

Docket: 2008-512(IT)I

BETWEEN:

STEPHEN DOUGHERTY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 10, 2008, at Calgary, Alberta

Before: The Honourable Justice T. O'Connor

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Margaret McCabe

JUDGMENT

The appeals are dismissed. There are no costs.

Signed at Ottawa, Canada, this 31st day of July 2008.

“T. O’Connor”

O’Connor J.

Citation: 2008TCC436
Date: 20080731
Docket: 2008-512(IT)I

BETWEEN:

STEPHEN DOUGHERTY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

O'Connor, J.

[1] This appeal was set for hearing in Calgary Alberta on July 10, 2008. Prior to hearing the appeal on its merits Counsel for the Respondent made a Motion to file an Amended Reply to the Notice of Appeal.

[2] The amendments requested in the Motion were established as true and did not prejudice the Appellant. Consequently, the Motion was granted and the Amended Reply was filed. The amendments are contained in paragraphs 19 and 25 of the Amended Reply.

[3] The relevant facts set forth in the Amended Reply are extremely thorough and are proven by the exhibits filed by the Respondent and/or by the evidence given by the Appellant. Those facts read as follows:

5. In computing income for the 2003 taxation year, the Appellant claimed gross rental income of \$500 and a net rental loss of \$16,149 as follows:

Rental Income		\$500
Less: Interest	\$11,051	
Property taxes	\$ 2,631	

Utilities	<u>\$ 2,967</u>	\$16,649
Net rental loss		<u>(\$16,149)</u>

6. The Appellant's 2003 income tax return was initially assessed on May 25, 2004 and the rental loss was assessed as filed.

7. In computing income for the 2004 taxation year, the Appellant claimed gross rental income of \$0 and a net rental loss of \$21,617 as follows:

Rental Income		\$ 0
Less: Interest	\$12,600	
Property taxes	\$ 3,176	
Utilities	\$ 1,949	
Repairs & Main	<u>\$ 3,892</u>	
		<u>\$21,617</u>
Net rental loss		<u>(\$21,617)</u>

8. The Appellant's 2004 income tax return was initially assessed on June 9, 2005 and the rental loss was assessed as filed.

9. In reassessing the Appellant for the 2003 taxation year, by notice dated March 23, 2006, the Minister disallowed the rental expenses and changed the net rental loss of \$16,149 to net rental income of \$500.

10. In reassessing the Appellant for the 2004 taxation year, by notice dated March 23, 2006, the Minister disallowed the net rental loss of \$21,617.

11. In reassessing the Appellant for the 2003 taxation year, by notice dated April 5, 2007, the Minister reduced the net rental income from \$500 to \$0.

12. The Appellant served on the Minister a Notice of Objection for the 2003 and 2004 years on June 25, 2007.

13. The Appellant did not file the Notice of Objection for the 2004 year within the time limited by subsection 165(1) of the *Income Tax Act* (the "Act").

14. By letter dated July 26, 2007 Minister informed the Appellant that the Notice of Objection for the 2004 year was late and an extension of time would not be allowed pursuant to paragraph 166.1(7)(a) of the *Act*.

15. In response to the Notice of Objection, the Minister confirmed the assessment for the 2003 taxation year by means of a Notice of Confirmation dated November 20, 2007 as the rental expenses were not incurred for the purpose of gaining or producing income from a business or property.

16. In determining the Appellant's tax liability for the 2003 and 2004 years, the Minister relied on the following assumptions of fact:

- (a) the Appellant owned a property at 108 Wilson Street, Oakville, Ontario (hereinafter the "Property");
- (b) the Property was zoned commercial/residential;
- (c) the Appellant's spouse owned an adjacent property (hereinafter "the Adjacent Property") at 61 Lakeshore Road West, Oakville, Ontario;
- (d) the Adjacent Property had a lease in place until January of 2005;
- (e) the Appellant moved to Calgary, Alberta in 1999;
- (f) the Property was only rented in January of 2003 for a total of \$500;
- (g) the Appellant hired a real estate agent and the combined properties (the Property and the Adjacent Property) were listed for sale in April of 2003;
- (h) the listing took into account the existing lease of the Adjacent Property;
- (i) an offer to purchase the combined properties was signed in December of 2003;
- (j) the sale of the combined properties had a one-year closing date to take into account the existing lease on the Adjacent Property;
- (k) the closing date of the sale of the combined properties was February 10, 2005;
- (l) there was no effort to rent the Property after January of 2003;
- (m) the interest expenses claimed for \$11,051 in the 2003 and \$12,600 in the 2004 year were not incurred for the purpose of gaining or producing income from a business or property;
- (n) the property taxes claimed of \$2,631 in the 2003 year and \$3,176 in the 2004 year were not incurred for the purpose of gaining or producing income from a business or property;
- (o) the utilities expenses claimed of \$2,967 in the 2003 year and \$1,949 in the 2004 year were not incurred for the purpose of gaining or producing income from a business or property, and

- (p) the repairs and maintenance expenses claimed of \$3,892 in the 2004 year were not incurred for the purpose of gaining or producing income from a business or property.

B. ADDITIONAL RELEVANT FACTS

17. The Appellant claimed rental losses in previous years as follows:

2002	(\$21,521)
2001	(\$21,320)
2000	(\$13,717)
1999	(\$ 9,645)

18. The Appellant has claimed a total of \$248,744 in rental losses since 1991 and has not declared net rental income in any year.

19. The Minister allowed the Appellant a capital loss carry forward for the 2005 taxation year in the amount of (\$2,343.50) as a result of allowing rental expenses in the amount of \$12,968.71 and \$14,486.29 for the 2003 and 2004 taxation years, respectively, to be capitalized.

C. ISSUES TO BE DECIDED

20. The issues to be decided are:

- (a) whether the Appellant is entitled to a rental loss in excess of the amount allowed by the Minister for the 2003 taxation year, and
- (b) whether the appeal for the 2004 taxation year is properly before the Tax Court of Canada.

C. STATUTORY PROVISION, GROUNDS RELIED ON AND RELIEF SOUGHT

21. The Respondent relies on Section 9, subsection 165(1) and paragraphs 18(1)(a), 18(1)(h) and 166.1(7)(a) of the *Act*, as amended for the 2003 and 2004 taxation years.

22. The Respondent submits that rental expenses, in the 2003 year, of \$16,649, were not incurred for the purpose of gaining or producing income from a business or property within the meaning of paragraph 18(1)(a) of the *Act*. The Respondent submits that the rental expenses have been properly disallowed pursuant to subsection 18(1) of the *Act*.

23. The Respondent submits that the Appellant is not entitled to a rental loss in excess of the amount allowed by the Minister, for the 2003 taxation year.

24. The Respondent further submits that as the Appellant did not file a Notice of Objection for the 2004 year within the time limited by subsection 165(1) of the *Act* nor file an Application for Extension of time to file an Objection within the time limited by paragraph 166.1(7)(a) of the *Act*, this year is not properly before the Court.

25. The Respondent submits that amount incurred by the Appellant in respect of interest, utilities, and repair and maintenance of the Property in the 2003 and 2004 taxation years were properly allowed as a capital costs to the Appellant, to form part of the adjusted cost base of the Property.

[4] The following sections of the *Income Tax Act* are relevant:

18. (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

General limitation

(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

...

Personal and living expenses

(h) personal or living expenses of the taxpayer, other than travel expenses incurred by the taxpayer while away from home in the course of carrying on the taxpayer's business;

...

Objections to assessment

18. (1) Dans le calcul du revenu du contribuable tiré d'une entreprise ou d'un bien, les éléments suivants ne sont pas déductibles :

Restriction générale

a) les dépenses, sauf dans la mesure où elles ont été engagées ou effectuées par le contribuable en vue de tirer un revenu de l'entreprise ou du bien;

...

Frais personnels ou de subsistance

h) le montant des frais personnels ou de subsistance du contribuable — à l'exception des frais de déplacement engagés par celui-ci dans le cadre de l'exploitation de son entreprise pendant qu'il était absent de chez lui ;

...

Opposition à la cotisation

165. (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,

(a) where the assessment is in respect of the taxpayer for a taxation year and the taxpayer is an individual (other than a trust) or a testamentary trust, on or before the later of

(i) the day that is one year after the taxpayer's filing-due date for the year, and

(ii) the day that is 90 days after the day of mailing of the notice of assessment; and

(b) in any other case, on or before the day that is 90 days after the day of mailing of the notice of assessment.

...
Extension of time by Minister

165. (1) Le contribuable qui s'oppose à une cotisation prévue par la présente partie peut signifier au ministre, par écrit, un avis d'opposition exposant les motifs de son opposition et tous les faits pertinents, dans les délais suivants :

a) lorsqu'il s'agit d'une cotisation relative à un contribuable qui est un particulier (sauf une fiducie) ou une fiducie testamentaire, pour une année d'imposition, au plus tard le dernier en date des jours suivants :

(i) le jour qui tombe un an après la date d'échéance de production qui est applicable au contribuable pour l'année,

(ii) le 90^e jour suivant la date de mise à la poste de l'avis de cotisation;

b) dans les autres cas, au plus tard le 90^e jour suivant la date de mise à la poste de l'avis de cotisation

...

Prorogation du délai par le ministre

166.1 (1) Le contribuable qui n'a pas signifié d'avis

166.1 (1) Where no notice of objection to an assessment has been served under section 165, nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.

...

Appeal

169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed, or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed

d'opposition à une cotisation en application de l'article 165 ni présenté de requête en application du paragraphe 245(6) dans le délai imparti peut demander au ministre de proroger le délai pour signifier l'avis ou présenter la requête.

...

Appel

169. (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation :

a) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;

b) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation;

toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été expédié par la poste au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

to the taxpayer under section
165 that the Minister has
confirmed the assessment or
reassessed

[5] It is clear from the above-quoted sections that an appeal can only be made to the Tax Court if a Notice of Objection has been filed. There was no Notice of Objection filed with respect to the 2004 taxation year and for that reason alone the 2004 taxation year is not properly before this Court and consequently the appeal with respect to 2004 taxation year is dismissed and/or quashed.

[6] I am also satisfied that the exhibits filed by the Respondent and the evidence adduced by the Respondent's cross-examination of the Appellant establish that no rental operation was carried on in the 2003-2004 years which would justify allowing the expenses claimed in those years. Paragraph 18(1)(a) is clearly applicable for both years 2003 and 2004. Moreover, the 2004 year is not properly before the Court.

[7] I do not consider that the Appellant was in bad faith in attempting to claim the expenses. He may have received some advice from an accountant or other person that perhaps the expenses could be claimed.

[8] I am further convinced of the conclusion that paragraph 18(1)(a) is applicable when one considers that there never was in all of the years since 1991 any net rental income plus the fact of the huge rental losses claimed in the years 1999 through 2002. Furthermore, the Appellant has been fairly treated by the Minister of National Revenue allowing certain expenses to be capitalized and used to reduce the capital gain the Appellant realized on the disposition of the Property.

[9] In conclusion, the appeals are dismissed. There shall be no costs.

Signed at Ottawa, Canada, this 31st day of July 2008.

“T. O'Connor”

O'Connor J.

CITATION: 2008TCC436

COURT FILE NO.: 2008-512(IT)I

STYLE OF CAUSE: STEPHEN DOUGHERTY AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: July 10, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice T. O'Connor

DATE OF JUDGMENT: July 31, 2008

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Margaret McCabe

COUNSEL OF RECORD:

For the Appellant:	
Name:	Stephen Dougherty, on his own behalf
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada