Docket: 2004-3402(IT)G

BETWEEN:

MARIE-FRANCE ROULEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

---

Appeal heard on common evidence with the appeal of *Richard Diotte* (2004-3395(IT)G), on May 31, 2007, at Quebec City, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Louis Sirois

Counsel for the Respondent: Martin Gentile

---

**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* for the 1999 taxation year is allowed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 9th day of May 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 28th day of November 2008.

Erich Klein, Revisor

Docket: 2004-3395(IT)G

BETWEEN:

RICHARD DIOTTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

---

Appeal heard on common evidence with the appeal of *Marie-France Rouleau* (2004-3402(IT)G), on May 31, 2007, at Quebec City, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Louis Sirois

Counsel for the Respondent: Martin Gentile

---

**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* for the 1999 and 2000 taxation years is allowed, with costs to the Respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 9th day of May 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 28th day of November 2008.

Erich Klein, Revisor

Citation: 2008TCC244
Date: 20080509
Dockets: 2004-3395(IT)G
2004-3402(IT)G

BETWEEN:

RICHARD DIOTTE,
MARIE-FRANCE ROULEAU,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

## REASONS FOR JUDGMENT

Tardif J.

[1] These are appeals from assessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("the Act") for both Appellants' 1999 taxation year, and for Appellant Richard Diotte's 2000 taxation year.

[2] In assessing Marie-France Rouleau, the Minister of National Revenue ("the Minister") added a shareholder benefit to her income under subsection 15(1) of the Act.

[3] In assessing Richard Diotte, the Minister added a shareholder benefit to his income under subsection 15(1) of the Act, disallowed two capital losses that he had claimed, and determined that a capital gain was business income.

[4] The appeals were heard on common evidence.

SUMMARY OF THE FACTS

[5] The Appellant Marie-France Rouleau and her spouse, the Appellant Richard Diotte, hold 40% and 60% respectively of the shares of Profilec Inc. ("Profilec"). In addition, the Appellant Mr. Diotte is the sole shareholder of Alliance Stratégique Inc. ("Alliance").

[6] Mr. Diotte worked as a registered securities representative from 1981 to 1995, when he gave up his licence and took employment in the private sector, where he worked until 2007. From 1995 to 1997, the Appellant was the president of a public corporation listed on the TSX stock exchange.

[7] Profilec and Alliance are corporations engaged in developing businesses, including the preparation of business plans. In addition, they help businesses in the areas of human resources evaluation, financial recovery and securing capital, and advise them on how to go about making a public offering or getting listed on a stock exchange.

[8] Profilec's fiscal year-end is January 31.

[9] Mr. Diotte and Profilec were involved in drawing up the business plan of Novamex USA Ltd. ("Novamex"), an American corporation, and helped it register with the Pink Sheets public securities market.

*Facts related to shareholder status*

[10] On January 29, 1999, Ms. Rouleau transferred 65,591 of her common shares in Novamex to Profilec in consideration of $98,871 in total, which corresponds to $1.51 (US$1) per share.

[11] On the same day, Mr. Diotte transferred 154,656 of his Novamex common shares to Profilec for a total consideration of $233,128, which also corresponds to $1.51 (US$1) per share.

[12] On February 1, 1999, Mr. Diotte made a second transfer, of 169,200 Novamex common shares, to Profilec for a total consideration of $255,299, which corresponds to $1.51 (US$1) per share.

[13] The share transfers to Profilec were all in repayment of advances made by that corporation to the Appellants.

[14] The Minister disputes the value that the Appellants attributed to the shares at the time of the transfer to Profilec; he submits that the transfer resulted in a shareholder benefit. A reassessment in this regard was issued on January 2, 2003, for the Appellants' 1999 taxation year.

*Facts related to the nature of the gains*

[15] In the course of the 1999 taxation year, Mr. Diotte reported capital gains of $53,947 from the disposition of shares of Medcomsoft Ltd. ("Medcomsoft"), and $410,888 from the disposition of shares of Novamex. In the course of the 2000 taxation year, Mr. Diotte reported a capital gain of $1,155,156 from the sale of Medcomsoft shares.

[16] The Minister disputes Mr. Diotte's characterization of the gains from these dispositions. Consequently, on January 2, 2003, he assessed Mr. Diotte for the 1999 and 2000 taxation years on the basis that the income was business income.

*Facts related to the loans*

[17] Mr. Diotte asserts that he lent $96,905 to Novamex, and that he accordingly claimed a capital loss equal to the loan principal in his income tax return for the 2000 taxation year as the loan had become a bad debt.

[18] In December 2000, Mr. Diotte lent $23,000 to a lawyer that he had retained with respect to various matters. At the precise moment of the loan, the parties had not come to an agreement on the terms and conditions governing interest and repayment.

[19] Having been unable to collect the debts, Mr. Diotte instituted a court action on May 30, 2001. In a settlement under which he received $16,500, Mr. Diotte dropped his action on April 26, 2002.

[20] The Minister disallowed the capital losses in question claimed by Mr. Diotte. He assessed Mr. Diotte accordingly for the 2000 taxation year on January 2, 2003.

ISSUES

[21] Did Profilec, a corporation of which the Appellant Ms. Rouleau is a shareholder, confer upon her an $85,753 benefit that must be included in her income for the 1999 taxation year under subsection 15(1) of the Act?

[22] Did Profilec, a corporation of which the Appellant Mr. Diotte is a shareholder, confer upon him a $423,656 benefit that must be included in his income for the 1999 taxation year under subsection 15(1) of the Act?

[23] Should the gains realized by the Appellant Mr. Diotte upon the disposition of the shares in Novamex and Medcomsoft in 1999 and 2000 be taxed as capital gains or business income?

[24] Do the loans made to Novamex, and to the lawyer Mr. Gosselin, give rise to deductible capital losses for the Appellant Mr. Diotte under paragraphs 38(*b*) and 39(1)(*b*) of the Act?

*Mr. Diotte's expert status*

[25] At the beginning of the hearing, the Appellant Mr. Diotte asked the Court to recognize him as an expert witness in his own appeal in order better to challenge the findings submitted by the Respondent's expert regarding the value of the Novamex shares.

[26] The Minister objected to Mr. Diotte's being so recognized. The Court immediately denied Mr. Diotte's request to be recognized as an expert in his own appeal and that of his spouse. An expert's role is to assist the Court where the matter involves a specific issue that falls outside the Court's general or specific knowledge.

[27] With respect to this question, Cresswell J. in *The Ikarian Reefer, National Justice Compania S.A. v. Prudential Co. Ltd.*, [1993] 2 Lloyds Rep. 68 (Q.B. Div.), enunciated ten rules with respect to the duties and responsibilities of an expert witness.

[28] Recently, the Ontario Superior Court of Justice, in *R. v. Inco Ltd.* (2006), 80 O.R. (3d) 594, [2006] O.J. No. 1809, restated some of these rules; among those relevant to the instant case are the following:

> Expert evidence presented to the court should be, and should be seen to be,

> the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> An expert should provide independent assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume a role of advocate.

In the case at bar, it is unreasonable to believe that the Appellant Mr. Diotte could have offered an entirely objective opinion uninfluenced by his personal interest. Given his interest in the matter, he definitely could not have provided the objectivity essential to expert status.

MR. DIOTTE'S SUBMISSIONS

[29] The Appellant Mr. Diotte submits that his January 1999 valuation of the Novamex shares was in keeping with generally accepted principles because it took into account not only the financial elements, but also the prospects of the company as well.

[30] He submits that the asset value approach used by the Canada Revenue Agency (CRA) did not allow one to arrive at the true market value of Novamex under the circumstances.

[31] The Appellants submit that the fair market value of the shares at that time was US$1 per share, and that the transfer transaction with Profilec was done at fair market value; in other words, Profilec did not confer a benefit on the Appellants.

[32] To support and validate their submissions, the Appellants noted that Profilec subsequently assigned the Novamex shares it acquired in January 1999 to an unrelated third party for an amount greater than US$1.

[33] The Appellant Mr. Diotte also argues that he is entitled to claim a capital loss as a result of the settlement, for $1, of a $96,905 debt that he was owed by Novamex.

[34] In addition, Mr. Diotte submits that he is entitled to claim a capital loss on a $23,000 loan made to a lawyer in December 2000 because the loan became a bad debt.

[35] Mr. Diotte argues that, in the past, the Minister had always accepted the characterization of the losses on Novamex and Medcomsoft shares as capital losses, and that the gains should thus be treated the same as the losses.

[36] Mr. Diotte submits that the Minister generally considers gains realized by an individual who invests in securities listed on a stock exchange to be capital gains, except if the person concerned is ordinarily engaged in such trading, in other words, where it is an ordinary source of income that can be considered a commercial activity.

[37] Mr. Diotte emphasizes that he ceased to be a broker in 1995; he argues that the fact that the transactions took place during the 1999 and 2000 taxation years, and involved almost exclusively securities of Novamex and Medcomsoft, validates the fact that he was no longer a broker, and thus, that the transactions in question were isolated in nature rather than ongoing.

[38] By way of an explanation of the context of the transactions, Mr. Diotte claimed that he sold his Novamex shares following a disagreement with the management of the company, and that, with regard to Medcomsoft, he simply reduced his holdings in the business.

[39] Mr. Diotte also stated that he occasionally receives shares of companies in consideration of professional services.

[40] Mr. Diotte submits that it was warranted and appropriate, under these circumstances, to treat the gains resulting from the dispositions of the Novamex and Medcomsoft shares during the 1999 and 2000 taxation years as capital gains.

THE RESPONDENT'S SUBMISSIONS

[41] The Respondent submits that Mr. Diotte's valuation of the Novamex shares does not reflect the fair market value of the business in January 1999. The Minister submits that the fair market value of the Novamex shares at that time was not $1.51 (US$1) per share as the Appellants claim, but, rather, $0.20 per share.

[42] The Minister, assuming that the transfer of the Novamex shares to Profilec was a repayment of advances that Profilec had made to the Appellants, was of the view that the Appellants received a shareholder benefit from Profilec.

[43] The Minister submits that this benefit is equal to the difference between the value of the advances repaid and the fair market value of the shares at the time of the transfer. The Minister submits that he properly assessed Ms. Rouleau for $85,753, and Mr. Diotte for $423,656.

[44] Furthermore, the Minister submits that neither the loan that Mr. Diotte made to Novamex, nor the loan that he made to the lawyer, entitles him to a capital loss.

[45] In support of this position, the Minister relies on the fact that the Appellant provided no evidence that he lent $96,605 to Novamex, or even that the loan was made for the purpose of gaining or producing income.

[46] As for the $23,000 lent to the lawyer, the loan did not include any terms as to interest, and, in fact, the debt was not established to have become a bad debt in the course of the 2000 taxation year, within the meaning of paragraph 50(1)(*a*) of the Act.

[47] Moreover, after commencing an action in May 2001, Mr. Diotte managed to collect $16,500 of the principal initially lent. These loans were not made for the purpose of gaining or producing income within the meaning of subparagraph 40(2)(*g*)(ii) of the Act; Mr. Diotte provided no evidence that the loans had become bad debts within the meaning of paragraph 50(1)(*a*) of the Act. Thus, in this regard, it is submitted that Mr. Diotte is not entitled to a capital loss under paragraphs 38(*b*) and 39(1)(*b*) of the Act.

[48] As for the characterization of the source of the income from the 1999 and 2000 sales of shares held by Mr. Diotte in Novamex and Medcomsoft, the Minister is of the view that they should be taxed as business income.

[49] The Minister submits that, under paragraph 39(5)(*a*) of the Act, no subsection 39(4) election concerning dispositions of Canadian securities can be made, because the Appellant Mr. Diotte was a trader in securities during the years in issue.

[50] Moreover, Novamex was not a Canadian resident corporation and its shares were not Canadian securities under subsections 39(4) and 39(6) of the Act. Thus, the Minister submits, the proceeds of the sale should have been taxed as business income under section 3 and subsection 9(1) of the Act, not as capital gains.

## ANALYSIS

### *Shareholder benefit*

[51] Since the transaction between the Appellants and Profilec was between related persons, under section 69 of the Act that transaction had to take place at fair market

value. In the case at bar, the fair market value of the Novamex shares therefore needs to be determined.

[52] Given the numerous factors that must be taken into consideration, and the weight that must be accorded to each, it is generally not easy to valuate a business and its shares.

[53] In the case of Novamex, the process is even more complex because it involves valuating a company that was a start-up at a time when the market was very speculative for such businesses.

[54] Mr. Diotte explained the process used to determine the value of the shares. He frequently referred to his knowledge and experience in order to validate or accredit the results of his approach. He was unable to lay the groundwork for an independent, rational approach; primarily, what he expressed were speculative expectations that clearly constituted a very important element in the process that led to the attribution of a value.

[55] His assessment was coloured and shaped by his personal knowledge of the case, but also, and above all, by rather intuitively grounded expectations.

[56] To be sure, the value of a share is never totally rational. There are credible markers that provide some degree of reliability, though these are often tied to the history of the file, and to market conditions, competition, the calibre of the directors and managers, and so forth.

[57] A multitude of other factors can have a bearing on value. There may be an explanation or cause for some of them, but very often, they may be nothing more than perception, rumours, intentions, and a variety of impulses that are very difficult to define or identify. In the case at bar, objective markers were practically non-existent because the business was very young.

[58] In light of all these factors and imponderables and Mr. Diotte's knowledge and experience, he should have chosen a less intuitive and more rational approach with respect to the criteria on which his valuation was based.

[59] Instead, he chose to consider elements that had a positive influence on the share price, an approach that could be characterized as very optimistic and as idealistic and rather intuitive.

[60] Although this was a biased approach in which self-interest clearly came into play, I do not believe that it was so unreasonable that it should be rejected out of hand. I do believe, however, that a certain degree of weighting is called for here.

[61] It is not surprising in this regard that the expert valuator's report tendered by the Minister arrives at a very different market value, simply by giving more weight or less weight to one or more of the factors that should be taken into account in valuating the business in question.

[62] Thus, the discrepancy between Mr. Sahakian and Mr. Diotte's valuations of the Novamex shares is not surprising. On the other hand, the Court can see that Mr. Diotte's thinking was certainly more thorough and appropriate than would have been the case with a witness lacking his experience and knowledge. Thus, Mr. Diotte's testimony is more interesting, and, above all, more nuanced in establishing the context in which the Novamex shares were valuated in January 1999.

[63] Certain factors make the valuation of the Novamex shares more complex, because it involves determining the value of a start-up business that had little or no financial history, and because one must go back to January 1999, which was right in the middle of a period when the market was very speculative, especially for this type of business.

[64] With respect to this aspect, Mr. Sahakian correctly asserts that the taxpayer's cash flow valuation method is not realistic in the instant case, as it is based almost exclusively on forecasting.

[65] Using sales forecasts for various tests developed by Novamex, Mr. Diotte estimated a sales figure and profit, which he then discounted. The basic premises relied on by Mr. Diotte for his valuation of the business are random, speculative, and even exaggerated.

[66] Novamex's value, based on a price of $1.51 (US$1) per share determined by Mr. Diotte in January 1999, was approximately $15,100,000. I find it difficult to believe that a reasonable approach could lead to such a determination, considering the scarcity of rational data to validate Mr. Diotte's conclusions.

[67] However, the valuation done by the expert witness Mr. Sahakian strikes me as being just as debatable, as he failed to consider several important elements in his determination of the company's value in the instant case. What is more, his assertion that Novamex was worthless in January 1999 is an exaggeration.

[68] Although a valuation must be based on theoretical concepts that usually constitute standard practice, the fact remains that a person's expertise is generally somewhat dependent on his or her experience. In this regard, Mr. Sahakian stated that this was the first matter of this kind that he had worked on. This no doubt had some bearing on the fact that he appears to have favoured the so-called liquidation value method of business valuation. Moreover, this weakness comes on top of his serious failure to meet with the concerned parties.

[69] At the time, the company was working on 18 diagnostic tests for the agri-food industry and for veterinarians.

[70] In January 1999, three of these tests were at the marketing stage, four were at the product introduction stage, and five were in the development stage.

[71] The fact that the Respondent's expert attributes no value to potentially promising tests on the basis that Novamex had not protected them by patent constitutes a clear deviation from accepted practice.

[72] It is quite possible for businesses to resort to mechanisms other than patents to protect the fruits of their research, and the fact that they do so is no reason to conclude that the discoveries are not intangible assets.

[73] It is not uncommon for small research and development businesses, with limited resources, to prefer to invest all they have in research, instead of incurring the often prohibitive costs of obtaining protection for an uncertain discovery.

[74] Moreover, Mr. Sahakian should also have spoken not only with Mr. Diotte, but also with other stakeholders who were active in Novamex at the time, and he should have done so regardless of the instructions that he received from the Respondent's representatives.

[75] His role is to provide a professional opinion without anyone's interference; if an expert feels it necessary or desirable to speak with the management of a company that he is valuating, he should have the freedom and the independence to do so.

[76] If he had spoken with those people, he would quite probably have learned that the company did not protect its tests by means of patents because the risk that they could be copied by reverse engineering was slight.

[77] Having examined all the evidence provided by the parties, I find that the Minister's proposed value of $0.20 per Novamex share is unreasonable under the circumstances.

[78] In view of Mr. Diotte's explanations and the Respondent's expert's incomplete analysis, and in the absence of objective and reliable elements, I arbitrarily fix the value of the shares at C$1 per share, a valuation that takes work-in-progress into account as an intangible asset.

*Capital losses on a $96,865 loan*

[79] With respect to the loan granted to Novamex, the only document adduced in evidence by Mr. Diotte is the discharge of a $96,905 debt in consideration of $1. Mr. Diotte supplied no facts or evidence concerning the income that he anticipated receiving from this loan.

[80] Other than a vague and incomplete oral explanation, no evidence has been provided that this amount was due and payable in the first place. Mr. Diotte agreed to release his debtor from the obligation in consideration of $1, on the pretext that any initiative to collect on his claim, which, again, was neither proven nor established, would have been prejudicial, and perhaps dangerously so, to the financial situation of the debtor.

[81] Mr. Diotte even added that he chose rather to collect part of his claim by means of the tax advantage resulting from the characterization of the loan. This was a very dubious course of action. Indeed, the tax treatment flowing from a given situation must apply either at the end or at the beginning of a process; it must not be a determinative element in causing a person to be less vigilant about asserting his or her rights.

[82] In *Byram*, [1999] 2 C.T.C. 149, the Federal Court of Appeal allowed a capital loss on interest-free loans that a shareholder had granted to a corporation in order to enable it to earn income, and thus pay dividends.

[83] An important consideration in *Byram* was that the corporation had only one shareholder.

[84] Here, Mr. Diotte was merely a minority shareholder who owned less than 5% of the issued shares, and there is no indication that he was going to receive dividends on those shares, quite the contrary, in fact.

[85] I find that the Appellant Mr. Diotte has failed to discharge his onus of showing that he had a chance of earning income as a result of the loan. Furthermore, Mr. Diotte came all too easily and quickly to the conclusion that he would be unable to collect on his debt. The least that can be said is that the oral explanation that he provided was certainly not sufficient in itself to validate his conclusion.

*The $23,000 loan to a lawyer*

[86] The explanation given was that the lawyer was faced with an urgent need for money. Knowing Mr. Diotte well as he had been Mr. Diotte's legal representative on a few occasions, the lawyer had become familiar enough with him to seek significant financial assistance ($23,000), to be provided within a very short period of time.

[87] Mr. Diotte did not hesitate to accede to this request, and he advanced the money by means of a cheque in the amount requested. The lawyer hurried to the bank to get the cheque certified, and made an oral promise to formalize the loan with Mr. Diotte within the next few days.

[88] Mr. Diotte explained that, despite many attempts and initiatives, he never managed to secure his debtor's cooperation in formalizing the loan; what is more, the debtor insinuated that he was owed this money (for his professional services, no doubt). The evidence discloses that Mr. Diotte did not see things that way, since he commenced legal proceedings to collect on his claim.

[89] The fact that the Appellant formally commenced legal proceedings to recover the amount in question completely refutes the Respondent's interpretation that this amount was a sort of gift, an act of generosity involving people who knew each other well. Though the situation is unusual, the evidence shows, on a balance of probabilities, that this was a genuine loan made in the ordinary course of business. Indeed, having regard to the unusual circumstances, it is reasonable to believe that Mr. Diotte wanted to formalize the loan along with its terms and conditions in the days following its payment. Since the explanations that were provided validate such a theory, I accept Mr. Diotte's submissions with respect to this aspect of the matter.

[90] For a number of years now, the special and very advantageous treatment given capital gains has validated the usefulness of the distinction to be made between such income and business income. The Act is relatively silent if not totally unhelpful when it comes to drawing this distinction, hence the numerous decisions on this subject. Unfortunately, the distinction is not a mathematical exercise, but rather one in which a multitude of factors, some of which pertain to the taxpayer's intent, must be considered.

[91] In Mr. Diotte's opinion, what we have here is a capital gain, whereas, in the Respondent's opinion, it is essentially income from carrying on an economic activity.

[92] In order to draw the distinction, it is important to determine whether the taxpayer was making an investment or carrying on a business. On the face of it, this appears to be a simple exercise, but in a context such as this, how can one know whether a person is investing or carrying on a business activity?

[93] Both an investor and a businessperson wish to make a profit; thus, the concept of profit is unhelpful in drawing the distinction. In general, an analysis of the circumstances and the context of the transaction provides the indicators for ascertaining the taxpayer's intent.

[94] Thus, the taxpayer's intention upon acquiring the assets or property must guide the analysis and lead to the distinction between an investment activity and the operation of a business.

[95] The indicia used to determine the taxpayer's intention include, *inter alia*, the nature of the property acquired, the volume of transactions, the holding period, the taxpayer's knowledge, and the general factual context. The taxpayer's actions and behaviour are relevant indicators of the taxpayer's primary intent.

[96] In the case at bar, the nature of the property in issue is such that the decision of the Supreme Court of Canada in *Irrigation Industries Ltd.*, [1962] S.C.R. 346, is of definite interest. That decision had the effect of creating a presumption with regard to shares. Martland J. wrote as follows for the Court:

> Corporate shares are in a different position because they constitute something the purchase of which is, in itself, an investment. They are not, in themselves, articles of commerce, but represent an interest in a corporation which is itself created for the purpose of doing business.

> Their acquisition is a well recognized method of investing capital in a business enterprise.

[Emphasis added.]

[97] This statement has been considerably diluted since then, to the point that it has become relatively easy to show that shares, usually defined as investments, are actually articles of commerce.

[98] Although the presumption still exists today, it can easily be rebutted if the taxpayer's primary intention was to carry on a business, or if an adventure or concern in the nature of trade was involved.

[99] In the case at bar, upon examining the nature of the property, it is clear that the shares acquired by Mr. Diotte were not the type of shares that would provide him with dividend income.

[100] The documentary evidence showed the volume of trading in Novamex shares and their price from when they were first listed on the stock market in June 1999 to the month of January 2000, and clearly disclosed significant fluctuations. For example, from November 4 to November 9, 1999, Novamex shares gained 71%, but the same shares lost almost 46% from November 9 to November 11, 1999.

[101] Given those circumstances, the Novamex and Medcomsoft shares were clearly speculative. Obviously, Mr. Diotte's intent was to acquire shares that had great growth potential but were very risky.

[102] In *Oakside Corporation Ltd. v. M.N.R.*, [1991] 1 C.T.C. 2132, Judge Beaubier of this Court stated that the acquisition of speculative shares generally points more to commercial activity than to traditional investment.

[103] The history of the transactions is also an important factor to consider in our analysis. In the hearing of the instant case, the Minister raised the point that Mr. Diotte, his spouse or a corporation under his control made at least 24 transactions on the shares in question during the period in issue.

[104] Although this is not a history of buying and selling, Mr. Diotte did make several trades involving these specific securities, which is certainly not a characteristic of investment activity.

[105] As for the holding period, Mr. Diotte acquired the Medcomsoft shares in August 1998, and sold them in the spring of 2000. The precise date on which the Novamex shares were bought is unknown, but it appears from Mr. Diotte's testimony that he was first put in contact with the corporation in early 1998; thus the shares were probably acquired after that time.

[106] Regarding the date on which the taxpayer, his spouse, or a corporation under his control disposed of the Novamex shares they held, it appears that he disposed of all the shares in the summer of 1999.

[107] This is a short total holding period of approximately 20 months for the Medcomsoft shares and approximately 18 months for the Novamex shares.

[108] A short holding period might not in itself be a determinative factor, but when it is combined with other elements, such as the speculative nature of the shares, the significant volume of transactions, and Mr. Diotte's expertise and skill, it is possible to find, on a balance of probabilities, that a commercial activity was being carried on. In this regard, Mr. Diotte clearly assumed it to be obvious that investments were involved simply because he gave up his securities dealer's licence.

[109] The Supreme Court of Canada, at [1962] S.C.R. 346, clearly stated that the terms and conditions of a loan to purchase shares were not decisive in distinguishing an investment from a commercial activity; they are, however, helpful in ascertaining the taxpayer's intent.

[110] In the case at bar, Mr. Diotte relied exclusively on very short-term financing, which tends to show that he did not intend to hold the securities for lengthy periods.

[111] A person as well-informed as Mr. Diotte would not use his line of credit for a medium- or long-term investment. However, the situation is completely different where a speculative share is involved.

[112] For example, the purchase of the Medcomsoft shares was financed by a bank overdraft, which is an even shorter-term form of financing than a line of credit.

[113] Mr. Diotte even resorted to credit-card financing to purchase the securities in issue. It is therefore my opinion that the type of financing used in the case at bar clearly shows that Mr. Diotte was not planning to keep the shares for any length of time.

[114] The manner in which all these purchases were financed shows, along with the other factors, that a commercial activity was clearly being carried on. Nothing significant in the evidence favours Mr. Diotte's position, other than the fact that shares are generally defined as investments.

[115] The fact that he gave up his securities dealer's licence is not sufficient to make investments out of all the share transactions in question. The Appellant possessed skills that enabled him to make profits through the use of an approach that was essentially commercial in nature.

[116] Mr. Diotte describes himself as an expert on the ethical aspects of the securities sector and securities valuation. During the periods covered by the reassessments, Mr. Diotte was self-employed in this particular field; he also offered general consulting services in business promotion, development, reorganization and start-up. His vast knowledge afforded him an overall view of a company that was very different, but also very specialized.

[117] In fact, he himself acknowledged that it happened on occasion that his fees were paid in the form of shares. His expertise enabled him to plan and organize his affairs in such a way that what he was doing was essentially a commercial activity, as validated, in fact, by a preponderance of evidence.

[118] Counsel for the Appellants seems to want to assert that a taxpayer is either an investor or a securities dealer; he arrives at this conclusion or makes this observation on the basis of the manner in which the Minister dealt with Mr. Diotte's tax file in the preceding years.

[119] It is indeed possible for a person to wear just one of these hats, but it is just as possible to wear both, and so each case is *sui generis*, and the entire list of relevant factors must be taken into account in coming to a conclusion regarding each situation.

[120] In this regard, there are several similarities between the facts of the case at bar and those in *Woods v. M.N.R.*, [1995] 2 C.T.C. 2084, a case in which the taxpayer, like the Appellant Mr. Diotte, helped start-up technology sector businesses, in particular with respect to financing. Like Mr. Diotte, Mr. Woods was sometimes paid in shares. This Court held that the profits from the sale of those shares constituted business income.

[121] In the case at bar, it has been shown, on a balance of probabilities, that the gain from the disposition of the Medcomsoft and Novamex shares constituted business income.

[122] *Vancouver Art Metal Works Ltd.* specifies that any person whose profession or business consists in buying and selling securities, whether for himself or another, is "a trader or dealer in securities".

[123] In my opinion, *Kane*, 94 DTC 6671, which adds the extent of the taxpayer's knowledge as a new parameter in the analysis, is particularly helpful in the case at bar.

[124] For all these reasons, the appeals are allowed in part in that the matters are to be referred back to the Canada Customs and Revenue Agency for reassessment on the basis of the following:

(1) The value of the shares at the time of the transfer is fixed at C$1, and this consequently changes the shareholder benefit to the Appellants according to the share transfers that gave rise to the benefit.

(2) The loan to Novamex did not give entitlement to a deductible capital loss, but the loan to the attorney Mr. Gosselin did give entitlement to such a loss.

(3) The gain from the disposition of the Novamex and Medcomsoft shares in 1999 and 2000 must be taxed as business income.

(4) The Respondent shall have her costs with respect to Mr. Diotte's appeal only.

Signed at Ottawa, Canada, this 9th day of May 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 28th day of November 2008.

Erich Klein, Revisor

| | |
|---|---|
| CITATION: | 2008TCC244 |
| COURT FILE NOS. | 2004-3395(IT)G and 2004-3402(IT)G |
| STYLES OF CAUSE: | Richard Diotte and Marie-France Rouleau v. Her Majesty the Queen |
| PLACE OF HEARING: | Quebec City, Quebec |
| DATE OF HEARING: | May 31, 2007 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Alain Tardif |
| DATE OF JUDGMENTS: | May 9, 2008 |

APPEARANCES:

| | |
|---|---|
| Counsel for the Appellants: | Louis Sirois |
| Counsel for the Respondent: | Martin Gentile |

COUNSEL OF RECORD:

For the Appellants:

| | |
|---|---|
| Name: | Louis Sirois |
| Firm: | Sirois & Champagne |

| | |
|---|---|
| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Canada |