Docket: 2007-4209(IT)I

BETWEEN:

AMIRTHALINGAM SIVASUBRAMANIAM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on April 24, 2008, at Toronto, Ontario.

Before: The Honourable D.G.H. Bowman, Chief Justice

Appearances:

For the Appellant: The appellant himself

Counsel for the Respondent: Alexandra Humphrey

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years are dismissed.

Signed at Toronto, Ontario, this 8th day of May 2008.

"D.G.H. Bowman"

Bowman, C.J.

Citation: 2008TCC261
Date: 20080508
Docket: 2007-4209(IT)I

BETWEEN:

AMIRTHALINGAM SIVASUBRAMANIAM,

Appellant,

and

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REASONS FOR JUDGMENT

Bowman, C.J.

[1] These appeals are from assessments made under the *Income Tax Act* for the appellant's 2003, 2004 and 2005 taxation years. The assessments deny the appellant's losses on the rental of seven condominiums in Scarborough, Ontario created by capital cost allowance ("CCA").

[2] The appellant is an accountant. Starting in about 1989 and for several years later, he acquired seven condominiums in Scarborough and rented them to tenants. He claimed CCA on the condominiums as well as smaller amounts of CCA on the furniture and equipment. The condominium units were under Class 1 and CCA at 4% was claimed. The furniture and equipment were under Class 8 and CCA at 20% was claimed.

[3] Schedule A sets out the financial results of the rental of the seven units. It will be apparent that they generated substantial gross revenues (upwards of $85,000 in each year). The expenses, even before CCA, were substantial and therefore the net income, before CCA, was not large in comparison to the capital outlay and the expenses. Indeed, in some years, a loss was created. In all years the deduction of CCA resulted in a loss on each unit and, overall, a very substantial total loss.

[4] The loss created by the CCA was disallowed under subsections 1100(11) and 1100(14) of the *Income Tax Regulations*. Essentially these provisions restrict the loss that may be claimed from rental or leasing properties to losses before claiming CCA. To put it a little more colloquially, you cannot create or increase a loss from rental or leasing properties by claiming CCA.

[5] Subsections 1100(11) and 1100(14) of the *Income Tax Regulations* read as follows:

> **(11) Rental properties** -- Notwithstanding subsection (1), in no case shall the aggregate of deductions, each of which is a deduction in respect of property of a prescribed class owned by a taxpayer that includes rental property owned by him, otherwise allowed to the taxpayer by virtue of subsection (1) in computing his income for a taxation year, exceed the amount, if any, by which
>
> (a) the aggregate of amounts each of which is
>
> (i) his income for the year from renting or leasing a rental property owned by him, computed without regard to paragraph 20(1)(a) of the Act, or
>
> (ii) the income of a partnership for the year from renting or leasing a rental property of the partnership, to the extent of the taxpayer's share of such income,
>
> exceeds
>
> (b) the aggregate of amounts each of which is
>
> (i) his loss for the year from renting or leasing a rental property owned by him, computed without regard to paragraph 20(1)(a) of the Act, or
>
> (ii) the loss of a partnership for the year from renting or leasing a rental property of the partnership, to the extent of the taxpayer's share of such loss.
>
> . . . . .
>
> **(14) ["Rental property"]** -- In this section and section 1101, "rental property" of a taxpayer or a partnership means
>
> (a) a building owned by the taxpayer or the partnership, whether owned jointly with another person or otherwise, or
>
> (b) a leasehold interest in real property, if the leasehold interest is property of Class 1, 3, 6 or 13 in Schedule II and is owned by the taxpayer or the partnership,
>
> if, in the taxation year in respect of which the expression is being applied, the property was used by the taxpayer or the partnership principally for the purpose of gaining or producing gross revenue that is rent, but, for greater certainty, does not include a property leased by the taxpayer or the partnership to a lessee, in the ordinary course of the taxpayer's or partnership's business of selling goods or rendering services, under an agreement by which the lessee undertakes to use the property to carry on the business of selling, or promoting the sale of, the taxpayer's or partnership's goods or services.

