

Docket: 2014-3394(IT)G

BETWEEN:

ANDREW FOOTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on August 25 and 26, 2016, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Peter Aprile  
Yoni Moussadji

Counsel for the Respondent: Amit Ummat

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**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2009 taxation year is dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 21st day of April 2017.

“Patrick Boyle”

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Boyle J.

Citation: 2017 TCC 61  
Date: 20170421  
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BETWEEN:

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### **REASONS FOR JUDGMENT**

#### **Boyle J.**

##### **Overview**

[1] The only issue in this appeal is whether gains on securities bought and sold by the Appellant in 2009 were on income or capital account.<sup>1</sup> For the reasons that follow, I have concluded that the Canada Revenue Agency (“CRA”) reassessment that characterizes the gains as income gains has not been demonstrated to be incorrect.

[2] This was a two-day trial with three witnesses. The Appellant testified, as did his investment advisor, Andrew Stiff. The Respondent called the CRA auditor, Leszek Gajewski. Written submissions were received after the hearing.

[3] Mr. Foote is a graduate of Queen’s University and a Certified Financial Analyst or CFA, and is the Co-Head of Institutional Trading at Raymond James Ltd. (“RJL”), a Canadian full service investment dealer or brokerage firm for individual and institutional investors. Mr. Foote was licensed by securities regulators in a large number of U.S. and Canadian jurisdictions, including as a trading and dealing officer. He maintained two investment accounts at RJL, one for Canadian and one for U.S. dollar positions.

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<sup>1</sup> The Appellant abandoned his appeal with respect to the appropriate foreign exchange conversion methodology for U.S. dollar denominated transactions at the opening of the hearing.

[4] Mr. Foote testified that his investment strategy has always been to invest in diversified securities that he feels have the potential for 30% returns, including distributions and growth, within what he thinks will be a certain reasonable time frame. He acknowledges that there is no written record of that objective.

[5] Mr. Foote also sold some securities short throughout. That is, he sold securities positions before he bought them and he borrowed the securities to close his sale. His short positions also went through these two accounts. Gains and losses on short sales were reported by Mr. Foote on income account throughout. All other gains and losses were reported on capital account throughout. Mr. Foote's gains and losses on short sales are not in dispute in this appeal.

[6] In the first two months of 2009, he liquidated his holdings in both accounts and converted them to cash. He testified he did this because he originally intended to pay down his mortgage when it was scheduled to renew.

[7] Instead, he saw an unprecedented opportunity to invest in stocks that met his investment criteria given that the market was considered by many to have bottomed out in its decline during the financial crisis that started to hit the markets in 2008. In the remaining 10 months of 2009, Mr. Foote purchased and sold stocks of 34 issuers costing about \$2,500,000.<sup>2</sup> This involved 38 purchase transactions and 50 sale transactions. His total gain was about \$550,000 or about 23%. His average hold period of stocks of an issuer was about 50 days. His average return on any particular issuer was about 30%. In those 10 months major Canadian and U.S. markets went up by about 40%.

[8] The Appellant reported all of his gains and losses on these positions as capital gains in his 2009 income tax return. CRA reassessed to include the full amount in income.

## **The Facts**

[9] Mr. Foote has been in the investment industry for over 25 years. He has been investing personally throughout that period. He started with the predecessor of what is known now as RBC Dominion Securities. He remained at that brokerage firm for 15 years. I was not told what he did at RBC Dominion Securities; the Respondent's assumption in the reply is that he was a "senior trader". From there he went to CIBC World Markets in about 2005. He described that when he left

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<sup>2</sup> The actual statements are in evidence. The parties' cumulative and average numbers from the statements' numbers do not always align. The difference is not material to my decision. I have not computed these numbers myself.

CIBC World Markets in 2007, he was its Head of Institutional Trading. He joined RJL as its Co-Head of Institutional Trading. He continues to hold that position.

[10] As Co-Head of Institutional Trading at RJL, Mr. Foote was not involved in the retail side of the business. The Research group at RJL is also separate from Institutional Trading. Institutional Trading does have full access to that group's research.

