TAX COURT OF CANADA

IN RE: the Income Tax Act

BETWEEN:

BALESH W. KONDA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

* * * * *

ORAL REASONS FOR JUDGMENT BY THE HONOURABLE JUSTICE PARIS

in the Courts Administration Service, Courtroom, 200 Kent Street, Ottawa, Ontario on Tuesday, September 18, 2007 at 2:00 p.m.

APPEARANCES:

Mr. Balesh W. Konda for himself

Ms. Marie-Andrée Legault for the Respondent

Mr. Simon Petit

Also present:

Ms. Line Lanthier Court Registrar

A.S.A.P. Reporting Services Inc. 8 2007

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1	Ottawa, Ontario
2	Upon commencing on Tuesday, September 18, 2007,
3	at 2:00 p.m.
4	REASONS FOR JUDGEMENT BY MR. JUSTICE PARIS, ORALLY:
5	This is an appeal from a
6	reassessment of the Appellant's 1988 taxation year,
7	by which the Minister of National Revenue
8	disallowed the Appellant's claim for investment tax
9	credit with respect to his investment in A.L.H.
LO	Systems.
L1	A.L.H. is a partnership which
L2	undertook to do scientific research and
L3	experimental development.
L 4	The Minister refused the
L5	investment tax credit on the basis that A.L.H. had
L6	not done any scientific research and experimental
L7	development within the meaning of paragraph
L8	37(1)(a) of the <i>Income Tax Act</i> and Regulation 2900
L9	of the Income Tax Regulations in the 1988 year.
20	Therefore, the Appellant as
21	partner of A.L.H. was found to not have had any
22	"qualifying expenditures" as defined in subsection
23	127(9) of the Act, and no investment tax credit
24	could be claimed.
25	There are a number of issues set
26	out in the Reply to the Notice of Appeal, but at

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- 1 the outset of this hearing for the sake of
- 2 expedience, I directed the parties to present
- 3 evidence and argument on two of the issues, and to
- 4 postpone presenting evidence and argument on the
- 5 remaining issues until the first two issues had
- 6 been decided, if it were still necessary to do so.
- 7 Therefore, the two issues to be
- 8 decided at this point are, firstly, whether the
- 9 Appellant has shown that A.L.H. did in fact carry
- 10 out any scientific research and experimental
- 11 development in 1988, and secondly, whether the
- 12 Appellant was a specified member of A.L.H. as that
- 13 term is defined in subsection 248(1) of the Act.
- 14 The Appellant conceded in argument
- 15 that he was a specified member of A.L.H., because
- 16 he did not participate actively in the operations
- 17 of the partnership on a regular, continuous and
- 18 substantial basis.
- I, too, am satisfied that the
- 20 evidence shows that the Appellant was a specified
- 21 member of A.L.H.
- The Appellant became a partner in
- 23 A.L.H. in the Fall of 1988, after attending a
- 24 presentation in Ottawa.
- 25 He understood that the partnership
- 26 would carry out research and development leading to

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- 1 the development of software for use in the
- 2 financial industry, and with applications in other
- 3 fields as well. The project was referred to as
- 4 "INCOM".
- 5 The partnership activities were to
- 6 be carried out in Montreal, but the Appellant said
- 7 he did not go to Montreal.
- 8 He received and read some progress
- 9 reports on the research activities, and attended
- 10 three or four meetings in Ottawa to discuss the
- 11 program and to give his opinion on whether the
- 12 research work was going in the right direction. He
- 13 also received some diskettes containing basic
- 14 computer exercises to be done by each investor in
- 15 the partnership, but says that he himself did not
- 16 do the exercises.
- 17 After a meeting in early 1989, the
- 18 Appellant said the project appeared to run into
- 19 difficulties, and his attempts to get further
- 20 information from A.L.H. were unsuccessful.
- 21 The activities carried out by the
- 22 Appellant cannot be considered to have been
- 23 continuous, regular or substantial in relation to
- 24 the activities of A.L.H. The Appellant was a
- 25 passive investor, and relied on others to carry out
- 26 all of the partnership operations. His input into

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1 the project was limited to his attendance at a few
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- 2 meetings to review the progress of the
- 3 partnership's research work, and to offering his
- 4 opinion at these meetings regarding the progress of
- 5 the research.
- 6 As a specified member of A.L.H.,
- 7 the Appellant is not permitted any investment tax
- 8 credit as set out in subsection 127(8) of the Act.
- 9 This conclusion alone is sufficient to dispose of
- 10 the appeal, but I will also deal with the question
- 11 of whether the Appellant has shown that A.L.H.
- 12 carried out scientific research and experimental
- 13 development in 1988.
- 14 Section 2900, sub (1) of the
- 15 Regulations sets out the meaning of "scientific
- 16 research and experimental development". It reads
- 17 in part as follows:
- For the purposes of this part, paragraphs
- 19 37(7)(b) and 37.1(5)(e) of the Act,
- 20 "scientific research and experimental
- 21 development is a systematic investigation
- or search carried out in the field of
- science and technology by means of
- 24 experiment or analysis, that is to say,
- 25 basic research namely, work undertaken
- 26 for the advancement of scientific
- 27 knowledge with a specific practical
- 28 application in view or development,
- 29 namely, use of the results of basic or
- 30 applied research for the purpose of
- 31 creating new, or improving existing,
- 32 materials, devices, products or
- processes.

1	According to the Respondent's
2	scientific expert, Mr. Claude Papion, no evidence
3	was presented by directors of A.L.H. to show that
4	any research and development work was actually
5	performed by or on behalf of A.L.H. in 1988.
6	The documentation that was
7	submitted consisted of a number of project
8	proposals, each different from one another, and a
9	series of studies, plans and discussion papers that
LO	did not show any research work done.
L1	Whether or not there was a link
L2	between the various project proposals that
L3	Mr. Papion looked at, the important point is that
L 4	no research or development work was ever documented
L5	to him by the A.L.H. directors. None of the
L6	progress reports that were purportedly received by
L7	the Appelant were given to Mr. Papion, and
L8	unfortunately none were put into evidence at the
L9	hearing.
20	I also note that, according to a
21	letter sent to Revenue Canada by Mr. Vohoang (on
22	behalf of A.L.H.) in January 1992 (Exhibit R-10),
23	the work done by A.L.H. on INCOM in 1988 consisted
24	of two project proposals, a system summary and an
25	analysis of some questionnaires filled in by
26	brokers and partners. This appears at page 3 of the

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- 1 letter. 2 Again, none of this work has been 3 shown to qualify as research and experimental 4 development as defined in Regulation 2900. As an 5 aside, it is almost inconceivable that the limited work that Mr. Vohoang lists as being done by A.L.H. 6 7 on the INCOM project in 1988 could have resulted in 8 expenditures of over \$3.17 million as claimed. 9 The Appellant presented no evidence that any scientific research and 10 experimental development done by A.L.H. The onus in 11 this case is on him to show that the basis for the 12 reassessment is incorrect and in the absence of 13 14 any such evidence, I must conclude that the 15 assumptions relied on by the Minister in reassessing are correct. 16 17 Therefore, on this basis as well, 18 the appeal cannot succeed. It is clear to me that 19 the Appellant invested in A.L.H. in good faith, and 20 did what he believed was required of him in order 21 to receive the tax benefits that the promoters of 22 the partnership claimed would be available. It 23 appears to me that the Appellant was misled in this
 - Given the foregoing conclusions it

regard, however, the fact that he was misled can

have no bearing on the outcome of this appeal.

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- 1 is not necessary to hear evidence or argument
- 2 concerning any of the Respondent's alternative
- 3 arguments.
- 4 On the basis of all of the
- 5 evidence that has been presented, the appeal is
- 6 dismissed.
- 7 --- Whereupon the proceedings concluded
- 8 at 2:10 p.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Shorthand and transcribed therefrom, the foregoing proceeding.

Sue Rochon