[6] There is a similar provision for leasing properties (depreciable property other than buildings) and there is an exception for corporations whose principal business is leasing or renting.

[7] Mr. Sivasubramaniam contends that the condominiums are not "rental properties" as defined by subsection 1100(14) because they were not, in the taxation years in question

> ". . . used by [him] . . . principally for the purpose of gaining or producing gross revenue that is rent, . . .".

Rather, he contends, the properties were acquired by him with a view to selling them at a profit and realizing a capital gain. He has in fact listed all or most of the condominiums for sale but has been unsuccessful in selling them or at all events in getting a price at which he is willing to sell. Interestingly, even in the boom times we have had in real estate in Toronto, these condominiums have not been moving. Perhaps it is the location.

[8] There is a problem with his argument. If, as he contends, his principal purpose was to sell the condominiums at a profit and not to obtain rental revenues then he runs a risk that the Canada Revenue Agency may say that they no longer are capital properties in his hands but have become the inventory of a business or an adventure in the nature of trade. Mr. Sivasubramaniam argues that they are inventory but I fear that he has not thought through the implications of that argument. If the condominiums really are inventory it means that they fall entirely outside of the CCA system because paragraph 1102(1)(*b*) of the *Income Tax Regulations* provides:

> **1102. (1)** The classes of property described in this Part and in Schedule II shall be deemed not to include property
>
> (*a*) the cost of which would be deductible in computing the taxpayer's income if the Act were read without reference to sections 66 to 66.4 of the Act;
>
> (*a*.1) the cost of which is included in the taxpayer's Canadian renewable and conservation expense (within the meaning assigned by section 1219);
>
> (*b*) that is described in the taxpayer's inventory;

[9] One might question whether there is some significance to the words "described in the taxpayer's inventory" on the theory that if it is not in fact "described" in the inventory, but forms part of the property held for sale in the course of a business, and is therefore "inventory" as defined in section 248, paragraph 1102(1)(*c*) does not apply. The short answer, I believe, is that paragraph

1102(1)(*c*) is probably unnecessary. If property is inventory, whether or not so described or described in a list called an inventory, it is not subject to CCA because it does not have a capital cost and therefore does not fall into paragraph 20(1)(*a*) of the *Income Tax Act*.[1]

[10] Moreover, if, as Mr. Sivasubramaniam contends his purpose in acquiring the units was not to earn rental income but to realize capital gains (arguably, if I may say so, something of an oxymoron) then the condominiums are excluded from the CCA regime by paragraph 1102(1)(*c*) of the *Income Tax Regulations* which reads:

> (*c*) that was not acquired by the taxpayer for the purpose of gaining or producing income;

[11] That paragraph would be applicable because of subsection 9(3) of the *Income Tax Act.*

> (3) *Gains and losses not included.* In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

[12] These are entirely theoretical conjectures but the fact remains that the use to which the units were put in the year was the production of rental income. They fall within the definition of rental properties. Nor do I think the condominiums were inventory. Most investments are bought in the hope that they will be disposed of at some time at a profit. That does not make them inventory or trading assets. In *Irrigation Industries Limited v. M.N.R.*, 62 DTC 1131, the Supreme Court of Canada said at pages 1134 to 1135:

> The only operations of the appellant in the present case were the purchase of 4,000 treasury shares directly from Brunswick and their subsequent sale, presumably through brokers. This is not the sort of trading which would be carried on ordinarily by those engaged in the business of trading in securities. The appellant's purchase was not an underwriting, nor was it a participation in an underwriting syndicate with respect to an issue of securities for the purpose of effecting their sale to the public, and did not have the characteristics of that kind of a venture. What the appellant did was to acquire a capital interest in a new

