Docket: 2009-2005(IT)G

BETWEEN:

GUY BOISVERT,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 3, 2011, at Montreal, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellant:	Kathy Kupracz
Counsel for the respondent:	Grégoire Cadieux

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2007 taxation year is dismissed, and the assessment is confirmed, with costs to the respondent.

Signed at Ottawa, Canada, this 16th day of June 2011.

"Alain Tardif"

Tardif J.

Translation certified true
on this 31st day of August 2011.

Erich Klein, Revisor

Citation: 2011 TCC 290
Date: 20110616
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GUY BOISVERT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from an assessment made following the settlement of an estate, the appellant having acted as liquidator. The respondent formulated the issue as follows in paragraph 15 of the Reply to the Notice of Appeal,

> [TRANSLATION]
> 15. The only issue is whether the Minister correctly added to the appellant's income for the 2007 taxation year the amount of $68,080.00 as income from an office or employment.

[2] The Minister relied on the following assumptions of fact in making the assessment under appeal:

> [TRANSLATION]
> (a) Marcel Sauvé appointed the appellant as one of the liquidators of his estate.

(b) Marcel Sauvé died on May 12, 2006.

(c) Article VIII of Marcel Sauvé's will contains the following clauses:

> [TRANSLATION]
> As a token of my gratitude for the services my liquidators will be called upon to render to my estate, whether in liquidating my estate as such or in administering the whole or part of the property thereof, I bequeath
>
> to Guy BOISVERT, my liquidator, as a remunerative legacy, my property located at 472 Ste-Marie Street in Lanoraie, Quebec, J0K 1E0, including, without exception or reservation, the land, the buildings thereon as well as the furniture, the household effects and the contents of all the buildings, in addition to the reimbursement of the expenses and travel costs incurred in fulfilling his office. In the event that that property is no longer part of my patrimony at the time of my death, however, I bequeath to him, as a remunerative legacy, an amount of FIFTY THOUSAND DOLLARS ($50,000.00), without interest, to be received once my estate is settled.

(d) Marcel Sauvé intended to bequeath his property located at 472 Ste-Marie Street in Lanoraie, Quebec, J0K 1E0, in consideration of services that the appellant would be called on to provide as liquidator of his estate.

(e) The appellant agreed to act as and did act as liquidator of the late Marcel Sauvé's estate.

(f) On November 23, 2007, the late Marcel Sauvé's estate transferred to the appellant the property located at 472 Ste-Marie Street in Lanoraie, Quebec, J0K 1E0.

(g) In the declaration of transmission dated November 23, 2007, the amount constituting the basis of the assessment of transfer tax with respect to that property was $68,080.00.

(h) Accordingly, the Minister determined that the value of that property at the time of transfer was $68,080.00.

[3] In addition, the parties agreed to submit a partial agreement on the facts, which reads as follows:

> [TRANSLATION]
> The parties agree on the following facts for the sole purposes of this appeal and without prejudice to their right to demonstrate, at the hearing of this appeal, additional facts that are not incompatible with the facts set out in this agreement:
>
> 1. Marcel Sauvé signed on September 3, 2004 his will, which provided for the appointment of the appellant and of Pierre Choquette as liquidators of the estate;
>
> 2. Article VIII of the will provides for a "remunerative legacy" for Guy Boisvert in the form of a property located at 472 Ste-Marie Street in Lanoraie as well as remuneration payable to the notary Richard Doucet for services to be rendered by him to the estate,
>
> 3. Marcel Sauvé died on May 12, 2006,
>
> 4. The appellant agreed to be a liquidator of Marcel Sauvé's estate,
>
> 5. On May 18, 2006, the appellant and Pierre Choquette appointed Richard Doucet as "special agent" and conferred on him the powers set out in the deed (hereinafter the "special agent deed").
>
> 6. On May 18, 2006, a professional services contract was concluded between the appellant, Pierre Choquette and Richard Doucet, in which they mandated Richard Doucet to prepare the documents set out in that contract (hereinafter "professional services deed"). Article 2 of the professional services deed sets out the expenses and fees to be paid to the notary Richard Doucet for the execution of the mandate.
>
> 7. On July 6, 2006, the appellant sold the deceased's 2003 Volkswagen Passat vehicle to Daniel Chevalier for $13,500.
>
> 8. On November 23, 2007, the property located at 472 Ste-Marie Street in Lanoraie was transferred to the appellant through a declaration of transmission. The amount constituting the basis of the assessment of transfer tax with respect to that property was $68,080.

9. Under the special agent deed and professional services deed, the notary Richard Doucet performed the following work, among other things:

   (a) will search with the Chambre des notaires du Québec and with the Barreau du Québec
   (b) estate inventory
   (c) closing of the deceased's bank accounts
   (d) claims with life insurance companies
   (e) claim with the Régie des rentes du Québec
   (f) settling the deceased's debts
   (g) declaration of transmission for the immovable situated at 472 Ste-Marie Street in Lanoraie
   (h) an accounting
   (i) obtaining a clearance certificate from the tax authorities
   (j) distributing property to heirs.

10. For all of the services rendered, the notary Richard Doucet billed an amount of $52,536.04 (including disbursements and taxes), which was paid out of the estate property.

11. The deceased's tax returns were prepared by the accountant Gilles Ducharme.

12. The only estate property the appellant disposed of was the following:

   (a) The 2003 Volkswagen Passat
   (b) The residence located at 472 Ste-Marie Street in Lanoraie, through the declaration of transmission dated November 23, 2007.

13. On June 23, 2008, the Canada Revenue Agency issued an assessment for the appellant's 2007 taxation year, adding to his income for that year an amount of $68,080 as income from an office or employment.

14. The appellant objected to that assessment on September 17, 2008.

15. On March 27, 2009, the Canada Revenue Agency confirmed the assessment for the 2007 taxation year.

[4] The only person who testified was the appellant. He is a retired teacher. He stated that he and the deceased testator had had a shared passion for all things military, particularly the cadets program, and that that was how they had met in the mid 1970s.

[5] Over the years, the appellant became very good friends with the testator, whose spouse was Belgian. The couple had had no children.

[6] At one point, the testator lived for long periods of time in Belgium with his spouse, who, in turn, regularly came to Quebec in the summer.

[7] The appellant invested in the friendship by visiting regularly and rendering many services, but also providing reliable, constant and enduring support to the testator to the point where their relationship became very close and the testator confided in and trusted the appellant. The testator told the appellant where he kept his will and how he wanted his estate to be settled.

[8] Moreover, on reading the will, it becomes apparent that the testator trusted the appellant since he conferred on him the responsibility of executing, for remuneration, his last wishes.

[9] The appellant explained in a vague and confused manner the work he had carried out in fulfilling the responsibility he had expressly accepted. He spoke of a great deal of travel, of the various tasks performed, of meetings with the notary or his assistants, of the sale of the motor vehicle, of receiving and analyzing mail, of correspondence, and of maintaining the property. He also arranged to have the testator's dog euthanized. He produced an account with respect to the estate, according to which he had travelled 10,620 kilometres, which proves that the appellant had to carry out a certain amount of work in executing his mandate.

[10] Throughout his testimony, the appellant constantly minimized the amount of work he did, stating several times that the notary had been given the mandate to settle everything and that, indeed, the notary was clearly the principal executor of the settlement.

[11] The documentary evidence available established, however, that the appellant had accepted the office and the responsibilities that came with it. Authentic deeds in certain cases are proof of their contents. Furthermore, the appellant acknowledged his signature making him the responsible, along with the notary, for the execution of the notary's mandate. In hindsight, it is easy to say that the remuneration provided for was excessive to the point where most of it should have been considered a gift, value given for no consideration. However, it is just as easy to imagine one or even several scenarios where the same remuneration would have been rather modest considering

the amount of work to be done. One has only to imagine a case in which one or more heirs had challenged the validity of the will.

[12] The Honourable Justice Lucie Lamarre rendered a judgment in June 2008 in *Jean-Claude Messier v. The Queen*, 2008 TCC 349, [2009] 1 C.T.C. 2557. It is true that that case was heard under the informal procedure, but the Act is no different where the informal procedure is involved.

[13] As the judgment very clearly sets out the statutory provisions that must be considered, I believe it would be useful to reproduce them here since they are exactly the same provisions as those that must be considered in this case:

> [3] It does not appear to be contested that, if the amount is indeed remuneration for the performance of the duties of their office as liquidators of the succession, it is taxable in their hands. Indeed, in an old decision, the Supreme Court of Canada held that the additional remuneration received by a legatee for the performance of his duties as testamentary executor (the office called "liquidator" in the new *Civil Code of Québec* ("*Civil Code*") was taxable under the terms of the *Income Tax Act* (ITA) (see *MacKenzie Estate v. Canada*, [1937] S.C.R. 192).
>
> [4] Such remuneration would be taxable under paragraph 3(*a*) and section 5 of the ITA and under the definition of "office" contained in section 248 of the ITA. Those provisions read as follows:
>
> **SECTION 3: Income for taxation year**
>
> The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:
>
> > (*a*) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,
>
> **SECTION 5: Income from office or employment**
>
> > (1) Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year.
>
> **SECTION 248: Definitions**
>
> > **(1)** In this Act,

> . . .
>
> "office" means the position of an individual entitling the individual to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a member of the Senate or House of Commons of Canada, a member of a legislative assembly or a member of a legislative or executive council and any other office, the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity and also includes the position of a corporation director, and "officer" means a person holding such an office;

[5] Under the *Civil Code*, the duties of a liquidator do indeed constitute an office for which the liquidator may be entitled to remuneration if he or she is already an heir and the testator provides for remuneration. The applicable provisions of the *Civil Code* are articles 783 *et seq.*:

> CHAPTER II – LIQUIDATOR OF THE SUCCESSION
> SECTION I - DESIGNATION AND RESPONSIBILITIES OF THE LIQUIDATOR
>
> **783.** Any person fully capable of exercising his civil rights may hold the office of liquidator.
>
> A legal person authorized by law to administer the property of others may hold the office of liquidator.
>
> **784.** No person is bound to accept the office of liquidator of a succession unless he is the sole heir.
>
> **785.** The office of liquidator devolves of right to the heirs unless otherwise provided by a testamentary disposition; the heirs, by majority vote, may designate the liquidator and provide the mode of his replacement.
>
> **786.** A testator may designate one or several liquidators; he may also provide the mode of their replacement.
>
> A person designated by a testator to liquidate the succession or execute his will has the quality of liquidator whether he was designated as administrator of the succession, testamentary executor or otherwise.
>
> **787.** A person designated by a testator to liquidate the succession or execute his will has the quality of liquidator whether he was designated as administrator of the succession, testamentary executor or otherwise.

> If one of the liquidators is prevented from acting, the others may perform alone acts of a conservatory nature and acts requiring dispatch.
>
> **788.** The court may, on the application of an interested person, designate or replace a liquidator failing agreement among the heirs or if it is impossible to appoint or replace the liquidator.
>
> **789.** The liquidator is entitled to the reimbursement of the expenses incurred in fulfilling his office.
>
> He is entitled to remuneration if he is not an heir; if he is an heir, he may be remunerated if the will so provides or the heirs so agree.
>
> If the remuneration was not fixed by the testator, it is fixed by the heirs or, in case of disagreement among the interested persons, by the court.
>
> **790.** The liquidator is not bound to take out insurance or to furnish other security guaranteeing the performance of his obligations, unless the testator or the majority of the heirs demand it or the court orders it on the application of any interested person who establishes the need for such a measure.
>
> If a liquidator required to furnish security fails or refuses to do so, he forfeits his office, unless exempted by the court.
>
> **791.** Any interested person may apply to the court for the replacement of a liquidator who is unable to assume his responsibilities of office, who neglects his duties or who does not fulfil his obligations.
>
> During the proceedings, the liquidator continues to hold office unless the court decides to designate an acting liquidator.
>
> **792.** Where the liquidator is not designated, delays to accept or decline the office or is to be replaced, any interested person may apply to the court to have seals affixed, an inventory made, an acting liquidator appointed or any other order rendered which is necessary to preserve his rights. These measures benefit all the interested persons but create no preference among them.
> The costs of inventory and seals are chargeable to the succession.
>
> **793.** Acts performed by a person who, in good faith, believed he was liquidator of the succession are valid and may be set up against all persons.

[6] In the case at bar, the question that arises is whether the amount of $15,000 that each of the Appellants received constitutes remuneration for the performance of the duties of their office (a remunerative legacy) or, rather, a particular legacy (a mere liberality) in which

case the amount received would not be taxable because it would not be income from an office within the meaning of section 5 of the ITA.

[7] The best guidance in drawing this distinction is the testator's intent, as expressed in the provision of the will. Here is what one author has stated on the subject:

> [TRANSLATION]
>
> How does one distinguish between a remunerative legacy and a mere liberality contained in a particular legacy? The testator's intent, as expressed in the provision of the will, remains the best guide, and it is only if the terms are worded carefully and precisely that this intent can be understood clearly.[56]
>
> 56. M. Roy, "Chronique testamentaire – La rémunération de l'exécuteur testamentaire" (1983) 5 R.P.F.S. 206-207.

[8] Another author writes:

> [TRANSLATION]
>
> Consequently, in interpreting the provisions of the will as a whole, a certain amount of caution must be exercised with respect to the compensation of testamentary executors. The testator's intent is very important in this regard, and it is only through careful drafting that this intent will emerge clearly from the terms used in a will that provides for such remuneration.
>
> For example, a specific legacy of $1,000 to an executor cannot be considered remuneration if the provisions of the will as a whole do not appear to refer to the executor's office. Rather, one would have to conclude that the legacy in question was merely a particular legacy that stems from a truly gratuitous intent to give. The situation is different if the will provides that the executor is entitled to a fee of $1,000 for work done as an executor. Even if the amount is not characterized as a fee, the fact that the testator intended to condition the payment upon acceptance of the office of executor would show that gratuitous intent was wholly lacking.
>
> . . . . the provision of the will remains the sole writing capable of distinguishing between a remunerative legacy and mere liberality expressed in the form of a particular legacy . . .

[14] In that case, the two appellants were two of the 15 universal legatees of the estate of Raoul Messier. The will also provided for a whole series of particular legacies to the nieces and nephews by marriage, and to various public institutions.

[15] As far as the will and its content are concerned, its provisions were similar to those in the present case.

[16] Here, the appellant maintains that the legacy is inadequately described as, in reality, it was not a remunerative legacy but merely a particular legacy subject to some conditions that were not very onerous.

[17] The main argument in support of his claims is the fact that the value of what was received by way of the legacy, that is, the amount of the remuneration, is disproportionately higher than the value of the work performed and services rendered. It was even suggested that a reasonable consideration might have been around $15,000, whereas it was determined to be almost $70,000.

[18] The appellant's argument is certainly interesting, but, on the one hand, it is definitely not sufficient to allow the Court to find in his favour, and, on the other hand, it implies that the Court should disregard or brush aside the content of several clear and precise documents that are both relevant and significant with respect to the appellant's argument.

[19] Indeed, to begin with, the will, an authentic deed prepared by a notary, sets out and states in a precise and clear manner the nature and quality of the bequest to the appellant. Not only did the appellant expressly agree to the terms and conditions of the legacy, but he also actually performed the tasks and assumed the responsibilities that were his and which resulted from the office he had accepted.

[20] In hindsight, now that his obligations have been fulfilled, it is easy to argue that the consideration was substantially greater than the value of the services rendered. However, given the significant assets, it is equally easy to imagine the numerous potential problems that liquidating the estate could have involved.

[21] The testator, in his wisdom, being advised by a legal practitioner, set out and stated his wishes. His ability to pay enabled him to express his gratitude through generosity.

[22] It is not for the appellant to question the will of the deceased or to cast doubt in particular on the following documents:

- the authentic will bearing the Minister's number 13 663, signed before the notary Richard Doucet on September 3, 2004;

- the notarized estate inventory bearing the Minister's number 14 619, signed by the appellant before the notary Richard Doucet on October 16, 2006;
- the declaration of transmission signed by the appellant personally and as liquidator on November 23, 2007;
- the accounting in November 2008;
- the professional services contract signed by the appellant on May 18, 2006.

[23] As for the will, it has the merit of being based essentially on documents prepared by a legal practitioner with the knowledge and experience needed to express the testator's last wishes.

[24] Up to that point, the appellant had had no input. However, on the opening of the succession, the appellant could have renounced his legacy and thereby avoided all the consequences inherent in that legacy. Instead, he clearly accepted it willingly and, as a result, did all that was necessary to liquidate the estate and to be entitled to the remuneration stipulated.

[25] The two liquidators, one of whom was the appellant, went through the many steps in the liquidation process leading up to the settlement.

[26] According to a letter sent to the notary, everything proceeded normally and to the heirs' satisfaction.

[27] The testator had high regard and also a great deal of respect for the appellant and a colleague, who acted as co-liquidators. The responsibility he asked them to take on was significant and the context was special as well: the legatees were brothers, sisters, nieces and nephews and the amount to be shared was substantial.

[28] Given the estate assets, which exceeded $2 million, the remunerative legacy was not unreasonable. It was a reasonable consideration, especially if the testator had assumed that the legacy would be taxable. Of course, this is conjecture, but I reiterate that the will was prepared by a notary.

[29] The characterization of income is not based on its amount, but rather on its source: no formula or recipe exists for determining the reasonableness of remuneration, which is very often a function of an infinite number of particularities.

[30] In this case, the size of the estate to be settled, the estate's ability to pay, the testator's generosity and the kind of relationship that existed between the appellant and the deceased are all factors that reflect a reality that the appellant would like to depict differently. The appellant's arguments are not very convincing; they are rather feeble and have no legal basis, as they are founded essentially on what he defines as reasonableness, a subjective concept interpreted by a person strongly motivated by self-interest.

[31] In addition, the words used are not such as to create confusion. In a situation where a party dies after consulting a specialist to help that party formulate the party’s last wishes with regard to its assets, it is foolhardy for the appellant to hypothesize, especially since his criticisms of the documents are essentially based on arguments whose basis is rather weak and certainly not very convincing.

[32] For these reasons, the appeal is dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 16th day of June 2011.

"Alain Tardif"

Tardif J.

Translation certified true
on this 31st day of August 2011.

Erich Klein, Revisor

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APPEARANCES:

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