

Docket: 2010-2890(IT)G

BETWEEN:

SYLVIE GIGUÈRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on April 3, 2012, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Louis Sirois

Counsel for the respondent: Julie David

JUDGMENT

The appeals from the reassessments dated August 12, 2009, made under the *Income Tax Act* for the 2004, 2005 and 2007 taxation years are dismissed with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of September 2012.

“Réal Favreau”

Favreau J.

Translation certified true
on this 6th of February 2013.

François Brunet, Revisor

Citation: 2012 TCC 309
Date: 20120906
Docket: 2010-2890(IT)G

BETWEEN:

SYLVIE GIGUÈRE,

Appellant

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from reassessments dated August 12, 2009, made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th suppl.), as amended (the Act), for the 2004, 2005 and 2007 taxation years. The reassessments of the 2004 and 2005 taxation years were made outside the normal reassessment period.

[2] In making the new reassessments dated August 12, 2009, the Minister of National Revenue (the Minister) added to the appellant's income, following the sale of the family residences, the amounts of \$31,068, \$44,729 and \$29,872 as business income for her 2004, 2005 and 2007 taxation years. The Minister also applied to the business income added to the appellant's income for her 2004, 2005 and 2007 taxation years the penalty prescribed in subsection 163(2) of the Act in the amounts of \$3,264, \$4,755 and \$3,359, respectively.

[3] In determining the tax payable by the appellant for the 2004, 2005 and 2007 taxation years, the Minister relied on the following assumptions of fact set out in paragraph 9 of the Reply to the Notice of Appeal:

[TRANSLATION]

- (a) The appellant is a police officer with the Service de police de la Ville de Montréal [Montréal Police Service];
- (b) During the years in issue, the appellant had a common law partner, Yves Thellen;
- (c) During the years from 2004 to 2007, Mr. Thellen was employed by Master, in Boucherville, a company specializing in cooling and heating systems and services;
- (d) Moreover, Mr. Thellen was a 50 percent shareholder in a company specializing in the sale and installation of fireplaces;
- (e) In 2001, the appellant and her partner were residing in Mirabel;
- (f) From 2001 to 2005, the appellant and her partner built seven single-family homes;
- (g) Except for the first house built in Mirabel, the other six houses were built in Blainville;
- (h) The business income added to the appellant's income for 2004, 2005 and 2007 was for the sale of the following three properties:
 - 385 Fontainebleau, Blainville;
 - 431 Fontainebleau, Blainville;
 - 7 Des Iris, Blainville;
- (i) The three properties in issue were sold in 2004, 2005 and 2007;
- (j) For the three properties in issue, the ownership period between the date of purchase of the land and that on which it was listed for sale varied between 67 and 110 [*sic*] days, as shown in the table entitled [TRANSLATION] "Important Transaction Dates," attached to this Reply as Appendix A and forming an integral part hereof;
- (k) In the case of the property at 385 Fontainebleau, the MLS listing states that the house is under construction and that it will be delivered in January 2004;
- (l) Between the date of purchase of the three lots and the date of sale of the three properties in issue, the holding period varied between 281 and 615 days, as shown in the table entitled "Important Transaction Dates" of Appendix A;
- (m) In 2004, 2005 and 2007, the appellant reported only employment income from the Service de police de la Ville de Montréal in her income tax returns.

BUSINESS INCOME

385 FONTAINEBLEAU STREET, BLAINVILLE

- (n) On August 28, 2003, the appellant made an offer of purchase in respect of a vacant lot facing onto Fontainebleau Street, Blainville, and bearing civic number 385;
- (o) Construction costs for said property shown in the appellant's table are overstated, considering the supporting documentation submitted;
- (p) With regard to said property, the appellant did not provide all her invoices and the invoices that she did submit were lower based on the construction costs table filed by the appellant;
- (q) Construction costs were assessed by the Canada Revenue Agency at \$312,942, as shown in the table entitled [TRANSLATION] "Construction costs for the house," attached to this Reply as Appendix B and forming an integral part hereof;
- (r) The construction costs in the table entitled [TRANSLATION] "Construction costs for the houses," attached to this Reply as Appendix B and forming an integral part hereof, are as follows:
 - Materials and subcontracting;
 - Unskilled labour work;
 - Contractor's profit.
- (s) The percentage of unskilled labour work performed by the appellant was pegged at 45% for each of the three properties;
- (t) On November 3, 2003, the residence at 385 Fontainebleau Street was put up for sale;
- (u) A promise to purchase was concluded on March 25, 2004, for the residence of 385 Fontainebleau Street;
- (v) On June 4, 2004, the residence at 385 Fontainebleau Street was sold for \$366,000;

431 FONTAINEBLEAU STREET, BLAINVILLE

- (w) On June 7, 2004, the appellant made an offer to purchase a vacant lot facing onto Fontainebleau Street, Blainville, and bearing civic number 431;
- (x) The construction costs for said property shown in the appellant's table are overstated, considering the supporting documentation submitted;
- (y) With regard to said property, the appellant did not provide all her invoices and the invoices that she did submit were lower based on the construction costs table filed by the appellant;
- (z) Construction costs were assessed by the Canada Revenue Agency at \$345,852, as shown in the table entitled [TRANSLATION] "Construction costs for the houses," attached to this Reply as Appendix B and forming an integral part hereof;

- (aa) On November 24, 2004, the residence at 431 Fontainebleau Street was put up for sale;
- (bb) A promise to purchase was concluded on July 7, 2005, for the residence at 431 Fontainebleau Street;
- (cc) On October 27, 2005, the residence at 431 Fontainebleau Street was sold for \$415,000;

7 DES IRIS STREET, BLAINVILLE

- (dd) On September 7, 2005, the appellant, the appellant made an offer to purchase a vacant lot facing onto Des Iris Street, Blainville, and bearing civic number 7;
- (ee) The construction costs for said property shown in the appellant's table are overstated, considering the supporting documentation submitted;
- (ff) The appellant did not provide any invoices based on the construction costs table presented by the appellant;
- (gg) The construction costs are assessed by the Canada Revenue Agency at \$307,358, as shown in the table entitled [TRANSLATION] "Construction costs for the houses," attached as Appendix B;
- (hh) On January 3, 2006, the residence at 7 Des Iris Street was put up for sale;
- (ii) On April 14, 2007, a promise to purchase was concluded for the residence of 7 Des Iris Street;
- (jj) On May 15, 2007, the residence at 7 Des Iris Street was sold for \$360,000.

[4] The Minister also relied on the following assumptions of fact set out in paragraph 10 of the Reply to the Notice of Appeal:

[TRANSLATION]

- (a) On September 26, 2003, the appellant was granted an hypothecary loan of \$296,000 from the Association de bienfaisance et de retraite des policiers et policières de la ville de Montréal;
- (b) On February 10, 2005, the appellant was granted an hypothecary loan of \$350,400 from the Association de bienfaisance et de retraite des policiers et policières de la ville de Montréal;
- (c) On September 13, 2005, the appellant was granted an hypothecary loan of \$274,400 from the Association de bienfaisance et de retraite des policiers et policières de la ville de Montréal;

[5] In imposing the penalty prescribed in subsection 163(2) for the 2004, 2005 and 2007 taxation years and in determining that the appellant made a misrepresentation that is attributable to neglect, carelessness or wilful default or has committed fraud in filing the returns for the 2004 and 2005 taxation years, the Minister relied on the following assumptions of fact set out in paragraph 11 of the Reply to the Notice of Appeal:

[TRANSLATION]

- (a) The facts mentioned in paragraph 9 above;
- (b) The adjustments made to the appellant's income are substantial in relation to the income reported;

	2004	2005	2007
Unreported income	\$31,068	\$44,729	\$29,872
Reported income	\$68,924 45%	\$70,700 63%	\$71,799 41%
Total income	\$99,992	\$115,429	\$101,671

- (c) The appellant is a police officer and is cognizant of the importance of respecting the laws.

[6] From 2001 to 2005, the appellant and her ex-spouse sold seven residences of which six were self-built. The four residences sold and which are not the subject of the reassessments of August 12, 2009, are the following ones:

- 11435 Gilles Villeneuve Street, Mirabel;
- 72 Matagami Street, Blainville;
- 39 Matagami Street, Blainville; and
- 41 Matagami Street, Blainville.

[7] The lot at 11435 Gilles Villeneuve Street was purchased by the appellant on June 14, 2001, and the residence built on it was put up for sale on September 10, 2001, that is, 88 days following the purchase of the land. Said residence was sold on January 25, 2002, that is, following a holding period of 225 days.

[8] The lot at 72 Matagami Street was purchased by the appellant on February 6, 2002, and the residence built on it was sold unfinished on May 24, 2002, that is, following a holding period of 107 days. Said residence was not lived in by the appellant.

[9] The lot at 39 Matagami Street was purchased by the appellant on April 24, 2002, and the residence built on it was put up for sale on September 28, 2002, that is,

157 days following the purchase of the land. Said residence was sold on November 29, 2002, that is, following a holding period of 219 days.

[10] The lot at 41 Matagami Street was purchased by the appellant on December 12, 2002, and the residence built on it was put up for sale on March 19, 2003, that is, 97 days following the purchase of the land. Said residence was sold on August 19, 2003, that is, following a holding period of 250 days.

[11] Yves Thellen, the appellant's ex-spouse, testified at the hearing. He explained that he was partners with his father and brother in a heating company (stoves and fireplaces) which they opened in Blainville in 1995. The company employed 25 employees and had a total sales figure of \$5,000,000. He devoted 60 to 65 hours per week to the business. After his father retired from the company in 2005 as a result of illness, he purchased his father's shares with his brother. Seeing as the company was then experiencing financial difficulties and that the bank threatened to call in its loans and foreclose on the company, Mr. Thellen fell into a depression and towards the end of 2005 he took a sick leave for about a month. He left his brother to manage the business alone until 2009, at which time the company went bankrupt. From February 2006 to 2009, he was a sales representative (stove and fireplace department) for the Master group. He worked at the store located on Henri Bourassa Boulevard in Montréal. He was a salaried worker and worked about 45 hours per week.

[12] During his testimony, Mr. Thellen explained that the purchase of lots and the construction of homes were solely in the appellant's name because it was easier for the appellant than him to obtain financing from the banks. He stated that he hired subcontractors to build the houses because it enabled him to obtain better quality materials. Following the purchase of a lot by the appellant, he would be in charge of receiving two to three bids by trades. He hired the subcontractors. He supervised and cleaned the construction site and verified the progress of the work. He stated that for each house he spent five to six hours per week on construction activities over a period of about three months. He did not keep a log of the time he spent on each house. According to him, there was a profit sharing agreement on the sale of the houses between he and the appellant but seeing as no profit was derived from the sale of the three houses in issue, there was no profit sharing.

[13] Mr. Thellen cited the couple's problems and his trips to Morocco in February and March 2003 to justify the sale of 385 Fontainebleau. The lot at 431 Fontainebleau was purchased by the appellant because she did not wish to be separated and suggested rather that they try living together again. Mr. Thellen cited

his health problems (herniated disk and his two bouts of depression, including the one that caused him to take time off work for a month in fall 2005) to justify the sale of 431 Fontainebleau. According to him, the appellant purchased the lot at 7 Des Iris in order to build a smaller home (a bungalow with 1,500 square feet of living space). Mr. Thellen cited his health problems (acute anxiety attacks and depression) and his problems with the Direction de la Protection de la Jeunesse concerning his 16-year-old son to justify the sale of 7 Des Iris.

[14] On cross-examination, Mr. Thellen confirmed that the subcontractors were, in most cases, paid in cash by the appellant from her bank account.

[15] The appellant testified at the hearing. She explained that she and her ex-partner self built the six houses and that she knew nothing about construction. She never worked on the work sites except when cleaning. She chose the model to build with her ex-partner. She chose the plumbing fixtures and was in charge of decorating. She confirmed that she purchased the lots in her own name because she was able to obtain financing and because she wanted to protect this asset from the creditors of her ex-partner's company.

[16] Based on the statement of the seller's disbursements dated June 4, 2004, prepared by the notary handling the sale of 385 Fontainebleau, the net cash to the seller was calculated as follows:

[TRANSLATION]

Sale price	\$366,000.00
Hypothecary balance due	\$266,214.89
Notary fees	\$467.82
Brokerage fees	\$20,000.00
Adjustments	(\$8,791.19)
2003 deduction of municipal taxes	<u>\$500.00</u>
Net cash to seller	\$70,026.10

[17] On the basis of the statement of disbursements prepared by the notary handling the sale of 431 Fontainebleau, on October 27, 2005, the balance owing to the seller was calculated as follows:

[TRANSLATION]

Sale price	\$415,150.28
Sales commission	\$23,350.08
Municipal taxes	\$5,087.01
School taxes	\$421.00
Hypothec	\$347,653.28
Pro-Carbur Inc.	\$265.88
Notary	<u>\$607.34</u>
Balance owing to the seller	\$37,765.69

[18] On the basis of the statement of disbursements prepared by the notary handling the sale of 7 Des Iris, the remittance to the seller was calculated as follows:

[TRANSLATION]

Sale price	\$360,000
Hypothec payment	\$273,368.67
Sales commission	\$20,000.00
Location certificate	\$427.31
Notary fees	\$700.00
Corporation des Roseaux sur le Lac (2007 annual contribution)	\$432.00
Allocations	<u>\$2,075.07</u>
Remittance to seller	\$62,996.95

[19] The appellant reiterated the fact that she provided the auditor for the Canada Revenue Agency (the CRA) with copies of invoices for the construction costs of the homes, except those pertaining to 7 Des Iris, which were all misplaced. She stated that she had provided invoices to obtain disbursements for hypothecs. According to the appellant, the auditor did not take into account, in estimating the construction costs, invoices paid in cash. She did, however, acknowledge that the amounts paid in cash were not very specific and were based on estimates.

[20] During her testimony, the appellant also acknowledged that the residence at 385 Fontainebleau was put up for sale on November 3, 2003, that is, even before construction had ended. The expected delivery date was January 2004. She cited these as reasons for the sale of said residence: her ex-partner's trips to Morocco and the amount of the hypothecary loan, which was too high. The residence at 431 Fontainebleau was sold, according to her, owing to her ex-spouse's health issues (back pain and depression) when the hypothec on that residence was higher than that on the residence at 385 Fontainebleau. Finally, she stated that she did not intend to sell the residence at 7 Des Iris because that residence suited them perfectly and because she believed it was to be their last. The residence was put up for sale on January 3, 2006, and was sold on May 15, 2007. The appellant acknowledged that she purchased as co-owner with her ex-spouse another residence located at 37 De L'Alsace Street following the sale of the residence at 7 Des Iris. She explained that at the time, her ex-spouse was a salaried employee of the Chapters group and no longer a business owner.

[21] During her testimony, the appellant provided explanations regarding the nature of the work performed by her ex-spouse during the construction of the residences. According to her, her ex-spouse did small jobs such as the installation of tile and insulating wool, and performed finishing work such as the installation of moulding.

[22] The appellant and her ex-spouse did not hire professionals to prepare their tax returns and did not claim a refund for the Quebec sales tax and Goods and Services Tax related to the construction of the residences. The sale of the residences was not reported in the appellant's tax returns for the 2004, 2005 and 2007 taxation years.

[23] The auditor for the CRA, Marie-Pierre Genest, asked the appellant to provide her with invoices related to the construction of the three residences in issue in order to establish their construction costs. According to the information provided by the appellant, the construction costs of 385 Fontainebleau totalled \$348,868.05 (including selling costs), which apparently yielded a profit of \$17,131.95 from the sale of the residence at the price of \$366,000.00.

[24] The construction costs of 431 Fontainebleau allegedly totalled \$436,927.96 (including selling costs), which yielded a loss of \$21,927.96 from the sale of the property at the price of \$415,000.

