

Docket: 2009-3612(IT)I

BETWEEN:

CHRISTINA MACINTYRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on April 8 & 9, 2010, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant: Dion R. McClean

Counsel for the respondent: Roxanne Wong

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the appellant's 2004 taxation year is allowed in part, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the Reasons for Judgment attached hereto.

The appeal from the reassessment made under the *Income Tax Act* with respect to the appellant's 2005 taxation year is dismissed in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada, this 18th day of May 2010.

"Patrick Boyle"

Boyle J.

Citation: 2010 TCC 277
Date: 20100518
Docket: 2009-3612(IT)I

BETWEEN:

CHRISTINA MACINTYRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The principal issue in this informal procedure income tax appeal heard in Toronto is whether Mrs. MacIntyre was entitled to deduct rental losses with respect to her former family home in Brampton which she had offered to rent in 2004 and 2005.

[2] The property in question is a large five bedroom, 3 bathroom single-family two-storey brick home with double garage in a 1980s subdivision in the northern part of Brampton. It is slightly less than 4,000 square feet not including an unfinished roughed-in basement. The subdivision is one of the more expensive ones in a community of owner-occupied homes. Mrs. MacIntyre and her then husband purchased it new in 1984 for \$195,000. Mrs. MacIntyre and her then husband lived in it together with their son until they separated and divorced in the late 1980s. Mrs. MacIntyre and her son continued to live there until 1992. The terms of the divorce provided her with the property. She received no other financial provision as part of the divorce. The house has always been registered in her name. In early 2004 the property was offered for sale at \$535,000 but did not sell. In late 2004 the property was again offered for sale at \$565,000 and did not sell. There was no evidence of any interest in the home when it was for sale.

[3] In 1992 Mrs. MacIntyre secured a tenant for the property for a year. Mrs. MacIntyre and her son moved into a small rental apartment in Etobicoke. After a year the tenant moved out and Mrs. MacIntyre moved back in for a year. She rented out the property again in 1994 when she moved into her current husband's home. That tenant stayed for two years until 1996. The rent was between \$2,200 and \$2,500 per month. She had a third tenant who stayed for approximately three years from 1996 to 1998. The rent was \$3,000 per month.

[4] Mrs. MacIntyre had secured each of her tenants as a result of the property being listed for rent with a real estate agent and offered on Multiple Listing Services ("MLS"). In 1992 she had advertised it for rent for a number of months in the local Brampton newspaper. Since then her only advertising of the property for lease has been having it continuously on MLS since this had proved successful for her at the outset.

[5] In 2001 Mrs. MacIntyre began using a new real estate salesperson in a local Brampton brokerage to offer the property for lease on MLS. This same agent was used when the property was also briefly listed for sale twice in 2004 and continues to be the property leasing agent. She assisted Mrs. MacIntyre in 2001 in finding a tenant for the property who stayed one year at a \$3,000 monthly rental.

[6] Since that tenant left in early 2002 the property was not rented again until the second half of 2008, several years after the years in question and subsequent to the Canada Revenue Agency ("CRA") audit of Mrs. MacIntyre's significant losses. In 2004 and 2005, with no gross revenue, her reported losses exceeded \$25,000. By 2007, they were almost \$35,000. Her fourth tenant who stayed somewhat over a year during 2008 and 2009 paid rent at \$3,500 per month. Her claimed expenses for 2008 were \$44,000 which is more than \$3,500 each month.

[7] The new real estate salesperson testified that, since she was hired, she has had the property offered for rent continuously on MLS whenever it was not rented. In 2001 she worked at a local Brampton office but shortly afterwards moved to an office at Bloor Street and Avenue Road in Toronto. She specializes in residential sales but has done other leases and is able to post rentals on MLS. She explained that she would pass the names of callers for the MLS listing on to Mrs. MacIntyre who would decide herself whether or not to show the property to them. Mrs. MacIntyre would show the property herself and the agent would not be involved again unless a lease was to be signed. It was only shown two to three times per year. There were not many more inquiries resulting from the MLS listing and sometimes interest in the property was so quiet she forgot about the listing. She never raised with

Mrs. MacIntyre the possibility of other marketing steps or approaches nor did Mrs. MacIntyre ask.

[8] The deducted expenses claimed included permanent new improvements such as crown moulding and landscaping as well as a snow blower. These costs should have been capitalized in any event. She also deducted in 2005 approximately \$700 for a vacuum cleaner even though the property had hardwood and ceramic floors throughout, except for the unfinished basement concrete floor, and had a built-in central vacuum. The property was rented unfurnished, and at the time the property was empty and had been empty for about three years. When pushed on this point in cross-examination she dropped the claim for the vacuum cleaner. She estimated travel expenses based upon three round trips each week from her Etobicoke home to the Brampton property. She could not substantiate how she had allocated her interest claimed as between her use of her line of credit for the Brampton property versus the use of it for other unrelated personal expenses.

[9] In 1994 Mrs. MacIntyre had a small loss. She rented the property out profitably for the years 1995 to 1998. She had no revenue in 1999 and 2000. In these years her annual expenses averaged \$15,000.

[10] In 2001 when she rented out the property for seven months at \$3,000, her annual expenses spiked up to \$35,000 resulting in an approximately \$14,000 loss which was the same as her loss the year before when she had no revenue or a tenant. No explanation was offered for this doubling of expenses. Her expenses have remained significantly higher since then, exceeding \$30,000 in most years, and by 2008 were \$44,000. She did not think her expenses for 2009 would be significantly different. The result has been that even when the property was rented since 2000, she still realized significant losses. Further, even if she could rent it at the full asking rent for a full calendar year she would still realize losses.

[11] The initial question to be decided is whether Mrs. MacIntyre's rental endeavours in respect of the property constituted a commercial endeavour which gave rise to income or loss from a business or property for tax purposes. The question is to be answered having regard to what are the indicia of commerciality present in a particular case: See the Supreme Court of Canada's decision in *Brian J. Stewart v. The Queen*, 2002 SCC 46, 2002 DTC 6969. Clearly from 1995 to 1998 she was able to rent it out with only the MLS listing at a rent that exceeded her associated expenses. Her 2001 lease, following a two-year vacancy, generated a monthly rent that slightly exceeded her monthly expenses though she suffered a loss in each of those years resulting from the vacant months.

[12] The question narrows to whether, in 2004 and 2005, Mrs. MacIntyre was still carrying on her rental pursuits in a sufficiently commercial manner to constitute a source of income or loss from a business or property for tax purposes. By 2004 she had experienced five straight years of significant losses and the property had been vacant for almost two years. Yet she left her marketing approach unchanged and limited to a MLS listing for her North Brampton rental home with a downtown Toronto house sales specialist. No other marketing was tried or even investigated. No attempt was made to get her expenses back in line with her pre-2000 profitability period. She turned down an inquiry to lease from an international engineering firm who wanted to house engineers on short-term assignments because she wanted a family to occupy her home and believed, without inquiry, that such use would not be allowed by the tenant engineering firm in any event.

[13] Mrs. MacIntyre is clearly very attached to this house. She still refers to it as her home even though she has not lived in it for 15 years. She spends part of three days each week there and spends hours each week gardening there even though she pays for a gardener / lawn care service. The only reason this is her rental home is because it used to be her principal residence. A significant part of her attachment is clearly personal since, if she is really incurring the expenses claimed on the property, there is no economic or commercial reason for her to carry on losing \$30,000 a year on a \$500,000 asset. On these numbers even the accrued gains resulting from the very strong residential real estate market in Southern Ontario and the Greater Toronto Area will have trouble offsetting her losses.

[14] She appears to only want to be a landlord of this particular house which has for a decade proven itself incapable of being profitable. It was not built or acquired to be a rental property. It is in an area of owner-occupied homes. According to the taxpayer and her real estate agent, one can buy a home like this for less than it costs to rent it. Mrs. MacIntyre never considered selling it in order to buy a comparably priced profitable rental property. She never changed her marketing plan or increased her efforts. She never sought to change the property to make it more able to be rented out more often or more profitably. In 2004 she listed the property for sale. She did not say she intended to use the proceeds to acquire a new rental property.

[15] In these circumstances, I am satisfied that by the end of 2004 Mrs. MacIntyre's rental pursuits were no longer being carried on in a commercial manner when looked at objectively. Further, by the end of that year the time for selling the asset in the ordinary course of winding up a commercial or business venture had also ended given that the house, even though it was nice, large and relatively expensive, was not

particularly unique and the local housing market was strong. Her pursuits since 2004 have not been a commercial endeavour but an attempt to minimize her carrying costs until she is ready to sell the house at a price acceptable to her or has decided to put it to another use. I do not really know which it is but Mrs. MacIntyre was not entirely forthright in some of her testimony for example with respect to the vacuum cleaner and with respect to the line of credit.

[16] Eternally springing hope and personal optimism are not dependable criteria to confirm that an endeavour is being pursued in a commercial manner. It is necessary to consider the endeavour and the taxpayer's pursuits objectively against reasonable business-like considerations.

[17] Mrs. MacIntyre is the manager of a financial institution. She is clearly smart and experienced in financial matters. I believe that, by the time she listed the property for sale in 2004, she knew it could not be rented profitably on these numbers. Her decision to stop trying to sell the house, after increasing the asking price, must have been made for reasons of her non-commercial personal attachment to the house, its gardens, its memories and her possible plans for it.

[18] Mrs. MacIntyre's appeal will be dismissed with respect to 2005. This leaves the 2004 expenses to be determined. Her amounts claimed for insurance, property taxes, gardener (lawn maintenance) and utilities should be allowed. Travel should only be allowed in the amount of \$500. There is insufficient evidence to be satisfied how much of her line of credit interest related to the property but clearly some of it did so relate and I am prepared to allow one-quarter of the amount claimed. The amounts claimed for crown moulding and the receipted amount (\$1,906) for "Gardening and Other" should be allowed but are required to be recognized as capital expenditures.

[19] The appeal with respect to 2004 is allowed in part only to the extent set out above. The appeal with respect to 2005 is dismissed.

Signed at Ottawa, Canada, this 18th day of May 2010.

"Patrick Boyle"

Boyle J.

CITATION: 2010 TCC 277

COURT FILE NO.: 2009-3612(IT)I

STYLE OF CAUSE: CHRISTINA MACINTYRE v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Canada

DATES OF HEARING: April 8 & 9, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: May 18, 2010

APPEARANCES:

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 Counsel for the respondent: Roxanne Wong

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