

Docket: 2013-3319(IT)I

BETWEEN:

SIMON PÉPIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence with the appeals of
Sabrina Dallaire (2013-3317(IT)I) on July 8, 2014,
at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Michel Montmorency
Counsel for the respondent: Alain Gareau

JUDGMENT

The appeals from the reassessments dated March 12, 2012, made by the Minister of National Revenue under the *Income Tax Act* for the 2007, 2008 and 2009 taxation years are allowed and the reassessments are referred back to the Minister for reconsideration and reassessment to give effect to the Partial Consent to Judgment dated July 8, 2014, and to subtract the taxable capital gain added to the appellant's income for the 2008 taxation year.

Signed at Ottawa, Canada, this 23rd day of October 2014.

“Réal Favreau”

Favreau J.

Translation certified true
on this 11th day of December 2014
Janine Anderson, Translator

Citation: 2014 TCC 312

Date: 20141023

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BETWEEN:

SIMON PÉPIN,

Appellant,

and

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Respondent.

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REASONS FOR JUDGMENT

Favreau J.

[1] These are appeals filed by the appellant under the informal procedure from the reassessments dated March 12, 2012, made by the Minister of National Revenue (the Minister) under the *Income Tax Act*, R.S.C. (1985) c. 1 (5th Supp.), as amended (the Act) for the 2007, 2008 and 2009 taxation years. These appeals were heard on common evidence with the appeals of Sabrina Dallaire (Docket 2013-3317(IT)I).

[2] In making the reassessments dated March 12, 2012, the Minister made the following adjustments to the appellant's income tax returns for the 2007, 2008 and 2009 taxation years:

	2007	2008	2009
Unreported income	\$6,195	\$7,405	\$7,140
Taxable capital gain		\$23,057	
Rental income	\$6,750	\$3,463	\$4,318
Change in net income	\$12,945	\$33,925	\$11,458
Amount subject to penalty pursuant to section 163(2)	\$12,945	\$33,925	\$11,458
Penalty imposed pursuant to 163(2)	\$3,255.21	\$5,162.65	\$2,690.66

[3] In setting the amount payable by the appellant, the Minister relied on the facts set out at paragraph 6 of the Reply to the Notice of Appeal:

[TRANSLATION]

- (a) On his tax returns for the 2007, 2008 and 2009 taxation years, the appellant reported total income in the amounts of \$1,200, \$1,200 and \$2,400, respectively;
- (b) The appellant receives non-taxable income from the société automobile du Québec;

Unreported income

- (c) At the audit stage, a deposit method analysis was performed of the appellant's bank accounts and there were unexplained discrepancies;
- (d) The Minister considers that these discrepancies in the respective amounts of \$6,195, \$7,405 and \$7,140 are the appellant's unreported income for the years 2007, 2008 and 2009;

Capital gains

- (e) On February 1, 2007, the appellant acquired equally with his spouse, Sabrina Dallaire, an immovable situated at 175-184 Jacques-Lussier Street in Varennes for \$270,000;
- (f) During the 2008 taxation year, the appellant disposed of the immovable for \$379,000;
- (g) The costs related to the disposition of the immovable were \$16,773;
- (h) The appellant did not report any capital gains in the 2008 taxation year;
- (i) The appellant and his spouse allegedly served as nominees;
- (j) The Minister did not believe the explanations provided by the appellant and his spouse regarding the alleged owners;
- (k) The Minister added to the appellant's income a taxable capital gain of \$23,057 representing the appellant's share (92,227 x 50% x 50%);

Rental income

- (l) The appellant and his spouse leased a dwelling unit in the basement of their principal residence for \$600 per month;
- (m) Since 2007, the appellant has been the sole owner of an immovable situated at 40 Du Vallon Crescent in Terrebonne (house) that he rents to a friend;
- (n) In his income tax returns for the 2007, 2008 and 2009 taxation years, the appellant did not report any rental income;
- (o) On September 19, 2011, while being audited, the appellant filed amended returns for the 2008 and 2009 taxation years. The Minister made the following adjustments:

(i) Dwelling unit

	Year 2007 allowed	Year 2008		Year 2009	
		amended	revised	amended	revised
Gross rental income	\$7,200	\$7,200	\$7,200	\$7,200	\$7,200
Insurance	\$1,082	\$1,082	\$1,082	\$1,082	\$1,082
Interest	\$17,443	\$17,109	\$17,109	\$16,728	\$16,728
Property taxes	\$2,800	\$2,735	\$2,800	\$2,809	\$2,800
Public services	\$3,732	\$3,612	\$3,371	\$3,525	\$3,667
Total expenses	\$25,057	\$24,538	\$24,362	\$24,144	\$24,287
Expenses related to the dwelling unit (36%)	\$9,021	\$8,834	\$8,770	\$8,692	\$8,743
Net rental income (net loss)	\$(1,821)	\$(1,634)	\$(1,570)	\$(1,492)	\$(1,543)
Appellant's portion	\$(910)	\$(817)	\$(785)	\$(746)	\$(772)

(ii) House

	Year 2007 allowed	Year 2008		Year 2009	
		amended	revised	amended	revised
Gross rental income	\$8,427	\$22,020	\$24,556	\$20,234	\$24,645

Insurance		\$1,319	\$0	\$1,367	\$0
Interest	\$712	\$15,268	\$15,268	\$15,166	\$15,166
Property taxes		\$4,386	\$4,386	\$3,736	\$3,736
Protection insurance	\$55	\$654	\$654	\$654	\$654
Total expenses	\$767	\$21,627	\$20,308	\$20,923	\$19,555
Net rental income (net loss)	\$7,660	\$393	\$4,248	\$(689)	\$5,090

- (p) According to the explanations that the appellant provided regarding certain deposits, the Minister revised the gross rental income for the house to \$8,427, \$24,556 and \$24,645 for the 2007, 2008 and 2009 taxation years, respectively;
- (q) The Minister determined that the net income for the two rental properties amounts to \$6,750, \$3,463, \$4,318 for the 2007, 2008 and 2009 taxation years, respectively.
- (r) The disallowed expenses were not incurred by the appellant.

[4] In imposing on the appellant the penalty under subsection 163(2) of the Act, the Minister relied on the following facts:

[TRANSLATION]

- (a) The facts mentioned in paragraph 6;
- (b) The appellant had to be aware that he was required to report the rental income for the dwelling and the house;
- (c) The appellant signed his income tax return for the 2008 taxation year;
- (d) The adjustments are substantial in relation to the income reported, as they represent 92%, 97% and 82% for the 2007, 2008 and 2009 taxation years, respectively;
- (e) In considering all of the appellant's income, the adjustments represent 22%, 84% and 32%, respectively.

[5] At the outset of the hearing, the parties filed a Partial Consent to Judgment dated July 8, 2014, the terms of which are as follows:

[TRANSLATION]

The parties consent to the Court rendering judgment, allowing in part the appeal from the assessments for the 2007, 2008 and 2009 taxation years with respect to the issue of unreported income (excluding any capital gain) and referring the matter back to the Minister of National Revenue for reconsideration and reassessment as follows:

1. For the 2007 taxation year, the total adjustments to the appellant's income shall be set at \$6,195 (decrease of \$6,750).
2. No penalty under subsection 163(2) of the *Income Tax Act* shall be applied.
3. For the 2008 taxation year, the total adjustments to the appellant's income (excluding any taxable capital gain) shall be set at \$7,405 (decrease of \$3,463).
4. No penalty under subsection 163(2) of the *Income Tax Act* shall be applied to the amount of \$7,405.
5. For the 2009 taxation year, the total adjustments to the appellant's income shall be set at \$7,140 (decrease of \$4,318).
6. The penalty under subsection 163(2) of the *Income Tax Act* shall be applied and calculated accordingly.

WITHOUT COSTS.

[6] Following the filing of the Partial Consent to Judgment, the sole issue is whether the Minister was justified in adding to the appellant's income the amount of \$23,057 as a taxable capital gain for the 2008 taxation year, under subsection 38(1) of the Act.

[7] The appellant alleges that the capital gain realized from the sale of the immovable at 178, 180, 182 and 184 Jacques-Lussier Street in Varennes (the immovable) cannot be attributed to him because he was acting as a 50% nominee for Alexandre St-Pierre, an acquaintance whom he had known for about ten years.

[8] During the testimony of the appellant, Sabrina Dallaire, his common-law spouse, and Alexandre St-Pierre, the following documents were filed:

- (a) the notarial purchase contract dated February 1, 2007, under which Simon Pépin and Sabrina Dallaire Tremblay acquired an undivided 50%

interest in the immovable for \$270,000; the gross rents for the leases in force at the date of purchase were \$2,145.00 per month;

- (b) a deed of residential hypothecary loan dated January 30, 2007, under which Corporation Hypothécaire Xceed and Corporation de Capitaux Xceed made a loan to Simon Pépin and Sabrina Dallaire Tremblay in the amount of \$264,836.25 at the annual interest rate of 6.95%, calculated on a semi-annual basis, and not in advance, over a term of three years secured by a first ranking hypothec on the immovable. The repayment of the loan (principal and interest) was made in equal and consecutive monthly instalments of \$1,664.42;
- (c) the notarial contract of sale dated July 3, 2008, under which Simon Pépin and Sabrina Dallaire Tremblay sold the immovable for \$379,000;
- (d) a photocopy of a cheque dated July 3, 2008, drawn on the notary's trust account made payable to Sabrina Dallaire Tremblay in the amount of \$92,227.30;
- (e) a photocopy of a cheque dated July 8, 2008, drawn on the account of Sabrina Dallaire at the Caisse Populaire de Varennes made payable to Karine Meunier in the amount of \$42,227 and a photocopy of another cheque dated July 8, 2008, drawn on the account of Sabrina Dallaire at the Caisse Populaire de Varennes made payable to François St-Pierre in the amount of \$50,000;
- (f) a nominee agreement under private writing dated January 5, 2007, signed by Sabrina Dallaire and Alexandre St-Pierre under which the parties agreed, *inter alia*, as follows:

[TRANSLATION]

- 2. Sabrina Dallaire stated that she acted in accordance with the instructions of Alexandre St-Pierre in the performance of her duties as acquirer of the property and that she only acted for the benefit of Alexandre St-Pierre.
- 3. Simon Pépin and Sabrina Dallaire are responsible for notifying Alexandre St-Pierre orally or in writing upon disposition of the property.

4. Alexandre St-Pierre shall then assume full tax liability upon disposition.
 5. This agreement is executed in accordance with the laws of the province of Quebec.
 6. The parties acknowledge that Sabrina Dallaire has no interest in the potential acquisition of the property and acts for and on behalf of Alexandre St-Pierre.
- (g) a nominee agreement under private writing dated January 5, 2007, signed by Simon Pépin and Alexandre St-Pierre under which the parties agreed, *inter alia*, as follows:

[TRANSLATION]

2. Simon Pépin states that he acted in accordance with the instructions of Alexandre St-Pierre in the performance of his duties as acquirer of the property and that Simon Pépin only acted for the benefit of Alexandre St-Pierre.
 3. Simon Pépin and Sabrina Dallaire are responsible for notifying Alexandre St-Pierre orally or in writing upon disposition of the property.
 4. Alexandre St-Pierre shall then assume full tax liability upon disposition.
 5. This agreement is executed in accordance with the laws of the province of Quebec.
 6. The parties acknowledge that Simon Pépin has no interest in the potential acquisition of the property and acts for and on behalf of Alexandre St-Pierre.
- (h) a document entitled [TRANSLATION] “Notice and acceptance of end of mandate as nominees in the acquisition and disposition of a property (July 10, 2008)” signed by Sabrina Dallaire, Simon Pépin and Alexandre St-Pierre under which Sabrina Dallaire and Simon Pépin acknowledge (i) having acted as nominees for Alexandre St-Pierre in the acquisition and sale of the immovable, (ii) that the mandates of Sabrina Dallaire and Simon Pépin were limited to the acquisition and management of the immovable until it was sold; and (iii) that following the sale of the immovable on July 3, 2008, the mandates expired.

[9] The issue is who actually owned the immovable between February 1, 2007, and July 3, 2008. The testimony of the parties involved is vague, imprecise and contradictory in many respects.

[10] During her testimony, Sabrina Dallaire revealed that she has known Alexandre St-Pierre for about ten years and that he was a friend. However, she was very vague about the circumstances of their initial encounters and the frequency of their subsequent encounters. She stated that Alexandre St-Pierre asked her to purchase the immovable because he did not have the financial resources to purchase it himself. She also indicated that she did not owe Alexandre St-Pierre any money and that he was not biker or a drug dealer.

[11] With respect to the acquisition, management and sale of the immovable, Sabrina Dallaire revealed that she did not visit the immovable prior to acquiring it, that she did not negotiate the hypothecary loan, that she did not sign the tenants' leases and collect the rents, and that she did not take steps to sell the immovable. More specifically, she indicated that Alexandre St-Pierre collected the rents paid by cheque or in cash and that he gave her the cheques and cash so that she could deposit them in her bank account to make the payments on the hypothec. The net proceeds from the sale of the immovable were also deposited in her own bank account.

[12] Sabrina Dallaire also submitted that she never received any remuneration or consideration for performing the [TRANSLATION] "small service" for Alexandre St-Pierre.

[13] During the audit, Sabrina Dallaire indicated to the Canada Revenue Agency (the CRA) that there was no nominee agreement while her agent subsequently submitted such an agreement. She stated that she did not draft the nominee agreement or the end of mandate as nominee agreement. She acknowledged having signed said agreements but she did not confirm whether the dates these agreements were signed were indeed the dates appearing on the documents.

[14] During her testimony, Sabrina Dallaire was unable to explain why the notary issued a cheque only to her representing all of the net proceeds from the sale in the amount of \$92,227.30 when she only had an undivided 50% interest in the immovable. However, she confirmed that she prepared and signed the cheques made payable to Karine Meunier and François St-Pierre and that she gave them to Alexandre St-Pierre.

[15] During his testimony, Simon Pépin acknowledged that in 2007 he purchased an undivided 50% interest in the immovable on behalf of and for the benefit of Alexandre St-Pierre, whom he identified as an acquaintance rather than a friend. He confirmed that he had been the spouse of Sabrina Dallaire since 2004 and that he co-owned with her the family residence located at 152 De la Marine Street in Varennes which contains one leased dwelling unit, and that he was also the sole owner of another immovable located at 40 Du Vallon Crescent in Terrebonne that is also leased.

[16] Simon Pépin indicated that he did not owe Alexandre St-Pierre any money at the time of the acquisition of the immovable and that he did not receive any form of compensation for the [TRANSLATION] “small service” he performed for him. He acknowledged that he did not report, in computing his income for the 2007 and 2008 taxation years, the rental income generated by the immovable and he confirmed that he did not take steps to sell the immovable. He was present at the notary’s office for the signing of the deeds of purchase and sale of the immovable.

[17] Alexandre St-Pierre also testified at the hearing. He is a student in the Department of Biomedical Sciences at the University of Montréal and, he is currently completing a paid internship at the Institute for Research in Immunology and Cancer.

[18] Alexandre St-Pierre confirmed the existence of the mandate for Sabrina Dallaire and Simon Pépin because, in 2007, he did not have the financial ability to acquire the immovable. He indicated that he found the immovable being sold on the Internet, that he visited it prior to acquiring it and that he noticed that the four dwelling units were being leased. He could not recall the exact amount of the monthly income generated by the immovable but indicated that the income was close to the operating and financing costs.