[11] Institutional Trading is essentially responsible for lining up or matching or pairing institutional clients who want to sell securities held by them with other institutional clients who want to buy those securities, or *vice versa*. If an institutional client wanted to sell, it was open to Mr. Foote to use RJL's own money, or its book, to complete the transaction. Some of the people who reported to him could also use RJL's book. These people were called traders and those who could not access the book were called sales traders. All of the traders and sales traders in Institutional Trading reported to Mr. Foote. The firm's book was used when it was needed to facilitate and fulfill a sale order and earn the commissions on the sale and/or the other institutions' purchases of the bulk of the sale order. Using the firm's book involves assessing the risk of loss to the firm. If Institutional Trading uses the firm's book to buy securities, it is also responsible to sell them. According to Mr. Foote, this happened all the time. If a loss resulted, Institutional Trading bore the loss.

[12] Mr. Foote explained that Institutional Trading operated in this same manner at CIBC World Markets and at RJL. Mr. Foote had also supervised all of Institutional Trading's traders at CIBC World Markets.

[13] In 2009, Mr. Foote's employment income from RJL was approximately \$775,000. This was significantly less than his previous three-year employment income of approximately \$2,000,000, \$2,000,000 and \$1,000,000 respectively.

[14] The brokerage sector is regulated. A brokerage firm's employees are only permitted to have investment accounts at their own brokerage. Activity in those accounts are monitored by a compliance department to ensure that the traded securities are not on a restricted list involving issuers about which the firm may be seen to have specific knowledge not yet publicly available.<sup>3</sup>

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<sup>3</sup> There has never been any suggestion by CRA or the Respondent, nor any hint in the evidence, that Mr. Foote realized any of his gains as a result of any such insider-type information.

[15] Mr. Foote set up two accounts at RJL when he joined, one for U.S. and one for Canadian activities.<sup>4</sup> He had the choice of opening discount accounts which would charge a \$10 cut-rate commission per trade, or full service accounts which would cost him a \$90 commission per trade. Mr. Foote chose full service accounts which gave him access to a financial investment advisor. Mr. Foote chose Mr. Stiff as his investment advisor. Mr. Stiff managed accounts of about 18 other RJL colleagues. Mr. Stiff referred to these as his pro accounts. Mr. Foote did not give Mr. Stiff discretion to engage in trades without his approval.

[16] Mr. Stiff met with Mr. Foote at the outset of their investment management relationship. Mr. Foote was his client for these purposes. They discussed Mr. Foote's personal investment experience, risk tolerance and investment strategy as required in order to get to know his client. Mr. Stiff said that this would be one of his most important conversations with Mr. Foote as with any client. This resulted in client account agreements being entered into.<sup>5</sup>

[17] Mr. Foote's client account agreements with RJL specify that:

- (a) his personal Investment Objectives for the accounts are:
  - (i) 50% Growth ("My emphasis is on realizing capital gains through investments in securities including, but not limited to, equities."),
  - (ii) 50% Speculative ("My emphasis is on maximizing my total return potential through investments in securities including, but not limited to, speculative equities, options or high risk fixed income products. I may also engage in short term trading.");
- (b) his personal Risk Tolerance for the accounts is 50% Medium and 50% High;
- (c) his Primary Intended Use of the accounts is Capital Appreciation;
- (d) his level of Investment Knowledge was Sophisticated;

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<sup>4</sup> He also had an account for his registered investments which is not relevant to this appeal.

<sup>5</sup> Client account agreements are required to be renewed every two years. The 2012 versions were put in evidence. Mr. Stiff testified that those were unchanged in any material respect from those prepared at the outset of the relationship and those in force in 2009.

- (e) his Investment Experience with all 10 categories of listed investments was Extensive.

[18] This is consistent with his 2009 monthly RJL investment account statements which each set out on the face page: (i) his 50:50 Growth:Speculative Investment Objectives, and (ii) his 50:50 Medium:High Risk Tolerance.

[19] Mr. Stiff and Mr. Foote spoke typically two or three times a week about buying and selling thoughts and opportunities as well as markets and investments generally. Mr. Foote initiated about 60% of these calls. All of Mr. Foote's specific buying and selling instructions would have been relayed in such conversations. Specific buying and selling discussions were initiated by each of them about equally. Mr. Stiff would at least quickly review Mr. Foote's holdings in each account for each conversation. He would normally provide Mr. Foote with his advice related to Mr. Foote's planned purchases, sales and reinvestments. Mr. Stiff knew that Mr. Foote followed the markets beyond what he may have needed to as Co-Head of Institutional Trading.

