Docket: 2011-957(IT)I

BETWEEN:

SHAYE B. GREEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 3, 2011, at Victoria, British Columbia.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Amandeep K. Sandhu

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* in respect of the 2008 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of January 2012.

"François Angers"

Angers J.

Citation: 2012 TCC 10
Date: 20111210
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BETWEEN:

SHAYE B. GREEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal by Mr. Shaye Green in respect of assessments made under the *Income Tax Act* (the "*Act*") for his 2008 taxation year. In reassessing the appellant, the Minister of National Revenue (the "Minister") deleted a capital loss of $2,750 claimed by the appellant and included a capital gain of $68,250 in respect of the disposition of a property located at 66 Main Street in the City of Ottawa (the "Property").

[2] The Property had belonged to the appellant's grandmother and was purchased as a lot in 1926. In or about 1954, a building was constructed, and the first level was used for commercial purposes while the grandmother's family resided in the upper-level apartment until 1966. The appellant's grandmother passed away in 1967. In her will, the Property was devised to her trustees, namely, the appellant's mother and her two brothers or their survivor or survivors, to hold and administer for the benefit of the appellant's mother for the term of her life, and upon her death, the Property was to be used and administered by her trustees for the benefit of the children of the appellant's mother until the youngest of those children should attain the age of twenty-one years, upon which event the Property was to be transferred in equal shares to those of her children who were alive at that time for their own use absolutely.

[3] The appellant's mother had the enjoyment of her life interest until she passed away on June 18, 2007. At the time of her death, all her children had reached the age

of twenty-one years and four were alive, including the appellant. They acquired a fee simple interest in the Property after the appellant's mother passed away. The appellant's mother was the only surviving trustee under the grandmother's will; until 2003 she filed T3s on behalf of the trust, but no capital disposition was reported by the trust during all those years.

[4] Transfer Tax Statements for the Property (Exhibit R-1, Tab 15) indicate that on March 7, 2008, documents were registered at the land registry office showing that the appellant, his brother and two sisters were tenants in common of the Property. The four of them sold the Property on March 10, 2008 for $395,000.

[5] An audit of the appellant's 2008 taxation year was conducted as a result of a request for a clearance certificate made by the appellant for his mother's estate. The audit revealed that the Property was not a principal residence, that T3s were filed by the trustees until 2003 and, as mentioned earlier, that no capital disposition was reported by the trust. On March 15, 1994, the trust did file an election to defer the deemed realization day under subsection 104(5.3) of the *Act* (Exhibit R-1, Tab 9).

[6] As a result, the auditor calculated the capital gain on the disposition of the Property by using the fair market value of the Property on December 31, 1971 (valuation day), which was agreed by the appellant to be at $100,000. The auditor added selling costs of $22,000 to that amount. An adjusted cost base of $122,000 was thus used to determine a total gain of $273,000, of which a one-quarter share was attributed to the appellant.

[7] The respondent submits that the beneficiaries, including the appellant, are deemed to have received the Property at its fair market value at the date of the grandmother's death in 1967. Since that date was prior to valuation day, the cost of the Property would be its fair market value on valuation day, which was agreed to be $100,000. The respondent further submits that the capital gain on the Property was properly calculated and included in the appellant's income for the 2008 taxation year.

[8] The appellant submits that the trust was responsible for paying the capital gains tax and that, since he only became an owner of the Property upon his mother's death, an adjusted cost base of the Property at that time should be used to calculate the capital gain. He submits that the adjusted cost base at the time of his mother's death cannot be lower than the price at which the Property was sold a few months later.

[9] The issue is whether the Minister correctly included the capital gain from the disposition of the Property in the appellant's income for his 2008 taxation year.

[10] It is important to review the facts of this appeal in order to answer the above question. When the appellant's grandmother was alive, she had both the legal and equitable title, which, in legal terms, is called a fee simple. When she passed away in 1967, her will created a trust with the appellant's mother and her two brothers being appointed as trustees. The fee simple was to remain with the trust but subject to a life estate in favour of the appellant's mother. Upon the appellant's mother's death, the fee simple held by the trust passed to the beneficiaries of the trust, namely, the appellant, his brother and two sisters, as tenants in common. There were no conditions attached to the life estate that made the appellant's mother liable for income taxes with respect to the Property. Trustees are responsible for filing income tax returns and it is they who deal with liability for capital gains tax, including where there are deemed realizations.

[11] The appellant also argued that his grandmother's estate should be liable for the capital gains tax. The capital gains tax was introduced on December 31, 1971 and such tax only started accruing in 1972. (See paragraph 104(4)(*b*) of the *Income Tax Act*). Since the appellant's grandmother passed away in 1967, her estate cannot be held responsible for capital gains tax that had not started accruing during her lifetime.

[12] This leaves us with the question of whether the trust may be held liable for paying the capital gains tax on the Property. Subsection 104(4) of the *Act* sets the date on which a deemed disposition occurs in a trust. It is called the 21-year deemed disposition rule. Subparagraph 104(4)(*b*)(i) applies to the appellant's grandmother's testamentary trust and under that provision the deemed disposition date is January 1, 1993, namely, 21 years after January 1, 1972.

[13] Subsection 104(5.3) of the *Act* allows a trust to defer the deemed disposition day if it files an election within six months after the subsection 104(4) deemed disposition day and if there is an "exempt beneficiary" among its beneficiaries. The appellant's mother is considered an exempt beneficiary under clause 104(5.4)(*b*)(ii)(A) of the *Act*. The appellant's mother, as trustee, filed the election on March 15, 1994, with the result that the deemed disposition day was deferred until January 1, 1999 in accordance with the provisions of subparagraph 104(5.3)(*a*)(i) of the *Act*.

[14] The trust did not follow up on this election and, although a disposition was deemed to have occurred in 1999, the trust did not pay tax on the capital gains

accrued up to that time. The Canada Revenue Agency could therefore have assessed the trust for such tax.

[15] Since 1999, in my opinion, capital gains have been accruing in the trust. Subsection 107(2) of the *Act* obliges a trust to roll over to the beneficiaries the capital gains accrued on a capital property by deeming the beneficiaries to have acquired the asset at a cost approximately equal to the trust's adjusted cost base. Subsection 107(2.001) of the *Act* allows the trust to elect not to have subsection 107(2) apply if it is resident in Canada, but a prescribed form must be filed with the trust's income tax return in the year of the distribution if that subsection (107(2.001) is invoked. The trust did not file the prescribed form with its 2007 income tax return when the Property passed from it to the appellant and his brother and sisters. Subsection 107(2) therefore applies so as to effect the rollover of the accrued capital gain to the beneficiaries.

[16] The evidence revealed that the auditor offered the appellant the opportunity to have the deemed disposition rule disregarded. It is very likely that the auditor, in such circumstances, would have used subsection 152(4) to assess taxes, interest and penalties on capital gains tax that has been owing since 1999. That would no doubt have led to a far worse result for the appellant.

[17] I have already informed the appellant, during the trial, that his claims for property tax, utilities and general maintenance for the Property were properly disallowed by the respondent as it was not established, on a balance of probabilities, that those expenses were incurred by him for the purpose of gaining or producing income from a business or property.

[18] The appeal is dismissed.

Signed at Ottawa, Canada, this 10th day of January 2012.

"François Angers"

Angers J.

CITATION:	2012 TCC 10
COURT FILE NO.:	2011-957(IT)I
STYLE OF CAUSE:	Shaye B. Green v. Her Majesty the Queen
PLACE OF HEARING:	Victoria, British Columbia
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REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	January 10, 2012

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Amandeep K. Sandhu

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada