Docket: 2011-3788(IT)G

BETWEEN:

ESTATE OF STANLEY VINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 10, 11, 12 and 13, 2013 and September 12 and 13, 2013, at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	David Nathanson, Q.C. Adrienne Woodyard
Counsel for the Respondent:	Martin Gentile Christopher Bartlett

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JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2003 taxation year is allowed, without costs, on the following basis:

1. The Minister will be permitted to reassess after the normal reassessment period to include in the taxpayer's income the recapture of capital cost allowance deductions from the deemed disposition of 3000 Victoria Park; and

2. The fair market value of the property municipally known as 1305 and 1309 Wilson Avenue is accepted at $8.6 million, as contained in David Atlin's Expert Report. Consequently, the fair market value of the deceased's shares in Leadway, which owned the Wilson property, will be subject to the addition of the sum of $1.4 million (Agreed Statement of Facts, paragraph 30).

The assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of February 2014.

"Diane Campbell"

Campbell J.

Citation: 2014 TCC 64
Date: 20140228
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BETWEEN:

ESTATE OF STANLEY VINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] Stanley Vine died on July 1, 2003. Immediately before his death, he owned, among other things:

(a) shares of Kilbarry Holding Corporation ("Kilbarry");

(b) an undivided 50 percent beneficial interest in a property municipally known as 3000 Victoria Park in Toronto ("Victoria Park"); and

(c) all of the shares of the capital stock of Leadway Apartments Limited ("Leadway").

[2] Leadway owned a property municipally known as 1305 and 1309 Wilson Avenue ("Wilson") which consisted of 171 individual rental units contained in two residential structures located on 2.7 acres of land.

[3] There are two issues to be determined in this appeal:

(a) whether, after the normal reassessment period, the Minister of National Revenue (the "Minister") can include recapture of capital cost

allowance deductions in the amount of $1,995,367, relating to the Victoria property, in computing income for the 2003 taxation year; and

(b) whether the Minister correctly determined the fair market value ("FMV") of the Wilson property and, consequently, the FMV of the shares in Leadway, which owned this property.

[4] At the commencement of the hearing, the Parties submitted an Agreed Statement of Facts as Exhibit A-2. I have attached it as a Schedule to my within reasons for ease of reference.

[5] The following summary of facts explains how the two issues in this appeal arose.

[6] Prior to Mr. Vine's death in 2003, the accounting firm of Mintz & Partners ("Mintz") had maintained a long-standing relationship with Mr. Vine. When he died, his named executors and trustees, his son-in-law, Norman Glowinsky, and daughter, Lillian Glowinsky, engaged Mintz to complete, among other things, valuations of corporate shares and real estate, in respect to the deemed disposition of all of Mr. Vine's properties. The terminal return, which the Parties referred to throughout as the "Original Return", was filed by the due date of April 30, 2004 and assessed by the Minister on June 7, 2004.

[7] Within the first taxation year with respect to the estate, the Appellant had sustained a capital loss of $34,148,186 respecting Kilbarry's shares. Since the Appellant wished to treat the Kilbarry loss as a capital loss of Mr. Vine for the taxation year in which he died, pursuant to subsection 164(6) of the *Income Tax Act* (the "*Act*"), an election was filed on September 28, 2004 in order to carry this loss back to offset capital gains. Consequently, on September 28, 2004, the Appellant filed an amended tax return (the "Amended Return") for the deceased's 2003 taxation year, which was within the time prescribed pursuant to subsection 152(6) of the *Act*.

[8] In addition, during the course of amending the Original Return, Mintz discovered a problem with the Original Return, arising from the firm's improper characterization of Mr. Vine's legal interest in Victoria Park. This property was held, by Mr. Vine and his daughter, as tenants-in-common at the time of his death. However, in the Original Return, Mintz had incorrectly treated the property as a partnership without recognizing that, for tax purposes, when disposing of an interest in property for valuation, reporting the property in this manner would have different

consequences from valuation of an undivided interest held as a tenancy-in-common (as Victoria Park was). The valuation of Victoria Park did not recognize this distinction in the Original Return, resulting in an erroneous capital gain being reported. Consequently, the reported capital gain of $2,915,000 should have instead been reported as a reduced capital gain of $1,073,970 together with a recapture of capital cost allowance ("CCA") of $1,995,367.

[9] All four witnesses from Mintz (Harley Mintz, Silvia Jacinto, Steven Rayson and Tom Strezos) knew that the deceased held this property as a tenant-in-common and not as a partnership. The problem occurred because, as business valuators and not tax experts, both Mr. Rayson and Mr. Strezos testified that they did not recognize the distinction in land ownership for the Victoria Park valuation for tax purposes. Steven Rayson testified that, after completing the valuation, he did not participate in the completion of the return. Five months later, when preparing the Amended Return to claim the loss carryback, Ms. Jacinto and Mr. Mintz realized that the Victoria Park property had been omitted from the Original Return because the property did not appear as one of the "line items" on Schedule 3 of that return, which reports the deemed dispositions of the properties. They testified that the capital gain of $2,915,000 was actually present within the Original Return and was included in the line 132 total, but was not listed above the total separately as a line item (Agreed Statement of Facts, paras 4-5). To correct this, Mintz properly reported the $1,073,950 capital gain and the $1.9 million recapture in respect to this property in the Amended Return. However, they failed to "back out" the initial $2,915,000 capital gain for this property that had been included in the Original Return. This resulted in a "double-counting" error in the deemed proceeds of disposition of Victoria Park. While the Amended Return attempted to correct the problem in the Original Return, the capital gain was, in fact, over-reported in Schedule 3 because the $2,915,000 was not "backed out" of the Amended Return. This problem was not discovered until May, 2007, at which time Ms. Jacinto wrote to Joao Pereira, the auditor, to advise that the totals in Schedule 3 of the Amended Return already contained a capital gain in respect to Victoria Park.

[10] The Minister commenced an audit of the deceased's terminal year in 2005 due to issues with the FMV attributed to some of the properties in the Amended Return. In May, 2007, as the normal reassessment period for the 2003 taxation year was about to expire, the Minister obtained a waiver from the Appellant. The waiver was in respect to capital gains but made no reference to the recapture of CCA (Agreed Statement of Facts, para 21).

[11] The Reassessment, completed in June, 2007, recognized, among other things, the Kilbarry capital loss that had been requested in the Amended Return. It also reduced the double-counting of capital gain by $2,915,000, in respect to the Victoria property, as requested by Ms. Jacinto in May, 2007. The Minister also included in the deceased's income the recapture of CCA deductions in the amount of $1,995,367 in respect of Victoria Park. It is this inclusion of the recapture that is at issue and, specifically, whether the Reassessment, which was beyond the normal reassessment period, can extend to include such recapture when it was not referenced in the waiver.

[12] The Reassessment also determined that the FMV of Wilson was $12 million, resulting in a FMV of Leadway's shares, which owned Wilson, of $13.4 million. The Original Return had listed the FMV of Leadway shares as $9,111,000 for the purposes of the deemed disposition. The Minister's valuation of Wilson gives rise to the second issue that is before me.

THE POSITION OF THE PARTIES ON EACH ISSUE

Issue #1: Recapture of CCA Deductions after Normal Reassessment Period

[13] According to the Appellant's argument, neither the taxpayer, the Estate of Stanley Vine, nor the person filing the return, the executors, made any misrepresentation attributable to neglect or carelessness, which would allow the Minister to reassess beyond the normal reassessment period. The accounting firm that prepared the return made an honest and simple mistake in the valuation and reporting of the disposition of the Appellant's interest in Victoria Park, characterizing it as a partnership interest when, in fact, it was held as a tenancy-in-common. Mintz discovered this error five months after the Original Return was filed and corrected it by reporting the recapture, together with the appropriate capital gain. However, the original capital gain that was claimed, when the property was incorrectly characterized as a partnership, was not "backed out" of the calculations on the Amended Return.

[14] This "double-counting" of the capital gain that occurred was discovered by Mintz in May, 2007 and this adjustment was permitted by the auditor without becoming statute-barred because it was covered in the waiver. The Appellant argued that, since the normal reassessment period expired on June 7, 2007 and because the waiver that the Minister obtained did not cover the recapture, the Minister is now precluded from reassessing the recapture unless it can be established that there was a misrepresentation, made by the Appellant in the Original Return, that is attributable

to neglect or carelessness. The inadvertent over-reporting does not constitute a misrepresentation as it was an error that favoured the Minister and there is nothing to prevent a taxpayer from correcting honest mistakes in a return. Even if this error was a misrepresentation, it was nullified by the filing of the correction in the Amended Return. The Appellant's position is that it was then incumbent upon the Minister to reassess to include the recapture before the expiry of the period. The Minister's failure to reassess prior to the expiry is an error of the Minister, not the Appellant. Even if the error in the Original Return is found to be a misrepresentation, it was nullified when the Amended Return was filed to correct the improper reporting of the Victoria Park property. It could then no longer be said that the Minister was relying on the misrepresentation made in the Original Return.

[15] The Appellant acted as a wise and prudent person to ensure there was tax compliance in the return. They engaged and relied upon a reputable accounting firm to properly report the income in the terminal return. Even if the executors had noticed the omission of Victoria Park, as one of the line items in Schedule 3 of the Original Return, according to the evidence of Mr. Rayson and Mr. Strezos, as well as that of Ms. Jacinto and Mr. Mintz, they would not have discovered the error as it related to the characterization of the property as a partnership, not a tenancy-in-common, and the consequent capital gain calculation. This inability to detect the error in the Original Return does not amount to neglect or carelessness. The Minister had all of the information required to make the reassessment within the normal reassessment period and the Appellant did nothing to prevent the Minister from reassessing the recapture.

[16] Even if Mintz made a misrepresentation in completing and filing the Original Return, there is no neglect or carelessness because, when it was corrected in the Amended Return, the Minister was no longer relying on the misrepresentation and could not therefore invoke subparagraph 152(4)(*a*)(i). The fact that it was not caught immediately reflects the complexity of the proper reporting for tax compliance purposes and, as the Appellant, in paragraph 145 of its Written Argument suggests, "the subtlety of the error."

[17] Even if Mintz were neglectful or careless in the preparation of the return, according to the caselaw, it cannot be attributed to the Appellant.

[18] The Respondent's argument, in respect to this issue, is that the executors of the Appellant and the accounting firm of Mintz made several misrepresentations in the Original Return which allows the Minister to rely on subparagraph 152(4)(*a*)(i) of the *Act* to include recapture that had not been declared in that return. Neither the

corrections, that Mintz did in the Amended Return, nor the auditor's mistaken belief, that a taxpayer-requested adjustment could be processed without time limits if the adjustment was being allowed, negate those misrepresentations contained in the Original Return. The Respondent relied on the Federal Court of Appeal decision in *Nesbitt v The Queen*, [1996] FCJ No. 1470, 96 DTC 6588 where the Court rejected a taxpayer's argument that there could be no operative misrepresentation that would allow the Minister to rely on this section of the *Act* where the Minister was aware of the mistake in the tax return prior to the expiry of the limitation period (Respondent's Written Argument, p. 6).

[19] Mintz had all of the information necessary for the proper completion of the return. The firm had completed returns for the deceased for a number of years prior to his death and Mintz knew that Victoria Park was owned by the deceased. Steven Rayson, who worked on the valuation report, was negligent because he knew the property was a joint venture, yet he valued the deceased's interest as a partnership. Silvia Jacinto agreed that, if she had been involved with the return at that point, and knowing the property was owned as a joint venture, she would have questioned the way the property was valued if she had seen Mr. Rayson's valuation report (Transcript, Volume 1, pp. 132-133).

[20] Although Harley Mintz testified that the omission of Victoria Park in Schedule 3 of the Original Return was the result of a "flaw in the program," the Respondent submitted that the omission is due to the negligence of Mintz (Respondent's Written Argument, paras 5-9).

[21] The Respondent also submitted that, if this Court concludes that Mintz has been negligent, "…it is the same thing as if the Appellant, the taxpayer, had been negligent…" (Transcript, Volume 6, p. 665) because neither Mr. Glowinsky nor Mrs. Glowinsky reviewed the return in any detail.

Issue #2: The FMV of the Wilson Property

[22] With respect to the second issue, the Appellant relied on the expert report of David Atlin in proposing a FMV of $8.6 million for Wilson. Mr. Atlin used the Overall Capitalization Method to arrive at a FMV and checked the accuracy of those results using the Direct Comparison Approach. Using this second approach, Mr. Atlin arrived at a FMV of $8,595,000.

[23] The Respondent's expert, Brian Walsh, arrived at a FMV of $12.832 million, but, according to the Appellant, the report is significantly flawed and should not be

relied upon. The Discount Cash Flow Method ("DCF method"), used by Mr. Walsh, was not an appropriate method for this type of residential property as it is best utilized in commercial contexts where there exists greater contractual certainty as to the terms of the leases and the expiry/renewal dates (Transcript, Volume 2, p. 203). Less weight should be accorded to the Walsh report because it contained unsupported and contradictory assumptions, inconsistencies and errors. Those unsupported assertions and errors included:

(a) the property management was "subprime", that is, it did not maximize the rents because they were not inclined to do so;

(b) inconsistent testimony regarding the use of data subsequent to 2003 and his refusal to review actual rental performance of Wilson;

(c) replacement of the Schedule "B" to his Report during the hearing, which impacts on his projected rental income figures in the table at page 107 of his Report;

(d) inconsistencies respecting the timing of rental increases;

(e) calculation errors affecting the net income figures for Year 5 onward;

(f) incomplete calculations in Appendix "C" to the Report, as 146 of the 170 rental units were omitted from the calculations;

(g) inconsistency in the calculation of property tax expense;

(h) inconsistent statements regarding the rental market;

(i) errors in his explanation of income growth within the DCF and direct capitalization methods; and

(j) calculation errors in his explanation of the DCF methodology.

In addition, Mr. Walsh did not readily disclose his review of a prior Canada Revenue Agency ("CRA") appraisal and its determination of the FMV and there was a potential that he may have been influenced by this prior CRA appraisal.

[24] The Respondent's expert, Brian Walsh, viewed the rental units as being far below market value. He stated that this could be a function of the property

management which, at the effective date, was a company, Biddington, operated by the deceased's son-in-law as President. Mr. Walsh was of the view that, since there was no contractual obligation on a purchaser to continue using Biddington to manage the property, a new owner would have benefited from future income by way of increased rents in respect to Wilson. Therefore, his FMV of $12.832 million properly incorporated appropriately forecasted rental increases, utilizing the direct capitalization method which was supported by his second chosen method, the discounted cash flow method ("DCF method").

[25] Mr. Walsh stated that the Appellant expert's FMV did not reflect Wilson's anticipated rental increases and growth and, consequently, the FMV underestimated Wilson's FMV. He was also of the view that Mr. Atlin's choice of methodology to determine FMV was not the most appropriate because rentals at Wilson were, as both experts acknowledged, well below the market values and Mr. Atlin's method did not account for Wilson's future anticipated rent increases. Although their respective capitalization rates were similar, the difference in the FMV resulted from Mr. Atlin's application of his rates against a forecasted income that was well below market rentals. Consequently, Mr. Atlin's net operating income did not take into account any rental income growth, other than the 2.9 percent statutory guideline amounts.

[26] Mr. Walsh also argued that Mr. Atlin's inappropriate choice of comparative properties impacted the FMV when he applied the middle range capitalization rates. If certain comparable properties had been excluded, it would have resulted in capitalization rates in the lower range being applied and, therefore, a lower FMV. In addition, Mr. Walsh applied a more appropriate turnover rate of 25 percent in respect to tenants vacating the premises and, consequently, impacting the rate of rental increases.

Analysis

Issue #1: Recapture of CCA Deductions after the Normal Reassessment Period

[27] The Minister will be permitted to make a reassessment that falls outside the normal reassessment period provided that, on the evidence, the taxpayer in his return misrepresented the facts through neglect, carelessness or wilful default. The Minister has the onus or burden of proof to establish its right to reassess after the normal reassessment period has expired by proving that a taxpayer made a misrepresentation in filing the return and that the misrepresentation is attributable to neglect, carelessness or wilful default.

[28] In order to reassess, the Minister must bring itself within the wording of the applicable provision, subparagraph 152(4)(*a*)(i) of the *Act*, which states:

> **152(4) Assessment and reassessment.** The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the 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, or
>
> […]

[29] If the Minister establishes that there is a right to reassess after the expiration of the normal period, the onus will then shift to the taxpayer to show that the failure to include the amount in the return was not due to a misrepresentation attributable to neglect, carelessness or wilful default.

[30] The provision is not penal in nature but remedial. Justice Bowie, in *College Park Motors Ltd. v The Queen*, 2009 TCC 409, 2009 DTC 1269, at paragraph 20, addressed its purpose as follows:

> [20] …the purpose of subparagraph 152(4)(*a*)(*i*) is not penal but remedial. It balances the need for taxpayers to have some finality in respect of their taxes for the year with the requirement of a self-reporting system that the taxing authority not be foreclosed from reassessing in those instances where a taxpayer's conduct, whether through lack of care or attention at one end of the scale, or willful fraud at the other end, has resulted in an assessment more favourable to the taxpayer than it should have been. This, quite rightly, is not a penalty case. It is simply a case where the fisc should not be deprived simply by reason of the passage of time between Mr. Ulmer's innocent mistake and his discovery of it, and resulting voluntary disclosure.

[31] There is no suggestion in this appeal that wilful default was a factor but, rather, the Respondent submits that neglect or carelessness led to the omission of recapture in the Original Return. While title to Victoria Park was held as tenants-in-common by the deceased and his daughter, the accounting firm of Mintz treated the property as if it was held as a partnership on the terminal return. This incorrect characterization led

to an over-reporting of the capital gain in respect to this property and no reporting of recapture.

[32] Justice Bowman, in *Farm Business Consultants Inc. v The Queen*, 95 DTC 200, confirmed by the Federal Court of Appeal at 96 DTC 6085, set out two questions to be answered in dealing with an otherwise statute-barred assessment:

(1) What is the alleged misrepresentation? and

(2) To what can the misrepresentation be attributed?