[20] Mr. Foote acknowledged he gleaned information on the markets from his RJL work, even though he did not necessarily need to know it to do his job. In addition, he estimated he spent about 45 minutes daily reading and watching business and markets news.<sup>6</sup> He also follows market analysts and research.

[21] On Mr. Foote's January 2009 RJL statements, his<sup>7</sup> two investment accounts were holding cash and securities valued at approximately \$650,000. In January, Mr. Foote sold about \$100,000 of his holdings and left that amount as cash in the accounts. By the end of February 2009, the securities in the accounts had been fully liquidated and the accounts had a cash balance of about \$657,000.

[22] Mr. Foote explained that he converted his holdings to cash because a Royal Bank of Canada ("RBC") mortgage on their home was maturing in, he thought, April 2009 and he intended to pay it off instead of renewing it. No mortgage or mortgage renewal documents from, or correspondence with, RBC or any other financial institution were put in evidence. Mr. Foote appears not to have even consulted them in preparation for trial as he was not even certain the bullet payment/renewal was due in April. There was no evidence whether the mortgage proceeds had been originally used to buy the home or for investment or other purposes. Mr. Stiff testified clearly and consistently that he was not told by

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<sup>6</sup> This may have included some time in the sports pages.

<sup>7</sup> The accounts were joint with his then wife in 2009. However, the parties agree that the activity, gains and losses were all his.

Mr. Foote about any plans to pay off his mortgage with his liquidation proceeds until at least March 2009, by which time Mr. Foote had already renewed (or committed to renew) the mortgage and started his reinvestment program.

[23] Mr. Foote renewed his mortgage and reinvested in the markets because of a prevailing sense that the markets had bottomed out by early March. Mr. Foote said he came to this judgment along with Mr. Stiff and after talking to his wife. He said his investment strategy remained unchanged from prior years, that he was buying securities that had a good prospect of overall 30% returns within a reasonable and foreseeable period.

[24] The 2009 monthly statements for the investment accounts are in evidence and are accepted by the Respondent and the Court as accurate. Read in conjunction with the other evidence, these show, among other things:

- (a) Mr. Foote finished liquidating his investments on Friday, February 27, 2009 and began reinvesting his cash on Monday, March 2, 2009; by the end of March he was 70% invested in securities and 30% in cash, in contrast to being only about 40% invested in securities at the end of 2008.
- (b) Mr. Foote invested in securities of 34 issuers. He only reinvested in two of the issuers whose securities he had liquidated in January and February.
- (c) The average hold period for the securities of any issuer was about 50 days. In five cases he sold within the first week of buying them. In 10 cases, sales began within 30 days of purchase; in 20 cases, within 60 days. In at least one case, Open Text, he continued buying an issuer's securities after he started selling identical recently acquired shares. In at least one other, Addax Petroleum, he started selling the day after he bought, even before his purchase settled, and that, for a gain of less than 1%. The longest hold period was 274 days, less than nine months. The longest hold period in the U.S. account was less than 30 days.
- (d) Distributions or dividends of about \$18,000 were received.

- (e) There was a total of 38 purchase transactions investing about \$2,500,000 and 50 sale transactions generating about \$3,000,000.<sup>8</sup> For some issuers, the shares were not purchased at the same time and/or were sold at different times.
- (f) The gain on each issuer's securities averaged 30%. This ranged from losses of 4% to 21% on three issuers, to gains of 2% to 158% on the other 31 issuers.
- (g) Mr. Foote sold 21 of the 34 issuers for less than his target rate of 30% rate of return.
- (h) At the beginning of March 2009, the value of the investment accounts was \$657,000. At the end of December 2009, the value was \$725,000.
- (i) Most of the approximately \$550,000 gains from the 2009 investment activities had been withdrawn by the Appellant throughout the year. The reasons and purposes of such withdrawals are not in evidence.

[25] About one-third of the issuers were in industry sectors for which Mr. Foote was primarily responsible at RJL. This is consistent with him being responsible at RJL for sectors comprising about one-third of the market. His description of his investment strategy and activities was no different with respect to his investments in these sectors.

[26] Securities which Mr. Foote bought and sold in 2009 were a mix of blue chip and very blue chip dividend paying stock to moderate risk and high risk stock. Mr. Foote and Mr. Stiff both testified to this effect, though they did not always assign the same degree of risk to particular issuers. Mr. Foote did not say he dealt with his blue chip investments any differently than his moderate or high risk investments.

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<sup>8</sup> The statements accurately show each individual purchase and sale order as well as how many transactions it took with separate counterparties to fulfill the order. In contrast, CRA counted transactions by the number of T5008 information slips it received regarding Mr. Foote, which would have reflected the latter greater number, not the number of purchase and sale orders on Mr. Foote's accounts which I regard as the relevant number. While this caused much concern and confusion during the course of the hearing, in the end it was agreed that nothing turned on it as, on average in 2009 and the surrounding years for which I was given any information, it always averaged about three transactions with different counterparties to fulfill and complete a particular sale or purchase order. In other words, CRA's number of individual purchase and sale transactions would always have been about three times that of Mr. Foote's and RJL's. Mr. Foote only paid a single \$90 commission for each purchase and sale order regardless of how many counterparty transactions were needed and this is readily identified from the statements.



[27] I was not given detailed evidence regarding Mr. Foote's investments in prior years. His total gains on his investing activities in 2006, 2007 and 2008 were about \$5,000, \$10,000 and \$35,000 respectively.<sup>9</sup>

## The Law

[28] Both parties have put forward the same legal test to be applied in this case. They both refer to this Court's decision in *Rajchgot v. the Queen*, 2004 TCC 548 (affirmed by the Federal Court of Appeal). In that case, our former Chief Justice Rip drew largely on the Federal Court of Appeal decision in *The Queen v. Vancouver Art Metal Works Limited*, 93 DTC 5116.

[29] In *Rajchgot*, the test in a case such as this is clearly defined as whether or not the securities giving rise to the loss or gain were sustained or realized from a business or an adventure in the nature of trade.

[30] In *1338664 Ontario Limited v. The Queen*, 2008 TCC 350, Justice Woods wrote:

5 In general terms, the test for determining whether securities' transactions constitute a business is whether the taxpayer is engaged in a scheme for profit making or whether there is merely an enhancement of value: *Irrigation Industries Ltd. v. M.N.R.*, 62 DTC 1131 (SCC); *Hawa v. The Queen*, 2006 TCC 612, 2007 DTC 28.

[31] Similarly, in *Hawa v. The Queen*, 2006 TCC 612, former Chief Justice Bowman wrote:

13 Counsel referred to a number of cases including *Rajchgot et al. v. The Queen*, 2004 DTC 3090 (TCC) aff'd, 2005 DTC 5607 (FCA); *McGroarty v. The Queen*, 94 DTC 6276 and *Sandnes v. The Queen*, 2004 DTC 2466. All of these cases turn on their own facts and illustrate the importance of the factual underpinning that supports a finding that a person has crossed the line from investing to trading. Here the volume of trades, the rapidity of turnover and the appellant's own testimony that he was buying and selling shares to realize a profit indicate that the concerted activity of the appellant was clearly the carrying on of a business. It is worthwhile repeating what Lord Justice Clerk said in the Court of Exchequer (Scotland) in *Californian Copper Syndicate (Limited and Reduced) v. Harris*, (1904) 5 T.C. 159 at 165:

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<sup>9</sup> These numbers are from Schedule A to the reply which the Appellant reviewed in cross-examination. He did not express any concern with these numbers. His only concern was that he thought it was misleading for the last row in the table to show dispositions as a function of employment income instead of showing his gain on dispositions to his employment income.

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the *Income Tax Act* of 1842 assessable to Income Tax. But, it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being — Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

[32] Counsel for the Appellant also put forward this test as described by Professor Krishna in *Fundamentals of Canadian Income Tax*, 2014, as: “Was the taxpayer intending to trade (do business) or invest (hold property)?”

[33] In *Rajchgot*, above, former Chief Justice Rip continued:

16 The Federal Court of Appeal in *The Queen v. Vancouver Art Metal Works Limited*, set out helpful factors in determining whether a taxpayer has embarked upon a trading or dealing business:

I have no doubt that a taxpayer who makes it a profession or a business of buying and selling securities is a trader or a dealer in securities within the meaning of paragraph 39(5)(a) of the Act. As Cattanach, J. stated in *Palmer v. R.*, [1973] C.T.C. 323, “it is a badge of trade that a person who habitually does acts capable of producing profits is engaged in a trade or business.” It is, however, a question of fact to determine whether one’s activities amount to carrying on a trade or business. Each case will stand on its own set of facts. Obviously, factors such as the frequency of the transactions, the duration of the holdings (whether, for instance, it is for a quick profit or a long term investment), the intention to acquire for resale at a profit, the nature and quantity of the

securities held or made the subject matter of the transaction, the time spent on the activity, are all relevant and helpful factors in determining whether one has embarked upon a trading or dealing business.

17 The critical factor in determining whether a taxpayer's acquisition of a property is for the purpose of investment or business is the intention of the taxpayer at the time of the acquisition of the property. Intention is to be ascertained from the appellant's whole course of conduct.

18 To find that Mr. Rajchgot (and his wife) were traders or the purchases and sales of the shares were adventures in nature of trade I have to determine Mr. Rajchgot's intention when he acquired the shares in light of his conduct. The parties agree that Ms. Lacey's intention was that of her husband. In determining Mr. Rajchgot's intention, factors such as the frequency of the transactions, the duration of the holdings (whether, for instance, it is for a quick profit or a long term investment), the nature and quantity of the securities held or made, the subject matter of the transaction, whether the securities are heavily financed, the time spent on the activity, motive and the particular knowledge he possessed all have to be taken into consideration. It is not the lack or presence of one or more factors that will determine whether a transaction is on capital or income account; it is the combined force of all of the factors that is important. There is no magic formula to determine which factors are more or less important. Some factors complement each other. Each case is different. A judge must balance all the factors. In the appeals at bar the following factors, at least must be reviewed: . . .

He went on to consider the facts and analyze the issue of intention under the following headings:

- a) Frequency of the Transactions
- b) The Duration of the Holdings
- c) The Nature and Quantity of the Securities Held
- d) The Time Spent on the Activity
- e) Financing
- f) Particular Knowledge He Possessed

[34] Both parties' submissions largely followed these headings. The Appellant added a heading for "Consistent Reporting", which has been considered in other cases. The Respondent added the heading "Intention to Acquire for Resale at a Profit (Motive)", which is listed as a consideration in *Vancouver Art Metal Works*, above, and is identified as critical in *Rajchgot*, above, as well as by Krishna.

[35] In support of the Respondent's alternative argument, that even if Mr. Foote intended to acquire any of the securities as capital investments he also had a sufficient secondary intention to trade them as part of an adventure in the nature of

trade, reference is made to the following passage from Justice Nadon in *Canada Safeway Limited v. Canada*, 2008 FCA 24:

61 A number of principles emerge from these decisions which I believe can be summarized as follows. First, the boundary between income and capital gains cannot easily be drawn and, as a consequence, consideration of various factors, including the taxpayer's intent at the time of acquiring the property at issue, becomes necessary for a proper determination. Second, for the transaction to constitute an adventure in the nature of trade, the possibility of resale, as an operating motivation for the purchase, must have been in the mind of the taxpayer. In order to make that determination, inferences will have to be drawn from all of the circumstances. In other words, the taxpayer's whole course of conduct has to be assessed. Third, with respect to "secondary intention", it also must also have existed at the time of acquisition of the property and it must have been an operating motivation in the acquisition of the property. Fourth, the fact that the taxpayer contemplated the possibility of resale of his or her property is not, in itself, sufficient to conclude in the existence of an adventure in the nature of trade. In *Principles of Canadian Income Tax Law, supra*, the learned authors, in discussing the applicable test in relation to the existence of a "secondary intention", opine that "the secondary intention doctrine will not be satisfied unless the prospect of resale at a profit was an important consideration in the decision to acquire the property" (see page 337). I agree entirely with that proposition. Fifth, the *viva voce* evidence of the taxpayer with respect to his or her intention is not conclusive and has to be tested in the light of all the surrounding circumstances.

