Docket: 2003-2860(IT)I

BETWEEN:

ALLEN E. EINBODEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 5, 2004 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Bonnie Boucher

AMENDED JUDGMENT

The appeal from the assessment made under the *Income Tax Act* (the "*Act*") for the 1995 taxation year is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant incurred an allowable business investment loss relating to Pace Ventures Inc. in the amount of $27,071.89 (calculated as 3/4 of a business investment loss in the amount of $36,095.85).

The appeal from the assessment made under the *Act* for the 1997 taxation year is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached schedule of business income (loss).

This judgment with attached Reasons is issued in substitution for the judgment dated July 13, 2004.

Signed at Ottawa, Canada, this 10th day of September 2004.

"J.E. Hershfield"

Hershfield J.

Schedule to Judgment dated July 13, 2004
Allen E. Einboden
Taxation Year 1997
Statement of Business Income
(Varied Amounts Shown in Bold Type)

Gross Income	$62,451.68
Cost of goods sold:	
Purchases	**4,890.91**
Sub-contracts	40,031.98
Cost of goods sold	**$44,922.89**
Gross profit	**$17,528.79**
Expenses:	
Advertising	14,166.90
Bad debts	
Interest	
Maintenance/repairs	**1,759.58**
Meals/entertainment	**1,425.54**
Motor vehicle	**4,199.09**
Office expenses	**1,505.88**
Professional fees	**1,381.25**
Salaries	
Travel	**6,237.46**
Telephone/utilities	**3,885.67**
Seminars/meetings	2,210.61
Other expenses	
Capital cost allowance	146.32
Total expenses	**$36,918.69**
Net business loss allowed	**$(19,389.90)**

Citation: 2004TCC591
Date: 20040910
Docket: 2003-2860(IT)I

BETWEEN:

ALLEN E. EINBODEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT DATED JULY 13, 2004 AND AMENDED JUDGMENT DATED SEPTEMBER 10, 2004

Hershfield J.

[1] Counsel for the Respondent, by letter dated July 23, 2004, requested an amendment to my Judgment dated July 13, 2004 which dismissed the Appellant's appeal in respect of his 1995 taxation year.

[2] The request is based on the Respondent's acknowledgement that there had been an agreement prior to the hearing to allow the Appellant an allowable business investment loss ("ABIL") for his 1995 taxation year. The Judgment dated July 13, 2004 dismissed the appeal for the 1995 taxation year on the misunderstanding the Appellant had been assessed on the basis of allowing the ABIL. Being satisfied that the relevant reassessment of the Appellant's 1995 taxation year did not allow an ABIL, the Judgment dated July 13, 2004 is amended in accordance with the Respondent's submission.

[3] In addition to the appeal respecting the Appellant's 1995 year, his 1997 taxation year was under appeal as well. Judgment dated July 13, 2004 dismissed such appeal with reasons delivered orally from the bench on the date of the hearing. By letter dated August 5, 2004, the Appellant requested Reasons for Judgment in writing.

[4] During the course of the hearing the parties had narrowed the issues in respect of the appeal of the Appellant's 1997 taxation year to the deductibility of amounts claimed by him as salaries to his wife who performed services in respect of the Appellant's Amway business. A brief history of such claim is as follows. The Appellant claimed $6,000.00 as salaries paid to his wife in respect of his business. The Appellant's spouse included such amount in her return as gross business income (consulting fees) and claimed a minor amount as a business expense. The first reassessment treated the Appellant and his wife as business partners. It disallowed the salary expense on the basis that it was never paid and, in any event, on the basis that it was accounted for in the partnership allocation of income/loss under the reassessments. The Appellant's wife was reassessed on this basis as well. The $6,000.00 she reported was removed and she was allocated a partnership loss of $2,095.00 so as to reduce her income by $8,095.00. A second reassessment abandoned the partnership basis for allocating income/loss and attributed losses of $16,265.00 to the Appellant as a sole proprietor. Such loss amount did not recognize a salary expense for services provided by the Appellant's wife. The Appellant's wife was also reassessed a second time. Under that reassessment the $2,095.00 loss allocated to her was reversed. There was no evidence that the $6,000.00 reported and removed by the first reassessment was brought back into her income in 1997. That is, contrary to the assertions of the Appellant at the hearing, it appears that there was symmetry in the reassessments as between the Appellant and his wife although that is ultimately not a factor in considering the disposition of the Appellant's appeal on the facts acknowledged by the testimony of both the Appellant and his wife at the hearing. Those acknowledged facts were, simply put, that no amounts were ever paid to the Appellant's wife in respect of her services (employment or consulting services) and that there was no intention to ever pay or collect any amount in respect of those services.

[5] As stated, the Appellant's appeal was dismissed with reasons from the bench. The following are such reasons taken from the transcript of the proceedings:

> Whether or not they are salaries or consultant fees, there is a legal requirement that in order to expense an amount there must be evidence of a legal obligation to pay, an intention to be legally bound to make a payment. Based on the testimony alone of both witnesses, I have insufficient evidence to conclude that there was a legal obligation created.
>
> What we have here is simply a situation where an Appellant has come to believe honestly or not – through his best

> intentions to find out through professional advisers, the CCRA or not – that he can benefit from splitting income with his wife. There is nothing wrong with splitting an income with a family member; work seems to have been done. However, quite frequently in family relationships, work is done without consideration; sometimes consideration is worked in after the fact.
>
> In this case, the pure legal question before me is whether or not the amounts were intended to be paid. Whether or not there was an obligation created whereby a payment could be enforced, was there an intention?
>
> The evidence of the parties is to the effect that, 'Well, nobody really told us we needed to have this legal obligation to pay. It was five years later that somebody told us that this wasn't just simply a wink/nod-type of situation. We thought, based on whatever information we could gather, that all we had to do was say what the amount was on our respective tax returns and just by putting it in our respective tax returns that is sufficient.'
>
> Income-splitting simply as declared on tax returns is not sufficient. It is clear law that amounts do not necessarily have to be paid; they can accrue (subject to special limitations in respect of salaries). On the expense side you can deduct them, even though the amounts are still payable. But, the evidence that I have heard from both witnesses is that, 'We didn't know we had to make them payable', which just underlines that they were not intended to be payable and on that basis these expenses cannot be allowed.
>
> A legal obligation to pay might be evidenced by things like a payment at some point (even a couple of years later) or documentation of a promise to pay; anything that indicates that there was a legitimate and *bona fide* intention to pay these amounts, as opposed to simply designating an amount for income tax purposes by filing such designated amounts on returns which is clearly not sufficient.
>
> The expenses in respect of the $6,000.00 so-called salary amount will not be allowed.

[6] While such reasons may seem to adopt a hard-line approach they are justified. As taxpayers can appropriately expect the benefits of a strict application of the law in the claiming of expenses, the Respondent can appropriately rely on the strict application of the legal requirements pertaining to such claims.

Signed at Ottawa, Canada, this 10th day of September 2004.

"J.E. Hershfield"

Hershfield J.

CITATION:	2004TCC591
COURT FILE NO.:	2003-2860(IT)I
STYLE OF CAUSE:	Allen E. Einboden and Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 5, 2004
REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
DATE OF AMENDED JUDGMENT:	September 10, 2004

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Bonnie Boucher

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	Morris Rosenberg Deputy Attorney General of Canada Ottawa, Canada