Docket: 2011-3952(IT)G

BETWEEN:

MOHAMMED TIBILLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 5, 2013, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Valerie Messore

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2007 and 2008 taxation years are dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 3rd day of July 2013.

"Lucie Lamarre"

Lamarre J.

Citation: 2013 TCC 215
Date: 20130703
Docket: 2011-3952(IT)G

BETWEEN:

MOHAMMED TIBILLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from reassessments made by the Minister of National Revenue (**Minister**) under the *Income Tax Act* (**ITA**) for the 2007 and 2008 taxation years.

[2] On December 18, 2007, the appellant sold for $285,000 a rental property that he had acquired on November 14, 2002 for $172,000. Both transactions were completed by notarial deeds (Exhibit R-1, Tabs 13 and 14).

[3] In filing his tax return for the 2007 taxation year, the appellant did not declare any capital gain on the sale of that property.

[4] On August 31, 2010, the Canada Revenue Agency (**CRA**) advised the appellant by letter[1] that his income tax return for the year 2007 was under review and that he was required to provide information and documents concerning the rental property sold in 2007, namely: copies of the contracts of purchase and sale, a

[1] Both parties acknowledged in court that the letter was mistakenly dated August 31, 2009, but was actually sent on August 31, 2010.

statement of the capital cost allowance claimed over the years he owned the property, and a list of any expenses related to the purchase and the disposition along with the corresponding receipts (Exhibit R-1, Tab 2).

[5] The appellant was late in filing his tax return for 2008 and copy of it, dated August 17, 2008, was received by the CRA on September 10, 2010 (Exhibit R-1, Tab 3, page 21, and Tab 18). In his tax return for the year 2008, the appellant declared a capital gain of $41,571.64 and a taxable capital gain of $20,785.82 (50% of the capital gain) on the sale of the above-mentioned rental property (Exhibit R-1, Tab 3, pages 2 and 6).

[6] In calculating the amount of the capital gain, the appellant added to the cost of the property an amount of $52,810, which he claimed represented renovation expenses that he incurred with respect to the property from April 2002, before his acquisition of it. The calculation of the capital gain by the appellant is found in his 2008 tax return (Exhibit R-1, Tab 3, page 17), to which he attached forms (Schedule 8) normally used by corporations for capital cost allowance (**CCA**). There is one such form for the taxation year ended December 31, 2002 (page 18) and another for the taxation year ended December 31, 2008 (page 10). The appellant acknowledged in court that in filing his 2008 tax return he filled in both forms, in which he indicated the amount of $52,810 as the "cost of acquisitions during the year".

[7] The CRA did not accept the addition of the amount of $52,810 to the cost of the property in the calculation of the capital gain, as the appellant did not provide any vouchers. Moreover, the CRA included the capital gain in income for 2007 instead of 2008 on the basis that the disposition of the property occurred in December 2007 and the appellant received the consideration for the property at that time.

[8] In a document provided to the CRA, the appellant indicated that the purchaser of the property had requested the reimbursement of a portion of the purchase price, following which the appellant demanded the cancellation of the sale. Apparently, the disagreement was settled amicably in March 2008. The appellant was therefore of the view that up until March 2008 the sale transaction, despite the agreement signed in December 2007, was uncertain and incomplete. That is why he declared the capital gain only in the year 2008 (see the appellant's letter to the CRA, dated September 17, 2010, Exhibit A-2, Tab 2).

[9] With respect to the renovation expenses of $52,810, the appellant explained in court that he purchased the property from a longtime friend who gave him access to

and control of the property as early as April 2002 to let him do the renovations. These consisted of repairing and expanding the basement, cementing the stairs from the basement to the main floor, and redoing the copper piping and the electrical wiring. He itemized the approximate costs of all these repairs on a sheet that he filed as Exhibit A-1. The appellant testified that the purchase transaction with respect to the property was only finalized in December 2002 because his friend who was selling the property suffered a heart attack in April 2002. This friend, who is still alive, was apparently in Africa at the time of the hearing, and that is why he was not called as a witness. The appellant did not have any vouchers for the renovations in question. He said that they had all been filed away somewhere in the basement of the house he now lives in, but he lost them all in a flood that occurred, he said, in 2008. He did not really explain why the information with respect to this flood was not brought to the attention of the CRA during the audit or the appeal process, or during the discoveries conducted by counsel for the respondent. He said he did not make an insurance claim after the flood in order to avoid an increase in his premiums. That is why he did not have any written proof confirming that incident.

[10] Nevertheless, the appellant is of the view that he may still claim these expenses as capital expenditures to be added to the cost of the property. He argues that, pursuant to subsection 230(4) of the ITA, he was not required to keep his vouchers for more than six years after the expenses were incurred.

[11] The appellant is now working for the CRA as a benefit officer dealing with child benefit claims. During the years at issue, he was an auditor for the CRA.

[12] Ms. Odette Lefebvre, an appeals officer with the CRA, who reviewed the appellant's file, testified that the tax return for 2002 was destroyed. She filed, however, a document entitled "Revenu et déductions" summarizing the appellant's 2002 tax return (Exhibit R-3). She explained that it can be seen from that document that the appellant earned in 2002 gross rental income of $2,405 from the property at issue here and claimed a net rental loss of $17,310, meaning that the appellant was allowed expenses of approximately $19,700 for 2002. Ms. Lefebvre also mentioned that no CCA form was filed with the 2002 tax return, as appears from the aforementioned document.

[13] She also determined from the "Index des immeubles" that the sale of the property by the appellant was registered in the official land register on December 19, 2007, and that the sale price paid was $285,000 (Exhibit R-1, Tab 15).

Analysis

[14] There are two issues before me. The first is to determine in which year the capital gain had to be declared. The second issue is to determine the exact amount of the capital gain.

I Year in which the capital gain had to be declared

[15] The income of a taxpayer for a taxation year is determined by the rules set out in section 3 of the ITA, paragraph (*a*) of which requires that the taxpayer report income from all sources. Capital gains, however, are included in income pursuant to paragraph 3(*b*). Paragraphs 3(*a*) and (*b*) read as follows:

> **DIVISION B — COMPUTATION OF INCOME**
>
> **Basic Rules**
>
> **3. Income for taxation year** — 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,
>
> (*b*) determine the amount, if any, by which
>
> (i) the total of
>
> (A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and
>
> (B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,
>
> exceeds
>
> (ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year . . . .

[16] The rules for the calculation of a capital gain are found in paragraph 39(1)(*a*) of the ITA, which reads as follows:

> **39. (1) Meaning of capital gain and capital loss** — For the purposes of this Act,
>
> (*a*) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(*a*) and without reference to paragraph 3(*b*), be included in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than . . . .

[17] Pursuant to paragraph 39(1)(*a*) of the ITA, a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year from that disposition as determined under Subdivision c.

[18] Paragraph 39(1)(*a*) provides, in effect, that a capital gain arises only on the disposition of property. The definition of "disposition" is found in subsection 248(1) of the ITA and reads as follows:

> **248. (1) Definitions** — In this Act,
>
> . . .
>
> "disposition" of any property, except as expressly otherwise provided, includes
>
> (*a*) any transaction or event entitling a taxpayer to proceeds of disposition of the property . . . .

[19] A disposition of property therefore includes a transaction or event entitling the taxpayer to proceeds of disposition of the property. This expression is in turn defined in section 54 of the ITA, as follows:

> **54. Definitions** — In this subdivision,
>
> . . .
>
> "proceeds of disposition" of property includes,
>
> (*a*) the sale price of property that has been sold . . . .

[20] Proceeds of disposition is therefore defined as meaning, among other things, the sale price received for property.

[21] In the present case, the sale occurred by deed of sale before a notary in the province of Quebec on December 18, 2007. The deed provided that the purchaser became the owner, with immediate possession and occupation on that same date (see deed of sale, Exhibit R-1, Tab 14, page 3 "Possession"). The consideration for the sale was $285,000, which the vendor (the appellant) acknowledged having received from the purchaser and for which complete discharge was given (see deed of sale, Exhibit R-1, Tab 14, page 6 "Prix"). The sale was registered in the official land register on December 19, 2007 as having been sold for that price (Exhibit R-1, Tab 15).

[22] It is therefore logical to conclude that the disposition happened in 2007 and should have been declared as a disposition of a capital property in the 2007 taxation year. The fact that the purchaser might have subsequently challenged the purchase price (an allegation that is not substantiated by any tangible evidence) is irrelevant here. The appellant in fact disposed of his property and received the proceeds of disposition in 2007. The capital gain had to be included in income for the 2007 taxation year pursuant to the above-mentioned provisions of the ITA.

[23] The appellant also argued that he was advised by someone from the CRA that his capital gain should be included in income for the 2008 taxation year, and that the respondent is bound by that advice. First, there is no evidence that any such advice was given. Second, even if it was, the question is not whether CRA officials exercised their powers properly but whether the amounts assessed can be shown to be properly owing under the ITA. What is in issue before this Court is the validity of the assessment and not the process by which it is established (see *Main Rehabilitation Co. v. The Queen*, 2004 FCA 403, 2004 DTC 6762, [2004] F.C.J. No. 2030 (QL), paragraph 8).

[24] I therefore conclude that the capital gain had to be declared in the 2007 taxation year.

II The amount of the capital gain

[25] The appellant added an amount of $52,810 to the adjusted cost base of the property in order to reduce the amount of his capital gain. This addition was refused by the CRA.

[26] The appellant did not provide any supporting vouchers. He only provided an estimate of the expenses incurred.

[27] The evidence disclosed that an amount of almost $20,000 was allowed as rental expenses for 2002. I gather that vouchers for those expenses were provided at the time.

[28] The appellant testified that the vouchers supporting the capital expenditures for that same year, which he now claims in order to reduce his capital gain, disappeared in a flood in 2008.

[29] Although the CRA started the audit in 2010, after the flood, the appellant never mentioned the flood to the CRA. He spoke of it for the first time in court.

[30] The appellant also said that he did not have any documentation that would help him demonstrate that he suffered flood damage. His explanation was that he did not want to make an insurance claim in order to avoid an increase in his premiums.

[31] I find the appellant's explanations difficult to believe. They are all the more so since he never disclosed the flooding to the CRA, although he was asked for documentation at the audit and at the appeal stages. He did not mention it during his examination for discovery either. Furthermore, it appears that the appellant did not disclose in his 2002 tax return the existence of the capital expenditures in question (according to the testimony of Ms. Lefebvre of the CRA).

[32] Finally, the appellant claims that those expenses were incurred before the acquisition of the property, which is another allegation that is difficult to believe without corroborating evidence. This Court, when it is not satisfied with regard to the credibility of a witness, in particular when the taxpayer is seeking to deduct expenses, has discretion to require the taxpayer to adduce supporting documents to prove his point (*House v. The Queen*, 2011 FCA 234, 2011 DTC 5142, paragraph 80). As stated by the Federal Court of Appeal in *Njenga v. The Queen.*, 96 DTC 6593 at page 6594, referred to in the *House* case:

> The Income tax system is based on self monitoring. As a public policy matter the burden of proof of deductions and claims properly rests with the taxpayer. The Tax Court Judge held that persons such as the Appellant must maintain and have available detailed information and documentation in support of the claim they make. We agree with that finding. Ms. Njenga as the Taxpayer is responsible for

> documenting her own personal affairs in a reasonable manner. Self written receipts and assertion without proof are not sufficient.

[33] I therefore agree with the respondent that the appellant was not entitled to add the expenses in question to the adjusted cost base of the property without supporting them with adequate vouchers.

[34] The appellant argued in the alternative that he did not have to keep his vouchers for more than six years after he incurred the expenses in 2002. He relied on section 230 of the ITA.

[35] The relevant portions of that provision read as follows:

> **General**
>
> **230. (1) Records and books** — Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.
>
> . . .
>
> **(4) Limitation period for keeping records, etc.** — Every person required by this section to keep records and books of account shall retain
>
> > (*a*) the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as is prescribed; and
> >
> > (*b*) all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate.
>
> . . .
>
> **(6) Exception where objection or appeal** — Where a person required by this section to keep records and books of account serves a notice of objection or where that person is a party to an appeal to the Tax Court of Canada under this Act, that

> person shall retain every record, book of account, account and voucher necessary for dealing with the objection or appeal until, in the case of the serving of a notice of objection, the time provided by section 169 to appeal has elapsed or, in the case of an appeal, until the appeal is disposed of and any further appeal in respect thereof is disposed of or the time for filing any such further appeal has expired.

[36] It is obvious from subsection 230(6) of the ITA that a taxpayer who objects to or appeals from an assessment must maintain his books and records until such time as the objection or appeal is resolved. The onus of proof is on the appellant to prove that the minister's assumptions in assessing him are wrong (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, paragraphs 92 and 93).

[37] Further, subsection 230(1) requires the taxpayer to keep records and books of account in order to make it possible to determine the taxes that are payable or amounts that are deductible. In addition, pursuant to subsection 230(4), all records and books of account, together with every account and voucher necessary to verify the information contained therein, must be retained until the expiration of six years from the end of the last taxation year to which the records and books of account relate.

[38] The reference to the expiration of six years from the end of the last taxation year to which the books and records relate is to be read in context. Here, I am of the view that, even though the expenses were incurred in 2002, the last taxation year to which the vouchers relate is the year in which the appellant claimed the expenses in order to reduce his capital gain, which he realized in 2007. Therefore, the vouchers could not be destroyed before the later of the expiration of six years after 2007 (subsection 230(4)) and the date on which his appeal is finally disposed of (subsection 230(6)).

[39] The appeals are dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 3rd day of July 2013.

"Lucie Lamarre"

Lamarre J.

CITATION:	2013 TCC 215
COURT FILE NO.:	2011-3952(IT)G
STYLE OF CAUSE:	MOHAMMED TIBILLA v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
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APPEARANCES:

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