

Indexed as:
Vaccarello v. Canada

**In Re The Income Tax Act
Between
Paul Vaccarello, Appellant, and
Her Majesty the Queen, Respondent
And between
Emilio Grimaldi, Appellant, and
Her Majesty the Queen, Respondent**

[1995] T.C.J. No. 1063

[1995] A.C.I. no 1063

[1996] 1 C.T.C. 2408

96 D.T.C. 1934

58 A.C.W.S. (3d) 341

Action Nos. 92-1543(IT)G, 92-1544(IT)G

Tax Court of Canada
Toronto, Ontario

Rip T.C.J.

Heard: August 17, 1995

Judgment: September 19, 1995

(11 pp.)

*Income tax -- Capital gains and losses -- Capital gains -- Proceeds of disposition for a capital asset
-- Income from a business or property -- Income, amount received as inducement or reimbursement
-- Nature of a benefit as compared to a loan.*

Appeal of V and G from assessments made under the Income Tax Act for the 1987 and 1988 taxation years. The appellants were each half owners of an insurance brokerage business, T. They discovered another property not far from their offices which was owned by B. The appellants entered

into a deal to purchase the B property and had some relatives who were going to invest with them. The relatives later backed out of the deal, leaving the appellants with inadequate financing. Another businessman, VDM, offered to immediately buy the B property from the appellants at a respectable profit if they went ahead with their purchase. The property was sold to VDM and V and G claimed that the proceeds of disposition were on capital account with regard to the 1987 taxation year. V and G had spent a considerable sum on renovation of the B property and had moved the operations of T there. VDM paid them an additional \$38,000 as incentive to vacate the B property. In issue regarding the 1988 taxation year was whether that money was a "benefit" conferred on V and G pursuant to section 15(1) of the Act and therefore to be included in their income for 1988. V and G claimed that the payment of \$19,000 to each of them was a loan by T and therefore should not be included in their income.

HELD: Appeal for 1987 allowed and referred back for reconsideration. The appeal for 1988 was dismissed. The appellants entered into the venture to acquire the property as a capital asset. The idea of selling the property at a profit had never been a motivating factor. However, the \$38,000 paid to get them out, was not a debt or loan to the appellants by T. They filed their returns on the basis that they made a capital gain in 1988 and they did not consider that they simply borrowed the \$38,000 from T.

Statutes, Regulations and Rules Cited:

Income Tax Act, s. 15(1).

Arthur Camporese, for the Appellants.
Kathryn Philpott, for the Respondent.

JUDGMENT:-- The appeal from the assessment made under the Income Tax Act (the "Act") for the 1987 taxation year is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the disposition of the Royal Bank Plaza was on capital account.

The appeal from the assessment made under the Act for the 1988 taxation year is dismissed.

REASONS FOR JUDGMENT

1 RIP T.C.J.:-- The appellants Paul Vaccarello and Emilio Grimaldi appeal assessments for the 1987 and 1988 taxation years on the basis that:

- a) the proceeds of disposition in 1987 of a property known as Royal Bank Plaza in Stoney Creek, Ontario was on capital account; and
- b) a benefit of \$19,000 was not conferred on each of the appellants by a corporation known as Tripemco Insurance Brokers Limited ("Tripemco") in 1988 pursuant to subsection 15(1) of the Income Tax Act ("Act").

2 The appeals were heard on common evidence.

3 The appellants each own 50% of the issued shares of Tripemco, a corporation engaged in the general insurance brokerage business. In 1986 Tripemco was operating out of premises the appellants, according to Vaccarello, believed it had outgrown and, as a result, the appellants were looking for a larger location for the company. Grimaldi stated that the premises consisted of "only 700 square feet" and, in addition, the lessor required the space. Tripemco was on a month-to-month lease.

4 In March 1986 the appellants and Vaccarello's uncles, Carmelo Alfano, Filippo Alfano and Giuseppe Scalia, purchased a commercial rental property located at 99 Highway No. 8 in Stoney Creek ("First Property"). Vaccarello described his uncles as labourers who had some money to invest with him and Grimaldi. He described Grimaldi and himself as "risk takers". Each of the uncles and the appellants together held an undivided one-quarter interest in the property. This property has been profitable and is still owned by the appellants and the uncles.

