Docket: 2007-4676(IT)I

BETWEEN:

MARGIT P. SCHWARTZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 22, 2008 at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

Agent for the Appellant:	Lawrence Pasternak, C.A.
Counsel for the Respondent:	Alexandra Humphrey

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of August, 2008.

"G. A. Sheridan"

Sheridan, J.

Citation: 2008TCC432
Date: 20080808
Docket: 2007-4676(IT)I

BETWEEN:

MARGIT P. SCHWARTZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant is appealing a reassessment disallowing her claim of a business loss of $37,500, the amount she had paid to a land developer for a lot in 1993. Her intention was to resell the lot for a profit once the land developer had obtained municipal approval and completed its development. She also considered having the land developer build a house on the lot and then selling the property. According to their agreement, the land developer was to transfer title in 1994 or as soon as he had the necessary municipal approval to begin development. However, months turned into years and despite the land developer's assurances to the contrary, the requisite municipal approval was never obtained. At some point during this time and without the Appellant's knowledge, the land developer abandoned the project and resold the entire parcel of land. Thus, the Appellant found herself without title to the lot she had purchased. Her efforts to recover the $37,500 from the land developer proved fruitless and in 2004, she deducted that amount as a business loss. The basis for her claim is that in acquiring the lot for development and resale, she had been engaged in an adventure in the nature of trade.

[2] The Minister's position is firstly, that the evidence does not support a finding that the Appellant was engaged in an adventure in the nature of trade. The Respondent further submits that even if she had been so engaged in 1993, by the time she claimed the loss in 2004, she no longer was and had not been for some time. While acknowledging that the Appellant's was a sympathetic case, counsel for the Respondent argued that the $37,500 was a capital outlay and as such, fell within the general exclusion of paragraph 18(1)(a):

> **18. (1) General limitations** -- In computing the income of a taxpayer from a business or property no deduction shall be made in respect of
>
> (a) **general limitation** -- an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

[3] Counsel for the Respondent also reminded the Court that unlike business losses, capital losses may be carried forward indefinitely and that in reassessing to allow the capital loss, the Minister had made the best of a bad situation for the Appellant.

[4] The Appellant was the only witness to testify. She was straightforward in her testimony. There is no doubt that the land developer's unscrupulous behaviour caused her financial and emotional hardship over the last decade. However, to succeed in her appeal, the Appellant had the onus of proving that her dealings in respect of the acquisition of the lot amounted to an adventure in the nature of trade.

[5] Although included in the definition of "business" in section 248 of the *Income Tax Act*, the phrase "an adventure in the nature of trade" itself is not specifically defined in the statute. Accordingly, its meaning has evolved in the case law: the relevant test is set out in *Irrigation Industries Ltd. v. Minister of National Revenue*[1]:

> 30 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 page 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

[1] [1962] C.T.C. 215 (S.C.C.).

> 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 or a venture 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. [Emphasis added.]

[6] The Appellant's evidence of "what took place in the nature of organizing the speculation, maturing of the property and disposing of the property" does not persuade me that her actions in respect of the acquisition of the lot were those of someone engaged in an adventure in the nature of trade. I agree with Mr. Pasternak's submission that simply because the Appellant had undertaken only one transaction does not, in itself, preclude a finding that she was engaged in an adventure in the nature of trade. However, combined with the other circumstances of her dealing with the property, that fact militates against the Appellant's position: though describing herself as an entrepreneurial spirit, the Appellant freely admitted she had no experience and had never worked in real estate. Her interest in buying the lot for resale occurred entirely by chance at a social event when a mutual friend, a real estate agent working with the land developer, told her about an opportunity to get in on "a great deal". But for that encounter, she would likely never have found herself in such a venture. I accept that the Appellant walked the property with the land developer and ultimately chose a corner lot; however, I doubt that she did so for the purpose of making an informed assessment as to the viability of any land flip she was about to embark on. On cross-examination, the Appellant was unable to explain with any precision what would have been required to develop the land for resale; nor did she have any firm plans as to whether she would build on the lot prior to resale: indeed, she had no idea how long it might have taken the land developer to build a house on the lot if ever he had obtained permission to proceed. Her forbearance in the face of the land developer's failure to obtain the requisite municipal approval and to ensure title was transferred to her in a timely fashion is inconsistent with the actions of one who is in the business of acquiring and reselling land for a quick profit. While I accept her explanation that these delays made it impossible for her to develop the lot herself or to advertise it for resale, there was no evidence that she had ever been planning to take such action. Other than asking about the progress from time to time, she did not take any steps to push the land developer to complete the deal so she

could get on with her plans. The last element, how she disposed of the property, is not applicable on the present facts as the intervening acts of the land developer deprived her of that opportunity.

[7] Like counsel for the Respondent, I sympathize with the Appellant's predicament. However, the case must be decided on the evidence provided; for the reasons set out above, I am not persuaded that the Appellant was engaged in an adventure in the nature of trade. In these circumstances, the Minister correctly assessed the loss incurred by the Appellant as on account of capital. The appeal is dismissed.

Signed at Ottawa, Canada, this 8th day of August, 2008.

"G. A. Sheridan"

Sheridan, J.

CITATION:	2008TCC432
COURT FILE NO.:	2007-4676(IT)I
STYLE OF CAUSE:	MARGIT SCHWARTZ AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
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APPEARANCES:

Agent for the Appellant:	Lawrence Pasternak, C.A.
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