

Docket: 2007-1962(IT)I

BETWEEN:

JACQUELINE PIGEON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 20, 2007, at Montréal, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Stéphanie Côté

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2003 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 17th day of December 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 1st day of February 2008
Michael Palles, Reviser

Citation: 2007TCC752
Date: 20071217
Docket: 2007-1962(IT)I

BETWEEN:

JACQUELINE PIGEON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] This is an appeal concerning the 2003 taxation year.

[2] The issue to be determined is whether, for the purpose of computing the appellant's income, the income from the sale of an immovable should be included as business income or as capital.

[3] The facts on which the Minister of National Revenue (the "Minister") relied for the reassessment are described in paragraphs 5 and 8 of the Reply to the Notice of Appeal (the "Reply") as follows:

[TRANSLATION]

5. On October 31, 2005, the Minister issued a reassessment to the appellant for her 2003 taxation year, making the following changes to her income, among others:

<u>Description</u>	<u>Amount</u>
ADDITION	
(DEDUCTION)	
Business income	\$37,722
Capital gain	
Taxable (50%)	(\$18,861)

Cancellation of deferral of net capital loss for 2004 taxation year	\$7,330
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8. In issuing and confirming the reassessment dated October 31, 2005, for the 2003 taxation year, the Minister relied on the same assumptions of fact, namely:
- (a) In her income tax return for the 2003 taxation year, the appellant reported a taxable capital gain of \$18,861 ($\$37,722 \times 50\%$) in connection with the sale of an immovable located at 364-366-368 Briggs East in Longueuil in the province of Quebec (hereafter the "immovable");
 - (b) The appellant had purchased the immovable on November 1, 2002;
 - (c) The immovable was sold on June 10, 2003;
 - (d) The appellant has owned property for many years;
 - (e) The appellant has bought and sold several immovables in the past;
 - (f) During the 2002 and 2003 taxation years, the appellant was a "real estate agent";
 - (g) During an interview with the Minister's auditor, (hereafter the "auditor") on August 17, 2005, the appellant confirmed having purchased the immovable with the intention to resell it within one year;
 - (h) The appellant had taken out a bank loan to finance the purchase of the immovable;
 - (i) The bank loan had a one-year term;
 - (j) The transaction in question was an adventure or concern in the nature of trade;
 - (k) In light of the preceding, the auditor determined that the amount of \$37,722 resulting from the sale of the immovable in 2003 was business income.

[4] I quote the entire Notice of Appeal, because the evidence will subsequently show that many of the statements in it are not consistent with reality:

[TRANSLATION]

April 22, 2007-04-22

Tax Court of Canada – Notice of Appeal – Informal Procedure

Type of appeal: 2003 Income Tax

To whom it may concern:

When I purchased the immovable, I had only one initial intention, which was to make a long-term investment. I had no secondary intention of selling this immovable in the short term. In addition, I never confirmed to Karine Touchette that I purchased this immovable to resell it in the short term. The resale of the immovable at 364-366-368 was not planned at the time of purchase.

The hypothecary loan was made according to standards, that is, amortized over 25 years and renewable in one year. At that time, the rate was 5.65% for one year. The hypothecary loan officer at the Laurentian Bank advised me to take this rate for a fixed term of one year, as rates were likely to be lower in one year. She was right, because around 2003 & 2004, the five-year fixed rate was lower, and there was a significant difference.

If I had been thinking about selling when I purchased, I would surely not have given a down payment of 25%. In general, speculators usually try to put down the least amount of cash, purchase several properties at a time and squeeze as much money as possible from what was not invested at the time of sale.

My initial intention was to purchase an immovable, manage it wisely and receive rental income.

I wanted to build up a portfolio for a decent retirement, as I did not have any pension fund.

In 2002 and 2003, I held full-time employment at Jean Coutu as a naturopathy clerk. I had income to support myself. The purchase of this immovable was really made as a retirement plan and to have rental income.

CIRCUMSTANCES LEADING TO THE SALE OF THE PROPERTY AT 364-366-368 BRIGGS-LONGUEUIL

Around February 23, 2003, Sylvain Simard contacted me, saying that he wanted to purchase a triplex. I told him that I was not interested in selling. Around April 6, 2003, he asked me once again if the immovable was for sale, as he had purchased other property in the St. Hubert area, but the transaction was not finalized. On

April 9, 2003, we met for 2 hours, 30 minutes. He was worried because he no longer had a place to live. After 2 hours and 30 minutes of discussion, I accepted his offer out of empathy, late in the evening, around 11:00 p.m.

This immovable had not been advertised anywhere, be it in a newspaper and through any network. In addition, it was sold for slightly less than its market value at that time.

MY PROFIT FROM THE SALE MUST BE TREATED AS A CAPITAL GAIN FOR THE FOLLOWING REASONS:

-I was personally liable for a hypothecary loan of \$97,500 which was used to make this purchase and put down 25% cash. Sale not planned at the time of purchase. The purchase of the immovable was made for investment purposes, and the immovable was to have been kept for a long time.

Ref.: *O&M Investments Ltd. v. Her Majesty the Queen* (1990) 1 C.T.C. 15

The fact that the taxpayer has been a part-time professional in the field of real estate for less than one year is not relevant, because the taxpayer makes his own investment decisions regarding real estate and securities.

Ref.: *Grouchy v. Her Majesty the Queen* (1990) C.T.C. 375.

-The taxpayer intended to develop a sufficient real estate portfolio for retirement.

"Jacqueline Pigeon"
Taxpayer

[5] In her notice of appeal, the appellant stated having chosen a fixed rate for her hypothecary loan. She stated the same thing at the hearing. She even submitted a financing offer from the Laurentian Bank in the amount of \$97,500 dated September 18, 2002, which confirmed this statement (Exhibit A-6).

[6] However, counsel for the respondent submitted a document from the same bank, a final offer dated September 26, 2002, in which the term is open (Exhibit I-2).

[7] At the hearing, the appellant also stated having paid a three-month penalty for paying off her hypothecary loan. However, the bank stated that she did not pay a penalty. This is confirmed by Exhibit I-7, [TRANSLATION] "Closing Sheet", in which the note "0" was written in the box entitled [TRANSLATION] "Penalties", and by Exhibit I-6, [TRANSLATION] "Deed of Loan, Immovable Hypothec", on the last page, where the clause entitled [TRANSLATION] "Special remarks" appears.

[8] At the hearing, the appellant stated that she had paid the difference between \$97,500, the amount of the hypothecary loan, and the purchase price of \$130,000 out of her own savings. However, counsel for the respondent submitted a loan document in the amount of \$32,500, dated November 1, 2002 (Exhibit I-1). This loan was guaranteed by a second hypothec on the Briggs Street property.

[9] The appellant stated that the sale of her property was the result of an unsolicited offer. The purchaser was the brother of a long-time friend or acquaintance. Neither the purchaser nor the friend testified. However, the appellant asked a friend who was allegedly at her home on the evening the unsolicited offer was made to testify on this point.

[10] Karine Touchette, an auditor for the Minister, stated that either the appellant or her representative did indeed tell her that this property had been purchased for the purpose of reselling it in the short term. Two other properties were also covered by this audit. The auditor accepted the appellant's explanation for one of them but included the other as business income as well. As far as the objection was concerned, the income from the sale of this other property was also deemed to be a capital gain. The auditor submitted a list of transactions involving immovables made by the appellant from 1990 to 2006 as Exhibit I-3.

[11] At the hearing, counsel for the respondent submitted a sworn statement from an adviser at the Laurentian Bank. The adviser was not present at the hearing. Most of the statements concerned facts and were supported by documentation. However, in one statement, the adviser reported what the appellant allegedly told her about her intentions when purchasing the property.

[12] Normally, the opposing party should have the right to cross-examine a deponent. If the deponent cannot testify, I am of the opinion that the content of his or her sworn statement must be disclosed to the opposing party before the hearing. However, in this case, the deponent's statement merely confirmed the reason for choosing an open term. This reason had been given by the appellant herself at the hearing when she explained why she had not chosen an open term.

[13] In this case, many of the statements made in the notice of appeal and at the hearing were not consistent with the truth. It is obvious that statements which are not consistent with the truth seriously undermine the appellant's credibility with regard to her statement to the effect that she had acquired the property for a long-term goal. In addition, the circumstances surrounding the purchase and resale must be considered: the short period of time during which she owned the property; the appellant's

numerous transactions involving immovables; the absence of key witnesses, such as the purchaser, in connection with the unsolicited offer; the purchase price, which was borrowed in its entirety; and the open term for the hypothecary loan. All these facts lead to the conclusion that it is much more plausible that the property was purchased for rapid resale, rather than for long-term investment.

[14] The appeal is therefore dismissed.

Signed at Ottawa, Canada, this 17th day of December 2007.

"Louise Lamarre Proulx"

Lamarre Proulx, J.T.C.C.

Translation certified true
on this 1st day of February 2008
Michael Palles, Reviser

CITATION: 2007TCC752

COURT DOCKET NUMBER: 2007-1962(IT)I

STYLE OF CAUSE: JACQUELINE PIGEON v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 20, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Louise Lamarre
Proulx

DATE OF JUDGMENT: December 17, 2007

APPEARANCES:

For the appellant:	The appellant herself
Counsel for the respondent:	Stéphanie Côté

SOLICITORS OF RECORD:

For the appellant:	
Name:	
Firm:	
For the respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada