

IN THE OREGON TAX COURT

MAGISTRATE DIVISION

Income Tax

DOROTHY J. SOLICK,

Plaintiff,

v.

DEPARTMENT OF REVENUE, State of Oregon,

Defendant.

TC-MD 040845F

DECISION

This matter is before the court on Plaintiff's appeal of Defendant's denial of her casualty loss claim for tax year 2001. Case management conferences were held on October 4, 2004, November 8, 2004, and December 15, 2004. Plaintiff represented herself. Defendant was represented by Michael Hamilton, of its staff. At request of the parties, the record was closed following the final case management conference.

I. STATEMENT OF FACTS

The court finds the following facts based upon the submissions and arguments presented by the parties. In 2001, Plaintiff and her family became seriously ill with symptoms such as headaches, nosebleeds, wheezing, and coughing. In May of that year, Plaintiff learned of something called "toxic mold" when she happened to see a television program describing the same symptoms in a family who had lost their home to toxic mold contamination. Although she had completed an extensive remodel of her kitchen, bathroom, and one other room between 1998 and 2000 and found no signs of mold, Plaintiff hired an environmental service to inspect her home. By the end of the month she received its report stating that toxic molds were present, likely due to a windstorm that had blown away several shingles in an area of the roof not easily seen.

Fortunately for Plaintiff, her homeowners' insurance policy had been purchased prior to the now-standard exclusion of losses due to toxic mold and her insurer immediately financed several attempted cures. However, when the environmental service removed and replaced sheetrock and insulation from a wall in the baby's room and treated the studs, toxic mold covered the treated studs again within 24 hours. On June 18, 2004, Plaintiff's insurer had her roof completely replaced, again to no avail. Within four days the environmental service determined that the toxic mold was systemic and, on June 22, 2001, Plaintiff's insurer financed the family's evacuation.

Plaintiff's testimony regarding the shock and trauma of learning about toxic mold and finding herself and her family stripped of home and possessions within a two-month period of time was very credible. It is substantiated by environmental reports and the actions taken by her insurer. Plaintiff's insurer gave her the choice of having the loss of her home or the loss of her personal property covered by her homeowners' policy. Plaintiff chose to be reimbursed for the loss of her home. Thinking that there was no hope of coverage for her possessions, Plaintiff did not take photographs. Because paper is a prime medium for growing molds, Plaintiff retained no receipts from which the value of the property she lost could be ascertained.

Although her doctors, her insurance company, and both environmental services told Plaintiff that all personal property that could not be disinfected by submersion in a bleach solution would have to be left behind, Plaintiff could not believe that she would have to give up everything she owned. She described trying to save a wooden bedframe by bleaching the wood and then painting it before moving it into her rental home, but the nose bleeds, headaches, and coughing renewed within days. Not even her son's saxophones could be decontaminated. Few items could be saved; Plaintiff testified that she spent hundreds of dollars disposing of her possessions at the local dump. By August 7, 2002, the City of Ashland issued a permit for the demolition of Plaintiff's home; the building and everything too large to haul to the dump were burned to the ground.

After the fact, Plaintiff learned that the loss of her personal property could qualify as a casualty loss on her tax return for that year; she estimated her loss and claimed \$38,617 on Schedule A of her Oregon tax return for 2001. Defendant denied her the deduction and Plaintiff appeals to this court.

II. ANALYSIS

At issue is whether the loss of Plaintiff's possessions due to contamination by toxic mold was an event of a "sudden, unexpected or unusual nature" and, if so, whether Plaintiff may deduct \$38,617 as a casualty loss for tax year 2001.

Defendant argued that because toxic mold has existed since prehistoric times, can take many years to appear, and has been affecting homes for more than 20 years, Plaintiff's loss was due to a progressive deterioration and a common substance rather than an event that qualifies as sudden, unexpected, or unusual. Defendant also questioned Plaintiff's substantiation of the dollar value of her loss, whether Plaintiff could have sold her possessions and recouped some of her loss, and whether she actually destroyed her possessions.

The court agrees that the presence of "garden-variety" molds in homes is a common and unsurprising occurrence in western Oregon. However, the evidence shows that common molds were not the cause of the losses Plaintiff experienced in 2001. Plaintiff submitted the results of environmental testing from two companies that show her home was contaminated by toxic mold. Those reports were not contested. The court finds Plaintiff's testimony regarding the suddenness of the onset of her family's illness, the resulting diagnosis of toxic mold, and their evacuation and loss credible evidence of an unusual and unexpected situation. For a family to be enjoying their newly-remodeled home without illness at the beginning of the year and finding themselves sick and evacuated to temporary quarters without any possessions within six months is unusual. For an insurance company to pay to burn down a home that it had just put a new roof on, is even more unusual. The unexpectedness of the event is clear from Plaintiff's first knowledge of the phenomenon of toxic mold in May and the diagnosis of toxic mold in her home before the end of the month. That six months is a time period that could qualify as sudden enough for a casualty loss is substantiated by case law.

In *Maher v. Commissioner*, 76 TC 593 (1981), *aff'd*, 680 F2d 91 (11th Cir 1982), the court held that it was the suddenness of the loss itself, not the suddenness of the precipitating event, that determines whether the requirement of suddenness is met. In that case, because ornamental palm trees that were attacked by insects did not begin to die until after 9 or 10 months, the loss was not sudden and could not be deducted as a casualty. To be sudden, an event must be "of a swift and precipitous nature and not gradual or progressive." Rev Rul 72-592, 1972-2 CB 101. In *Kilroe v. Commissioner*, 32 TC 1304 (1959), the taxpayer's home had been inspected and declared free of termites in mid-January, but in the latter part of April infestation and substantial damage was found. That court stated:

"The term 'suddenness' is comparative, and gives rise to an issue of fact under circumstances which may exist in a variety of backgrounds in respect of which the rapidity and detection of the damage may vary considerably, depending on the nature of the hostile operating force and the surrounding circumstances of the particular case." *Id.* at 1306.

That court also stated that it did not expect the taxpayer to "pinpoint the date of invasion with exactitude" and that persuasive to its decision to find for the taxpayers was that they had taken preventative measures to guard against termite infestation, there was no exterior evidence of damage, and the time period involved was brief. *Id.* at 1309, 1311.

Plaintiff's position here is on point with the *Maher* and *Kilroe* cases. Plaintiff testified that she had quickly dealt with water damage in two prior incidents - a leaking hot water heater and visible damage to her roof - demonstrating her conscientiousness as a homeowner. During the extensive remodeling that took place through 2000, no sign of mold was discovered and no symptoms from toxic mold exposure appeared. Not only was the growth of the toxic mold sudden, but Plaintiff's loss itself was sudden. Illness, evacuation, and separation from her possessions all occurred within the first six months of the year. In the past, this court has held that a casualty loss has "an element of accident or uncontrollable force." *Chart Development v. Dept. of Rev.*, 17 OTR 170 (2003) (holding that removal of timber by owner was not a casualty loss). The rapid growth of toxic mold in Plaintiff's home and failed attempts at eradicating it demonstrate an uncontrollable force. For the above reasons, the court finds that Plaintiff's loss of possessions to toxic mold contamination was not only unusual and unexpected, but also sudden.

The court also finds credible Plaintiff's testimony regarding the value of her contaminated possessions. Plaintiff presented the court with a letter and a report from two environmental services that document contamination of her home by *Stachybotrys* and other toxic molds, and describe her home as "heavily contaminated." A scientific report submitted to the court by Defendant describes *Stachybotrys* as being hidden in the floors, walls, or ceiling, "with no or little visible evidence within the interior of the room," and states that spores contaminate the interior of the room through cracks in the building materials. (Def's Ex A at 4.) The report warns that if *Stachybotrys* is discovered, "do not attempt to solve the problem without following recommended safety procedures for working with toxic molds, especially if heavily contaminated." (*Id.* at 5.) Respirators, gloves, eye and skin protection, and disposal of contaminated materials in plastic bags is recommended; most notably, the report states: "Disinfecting the surface of contaminated materials, a common reaction to deal with molds, may kill the fungus on the surface, but mycelium within the substrate will often survive and grow again." (*Id.*)

The above statements corroborate Plaintiff's testimony of her attempts to decontaminate her household possessions. In addition, letters from local secondhand-goods stores and an estate liquidation service that are signed by the proprietors state that they spoke with Plaintiff but do not purchase items infected with *Stachybotrys*. In light of the scientific report submitted by Defendant, that would seem a prudent and principled business decision, one that precluded Plaintiff from mitigating her loss by resale.

Underlying the loss deduction provisions of Internal Revenue Code section 165 is the concept of "a financial detriment actually suffered by the taxpayer." Jacob Mertens, Jr, 7 *Mertens Law of Federal Taxation* §28:01. The few photographs Plaintiff was able to submit to the court show a home that was once furnished amply and included antiques, family heirlooms, and artwork that would be difficult to price - and prove that her possessions were not of low value. Defendant's suggestion that Plaintiff could determine the value of her newly-purchased \$1,200 Amana refrigerator and a ceramic top radiant stove by comparing them to appliances available at her local Goodwill store is not reasonable. That a taxpayer with the purchasing power to fill her home with such appliances and artwork collections could have lost \$38,617 in personal possessions to contamination of her home by toxic mold is reasonable. Her claim is further substantiated by the higher figure she arrived at after complying explicitly with Defendant's instructions.

The court finds Plaintiff's claim of \$38,617 in casualty loss for tax year 2001 both reasonable and substantiated. Plaintiff's appeal for reversal of Defendant's assessment of tax, interest, and penalties is granted.

III. CONCLUSION

The conclusions of this court are that Plaintiff has demonstrated that the contamination of her home with toxic mold was an event that was not only sudden, but also unusual and unexpected, and that her claim of \$35,617 in casualty loss of her possessions is substantiated.

Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is granted.

Dated this _____ day of March 2005.

SCOT A. SIDERAS

MAGISTRATE

THIS DOCUMENT WAS SIGNED BY MAGISTRATE SCOT A. SIDERAS ON MARCH 8, 2005 . THE COURT FILED THIS DOCUMENT ON MARCH 8, 2005.

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, BY MAILING TO: 1163 STATE STREET, SALEM, OR 97301-2563; OR BY HAND DELIVERY TO: FOURTH FLOOR, 1241 STATE STREET, SALEM, OR. YOUR COMPLAINT

**MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE
DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE
CHANGED.**