Docket: 2018-4122(IT)G

BETWEEN:

GIACOMO TRIASSI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 4, 2021, at Montreal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Emmanuel Jilwan

JUDGMENT

The appeal from the reassessments dated September 19, 2013 concerning the 2011 taxation year, and dated October 12, 2018 concerning the 2009 and 2010 taxation years of the appellant, is dismissed with costs to the respondent in accordance with the attached reasons for judgment.

Signed at Montreal, Quebec, this 14th day of July 2022.

"Réal Favreau"

Favreau J.

Citation: 2022TCC76
Date: 20220714
Docket: 2018-4122(IT)G

BETWEEN:

GIACOMO TRIASSI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from reassessments established by the Minister of National Revenue (the "Minister") by virtue of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the "*Act*") concerning the 2009, 2010 and 2011 taxation years of the appellant.

[2] On September 19, 2013, the Minister issued notices of reassessment pertaining to the appellant's 2009, 2010 and 2011 taxation years.

[3] The changes made to the appellant's income consisted of the denial of net rental losses reported of $43,868, $23,287 and $40,379 respectively for 2009, 2010 and 2011 and the inclusion of interest income of $1,822 (added to the appellant's income by a February 2011 notice of reassessment) and of a taxable capital gain of $150,000 both for the 2010 taxation year.

[4] On October 12, 2018, the Minister issued notices of reassessment for the appellant's 2009 and 2010 taxation years, allowing a net rental loss of $20,589 for 2009 and reducing the taxable capital gain to establish it at $100,000 for 2010. The said reassessments were based on an out-of-Court settlement with the Quebec Revenue Agency, duly signed by the appellant. In an affidavit dated November 12, 2020, the appellant solemnly affirmed that he was misled by the lawyers representing him in this case and that he signed an agreement against his interests with the Quebec Revenue Agency.

[5] The issues to be decided are the following:

(a) was the Minister justified in establishing the appellant's net rental loss for his 2009 taxation year at $20,589 and in disallowing his reported rental losses for his 2010 and 2011 taxation years?
(b) was the Minister justified in establishing a taxable capital gain of $100,000 for the appellant's 2010 taxation year?
(c) was the Minister justified in reassessing the appellant's 2009 taxation year beyond the normal reassessment period?

[6] Mr. Triassi testified at the hearing. He was the sole shareholder and administrator of a knitting company called G.A.T. Knitting Inc. The company was incorporated in 1995 and ceased operation in 2007. The company's GST and QST registrations were terminated on September 1, 2007 and the company was voluntarily dissolved in 2007 and not in December 2009, as previously indicated.

[7] On April 6, 2000, the appellant acquired a one-storey brick building of 10,000 square feet whose civic addresses are 370 De Beauharnois Avenue and 8888 and 8890 Verville Street in the city of Montreal (the "De Beauharnois property"). The purchase price was in consideration of the sum of $150,000.

[8] On March 8, 2008, the appellant entered into a one-year lease agreement with Mr. Sylvain Larose for the part of the building whose civic address is 8888 Verville Street. The lease period was from March 1, 2008 to March 1, 2009 and the monthly rent was $2,300 plus taxes. The leased property was to be used for storage purposes.

[9] On April 2, 2008, the appellant entered into another one-year lease agreement with Mr. Sylvain Larose for the garage of the building located at civic address, 370 De Beauharnois Avenue. The lease period was from April 1, 2008 to March 1, 2009 and the monthly rent was $300 including taxes. The leased property was to be used solely for parking purposes.

[10] On October 8, 2008, the appellant entered into a one-year lease agreement with his company G.A.T. Knitting Inc. for the part of the building whose civic address is 370 De Beauharnois Avenue. The monthly rent was $3,500 including taxes and the leased property was to be used for storage of knitting machines.

[11] On January 26, 2009, there was a fire at 8888 Verville Street which terminated the two leases with Mr. Sylvain Larose, being the leases at 8888 Verville Street and the garage at 370 De Beauharnois Avenue.

[12] According to the appellant, the fire at 8888 Verville Street caused damages estimated at $200,000. By way of an out-of-court settlement dated November 21, 2012, the appellant received $60,000 as compensation from his insurance company.

[13] During 2009 and 2010, the appellant proceeded with the renovations of the property and he finally sold the De Beauharnois property in July 2010 for $450,000. During the period between the date of the fire and the date on which the property was sold, the property has not been leased.

[14] On April 13, 2010, the appellant purchased an immovable property located at civic address 3, 28th Avenue in the city of Ile-Perrot for the price of $155,000 (the "Ile-Perrot property"). The property was not in good shape and required major renovations which were done in 2010. The appellant stated that the property was rented in 2010 and that the monthly rent was $300 per month, paid cash. The appellant also asserted that there was no formal lease signed for that property and that the rent has not been declared for tax purposes.

[15] In 2011, the property was put for rent but it was not rented. In 2012, the property was sold by the appellant apparently at no profit due to the substantial renovation costs.

[16] During his cross-examination, the appellant was confronted with the fact that his company never paid rent on the October 8, 2008 lease because it was dissolved a year earlier. The appellant asserted that Sylvain Larose paid rent in cash for three months and that he did not declare the rent for income tax purposes. He further stated that the De Beauharnois property was used to store eight knitting machines during the time they were put for sale. As nobody was interested in buying the said machines, they were finally scrapped. According to the appellant, he used only 15% of the building for the storage of his machines.

[17] Concerning the Ile-Perrot property, the appellant used it to store his car during the winter and some neighbours apparently paid $300 per month to park their recreational vehicles there. No income from these properties was reported by the appellant.

Position of the parties

[18] The appellant explained that he acquired the two buildings in his own name but they were not for his personal use. The two buildings were rented out to Sylvain Larose who paid rent. He further added that he had income from the garage operations in 2007 and 2008 in the De Beauharnois property. Concerning the $60,000 insurance proceeds, the appellant explained that they were applied towards the $200,000 expenses that were incurred for the renovations.

[19] The respondent reiterated the fact that the reassessments for the 2009 and 2010 taxation years of the appellant were based on the out-of-court settlement with the Quebec Revenue Agency, signed by the appellant at a time when he was represented by a lawyer.

[20] The activities conducted by the appellant at the two properties had a personal element as they were used to store the knitting machines belonging to the appellant and his personal car during the winter.

[21] The appellant did not carry out his rental activities at the two properties in accordance with objective standards of business-like manner behaviour.

[22] The credibility of the appellant is compromised by the fact that he did not report his rental income for both properties in his 2009, 2010 and 2011 taxation years and by not reporting for tax purposes the $60,000 insurance proceeds that he received.

[23] Subsection 44(1) of the *Act* which permits a taxpayer to defer the recognition of a capital gain in certain circumstances upon disposition of a property that qualifies as a former business property immediately before the disposition is not applicable in this case. The definition of "former business property" specifically excludes real property owned by a taxpayer and used in that particular year principally for the purpose of generating gross revenue, that is rent. Consequently, the appellant had to include the taxable capital gain of $100,000 in his income for his 2010 taxation year.

[24] The respondent submits that the appellant misreported his income in his 2009 income tax return by not including interest income of $1,822. Consequently, the appellant made misrepresentations due to neglect, carelessness or wilful default and the Minister was justified in reassessing the appellant's 2009 taxation year beyond the normal reassessment period.

Analysis and conclusion

[25] Firstly, I want to point out here that the statute-barred issue concerning the 2009 taxation year is not under appeal because the appellant did not raise it in his amended notice of appeal. Moreover, the interest included in the appellant's 2009 taxation year is also not under appeal because this issue is not contested by the appellant. The appellant has the burden to establish that he did not earn that income and he failed to do so.

[26] The determination of whether a taxpayer is entitled to deduct losses from his rental activities has been considered in many courts' decisions and depends if the taxpayer has a source of income from a business or property.

