

Docket: 2019-396(IT)G

BETWEEN:

SAMUEL JAMES MINGLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 12, 2021 at Hamilton, Ontario

Before: The Honourable Justice Susan Wong

Appearances:

Counsel for the Appellant: John Loukidelis

Counsel for the Respondent: Kevin Hong

AMENDED JUDGMENT

The appeal from an assessment numbered 4363666 dated May 4, 2017 made under the *Income Tax Act* is dismissed, without costs, **in accordance with the attached amended reasons for judgment.**

This Amended Judgment is issued in place of the Judgment dated March 4, 2022.

Signed at Ottawa, Canada, **this 2nd day of May 2022.**

“Susan Wong”

Wong J.

Citation: 2022 TCC 34
Date: 20220502
Docket: 2019-396(IT)G

BETWEEN:

SAMUEL JAMES MINGLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Wong J.

I. Introduction/Overview

[1] When the appellant's father died in 1994, the appellant and his brother became executors of his estate. In his will, their father left most of his estate to the appellant's brother as well as a portion to grandchildren and great-grandchildren. The appellant was peaceful with this decision but wished to ensure that his daughter received her share of the estate. Sixteen years after his father's death, the appellant took steps with his brother to ensure that she received her share in the form of a mortgage against their deceased father's property. To do so, he had to sign documents as an executor of the estate.

[2] Unfortunately, his deceased father's estate owed income tax from the outset and was in arrears when the mortgage was granted in 2010. The appellant's brother died in 2016 and the Minister of National Revenue assessed the appellant personally for the tax debt because the mortgage was granted without first obtaining a clearance certificate.

[3] The appellant says that he is not liable for the unpaid taxes because he renounced his executorship by letter two months after his father's death. He also says that he **did not act** as a *trustee de son tort* when he granted the mortgage to his daughter, so his renunciation remained valid.

II. Issues

[4] The assessment question is whether the appellant Mr. Mingle is liable for the 2006 to 2010 tax debt of his deceased father's estate because as executor, he failed to obtain a clearance certificate before distributing its property.

[5] To answer this question, this Court must decide whether he renounced his executorship.

[6] There is also a secondary question as to whether the Minister was out of time to assess Mr. Mingle for the estate's 2006 tax debt.

III. Factual background

[7] Mr. Mingle is a self-made businessman who retired over twenty years ago after operating his own dry-cleaning business for fifteen years, followed by twenty years as the owner/operator of a motel. Although the notice of appeal says that Mr. Mingle is a non-resident¹, he testified that other than Port Colborne and Niagara-on-the-Lake, he has lived in the city of Niagara Falls for most of his life.

[8] When his father Anthony Mingle ("Anthony") died in May 1994, Mr. Mingle and his brother James Anthony Mingle ("James") were appointed as executors and trustees of the estate. Anthony's will and two codicils provided that, among other things:

- a. unpaid debts and income taxes should be paid out of his estate;²
- b. his house should be conveyed to James;³
- c. his shares in a company called Nialund Properties Limited should be conveyed to James;⁴
- d. each grandchild should receive \$4,000;⁵
- e. each great-grandchild should receive \$2,000;⁶
- f. half of the residue of his estate should be given to James;⁷ and

g. the other half of the residue of his estate should be divided equally between two granddaughters, Susan McDowell and Alisa Davies (Mr. Mingle's daughter).⁸

[9] Mr. Mingle testified that he handwrote a letter⁹ to James dated July 27, 1994, and it read as follows:

Jim

Everyone seems to still think I'm co-executor of Dad's estate even though I told you and everyone else involved that I will not act in that role.

Please do what you can to keep me out of it.

SM

Copy of the letter I gave to Jim on the advice of Guy Ungaro

[10] Mr. Mingle stated that in July 1994, he personally delivered the letter to James, with whom he had always had some conflict. Mr. Mingle testified that he (himself) was not a beneficiary to their father's will nor did he wish to be, because James' needs were greater at the time. He also stated he did not know in advance that he would be appointed as an executor. He testified that James and their father worked together all the time while he (himself) focused on his own activities.

[11] James died in August 2016¹⁰. Mr. Mingle testified that James' wife subsequently gave him (Mr. Mingle) some of James' files and the original July 27, 1994 handwritten letter was amongst those files. While a photocopy was entered into evidence (as is the norm), the original letter was available for viewing during the hearing. The original letter was written in blue ink and included the notation "Copy of the letter I gave to Jim on the advice of Guy Ungaro". In cross-examination, Mr. Mingle explained that Mr. Ungaro was his lawyer; he also stated that he was uncertain why he would have written this notation on the original letter given to James.

[12] Scott Caldwell -- a retired accountant -- testified that from 1996 to about 2014, he handled accounting matters for Anthony's estate and in that context, worked with the estate's lawyer (John Broderick) and with James. Mr. Caldwell stated that he filed annual T3 returns on behalf of the estate and recalled that the estate had been in tax arrears since Anthony's death. He stated that the estate entered into a series of arrangements with Canada Revenue Agency with respect to payment towards arrears plus waivers of interest and penalties, beginning in 1995 or 1996 until about 2014.

He testified that he dealt with James and Mr. Broderick, both of whom were his firm's client contacts when he inherited the estate file.

[13] Mr. Caldwell explained that the property in question is part of a commercial plaza on Lundy's Lane in Niagara Falls. He stated that the plaza operated under a condominium-style of ownership and that through a somewhat complicated arrangement, condominium interests in this part of the plaza were held by each of three owners, i.e. Migale Vincent Holdings (James' holding company), Nialund Properties Limited (in which Anthony owned shares), and a third party. Mr. Caldwell stated that in 2010, Migale was incorporated as part of James' estate planning and it held the condominium interest owned and bequeathed by Anthony (the "Property").¹¹

[14] In late 2010, a series of steps was undertaken by Mr. Mingle and James, resulting in a \$240,000 mortgage against the Property in favour of Mr. Mingle's daughter Alisa Davies. The steps included the following:

- a. On August 5th, Mr. Mingle and James signed a Covenant to Indemnify the Land Titles Assurance Fund as estate trustees of Anthony's will. The covenant states that they are applying to the Ontario land registrar to become the registered owners of the Property without the need to obtain a Certificate of Appointment of Estate Trustee with a Will. In the covenant, they confirm that all of Anthony's debts have been paid in full.¹²
- b. On August 11th, an application for "Transmission By Personal Representative – Land" was electronically filed and signed by Mr. Broderick as representative for the applicants, being Mr. Mingle and James as estate trustees. The application stated that each of the applicants was entitled to be the owner of the Property as estate trustee. As a schedule to the transmission, Mr. Broderick declares that Anthony's will appointed Mr. Mingle and James as executors and that Anthony's estate is valued at \$50,000.¹³
- c. On September 1st, Mr. Mingle and James transferred the Property now valued at \$240,000 to James' holding company Migale.¹⁴
- d. Also on September 1st, a charge in the amount of \$240,000 is granted by Migale to Alisa Davies.¹⁵

[15] Mr. Mingle stated that he wished for his daughter to receive a share of Anthony's estate and to that end, James proposed granting a mortgage in favour of Alisa Davies. He testified that he signed the covenant but did not read it or seek independent legal advice. He stated that he did not discuss the estate's debts with James or Mr. Broderick, nor did anyone raise the prospect of obtaining a clearance certificate. He explained that he conducted himself this way because he trusted James and Mr. Broderick. He testified that other than the covenant, he did not remember seeing any of the other documents listed above.

[16] The parties agree that the will was not probated.

IV. Legislative framework

A. Federal

[17] A "legal representative" of a taxpayer includes a trustee and an executor (among other things) or "any other like person, administering, winding up, controlling or otherwise dealing in a representative or fiduciary capacity with the property that belongs or belonged to, or that is or was held for the benefit of, the taxpayer or the taxpayer's estate."¹⁶

[18] The Minister's authority to assess an executor for an estate's unpaid tax debt falls under section 159 of the *Income Tax Act*. The wording is important so I will not paraphrase it.

[19] Subsection 159(1) of the *Income Tax Act* deals with liability where one person acts for another, and reads in part as follows:

159. (1) Person acting for another – For the purposes of this Act, where a person is a legal representative of a taxpayer at any time,

- (a) the legal representative is jointly and severally, or solidarily, liable with the taxpayer
 - (i) to pay each amount payable under this Act by the taxpayer at or before that time and that remains unpaid, to the extent that the legal representative is at that time in possession or control, in the capacity of legal representative, of property that belongs or belonged to, or that is or was held for the benefit of, the taxpayer or of the taxpayer's estate, and
 - (ii) to perform any obligation or duty imposed under this Act on the taxpayer at or before that time and that remains outstanding, to the extent that the obligation or duty can reasonably be considered

to relate to the responsibilities of the legal representative acting in that capacity; and

...

[20] Subsection 159(2) deals with the requirement to obtain a clearance certificate before distributing property and says:

159. (2) Certificate before distribution – Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts

- (a) for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and
- (b) for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity

have been paid or that security for the payment thereof has been accepted by the Minister.

[21] Subsection 159(3) deals with the possible consequences of distributing property without obtaining a clearance certificate and says:

159. (3) Personal liability – If a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate under subsection (2) in respect of the amounts referred to in that subsection,

- (a) the legal representative is personally liable for the payment of those amounts to the extent of the value of the property distributed;
- (b) the Minister may at any time assess the legal representative in respect of any amount payable because of this subsection; and
- (c) the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, to an assessment made under this subsection as though it had been made under section 152 in respect of taxes payable under this Part.

[22] By virtue of paragraph 152(3.1)(b), the normal reassessment period for the estate is three years. To collect the estate's tax debt, the Minister is subject to a 10-year limitation period calculated from the date that is 90 days after the last notice of

assessment was sent.¹⁷ This 10-year limitation period restarts if the Minister assesses any person under subsection 159(3) for the tax debt within the original 10-year period.¹⁸ The limitation period as well as the restart triggered by a subsection 159(3) assessment came into effect on May 14, 2004.¹⁹

[23] Distilled down to the circumstances of this case, a trustee/executor is liable for the estate's tax, interest, and penalties that are unpaid before and while the person is trustee/executor. Before distributing the estate's property, the trustee/executor must obtain a clearance certificate from the Minister certifying that there are no outstanding amounts. If the trustee/executor distributes the property without obtaining the certificate, then they are personally liable for the unpaid amounts (up to the value of the property distributed) and can be assessed as though it is their own tax debt.

B. Ontario

[24] The parties argued the relevance and application of section 34 of the Ontario *Estates Act*, which reads as follows:

Consequences upon executor renouncing

34. Where a person renounces probate of the will of which the person is appointed an executor, the person's rights in respect of the executorship wholly cease, and the representation to the testator and the administration of the testator's property, without any further renunciation, goes, devolves and is committed in like manner as if such person had not been appointed executor.²⁰

V. Analysis/Discussion

[25] I have great sympathy for the challenge of family dynamics, particularly during times of strife such as the death of a parent. To that end, I also have great sympathy for Mr. Mingle's desire to ensure that his daughter received her fair share of her grandfather's estate, regardless of any family dynamics which may have existed in the background.

[26] It is relatively clear from the evidence that Mr. Mingle did not play a prominent role in the day-to-day administration of Anthony's estate. However, I am unable to find that he renounced his executorship at any time. The original pen-and-ink version of the July 1994 handwritten renunciation letter had a pen-and-ink notation²¹ that it was a copy of the letter delivered to James. If the original letter was in James' possession until his death in 2016 and then subsequently returned to Mr.

Mingle with other files, I cannot find a logical explanation for why the original letter would have this notation and none was provided during the hearing. Therefore, on a balance of probabilities, it is likely that this letter was not written and/or delivered to James in 1994.

[27] The parties did not tender a complete set of land transfer documents in evidence but it is reasonable to assume that they consisted of more than the covenant to indemnify.²² Mr. Mingle may not have understood everything about being an executor or every aspect of the land transfer documents he signed; however, I believe he understood that he was signing as executor and that such authority was needed in order to deal with the Property and secure a mortgage in his daughter's favour. For example, the covenant to indemnify identified him as executor and he signed it.

[28] In light of my finding that there was no renunciation, it is not necessary to consider section 34 of the Ontario *Estates Act* or the common law principle of *trustee de son tort*. However, I will note that section 34 deals with the renunciation of probate and the will was not probated in the present case, so the section is of limited assistance. In addition, if Mr. Mingle was a *trustee de son tort* (i.e. a person who is not appointed as trustee but whose course of conduct suggests that he be treated as one),²³ I believe that for income tax purposes, he would have still fallen within the definition of "legal representative" which encompasses "any other like person ... dealing in a representative or fiduciary capacity with the property."²⁴

Limitation period under section 222

[29] Mr. Mingle was assessed under subsection 159(3) on May 4, 2017 for the estate's 2006 to 2010 tax liabilities. With respect to those taxation years, the estate was assessed or reassessed on the following dates:²⁵

Taxation year	(Re)Assessment
2006	June 20, 2007
2007	June 25, 2008
2008	July 9, 2009
2009	June 9, 2010
2010	January 18, 2012

[30] The initial limitation period for the Minister to collect against the estate expired 90-days-plus-ten-years after each of the above dates. With respect to 2006,

the limitation period expired on September 18, 2017, i.e. September 18, 2007 plus ten years. Therefore, the May 4, 2017 assessment under subsection 159(3) appeal was issued within time and triggered a restart of the 10-year limitation period to now expire on August 2, 2027, i.e. August 2, 2017 plus ten years. The remaining taxation years were assessed/reassessed later so the Minister was more clearly within the time limit to assess under subsection 159(3).

VI. Conclusion

[31] The appeal is dismissed, without costs.

These Amended Reasons for Judgment are issued in place of the Reasons for Judgment dated March 4, 2022.

Signed at Ottawa, Canada, **this 2nd day of May, 2022.**

“Susan Wong”

Wong J.

CITATION: 2022 TCC 34
COURT FILE NO.: 2019-396(IT)G
STYLE OF CAUSE: SAMUEL JAMES MINGLE v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: October 14, 2021

AMENDED REASONS FOR JUDGMENT BY: The Honourable Justice Susan Wong

DATE OF **AMENDED** JUDGMENT: **May 2, 2022**

APPEARANCES:

Counsel for the Appellant: John Loukidelis

Counsel for the Respondent: Kevin Hong

COUNSEL OF RECORD:

For the Appellant:

Name: John Loukidelis

Firm: Loukidelis Professional Corporation
Hamilton, Ontario

For the Respondent:

François Daigle
Deputy Attorney General of Canada
Ottawa, Canada

¹ Notice of Appeal, paragraph 7

² Exhibit A-1 (Joint Book of Documents), Tab 1 -- Will of Anthony Mingle dated December 15, 1989 at paragraph 2(b)

³ Exhibit A-1 (Joint Book of Documents), Tab 1 -- Codicil dated April 25, 1991 at paragraph 2(b)(i)

⁴ Exhibit A-1 (Joint Book of Documents), Tab 1 -- Will of Anthony Mingle dated December 15, 1989 at paragraph 2(c)

⁵ Exhibit A-1 (Joint Book of Documents), Tab 1 -- Will of Anthony Mingle dated December 15, 1989 at paragraph 2(c)(i)

⁶ Exhibit A-1 (Joint Book of Documents), Tab 1 -- Will of Anthony Mingle dated December 15, 1989 at paragraph 2(c)(ii)

⁷ Exhibit A-1 (Joint Book of Documents), Tab 1 -- Codicil dated February 4, 1992 at paragraphs 2(d) and 2(d)(i)

⁸ Exhibit A-1 (Joint Book of Documents), Tab 1 -- Codicil dated February 4, 1992 at paragraphs 2(d) and 2(d)(ii)

⁹ Exhibit A-1 (Joint Book of Documents), Tab 2

¹⁰ Notice of Appeal, paragraph 8

¹¹ Notice of Appeal, paragraph 13 -- legal description of the Property

¹² Exhibit A-1 (Joint Book of Documents), Tab 3 – Covenant to Indemnify the Land Titles Assurance Fund

¹³ Exhibit A-1 (Joint Book of Documents), Tab 3 – Transmission by Personal Representative – Land plus schedule

¹⁴ Exhibit A-1 (Joint Book of Documents), Tab 4 – Service Ontario Parcel Register (Abbreviated) for Property Identifier

¹⁵ Exhibit A-1 (Joint Book of Documents), Tab 4 – Service Ontario Parcel Register (Abbreviated) for Property Identifier

¹⁶ *Income Tax Act*, section 248(1), definition of “legal representative”

¹⁷ *Income Tax Act*, section 222(4)

¹⁸ *Income Tax Act*, section 222(5)(c)

¹⁹ *An Act to implement certain provisions of the budget tabled in Parliament on March 23, 2004*, S.C. 2004, chapter 22, section 50

²⁰ *Estates Act*, R.S.O. 1990, chapter E.21

²¹ Exhibit A-1 (Joint Book of Documents), Tab 2

²² Exhibit A-1 (Joint Book of Documents), Tab 3 – Covenant to Indemnify the Land Titles Assurance Fund

²³ *Chambers Estate v. Chambers*, 2013 ONCA 511 at paragraph 75

²⁴ *Income Tax Act*, section 248(1), definition of “legal representative”

²⁵ Reply to the notice of appeal, paragraph 4