

Dockets: 2008-3080(IT)I  
2008-3081(IT)I

BETWEEN:

RHÉAL LANDRIAULT  
and  
CAROLE L. BERCIER,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on common evidence on June 22, 2009, at Ottawa, Canada.

Before: The Honourable Justice Réal Favreau

Appearances:

For the appellants

The appellant herself

Counsel for the respondent:

Marie-Ève Aubry

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**JUDGMENT**

The appeals from assessments dated March 1, 2007, made under the *Income Tax Act* for the 2003 and 2004 taxation years are dismissed without costs in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 28th day of July 2009.

"Réal Favreau"

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Favreau J.

Translation certified true  
on this 25th day of September 2009  
Margarita Gorbounova, Translator

Citation: 2009 TCC 378  
Date: 20090728  
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### **REASONS FOR JUDGMENT**

Favreau J.

[1] These appeals were heard on common evidence.

[2] The appellants are appealing from assessments dated March 1, 2007, made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act), whereby the Minister of National Revenue (the Minister) disallowed net rental losses of \$7,523 and \$4,836 for the 2003 and 2004 taxation years.

[3] In 2001, the appellants purchased a two-unit residential property located at 299 Olmstead Street in Ottawa. The appellants are equal co-owners of that property. The appellants occupy the lower unit, while the upper unit is rented out to Carole Bercier's son, Nicholas Bercier (Nicholas). The upper unit is comprised of two bedrooms, a kitchen, a bathroom and a living room.

[4] When the appellants purchased the property, the two upper-unit bedrooms were rented out to two tenants for \$325 per month each. The tenants moved out in May 2002, and Nicholas moved into the upper unit. Nicholas was living alone in the

unit until his brother joined him at an unspecified date (presumably sometime after 2004).

[5] Nicholas paid \$300 per month to rent out the unit in 2003 and \$450 per month in 2004. His rent payments covered the cost of electricity, water, heating, telephone and satellite television. The gross rental income for 2003 was \$3,600, while the expenses claimed by the appellants were \$11,124 or \$927 per month. The gross rental income for 2004 was \$5,400, while the expenses claimed were \$10,236 or \$853 per month.

[6] Since buying the property, the appellants reported the following rental losses:

2001	\$3,022
2002	\$2,754
2003	\$7,524
2004	\$4,836

[7] The appellants are claiming that their primary intention for this income property has always been to make it into a profitable business. They stated that they had tried to rent out the second bedroom of the upper unit to a friend, but failed. The appellants acknowledged that, until September 2003, they had been renting out the unit to Nicholas at a rate below market value. However, they are claiming that it was a temporary arrangement just until Nicholas could take advantage of a support program offered by the Province of Ontario, namely, the Ontario Disability Support Program. They raised the rent to \$450 per month once Nicholas became eligible for that program in October 2003. After the appellants had consulted with Social Services in 2002, the rent was set at \$450 per month. A second-floor rental unit, such as the one owned by the appellants, entitled the beneficiary to monthly rent payments of \$450. Ms. Bercier also explained at the hearing that without that unit she would have lost her son.

[8] The appellants have experience in business: Ms. Bercier has been working in administration at the Royal Canadian Mounted Police for nine years, and Mr. Landriault had his own construction business specializing in foundations for 17 years.

[9] The issue is whether the rental expenses claimed by the appellants were incurred for the purpose of earning income from a business or property or whether they are personal or living expenses for the purposes of the Act.

[10] The relevant statutory provisions are paragraphs 18(1)(a) and (h) and paragraph (a) of the definition of "personal or living expenses" in subsection 248(1) of the Act. Those provisions read as follows:

General limitations

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;

Definitions

248. (1) In this Act,

personal or living expenses

"personal or living expenses" includes

(a) the expenses of properties maintained by any person for the use or benefit of the taxpayer or any person connected with the taxpayer by blood relationship, marriage or common-law partnership or adoption, and not maintained in connection with a business carried on for profit or with a reasonable expectation of profit,

[11] The appellants greatly emphasized that they had intended to make a profit from renting out the upper unit. The only evidence supporting that intention was the increase in rent once Nicholas became eligible for the support program.

[12] The Supreme Court of Canada clearly indicated in *Stewart v. The Queen*, 2002 D.T.C. 6983, that the subjective intention to profit must be accompanied by objective factors of businesslike behaviour. In that regard, the Court stated the following at paragraphs 54 and 55:

54. It should also be noted that the source of income assessment is not a purely subjective inquiry. Although in order for an activity to be classified as commercial in nature, the taxpayer must have the subjective intention to profit,

in addition, as stated in *Moldowan*, this determination should be made by looking at a variety of objective factors. Thus, in expanded form, the first stage of the above test can be restated as follows: "Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?" This requires the taxpayer to establish that his or her predominant intention is to make a profit from the activity and that the activity has been carried out in accordance with objective standards of businesslike behaviour.

55. The objective factors listed by Dickson J. in *Moldowan*, at p. 486, were: (1) the profit and loss experience in past years; (2) the taxpayer's training; (3) the taxpayer's intended course of action; and (4) the capability of the venture to show a profit. . . .

[13] In this case, it was clearly established on the balance of probabilities that the appellants had no real intention of making a profit from renting out the unit to Nicholas. As in *Rapuano v. The Queen*, 2009 TCC 150, the agreement with Nicholas was essentially a family arrangement under which a minimal rent was paid to help defray the operating costs of the property.

[14] The rental activities were not carried out on a commercial basis and hence cannot be a source of income for the purposes of the Act. As admitted by the appellants themselves, the rent paid by Nicholas in 2003 was below the fair market value of rent payable for a similar unit in the area. Even after it had been increased in 2004, the rent paid by Nicholas was utterly insufficient for the property to be capable of showing a profit.

[15] In light of the foregoing, the rental expenses claimed by the appellants are personal or living expenses for the purposes of the Act.

[16] The appeals are dismissed without costs.

Signed at Montréal, Quebec, this 28th day of July 2009.

"Réal Favreau"

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Favreau J.



CITATION: 2009 TCC 378

COURT FILE NOS.: 2008-3080(IT)I and 2008-3081(IT)I

STYLES OF CAUSE: RHÉAL LANDRIAULT AND CAROLE L. BERCIER AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Canada

DATE OF HEARING: June 22, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: July 28, 2009

APPEARANCES:

For the appellants: The appellant herself

Counsel for the respondent: Marie-Ève Aubry

COUNSEL OF RECORD:

For the appellants:

Name:

Firm:

For the respondent: John H. Sims, Q.C.  
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