Docket: 2019-1732(IT)I

BETWEEN:

ANTHONY DICAITA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 8, 2020 at Hamilton, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Acinkoj Magok

JUDGMENT

The appeal from reassessments made under the *Income Tax Act* for the 2012 and 2013 taxation years is allowed, in part, and the matter is referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Kingston, Ontario, this 11th day of February 2021.

"Rommel G. Masse"

Masse D.J.

Citation: 2021 TCC 5
Date: 20210211
Docket: 2019-1732(IT)I

BETWEEN:

ANTHONY DICAITA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

[1] The Appellant appeals re-assessments made under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the "*Act*"), for his 2012 and 2013 taxation years. At issue are the deductibility of expenses incurred in relation to two rental properties; one located in Vancouver BC and the other located in Phoenix AZ.

Factual Context

[2] The Appellant was the only witness at the hearing of this appeal. He is employed as the CEO of a charitable organization in Toronto. I found him to be an articulate, intelligent, honest, well-organized and credible witness. He owns two rental properties – a townhouse unit located at 754 Millyard Road, Vancouver BC (the "Vancouver Property"), and a single family dwelling located at 3524 Paradise Lane in Phoenix, AZ, USA (the "Phoenix Property").

a) The Vancouver Property

[3] This is a townhouse unit in a condominium complex of 56 units constructed in the 1970's. The Appellant has owned this unit since 1989. It has always been a rental property. The unit is located in a desirable part of Vancouver and has always enjoyed a high occupancy rate. Tenant turnover is low and new tenants are easy to find. The monthly rent is $1,500. Because the tenant turnover is so low, there is little opportunity to do more than put on a fresh coat of paint and effect minor repairs between tenancies. Over the years, the unit got run down due to wear and tear and was "showing its age".

[4] The complex is managed by the Strata Council Board ("Strata"). In April 2010, Strata undertook a major remediation of the complex to deal with issues of rot, mold, asbestos, water leakage and structural issues. The project involved only the exterior common elements of the complex and had nothing to do with the interior of any of the units. This was a long-term project, lasting 20 to 22 months. The cost of the project was in excess of $6,000,000.

[5] During the remediation work, the entire housing complex became an active construction site. Scaffolding surrounded the building, tarps were draped around the scaffolding, and there were waste bins, building materials, construction vehicles and construction workers on site. This was very disruptive for all occupants of the complex. The Appellant's tenant at the time was not happy with the disruption and demanded a significant reduction in rent. The Appellant declined. Consequently, the tenant vacated the unit sometime in November 2010.

[6] The Appellant tried to rent the unit out but prospective tenants lost interest when they saw the ongoing disruption caused by the exterior construction. They were also concerned about the length of time it would take to complete the work. The remediation project made it very difficult to rent out any unit in the complex. Still, the Appellant tried to rent out his unit but to no avail. The Appellant believes that if the remediation project, over which he had no control, had not occurred, his unit would have remained rented.

[7] The Appellant decided that the tenancy hiatus during the remediation provided an opportunity to effect long overdue and much needed repairs to his unit to address issues caused by wear and tear over time and to replace some fixtures and appliances that had worn out and reached the end of their useful life. Many of these items were original to the unit when the complex was built in the 1970's.

[8] Sometime in January 2012, the Appellant hired a contractor to effect the necessary repairs to the interior of his unit. Work began in early 2012 and was completed in May 2012. However, the exterior remediation work fell behind schedule and this directly impacted the Appellant's ability to rent out his unit even after the interior repairs were completed. The unit remained vacant until November 2012 but was eventually rented out in December 2012.

[9] The repairs to the unit consisted of replacing some bathroom fixtures, sinks, vanities, toilet, kitchen cabinetry, countertops, appliances, fireplace insert, doors, hardware, door handles, railings, carpets/flooring, some millwork in terms of baseboards and painting. The Appellant incurred costs of about $24,000 to

complete the repairs. He estimates that the cost of the repairs amounted to only about 5% of the fair market value of the unit. The Appellant asserts that the work done to his unit was not a reconstruction or a rehabilitation of the structure. No construction permits were required because the work did not involve any structural or design changes or changes to the layout. Any appliances or fixtures that were replaced were replaced with items of similar quality and value to what was being replaced. There was no upgrading of any of the items. The repairs were not intended to materially impact the value of the unit. After the repairs, the unit was rented for $2,200 per month, an increase of $700 per month, in line with comparable units.

[10] The Appellant claims deductions of $22,483 under the heading of repairs and maintenance for his 2012 taxation year. The Minister of National Revenue (the "Minister") takes the view that these expenses are not deductible because the unit was not available to be rented out and therefore the Appellant did not have a source of income. In the alternative, the expenses are not deductible as current operating expenses because they are properly categorized as capital expenditures and thus not deductible pursuant to paragraph 18(1)(b) of the *Act*.

b) The Phoenix Property

[11] This property was built in the 1990's. The Appellant purchased it in the early 2000's. In 2013, there were a number of issues that required the Appellant's attention in Phoenix such as problems with the tenant, repairs to the roof, the pool and spa, and landscaping matters. The Appellant took advantage of a family trip to Las Vegas to drive down to Phoenix from Las Vegas in order to address problems with the property in person together with his property manager. He and his wife stayed at a hotel for a number of days. Expenses claimed as rental expenses were exclusively associated with the time spent in Phoenix, not Las Vegas, and were for food, lodging and travel. Once the issues with the Phoenix Property were resolved, he and his wife flew back to Toronto. The Appellant initially claimed total travel expenses for airplane tickets for two, food, lodging and car rental from Las Vegas to Phoenix as well as some minor amounts for gas, airport parking, medication and a gift for the Appellant's property manager.