### **Credibility and Findings**

[36] A taxpayer's intention is subjective and a taxpayer's testimony is, not surprisingly, largely if not completely self-serving. The extent to which a taxpayer is considered credible and the extent to which their evidence is corroborated are very relevant considerations in circumstances where the Court is required to determine the intention for a taxpayer doing something.

[37] I do not accept Mr. Foote's rejection of his personal investment experience, risk tolerance and strategies as recorded on his RJL investment account agreements and statements. I accept instead Mr. Stiff's version of how those documents are generally completed and how they would have been completed in Mr. Foote's case. These client account agreements and statements are the only evidence other than his own testimony about his stock trading experience and objectives and he tried to brush them off insouciantly. I was not shown account statements of any prior years. The account agreements and statements provide relevant evidence on key questions to be considered in this appeal. Mr. Foote would have the Court believe that the new client agreements were always prepared in order to protect investment managers and brokerage firms from their clients. He stated that in his

case these did not at all reflect his personal experience with investments, his investment strategy or his risk tolerance. I am certain that his cringeworthy version would significantly disappoint both RJL and the regulators. He also said he would have signed the account agreements and forgotten them; this would be inconsistent with them being renewed at least every two years and with the key information being set out prominently on the face page of each month's statement for each account. I am not satisfied that these documents do not generally describe Mr. Foote's personal investment experience, risk tolerance and strategies as well as can be done with assigning percentages to words and phrases and creating pie charts, etc. I conclude that they do.

[38] This has the further effect of harming the credibility and weight to be given to his other evidence on key points that may not be consistent or corroborated. This is in addition to my concerns about his credibility when he proved very difficult and argumentative when asked to confirm the data or the other evidence. For example, he declared some data as absolutely false when his only concern was that he did not like what the data was used to demonstrate in the table. He was very intentionally evasive and difficult about clear statements in a letter from his accountant.

[39] I am also not satisfied on a balance of probabilities about his mortgage paydown plans for April 2009. Neither his then wife nor anyone from RBC testified to corroborate this, nor were any RBC documents showing when he committed to renew the mortgage put in evidence. These could have been produced in support of this key aspect of his position at the hearing and were not. Even Mr. Stiff, who would have seen significant growth in Mr. Foote's cash position in his RJL accounts in January and February 2009, and who would have been receiving his sale orders without corresponding purchase orders, and who said he would have been reviewing Mr. Foote's accounts' positions in connection with each conversation with Mr. Foote, was not told by Mr. Foote of his mortgage payoff plan until after it was no longer his plan. That is very odd. Further, I note Mr. Foote's employment income had dropped by more than 50% in 2008 and was dropping another 25% through 2009. Finally, I remain troubled by him selling off as part of a liquidation right up to Friday, February 27, 2009 and beginning his new reinvestment program on Monday, March 2, 2009; that would have been a memorable weekend, but it was not described.

[40] I am also unable to conclude on a balance of probabilities that Mr. Foote's 2009 investment strategy was unchanged from prior years because I was given very limited evidence from other years from which this could be expected to be readily corroborated. At the very least, by some point well before the closing

months of 2009, I conclude that the time horizon for his 30% overall target return was considerably shorter than say the 2.5-year example of his expected comparable horizon before 2009. He continued buying right through December 2009, long after he sold multiple positions after very short holds. Surely by some point in the first part of his 2009 reinvestment activities, he realized that he was picking securities for the quickest target cumulative return. He also would have realized that distributions were no longer going to contribute to his 30% target return. His 2009 transactions tripled relative to prior years. His 2010 transactions remained at about the same level even though 2009's historic returns were no longer the markets' performance.

[41] There was no explanation as to why Mr. Foote should be selling his Open Text stock before he finished buying more given his stated investment strategy. These were not short sales. He bought, then sold some the following month, then bought some more the following week, then sold them all three days later. He said in examination-in-chief that when he bought Open Text he believed that long term he could achieve his desired 30% return.

[42] I conclude from all of the evidence that, at the time of his 2009 securities purchases, Mr. Foote intended to sell them as soon as he could realize a reasonable gain in prevailing markets, and that he expected that to be a very short time frame in the circumstances.

[43] The combined result of not being able to conclude (i) that his investment strategy was unchanged in 2009 or (ii) that he liquidated in early 2009 in order to pay off his mortgage, and not having been given detailed evidence regarding prior years, is that I am left largely considering only the actual activity in his accounts in 2009.

[44] I also do not accept that Mr. Foote's expertise and experience did not extend to what he regarded as actual trading activities, as compared with his facilitator/matchmaker/pairing role as Co-Head of Institutional Trading, since he spent 15 years at RBC Dominion Securities and I was not told anything at all about what he did there. One can guess he might well have risen very nicely through the ranks at RBC Dominion Securities since he became Head of Institutional Trading at CIBC World Markets when he left. One might reasonably infer he had some considerable and successful trading experience by the end of his 15 years there.

[45] Even his underlying explanation that, as Co-Head of Institutional Trading, he was not really trading is overly facile. He explained that he was a facilitator of trades and he does not manage money. He explained that he is only actually trading

on a day-to-day basis as a head of Institutional Trading because he presses the cross button. That is like saying the real estate broker is different from the real estate agent who is different from the mortgage broker or the law clerk at the registry office or logged on to the registry website. The fact is he earned his living all through his professional career at firms who earned much of their income from trading in securities for their clients' account and for their own account. He was a key officer in an integral department in those businesses. He was not their vice-president of human resources or information technology. He was head of Institutional Trading. All of the traders in Institutional Trading were supervised by him. All of this makes Mr. Foote, in common parlance and as generally described in the markets in which he works as described by both Mr. Stiff and himself, a trader.

[46] While Mr. Foote's securities trading activities in 2009 may arguably not have risen to the level of him carrying on a business of trading securities, they appear to handily meet all of the requirements to have been considered an adventure or concern in the nature of trade which, under the definition of "business" in section 248 of the *Income Tax Act*, makes the gains income gains.

[47] I find that throughout the last 10 months of 2009, actively trading securities profitably for gain was Mr. Foote's primary intention with respect to all of the purchases in his investment accounts (other than those to close out his short sales). If I am wrong in this regard, it was at least a secondary intention of his that significantly motivated his purchases.

[48] Mr. Foote's lengthy, significant and successful professional career in prominent brokerage firms is a relevant consideration in this case. I wholly accept that it must be reasonably possible for a securities trader or for a senior officer of a brokerage firm to realize gains generated by buying and selling securities on capital not income account. However, Mr. Foote has been unable to satisfy me that, on the facts in evidence, his is such a case. He is not being treated differently or singled out because his investments were in securities. An antique dealer, or a senior management employee of one, or of a numismatic or philatelic dealer, a vintage car collector, a real estate broker, or an auctioneer in comparable circumstances could reasonably expect a similar result.

[49] It is not a full answer that he was not trading on specific insider-type information and that his buying and selling decisions were based on information that any member of the public with enough time, diligence, access, resources and effort might also have been able to compile.

## Conclusion

[50] Having regard to the evidence relating to all of these considerations and my findings above, I conclude that Mr. Foote was trading in the securities as a business activity, or at least was buying and selling the securities as part of an adventure in the nature of trade. The key considerations in this case in arriving at that decision are:

1. I have already found his primary intention when purchasing the securities to be to sell them at a profit as soon as a reasonable return in the then market circumstances could be realized. In so doing, I expressly did not accept his testimony about his intention.
2. Mr. Foote spent considerable time each day monitoring markets beyond what he said was required for his employment. In addition, he gleaned relevant market information as part of his daily job as Head of Institutional Trading at a major investment dealer. This also gave him well beyond average access to market information that is public, and he availed himself of that access and information.
3. The nature of the gains realized by Mr. Foote buying and selling securities in his investment accounts bears a close similarity to what he has been doing in his investment dealer positions for decades. He has developed considerable expertise and accumulated considerable knowledge at this.
4. Mr. Foote was buying and selling regularly throughout the year.
5. Mr. Foote's holding periods were clearly short and often very, very short.

[51] The appeal is dismissed, with costs.

Signed at Ottawa, Canada, this 21st day of April 2017.

“Patrick Boyle”

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Boyle J.



CITATION: 2017 TCC 61

COURT FILE NO.: 2014-3394(IT)G

STYLE OF CAUSE: ANDREW FOOTE v. THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: August 25 and 26, 2016

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: April 21, 2017

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