

Docket: 2016-482(IT)G

BETWEEN:

THE ESTATE OF THE LATE LAURENCE LEWIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 4, 2018, at Montreal, Quebec.

Before: The Honourable Justice R al Favreau

Appearances:

Counsel for the Appellant: Aaron Rodgers

Counsel for the Respondent: Marie-Aim e Cantin

JUDGMENT

The appeal from the reassessment made by the Minister of National Revenue under the *Income Tax Act*, notice of which was issued on May 5, 2014 with respect to the 2008 taxation year of the late Laurence Lewin is dismissed with costs, in accordance with the attached reasons for judgment.

Signed at Montreal, Quebec, this 30th day of January 2019.

“R al Favreau”

Favreau J.

Citation: 2019 TCC 21
Date: 20190130
Docket: 2016-482(IT)G

BETWEEN:

THE ESTATE OF THE LATE LAURENCE LEWIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a reassessment made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the “*Act*”), concerning the 2008 taxation year of the late Laurence Lewin.

[2] By way of the reassessment dated May 5, 2014, the Minister added a taxable capital gain of \$959,165 to the terminal return of Laurence Lewin which resulted in an increase of the tax payable from \$292,243.55 to \$570,401.40.

[3] The appellant was originally assessed in respect of the terminal return of the late Laurence Lewin on June 1, 2009.

[4] The issue to be decided is whether the Minister was justified to reassess the appellant on May 5, 2014 and to determine the actual fair market value of the assets owned by the deceased, namely the shares of Laurence Lewin Holdings Inc. (“Holdings”) when he died on November 12, 2008.

[5] In determining the appellant's tax liability for the 2008 taxation year, the Minister relied on the following assumptions of fact as set out in paragraph 5 of the Reply to the Notice of Appeal:

- (a) Laurence Lewin was the only shareholder of Laurence Lewin Holdings Inc. before he died on November 12, 2008.
- (b) The fair market value of Laurence Lewin Holdings Inc. on November 12, 2008 was \$4,195,715.
- (c) The fair market value of Laurence Lewin Holdings Inc. was misrepresented at a value of \$2,277,386 in the tax return of The Estate of Laurence Lewin.
- (d) Louis Grossbaum, Andrew Montlake and Martin Greenberg were the executors of The Estate of Laurence Lewin.
- (e) Louis Grossbaum, a chartered accountant, was also the accountant and the tax preparer for Laurence Lewin, The Estate of Laurence Lewin, Laurence Lewin Holdings Inc., LLH Corporation, Gants Hill Management Co., during the year in litigation, and the previous and following years.
- (f) Louis Grossbaum was aware or should have been aware of the fair market value of Laurence Lewin Holdings Inc.

[6] In determining that the appellant made a misrepresentation attributable to neglect, carelessness or wilful default in filing his tax return for the 2008 taxation year, the Minister relied on the following facts set out in paragraph 6 of the Reply to the Notice of Appeal.

- (a) All the facts mentioned at paragraph 5.
- (b) There is a substantial difference between the fair market value of Laurence Lewin Holdings Inc. as described by the executor and accountant Louis Grossbaum and the actual fair market value of assessed by the Canada Revenue Agency ("CRA").

[7] At the time of his death, Laurence Lewin held shares in Holdings, a company incorporated on May 14, 1990 which held shares in Gants Hill Management Company Ltd. ("Gants"), incorporated on January 15, 1991 and in LLH Corporation (formerly 4384199 Canada Inc. ("LLH"), incorporated on January 24, 2006. All three companies were incorporated under the *Canada Business Corporations Act* and transferred to the British Virgin Islands on January 24, 2007. Gants and LLH were wholly-owned subsidiaries of Holdings.

[8] Mr. Louis Grossbaum, a chartered accountant who was the managing partner of the accounting firm WSPG, was one of the executors of Laurence Lewin's estate and was in charge of filing the terminal return. His firm has been doing the accounting and preparing the tax returns for Laurence Lewin and Holdings since 1990 and for Gants since 1991. Richter was LLH's external auditor until 2014.

[9] MNP, an accounting firm which merged with WSPG on January 1, 2011 prepared LLH's financial statements and its corporation tax returns starting January 31, 2014 and subsequently on January 31, 2015 and January 31, 2016.

