Docket: 2004-1225(IT)G

BETWEEN:

FRANCIS O'DEA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *Sean O'Dea* (2004-1226(IT)G), *John Rankin* (2004-1227(IT)G), and *Geoffrey Bailey* (2004-474(IT)G) on June 17, 18 and 19, 2008 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Louise R. Summerhill and Chris Dunn
Counsel for the Respondent:	Marie-Thérèse Boris and Brent E. Cuddy

---

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1992, 1993, 1994, 1995 and 1996 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

If the parties cannot settle the issue of costs within 60 days of the date of the within Reasons, they may contact the Court to obtain dates for the filing of written submissions.

Signed at Vancouver, British Columbia, this 1st day of June 2009.

"Diane Campbell"

Campbell J.

Docket: 2004-1226(IT)G

BETWEEN:

SEAN O'DEA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Francis O'Dea (2004-1225(IT)G), *John Rankin* (2004-1227(IT)G), and
Geoffrey Bailey (2004-474(IT)G) on June 17, 18 and 19, 2008
at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Louise R. Summerhill and Chris Dunn
Counsel for the Respondent:	Marie-Thérèse Boris and Brent E. Cuddy

---

<u>JUDGMENT</u>

The appeals from the assessments made under the *Income Tax Act* for the 1992, 1993, 1994, 1995 and 1996 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

If the parties cannot settle the issue of costs within 60 days of the date of the within Reasons, they may contact the Court to obtain dates for the filing of written submissions.

Signed at Vancouver, British Columbia, this 1st day of June 2009.

"Diane Campbell"

Campbell J.

Docket: 2004-1227(IT)G

BETWEEN:

JOHN RANKIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *Francis O'Dea* (2004-1225(IT)G), *Sean O'Dea* (2004-1226(IT)G), and *Geoffrey Bailey* (2004-474(IT)G) on June 17, 18 and 19, 2008 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Louise R. Summerhill and Chris Dunn
Counsel for the Respondent:	Marie-Thérèse Boris and Brent E. Cuddy

---

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1994, 1995 and 1996 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

If the parties cannot settle the issue of costs within 60 days of the date of the within Reasons, they may contact the Court to obtain dates for the filing of written submissions.

Signed at Vancouver, British Columbia, this 1st day of June 2009.

"Diane Campbell"

Campbell J.

Docket: 2004-474(IT)G

BETWEEN:

GEOFFREY BAILEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *Francis O'Dea* (2004-1225(IT)G), *Sean O'Dea* (2004-1226(IT)G), and *John Rankin* (2004-1227(IT)G) on June 17, 18 and 19, 2008 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Louise R. Summerhill and Chris Dunn
Counsel for the Respondent:	Marie-Thérèse Boris and Brent E. Cuddy

---

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1994, 1995 and 1996 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

If the parties cannot settle the issue of costs within 60 days of the date of the within Reasons, they may contact the Court to obtain dates for the filing of written submissions.

Signed at Vancouver, British Columbia, this 1st day of June 2009.

"Diane Campbell"

Campbell J.

Citation: 2009 TCC 295
Date: 20090601
Dockets: 2004-1225(IT)G,
2004-1226(IT)G,
2004-1227(IT)G,
2004-474(IT)G.

BETWEEN:

FRANCIS O'DEA,
SEAN O'DEA,
JOHN RANKIN,
GEOFFREY BAILEY,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

Introduction:

[1] These appeals concern the disallowance of losses by the Minister of National Revenue (the "Minister") in respect to the 1992 to 1996 taxation years for Francis O'Dea and Sean O'Dea and in respect to the 1994 to 1996 taxation years for Geoffrey Bailey and John Rankin. In addition to the disallowance of the losses, the Minister imposed gross negligence penalties with respect to Francis O'Dea and Sean O'Dea.

[2] All of the Appellants in these appeals were limited partners in the Proshred Florida/Georgia Limited Partnership (the "Partnership"). Geoffrey Bailey

also purchased units in the Kilrush Limited Partnership (the "KP Partnership"), which was a limited partner in the Partnership. The Appellants are representative of a total group of 17 limited partners who purchased limited partnership units in the Partnership and/or the KP Partnership. Both the Partnership and the KP Partnership were established by the O'Deas and were registered as limited partnerships on August 29, 1988 and May 1, 1994, respectively. Both the Partnership and the KP Partnership were registered tax shelters under the *Income Tax Act* (the "*Act*").

[3] In respect to the relevant taxation years, the Minister determined that the Appellants were not entitled to deduct the losses from the Partnership and/or KP Partnership. These losses were denied on the primary basis that the long-term promissory notes, being one of the vehicles which all of the investors utilized to pay for their purchase of partnership units, were limited recourse amounts within subsection 143.2(1) of the *Act* because the interest on these notes was not paid by the Appellants or was not paid within 60 days of each taxation year-end as required under subsection 143.2(7). This had the effect of reducing each investors' cost of their units, thereby reducing the at-risk amount for each investor under subsection 96(2.2) of the *Act* and correspondingly reducing, by the same amount, the Appellants' entitlement to deduct their respective losses under subsection 96(2.1) of the *Act*. In addition, the Minister's assessments were based on a determination that the Partnership was not a valid partnership and that certain expenses were unsupported and lacked credibility.

[4] I heard evidence from three of the Appellants, Francis O'Dea, Sean O'Dea and Geoffrey Bailey, as well as Glenn Fraser, a chartered accountant with Fraser, Cellucci & Associates (now Taligent Group Inc.), that provided accounting services to the entire group of companies involved in these appeals. The Respondent relied on the testimony of the auditor, Gino Casciano.

<u>Facts</u>:

[5] The Appellants, Francis and Sean O'Dea, are brothers who together created the Proshred mobile document shredding business in the mid-1980's. Proshred Holdings Limited ("PHL") was incorporated in Ontario on March 19, 1987 and operated the Proshred business through franchises in both Canada and the United States ("U.S.") during the relevant years under appeal.

[6] As part of the franchising aspect of the business, PHL operated a centralized service bureau (the "Service Bureau") that provided certain administrative services

and functions to its franchisees in Canada and the U.S. The Service Bureau was maintained through a call centre located in Canada which took orders, maintained client accounts, including collections and remittances and provided accounting services for the franchisees in both countries. In return for these services, each of the franchisees paid a licensing fee based on the franchisee's gross revenue (the "Licensing Fees"). To facilitate the U.S. operations, PHL operated in that country through Proshred Inc. ("PI"), a wholly owned U.S. subsidiary, which held all of the licensing rights to operate the Service Bureau for the franchisees in the U.S.

[7] Francis O'Dea was the Chairman of PHL and President of PI; Sean O'Dea was the President of PHL. They have extensive business backgrounds dating back to the mid-1970's and both have been involved with other companies, including the establishment of the widely known Second Cup business. They initially expanded the Proshred business through limited partnerships, which were profitable for investors, before pursuing expansion through franchising operations. Sean O'Dea was primarily responsible for developing the franchises.

[8] Although PI held the licensing rights to operate the Service Bureau in the U.S., it did not carry on any operational activities (Master Licence Agreement, dated March 28, 1990, Joint Book of Documents, Tab 7). According to Francis O'Dea, PI was "just a shell" (Transcript, page 34).

(A) Expansion of the Proshred Business:

[9] After consulting with various professional advisors in 1994, PHL decided to expand into the U.S. market using the structure of a limited partnership. On April 29, 1994, PI sold its licensing rights to operate the Service Bureau for the territories of Florida and Georgia ("F/G Licensing Rights") to another U.S. corporation, PC Holdings Inc. ("PC Holdings"). Peter Charlton, a Chartered Accountant and CPA, was the sole shareholder of PC Holdings. He also acted as a consultant for PHL in Canada and was intimately involved with the accounting and financial strategies of PHL. The Original Purchase Contract dated April 29, 1994 between PI, PHL and PC Holdings for the F/G Licensing Rights listed a sale price of $3.4 million with payment from PC Holdings to PI to be made by way of a promissory note.

[10] According to Francis O'Dea, PC Holdings acquired the F/G Licensing Rights because Peter Charlton recognized the potential of the Proshred business in the U.S. However, later in his testimony, Mr. O'Dea stated that the intention in selling the F/G Licensing Rights to PC Holdings was "… to create this partnership

in order to expand the Proshred Florida/Georgia territories and this was the mechanism for doing that." (Transcript, page 32)

[11] Shortly after, on May 2, 1994, PC Holdings sold the F/G Licensing Rights to Proshred General Partner Inc. ("Proshred GP"), a company incorporated under the laws of Ontario as a wholly owned subsidiary of PHL. Proshred GP was the only general partner of the Partnership and held a 0.1% interest in the Partnership. Proshred GP purchased the F/G Licensing Rights on behalf of the Partnership and issued a promissory note in the amount of $3.6 million to PC Holdings for payment of the F/G Licensing Rights.

[12] Also on May 2, 1994, Proshred GP entered into the following additional agreements with PHL on behalf of the Partnership:

1. the Service Bureau Management Contract, under which PHL agreed to manage the service bureau for the Florida and Georgia franchises on behalf of the Partnership;

2. the Cash Flow Deficiency Agreement ("CDA"), under which PHL agreed to supplement any cash flow deficiency to enable the Partnership to pay operating expenses and make distributions to its limited partners;

3. the Startup Services Agreement ("SSA"), under which PHL would be responsible for the initial setting up and development of the franchise territories in Florida and Georgia; and

4. the Franchise Completion Agreement ("FCA"), under which PHL would be responsible for completing the development of the franchise territories in Florida and Georgia.

[13] Throughout this period PHL continued to operate the Service Bureau for all of the franchises in both Canada and the U.S., including those in Florida and Georgia, even though PI held the licensing rights to operate the Service Bureau in the U.S. This continued despite the fact that the F/G Licensing Rights were later acquired by PC Holdings, and then by Proshred GP, which purchased the F/G Licensing Rights on behalf of the Partnership.

(B) Purchase of the Partnership Units:

[14] In the fall of 1994, a total of 4,950 units of the Partnership (the "Units") were offered pursuant to an Offering Memorandum dated September 26, 1994, which was amended and reissued on December 7, 1994. The purchase price was $1,000.00 per Unit, payable in three components: a cash payment of $120 per Unit, a short-term promissory note of $152.73 per Unit, payable with 9% interest on January 2, 1995 (the "ST Note") and a long-term promissory note of $727.27 per Unit, payable on December 31, 2019, with interest due and payable annually at the rate equal to "prime plus one" (the "LT Note"). The principal amount of all of the LT Notes totalled $3.6 million. This purchase price structure was determined after seeking the advice of various legal and accounting professionals.

[15] While the typical investor purchased Units by a cash component, an ST Note and an LT Note, the O'Deas each paid for their Units by an LT Note and a mid-term note payable on August 30, 1999, with interest due and payable annually at the rate equal to "prime plus one" ("MT Note"). The MT Notes represented the value, that the O'Deas would have paid by the cash component and the ST Note, had they purchased their Units according to the price structure prescribed under the Offering Memorandum. In their testimony, they could not recall why they used MT Notes instead of the cash component and ST Note.

[16] The Appellants acquired their respective number of Units as follows:

Appellants	**Subscription Date**	**Units**	**Total Cost**	**Cash**	**ST Note or MT Note**	**LP Note (or LT Note)**
Francis	December 29, 1994	900	$900,000	-	$246,069	$654,543
Sean	December 29, 1994	300	$300,000	-	$82,023	$218,181
Bailey	December 21, 1994	97	$97,000	$11,640	$14,815	$70,545
Rankin	December 22, 1994	150	$150,000	$18,000	$22,909	$109,091

Note: Amounts for O'Deas do not equal the "totals" - these were the amounts found on the notes at tabs 21 and 22 of the Joint Book of Documents.
Note: The Partnership's documents referred to the LT Note as the LP Note.

[17] Not all of the Partnership's 4,950 Units were acquired by individual investors. The KP Partnership acquired the outstanding 2,559 units on December 30, 1994. As payment, the KP Partnership issued a short-term promissory note with an annual interest rate of 9% but no fixed terms of repayment ("KP ST Note"), and a long-term promissory note ("KP LT Note"), under the same terms as the LT Notes of the other limited partners. It did not pay a cash component. The KP ST Note and KP LT Note were not submitted into evidence.

[18] The ownership of a unit in the KP Partnership entitled the owner on a *pro rata* basis to an undivided proportionate interest in the rights, benefits, profits and losses of a Unit in the Partnership. The only assets of the KP Partnership, during the years under appeal, were the Units it held in the Partnership.

[19] On April 24, 1995, Mr. Bailey acquired 97 units in the KP Partnership at the price of $1,000.00 per unit, by a payment consisting of a cash component, a short-term note payable on January 1, 1996 and a long-term note payable on December 31, 2019.

[20] Approximately $1.35 million in cash would have been raised as a result of the offering, if all of the Units had been fully subscribed with a subscription price that included the cash component. However, there were 3,849 units for which no cash was received because both the O'Deas and the KP Partnership did not pay this cash component. As a result $1.05 million of the anticipated $1.35 million potential cash component was not raised. Despite the Appellants' contention that the purpose of the Partnership was to finance the U.S. expansion, aside from the MT Notes of the O'Deas and the ST Notes from Mr. Bailey and Mr. Rankin, the Partnership received no principal amounts on any of the Notes.

(C) <u>ST Notes, MT Notes, LT Notes and the Payment of Interest</u>:

[21] In respect of the purchase of their Units, Mr. Bailey and Mr. Rankin paid the cash component to the Partnership. They also paid the ST Notes, with interest, to the Partnership on January 2, 1995.

[22] Both O'Deas testified that their MT Notes were paid in full with interest as required on or before August 30, 1999. However, they did not make interest payments on these notes during the relevant taxation years.

[23] The Appellants relied heavily on the evidence of Glenn Fraser with respect to their contention that the requisite interest payments were in fact made by the

limited partners in respect to the KP ST Note, the KP LT Note and the LT Notes during the relevant years.

[24] Although Mr. Fraser was not involved with the structuring of the Partnership or the KP Partnership, his firm, Fraser Celluci, was hired by PHL to do the bookkeeping and accounting for the entire Proshred group of companies. Under the firm's engagement, they were responsible for preparing the annual working paper files for the taxation years beginning in 1995 and for filing the annual Partnership Information Returns with CRA for both the Partnership and KP Partnership. The firm did not prepare the financial statements.

[25] According to Mr. Fraser, interest on the KP ST Note was paid every year by cheque and therefore the Partnership had received payment by cheque from the KP Partnership in satisfaction of the KP ST Note. Subsequent statements indicate that the Partnership recognized the interest income accordingly. However a review of the Partnership's bank account statements confirmed that those statements did not disclose any deposits during the relevant years. In fact the Partnership's account had been inactive since December 31, 1995. He suggested that the cheques "… might have been deposited in the Proshred Holdings' bank account" (Transcript, page 265).

[26] With respect to the payment of interest on the LT Notes, including the KP LT Note, article 4.04(a) of the Restated Limited Partnership (Schedule "A" of the Offering Memorandum, Tab 5, Joint Book of Documents) provided:

> (a) A distribution shall be made in each Fiscal Year to the Limited Partners in an amount equal to interest due on the L.P. Note in respect of that Fiscal Year, to be paid on or before December 31st of that Fiscal Year. At the direction of the Limited Partner that distribution may be paid directly to the holder of the L.P. Note in satisfaction of the Limited Partner's obligations to pay interest thereon;

[27] According to the Appellants, distributions were made according to article 4.04(a). Although article 4.03 stated that distributions should be made from the gross revenues of the Partnership, the distributions were made by way of drawings from each limited partner's capital account. The amounts made in distributions in each taxation year are consistent with the continuity schedule from 1994 to 1997 of the Equity, ACB and at-risk amounts for each limited partner.

[28] According to the Appellants, interest on the LT Notes was paid by the limited partners via journal entries in each of the relevant taxation years (Tab 2, Exhibit A-

2). Mr. Fraser stated that the entries were prepared within sixty days of the subsequent year-end, since the working papers for the financial statements were submitted to the accounting firm within forty-five to sixty days of the subsequent year.

[29] The Appellants stated that the Partnership had later assigned the LT Notes to PC Holdings in satisfaction of the $3.6 million promissory note that it owed to PC Holdings in respect to the F/G Licensing Rights. However, the limited partners did not sign a direction or authorization permitting the Proshred GP or the Partnership to pay the LT Notes directly or to pay the interest owing or to permit the KP Partnership to pay the LT Notes directly to any other third party. It is true, however, that the form of the LT Notes contained the following provision: "funds from the long term note would be paid over to a third party for services that are owing and performed on behalf of the Partnership". Other than this, there was no evidence that the Partnership had assigned any of the LT Notes.

[30] Mr. Fraser dealt with Mr. Charlton and followed his direction and guidance in the course of his work for the Proshred companies. Although Mr. Fraser was not familiar with any of the relevant Agreements, he stated that he would have taken direction from Mr. Charlton in making the required journal entries. In respect to journal entries he stated:

> … part of the journal entries would have been prepared by us and part of the journal entries would have bee [sic] provided to us.
>
> …
>
> By one of the professional firms.

(Transcript, page 219)

[31] On March 31, 1997 Mr. Fraser wrote a memorandum to Mike Kecskemeti, another employee with his firm, which stated that the interest in respect to the LT Notes was deemed to be paid on January 1, 1996 for the 1995 year-end. (Exhibit A-1, Tab 55)

[32] Mr. Fraser testified that his phrasing "interest was deemed to be paid" meant that "it was to be paid". (Transcript pages 252-254)

[33] With respect to the journal entries documented at Exhibit A-2, Tab 2, Mr. Fraser admitted the following:

(1) that he printed them from the computer system at his office one week prior to the hearing;

(2) that he did not recall who actually prepared the entries;

(3) that there was nothing in the documents to indicate when the entries were made;

(4) that the entries were "not proper" because, although they reference a year, they contain no exact date (Transcript, page 276); and

(5) that, although there was a list of journal entries that could support a general ledger, they were not the original journal entries that were part of the books and records of the Partnership (Transcript, page 279).

[34] At the time of the audit, Mr. Casciano was not provided with any evidence that interest on the LT Notes had been paid. He expected to see journal entries reflecting the interest amounts on the LT Notes, which were allegedly later assigned to PC Holdings, as well as entries relating to the non-resident withholding tax. Although he was not provided the journal entries, contained at Tab 2, Exhibit A-2, during the audit, he stated that the reassessments would have remained unchanged because the journal entries at Tab 2 were not dated and there were no purported entries for 1994 and 1995. Similarly, even if the working papers at Tab 1, Exhibit A-2, had been provided during the audit, the reassessments would also remain unchanged because they were "… just produced for the purpose of preparing the financial statements, but it certainly doesn't demonstrate that any books and records were kept". (Transcript, page 363).

(D) The Partnership's business, expenses and corresponding losses:

[35] Unlike the Canadian operation, the Florida/Georgia operation was not successful and the Partnership was unable to meet its U.S. projections. The Partnership never made sufficient revenue to cover the amount of debt it owed to PHL as a result of the fees it incurred under the various Agreements (management fees owing to PHL, $3.6 million loan payable to PC Holdings and the payments to PHL under the SSA and the FCA).

[36] Sean O'Dea was involved with the preparation of the financial projections, (Exhibit R-2), disclosed in the Offering Memorandum, which was used to promote

the initial sale of the Units in the Partnership to potential investors. He confirmed that the Proforma Statement was prepared prior to the formation of the Partnership. According to the forecasts in the Proforma Statement, the Partnership would have received $521,136.00 in service bureau fees in 1996. The sole revenue source for the Partnership was from these service bureau fees. In determining the projected service bureau fees, Sean O'Dea considered the anticipated sales in Florida and Georgia. The projections contained in the Offering Memorandum anticipated that total gross shredding sales for Florida and Georgia in 1996 alone would total approximately $3.8 million. In comparison, after eight years of operations, the total gross shredding sales for all of Canada totalled only $4.3 million. Sean O'Dea admitted that his projected revenue level for Florida and Georgia, after only two years, exceeded the level achieved in Canada after a full nine years of operations. However, he pointed out that PHL had begun franchising the business in Canada during the latter years and that after only three years of operations, PHL was making approximately $2 million annually in gross shredding sales. The projections in both the Proforma Statement and the Offering Memorandum were consistent.

[37] Sean O'Dea testified that he reviewed the Offering Memorandum including the tax disclosure section at page XIII of the Offering Memorandum, which was prepared by the accounting advisors, Mintz & Partners. At page iii of the Offering Memorandum (Tab 5, Joint Book of Documents) it stated:

> Ownership of Partnership Units is intended to provide Limited Partners with the opportunity to receive cash distributions from the Partnership which will be applied to pay down the L.P. Notes, may provide a cash return, and in the meanwhile provide sufficient cash to cover income tax at the top marginal rate on any income allocated from the Partnership less any interest paid on the L.P. Notes and to provide certain allowable income tax deductions which will shelter other income. See "Tax Consequences"

Francis O'Dea testified that he understood this to mean that "… the service bureau revenue will be recorded in the books of the partnership and that distributions from that revenue stream will be paid out to the partners" (Transcript, page 56). However, the Partnership failed to earn enough revenue to make the annual interest distributions to its limited partners.

[38] The Partnership incurred significant losses in its operations for the years ending on December 31, 1994, 1995 and 1996. These losses were then allocated to its limited partners, including the KP Partnership, during those years. The

KP Partnership then re-allocated those losses to its own limited partners on a *pro rata* basis.

[39] The Partnership's Statement of Loss, for the year ended December 31, 1994, shows "start-up fees" of $950,000.00 which were deducted by the Partnership as an expense for services rendered by PHL under the SSA. The Partnership's Statement of Operations, for the years ended December 31, 1995 and 1996, shows that franchise completion fees in the amounts of $1.3 million and $500,000.00 were deducted as an expense for the cost of developing the franchises in Florida and Georgia and allegedly incurred by PHL under the FCA.

The relevant parts of Clauses 2 and 3 of the SSA read as follows:

> 2. PHL estimates that the foregoing costs and expenses to be incurred by it up to December 31st, 1994 in the provision of the items listed in paragraph 1 hereof and of such other services related to the startup of the business in the Territory will be approximately $950,000. PHL undertakes to provide to the Limited Partnership a statement of such expenses showing the various classes of expenditure with reasonable particularity as soon as may conveniently be done after the calendar year-end.
>
> 3. The Limited Partnership undertakes … to reimburse PHL for the said startup costs and expenses out of the proceeds of the sale of limited partnership units …

Similarly, the relevant parts of Clauses 2 and 3 of the FCA read as follows:

> 2. PHL estimates that the foregoing completion costs and expenses to be incurred by it on behalf of the Partnership in the two year period from January 1st, 1995 to December 31st, 1996 in the provision of the completion services indicated in paragraph 1 hereof and of such other services related to the completion of the development of the business of the Partnership in the Territory will be approximately $1,800,000. PHL undertakes to provide to the Limited Partnership a statement of such expenses showing the various classes of expenditure with reasonable particularity as soon as may conveniently be done after the 1996 calendar year-end.
>
> 3. The Limited Partnership undertakes to reimburse PHL for the said completion costs and expenses without interest out of funds received from the Service Bureau business …

[40] Pursuant to the SSA, the Partnership would reimburse PHL the amount of $950,000.00, which was the approximate cost related to setting up the various

franchise territories. Similarly, the FCA required the Partnership to reimburse PHL for expenses incurred in 1995 and 1996 in further development of these territories, for which the fee was set at $1.8 million. With respect to these payments, Francis O'Dea testified that it was "… the cost that we thought it would be and that would be reimbursed" (Transcript, page 81). If the costs incurred by PHL, in meeting its obligations pursuant to the SSA and FCA, exceeded the amounts of $950,000.00 and $1.8 million respectively, Francis O'Dea testified that PHL would be responsible for those additional costs and would not pass those costs on to the Partnership.

[41] Although the agreements stated that PHL would provide the Partnership with a statement of the actual costs and expenses that were incurred, Francis O'Dea admitted that, to his knowledge, it was never done. However, the Appellants contend that the various documents provided under Tab 69 of the Joint Book of Documents contain all of the required invoices and receipts related to the costs and expenses that PHL incurred under the SSA and FCA.

[42] Mr. Casciano concluded that the expenses deducted by the Partnership, purportedly relating to expenses under the SSA and FCA, for the years ending 1994, 1995 and 1996, lacked credibility and that the legitimate expenses would have been "Significantly reduced. Virtually nil." (Transcript, page 378). He also determined that the documents at Exhibit R-5, which provided a statement of expenses totalling $3,275,000.00 incurred by PHL on behalf of the Partnership between 1993 and 1996, contained a margin of $740,221.00 that was clearly not an expense but which was added to enable the statement to equal the $3,275,000.00 figure. He also had concerns that the 1993 expenses were being reimbursed by the Partnership to PHL in 1994.

[43] When the audit commenced in June 1999, Mr. Casciano wrote to the Partnership requesting various documentation. No accounting records or a general ledger were provided in response to this request. Intermittently during the audit, he did receive some handwritten and undated adjusting and closing entries and reconciliations for a PHL inter-company account and some, but not all, of the Partnership's bank statements. Mr. Casciano concluded that this information did not demonstrate proof of proper record keeping and consequently, he was unable to verify the reporting revenues, expenses and the Limited Partners' losses from the information provided to him during the audit.

[44] With respect to the documents at Tab 1, Exhibit A-2, Mr. Casciano stated that up until a week before the hearing, he had never seen the documents at

pages 2, 3, 4, 5, 6, 12, 13, 16, 17, 19 and 20. With respect to the documents at pages 1, 8, 18, 21 and 22, he had seen similar documents but not the exact documents as those produced in Exhibit A-2. With respect to the documents at pages 9, 10, 11, 14 and 15, he saw those during the course of the audit.

[45] Similarly, Mr. Fraser's evidence respecting whether or not the Partnership maintained independent books and records or a general ledger was inconsistent. During the hearing, Mr. Fraser first said that the Partnership maintained its general ledger and that its books and records were kept at the offices of PHL. However, he later admitted that he did not recall whether the Partnership had independent books and records and also admitted that the Partnership did not have an independent accounting system.

[46] Francis O'Dea admitted that the Appellants were unable to produce bank statements for the Partnership, other than the bank statement covering December 29, 1995 to December 31, 1996 (Tab 52, Joint Book of Documents). He also admitted that the PHL bank account had been inactive since at least December 1995.

(E) Francis and Sean O'Dea and Geoffrey Bailey:

[47] Francis O'Dea was instrumental in planning the Partnership's expansion and actively promoting the sale of Partnership's Units to potential investors. Although Mr. O'Dea testified that he was more concerned with expansion of the business and not the tax consequences, he did admit that he "presumably" knew that a limited partner could only deduct the full losses if the ST Note was paid. Francis O'Dea claimed full deductions for losses notwithstanding that he had not paid any cash component or subscribed to or paid on a ST Note in the relevant taxation years. He admitted that, as of December 31, 1996, he owed the Partnership $245,454.00, representing the subscription price of his MT Note (Transcript, page 93). (Note: In contrast, Tab 21 lists the Principal amount on the MT Note as $246,069.00.) However, on re-examination he stated that it was only shortly prior to the hearing that he became aware of the possibility of problems with respect to the MT Note and the deductibility of losses.

[48] The LT Notes required that interest be paid at a rate equal to "prime plus one", "calculated half yearly not in advance and payable annually on December 31st in each year." (Tab 21, Joint Book of Documents). Francis O'Dea testified that he was aware that interest on the LT Notes must be paid within 60 days of year-end as per the Offering Memorandum and the tax shelter rules

contained in the *Act*. He testified that he gave direction to Mr. Fraser to ensure that this interest was paid and he believed that interest on these notes was paid by the limited partners through journal entries. Sean O'Dea's evidence was essentially the same in respect to the interest payments on the LT Note. In particular he knew that if interest was not paid on a loan, the amount of loss deductible by a limited partner would also be limited.

[49] Mr. Bailey, a physician in Newfoundland, was a limited partner of the Partnership, as well as a limited partner of the KP Partnership. He viewed his participation as a long-term investment which he hoped would be profitable. Before purchasing units he read the Offering Memorandum for each of the Partnerships. His subscription price for his units was in accordance with the purchase price structure under the Offering Memorandum. With respect to the payments on the LT Note, he had this to say:

> A. I understood the payments were to flow from the earnings from the service bureau and make interest payments to cover the long-term note and any principal payments that -- if there was adequate income at that point, to make principal payments in the early part of the investment and then as the investment proceeded, payments on the principal as well over the course of the long-term note which was to be concluded in 2019, I believe.

(Transcript, page 180)

[50] With respect to interest on the LT Note owed to the Partnership, he stated:

> I haven't paid interest on the long-term note. It was -- on my understanding it was to be paid through income generated by the Limited Partnership and in the absence of that amount of money there was another deficiency agreement between Proshred Holdings to provide loans to cover the interest payments in short-term intervals until there was sufficient cashflow through the Partnership to pay that.

(Transcript, page 185)

With respect to the taxation years in issue, Mr. Bailey received certain documents from the Partnership for the purpose of filing his tax returns that led him to believe that interest was duly paid on his LT Note.

(F) <u>The Reassessments</u>:

[51] The Minister reassessed Francis O'Dea, Sean O'Dea, Mr. Bailey and Mr. Rankin in July of 2000 (the "Reassessments"). The Reassessments disallowed all of the partnership losses that each of the Appellants claimed for the taxation years of 1994, 1995 and 1996. The Minister also disallowed any partnership losses that the O'Deas sought to carry back to 1992 and 1993. The Reassessments were primarily based on the application of the limited recourse rules under section 143.2 of the *Act*, which reduced each of the Appellant's at-risk amounts under subsection 96(2.2) and their entitlement to the partnership losses under subsection 96(2.1) of the *Act*. The Minister also determined that the Partnership was not a valid partnership and, further, that the Partnership should not be entitled to claim expenses that it allegedly incurred under the SSA and FCA. In addition, penalties under subsection 163(2) of the *Act* were imposed on the O'Deas.

<u>The Issues</u>:

[52] 1. Does subsection 143.2(7) of the *Act* apply to the MT Notes, the LT Notes, the KP ST Note and the KP LT Note to deem them limited recourse amounts so that the Minister would be permitted to reopen the statute-barred years pursuant to subsection 143.2(15)?

2. If the Appellants are entitled to deduct the losses, are Francis and Sean O'Dea entitled to carry back their partnership losses to the 1992 and 1993 taxation years?

3. If the Notes are not limited recourse amounts under section 143.2:

   (a) Is the Minister statute-barred from reassessing the Appellants in regard to the respective Notes?

   (b) Is the Minister statute-barred from reassessing the Appellants on any other basis?

4. Aside from the determination of whether the Notes are limited recourse amounts under section 143.2, are the Appellants entitled to deduct their respective partnership losses based on the following:

   (a) Was the Partnership a sham and/or a valid partnership for the purposes of section 96 of the *Act*?

(b) Is the Partnership entitled to deduct all of the expenses that it alleges it incurred during the relevant taxation years such that the Appellants would be entitled to deduct their respective losses in this regard?

5. Are Francis and Sean O'Dea liable for gross negligence penalties as assessed by the Minister under subsection 163(2) of the *Act*?

The Position of the Appellant and the Respondent on the Main Issues:

1. The Statute-barred Issue:

[53] The Minister issued the Reassessments, in respect of the 1994 to 1996 taxation years (and for the O'Deas, also the 1992 and 1993 taxation years), during July 2000. Therefore, the Appellants argue that the Reassessments were issued after the statutory limitation period under subsection 152(4) of the *Act*.

[54] The Respondent's position is that the Minister is entitled to open otherwise statute-barred years pursuant to subsection 143.2(15) of the *Act* to enable the Minister to assess to give effect to section 143.2. The Respondent's position is that none of the taxation years are statute-barred to the extent that the Appellants' entitlement to partnership losses are reduced by the deemed limited recourse amounts under subsection 143.2(7). The Respondent submits that the MT Notes, the LT Notes, the KP ST Note and the KP LT Note are deemed to be limited recourse amounts under subsection 143.2(7) because the Appellants and the KP Partnership did not pay interest on the Notes issued to the Partnership. Alternatively, the Respondent submits that interest was not paid on the Notes within 60 days of year-end. The Respondent also submits that the KP ST Note is deemed a limited recourse amount under subsection 143.2(7) because there were no *bona fide* terms of repayment. With respect to Mr. Bailey, the Respondent also argues that he did not pay interest on his long-term note to the KP Partnership.

[55] If subsection 143.2(7) does not apply to the Notes, the Minister will not be able to rely on subsection 143.2(15) to open the statute-barred years and in that event, the Respondent argues that the Minister would not be barred from reassessing the Appellants pursuant to subsection 152(4) of the *Act*. The Respondent argues that the expenses under the SSA and FCA did not relate to the provision of the service bureau functions of the Partnership. The Partnership, in claiming expenses that did not belong to it, made representations attributable to neglect, carelessness or wilful default. Since the in-depth knowledge of the

directing minds of the Partnership, Francis and Sean O'Dea, could be attributed to all of the Appellants, the Respondent contends that all of the Appellants made misrepresentations on their returns which allow the Minister to reassess those years pursuant to subsection 152(4) of the *Act*.

2. Application of subsection 143.2(7) to the Notes:

[56] In respect to Mr. Bailey and Mr. Rankin, the Respondent admits that they paid the cash component of their purchase price of the Units. The Respondent also admits that they paid their ST Notes to the Partnership, with interest, on January 2, 1995.

[57] During the hearing, Francis and Sean O'Dea conceded that they did not pay cash for the purchase of their Units and instead of the cash component and an ST Note, they each issued an MT Note to the Partnership. Both O'Deas assert that they paid the principal and interest of the MT Note on the due date, August 30, 1999. However, Francis and Sean O'Dea admit that they did not make any interest payments on their MT Notes during each of the relevant taxation years under appeal. The O'Deas conceded that their at-risk amounts should have been reduced by the amount of their MT Notes pursuant to paragraph 96(2.2)(c) and subsection 96(2.1) of the *Act*.

[58] The Respondent argued that the KP ST Note did not reflect a *bona fide* arrangement for repayment for the Units and that, even if it did, interest on the KP ST Note was not paid within 60 days of year-end. The loan payable amount under the KP ST Note was therefore a limited recourse amount under subsection 143.2(7) of the *Act*.

[59] The Respondent denies that the LT Notes, including the KP LT Note, created a valid obligation for the Appellants or the KP Partnership to pay the Partnership. The Respondent contends that interest on the LT Notes was not paid by the Appellants and the KP Partnership, as required pursuant to the terms of the Notes. Alternatively, if interest was paid, the Respondent's position is that this interest was not paid within 60 days of the year-end of the Partnership in each of the relevant taxation years.

[60] The Appellants contend that the LT Notes were assigned by the Partnership to PC Holdings to satisfy the debt owed by the Partnership to PC Holdings. In addition, the Appellants contend that interest was paid within 60 days via journal entries.

3. The Validity of the Partnership:

[61] If subsection 143.2(7) does not apply to the Notes, the Respondent contends that subsection 152(4) can be used to open the otherwise statute-barred years, so that the Minister can reassess the Appellants to disallow the partnership losses based on the validity of the Partnership.

[62] The Respondent contends that, since the sole purpose of the Partnership was to provide tax losses to its investors, the Partnership was a sham. Even if the Partnership was not a sham, the Respondent argues that the Partnership was not a valid partnership for the purposes of the *Act*. The Respondent denies that the Partnership was carrying on a business at any time. Therefore, the Partnership did not constitute a valid partnership pursuant to the laws of Ontario, which governs partnerships. If the Partnership is not a valid partnership, then the Appellants are not entitled to any of their partnership losses flowing from the Partnership and/or KP Partnership.

[63] The Appellants' argument is that the Partnership carried on a valid business in the relevant taxation years and, as a result, it incurred losses in each of those years, all of which could be allocated to the Appellants, proportionate to their respective Unit holdings in the Partnership, pursuant to section 96 of the *Act*. The Appellants assert that the Partnership was in the business of providing, for a fee, service bureau functions to the Proshred franchisees in Florida and Georgia with a view to a profit.

4. The Deduction of Partnership Expenses:

[64] If subsection 143.2(7) does not apply to the Notes, and if the Partnership was a valid one, the Respondent's position is that the Partnership was not entitled to deduct the expenses, relating to payments made to PHL under the SSA and FCA, because these expenses were not incurred by the Partnership for the purpose of gaining or producing income.

[65] The Appellants submitted invoices detailing expenses purportedly relating to the start-up services costs and the franchise completion costs (Tab 69, Joint Book of Documents). However, the Respondent denied the validity of these invoices. During the hearing, the Appellant conceded that a number of these invoices did not in fact relate to the Partnership and were not incurred in the relevant period or that they related to personal expenses.

5. Gross Negligence Penalties Levied Against the O'Deas:

[66] The Respondent contends that the O'Deas, as the directing minds of the Proshred group of companies, knowingly or in circumstances amounting to gross negligence participated in or made false statements or omissions in their income tax returns in respect to the relevant taxation years. However the Appellants, Francis and Sean O'Dea, argue that since they relied on the advice of financial and legal advisors in forming the Partnership and carrying out the transactions relevant to the issues under appeal, they should not be liable for the penalties imposed pursuant to subsection 163(2).

Analysis

[67] I have attached, as Schedule "A" to my reasons, diagrams submitted by both counsel outlining the transactions which occurred in these appeals.

1. Does subsection 143.2(7) of the *Act* apply to the MT Notes, the LT Notes, the KP ST Note and the KP LT Note to deem them limited recourse amounts so that the Minister would be permitted to reopen the statute-barred years pursuant to subsection 143.2(15)?

[68] Counsel for both the Appellants and Respondent agree that if subsection 143.2(7) applies to the MT Notes, the LT Notes and the KP ST Note and KP LT Note, then no taxation year will be statute-barred pursuant to subsection 143.2(15), in respect to the Reassessments made under section 143.2 of the *Act*.

[69] Subsection 143.2(15) permits the Minister to reopen and reassess any statute-barred taxation year, as may be necessary, if the assessment relies on the provisions of section 143.2. Subsection 143.2(15) reads:

> Notwithstanding subsections 152(4) to (5), such assessments, determinations and redeterminations may be made as are necessary to give effect to this section.
> (Emphasis added)

However, the application of subsection 143.2(15) is limited to the Minister's Reassessments made under section 143.2 of the *Act*, with respect to the disallowance of the partnership losses, resulting in the reduction of the Appellants' at-risk amounts

by the deemed limited recourse amounts of their LT Notes, the MT Notes of the O'Deas, the KP ST Note and the KP LT Note.

[70] Section 143.2 provides the limited recourse rules applicable to tax shelter investments. It is undisputed that the Partnership and the KP Partnership are both registered as tax shelters pursuant to subsection 237.1(1) and that the Appellants' investments in the partnerships are tax shelter investments within the meaning of section 143.2.

[71] Subsection 143.2(7) deems the unpaid principal of certain long-term debt under a tax shelter investment to be a limited recourse amount unless the stipulated exceptions apply. For the relevant years under appeal, this provision states:

> *Repayment of indebtedness*
>
> 143.2.(7) For the purpose of this section, the unpaid principal of an indebtedness is deemed to be a limited-recourse amount unless
>
> 143.2.(7)(a) bona fide arrangements, evidenced in writing, were made, at the time the indebtedness arose, for repayment by the debtor of the indebtedness and all interest on the indebtedness within a reasonable period; and
>
> 143.2.(7)(b) interest is payable at least annually, at a rate equal to or greater than the lesser of
>
>> (i) the prescribed rate of interest in effect at the time the indebtedness arose, and
>>
>> (ii) the prescribed rate of interest applicable from time to time during the term of the indebtedness,
>
> and is paid in respect of the indebtedness by the debtor no later than 60 days after the end of each taxation year of the debtor that ends in the period.

[72] If the MT Notes, the LT Notes, the KP LT Note and the KP ST Note are deemed to be limited recourse amounts pursuant to subsection 143.2(7), because they do not fall within the exceptions, then the adjusted cost base of the Appellants' interest, together with the KP Partnership's interest in the Partnership, will be reduced by the principal amount of those Notes pursuant to subsection 143.2(6). Consequently, the at-risk amount of each Appellant will be correspondingly reduced pursuant to subsection 96(2.2). This will limit the entitlement of each Appellant to deduct their respective share of the Partnership losses under subsection 96(2.1).

Similarly, Mr. Bailey's entitlement to his share of losses flowing from the KP Partnership will be limited because the KP Partnership's share of losses from the Partnership will be limited by the principal amount of the KP ST Note and the KP LT Note.

[73] In *Tolhoek v. The Queen*, 2007 DTC 247 (T.C.C.), I concluded that the word "and" between provisions (a) and (b) in subsection 143.2(7) meant that if the indebtedness fails in either paragraph, it will be deemed to be a limited recourse amount. The Respondent related this provision to the MT Notes, the LT Notes, the KP ST Note and the KP LT Note. The position of the Respondent is that firstly, the KP ST Note is a limited recourse amount that affects the at-risk amount of the KP Partnership because there were no *bona fide* terms of repayment. Secondly, the Respondent argues that paragraph (b) of subsection 143.2(7) will apply to deem the MT Notes and the LT Notes, including the KP LT Note, to be limited recourse amounts because interest on these Notes was not paid by the Appellants and the KP Partnership or if it was paid, the interest was not paid within 60 days of year-end.

[74] With respect to the MT Notes issued by the O'Deas to the Partnership, in lieu of the cash component and the ST Note component, both Francis and Sean O'Dea conceded that they made no payments on these notes until August 1999 and by this concession, those notes are deemed limited recourse amounts under subsection 143.2(7). This will reduce their at-risk amounts by the principal amounts of their MT Notes pursuant to paragraph 96(2.2)(c) and subsection 96(2.1) and, correspondingly, limit their entitlement to the Partnership losses.

[75] In respect to the Respondent's first argument that the KP ST Note is a limited recourse amount pursuant to subsection 143.2(7), in *Tolhoek*, which was affirmed by the Federal Court of Appeal on April 7, 2008, I held that taxpayers must demonstrate the presence of the following constituent elements under paragraph (a) of subsection 143.2(7) to avoid the application of the limited recourse rules: *bona fide* arrangements, evidenced in writing, made at the time the indebtedness arose, made for the purposes of the repayment of debt and all interest and finally that the arrangements were made within a reasonable period.

[76] In addition, as addressed at paragraphs [19] to [22] and [34] to [35] of *Tolhoek*, the proper approach for determining the existence of a *bona fide* debt should be a two step analysis:

> [19] … first, the terms of the arrangement should be identified, and second, the *indicia* of *bona fides* should be examined in order to determine if a genuine, good faith arrangement existed. …
>
> …

[77] The Appellants acknowledge that the KP Partnership did not pay a cash component for its purchase of the Partnership's Units. The route of a cash component and an ST Note taken by the other partners (aside from the O'Deas) was entirely booked, in the case of the KP Partnership, to the KP ST Note. The terms of this note, according to Mr. Fraser's evidence, consisted of 9% interest with no fixed repayment date. The KP ST Note was not submitted into evidence and without the note, apart from Mr. Fraser's evidence, I have no way of ascertaining the exact terms of the note. The Appellants' assertion, that various financial and working papers of the Partnership support a conclusion that amounts representing principal and interest were paid by the KP Partnership in each year, does not in fact substantiate that such payments were made. Instead they show only that the KP ST Note was on the Partnership's 1994 Balance Sheet and that it reappeared again in the 1995 and 1996 Balance Sheets at reduced amounts.

[78] There are a number of problems that prevent a conclusion that a *bona fide* arrangement existed between the KP Partnership and the Partnership. Most importantly, there is no evidence of *bona fide* arrangements for repayment of the debt. Apart from the financial statements, there is no evidence to support a conclusion that principal and/or interest was ever paid on the KP ST Note, and in particular, there were no records of any receipt of cash or cheques by the Partnership. I am not swayed by Mr. Fraser's testimony because it was vague, inconsistent and at times contradictory. He first testified that the Partnership did receive payment by cheque but after a review of the Partnership's bank statements, he confirmed that there were no deposits to support his testimony in the relevant years. At this point in his evidence, he suggested that the cheque may have been deposited instead into PHL's account. Again I was not provided with the supporting documentation if this in fact is what occurred. In addition, without the KP ST Note I have no actual evidence that this loan was in writing as required by paragraph 143.2(7)(a). According to Mr. Fraser's evidence, the note had no fixed date of repayment and without that there is no evidence that the KP Partnership had a *bona fide* obligation to repay the loan.

[79] Clearly the KP ST Note does not meet the requirements of paragraph (a) of subsection 143.2(7) and, as a result, it must also be deemed to be a limited recourse amount.

[80] With respect to the Respondent's second position on payment of the interest on the LT Notes, including the KP LT Note, at paragraphs [46] to [47] of *Tolhoek v. The Queen*, [2008] F.C.J. No. 538, I outlined the proper approach to be taken in determining whether interest was paid pursuant to paragraph 143.2(7)(b):

> [46] I believe that it is critical that interest was paid pursuant to a "*bona fide* arrangement". As I concluded under paragraph 143.2(7)(*a*), I do not find circular flow of money, in itself, to be offensive provided the *indicia* of *bona fides* are otherwise present; nor do I have a problem with the off-setting journal entries which were completed in 1998. The authorities are compelling and the decision of Bonner J. in *Armstrong v. Canada* (*Minister of National Revenue, M.N.R.*), (1987) 88 DTC 1015, has been cited with approval in many cases.

[81] In affirming my conclusions, the Federal Court of Appeal in *Tolhoek* highlighted, at paragraph 47, the requirement under paragraph 143.2(7)(b) that:

> … a failure to pay interest <u>in respect of any year</u> in which the [indebtedness] will result in the principal amount of that indebtedness being deemed to be a limited-recourse amount.
>
> (Emphasis added)

In addition, the Federal Court of Appeal at paragraph 59 stated:

> …
>
> [59] … As previously indicated, the intention on the part of the promoters to structure the tax shelter in such a way as to avoid the provisions of section 143.2 is irrelevant. If the specific and technical aspects of the structure do not, in fact, bring about the intended result, then the scheme must fail. …

[82] In *Tolhoek*, I concluded that recording an interest payment by way of a journal entry was not by itself offensive to section 143.2. The Federal Court of Appeal agreed with my further conclusion that payments via journal entries may on their own be sufficient to establish that the requirements have been complied with pursuant to subsection 143.2(7). Against this background, I will now review the arrangements to determine whether, based on the facts, I can conclude that interest on the LT Notes and the KP LT Note was paid.

[83] Originally interest was to be paid by the Partnership through distributions from gross revenue. However, this approach had to change when there was insufficient revenue in each year to comply with this provision. The Appellants submit that the interest, payable by each limited partner on their LT Notes (and by the KP Partnership on the KP LT Note), was in fact paid via journal entries, whereby interest was credited with a corresponding reduction to each limited partner's capital account.

[84] The Appellants submitted various documents to support their position including the following: the LT Notes, working papers, spreadsheets showing the calculation of equity, adjusted cost base and at-risk amounts of each partner which also purported to show that such distributions to each partner were made in 1994, 1995 and 1996, the audited financial statements for the years ending 1994 and 1995 and the unaudited financial statements for 1996 to show the Partnership recognized the interest income, journal entries maintained by Mr. Fraser and the Partnership Information Return, filed for the year 1996 to show that drawings were made from the capital accounts of the partners. It should be noted that the Partnership Information Returns for 1994 and 1995 do not show similar drawings from the capital accounts.

[85] The evidence of the O'Deas and of Mr. Bailey was that all of the limited partners paid interest on their LT Notes via journal entries. Mr. Bailey testified that he received documentation from the Partnership indicating to him that the interest had been paid on the LT Notes. However, none of the referenced documentation was submitted into evidence.

[86] Based on the evidence before me, I cannot conclude that interest was in fact paid on the LT Notes, including the KP LT Note. The evidence raises suspicions as to whether the journal entries were actually made during the time period that the Appellants allege they were made. Although Mr. Casciano requested the accounting books and records of the Partnership, they were never provided to him. Mr. Fraser was responsible for maintaining these records for the entire Proshred group of companies. He referred many times to these journal entries which he stated he made for the Partnership. However, he was confused as to whether the Partnership ever had its own accounting system or its own books and records. His evidence was unclear and certainly never straightforward. Just one week prior to the hearing, the Appellants provided these journal entries to the Respondent. If they had been properly recorded at the appropriate times, it should have been relatively easy for Mr. Fraser to produce them for Mr. Casciano when they were requested during the audit. I was given no adequate explanation for why this did not occur.

[87] The journal entries consist of those purportedly made in the Partnership's books (Tab 2, Exhibit A-2), those purportedly made in the PHL books (Tab 2, Exhibit A-2) and those purportedly made in the PI books (Tab 2, Exhibit A-2). The Appellants assert that these journal entries, and in particular those made in 1996, 1997 and 1998, reflect interest payments by the limited partners. The Appellants' position is that the LT Notes, including the KP LT Note, which total $3,600,000.00, were assigned to PC Holdings in payment of the Note that the Partnership owed to PC Holdings for the purchase of the service bureau licensing rights. The Appellants' position also relies on the terms of the Offering Memorandum and clause 4.04 of the Limited Partnership Agreement which stated that a distribution was to be made to the limited partners in amounts equal to the interest due on their LT Notes, which could be paid directly to the holder of these notes. These agreements went on to state that, where there was insufficient cash available to make these distributions, the Partnership was to fund such distributions out of the proceeds of the Cash Flow Loans. As per the CDA, if the Partnership had insufficient funds to make these distributions for interest payments, then PHL would provide the Partnership with sufficient Cash Flow Loans to cover the required distributions. The Appellants therefore assert that the journal entries reflect that interest distributions were made to the limited partners from funds borrowed from PHL. While these journal entries recognized a loan payable to PHL, it debited the "Equity" account. The journal entry of $324,000.00 was to reflect a 9% interest payable on $3,600,000.00, the total amount of the LT Notes. Drawings from the capital accounts of the limited partners and recorded in the Partnership Information Returns were to reflect those amounts debited to the Partnership's Equity account by the journal entries. However, these documents show only that drawings were made in 1996, but no drawings were made in 1994 or 1995 and no evidence was provided for years subsequent to 1996. The Appellants also submit that those entries on the books of PHL reflect that the Interest Distributions were paid directly to PC Holdings in the form of a "Loan Receivable – PC Holdings". The LT Notes were allegedly assigned from the Partnership to PC Holdings to satisfy the $3,600,000.00 note owed by the Partnership. Journal entries made in the books of PI reflect that interest income accrued each year on the $3,400,000.00 note receivable by PI from PC Holdings for the purchase of the F/G Licensing Rights. However, there were no journal entries to show that there was any assignment of the notes by PC Holdings to PI.

[88] There are a number of concerns which I have with the Appellants' assertions. The form of the LT Notes indicates that interest was to be calculated half yearly not in advance and payable annually on December 31 in each year. The Appellants submit that there were no journal entries in 1995 because the Interest Distributions were made in January 1996. However, this violates the provision

contained in the LT Notes that interest be paid annually on December 31 of each year. The Appellants also assert that the Interest Distributions were made in 1994 and that this same amount was recognized as interest income by the Partnership in its 1994 financial statements. However, there were no journal entries at all to reflect interest payments for 1994. Subsection 143.2(7) is clear that the payment of interest must occur for every taxation year of indebtedness (as established in *Tolhoek*). A failure of the payment in any one year will result in the principal amount of indebtedness being deemed a limited recourse amount under this provision. The LT Notes, although signed on different dates, were signed prior to December 31, 1994. As a result, a payment of interest to recognize the indebtedness in 1994 should have been made in respect to these notes. The admissions by Mr. Fraser concerning these journal entries are summarized at paragraphs 32 and 33 of my reasons. Although the Appellants seek to use Mr. Fraser's testimony to support their contention that interest payments were made on the LT Notes, these admissions clearly have the opposite effect. Instead of putting to bed a host of questions concerning these journal entries, the admissions simply reinforced the lingering doubt I had after hearing Mr. Fraser's testimony.

[89] In response to the Respondent's argument that the LT Notes were never properly assigned to PC Holdings, the Appellants were unable to produce any evidence that the limited partners executed any type of assignment or direction to have the Interest Distributions paid directly to the assignee. Both the Service Bureau Agreement and Limited Partnership Agreement provide for the assignment of the Notes subject to the endorsement of each limited partner and that, with the direction of the limited partners, the Interest Distributions could be paid directly to the holder of the notes, other than the Partnership. However, Mr. Bailey testified that he never signed an authorization or direction relating to his LT Note. The Appellants relied on the actual form of the LT Notes to support the assignment, which included the following:

> PROVIDED that and the undersigned understands and acknowledges that this Note will be assigned by the payee ONLY to a corporate third party in satisfaction of moneys owing for services performed for and the business acquired by the Limited Partnership, and it may not be further assigned or otherwise dealt with without the consent of the Limited Partners expressed by an Ordinary Resolution as aforesaid; …
>
> (Exhibit A-2, Tabs 16, 18, 21 and 22)

Even if this passage supports that the LT Notes were effectively assigned to PC Holdings, the Appellants failed to prove that an assignment or direction had

been executed by the limited partners for the Interest Distributions to be paid directly to PC Holdings. The Appellants may have been able to prove the assignment with the testimony of Mr. Charlton, the principal of PC Holdings, together with the general ledger of PC Holdings. Without these, the Appellants are simply unable to establish that these notes were assigned to PC Holdings and, correspondingly, that PC Holdings recorded investment income during the relevant taxation years.

[90] Even if I accepted the Appellants' arguments with respect to the assignment of the LT Notes and the direct payment of the Interest Distributions to PC Holdings, I still have no evidence that payments were actually made. The journal entries prove that, in each year, $324,000.00 was transferred in Interest Distributions but there were no subsequent matching entries to show that interest was paid to either the Partnership or PC Holdings or that interest income was recognized by either of those entities. These missing items leave gaping holes in the accounting records and, consequently, fail to show the critical connections which are essential to the Appellants' position. The recording of "Loan Payable – PC Holdings" does not, on its own, indicate that interest was paid. It proves only that PHL recorded an accruement of the interest as a loan payable in its books. The term "paid" used in paragraph 143.2(7)(b) cannot be synonymous with the term "accrued".

[91] There are also two inconsistencies with the Appellants' argument that the Partnership's financial statements show that interest income was recognized in the taxation years 1994 to 1996. First, the amount of interest income in these years, $1,775.00 in 1994, $60,190.00 in 1995 and $58,136.00 in 1996, do not match the purported Interest Distributions of $324,000.00. Second, the onus is on the Appellants in respect to this issue and if they are going to assert that the interest has been paid directly to PC Holdings, then they must provide satisfactory evidence that establishes that the interest income was recognized by PC Holdings, and not by the Partnership. Although Mr. Bailey testified that he received documents and statements from the Partnership that informed him about interest that was "payable or due" on the LT Note, for the KP Partnership and the Partnership, this evidence does not equate to interest being paid (Transcript page 201).

[92] Although I have reviewed in detail the various documents that were submitted as exhibits to support the intended compliance and in particular these purported journal entries, I am simply unable to conclude that this circular flow of funds, by way of loans receivable and loans payable, constitute the payment of

interest which is contemplated within the meaning of paragraph 143.2(7)(b). Since the arrangements do not withstand careful scrutiny, as per the Federal Court of Appeals directions in *Tolhoek*, they cannot be legally binding.

[93] Even if I had concluded that the Appellants and the KP Partnership had paid interest on the LT Notes, the Appellants would still have had the onus of proving that interest had been paid within 60 days of each year-end in 1994 to 1996. There was insufficient evidence in respect to this issue to allow me to conclude that interest had been properly paid. Interest in each year would have to be paid within 60 days of year-end or by March 31 of each subsequent taxation year during the periods of indebtedness. The journal entries that record the Interest Distributions among PHL, the Partnership and PC Holdings are undated except for the year in which they were purportedly made. Mr. Fraser's evidence was that he would have made the necessary entries for the Partnership within the first 60 days of any subsequent year in order to meet the March 31 deadline for filing the Partnership Information Returns. However, he never testified that this was actually completed in respect to the entries of 1996, 1997 and 1998. On this basis alone, I am being asked to assume that these entries represent the interest payments for 1995, 1996 and 1997 and that they were made prior to March 1 in each subsequent year. That is something I am not prepared to do.

[94] In addition, Mr. Fraser admitted that he wrote a memorandum (Exhibit A-1, Tab 55) to one of his staff, dated March 31, 1997 that stated in part:

> As you are aware, the Proshred Florida/Georgia Limited Partnership had long term notes receivable from Limited Partners. The notes were assigned to PC Holdings to eliminate the partnership liability to PC Holdings on purchase of the rights for the Service Bureau from PC Holdings. The partnership guaranteed a cash flow to Limited Partners to pay their portion of the interest on the long term note receivable. Since the partnership is cash short, it has used the cash flow deficiency agreement with PHL to fund the interest on the notes.
>
> The interest was deemed to be paid on January 1, 1996 for the 1995 year end. As a result we need to reflect this amount in two areas:
>
> (1) Inter-Company PHL – Cash Flow Loan
>
> (2) Partner's Equity & A+ - risk calculation.

(Exhibit A-1, Tab 55) (emphasis added)

The phrase "interest was deemed to be paid" indicates that interest for the 1995 year-end was not in fact paid on January 1, 1996. This memorandum shows only that Mr. Fraser was requesting one of his staff to recognize this "deemed" payment of interest, approximately one year and 90 days later on March 31, 1997. This clearly suggests that the journal entries were not made at the appropriate time and lends support to my suspicions that in fact these entries did not coincide with the actual occurrences but rather were produced in a subsequent period.

[95] Even if I were able to conclude that these entries did in fact represent that interest payments were duly made within 60 days of the 1995, 1996 and 1997 year-ends, I have no evidence that the interest for 1994 was paid prior to March 1, 1995. Mr. Fraser stated that he was not involved with the preparation of financial documentation for the Partnership prior to 1995 and therefore he could not provide evidence with respect to entries or interest payments for the 1994 year.

[96] Since there is insufficient evidence to establish that interest on the LT Notes and the KP LT Note was duly paid by the Appellants and the KP Partnership within 60 days of 1994, 1995 and 1996 year-ends, the LT Notes are deemed also on this basis to be limited recourse amounts pursuant to subsection 143.2(7). With respect to my earlier finding that the KP ST Note is deemed to be a limited recourse amount, the KP ST Note together with the KP LT Note are both deemed to be limited recourse amounts, reducing the at-risk amount of the KP Partnership to nil pursuant to subsection 96(2.2). Since the KP Partnership will not be entitled to deduct any of the Partnership losses, Mr. Bailey will not be entitled to deduct any of the Partnership's losses that were originally assigned to him through the KP Partnership.

[97] Since the Appellants and the Respondent agreed that, if subsection 143.2(7) applied to the Notes, then no taxation year in respect to this issue would be statute-barred and, based on my conclusions respecting these notes, subsection 143.2(15) will apply to allow the Minister to reopen and reassess these otherwise statute-barred years with respect to the partnership losses claimed by the Appellants with regard to their LT Notes, the MT Notes of the O'Deas, the KP ST Note and KP LT Note.

[98] Therefore, Francis and Sean O'Deas' entitlement to deduct losses from the Partnership is reduced to nil, based on my conclusions with respect to their MT Notes and LT Notes, since the principal amounts of these Notes made up the entire amount of their adjusted cost base of their Units. In respect of Mr. Bailey, his entitlement to deduct Partnership losses is reduced by his LT Note and the

losses allocated to him from the KP Partnership. In respect of Mr. Rankin, his entitlement to deduct Partnership losses is reduced by his LT Note. As a result, the conclusions above do not affect Mr. Bailey and Mr. Rankin's entitlement to deduct losses from the Partnership proportionate to their cash payments and the principal amount of their ST Notes.

2. If the Appellants are entitled to deduct the losses, are Francis and Sean O'Dea entitled to carry back their partnership losses to the 1992 and 1993 taxation years?

[99] Since the O'Deas are not entitled to claim any of the Partnership losses, this issue is effectively resolved.

3. If the Notes are not limited recourse amounts under section 143.2:

(a) Is the Minister statute-barred from reassessing the Appellants in regard to the respective Notes?

[100] Since the MT Notes, the LT Notes, the KP ST Note and the KP LT Note are deemed as limited recourse amounts under section 143.2, the Minister is not statute-barred to reassess in regard to the respective Notes, pursuant to subsection 143.2(15).

(b) Is the Minister statute-barred from reassessing the Appellants on any other basis?

[101] Since the O'Deas' entitlement to losses has been reduced to nil by the application of section 143.2, I need only address the effect of section 152 as it relates to Mr. Bailey and Mr. Rankin. The remaining issues respecting the validity of the Partnership and the deductibility of those Partnership expenses are still relevant for determining whether the entitlement of Mr. Bailey and Mr. Rankin to the Partnership's losses should be further reduced. The Respondent relies on subsection 152(4) to argue that the statute-barred years should be reopened with respect to the remaining issues. Therefore, I will consider the application of subsection 152(4) as it applies to Mr. Bailey and Mr. Rankin.

[102] According to subsection 152(4), if Mr. Bailey and Mr. Rankin "made any misrepresentation that is attributable to neglect, carelessness or wilful default …" then the Respondent would be permitted to reassess outside the normal assessment period of three years.

[103] The Federal Court of Appeal in *Venne v. The Queen*, 84 DTC 6247, held that a misrepresentation that is attributable to neglect under subparagraph 152(4)(a)(i) is established if a taxpayer fails to exercise reasonable care.

[104] In deducting their share of Partnership losses, Mr. Bailey and Mr. Rankin relied on the Partnership's Offering Memorandum, which included various professional opinions regarding the tax consequences and the validity of the deductibility of the Partnership expenses. Mr. Bailey testified that he in fact received Partnership statements which informed him of the amount of partnership losses that he could deduct in his personal income tax returns. These individuals were involved as limited partners. They were not the directing minds nor were they involved in the initial structuring details. I believe they were acting in a reasonable and prudent manner in placing reliance on the various professional opinions before making a decision to invest and should not be held to a higher standard. To do so would be to insist that they must personally investigate the technicalities of the various structures and arrangements of public offering documents. Therefore their reliance on the statements received from the Partnership will not amount to a failure to exercise reasonable care in filing their returns and, consequently, in respect to the additional assessments, other than those made pursuant to section 143.2, the Minister will not be permitted to apply subsection 152(4) to reopen these taxation years in respect to Mr. Bailey and Mr. Rankin.

4. Aside from the determination of whether the Notes are limited recourse amounts under section 143.2, are the Appellants entitled to deduct their respective partnership losses based on the following:

(a) **Was the Partnership a sham and/or a valid partnership for the purposes of section 96 of the *Act*?**

(b) **Is the Partnership entitled to deduct all of the expenses that it alleges it incurred during the relevant taxation years such that the Appellants would be entitled to deduct their respective losses in this regard?**

[105] Because of my conclusions in the preceding three issues, I do not need to address this issue at all. However, based on the evidence, the submissions by counsel and the case law, I would have concluded that the Partnership was not a sham because there was no evidence of a common intention among investors to deceive the Minister with respect to the true nature of the Partnership (see

Continental Bank Leasing Corp. v. Canada, [1998] S.C.J. No. 63; *Stubart Investments Ltd. v. Canada*, 10 D.L.R. (4th) 1 (S.C.C.); *2530-1284 Québec Inc. et al. v. The Queen*, 2008 DTC 3245 (T.C.C.), affirmed 2008 FCA 398 [*Faraggi*]; *Snook v. London and West Riding Investments Ltd.*, [1967] 1 All E.R. 518 (H.L.)) On the other hand, it does not satisfy the essential elements of a partnership under the relevant partnership law because the Partnership was not carrying on a business with a view to a profit (see *Partnerships Act*, R.S.O. 1990, c. P.5; *Backman v. Canada*, [2001] S.C.J. No. 12; *Spire Freezers Ltd. et al. v. The Queen*, 2001 DTC 5158 (S.C.C.)); *Continental Bank*, *supra*). The Partnership held only the legal rights to the F/G Licensing Rights and throughout it was PHL that operated the service bureau functions. The Partnership never earned a profit and was never able to recoup any of the significant losses it incurred. The transactions were structured so that it was virtually impossible for the Partnership revenues to meet the debt levels and consequently there was no intention to earn a profit even as an ancillary purpose. Therefore, the limited partners of the Partnership would not have been entitled to deduct any losses from the Partnership, because it was not a valid partnership under section 96 of the *Act*. In addition, the Partnership would not be entitled to deduct expenses if it is not a valid partnership.

5. Are Francis and Sean O'Dea liable for gross negligence penalties as assessed by the Minister under subsection 163(2) of the *Act*?

[106] The Minister levied penalties against Francis and Sean O'Dea pursuant to subsection 163(2) because, as the principals of the Proshred group of companies, they were in the best position to know that the Partnership losses were not deductible and therefore made or acquiesced in the making of false statements in respect to their returns in the relevant years. The Respondent argued that the O'Deas claimed losses which were otherwise restricted by subsections 143(2.2) and 96(2.2) and misrepresented that the Partnership carried on a business when in fact it was established to acquire tax losses.

[107] In *Venne*, Justice Strayer of the Federal Court of Appeal, at page 6256, held that the requirement of "gross negligence" under subsection 163(2) of the *Act*, in contrast to the level of "neglect" required under subsection 152(4), involves a greater degree of neglect:

> …"Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not. …

[108] In *410812 Ontario Limited v. The Queen*, [2002] T.C.J. No. 176, at paragraph 9, Bowman A.C.J. (as he was then), concluded that the general principle applied by the Court with respect to subsection 163(2) is as follows:

> **9** If any broad principle can be deduced from the multiplicity of cases decided under subsection 163(2) of the *Income Tax Act* it is that courts are reluctant to sanction the imposition of gross negligence penalties unless evidence of a high degree of negligence is clearly established.

[109] Similarly, Justice Bowman in *Klotz v. The Queen*, 2004 DTC 2236, at paragraph 68, emphasized that gross negligence "… connotes a much greater degree of negligence amounting to reprehensible recklessness". Carelessness or a failure to exercise due diligence is not enough to warrant the imposition of gross negligence penalties.

[110] In particular, Justice Bowman held, in *Farm Business Consultants Inc. v. The Queen*, 95 DTC 200, at pages 205 and 206, that the taxpayer must be given the benefit of the doubt when assessing penalties:

> … Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted. …

[111] Francis and Sean O'Dea are both experienced businessmen with extensive business experience. They were also the directing minds of the Proshred group of companies and the Partnership. They were involved in the expansion of the Proshred business and both had read and signed the Offering Memorandum and were aware of its contents and its disclosure relating to tax consequences. Francis O'Dea had to be involved with the intimate details of the structure of the Partnership as he was the individual that promoted it to potential investors by using the Offering Memorandum. Sean O'Dea was responsible for the operations of the Proshred business and for formulating the projections relating to the profitability of the Partnership.

[112] While the conduct of the O'Deas may warrant a finding of "negligence" or lack of reasonable care, it would not automatically justify a penalty under subsection 163(2). The gross negligence penalties under subsection 163(2) should

be levied only in exceptional circumstances where the taxpayer has exhibited "reprehensible recklessness".

[113] Similarly to the facts in *Klotz*, the O'Deas testified that they relied on various professional advisors and, following the *Klotz* decision, I conclude that the O'Deas' carelessness with respect to verifying the necessary information does not amount to gross negligence. Although their suspicions should have been raised based on their business background, their conduct does not meet the requisite threshold of reprehensible recklessness.

[114] Although the O'Deas were cross-examined extensively regarding their understanding of the at-risk rules and the non-payment of their MT Notes, it is doubtful that they "knowingly, or under circumstances amounting to gross negligence" deducted the full amount of the Partnership losses allocated to them with the full understanding that it might not be allowed under the *Act*. I am not convinced based on the facts that the O'Deas knew that interest was not being paid on their LT Notes when they looked to deduct losses from the Partnership. Their conduct falls short of the requisite behaviour required to assess gross negligence penalties because it does not cross the threshold into the realm of cavalier, reprehensible or intentional as suggested by the case law.

Conclusions

[115] In summary, my conclusions are as follows:

(1) Although the reassessments were made outside the normal reassessment period, because subsection 143.2(7) applies to deem the Notes (with the exception of the ST Notes of Mr. Bailey and Mr. Rankin) limited recourse amounts, the Minister is permitted pursuant to subsection 143.2(15) to reassess those statute-barred years for all Appellants. This reduces the cost of the Partnership Units for each of the Appellants and effectively reduces their at-risk amounts and entitlement to deduct their corresponding losses under subsection 96(2.1) of the Act, by the principal amounts of each of those Notes.

(2) The long-term promissory notes of the Appellants, the LT Notes, are deemed to be limited recourse amounts under subsection 143.2(7) because the Appellants did not prove that interest was paid on their notes nor that it was paid within 60 days of the end of each taxation year.

(3) The MT Notes of Francis and Sean O'Dea are also deemed to be limited recourse amounts under subsection 143.2(7) because the O'Deas, by their own admission, did not pay interest on those notes within 60 days of the end of each taxation year. Therefore, the Partnership losses of Francis and Sean O'Dea shall be further reduced by the principal amount of their MT Notes which were issued to the Partnership. As a result of my conclusions respecting the MT Notes and the LT Notes, the O'Deas' entitlement to deduct any of the Partnership's losses is reduced to nil.

(4) The long-term note issued by the KP Partnership to the Partnership, the KP LT Note, like the other long-term notes issued by the limited partners, is also deemed to be a limited recourse amount. The partnership losses that were allocated by the KP Partnership to Mr. Bailey will also be accordingly reduced. In addition, the short-term note issued by the KP Partnership, the KP ST Note, is deemed to be a limited recourse amount under subsection 143.2(7) because it was not a *bona fide* loan and the interest was not paid within 60 days of the end of each taxation year. Therefore Mr. Bailey's entitlement to deduct losses will be reduced by the amount of his LT Note to the Partnership and any amount flowing to him in respect of his KP Partnership holdings.

(5) Mr. Rankin's potential to deduct losses will also be reduced by the amount of his LT Note.

(6) The Minister will not be permitted to apply subsection 152(4) to reopen the taxation years of Mr. Bailey and Mr. Rankin. Consequently, their ability to deduct Partnership losses other than losses associated with their LT Notes and Mr. Bailey's KP ST Note and KP LT Note, will be unaffected.

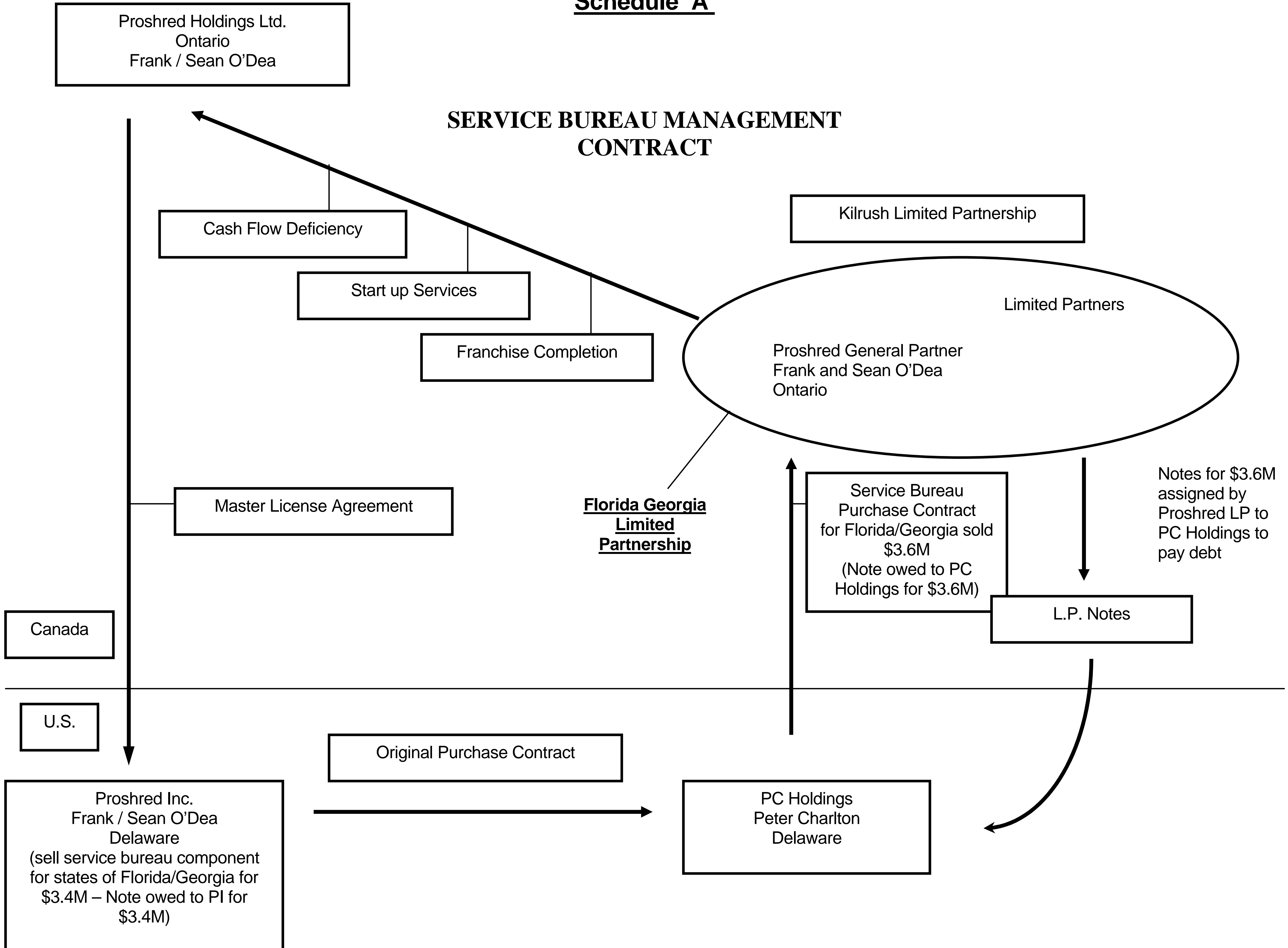
(7) Penalties under subsection 163(2) of the *Act* levied against the O'Deas are to be deleted.

(8) If the parties cannot settle the issue of costs within 60 days of the date of the within Reasons, they may contact the Court to obtain dates for the filing of written submissions.

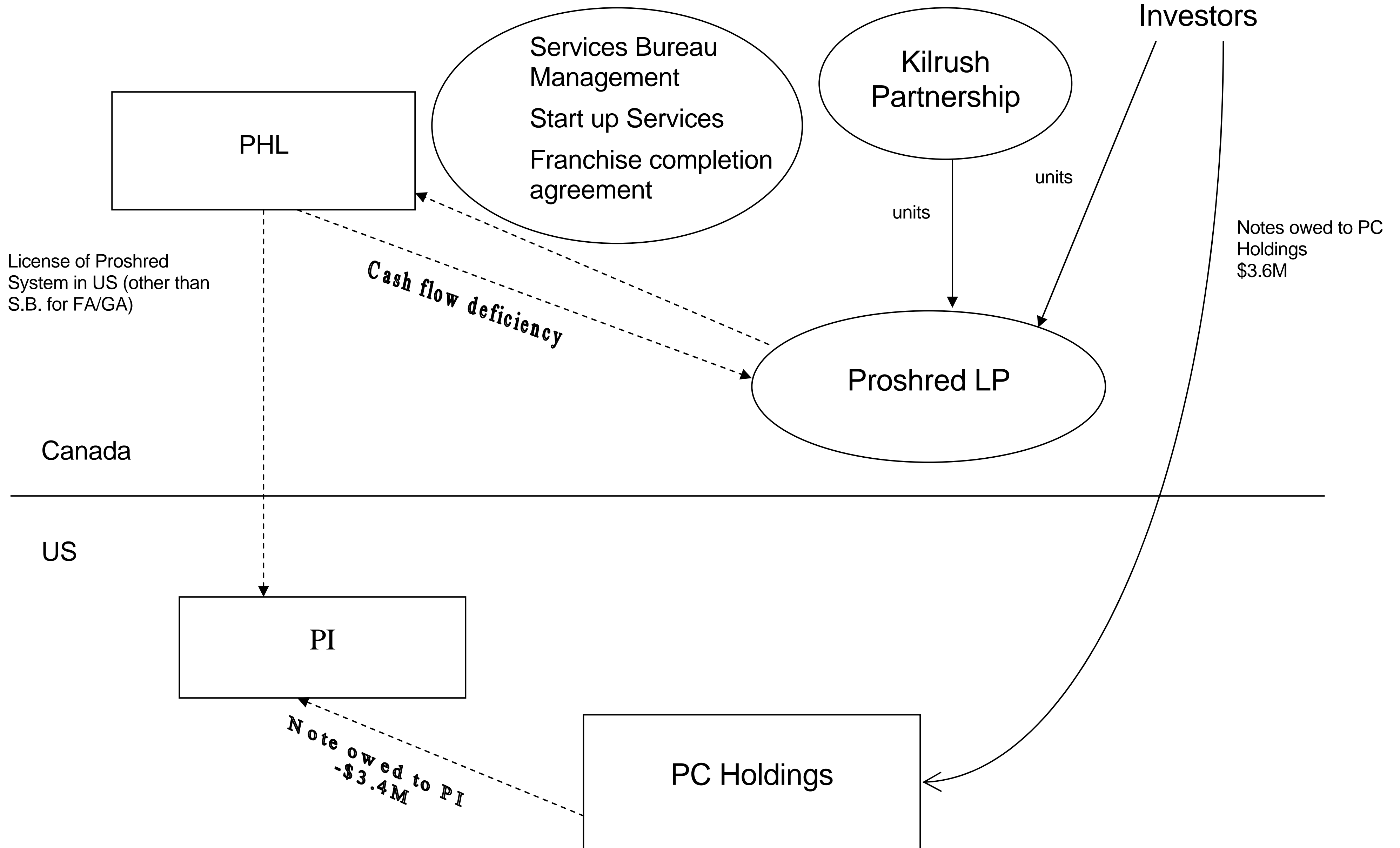
Signed at Vancouver, British Columbia, this 1st day of June 2009.

"Diane Campbell"

Campbell J.



Schedule 'A'
Proshred Holdings Ltd.
Ontario
Frank / Sean O'Dea
SERVICE BUREAU MANAGEMENT
CONTRACT
Cash Flow Deficiency
Start up Services
Franchise Completion
Kilrush Limited Partnership
Limited Partners
Proshred General Partner
Frank and Sean O'Dea
Ontario
Master License Agreement
Florida Georgia
Limited
Partnership
Service Bureau
Purchase Contract
for Florida/Georgia sold
$3.6M
(Note owed to PC
Holdings for $3.6M)
Notes for $3.6M
assigned by
Proshred LP to
PC Holdings to
pay debt
L.P. Notes
Canada
U.S.
Original Purchase Contract
Proshred Inc.
Frank / Sean O'Dea
Delaware
(sell service bureau component
for states of Florida/Georgia for
$3.4M – Note owed to PI for
$3.4M)
PC Holdings
Peter Charlton
Delaware


Investors
Services Bureau Management
Start up Services
Franchise completion agreement
Kilrush Partnership
PHL
units
units
Notes owed to PC Holdings $3.6M
License of Proshred System in US (other than S.B. for FA/GA)
Cash flow deficiency
Proshred LP
Canada
US
PI
Note owed to PI -$3.4M
PC Holdings

CITATION:	2009 TCC 295
COURT FILE NO'S.:	2004-1225(IT)G, 2004-1226(IT)G, 2004-1227(IT)G, and 2004-474(IT)G.
STYLE OF CAUSE:	Francis O'Dea, Sean O'Dea, John Rankin, Geoffrey Bailey and Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	June 17, 18 and 19, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	June 1, 2009
APPEARANCES:	
Counsel for the Appellants:	Louise R. Summerhill and Chris Dunn
Counsel for the Respondent:	Marie-Thérèse Boris and Brent E. Cuddy
COUNSEL OF RECORD:	
For the Appellant:	
Name:	Louise R. Summerhill and Chris Dunn
Firm:	Aird & Berlis LLP
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada