Docket: 2006-1685(IT)I

BETWEEN:

CARL CURRIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on August 29, 2007 at Charlottetown, Prince Edward Island
with Final Submissions filed on February 20, 2008

Before: The Honourable Justice E. P. Rossiter

Appearances:

Counsel for the Appellant: David W. Hooley, Q.C.

Counsel for the Respondent: Lindsay D. Holland

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**JUDGMENT**

The appeal from the assessment made under subsection 160(1) of the *Income Tax Act*, notice of which is dated February 3, 2004 and bears number 30527 is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is not liable for interest on the Estate debt from December 31st of the year of the transfer, for and in accordance with the reasons set out in the attached Reasons for Judgment.

The Appellant shall be entitled to his costs.

Signed at Ottawa, Canada, this 13th day of June, 2008.

"E. P. Rossiter"

Rossiter, J.

Citation: 2008TCC338
Date: 20080613
Docket: 2006-1685(IT)I

BETWEEN:

CARL CURRIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Rossiter, J.

Facts

[1] Delmar Currie died August 10, 1996.

[2] Delmar Currie's son, Carl Currie, is the Appellant and is one of the Executors of Delmar Currie's Estate (the "Estate"). Letters of Probate were granted on the Estate from the Prince Edward Island Supreme Court.

[3] On May 12, 1997 a Notice of Assessment was issued by Canada Revenue Agency ("CRA") in respect of the Estate in the amount of $69,176.73, which was reduced to a nil balance after the payment of $10,894 in income tax installments and the application of a variety of credits.

[4] On April 7, 2000 a Notice of Reassessment was issued in respect of the Estate by CRA showing a total tax payable of $684,458.07, plus applicable credits and interest, for a total liability of $793,061.48.

[5] After the initial Notice of Assessment of May 12, 1997, before the reassessment of April 7, 2000, and before a Tax Clearance Certificate was issued by CRA on June 13, 2006, the assets of the Estate were distributed to the beneficiaries in accordance with the Letters of Probate on the Estate.

[6] On May 24, 2000, a Notice of Objection of the reassessment was filed with CRA.

[7] On April 26, 2002, additional arrears interest of $165,653.24 was charged upon the Estate bringing the total tax owing to $958,714.72.

[8] On February 3, 2004 ("Assessment #1"), the Appellant was assessed under subsection 160(1) of the *Income Tax Act* ("*Act*") on the basis that the Estate had transferred property to him between 1996 and 1999, and the fair market value of the property transferred exceeded the amount owing to the Respondent by the Estate. The total tax liability assessed was $544,146.86, which consisted of $222,702.32 in federal tax and $321,444.54 in interest.

[9] The Appellant made payments on the Estate assessment:

| | |
|---|---|
| July 21, 2004 | $50,000.00 |
| December 23, 2005 | $173,000.00 |
| February 6, 2006 | $150,000.00 |
| March 23, 2006 | $247,289.64 |
| Total | $620,289.64 |

[10] On April 19, 2004 the Appellant filed a Notice of Objection on Assessment #1.

[11] On January 25, 2006 Assessment #1 was confirmed.

[12] On April 25, 2006, the Appellant filed a Notice of Appeal.

[13] On May 11, 2006 ("Assessment #2") a Notice of Assessment/Reassessment was issued to Carl Currie under subsection 160(1) of the *Act* showing the balance owing on the assessment was nil. This Assessment stated in part as follows:

> A reassessment pertaining to the liability under subsection 160(1) of the *Income Tax Act*, and section 19 of the *Income Tax Act* - Prince Edward Island, at the time of transfer (section 48, Income Tax Act – Prince Edward Island including and after December 20, 2000), in the amount of $00.00 in respect to a previous assessment dated February 03, 2004 bearing #30527.

[14] Assessment/Reassessment #2 was accompanied with a letter from the CRA collection officer which stated in part as follows:

> Please find attached, a notice of re-assessment with respect to the Estate of Delmar Currie which addresses the previous notice of assessment mailed to you on February 03, 2004.
>
> As a result of the payment in full of all amounts owed by the Estate, we have re-assessed your liability for payment and have vacated the previous assessment.
>
> …

Issues

[15] The issues in this appeal as agreed to by the parties are:

1. Which Notice of Assessment/Reassessment, Assessment #1 of February 3, 2004 or Assessment #2 of May 11, 2006, is before the Court?

2. Can interest be levied under subsection 160(1) of the *Act* and was the assessment correct?

Position of the Appellant

[16] The Appellant is of the view that, although the Appellant is jointly and severally liable from February 3, 2004 onward with respect to the debt of the Estate pursuant to subsection 160(1) of the *Act*, the Appellant is not liable for any interest which accumulated on the debt post February 3, 2004 to the date of payment. The Appellant states that he overpaid interest on the debt owing to CRA, the amount of interest accumulated and paid post February 3, 2004 was $75,101.72.

Position of the Respondent

[17] The Respondent asserts that similar to the *Algoa Trust v. R.*, [1998] 4 C.T.C. 2001 (T.C.C.) decision, the Appellant is jointly and severally liable for the debt of the Estate, which is limited to the differences between the fair market value of the property transferred to the Appellant less the good and valuable consideration paid for the property at the time of the transfer plus accumulating interest and penalties, notwithstanding that some of the interest may have accrued post February 3, 2004.

Law and Analysis

[18] On August 21, 2006, the Respondent brought a Motion to Dismiss the Notice of Appeal for two reasons:

1. The remedy being sought by the Appellant was not within the jurisdiction of the Tax Court of Canada; and

2. A nil assessment was not a valid assessment to which an appeal could be sought.

This Motion was dismissed by Justice Bowie and he characterized the Motion as frivolous.

[19] At trial, the Appellant argued that the Respondent could not raise the jurisdiction issue as it did in the pre-trial Motion because it was argued and dealt with by Justice Bowie – in essence arguing that *res judicata* or *estoppel* applied. The Respondent says it can challenge jurisdiction because Justice Bowie did not deal in the Motion as to whether or not the Court had jurisdiction.

[20] I have reviewed in detail Justice Bowie's decision of November 22, 2006, and note that the only issue on the Motion was the assertion by the Respondent that the Appellant had no appeal from a nil assessment and therefore the Court had no jurisdiction. To succeed on the Motion the Respondent would have had to have shown that it was plain and obvious that the appeal could not succeed - beyond that, the Motion before Justice Bowie decided nothing. Justice Bowie held that it was not plain and obvious that the appeal could not succeed. The Motion was unsuccessful.

[21] The Appellant's objection is to the paying of approximately $75,000 interest accrued against him on the Estate debt after Assessment #1. The Appellant's appeal is from Assessment #1 which does not include that $75,000. What was wrong with Assessment #1? On the face of it nothing, but subparagraph 160(1)(e)(*ii*) of the *Act* states as follows:

> **160(1) Tax liability re property transferred not at arm's length**. Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> (*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,
>
> (*b*) a person who was under 18 years of age, or

> (*c*) a person with whom the person was not dealing at arm's length,
>
> the following rules apply:
>
> (*d*) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
>
> (*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
>
> (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
>
> (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act. [Emphasis Added]

[22] Subparagraph 160(1)(e)(*i*) is really not applicable. Under subparagraph 160(1)(e)(*ii*), the Appellant is liable for all amounts which the transferor, that is the Estate, is liable to pay under the *Act* in or in respect of the taxation year in which the property was transferred or in a preceding taxation year - this means any amount owing for the transfer of the Estate up to and including December 31st of the year of the transfer. The Appellant is only liable for that which the Estate was liable as per subparagraph 160(1)(e)(*ii*). The transfer most certainly took place before Assessment #1. As a result, Assessment #1 must be sent back to the Minister for recalculation and reconsideration, on the basis that the Appellant is only liable for the amount owing by the transferor, that is the Estate, up to and including December 31st of the year of the transfer and nothing more. This is certainly consistent with *Algoa Trust, supra*. Also, the Appellant specifically wanted to be repaid the $75,000, paid by him as interest, post the Assessment #1. This amount will be deleted from the assessment, per my previous comment and most certainly should be deleted to be consistent with *Algoa Trust, supra,* in which Dussault T.C.J. set out the inability of the Minister of National Revenue to levy interest against the transferee, at pages 2002 and 2003:

> …
>
> 3. The rule stated in s. 160 of the Act does not have the effect of creating a tax debt. The effect of the provision is not to create a second debt: there is only one tax debt. The wording of the Act is quite clear: the purpose of s. 160 is essentially to add

> another debtor who is jointly and severally liable with the transferor. This new debtor is called the transferee. There is thus no new debt created under the Act and the obligation arises not from the assessment but from the Act itself. Fundamentally, therefore, there is only one debt and only that debt can bear interest.
>
> 4. First, subsection (1) of s. 160 in fact states that the transferee is jointly and severally liable and that his or her liability is limited to the lesser of the two amounts mentioned in s. 160(*e*)(i) and (ii), namely (i) the value of the property transferred less the consideration, and (ii) the total of all amounts which the transferor is liable to pay in or in respect of the year of the transfer or any preceding year, that is to say, for the year of the transfer and for any preceding years.
>
> 5. Secondly, s. 160(2) provides that the Minister of National Revenue ("the Minister") may at any time make an assessment. This is also quite clear. However, the limit imposed in s. 160(1)(*e*) must be observed for each assessment.
>
> 6. Thirdly, I would say that there is no provision of the Act regarding interest that may be applicable to an assessment issued pursuant to s. 160 of the Act. This is logical, since there is no new tax debt and an assessment under s. 160 already incorporates the interest which the transferor owed in addition to the tax. The assessment may also incorporate penalties and interest thereon.
> …

[23] Based upon the *Algoa Trust* decision no interest can be assessed under section 160 of the *Act* in the present appeal.

[24] With respect to Assessment #2, this assessment is not under appeal and never has been. The Minister of National Revenue cannot prevent the taxpayer from pursuing his appeal from Assessment #1, by issuing Assessment #2 unless it is vacating Assessment #1, in which case all money paid under Assessment #1 should be refunded to the Appellant.

[25] Chief Justice Bowman in *943372 Ontario Inc. v. R.*, 2007 TCC 294, [2007] 5 C.T.C. 2001, questioned the use of reassessments to reply to objections which appears to have occurred in the case at bar. Justice Bowie also questioned the status of Assessment #2 by stating the following in his Reasons for Order delivered orally on November 22, 2006:

> [8] If the Minister's representative, Mr. Rollins, really meant what he said in that letter, namely that "… we have vacated the previous assessment …", he would presumably have enclosed a cheque for all of the amounts that Mr. Carl Currie, the Appellant, paid towards that assessment, and he would presumably have sent cheques to anybody else who paid towards it as well. That, however, does not appear to be the case.

…

> [10] The Attorney General, however, suggest that while the assessment is not vacated in the sense that the Appellant is entitled to have his money back, it is vacated in the sense that the Appellant can no longer appeal from it because it no longer exists, or as counsel put it, it is now a nil assessment from which no appeal lies.

[26] As was done in *Algoa Trust, supra*, the Court is permitted to refer an assessment back to CRA for the reassessment to be issued reflecting changes to the calculations of interest. The Court orders a variation to the Appellant's assessment dated February 3, 2004 (Assessment #1) relating specifically to the recalculation of interest levied, as against the Appellant from December 31st of the year of transfer.

[27] The Appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is not liable for interest on the Estate debt from December 31st of the year of the transfer.

[28] The Appellant shall be entitled to his costs.

Signed at Ottawa, Canada, this 13th day of June, 2008.

"E. P. Rossiter"

Rossiter, J.

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| CITATION: | 2008TCC338 |
| COURT FILE NO.: | 2006-1685(IT)I |
| STYLE OF CAUSE: | CARL CURRIE AND HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Charlottetown, Prince Edward Island |
| DATE OF HEARING: | August 29, 2007 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice E. P. Rossiter |
| DATE OF JUDGMENT: | June 13, 2008 |

APPEARANCES:

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| Counsel for the Appellant: | David W. Hooley, Q.C. |
| Counsel for the Respondent: | Lindsay D. Holland |

COUNSEL OF RECORD:

For the Appellant:

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| Name: | David W. Hooley, Q.C. |
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| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Canada |