

Docket: 2007-2740(IT)G

BETWEEN:

THE ESTATE OF THE LATE ANNA NTAKOS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 23-24, 2012, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Agent for the Appellant: Olga Fousteris
Counsel for the Respondent: Eleanor Thorn

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 year is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the Deceased did not receive management fees in 2004 from Dupont Construction Supplies Limited.

At the request of the representative for the Appellant, no costs are awarded.

Signed at Ottawa, Canada, this 21st day of November 2012.

“V.A. Miller”

V.A. Miller J.

Citation: 2012TCC409
Date: 20121121
Docket: 2007-2740(IT)G

BETWEEN:

THE ESTATE OF THE LATE ANNA NTAKOS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] This is an appeal by the Estate of Anna Ntakos in respect of an assessment of the 2004 taxation year of Anna Ntakos (the “Deceased”). At the hearing, the Appellant was represented by Olga Fousteris (“Fousteris”), an executrix of the estate and a daughter of the Deceased.

[2] The Deceased died on October 5, 2004. Her income tax return for the 2004 taxation year was signed by Fousteris on April 28, 2005 and filed with the Minister of National Revenue (the “Minister”). In that return, taxable capital gains of \$249,980 and business income of \$169,587.38 were included in calculating the income of the Deceased. The return was assessed as filed. The Appellant objected to the assessment and it was confirmed by notice dated March 21, 2007.

[3] Although both the amount of taxable capital gains and business income were pled as issues in the notice of appeal, the Appellant abandoned the issue with respect to the taxable capital gains. At the hearing of this appeal, the only issue was whether business income of \$169,587.38 was properly included in the income of the Deceased for the 2004 taxation year.

[4] The witnesses who appeared at the hearing on behalf of the Appellant were:

Navin Mahendra, chartered accountant and present accountant for Dupont Construction Supplies Ltd.;

Peter Ntakos (“Peter”), son of the Deceased and executor of the estate;

Tammy Boulias (“Tammy”), daughter of the Deceased and executrix of the estate.

[5] Firoz Teli, an auditor with the Canada Revenue Agency (“CRA”), testified for the Respondent.

[6] At the time of her death, the Deceased owned one third of the outstanding shares of Ntakos Holdings Inc. (“NHI”). These shares had been owned by her spouse, John and had devolved to her under John’s Will when he died in November 1995.

[7] The remaining shares in NHI were owned equally by the brothers-in-law of the Deceased, Konstantinos Ntakos (“Gus”) and Teofanis Ntakos (“Ted”).

[8] NHI owned all of the outstanding shares of Dupont Construction Supplies Limited (“Dupont”).

[9] There were several documents submitted into evidence which stated that the Deceased had received business income in the form of management fees from Dupont in 2004.

[10] There was an invoice dated November 30, 2003 and signed by the Deceased which indicated that she had provided management services to Dupont for the period December 1, 2002 to November 30, 2003 for a fee of \$100,000 plus \$7,000 Goods and Services Tax (“GST”). There was also a receipt to Dupont signed by the Deceased wherein she acknowledged payment in full of the fees by way of set-off against loans she owed to Dupont. The receipt was dated May 31, 2004.

[11] There was a Resolution of the Shareholders of NHI (the “Resolution”) signed by the Deceased and the other shareholders and dated July 8, 2004 wherein NHI voted its shares in Dupont to approve that Dupont pay management fees to the shareholders of NHI. According to the Resolution, the fees approved for the Deceased were \$100,000 and \$169,587.38. The Resolution also included the following statement:

(iii) (NHI) vote its shares in Dupont Construction Supplies Limited to approve that Dupont Construction Supplies Limited finalize and or amend its financial statements and books of account so as to be consistent with acknowledgements signed by each of Konstantinos Ntakos, Teofanis Ntakos, and Anna Ntakos as of even date herewith in respect of net loan advances made to them by Dupont Construction Supplies Limited.

[12] For the 2004 taxation year, there was an invoice dated July 30, 2004 and signed by the Deceased which indicated that she provided management services to Dupont for the period December 1, 2003 to November 30, 2004 for a fee of \$169,587.38 plus GST. In a receipt dated July 30, 2004, the Deceased acknowledged payment of these fees by way of set-off against loans she owed to Dupont.

[13] Both Peter and Tammy identified the Deceased's signature on the documents described in the above paragraphs. They both testified that the Deceased could not read English. She spoke little English and her native language was Greek. It was Peter's evidence that the Deceased signed the invoices and receipts because she believed that she would receive the management fees in cash. Tammy testified that she and her siblings were not aware that the Deceased had signed the documents noted above until after they received the assessment from the CRA.

[14] Peter testified that the management fees were not paid to the Deceased nor could they have been satisfied by way of set-off because the Deceased did not owe any money to Dupont. He stated that Dupont owed money to the Deceased as a result of a loan which his father had made to it. It was his evidence that in 1991 when Dupont required an infusion of capital, his father, John Ntakos, had borrowed \$250,000 from the Toronto Dominion Bank and secured the loan by a mortgage on the family home at 1 Biggar Avenue, Toronto, Ontario. Both John Ntakos and the Deceased signed the mortgage for the loan of \$250,000. John Ntakos then advanced \$170,150 to Dupont.

[15] I note that in the notice of appeal, it was pled that John Ntakos had advanced \$250,000 to Dupont in 1991. The Appellant has now altered its position because it was shown at the discovery that only \$170,150 was deposited into Dupont's bank account by John Ntakos in 1991.

[16] Peter also testified that his uncle, Gus, misappropriated funds from Dupont and had these funds allocated in Dupont's books as management fees to the Deceased and the fees were never received by the Deceased.

[17] According to the evidence of both Peter and Tammy, a family feud which had been simmering since their father's death in 1995, finally erupted in 2004. Ted and Gus were accused of surreptitiously taking significant amounts of money from Dupont. Although no details of the financial arrangements were given, Peter testified that a settlement was finalized with Ted in July 2005 and with Gus in April 2011.

[18] One of the results of the settlements with Ted and Gus was that Peter and his sisters now own all of the shares of NHI. They engaged Navin Mahendra in 2011 to

be the accountant for Dupont and tasked him with “unravelling” the shareholder accounts. He has not finished this task but Navin Mahendra did testify that he saw no documents to support that the Deceased was paid management fees in 2004. According to Dupont’s General Ledger for the year end November 30, 2004, there were no management fees paid in 2004 and Dupont owed the Deceased \$107,000. He stated that the year-end adjustment entries were in writing but had not been entered into Dupont’s books. There were no details given of the proposed year-end adjustments.

[19] Firoz Teli, an auditor with the CRA, performed a review of Dupont’s records to ascertain whether the management fees declared by the Deceased were actually received or enjoyed by her. On a review of the shareholders’ accounts, he found that John Ntakos had initially made loans which totalled \$170,150 to Dupont in February and March 1991. However, he also found that there were year-end adjustment entries in 1991 to reallocate these loans to a related company called Marbot. After this entry, the John Ntakos’ shareholder account was in a debit position. Based on the records available to him, Mr. Teli concluded that Dupont did not owe John Ntakos and the Deceased any amount of money.

[20] He testified that Dupont’s records did show that it made all payments on the mortgage for 1 Biggar Avenue since the mortgage was given in 1991. These payments were debited to John (Anna) Ntakos’ shareholder account. As of October 4, 2004, the Deceased owed Dupont the amount of \$155,955.13. Dupont continued to make the mortgage payments on 1 Biggar Avenue after the death of Anna Ntakos. (I note that this account also recorded monthly payments to the CRA. There was no testimony with respect to these amounts.)

[21] I asked Fousteris why she signed the return for the Deceased if she believed that the Deceased did not receive management fees. Her answer was that the return was prepared by Dupont’s accountant and she signed the return without reviewing it.

Analysis

[22] In this appeal, the Appellant had the difficult task of proving a negative. By demonstrating that the Deceased did not earn and was not credited with management fees from Dupont in 2004, the Appellant argued that the amount of management fees reported by the Appellant was incorrect. It is my view that the Appellant has been successful.

[23] Each of the Deceased’s children testified that because the Deceased could not read English, she could not have understood the documents she signed. I believe the

witnesses that their mother did not read English. However, none of them were present when the Deceased signed the invoices and receipts and they do not know if the documents were explained to her or what was said to her. I do not actually know who presented the documents to the Deceased for her signature. I have only the assumptions and allegations made by Tammy and Peter that it was Gus. Also, Gus was not a witness before me and I make no findings on any of the allegations made against him.

[24] Both Peter and Tammy testified that the wives of the original shareholders received \$500 weekly as a salary from Dupont. However, the Deceased had not received a salary from Dupont since March 2001. The General Ledger for Dupont as of November 30, 2004 supported this testimony.

[25] I have concluded from the evidence that the Deceased never worked for Dupont and that she did not participate in any of the business or financial decisions made for Dupont. The Deceased was not a director of either NHI or Dupont.

[26] Navin Mahendra testified that there was no evidence in Dupont's books that a management fee was paid in 2004 to the Deceased or that she received it by way of set-off. This was confirmed by Firoz Teli in his Audit Report.

[27] The General Ledger for Dupont had two shareholder accounts for Anna Ntakos. One account in the name of the Deceased showed a credit of \$107,000 and the account which recorded the mortgage payments made by Dupont on the Deceased's behalf indicated that she owed Dupont the amount of \$155,955.13 as of October 4, 2004. According to Dupont's books, the Deceased was indebted to Dupont at the time of her death.

[28] There was no evidence concerning the credit of \$107,000 to the Deceased in Dupont's books and I make no observations with respect to it.

[29] On a review of all the evidence, I have concluded that the invoice dated July 30, 2004 which indicated that the Deceased provided management services to Dupont for the period December 1, 2003 to November 30, 2004 created a fiction. The Deceased did not provide services to Dupont in 2004 and she did not receive management fees from Dupont in 2004. She was neither an employee nor a director of Dupont.

[30] I have also concluded from Firoz Teli's evidence that Dupont was not indebted to the Deceased. His evidence was that the moneys lent to Dupont in 1991 by the Deceased's spouse were reallocated to a related company called Marbot.

[31] The Deceased did incur a debt with Dupont. She received a benefit from Dupont by having it make her mortgage payments.

[32] Although it was not argued at the hearing of the appeal, the Respondent made the alternative argument in the Reply that the amount of \$169,587.38 received by the Deceased in 2004 was a benefit conferred on her as a shareholder of Dupont and NHI in accordance with subsection 15(1) of the *Income Tax Act* (the “Act”).

[33] However, the Deceased was not a shareholder of Dupont and therefore the benefit she received from Dupont was not a shareholder benefit. The Deceased as a shareholder of NHI was only an indirect shareholder of Dupont. In *Mullen v. Minister of National Revenue*, [1990] 2 C.T.C. 2142, Brulé J. made an analysis of the application of subsection 15(1) with respect to a benefit received by an indirect shareholder. He stated:

37 Originally it was alleged that benefits were received by the Mullens as shareholders of the company. The evidence showed that this was not the case. They were only shareholders of a holding company and as such did not receive any benefit as shareholders contemplated in subsection 15(1) of the *Income Tax Act*. The rationale for this position may be found in examining subsections 15(1) and 15(2).

38 The important wording of subsection 15(1) is as follows:

Where, in a taxation year, a benefit has been conferred on a shareholder, or a person in contemplation of his becoming a shareholder, by a corporation (...) the amount or value thereof shall (...) be included in computing the income of the shareholder for the year.

39 Although a liberal interpretation of the words “a shareholder of a corporation” could encompass on its scope the situation of a shareholder of a corporation connected to the one conferring the benefit, such an interpretation does not seem to be the appropriate one.

40 The basis of this conclusion lies in a simple argument; subsection 2 of the same section, which relates to a shareholder debt, uses express words to cover in its scope an indirect link between a shareholder and a corporation, that is the situation of a connected corporation.

41 Subsection 15(2) of the *Income Tax Act* reads:

Where a person (...) or a partnership (...) is a shareholder of a particular corporation, *is connected with a shareholder of a particular corporation* or is a member of a partnership, or a beneficiary of a trust, that is a shareholder of a particular corporation and the person or partnership has in a taxation year received a loan from or has become indebted to the particular corporation, to any other corporation related thereto or to a partnership of which the particular corporation or a corporation related

thereto is a member, the amount of the loan or indebtedness shall be included in computing the income for the year of the person or partnership ...

42 I infer from this that the legislator, by not using express words as to cover the situation of a connected corporation, does not want 15(1) to encompass more than a direct link between shareholder and corporation. By its silence or omission, the legislator seems in fact to have meant that 15(1) should not cover any indirect link like the situation at bar.

[34] In its Reply, the Respondent relied on only subsections 6(1) and 15(1) to include the amount of \$169,587.38 in the Deceased's income. When Firoz Teli finished his audit of Dupont in 2010, the Minister knew the true state of affairs with respect to the Deceased's 2004 taxation year. However, the Reply was not amended to accord with the new facts discovered by the audit. Had the further facts and proper sections of the *Act* been pled, the onus would have been on the Respondent to prove them but based on the evidence which was before me, it would have been difficult for the Appellant to have been successful: *Pillsbury Canada Ltd. v. M.N.R.*, [1965] 1 Ex. C.R. 676 and *del Valle v. M.N.R.*, [1986] 1 C.T.C. 2288 (TCC).

[35] However, no such amendments were made to the Reply, and the appeal is allowed on the basis that the Deceased did not receive management fees in 2004 from Dupont. At the request of the representative for the Appellant, there will be no costs.

Signed at Ottawa, Canada, this 21st day of November 2012.

“V.A. Miller”

V.A. Miller J.

CITATION: 2012TCC409

COURT FILE NO.: 2007-2740(IT)G

STYLE OF CAUSE: THE ESTATE OF THE LATE ANNA
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PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 23, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: November 21, 2012

APPEARANCES:

Agent for the Appellant: Olga Fousteris
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