Docket: 2007-4483(IT)I

BETWEEN:

FRANÇOIS D. MÉNARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 2, 2008, at Shawinigan, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Anne Poirier

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2001 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of July 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 7th day of August 2008.
Susan Deichert, Reviser

Citation: 2008TCC376
Date: 20080704
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BETWEEN:

FRANÇOIS D. MÉNARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from an assessment pertaining to the 2001 taxation year. The issue for determination is whether a total of $7,794 in expenses, incurred in respect of the residence located on Servant Street in Laval and deducted in the 2001 taxation year, was incurred by the Appellant for the purpose of gaining or producing income from property or from the operation of a business.

[2] The facts are both simple and uncontested. The Appellant lived in a dwelling as a tenant. He decided to purchase a building with the intention that it would eventually become his residence.

[3] When the promise to purchase was signed in the fall of 2000, the vendor made the sale of the building conditional on his being able to continue to live there until May 5, 2001, which was roughly a year from then. The Appellant, being bound by a lease, agreed to this condition.

[4] Some months later, the Appellant decided to avail himself of an employment opportunity in Trois-Rivières. On January 25, 2001, he signed the notarial deed in advance in order to formalize the transfer of the building and put it on the market, having decided to pursue his career in Trois-Rivières.

[5] Having moved from the Montréal area to the Trois-Rivières area in 2001, the Appellant claimed a $13,117 deduction on account of moving expenses. The Minister allowed $5,323 of this amount, but disallowed $7,794, which is why the taxpayer brought this appeal.

[6] The taxpayer also brought an action against the Ministère du Revenu du Québec. The outcome of that litigation was a judgment of Judge Nicole Mallette of the Court of Québec (Small Claims Division) in Docket No. 400-32 008087-053.

[7] In the Tax Court of Canada, the Appellant appears first to have asserted that this judgment was correct, and then to have claimed the contrary. He made two different arguments.

[8] Initially, he submitted that, since his relocation was deemed eligible, he should be entitled to deduct all the expenses that he reported.

[9] In order to distinguish the instant matter from the matter brought before the Court of Québec, the Appellant stated that the provincial legislation is different from the legislation that governs the instant matter, because section 348 of the *Taxation Act* (Quebec) specifically provides that the residence in question must be the residence in which the taxpayer ordinarily lives.

SECTION 348

> **348.** [Deduction of moving expenses] An individual contemplated in section 347 who moves, in Canada, from a residence at which he ordinarily lives may deduct amounts paid by him as moving expenses in computing his income for the taxation year during which he moves or for the next year.
>
> (2) . . .
>
> (3) Furthermore, such expenses may only be deducted by the individual only to the extent that:
>
> (*a*) they were not paid on his behalf by his employer;
>
> (*b*) they are not deductible in computing his income:
>
> i. for a preceding taxation year under this section, or
>
> ii. under a provision of this act other than this section;

> (*c*) they do not exceed the income from the year from the individual's business or employment, after he has moved or, in the case of a student enrolled in full-time attendance, the aggregate of the amounts which must be included in his income for the year under paragraphs g and h of section 312; and
>
> (*d*) any reimbursement or allowance received by him in respect of those expenses is included in computing his income.

[10] Paragraph 62(3)(*a*) of the *Income Tax Act* (Canada) provides as follows under the heading "Definition of moving expenses":

> Definition of "moving expenses"
>
> In subsection 62(1), "moving expenses" includes any expense incurred as or on account of
>
> (*a*) travel costs (including a reasonable amount expended for meals and lodging), in the course of moving the taxpayer and members of the taxpayer's household from the old residence to the new residence,

[11] The Appellant emphasized the reference to "old residence" in the text, and argued that the provision does not require the residence to have been occupied by the owner who is claiming a deduction, whereas the provincial statute in force at the time specified that the residence in question must be the one in which the individual "ordinarily lives". In the Appellant's submission, the provincial provision is more precise, and, in the absence of such precision in the federal legislation, he must succeed, since he meets the requirements thereof. The success of the Appellant's claim turns on his interpretation of paragraph 62(3)(*a*).

[12] However, the provision in question must be interpreted as a whole, in light, among other things, of the part that reads as follows:

> . . . moving the taxpayer and members of the taxpayer's household from the old residence to the new residence;

[13] The Appellant's interpretation is quite far-fetched. How can it be claimed that the building in issue was his old residence, when the Appellant himself admits that he and his family never resided there? In fact, he never had the right to live there, because he granted the vendor-promisor the right to do so until May 5, 2001. Indeed, he validated this right, stipulated in the fall of 2000, when he signed the notarial deed on January 25, 2001. This observation is based on the admission contained in paragraph 8(b) of the Reply to the Notice of Appeal, which reads as follows:

> [TRANSLATION]
>
> b) On January 25, 2001, the contact to purchase the house was signed. It contained a clause permitting the vendors to remain on the premises until May 5, 2001, in consideration of $1,845, plus heating and electricity costs.

[14] In order to accept the Appellant's interpretation, one would need to have a very fertile imagination in which expectations are more important than the reality of the provision that gave rise to them.

[15] Nothing in the evidence supports the Appellant's interpretation, except perhaps the fact that, at one point, he clearly wanted the building in question to become his residence. (In fact, that point in time can be narrowed down to May 5, 2001.)

[16] If his move to Trois-Rivières had taken place in 2003, and he had lived in the Laval building effective May 5, 2001, this litigation would undoubtedly never have been instituted.

[17] The Appellant was not living in the Laval building at the relevant time. A title to property, or a right eventually leading to such title being obtained, is not evidence of the use of the property at the time that the right in question was acquired. Such an interpretation would result in aberrations if it were accepted.

[18] The absence of the words "ordinarily lives" in paragraph 62(3)(*a*) of the *Income Tax Act* led the Appellant to believe that he could rely on this omission to his advantage. However, he undoubtedly understood that his interpretation would be rejected since it is based on no serious considerations whatsoever, even when the words "old residence" are isolated from their context as the Appellant would have it.

[19] Indeed, in ordinary language, the term "residence" does not connote anything related to a right in or title to property. Residence means a place in which one lives. A residence can be temporary, seasonal, permanent, transitory, and so forth, but it does not include a building in which an individual, in this case its owner, never lived.

[20] Although the decisions submitted deal with situations that are very different from this one, certain passages from those decisions are very relevant.

[21] Here is what the Federal Court of Canada stated in *Séguin v. Canada*, A-52-97, [1998] 2 C.T.C. 13, 97 DTC 5457:

> **6** Although the purpose of the provision is no doubt to encourage mobility of employment, and the enumeration in subsection 62(3) of the Act is not exhaustive, as is indicated by the use of the verb "includes" ("*comprend*") in that section, since its purpose is not to cover all possible moving expenses, we do not think section 62 as a whole can be read as it was by the tax court judge.
>
> **7** What section 62 allows, within its first subsection, is a deduction by the taxpayer of the amounts
>
> - 62(1) ... 62(1) ...paid by him as or on account of moving expenses incurred in the course of moving from his old residence to his new residence.
> - 62(1) payées à titre ou au titre des frais de déménagement engagés pour déménager de son ancienne résidence pour venir occuper sa nouvelle résidence ...
>
> **8** According to the ordinary meaning of the words used, the provision includes those expenses incurred for physically moving, changing one's residence, and certain other expenses directly related to the actual move and resettlement, and not some amount intended to compensate for accessory damages that are unrelated to the actual move to and resettlement in the new residence. Thus, it excludes the interest expenses on the old residence that do not pertain directly to the physical move of the taxpayer and his family, but instead pertain to the bank loan he took out on his old residence.

[22] In *L'abbé v. Canada*, [2000] 2 C.T.C. 2132 (T.C.C.), Docket No. 98-3468(IT), Judge McLatchy stated the following:

> **5** A common thread running through these cases is that the costs to be included in moving expenses must be reasonable and sensible in the circumstances. It is the opinion of this Court that the claim by the Appellant in these circumstances is not an expense that can be included as a moving expense. It is an injury suffered as an incident of the move but it is one of those items that must be considered to be a loss or injury to be suffered if a move is contemplated. It will not be included in moving expenses, therefore, is too much of a loss to sustain, negating the move?

[23] In preparing his case, the Appellant undoubtedly noticed the weakness of his reasoning, which is based on an erroneous and inappropriate interpretation, and this caused him to retreat behind a second argument, the basis of which is an entirely different issue, namely, a terminal loss.

[24] With respect to this issue, the Appellant tried to explain that his plan underwent a transformation while in progress. In order to account for the fact that the vendor remained in the building in question, he asserted that this was a condition of the sale. He was amenable to the condition because he himself was bound by a lease.

[25] He wanted to cover his costs for a short period, that is, until his lease expired and he could live in the building. The acceptance of the job offer in Trois-Rivières definitively ended his plan to make the building he purchased his new residence. At that point, he thought that he could make a good profit, but he did not.

[26] Hence, the Appellant asserted that this was a commercial activity.

[27] Lastly, the Appellant stated that if his arguments regarding the deduction of his moving fees are not accepted, they should be accepted with respect to his operating costs, or else the effect would be to totally deny the existence of the costs associated with the building purchase.

[28] Taxpayers are to be taxed based on actual facts, not on theories posited by interested taxpayers.

[29] In the instant case, the Appellant never really intended his venture to be commercial in nature. He was essentially seeking to recoup his investment following a decision about his career path. In order to minimize his losses, he is attempting to distort the facts or interpret them with a view to obtaining certain tax advantages. Unfortunately, a taxpayer's tax burden is to be assessed or determined based on the actual facts.

[30] Since the Appellant has not succeeded in showing that his arguments are well-founded, his appeal must be dismissed.

Signed at Ottawa, Canada, this 4th day of July 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 7th day of August 2008.
Susan Deichert, Reviser

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Anne Poirier

COUNSEL OF RECORD:

For the Appellant:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada