

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A. NORMAN WOLGIN and	:	CIVIL ACTION
I. ROBERT WOLGIN,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
KENNINGTON LTD., INC.,	:	
Defendant.	:	NO. 98-CV-5956

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**J. M. KELLY, J.**

**AUGUST 12, 1999**

This matter is before the Court on Plaintiffs' Norman and I. Robert Wolgin ("the Wolgins") motion to hold Defendant Kennington in contempt. The Court held a hearing on this motion on March 10 and 11, 1999. Having reviewed the testimony recorded those days and the proposed findings of fact and conclusions of law the parties submitted, the Court is prepared to make the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. On November 11, 1998, a panel of three arbitrators of the American Arbitration Association presided over an arbitration commenced by the Wolgins.
2. One of the issues presented to the arbitration panel was whether certain tax losses incurred by Green Island Associates ("GIA") had been properly allocated between Kennington and the Wolgins.
3. The arbitrators concluded those tax losses had not been properly allocated, and entered an award ordering Kennington either to file amended tax returns itself for the years 1994, 1995, and 1996, or allow the Wolgins to designate an accounting firm to prepare and sign the returns.

4. The Court affirmed this aspect of the arbitrators' award on May 6, 1998.
5. On March 10 and 11, 1999, the Court heard argument and testimony on the Wolgins' motion to hold Kennington in contempt of the May 6, 1998, Order.
6. Seymour Bush, GIA's accountant, testified on behalf of Kennington.
7. Edward Liva, a partner at Arthur Andersen and the accountant the Wolgins hired to prepare the amended returns, testified on behalf of the Wolgins.
8. The Court found Bush's testimony to be unreliable in several respects.
9. Bush contradicted his previous testimony. For instance, he testified at the arbitration that GIA entered into a non-recourse loan, and testified at the hearing that the loan was a recourse obligation. His realization that the loan was a recourse loan allowed him to sign the amended returns he previously declared he would not sign.
10. Bush created an inaccurate record. For instance, he conferred with Charles Henry, the Wolgins' accountant, about a worksheet he prepared in connection with the amended returns. He wrote to Henry that he understood Henry was "in general agreement" with Bush's calculation records. Henry responded that he told Bush only that he was able to follow Bush's calculations, not that he agreed with Bush's methods or conclusions.
11. Bush failed to keep the Wolgins informed. For instance, the worksheet he showed to Henry reflected substantial losses assigned to Kennington, and relatively minimal losses assigned to the Wolgins. The amended returns he subsequently filed dramatically reversed those assignments.
12. The Court found Liva's testimony to be credible and forthright.
13. Amended returns such as those the Court ordered here must be filed within three

years of the filing of the original partnership return.

14. The 1994 GIA amended returns, then, were required to be filed by August 30, 1998.

15. Kennington believed the amended tax return for 1994 was due by October 15, 1998.

16. The Wolgins and Kennington exchanged several correspondences in May and June of 1998 concerning whether Kennington would file the amended returns itself or allow the Wolgins to select a firm to prepare the returns, but the parties never reached any agreement.

17. The Wolgins then proceeded to retain the accounting firm of Arthur Andersen to prepare the amended returns.

18. Liva called Bush and informed Bush that he would prepare and file the amended returns.

19. Bush, however, proceeded to prepare the same amended returns.

20. Arthur Andersen also prepared those returns, for a fee of \$13,950.00.

21. On August 17, 1998, Bush showed Henry a worksheet showing the allocation of losses to be contained in the amended returns.

22. According to this worksheet, Kennington should have been assigned approximately \$3,994,014.00 in losses, and the Wolgins assigned \$265,009.00.

23. Bush arrived at these figures by employing a “strict interpretation” of Section 503 of the Partnership Agreement.

24. The Court’s Order of May 6, 1999, specified that the amended returns were to be prepared in accordance with Section 503 of the Partnership Agreement.

25. Bush finished preparing the amended returns, which he filed on September 11, 1999.

26. The amended returns assigned Kennington \$963,619.00 in losses and the Wolgins \$3,120,404.00 in losses.

27. Bush failed to file amended returns prepared in accordance with Section 503 of the Partnership Agreement because he believed Section 503 violated Treasury Department regulations.

28. On the advice of counsel, Bush attached to the amended returns a disclaimer that stated the amended returns may not be in compliance with Treasury Department regulations, and that the amended returns were prepared pursuant to court order.

29. Disclaimers such as this one ordinarily are not attached to amended returns.

30. Liva would have filed the amended returns without attaching the disclaimer.

31. Bush also failed to file a Form 8082 with the amended return, although Kennington since has filed that form.

32. Treasury Department regulations require the filing of a Form 8082 with the amended return.

33. The Internal Revenue Service has not yet notified either party whether it has accepted or rejected the amended returns.

### **CONCLUSIONS OF LAW**

1. Kennington has violated the Court's Order of May 6, 1998, in the following ways:

(a.) Kennington failed to notify the Wolgins of their decision whether to prepare the amended returns itself or allow the Wolgins to proceed with the selection of an

appropriate accounting firm.

(b.) Kennington failed to file amended returns in accordance with Section 503 of the Partnership Agreement.

(c.) Kennington failed to file the amended returns in a timely manner.

(d.) Kennington failed to accompany the amended returns with the required Form 8082.

(e.) The disclaimer Kennington attached to the amended returns was unnecessary and may have jeopardized the chances the Internal Revenue Service would accept the amended returns.

2. Kennington is in contempt of the Court's May 6, 1998, Order.

3. The Court will order Kennington to pay to the Wolgins all reasonable legal fees, including counsel fees, the Wolgins have incurred in this particular case, Civil Action Number 98-5956.

4. The Court will order Kennington to reimburse the Wolgins for the expenses incurred from Arthur Andersen's preparation of the amended returns.

5. Judgment is entered in favor of the Wolgins without prejudice; the Wolgins may seek further relief from the Court should the Internal Revenue Service reject the amended returns.

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A. NORMAN WOLGIN and	:	CIVIL ACTION
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Plaintiffs,	:	
	:	
v.	:	
	:	
KENNINGTON LTD., INC.,	:	
Defendant.	:	NO. 98-CV-5956

**ORDER**

AND NOW, this 12th day of August, 1999, upon consideration Plaintiffs' A. Norman and I. Robert Wolgin's Motion to Hold Defendant Kennington Ltd. in Contempt (Document No. 1); the hearing the Court held on March 10 and 11, 1999; and the parties' proposed findings of fact and conclusions of law, it is hereby **ORDERED**:

1. Plaintiffs' motion is **GRANTED**;
2. Defendant Kennington is found to be in contempt of the Court's May 6, 1998, Order;
3. Defendant Kennington is ordered to reimburse Plaintiffs for all reasonable legal fees incurred in this civil action, including reasonable counsel fees;
4. The parties will have until September 10, 1999, to agree on what reasonable legal fees Plaintiffs have incurred. In the absence of an agreement, Plaintiffs will have until September 17, 1999, to submit to the Court its position on what reasonable legal fees they have incurred. Defendant will have until September 24, 1999, to respond to Plaintiffs' position.
4. Defendant Kennington is ordered to reimburse Plaintiffs \$13, 950.00, the amount Arthur Andersen charged Plaintiffs; and

5. Judgment is entered in favor of the Wolgins without prejudice; the Wolgins may seek further relief from the Court should the Internal Revenue Service reject the amended returns.

BY THE COURT:

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JAMES McGIRR KELLY