Docket: 2012-312(IT)I

BETWEEN:

SUCCESSION OF SUZIE BROUSSEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on October 31, 2012, at Shawinigan, Quebec

Before: The Honourable Justice Lucie Lamarre

Appearances:

| | |
|---|---|
| Agent for the appellant: | Guy Plourde |
| Counsel for the respondent: | Marie-France Dompierre |

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**JUDGMENT**

The appeal from a reassessment made under the *Income Tax Act* for the 2004 taxation year is dismissed.

Signed at Ottawa, Canada, this 7th day of November 2012.

"Lucie Lamarre"

Lamarre J.

Translation certified true
On this 19th day of December 2012
Johanna Kratz, Translator

Citation: 2012 TCC 390
Date: 20121107
Docket: 2012-312(IT)I

BETWEEN:

SUCCESSION OF SUZIE BROUSSEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

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## REASONS FOR JUDGMENT

Lamarre, J.

[1] The appellant is appealing from an assessment by the Minister of National Revenue (**Minister**) under the *Income Tax Act* (**ITA**) for the 2004 taxation year.

[2] In filing her income tax return for that year, Suzie Brousseau (who passed away on October 6, 2010) reported a terminal loss of $16,500 following the disposition of a rental property, a triplex. The property was sold for $40,000, and she established the adjusted cost base (**ACB**) at $56,500.

[3] Ms. Brousseau and her brother had purchased the triplex together from their father on December 20, 1990.

[4] They had paid $20,000 plus $670 in transfer taxes and the notary fees related to the transaction; the municipal assessment was $36,700.

[5] The transaction provided that the seller (the father) could live in one of the apartments rent-free for nine years.

[6] In 1993 and 1994, Ms. Brousseau and her brother incurred capital expenses totalling $18,347.

[7] On January 7, 1998, Ms. Brousseau bought her brother's share for $21,416.45 and incurred $1,409 in costs related to the transaction.

[8] As a result of the disposition of the property in 2004, the Minister reduced the ACB of $56,500 established by the appellant to $42,333, calculating as follows:

| | |
|---|---|
| Acquisition cost in 1990 | $20,000.00 |
| + related costs | $670.00 |
| Capital expenses in 1993 + 1994 | $18,347.00 |
| Total | $39,017.00 |
| Appellant's undivided share (1/2) | **$19,508.50** |
| Plus | |
| Acquisition cost of her brother's undivided share in 1998 | $21,416.45 |
| + related costs | $1,409.00 |
| Total cost for appellant | **$42,333.95** |

[9] The appellant established the ACB as follows, according to the information gathered by the Minister and the agent for the appellant:

| | |
|---|---|
| Fair market value (**FMV**) at time of acquisition | $40,000.00 |
| Plus | |
| Current expenses for her father's apartment (that could not be deducted from the rental income) | $16,500.00 |
| Total | **$56,500.00** |

[10] According to the agent for the appellant, the $16,500 represent the annual share of the property taxes, mortgage interest and insurance attributable to the father's apartment from the date on which the property was acquired until its disposition. In an audit for 1990 and 1991, these expenses were disallowed as

rental operating expenses, and it seems that an officer from Revenue Canada, Taxation (as the Canada Revenue Agency was then called), regarded this portion of the expenses incurred in 1991 as capitalizable (see page 2 of Exhibit A-1).

[11] Indeed, it appears from the evidence that the total amount of these expenses that the appellant wished to include in her computation of the ACB amounts to $18,278 rather than $16,500 (Exhibit A-2 and Reply to the Notice of Appeal, paragraph 6(*k*)).

[12] The appellant submits that the respondent must include this amount of expenses when computing the ACB since the officer had told them that the amount was [TRANSLATION] "capitalizable".

[13] The issue is therefore how to compute the ACB.