[25] The construction costs of 7 Des Iris allegedly totalled \$418,500.30 (including selling costs), which yielded a loss of \$58,500.30 from the sale of the property at the price of \$360,000.00. Seeing as numerous invoices were missing, the appellant based

her calculations on an appraisal done by the financial institution for a hypothecary loan, to which she added certain costs such as the cost of the lot, selling expenses, the cost of the interlocking paving stone, etc.

[26] CRA auditor Christian Lanthier testified at the hearing. He explained that the appellant's file was audited owing to the high number of real property transactions. Marie-Pierre Genest began the audit on November 20, 2007, but she transferred the file to him on October 14, 2008. He also explained that Ms. Genest requested an appraisal for each of the residences in issue as she noticed that the construction costs submitted by the appellant appeared to be overstated compared to the estimated potential profit. She drew that conclusion by comparing the construction costs submitted by the appellant with initial selling price appearing on the MLS listing:

[TRANSLATION]

	385 Fontainebleau	431 Fontainebleau	7 Des Iris
Construction costs	\$348,868	\$436,928	\$418,500
The initial sale price	<u>\$374,000</u>	<u>\$474,000</u>	<u>\$374,500</u>
Profit (Loss)	\$25,132\$	\$37,072	(\$44,000)

[27] Moreover, Ms. Genest also noticed that the construction costs submitted by the appellant were unreliable because too many invoices were missing. The total number of invoices missing or lost regarding 385 Fontainebleau was \$63,591.99, whereas the amount of supporting documents accepted regarding 431 Fontainebleau was \$306,813.50 and that the amount of supporting documents accepted regarding 7 Des Iris was only \$96,836.60.

[28] The three expert reports were filed in a bundle as Exhibit I-3 and Alain Papineau, chartered appraiser, testified at the hearing to explain the method he followed, his analysis of the relevant information and facts and the findings from his review. The purpose of the three appraisals was to determine the cost of construction for each of the houses under review by adding the purchase cost of the subjacent land. The question, in fact, was to determine the replacement cost of each residence at the time of their construction. For an informed buyer, the replacement cost represents the maximum value the buyer should accept to pay to purchase the house.

[29] During his testimony, Mr. Papineau explained that he walked around the exterior of each house, that he looked at the plans and specifications of each house provided by the appellant and MLS listings. A verification of the titles of each house was conducted with the Registry Office. Furthermore, the municipal data, the appraisals, zoning and regulations were verified with the competent authorities.

[30] The replacement cost of each property was estimated on the basis of the Go-Estimation software of the Association provinciale des constructeurs d'habitations du Québec Inc., which takes into account the construction costs of a house with irregular dimensions.

[31] Among the assumptions made by the appraiser, one is to the effect that the costs were shared between materials, labour and other indirect costs. In the case of the three residences in issue, it was presumed that material and indirect costs represented 64% of the total cost, whereas labour costs represented 36% of the total construction cost. The average hourly rates per trade in 2004 that were used by the appraiser are derived from the Régie du Bâtiment du Québec. As another assumption, the appraiser estimated the developer's profit and the profit from general and administration costs at 15% for 7 Des Iris and at 20% in the case of the two other houses.

[32] He also considered that 45% of the unskilled labour cost related to the appellant and her ex-spouse.

[33] In the appraiser's view, the applicable allocation and construction cost for 385 Fontainebleau as of July 1, 2004, are as follows:

[TRANSLATION]

Land (purchase cost in 2003)	\$57,972	
Residence (cost estimate in 2004)	\$333,826	(\$114.13 / sq.ft.)
Land improvements	<u>\$0</u>	
Total cost (taxes included)	\$391,798	

[34] In the appraiser's view, the applicable allocation and construction cost for 431 Fontainebleau as of July 1, 2004, are as follows:

[TRANSLATION]

Land (purchase cost)	\$60,000	
Residence (cost estimate in 2004)	\$332,921	(\$115.24 / sq.ft.)
Heated in-ground pool	\$16,679	
Land improvements	<u>\$18,715</u>	
Total cost (taxes included)	\$428,315	

[35] In the appraiser's view, the applicable allocation and construction cost for 7 Des Iris as of February 1, 2006, are as follows:

[TRANSLATION]

Land (purchase cost in 2005)	\$74,766	
Residence (cost estimate in 2006)	\$285,577	(\$150.15 / sq.ft.)
Land improvements	<u>\$8,480</u>	
Total cost (taxes included)	\$368,823	

[36] In calculating the profit from the sale of the properties in issue, the Goods and Services Tax and the Quebec sales tax were recalculated and subtracted from the construction cost of each residence.

Analysis

[37] The provisions of the Act that apply in this case are as follows:

DIVISION B

COMPUTATION OF INCOME

Basic Rules

3. The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

...

Subdivision b

Income or Loss from a Business or Property

Basic Rules

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

...

152. (3.1) **Normal Reassessment Period** — For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is

- (a) if at the end of the year the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the period that ends four years after the earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year; and
- (b) in any other case, the period that ends three years after the earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year.

...

152. (4) **Assessment and reassessment [limitation period]** — The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

- (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

...

152. (4.01) Assessment to which paragraph 152(4)(a), (b) or (c) applies — Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(a), (b) or (c) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,

(a) where paragraph 152(4)(a) applies to the assessment, reassessment or additional assessment,

- (i) any misrepresentation made by the taxpayer or a person who filed the taxpayer's return of income for the year that is attributable to neglect, carelessness or wilful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this Act, or

...

163. (2) False statements or omissions -- Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of

...

PART XVII

INTERPRETATION

248. (1) In this Act,

“business” includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment;

[38] The first issue is whether the construction activities and the sale of single-family homes were undertaken by the appellant in the course of a business or in the course of an activity that generated capital gains against which the principal residence exemption could be claimed.

[39] As I stated in *Ayala v. The Queen*, 2010 TCC 206, at paragraphs 9, 10 and 11, the applicable principles when real property is sold are as follows:

[9] . . . [T]he Act does not have a criterion that allows for a distinction to be made between capital gain and business income (including income from an adventure in the nature of trade), requiring the Court to refer to the criteria developed in the case law. However, there is no criterion to determine with certainty whether a transaction leads to a capital gain or business income. Each situation is a specific case to be analyzed in light of the facts.

[10] Among the criteria developed by the case law, the following are of note:

- i. The nature of the property sold;
- ii. The length of time the taxpayer was in possession as owner of the property;
- iii. The frequency and number of operations carried out by the taxpayer;
- iv. The improvements made by the taxpayer to the property;
- v. The circumstances surrounding the sale of the property; and
- vi. The taxpayer’s intention at the time the property was acquired, as indicated by the taxpayer’s actions.

[11] In addition to these criteria, Canadian courts have developed the "secondary intention" criterion that may apply even when the taxpayer's main intention has been established as making a long-term investment. This criterion applies if, at the time the property was acquired, the taxpayer had considered the possibility of selling the property for a profit if the long-term investment project could not be achieved for whatever reason.

[40] In this case, the appellant sold seven single-family homes between 2001 and 2007 of which six were self-built by the appellant and her ex-spouse. The appellant’s modus operandi consisted in purchasing one vacant lot at a time, in building a single-family home on it, in living in it for a few months and in selling it for a profit. In the case of 385 Fontainebleau, the residence was put up for sale even before its construction was completed.

[41] The holding period of the seven residences varied between 107 days and 615 days: 281 days for 385 Fontainebleau; 507 days for 431 Fontainebleau and 615 days for 7 Des Iris. The number of days before the residences were put up for sale varied between 67 days and 157 days: 67 days for 385 Fontainebleau; 170 days for 431 Fontainebleau and 118 days for 7 Des Iris.

[42] The land subjacent to the seven residences was acquired by the appellant between 2001 and 2005, one in 2001, three in 2002 and one in (the course of) each of the years 2003, 2004 and 2005. The land was normally purchased by the appellant a few days following the sale of a residence or sometimes a few days prior to the sale of a residence. For 385 Fontainebleau, the land was purchased nine days following the sale of 41 Matagami whereas for 431 Fontainebleau, the land was purchased three days following the sale of 385 Fontainebleau. For 7 Des Iris, the land was purchased 50 days prior to the sale of 431 Fontainebleau.