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[1] I do not think that this case is one in which to discuss the somewhat anomalous position of taxpayers who are in the business of leasing property and who subsequently sell the property to the persons to whom it was leased. This is the position in which the taxpayer found itself in *Canadian Kodak Sales Limited v. M.N.R.*, 54 DTC 1194. The taxpayer had claimed, and was allowed, CCA on photographic equipment in previous years and subsequently sold the equipment to its customers. Thorson, P. of the Exchequer Court held that the sales were not on capital account but were made in the course of the appellant's business. In this he followed *Gloucester Railway Carriage and Wagon Co. Inland Revenue Commissioners*, (1925) A.C. 467. He also refused to apply the recapture provision of the *Income Tax Act*. The case does give rise to a conceptual anomaly but I do not propose to try to resolve it here.

corporate business venture, in a manner which has the characteristics of the making of an investment, and subsequently to dispose, by sale, of that interest.

But it may be contended that persons may make a business merely of the buying and selling of securities, without being traders in securities in the ordinary sense, and that the transactions involved in that kind of business are similar, except in number, to that which occurred here. It has, however, been pointed out in the well known case of *Californian Copper Syndicate v. Harris, (*1904) 5 T.C. 159 at 165, that, where the realization of securities is involved, the taxability of enhanced values depends on whether such realization was an act done in the carrying on of a business. In that case the Commissioners had held that the transaction there in question was an adventure or concern in the nature of trade. The judgments on appeal make no reference to that point, but are based on the ground that the turning of the investment to account in that case was not merely incidental, but was the essential feature of the appellant's business. The passage in question reads as follows:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the *Income Tax Act* of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

In my opinion, the transaction in question here does not fall within either of the positive tests which the authorities have suggested should be applied.

[*Question of intention*]

The only test which was applied in the present case was whether the appellant entered into the transaction with the intention of disposing of the shares at a profit so soon as there was a reasonable opportunity of so doing. Is that a sufficient test for determining whether or not this transaction constitutes an adventure in the nature of trade? I do not think that, standing alone, it is sufficient. I agree with the views expressed on this very point by Rowlatt J. in *Leeming v. Jones*, *supra*, at p. 284. That case involved the question of the taxability of profits derived from purchase and sale of two rubber estates in the Malay Peninsula. The Commissioners initially found that there was a concern in the nature of trade because the property in question was acquired with the sole object of disposing of it at a profit. Rowlatt J. sent the case back to the Commissioners and states his reasons as follows:

> I think it is quite clear that what the Commissioners have to find is whether there is here a concern in the nature of trade. Now, what they have found they say in these words (I am reading it in short): That the property was acquired with the sole object of turning it over again at a profit, and without any intention of holding the property as an investment. That describes what a man does if he buys a picture that he sees going cheap at Christie's, because he knows that in a month he will sell it again at Christie's. That is not carrying on a trade. Those words will not do as a finding of carrying on a trade or anything else. What the Commissioners must do is to say, one way or the other, was this -- I will not say carrying on a trade, but was it a speculation in the nature of trade? I do not indicate which way it ought to be, but I commend the Commissioners to consider what took place in the nature of organizing the speculation, maturing the property, and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not.

The case was returned to the Commissioners, who then found as a fact that there had not been a concern in the nature of trade. Ultimately it reached the House of Lords, [1930] A.C. 415, where the main issue was as to whether the profits were taxable under Case VI of Schedule D of the *Income Tax Act*, 1918. There is, however, a general statement of principle by Lord Buckmaster, at p. 420, which aptly applies to the present case, when he says:

> an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realization does not make it income.

[13] In the result I think the condominiums were rental properties and the restrictions in subsection 1100(11) of the *Income Tax Regulations* apply.

[14] The appeals are therefore dismissed.

Signed at Toronto, Ontario, this 8th day of May 2008.

"D.G.H. Bowman"

Bowman C.J.

SCHEDULE A

1 SAUGEEN CRESCENT, SCARBOROUGH, ONTARIO	**2003**	**2004**	**2005**
Gross income	$19,150.00	$16,650.00	$16,200.00
Expenses before capital cost allowance on all properties ("total CCA")	$17,457.58	$16,418.62	15,822.95
Income (loss) before total CCA	1,692.42	231.38	377.05
Less: CCA on unit	3,927.55	3,770.45	3,619.63
CCA on furniture and equipment	148.85	119.08	95.26
Net Income (Loss)	($2,383.98)	($3,658.14)	($3,337.84)
4062 LAWRENCE AVENUE EAST, Unit 307 SCARBOROUGH, ONTARIO	**2003**	**2004**	**2005**
Gross income	$13,250.00	$12,000.00	$12,000.00
Expenses before capital cost allowance on all properties ("total CCA")	11,779.47	11,458.76	10,636.60
Income (loss) before total CCA	1,470.53	541.24	1,363.40
Less: CCA on unit	4,037.60	3,876.10	3,728.25
CCA on furniture and equipment	465.00	972.00	777.60
Net Income (Loss)	($3,032.07)	($4,306.86)	($3,142.45)
4062 LAWRENCE AVENUE EAST, Unit 607 SCARBOROUGH, ONTARIO	**2003**	**2004**	**2005**
Gross income	$9.800.00	$6,600.00	$10,250.00
Expenses before capital cost allowance on all properties ("total CCA")	7,001.75	7,171.28	11,568.22
Income (loss) before total CCA	2,798.25	(571.28)	(1,318.22)
Less: CCA on unit	2,427.72	2,330.61	2,237.38
CCA on furniture and equipment	311.04	248.83	199.07
Net Income (Loss)	$59.49	$3,150.72)	$3,754.67)
99 BLACKWELL AVENUE, PH5 SCARBOROUGH, ONTARIO			
Gross income	$13,050.00	$12,600.00	$10,500.00
Expenses before capital cost allowance on all properties ("total CCA")	11,434.55	10,623.27	9,674.76
Income (loss) before total CCA	1,615.45	1,976.73	825.24
Less: CCA on unit	3,594.61	3,450.82	3,312.79
CCA on furniture and equipment	400.32	320.26	256.20
Net Income (Loss)	($2,379.48)	($1,794.35)	($2,743.76)

99 BLACKWELL AVENUE, Unit 303 SCARBOROUGH, ONTARIO	**2003**	**2004**	**2005**

Gross income	$14,200.00	$12,100.00	$8,500.00
Expenses before capital cost allowance on all properties ("total CCA")	11,176.24	9,913.07	9,774.29
Income (loss) before CCA	3,023.76	2,186.93	(1,274.29)
Less: CCA on unit	3.829.43	3,676.26	3,529.20
CCA on furniture and equipment	399.46	319.56	255.65
Net Income (Loss)	($1,205.13)	($1,808.89)	($5,059.14)
3380 EGLINTON AVENUE EAST, Unit 1702, SCARBOROUGH, ONTARIO	**2003**	**2004**	**2005**
Gross income	$10,000.00	$12,600.00	$12,600.00
Expenses before capital cost allowance on all properties ("total CCA")	11,460.48	13,344.18	11,885.26
Income (loss) before CCA	($1,460.48)	($744.18)	$714.74
Less: CCA on unit	3,829.43	3,676.25	3,529.20
CCA on furniture and equipment	320.84	256.67	205.34
Net Income (Loss)	($5,610.75)	($4,677.10)	($3,019.80)
10 STONEHILL CRT., Unit 702, SCARBOROUGH, ONTARIO	**2003**	**2004**	**2005**
Gross income	$14,640.00	$13,250.00	$14,300.00
Expenses before capital cost allowance on all properties ("total CCA")	16,492.08	16,354.38	13,695.36
Income (loss) before total CCA	($1,852.08)	($3,104.38)	$604.64
Less: CCA on unit	5,023.87	4,822.92	4,630.00
CCA on furniture and equipment	320.40	256.32	205.06
Net Income (Loss)	($7,196.35)	($8,183.62)	($4,230.42)

CITATION:	2008TCC261
COURT FILE NO.:	2007-4209(IT)I
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APPEARANCES:

For the Appellant:	The appellant himself
Counsel for the Respondent:	Alexandra Humphrey

COUNSEL OF RECORD:

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