[14] The ACB is defined at section 54 of the ITA:

> INCOME TAX ACT
>
> **Section 54: Definitions.**
>
> **"adjusted cost base"** — "adjusted cost base" to a taxpayer of any property at any time means, except as otherwise provided,
>
> (*a*) where the property is depreciable property of the taxpayer, the capital cost to the taxpayer of the property as of that time, and
>
> (*b*) in any other case, the cost to the taxpayer of the property adjusted, as of that time, in accordance with section 53,
>
> except that
>
> (*c*) for greater certainty, where any property (other than an interest in or a share of the capital stock of a flow-through entity within the meaning assigned by subsection 39.1(1) that was last reacquired by the taxpayer as a result of an election under subsection 110.6(19)) of the taxpayer is property that was reacquired by the taxpayer after having been previously disposed of by the taxpayer, no adjustment to the cost to the taxpayer of the property that was required to be made under section 53 before its reacquisition by the taxpayer shall be made under that section to the cost to the taxpayer of the property as reacquired property of the taxpayer, and
>
> (*d*) in no case shall the adjusted cost base to a taxpayer of any property at any time be less than nil.

[Emphasis added.]

[15] Even though the appellant did not deduct the depreciation of the property over the years, the property is nonetheless a rental property which falls in the class of depreciable property (that is, real property included in Class 1 of Schedule II to the *Income Tax Regulations* (**Regulations**), C.R.C., c. 945) and subsection 1100(1) of the Regulations). For the buyer, the ACB of a property is therefore the buyer's capital cost.

[16] Capital cost is not defined in the ITA but was defined as follows in *R. v. Stirling*, [1985] 1 F.C. 342 (Federal Court of Appeal), at paragraph 3:

> 3. . . . the word "cost" in those sections [the former subparagraph 40(1)(*c*)(i) and section 54 of the ITA which dealt with computing the capital gain] means the price that the taxpayer gave up in order to get the asset . . .

[17] Under subsection 9(1) and paragraph 18(1)(*a*) of the ITA, the current expenses one incurs in operating a rental property, in the course of carrying on a business, are fully deductible as operating expenses from rental income in the year in which these expenses were incurred. They are not included in the cost of a building.

[18] In contrast, a capital expense may not be deducted under paragraph 18(1)(*b*) of the ITA, but is part of the capital cost of the property and may be depreciated over several years under the scheme set out in paragraph 20(1)(*a*) of the ITA and the Regulations. This is why this type of expense is described as being [TRANSLATION] "capitalizable". The relevant provisions read as follows:

> INCOME TAX ACT
>
> **Subdivision b — Income or Loss From a Business or Property**
>
> **Section 9: Basic Rules**
>
> **(1) Income** — 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.
>
> . . .

**Deductions**

**Section 18: General limitations.**

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

**(*a*) General limitation** — 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;

**(*b*) Capital outlay or loss** — an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part;

. . .

**Section 20: Deductions permitted in computing income from business or property.**

**(1)** Notwithstanding paragraphs 18(1)(*a*), (*b*) and (*h*), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:

**(*a*) Capital cost of property** — such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

[19] A current expense can be defined as an annual or regular expense that is related to the running of a building. As mentioned above, under the ITA, such expenses can be deducted in full from income in the year for which they were incurred, as long as they are reasonable and not a personal expense. In the case at bar, the appellant wishes to capitalize (or, in other words, include in the cost of the property) annual expenses (such as property taxes, interest, insurance) that she could not deduct from her rental income. Clearly, such expenses, by their very nature, are not capitalizable. Moreover, they would not have been deductible since they were personal expenses, related to the part of the property inhabited by the appellant's father, who was not paying any rent.

[20] Moreover, the appellant could not use the fair market value of the triplex at the time of its acquisition as the cost of acquisition when computing her ACB.

[21] The appellant acquired her undivided share of the triplex from her father below the fair market value. This has an impact on the father's presumed proceeds of disposition but no impact on the cost to her.

[22] Section 69 of the ITA provides for adjustments to be made when computing the proceeds of a disposition or an acquisition in the case of inadequate considerations. Section 69 reads as follows:

> INCOME TAX ACT
>
> **Section 69: Inadequate considerations.**
>
> **(1)** Except as expressly otherwise provided in this Act,
>
> (*a*) where a taxpayer has acquired anything from a person with whom the taxpayer was not dealing at arm's length at an amount in excess of the fair market value thereof at the time the taxpayer so acquired it, the taxpayer shall be deemed to have acquired it at that fair market value;
>
> (*b*) where a taxpayer has disposed of anything
>
> (i) to a person with whom the taxpayer was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time the taxpayer so disposed of it,
>
> (ii) to any person by way of gift *inter vivos*, or
>
> (iii) to a trust because of a disposition of a property that does not result in a change in the beneficial ownership of the property; and
>
> the taxpayer shall be deemed to have received proceeds of disposition therefore equal to that fair market value; and
>
> (*c*) where a taxpayer acquires a property by way of gift, bequest or inheritance or because of a disposition that does not result in a change in the beneficial ownership of the property, the taxpayer is deemed to acquire the property at its fair market value.

[23] Consequently if the buyer does not acquire the property by way of gift, bequest, and so forth, but acquires it for less than its fair market value, the actual price paid is taken to calculate the ACB (see David Sherman's Notes under section 69 of Carswell's French edition of the ITA, 2012, 6th edition).

[24] In conclusion, the ACB as computed by the appellant is definitively incorrect. The amount computed by the Minister is correct and must be retained.

[25] Regarding the appellant's argument that she computed the ACB taking into account the position of the Revenue Canada officer in the audit for 1990 and 1991, I cannot accept it. According to the document filed in evidence as Exhibit A-1, I note that the portion of the expenses related to the apartment occupied by the father, was not accepted as an operating expense. These expenses were clearly personal expenses that are not deductible (see *Stewart v. R.*, 2002 CarswellNat 1071, 2002 SCC 46, at paragraphs 56 and 57).

[26] For the reasons outlined above, the fact that the officer stated that the amount was capitalizable has no legal basis. This Court is not bound by the comments of an officer of the Canada Revenue Agency (CRA), Revenue Canada at the time, if the comments are not defensible under the ITA. This Court has jurisdiction to determine the merits of an assessment, but it cannot set it aside on the basis of abuse of process or abuse of power, which the appellant is attempting to argue (see *Roitman v. R.*, 2006 CarswellNat 3587, 2006 FCA 266 (Federal Court of Appeal)).

[27] I note, however, that the appellant was most likely misled by the comment [TRANSLATION] "capitalizable amount" in regard to the expenses related to the father's apartment in the document filed as Exhibit A-1.

[28] In my opinion, and it also seems to be the opinion of counsel for the respondent, this is a serious ground to be considered by the CRA in an application to waive the interest, which the appellant may make under subsection 220(3.1) of the ITA. I emphasize, however, that this application must be made to the Minister, who has the discretion to grant such a waiver. This Court has no jurisdiction in that regard.

[29] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 7th day of November 2012.

"Lucie Lamarre"

Lamarre J.

Translation certified true
On this 19th day of December 2012
Johanna Kratz, Translator

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|---|---|
| CITATION: | 2012 TCC 390 |
| COURT FILE NO.: | 2012-312(IT)I |
| STYLE OF CAUSE: | Succession of Suzie Brousseau v. Her Majesty the Queen |
| PLACE OF HEARING: | Shawinigan, Quebec |
| DATE OF HEARING: | October 31, 2012 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Lucie Lamarre |
| DATE OF JUDGMENT: | November 7, 2012 |

APPEARANCES:

| | |
|---|---|
| Agent for the appellant: | Guy Plourde |
| Counsel for the respondent: | Marie-France Dompierre |

COUNSEL OF RECORD:

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Name:

Firm:

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