

Docket: 2006-2110(IT)I

BETWEEN:

VIRGILIU GAGEA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on August 27, 2007, at Toronto, Ontario

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Justin Kutyan

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2000 and 2001 taxation years are dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Toronto, Ontario, this 16th day of October 2007.

“L.M. Little”

Little J.

Citation: 2007TCC620
Date: 20071016
Docket: 2006-2110(IT)I

BETWEEN:

VIRGILIU GAGEA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. Facts

[1] In the 2000 and 2001 taxation years, the Appellant was employed as a commission salesperson by Westminster Securities Ltd. (“Westminster”) Chartwell Securities (“Chartwell”) and BMO Nesbitt Burns (“Nesbitt”).

[2] The Appellant reported the following income:

2000 Taxation Year

	<u>Employment Income</u>	<u>(Commissions)</u>
Westminster	\$3,915.68	\$3,915.68
Chartwell	\$29,630.41	\$21,216.64

2001 Taxation Year

	<u>Employment Income</u>	<u>(Commissions)</u>
Westminster	\$3,256.72	\$3,256.72
Nesbitt	\$30,591.48	\$30,591.48

[3] The Appellant said that in September 2000 while acting as a financial advisor with Westminster he handled the purchase of 300 shares of American Telephone and Telegraph (“AT&T”) for a customer by the name of Peter Nabokow.

[4] The Appellant said that Mr. Nabokow provided the Appellant with a cheque for the 300 AT&T shares and the cheque was returned by the bank with an NSF (Not Sufficient Funds) stamp. The Appellant also said that Mr. Nabokow provided a second cheque which was also returned with an NSF stamp.

[5] The Appellant said that the Sales Manager at Westminster forced him to cover the loss suffered on the AT&T share transaction and the 300 shares of AT&T that Mr. Nabokow had purchased were transferred by the Sales Manager to the Appellant’s personal account.

[6] In April 2001, the Appellant sold the 300 shares of AT&T and suffered a loss of \$3,317.00 (U.S. funds) or approximately \$6,000.00 in Canadian funds

[7] The Appellant said that he did not claim the loss when he filed his income tax return for the 2001 taxation year. However, the Appellant said that he discussed the loss with the auditor from the Canada Revenue Agency when he was audited. The Appellant said that the auditor told him that he could not deduct the loss suffered re. the 300 AT&T shares.

B. Issue

[8] The issue is whether the Appellant can deduct the loss of \$6,000.00 suffered by him on the sale of 300 shares of AT&T in determining his income for the 2001 taxation year.

C. Analysis

[9] As noted above, the Appellant was an employee of Westminster. As an employee the Appellant was restricted to the deductions allowed by subsection 8(1) of the *Income Tax Act* (the "Act").

[10] In my opinion the Appellant is not allowed to deduct the loss of \$6,000.00 suffered by him on the sale of the 300 AT&T shares pursuant to the provisions contained in subsection 8(1) of the *Act*. In support of my conclusion, I refer to the decision of the Supreme Court of Canada in *Gifford v. The Queen et al.*, 2004 DTC 6120.

[11] In *Gifford*, the Supreme Court was dealing with the deductions that might be claimed by financial advisors of an investment company (Midland Walwyn Capital Inc.). In the *Gifford* case Justice Major speaking for the Court said:

11 Before turning to the specific issues raised by this appeal, it is useful to review the general scheme for allowing deductions under the Act. The appellant taxpayer here earned income from employment and under the Act could only make deductions, as a result of s. 8(2), if the deduction was expressly allowed under s. 8.

12 If an employee meets the requirements of s. 8(1)(f)(i) to (iv), he is then allowed to deduct any expense made for the purpose of "earning the income from the employment". If the expense is a payment "on account of capital", s. 8(1)(f)(v) removes it from the scope of expenses that can be deducted.

13 When the source of income is a business or property as opposed to employment, the scope of available deductions is much broader because s. 9 states that the taxpayer's income will be the profit from the business or property. In calculating the profit from a business or property a taxpayer can make deductions in accordance with generally accepted accounting principles unless precluded by some other section of the Act. Sections 18(1)(a) and (b) are similar to the portions of s. 8(1)(f) that act as general limits on what can be deducted. Section 18(1)(a) states that only those expenses incurred for the purpose of gaining or producing income from a business or property can be deducted, and s. 18(1)(b) uses similar language as s. 8(1)(f)(v) to, among other things, preclude deductions of payments "on account of capital".

14 While the general rules are similar, the exceptions create differences in the ability of taxpayers who earn their income from employment as opposed to from business or property to claim deductions in what appear to be similar circumstances.

15 If an employee otherwise meets the requirements of s. 8(1)(f) but is prohibited from making a deduction because the expense is a payment "on account of capital" within s. 8(1)(f)(v), the only exception provided by the Act is s. 8(1)(j). This section allows for the deduction of payments on account of capital where the item purchased is either a motor vehicle or an aircraft in a manner similar to the capital cost allowance deduction under s. 20(1)(a) discussed below. The employee taxpayer is also allowed to deduct the interest paid on money borrowed to purchase either of these items.

16 In contrast, a taxpayer earning income from business or property may be able to deduct expenses that fall within s. 18(1)(b) pursuant to a number of exceptions in the Act. Two of the more common exceptions are in s. 20(1)(a) and (b). Section 20(1)(a) allows a portion of the capital cost of certain property to be deducted from this income, if the regulations provide for a capital cost allowance in relation to that type of property. Section 20(1)(b) provides a similar deduction for expenditures to purchase certain intangible capital assets, such as goodwill. Section 20(1)(c) is a specific provision that allows interest to be deducted when it is paid on money borrowed for certain purposes.

17 That employees are treated differently than taxpayers earning income from business or property under the Act is not novel nor readily seen as fair. It has resulted in significant litigation when taxpayers attempted, with limited success, to cast themselves as independent business owners as opposed to employees to attempt to get the advantage of the more favourable deductions.

[12] Since the Appellant was an employee of Westminster engaged as a commercial salesperson selling securities to the public, he is limited to the deductions allowed by subsection 8(1) of the *Act*. In my opinion the loss suffered by the Appellant with respect to the sale of 300 shares of AT&T is not deductible by subsection 8(1) of the *Act*.

[13] Based on an analysis of the facts presented by the Appellant in Court it would appear that he should be able to claim a capital loss in connection with the loss suffered by him on the sale of the 300 shares of AT&T.

[14] The appeals are dismissed without costs.

Signed at Toronto, Ontario, this 16th day of October 2007.

“L.M. Little”

Little J.

CITATION: 2007TCC620

COURT FILE NO.: 2006-2110(IT)I

STYLE OF CAUSE: Virgiliu Gagea
and Her Majesty the Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 27, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: October 16, 2007

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Justin Kutyan

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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