

BETWEEN:

MIKE DAOUST,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

Before: The Honourable Justice Steven K. D'Arcy

For the Appellant: The Appellant himself
Counsel for the Respondent: Rachelle Nadeau

EDITED VERSION OF TRANSCRIPT
OF ORAL REASONS FOR JUDGMENT

Let the attached edited transcript of the Reasons for Judgment, delivered from the Bench on April 9, 2010 at Winnipeg, Manitoba, be filed. I have edited the transcript (certified by the Court Reporter) for style, clarity, and accuracy. I did not make any substantive changes.

Signed at Ottawa, Canada, this 17th day of June 2010.

“S. D’Arcy”

D'Arcy J.

Citation: 2010 TCC 330
Date: 20100427
Docket: 2009-2868(IT)I

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MIKE DAOUST,

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**EDITED VERSION OF TRANSCRIPT
OF ORAL REASONS FOR JUDGMENT**

**(Delivered orally from the Bench
on April 9, 2010 at Winnipeg, Manitoba)**

D'Arcy J.

[1] The Appellant, Mike Daoust, has appealed income tax reassessments in respect of his 2005 and 2006 taxation years. These are my oral reasons for judgment.

[2] The appeal concerns rental losses in respect of a cottage located at Moth Lake in Manitoba (which I will refer to as the "cottage") that were deducted by the Appellant when computing his income for the relevant years.

[3] When filing his tax returns for the 2005 and 2006 taxation years, the Appellant claimed rental losses of \$9,173.77 and \$6,506.38 respectively. The reassessments denied the rental losses claimed.

[4] I will first summarize the facts.

[5] The Appellant purchased the cottage in 2004. He testified that he purchased the property both to generate income and as a capital investment.

He believed that he could generate income from the cottage by renting it to family, friends and colleagues. He felt that the cottage was attractive due to its very private location and proximity to Winnipeg. The cottage was winterized and could be rented year round.

[6] He believed that he could rent the cottage for \$1,600 per week, even though he accepted that the rental rates for comparable properties were substantially less. Apparently, the rent for a “high-end” property was \$1,500 per week. The cottage was not a “high-end” property.

[7] He spent two months in 2004 preparing the cottage for rent. Beginning in 2005, the cottage was available for rent. The Appellant testified that, in addition to offering the property to family, friends and colleagues, he advertised the property in an attempt to rent the property to people he did not know. He advertised the property in a Winnipeg daily newspaper, in an online rental website, posters placed in various places close to the cottage and in the Kenora local paper.

[8] The Appellant was not successful in renting the cottage. The cottage was not rented in 2005. In 2006 it was rented for two weeks, one week to a long-time friend and a second week to his brother. In 2007 the property was rented for one week to a third party who the Appellant did not know. These rentals resulted in total rental revenue of \$4,400.

[9] The Appellant reported substantial losses from the rental of the cottage. He calculated the losses on the assumption that his personal use of the cottage during these years was 50 percent. Based upon 50 percent use as a rental property, the Appellant calculated losses of \$9,193.77 in 2005, \$6,506.38 in 2006 and \$8,025 in 2007, for total losses in the three years of \$23,725.15.

[10] In 2009 the cottage was sold for \$315,000, resulting in an \$80,000 capital gain.

[11] The issue I must decide is whether the cottage constituted a source of income. The approach to be taken in making such a determination is mandated by the 2002 decision of the Supreme Court of Canada in *Stewart v. Canada*, [2002] 2 S.C.R. 645.

[12] The Court noted at paragraphs 52 to 55 of its decision that where there is some personal or hobby element to the activity in question, one must apply a pursuit of profit source test.

[13] At paragraph 54 the Court stated the test 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.

[14] The Court provided the following non-exhaustive list of objective factors that should be considered:

- the profit and loss experience in past years;
- the taxpayer's training;
- the taxpayer's intended course of action; and
- the capability of the venture to show a profit.

[15] The Court emphasized that although the reasonable expectation of profit is a factor to be considered, it is not the only factor, nor is it conclusive. The key is to determine whether or not the taxpayer is carrying on the activity in a commercial manner without second-guessing the business judgment of the taxpayer.

[16] Since there was a personal element in the activity in question, I must apply the “pursuit of profit” source test. In short, I must determine whether the Appellant's predominant intention was to make a profit from the rental of the cottage and whether the rental of the cottage was carried on in accordance with objective standards of business-like behaviour.

[17] This determination can be made in the current case by considering the four factors noted in *Stewart*.

[18] The profit and loss experience would indicate that the Appellant's primary intention was not to make a profit from the rental of the cottage. The rental of the cottage was never profitable and, as noted previously, the rental incurred substantial losses on minimal revenue.

[19] If I accept the Appellant's testimony, then it would appear that his intended course of action was to make a profit. However, he provided very little evidence to support his verbal testimony. He did not produce copies of any of the advertisements, nor did he provide a copy of even a simple business plan.

[20] Further, he did not explain why the rent was set at a weekly rental rate that did not appear to be realistic, a rate that resulted in few rentals for a property that appears to be an excellent rental property.

[21] This brings into question whether the Appellant really intended to rent the cottage on a regular basis.

[22] It appears to me that the combination of a very high rental rate and a limited target market of friends and relatives resulted in the rental of the cottage not having the capacity to show a profit.

[23] I agree with counsel for the Respondent that the primary intention of the Appellant was to use the cottage for personal purposes, with occasional rentals to reduce the cost of maintaining the property.

[24] In short, it was not the Appellant's predominant intention to make a profit from the rental of the cottage. The cottage was not a source of income.

[25] For these reasons, the appeal is dismissed without costs.

D'Arcy J.

CITATION: 2010 TCC 330

COURT FILE NO.: 2009-2868(IT)I

STYLE OF CAUSE: MIKE DAOUST AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: April 7, 2010
April 9, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice
Steven K. D'Arcy

DATE OF JUDGMENT: April 27, 2010

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Rachelle Nadeau

COUNSEL OF RECORD:

For the Appellant: N/A

For the Respondent: Myles J. Kirvan
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