Docket: 2017-2083(IT)I

BETWEEN:

LISA MAKOSZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 4, 2018, at Montreal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Dominic Bédard-Lapointe

JUDGMENT

The appeal from the reassessment dated October 20, 2015 concerning the appellant's 2012 taxation year is dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 13th day of December 2018.

"Réal Favreau"

Favreau J.

Citation: 2018 TCC 250
Date: 20181213
Docket: 2017-2083(IT)I

BETWEEN:

LISA MAKOSZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a reassessment dated October 20, 2015, made by the Minister of National Revenue (the "Minister") concerning the appellant's 2012 taxation year, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the "*Act"*).

[2] By way of the reassessment, the Minister added a taxable capital gain in the amount of $49,918 to the appellant's income for the 2012 taxation year for the reason that the disposition of 1.47 acres of land immediately contiguous to the housing unit was in excess of ½ hectare and that excess did not contribute to the use and enjoyment of the housing unit as a residence, as per the definition of "principal residence", pursuant to section 54 of the *Act*.

[3] In determining the appellant's tax liability in respect of the 2012 taxation year, the Minister made the following assumptions of fact:

a) the Appellant is the sole owner of a property located at 2655, rue Principale, PO Box 81, Sainte-Justine-De-Newton, Québec (hereinafter the "property");

b) the property of approximately 4.17 acres included two adjacent lots bearing number 2398404 and number 2398410, a house, a septic field, a pool, a garage, a barn, a sugar shack and a woodlot;

c) the lot number 2398410 was acquired in 1986 for the amount of $ 500;

d) on July 9, 2012, the Appellant sold 1.47 acres (33%) of the lot, now identified as lot number 4940249 (hereinafter the "lot") to the Municipality of Sainte-Justine-De-Newton for the amount of $ 100,000;

e) the lot was comprised of the woodlot;

f) the lot did not include the house or any other buildings which would have contributed to the use and enjoyment of the housing unit by the Appellant;

g) the Municipality of Sainte-Justine-De-Newton did not have any regulation requiring that a housing unit residence should be built on a lot that exceeds ½ hectare;

h) the taxable capital gain was calculated as follows:

Proceeds of disposition	$ 100,000
Adjusted cost base ($ 500 x 33%)	$ 165
Capital gain	$ 99,835
Taxable capital gain (50%)	$ 49,918

[4] The appellant acquired the property in four transactions hereinafter described:

- on October 28, 1985, the appellant purchased lot No. 206-4 situated in the Municipality of Sainte-Justine-De-Newton consisting of a superficial area of 14,770 square feet on which a house is erected, bearing civic address 2655, chemin du Troisième Rang, for the price of $27,000;
- on March 4, 1986, the appellant purchased part of lot No. 206 for the price of $500;
- on October 1, 1990, the appellant purchased a vacant piece of land designated as lot No. 206-7 in the Official Plan and Book of Reference of the Parish of Sainte-Justine-de-Newton for the price of $3,000;
- on May 31, 1991, the appellant purchased a piece of land designated as lot No. 206-8 in the Official Plan and Book of Reference of the Parish of Municipality of Sainte-Justine-De-Newton consisting of a superficial area of 49,006.45 square feet for the price of $1.

[5] Before the sale of a piece of land to the Municipality of Sainte-Justine-De-Newton for the expansion of the municipal aqueduct, the appellant's entire property was approximately 4.17 acres consisting of two lots now designated as lot

No. 2398404 (former lot No. 206-4) and lot No. 2398410 (a portion of former lot No. 206 and lots 206-7 and 206-8).

[6] The appellant's house is located on lot No. 23988404 with her septic field, barn, sugar shack and garage, all located on lot No. 23998410.

[7] The piece of land sold to the Municipality of Sainte-Justine-De-Newton was a portion of lot No. 2398410 (approximately 1.47 acres) consisting of a woodlot which is alleged to be the main source of wood used to heat the appellant's house.

The issue

[8] The only issue in this case is to determine whether the piece of land sold was necessary for the use and enjoyment of the housing unit as a residence.

Statutory Provisions and Analysis

[9] Generally, a capital gain realized by a Canadian taxpayer on the sale of a principal residence is exempt from income tax. The statutory definition of "principal residence" does limit the amount of land that qualifies for the exemption to half a hectare unless the taxpayer establishes that the excess land was necessary for the use and enjoyment of the housing unit.

[10] The limitation is found in paragraph 54(*e*) under the definition of "principal residence":

> the principal residence of a taxpayer for a taxation year shall be deemed to include, except where the particular property consists of a share of the capital stock of a co-operative housing corporation, the land subjacent to the housing unit and such portion of any immediately contiguous land as can reasonably be regarded as contributing to the use and enjoyment of the housing unit as a residence, except that where the total area of the subjacent land and of that portion exceeds 1/2 hectare, the excess shall be deemed not to have contributed to the use and enjoyment of the housing unit as a residence unless the taxpayer establishes that it was necessary to such use and enjoyment, and
>
> . . .

[11] The total area of the land on which the housing unit is situated includes not only land subjacent to the housing unit but also such portion of any immediately contiguous land as can reasonably be regarded as contributing to the use and enjoyment of the housing unit as a residence.

[12] Where only a portion of a property qualifying as a taxpayer's principal residence is disposed of, as in the case here, the property may be designated as the taxpayer's principal residence in order to make use of the principal residence exemption for the portion of the property disposed of (ref. Income Tax Folios, S1-F3-C2 – Principal residence dated March 22, 2017, paragraph 2.36).

[13] To reverse the deeming provision in paragraph (*e*) of the definition of "principal residence", the appellant must establish that her principal residence exceeds half a hectare and the excess was necessary for the use and enjoyment of the housing unit as a residence.

[14] In this case, the appellant did not establish on a balance of probabilities that the land sold, which represented 33% of the total area of the property, was necessary for the use and enjoyment of her housing unit as a residence. She kept 2.7 acres with a woodlot on it.

[15] Between 1985 and 1991, the appellant purchased four pieces of land. Her housing unit was located on the land acquired in the first transaction. The three subsequent transactions were not made by necessity for the use and enjoyment of her housing unit but rather as a choice of lifestyle. The appellant used this additional land to build a pool, a barn, a garage, a septic field and a sugar shack. The land sold is a woodlot with no structure on it and is far away from the appellant's housing unit. In my view, the land sold was not necessary to fulfil its function as a residence.

[16] The land sold was not required in order to provide the appellant with access to and from a public road and was not subject to a municipal or provincial law or regulation requiring a lot size for residential purpose or imposing a severance or subdivision restriction. However, the land sold was landlocked with limited uses. The lot No. 2398410 had no direct access to a public or private road except through lot No. 2398404 where the appellant's housing unit was located. Therefore, a frontal restriction existed.

[17] The appellant testified that her housing unit is equipped with a wood heating system, an electrical system and a gas fireplace and that hardwood cut on her property is normally sufficient to heat her house during the winter. She said that occasionally, she had to purchase supplementary wood to heat her house which was poorly insulated when she acquired it.

[18] The appellant did not provide any detailed information concerning the heating system now in place in her house nor the type and quantity of wood cut every year from her property to heat her house and the sugar shack.

[19] A simple statement that wood was cut on the piece of land sold, to heat her house, is not sufficient to allow the appellant to meet her burden of proof that the piece of land was necessary for the use and enjoyment of her housing unit as a residence.

[20] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 13th day of December 2018.

"Réal Favreau"

Favreau J.

CITATION:	2018 TCC 250
COURT FILE NO.:	2017-2083(IT)I
STYLE OF CAUSE:	Lisa Makosz and Her Majesty the Queen
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 4, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	December 13, 2018

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Dominic Bédard-Lapointe

COUNSEL OF RECORD:

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Name:

Firm:

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