

Docket: 2009-3864(IT)G

BETWEEN:

MARGARET SWAIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of  
*Randall W. Marusyk* (2009-2694(IT)G) and  
*Scott R. Miller* (2009-2695(IT)G), on June 2, 2011, at Ottawa, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Matthew G. Williams  
Shaun Doody

Counsel for the Respondent: Suzanie Chua

---

**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* with respect to the Appellant's 2006 taxation year is dismissed, with costs, in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 10th day of February 2012.

"Patrick Boyle"

---

Boyle J.

Docket: 2009-2694(IT)G

BETWEEN:

RANDALL W. MARUSYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of  
*Margaret Swain* (2009-3864(IT)G) and *Scott R. Miller* (2009-2695(IT)G),  
on June 2, 2011, at Ottawa, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Matthew G. Williams  
Shaun Doody

Counsel for the Respondent: Suzanie Chua

---

**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* with respect to the Appellant's 2006 taxation year is dismissed, with costs, in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 10th day of February 2012.

"Patrick Boyle"

---

Boyle J.

Docket: 2009-2695(IT)G

BETWEEN:

SCOTT R. MILLER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of  
*Margaret Swain* (2009-3864(IT)G) and *Randall W. Marusyk* (2009-2694(IT)G),  
on June 2, 2011, at Ottawa, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Matthew G. Williams  
Shaun Doody

Counsel for the Respondent: Suzanie Chua

---

**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* with respect to the Appellant's 2006 taxation year is dismissed, with costs, in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 10th day of February 2012.

"Patrick Boyle"

---

Boyle J.

Citation: 2012 TCC 46  
Date: 20120210  
Dockets: 2009-3864(IT)G  
2009-2694(IT)G  
2009-2695(IT)G

BETWEEN:

MARGARET SWAIN,  
RANDALL W. MARUSYK,  
SCOTT R. MILLER,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Boyle J.**

[1] The three Appellants are lawyers operating an intellectual property law firm in partnership in Ottawa. They deducted a loss in computing the partnership's 2006 income relating to a loan to EM Diagnostics Inc. ("EM Diagnostics") of approximately \$325,000 (approximately US\$245,000) along with a further approximately \$140,000 of accrued and unpaid interest.

[2] According to the taxpayers, Discovery Biotech Inc. ("Discovery Biotech"), a corporation somehow involved with, or related to, EM Diagnostics, was a Nevada corporation operating out of Arkansas. Discovery Biotech's President and Chief Executive Officer was a Canadian who died suddenly in Texas. The corporation claimed to have some vague rights to some equally vague technology developed in Russia which might be used to further develop in the US a patentable US version of the Russian technology that could be used as, or lead to the development of, a device to be used in screening for breast cancer creating value in Discovery Biotech sufficient to allow it to be sold at a profit to a major player. Virtually no supporting or explanatory evidence was put in on this point.

[3] In order to develop a breast cancer screening device, money needed to be raised and investors found. EM Diagnostics was incorporated and introduced for this purpose. EM Diagnostics was established because the Ontario Securities Commission (“OSC”) had earlier barred the Canadian corporation, Discovery Biotech, from offering securities to the public because it had been doing so in violation of applicable securities law. The President and Chief Executive Officer of Discovery Biotech was also the President and CEO of EM Diagnostics. It was not clear how or whether applicable securities law was complied with in respect of the EM Diagnostics loan from one or more Canadians.

[4] The loan advance was made in February 2004 by Dr. Swain from her personal bank account. The written agreement was between Dr. Swain, EM Diagnostics, Discovery Biotech and another affiliated corporation, Oakhill Investments Limited (“Oakhill Investments”). The role of Oakhill Investments remains a mystery notwithstanding some testimony on the point. The funds were actually advanced to another individual who was said to be a key contractor or employee working on the US development of the device who threatened to quit if the money was not received right away.

[5] Discovery Biotech’s President and CEO assured Dr. Swain that he had the needed money all lined up but it would take another month, two at the most, so if the needed money could be loaned to him for three months and repaid from the money to come from the other investors he had lined up. Dr. Swain says she suggested to just make it six months because she was a busy international business traveller but to pay her back as soon as he could. The loan advance was not accounted for in the firm’s partnership accounts for some time; it appears to be not before December 31, 2006 and probably in February 2007. Dr. Swain was not paid or reimbursed for her advance in cash but rather by an adjustment to her capital account. The firm’s Chief Financial Officer and accountant responsible for the partnership’s accounts did not testify. Mr. Miller, one of three partners, was not aware of the loan having been made until told about it in 2006.

[6] The 2004 loan agreement is titled Promissory Note Agreement and subtitled Given for a Patent Right. The agreement included demand promissory note language within the body of the agreement which also purported to grant security in the device in the event of default. The lender agreed in the promissory note portion not to demand repayment within the first six months. The lender in the agreement is identified only as Dr. Swain. The borrower is defined as Discovery Biotech, EM Diagnostics and Oakhill Investments. In an addendum dated in May 2006 to the 2004

Promissory Note Agreement – Given for a Patent Right, the lender is consistently described as Dr. Swain although Mr. Marusyk did witness her signature in 2006. (Dr. Swain's signature page to the original 2004 agreement was not put in evidence so I do not know who witnessed her signature when she advanced the money and signed the original agreement as lender.) The 2006 addendum says the purpose of Dr. Swain's loan had also been to allow the borrower corporations to pay their accrued legal bills owing to the firm. The 2006 addendum also purported to have her agree to exchange her debt for shares of EM Diagnostics valued at US\$2.00 per share. A separate Promissory Note Agreement between EM Diagnostics and the Appellants' law firm was also entered into in 2006, dated somewhat before Dr. Swain's 2006 addendum, dealing with the outstanding professional fees, disbursements and interest owing to the law firm.

[7] By the time the loan was advanced in 2004, the OSC proceedings against Discovery Biotech and its President and CEO were underway. There had been a number of OSC press releases and public notices regarding this between June 2003 and June 2004. Charges were laid against Discovery Biotech, its President and CEO and two other individuals. Convictions were obtained, however the President and CEO had already died.

[8] The taxpayers' position is that the loan was worthless in 2006. One witness said EM Diagnostics had gone bankrupt, another said it had been dissolved. The only written evidence I was given indicated EM Diagnostics was in default in providing the Secretary of State of Nevada with its list of officers. There was no evidence as to what became of the group's rights to the Russian technology. There was no evidence that indicated that Dr. Swain or the partnership pursued the lender's rights under the promissory notes or questioned a liquidator, receiver or trustee of the corporation. There was no evidence as to what was in fact done with the money raised by the corporation. There was no evidence as to what other money was raised by the corporation from other investors at any time, how much was needed to be raised to pursue the development of a potentially patentable device, nor how any other moneys raised were in fact spent.

[9] The taxpayers deducted a loss in respect of the full amount of the loan and accrued interest. It is their position that this was a loss of their law partnership that was incurred as part of the firm's business of providing intellectual property legal services and thus resulted in an income loss. EM Diagnostics and Discovery Biotech had been clients of the firm since 2000 and the firm continued to do legal work in 2004 and 2005. These legal bills were not paid. It is the taxpayers' position that they hoped that the cash loaned to EM Diagnostics would help it to develop a device

based on the Russian technology that would be patentable and thus in turn lead to significant legal work for a broad range of specialized and profitable intellectual property legal services. It does not appear that any of the taxpayers or the law firm obtained any commitment or retainer from the corporations to use its services in the future. It does not appear that a budget or estimate of the costs and timeframes of future legal services were ever developed and discussed with the corporations.

[10] The evidence established that neither the partnership nor these three lawyers had ever before made any direct investment in, or loan to, a client, nor have they ever since. Nor had the lawyers or the firm ever loaned money to others as part of their business. They were never repaid any of the principal of this loan; they were never paid interest on this loan. (It is not clear that they ever included in income the accrued and unpaid interest they deducted as a loss. They abandoned their position on the accrued interest at trial.)

[11] There was no evidence this loan to a client was ever reported to the Law Society of Upper Canada or to any other law society in another jurisdiction in which they are called.

[12] In this case, there is clearly not sufficient credible, corroborated and contemporaneous evidence to allow me to conclude as a factual matter on a balance of probabilities that the loan was made by or on behalf of the partnership. Further, I am unable to conclude that, even assuming the loan was made by the partnership, the loan was made as any part of the legal business carried on by the partnership. Similarly, to the extent the loan may have been made by Dr. Swain, I am unable to conclude it was made as any part of the law practice she carried on through the partnership. For these reasons, I must dismiss these appeals.

[13] I can only conclude on the evidence presented that, assuming this was not an outright case of being defrauded, swindled or scammed, whoever owned the debt owned it on capital account which would give rise to a capital loss, and not on income account giving rise to an income loss. In the case of a taxpayer being defrauded, scammed or swindled outside the ordinary course of a pre-existing *bona fide* business, as in *Heppner v. The Queen*, 2007 TCC 667, 2008 DTC 2001 (Nigerian faxes), and *Hammill v. The Queen*, 2005 FCA 252, 2005 DTC 5397 (gemstones), taxpayers may not even have a capital loss recognized for tax purposes.

[14] This is not a case of a self-represented ordinary Canadian coming to Court perhaps somewhat unsure of what evidence may be needed or appropriate. The three taxpayers are successful lawyers and are represented by an experienced tax litigator.

[15] The Respondent asked that I make certain specific adverse credibility findings against the taxpayers. It is not necessary for me to do so in order to decide this case and dismiss the appeals for the reasons given above. However, I can say that I do not believe I was told a full and coherent story by these taxpayers. The taxpayers' version of events was possible, it was perhaps plausible notwithstanding that the testimony of Dr. Swain and Mr. Marusyk was inconsistent in several respects with what documents I was given. It remained however a far cry from the requisite degree of probability. I suspect this is because Dr. Swain appears to have been duped. Nothing else makes sense on the very limited evidence I was given. If that is indeed the case, this has been a very poor performance by the taxpayers.

[16] The appeals are dismissed, with costs. I understand from counsel they wish to make submissions as to the amount of costs.

Signed at Ottawa, Canada, this 10th day of February 2012.

"Patrick Boyle"

---

Boyle J.



CITATION: 2012 TCC 46

COURT FILE NOS.: 2009-3864(IT)G, 2009-2694(IT)G,  
2009-2695(IT)G

STYLE OF CAUSE: MARGARET SWAIN AND HMQ,  
RANDALL W. MARUSYK AND HMQ,  
SCOTT R. MILLER AND HER HMQ

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 2, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: February 10, 2012

APPEARANCES:

Counsel for the Appellants: Matthew G. Williams  
Shaun Doody

Counsel for the Respondent: Suzanie Chua

COUNSEL OF RECORD:

For the Appellants:

Name: Matthew G. Williams  
Shaun Doody

Firm: Thorsteinssons LLP  
Toronto, Ontario

For the Respondent: Myles J. Kirvan  
Deputy Attorney General of Canada  
Ottawa, Canada