[10] The appellant's terminal return was signed and filed by Mr. Grossbaum in April 2009 although the tax return was prepared by someone else within his firm. In order to file the appellant's terminal return, Mr. Grossbaum had to value the shares of Holdings which were held by the deceased on November 12, 2008. In making his valuation, Mr. Grossbaum did not take into account the value of the investments that Holdings had in LLH and Gants.

[11] In the appellant's terminal return, Mr. Grossbaum calculated the fair market value of the Holdings' shares to be \$2,277,386 while the CRA reassessed the appellant on a fair market value of 4,195,715.

The Issues

[12] The issues to be determined in this appeal are (a) whether the error made by Mr. Grossbaum in evaluating Holdings' shares constitutes a misrepresentation of the actual fair market value of the shares and, if so, (b) whether the misrepresentation is attributable to Mr. Grossbaum's neglect, carelessness or wilful default when filing the appellant's terminal return.

Mr. Grossbaum's Testimony

[13] Mr. Grossbaum testified at the hearing and explained how he prepared the evaluation of Holdings' shares as of November 12, 2008. The calculation that he did and submitted to the Revenu Québec in the course of the audit initiated in 2010 was as follows:

Retained earnings of Holdings at January 31, 2008		
Less		\$ 6,731,653
A. Marketable securities on January 31, 2008 statement		
• cost	\$ 10,575,901	
• fair market value	\$ 9,412,154	
Reduction in value of portfolio		(\$ 1,163,747)
B. Capital dividend paid subsequent to January 31, 2008		(\$1,581,000)
C. Dividend received in year ended January 31, 2008 reflected as receivable in wholly-owned subsidiary which receivable was not collectable		(\$ 1,709,520)
Deemed disposition on November 12, 2008		\$ 2,277,386

[14] The reductions of items A and B above are not in dispute in this appeal.

[15] Mr. Grossbaum explained that when he made his evaluation of the shares of Holdings, he did not keep notes as to how he arrived at the amount of \$2,277,386. He said that he relied on financial information provided by Mr. Gerald Randall, the manager at La Senza, who was in charge of the preparation of the income tax returns for both La Senza and LLH. Until 2008, La Senza was a wholly-owned subsidiary of LLH. Mr. Grossbaum pointed out that he signed the income tax return of LLH for the taxation year ended February 1, 2009 and the attached certification as an officer of the company but that neither he nor his firm prepared the said income tax return. Mr. Grossbaum added that the amounts involved in the said return were insignificant as LLH reported a loss and claimed a refund.

[16] Mr. Grossbaum further recognized that he could have access to the financial statements of LLH and Gants but he did not ask for them. He stated that his evaluation was based on 2008 figures as the evaluation had to be made before the filing of LLH's and Gants' 2009 tax returns.

[17] Mr. Grossbaum acknowledged that, at his examination for discovery held on January 25, 2017, he provided the following answer to an undertaking given at that discovery:

7. Because LLH Corporation was a wholly-owned subsidiary of Laurence Lewin Holdings Inc. and because we had to determine the value of Mr. Lewin's shareholdings of Laurence Lewin Holdings Inc. on his 2008 terminal T1 return, we determined that the receivable of \$1,709,520 reflected on the balance sheet of LLH Corporation was not collectible and accordingly reduced the value of his shares to the deemed disposition amount of \$1,709,520.

[18] On January 31, 2018, Mr. Grossbaum filed a revised fair market value of the shares of Holdings. He explained that he adjusted the value of the shares of Holdings because he became aware of the existence of a Retirement Compensation Arrangement in Gants which had a significant impact on the value.

[19] The revised calculation did not affect the total value of the shares of Holdings which stayed at \$2,217,468 but the explanations given for the reductions of the value of the shares were different. The two main adjustments were the following:

(a) a reduction valued at \$850,428

- (4) On the balance sheet of Laurence Lewin Holdings there were Class 'E' preferred shares issued to the retirement compensation arrangement for designated executives of Gants Hill Management Company Ltd. The adjusted cost base of these Class 'E' shares issued when assets were rolled into Lewin Holdings had an ACB of \$510,378 but a redemption value of \$850,428. These shares were not owned by Lewin and upon death, in accordance with the terms of his will, the amount was paid to his spouse, Carole Teitelbaum. Therefore, the redemption value has to come off the value of Lewin Holdings.

(b) a reduction valued at \$1,016,047

- (5) Prior to the death of Lewin, the share of La Senza, owned by Lewin Holdings, were sold to Limited Brands. Pursuant to a tax plan set up by Richter, the auditors of La Senza, negligible taxes were paid and NIL taxes to Quebec. Quebec instituted an audit and was proposing to assess the dividend received of \$5,551,798 (see Lewin Holdings January 31, 2008 income statement) as regular business income.

Accordingly, because there would be a long hard battle, MNP took a reserve for the possible taxes –

\$5,551,798 x 16.5% Quebec rate	916,047
Plus: Professional fees to represent the company against MRQ	100,000

[20] Mr. Grossbaum stated that he was aware of the existence of the retirement compensation arrangement but he did not know what to do with it when he filed Laurence Lewin's 2008 terminal return. He said that he needed an opinion from counsel representing the trust. Concerning the reserve of \$1,016,047 for a potential tax liability, Mr. Grossbaum stated that this information was provided to him by Richter. Mr. Grossbaum acknowledged that no tax liability finally arose from the transaction and on November 12, 2008, the audit of Revenu Québec had not started.

[21] During his testimony, Mr. Grossbaum recognized that he made a mistake in evaluating the shares of Holdings by not taking into account the value of the subsidiaries of Holdings but he maintained that the two subsidiaries had no significant value.

Mr. Aich's Testimony

[22] Mr. Abdellatif Aich, an appeals officer of CRA, testified at the hearing. He provided financial information extracted from the database Cortax concerning the 2009 and 2010 taxation years of Holdings and LLH, information which was not contested by the appellant.

[23] Mr. Aich explained that CRA received the information concerning the appellant's file in April 2014 from Revenu Québec and issued a notice of reassessment in May 2014 based on the information provided by Revenu Québec. CRA did not conduct any valuation of the shares of Holdings.

[24] Mr. Aich pointed out that Mr. Grossbaum is constantly changing his explanations to justify the difference in value of the shares of Holdings between Revenu Québec's valuation of \$4,195,715 and his own valuation of \$2,217,468.

[25] The first explanation was that there was a dividend of \$1,709,520 that was not collectible. In January 2018, after Revenu Québec's audit, Mr. Grossbaum came out with a new adjusted value, taking into account a reserve for potential

taxes arising as a result of the sale of La Senza's shares and the redemption value of the class 'E' preferred shares of Gants issued to its executives pursuant to Gants' retirement compensation arrangement, which shares were rolled into Holdings prior to Mr. Lewin's death.

[26] Mr. Aich did not have an issue with the \$850,428 adjustment with respect to the retirement compensation arrangement but had an issue with the \$1,016,047 adjustment because, on November 12, 2008, Revenu Québec had not started its audit yet. After seven years of audit, from 2010 to 2017, Revenu Québec did not tax the \$5,551,798 dividend which had been entirely taxed in Alberta. In January 2018, Mr. Grossbaum knew that there was no adjustment to be made for Quebec taxes.

The Law

[27] When a person dies, he is deemed to have, immediately before his death, disposed of each capital property that he owned and to have received proceeds of disposition therefore equal to the fair market value of the property immediately before his death. Paragraph 70(5)(a) reads as follows:

Capital property of a deceased taxpayer

Where in a taxation year a taxpayer dies,

- (a) the taxpayer shall be deemed to have, immediately before the taxpayer's death, disposed of each capital property of the taxpayer and received proceeds of disposition therefor equal to the fair market value of the property before the death;

...

[28] Subsection 152(4) of the *Act* allows the Minister, in certain circumstances, to make a reassessment after the expiration of the normal reassessment period. The relevant parts of this subsection are as follows:

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

...

Analysis

[29] The first question to be determined is whether the appellant's representative made a misrepresentation in filing the terminal return of the late Laurence Lewin for the period ending November 12, 2008 in which he indicated that the shares of Holdings had a fair market value of \$ 2,277,386.

[30] For Quebec tax purposes, the fair market value of the shares of Holdings has been established at \$4,195,715 and the appellant has been assessed a capital gain on the deemed disposition of the shares, based on a fair market value of \$4,195,715. This capital gain assessed in respect of the shares of Holdings has not been contested by the appellant.

[31] The difference in value between the fair market value of the shares of Holdings, as reported, and the fair market value of the said shares, as established by Revenu Québec, amounts to \$1,918,330 and is due to the denial of a downward adjustment of \$1,709,520 claimed by the appellant's representative and by the increased value at \$208,810 corresponding to the fair market value of the two subsidiaries of Holdings (\$ 94,182 for LLH and \$ 114,628 for Gants) which were not initially taken into account by the appellant's representative.

[32] In his notice of appeal, the appellant maintains that the terminal return filed for Laurence Lewin properly calculated the value of the assets and, in the alternative, alleges that, if there were errors in the calculation of the value of the assets, these errors were not made negligently.

[33] The evidence is clear that Mr. Grossbaum made obvious errors in calculating the fair market value of the shares of Holdings by not taking into account the fair market value of the two subsidiaries of Holdings and by claiming and unjustified downward adjustment of \$ 1,709,520. The fact that the fair market value of the shares of Holdings has been erroneously calculated has not been contested during the hearing of the appeal.

[34] It is also clear in jurisprudence that an error made when filing a tax return whether made in good faith, by inadvertence or by a simple calculation error is considered to be a misrepresentation within the meaning of subparagraph 152(a)(i) of the Act (*Mont-Bruno v. Canada*, 2018 TCC 105, paragraphs 37 and 38; *Nesbitt v. Canada*, [1996] F.C.J. No. 1470 (QL) (FCA), paragraphs 8 and 9; *Vine Estate v. Canada*, [2015] F.C.J. No. 651(QL) (FCA), paragraphs 33 – 35; and *Ridge Run Developments Inc. v. Canada*, 2007 TCC 734).

[35] The second question to be determined is whether the executor of the appellant has been negligent when he filed the terminal return of the deceased.

[36] In *Venne v. Canada* (MNR), [1984] F.C.J. No. 314 (QL) (FCTD), Justice Strayer stated that a taxpayer has been negligent if it is shown that he has not exercised reasonable care.

[37] In this context, “reasonable care” has been defined by the Courts as the care that would be expected of a wise and prudent person in the same circumstances (*Robertson v. Canada*, 2015 TCC 246, confirmed in 2016 FCA 303 and *Mina Kawtab Yunus v. Canada*, 2015 TCC 272).

[38] In *Gebhart Estate v. Canada*, 2008 FCA 206, the executor of an estate was considered to have been negligent in the performance of his duties to ensure that the terminal return was properly filed. The mistake that he did could have been easily avoided if a validation of the missing information had been performed.

[39] In the case at bar, the evidence supports the conclusion that there was neglect on the part of Mr. Grossbaum in the performance of his duties as an executor of the estate of Mr. Laurence Lewin, to ensure that the 2008 income tax return was properly filed.

[40] The calculation of the fair market value of the shares of Holdings was not been carried with due care by an in-depth analysis of the supporting material.

[41] In the absence of evidence from Mr. Grossbaum to give a reasonable explanation as to why the value of the two subsidiaries of Holdings was first being ignored is a *prima facie* case of negligence on the part of the accountant. He knew the existence of the two subsidiaries and that an important transaction (the sale of La Senza) took place a few months before Mr. Lewin’s death and he had access to their financial statements.

[42] Concerning the \$1,709,530 adjustment, Mr. Grossbaum did not explain why he considered that dividend was not collectible. Nothing supported that treatment. The amount of \$1,709,520 appeared in the balance sheets of Holdings and LLH as at January 30, 2008 and 2009, as an asset of LLH and as a liability of Holdings. In subsequent years' financial statements, the amount of \$1,709,520 had not been written down which meant that the adjustment should not have been made.

[43] The fair market value of the shares of Holdings on November 12, 2008 had to be determined with information available prior to filing the terminal tax return. Mr. Grossbaum tried until January 2018 to justify his evaluation by taking into account information that was not available at the time he filed the terminal tax return. This is not acceptable.

[44] As the reassessment is deemed valid, the appellant has the burden to demonstrate that the determination of the fair market value of the shares of Holdings made by the minister was not correct. In my view, the appellant has failed to discharge his burden.

[45] For all these reasons, the appeal is dismissed with costs.

Signed at Montreal, Canada, this 30th day of January 2019.

« Réal Favreau »

Favreau J.

CITATION: 2019 TCC 21

COURT FILE NO.: 2016-482(IT)G

STYLE OF CAUSE: The Estate of the Late Laurence Lewin and Her Majesty the Queen

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: July 4, 2018

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: January 30, 2019

APPEARANCES:

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