5 Premises were available at 174 Highway, No. 8, "down the street" from Tripemco's offices. Grimaldi made inquiries and discovered the owner of 174 Highway No. 8, known as the Royal Bank Plaza, was Sam Beckir and his wife. Mr. Beckir was 72 years old at the time. Grimaldi had known the Beckirs since he was a child. Grimaldi discussed leasing the premises over coffee with Beckir and the latter gave Grimaldi the keys to the vacant premises so that he could inspect them. Grimaldi visited the premises and concluded a lot of work was necessary. The rentable space was approximately 3,000 square feet. He visited Beckir at his home and asked him what amount of rent he wanted. Beckir in turn asked Grimaldi what he wanted to do with the premises. They eventually agreed that Tripemco would renovate the premises and the rent and other terms of the lease would be settled on completion. Grimaldi stated "nothing was in writing" since he and Beckir trusted each other.

6 These discussions took place during mid to late October, 1986. Renovations started in November and were completed in early January. Cost of renovations were originally estimated to be \$24,000 but went "higher as we went along", recalled Vaccarello. The appellants had numerous informal coffee meetings with Beckir during renovations and during the first or second week of November, Beckir offered to sell the property to the appellant for \$1,600,000.

7 At first Grimaldi was of the view the appellants could not afford investing in the Royal Bank Plaza property but Beckir encouraged them to pursue the idea. Financing was necessary, the appellants could not afford the property by themselves. The appellants met with the uncles in November seeking their assistance. The First Property was paying for itself, recalled Vaccarello, and it was hoped the same could be done with the Royal Bank Plaza. The uncles told the appellants "to check it out" and if the appellants thought the Royal Bank Plaza was "a good deal", they would help out.

8 The appellant reviewed the leases at the Royal Bank Plaza. In reviewing the leases and other matters affecting the property, the appellants relied on the advice of Murray Van Der Marel, an owner of commercial real property in Stoney Creek. The appellants, through Tripemco, had insured Van Der Marel's properties. Van Der Marel advised the appellants the deal was "good": the property was worth more than the asking price.

9 Financing for the First Property had been arranged with A. Meneian, a manager of National Trust. The appellants discussed financing of the Royal Bank Plaza with Meneian. The appellants proposed putting a second mortgage of \$200,000 to \$250,000 on the First Property. Meneian told them, said Vaccarello, there would be no problem since the First Property was fully occupied and

was generating monthly revenue of \$6,000. In the meantime the appellants had meetings with Beckir. At the end of January, Tripemco had moved into the premises at the Royal Bank Plaza.

10 An agreement offering to purchase the Royal Bank Plaza was signed by Vaccarello and Grimaldi as purchaser and Mr. and Mrs. Beckir as vendors on February 11, 1987. The appellants made a deposit of \$5,000 to Beckir to be applied to the sale price. The balance of the purchase price of \$1,600,000 was to be paid as to \$1,395,000 on closing and the Beckirs taking back a second mortgage of \$200,000. The offer was conditional upon the appellants obtaining a first mortgage on the Royal Bank Plaza for not less than \$1,200,000. In the event the appellants failed to obtain the mortgage within a given period of time, the offer would become nil and void and the deposit paid to Beckir would be returned to the appellants. The sale was to take place on May 1st, 1987.

11 According to Grimaldi a meeting of the appellants and the uncles took place at Scalia's home "supper time" on February 11, 1987. The appellants were excited. They had a good price and no foreseeable problems. However the uncles had changed their minds; they would not participate in the transaction. Apparently the uncles had heard rumours of a tenant in the First Property, a fitness centre, that occupied 75% of the First Property, vacating the premises. Also, some of that tenant's cheques had not been honoured. Vaccarello said the uncles were worried and did not want to get further involved, he recalled, "They apologized for telling us so late."

12 The appellants could no longer use the First Property to obtain funds for the Royal Bank Plaza and if they could not use the First Property to help them, the appellants felt they would not get financing for the Royal Bank Plaza. Vaccarello said he had talked to Meneian before and his offer was promised on the appellants obtaining \$200,000 from the First Property. The appellants "did not have the cash", said Vaccarello. If the fitness centre vacated, Vaccarello added, "we could barely carry the first building".

13 On February 12, 1987 the appellants were of the view, said Vaccarello, it would be impossible to obtain financing. "We had done all our homework, relationships were involved ... [and we were] ... in panic." Vaccarello stated he and Grimaldi were "pretty upset". They had spent a lot of money renovating and were committed to purchase the Royal Bank Plaza. Grimaldi testified there "was no way I was going to go against my word to Mr. Beckir ... it's not my style". Vaccarello acknowledged the appellants could have "walk[ed] away from the deal" if they could not obtain financing. However, he said, the appellants took into account Beckir's age, his relationship with them and the fact that Tripemco had money in the renovations. Another reason for proceeding with the purchase was Van Der Marel's advice the transaction was a good deal. "What am I, stupid?" Vaccarello replied to respondent's counsel's suggestion the appellants "walk away".

14 Grimaldi also acknowledged the appellants "could've gotten out of the deal if no financing" was obtained. "Meneian okayed the \$1.2 million financing. Our problem was the \$200,000". He stated Meneian approved the loan based on the group of investors involved, which included the uncles.

15 Beckir and Van Der Marel had told Grimaldi he was "setting a deal of a lifetime ... [It] was a good plaza to hold onto for a long, long time". Grimaldi also declared "I was not going to go back to Mr. Beckir on my word ... Van Der Marel offered us an out and we took it." He added that "if Van Der Marel was not available on February 12th we would have continued to look ... We would not leave Beckir out in the cold".

16 Later in the evening of February 11th, Vaccarello telephoned a Mr. Valeri, who was in the insurance business, and Mr. Frisina, a businessman in the area. They met with these gentlemen at about ten or eleven o'clock that evening, Vaccarello recalled, "to convince them to participate" in the Royal Bank Plaza purchase. Vaccarello said "they saw we were in a panic and didn't want to go in. We felt that with us moving in plus rents from others ... this was a good deal ... [but] they weren't interested".

17 Vaccarello testified that the next morning he telephoned Van Der Marel and asked him if he wanted to be a partner in the Royal Bank Plaza. The appellants met Van Der Marel at the latter's office. They informed Van Der Marel the uncles refused to participate and they could not close the transaction by themselves. At the same time, they did not want to "betray" Beckir by walking away. Van Der Marel said he had enough headaches with his present partners and did not want new partners. However he offered to purchase the property. Grimaldi said the offer "took the wind out of me ... because that was not our intention". Vaccarello repeated their intention was to hold the Royal Bank Plaza for the long term. He stated "we were trying to convince him to let us participate". Van Der Marel offered to purchase the property for \$1,720,000, allowing the appellants a profit. Vaccarello stated the appellants "had to choose between getting out of the deal without a penalty or sell to Van Der Marel". One of the conditions of the purchase by Van Der Marel was the Tripemco would stay at the Royal Bank Plaza. They agreed to sell. Vaccarello, according to Grimaldi, told him "all means [had been] exhausted and [they] really had no choice but to sell".

18 The appellants then met with Beckir to inform him of the events that had taken place. Grimaldi stated he had previously assured Beckir that the tenants would be taken care of. Grimaldi said he and Vaccarello told Beckir they "would make some money on the deal" and Beckir said "I'm happy for you".

19 On February 13, 1987, Tripemco offered to lease the premises at the Royal Bank Plaza from Beckir for a period of five years, effective May 1, 1987. Beckir accepted the offer.

20 Vaccarello said his uncles' fears were well-founded. The fitness centre's cheques for March and April rent "bounced" and in May the tenant made "a midnight move".

21 The appellants acquired a rental property in Burlington, Ontario in 1989 which they still own. Grimaldi indicated the appellants were able to borrow \$200,000 on the security of a mortgage on the First Property to finance the acquisition of the Burlington property. Except for acquiring their family homes, they have had no other real estate ventures.

22 The appellants sold the Royal Bank Plaza to Equicorp Investment Systems Inc. ("Equicorp"), a company associated with Van Der Marel, on or about May 1, 1987; the agreement of purchase of sale is dated February 16, 1987. On or about May 1, 1987 Equicorp sold the Royal Bank Plaza to Queenston Gray Holdings Limited ("Queenston") for approximately \$1,900,000.

23 Van Der Marel confirmed that the appellants approached him to be a partner in the Royal Bank Plaza since they did not have the means to buy the property alone. He had discussed the merits of the property with the appellants when the latter had earlier approached him for advice. Van Der Marel thought the property had good exposure on Highway No. 8 for a "walk-in trade". He was not aware the Royal Bank Plaza was available for sale before the appellants discussed their possible purchase with him.

24 Van Der Marel testified the appellants "were panicked" when they met in his office on February 12th. They explained to him that the uncles had changed their minds and a down payment was now "difficult to come by". Van Der Marel did not suggest to the appellants they look for other partners nor did the appellants ask for such help, he added.

25 Queenston was always looking to acquire property, Van Der Marel stated. He did business with Queenston on a daily basis and approached that company to determine if it was interested in the Royal Bank Plaza.

26 Giuseppe (Joseph) Scalia was 56 years of age at time of trial. He is a steelworker at Stelco. He confirmed Vaccarello proposed the acquisition of the Royal Bank Plaza and he and the other two uncles agreed and then changed their minds because of rumours concerning a tenant in the First Property.

27 By letter dated June 12, 1992 Scalia and Carmelo and Filippo Alfano informed Revenue Canada that they told the appellants on February 15, 1987, not February 11th as stated in his evidence-in-chief, they would not participate in the Royal Bank Plaza transaction. Van Der Marel wrote a "To Whom It May Concern" letter to Tripemco on June 3, 1992 stating that Vaccarello approached him to purchase the Royal Bank Plaza on a joint venture basis on February 16, 1987. In cross-examination Scalia first said he could not remember sending the letter and then stated he could not remember if the date of the decision was February 11th or February 15th.

28 The thrust of the cross-examination by respondent's counsel of the appellants was that they could have gotten out of the deal with Beckir without cost if they could not obtain the financing described in the Offer to Purchase and they did not do so. Rather, they went ahead and sold the Royal Bank Plaza at a profit. This also appears to be the main reason for the assessments.

29 The testimony of the appellants was consistent with that of Van Der Marel. Some questions concerning dates of some events are set out in the letters sent to Revenue Canada by Scalia and Van Der Marel. However, a review of the testimony of the witnesses and the documentary evidence does not assist the respondent. In his letter, Scalia writes he informed the appellants on September 15th of his decision not to participate. Van Der Marel wrote the appellants first approached him on February 16th. These two letters, taken alone, confirm that the appellants wanted to hold on to the Royal Bank Plaza after the uncles withdrew. However I am not satisfied the dates set out in the letters are the true dates. The Agreement of Purchase and Sale between Equicorp, the company associated with Van Der Marel, is dated February 12, 1987. On page one of that Agreement, February 16, 1987 appears as the date the Offer to Purchase is to expire. The offer to lease the premises at the Royal Bank Plaza by Tripemco is dated February 13, 1987. Counsel for the respondent questioned neither Vaccarello nor Van Der Marel whether the latter insisted on Tripemco having a lease before he would agree to purchase the Royal Bank Plaza; it is reasonable that if such condition did exist, the appellants would have gone to Beckir a day or two after seeing Van Der Marel to make an offer to lease. Scalia was not sure when he informed the appellants he would not participate in the Royal Bank Plaza transaction. All the documentary evidence - save for the letters to Revenue Canada by Scalia and Van Der Marel - appears to corroborate the essence of the appellants' testimony and their version of events.

30 The appellants entered into the venture to acquire the Royal Bank Plaza as a capital asset. This plan had the blessings of the uncles who were their partners in another property and whose help they required for financing. The uncles were to participate with the appellants to purchase the prop-

erty. The appellants made an offer to Beckir, which was accepted. When the uncles withdrew their commitment, the appellants sought other people to replace the uncles. The appellants could not afford to purchase the property by themselves. They failed to find new partners and accepted Van Der Marel's offer to sell. It is true the appellants could have walked away from the transaction without costs, but did not do so. They elected to sell their interest and make a profit: this is not a sin. The idea of selling the Royal Bank Plaza was not a motivating factor leading the appellants to enter into the transaction. To make a profit so quickly was not in the minds of the appellants.

Subsection 15(1) Assessment

31

Where, in a taxation year, a benefit has been conferred on a shareholder, or on a person in contemplation of his becoming a shareholder, by a corporation otherwise than by

- (a) the reduction of the paid-up capital, the redemption, cancellation or acquisition by the corporation of shares of its capital stock or on the winding-up, discontinuance or reorganization of its business, or otherwise by way of a transaction to which section 88 applies,
- (b) the payment of a dividend,
- (c) conferring on all owners of common shares of the capital stock of the corporation a right to buy additional shares thereof, or
- (d) an action described in paragraph 84(1)(c.1), (c.2) or (c.3),

the amount or value thereof shall, except to the extent that it is deemed by section 84 to be a dividend, be included in computing the income of the shareholder for the year.

32 Vaccarello testified Queenston "wanted us out of the premises" at the Royal Bank Plaza. Tripemco had entered into a lease with Beckir on February 13, 1987. Queenston wanted the space for itself. At the same time the appellants wanted to have Tripemco in their own building. Negotiations took place with Angelo Swampilli of Queenston. The appellants informed Swampilli that Tripemco had spent money on renovations. Eventually Queenston agreed to pay \$38,000 to have Tripemco move. According to Grimaldi the money was paid to "get us out of there ... to renovate the fitness centre [and] ... to reimburse us our renovations" at the Royal Bank Plaza. The money was paid by cheque to Vaccarello on or about November 11, 1988. Tripemco vacated the premises on December 31, 1988 and moved to the First Property.

33 Vaccarello gave one-half of the \$38,000 to Grimaldi. He said he went to their accountant and advised him of the payment of the \$38,000 and the allocation. Vaccarello said the accountant advised him to report the \$19,000 he retained in his income tax return as a capital gain. He and Grimaldi would then claim a capital gains deduction. Revenue Canada assessed on the basis the \$38,000 belonged to Tripemco and the amounts received by the appellants in 1988 were benefits conferred on the appellants by Tripemco in their capacity as shareholders and are to be included in their income for 1988 in accordance with subsection 15(1) of the Act.

34 In their Notices of Appeal, the appellants also submitted that the \$38,000 payment from Queenston resulted in an amount owed by the appellants to Tripemco which amount was repaid by the appellants prior to the end of the taxation year of Tripemco¹ following the taxation year in which the loan was made and therefore no amount is to be included in the income of the appellants pursuant to subsection 15(2).

35 There is absolutely no evidence that a debt or loan relationship was entered into by the appellants and Tripemco at the time Queenston paid the appellants the \$38,000. The appellants filed their 1988 income tax returns on the basis they made a capital gain in the year. I cannot conclude from the evidence that the appellants considered in 1988 that they simply borrowed \$38,000 from Tripemco. This was money that belonged to Tripemco. Without considering whether the appellants repaid the \$38,000 to Tripemco, I cannot agree with the appellants' submission that subsection 15(2) applies to the facts of their appeals.

36 The appeals for 1987 are allowed with costs and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessments on the basis that the disposition of the Royal Bank Plaza was on capital account. The appeals for the 1988 taxation year are dismissed.

qp/d/scl/DRS/DRS

¹ Tripemco's taxation year ends on December 31st.