Docket: 2008-2650(IT)I

BETWEEN:

TADEUSZ KOSEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 27, 2009, at Montreal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

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

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2002 taxation year is quashed and the appeal from the reassessment made under the *Income Tax Act* for the 2006 taxation year is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of April 2009.

"Paul Bédard"

Bédard J.

Citation: 2009 TCC 228
Date: 20090429
Docket: 2008-2650(IT)I

BETWEEN:

TADEUSZ KOSEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal from a reassessment (notice of which is dated May 1, 2006) made against the Appellant for his 2002 taxation year. In so reassessing, the Minister of National Revenue (the "Minister") disallowed the deduction claimed for an allowable business investment loss ("ABIL") of $33,269. This is also an appeal from a reassessment made against the Appellant for his 2006 taxation year. In so reassessing, the Minister disallowed the deduction claimed for a non-capital loss from other years in the amount of $36,423.44.

The facts for the 2002 taxation year

[2] The Appellant filed his income tax return for the 2002 taxation year on June 27, 2003 and the Minister issued the initial assessment for the taxation year on July 14, 2003. In so assessing the Appellant, the Minister allowed the deduction claimed for an ABIL in the amount of $33,269.

[3] Following information received from the Quebec Minister of Revenue, the Minister sent a letter (Exhibit R-3) to the Appellant advising him that the ABIL claimed for the 2002 taxation year had been revised to nil, and reassessed the appellant for that taxation year on May 1, 2006, disallowing the ABIL as claimed. Consequently, the time for objecting to the reassessment expired on July 30, 2006.

[4] Following the reassessment, the Appellant sent a letter (Exhibit R-4) dated September 5, 2006 to the Canada Revenue Agency (the "Agency"). The Agency replied to the Appellant by letter dated September 25, 2006 (Exhibit R-5). The Appellant also sent a letter (Exhibit R-5) dated January 22, 2007 to the Agency.

[5] On January 25, 2008, the Appellant made a follow-up call regarding a notice of objection filed for the 2002 taxation year and dated September 22, 2007. That notice of objection had not been received by the Minister and the Appellant resubmitted the same together with attached documentation, which was received by the Minister on January 30, 2008.

[6] On May 12, 2008, the Minister informed the Appellant that the notice of objection postmarked January 25, 2008 could not be accepted as it was not filed within 90 days following the date of reassessment, namely May 1, 2006, and further informed the Appellant that he was also too late to file a request for an extension of time to file a notice of objection.

Analysis and conclusion for the 2002 taxation year

[7] The relevant sections of the *Income Tax Act* (the "Act") are the following:

> **165(1) Objections to assessment --** A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,
>
> > (*a*) where the assessment is in respect of the taxpayer for a taxation year and the taxpayer is an individual (other than a trust) or a testamentary trust, on or before the later of
> >
> > > (i) the day that is one year after the taxpayer's filing-due date for the year, and
> >
> > > (ii) the day that is 90 days after the day of mailing of the notice of assessment; and

(*b*) in any other case, on or before the day that is 90 days after the day of mailing of the notice of assessment.

. . .

165(2) Service -- A notice of objection under this section shall be served by being addressed to the Chief of Appeals in a District Office or a Taxation Centre of the Canada Revenue Agency and delivered or mailed to that Office or Centre.

. . .

166.1(1) Extension of time [to object] by Minister -- Where no notice of objection to an assessment has been served under section 165, nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.

. . .

169(1) Appeal -- Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(*a*) the Minister has confirmed the assessment or reassessed, or

(*b*) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

[8] Subsection 169(1) of the Act obliges a taxpayer to serve a notice of objection in order for that taxpayer to be able to appeal an assessment. In other words, service of notice is a condition precedent to the institution of an appeal. In the present case, there is no evidence that Appellant served on the Minister within the time prescribed (which in the present case expired on July 30, 2006) a notice of objection (the notice of objection must be addressed to the Chief of Appeals of the appropriate district) in writing, setting out the reasons for the objection and all the relevant facts, nor is there any evidence that the Appellant made an application to the Minister for an extension of time to file a notice of objection. As a result, the appeal for the 2002 taxation year must be quashed.

The 2006 taxation year

[9] The Appellant filed his income tax return for the 2006 taxation year on April 29, 2007 and the Minister issued the initial assessment for the 2006 taxation year on May 10, 2007. In so assessing the Appellant, the Minister disallowed the deduction claimed for a non-capital loss from other years in the amount of $36,423.44. The Minister refused that non-capital loss claim for the 2006 taxation year as the Appellant had no non-capital loss within the meaning of subsection 111(8) and paragraph 111(1)*a*) of the Act available to carry forward to the 2006 taxation year. The evidence revealed in this regard that:

i) The Appellant claimed in his 1994 income tax return an ABIL of $235,132 ($313,509 x 75%). The ABIL was applied against the Appellant's income in the following manner:

- $34,603 in 1994
- $34,292 in 1991 (carry-back)
- $29,448 in 1992 (carry-back)
- $44,223 in 1993 (carry-back)
- $11,219 in 1995 (carry-forward)
- $48,750 in 1996 (carry-forward)
- $32,597 in 1997 (carry-forward).

ii) The Appellant claimed in his 1998 income tax return an ABIL of $62,194 ($82,926 x 75%). The Appellant was allowed a deduction of $39,666 against his income for that year. The amount left was $22,528. This amount was carried forward to the year 2000.

iii) The Appellant claimed in his 1999 income tax return an ABIL of $27,375 ($36,500 x 75%). This amount was applied against the Appellant's income for that year.

iv) The Appellant never claimed an ABIL in his income tax returns for taxation years following the 1999 taxation year.

[10] Consequently, I am of the opinion that the Minister was justified in refusing the non-capital loss carried forward from other taxation years to the 2006 taxation year since the evidence showed that the Appellant had no non-capital loss within the

meaning of subsection 111(8) and paragraph 111(1)*a*) of the Act available to carry forward to the 2006 taxation year.

[11] In this case, the Appellant submitted essentially that he incurred in his 2002 and preceding taxation years ABILs that were never claimed and that, consequently, he should be allowed to carry forward those ABILs for application against his 2006 income.

[12] I am of the opinion that a taxpayer cannot carry forward an ABIL never claimed in his income tax return for the year in which the ABIL occurred. I also want to point out that it is simply too late for the Appellant to claim those ABILs since the taxation years in which they occurred are statute-barred.

[13] For these reasons, the appeal for the 2006 taxation year is dismissed.

Signed at Ottawa, Canada, this 29th day of April 2009.

"Paul Bédard"

Bédard J.

CITATION:	2009 TCC 228
COURT FILE NO.:	2008-2650(IT)I
STYLE OF CAUSE:	TADEUSZ KOSEK v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	January 27, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
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APPEARANCES:

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