

**Date: 20080612**

**Docket: A-536-06**

**Citation: 2008 FCA 206**

**CORAM: SHARLOW J.A.  
PELLETIER J.A.  
RYER J.A.**

**BETWEEN:**

**ESTATE OF HERMAN GEBHART**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Regina, Saskatchewan, on June 2, 2008.

Judgment delivered at Ottawa, Ontario, on June 12, 2008.

**REASONS FOR JUDGMENT BY:**

**RYER J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
PELLETIER J.A.**

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**BETWEEN:**

**ESTATE OF HERMAN GEBHART**

**Appellant**

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**Respondent**

**REASONS FOR JUDGMENT**

**RYER J.A.**

[1] This is an appeal from a decision of Justice Beaubier (the “Tax Court Judge”) of the Tax Court of Canada (2006 TCC 572), dated October 31, 2006, dismissing the appeal of the Estate of Herman Gebhart (the “Estate”) from a reassessment (the “reassessment”) of its 1996 taxation year that was issued, pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) (the “ITA”), on the basis that the income of the Estate for that taxation year was under-reported by \$40,953, an amount that the Estate received in that taxation year as the proceeds from the closure of an RSP account held by Mr. Herman Gebhart at the time of his death.

[2] The income tax return of the Estate for the taxation year in question was assessed by the Minister of National Revenue (the “Minister”) on January 27, 1997. The reassessment was issued on January 31, 2002, a date that was beyond the normal reassessment period, within the meaning of paragraph 152(3.1)(b) of the ITA, for the Estate in respect of its 1996 taxation year. The Minister justified the issuance of the reassessment pursuant to subparagraph 152(4)(a)(i) of the ITA on the basis that the taxpayer or person who filed the income tax return for the 1996 taxation year of the Estate made a misrepresentation that was attributable to neglect, carelessness or wilful default in filing the return.

[3] The issue in this appeal is whether the issuance of the reassessment after the normal reassessment period for the Estate in respect of its 1996 taxation year is sustainable.

#### **THE APPLICABLE PROVISIONS OF THE ITA**

[4] The relevant statutory provisions, paragraphs 152(3.1)(b) and 152(4)(a) of the ITA, are as follows:

152(3.1) For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is

*(b)* in any other case, the period that ends 3 years after the earlier of the day of mailing of a notice of an original assessment under this Part in respect of the taxpayer for the year and

152 3.1) Pour l’application des paragraphes (4), (4.01), (4.2), (4.3), (5) et (9), la période normale de nouvelle cotisation applicable à un contribuable pour une année d’imposition s’étend sur les périodes suivantes :

*b)* trois ans suivant le premier en date de ces jours, dans les autres cas.

the day of mailing of an original notification that no tax is payable by the taxpayer for the year.

(4) 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

...

(4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants:

a) le contribuable ou la personne produisant la déclaration:

(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

[...]

## **FACTS**

[5] Mr. Gebhart died on his ranch near Mankota, Saskatchewan in May of 1996. His nephew, Mr. Richard Kohl, was the Executor of the Estate. Mr. Kohl died in 2005.

[6] In 1996, Mr. Kohl retained Mr. Paul Lewans, a lawyer from Assiniboia, Saskatchewan, to handle the legal matters in relation to the administration of the Estate. In the course of obtaining a grant of probate, Mr. Lewans prepared a statement of assets (the “Statement of Assets”) of the Estate that indicated that the deceased had an RSP with Mackenzie Financial Corporation (“MFC”) and certain accounts with Canadian Imperial Bank of Commerce (“CIBC”).

[7] The information pertaining to the CIBC accounts was contained in correspondence from CIBC. That information contained indications that two of those accounts were RSPs, although Mr. Lewans appears not to have recognized those indications. The record contains no indication as to whether Mr. Kohl actually saw this correspondence. The information pertaining to the MFC RSP was provided to Mr. Lewans in correspondence to him from MFC.

[8] In July of 1996, funds from the closure of the CIBC RSPs were sent to the Mankota branch of the CIBC (“CIBC-Mankota”) and were deposited into the account of the Estate. T4RSPs relating to the closure of the CIBC RSPs were also provided to CIBC-Mankota.

[9] At some unspecified time in 1996, funds from the closure of the MFC RSP were also sent to CIBC-Mankota and were deposited into the account of the Estate. The record does not contain any direct evidence that A T4RSP relating to the closure of the MFC RSP was provided to the CIBC-Mankota.

[10] Mr. Kohl and Mr. Lewans were aware of the receipt of funds from CIBC and MFC on the closures of the CIBC RSPs and the MFC RSP and of the T4RSPs from CIBC. However, they were apparently surprised to learn that Mr. Gebhart had RSP accounts with both CIBC and MFC. Mr. Lewans testified that on a number of occasions, he had asked Mr. Kohl if a T4RSP had been received in relation to the MFC RSP.

[11] The 1996 income tax return was prepared by Mr. Lewans and, according to his evidence, was signed by him or by Mr. Kohl. In preparing that return, Mr. Lewans included, as RSP income, the amounts indicated on the CIBC T4RSPs. However, that return did not report any amount of RSP income in respect of the MFC RSP. Mr. Lewans testified that he reviewed that return with Mr. Kohl before it was filed.

[12] The 1996 income tax return was filed prior to 1997 and an assessment of that return was issued by the Minister on January 27, 1997.

[13] The Minister received a T4RSP in respect of the MFC RSP, although the date of such receipt is not apparent.

[14] On November 28, 2001, the Minister wrote to the Estate advising of the unreported RSP income in relation to the MFC RSP and on January 31, 2002, the reassessment was issued.

[15] The Estate objected to the reassessment, the Minister confirmed it and the Estate appealed to the Tax Court of Canada.

### **THE DECISION OF THE TAX COURT JUDGE**

[16] The Tax Court Judge found that the Minister was entitled to reassess the 1996 taxation year of the Estate pursuant to subsection 152(4) of the ITA, holding that the failure to report the RSP income that arose on the closing of the MFC RSP amounted to a misrepresentation that was attributable to neglect or carelessness.

[17] In reaching that conclusion, the Tax Court Judge noted that when CIBC provided the proceeds of the CIBC RSPs to the Estate, it also provided the related T4RSPs. The Tax Court Judge then inferred that MFC did the same thing, that is to say, it provided a T4RSP along with the proceeds of the MFC RSP that were sent to CIBC-Mankota. The Tax Court Judge further inferred that CIBC-Mankota gave the MFC T4RSP to Mr. Kohl, who then misplaced it. According to the Tax Court Judge, the failure on the part of Mr. Kohl to keep track of the MFC T4RSP constituted the kind of neglect or carelessness that warranted the reassessment of the 1996 taxation year of the Estate after the normal reassessment period.

## ANALYSIS

[18] Subparagraph 152(4)(a)(i) of the ITA permits the Minister to issue a reassessment for a taxation year after the normal reassessment period for a taxpayer in respect of such taxation year if the taxpayer or person filing the return in respect of such a taxation year has made a misrepresentation that is attributable to neglect, carelessness or wilful default in filing the return.

[19] In this appeal, the issue relates only to the neglect or carelessness elements of subparagraph 152(4)(a)(i) of the ITA. In *Venne v. Canada (Minister of National Revenue – M.N.R.) (F.C.T.D.)*, [1984] C.T.C. 223 Justice Strayer stated, at page 228, that:

... it is sufficient for the Minister, in order to invoke the power under subparagraph 152(4)(a)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care.

I agree with that statement as to the standard that must be met to demonstrate that a misrepresentation is attributable to neglect or carelessness for the purposes of subparagraph 152(4)(a)(i) of the ITA.

[20] The Estate attacks the decision of the Tax Court Judge on two grounds. The first is that the findings of negligence on the part of Mr. Kohl cannot be supported because they are based upon inferences that were improperly drawn by the Tax Court Judge. The second ground is that apart from the inferences, there was no evidence before the Tax Court Judge that supports a finding of negligence on the part of Mr. Kohl in the filing of the 1996 income tax return.