[43] At the time of acquiring the land subjacent to 385 Fontainebleau and building said residence, the appellant had at least the secondary intention, if not the primary intention, to resell it at a profit. At the hearing, the appellant was unable to establish, in the light of the circumstances surrounding the acquisition of the property, that her intention was to live in it long term as she put the house up for sale even before its construction was completed.

[44] As for 431 Fontainebleau, the appellant put it up for sale less than six months following the date of acquisition of the subjacent land and purchased the land subjacent to 7 Des Iris 50 days prior to the sale of said residence. These two factors concerning the appellant's conduct tend to show that at the time of acquiring the land subjacent to 431 Fontainebleau and building said residence, the appellant's intention was not to make a long-term investment.

[45] The same goes for the residence at 7 Des Iris, which was put up for sale within four months of purchasing the subjacent land.

[46] The three residences in issue were sold through a realtor and their sale did not result from unsolicited offers received by the appellant.

[47] The reasons cited by the appellant and her ex-spouse for the sale of the three residences in issue, namely, the couple's family problems, the health of the appellant's ex-spouse and the high amount of the hypothec, do not appear to me to be the real reasons for selling the residences. The testimony of the appellant's ex-spouse revealed inconsistencies in the dates of his trips to Morocco and the impact of said

trips on the sale of 385 Fontainebleau. The ex-spouse's health issues do not appear to have prevented him from building in fall 2005 the residence at 7 Des Iris. The amount of the hypothec on each of the three residences was about \$296,000 for 385 Fontainebleau, \$350,400 for 431 Fontainebleau and \$334,400 for 7 Des Iris. According to the appellant's testimony, there is nothing to show that she had difficulty obtaining the financing required to build the three residences or that she had any difficulty covering the carrying costs of the homes considering that the amount of the hypothec on each of the residences remained relatively constant.

[48] According to the evidence, the appellant and her ex-partner were very active in completing the construction work of the three residences in issue. The appellant purchased the land subjacent to the residences and was responsible for obtaining the financing required to build. She shopped for such materials as plumbing fixtures and was in charge of decorating. Her ex-partner obtained bids from the subcontractors and orchestrated completion of the work in addition to being in charge of installing insulating wool, tile, partitions and finishings.

[49] A review of the criteria applicable in the case at bar leads me to conclude that the appellant carried on an activity in the nature of trade by building and selling the three residences in issue the profits of which were to be included as business income in computing the appellant's income.

Computing the profit from the sale of the residences

[50] The CRA auditor Genest had to call upon a chartered appraiser to determine the construction costs of each residence in the light of the absence of invoices in the case of 7 Des Iris or missing or incomplete invoices in the case of the other two residences.

[51] No one appeared on behalf of the appellant to determine the construction costs of each residence or to contradict the working assumptions of the CRA appraiser. The appellant alleged that the cost of the unskilled labour undertaken by the appellant and her ex-partner appraised at 45% was unrealistic considering her ex-partner's financial problems and his health conditions but she was unable to provide at the hearing any records that would make it possible to establish a different percentage. The appellant also claimed that all of the home equity lines of credit taken out for each residence were used to pay the construction costs but no testimonial or documentary evidence supporting that claim was offered at the hearing.

[52] On the basis of the appraisals done by the appraiser, the sale of 385 Fontainebleau generated a net profit of \$31,068, that is, 8.48% of the proceeds of disposition, whereas the sale of 431 Fontainebleau generated a net profit of \$44,729, that is, 9.9% of the proceeds of disposition, and the sale of 7 Des Iris generated a net profit of \$29,872, that is, 8.29% of the proceeds of disposition. Those profit percentages appear reasonable to me in the circumstances.

Assessments outside the normal reassessment period

[53] The respondent has the burden of proof with respect to the 2004 and 2005 taxation years as the Notices of Reassessment were sent after the normal reassessment period (see subsections 152(3.1), 152(4) and 152(4.1) cited at paragraph 37 above).

[54] The Minister submits that the appellant made a misrepresentation that is attributable to neglect, carelessness or wilful default in failing to report the business income of \$31,068 and \$44,729 for the 2004 and 2005 taxation years, representing 45% and 63% of her reported income for each of the taxation years, respectively.

[55] In *Venne v. Canada*, [1984] F.C.J. No. 314 (QL), Justice Strayer made the following comments with respect to the Minister's burden of proof:

. . . that it is sufficient for the Minister, in order to invoke the power under subparagraph 152(4)(a)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the words "misrepresentation that is attributable to neglects" must mean, particularly when combined with other grounds such as "carelessness" or "wilful default" which refer to a higher degree of negligence or to intentional misconduct. . . .

[56] In this case, it is clear to me that the appellant did not show reasonable care in preparing her tax returns for the 2004 and 2005 taxation years. She should have consulted with an accountant or a tax lawyer considering her particular situation related to the number of residences built and sold, to their holding period and to the circumstances surrounding the sale of the residences. The residence at 385 Fontainebleau was put up for sale even before construction was completed, which demonstrates that she had intended to resell the property at a profit.

[57] In view of the fact that the appellant did not claim the tax rebates to which she was entitled with respect to the construction of the residences and of the fact that she did not keep a log of the hours worked on the construction sites and invoices from material suppliers and subcontractors, it can be inferred that the appellant did not show reasonable care in the circumstances.

[58] In my opinion, the Minister was justified in making reassessments for the appellant's 2004 and 2005 taxation years.

Imposition of the penalty

[59] Subsection 163(2) of the Act imposes a penalty on a taxpayer who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return (see subsection 163(2) cited at paragraph 37 above).

[60] As in the case of the assessments made outside the normal reassessment period, the Minister has the burden of proving the circumstances warranting the imposition of a penalty under subsection 163(2).

[61] Judge Archambault described the Minister's burden as follows in *Corriveau v. Canada*, 2008 FCA 241:

26 . . . he must prove: (1) that the taxpayer made a false statement or omission in a return, and (2) that the false statement or omission was made knowingly or under circumstances amounting to gross negligence.

[62] In *Venne, supra*, Justice Strayer specified the interpretation of the notion of "gross negligence" as follows:

. . . . "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not. . . .

[63] In the case at bar, the appellant made or participated in, asserted to or acquiesced in the making of a false statement or omission in her income tax returns for the 2004, 2005 and 2007 taxation years. The adjustments made to the appellant's income are significant, 45%, 63% and 41%, respectively, compared with the reported income. Those false statements or omissions are tantamount to intentional acts on the

part of the appellant and demonstrate an indifference as to whether the law is complied with or not. The appellant is a police officer and is aware of the importance of respecting the laws. The absence of records and the missing invoices from material suppliers and subcontractors are tantamount, in my opinion, to intentional acting on the part of the appellant and demonstrate an indifference as to whether the law is complied with or not.

[64] In the circumstances, the Minister was justified in applying the penalty under subsection 163(2) of the Act on the business income added to the appellant's income for her 2004, 2005 and 2007 taxation years.

[65] For these reasons, the appeals are dismissed with costs.

Signed at Ottawa, Canada, this 6th day of September 2012.

“Réal Favreau”

Favreau J.

Translation certified true
on this 6th of February 2013.

François Brunet, Revisor

CITATION: 2012 TCC 309
COURT FILE NO.: 2010-2890(IT)G
STYLE OF CAUSE: Sylvie Giguère and Her Majesty the Queen
PLACE OF HEARING: Montréal, Quebec
DATE OF HEARING: April 3, 2012
REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau
DATE OF JUDGMENT: September 6, 2012

APPEARANCES:

Counsel for the appellant: Louis Sirois

Counsel for the respondent: Julie David

COUNSEL OF RECORD:

For the appellant:

Name: Louis Sirois

Firm: Sirois, Tremblay & Associates, Lawyers
Québec, Quebec

For the respondent:

Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada