Docket: 2016-3868(IT)I

BETWEEN:

NATHALIE FISET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 2 and 3 2017, at Montréal, Quebec.

Before: The Honourable Justice Robert N. Fournier, Deputy Judge

Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Amélia Fink

JUDGMENT

The respondent's motion to quash the appeals from the reassessments dated July 18, 2016, made under the *Income Tax Act* (the Act), for the 2008 and 2009 taxations years is allowed and the appeals are quashed.

The respondent's motion to quash the appeals from the reassessments dated October 8, 2014, made under the Act, for the 2008, 2009 and 2011 taxations years is dismissed.

The respondent's motion to quash the appeal from the initial assessment dated July 28, 2011, made under the Act, for the 2010 taxation year is allowed and the appeal is quashed.

The respondent's motion to quash the appeals from the assessments made under the Act, with respect to the 2012 to 2015 taxation years, inclusively, is allowed and the appeals are quashed.

The appeal from the reassessment dated July 18, 2016, made under the Act, for the 2011 taxation year is allowed in part and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment to allow the deduction of additional rental expenses in the amount of $26,936.65.

The appeals from the additional assessments dated October 8, 2014, made under the Act, for the 2008, 2009, 2010 and 2011 taxation years are allowed and the additional assessments are quashed.

Without costs.

Signed at Ottawa, Canada, this 21st day of April 2017.

"Robert N. Fournier"

Fournier D.J.

Citation: 2017 TCC 63
Date: 20170421
Docket: 2016-3868(IT)I

BETWEEN:

NATHALIE FISET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Fournier D.J.

I. Introduction and factual background

[1] For all intents and purposes, until 2015, Nathalie Fiset received income from her profession as a family doctor and filed her federal and provincial income tax returns annually. She also had income property in Quebec, when in September 2005 she acquired another rental property in the United States as an investment. In 2010, she purchased a second one and in 2011 a third one, all in Florida, where she hired a management company to rent her properties short term to landlords to get a return on her investments. It would appear that during the period between 2005 and 2013, the appellant regularly asked the accountant who prepared her income tax returns whether she had to declare the houses she owned in Florida. He advised her that as long as she did not earn income from them, this was not necessary, advice Ms. Fiset continued to rely on each year.

[2] In 2013, the appellant asked him whether she was allowed to claim the losses she had incurred in recent years on the properties in Florida. On that occasion, her accountant responded in the affirmative, but told her that she would have to file a Request for an Adjustment to an Income Tax Return with Revenu Québec (ARQ) as well as a Foreign Income Verification Statement with the Canada Revenue Agency (CRA). However, he explained to her that this process could only be relied upon for the years going back as far as 2008, which the appellant agreed to do. After some research, Ms. Fiset said she was reassured by

the service commitments of the ARQ and the integrity statements published by the CRA. She therefore filed said forms in August 2013 in the hopes that if these changes were accepted, the net amount of the tax refund would be well worth it according to her accountant.

[3] From the beginning, she noticed that her accountant made a number of errors, but she enquired about the procedure for the imposition of late filing penalties and through her accountant, she voluntarily provided information relating to the 2008, 2009, 2010 and 2011 fiscal years. It is important to note that the appellant never received any requests to do so, as in her view she never voluntarily concealed any information. She then submitted that she never refused to provide the information sought and that she always cooperated with the authorities. Following her response to a request for additional information, the appellant received a first notice of assessment dated January 2014, informing her of direct deposits exceeding $18,000.

[4] However, on September 19, 2014, the CRA sent her notices of reassessments for those same years, requiring her to repay an amount in excess of $10,000. And apparently, to add insult to injury, on October 8, 2014, the Minister issued to her additional notices of assessments, regarding the imposition of a penalty under subsection 162(7) of the *Income Tax Act* (Act) for the 2008, 2009, 2010 and 2011 taxation years for the late filing of the infamous T1135 form (Foreign Income Verification Statement) for the years mentioned above. During the three years following her request for adjustments, the appellant testified that she did not have it easy and that she suffered blows at the hands of the CRA, which she said [TRANSLATION] “hit her like a ton of bricks”. Without getting into the details of her unpleasant experience, suffice it to say that for all practical purposes, the Minister finally issued notices of reassessment on July 28, 2014, in respect of the taxation years in question. Obviously, the appellant still disagreed with the Minister’s decisions, which precipitated the proceedings before us today in this case.

II. Statutory provisions and analysis

[5] With respect to the 2008 and 2009 taxation years, it is important to remember that the notice of reassessment was issued on July 28, 2014, under subsection 152(4.2) of the Act and that, therefore, the appellant’s objections are indeed invalid pursuant to subsection 165(1.2) of the Act, which provides that no objection may be made by a taxpayer to an assessment made under subsection

152(4.2). Consequently, the appeals from the reassessments dated July 28, 2014, for the 2008 and 2009 taxation years are not properly before this Court. These appeals are therefore quashed. Indeed, the same is true for 2010, primarily because the Minister never issued a reassessment dated July 28, 2014, for this same taxation year. It would appear that the corrections made to the net rental loss were cancelled by an equivalent reduction in the Capital Cost Allowance (CCA) initially claimed by the appellant—which explains the absence of a notice of reassessment in the circumstances. Moreover, the appellant did not object to the assessment actually dated July 28, 2011, within the time frame provided for in subsection 165(1) of the Act, which expired on June 15, 2012. In accordance with subsection 166.1(7) no extension of time could be granted as the deadline for submitting such an application was June 15, 2013. And even if the Minister saw fit to issue a notice of assessment for 2010, as he was criticized for by the appellant, the end result would have been the same, pursuant to subsection 152(4.2) cited above. The appeal in respect of the 2010 fiscal year is therefore quashed as well.

[6] As for the 2011 taxation year, the appeal from the reassessments dated July 28, 2014, is properly before the Court. In this case, the Minister had reduced the Capital Cost Allowance (CCA) that the appellant had claimed when she filed her original income tax return. The appellant also challenged several expenses that were disallowed in this latter assessment. Fortunately for all, the parties agreed on a number of expenses initially disputed so that the Court was indeed able to render a consent-based decision in respect of the 2011 taxation year. Except for the [TRANSLATION] "commission" expenses, the parties more or less agreed that a [TRANSLATION] "table" produced by counsel for the respondent could serve as a guide regarding the details of their agreement.

[7] In summary and regarding the property located at 602 Hillcrest Drive, Davenport, Florida, the respondent allowed additional concessions in the amount of US$2,466 (maintenance and repairs) and US$6,074 (utilities) for a total conceded amount of US$8,540. As for the property located at 1943 Southern Dunes, Haines City, Florida, the respondent allowed US$1,200 (management fees), US$3,353 (maintenance and repairs) and US$6,804.09 (utilities) for a total conceded amount of US$11,357.09 in that respect. Finally, regarding the property located at 307 Villa Sorrento, Haines City, Florida, again the Respondent conceded US$500 (management fees), US$1,425 (maintenance and repairs), US$2,004 (utilities), US$214,95 (HOA fees) and US$2,290 ("closing costs") under paragraph 20(1)(*e*) of the Act for a total conceded amount of US$6,433.95 in that respect. At the hearing, it was agreed that the conversion rate in Canadian dollars

would be 1.023, for a total of CAN$26,936.65. The appellant would have liked to have her claims for [TRANSLATION] "commissions" allowed and although these amounts seem reasonable to me in the circumstances, I nevertheless denied them. The respondent objected because Ms. Fiset was unable to provide sufficient or supporting documentary evidence. In this context, the Minister relied on the statements found in *Transocean Offshore Ltd. v. R.*[1] at paragraph 35 and *House v. R.*[2] at paragraph 80.

III. Processing of penalties – T1135 form

[8] First, I would like to point out that subsections 162(7) and 233.3(3) of the Act are both very clear and very strict. As put succinctly by Justice Favreau in *Leclerc v. R.*, "Parliament's intention is to motivate taxpayers who own foreign property whose cost amount exceeds $100,000 to report their foreign-source income".[3] Also, as noted by Ms. Fiset during her testimony, she had never intended to conceal foreign income. It was certainly not fraud, but rather more or less wilful default. While the appellant admits that she did not check the appropriate box in her income tax returns, indicating that she owned foreign property, it would appear that in the first few years, she did not receive any income. Moreover, every year she asked her accountant whether she had to declare it; he always told her that was not necessary in the circumstances. Also, there was never a question of providing this infamous T1135 form. However, although the appellant had committed an error, it is obvious that it was committed in good faith, as she may have been misinformed.

