

Docket: 2010-881(IT)I

BETWEEN:

SYLVAIN LESSARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 31, 2010, at Baie-Comeau, Quebec.
Before: The Honourable Justice Alain Tardif

Appearances:

For the appellant: The appellant himself
Counsel for the respondent: Christina Ham

JUDGMENT

The appeal from the assessment made pursuant to the *Income Tax Act* (the Act) for the 2005 and 2006 taxation years is allowed in part; the file is referred back to the Minister of National Revenue for reconsideration and reassessment, considering the fair market value of the rental property that became the appellant's residence in July 2005 is reduced by \$10,000. As a result, a recalculation must be made to determine the terminal loss to which the appellant is eligible. With regard to the other aspects of the assessment, in particular the disallowed expenses, the assessment remains unchanged; the only change is the \$10,000 reduction.

Signed at Ottawa, Canada, this 25th day of October 2010.

"Alain Tardif"

Tardif J.

Translation certified true
on this 16th day of December 2010.

Elizabeth Tan, Translator

Citation: 2010 TCC 544
Date: 20101025
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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal with two distinct components. The first is regarding expenses, which were disallowed on the ground that they were primarily personal expenses.

[2] The second is regarding the fair market value (FMV) of the property at the time its usage changed; the building was being used as a rental property and became the appellant's personal residence in July 2005.

[3] First, the appellant stated firmly that all the expenses incurred for the rental of the property for which the claim was made were deductible because they occurred on dates during which the property was occupied by a third party; they could therefore not be personal expenses because he was not yet living in the property in question, having moved only at the beginning of July 2005. In other words, the appellant stated that the dates show the expenses were incurred before he took possession of the premises as his residence; this, according to the appellant, was sufficient to come to the conclusion that they were allowable expenses and not personal expenses.

[4] He added and provided evidence that he was forced to personally occupy the premises unexpectedly, and it was completely unplanned, since the person who lived there had the right to continue to live there. He noted that he had to negotiate with his tenant and offer compensation to convince him to leave the premises so he could use it as his residence, starting in July 2005.

[5] The auditor explained that the deduction of expenses was disallowed because he considered them to be personal expenses. As an example, he presented an invoice for ceiling fixtures. He also stated that it might have been a capital expenditure. Lastly, certain expenses were incurred shortly before the property's usage officially changed. These are the explanations submitted to justify the decision to disallow the expenses.

[6] To support the validity of his claims on this aspect of his appeal, the appellant essentially stated and proved that he took possession of the premises at the beginning of July 2005; this claim was not challenged.

[7] Therefore, the question is: does the fact the appellant showed and established that he took possession on a specific date of the premises, which until then had been rented out, automatically become acceptable evidence that expenses were deductible if incurred before that date?

[8] The answer is clearly no; in fact, the date might be relevant but it is certainly not a determining factor in itself regarding what is deductible or not. It is absolutely essential to show that it was an expense related to the rental activity or company, particularly since the boundary can be rather hazy in this field.

[9] In the present case, the tenant's contribution might have been determining. The appellant's evidence, namely his own verbal explanations, is not sufficient to find that he met his burden of proof. Therefore, the appeal on this component must be dismissed.

[10] As for the second component, it deals with the FMV of the house following its change in usage in July 2005.

[11] In 2008, the respondent had an evaluation made of the residence in question, located at 30 Nicolas-Godbout Avenue, in Baie-Comeau. The evaluation expert, Yvon Ouellet, prepared a report, submitted as Exhibit I-3. He explained his process, including a visit of the premises and a long conversation with the owner, the appellant, on December 10, 2008.

[12] He indicated that the appellant cooperated; according to the expert, the appellant had the opportunity to make all the submissions he wanted by presenting a descriptive history of the property, since the evaluation was for the FMV in July 2005, almost three years prior to the visit of the premises.

[13] The work carried out by the expert was done in accordance with the trade practices, although it was quite a challenge to conduct a retroactive assessment of the FMV three years later.

[14] Such an exercise is even more difficult because over the past ten or so years, the property market has undergone many variations, so much so that the important, dominant factor in the matter, that of comparable values, fluctuated a great deal.

[15] In addition to this constraint, Mr. Ouellet also had another particularity to deal with: the house had been a rental property until July 2005, when it became the appellant's personal residence.

[16] It is reasonable to believe that during the change in usage, modifications or improvements could certainly have been made to the property, all leading to an increased FMV. In fact, owners are usually more selective about the quality of a property they will reside in themselves than property they own for rental purposes.

[17] In this case, the appellant stated he is a handy person, able to do a lot of work on the property. He stated that he is disciplined, organized and can distinguish between his personal affairs and those related to his rental activities.

[18] After firmly establishing these two premises, the appellant gave a long presentation; it was well organized and clear and included the following categories:

- garage;
- kitchen, bathroom and floors;
- laundry room;
- lighting fixtures;
- bedroom and windows;
- landscaping;
- renovations in certain rooms and walls;

- electricity and heating;
- entrance—paving and exterior decorations;
- interior decorations;
- fence;
- patio;
- sale and evaluation.

[19] He stated and repeated that he was not able to present all his documentary evidence because they were essentially personal expenses and he was therefore not under any obligation to keep the invoices or documents establishing these expenses, since this type of invoice is relatively unimportant and secondary.

[20] He then gave a long narrative on the exhibits and invoices indicating the scope of the renovations at the property for which Mr. Ouellet established the FMV in 2007; the expenses and work described were carried out after July 2005, when then property changed usage.

[21] I did not add up all the amounts of the purchases described in the invoices. I rely on the appellant's evaluation; he claims he invested more than \$35,000 in his new residence without taking into consideration the uncalculated time and work he performed himself.

[22] Based on the invoices in question, the appellant stated and repeated that the evaluator neglected to take into consideration the significance of the work performed after July 2005.

[23] The expert Ouellet indicated that the appellant cooperated and provided an extensive history of the residence for which the FMV was to be established. Mr. Ouellet also noted that he took into consideration improvements, repairs and various additions.

[24] Although the quality of Mr. Ouellet's work is not in question, I believe the appellant's substantial and documented submissions show on a balance of probabilities that he invested substantial amounts for repairs, transformations and improvements to make his new residence more pleasant and to improve its quality.

[25] I do not find, however, that the evaluation should be reduced in the amount suggested by the appellant, since it is clear that the amounts spent on repairs, decorations, improvements and transformations did not affect the FMV to that extent.

[26] On one hand, such expenditures might have a neutral effect, and on the other, if they are not done, the FMV would be lowered, but in certain situations, the expenses might have an impact and contribute to an increase in the FMV.

[27] In this case it is impossible to accurately determine the impact such expenditures had on the FMV established by Mr. Ouellet. However, given that the evaluation was to establish a value three years earlier than the date of the visit to the property, given the importance of the documentary evidence, given the numerous and reasonable explanations provided by the appellant, and finally, given that this was a rental property generally with simpler and less polished finishings, I believe there are sufficient reasons to intervene.

[28] The appellant questioned the expert in particular about the flooring. On this, the expert essentially stated and repeated that he took into consideration the changes, improvements, etc.

[29] In this situation, the parties' positions are at opposite extremes: the expert's work was properly done, in accordance with the trade practices. Are such qualities sufficient to conclude that the FMV retained is completely beyond reproach or totally reliable? I do not think so, particularly since it is utterly impossible to recreate the exact state of the premises at the time of the change in usage, unless the interested party, in this case the appellant, had made it possible using many descriptive photos of the premises, combined with witness input.

[30] In this case, the appellant, who has this burden of proof, did not make such a presentation; he merely referred to many invoices for a very significant total amount to establish that the expert under-evaluated him. It is impossible, however, that such expenditures would translate into an equivalent added value.

[31] At the time of the change in usage, the best way to establish the scope or extent of the changes or improvements made would have been photos and/or an expert's opinion at the time. However, the appellant, who has the burden of proof, did not feel it was necessary to rely on these tools, which would have been very useful, if not determining.

[32] For these reasons and in a completely arbitrary manner, justified essentially by an approach led by the principle of reasonableness, I find that the FMV established by Mr. Ouellet should be revised and reduced by \$10,000 for the residence only,

since the land was not affected by the amounts, which were correctly attributed; this clearly has a direct impact on the terminal loss, which will be the subject of a subsequent review.

[33] The appeal is therefore allowed in part, and the Minister of National Revenue shall make reassessments, taking into consideration the value given to the residence is \$79,400 not \$89,400, for a total evaluation of \$97,700 not \$107,700; the value of the land is unchanged and established at \$18,300. As a result, the Minister shall make the recalculations pursuant to the *Income Tax Act* to determine the appellant's terminal loss, all without costs.

Signed at Ottawa, Canada, this 25th day of October 2010.

"Alain Tardif"

Tardif J.

Translation certified true
on this 16th day of December 2010.

Elizabeth Tan, Translator

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PLACE OF HEARING: Baie-Comeau, Quebec

DATE OF HEARING: August 31, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: October 25, 2010

APPEARANCES:

For the appellant: The appellant himself
Counsel for the respondent: Christina Ham

COUNSEL OF RECORD:

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