

BETWEEN:

DENISE A. DaCOSTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of Cynthia DaCosta
(2015-3549(IT)G) on November 7, 2017, at Toronto, Ontario

By: The Honourable Justice David E. Graham

Appearances:

For the Appellant:

The Appellant herself

Counsel for the Respondent:

Leonard Elias

JUDGMENT

The appeal from the reassessment of the Appellant's 2010 tax year is allowed without costs and the matter referred back to the Minister for reassessment on the basis that the gross negligence penalties are to be removed.

Signed at Ottawa, Canada, this 24th day of November 2017.

“David E. Graham”

Graham J.

Docket: 2015-3549(IT)G

BETWEEN:

CYNTHIA DaCOSTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of Denise A. DaCosta (2015-3548(IT)G) on November 7, 2017, at Toronto, Ontario

By: The Honourable Justice David E. Graham

Appearances:

For the Appellant:

The Appellant herself

Counsel for the Respondent:

Leonard Elias

JUDGMENT

The appeal from the reassessment of the Appellant's 2010 tax year is dismissed with costs.

Signed at Ottawa, Canada, this 24th day of November 2017.

“David E. Graham”

Graham J.

Citation: 2017 TCC 235
Date: 20171124
Docket: 2015-3548(IT)G

BETWEEN:

DENISE A. DaCOSTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2015-3549(IT)G

AND BETWEEN:

CYNTHIA DaCOSTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Graham J

[1] Cynthia DaCosta is the paternal grandmother of Denise DaCosta.¹ In 2006, the Appellants each signed a contract of purchase and sale to acquire a condo in a building that was being constructed in Toronto. Denise's contract was for Unit 5 and Cynthia's contract was for Unit 6. Both purchases closed in June 2010. Unit 5 was sold that same month. Unit 6 was sold one month later.

[2] Neither Appellant reported any income relating to the condos on her 2010 tax return. The Minister of National Revenue reassessed Denise's 2010 tax year on the basis that Denise had failed to report business income of \$106,025 on the sale

¹ For simplicity, I will refer to the Appellants by their first names. I understand that Denise DaCosta's legal name may actually be Denise DaCosta DaSilva. However, the notice of reassessment in issue was issued under the name Denise DaCosta and that name was also used in the Notice of Appeal.

of Unit 5. The Minister reassessed Cynthia's 2010 tax year on the basis that Cynthia had failed to report business income of \$103,206 on the sale of Unit 6. The Minister assessed gross negligence penalties against both Appellants. The Appellants have appealed the reassessments.

[3] There are three issues:

- a) Should the profits on the sales be taxed on income account or on capital account?
- b) Should those profits be reduced to account for costs of disposition or other expenses that were not allowed by the Minister?
- c) Were the Appellants grossly negligent in failing to report the profits from the sale of the condos?

Income vs. Capital

[4] The Appellants take the position that they should be taxed on capital account. I disagree.

[5] The Appellants testified that the condos were next to Seneca College and that the plan was that Denise, who planned to attend Seneca College after graduating from high school, would live in her condo and Cynthia would rent hers to third parties. I do not believe that these were the Appellants' intentions. I reach this conclusion for two reasons.

[6] The first reason that I do not believe the Appellants intended to hold the condos on a long-term basis is that I did not find Cynthia to be a credible witness and thus do not believe her statement as to the Appellants' intentions. She gave vague and often contradictory testimony. Twice she made statements that were inconsistent with answers she had previously provided. When I asked her specific questions to try to understand what appeared to me to be contradictory positions, she gave responses that bordered on evasive. I found Denise to generally be a credible witness. However, it was apparent to me that Denise knew nothing about the transactions other than what Cynthia had told her. Thus, while I think Denise told the truth when describing her understanding of the transactions, I cannot rely on her understanding.

[7] The second reason that I do not believe the Appellants intended to hold the condos on a long-term basis is that it is clear that doing so would never have been an option for them. This is not a situation where a taxpayer planned to hold a property on a long-term basis and some unexpected event intervened to frustrate that intention. When the Appellants entered into contracts of purchase and sale to acquire the condos neither of them had the financial resources to actually complete the purchases. Denise was only seventeen at the time. Her only hope to be able to complete the purchase was if Cynthia gave her the money to do so. Cynthia had significant mortgage, line of credit and credit card debts and had had those debts for some time. She was not in a position to expect to be able to complete her own purchase let alone finance the completion of Denise's purchase. Cynthia is a real estate agent. When she signed the contract of purchase and sale, she had been a real estate agent for approximately 18 years. As such, she would have been well aware of the need for financing and the requirements for obtaining that financing in order to close.

[8] Sure enough, when the time came to close the purchases, neither Appellant had the money to do so. Cynthia's credit rating was too poor for any conventional lender. Denise was earning less than \$7,000 per year so, even if she had hoped to contribute financially, she was in no position to do so. Cynthia had to borrow money from friends on short-term loans just to bridge the time between the closing of the purchases and the subsequent sales. She used the proceeds from the sale of Unit 5 to help close the purchase of Unit 6.

[9] Unit 6 was listed for sale before Cynthia even took ownership of it. Denise signed an agreement of purchase and sale for Unit 5 almost two months before she even took ownership of it. Cynthia and her son (Denise's father) were the listing agents on both sales. The condos were sold at a significant profit.

[10] Based on all of the foregoing, I conclude that Cynthia's primary intention was always to try to sell the condos at a profit. I find that Denise's intention was simply to do whatever Cynthia wanted and thus that she indirectly had a primary intention to sell her condo at a profit. As a result, I find that the Appellants held the condos on income account.

Amount of Profits

[11] The Appellants submit that their profits from the sale of the condos should be reduced to account for costs of disposition and other expenses that were not allowed by the Minister. They have not proven their case on this point.

[12] The Minister had already accounted for certain costs of disposition in calculating the Appellants' profits. Cynthia spoke generally about the types of closing costs that were incurred but did not identify which costs she believed had not been allowed. Similarly, the Appellants produced no documentary evidence to support any such costs. In the circumstances, I cannot allow any additional costs of disposition.

[13] Cynthia testified that she received occupancy of Unit 6 in January 2010 and had had to pay occupancy fees between then and the time she took title in June. She stated that she had rented the property during that period to try to offset those costs but had still ended up losing money. She submitted that those losses should reduce her income on the disposition. Cynthia did not introduce any documentary evidence supporting her position. Given my findings concerning her credibility, I am not prepared to allow her to claim these losses in the absence of documentary evidence.

Penalties

[14] The Minister assessed gross negligence penalties, not because the Appellants failed to report their profits on income account, but rather because they failed to report them at all.

[15] Cynthia was fully aware of the profit that she had made. She claimed that she was not aware that she had to report that profit. As set out above, Cynthia is a real estate agent. When she filed her 2010 tax return, she would have been a real estate agent for approximately 23 years. I do not believe that she was unaware that profits made selling real estate that is not one's principal residence are taxable. I do not believe Cynthia's testimony that she disclosed the sale to her accountant. Even if she had, she did not review her tax return before signing it so would not have been aware whether the accountant had included the income from the sale or not. Cynthia reported taxable income of approximately \$20,000 on her 2010 tax return. Her unreported income is more than five times higher than that. Based on all of the foregoing, I find that Cynthia was grossly negligent in not reporting her profit from selling Unit 6.

[16] By contrast, I find that Denise was not grossly negligent. She was only 17 years old when she signed the contract of purchase and sale. She did so under the direction of her grandmother and father, both of whom were real estate agents. Denise was 21 years old when the purchase closed and the subsequent sale occurred. Her grandmother and father were the listing agents on the sale. The sale was arranged and negotiated entirely by them. Again, Denise simply signed the documents that her grandmother and father asked her to sign. Denise did not receive any of the profit from the sale of Unit 5. All of that money was used by Cynthia to close the purchase of Unit 6.

[17] Normally I would consider a taxpayer who blindly signed contracts for the purpose of flipping real estate and failed to inquire whether there were any tax consequences relating to those contracts to have been grossly negligent. However, in the circumstances, I am not prepared to do so in Denise's case. The profits from the sale of Unit 5 went to Cynthia, not Denise. If tax was to be paid on that sale, the money would have had to have come from Cynthia. I conclude that, just as Cynthia did not want to pay that tax on the profit on her own condo, she similarly did not want to pay it on the profit on Denise's condo. Because of this, I am not convinced that Cynthia told Denise that she had to report the income. It appears far more likely to me that Cynthia kept Denise in the dark than that she conspired with her to file false tax returns.

[18] I think it is reasonable for a twenty-one-year-old whose tax experience consists of reporting relatively small amounts of T4 income on her tax return each year to rely on her own father and grandmother, both of whom are real estate agents intimately familiar with the details of a sale, to tell her if she needed to report income on her tax return. Had Denise received the proceeds of sale or had reason to distrust her family, I would likely have come to a different conclusion.

Potential Issues Not Pled

[19] During the course of the trial, a significant amount of evidence given by the Appellants and some submissions that they made suggested that there may be two other issues that could have been raised in the appeals and perhaps would have been raised had the Appellants been represented by counsel. I feel that, for completeness, I should identify those issues and explain why I have not addressed them.

[20] The first issue that perhaps could have been raised is whether Cynthia was the beneficial owner of Unit 5 and Denise merely held legal title to the property as

a bare trustee. Had that issue been raised and had I ruled in the Appellants' favour on that issue, the result would have been that the profit from the sale of Unit 5 would not have been taxed at all. I would have had to allow Denise's appeal and remove the Unit 5 profits from her income, but I would not have been able to add those profits to Cynthia's income as I do not have the power to increase an appellant's taxable income on appeal.

[21] The second issue that perhaps could have been raised is whether beneficial ownership of the condos was even disposed of in 2010 or whether legal title was simply transferred to close family friends in order to fool a bank into indirectly providing financing to Cynthia. Had that issue been raised and had I ruled in the Appellants' favour on that issue, the result would have been that I would have had to allow both appeals.

[22] There is no need for me to review the evidence and submissions that give rise to these potential issues nor is there any need for me to determine whether that evidence was credible. Neither of these issues was raised in the Appellants' notices of appeal. On the contrary, the facts, issues and reasons pled in the notices of appeal are inconsistent with these arguments. The issues pled are the three issues that I have analyzed above. Neither of the Appellants asked for leave to amend her notice of appeal. The purpose of pleadings is to set out the issues in the litigation so that each party may properly prepare. An issue not pled cannot be raised at trial. While the Court may show some lenience in interpreting the pleadings of a self-represented taxpayer who lacks the expertise to precisely identify the tax issue at hand, it is not unreasonable to expect that such a taxpayer will at a bare minimum make an attempt to identify the issue and accurately plead the facts necessary to support it. The Appellants did neither.

Conclusion

[23] Based on all of the foregoing, the appeal of Cynthia DaCosta is dismissed and the appeal of Denise DaCosta is allowed and the matter referred back to the Minister for reassessment on the basis that the gross negligence penalty should be removed.

Costs

[24] The Respondent is only seeking costs in respect of Cynthia DaCosta's appeal. Costs are awarded to the Respondent in respect of that appeal.

Signed at Ottawa, Canada, this 24th day of November 2017.

“David E. Graham”

Graham J

CITATION: 2017 TCC 235

COURT FILE NOs.: 2015-3548(IT)G
2015-3549(IT)G

STYLES OF CAUSE: DENISE A. DaCOSTA v. HER MAJESTY
THE QUEEN
CYNTHIA DaCOSTA v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 7, 2017

REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham

DATE OF JUDGMENT: November 24, 2017

APPEARANCES:

For the Appellant, Denise A. DaCosta:	The Appellant herself
For the Appellant, Cynthia DaCosta:	The Appellant herself
Counsel for the Respondent:	Leonard Elias

COUNSEL OF RECORD:

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Name:

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