Citation: 2009TCC558
Date: 20091103
Docket: 2009-260(IT)I

BETWEEN:

IRMA HENKELS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on August 12, 2009,
in Cranbrook, British Columbia.)

By: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant:	J. Malcolm Killam
Counsel for the Respondent:	Whitney Dunn

Miller J.

[1] Ms. Henkels appeals, by way the Informal Procedure, the Minister of National Revenue's assessment of her 2005 taxation year in connection with rental income that she earned in that year. There are two major issues in this case. First, is Ms. Henkels entitled to claim 50% of her current property expenses or 35% as relating to the rental of part of her property? Second, is Ms. Henkels entitled to a capital cost allowance beyond the amount allowed by Canada Revenue Agency? In that regard, CRA allowed CCA only on the paving costs of the driveway.

[2] I will briefly go over the facts. Ms. Henkels did not testify. Only her agent (her accountant and certified financial planner), Mr. Killam, appeared on her behalf. He was well aware of Ms. Henkels' circumstances and he certainly knew the property. He was a credible witness. He had acted as a financial advisor to Ms. Henkels for many years and started doing her income tax returns in 2005. Up to that point, Ms. Henkels had always filed her tax returns claiming property expenses at the rate of 35%, as this represented the percentage of square feet occupied by the tenant in her principal residence.

[3] Ms. Henkels had a 2,000 square foot home that included a 700 square foot rental suite on the lower floor. This suite had a combined living room/kitchen, as well as one bedroom and a bathroom. Upstairs, where Ms. Henkels lived, were two bedrooms, a living room, kitchen and two bathrooms.

[4] In 2005, Ms. Henkels had just the one tenant. Both she and the tenant had a car and they shared the driveway and a two-car carport. According to Mr. Killam, the tenant had the complete run of the property.

[5] Ms. Henkels had started renting the property in 1994. Just before doing so, she spent $15,000.00 on repairs to the water well which was situated some 285 feet away from her home. Ms. Henkels claimed 50% of her property expenses related to the rental of the property. The expenses included insurance, maintenance and repairs, property taxes, salaries and wages, utilities, security, gardening and snow removal. She also claimed $900.00 for legal and accounting, though $500.00 was not billed until 2008 for services rendered after the 2005 taxation year.

[6] CRA allowed Ms. Henkels 35% of the property expenses based on the square footage percentage. Using Ms. Henkels' numbers would reduce her rental income of $3,875.00 to close to nil. CRA's approach yielded only $2,096.00 in expenses, leaving Ms. Henkels with net income of $1,778.00.

[7] CRA then allowed CCA on driveway paving costs as a class 17 asset at the rate of eight percent. Ms. Henkels maintains, through Mr. Killam, that she is entitled to CCA on the following: water well pump $18,000.00, furnace $15,000.00; hot water tank $150.00; water softener $550.00; septic system $1,400.00; fridge $900.00; stove $500.00 and furniture $3,000.00.

[8] Mr. Killam suggested all these capital items fell into the catchall class 8 category at 20%. Apart from the $1,500.00 well repair cost, which Mr. Killam

suggested Ms. Henkels might still have receipts for, all the other amounts were Mr. Killam's estimate of fair market value at the time that Ms. Henkels started renting the property.

Analysis

[9] I will deal with the property expenses, the current expenses first. Mr. Dunn referred me to several cases suggesting that the percent of square footage rented compared to used personally was a valid, acceptable means to determine the appropriate breakdown. These cases, which include *Connor (J.G.) v. Canada*[1] for example, or a number of them deal with mortgage interest and not all property expenses. I do not take these cases to stand for the proposition that square footage is the only basis for allocating expenses.

[10] Mr. Killam argues that two people use the property equally and therefore 50% is a more appropriate measure. My view is that there are certain expenses for which the 50/50 split does indeed seem more reasonable and logical. For example, utilities, security, gardening, snow removal, where there is a direct connection between usage and the related cost. The same, however, could not be said for the other expenses, which I agree with Mr. Dunn, are readily and properly determined on a square footage basis.

[11] Mr. Killam argued further that some factor -- some percentage should be factored in to take account of Ms. Henkels' loss of privacy. Having not heard from Ms. Henkels, I am not prepared to do this. She may well have got considerable enjoyment from the tenant, not any loss of privacy. The evidence does not support me making any ruling in that regard.

[12] Therefore, with respect to current expenses, I allow an additional 15% in the categories of utilities, security, gardening and snow removal. This is an additional $455.00. This leaves Ms. Henkels with net income of $1,778.00 minus the $455.00, or $1,323.00.

[13] I will now turn to the question of CCA to determine if Ms. Henkels is entitled to any further CCA beyond the driveway costs. I received no documents from Mr. Killam that related to any of the capital expenditures. I also received no detailed evaluation other than his educated estimate as a financial planner and

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[1] 1995 CarswellNat 643.

someone, I am satisfied, who was knowledgeable of such costs in this area. I am reluctant to decide these issues on such limited information except, however, for the $15,000.00 water well repair expense, which I am satisfied was indeed incurred by Ms. Henkels just before she started renting the property.

[14] While I certainly would have preferred some documentary evidence on that point, Mr. Killam was a credible witness and seemed authoritative on that issue. The question then is what class a water well pump falls into for CCA purposes? Mr. Dunn for the Respondent, suggests it falls in class 1, specifically under subsection *(q)*. I will read that.

> Class 1, 4% class. Property not included in any other class that is a building or other structure or a part of it, including any component parts such as electric wiring, plumbing, sprinkle systems, air conditioning equipment, heating equipment, lighting fixtures, elevators and escalators…
>
> …

[15] Mr. Killam suggests class 8 would be the more appropriate class, which is also a catchall class. And the pertinent provision in class 8 is 20%.

> Property not included in class 1, 2, 7, 9, 11, 17 or 30 that is (i) a tangible, capital property that is not included in another class in this schedule…
>
> …

And then there are some exceptions that do not apply.

[16] I have not been provided a great deal of jurisprudence on this issue, but I will take the words of class 1 at their face value. To be in class 1, the water well and pump must be a part of Ms. Henkels' house. Mr. Dunn ably argued that because the supply of water was essential to the functioning of the house, it was part of the house. Mr. Dunn, I disagree. The water well was 285 feet away. It was a separate structure altogether, and though a water supply is clearly critical, that does not make the well a part of the house. It is physically separate and I find more logically fits into the catchall class 8, which is 20%. A supply of water is a utility, which I determined is the sort of expense eligible for a 50/50 split. I find Ms. Henkels is entitled to 20% of 50%. In other words, 10% of the $15,000 or $1,500.00. This exceeds her net income and therefore reduces her income from the rental property to zero, though it does not allow her to claim any loss.

[17] The appeal is allowed and referred back to the Minister for reconsideration and reassessment on the basis that Ms. Henkels is entitled to additional current

expense of $455.00 and CCA of $1,500.00, only $1,323.00 of which is necessary to bring Ms. Henkels' income to zero.

Signed at Ottawa, Canada, this 3rd day of November 2009.

"Campbell J. Miller"

Miller J.

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STYLE OF CAUSE:	IRMA HENKELS and HER MAJESTY THE QUEEN
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APPEARANCES:

Agent for the Appellant:	J. Malcolm Killam
Counsel for the Respondent:	Whitney Dunn

COUNSEL OF RECORD:

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