

Mittal v The Queen, 2012 TCC 417

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Business Losses: When Does a Taxpayer's Stock Market Activity Amount to An Adventure in the Nature of Trade?

Mittal v The Queen, [2012 TCC 417](#)

At issue was whether the taxpayer's activities amounted to a business as a trader in securities, or whether he was involved in an adventure in the nature of trade, so as to deduct his losses for the years in question as business losses.

The Court stated that the losses are deductible as business losses so long as the less onerous test of "adventure or concern in the nature of trade" is made out. Here, the court saw the considerable amount of time spent on the activity, the short time frame of holdings, the intention to resell for profit, and the frequency of trades to be classic indicators of an adventure in the nature of trade. The court saw the nature of securities (mostly blue chip) and the lack of high leveraging (low risk) as being neutral factors.

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FACTS

The taxpayer claims to be a trader in securities and deducted losses from that activity in 2006 and 2007. The MNR denied those losses, claiming them to be on account of capital on the basis that the taxpayer is not a trader and not engaged in an adventure in the nature of trade. The Taxpayer's 2004 and 2005 losses were assessed on account of capital, but a settlement was reached wherein the 2005 losses were treated as business losses.

The Taxpayer is an engineer by profession, and though he had his own trading account since 2000, he claims not to have been a trader until 2004 were he prepared a business plan for his securities trading. The taxpayer read extensively in trading, did extensive other research, and devoted (logged) 25 hours per week to his trading activities including research, bookkeeping, etc.. He invested for other family members, and stated that he intended to rely on investing as his business upon retirement.

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ANALYSIS

The Court began by referring to the definition of "business" in subsection 248(1), which includes "undertaking of any kind whatever ... ad an adventure or concern in the nature of trade". The court identified the factors that constitute a person engaging in stock market activity as a business, referring to *The Queen v Vancouver Art Metal Works Ltd*, 93 DTC 5116 (FCA): (a) frequency of transactions; (b) duration of holdings; (c) intention to acquire for resale at profit; (4) nature and quantity of securities; (5) time spent on activity.

The TCC quoted from *Braid v Canada*, [2010 FCA 35](#), which relied on the SCC in *Irrigation Industries Ltd v MNR*, [\[1962\] SCR 346](#), that defined an adventure in the nature of trade:

The positive tests to which he refers as being derived from the decided cases as indicative of an adventure in the nature of trade are: (1) Whether the person dealt with the property purchased by him in the same way as a dealer would ordinarily do and (2) whether the nature and quantity of the subject-matter of the transaction may exclude the possibility that its sale was the realization of an investment, or otherwise of a capital nature, or that it could have been disposed of otherwise than as a trade transaction.

[...]

On the negative side:

- (i) The singleness or isolation of a transaction cannot be a test of whether it was an adventure in the nature of trade—it is the nature of the transaction, not its singleness or isolation that is to be determined.
- (ii) It is not essential to a transaction being an adventure in the nature of trade that an organization be set up to carry it into effect.
- (iii) The fact that a transaction is totally different in nature from any of the other activities of the taxpayer and that he has never entered upon a transaction of that kind before or since does not, of itself, take it out of the category of being an adventure in the nature of trade.
- (iv) The intention to sell the purchased property at a profit is not of itself a test of whether the profit is subject to tax for the intention to make a profit may be just as much the purpose of an investment transaction as of a trading one. The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity.

In dealing with these factors, the Court referred to the decision of the TCC in *Rajchgot v Canada*, [2004 TCC 548](#):

... 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.

and to *Zsebok v Canada*, [2012 TCC 99](#), where it was said that in addition to the above the taxpayer must prove special knowledge of the market in which the taxpayer trades, but stated that this was not strictly accurate at this statement was based on the comments in *Kane v Canada*, [1995] 1 CTC 1, where the issue was subsection 39(4) and it was said:

... The factors highlighted by the Court of Appeal have traditionally been applied indiscriminately to identify both persons who carry on a business in the true sense, as well as persons who are in business by virtue of having engaged in an adventure or adventures in the nature of a trade. Because they are badges or indicia of trade, they must be found to exist to a degree or another under either analysis before a conclusion as to the existence of a business for tax purposes can be reached. Usually, the distinction matters little as the tax treatment of profits or losses arising from a business is generally the same whether a business is found to exist as such or whether its existence is premised on the extended definition of the word "business". Hence, the Courts have paid little or not attention to it. ...

The Court then went on to say that all that is needed for the taxpayer to succeed is meeting the less onerous factors for "adventure in the nature of trade" (para 19). The overall observation of the taxpayer activities was that of "an individual spending a great deal of time, energy and money in a very organized and businesslike fashion in investing in the stock market, to the extent that he intended this to be his retirement business. Unfortunately for Mr. Mittal, it proved not to be as lucrative as he had hoped. Being unsuccessful, however, does not make it any less an adventure." (para 19).

The Court then dealt with the factors. There is no magic number when it comes to the frequency of transactions, but that this taxpayer fit the profile of a day trader (160 trades scattered throughout the year), and rejected the crown's argument that 60 days of trading

activity was insufficient (no magic formula) (para 21). The majority of the stocks were short term holds in this case, and the number of trades indicated an intention to earn a profit on resale (para 22). The court noted that there were some blue chip stocks acquired, but that these were sold quickly (not long term), and this indicated an approach to diversification to reduce risk, adding that even having the majority of stocks being blue chip stocks is not an indication that the taxpayer was not involved in an adventure (para 25). The court also dealt with the lack of high leverage by referring to borrowings from family but saw this factor as neutral (para 26). Finally, the taxpayer spent a great deal of time (25 hours per week) on the trading activities, and the court saw this as the classical example of an adventure in the nature of trade.

The Court allowed the deductions.

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