

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120613

Docket: A-202-11

Citation: 2012 FCA 180

**CORAM: BLAIS C.J.
LÉTOURNEAU J.A.
PELLETIER J.A.**

BETWEEN:

OUMAR MBÉNAR

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on June 6, 2012.

Judgment delivered at Ottawa, Ontario, on June 13, 2012.

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

CONCURRED IN BY:

BLAIS C.J.
PELLETIER J.A.

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Issue on appeal and standard of review

[1] Mr. Mbénar, who is not represented by counsel, is appealing from a decision of Justice Favreau of the Tax Court of Canada (judge).

[2] In his decision dated May 6, 2011, the judge found that the expenses incurred by the appellant in renovating two rental properties he had acquired were capital expenditures and not

current expenditures, as the appellant claimed. On this basis, the judge therefore confirmed the reassessments made by the Minister of National Revenue for the years 2004 to 2006.

[3] This appeal is in fact a repeat of the debate on the nature of the expenditures incurred, except that, as required by the case law of this Court, we cannot exercise our power to intervene with regard to the judge's decision unless he has made an error of law or, in cases of questions of fact or of mixed fact and law, a palpable and overriding error: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

Analysis of judge's decision and arguments of parties

[4] The appellant correctly points out that, particularly in borderline cases, it is not easy to determine the true nature of an expenditure for tax purposes. The case law, with its at times subtle nuances, reflects this difficulty. For a taxpayer who, like the appellant, is representing himself, the challenge is even greater.

[5] After both parties had presented all of their evidence but before they began their oral arguments, the judge tried to help the appellant, to the extent that his adjudicative functions allowed him to do so, by pointing out to him that the expenditures seemed to him to be [TRANSLATION] “pretty much capital in nature”: see in the Appeal Book, at page 69, the transcript of the discussion between the parties and the judge. In a final effort and gesture that he called [TRANSLATION] “a little exceptional”, the judge ordered an adjournment to allow the

appellant to reconsider the settlement offer made by the respondent and to discuss it one more time with counsel for the respondent: *ibidem*, at pages 69, 70 and 73. The judge even went so far as to inform the appellant that, in the circumstances, the expenditures were such that they could not be separated into current expenditures and capital ones. In short, that judge told the appellant that, in terms of deductibility, it was all or nothing, and he should think it over carefully: *ibidem* at pages 72 and 73.

[6] When the hearing resumed, the appellant informed the judge that he had been unable to come to an agreement, and the parties made their respective arguments. The case was reserved for judgment.

[7] At the end of his analysis of the evidence, the judge writes the following at pages 12 and 13 of his reasons for decision regarding the major renovations that the appellant made between the September 2004 and November 2005:

[12] Based on the evidence, the expenditures that were deducted by the appellant were related to major renovations done in all parts of the building, inside and outside: foundation, insulation, roof, windows and doors, electrical, heating system, plumbing, parking lot, etc. In fact, it was a complete rehabilitation of a building that was in total disrepair and dangerous for the tenants.

[13] The expenditures in question were significant, close to \$175,000 in total, in comparison with the purchase price of the building, which was \$98,500, that is, 1.75 times higher than the acquisition cost. Such expenditures cannot in any way be considered as being for minor repairs or regular maintenance. Those expenditures were made in order to provide a lasting benefit for the property so that the units can be rented out safely.

[Emphasis added.]

[8] The respondent's reply to the notice of appeal indicates a complete rehabilitation and lists the following as just the main examples of this work:

the cracks in the foundation were repaired;

the vehicle parking was redone;

the front entrance of 2221 Bardy Avenue was demolished and rebuilt;

the electrical wiring and plumbing were completely redone;

the existing heating system was removed;

a new service room was built, including new electrical input and new water supply;

the roof and the exterior wall stonework were repaired;

existing doors and windows were replaced;

exterior balconies were repaired;

the interior was redesigned; and

the damage done to the existing building resulting from repairing cracks and from mechanical and electrical work was also repaired.

[9] I cannot see in the judge's finding any error in law or overriding and palpable error that would warrant intervention. *Bishop v. Attorney General of Canada*, 2010 FCA 137, affirming the decision of the Tax Court of Canada in *Bishop v. Canada*, 2009 TCC 323, and the judgments in *Fiore (F.) v. Canada*, [1993] 2 C.T.C. 68 and *Gauthier v. Québec (Sous-ministre du Revenu)*,

2010 QCCQ 3068 are similar in terms of the facts to the appellant's situation and support the judge's finding. The renovations go beyond mere repairs and regular maintenance and would have a lasting effect on the appellant's properties.

[10] For these reasons, I would dismiss the appeal. Like the Tax Court of Canada, which did not grant any, I would not allow any costs on appeal in the circumstances.

“Gilles Létourneau”

J.A.

“I agree.

Pierre Blais C.J.”

“I agree.

J.D. Denis Pelletier J.A.”

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-202-11

STYLE OF CAUSE: OUMAR MBÉNAR v. HER MAJESTY THE
QUEEN

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: June 6, 2012

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: BLAIS C.J.
PELLETIER J.A.

DATED: June 13, 2012

APPEARANCES:

Oumar Mbénar FOR HIMSELF

Marie-France Dompierre FOR THE RESPONDENT
Julie David

SOLICITORS OF RECORD:

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Deputy Attorney General of Canada