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TAX COURT OF CANADA

IN RE: THE INCOME TAX ACT

2002-1574 (IT)G

BETWEEN:

PAUL HOUWELING,

Appellant;

- and -

HER MAJESTY THE QUEEN,

Respondent.

Held before Mr. Justice Bowman in Courtroom No. 602, 6th Floor, 701 West Georgia Street, Vancouver, B.C., on Friday, September 9, 2005.

APPEARANCES:

Mr. P. Houweling, Appearing on his own behalf;

Mr. R. Wilhelm, Appearing for the Respondent.

THE REGISTRAR: L. Giles

Allwest Reporting Ltd.
#302-814 Richards Street
Vancouver, B.C.
V6B 3A7

Per: S. Leeburn

REASONS FOR JUDGMENT

1
2 (Delivered Orally in Vancouver, B.C. on Friday, September 9,
3 2005)

4 JUSTICE: This is an appeal from
5 assessments for 1997 and 1998 of the appellant. The case
6 came on before me several months ago and I adjourned it to
7 permit Mr. Houweling to file a late election or to ask for
8 the Minister to accept a late election. He did not. The
9 Minister did not accept it for reasons that are set out in
10 the Minister's letter.

11 What happened was that back in 1997 the
12 appellant and his brother, Cornelius, who had apparently
13 not been getting along, decided to go their separate ways,
14 and the result was that Mr. Houweling, Mr. Paul Houweling,
15 signed an agreement in which he was going to sell the
16 shares of his company, of which he had 50 percent,
17 Houweling Nurseries Limited and HNL Holdings, to his
18 brother. Now, it didn't quite work out that way.

19 The plan was, if I understand correctly,
20 that he would sell his shares to a company called Amethyst
21 and file a Section 85 election. The result of a Section
22 85 election, of course, is that you can roll shares into a
23 corporation at their adjusted cost base or at some other
24 figure not exceeding the fair market value and that defers
25 the tax on it.

1 The arrangement was going to be then that
2 the shares of Amethyst would be given to. I suppose it's
3 Houweling Nurseries Limited, and then they would be
4 redeemed and there would at least be a deferral of the tax
5 or a deduction of the tax equal to the safe income.

6 Well, it didn't work that way. The shares
7 were evidently treated as having had a fair market value
8 of about \$5.7 million. Mr. Houweling was given many
9 opportunities to file a proper Section 85 election and to
10 file a late filing penalty, which was necessary to
11 validate the late filing of the election, he did not do
12 so, which would have deferred the capital gain of \$5.7
13 million.

14 Mr. Houweling has spent a great deal of
15 time telling me about the way in which he was defrauded by
16 his brother, his accountant and his lawyers, but none of
17 these seem to me to be very relevant to the issue before
18 me and that is whether or not he realized a capital gain
19 on the sale of his shares.

20 I have tried to help Mr. Houweling as much
21 as I can, but so much of this trial and the earlier trial
22 was taken up with allegations of fraud by his brother, his
23 accountant and his lawyers.

24 The whole thing could have been avoided if
25 the proper Section 85 election had been filed because Mr.

1 Houweling stated, for example, that the shares which were
2 treated as having had a fair market value of \$5.7 million
3 roughly, really had a fair market value of 36 million.

4 Well, exactly how this helps Mr. Houweling
5 I don't know because it would have meant that he had a
6 capital gain of some \$36 million. If you can't pay the
7 tax on a capital gain of 5.7 million I am sure you would
8 have even more difficulty paying the tax on a capital gain
9 of 36 million.

10 I do not like to deal with things on the
11 basis of onus of proof but I do not think that he has
12 established, on a balance of probabilities, that there is
13 anything wrong with the assessment. If anything, his own
14 evidence would indicate the assessment was much too low.
15 In the circumstances, the appeal is dismissed.

16 Mr. Wilhelm, what do you have to say about
17 the costs?

18 MR. WILHELM: The Crown does seek costs
19 in this matter. The Crown has attempted both before this
20 litigation and during to assist the appellant and the
21 appellant has a right to his day in court, obviously, but
22 in my view chose not to partake of that assistance, which
23 resulted in the length of this trial, et cetera.

24 And as well I should say that at one point
25 the Crown tried to negotiate with Mr. Houweling for a

1 statement of agreed facts for this trial, which would have
2 been very helpful, in my view, and Mr. Houweling simply
3 did not even respond.

4 So the Crown seeks normal party and party
5 costs and disbursements.

6 JUSTICE: Mr. Houweling, do you have
7 anything to say about that? Is there any reason why I
8 shouldn't award costs to the Crown?

9 MR. HOUWELING: It must be -- I don't
10 know if it's a moot point but I don't know if anybody
11 really believes me. No one seems to believe me. We have
12 no money.

13 JUSTICE: Well, that may well be. You
14 did get some 5 or \$6 million dollars somewhere or other
15 and I don't know what's all happened to that.

16 MR. HOUWELING: Your Honour, if I had
17 known that that's what they wanted to do with me --

18 JUSTICE: But if --

19 MR. HOUWELING: I didn't know.

20 JUSTICE: If you had known that who
21 wanted to do what to you?

22 MR. HOUWELING: Had I known that behind
23 the scenes was this tax bill coming and there was supposed
24 to be further 25 percent of profit payments for five
25 years, which should have totaled minimum 20 million -- I

1 did not know that -- what happened, tab 80 clearly shows,
2 and we did -- I don't know if -- and I don't want to sound
3 like -- but Labrador, one of our provinces, in their
4 constitution it does say, "Seek ye first the Kingdom of
5 heaven, and all these other things will be handed to you."

6 So, we took care, or took care, we agreed
7 and did quite some charitable giving. We bought a
8 property which turned out to be clay rather than gravel,
9 so everything seemed to be going against us. We did not
10 waste money. A greenhouse operation was purchased on the
11 Island, ten days later MacMillan Bloedel phoned and said,
12 "You're not getting water." What do you think a
13 greenhouse operation with no water is worth? So anyway --

14 JUSTICE: Mr. Houweling, all I want to
15 know is is there any reason why I shouldn't award the
16 ordinary party and party costs against you?

17 You have, I am sorry to say, been the
18 author of your own misfortune to a large degree. Mr.
19 Wilhelm has tried to help you. The assessor, in that he
20 held off issuing an assessment pending receipt of a proper
21 Section 85 election and he never got it -- you could have
22 avoided this by the payment of whatever this late filing
23 penalty was.

24 MR. HOUWELING: Your Honour, the proper
25 elections in the overall scheme are less than one percent

1 of the fact or one and a half percent. It's not -- it
2 wouldn't leave me really in a different position today.

3 JUSTICE: You see, this case didn't need
4 to come to court.

5 MR. HOUWELING: I wish it didn't have
6 to.

7 JUSTICE: It could have been avoided.

8 Mr. Houweling, in all the circumstances I
9 can see no reason for exercising my discretion to absolve
10 you of the obligation to pay costs. So I will dismiss the
11 appeal with costs.

12 (PROCEEDINGS CONCLUDED)

13
14 I HEREBY CERTIFY THAT THE FOREGOING
15 is a true and accurate transcript
16 of the proceedings herein to the
17 best of my skill and ability.

18 _____
19 B. Moss, COURT REPORTER
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