Docket: 2012-2210(IT)G

BETWEEN:

THE ESTATE OF THE LATE RAYMOND KRENBRINK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 9, 2013, at Vancouver, British Columbia.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	Jonathan M. Aiyadurai
Counsel for the Respondent:	Shannon M. Currie

JUDGMENT

The Appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 27th day of January 2014.

"David E. Graham"

Graham J.

Citation: 2014 TCC 22
Date: 20140127
Docket: 2012-2210(IT)G

BETWEEN:

THE ESTATE OF THE LATE RAYMOND KRENBRINK,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] Raymond Krenbrink is deceased. At the time of his death he was the annuitant under a Registered Retirement Income Fund with a fair market value of $228,164. Mr. Krenbrink's daughter, Diana Brown, was the executor of his estate. When Ms. Brown filed a date of death tax return for Mr. Krenbrink, she did not include the fair market value of his RRIF in his income as required under subsection 146.3(6) of the *Income Tax Act* (the "*Act*"). The Minister of National Revenue assessed Mr. Krenbrink's date of death tax return as filed. The Minister subsequently reassessed Mr. Krenbrink to include the RRIF income. The reassessment was made beyond the normal reassessment period.

[2] The Appellant does not dispute that the fair market value of the RRIF should have been included in Mr. Krenbrink's income. However, the Appellant states that the Minister is now statute barred from doing so. The Respondent submits that the Appellant made a misrepresentation attributable to carelessness or neglect in not reporting the fair market value of the RRIF and thus that the period is not statute barred.

Witnesses

[3] Ms. Brown and the Canada Revenue Agency auditor, Rob McGregor, both testified. I found Mr. McGregor to be a credible witness. Ms. Brown had a very poor recollection of events. While her inability to recall key facts was noticeably convenient to her case, I have nonetheless given her the benefit of the doubt that her poor recollection arose from the passage of time rather than a desire to avoid answering questions.

Facts

[4] At some point prior to 2001, Mr. Krenbrink gave Ms. Brown a power of attorney over his affairs. Ms. Brown testified that although the power of attorney gave her control over her father's affairs, in general she simply did what her father told her to do.

[5] Mr. Krenbrink had a Registered Retirement Savings Plan. In 2001, Mr. Krenbrink transferred his RRSP assets to a RRIF managed by Talvest Fund Management. Ms. Brown was named as a 50% beneficiary of the RRIF on Mr. Krenbrink's death. Mr. Krenbrink was required to sign an Application form to create the RRIF (Exhibit R-2). Both Mr. Krenbrink and Ms. Brown signed the form. [1] Ms. Brown testified that she knew that her father had about $230,000 in his RRIF.

[6] Mr. Krenbrink died on July 3, 2004. On August 17, 2004, Ms. Brown signed a letter telling Talvest to distribute her 50% share of the RRIF to an investment account in her name. [2]

[7] A law firm assisted Ms. Brown with the administration of Mr. Krenbrink's estate. Ms. Brown testified that she did not hire the firm but there is no debate that the firm was involved. The law firm instructed Ms. Brown to gather her father's tax slips and to have a professional prepare the date of death return. Ms. Brown was angry about having to do this.

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[1] While there was some suggestion that Ms. Brown may have signed the form as a potential beneficiary, I find that she did so as Mr. Krenbrink's attorney. There was nothing in the form that required beneficiaries to sign, the other beneficiary did not sign and Ms. Brown signed beside her father's signature on the part of the form where the annuitant is to sign.

[2] The letter actually refers to Primerica PFSL Investments Canada Ltd. It was unclear at trial whether Talvest is a division of Primerica or whether the two are separate entities. Nothing turns on this.

[8] Ms. Brown collected all of her father's tax slips in a folder. She did not review them. One of those slips was a T4RIF from Talvest (Exhibit R-3). The T4RIF listed three key amounts. The first amount was in box 16 of the slip. That box is described as "Taxable amounts". The figure $6,058.92 was written in that box. The second amount was in box 18 of the slip. That box is described as "Amounts deemed received by the annuitant". The figure $228,164.20 was written in that box. The third amount was in box 28. That box is described as "Income tax deducted". The figure $58.92 was written in that box.

[9] Ms. Brown testified that once she had all of her father's tax slips she left her house and drove until she saw a sign for a business that prepared tax returns. She selected the first business that she saw. The name of the business was "FAST TAX returns done for u inc." Ms. Brown gave all of the tax slips to the tax preparer. The tax preparer then prepared the date of death tax return. Ms. Brown signed the return. She cannot recall whether she reviewed the return before signing it or not. She also cannot recall whether she had any conversations with the tax preparer. After signing the return, Ms. Brown forwarded it to the estate's lawyers who presumably filed it with the CRA. She sent the return to the lawyers instead of directly to the CRA because she was angry that she had to have the return done and sending it to the lawyers was, in her words, her way of saying "I did it. Do with it what you want."

[10] The tax preparer clearly made an error in completing the tax return. Only two of the three amounts from the T4RIF were reported on the tax return. The $6,058.92 amount was included at line 115 and the $58.92 amount was included at line 482. The $228,164.20 was not reported anywhere. As a result, the total income reported on the return was only $20,056.10 (less than 10% of what the total should have been).

Issues

[11] The Appellant raised numerous issues:

(a) Did the Appellant make a misrepresentation?

(b) If the Appellant made a misrepresentation, does subsection 152(9) permit the Respondent to argue that the misrepresentation was attributable to either carelessness or neglect or is the Respondent limited to arguing that the misrepresentation was attributable to carelessness?

(c) If subsection 152(9) permits the Respondent to argue that the misrepresentation was attributable to carelessness or neglect, is the Respondent prevented from doing so because the Respondent failed to include subsection 152(9) in her list of statutory provisions relied upon in the Reply?

(d) If subsection 152(9) permits the Respondent to argue that the misrepresentation was attributable to carelessness or neglect and the Respondent is not prevented from doing so because the Respondent failed to include subsection 152(9) in her list of statutory provisions relied upon in the Reply:

(i) what is the minimum standard of care that the Minister must prove the Appellant failed to meet;

(ii) is there a lower standard of care required of executors; and

(iii) did the Appellant meet the applicable standard of care?

Misrepresentation

[12] The Appellant did not admit that a misrepresentation was made. However, the Appellant agrees that the fair market value of the RRIF should have been included in income and did not provide any evidence or argument that would suggest a misrepresentation was not made. I conclude that the failure to include $228,164.20 was a misrepresentation.

Subsection 152(9)

[13] Subparagraph 152(4)(*a*)(i) sets out the relevant circumstances in which the Minister can open up a statute barred year:

> The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year … except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (a) the taxpayer or person filing the return

> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this *Act* …

[14] Under this subparagraph, if the Minister wants to open up a statute barred year, she bears the onus of proving that the taxpayer has made a misrepresentation attributable to neglect, carelessness or wilful default.

[15] The Minister reassessed the Appellant on the basis that the Appellant had made a misrepresentation attributable to carelessness. The Appellant submits that the Respondent is prohibited from raising any new basis of assessment. The Appellant submits that, in now arguing that the misrepresentation was attributable to carelessness or neglect, the Respondent is raising a new basis of assessment.

[16] Subsection 152(9) sets out the circumstances in which the Minister can raise an alternative argument in support of an assessment. Subsection 152(9) states:

> **Alternative basis for assessment.** The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this *Act*
>
> > (*a*) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and
> >
> > (*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

[17] The Appellant submits that subsection 152(9) permits the Minister to raise a new argument in support of an assessment but not a new basis for assessment.

[18] The distinction between a new basis for assessment and a new argument in support of an assessment is mere semantics. What matters is the underlying transaction and the amount of tax assessed (*Anchor Pointe Energy Ltd*. v. *The Queen*, 2003 FCA 294).

[19] The Federal Court of Appeal set out the conditions that must be met for subsection 152(9) to apply in *Walsh* v. *The Queen*, 2007 FCA 222. At paragraph 18, Chief Justice Richard stated:

> The following conditions apply when the Minister seeks to rely on subsection 152(9) of the Act:

1) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment;

2) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(a) and (b), which speak to the prejudice to the taxpayer; and

3) the Minister cannot use subsection 152(9) to reassess outside the time limitations in subsection 152(4) of the Act, or to collect tax exceeding the amount in the assessment under appeal.

[20] The Respondent submits that she has not raised a new argument. It is not necessary for me to decide whether the Respondent has raised a new argument because, even if the Respondent had raised a new argument, the three conditions set out in *Walsh* have been met.

(a) The Minister reassessed the Appellant in respect of a deemed income inclusion from an RRIF that occurred upon death. That is the same "transaction" that the Minister continues to pursue at appeal.

(b) The Appellant provided no indication of any prejudice of the type described in subsection 152(9). The Appellant had notice of the Respondent's position from the time the Reply was filed. The Reply clearly stated that the Respondent was taking the position that the Appellant's misrepresentation was due to carelessness or neglect. I am accordingly unaware of any evidence that the Appellant would not have been able to introduce without leave from the Court.

(c) Finally, the amount of tax assessed has not changed as a result of the Minister's position that the misrepresentation was attributable to carelessness or neglect.

Statutory Provisions Relied Upon

[21] The Appellant submits that, even if subsection 152(9) allows the Respondent to add neglect as a reason for the misrepresentation, the Respondent should be precluded from relying on that subsection because, contrary to Rule 49(1)(g) of the *Tax Court of Canada Rules (General Procedure)*, the Reply did not list subsection 152(9) as one of the statutory provisions upon which the Respondent was relying. The Respondent submits that it was not necessary to list subsection 152(9) because adding neglect as a reason for the misrepresentation did not amount to a new

argument. In the alternative, the Respondent submits that the Appellant has not been prejudiced in any way by not having subsection 152(9) included.

[22] Again, I do not need to determine whether adding neglect as a reason for the misrepresentation amounted to a new argument as I find that, even if it was a new argument, the Appellant was not prejudiced by the failure to list subsection 152(9) in the Reply.

[23] The Appellant relied on the Tax Court decision in *Bibby* v. *The Queen*, 2009 TCC 588. In that case, the Minister had confirmed a reassessment in reliance on subsection 15(1) of the *Act* and then, at trial, without having pled it, sought to rely on section 6 of the *Act*. Justice Bowie prevented the Respondent from doing so. At paragraph 23 he stated:

> Subsection 49(1) of the General Procedure Rules requires that every Reply shall state:
>
> (a) the statutory provisions relied on; [and]
>
> (b) the reasons the respondent intends to rely on
>
> The purpose of these requirements is to ensure that the issues are properly defined for the purposes of discovery and trial, and so that the appellant will know what arguments he must meet, and so that he will be able to marshal and lead his evidence accordingly. This is not a mere formality that may be overlooked when it has not been complied with; it is a core component of the trial process, and to ignore non-compliance would undermine the integrity of that process: see *R. v. Glisic* (1987), [1988] 1 F.C. 731 (Fed. C.A.); see also *Fortino v. R.* (1996), 97 D.T.C. 55 (T.C.C.); aff'd. (1999), 2000 D.T.C. 6060 (Fed. C.A.).

[24] It is clear from the above that in interpreting Rule 49(1)(g) Justice Bowie was concerned about maintaining the fairness of the trial process. Subsection 15(1) taxes shareholders on amounts appropriated from a company. By contrast, section 6 taxes employment income. I can therefore see how Justice Bowie would have concluded that the failure to plead section 6 would significantly prejudice an appellant who was expecting to fight an appeal dealing with subsection 15(1).

[25] By contrast, I have difficulty seeing how the failure to plead subsection 152(9) could have prejudiced the Appellant or in any way impacted the fairness of the trial process. The Appellant knew what the issues would be at trial and what arguments would have to be met. In the Reply, the Respondent identified the charging

provisions that she was relying on (section 146.3 and subsection 56(1)) and the provision that she was relying upon to permit the Minister to reassess a statute barred year (subsection 152(4)). The Respondent also identified that her position was that the Appellant's misrepresentation was attributable to neglect or carelessness. Furthermore, counsel for the Appellant did not provide any explanation of how the addition of subsection 152(9) to the list of statutory provisions relied upon would have caused the Appellant to adduce any other evidence at trial. All that the addition of subsection 152(9) would have done was to highlight for the Appellant the procedural means by which the Respondent, to the extent that the addition of neglect amounted to a new argument, was entitled to make that new argument. Since it was counsel for the Appellant, not counsel for the Respondent, who raised subsection 152(9) in argument, the potential application of the subsection was clearly not something which the Appellant needed to have highlighted. [3]

[26] In addition to the above, I am mindful of the fact that the Appellant is, to an extent, arguing out of both sides of its mouth. The Appellant argues that the Respondent cannot take the position that the misrepresentation was attributable to neglect because that position would amount to a new basis of assessment. Yet that issue was not raised by the Appellant in its pleadings. Admittedly the Appellant was not aware of the issue until it received the Reply. However, once the Appellant read the Reply and realized that the Respondent intended to rely on neglect to support the reassessment, the Appellant should, in fairness to the Respondent, have filed an Amended Notice of Appeal raising the issue. The Appellant is, in essence, arguing that it is unfair that the Respondent, who was unaware of the issue the Appellant was going to be raising, did not plead subsection 152(9) despite the fact that subsection 152(9) would not even have been the Respondent's primary defence of that unanticipated issue but rather her alternative defence of the unanticipated issue.

[27] Based on all of the above, to the extent that it is even necessary for the Respondent to rely on subsection 152(9), I am not prepared to prevent her from doing so.

Standard of Care for Executors

[28] The parties agree that to prove neglect, the Respondent must prove that the Appellant failed to exercise reasonable care (*Venne* v. *The Queen*, [1984] CTC 223 (FCTD); *Gebhart Estate* v. *The Queen*, 2008 FCA 206). They also agree that the

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[3] Since the Respondent had the burden of proving the statute barred year could be opened, counsel for the Respondent made submissions first.

standard by which a taxpayer is normally judged is that of a wise and prudent person. However, the Appellant submits that the wise and prudent person standard should not be applied to executors. The Appellant cites the Supreme Court of Canada decision in *Wohlleben* v. *Canada Permanent Trust Company* (1976), 70 DLR (3d) 257 as authority that the standard of care for executors is that of a person of ordinary prudence managing his or her own affairs, not that of a wise and prudent person.

[29] I do not agree with the Appellant's position. In *Wohlleben*, the Supreme Court of Canada described the standard of care that a trustee administering a trust owes to the beneficiaries of the trust, not the standard of care that an executor filing tax returns owes to the Minister. I see no reason why the standard of care that an executor owes to the Minister would be any different than the standard of care that other taxpayers owe. The Appellant did not direct me to any tax cases that would support the application of the *Wohlleben* standard to tax cases.

Neglect

[30] The only issue that remains is whether the Appellant's misrepresentation in failing to report the $228,164.20 in RRIF income was attributable to neglect. I find that it was.

[31] Ms. Brown's failure to review the tax slips that she received for the estate (including the T4RIF) was imprudent. An executor exercising reasonable care would have reviewed the T4RIF, would have seen the $228,164.20 set out thereon and, having seen that amount, at a bare minimum would have looked for it on the tax return. Upon not seeing the amount on the tax return, an executor exercising reasonable care, would then have made enquiries of the tax preparer. An executor exercising reasonable care may even have looked at the back of the T4RIF, noted the following description relating to Box 18 and made the appropriate enquiries:

> Box 18 - This is the fair market value of all the property held by the RRIF at the time of the annuitant's death. For more information on how to report this amount, get the guide called *RRSPs and Other Registered Plans for Retirement*.

[32] It is important to recognize that the T4RIF was not a relatively insignificant form relating to a minor aspect of the estate. The RRIF represented more than 70% of all the assets distributed to beneficiaries as a result of Mr. Krenbrink's death.[4] Ms. Brown was well aware of the significance of the RRIF. She was a 50% beneficiary of

[4] Approximately $90,000 was distributed through Mr. Krenbrink's estate in addition to the $228,164.20 distributed from the RRIF.

the RRIF. While she testified that she does not recall the amount of money that she received from the RRIF, she does recall receiving money after her father's death. I accept that she may no longer recall the amount of money that she received, but I find that she would have been aware of the amount at the time. All she would have had to do to determine the value of the RRIF would have been to double the amount she received. As a result, there is no doubt in my mind that Ms. Brown would have been fully aware of the specific amount that she had received both when she received it in 2004 and when she signed the date of death tax return in 2005. Accordingly, she ought to have known the importance of reviewing the T4RIF.

[33] There is no evidence as to whether Ms. Brown reviewed the date of death tax return or not. Ms. Brown testified that while she has experience filing her own tax returns, she has no experience either as an executor or in filing tax returns for deceased people. As a result, she stated that if she had reviewed the return she would not have known whether it was right or wrong. However, the simple fact is that, having not looked at the T4RIF, Ms. Brown would not have been in a position to identify errors or make further enquiries even if she had reviewed the return. Her decision not to look at the T4RIF in the first place was imprudent.

[34] Ms. Brown testified that she expected that she would have to pay tax on the RRIF funds personally when she filed her personal tax return. She did not offer any explanation as to how she came to that belief. She simply described it as "an assumption on [her] part". She did not seek any advice on this point. Ms. Brown testified that she prepares and files her own tax returns. Ms. Brown's 2004 tax return was not entered as an exhibit. I draw an adverse inference from that fact. I conclude that had her return been filed as an exhibit it would not have shown that Ms. Brown attempted to report the missing RRIF income. Based on this adverse inference, I conclude that Ms. Brown was indifferent as to whether the RRIF amount was properly reported on any return, be it her personal return or the date of death return of Mr. Krenbrink.

[35] I note that, in reaching my conclusion that Ms. Brown was negligent, I have given some minor weight to what could be described as Ms. Brown's negative attitude about getting the return prepared as evidenced by her anger with the estate's lawyers for making her get the return prepared, the method by which she chose the tax preparer and her decision to send the tax return back to the lawyers instead of to the CRA. While none of these actions is individually troubling, when viewed collectively and in combination with her decision not to review any tax slips, they are indicative of an overall desire to put as little effort into the preparation of the tax return as possible.

Carelessness

[36] The Appellant asserts that there is a difference between neglect and carelessness and that the standard of care necessary for carelessness is higher than that of neglect. Given my conclusions above, it is unnecessary for me to consider this issue.

Summary

[37] Based on all of the foregoing, the appeal is dismissed with costs.

Signed at Ottawa, Canada, this 27th day of January 2014.

"David E. Graham"

Graham J.

CITATION:	2014 TCC 22
COURT FILE NO.:	2012-2210(IT)G
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PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 9, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Graham
DATE OF JUDGMENT:	January 27, 2014

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