[9] It was not until August 2013, when she made the decision to make a request for adjustments in order to claim losses on her properties in the United States that everything was declared, although no demand was served on her. Also, it is obvious that the appellant could have perhaps avoided all these penalties, if only she had relied on the provisions available to her through the Voluntary Disclosure Program. Accordingly, she was imposed a maximum penalty in this case for 2008, 2009, 2010 and 2011, which resulted in an invoice exceeding $11,000. And

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1 *Transocean Offshore Ltd. v. R.*, 2 C.T.C. 183, paragraph 35 - A trier of fact is entitled to draw an inference adverse to a party who has or may reasonably be presumed to have some evidence that is relevant to disputed facts, but fails to adduce that evidence.

2 *House v. R.*, 1 C.T.C. 13, paragraph 80 - What these cases stand for is the proposition that, depending on the circumstances of the case, a taxpayer may be required, in addition to his oral testimony, to adduce supporting documents to prove a given point.

3 *Leclerc v. R.*, 2010 TCC 99, paragraph 15.

although that was not case, again, it was because she was unaware. In the end, I recognize that Ms. Fiset exercised due diligence during the course of this case, despite her failure to file form T1135.

[10] In *Douglas v. R.*,[4] Justice Woods set aside a penalty in such circumstances stating: "It would be unfair to penalize Mr. Douglas for failure to comply with a filing deadline in these circumstances". It must be noted that I would have done the same here, had it not been for the fact that the respondent vacated the penalties in this case, after hearing the appellant's testimony. In this context, it is important to recognize that the Minister of National Revenue (or his delegate) has the discretion to waive any penalty or interest imposed under the Act (subsection 220(3.1). This is a fairness provision. In my opinion, to insist that the appellant suffer the consequences of an honest mistake would neither benefit the public administration nor enhance confidence in the CRA. Fortunately, in the end, there was agreement between the parties regarding the [TRANSLATION] "penalties" imposed under subsection 162(7) and the penalties are vacated.

IV. Conclusion

[11] For these reasons:

A. The respondent's motion to quash the appeals from the reassessments dated July 18, 2016, made under the *Income Tax Act* (the Act), for the 2008 and 2009 taxations years is allowed and the appeals are quashed.

B. The respondent's motion to quash the appeals from the reassessments dated October 8, 2014, made under the Act, for the 2008, 2009 and 2011 taxations years is dismissed.

C. The respondent's motion to quash the appeal from the initial assessment dated July 28, 2011, made under the Act, for the 2010 taxation year is allowed and the appeal is quashed.

D. The respondent's motion to quash the appeals from the assessments made under the Act, with respect to the 2012 to 2015 taxation years, inclusively, is allowed and the appeals are quashed.

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[4] *Douglas v. R.*, 2012 TCC 73, paragraph 13.

E. The appeal from the reassessment dated July 18, 2016, made under the Act, for the 2011 taxation year is allowed in part and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment to allow the deduction of additional rental expenses in the amount of $26,936.65.

F. The appeals from the additional assessments dated October 8, 2014, made under the Act, for the 2008, 2009, 2010 and 2011 taxation years are allowed and the additional assessments are quashed.

[12] Without costs.

Signed at Ottawa, Canada, this 21st day of April 2017.

"Robert N. Fournier"

Fournier D.J.

CITATION:	2017 TCC 63
COURT FILE NO.:	2016-3868(IT)I
STYLE OF CAUSE :	NATHALIE FISET v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 2, 2017
REASONS FOR JUDGMENT BY:	The Honourable Robert N. Fournier, Deputy Judge
DATE OF JUDGMENT:	April 21, 2017

APPEARANCES:

For the appellant:	The appellant herself
Counsel for the respondent:	Amélia Fink

COUNSEL OF RECORD:

For the appellant:	
Name:	
Firm:	
For the respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada