

Docket: 2007-3116(IT)I

BETWEEN:

JOSEPH AZRAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on March 14, 2008, at Montreal, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant:                      The Appellant himself

Counsel for the Respondent:        Alain Gareau

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**JUDGMENT**

The appeal of the reassessments established under the *Income Tax Act* for the 2003 and 2004 taxation years is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of April 2008.

"Paul Bédard"

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Bédard J.

Translation certified true  
on this 4th day of June 2008.

Elizabeth Tan, Translator

Citation: 2008TCC217  
Date: 20080428  
Docket: 2007-3116(IT)I

BETWEEN:

JOSEPH AZRAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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### **REASONS FOR JUDGMENT**

Bédard J.

[1] The issue in question is relatively simple: whether the Appellant could deduct his losses from the disposition of publicly traded shares as business losses in calculating his income. Were they business losses or capital losses?

[2] When he produced his tax returns, the Appellant deducted business losses of \$23,840 for the 2003 taxation year and \$29,671 for the 2004 taxation year.

[3] By notices of reassessment dated December 18, 2006, the Minister of National Revenue (the "Minister") cancelled the business losses deducted for the 2003 and 2004 taxation years and recorded a capital loss of \$23,840 in the Appellant's file for the 2003 taxation year, and \$23,417 for the 2004 taxation year.

[4] On or around February 2, 2007, the Appellant filed a Notice of Objection to the Ministers against the December 18, 2006, reassessments for the 2003 and 2004 taxation years.

[5] On June 20, 2007, the Minister confirmed the December 18, 2006, reassessments for the 2003 and 2004 taxation years.

[6] On July 3, 2007, the Appellant appealed to the Court to have the December 18, 2006, reassessments vacated, for the 2003 and 2004 taxation years.

[7] To establish and confirm the reassessments for the 2003 and 2004 taxation years, the Minister relied on the same hypotheses, namely:

[TRANSLATION]

(a) During the years in question, the Appellant had a job with the company Hani Autos Inc; **(admitted)**

(b) His employment income was \$52,850 for the 2003 taxation year and \$79,875 for the 2004 taxation year; **(admitted)**

(c) The Appellant did not have professional training in the securities field; **(denied)**

(d) During the 2003 taxation year, the Appellant performed three security transactions, which resulted in a loss of \$23,839; **(denied)**

(e) During the 2004 taxation year, the Appellant performed 15 security transactions, which resulted in a loss of \$23,417; **(admitted)**

(f) During the 2000 taxation year, the Appellant made a profit during the disposition of securities and this profit was assessed by the Respondent as a capital gain. **(admitted)**

[8] The purchase and sale of shares the Appellant carried out and their price, dates of purchase and sale for 2000 are described at Schedule "A", attached to these Reasons.

[9] The purchase and sale of shares the Appellant carried out and their price, dates of purchase and sale for 2001 are described at Schedule "B", attached to these Reasons.

[10] The purchase and sale of shares the Appellant carried out and their price, dates of purchase and sale for 2002 are described at Schedule "C", attached to these Reasons.

[11] The purchase and sale of shares the Appellant carried out and their price, dates of purchase and sale for 2003 are described at Schedule "D", attached to these Reasons.

[12] The purchase and sale of shares the Appellant carried out and their price, dates of purchase and sale for 2004 are described at Schedule "E", attached to these Reasons.

[13] The evidence shows that the Appellant purchased publicly traded shares for \$188,071; \$408,584; \$188,346; \$44,671 and \$117,016 in 2000, 2001, 2002, 2003 and 2004, respectively. The evidence also shows that the Appellant sold publicly traded shares for \$200,623; \$414,143; \$159,761; \$19,522 and \$93,040 in 2000, 2001, 2002, 2003 and 2004, respectively.

[14] The Appellant testified that:

- (a) he worked as an employee in 2003 and 2004, around 40 hours a week;
- (b) during the years in question, he and members of his family spent around 80 hours a week doing market studies on securities and researching potential purchases;
- (c) during the 2000 and 2001 taxation years, he made a profit of \$12,589 and \$8,393, respectively, through the disposition of publicly traded shares; he treated these profits as capital gains in his tax returns for those years;
- (d) during the 2002 taxation year he had a loss of \$28,586 through the disposition of publicly traded shares; he treated these losses as capital losses in his tax return that year;
- (e) in 1999, he actively operated a jewellery purchase and sale company and a stock market investment company. On April 26, 1999, as a natural person operating an individual business, the Appellant produced a certificate of registration (Exhibit A-3) indicating he operated these two businesses. The Appellant explained that in 2000 he stopped actively operating his stock market investment business because the publicly traded shares were "at their peak" and that was why he submitted a deregistration certificate for his investment business (Exhibit A-6) to the Inspecteur général des institutions financières on June 4, 2000. The

Appellant added that he started to actively operate his investment business again in December 2003 and that was why he again submitted a registration certificate in April 2004 (Exhibit A-11) stating that he had again begun operating his investment business.

[15] I would point out that the Appellant's overall testimony did not mention his knowledge and training in the securities field, his investment strategy and research tools.

#### Appellant's position

[16] The Appellant claimed that profits and losses in 2000, 2001 and 2002 from the disposition of publicly traded shares during those years were treated as capital gains and losses because he did not operate the investment business during those years as shown by the registration statement he produced. Moreover, he claims that the losses in 2003 and 2004 from the provision of these publicly traded shares in those same years were considered as business gains and losses because he operated an investment business during those years as shown by the registration statement he produced.

#### Analysis and conclusion

[17] In general, the result of an operation is a capital gain (or a loss) insomuch as there is investment-related accounting, meaning when there is a disposition of property acquired for financial return (to draw income from property or a business) or even for personal purposes. On the contrary, the result of an operation is considered a business income (or loss) when the operation is related to a business concept, speculation or a commercial business or project.

[18] With no definitions in the legislation, the courts have had to develop several criteria in an effort to characterize a gain or loss resulting from specific work. However, no criterion taken in isolation is necessarily sufficient or determinative and that, in each case, all the circumstances of the operation must be examined. The criteria or factors most often used include the following:

- (i) the taxpayer's true intention as shown by the taxpayer's conduct and the circumstances in which the transactions occurred;
- (ii) the time between the purchase and the sale;

- (iii) the frequency of transactions (history of extensive buying and selling of securities);
- (iv) the nature of the securities (whether are they speculative);
- (v) whether the transactions are of the same kind or carried out in the same way as those of a dealer in securities. In this sense, does the taxpayer spend a substantial part of his or her time studying the securities markets and investigating potential purchases? Are security purchases financed primarily on margin or by some other form of debt?

[19] The Appellant must first understand that producing a registration statement that he operates an investment business does not ensure that the profits and losses from the disposition of securities in a given year are, for the purposes of the Act, business profits or losses during that year. The registration statement is an element that enters into our analysis; however, I feel that this element is not a determinative one. The Appellant's producing statements of registration indicating he operated an investment business in 1999, 2003 and 2004 and that he stopped operating this business in 2000, 2001 and 2002 is even less determinative in this case since there were more operations and their monetary value was higher in the years the statement of registration indicates he stopped operating his investment business.

[20] The Appellant purchased publicly traded shares (as thousands of Canadians do) to make a profit. However, nothing in the evidence submitted indicates that the Appellant's transactions fit within the concept of business, trade, speculation or a commercial matter or project. In this case, the securities transactions were not speculative. There were few operations (no purchases in 2003, 14 in 2004, one sale in 2003, and 12 sales in 2004). The shares sold in 2003 had been held for around two years. The fact that the period of detention for shares was generally shorter in 2004 is not determinative as to the nature of the Appellant's losses. The Appellant did not submit any evidence that his operations were similar to those of a dealer and that they were carried out in the same way.

[21] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 28th day of April 2008.

"Paul Bédard"

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Bédard J.

Translation certified true  
on this 4th day of June 2008.

Elizabeth Tan, Translator



**SCHEDULE "A"****I. 2000 REPORT**

DATE OF PURCHASE	TITLE	SHARES	PURCHASE	DATE OF SALE	SALE	PROFIT	LOSS
30 NOV 00	BBD,B	500	11485.50	08 DEC 00	11970.50	485.00	
18 SEP 00	INVT	1450	2210.27	19 SEP 00	3168.07	957.80 CA	
02 NOV 00	INVT	4000	3331.60	08 NOV 00	3777.45	445.85 US	
04 OCT 00	LU	450	13754.35	11 OCT 00	14932.65	1178.30 US	
30 OCT 00	LU	700	14160.60	03 NOV 00	15840.11	1679.51 US	
08 NOV 00	WCOM	800	14329	08 NOV 00	14470.16	140.81 US	
14 NOV 00	WCOM	1000	16279.35	17 NOV 00	16970.08	690.73 US	
24 NOV 00	WCOM	1250	19172.85	6 DEC 00	20273.97	1101.12 US	
8 DEC 00	WCOM	1250	18319.10	11 DEC 00	19336.50	1017.40 US	
12 DEC 00	WCOM	1250	18475.35	14 DEC 00	19727.92 US	1251.77 US	
TOTAL	CANADIAN		EXCHANGE RATE 1.4852 x			1442.80 CA	
TOTAL	US					7505.49 US	
TOTAL	IN CANADIAN					12589.95	

Symbols

BBD,B

INVT

LU

WCOM

Companies

Bombardier

InvestAmerica

Lucent Technologies

Worldcom

Activities

Aeronautics

Telecommunications network

Telecommunications

Telephony and telecommunications

**SCHEDULE "B"****I. 2001 REPORT**

DATE OF PURCHASE	TITLE	SHARES	PURCHASE	DATE OF SALE	SALE	PROFIT	LOSS
20 DEC 00	BBD,B	520	11703.50	02 JAN 01	12216.50	513.00	
05 JAN 01	BBD,B	550	12129.5	22 JAN 01	12730.5	601	
8 MAR 01	BBD,B	650	12932	08 MAR 01	13039.50	103.5	
27 SEP 01	BBD,B	1000	13479	27 SEP 01	13541	62	
23 OCT 01	BBD,B	1000	11289	23 OCT 01	1139	102	
02 NOV 01	BBD,B	2000	21060	8 NOV 01	21060	502	
10 JUL 01	ERICY	1000	4879.35 US	2 AUG 01	5070.48 US	191.13 US	
07 SEP 01	ERICY	1000	4229 US	22 OCT 01	4420.85 US	191.85 US	
22 JAN 01	QQQ	750	48780.6 US	23 JAN 01	4982.78 US	402.18 US	
06 JUL 01	QQQ	250	11434.35 US	10 JUL 01	11220.27 US		<214.10> US
05 JAN 01	WCOM	1450	21431.35 US	27 DEC 00	21431.35 US	1452.16 US	
16 JAN 01	WCOM	1000	21216.85 US	17 JAN 01	21344.93 US	128.08 US	
25 MAY 01	WCOM	750	13304.35 US	25 MAY 01	13775.18 US	470.83 US	
5 JUN 01	WCOM	750	13266.85 US	6 JUN 01	13312.70 US	45.85 US	
27 JUL 01	WCOM	1000	13529.35 US	31 JUL 01	13970.18 US	440.78 US	
14 AUG 01	WCOM	1000	13379	16 AUG 01	13620.5 US	241.54 US	
30 AUG 01	WCOM	1000	13289 US	30 AUG 01	13370.65 US	80.55 US	
31 AUG 01	WCOM	1000	13120 US	10 SEP 01	13220.55 US	91.55 US	

29 OCT 01	WCOM	1000	12074 US	29 OCT 01	12120.59 US	46.59 US	
21 DEC 01	NT	1000	11925.1	31 DEC 01	12031	106 US	
14 JUN 01	AVA	37	DIVIDEND	14 JUN 01	529.33	529.33 US	
TOTAL		US RATE 1.5484 x 4204.32			CA CA	1883.50 6509.96	
						8393.46	

Symbols

BBD,B  
ERICY  
QQQ  
WCOM  
NT  
AVA

Companies

Bombardier  
Ericsson Telephone  
Nasdaq 100 shares  
Worldcom  
Nortel Networks  
Avaya

Activities

Aeronautics  
Telephones  
Top 100 technology cos.  
Telephony and telecommunications  
Telecommunications  
Telecom equipment

**SCHEDULE "C"****I. 2002 REPORT**

DATE OF PURCHASE	TITLE	SHARES	PURCHASE	DATE OF SALE	SALE	PROFIT	LOSS
14 JAN 02	BMO	1000	36229	14 JAN 02	36301	72	
16 JAN 02	BMO	1000	36069	27 JAN 02	36371	302	
12 FEB 02	QQQ	700	24839 US	13 FEB 02	24897.6 US	58.62 US	
04 JAN 02	WCOM	1000	14109 US	7 JAN 02	14250.78 US	141.78 US	
14 JAN 02	WCOM	2000	26298 US	7 FEB 02	16239 US		<10058> US
12 APR 02	WCOM	1500	8670 US	5 JUL 02	85.98 US		<8584.02> US
TOTAL			US RATE 1.5704 x				<18642> US <29275> CA
						688.70 CA	
LOSS IN 2002						<28586> CA	

**SCHEDULE "D"****I. 2003 REPORT**

DATE OF PURCHASE	TITLE	SHARES	PURCHASE	DATE OF SALE	SALE	PROFIT	LOSS
7 MAR 00	SIKG	1500	1154.50	BANKRUPT	—		<1154.5>
29 SEP 00	ITMS	3500	3039.50	BANKRUPT	—		<3039.5>
24 JAN 01	QQQ	400	26985.59 US	11 DEC 03	13015.34 US		<19646> Rate 1.5095
TOTAL							<23840.52>

SymbolsCompaniesActivities

SIKG

Sigmen Gold

Gold mining

ITMS

Micro-Tempus

Software equipment

QQQ

Nasdaq 100 shares

Top 100 technology cos.

**SCHEDULE "E"****I. 2004 REPORT**

DATE OF PURCHASE	TITLE	SHARES	PURCHASE	DATE OF SALE	SALE	PROFIT	LOSS
12 JAN 04	NT	1000	7379	13 JAN 04	7821	442	
13 JAN 04	NT	1000	7819	14 JAN 04	7921	102	
21 JAN 04	NT	1000	8949	21 JAN 04	8971	22	
26 JAN 04	NT	1000	8479	26 JAN 04	8621	142	
27 JAN 04	NT	1000	8379	28 JAN 04	8521	142	
5 FEB 04	NT	1000	11209	10 JUL 04	5351		<5858>
27 MAY 04	QQQ	600	21209 US	28 MAY 04	21246.5 US	37.5 US	
28 NOV 04	QQQ	350	13679 US	30 NOV 04	13708 US	29.17 US	
14 NOV 04	UBS	3000	80705	19 OCT 04	232		<7838.5>
25 MAR 00	SGI	1650	5170	6 DEC 04	162.40		<5007.6>
14 MAR 00	GEM	850	837	24 DEC 04	0		<837>
28 NOV 00	INVT	2900	2141.95 US	23 DEC 04	0		<2414.95> US Rate 1.542  <3723.85> CA
7 MAR 00	SIKGOLD	1500	1154.50	DEC 04	BANKRUPT		<1154.50>
6 MAR 00	VENGOLD	260	1078.5	DEC 04	BANKRUPT		<1078.5>
TOTAL						9528	<25497>
GRAND TOTAL							<24544> CA

Symbols

NT  
QQQ  
UBS  
INVT

Companies

Nortel Networks  
Nasdaq 100 shares  
Unique Broadband  
InvestAmerica

Activities

Telecommunications  
Top 100 technology cos.  
Fibre optics  
Telecommunications network

SIKG  
VENG  
SGI  
GEM

Sigmen Gold  
VenGold  
Signalgene  
Nortern Financial

Gold mining  
Gold mining  
Biomedical  
Internet advertising

CITATION: 2008TCC217

COURT FILE No.: 2007-3116(IT)I

STYLE OF CAUSE: JOSEPH AZRAK AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 14, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: April 28, 2008

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Alain Gareau

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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Deputy Attorney General of Canada  
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