[27] In *Sokil v. The Queen*, 2009 CarswellNat 4124, 2009 TCC 601(IP), I referred to the test developed by the Supreme Court of Canada in *Stewart v. R.*, 2002 D.T.C. 6969, to determine "if a taxpayer has a source of income from a business or property" (paragraphs 15 and 16):

> [15] The Supreme Court of Canada developed in *Brian J. Stewart v. The Queen*, 2002 D.T.C. 6969, a two-stage approach to determining whether a taxpayer has a source of business income such that section 9 of the *Act* applies. In paragraph 50, the two-stage approach is set out as follows:
>
> . . .
>
> > (i) Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavour?
> >
> > (ii) If it is not a personal endeavour, is the source of the income a business or property?
>
> The first stage of the test assesses the general question of whether or not a source of income exists; the second stage categorizes the source as either business or property.
>
> (16) The Supreme Court of Canada provided further explanation concerning the first stage of the test in paragraphs 52, 54 and 55 of the *Stewart* decision:
>
> > [52] The purpose of this first stage of the test is simply to distinguish between commercial and personal activities . . . Thus, where the nature of a taxpayer's venture contains elements which suggest that it could be considered a hobby or other personal pursuit, but the venture is undertaken in a sufficiently commercial manner, the venture will be considered a source of income for the purposes of the *Act*.

> . . .
>
> [54] . . . 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. . . .

[28] In my view, pursuant to the *Stewart* decision, there was a personal element with respect to the appellant’s rental activities. The appellant used the De Beauharnois property for storage of his knitting machines and the Ile-Perrot property to store his personal car during the winter.

[29] The fact that a personal element exists in the appellant’s rental activities does not mean that he is precluded from deducting his rental losses. As stated in the *Stewart* decision, a further analysis is required to determine if the appellant has:

- an intention to make a profit from the rental activities and if there is evidence in support of that intention; and
- carried out his rental activities in accordance with objective standards of business-like behaviour.

[30] In this case, I am of the view that the appellant’s stated intention to make a profit is not supported by evidence. Furthermore, in my view, the appellant did not carry out his rental activities in accordance with objective standards of business-like behaviour. I find that the appellant did not meet this burden.

[31] The appellant claimed his rental losses but did not report the rental income derived from his rental activities for tax purposes.

[32] Concerning the capital gain issue, I want to point out that the replacement property rollover is provided for in subsection 44(1) of the *Act*. This is an exemption to the general rule on how capital gains are taxed and all of its conditions must be met in order for the taxpayer to be able to benefit from it.

[33] Subsection 44(1) of the *Act* is applicable when a taxpayer disposes of a "former business property" and acquires, within a certain period of time, another capital property that replaces the former property (the "replacement property"). When all the conditions are met, the taxpayer may, in computing the capital gain realized upon the disposition of the former property, use the adjusted cost base of the replacement property (usually its acquisition cost) instead of that of the former property, thereby deferring the inclusion of at least part of the gain realized.

[34] Based on the facts of this case, I do not find that the appellant is entitled to benefit from the rollover provisions of subsection 44(1) of the *Act*. The definition of a "former business property" in subsection 248(1) of the *Act* specifically excludes a rental property which is defined to mean real property owned by the taxpayer and used in the particular year in which it was disposed of principally for the purpose of gaining or producing gross revenue that is rent. Furthermore, a former business property cannot be replaced with a rental property.

[35] In 2010, because no business was effectively carried out by the appellant in the De Beauharnois property and the Ile-Perrot property, the Ile-Perrot property cannot qualify as a replacement property.

[36] For all these reasons, the appeal is dismissed with costs to the respondent.

Signed at Montreal, Quebec, this 14th day of July 2022.

"Réal Favreau"

Favreau J.

CITATION:	2022TCC76
COURT FILE NO.:	2018-41229(IT)G
STYLE OF CAUSE:	GIACOMO TRIASSI AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	November 4, 2021
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	July 14, 2022

APPEARANCES:

For the Appellant::	The Appellant himself
Counsel for the Respondent:	Emmanuel Jilwan

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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