[19] During his testimony, Alexandre St-Pierre was very vague and imprecise when the issue of the signing of leases and the collection of rents was raised. At first he said that he presented himself to the tenants as the owner of the immovable only to then claim that the rents were sometimes collected by him and on other occasions by Sabrina Dallaire and/or Simon Pépin. He could not recall to whom the rent cheques were made payable. As for the leases, he could not recall who had signed them, or who sent the renewal notices to the tenants in 2007 and in 2008. He also confirmed that he did not report, in computing his income, the rental income generated by the immovable.

[20] Alexandre St-Pierre revealed that he did not take steps with the bank to negotiate the terms of the hypothec and that he was neither present at the notary's office for the signing of the purchase and sale documents for the immovable nor at the bank for the signing of the hypothecary loan documents. He could not recall whether a listing contract for the immovable had been signed with a real estate agent or the exact amount of the profit realized from the sale of the immovable (according to him, the profit was between \$40,000 and \$70,000).

[21] The most telling fact in the testimony of Alexandre St-Pierre is without a doubt his allegation that Sabrina Dallaire and Simon Pépin received thousands of dollars for their good services. Furthermore, he justified the issuance of the cheques to his aunt Karine Meunier and his uncle François St-Pierre by the fact that he owed his uncle the amounts in question following his financial support in several other projects.

[22] Alexandre St-Pierre stated that he took the nominee agreement templates from the Internet and that he had full knowledge of the tax consequences that could result from the application of the said nominee agreements.

Analysis

[23] The witnesses gave contradictory and irreconcilable versions of the facts, including the consideration obtained by Sabrina Dallaire and Simon Pépin for having acted as nominees, the identity of the person who negotiated the terms of the hypothec with the bank and the identity of the person who managed the immovable.

[24] The testimony of Alexandre St-Pierre was particularly unclear and imprecise and was inconsistent with the documentary evidence such as the purchase price of the immovable, the amount of the hypothec, the amount of the monthly rents, the identity of the person who signed the leases and who collected the rents, the selling price of the immovable and the amount of the profit realized upon the sale of the immovable.

[25] No explanation was provided as to why the notary handling the sale of the immovable only issued one cheque made payable Sabrina Dallaire when she only had an undivided 50% interest in the immovable. Sabrina Dallaire did not provide any clear explanations as to the circumstances giving rise to the issuance of the cheques made payable to François St-Pierre and Karine Meunier, the amounts of which corresponded exactly to the net proceeds of the sale of the immovable.

[26] Other witnesses could have corroborated the facts, such as the tenants occupying the immovable during the years in question, the bank representative who granted the hypothec, the notary who handled the sale, the real estate agents, if any, who were involved in the purchase or sale of the immovable, or the aunt and uncle of Alexandre St-Pierre.

[27] The analysis of the documentary and testimonial evidence filed in these appeals leads me to conclude that Sabrina Dallaire and Simon Pépin were not the true owners of the immovable.

[28] I do not believe that a young waitress in a bar or restaurant, who was 21 years of age when the immovable was acquired, had the financial ability with her spouse, an auto body repairman in 2007, to qualify on their own for a hypothecary loan of \$264,836,25, that is, 98% of the immovable's purchase price and make monthly hypothecary payments of \$1,664,42 when the amount of the gross monthly rents was only \$2,145,00.

[29] In my view, someone else had to have intervened to negotiate the terms of the hypothec and guaranteed the repayment and that someone could very well be a person who received a portion of the net proceeds from the sale of the immovable. However, I need not decide this issue in the resolution of these appeals.

[30] For these reasons, the appeals are allowed.

Signed at Ottawa, Canada, this 23rd day of October 2014.

“Réal Favreau”

Favreau J.

Translation certified true
on this 11th day of December 2014
Janine Anderson, Translator

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