

Docket: 2013-3739(IT)I

BETWEEN:

GLENYS ABREO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2002 and 2003 taxation years is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

Docket: 2013-4195(IT)I

BETWEEN:

MICHAELANGELO CAPISTRANO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2003 taxation year is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

Docket: 2014-2804(IT)I

BETWEEN:

NOAH M. THOMPSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2002 and 2003 taxation years is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

Docket: 2014-379(IT)I

BETWEEN:

LARISSA KLEPATCH,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2003 and 2004 taxation years is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

Docket: 2015-1364(IT)I

BETWEEN:

DAVID HAMILTON,

and

Appellant,

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2001, 2002 and 2003 taxation years is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

Docket: 2015-1365(IT)I

BETWEEN:

ARTHUR GOTHREAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2002 and 2003 taxation years is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

Docket: 2015-1367(IT)I

BETWEEN:

TERRI GOTHREAU,

and

HER MAJESTY THE QUEEN,

Appellant,

Respondent.

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

Agent for the Appellant: Arthur Gothreau
Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2002 and 2003 taxation years is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

Docket: 2015-1829(IT)I

BETWEEN:

TAHER CHIBANI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

Agent for the Appellant: Shawn Deane
Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2001, 2002, 2003 and 2004 taxation years is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

BETWEEN: Docket: 2015-3275(IT)I
MICHAEL EDWARD KINCHSULAR,
Appellant,
and
HER MAJESTY THE QUEEN,
Respondent,
Docket: 2015-3277(IT)I
AND BETWEEN:

MICHAEL EDWARD KINCHSULAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 19, 20, 21, 22 and 23, 2018, December 3, 4
and 5, 2018, January 21, 22, 23 and 24, 2019 at Toronto, Ontario
Before: The Honourable Mr. Justice Brent Paris

Appearances:

Agent for the Appellant: Shawn Deane

Counsel for the Respondent: Vlad Zolia
Christina Ham

JUDGMENT

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2003 and 2004 taxation years is dismissed, without costs.

Signed at Ottawa, Ontario, this 24th day of May 2019.

“B. Paris”

Paris J.

Citation: 2019TCC122
Date:20190524
Docket: 2013-3739(IT)I

BETWEEN:

GLENYS ABREO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2013-4195(IT)I

AND BETWEEN:

MICHAELANGELO CAPISTRANO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2014-2804(IT)I

AND BETWEEN:

NOAH M. THOMPSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2014-379(IT)I

AND BETWEEN:

LARISSA KLEPATCH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

AND BETWEEN: Docket: 2014-893(IT)I
GARRY HEALEY,
Appellant,
and
HER MAJESTY THE QUEEN,
Respondent,

AND BETWEEN: Docket: 2015-1364(IT)I
DAVID HAMILTON,
Appellant,
and
HER MAJESTY THE QUEEN,
Respondent,

AND BETWEEN: Docket: 2015-1365(IT)I
ARTHUR GOTHREAU,
Appellant,
and
HER MAJESTY THE QUEEN,
Respondent,

AND BETWEEN: Docket: 2015-1367(IT)I
TERRI GOTHREAU,
Appellant,
and
HER MAJESTY THE QUEEN,
Respondent,

Docket: 2015-1829(IT)I

AND BETWEEN:

TAHER CHIBANI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-3275(IT)I

AND BETWEEN:

MICHAEL EDWARD KINCHSULAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-3277(IT)I

AND BETWEEN:

MICHAEL EDWARD KINCHSULAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris B.

[1] All of the Appellants in these appeals participated in one or both of two buy-low donate-high charitable donation tax programs in 2001, 2002 and 2003 and claimed charitable donation tax credits in respect of donations of software they made under those programs to the National Children's Burn Society ("NCBS").

The donation programs were created, promoted and operated by Mr. Tom Reid, an accountant, and by companies he controlled.

[2] NCBS was a registered charity set up by Mr. Reid. The stated mission of NCBS was to “promote fire-safety, prevention, awareness and education among children, to ease the psychological adjustment or provide entertainment and recreational activities to burned and disfigured children after hospitalization.”

[3] The Minister of National Revenue (the “Minister”) reassessed all of the participants and reduced their charitable donation tax credits on the basis that the fair market value of the donated software at the time of donation was less than the amount claimed. In subsequent reassessments, the Minister also assumed that the participants in the programs lacked the requisite donative intent when they transferred the software to NCBS and therefore that they did not make any gifts to the NCBS that would qualify for a charitable donation credit. However, the Minister did not reduce the amount of the donation tax credits that had previously been allowed. In the Reply to Notice of Appeal, the Respondent has also pleaded that the donation receipts provided to the Appellants by NCBS were back-dated and are therefore invalid.

[4] The appeals were heard on common evidence. Mr. Chibani and Mr. Kinchsular were represented by Mr. Shawn Deane and Ms. Gothreau was represented by her spouse. All of the other Appellants were self-represented.

[5] The Respondent called two expert witnesses and an officer from the Canada Revenue Agency, as well as Mr. Martin Warren, who was employed by Mr. Reid during part of the period that the programs were operated. The Respondent also called Mr. Nadeem Khan, owner of a company that supplied software for the program in 2001, and Ms. Kim Soper, a manager at IBM.

[6] Several of the Appellants testified: Ms. Klepatch, Mr. Hamilton, Mr. Chibani, Mr. Thompson, Mr. Capistrano, Mr. Kinchsular and Mr. Healey. The Appellants also called Mr. Deane and Mr. Robert Gagné, who had also participated in the programs, and Mr. Maurice Bramhall, who had provided a valuation of some of the donated software.

[7] Some Appellants appeared at the beginning of the hearing but were unable to remain for the entire hearing. Those Appellants indicated that they would rely on the evidence presented and submissions made by the other Appellants.

I. ISSUES

[8] The issues in these appeals are whether the Appellants had the intention to make a gift of the software to NCBS, whether the donation receipts provided by NCBS were backdated, and the fair market value of the software that was allegedly donated.

[9] There is also an issue of whether Mr. Chibani's appeal for the 2003 taxation year should be quashed because he failed to object to the most recent reassessment for that year.

II. BACKGROUND

2001 Donation Program

[10] Up to and including 2001, the donation program was operated and promoted by a numbered Ontario company operating under the name Vitex Corporation ("Vitex"). Tom Reid was the director of Vitex.

[11] Between 1999 and 2001, Vitex purchased certain office software known as "Lotus Smart Suite" ("LSS") from Systelligence Systems Inc. ("Systelligence") for \$17 per copy. In reassessing the participants, the Minister assumed that the LSS software purchased by Vitex was the original equipment manufacturer ("OEM") version of LSS. The OEM version of LSS is a different product than the retail version of LSS. This point will be discussed in more depth later in these reasons.

[12] In the 2001 taxation year, 232 individuals, including the Appellants Ms. Klepatch, Mr. Chibani and Mr. Hamilton, participated in the donation program.

[13] Vitex sold the LSS software it had acquired from Systelligence to the donation program participants for \$120 per copy.

[14] In turn, the participants donated the software to NCBS and each participant received a donation receipt from NCBS. The amount shown on the donation receipt was based on each copy of the LSS software having a fair market value of \$600.

[15] In filing their tax returns for the 2001 taxation year, the participants claimed a charitable donation tax credit and received a tax refund based on the charitable donation receipt received from NCBS. They also reported a capital gain based on

the difference between the amount they paid for the software and the value attributed to the software by NCBS on the charitable donation receipts.

[16] The Minister reassessed the participants for the 2001 tax year and in doing so assumed that the software they acquired from Vitex and donated to NCBS was the OEM version of Lotus Smart Suite and that the fair market value of the software was \$17 per copy. However, the Minister allowed each of the participants a charitable donation tax credit for the year calculated on the basis that the amount of their donation was equal to the price they paid for the software, i.e. \$120 per copy. The Minister also deleted the capital gains declared by the participants in relation to the donated software.

[17] In further reassessments of the participants in the program in 2001, the Minister applied and then deleted gross negligence penalties. The Minister also took the position that the participants had no donative intent in transferring the software to NCBS and therefore had not made any gifts that could give rise to a charitable donation tax credit. However, the Minister did not reduce the credits already allowed to the participants.

2002 Donation Program

[18] In 2002 the donation program was operated and promoted by another numbered Ontario company, operating as Tac II Software Ltd. (“Tac II”). Tom Reid was also the director of Tac II.

[19] In 2002, 1,195 individuals participated in the program, including the following Appellants: Ms. Klepatch, Mr. Hamilton, Mr. Thompson, Mr. Chibani, Ms. Abreo, and Mr. and Mrs. Gothreau.

[20] In May 2002, Tac II purchased licenses from three companies to produce and sell an unlimited numbers of copies of certain children’s educational software and clip art software in Canada. The licences were valid for one year. Tac II purchased a license for “Mazlo’s Spelling Adventure Volumes 1 and 2” and “Fred Penner’s Company’s Coming” from Kaboose.com for \$19,000 and a license for “Larken’s Living Letters 3.0” and “Larken’s Living Numbers 2.0” from Larken Software Inc. for \$15,000 USD. It also purchased a license for a collection of clip art software described as “Wildside Press Animals”, “Wildside Press Castles and Cathedrals”, “Wildside Press Designs”, “Wildside Press Arms and Battles” and “Wildside Press People” (collectively the “Clip Art”) from Judson Rosebush Company Inc. for \$5,000 USD.

[21] Tac II used the licenses to create two different bundles of software on CD-ROMs, and called the bundles the “Blue Collection” and the “Purple Collection”. The Blue Collection CD-ROM consisted of “Mazlo’s Spelling Adventure Volume 2”, “Larken’s Living Letters 3.0” and the Clip Art. The Purple Collection CD-ROM consisted of “Fred Penner’s Company’s Coming”, “Larken’s Living Numbers 2.0”, and the Clip Art.

[22] For the year 2002, Tac II sold the Blue and Purple Collection CD-ROMs to the donation program participants for \$60 per copy. In turn, the participants donated them to NCBS and received a donation receipt based on each copy of the donated software having a fair market value of \$300.

[23] In filing their tax returns for the 2002 taxation year, the participants claimed a charitable donation tax credit and received a tax refund based on the charitable donation receipt received from NCBS. They also reported a capital gain based on the difference between the amount they paid for the software and the value attributed to the software by NCBS on the charitable donation receipts.

[24] The Minister first reassessed the participants in the program in 2002 to reduce their charitable donation tax credits on the basis that the fair market value of the Blue Collection software was \$37.30 per copy and the fair market value of the Purple Collection software was \$40.60 per copy based on a valuation prepared internally by the CRA. In the case of Ms. Klepatch, Mr. Thompson and Mr. Hamilton, no charitable donation tax credit was allowed because they failed to provide supporting documentation to the CRA auditor. The Minister also deleted the capital gains declared by the participants in relation to the donated software.

[25] In subsequent reassessments for the 2002 taxation year, Ms. Klepatch was allowed a charitable donation tax credit based on the amount she paid for the Blue and Purple Collection software (\$4,800), and Mr. Hamilton and Mr. Thompson were allowed a charitable donation tax credit based on the fair market value of the software as determined by the Minister. The discrepancy in treatment between Ms. Klepatch and the other participants was apparently an error on the part of the CRA. In the ultimate reassessments of all of the participants for the 2002 taxation year, the Minister assumed that the participants had no donative intent in transferring the software to NCBS and therefore had not made any gifts that could give rise to a charitable donation tax credit but, again did not reduce the credits already allowed to the participants.

[26] In 2003 the donation program was operated and promoted by a new corporation, Concept Three Software Corporation (“Concept III”). Tom Reid’s stepson, Robert Freeman was the director of Concept III.

[27] In 2003, 1,630 individuals participated in the program, including all of the Appellants.

[28] Tac II continued to produce the Blue and Purple Collection software for the donation program in 2003, having acquired extensions of the licenses to produce unlimited copies of the software until the end of 2003. It paid \$9,500 to Kaboose.com, \$7,500 US to Larken Software Inc. and \$2,500 US to Judson Rosebush for the extensions.

[29] For the 2003 year, Tac II sold the Blue and Purple Collection CD-ROMs to another numbered corporation, which operated as BAT Investments Ltd. (“BAT”). Mr. Reid’s stepson Robert Freeman was also the director of BAT. Tac II sold the Blue and Purple Collection CD-ROMs to BAT for \$0.58 per copy. BAT then sold them to Concept III for \$ 39.44 per unit, and in turn, Concept III sold the CD-ROMs to the donation program participants for \$ 55.20 per copy.

[30] The participants then donated the CD-ROMs to NCBS and received a donation receipt based on the donated software having a fair market value of \$250 per copy. In filing their tax returns for the 2003 taxation year, the participants claimed a charitable donation tax credit and received a tax refund based on the charitable donation receipt received from NCBS. They also reported a capital gain based on the difference between the amount they paid for the software and the value attributed to the software by NCBS on the charitable donation receipts.

[31] The Minister first reassessed the participants in the program in 2003 to reduce their charitable donation tax credits relating to the software donations on the basis that the fair market value of the Blue Collection software was \$33.81 per copy and the fair market value of the Purple Collection software was \$36.80 per copy based on a valuation prepared internally by the CRA. Subsequently, the Minister reassessed the participants to delete the capital gains reported in relation to the software donations. The Minister also again assumed that the participants had no donative intent in transferring the software to NCBS and therefore had not made any gifts that could give rise to a charitable donation tax credit but did not reduce the credits already allowed to the participants.

III. ANALYSIS

Preliminary motion to quash Mr. Chibani's appeal for 2003

[32] The Respondent seeks to have Mr. Chibani's appeal from the reassessment of his 2003 taxation year quashed on the basis that he had failed to file a notice of objection to the latest reassessment of that year which was issued on February 23, 2007.

[33] The record shows that Mr. Chibani was originally assessed for the 2003 taxation year on April 22, 2004. He was then reassessed on February 3, 2006. It is not disputed that he filed a valid notice of objection to that reassessment. Next, the Respondent says that he was reassessed by notice dated February 23, 2007. On March 8, 2007 the CRA sent a letter to Mr. Chibani advising him that because of the reassessment that had just been made, his previous notice of objection was no longer valid and that he would have to file a new notice of objection or proceed directly to the Tax Court if he wished to dispute the new reassessment. Mr. Chibani said he did not recall receiving either the notice of reassessment or the letter dated March 8, 2007. He did not file a new notice of objection.

[34] Several years later, on August 1, 2014, the Minister reassessed Mr. Chibani for his 2001 and 2002 taxation years. Mr. Chibani missed the deadline for filing a notice of appeal to this Court and applied for an order extending the time to file a notice of appeal to the reassessments of his 2001, 2002 and 2003 taxation years. The Minister consented to the application and the application was granted by the court for all three taxation years. The issue of the Court's jurisdiction to hear Mr. Chibani's appeal of the 2003 reassessment was only raised when the Respondent filed the Re-amended Reply to the Notice of Appeal raise the issue.

[35] While it is clear that the Respondent is not estopped from raising the issue of the validity of Mr. Chibani's appeal by reason of the consent given to Mr. Chibani's time extension request, I find that the Respondent has not presented sufficient evidence to allow me to make the order sought. I am satisfied that Mr. Chibani did not receive the reassessment. As a result, the Respondent has onus to prove that it was mailed to Mr. Chibani: see *Aztec Industries Inc. v. Canada* (1995), 95 D.T.C. 5235 (FCA). In this case, the Respondent has not provided any evidence to show that the notice of reassessment dated February 23, 2007 was in fact mailed to Mr. Chibani. Normally this type of evidence is presented in the form of an affidavit from a CRA officer who has knowledge of the mailing procedures followed in the office from which the reassessment was sent and has reviewed the

computer records relating to the mailing of the notice of reassessment. No such evidence was presented by the Respondent here, and in the absence of such proof, the Respondent's motion to quash is denied.

Fair market value of the software

[36] I will deal next with the issue of the fair market value of the software that the Appellants donated to NCBS in each of the programs.

- 2001 Taxation year: Lotus Smart Suite

[37] Ms. Klepatch, Mr. Chibani and Mr. Hamilton maintain that the software they purchased from Vitex and donated to NCBS was the retail version of the Lotus Smart Suite software, and that each copy of that software had a fair market value of \$600. In the alternative, they argue that the fair market value of the OEM version and the retail version had the same functionality and therefore that the fair market value of the OEM version of the software was equal to the fair market value of the retail version.

[38] The Respondent does not dispute that the fair market value of the retail version of the LSS software was \$600 per copy, but says that this value is not relevant because the Appellants did not donate copies of the retail version. The Respondent submits that since the Minister assumed that the Appellants donated copies of the OEM version, the onus is on the Appellants to prove that they donated copies of the retail version. In the alternative, the Respondent says that the Appellants have the onus to prove that the fair market value of the OEM version of LSS was greater than \$17 per copy, as assumed by the Minister.

[39] The Respondent maintains that the OEM version could only be acquired by a consumer as part of the purchase of a computer, and that the OEM version acquired by Ms. Klepatch, Mr. Chibani and Mr. Hamilton were not licensed by Lotus for use in any other circumstances. Therefore the Respondent says that the fair market value of the OEM version was equal to the price at which Systelligence sold the software to Vitex.

[40] The evidence with respect to which version of the LSS software acquired and donated to NCBS tends in my view to support the Respondent's position.

[41] Martin Warren testified that he worked in Tom Reid's office beginning in 2000 and that his duties included oversight of workers conducting fundraising for NCBS. He said that in the spring of 2001, he was in the office and saw a shipment of LSS software that had been purchased by Vitex to be used in the donation program. He said that he noticed that the copies of the software were marked as the OEM version of LSS. He raised the issue with Mr. Reid and told him that the OEM version was not authorized for resale and that without a license for the use of the software from Lotus, it could not be purchased lawfully and was worthless. According to Warren, the software used in the donation program was subsequently changed to the Blue and Purple Collections for the 2002 and 2003 taxation years.

[42] Mr. Warren also said that the participants in the program were shown a copy of the retail version of LSS when they came to the office, but that the software that was donated to NCBS on behalf of the participants was the OEM version.

[43] Ms. Klepatch, Mr. Chibani and Mr. Hamilton testified that they were shown a copy of the retail version of the LSS software when they agreed to participate in the program. None of them, however, could confirm that copies of the retail version were in fact donated to NCBS.

[44] Ms. Soper, the manager of distribution partners for Lotus during the relevant period, testified that the OEM version of LSS was not a retail product and that it was only made available by Lotus to its authorized distributors to install on computers they sold to consumers. Lotus did not allow the OEM version to be sold separately. She also confirmed that neither Systelligence nor Magnasoft, the company from which Systelligence purchased the OEM version of LSS, were authorized by Lotus to distribute its products. Ms. Soper also said that Lotus did not permit its distributors in the U.S. to sell Lotus products in Canada. Finally, Ms. Soper testified that the price charged by Lotus for the retail version of LSS was approximately 60% of the suggested retail price of \$400 to \$600. This would result in a wholesale price for the retail version of LSS of between \$240 and \$360 per copy.

[45] Mr. Khan, the owner of Systelligence, testified that his company supplied about 20,000 copies of the LSS software to Vitex, all of which was the OEM version. He also said that Systelligence acquired most of it from a software wholesaler named Magnasoft for \$15 to \$16 per copy. Systelligence sold it to Vitex for \$17 per copy. The price paid by Vitex was set out in an invoice from Systelligence that was produced at the hearing. Mr. Khan stated that a small

amount of the LSS software was purchased from a U.S. company when it wasn't available from Magnasoft.

[46] Mr. Khan testified that the packaging of the LSS software that he sold to Vitex was different from the packaging for the retail version of LSS. He was clear that Systelligence did not sell any copies of the retail version of LSS to Vitex. Mr. Khan also testified that he sold individual copies of the LSS OEM software to other customers for the same price paid by Vitex.

[47] In light of the evidence given by Mr. Warren, Ms. Soper and Mr. Khan, which I find to be credible, I am satisfied that the LSS software acquired by Vitex and used in the NCBS donation program was the OEM version and that this was the version that was actually donated by the program participants. As such, the Minister's assumptions in this regard have not been demolished by the Appellants.

[48] I also find that the OEM version acquired by Vitex was more likely than not a pirated version, and that this is why the software could be acquired for only \$17 per copy, far below even the wholesale price charged by Lotus for the retail version of LSS.

[49] I also reject the Appellant's argument that because both the OEM version and the retail version of the LSS software had the same functionality, the fair market value of each version would be equal. The evidence showed that Lotus did not authorize the sale of the OEM version as a stand-alone product and therefore that the use of the OEM version acquired by Vitex was illegal. The Appellants presented no expert evidence to show that the fair market value of the OEM version, acquired in these circumstances, was equal to the fair market value of the retail version. Therefore there is no evidence before me to refute the fair market value assumed by the Minister.

[50] It was also submitted by the Appellants that the Respondent did not prove what version of the LSS software had been donated by the program participants to NCBS and that the appeal should be allowed for this reason. However, the Minister assumed in reassessing the Appellants that they donated the OEM version of LSS and that the fair market value of what was donated was \$17 per copy. The onus is therefore on the Appellant's to disapprove those assumptions, which I find they have not done. As noted by Létourneau J.A in *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188 at paragraph 28:

When pleaded, assumptions of fact place on the taxpayers the initial onus of disproving, on a balance of probabilities, the facts that the Minister assumed: see *Canada v. Anchor Pointe Energy Ltd.*, at paragraph 2 and *Hickman Motors Ltd. v. Canada*, 1997 CanLII 357 (SCC), [1997] 2 S.C.R. 336, at paragraph 92

[51] Also, it does not assist the Appellants that they may have been shown copies of the retail version at the time they agreed to participate in that donation program. They can only be entitled to a donation tax credit for what was actually transferred to NCBS, and if Vitex transferred something other than what was shown to the Appellants, this would have no bearing on the tax credit available. The Court must deal with what the taxpayer actually did: see *Bronfman Trust v. Canada*, [1987] 1 S.C.R. 32, at paragraph 44, per Dickson C.J.

[52] Mr. Chibani's and Mr. Kinchsular's representative, Mr. Deane, submitted that according to Mr. Khan, the OEM version of the LSS software sold by Systelligence to Vitex included a license to use the software. In fact, Mr. Khan did not say that the OEM versions he sold came with a license, only that the first software he sold came with some booklets. No mention of a license was made. Furthermore, all of the other evidence supports the position that the LSS software donated to NCBS by the participants was unlicensed and unauthorized by Lotus.

[53] Mr. Deane also argued that Ms. Soper did not state what price Lotus charged its distributors for the OEM software and therefore that the Respondent had not proved the fair market value of the OEM version.

[54] Ms. Soper declined to disclose the amount charged to its distributors because she said that it was proprietary information. However, in my view it would not have assisted the Appellants to know what Lotus charged because Lotus did not sell the OEM version to anyone other than its distributors and the distributors could not sell the software. It could only be installed on a computer sold by them. The evidence shows that the copies obtained by Vitex from Systelligence were unauthorized and unlicensed and for that reason are not comparable to the OEM version sold by Lotus to its distributors.

[55] Mr. Deane also submitted that it was unfair that the Minister had allowed Ms. Klepatch a donation tax credit based on her cash outlay for the LSS software (\$120 per copy) while Mr. Chibani and Mr. Hamilton were allowed donation tax credits based on a fair market value of \$17 per copy for the software. Mr. Deane said that Mr. Chibani should be allowed the same treatment as Ms. Klepatch, and Mr. Hamilton adopted Mr. Deane's submissions. However, the evidence shows

that all three of these Appellants were allowed a donation tax credit based on the \$120 per copy they paid for the LSS software. Mr. Deane was perhaps thinking of the discrepancy between the treatment of Ms. Klepatch and the other Appellants in the reassessment of her 2002 taxation year. Ms. Klepatch was allowed a donation tax credit on the basis of the amount she paid for the Blue and Purple Collections (\$60 per copy) rather than on the basis of their fair market value (\$37.30 and \$40.60 per copy, respectively) that was allowed to the other participants.

[56] Although Mr. Deane's submission related to the wrong taxation year and software, I will address the substance of the submission as it would apply to the 2002 taxation year. The jurisprudence is clear that there is no requirement for the Minister to be consistent in assessing different taxpayers, only that the assessment under review by the Court be in accordance with the law. In this case, that means that I must determine whether the Appellants have shown that the fair market value of the Blue and Purple Collections assumed by the Respondent is incorrect. To the extent that the Minister may have mistakenly allowed Ms. Klepatch a donation tax credit that exceeds that to which she is entitled for her 2002 taxation year is not relevant for the purpose of determining the donation tax credit of the other Appellants. An erroneous assessment of another taxpayer cannot give a taxpayer a right to the same treatment: *Arrijoja v. Canada*, 2005 TCC 95 at paragraph 27. Also, this Court does not have the power to order the Minister to increase Ms. Klepatch's tax payable, nor has the Respondent asked me to do so: *Skinner v. Canada*, 2009 TCC 269 at paragraph 30.

- 2002 and 2003 taxation years: Blue and Purple Collections

[57] I turn next to the question of the fair market value of the Blue and Purple Collection CD-ROMs that were donated to NCBS by participants in the program in 2002 and 2003.

[58] The Blue Collection consisted of "Larken's Living Letters", "Mazlo's Animated Spelling Adventure Volume 2" and a "Collection of Clip Art". The Purple Collection consisted of "Larken's Living Numbers", "Fred Penner's Company Coming" and a "Collection of Clip Art". The Clip Art collection was the same on both CD-ROMs.

[59] The Respondent called two expert witnesses to give evidence in respect of the Blue and Purple Collections.

[60] The first expert, Mr. Hassan Makkeh, a software engineer, provided a report on technical aspects of the Blue and Purple Collection CD-ROMs relating in particular to their installation and use. He testified that Mazlo's Spelling Adventure and Fred Penner's Company Coming were not compatible with the latest computer operating system available in 2002, Windows XP, and that the default installation options provided for Larken's Living Letters on the Blue Collection did not work on either Windows 98 or Windows XP.

[61] Mr. Makkeh also found certain difficulties with the Clip Art Collection. The Clip Art consisted of 1299 steel engraving images divided into various groupings according to their subject matter, such as animals, battles, borders and castles. Mr. Makkeh said that the collection of images was originally produced on five CD-ROMs, but that in order to fit them all onto one CD-ROM along with the other Blue and Purple Collection software, most of the images had been scaled to a smaller size. As a result, the quality of the images was distorted when the user attempted to view or print the image on its original size. He described the distorted images as unusable, and the example provided in his report shows a blurred image in place of the detailed original image.

[62] The Respondent's next expert, Dr. Luc Michaud, an economist and software production executive, provided opinion evidence as to the fair market value of the Blue and Purple Collections. He testified that the market for CD-ROM software was generally very weak in the period between 2002 and 2004 because of an oversupply of products. He said that tens of thousands of CD-ROM products had been created and that this was brought about by the low-cost entry into the market. The oversupply caused prices to drop.

[63] Dr. Michaud also testified that the rapid technological advances in computer technology in the late 1990s and early 2000s allowed for the creation of more and more sophisticated animation and sounds on CD-ROM software. Also, new computer operating systems were being released frequently and CD-ROMs that were not compatible with the latest operating system were unmarketable in ordinary retail channels. He described the secondary market that had developed around the turn of the millennium for outdated software products where several software titles were bundled on a single CD-ROM and sold at a discount. He said that the price of bundles was often much lower than the sum of the prices for the individual components.

[64] Dr. Michaud said that he found no indication in his research that the Blue and Purple Collections were ever sold commercially. He then attempted to obtain

the list prices for the software included on the Blue and Purple Collections. He was only able to obtain offering prices for Larken's Living Letters and Larken's Living Numbers using a website called "The Wayback Machine" that stores old versions of web pages. He found that Larken's Living Letters was offered for sale for \$24.95 in 1998 and that this dropped to \$15.95 by 2001. Larken's Living Numbers was offered at \$15.95 in 1998. Dr. Michaud said that both of those prices would have dropped by 2002, given the market conditions. He also said that he did not find any CD-ROM bundles of software that contained any of the Larken products. Finally, he said that he was unable to find any information on prices for Fred Penner's Company Coming or Mazlo's Spelling Adventure.

[65] Dr. Michaud also cautioned that the prices shown on websites for CD-ROM software were not necessarily indicative of the fair market value of the product, only the price at which it was offered. Without confirmation that sales of the product had occurred at the listed prices, the only conclusion that could be drawn was that the listed price is represented the maximum of what fair market value might be.

[66] Dr. Michaud then proceeded to compare the Blue and Purple collection software with three other children's education software products from that time for comparison purposes. He found that in 2002 and 2003 the price range of children's educational software that were compatible with the latest operating system and featuring well-known children's characters was approximately \$10 to \$20 but he considered these products to be superior to the Blue and Purple Collections because they had superior graphics, more activities and longer running times to the activities. He said that, in comparison, the Blue and Purple Collection software appeared dated, with a limited number of colours used in the graphics and haphazard animations that moved unsteadily across the screen. He also said that it was unlikely that retailers would accept products that did not run on Windows XP in 2002 and 2003.

[67] Dr. Michaud also testified that retailers had no tolerance for products with technical deficiencies and that the installation problem that Mr. Makkeh described for "Larken's Living Letters" would have made the Blue Collection unsaleable and therefore of no value.

[68] With respect to the Clip Art Collections, he said that the usefulness of the images was impaired by the loss of sharpness that resulted from the compression of the image files. He said that he was shocked by the poor quality of those images compared to collections to other clip art available at the time. He also testified that

the prices for clip art collections was rapidly declining in 2001, giving as an example an 18 CD-ROM collection of 350,000 images that was available for \$29.95, which works out to less than 1 /100th of a cent per image. In his opinion, the images in that collection were of much higher quality than those in the clip art collection on the Blue and Purple Collection.

[69] In conclusion, Dr. Michaud determined that the fair market value of the Blue Collection was \$0 because of the technical flaw in the installation of Larken's Living Letters.

[70] With respect to the Purple Collection, he found that because it was old software, parts of which that were incompatible with Windows XP, and because the clip art collection was mediocre at best, it was unimaginable that the software could have been commercialized. He found that since good quality bundles of children's educational software could be obtained for \$20 at that time, the fair market value of the Purple Collection was no more than \$10 per copy.

[71] The Appellants argued that the price shown on various websites for the software components included on the Blue and Purple Collection CD-ROMs should be taken as their fair market value. Those prices were listed on a valuation for the Blue and Purple Collections prepared for and provided by the promoters to the participants in the program. There was, however, no evidence to show that there were any actual sales of the software at that those prices during the years in issue. As noted by Dr. Michaud, the asking prices would only establish a maximum for fair market value. Furthermore, although the author of the valuation report, Mr. Bramhall, was called as a witness, he was not qualified as an expert and the requirements of the Informal Procedure Rules were not met for the production of expert evidence. Even if Mr. Bramhall had been able to give expert evidence, it did not appear that he had verified that sales of the software at the prices listed on the websites had taken place. For these reasons, I am unable to give any weight to his conclusions regarding fair market value.

[72] Mr. Deane, submitted that the Court should impose a lower standard of proof on the Appellants because they were not given an opportunity to provide evidence of fair market value during the objection process. This position is also untenable. The onus of proof cannot be varied on a case-by-case basis, and, in addition, there is no evidence before me to show that the Appellants were denied an opportunity to contest the Minister's determination of fair market value. Also, the Appellants were presented with the Respondent's expert reports far in advance of the hearing and in my view had ample time to obtain their own expert evidence.

[73] Mr. Deane also submitted that there was no proof that the defect in the installation process for Larken's Living Letters on the Blue Collection was on all of the copies that were produced and that it was possible that the flaw was only on the copy given to Dr. Michaud and Mr. Makkeh to review.

[74] I find it unlikely that the flaw was only present on the copy reviewed by the expert witnesses. Mr. Warren testified that the copies of the Blue and Purple Collection were made for the promoters by a company named "Duplium" from a master disc and that its error rate in copying was very small. Also, Dr. Michaud testified that it was very unlikely that the installation flaw would have been caused by a copying error and that it was more likely an error on the master disc.

[75] It was also submitted that the Appellants were not aware of the technical defect in the Blue Collection software and that had they known, they could have sought to have it replaced with working copies. Again, however, I can only make a finding on the facts that are before me, not on what might have occurred.

[76] Overall, I find the conclusions reached by Dr. Michaud regarding fair market value to be consistent with the fact that Tac II was able to purchase licenses to produce the component software on the Blue and Purple Collections for very modest amounts. One of the documents produced by the Respondent was an invoice to BAT from Tac II dated August 14, 2003 for 175,000 copies of the Blue and Purple Collections. These were produced under license extensions that cost Tac II approximately \$25,000. Therefore, the cost to Tac II for the license came to less than 15 cents per copy of the Blue and Purple Collections even if no other copies were made. This would support the view that the software was of little commercial value by 2002 and 2003. I also accept that the software was outdated by that point, having been created in or around 1997 or 1998 and given the rapid technological advances over the intervening period. Given all of these factors, in addition to the technical flaw on the Blue Collection and the poor quality of the Clip Art, lead me to conclude that the Appellants have not shown that the fair market value of the Blue and Purple Collections was greater than the amounts assumed by the Minister.

[77] I would also like to address the issue of the Appellants' good faith in participating in the programs, since the point was raised frequently in the submissions made by the Appellants. Mr. Healy also maintained that the CRA should be pursuing the promoters of these programs rather than the participants, and that the CRA had a duty to warn taxpayers against participating in the program.

[78] While it is unfortunate that the Appellants were taken advantage of by the promoters of the donation programs and that this has caused them financial hardship, I believe that they were, to a certain extent, willfully blind to the excessive valuations placed on the donated software by the promoters and NCBS. It appears that none of the Appellants attempted to determine how the software sold to them by the promoters could immediately have a fair market value of four or five times what they paid for it for the purposes of their donations. I fail to understand how they were able to believe that the promoters would choose to sell them the software for a fraction of its alleged value. In any event, the fact that the Appellants were deceived is not a factor that I can take into account in my decision. The Federal Court of Appeal in *Chaya v Canada*, 2004 FCA 327, stated at paragraph 4 of that decision that:

It is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity. If the applicant considers the law unfair, his remedy is with Parliament, not with the Court.

IV. CONCLUSION

[79] Given my conclusion on the issue of fair market value of the property donated by the Appellants to NCBS each year, the appeals must be dismissed, and it is not necessary for me to address the Respondent's remaining arguments concerning donative intent and backdating of the charitable donation receipts.

[80] The Respondent asked for an order for costs against the Appellants, but I decline to do so given that these appeals were brought in the informal procedure and nothing in the Appellants' conduct unduly delayed the prompt and effective resolution of the appeals.

Signed at Ottawa, Ontario, this 24th day of May 2019.

"B. Paris"

Paris J.

CITATION: 2019TCC122

COURT FILE NOs.: 2013-3739(IT)I, 2013-4195(IT)I, 2014-2804(IT)I, 2014-379(IT)I, 2014-893(IT)I, 2015-1364(IT)I, 2015-1365(IT)I, 2015-1367(IT)I, 2015-1829(IT)I, 2015-3275(IT)I, 2015-3277(IT)I

STYLE OF CAUSE: GLENYS ABREO AND HER MAJESTY THE QUEEN; MICHAELANGELO CAPISTRANO AND HER MAJESTY THE QUEEN; NOAH M. THOMPSON AND HER MAJESTY THE QUEEN; LARISSA KLEPATCH AND HER MAJESTY THE QUEEN; GARRY HEALEY AND HER MAJESTY THE QUEEN; DAVID HAMILTON AND HER MAJESTY THE QUEEN; ARTHUR GOTHREAU AND HER MAJESTY THE QUEEN; TERRI GOTHREAU AND HER MAJESTY THE QUEEN; TAHEY CHIBANI AND HER MAJESTY THE QUEEN; MICHAEL EDWARD KINCHSULAR AND HER MAJESTY THE QUEEN; MICHAEL EDWARD KINCHSULAR AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 19, 20, 21, 22 and 23, December 3, 4 and 5, 2018, January 21, 22, 23 and 24, 2019

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Brent Paris

DATE OF JUDGMENT: May 24, 2019

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