Docket: 2014-670(IT)I

BETWEEN:

ERIC DE SANTIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 19, 2015, at Ottawa, Canada.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	André Leblanc

JUDGMENT

The appeal from reassessments made under the *Income Tax Act* for the 2009, 2010 and 2011 taxation years is allowed, without costs, and the reassessments at issue are vacated.

Signed at Ottawa, Canada, this 17th day of April 2015.

"Robert J. Hogan"

Hogan J.

Translation certified true
On this 3rd day of June 2015
Margarita Gorbounova, Translator

Citation: 2015 TCC 95
Date: 20150417
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REASONS FOR JUDGMENT

Hogan J.

I. Overview

[1] The appellant is appealing from reassessments in which the Minister of National Revenue (the Minister) reduced the value of donations of bottles of wine for the 2009, 2010 and 2011 taxation years, by the following amounts:

Taxation year	Donations deducted by the appellant	Donations disallowed by the Minister
2009	$1,050	$697
2010	$1,100	$756
2011	$8,550	$5,878

[2] In addition, for the 2011 taxation year, the appellant reported a capital gain of $5,500 in his income tax return relative to a donation of a bottle of wine appraised at $6,500. In his assessment, the Minister reduced the taxable capital gain by $2,235 in order to take into account the adjustment mentioned above.

II. Factual background

[3] The appellant is a wine enthusiast. During the years at issue, the appellant made donations of bottles of wine to the charity Fondation du Centre de santé et de services sociaux de Gatineau (the Foundation).

[4] The Foundation is a Canadian registered charity located in Gatineau, Quebec.

[5] The donations made by the appellant were used to help the Foundation fundraise through its annual premium wine auction. The funds raised in this way every year made it possible to support the Centre de santé et de services sociaux de Gatineau in reaching its goals, namely, improving the health and wellness of members of the community it serves.

[6] The auction took place under the authority of the Société des alcools du Québec (SAQ), and the wines sold were rare wines, not available in its stores.

[7] The bottles of wine were sold in lots. No guarantees were provided on the lots either by the Foundation or by the auctioneer. In addition, all the lots had to be awarded to the highest bidder.

[8] The wines donated to the Foundation are appraised by Alain Laliberté. He is a wine appraiser and sommelier with a degree from the Faculté d'œnologie de Bordeaux. However, he is not a chartered appraiser despite his extensive knowledge of the subject.

[9] In 2009, the appellant donated to the Foundation three bottles of wine appraised by Mr. Laliberté at $350 each. He therefore received an official tax receipt for a total of $1,050 and enclosed it with his income tax return for the 2009 taxation year.

[10] The appellant testified that he had attended the auction and that the three bottles of wine were sold in a lot with two other wines, which did not belong to him, for a total of $800. The lot of five bottles of wine was appraised at $1,700.

[11] In February 2010, the appellant received an appraisal note from Mr. Laliberté regarding the 2009 donations confirming that the three bottles of wine in question were appraised correctly.

[12] In addition, in 2010, the appellant donated to the Foundation three bottles of wine appraised by Mr. Laliberté at a total of $1,100.

[13] In the winter of 2011, the appellant received an appraisal note from Mr. Laliberté regarding the 2010 donations confirming the value attributed to the appellant's three bottles of wine.

[14] At the hearing, the appellant stated that, in 2011, he went through a very difficult personal situation during which he used the care and support of the network of the Centre de santé et de services sociaux de Gatineau. That was the reason why he decided to make a more substantial donation to the Foundation that year.

[15] Thus, the appellant donated seven bottles of wine for the annual auction. The wines were appraised by Mr. Laliberté at a total of $8,550. One of the seven bottles of wine donated was appraised at $6,500; therefore, the appellant reported a capital gain of $5,500 for that taxation year.

[16] In the winter of 2012, the appellant received an appraisal note from Mr. Laliberté regarding the 2011 donations confirming the value attributed to the appellant's seven bottles of wine.

[17] In his notices of reassessment, the Minister reduced the total value of the bottles of wine donated by the appellant by a factor of 3.2, which resulted in the donation amounts of $328 for the 2009 taxation year, $344 for the 2010 taxation year and $2,672 for the 2011 taxation year.

III. Issues

[18] The issues raised by the respondent are as follows:

(a) What is the fair market value of the wine donated by the appellant?

(b) What is the taxable capital gain with regard to the wines donated by the appellant in 2011?

IV. Analysis

(1) Rules of evidence in informal procedure

[19] First, a preliminary issue that the Court was faced with during the parties' arguments must be clarified. Counsel for the respondent raised the issue that the evidence filed by the appellant, more specifically, Mr. Laliberté's appraisal notes, were unreliable. He has argued that the rules of hearsay evidence apply even though the appeal is governed by the informal procedure.

[20] The rule on evidence management in cases before the Court that are governed by the informal procedure is stated in subsection 18.15(3) of the *Tax Court of Canada Act*:[1]

> 18.15(3) Notwithstanding the provisions of the Act under which the appeal arises, the Court is not bound by any legal or technical rules of evidence in conducting a hearing and the appeal shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit.

> 18.15(3) Par dérogation à la loi habilitante, la Cour n'est pas liée par les règles de preuve lors de l'audition de tels appels; ceux-ci sont entendus d'une manière informelle et le plus rapidement possible, dans la mesure où les circonstances et l'équité le permettent.

[21] This provision was recently interpreted by the Federal Court of Appeal in *Madison v. Canada*.[2] It had to be determined whether the judge of the Tax Court of Canada had erred in refusing to admit in evidence the notes taken by the appellant during a telephone conversation relevant to the dispute.

[22] Justice Sharlow overturned the trial judge's decision, finding that an error of law had been made, as indicated in the following excerpt:

> More importantly in the present context, it is an error of law to exclude hearsay evidence in a Tax Court proceeding conducted under the informal procedure rules without first considering whether it is sufficiently reliable and probative to justify its admission, taking into account the need for a fair and expeditious hearing (*Selmeci v. Canada*, 2002 FCA 293, at paragraph 8).[3]

[23] In *Selmeci v. Canada*,[4] the Federal Court of Appeal confirmed the broad discretionary power of a Tax Court of Canada judge in his or her assessment of the evidence under the informal procedure. Justice Malone stated that, in enacting section 18.15 of the *Tax Court of Canada Act*, parliament "did not intend to eradicate the normal rules of evidence under the Informal Procedure".[5] He stated that, rather, the provision was intended "to provide Tax Court Judges with the necessary flexibility to enable

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[1] R.S.C. 1985, c. T-2.
[2] 2012 FCA 80.
[3] Ibid.
[4] 2002 FCA 293.
[5] Ibid., paragraph 9.

them to deal as informally and expeditiously with an appeal as the circumstances of the case and considerations of fairness allow".[6]

[24] Accordingly, to respond to the respondent's argument, the rules of hearsay evidence clearly cannot be disregarded merely because the hearing was conducted under the informal procedure. It is, nonetheless, well established in the case law that a Tax Court of Canada judge has broad discretion with respect to assessing the reliability of a piece of evidence and of the need for this evidence. It would therefore be an even bigger error for the judge to reject evidence on technical legal grounds without considering whether the evidence is sufficiently reliable and probative to justify its admission.[7]

(2) Applicable burden of proof

[25] The respondent also argues that, when a taxpayer seeks a deduction in computing the tax payable, the onus is on him or her to establish that he or she is entitled to that deduction.[8]

[26] In *Hickman Motors Ltd. v. Canada*,[9] the Supreme Court of Canada established the principle that, in appealing the Minister's assessment, the taxpayer has the initial burden of making a *prima facie* case demolishing the Minister's assumptions in support of the assessment. If the taxpayer succeeds in this, the burden of proof shifts to the Minister, who must then establish the correctness of the assessment on the balance of probabilities. Only after the Minister has discharged his burden of proof, the taxpayer must then again prove his version of the facts by a preponderance of evidence.

[27] In *House v. Canada*,[10] the Federal Court of Appeal applied the principles stated in *Hickman Motors*. The Court stated that a *prima facie* case based on the credible testimony of a taxpayer was sufficient with or without supporting documents to enable the taxpayer to discharge the burden of demolishing the Minister's assumptions. Justice Nadon relied, *inter alia*, on *Amiante Spec Inc. v. Canada*[11] in stating that principle.

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[6] Ibid.
[7] *Suchon v. Canada*, 2002 FCA 282, paragraph 32 (leave to appeal to SCC refused).
[8] Transcript, page 97, lines 25 to 28.
[9] [1997] 2 SCR 336, [1997] SCJ No. 62 (QL).
[10] 2011 FCA 234.
[11] 2009 FCA 139.

[28] Thus, the Federal Court of Appeal overturned the decision of the Tax Court of Canada on the ground that the trial judge had not applied the correct burden of proof with regard to the Minister's assumptions:

> As stated earlier, the appellant's burden was that of mounting a *prima facie* case "demolishing" the Minister's assumptions. In other words, the appellant's burden was to demonstrate that the Minister's assumptions were incorrect, not to establish that he had not received $305,000 in 2003. . . .
>
> [Emphasis added.]

[29] Accordingly, the appellant's burden of proof must not be different from that imposed by that principle stated by higher courts and well established for several years.

[30] At this stage of the analysis of the evidence, the Court must determine whether the appellant had successfully rebutted the Minister's assumptions in support of the assessments by mounting a *prima facie* case. Three approaches are possible to determine this. The taxpayer may discharge the burden of making a *prima facie* case by showing that one or more of the Minister's assumptions were wrong, showing that the assumptions are not relevant to the assessment or establishing that the Minister did not in fact make the assumptions that he claims he based himself on when assessing the taxpayer.[12]

[31] The appellant has discharged his or her burden of proof when he or she has produced credible and uncontradicted evidence on one of these points.[13]

(3) Evidence presented

[32] The taxpayer tried to prove the following assumption of the Minister to be incorrect:[14]

> [TRANSLATION]
> (d) As of the date of the donations, the fair market value of the wines donated by the appellant was at most $328 for the wines donated in 2009, $344 for the wines donated in 2010 and $2,672 for the wines donated in 2011.[15]

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[12] "Tax Disputes with the Canada Revenue Agency (CRA) — The Burden of Proof" (February 24, 2011), Pushor Mitchell LLP (blog) online: http://www.pushormitchell.com/2011/02/tax-disputes-canada-revenue-agency-cra-burden-proof/.

[13] William Innes and Hemamalini Moorthy. "Onus of Proof and Ministerial Assumptions: The Role and Evolution of Burden of Proof in Income Tax Appeals". (1998) 46:6 Can. Tax J. 1187, at page 1208.

[14] Transcript, page 60.

In other words, the Minister assumed that the appraisals of the wines donated by the appellant had been increased by a factor of 3.2 in order for the tax credit to correspond to the fair market value of the wine, as it appears from paragraph 5 of the Reply to the Notice of Appeal.

[33] This assumption of the Minister is compatible with the information in some documents provided by the Canada Revenue Agency (CRA) and filed in evidence by the appellant. First, the auditor in this case explains in a letter addressed to the appellant that he had found that, on average, the fair market value provided by the appraiser, Mr. Laliberté, was more than three times higher than the sale price at the auction. According to him, a factor of 3.2 was applied by Mr. Laliberté, to increase the tax credit so that it corresponds to the fair market value of the bottle.[16] The auditor relied on section 2 of Mr. Laliberté's document entitled [TRANSLATION] "Wine appraisal procedures for charitable purposes", reproduced in part below:

> [TRANSLATION]
> 2. Researching information from different sources in order to establish an average market price for northeastern North America, which is divided into various jurisdictions and as many different taxation systems as there are states and provinces.
>
> . . .
>
> This average market price is then multiplied by a factor of 3.2 to round off the final appraisal. Why 3.2? Simply because on average the real remaining value of the tax credit is equivalent to the average market price but does not take into account the costs to consider if a wine is only available in the United States or even in Europe or Asia, as is the case for most wines.[17]
>
> [Emphasis added.]

[34] In the above-mentioned letter, the auditor states that the method Mr. Laliberté used to appraise the wine takes into account the international market,[18] while the most relevant market was that of the auction at which the wine was sold.[19] The auditor states the following in the audit report:

> . . . The fact is the bottles were donated in the National Capital Region and then auctioned in the National Capital Region. While the National Capital Region may

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[15] Reply to the Notice of Appeal, paragraph 11.
[16] Exhibit A-1, tab 14, page 11.
[17] Ibid., page 117.
[18] Ibid., page 11; see also paragraph 3 of the Reply to the Notice of Appeal.
[19] Exhibit A-1, tab 14, page 11.

> not command the same prices as other major cities, this does not preclude it from being the "relevant market". The same bottle sold at auction in New York, Toronto and the National Capital Region will fetch vastly different prices because ***they are*** each a different market; each with different demographics and economic variables. Over ten charities in the Ottawa area hold fine wine auctions each year. Within a four year period 2001-2004 our auditors took a sample of 3569 bottles – this represents only a fraction of the bottles sold during this period. It is our position that a market has been created by virtue of these annual wine auctions.[20]

[35] Finally, in the audit report, the auditor specifies that, given that the wines in question were sold mainly in lots, the various lots are the property to be appraised:

> . . . the courts are clear that one cannot value all assets separately then simply sum the total of each to arrive at a group value – which was done. The courts also recognize that selling assets in groups devalues the assets and a discount factor must be applied – which was not done.[21]

[36] Thus, the auditor simply reduced the fair market value determined by Mr. Laliberté by a factor of 3.2, basing himself on Mr. Laliberté's appraisal procedure document, as clearly shown in the audit report:

> According to the appraisers' [*sic*] evaluation methodology, the average fair market value (FMV) of the bottles of wine donated to the CSSS Fondation wera [*sic*] multiplied by a factor of 3.2 to increase the tax credit to the FMV of the bottles. In addition, the prices the bottles fetched at auction represent less than 31.25% (1/3.2) of the FMV determined by the appraiser. . . . In consequence, we have readjusted the FMV of the bottles of wine donations [*sic*] by the factor of 3.2. . . .
>
> We readjusted the capital gains by a factor of 3.2 as a result of the the [*sic*] revaluation [*sic*] of the wine bottles FMV as per paragraph 39(1).[22]

[37] The appellant disputes that assumption of the Minister on the five grounds outlined below.

[38] First, the appellant claims that the Minister was wrong with regard to the factor applied by Mr. Laliberté. He argues that Mr. Laliberté applied a factor of 2.2 or even 1.8, not 3.2, to an average market price.

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[20] Ibid., page 145.
[21] Ibid., page 17.
[22] Ibid., page 22.

[39] The appellant added that the Minister erred regarding the reason for the increase of the fair market value established by Mr. Laliberté. He argues that applying the factor was necessary, not to make the tax credit amount correspond to the fair market value, but rather to take into account the costs to consider when a wine is only available in the United States, Europe or Asia.

[40] The appellant is relying on Mr. Laliberté's appraisal procedures document, which states the following:

> [TRANSLATION]
> The following costs are included in my multiplying ratio of 3.2, which does not apply to all of the wines because it varies depending on the value of the bottle. If they are less costly, the ratio may be lowered to 2.2, or even 1.8.
>
> 1. Capital investment
>
> 2. Customs fess
>
> 3. Transportation
>
> 4. Storage
>
> 5. Insurance
>
> 6. Sales tax
>
> 7. Various acquisition fees
>
> 8. Brokers' fees
>
> 9. And, especially, the rarity of the product after 10-20 or 30 years of distribution[23]

[41] Accordingly, the appellant argues that the Minister based his assumption that Mr. Laliberté inflated the market value of the wines by multiplying it by a factor of 3.2 on an unreasonable selective reading and an erroneous interpretation of Mr. Laliberté's appraisal procedures.

[42] Second, the appellant claims that the Minister erred in not taking into account the SAQ mark-up that applies to importing foreign wines. The appellant argues that the average market price used by Mr. Laliberté was a market value on

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[23] Ibid., page 118.

the international market. The appellant maintains that, consequently, a substantial SAQ mark-up must necessarily be added in Quebec.

[43] He relies on the SAQ's 2014 annual report,[24] which discusses the breakdown of an imported wine's sale price. It states that the mark-up and the specific tax on any foreign bottle of wine in Quebec represent about 50% of the retail price. However, it is indicated in a footnote that [TRANSLATION] "the mark-up makes it possible to assume the costs of sale and marketing, distribution and administration and to make a net profit".

[44] Third, the appellant claims that the Minister erred in alleging that Mr. Laliberté did not apply an adjustment factor that took into account the fact that the bottles were sold in lots. The appellant argues that the bottles of wine he donated were donated individually to the Foundation even though they were sold in lots at the auction.

[45] He maintains that he had no say in the Foundation's choice to group certain wines together in lots and that, in any case, his gifts were not massive, and therefore the market adjustment factor set out in the case law does not apply.

[46] Fourth, the appellant claims that the Minister failed to precisely identify the property to be appraised.

[47] The appellant relied on the audit report, which states that "[t]he CRA did not attempt to value the bottles – there were simply too many to undertake such a task".[25]

[48] The appellant argues that, had the Minister conducted such an appraisal, he would not have decided on a discount factor of 3.2.

[49] However, in the audit report, the auditor justifies the CRA's choice as follows: "Rather we analyzed the methodology used and found it does not conform to generally accepted analytical methodologies, which has resulted in the appraisals not meeting established standards of professional appraisal practice".[26] The auditor adds the following:

> The method used by Alain Laliberté to obtain fair market value described in his own appraisal procedures is . . . a very mechanical process, and as outlined in by Associate Chief Justice Bowman in *Maréchal v. The Queen*, 2004 TCC 464,

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[24] Exhibit A-1, tab 24, page 41.
[25] Exhibit A-1, tab 14, page 16.
[26] Ibid.

> Where the Board or the Court has the obligation of determining the FMV of a property and faced with several different figures, it does not fulfill that obligation by picking the highest. It is not bounded by any valuation and is not obliged to pick any one. Its obligation is to do the best it can to arrive at a true value, difficult as this may be. . . . It is not a mechanical process. It is one that requires weighing all of the material before it and applying its best judgment to arrive at the correct result.[27]

[50] The appellant referred to the analysis of sale of premium wines at auction.[28] On page 121, we can see the result of the sale of the appellant's three bottles of wine donated in 2009 and appraised at $1,050 in total. It is noted that these bottles were included at the auction in lot 63 with two other bottles appraised at $300 and $350. The lot of five bottles was sold for $800, while it was worth $1,700 overall. The appellant argues that the sale price here reflects a factor of about 2.1, not 3.2.

[51] In his arguments, counsel for the respondent acknowledged several times that the factor of 3.2,[29] assumed by the Minister was incorrect for the 2009 taxation year.

[52] Finally, the appellant claims that the relevant market for the purposes of assessing the fair market value of the bottles of wine cannot be that of the premium wine auction held by the Foundation close to a year after the gift. He argues that you had to pay $50 to take part in the auction, that the bottles of wine were sold in lots and that the Foundation was obliged to award all of the lots.

[53] He maintains that the Foundation's auction cannot therefore be considered an unrestricted market.

V. Conclusion

[54] As mentioned earlier, the taxpayer must discharge his initial burden to demolish the Minister's assumptions when he or she mounts at least a *prima facie* case.[30]

[55] In my view, the evidence presented by the appellant in this case complies with the *prima facie* standard.

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[27] Ibid., pages 143 and 144.
[28] Ibid., pages 119 to 137.
[29] Transcript, pages 84, 85, 87, 88 and 90.
[30] *Hickman Motors*, *supra*, paragraph 93.

[56] Let us recall that one of the Minister's assumptions in this case is that the appraisals of the bottles of wine donated by the appellant were increased by a factor of 3.2 so that the tax credit could correspond to the fair market value of the wines. The appellant rebutted that assumption by making a *prima facie* case establishing (i) the incorrectness of the alleged ground for applying a factor as well as the actual factor applied; (ii) the incorrect identification of the property in question; and (iii) the error made in determining the relevant market.

[57] None of the evidence filed by the appellant was contradicted by the respondent. Accordingly, I am of the view that the appellant rebutted the Minister's assumptions regarding the factor of 3.2.

[58] The burden of proof having thus shifted, it was the respondent's turn to establish by the preponderance of the evidence that the Minister's assessments were well-founded. In this case, the respondent filed no evidence and was unable to raise the smallest doubt about the credibility of the appellant's testimony. Therefore, the appellant appears to be entitled to succeed in this appeal.

[59] For these reasons, I allow the appeal and order the assessments at issue to be vacated.

Signed at Ottawa, Canada, this 17th day of April 2015.

"Robert J. Hogan"

Hogan J.

Translation certified true
On this 3rd day of June 2015
Margarita Gorbounova, Translator

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APPEARANCES:

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Counsel for the respondent:	André Leblanc

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