Amounts in Dispute

a) The 2012 Taxation Year

[12] The Appellant disputes all disallowed rental expenses in 2012 as follows:

Rental Expenses	2012 Claimed	2012 Allowed	2012 Disallowed (Amount at Issue)
Maintenance and repairs	$22,483	---	$22,483
Management and administration	$3,656	---	$3,656
Office expenses	$786	---	$786
Other expenses	$5,618	---	$5,618
Mortgage interest	$10,063	$3,927	$6,137
Property taxes	$2,570	$1,150	$1,420
Rancho Management	$1,323	$73.00	$1,250
Total Rental Expense			**$41,350**

b) The 2013 Taxation Year

[13] The Respondent asserts that the amount in dispute for 2013 is $4,923.15. This is in regard to travel expenses between Toronto and Phoenix in order to address issues with the rental property in Phoenix. The Minister has allowed the sum of $689 for car rental between Las Vegas and Phoenix.

Issues

[14] The issues in this appeal are:

a. Is the amount of $22,483 spent on the Vancouver Property during the 2012 taxation year properly categorized as capital expenditures or as current operating expenses?

b. Are other amounts claimed as rental expenses deductible for the 2012 taxation year?

c. Are all of the claimed travel expenses incurred in relation to the Phoenix Property properly deductible for the 2013 taxation year?

Position of the Parties

a) The Appellant

[15] The Appellant submits that the work done on the Vancouver Property was in the nature of current operating expenses and not capital in nature. In addition, other annualized expenses that were claimed as rental expenses by the Appellant have been improperly disallowed. The Appellant asserts that all of the travel expenses incurred by him in relation to the Phoenix Property ought to have been allowed for 2013 and not just the car rental expense.

b) The Respondent

[16] The Respondent submits that the $22,483 expended by the Appellant on the Vancouver Property was on account of major renovations such that they are capital in nature and ought not to be treated as current operating expenses. With some concessions, the Respondent asserts that the other 2012 expenses were properly disallowed. The Respondent is willing to make some concessions regarding the 2013 travel costs in relation to the Phoenix Property as explained later in these Reasons.

Analysis

a) The Applicable Legislation

[17] It is always useful to revert to the basic principles set out in the Act concerning the calculation of income and losses from a business or property. These are outlined in section 9 of the Act which provides:

> 9(1) Income – Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.
>
> (2) Loss – Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source of income computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

[18] So a taxpayer can deduct expenses incurred to earn a profit, subject to limitations set out in the *Act*. Section 18 of the *Act* sets out general limitations on deductions. The relevant provisions of section 18 are as follows:

> 18(1) General limitations – In computing the income of a taxpayer from a business or property no deduction shall be made in respect of
>
> > (a) general limitation – an outlay, loss or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;
> >
> > (b) capital outlay or loss – an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part;
> >
> > …
> >
> > (h) personal and living expenses – personal or living expenses of the taxpayer, other than travel expenses incurred by the taxpayer while away from home in the course of carrying on the taxpayer's business;

[19] Paragraph 18(1)(a) provides that an expense is deductible only to the extent that it was incurred for the purpose of gaining or producing income from business or property. Paragraph 18(1)(b) disallows expenditures on account of capital outlays. Paragraph 18(1)(h) disallows deductions of expenses that are for personal purposes or for living expenses. Finally, section 67 of the Act provides that otherwise deductible expenses must be reasonable in all the circumstances.

b) Was the Vancouver Property a Source of Income?

[20] A taxpayer cannot deduct expenses for tax purposes in relation to an activity or property unless that activity or property is a source of income. In order for an activity or property to be so classified, the taxpayer must establish that his or her predominant intention is to make a profit in accordance with objective standards of businesslike behaviour[1].

[21] There is no doubt that the Appellant's predominant intention at all times was to earn a profit from his rental properties. The Vancouver unit had been continuously rented out for years prior to the repairs and was rented out after the exterior remediation and interior repairs were completed. I am also satisfied that the Appellant conducted his rental activities for the Vancouver Property in accordance with objective standards of business like behaviour.

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[1] *Stewart v. The Queen*, 2002 SCC 46.

[22] The CRA initially took the position that the Vancouver Property was not a source of income since it was not available to be rented out during the 2012 taxation year. I disagree. I conclude that the unit was a source of income before, during and after the renovations. The unit was rented out at the time the exterior remediation was undertaken. When the tenant moved out, the Appellant unsuccessfully tried to rent out the unit but the exterior remediation was an impediment. The Appellant took advantage of the vacancy to effect his repairs. When the interior repairs were done, the Appellant again tried to rent out the unit but was only successful in doing so for December 2012 following completion of the major exterior remediation project.

[23] I have not been referred to any legislative provision nor any binding jurisprudence standing for the proposition that an income earning property that is temporarily not available to rent is not a source of income. A property does not need to be generating income at every stage of operation in order to be considered a source of income. What is required according to *Stewart*[2] is the predominant intention to make a profit in accordance with objective standards of businesslike behaviour. That has been clearly established. The fact that the unit was vacant from January through to November of 2012 means only that it was not earning income during that time – it does not mean that it was not a source of income. Although the Appellant's property manager did not attempt to lease the property (see Exhibit R-2), the Appellant did try to find tenants through other means – he simply was not successful. The unit did not lose its character as a source of income while the work was being done just because it was vacant or not available to be rented.

[24] I conclude that the Vancouver Property was a source of income for the Appellant before, during, and after interior renovations were completed.

c) Capital Expenses or Current Operating Expenses

[25] Having concluded that the unit was a source of income, it is necessary to classify any expenses in relation to the unit as either capital or current in nature. This is important because current expenses can be deducted from income or carried forward as a loss. Capital expenses are not deductible in computing income from a business or property. This is because paragraph 18(1)(b) of the *Act* prohibits the deduction of any outlay on account of capital unless specifically allowed elsewhere in the *Act.* However, since a depreciable property wears out and becomes obsolete

[2] *Ibid.*

over time, paragraph 20(1)(a) of the *Act* permits a deduction of part of the capital cost of the property, as allowed by *Regulation*.

[26] Nowhere in the *Act* or *Regulations* are "capital expenditure" or "operating expense" clearly defined. Whether a particular outlay should be treated as a current expense or capitalized is a determination to be made in accordance with Generally Accepted Accounting Principles and is not dealt with by any specific provision of the *Act*.[3]

[27] The classic definition of a capital expenditure is one incurred for procuring "*the advantage of an enduring benefit*", and includes "*preserving an asset*", but not an expense that creates no identifiable asset.[4] Obviously, if as a result of the repairs, something is created that did not exist before, the expenditure will tend to be a capital expenditure.

[28] The Federal Court of Appeal in *Hare v. The Queen*[5] has held that it is a question of fact, best left to the trial judge, to determine whether renovations are capital or current.

[29] Justice Hershfield of this Court has held that, in determining if certain work is capital or current, we have to look at the "*purpose and nature of the work done*".[6] In analyzing the various factors that allow us to determine the purpose and nature of the work done, we must be guided by jurisprudence, the letter of the *Act* and common sense.[7]

[30] In *Cousineau v. The Queen*[8], Justice Bédard of this Court provides a thorough analysis that informs the determination of when an expenditure is a capital expense or an operating expense. I find it useful to quote him extensively starting at paragraph [10] of his Reasons:

> [10] The characterization of expenditures is not based on a rigid test. Instead, the nature of the expenditures must be examined (*Marklib Investments II-A Ltd. v. R.*, 2000 D.T.C. 1413 (T.C.C.) (A.G.) para. 18).

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[3] *Rainbow Pipe Line Co. Ltd. v. R.*, 2002 FCA 259 at paras 11, 12 and 14.
[4] *The Minister of National Revenue v. Algoma Central Railway*, [1968] S.C.R. 447.
[5] *Hare v. The Queen*, 2013 FCA 80 at para. 11 [*Hare* (FCA)].
[6] *Hare v. The Queen*, 2011 TCC 294 at para. 44 [*Hare* (TCC)].
[7] *Hare* (TCC), *supra*, at para. 45.
[8] *Cousineau v. The Queen*, 2013 TCC 375.

[11] The primary test with respect to capitalizable or operating expenditures is the intention and purpose of the expenditures.

[12] Judge Lamarre Proulx in *Bergeron v. M.N.R.*, 90 D.T.C. 1511 (T.C.C.) para. 33, noted the relevant jurisprudence:

> The principles I draw from these cases are the following:
>
> income-related expenses include repairs the purpose of which is to make the part or the property repaired suitable for normal use again;
>
> capital expenses include work the purpose of which is to replace an asset by a new one and work which involves such a degree of improvement to an asset that it becomes a new one. This asset must have significant value compared to the rest of the property or be an asset in itself; work to change the use of premises or a room or to add new premises or a new room is usually capital in nature; the same is true of a change in the heating system;
>
> although the factor of recent purchase is not significant when there is no change of use, the increase in value of the real property over the purchase price, as a result of the repairs, is an indication that the cost or part of the cost of the expenses is in the nature of the purchase price of property;
>
> expenses must be reasonable in the circumstances (section 67 of the Act): the question is whether they were reasonably incurred to derive income or to increase the value of the property, and in what proportion; future profits can be taken into account if the expenses in question reduce subsequent expenses and also I suppose the unforeseen scale of the costs.
>
> To find this purpose, the Court must ascertain whether the repairs were designed to improve the existing building or make it different (*Hare v. R.*, 2011 TCC 294 para.16). If, as a result of the repairs, something is created that did not exist previously, the expenditure will tend to be capitalizable. "If repairs resulted in virtually the same old building as before the repairs were undertaken then such should be properly expensed" (*Chambers v. R.*, [1998] 1 C.T.C. 3273 (T.C.C.) para. 14).

[14] To determine whether the repairs improved the building to the point of creating something new, the Court may take into account the appearance, whether or not the building had to be vacated while repairs were undertaken and the dollar amount of the repairs in relation to the value of the building (Chambers v. R.,

> [1998] 1 C.T.C. 3273 (T.C.C.) para 15). One may also verify whether the expenditures were aimed only at repairing the defect (*Marklib Investments II-A Ltd. v. R., supra,* para. 27).
>
> [15] The Court may also consider whether the repairs were usual repairs on a property in rental condition or were repairs to make the property rentable (*Leclerc v. R.*, [1998] 2 C.T.C. 2578 (T.C.C.) para. 12). In *Hare v. R., supra,* the expenses had been incurred before the building was rented. The expenses were held to be capitalizable because they had been incurred for the purpose of preparing the property to be rented.
>
> [16] The timing of the repairs may also be taken into account in determining the purpose of the expenses at issue.
>
> [17] The CRA has also identified a number of criteria that the jurisprudence has considered, i.e. (CRA, Interpretation Bulletin IT – 128R, *Capital Cost Allowance – Depreciable Property* (May 21, 1985) No. 4):
>
> - Enduring benefit;
> - Maintenance or betterment expenditure;
> - Expenditure on an integral part of the property or to acquire a property;
> - Value of the expenditure in relation to the value of the whole property or in relation to average maintenance and repair costs;
> - Used property requiring repairs at time of acquisition to put it in suitable condition;
> - Repairs in anticipation of a sale.

[31] The jurisprudence provides several examples of renovations that have been held to be current expenses:

a. Replacing a 20 year old deck at a cost of $8,146 which was 3.1% of the total cost of the property - *Lewin v. The Queen*[9].

b. Repairs in the amount of $29,823 to put a duplex purchased for $419,000 back to original state – *Janoto v. The Queen*[10].

c. Major repairs of hurricane damages and damages caused by a tenant did not improve a house beyond its original condition – *Martinello v. The Queen*[11].

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[9] *Lewin v. The Queen*, 2008 TCC 618 (CanLII).

[10] *Janota v. The Queen*, 2010 TCC 395 (CanLII). The property was left vacant while the repairs were being done as in the instant case. The property commanded higher rents once the repairs were completed.

d. Returning a roof to its original condition at a cost of $6,900 – *Palangio v. The Queen*[12].

e. Replacing part of a parking garage roof with a longer lasting one – *Aon Inc. v. The Queen*[13].

[32] The following building expenses were held to be in the nature of capital expenditures:

f. Significant renovations undertaken to ready a property for rental that was in poor condition: *Fiore v. The Queen*[14]; *Hare v. R.*[15].
g. Repairs and renovations to reconstruct a building and create an asset of enduring nature: *Fotherby v. The Queen*[16]; *Scharfe v. The Queen*[17]; *Bishop v. The Queen*[18]; *Mbénar v. The Queen*[19].
h. Replacing wood framed windows with vinyl framed; *Peach v. The Queen*[20].

[33] On reading all of the foregoing cases, it becomes clear that the test for determining if any particular expenditure is capital or current in nature can be difficult to apply. Different situations may lead to different results. Depending on circumstances, the same expenditure can be classified as either capital or current. Ultimately, whether an expense is incurred on account of income or capital is a determination that can only be made after the facts have been considered in full. No one factor is determinative and considering them collectively is necessary.

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[11] *Martinello v. The Queen*, 2010 TCC 432 (CanLII). The hurricane damage rendered the house uninhabitable for a time.
[12] *Palangio v. The Queen*, 2012 TCC 405 (CanLII).
[13] *Aon Inc. v. The Queen*, 2017 TCC 166 (CanLII). Repairs were in an amount exceeding $4,000,000. Damages to the garage were caused by exposure to salt, snow, rain and traffic. The repairs were such that the garage would be "worry free" for the next 20 to 30 years.
[14] *Fiore v. The Queen*, [1993] 2 C.T.C. 68.
[15] *Hare (FCA), supra*, note 4.
[16] *Fotherby v. The Queen*, 2008 TCC 343 (CanLII).
[17] *Scharfe v. The Queen*, 2010 TCC 39 (CanLII). Barns on farm property, including an old barn, were improved and brought to a state where they could be rented as cold storage
[18] *Bishop v. The Queen*, 2010 FCA 137 (CanLII).
[19] *Mbénar v. The Queen*, 2012 FCA 180 (CanLII). Justice Favreau, the judge of first instance, described the expenditures as being related to major renovations which amounted to a complete rehabilitation of a building that was in total disrepair and dangerous for the tenant.
[20] *Peach v. The Queen*, 2020 TCC 12 (CanLII) (under appeal to the FCA).

[34] The overarching test to be applied in determining if an expenditure is current or capital in nature is the "purpose and nature" of the expenditure. In arriving at my conclusion, I have considered the following factors in light of the entirety of the evidence.

i) Betterment and Enduring Benefit

[35] In the instant case, the repairs did result in a betterment or improvement to the unit which was of enduring benefit. However, it is axiomatic that any and all repairs involve some degree of improvement to a property. The question is whether the improvement was significant enough to bring into existence a different capital asset than what was there before. I am of the view that in the instant case, it does not.

[36] The property was a rental unit situated in a desirable Vancouver neighbourhood. It remained so after the repairs. In my view, the repairs did not result in anything new, they did not create a new asset and they simply updated what was already in existence. To quote Justice Hershfield in *Hare*[21] at paragraph 44:

> [44] There is no doubt that the cases in this area suggest that the fact that an enduring benefit arises from a repair will not disqualify it from current expense treatment. This, in itself, makes the analysis difficult since it takes the analysis away from a traditional perspective. Replacing a roof or kitchen cupboards can be a repair notwithstanding that they have enduring value. This departure from the traditional analysis seems to stem from the inevitability that all repairs will have some enduring value and from the ongoing and repetitive cycle of repairs due to usage, time and unforeseen issues. Such realities require, or at least have caused, a change in focus and I agree with the Appellant's counsel that the primary focus is on the purpose and nature of the work done.

[37] The evidence of the Appellant, which I accept, is to the effect that the work done to the interior of the unit was meant to restore the unit to its original condition and not to create a new asset. The work was meant to replace existing items that were worn out and had reached the end of their useful life. The repairs described by the Appellant appear to be a lot but they were done for less than $24,000; not a large amount of money considering the work done. The repairs did not require building permits or create any building code issues. The work did not involve any redesign of the unit and did not change, alter or increase the size, layout or functionality of the unit. Materials and items purchased were "like for like"

[21] *Hare* (TCC), *supra*, at para. 44.

products and involved no upgrades to better quality products or materials than what was there originally. The intention of the taxpayer was to keep the unit in a rentable condition; in other words make it suitable for its normal use. The purpose of the repairs was restorative and not rehabilitative. According to Justice Hershfield in *Hare*[22] at paragraph 15, notwithstanding the enduring nature of repairs and renovating aspects of some of them, if the repairs have not altered the character of the property or changed it into, or replaced it with, something new, then they may be considered to be current expenses. The focus must be on the purpose of the repair, whether it was to improve the capital asset or make it different or better. That repairs are expected to and do inevitably improve a property and may even by a "once in a lifetime incurrence", do not mean they are not repairs.

[38] I find that the improvement or betterment of the unit was not significant enough to bring into existence a different capital asset than what was there before. The repairs did not alter the character of the property or change it into something new.

ii) Typical Repairs

[39] Typical repairs on a property in rental condition, even costly ones, indicate that the expenses are current in nature. There is nothing unusual in replacing worn out and outdated kitchen cabinets. The same can be said of the other repairs described by the Appellant. On the other hand, if the expenses are extravagant and out of the ordinary for a rental property, it is less likely that the expenses would be categorized as current and would shift the analysis towards a capital expenditure. The repairs described by the Appellant, although they might infrequently occur, are typical.

iii) Timing of the Repairs

[40] In determining the nature and purpose of the repairs the timing of the repairs can sometimes be an important factor in the overall analysis.

[41] It can successfully be argued that none of the repairs taken individually would amount to a capital expenditure. However, if I understand counsel for the Respondent correctly, she asserts that because the repairs were all done at once, then the total magnitude of the repairs are such that cumulatively, they result in the

[22] *Hare* (TCC), *supra*, at para. 15.

unit being converted into a new asset and therefore in the nature of a capital outlay. The Respondent relies on the case of *Méthé v. M.N.R.*[23]. In that case, Justice Taylor stated at paragraph 8:

> [8] … I can only point out that the replacement of one item (a door, a window, a floor, etc.) which normally "might be repairs", *when done within the context of an entire renovation project* may very readily lead into the capital expenditure world as contrasted with the current expenditure environment. I would quote from page 2210 (D.T.C. 224 of *Wagar (supra):*
>
> > … Therefore, as I see it, the *nature* of an individual expenditure itself may not, be, in circumstances such as this case, the sole criteria upon which the distinction is made. Clearly a replaced "door" can be a repair, but it also can be a capital expenditure in the circumstances where the general overview of that accomplished by all the repairs is **a total reconstruction or rehabilitation of the structure**. The Minister, in assessing, is entitled to take an overview of the entire expenditure program, and it may almost be necessary, on some occasions, that the breakdown be done somewhat arbitrarily between "current" and "capital". I am not aware of jurisprudence which would mandate for the Minister a course of accepting any or all individual items of expenditures as "current" rather than viewing some of those expenditures as on the same continuum as the original capital asset purchase, leading toward a completion of that capital expenditure program.
>
> [Emphasis is mine.]

[42] However, the Canada Revenue Agency (the "CRA") itself accepts that multiple repairs being done together does not necessarily reclassify the nature of the repairs. Paragraph 4(d) of Interpretation Bulletin IT-128R states:

> … where a major repair job is done which is an accumulation of lesser jobs that would have been classified as current expense if each had been done at the time the need for it first arose; the fact that they were not done earlier does not change the nature of the work when it is done, regardless of its total costs.

[43] I share the point of view that just because a lot of repairs are done all at once does not make the expenditures "capital" in nature. It is only where the effect of multiple repairs is to substantially improve the repaired property to a point past its original condition or to bring into existence an asset different from that which it

[23] *Méthé v. M.N.R.*, [1986] 1 CTC 2493.

replaced, that the repairs will be categorized as "capital" as was the case in *Shabro Investments Ltd. v. R.*[24] I take much guidance from the dicta of Justice Hershfield where he stated at para. 52 of *Hare*[25]:

> [52] … I note that there is little doubt that, generally speaking, the current treatment of repairs will not be changed simply because a number of repairs are undertaken at the same time. There seems to be no suggestion in the authorities that the courts will second-guess an owner's decision as to the timing of repairs that may, for example, be done at various stages of where, during vacancies or slow rental markets or when economies present themselves, including a decision to do multiple repairs that may, when done together, appear to be a renovation when they might more properly be considered to be cyclical restorative repairs undertaken with no intention of altering the character of the property.

