. for an amount that could have exceeded their fair market value at the time of the disposition.

[412] The answer to this question must be affirmative. Under the agreements, the appellant was able to dispose of his shares in Commu-Sys Enr. and Cablotel Enr. for a consideration¾the word "amount" used in subparagraph 96(2.2)(*d*)(iv) being very broad in meaning given the definition in subsection 248(1) of the *Act* — that could have exceeded their market value at the time of the disposition. As consideration for the disposition of the appellant's shares, the agreements provided for the extinguishment of the two debts (resulting from the loans made by Loron Inc. and Noreco Inc.), the principal amount of which totalled $25,500. The agreements did not provide for any method of valuing the appellant's shares, nor did they establish a ceiling that could have been the fair market value of the shares at the time of the disposition. The parties did not in

> effect establish a ceiling based on the market value of the shares just by stating in each agreement that the sale was being made for the amount indicated, "which represent[ed], to the best of the parties' knowledge, the fair market value of the shares sold". The agreements did not provide that the appellant was required to repay any excess amount if the appropriate authority determined in the final analysis that the amount set out in either agreement exceeded the market value of the shares to which the relevant agreement applied. It was therefore possible under the agreements for the consideration received for the disposition of the appellant's shares to exceed their market value at the time of the disposition.
>
> [413] I do not think that I need consider whether, in the present case, the consideration received by the appellant on December 20, 1993, and February 16, 1994 — that is, the extinguishment of his debts to Loron Inc. and Noreco Inc. — actually exceeded the market value of the shares of which he disposed. I must be guided solely by the wording of the agreements, which, in my opinion, did not preclude the possibility of the consideration's exceeding the market value of the appellant's shares at the time of the disposition.
>
> [414] It is therefore my view that the exception set out in subparagraph 96(2.2)(*d*)(iv) of the *Act* cannot be relied on by the appellant in this case.
>
> . . .
>
> [416] I therefore conclude that the appellant must be considered a limited partner within the meaning of paragraphs 96(2.4)(*b*) and 96(2.2)(*d*). As a consequence, I do not have to look at the application of the other subparagraphs of subsection 96(2.4) of the *Act*.
>
> [Emphasis added.]

[30] Since Mr. Rouleau claims that his situation was different from Mr. McKeown's, I must comment on his arguments. First of all, he submits that he never sold his interest in Cablotel and that he does not come within the definition of "limited partner" contemplated in subsection 96(2.4) of the Act.

[31] In my opinion, this argument is without merit for several reasons. First of all, I think that it can be inferred from Mr. Rouleau's conduct, and that of Noreco, that he tacitly accepted the sale of his interest in Cablotel to Noreco, even though he did not sign the contract of assignment. The facts on which I make this finding are as follows. Mr. Rouleau never paid interest on the loan that he obtained from Noreco, apart from the interest paid in advance upon his subscription. He never repaid Noreco for the $7,500 loan, which was supposed to have been repaid in full later in 2003, but he repaid the $7,500 loan from the Caisse populaire. Noreco never claimed the

interest for the period subsequent to the first two months, nor did it demand the repayment of the $7,500 loan itself. In its view, it acquired Mr. Rouleau's interest in Cablotel, an interest which had, in fact, been pledged. (See note 17 above.) Moreover, Mr. Rouleau undertook no serious efforts to claim his part of the proceeds of the sale, to Omzar, of the rights to the results of the R&D done by Cablotel. If he had done so, he would only have been entitled to an amount equal to his loan, in which case compensation would have been effected.

[32] Even if I am erring in fact and law in concluding that Mr. Rouleau tacitly accepted the sale of his interest, I do not think that this alters the application of the relevant provisions, namely subsections 96(2.4) and 96(2.2) of the Act, in any way. The important thing to determine is whether Mr. Rouleau, in 1992 or the three subsequent years, was entitled to receive a benefit within the meaning of subsections 96(2.4) and (2.2) of the Act. I will repeat the relevant portion of subsection 96(2.4): "a taxpayer [Mr. Rouleau] who is a member of a partnership [Cablotel] at a particular time is a limited partner . . . if, at that time or within 3 years after that time, [the taxpayer] is entitled . . . to receive an amount or to obtain a benefit that would be described in paragraph 96(2.2)(*d*) [of the Act]. The benefit contemplated by this paragraph is the "benefit that the taxpayer . . . is entitled, either immediately or in the future and either absolutely or contingently, to receive or to obtain, whether by way of reimbursement, compensation, revenue guarantee, proceeds of disposition . . . or in any other form or manner whatever, granted or to be granted for the purpose of reducing the impact . . . of any loss that the taxpayer may sustain because the taxpayer is a member of the partnership . . . .

[33] In my opinion, Mr. Rouleau was not only entitled to receive such a benefit, but actually received one, thereby reducing the impact of the loss that he sustained because of his membership of Cablotel. Given the arrangement put in place, I have no doubt that Omzar and Noreco's intent was that Mr. Rouleau would not have to repay the loan advanced by Noreco, a corporation that was related to Omzar. The mechanism designed to achieve this objective was to extinguish Mr. Rouleau's loan (and that of all other investors) by repurchasing his interest at a price equal to the amount of that loan. The only thing that he had to do was to sign the contract of assignment. However, for personal reasons, Mr. Rouleau refused to sign it.

[34] In addition, the benefit need not be in the form of "proceeds of disposition". Paragraph 96(2.2)(d) of the Act specifies that the benefit can be in an "other" form. Here, Mr. Rouleau got the same benefit as the other Cablotel partners, who signed the assignment contract: a discharge from the obligation to repay the loan, which discharge Noreco granted in order to reduce the impact of the loss resulting from

the acquisition of a partnership interest in Cablotel. He was never asked to repay the loan, and I am satisfied that he will never have to repay it. That is the form of the benefit that Mr. Rouleau received. In the spirit of the people who designed and promoted this tax-related arrangement, the lack of a signature on a contract was not going to cause anyone to lose the benefit of discharge from the obligation to repay the loan, a benefit that they offered all the investors. In actuality, Mr. Rouleau never had to finance more than half his loss and that was the abuse that the provisions of section 96 of the Act are designed to stop. It is my conclusion that all the conditions precedent to a finding that Mr. Rouleau was a limited partner of Cablotel for the purposes of the Act have been met.

[35] Since Mr. Rouleau is a limited partner of Cablotel, he is not entitled to deduct his share of the R&D losses sustained by that tax shelter. And since all the losses are R&D losses, he is not entitled to deduct any loss amount. The ITCs must meet with the same fate.[40]

[36] There is an additional reason to conclude that Mr. Rouleau is not entitled to deduct the ITCs. He was also a passive specified member of Cablotel for the purposes of subsection 127(8) of the Act; consequently, he cannot deduct his share of the ITC amount that might have been determined in respect of that partnership. In order not to be considered a passive specified member,[41] Mr. Rouleau would have

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[40] See subparagraph 96(1)(*g*)(ii) and paragraph 127(8)(*a*) of the Act, quoted in the preceding footnotes.

[41] The French definition of "*associé déterminé*" ("specified member" of a partnership) is set out in subsection 248(1) of the Act:

> « associé déterminé » s'entend, dans un exercice financier ou une année d'imposition, selon le cas, d'une société, de tout associé qui :
> *a*) soit est commanditaire ou assimilé de la société, au sens du paragraphe 96(2.4), à un moment de l'exercice ou de l'année,
> *b*) soit, de façon régulière, continue et importante tout au long de la partie de l'exercice ou de l'année où la société exploite habituellement son entreprise :
> (i) ne prend pas une part active dans les activités de la société, sauf dans celles qui ont trait au financement de l'entreprise de la société, ou
> (ii) n'exploite pas une entreprise semblable à celle que la société exploitait au cours de l'exercice ou de l'année, sauf à titre d'associé d'une société.

The English version of the definition is even clearer:

> "specified member" of a partnership in a fiscal period or taxation year of the partnership, as the case may be, means

had to prove, on a balance of probabilities, that he was engaged in Cablotel's activities on a regular, continuous and substantial basis.

[37] As Chief Judge Garon held in *McKeown*, the membership of the Cablotel partners was very symbolic at best, and it seems clear to me that this conclusion also applies to Mr. Rouleau. Moreover, I believe that the intent of Parliament in enacting the definition of "limited partner" for the purposes of computing the ITC was to prevent tax-shelter partnerships from benefiting from the ITC.

[38] In my view, it is completely contrary to the intent of the Act to argue that one possible reason for Mr. Rouleau's lack of activity is the fact that the Cablotel partnership was engaged in only a small amount of activity. The reality is that in order to be excluded from the concept of passive specified member, one must show that one has been active, and, if there was no reason to be active, this would constitute a circumstance intended to be caught by the provision. I have no doubt that Mr. Rouleau was a passive specified member for the purposes of the ITC and I find accordingly.

[39] One can have doubts about the nature of certain expenses incurred by Cablotel and about whether they qualify under section 37 of the Act, but in view of the fact that Mr. Rouleau was not entitled to deduct any of those expenses whether they were incurred or not, I find that Mr. Rouleau's appeal must be dismissed.

The penalty in section 179.1 of the Act and costs for abuse of process

[40] In the submission of counsel for the Respondent, Mr. Rouleau knew that he had a significant tax liability which remained unpaid. He also knew that collection measures were being suspended for such time as the appeal was pending. He read only such portion of *McKeown* as applied directly to his case. He acknowledges that

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> (*a*) any member of the partnership who is a limited partner (within the meaning assigned by subsection 96(2.4)) of the partnership at any time in the period or year, and
>
> (*b*) any member of the partnership, other than a member who is
>
> (i) actively engaged in those activities of the partnership business which are other than the financing of the partnership business, or
>
> (ii) carrying on a similar business as that carried on by the partnership in its taxation year, otherwise than as a member of a partnership,
>
> on a regular, continuous and substantial basis throughout that part of the period or year during which the business of the partnership is ordinarily carried on and during which the member is a member of the partnership.
>
> [Emphasis added.]

he received the case law that the Department of Justice lawyers sent him, including the decisions in *Brillon*, 2006 TCC 76, 2006 DTC 2340 (Fr.)); *Boudreault*, 2005 TCC 660, 2005 DTC 1650 (Fr.); and *Maslanka*, 2004 TCC 158, 2004 DTC 2933, which he did not read because they were unfavourable to him.

[41] Counsel for the Respondent also contend that, one week before the hearing of his appeal, Mr. Rouleau said that he had facts to show regarding his degree of participation in Cablotel's activities. Some members of the Cablotel partnership then testified in Court at his request. Counsel for the Respondent submit that the testimony of those witnesses was prejudicial to Mr. Rouleau. Moreover, they assert that Mr. Cusson has acknowledged that he is now aware of the subtleties of the Act, and has said that he had decided to settle his file after consulting independent counsel. In their submission, this constituted an objective assessment of his file. The lack of such an objective assessment by Mr. Rouleau, and his conduct with respect to the payment of his tax liability [TRANSLATION] "leaves no room for any further doubt that he used this Court as a kind of parking space, that his appeal was pending because of the suspension of collection measures, and that this suited him." The lawyers add: [TRANSLATION] "[P]erhaps he said to himself: 'I don't have much to lose by going to Court, so I will go.'" The Respondent's counsel submit that there [TRANSLATION] "are still many matters like Mr. Rouleau's before this Court, and we submit that the time has come . . . to tell the appellants that if they do not adduce evidence — and this is what we wrote to Mr. Rouleau — that [he would need to] adduce evidence with respect to important aspects [but he nonetheless] has come before this Court . . . without being aware of highly relevant case law . . . and I think that he should be ordered either to pay costs or [be subject to] section 179.1."

[42] Counsel for the Respondent also cited *Fournier*,[42] where the Federal Court of Appeal acknowledged that this Court has the power to award costs to the respondent where a taxpayer commits an abuse of process. *Fournier* involved "excessive and abusive stubbornness." In the submission of counsel for the Respondent, the abuse in the case at bar was that Mr. Rouleau called witnesses whose testimony was unfavourable to his case. There were also repeated last-minute requests to amend the Notice of Appeal and to postpone the hearing in order to have more time to prepare.

[43] Mr. Rouleau would undoubtedly have been better off accepting the settlement that the Minister offered him and all investors in this type of R&D tax shelter on December 8, 1995 (Exhibit A-6.). I have trouble understanding why he did not do so.

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42 *Fournier v. Canada*, [2005] F.C.J. No. 606 (QL), 2005 FCA 131.

However, I do not believe that the penalty contemplated in section 179.1, which states as follows, should be imposed here:

> 179.1 **No reasonable grounds for appeal** – Where the Tax Court of Canada disposes of an appeal by a taxpayer in respect of an amount payable under this Part or where such an appeal has been discontinued or dismissed without trial, the Court may, on the application of the Minister and whether or not it awards costs, order the taxpayer to pay to the Receiver General an amount not exceeding 10% of any part of the amount that was in controversy in respect of which the Court determines that there were no reasonable grounds for the appeal, if in the opinion of the Court one of the main purposes for instituting or maintaining any part of the appeal was to defer the payment of any amount payable under this Part.
>
> [Emphasis added.]

[44] For a reason that I cannot comprehend, Mr. Rouleau, like many taxpayers who invested in tax shelters like Cablotel, is unable to accept that he was misled by proponents who were dishonest or incompetent, or exercised poor judgment. These projects should never have been offered to ordinary investors like him. The fact that the Commission des valeurs mobilières du Québec [Quebec securities commission] did not approve the sale of these shares to the public should have alerted the investors. Be that as it may, Mr. Rouleau, blinded by his own conviction, continues to believe that he is entitled to his tax deductions. Apparently, he even took roughly six weeks of unpaid leave to prepare for the hearing of his appeal. Mr. Rouleau represented himself, and the complexity of the relevant provisions of the Act might have prevented him from correctly assessing the merits of his position. In any event, I will give him the benefit of the doubt as to the reasons behind his efforts. I am not satisfied that one of the primary reasons for his persistence was to defer the payment of his taxes. As he pointed out, the interest continues to accrue, and the longer the delay in repaying his tax liability, the greater his tax burden gets. Consequently, I will not grant the Respondent's request to have the penalty set out in section 179.1 of the Act imposed.

[45] Moreover, since this is an informal procedure appeal and there has been no patent abuse of process, it is not appropriate to award costs to the Respondent either. This does not mean that I do not believe that a form of abuse of the judicial system has taken place here, because a similar appeal by Mr. McKeown was heard for 33 days, and the hearing of Mr. Rouleau's appeal required five days. In neither instance did the appellants succeed. The two appeals should probably have been joined in order to prevent the Minister from having to present lengthy and detailed proof in support of his assessment twice. Other solutions could perhaps have

attained the objective of administering justice more effectively. However, it is my opinion that, in the instant case, it is not appropriate to penalize Mr. Rouleau by applying section 179.1 or by ordering him to pay costs.

[46] For all these reasons, Mr. Rouleau's appeal is dismissed, without costs.

Signed at Georgeville, Québec, this 17th day of September 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 12th day of October 2007.

Brian McCordick, Translator

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PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	May 11, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	September 17, 2007

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Pierre Cossette Simon Petit

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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