

Docket: 2007-755(IT)I

BETWEEN:

YVON THIBAUT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal Heard on August 22, 2007, at Montréal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Chantal Roberge

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**JUDGMENT**

The appeal from the assessment under the *Income Tax Act* for the 2003 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 30th day of August, 2007.

“Lucie Lamarre”

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Lamarre J.

Citation: 2007TCC515  
Date: 20070830  
Docket: 2007-755(IT)1

BETWEEN:

YVON THIBAUT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Lamarre J.

[1] The Appellant contested the assessment made by the Minister of National Revenue (the “Minister”) for the 2003 taxation year, by which the Minister refused to consider the profit of \$139,935 realized by the Appellant through stock market transactions as a capital gain. The Minister instead considered this profit as business income. Accordingly, the carrying over of a capital loss for the same amount for a previous year (1995) was refused. The Minister also imposed a penalty under subsection 163(2) of the *Income Tax Act* (the Act), on the portion of the profit that had not been included by the Appellant in his tax return, given that the Appellant had considered this profit as a capital gain (on 50% of \$139,935).

[2] At the objection stage, the Appellant only objected to the penalty (Exhibit I-1, tab 1). Before this Court, the Appellant also contested the qualification of the profit as business profit. He argued that it is in fact a capital gain, against which he claimed the application of the capital loss incurred in 1995.

[3] The Appellant is an agronomist who has worked at Maple Leaf for 32 years. Since 2000, he has been vice-president of a division of this company: (“Shur-Gain Quebec”). All the administrators of this division in Quebec report to him for

everything having to do with administration, production, sales and everything relating to the company's business plan. In 2002 and 2004, he received yearly remuneration varying from \$210,000 to \$240,000.

[4] The Appellant has been personally investing in securities Since 1986. He claims to be self-taught in this area and has taken a liking to it over the years, to the point of investing a large portion of his time in it. From 1987 to 1997, he suffered losses from these stock transactions totalling \$738,550. He claimed these losses as losses other than capital losses against his other income. He had been reassessed a first time in 1989 for the 1987 taxation year and was able to convince the Minister that the losses were not capital losses. In light of the repeated losses, he was reassessed in 1999 for the 1995, 1996 and 1997 taxation years. At that time, the Minister considered that the Appellant had not demonstrated that he had a reasonable hope of profit and considered the losses as capital losses. The Appellant objected on May 25, 2000, and an agreement was signed, under which the Appellant accepted to consider the loss incurred in 1995 as a capital loss and the Minister accepted to consider the losses from 1996 and 1997 as losses other than capital losses (Exhibit I-1, tab 7). It appears that the Minister came to agree with the Appellant's argument for 1996 and 1997, i.e. that the losses incurred in those years were not capital losses because the Appellant had made a profit on his stock transactions in 1998 and 1999 and declared them as business profit in his tax returns.

[5] Paradoxically, following the agreement of May 25, 2000, the Appellant wrote to the Canada Revenue Agency (the "CRA") on August 3, 2000, asking that the profit that he had reported as business income in 1998 and 1999 be considered a capital gain so that he could absorb the capital loss from 1995.

[6] On March 20, 2001, the CRA responded to the Appellant that it had accepted to consider the losses of 1996 and 1997 as non-capital losses specifically because the Appellant had declared a business profit in 1998 and 1999. It was therefore out of the question to consider the profit realized in 1998 and 1999 anything other than business income.

[7] The profit was \$78,372 in 1998 and \$84,023 in 1999.

[8] In 2000, 2001 and 2002, the Appellant again incurred losses, totalling \$495,833, which he claimed as non-capital losses against his other income. In 2003,

the Appellant realized a profit of \$139,935 and decided to declare it as a capital gain in order to absorb his capital loss from 1995. In 2004, the Appellant again incurred a loss of \$152,534, which he deducted as a non-capital loss.

[9] It is the profit of \$139,135 realized in 2003 that the Minister considers as business income and which is at issue before me. Given the case history, the Minister argued that the Appellant was trying to take advantage by declaring this profit as a capital gain taxed at 50% when he had always declared his losses as non-capital losses deductible at 100% against any other income (a capital loss only being deductible at 50% and only against a capital gain). Given the Appellant's attitude, the Minister considered that in 2003, the Appellant had knowingly, or in circumstances tantamount to gross negligence, made a false statement in his tax return by declaring a capital gain that he cancelled out with a capital loss suffered in 1995. He therefore applied the penalty imposed under subsection 163(2) of the Act to the non-taxable portion of the capital gain carried over by the Appellant (on 50% of \$139,935).

[10] In my opinion, the Minister did not err in reassessing the Appellant as he did. For one, the Appellant considered himself as operating a business in the field of buying and selling shares since 1986, as he himself indicated in a letter that he attached to all of his tax returns except for that of 2003. Also, he had registered with the office of the Prothonotary for the district of Longueuil, on January 13, 1989, as doing business in the field of stock transactions as of January 1, 1989. The question of whether the Appellant really operated a business has already been argued twice with the Minister, and, with the exception of 1995, the Minister accepted the position that the Appellant operated a business. This position was finally accepted by the Minister given the significant number and the high value of the stock transactions made by the Appellant over the years. Moreover, the Appellant had submitted that he invested on margin, in highly speculative stocks, and that the holding period was very short (approximately 2 to 37 days). Since the Appellant had shown profits in 1998 and 1999, the Minister accepted that the Appellant traded securities with the reasonable hope of making a profit in 1996 and 1997. From this, the Minister concluded that the Appellant had operated a business during those years.

[11] After that, the Appellant again incurred losses and the Minister remained consistent with his previous decision by accepting these losses as non-capital losses.

[12] The same cannot be said of the Appellant who, as soon as he had obtained the settlement for 1995-1997, made an about-face and asked that the profit realized

in 1998 and 1999 be considered as a capital gain, when he had successfully argued a few months previously that he had operated a business during those years. In 2003, he repeated the same scenario. He explained to the Court that it was what he had understood of the previous settlement, i.e. that as soon as he would make a profit, he could declare it as a capital gain in order to absorb his capital loss from 1995.

[13] In 2004, the Appellant again claimed to operate a business when he suffered a loss.

[14] The Appellant is too intelligent to know that he cannot hedge his bets like this. He made his bed and acted like someone who operated a securities trading business. The Minister accepted this position in the end. The Appellant has not convinced me that he changed his way of doing things in 2003. If there was any change, it was that he performed a greater number of transactions in 2003. In my opinion, he is in no position now argue that he had converted his business into a simple investment in 2003, and then argue that he again operated a business in 2004.

[15] As for the penalty, in my opinion, it is justified. The Appellant took advantage of his losses over the years to reduce the tax burden on his other income. When he made profits, he claimed not to be in business. He said that he had understood from the settlement of 2000 that he could consider profit from a subsequent year as a capital gain in order to absorb the loss from 1995. Even if that is what he had understood, he had also applied to convert his business income from 1998 and 1999 into capital gains. The Minister clearly indicated to him that this was not possible. The Appellant cannot claim again in 2003 that he misinterpreted the settlement signed in 2000. He clearly stated that he had declared a capital gain in order to nullify it by applying the capital loss. As mentioned above, the Appellant cannot hedge his bets. He knew that he met the majority of the criteria to be considered as operating a business, all the more so since when he changed his way of doing things in 2003, it was only in order to increase the number of transactions during the last months of the year.

[16] The Appellant could not be ignorant of the fact that the profit realized was a business profit.

[17] I believe the Minister has demonstrated that the Appellant knowingly, or in circumstances tantamount to gross negligence, made a false statement by declaring his profit as a capital gain in 2003.

[18] The appeal is dismissed.

Signed at Ottawa, Canada, this 30th day of August, 2007.

“Lucie Lamarre”

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Lamarre J.

CITATION: 2007TCC515  
COURT FILE NUMBER: 2007-755 (IT)1  
STYLE OF CAUSE: YVON THIBAULT AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: August 22, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: August 30, 2007

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Chantal Roberge

COUNSEL OF RECORD:

For:

Name:

Firm:

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