Docket: 2008-3291(IT)G

BETWEEN:

JOHN D'ANDREA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 17, 2011, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Simon-Nicolas Crépin

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 1999 taxation year is allowed and the reassessment is vacated.

Signed at Ottawa, Canada, this 17th day of June 2011.

"V.A. Miller"

V.A. Miller J.

Citation: 2011TCC298
Date: 20110617
Docket: 2008-3291(IT)G

BETWEEN:

JOHN D'ANDREA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] This is an appeal by John D'Andrea from the reassessment of his 1999 taxation year in which the Minister of National Revenue (the "Minister") included the amount of $1,877,500 in income pursuant to subsection 56(2) of the *Income Tax Act* (the "*Act*"). The notice was issued pursuant to subsection 152(4) and penalties were assessed under subsection 163(2) of the *Act.*

[2] In making the reassessment, the Minister relied on the following assumptions of fact:

> (a) on October 14, 1988, the Appellant with family members and friends incorporated a group of 27 shareholders (the Group).
>
> (b) the Appellant having been very active and very successful over the years as a broker and developer of real estate in Sarnia, the Group appointed him as the company's business manager.
>
> (c) the Group purchased the "Holmes Foundry" property (the Property) for $1.2 million on December 7, 1989.
>
> (d) in the late 1990's a number of offers were made to the Group to acquire the Property but none were accepted.

(e) in 1998, M. Frank Fazio, a real estate lawyer, was retained by both the Group and the Appellant personally and he obtained rezoning for the Property to allow a casino development.

(f) in 1998, the Chippewas of the Thames Land Claim Trust (the Chippewas) retained Mr. Charles Brudenell and Mrs. Brenda Reid, two real estate agents to find sites for potential casinos.

(g) in August 1998, the following joint venture was proposed by Mr. Fazio to Brudenell, Reid and the Chippewas:

- the Chippewas would purchase 50% of the land value while the Appellant would supply the rest;

- the Chippewas were to supply either 50% of the land or by way of 50% ownership of the joint venture corporation which the other 50% would be owned by the Appellant;

- the Appellant was to supply either 50% of the land or by way of 50% ownership in the same joint venture corporation;

- the value of the property on (as) *sic* set out in the documentation was $213,000 an acre for 17 acres of land for a total value of $3,612,000;

- the Chippewas were to supply the bingo license and the Appellant was to supply his development expertise.

(h) in February 1999, the Appellant made representations to the shareholders of the Group to inform them that he had found a buyer that would purchase the property for $1.8 million. He also told them that he had no connection with the buyer.

(i) on February 9, 1999, an amalgamation took place between 1075111 Ontario Inc., a corporation owned by Titen Real Estate which in turn had the Appellant as its sole shareholders and 1317424 Ontario Inc., a corporation owned by the Chippewas to create a new corporation, 1317424 Ontario Inc. which is now owned 50% by the Chippewas and 50% indirectly by the Appellant through 1075111 Ontario Inc.

(j) the Appellant knew before March 31, 1999, that the property was worth not less than $3.7 million.

(k) on March 18, 1999, Mr. Ben Lansink, a professional appraiser, set the value of the property somewhere between $4,755,000 and $5,000,000.

(l) on March 31, 1999, the Group sold the property to 1317424 Ontario Inc. for $1,810,050, that amount was advanced by the Chippewas.

(m) in consideration for closing the transaction, Mr. Brudenell was paid a commission of $181,005 which represented 5% of $3,612,000.

(n) in July of 1999, the Appellant handed a statement of adjustments to the Group's accountant, who recorded the sale in the corporation's books at $1,810,050 in accordance with the statement.

(o) the Group reported the sale at $1,810,050 in its income tax return for its 1999 taxation year.

(p) the Appellant's uncle, Mr. Peter Frezza, who was a shareholder in the Group, found out that the Appellant was a partner with the Chippewas in purchasing the property.

(q) Mr. Frezza reported the events to the Ontario Provincial Police and the Appellant was later charged for fraud on April 20, 2000.

(r) on July 11, 2002, the Appellant was found guilty of fraud by deceiving his victims knowing that the $1.8 million paid was only half the value of the property.

(s) the scheme of the Appellant resulted in the transfer of half the property to 1317424 Ontario Inc. without any consideration.

(t) 1075111 Ontario Inc. owning half the shares of 1317424 Ontario Inc., it received the ownership of 50% of the property.

(u) the Appellant's plan for 1317424 Ontario Inc. was to develop a casino on the property.

(v) at the time of the events, the Appellant had "de facto" control of the Group.

(w) The Appellant admitted that he was very concerned in 1999 that there was a tax problem with the sale of the property.

[3] The Respondent tendered, as an exhibit, the Reasons for Judgment given by McGarry J. of the Ontario Superior Court of Justice at the Appellant's criminal trial. McGarry J. found that, on March 31, 1999, the fair market value ("FMV") of the Property was approximately $3.6 million. This finding was affirmed by the Ontario Court of Appeal.

[4] In the Notice of Appeal and at the hearing of this appeal, the Appellant disputed that the FMV of the Property at the time of the sale was $3,612,000. It was his evidence that in 1999, he believed that the FMV of the property was around $2

million. He believed that the Group received full value for the Property and he did not receive a benefit.

[5] The Minister reassessed the Appellant on the basis that the FMV of the Property at the time of the sale on March 31, 1999 was no less than $3,755,000.

[6] Prior to the hearing of this appeal, counsel for the Appellant informed the court and counsel for the Respondent that the Appellant was no longer disputing the FMV of the Property. It was therefore not an issue before me.

Appellant's Evidence

[7] It was the Appellant's evidence that in the late 1990s, there was a rumour that a charity casino, which would be run by the Ontario government, would locate in Sarnia. The Group retained Frank Fazio, a real estate lawyer, who succeeded in having the Property rezoned to allow for a casino development.

[8] Shortly thereafter, Frank Fazio told the Appellant that Benchmark Realty (Mr. Charles Brudenell and Mrs. Brenda Reid) had a client, the Chippewas, who was interested in purchasing a property on which they could develop a casino.

[9] Frank Fazio insisted on showing the Property to Benchmark Realty and the Chippewas. Most of the communications with respect to the sale was through Frank Fazio.

[10] In late 1998, Frank Fazio told him that the Chippewas were interested in purchasing the Property. However, they had a limited amount of cash and they would not buy unless they could find a real estate developer who would form a joint venture with them.

[11] Frank Fazio proposed that the Appellant consider entering a joint venture with the Chippewas. Frank Fazio made the proposal to the Chippewas and he wrote the joint venture agreement.

[12] The Appellant gave several reasons for accepting the transaction which Frank Fazio had negotiated. He stated that there was in-fighting among the shareholders of the Group and the Group had become totally dysfunctional. The Group had held the Property for 10 years and it was his opinion that the FMV of the Property was not more than $2 million. His opinion was informed by the sale of other properties in the area and the environmental problems contained within the Property. In addition, the Appellant was having matrimonial problems and his spouse was a member of the Group.

[13] It was the Appellant's evidence that he entered the agreement with the Chippawas so that the Group could obtain the $1.8 million. He wanted to help the Group "out of a bad deal".

[14] The Appellant stated that it was Benchmark Realty who led the Chippewas to believe that the Property was worth more than $1.8 million. Benchmark Realty hired an appraiser, Ben Lansink, who stated that the FMV of the Property was approximately $4.7 million. Contrary to the Minister's assumption in paragraph 2(j) above, the Appellant stated that he did not know or believe that the Property was worth not less than $3.7 million. It was only at his trial for fraud that he learned that Ben Lansink had made an appraisal of the Property. However, he disagreed with Lansink's conclusion with respect to the FMV of the Property.

[15] The Appellant thought that Frank Fazio was representing him and the Group. After the sale of the Property, he learned that Frank Fazio had received a commission from Benchmark Realty as well as from the Group.

[16] The tenor of the Appellant's evidence was that he was not trying to justify what he did. In his opinion, the only problem with his actions in 1999 was that he did not disclose to the shareholders of the Group that he retained an interest in the Property.

[17] In conclusion, the Appellant stated that he relied heavily on his lawyer, Frank Fazio, for advice.

[18] The three issues before me were:

(a) Did the Minister correctly include the amount of $1,877,500 in the Appellant's income pursuant to subsection 56(2) of the *Act*?

(b) Is the reassessment valid pursuant to subsection 152(4) of the *Act* on the basis that the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default?

(c) Was a penalty pursuant to subsection 163(2) of the *Act* correctly imposed?

Subsection 56(2)

[19] Subsection 56(2) of the *Act* reads as follows:

> **56(2) Indirect payments** -- A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the

> benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person (other than by an assignment of any portion of a retirement pension pursuant to section 65.1 of the *Canada Pension Plan* or a comparable provision of a provincial pension plan as defined in section 3 of that Act or of a prescribed provincial pension plan) shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.

[20] The four preconditions to the application of subsection 56(2) are within the subsection itself. They are:

> (a) the transfer of property must be to a person other than the reassessed taxpayer;
>
> (b) the allocation must be at the direction or with the concurrence of the reassessed taxpayer;
>
> (c) the transfer of property must be for the benefit of the reassessed taxpayer or the benefit of another person whom the reassessed taxpayer wished to benefit; and,
>
> (d) the transfer would have been included in the reassessed taxpayer's income if it had been received by him[1].

[21] The four preconditions necessary to invoke subsection 56(2) have been met in this appeal.

[22] Prior to the sale of the Property, on February 9, 1999, the Appellant arranged that 1075111 Ontario Inc. (a corporation owned by Titen Real Estate which in turn had the Appellant as its sole shareholder) was amalgamated with 1317424 Ontario Inc. (a corporation owned by the Chippewas) to create a new holding company, 1317424 Ontario Inc. (Newco). Newco was owned 50% by the Chippewas and 50% by the Appellant through 1075111 Ontario Inc.

[23] The Appellant directed the sale of the Property from the Group to Newco.

[24] The transfer of the Property to Newco was for the benefit of 1075111 Ontario Inc. and the Chippewas. I conclude that the Appellant desired to confer the benefit on 1075111 Ontario Inc. as it was wholly owned by him.

[25] If the Property had been transferred directly to the Appellant and the Chippewas, 50% of the value of the Property would have been included in the Appellant's income pursuant to subsection 15(1) of the *Act.*

[26] As a consequence, I conclude that the Minister was correct to include $1,877,500 in the Appellant's income subject to his satisfying the onus which is upon him in subsection 152(4).

Subsection 152(4)

[27] The question then becomes whether the reassessment dated March 13, 2006, which was issued pursuant to subsection 152(4) of the *Act*, was valid.

[28] Neither party stated the date of the original assessment in their pleadings or at the hearing of the appeal. However, as a result of the issues raised by the Appellant in his Notice of Appeal, I assume that the Notice of Reassessment dated March 13, 2006 was issued beyond the limitation period for the Appellant's 1999 taxation year.

[29] At the hearing of this appeal, counsel for the Respondent made submissions only with respect to subsection 56(2). He made no submissions concerning subsections 152(4) and 163(2).

[30] Subsequent to the hearing, I asked the parties to give me their representations with respect to subsection 152(4).

[31] The relevant portion of subsection 152(4) of the *Act* reads as follows:

> 152(**4) Assessment and reassessment [limitation period]** -- The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (a) the taxpayer or person filing the return
>
> > (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

[32] The onus is on the Minister to prove that he was entitled to reassess the Appellant beyond the normal reassessment period. As stated by Strayer J.A. in *Nesbitt v. Canada:*

> 5 The issue before the Trial Division was whether such a reassessment was invalid as being issued beyond the four year limitation period. It was common

> ground that for the reassessment to be valid when made after that period the Minister would have to demonstrate that the taxpayer had made a "misrepresentation ... attributable to neglect, carelessness or wilful default ..." as provided by subparagraph 152(4)(*a*)(i) of the *Income Tax Act*.[2]

[33] In order to satisfy that onus, the Minister must first prove that the Appellant made a misrepresentation in filing his income tax return or in supplying information under the *Act*. Second, he must also prove that the misrepresentation was attributable to neglect, carelessness or wilful default[3].

Any Misrepresentation

[34] In subparagraph 152(4)(*a*)(i) the word misrepresentation is preceded by the word “any”. In *Taylor v. M.N.R.*, the Exchequer Court interpreted this phrase to mean any representation that was false in substance and in fact at the material date. It stated:

> 24 It is to be noted also that the section refers to "*any* misrepresentation" and it would be improper, therefore, to construe that term as excluding a particular sort of misrepresentation such as an innocent misrepresentation. I have reached the conclusion that the words "any misrepresentation", as used in the section, must be construed to mean any representation which was false in substance and in fact at the material date, and that it includes both innocent and fraudulent misrepresentations[4].

[35] In *Nesbitt v Canada*[5], Heald J. agreed with Crown counsel that an incorrect statement in an income tax return amounts to misrepresentation. He made the following statement:

> 22 On the other hand, the submission by counsel for the Defendant that the erroneous amounts set out in the Plaintiff's tax return constitute a "misrepresentation" within the meaning of paragraph 152(4)(*a*)(i), is supported by the relevant jurisprudence. In the case of *Minister of National Revenue v. Foot*,[11] the Exchequer Court dealt with subsection 42(4)(*a*) of the 1948 *Income Tax Act*, a predecessor to paragraph 152(4)(*a*)(i), the relevant paragraph in this case. The Court addressed the issue of what constituted a "misrepresentation" within the meaning of the applicable section at that time. It was held that the phrase "any misrepresentation" was synonymous with the expression "incorrect". It was the submission of counsel for the Defendant that any incorrect statement amounts to a "misrepresentation" as that term is used in paragraph 152(4)(*a*)(i), *supra*. I agree with that view of the matter.

[36] As I have already concluded that the Appellant did receive an indirect benefit which should have been included in his income, I also find that the Appellant made a misrepresentation in filing his income tax return.

Neglect, Carelessness or Wilful Default

[37] At the hearing of this appeal, counsel for the Respondent asked the Appellant no questions about his failure to include the reassessed amount in his 1999 income tax return. No evidence was elicited surrounding the Appellant's filing of his 1999 income tax return. Counsel also made no submissions at the hearing with respect to subsection 152(4) of the *Act.* Quite simply, the issue with respect to subsection 152(4) was not addressed by counsel at the hearing.

[38] In his written submissions, counsel stated that the Appellant's misrepresentation was attributable to wilful default. He based his assertion on statements made by McGarry J. in his Reasons for Judgment at the Appellant's criminal trial.

[39] First, I find that the statements referred to by counsel explain why the Appellant arranged his affairs so that the Property was held by Newco. According to McGarry J., "the deal was restructured in order that there be no taxation on anything".

[40] Also according to McGarry J., the Appellant perceived that the transaction between him and the Chippewas would result in a future tax on profits. There was also reference in McGarry J.'s decision that the Appellant was instructed about avoiding any tax implications for the Chippewas.

[41] I interpret these statements to mean that the Appellant thought that he had arranged his affairs so that he did not have to report the transaction in his 1999 income tax return.

[42] The statements, in McGarry J.'s Reasons for Judgment which the Respondent has relied on, ought to have been posed to the Appellant so that he could offer an explanation. It would then have been up to me whether or not I accepted that explanation.

[43] The evidence relied on by the Minister has left me with more questions than it has answered. Did the Appellant seek advice prior to filing his 1999 income tax return? Was the Appellant's view of the transaction so unreasonable that it could not have been honestly held?

[44] It is not enough to suggest wilful default. There must be some evidence to support a finding of wilful default. The evidence relied on by the Minister in McGarry J.'s decision was not sufficient to meet the Minister's onus under the second element in subparagraph 152(4)(*a*)(i)[6].

[45] Although McGarry J. found that the Appellant had committed a fraud on the shareholders of the Group, this fraud does not automatically pertain to a finding under subsection 152(4) of the *Act*. The precise finding by McGarry J. was as follows:

> I find in this case that the accused, through non-disclosure to others, was acting in a deceitful and dishonest manner and further, that it was not necessary for the Crown to establish the full value of the land but rather, the imperiling of economic interest. In this case, clearly the accuse(d) *sic* received a benefit to the detriment of other shareholders by retaining a half interest in the land.
>
> …
>
> Therefore based on the foregoing, I am satisfied beyond a reasonable doubt that by means of fraud and deceit that the accused did deprive the shareholders and that there will be a conviction registered

[46] Subsection 152(4) reads that the misrepresentation is with respect to the filing of the return or supplying of information in the income tax return.

[47] When a taxpayer has been assessed beyond the limitation period, the Minister cannot meet his onus pursuant to subsection 152(4), if counsel fails to address the issue at the hearing.

[48] The Respondent has failed to demonstrate that the Appellant's misrepresentation was attributable to negligence, carelessness or wilful default.

[49] The appeal is allowed and the assessment is vacated.

Signed at Ottawa, Canada, this 17th day of June 2011.

"V.A. Miller"

V.A. Miller J.

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[1] *Neuman v M.N.R.*, [1998] 1 SCR 770 at paragraph 32

[2] 96 D.T.C. 658 (FCA)
[3] *Nesbitt v The Queen*, (1996) F.C.J. No. 19 (FCTD) at paragraph 10*; Boyer v Canada*, 2008 TCC 88 at paragraph 16
[4] [1961] C.T.C. 211 (Ex. Ct.)
[5] (1996) F.C.J. No. 19 (FCTD)
[6] *Markakis v M.N.R.*, [1986] 1 C.T.C. 2318 (TCC)

CITATION:	2011TCC298
COURT FILE NO.:	2008-3291(IT)G
STYLE OF CAUSE:	JOHN D'ANDREA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 17, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	June 17, 2011

APPEARANCES:

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