

Docket: 2006-3193(IT)I

BETWEEN:

ROBERT VAN DE VELDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on August 13, 2007 at Toronto, Ontario

Before: The Honourable Justice Valerie A. Miller

Appearances:

For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Kate Leslie

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**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia this 6<sup>th</sup> day of September, 2007.

“V.A. Miller”

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V.A. Miller, J.

Citation: 2007TCC533  
Date: 20070906  
Docket: 2006-3193(IT)I

BETWEEN:

ROBERT VAN DE VELDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

V.A. Miller, J.

[1] The Appellant is appealing an assessment issued in accordance with the *Income Tax Act* (“Act”) in respect of his 2004 taxation year. The Minister of National Revenue (“Minister”) assessed the Appellant’s income tax return for the 2004 taxation year as filed. However, the Appellant disputes the amount on one of the T4’s issued to him for the 2004 taxation year from Allstream Inc. (“Allstream”).

#### **FACTS**

[2] The Appellant was a senior executive with Allstream. In 2003 and 2004, Allstream had a Management Incentive Plan which included a program whereby Restricted Stock or Share Units (“RSUs”) could be awarded to its senior executives. Allstream started the incentive plan to retain its senior executives.

[3] On April 17, 2003, the Appellant was awarded 1000 RSUs. In 2003, he was awarded an additional 334 RSUs as a performance adjustment. On February 3, 2004, the Appellant was awarded 360 RSUs. The Appellant agreed that all awards were subject to terms and conditions that had to be met before the RSUs vested in the Appellant.

[4] One of the exhibits filed by both parties was a letter dated May 7, 2004 to the Appellant from Allstream. It reads in part as follows:

Notice to Holders of Allstream Restricted Share Units

As you may be aware, on March 18, 2004, Allstream announced that Manitoba Telecom Services Inc. (“MTS”) had agreed to acquire all of the Class A Voting Shares and Class B Limited Voting Shares (the “Allstream Shares”) of the Company, for consideration of \$23.00 plus 1.0909 MTS shares per Allstream Share. On May 12, 2004, the Company’s shareholders will vote on the proposed transaction. Additional information concerning the proposed transaction is contained in the Company’s Management Proxy Circular dated April 8, 2004 which has been filed on SEDAR and on EDGAR.

Your RSUs were granted pursuant to the Company’s Management Incentive Plan (the “Plan”). The Plan provides that where the Company enters into a transaction, which is completed, would result in a “Change in Control” (as defined in the Plan), all RSUs granted pursuant to the Plan shall vest not less than 10 business days prior to the closing of the transaction which constitutes such a Change in Control. The proposed transaction constitutes a Change in Control for the purposes of the Plan. As a result, the vesting of all of your RSUs will accelerate.

According to our records, you have the following Restricted Share Units to participate in the transaction:

Description	Grant Date	Granted	2003 Performance Adjustment	2003 Ineligible Absence*	Vested
RSUs	April 17, 2003	1,200	134		1,334
RSUs	February 3, 2004	360			360

\*Absences greater than 21.75 working day in the plan year will be prorated.

The Company is putting into place a procedure to facilitate your redemption of RSUs, full details of which will be provided to you shortly.

**If the transaction does not close, then the vesting of RSUs shall instead revert to the manner in which vesting was originally to have occurred under the Plan.** (emphasis added)

[5] As well, a letter dated June 19, 2006 addressed to the Chief of Appeal was filed as an exhibit by both parties. It reads:

June 19, 2006

Chief of Appeals  
 Canada Revenue Agency  
 Barrie Tax Services Office  
 81 Mulcaster Street  
 Barrie, Ontario  
 L4M 6T7

Dear Sir:

Re: Robert Van de Velde  
 2004 Tax year

In 2003 and 2004, Allstream had two long term incentive programs for its senior executives – Restricted Share Units (RSUs) and Stock Options. Robert Van de Velde qualified for the RSU program.

In 2004 Manitoba Telecom Inc. acquired the shares of Allstream Inc. in a transaction that closed on June 4, 2004. As a result of the transaction, the shares granted to Mr. Van de Velde in 2003 and 2004 were fully vested and released to the Trustee on May 25, 2005 so he could participate in the transaction. The Trustee for the transaction received 1,694 shares valued at \$118,410.60 (\$69.90 each) on Robert Van de Velde's behalf. Because the employee was not required to pay anything for the shares, he received employment income equivalent to the market value of the shares sent to the Trustee.

Description	Amount/Number
RSU's Granted April 17, 2003	1,000
RSU 2003 Performance Adjustment – 33.5% of 1,000 shares	334
RSU's Granted February 3, 2004	360
Total number of RSUs Granted, Vested and Eligible to Participate	1,694
Market Value – May 25, 2004 RSU Valuation Date (Stock Symbol – ALR.A)	\$69.90
Taxable Benefit – 1,694 shares @ \$69.90 <ul style="list-style-type: none"> <li>• 1,694 was the number of shares submitted to the Trustee on the employee's behalf</li> </ul>	\$118,410.60

<ul style="list-style-type: none"> <li>• Employee was not required to pay for the shares</li> <li>• Taxable benefit equals # shares x market price</li> <li>• This was not a stock option transaction; therefore, did not qualify for the stock option benefit deduction (T4 Box 39).</li> </ul>	
Box 14 – 2004 T4 (Employment Income)	\$118,410.60
Box 38 – 2004 T4 (Company Share Related Taxable Benefit)	\$118,410.60
Box 39 – 2004 T4 (Not a Stock Option transaction)	Not Applicable

Employees were notified that they should consult their own financial advisor about the tax consequences of this transaction because no statutory deductions were taken as a result of this transaction.

If you have any questions or require additional information, please contact me directly at (416) 345-2130, by mail at the address show above or by email at [Ann.Murrell@mtsallstream.com](mailto:Ann.Murrell@mtsallstream.com).

Yours truly,

*Signature*

Ann Marie Murell  
Senior Manager Human Resources

ISSUE

[6] The issue in this appeal is whether the benefit received in connection with the RSUs should be valued when the award was granted or when the award vested.

LAW

[7] At the beginning of the trial the Respondent made a motion to amend the Reply to the Notice of Appeal to include section 7 of the *Act*. The Appellant consented to the motion and it was granted.

[8] Paragraph 7(1)(a) of the *Act* reads:

7. (1) Subject to subsections (1.1) and (8), where a particular qualifying person has agreed to sell or issue securities of the particular qualifying person (or of a qualifying person with which it does not deal at arm's length) to an employee of the particular qualifying person (or of a qualifying person with which the particular qualifying person does not deal at arm's length),

(a) if the employee has acquired securities under the agreement, a benefit equal to the amount, if any, by which

(i) the value of the securities at the time the employee acquired them exceeds the total of

(ii) the amount paid or to be paid to the particular qualifying person by the employee for the securities, and

(iii) the amount, if any, paid by the employee to acquire the right to acquire the securities

is deemed to have been received, in the taxation year in which the employee acquired the securities, by the employee because of the employee's employment;

[9] In *Steen v. The Queen*, [1986] 2 C.T.C. 394, Rouleau, J. reviewed the jurisprudence that considered paragraph 7(1)(a) of the *Act* and he stated at paragraph 31:

In conclusion, after an examination of the scheme of paragraph 7(1)(a) of the Act and of the relevant jurisprudence, I am satisfied that a taxpayer is deemed to have received a benefit, if any, at the moment he obtains legal ownership or the incidence of legal ownership in and to the shares subscribed.

[10] Black's Law Dictionary defines the verb "vest" as:

vest, *vb.* 1. To confer ownership of (property) upon a person. 2. To invest (a person) with the full title to property. 3. To give (a person) an immediate, fixed right of present or future enjoyment. 4. *Hist.* To put (a person) into possession of land by the ceremony of investiture. – vesting, *n.*

## CONCLUSION

[11] The evidence was clear that the award of the RSUs to the Appellant did not vest immediately upon their being granted. While the Appellant received a benefit when he was granted an award of RSUs, the benefit could not be quantified until the Appellant obtained title to those RSUs.

[12] As a result of the above, I find that the benefit received by the Appellant should be valued when the RSUs vested in the Appellant as this was when he acquired legal ownership of the RSUs. According to the evidence, the RSUs vested in the Appellant on May 25, 2004 and the value of the RSUs was \$118,410.60.

[13] The appeal is dismissed.

Signed at Vancouver, British Columbia this 6<sup>th</sup> day of September, 2007.

“V.A. Miller”

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V.A. Miller, J.

CITATION: 2007TCC533  
COURT FILE NO.: 2006-3193(IT)I  
STYLE OF CAUSE: Robert Van de Velde v. The Queen  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: August 13, 2007  
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller  
DATE OF JUDGMENT: September 6, 2007

APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Kate Leslie

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Ottawa, Canada