[21] While it is possible that the attack upon the propriety of the inferences that were drawn by the Tax Court Judge may have some merit, in my view, there was ample evidence before the Tax Court Judge that supports his conclusion. In particular:

- (a) both Mr. Kohl and Mr. Lewans knew that Mr. Gebhart had an RSP with MFC and that MFC had sent the cash value of that RSP to CIBC-Mankota;
- (b) Mr. Lewans was expecting to receive a T4RSP from MFC and asked Mr. Kohl about the receipt of such a document;
- (c) Mr. Kohl did not provide a T4RSP from MFC to Mr. Lewans. This may have been because no such document was ever received by Mr. Kohl or because he received one but lost it or because he received one, but did not realize it related to the MFC RSP, possibly because it was issued in the name of MRS Trust Company;
- (d) Mr. Kohl, as executor of the Estate, was responsible for the filing of the 1996 income tax return, which was prepared and filed by Mr. Lewans in accordance with instructions from Mr. Kohl; and
- (e) the 1996 income tax return does not report any amount of income in respect of the MFC RSP, even though both Mr. Kohl and Mr. Lewans knew that the cash proceeds from that investment had been received by the Estate.

[22] The explanation for the failure to report the amount of the proceeds from the MFC RSP in the 1996 income tax return of the Estate is that Mr. Kohl and Mr. Lewans were confused over the apparent existence of RSPs with both CIBC and MFC and the non-existence of a T4RSP with respect to the MFC RSP.

[23] Counsel for the Estate concedes that the failure to report the proceeds from the closure of the MFC RSP in the 1996 income tax return is a misrepresentation, within the meaning of subparagraph 152(4)(a)(i) of the ITA, but contends that this misrepresentation is not attributable to any neglect or carelessness on the part of Mr. Kohl, the person legally responsible for the filing of that income tax return.

[24] I am unable to agree with that contention. In my view, the evidence that was before the Tax Court Judge supports the conclusion that there was neglect on the part of Mr. Kohl in the performance of his responsibility, as executor of the Estate, to ensure that the 1996 income tax return was properly filed.

[25] Mr. Kohl knew, or ought to have known, that the proceeds from the closure of all RSPs owned by Mr. Gebhart at the time of his death were required to be included in the income of the Estate for 1996. He was surely told that by Mr. Lewans and it should have been obvious to him from his review of the 1996 income tax return itself, which reported the proceeds from the closure of the CIBC RSPs as income. Moreover, the absence of a T4RSP with respect to the amount received on the closure of the MFC RSP did not exempt that amount from being reported as RSP income in that income tax return.

[26] The confusion that may have been present in Mr. Kohl's mind was whether there were, in fact, more RSPs than he and Mr. Lewans had initially thought. This confusion could easily have

been cleared up by a visit or telephone call to CIBC-Mankota, where Mr. Gebhart had conducted his financial affairs. It was not a difficult problem to sort out and, in my view, Mr. Kohl did not exercise reasonable care in authorizing the filing of the 1996 income tax return before the matter of how many RSPs Mr. Gebhart actually held at the time of his death had been clarified. It follows, in my view, that the evidence that was before the Tax Court Judge supports his conclusion that there was a misrepresentation attributable to neglect or carelessness on the part of Mr. Kohl in the filing of the 1996 income tax return of the Estate, as contemplated by subparagraph 152(4)(a)(i) of the ITA, that warranted the reassessment of the Estate in respect of its 1996 taxation year after the normal reassessment period for the Estate in respect of that taxation year.

## **DISPOSITION**

[27] For the foregoing reasons, I would dismiss the appeal with costs.

“C. Michael Ryer”

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J.A.

“I agree  
K. Sharlow J.A.”

“I agree  
J.D. Denis Pelletier J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-536-06

**(APPEAL OF A DECISION OF THE TAX COURT OF CANADA (BEAUBIER, J.) DATED  
OCTOBER 31, 2006 IN TCC FILE NO. 2003-754(IT)G)**

**STYLE OF CAUSE:** ESTATE OF HERMAN GEBHART  
v. HER MAJESTY THE QUEEN

**PLACE OF HEARING:** REGINA, SK

**DATE OF HEARING:** JUNE 3, 2008

**REASONS FOR JUDGMENT BY:** RYER J.A.

**CONCURRED IN BY:** SHARLOW J.A.  
PELLETIER J.A.

**DATED:** JUNE 12, 2008

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