TAXADVISOR

Advisor Losses

Commissioned employees at a disadvantage

COURT REPORT

BY JAMIE GOLOMBEK

The continuing inability for financial advisors who are considered commissioned employees to write off various expenses that their self-employed counterparts otherwise can deduct was the subject matter of yet another tax case decided by the Tax Court last month (*Gagea v. The Queen, 2007 TCC 620*).

Virgiliu Gagea was a financial advisor employed by Westminster Securities Ltd. in 2000, and Chartwell Securities for part of 2001.

In September 2000, while employed as a financial advisor with Westminster, Gagea purchased for a client account 300 shares of American Telephone and Telegraph ("AT&T").

The client provided Gagea with a cheque for the 300 AT&T shares but unfortunately, the cheque bounced and was subsequently returned by the bank with an NSF (Not Sufficient Funds) stamp. A second cheque was then provided by the client, but sadly, that cheque was also returned with an NSF stamp.

The sales manager at Westminster forced Gagea to cover the loss suffered on the AT&T share transaction and the 300 AT&T shares were thus transferred by the sales manager from the client's account to Gagea's personal trading account.

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In April 2001, Gagea sold the 300 AT&T shares and realized a loss of approximately $6,000 in Canadian funds.

While Gagea didn't originally claim that loss when he filed his 2001 tax return, he went to court to see if he could apply that loss, presumably as a business deduction, against his 2001 income.

The judge referred Gagea, who was considered an employee of Westminster, to the now-infamous Supreme Court of Canada decision in *Gifford* (*Gifford v. The Queen et al., 2004 DTC 6120*).

Regular readers of this column will no doubt be familiar with the Gifford decision in which the Supreme Court reviewed the eligible deductions that could be claimed by financial advisors who are considered employees of a brokerage firm (Midland Walwyn in the *Gifford* case).

In that case, the highest court made it clear that there is a big difference between what employees can deduct (very restricted) as opposed to what independent financial advisors who are considered "self-employed" can write off.

As the Supreme Court said at the time, "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."

The judge therefore concluded that since Gagea was an employee of Westminster, he is limited to the deductions specifically permitted by the Act for employees and that the loss on the 300 AT&T shares is simply not deductible as a permitted expense by a commissioned employee.

That being said, the judge saw no reason why Mr. Gagea would be restricted from claiming a capital loss on the sale of the shares, which is clearly less valuable since only half of such loss is deductible and only against capital gains.

Of course, it goes without saying that Mr. Gagea should probably have sold the shares immediately upon being forced to purchase them instead of waiting seven months, thus minimizing any risk of loss.

Meanwhile, that does beg the question: if Mr. Gagea had made a profit instead of a loss on the subsequent sale of the shares, would he have found himself in court at all, claiming full income treatment as opposed to a 50% taxable capital gain? AER

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