[44] In the instant case, I accept the Appellant's argument that the timing of the repairs was somewhat serendipitous in that the hiatus in tenancies provided him with an opportunity to effect the needed repairs all at once in a more efficient and economical way without any disruption to his tenant. The timing of the repairs was simply fortuitous. It is the nature and purpose of the repairs that is determinative. I find that the timing of the repairs is not a significant factor in the instant case.

iv) Property Vacant During Repairs

[45] The Respondent argues that the unit had to be vacant in order to effect the repairs and therefore the expense should be considered to be capital in nature. Although it is true that the unit was vacant between tenancies, it does not follow that it had to be vacant in order to effect the repairs. It was simply easier to effect the repairs if the unit was vacant. Justice McArthur of this Court observed at paragraph 24 of *Janota v. The Queen*[26] that it is more practical to leave a rentable property vacant while necessary work is being done, commanding higher rent after completion. The fact that the Appellant's unit was vacant during the repairs is not a significant factor in the circumstances of this case.

v) Cost of Repairs Compared to Value of Property

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[24] *Shabro Investments Ltd. v. R.*, 79 DTC 5104 (FCA)
[25] *Hare* (TCC), *supra.*
[26] *Janota v. The Queen, supra,* footnote 11.

[46] The overall cost of the repairs as compared to the market value of the entire property may aid in the analysis for determining whether expenses are capital in nature or current in nature[27].

[47] In the instant case, the evidence discloses that the total value of the repairs effected to the interior of the unit were less than $24,000. It is the evidence of the Appellant that this was about 5% of the total fair market value of the unit. There is no admissible evidence as to the fair market value of the unit, however, I take judicial notice of the fact that the price of real estate in downtown Vancouver is very high, among the highest in Canada. If the Appellant is correct that $24,000 is approximately 5% of the value of the unit, then the unit is only worth about $480,000 – not much in the hot real estate market of Vancouver. The market value may very well be much higher which would make the percentage lower. A low percentage of fair market value, in this case a single-digit percentage, suggests that these expenses are current and not capital.

vi) Increase in Rent

[48] The rent for the unit was $1,500 per month before the interior repairs and exterior remediation had been completed and $2,200 afterwards; a significant increase of $700. Counsel for the Respondent, if I understand her argument correctly, suggests that the ability to fetch such an increase in rent indicates that the repairs were capital in nature in that the repairs created a more valuable capital asset which was able to command a higher rent.

[49] I am of the view that the exterior remediation, which was beyond the control of the Appellant, greatly improved the complex and thus the unit, more so than the interior repairs, and would have contributed significantly to an increase of the unit's market value likely to the tune of $107,000. The interior repairs were less than $24,000. The increase in rent is just as likely attributable to the exterior remediation then it is to the interior repairs. I am of the view that the increase in rent is not a significant factor in the unique circumstances of this case. In any event, it is not surprising that a unit in a good state of repair is able to command a higher rent than would a unit that requires many repairs[28].

[50] In conclusion, the nature and purpose of the work, when considered in the light of the foregoing factors, persuade me that the expenses here under

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[27] *Chambers v. R.,* [1998] 1 C.T.C. 3273 (TCC)

[28] See, for example *Janota v. The Queen*, supra footnote 11.

consideration were current and not capital in nature. The repairs effected by the Appellant did not result in the creation of a different capital asset than what was there before. The repairs were restorative, not rehabilitative. They were meant to bring the property to the state that it previously was. There was no material changes to the physical structure, the layout or functionality of the unit. The expenditures were modest compared to the value of the property. The same repairs, if done incrementally over time, would have been costlier and more disruptive than if done all at once. To do all the repairs at the same time did not change their character. The repairs were not an excuse to upgrade the unit in order to appeal to a different class of renter or to effect a change in the character of the property as opposed to a consequential improvement incidentally achieved in completing them in a restorative sense[29].

[51] I find that the repairs amounting to $23,483 during the 2012 taxation year are current in nature and are not capital.

Deductibility of 2012 Annualized Costs

[52] The Minister disallowed $2,613.71 paid to Colyvan Pacific Maintenance as well as mortgage interest of $6,137, property taxes of $1,420 and Rancho Management fees of $1,250 in respect of the Vancouver Property on the basis that those expenses were incurred on account of capital. The Minister asserts that the Vancouver Property was not in rentable condition from January 2012 through to November 2012 and therefore these expenses ought to be capitalized in accordance with paragraph 18(1)(b) of the Act. As I have already opined in paragraphs 22 through to 24 of these Reasons, the fact that the unit was vacant does not mean that it was not a source if income.

[53] I accept that the Vancouver Property was in fact available to rent from January to November 2012 but prospective tenants were wary of renting the unit due to the disruption caused for months on end by the exterior remediation project. The exterior remediation was completely beyond the control of the Appellant. I accept that owners of other units who resided in those units continued to do so during the remediation project. The Appellant's tenant was willing to stay so long as the Appellant made dramatic financial concessions.

a) Management and Administration Fees 2012-$3,656

[29] *Hare* (TCC), *supra*, at para. 55.

[54] The Appellant claimed rental expenses of $3,656 in the 2012 taxation year on account of management and administration fees, which the Minister had initially disallowed in its entirety. In his written argument, the Appellant breaks down this amount as follows:

Colyvan Pacific Maintenance	$2,851.32
Rancho Maintenance	$90.44
Business License	$263.00
Misc. Office Exp.	$341.62
Home Warranty	$110.06
Total	$3,656.38

[55] The Minister has already allowed the full expenses of $90.44 in respect of Rancho Maintenance fee relating to the Vancouver Property, $263.00 on account of Business License fees, $361.00 in office supplies and $110.00 in respect of home warranty expenses (see Respondent's Reply at para. 10(b)). Therefore it is only the $2,851.32 paid to Colyvan Pacific that is in dispute. Of this amount, the Minister concedes that the Appellant is entitled to partially deduct the sum of $237.61 of additional rental expenses for the month of December 2012 when the unit was rented out. The Respondent suggests that the remaining $2,613.71 is attributable to the months of January through to November 2012 when the unit was vacant and not available to be rented and is therefore disallowed. This amount should be capitalized. For reasons already given in paragraphs 22 to 24, I disagree.

[56] I hold that the remaining $2,613.71 is deductible as a current expense.

b) Mortgage Interest for 2012

[57] The Appellant claimed the amount of $10,063 on account of mortgage interest in relation to the Vancouver Property for the 2012 taxation year. The Minister disallowed the sum of $6,137, again on the basis that the unit was not available to be rented and therefore this amount should be capitalized. For the same reasons given above, I disagree. Therefore I hold that the amount of $6,137 is deductible as a current expense.

c) Property Taxes for 2012

[58] The Appellant claimed the amount of $2,570 on account of property taxes paid in relation to the Vancouver Property for the 2012 taxation year. The Minister disallowed $1,420 of this amount, again on the basis that the unit was not available to be rented and therefore this amount should be capitalized. For the same reasons given above, I disagree. Therefore I hold that the amount of $1,420 is deductible as a current expense.

d) Rancho Management Fees for 2012

[59] The Appellant claimed the amount of $1,323 on account of fees paid to Rancho Management. Of this amount, the Minister disallowed $1,250 again on the basis that the unit was not available to be rented and therefore this amount should be capitalized. For the same reasons given above, I disagree. Therefore I hold that the amount of $1,250 is deductible as a current expense.

Home Office Expenses - 2012

[60] The Appellant claims a rental expense in the amount of $786 (really $790.64 according to the invoice submitted to the Court) on account of Office Expense. Apparently, this was for the purchase of an Apple iPad. There was also some question about an expenditure of $49.19 for an Intuit tax preparation programme. The Minister disallowed the cost of the iPad on the basis that this expense was a personal expense. An iPad certainly can have a multitude of personal uses as well as some business uses. In his written argument the Appellant states that any amounts tabulated under "home office expenses" (which include the iPad and tax programme) are apportioned to "home office expenses" based on square footage of his home to the tune of 13.57% of total square footage to reflect the business use of a part of his home. Therefore, the business portion of these expenses is already lumped in with the Appellant's claim for work-space-in-the-home expenses. The remaining portion would be a personal expense. Therefore, I find that the claimed amount of $786 has already been accounted for.

[61] As an aside, it should be noted that the Appellant claimed total home office expenses for 2012 in the amount of $3,664.59 and $3,494.87 for 2013 (see Exhibit R-3a and 3b). These are significant amounts. I agree with the Respondent that a substantial amount of time must be spent working within the home office in order for a taxpayer to allocate such a significant portion of home expenses for business purposes. In the instant case, the Appellant hired professional property managing firms to manage his properties and paid them handsomely for their work. Therefore, it is difficult for me to see that he spent a whole lot of time in his home

office working on issues relating exclusively to the rental properties. I find that these amounts claimed are not reasonable. The CRA has already allowed home office expenses of $1,763 for 2012 and $2,333 for 2013 as well as office supplies in the amount of $361.00 pursuant to subsection 18(2) of the Act (see page 9 of the Respondent's Reply to the Notice of Appeal). This is reasonable in all of the circumstances.

Other Expenses for 2012 - $5,618

[62] The Appellant puts in issue the disallowance of other claimed expenses in the amount of $5,618. However, he asserts that the CRA has categorized and regrouped expense items in a fashion that he cannot reconcile. The Appellant states that based on information available to him, these other expenses refer to bank service charges of $201.37 plus home office expenses in the amount of $3,664.59 for a total of $3,865.96. He does not offer an explanation for the balance.

[63] The Respondent submits that the Appellant has not demonstrated how those expenses were incurred in connection with gaining an income from his rental properties. The burden rests on the Appellant to establish, on a balance of probabilities, that the Minister did not properly consider and allow his claimed expenses[30]. The Minister has already allowed bank service fees of $201 and $113 in the 2012 and 2013 taxation years respectively. As already indicated, the Minister has already allowed home office expenses of $1,763 and $2,333 in the 2012 and 2013 taxation years respectively. I have already found that this was reasonable. Since there is no evidence as to the specifics of the expenses that comprised the amount of $5,618 as "other expenses", these expenses are disallowed.

Travel Expenses to Arizona in 2013

[64] The Appellant asserts that the following expenses are in relation to his return trip between Toronto and Phoenix:

Airfare (Appellant and spouse)	$1,614.20
Accommodation (4 nights)	$2,503.81
Gasoline	$75.37
Airport Parking	$90.00
Vehicle Rental	$689.00

[30] *Hickman Motors Ltd. v. Canada*, [1997] 2 SCR 336.

Gift for Property Mgr.	$79.53
Food (outside hotel)	$516.49
Medication/Food	$43.75
Total	$5,612.15

a) Airfare

[65] The total airfare of $1,614.20 was for two people, the Appellant and his spouse, to go from Toronto to Las Vegas and then from Phoenix to Toronto. However, the Appellant rented a vehicle from Las Vegas to Phoenix at a cost of $689.00. The Minister agreed that this leg of the journey was for business purposes and allowed this sum as a deduction. The Appellant conceded at trial that he should not have claimed the entire amount of $1,614.10 since half of that was attributable to his spouse and therefore was personal in nature. Consequently, he claims half that amount, or $807.10.

[66] The Respondent argues that the trip to Las Vegas was entirely for personal reasons for both the Appellant and his spouse and so the expense for the flight from Toronto to Las Vegas is disallowed. The Respondent asserts that it is only the Appellant's portion of the flight from Phoenix to Toronto that ought to be allowed as rental expense. The Minister has already allowed the car rental $689 (which I find is generous) but concedes that an additional rental expense of $363.58 ought to be allowed on account of travel in respect of his portion of the flight from Phoenix to Toronto. I agree. The Appellant argues that it was more economical to fly to Las Vegas and rent a vehicle to Phoenix and then fly from Phoenix to Toronto than it was to fly return between Toronto and Phoenix and rent a vehicle while in Phoenix. I disagree. This is simply not borne out by the submitted documentation. I am prepared to allow the amount of $363.58 on account of travel expense in addition to the $689 dollars already allowed for vehicle rental.

b) Accommodations and Food

[67] The Appellant claims hotel accommodations and meals at the hotel in the amount of $2,503.81. He also claims an additional $516.49 for meals consumed outside the hotel during his stay in Phoenix. I find that the Appellant spent four nights in Phoenix from April 1st to April 5th when he departed Phoenix. The daily charges were $404 for room rate and $4.48 for room tax for each night for a total

of $408.48 per night. This amounts to a total of 408.48 x 4 = $1,633.92. I am prepared to allow $1,633.92 as rental expenses on account of accommodations.

[68] The hotel invoice submitted also included amounts related to meals consumed at the hotel in the amount of $465.67. The Appellant asserts in his written submissions that the only meals he had at the hotel was lunch and dinner on April 1st, breakfast and dinner on April 2nd and only breakfast on April 3, a total of five meals. That is a lot of money for 2 breakfasts, one lunch and 2 dinners. The Appellant also claims the amount of $516.49 on account of meals consumed outside of the hotel. In his written submissions, the Appellant asserts that this is for 2 breakfasts 4 lunches and 2 dinners. The total claimed for meals is $982.16 for meals consumed on a business trip over 5 days. That is simply an unreasonable amount for one individual. The Appellant has not satisfied me that this amount was in relation to only himself and if it was then this expense is unreasonably high. I am of the view that a reasonable amount to be allowed for meals while in Phoenix is one-half of that amount and even that is generous. Therefore I will allow the amount of $982.16 x ½ = $491.08 on account of meals. This is somewhat arbitrary but I am of the view that it is reasonable in all of the circumstances.

c) Gasoline, Airport Parking and Gift

[69] The Respondent concedes that the Appellant ought to be entitled to deduct additional expenses of $75.37, $90 and $79.53 respectively on account of fuel, Airport Parking and gift for his property manager.

d) Medication

[70] The Appellant claims $43.75 which was spent for sunscreen. This is in the nature of personal expenses and is therefore disallowed.

Disposition of Appeal

[71] For the foregoing reasons, the Appeal is allowed in part and the matter is referred back to the Minister for reconsideration and reassessment on the basis of the following:

a) Vancouver Property – 2012

i. $23,483 is allowed as a current rental expense on account of repairs and maintenance.

ii. $2,613.71 is allowed as a current rental expense on account of Management and Administration Fees. This is in addition to $237.61 paid to Colyvan, $263 paid for business license, $90.44 paid to Rancho Maintenance, $361 paid for office supplies and $100 paid for home warranty expense which sums have already been allowed by the Minister.

iii. $6,137 is allowed as a current rental expense on account of mortgage interest in addition to the $3,926 already allowed by the Minister.

iv. $1,420 is allowed as a current rental expense on account of property taxes in addition to the $1,150 already allowed by the Minister.

v. $1,250 is allowed as a current rental expense on account of fees paid to Rancho Management in addition to sums already allowed by the Minister.

b) Travel Expenses re Arizona Property – 2013

i. $363.58 is allowed as current rental expense on account of travel. This is in addition to the $689 already allowed by the Minister for vehicle rental.

ii. $1,633.92 is allowed as current rental expense on account of accommodations.

iii. $491.08 is allowed as current rental expense on account of meals while in Phoenix, Arizona. This includes the amount of $258.25 and $114.29 which the Respondent has conceded.

iv. The Minister concedes that $75.37, $90.00 and $79.53 ought to be allowed as current rental expenses on account of gas, airport parking and gift for Property Manager respectively.

[72] The Taxpayer is entitled to no other relief.

Signed at Kingston, Ontario, this 11th day of February 2021.

"Rommel G. Masse"

Masse D.J

CITATION:	2020 TCC 5
COURT FILE NO.:	2019-1732(IT)I
STYLE OF CAUSE:	ANTHONY DICAITA V. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	October 8, 2020
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	February 11, 2021

APPEARANCES:

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Counsel for the Respondent	Acinkoj Magok

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