

BETWEEN:

DUY THINH BUI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on September 3, 2013 and decision rendered orally
on September 10, 2013, at Toronto, Ontario.

Before: The Honourable Justice B. Paris

Appearances:

For the appellant: The appellant himself
Counsel for the respondent: Louis L'Heureux

JUDGMENT

The appeals from the reassessment for the 2005 taxation year and from the assessment for the 2008 taxation year made pursuant to the *Income Tax Act* are dismissed, without costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 15th day of October 2013.

"Brent Paris"

Paris J.

Citation: 2013 TCC 326

Date: 20131015

Docket: 2010-3320(IT)I

BETWEEN:

DUY THINH BUI,

Appellant,

and

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REASONS FOR JUDGMENT

Paris J.

[1] There are appeals filed pursuant to the informal procedure from assessments and reassessments in which the Minister of National Revenue (the Minister) disallowed rental losses, capital losses and business losses, as well as the refundable tax credits for beneficiaries residing in Canada claimed by the appellant for the 2005 to 2008 taxation years. At the hearing, the respondent asked the Court to quash the appeals for the 2006 and 2007 taxation years on the ground that the assessments made for those years were "nil" assessments. The appellant agreed to this request and the appeals for those taxation years are quashed.

[2] The amounts reported as rental losses were \$518,470 in 2005 and \$4,695,984 in 2008. The capital loss reported for 2005 was \$1,869,546. The amount of the business loss reported for 2005 was \$50,446. Lastly, the appellant claimed a \$6,110,851 refundable tax credit for beneficiaries residing in Canada for 2008.

[3] At the beginning of the hearing, the appellant confirmed that he understood there were monetary limits for appeals governed by the informal procedure.

[4] The factual assumptions on which the Minister relied to make the assessments in question are set out in paragraph 10 of the Reply to the Notice of Appeal, reproduced in the appendix attached to these reasons.

[5] The appellant has the burden of proving that these facts are not true.

[6] I will summarize the relevant facts. The appellant's father died in France in 2004. His wife and 14 children, including the appellant, are the beneficiaries of his estate.

[7] Among other things, the estate includes four real properties in Vietnam and six in France. The appellant reported rental losses with regard to eight of these properties in 2005, and nine of these properties in 2008. (The appellant stated that he established the losses he reported in the tax return by estimating a rental value for each property.)

[8] In disallowing the rental losses, the Minister presumed that at all relevant times, the appellant was not the owner of any of these properties since they had not been distributed by the estate.

[9] The appellant testified that these properties belonged to him. He seemed to state that the other beneficiaries of his father's estate lost their right to inherit because they acted in bad faith towards their father and towards the estate. He stated that he had taken legal action with regard to the estate, but that his cases were still before the courts in France and the United States. He asked this Court to wait for the judgments in France since the administration of the estate is being processed there.

[10] It is not appropriate, in my opinion, to wait for the liquidation of the estate to be completed or even for a final decision to be rendered by the French court with regard to the estate. First, the appellant did not prove the nature or content of any case brought by the appellant in France. Therefore, I am not able to assess its relevance. Second, Associate Chief Judge Bowman of this Court found, in *Kovarik v The Queen*, 2001 CanLII 513 (TCC), 2001 2 CTC 2503 (at paragraph 22) that:

... This court's function is to decide whether an assessment is right on the facts before it, not whether it might be changed as the result of a subsequent event such as a rectification order. If, every time a particular transaction had unexpected or unwanted tax consequences and the Minister assessed accordingly, this court on an appeal were to defer making a decision and grant a sort of stay of execution while the taxpayer sought a rectification order to reverse the adverse effects of the earlier transaction a goodly number of our cases would be hoist into judicial never-never land pending the disposition of the application by the provincial court. Acting as a form of judicial limbo is not part of this court's mandate.

I agree. All the documentary evidence and testimony presented at the hearing before me supports the respondent's theory that the appellant was not the owner of any of

the property in question. The property tax bills for the real properties in France, produced by the appellant himself, show that these properties are still registered in his late father's name or in his late father and his wife's names together. The estate statements also show that the real properties in France and Vietnam are part of the estate. During cross-examination, the appellant himself admitted that the estate had not yet been distributed. As such, in Ontario, the appellant did not have ownership of the property that was part of the estate. If the appellant wanted to show that French law granted him ownership of the property that was still part of his late father's estate, he should have submitted evidence through an expert witness on French law in this regard. In the absence of such evidence, I must find that French law is the same as Canadian law on this matter. In *Backman v Canada*, 2000 1 FC 555, at paragraph 38, the Federal Court of Appeal ruled on this issue as follows :

38 Where foreign law is relevant to a case, it is a question of fact which must be specifically pleaded and proved to the satisfaction of the Court. Professor J.-G. Castel has summarized the effect of the failure of a party to establish foreign law as a fact before the Court:

If foreign law is not pleaded and proved or is insufficiently proved, it is assumed to be the same as the *lex fori*. This seems to include statutes as well as the law established by judicial decision.

[11] The appellant did not show that he was entitled to receive income from the estate during the 2005 and 2008 taxation years either. If he was not entitled to this, he could not claim any loss related to this income.

[12] Moreover, the appellant admitted that the rental losses he reported were estimated amounts, determined based on a rental value for each property, calculated by the appellant himself. I am not at all convinced that these estimates reflect reality. Therefore, even if the appellant had shown that he was the owner of these properties, which he did not do, I would have disallowed the deduction of these losses on the ground that the amounts were not established. I rely on the Federal Court of Appeal decision in *Northwood Pulp and Timber Ltd. v Canada*, 1998 CanLII 8602 (FCA), 98 DTC 6640, in which the court stated the following, at paragraph 9:

[9] The appellant's position in the present case is inconsistent with "established case law principles". We agree with what the learned Trial Judge said in the present case:

The thrust of the cases referred to by both counsel show that the Courts have consistently disqualified for income tax purposes, in calculating taxable profits, amounts that are

provisional estimates, are conditional, contingent or uncertain. The estimates disallowed by the Minister here were certainly of that nature.

[13] The capital loss the appellant claimed for the 2005 taxation year was composed of many elements, all detailed at subparagraph 10(h) of the Reply to the Notice of Appeal. With regard to the alleged losses regarding the two properties in Vietnam (the first two elements), the appellant admitted that in 2005 there had been no disposition of these properties. Paragraph 39(1)(c) of the *Income Tax Act* (the Act) states that a capital loss must result from the disposition of a property.

[14] The loss claimed with regard to the property in Los Angeles (the third element), the former principal residence of the appellant and his family, cannot be allowed either. According to the appellant's wife's testimony, this house was seized by the bank holding the mortgage on the house. The seizure took place in the early 1990s.

[15] Pursuant to sub-paragraph 40(2)(g)(iii) of the Act, any loss resulting from the disposition of a personal-use property is deemed to be nil. Moreover, the loss in question occurred well before 2005, and could not be claimed in 2005. For these reasons, the claim for a loss with regard to the disposition of the Los Angeles house is disallowed.

[16] The fourth element of the capital loss consists of an amount the appellant claims he should have received, but did not receive, following the sale of an apartment situated at 9 boulevard Barbès in Paris, fax dated 15-4-2011 pp. 133/A-6, which he held in co-ownership with his brother. With no clarifications about the date of disposition or any document whatsoever to corroborate the appellant's testimony that he was the co-owner, I find that he did not show that he suffered a capital loss with regard to this property.

[17] The fifth, sixth and seventh elements of the capital loss claimed are with regard to gold and amounts of cash that, according to the appellant, were stolen from his late father's estate. He stated that the gold and cash belonged to the estate. If this were the case, he cannot claim a capital loss because the loss was incurred by the estate not him, if there had indeed been a loss.

[18] The last element of the capital loss was described by the appellant as a mathematical adjustment between him and his wife regarding a promissory note. With no clarifications about the nature of this loss, I cannot allow the deduction.

[19] I must now consider the issue of the business losses reported by the appellant for the 2005 taxation year, regarding the firm Thinh Bui and the business TNT E-Commerce. During cross-examination, the appellant admitted that the expenses resulting in these losses were incurred for the administration of his late father's estate. Moreover, nothing in the evidence shows that the appellant operated any type of commercial business in 2005 or that the expenses claimed were incurred for the purpose of earning an income in the course of a commercial activity. The Minister properly disallowed these losses.

[20] Lastly, there is the issue of refundable tax credits for beneficiaries residing in Canada that the appellant claimed pursuant to subsection 210.2(3) of the Act. Subsection 210.2(3) allows for a refund of the tax paid by a trust under Part XII.2 of the Act. The refund to beneficiaries is allowed if the conditions listed at subsection 210.2(3) are met. Without going into the details of the application of Part XII.2 of the Act, I will simply note that the tax refund provided under subsection 210.2(3) is dependent on whether the trust paid an amount of income tax pursuant to the Act.

[21] In this case, the appellant admits that there was no tax paid by a trust. It is therefore clear that he is not eligible for the tax credits claimed because there is no amount to be refunded.

[22] Having analyzed the appellant's claims and the evidence he submitted, and having heard his arguments and the respondent's arguments, I find that the appellant did not show that the Minister erred in fact or in law when making the assessments for the 2005 and 2008 taxation years. The appeals regarding these two years are therefore dismissed. Those regarding the 2006 and 2007 taxation years were already quashed.

Signed at Ottawa, Canada, this 15th day of October 2013.

"Brent Paris"

Paris J.

Translation certified true
on this 4th day of November 2013.
Elizabeth Tan, Translator

APPENDIX 1

[TRANSLATION]

10. To determine the tax payable by the appellant for the 2005, 2006, 2007 and 2008 taxation years, the Minister relied on the following assumptions of fact:

1. Rental losses

(a) in his tax returns for the 2005 to 2008 taxation years, the appellant claimed rental losses with regard to properties in Vietnam and France as follows:

	Properties Vietnam	2005	2006	2007	2008
1	1095 Tran Hung Dao, Vietnam	\$114,773	\$190,879	\$418,770	\$887,473
2	1097 Tran Hung Dao, Vietnam	\$114,763	\$190,731	\$418,770	\$887,473
3	1099 Tran Hung Dao, Vietnam	\$228,514	\$381,442	\$4,692,622	\$2,817,011
4	67 Duy Tan Pho Hue, Vietnam	\$58,385		\$12,683	\$66,723
5	5 avenue de Lattre de Tassigny, France	\$500		\$15,708	\$16,157
6	9 Bd. Bardes, France studio Lot 4			\$9,534	
7	9 Bd. Bardes, France – Commercial	\$500		\$6,048	\$6,212
9	8 rue Châteaudun, France	\$535		\$6,624	\$6,360
10	69 rue Montpanasse, France	\$500		\$2,491	\$1,098
11	2 avenue Tourelle, France			\$4,208	\$7,477

(b) at all relevant times, the appellant was not the owner of any of these properties;

(c) at all relevant times, these properties were held by the estate of the appellant's father, of which he is one of the 14 beneficiaries;

(d) at all relevant times, no distribution had been made by the estate of the appellant's father;

- (e) the appellant did not incur a rental loss with regard to the properties in question during the years in question;
- (f) to determine the amount of the rental losses, the appellant used a hybrid accounting system that seems to be allowed under the *Code général de l'impôt français*. Pursuant to this method, a tenant can choose to not pay rent for a period of 5 years and the landlord would not have to report rental income for as long as the rent is not received;
- (g) with this in mind, the appellant calculated his rental losses using, for the most part, the following reasoning:
 - he claimed rental expenses under various titles, including "administration fees", "office expenses", or "other expenses", in order to bring his net rental income to nil;
 - these rental expenses were not paid or incurred by the appellant and the amounts claimed are arbitrary;
 - the appellant also claimed a terminal loss under subsection 20(16) of the Act although none of the properties in question were subject to a disposition during the years in question;
 - the rental expenses, combined with the terminal losses claimed under subsection 20(16) of the *Income Tax Act*, R.S.C. (1985) c. 1 (5th Suppl.) (the Act), created the rental losses the appellant claimed.

2. Capital losses

2005

- (h) the appellant declared capital losses in his 2005 tax return with regard to the following properties:

Item	Nature of property in question	2005
1	Property at 67 Duy tan, Pho Hue, Vietnam	\$280,000
2	Property at 1099 Tran Hung Dao, Vietnam	\$2,489,760
3	Property at 724 Genese Ave. LA 900046	\$209,020
4	Property at 9 Bd Bardes, France	\$10,000
5	Gold	\$1,470,546
6	SCI Duncan France (cash)	\$161,000
7	SCI Immoretel France (cash)	\$238,000
8	Promissory note by Monique Metrasse	\$45,800

- (i) the appellant did not incur any loss with regard to items 1 to 8;
- (j) none of the items 1 to 8 were the subject of a disposition during the years in question;

Real property: items 1, 2, 3 and 4

- (k) at all relevant times, the appellant was not the owner of the real property noted at items 1, 2, 3 and 4;
- (l) at all relevant times, these properties were held by the estate of the appellant's father, of which he was one of the 14 beneficiaries;
- (m) at all relevant times, no distribution had been made by the estate of the appellant's father;
- (n) none of the real properties noted at items 1, 2, 3 and 4 were the subject of a disposition during the taxation years in question;
- (o) items 3 and 4, for which the associated losses are a result of foreclosures on mortgages, had not been acquired or used by the appellant for the purpose of earning business or property income;

Gold and cash: items 5, 6 and 7

- (p) items 5, 6 and 7 represent gold and cash allegedly stolen from the estate of the taxpayer's father;
- (q) at all relevant times, the appellant was not the owner of items 5, 6 and 7; this property belonged to the appellant's father and, after his death, to his estate;

- (r) moreover, items 5, 6 and 7 were not acquired by the appellant to earn property or business income;

Promissory note by Monique Metrasse: item 8

- (s) item 8, which represents a promissory note issued by the appellant's spouse Monique Metrasse, was not acquired by the appellant for the purpose of earning business or property income;

2006

- (t) in his 2006 tax return, the appellant also declared capital losses totalling \$658,210;
- (u) the appellant did not provide any documentation or justification to explain such losses;
- (v) the appellant did not incur such losses in 2006 for property acquired for the purpose of earning business or property income;

3. Business losses

- (w) the appellant claimed business losses in his 2005 and 2007 tax returns as follows:

	2005	2007
Thin Bui Firm	\$25,283	
TNT E-Commerce	\$25,163	\$10,911

Thin Bui Firm

- (x) the appellant did not operate a business with regard to the firm Thin Bui;
- (y) no gross income was declared with regard to the firm Thin Bui;
- (z) the expenses claimed with regard to the firm Thin Bui represent personal expenses incurred to manage the estate of the appellant's father in France and are not related to a business operations;
- (aa) the expenses claimed with regard to the firm Thin Bui were not all paid or incurred;

TNT E-Commerce

- (bb) the appellant did not operate a business with regard to TNT E-Commerce;

- (c) the appellant did not report any gross income for 2005, and reported \$800 for 2007;
- (dd) the expenses claimed with regard to TNT E-Commerce are personal and not related to the operation of a business; some of these expenses are related to the management of the estate of the appellant's father;
- (ee) the expenses claimed with regard to TNT E-Commerce were not all paid or incurred;

4. Refundable tax credit for beneficiaries residing in Canada

- (ff) in his 2007 and 2008 tax returns, the appellant claimed "refundable tax credits for beneficiaries residing in Canada" pursuant to subsection 210.2(3) of the Act, for the amounts of \$4,388,337.68 and \$6,110,866.91 respectively;
- (gg) in order to claim these credits, the appellant provided the Minister with T3 slips, "Statement of Trust Income Allocations" apparently issued by the trust "BUI Ngoc Chau BUI Duy Thinh" whose address is allegedly 5 Ave de Lattre de Tassigny, Saint-Maur, France.
- (hh) at all relevant times, this trust that issued the T3 slips for the appellant was a non-resident trust and was not registered for tax purposes; and
- (ii) at all relevant times, this trust that issued the T3 slips, whether validly registered or not, did not pay Part XII.2 taxes.

CITATION: 2013 TCC 326

COURT FILE NO.: 2010-3320(IT)I

STYLE OF CAUSE: DUY THINH BUI AND HER MAJESTY
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 3 and 10, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: October 15, 2013

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Louis L'Heureux

COUNSEL OF RECORD:

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Name:

Firm:

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