

Docket: 2007-3191(IT)I

BETWEEN:

CÉLINE ST-ANDRÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Symon Migneault*
(2007-3197(IT)I) on April 28, 2008, at Montréal, Quebec

Before: The Honourable Justice François Angers

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Chantal Roberge

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* with respect to the 2001, 2002 and 2003 taxation years is allowed in part and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 14th day of July 2008.

"François Angers"

Angers J.

Translation certified true
on this 2nd day of September 2008.
Susan Deichert, Reviser

BETWEEN:

SYMON MIGNEAULT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Citation: 2008TCC391
Date: 20080714
Dockets: 2007-3191(IT)I
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BETWEEN:

CÉLINE ST-ANDRÉ,
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Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

Angers J.

[1] In filing their income tax returns for the 2001, 2002 and 2003 taxation years, the Appellants respectively reported rental losses of \$3,435.39 for the 2001 taxation year, \$21,551.80 for the 2002 taxation year and \$2,642 for the 2003 taxation year. The Minister of National Revenue ("the Minister") cancelled their rental losses for the 2001 and 2002 taxation years and added a net rental income of \$2,642 for their 2003 taxation year. In reply to the Appellants' objection, the Minister cancelled the net income of \$2,642 so that the 2003 assessment is now void and no longer being contested. With respect to the 2001 taxation year, the Minister indicated at the hearing that he was consenting to judgment so that only the 2002 taxation year is at issue in this appeal. It should be noted that the assessment for the year 2001 was made after the normal assessment period.

[2] The Appellants are spouses and the parents of five children. At the end of the summer of 2001, they purchased in equal shares a parcel of land upon which are

situated two cottages with the civic addresses of 451 and 453 Des Geais Bleus, in the municipality of Nominique, Quebec. The female Appellant was familiar with this area because she had lived there during her childhood. They started out by looking for a single cottage. When this opportunity arose, the two cottages could not be sold separately, so they made this purchase with the intention of earning rental income but they had not prepared a business plan.

[3] The cottage at 451 des Geais Bleus is located near Lac Lesage. It has several bedrooms which can accommodate up to 16 people. The cottage at 453 Des Geais Bleus is located behind it and can accommodate up to 8 people.

[4] In 2001, the year of the purchase, No. 451 was not rented. No. 453 had been rented to the female Appellant's brother for two or three weeks and had earned \$600 in rental income.

[5] In 2002, the male Appellant prepared a business plan primarily targeting the rental of 451 Des Geais Bleus to set up a summer camp for diving, taekwondo and karate. There was also the possibility of renting the pontoon and other accessories such as pedal boats, canoes, windsurf boards and other things. However, there was little rental activity in 2002 and the plan for the camp never materialized. The male Appellant admitted that he had not done any research or detailed market studies and that he had relied on rumours that cottages were easy to rent in this region.

[6] The Appellants posted several advertisements in local convenience stores with their telephone number and relied on word of mouth. The advertisements were for 453 Des Geais Bleus, and the Appellants succeeded in renting it and earned rental income of \$900 in 2002. Several reservations were made but they were often cancelled at the last minute and since the Appellants had not asked for a deposit, they came away empty-handed in these cases. No. 453 Des Geais Bleus was rented for four weeks and two weekends in 2002. Each of the Appellants deducted half of the expenses totalling \$12,783.88, which can be broken down as follows:

Mortgage interest	\$1,624.65
Municipal taxes	\$357.81
School taxes	\$117.60
Electricity	\$330.00
Telephone	\$410.49

Cable television	\$341.82
Improvements	\$4,386.78
Furniture and accessories	\$568.41
Recreation and equipment	\$4,118.32
Insurance	<u>\$528.00</u>
Total	\$12,783.88

The Appellants never occupied 453 Des Geais Bleus in 2002.

[7] No. 451 proved more difficult to rent. The Appellants encountered several problems with it in 2002. It must first be emphasized that only the basement of the cottage could be rented and it was rented only for four nights, thereby earning a rental income of \$300 for the year 2002. The Appellants used 451 des Geais Bleus for personal purposes during the summer of 2002.

[8] No. 451 had a serious erosion problem which made its foundation unstable. The Appellants had to perform some major work in 2002 for which they deducted the related expenses. The expenses can be broken down as follows:

Mortgage interest	\$1,115.74
Foundation	\$9,185.45
Electrician	\$3,680.80
Plumbing	\$1,643.60
Insulation	\$2,726.09
Materials	\$5,046.23
Septic tank	\$1,414.81
Labour	\$5,193.38
Notary	\$750.00
Assessor	\$575.13
Insurance	<u>\$188.50</u>
Total	\$31,519.73

[9] The expense for the foundation represents 35% of the amount actually paid under this heading, namely, \$26,244.00. Each of the Appellants deducted half of it, as they had done for the expenses relating to 453 Des Geais Bleus. The work in question involved the construction of a new foundation, which necessitated raising

the cottage. They also finished the basement and the two bathrooms, constructed a staircase, and replaced the electrical system, the plumbing, the insulation, the patio in treated wood and the porch. They did excavation work and repaired the septic tank.

[10] No. 451 was not more successful in 2003. In fact, except for the income of \$300 collected in 2002, no rental income was obtained from it in 2001, 2003 and 2004 and it is in fact no longer for rent because the intention is to do something else with it. No. 453 generated rental income of \$600 in 2001 and \$500 in 2003. It was not rented in 2004.

[11] The Respondent justified disallowing the rental losses reported for the two cottages on the grounds that these were personal expenses and that the Appellants never intended to engage in that activity with a view to profit nor to make that activity a source of income within the meaning of the *Income Tax Act*.

[12] According to the evidence, there is no doubt that the Appellants were looking for a cottage for personal use. The area in which they were looking was meaningful for the female Appellant because she was familiar with it from her childhood. When the opportunity arose to buy two cottages on the same parcel of land, the idea of renting came to mind because this purchase exceeded their budget. It took until 2002 for a business plan, including the rental of 451 Des Geais Bleus, to be developed by the male Appellant. He admitted that he had no training in the field, did not conduct any market studies and relied only on rumours that cottages were easy to rent. The business plan did not include a plan to rent 451 Des Geais Bleus for 2002 but only future projects. It was partly occupied by the Appellants and their children and was the subject of major work beginning in August 2002 and for the remainder of the year.

[13] It is also obvious that the rental rates were not established based on the profitability of the project but on the basis of average rental prices for cottages in this area.

[14] That being said, the Supreme Court of Canada in *Stewart v. R.*, [2002] 2 S.C.R. 645, restated the way in which a reasonable expectation of profit is to be analyzed, and also decided that this test applies only in certain circumstances. I am reproducing below paragraph 60 of this judgment:

In summary, the issue of whether or not a taxpayer has a source of income is to be determined by looking at the commerciality of the activity in question. Where the

activity contains no personal element and is clearly commercial, no further inquiry is necessary. Where the activity could be classified as a personal pursuit, then it must be determined whether or not the activity is being carried on in a sufficiently commercial manner to constitute a source of income. ...

[15] Furthermore, at paragraph 54, the Supreme Court of Canada indicated how the analysis must be carried out:

It should also be noted that the source of income assessment is not a purely subjective inquiry. Although in order for an activity to be classified as commercial in nature, the taxpayer must have the subjective intention to profit, in addition, as stated in *Moldowan*, this determination should be made by looking at a variety of objective factors. Thus, in expanded form, the first stage of the above test can be restated as follows: “Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?” This requires the taxpayer to establish that his or her predominant intention is to make a profit from the activity and that the activity has been carried out in accordance with objective standards of businesslike behaviour.

[Emphasis added.]

[16] I therefore find, for the reasons indicated in the preceding paragraphs, that 451 Des Geais Bleus was purchased mainly for personal purposes and used as such in 2002. It is also obvious, in view of the condition of this cottage, that major repairs were necessary. This work began in August 2002 and affected the structure of the cottage. The business plan developed by the Appellant Symon Migneault forecast activities over the following years which never materialized. In my opinion, in 2002, 451 Des Geais Bleus did not have a commercial nature. The fact that it was rented for four nights is clearly insufficient to lead me to find that this activity was carried out in a sufficiently commercial manner to constitute a source of income. I must also add that the expenses deducted by the Appellants for 451 Des Geais Bleus were primarily for major and necessary work of a capital nature, and not expenses for normal maintenance and repairs.

[17] However, I come to a different conclusion with respect to 453 Des Geais Bleus. Although this cottage was purchased with the intention eventually of selling it to the female Appellant's brother, this does not preclude the fact that it was intended to be rented, at least in 2002, and this rental was carried on in a sufficiently commercial manner. The Appellants' lack of experience certainly cost them some rentals and therefore some income, but the activity was purely commercial. The Appellants are therefore entitled to deduct their respective portions of the rental expenses for 453 Des Geais Bleus for the year 2002.

[18] The appeals are allowed in part and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment.

Signed at Edmundston, New Brunswick this 14th day of July 2008.

"François Angers"

Angers J.

Translation certified true
on this 2nd day of September 2008.
Susan Deichert, Reviser

CITATION : 2008 TCC 391

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and Her Majesty the Queen

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REASONS FOR JUDGMENT BY: The Honorable Justice François
Angers

DATE OF JUDGMENT: July 14, 2008

APPEARANCES:

For the Appellants: The Appellants themselves

Counsel for the Respondent: Chantal Roberge

COUNSEL OF RECORD:

For the Appellants:

Name:

Firm:

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