[33] Because of the nature of this appeal, a key question, in determining if there was a misrepresentation, is “who made that alleged misrepresentation?” Paragraph 152(4)(*a*) refers to “the taxpayer or the person filing the return.” The taxpayer is the deceased, Mr. Vine, or more appropriately his estate, and so clearly, in these facts, the deceased could not make a misrepresentation in the terminal return. So who is “the person filing the return”? In *Aridi v. The Queen*, 2013 TCC 74, 2011 DTC 1189, Justice Hogan analyzed the *Act* generally and gave this phrase a meaning consistent with the rest of the *Act*. In many sections of the *Act*, a person may or may not be required to file a return on behalf of a taxpayer (*Aridi*, paras 24-26). Subparagraph 150(1)(*d*)(i) requires the deceased taxpayer’s legal representative, Mr. and Mrs. Glowinsky in this case, to file the return. Therefore, only those misrepresentations made by the executors, Mr. and Mrs. Glowinsky, would be relevant. This interpretation is consistent with other caselaw and with Justice Hogan’s analysis in *Aridi*. At paragraphs 25 and 26 of *Aridi*, Justice Hogan stated the following:

> [25] In that sense, the phrase "person filing the return" in paragraph 152(4)(*a*) of the ITA must be interpreted in the same way as in section 150, unless the contrary is indicated by the context. In this case, the context, far from indicating to the contrary, confirms this interpretation.
>
> [26] Thus, I am of the view that the phrase "person filing the return" in paragraph 152(4)(*a*) of the ITA refers to a person listed in subsection 150(1) of the ITA. Consequently, I cannot accept the respondent's argument that paragraph 152(4)(*a*) of the ITA applies as well to an accountant or professional who prepares the return. In addition, even if I accepted the respondent's position, I note that there is no evidence that the accountant filed the return. The evidence shows only that the accountant prepared the return for the appellant.

The person filing the return for the taxpayer is distinct from the person who prepares the return, in this case the accounting firm of Mintz. As a result, I am concerned only with potential neglect or carelessness of the executors, not of Mintz.

[34] The leading case in this area is the Federal Court – Trial Division decision in *Venne v The Queen (M.N.R.)*, 84 DTC 6247, where Justice Strayer, at page 6251, made the following comments respecting the neglect that must be established to conclude that a taxpayer has not exercised reasonable care:

> I am satisfied that it is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(*a*)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the word "misrepresentation that is attributable to neglect" must mean, particularly when combined with other grounds such as "carelessness" or "wilful default" which refer to a higher degree of negligence or to intentional misconduct. Unless these words are superfluous in the section, which I am not able to assume, the term "neglect" involves a lesser standard of deficiency akin to that used in other fields of law such as the law of tort. …
> (Emphasis added)

[35] The test for a finding of neglect is, therefore, one of lack of reasonable care. This test, established in *Venne*, was confirmed in the Federal Court of Appeal decision of *Gebhart Estate v The Queen*, 2008 FCA 206, 2008 DTC 6581.

[36] A misrepresentation is false in substance and fact, whether innocent or not (*Minister of National Revenue v Taylor*, [1961] Ex. CR 318, 61 DTC 1139). In *Nesbitt*, at paragraph 8, the Court stated:

> … A misrepresentation has occurred if there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment. … (Emphasis added)

There is clearly a misrepresentation based on the evidence before me. Simply, no recapture was declared in the return. The Respondent pointed out that the Original Return, in respect to Victoria Park, did not report a deemed disposition, proceeds of disposition, an adjusted cost base, capital gain or loss, or recapture of CCA. The Appellant characterized the error as an actual over-reporting of a capital gain and a non-reporting of the recapture. Although the property had been omitted from the itemized list (Tab 37 of the Joint Book of Documents), a capital gain from the incorrect characterization of the property was actually included within the total

amount. However, the correct capital gain and the recapture were not. When the Amended Return was filed within the statutory period, the recapture was included, although problems continued with the proper reporting of the capital gain, as the original incorrect amount was not "backed out" of the Amended Return. There is clearly a lack of reasonable care on the part of Mintz in preparing the Original Return. Given that the valuators at Mintz for the Victoria Park property were business valuators and not tax experts, it would appear that a simple review of the return, by the appropriate specialists within Mintz, would have revealed the errors in the Original Return. Even if it was a program error, as contended by some of the witnesses for Mintz, upon a review, the omission of recapture and the capital gains discrepancy should have been detected. This was the only property that created a capital gain in section 4 of Schedule 3 and its omission should have been apparent on a review by a tax preparer. It was not an honest mistake, as the Appellant contends, but a mistake due to lack of care and inattention which created an incorrect statement that was material to the return. It was obviously incorrect and not insignificant to the proper processing of the return. This was not a complicated or technical reporting issue. Even though I accept that, based on the evidence, Mintz was either neglectful or careless, this is not the test for concluding that the Minister can reassess beyond the normal period.

[37] What I must instead decide is whether the executors, who were the persons responsible for filing the Original Return of the deceased, failed to exercise reasonable care which would then allow the Minister to reassess beyond the normal period. The caselaw is divided as to whether a taxpayer may successfully argue that, because his accountant was negligent, he is not liable for the misrepresentation. Justice Hogan in *Aridi* reviewed a number of decisions in this regard and rightly concluded that even where courts have recognized an accountant's negligence, in those cases, where the taxpayers were not given the benefit of subparagraph 152(4)(*a*)(i), it was because their conduct was also found to be negligent. Was the conduct of the Glowinskys negligent, as in this group of cases, or was their conduct one of reasonable care in filing the return? Mr. Glowinsky testified that, since he had no knowledge of accounting and since he anticipated complexities when dealing with a number of properties belonging to the deceased, he engaged Mintz, which had been involved with doing accounting work for the family since the late 1980s, to complete the return because "…we had faith in and we trusted; they had been there for a long time…" (Transcript, Volume 1, p. 26) and "…[t]hey were just continuing to do what they had been doing for years… They were familiar with the estate, I trusted them…" (Transcript, Volume 1, p. 27). He stated that neither he nor his wife were involved with the preparation of the return. He further admitted that he did no type of review whatsoever of the return. "… I might have just looked through it, but I didn't review

it. It wouldn't have meant very much to me. I didn't appreciate all the nuances involved in a complicated tax return." (Transcript, Volume 1, p. 28). When asked if he formed any view as to the accuracy of the return, he stated that "… They were just numbers. It meant nothing to me." (Transcript, Volume 1, p. 28). When asked about his involvement and review of the Amended Return, he stated:

> A. No, for the same reason I didn't review the first one. I mean, it wouldn't have meant very much to me, and I was assuming that Mintz & Partners who had been engaged for many years knew what they were doing. I had complete confidence in them.
>
> (Transcript, Volume 1, p. 29)

[38] The care that he exercised in dealing with the return consisted of quickly flipping through it, if in fact he looked at it at all (Transcript, Volume 1, p. 34). He did not review it, as it meant very little to him. There was no evidence that he tried to understand it, asked any questions about its content or reviewed the properties that would be included in such a return. He was the President of the property management company that looked after 10 to 13 properties within the Toronto area owned by his deceased father-in-law. While he may have been unaware of the technical tax details in the return, he did have first-hand knowledge of the properties owned by the deceased at his death that had to be dealt with in a terminal return.

[39] Where taxpayers have been successful with respect to this issue, they have established, to the satisfaction of the Court, that they engaged in conduct or actions amounting to reasonable care in the review of their returns or they have been able to substantiate the reasons for their *bona fide*, although incorrect, beliefs. In *Angus v The Queen*, 96 DTC 1824, Justice Lamarre Proulx, at paragraph 7, defined reasonable care as the care that would be expected of a wise and prudent person in the circumstances. In cases where the courts have held that this standard of reasonable care had been met, taxpayers have reviewed the return, had extensive conversations with accountants and asked relevant questions (*Aridi*) or had formed a *bona fide* belief of the correctness of the return based on a recommended filing position by accountants and a CRA technical bulletin (*Envision Credit Union v The Queen*, 2010 TCC 576, 2010 DTC 1399) or had reviewed and relied on a partnership offering memorandum and professional opinions and statements from the partnership (*O'Dea v The Queen*, 2009 TCC 295, 2009 DTC 1172).

[40] In the present appeal, neither of the executors took any of these types of steps or actions. Their review of the return lacked a bare minimum of attention and care.

Their conduct is akin to those taxpayers in the cases of *Venne*, *Nesbitt* and *College Park Motors*, to name a few. In *Venne*, for example, the taxpayer claimed that he was not personally responsible for many of the errors which had been committed by the bookkeepers and later the chartered accountant. Justice Strayer, at page 6252, concluded that:

> First, there is ample evidence that the taxpayer did not read his returns before signing them. … While one cannot expect a person with the plaintiff's limited education and limited experience with accounting matters to understand fully the details of a tax return, in my view he cannot absolve himself from all responsibility by hiring what he now says to be a patently inadequate bookkeeper and leaving matters entirely in the latter's hands. … Secondly, the errors in the income tax returns should have been sufficiently obvious that a reasonable man of even limited education and experience, especially one who was apparently a very successful businessman and investor, should have noticed.

In *College Park Motors*, Justice Bowie concluded that, if the taxpayer had reviewed the draft return as a prudent individual, he would have seen questions within the return which would have prompted him to ask the appropriate questions of his accountant. I believe this applies to the facts before me.

[41] Although the Appellant argued that, even if Mr. Glowinsky had reviewed the return he would not have spotted the omission of the recapture, I do not believe that the standard of reasonable care requires that the taxpayer pick out the specific errors/mistakes/miscalculations in the return but, rather, the standard requires that the taxpayer's conduct and actions exhibit a deliberate attempt to complete a review and inquiry with the knowledge they have. It is the standard of a reasonably prudent person, not that of a tax expert.

[42] Consequently, because the executors, as those persons responsible for filing the Original Return, do not meet the standard of reasonable care, the Minister has satisfied its burden and will be entitled to reassess for this taxation year in respect to the recapture of CCA under subparagraph 152(4)(*a*)(i) of the *Act*.

[43] The fact that the Minister could have perceived the error is irrelevant. The Appellant suggested that the Amended Return was an invitation to the Minister to reassess, whether or not the Minister had relied on a misrepresentation or could have acquired the truth despite any misrepresentation. In *Nesbitt*, the taxpayer had correspondence indicating that the Minister was aware of the error in the reported capital gains. Despite the correspondence, Justice Strayer concluded that the

misrepresentation, once made by the taxpayer, continued to be operative. At paragraph 8, he stated:

> … It remains a misrepresentation even if the Minister could or does, by a careful analysis of the supporting material, perceive the error on the return form. It would undermine the self-reporting nature of the tax system if taxpayers could be careless in the completion of returns while providing accurate basic data in working papers, on the chance that the Minister would not find the error but, if he did within four years, the worst consequence would be a correct reassessment at that time.

[44] The Appellant's suggestion, that the Amended Return was an invitation to the Minister to reassess, captures the exact problem posed by Justice Strayer in *Nesbitt*. A taxpayer could improperly complete a return in the hope of getting away with paying a lesser amount of tax and, in the worst case scenario, having to pay the correct amount of tax. Regardless of whether the Minister could perceive the error, it is logical that a misrepresentation remains operative. Otherwise, it would discourage taxpayers from being diligent and taking reasonable care in the preparation of their returns.

[45] The Appellant cited the case of *Petric v The Queen*, 2006 TCC 306, 2006 DTC 3082 to support its proposition that a misrepresentation becomes inoperative if the Minister could perceive the error. In that case, Justice Lamarre, at paragraph 38 of her reasons, explains two seemingly inconsistent lines of cases, with *Nesbitt*, on the one hand, and *The Queen v Regina Shoppers Mall Limited*, 91 DTC 5101 (FCA), on the other hand. The decision in *Regina Shoppers Mall* involved a controversial categorization of earnings, while *Nesbitt* involved a taxpayer misrepresenting a basic or straightforward fact which allowed the Minister to reassess even where the error could have been perceived. Where the outcome is more controversial, as in *Regina Shoppers Mall*, and where there is more room for a taxpayer, who has taken reasonable steps, to make an error or where the issues are truly beyond his expertise, then caselaw seems to suggest that, in those instances, the Minister should not be allowed to reassess beyond the normal reassessment period. Those outcomes protect and balance the integrity of the system which is self-representing and the certainty and finality offered by a limitation period.

[46] In the present appeal, the matter of recapture with respect to the property is not a controversial item. It is standard reporting procedure in a terminal return that this property would be treated as a deemed disposition with consequent recapture to be declared depending upon the nature of the legal title to the property. Because the title to the property was held as a tenancy-in-common and not a partnership, there had to be recapture declared. Mintz had been the deceased's accounting firm for many years

prior to his death. The firm was not new to the taxpayer's portfolio of assets and how title was held. It would have been in their records. Mr. Glowinsky had been the President of the property management company for the deceased's real estate holdings. He was a businessman who was aware of what the assets were in the deceased's estate and, at minimum, should have questioned why Victoria Park was not listed. I believe that he would have done so had he bothered to read the return or if he had given even a slight perusal to it. In all likelihood, he would not have specifically picked up on the omission of declared recapture but, being familiar with the properties owned by the deceased, as a reasonably prudent individual, he should have recognized that Victoria Park did not appear to him to be included in the return. This was not, as the Appellant suggests, an honest mistake or honestly-held mistaken belief. I make this conclusion while acknowledging that, in these particular facts before me, the line between honest mistake and neglect/carelessness is blurred and that the distinction is almost 'too close to call'. There appears to be a common thread in the jurisprudence in this area. First, where the court has found that taxpayers committed an honest mistake in filing a return, that honest, although mistaken, belief was established as a fact, based on the evidence before the court, whether in the application of a provision or a mistaken belief as to their own actions (for example, that they had remitted the tax). In the case before me, Mr. Glowinsky provided no evidence that he held any such belief except for the trust placed in the accountants. Second, in a number of the cases, the taxpayers have shown that some reasonable steps were taken to ensure the correctness of the return. Again, Mr. Glowinsky testified that he felt he would not have understood the return so he did not bother to review it. Such indifference is irreconcilable with the caselaw concerning honest mistake. While the conclusion that I have reached on this issue bears all the hallmarks of being unfair, I refer to the comments of Justice Robertson in *The Queen v Nassau Walnut Investments Inc.* (1996), 97 DTC 5051 (FCA) at page 5057:

> It cannot be doubted that the refusal of the Minister to accede to Nassau's request seems antithetical to elemental concepts of fairness. Conversely, the doctrine of honest mistake is appealing because its application is intended to bring about a result that is in harmony with basic ideas of fairness. But the difficulty with the doctrine lies in delimiting its boundaries. To paraphrase Judge Learned Hand, I do not think it desirable for this Court to embrace the opportunity of anticipating a doctrine which may be in the womb of time but whose birth is somewhat distant: see *Spector Motor Service, Inc., v. Walsh*, 139 F. 2d 809 at 823. The doctrine of honest mistake may serve as a starting point for analysis but cannot supplant a contextual and purposive approach to the interpretation of tax legislation. In other words, legal conclusions cannot rest upon the premise of unfairness without a corresponding examination of the legislative framework relevant to the issue at hand.

[47] In summary, the Minister will be permitted to reassess after the normal reassessment period to include in the taxpayer's income the recaptured capital cost allowance from the deemed disposition of 3000 Victoria Park.

Issue #2: The FMV of the Wilson Property

[48] The Original Return reported the FMV of the shares of Leadway for the purposes of the deemed disposition as $9,111,000 (Joint Book of Documents, Tab 2, Schedule 3). Leadway was the owner of Wilson, which consisted of two multi-residential rental units on 2.7 acres of land. The Minister obtained a waiver during its audit of the deceased's 2003 taxation year that covered the reassessment of this property. The Minister determined that the FMV of Leadway's interest in Wilson was $12.832 million and, consequently, the FMV of the Leadway shares was $13.4 million (Agreed Statement of Facts, paragraph 30 – parties agree that $1.4 million is to be added to whatever the Court determines the FMV of Wilson to be). The determination of the FMV of Wilson is essential in order to calculate the deceased's gain from the deemed disposition of the corporate shares of Leadway at the date of death.

[49] Both the Respondent and the Appellant relied upon expert valuations of Wilson, each of which take a very different view of the FMV of this property. Both experts employed different valuation methods, with the Appellant's expert, David Atlin, arriving at a FMV of $8.6 million (less than the Appellant's reported FMV of $9.11 million in the Original Return) and the Respondent's expert, Brian Walsh, arriving at a FMV of $12.832 million. The wide disparity between these two valuations is attributable primarily to the approach each expert took in respect to rental revenues for Wilson over the course of a number of years. Their approaches otherwise were not that dissimilar and both selected and applied approximately the same capitalization rate. The higher the capitalization rate applied, the lower the FMV will be and, conversely, the lower the rate, the higher the FMV. Mr. Atlin applied the average between the two capitalization rates of 7.25 percent and 7.50 percent, while Mr. Walsh applied a rate of 7.25 percent.

[50] Both experts acknowledged that Wilson contained an inordinate number of tenants that were paying below market rents for their units. The property was subject to the Provincial rent control legislation in place at that time. It limited a landlord's ability to increase rental amounts annually beyond statutory limits even though tenants might be paying below market rates. In 2003/2004, that yearly rental maximum increase was 2.9 percent. Other than this legislated rental increase, a landlord could increase rent by more than 2.9 percent only if the tenant vacated the

unit or if capital improvements had been made to the property. However, a capital expenditure increase, which had a cap of 4 percent, was subject to a process of approval before the Ontario Rental Housing Tribunal and, consequently, not a guaranteed increase.

[51] Mr. Atlin determined the normalized net operating income ("NOI") for the property by estimating the gross income of the properties for the following year (page 53 of his Report). He considered rental revenue at the standard legislated amount of a 2.9 percent increase for below-market units and also other sources of revenue such as parking, laundry and cable before deducting a 2.5 percent allowance for vacancy and bad debt. After arriving at a gross income of $1.475 million, based on prior years, and after deducting expenses, he estimated a NOI of $728,990. After applying his chosen capitalization rates of 7.25 percent and 7.50 percent, he then took the average between these two calculations and arrived at an amount of $9.775 million. From this figure, he deducted capital expenditures in the amount of $1.180 million, which had been itemized in prior engineering reports, and he did so according to a decreasing percentage in terms of those expenses which were immediate and necessary, those that could be done between Years 3 and 5 and those that could wait and be done between Years 5 and 10. This last calculation provided the FMV of $8,595,000, which Mr. Atlin rounded to $8.6 million. This capital expenditure adjustment was very similar to the adjustment Mr. Walsh took in both of the methods which he employed.

[52] According to Mr. Walsh's testimony, one of the methods he used, the DCF method, is based on the principle of "anticipation", that being, in this appeal, the future rental revenue which it is anticipated will be derived from the property. Mr. Walsh agreed with the Appellant's suggestion that an anticipated projection of future revenue must be "likely" in a given market as opposed to merely "possible". Mr. Walsh also agreed with comments taken from the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP") that, when this analysis is undertaken it must be checked for errors and reasonableness due to the compounding effects that can be produced by inputting even minor errors. Mr. Walsh assumed a theoretical Years 3 and 4 income, an approach based on dramatic increments to rental revenue after the effective date. Mr. Atlin disagreed with the use of the DCF analysis for Wilson because he felt that it was more commonly employed for valuing commercial properties such as shopping malls or office buildings where there is long-term contractual lease certainty and predictability as opposed to multi-unit residential apartment complexes.

[53] At this point, I make three observations in respect to Mr. Walsh's Report and testimony:

(a) first, the Report contained too many significant errors and unwarranted assumptions that would allow me to place any reliance on it;

(b) second, both Mr. Walsh's credibility and impartiality as a witness and an expert were compromised during his testimony; and

(c) third, as a consequence, I gave this report no weight.

[54] Although Mr. Atlin's Report could have benefited from an analysis of the property's demographic makeup, which Mr. Walsh did not address either, and contained a few minor errors, it is far more accurate than Mr. Walsh's Report and his testimony was straightforward and credible.

[55] In Mr. Walsh's Report and during much of his testimony in Court, he represented that he had "…no present or prospective interest or bias with respect to the property…" (the Walsh Report, paragraph 4, page (i)). Eventually, however, after repeated cross-examination, he admitted that he had been given copies of the initial CRA appraisal report, as well as the Appellant's Expert Report, and that he had read both prior to the preparation of his own Report (Transcript, Volume 3, pp. 384-394). He did not disclose his access to these appraisals in his Report as he should have done nor was it forthcoming in his testimony. Mr. Walsh's independence as an appraiser was compromised once he saw and read both of those other appraisals. He was, at times, non-responsive and appeared to be hedging many of the questions on cross-examination. In the case of *Brunette v M.N.R.*, 82 DTC 1308, at paragraph 39, which the Appellant referred me to, the Tax Appeal Board concluded that a report prepared by a department employee who had reviewed prior reports, was seriously impaired. The extent to which Mr. Walsh's conclusions had been tainted or influenced by information contained in other reports is difficult to assess. However, his choice, not to disclose this information in his Report or in his testimony without some prodding, is indicative of his knowledge that this potential existed and, more importantly, it undermines his objectivity and impartiality as a witness and a qualified expert and makes his testimony as a whole suspect and unreliable.

[56] Mr. Walsh's analysis is based largely on a series of speculative assumptions, particularly as they relate to rental income projections that he assumed would be achieved between Years 3 and 4. This analysis predicted an income based on a pattern of rental revenue which is not evident on the effective date. Unlike Mr. Atlin,

he ignored rental income that had actually been attained in years prior to the effective date and, instead, based his NOI on hypothetical revenue (which he referred to as stabilized or normalized revenue) that he assumed would be achieved in Years 3 and 4, that is, between 2006 and 2007, subsequent to the effective date in 2003. It is Mr. Walsh's use of this hypothetical Year 3 and 4 stabilized income or the NOI amount that accounts for the large difference in the FMV in each expert report. Much of the rest of their analysis is not that far apart, including the capitalization rates that each expert applied. Mr. Walsh's net income figure of $980,491 in Year 3, as well as his rental projections over a ten-year period, assumes that all of his projected rent increases will have occurred in Years 1 to 3. He based his analysis, respecting future rental revenue, on the following:

(1) 25 percent tenant turnover applied equally to below-market and at-market units enabling rents to be increased in all units to market rates by Years 3 and 4;

(2) application of the legislated 2.9 percent yearly rental increase; and

(3) completion of capital expenditures at the end of Year 1 (2004) enabling an additional 3 percent one-time rental increase.

[57] However, Mr. Walsh ignored the acknowledged fact that, on the effective date in 2003, the Wilson properties contained a significant number of units with tenants paying below-market rents. Common sense dictates that, based on practicalities, tenants paying below-market rents would not vacate their units to relocate to at-market rentals, except under exceptional circumstances and they could not otherwise be forced out. Both experts, therefore, had very different views on the timing of when tenants with below-market rentals would vacate those units and, consequently, when rental amounts could be increased for those units. Even if I had decided to give any weight to Mr. Walsh's Report, which I have not, I would still reject his analysis in this respect. Mr. Atlin's view is just simply more realistic in the commercial world considering the practicalities landlords face in respect to such tenants and the difficulty a prospective buyer would have in projecting when these tenants would vacate and when the opportunity to increase rents might occur. As Mr. Atlin testified, the opportunity did exist at the effective date but the precise timing was indeterminate. For this reason, Mr. Walsh's application of a rate of 25 percent per year tenancy turnover at Wilson is flawed because he failed to differentiate between those units with tenants paying below-market rents and those with tenants paying at-market rents. According to Mr. Walsh's assumption, all or substantially all of the tenants paying below-market rents would have vacated their units between

Years 3 and 4 at this turnover rate, enabling all of the significant number of below-market rents at Wilson to be brought up to market levels. This ignores the fact that tenants, paying lower rentals than what the current market could support, do not vacate at the same rate as those tenants that pay market rates. Those below-market tenants cannot be evicted and the rent control legislation limited yearly rent increases to 2.9 percent of existing rent. Mr. Walsh's conclusion in this respect is flawed. Because Mr. Walsh's assumption overestimates the number of below-market tenants that would vacate Wilson, he consequently overestimates the future rental revenue for Wilson.

[58] As the Appellant pointed out, the 2004 rent roll shows that the actual performance of the Wilson property after 2003 was significantly lower than the projections that Mr. Walsh proposed. Those projections, which in reality were not achieved, are simply unsubstantiated. According to the CUSPAP standards, an accurate appraisal using the DCF method can be produced only where the events upon which it is predicated are "likely" to occur or be achieved. Mr. Walsh's assumptions respecting 25 percent turnover for below-market rentals and consequent future rental increases are unsustainable and distorted due to the future projected income for Wilson. This applied whether he used the direct capitalization method or the DCF analysis. In the direct capitalization method he capitalized the Year 3 and 4 NOI figure, that he predicted could be achieved, instead of the Year 1 figure. As Mr. Atlin explained, a capitalization rate of 7.25 percent has embedded within it the assumption that there will be an upside to the property but if the rate is applied to a NOI figure that assumes this upside has already occurred (as Mr. Walsh does), then it results in a compounding and double-counting which distorts the resultant FMV.

[59] It is interesting to note that Mr. Walsh suggested that the below-market rents could be attributed to poor management of Wilson and linked this to the family connection between Leadway and Biddington, the property management company owned by the deceased's son-in-law. As the Appellant pointed out, there was no factual basis for this suggestion and, in fact, at the time that Mr. Walsh attended at the property in 2012 for a viewing, Biddington had been replaced by a new management company. I do not see the correlation between the alleged bad management and the rate of turnover of below-market tenants and, ultimately, how better management could have evicted those tenants or encouraged them to leave in an effort to get rents up to market levels. In any event, it was an unsupported and rather ridiculous supposition that management, particularly one that had close family ties, would have no interest in having rents at market rates where possible.

[60] Both the direct capitalization method and DCF method, employed by Mr. Walsh, relied upon calculations formulated in an Appendix B to his Report as the foundation for his projected rental income. Subsequent to his direct examination and well into his cross-examination, it became apparent to him that his calculations contained in Appendix B could not be reconciled with the content of his Report, particularly the Table at page 107, and that it would have to be re-drafted and replaced. Mr. Walsh did so and submitted an entirely new Appendix B the next day of the hearing. However, this new Appendix B was also incomplete and fraught with errors. While the Table at page 107 of his Report shows projected rental income for Years 1 to 10, Appendix B showed calculations respecting projected rental income for only Years 1 to 3 and omitted entirely the calculations for Years 4 to 10. Consequently, his calculations cannot be verified and there is no way to assess the extent to which this may have affected his analysis and ultimately his conclusions concerning FMV.

[61] By Mr. Walsh's own admission, the new Appendix B contains another inconsistency concerning his application of a rental increase respecting capital expenditures that would be achieved at the end of Year 1. According to Appendix B, this rental increase for capital expenditures commences by month 10 of Year 1, and not, as one would expect, at the end of Year 1. This, of course, results in an accelerated increased rental forecast affecting a substantial number of the units. Because of the procedural steps that must be followed before a rental increase would be allowed in respect to capital expenditures, if at all, it would be entirely unreasonable to expect this to occur by month 10 of Year 1. For example, before permission could be obtained for a rental increase, many variables had to occur:

(a) the work on the building had to be completed;

(b) notice of a rental increase had to be provided to the tenants with time to respond; and

(c) if there was a challenge by the tenant to a rent increase the matter had to go for hearing before a rental tribunal with various steps to be followed if this occurred.

Therefore, there was uncertainty and no guarantee that rent could be increased when capital expenditures were completed. Using Mr. Walsh's method, he had to assume that all of the foregoing would "likely" be completed by month 10 of Year 1. In my view, this is an unlikely and unreasonable assumption on his part which again distorted his rental income projections upwards resulting in the error being

compounded in subsequent years. As Mr. Atlin correctly observed, commercial realities dictate that a prudent buyer would not purchase a property assuming that the rate of growth would be achieved without risk and at the same time a prudent seller would not expect to sell as if this could be achieved without risk.

[62] An Appendix C attached to the Report also contains omissions, concerning calculations of capital expenditures, similar to omissions contained in the original Appendix B which was eventually replaced. A significant number of the total 176 units were omitted from the calculations in both Appendices making it impossible to verify the calculations within the Report in respect to the property.

[63] In addition to the foregoing errors, the new Appendix B contained other discrepancies which Mr. Walsh blamed on inputting errors in the Excel program used to prepare his tables. No explanation was provided as to why some yearly rental increases, subsequent to the income stabilization he suggested, would occur in Years 3 and 4, would be more than the suggested yearly legislated 2.9 percent increase. Such a calculation error which occurred at Years 4 to 5 results in an immediate overstatement of net income figures subsequent to Year 5 and eventually an inflated FMV under his DCF method. Because of the importance of Appendix B in the formulation of his calculations and reliance on the projected rental income analysis, it makes the accuracy of his conclusions, at best, suspect and, at worst, unreliable.

[64] There were other inconsistencies within his Report. It was apparent during the cross-examination that he had calculated the property tax expenditure incorrectly (Table at page 107 of his Report). After reviewing his Report and his testimony, it is still not clear to me why he used the figures he did or how he justified his results. The value attributed to Wilson in the 2003 property tax bills by the Municipal Property Assessment Corporation ("MPAC") was $11,017,000, which he had available to him. Applying the applicable 2003 property tax rate would yield property taxes of $316,373. Between Years 2003 and 2004, to establish the 2004 (Year 1) property tax rate, Mr. Walsh factored into his calculations an increase of 2.45 percent which, based on the MPAC value of $11,017,000, as acknowledged by Mr. Walsh, would have resulted in taxes of $324,124 in 2004 (Year 1). However, Mr. Walsh's table, at page 107 of the Report, references a property tax expense of $247,000, not $324,124, as would be expected based on the MPAC figures. To add confusion to this matter, he testified that he actually relied on property taxes in Year 1 in the amount of $241,092, not the $316,373 amount, or the $247,000 figure (Transcript, Volume 4, pp. 506-508). The amount of the reduction in FMV would be increased again if, instead of the $247,000 figure, the amount of $241,092 is substituted. According to the Appellant's argument, and it seems apparent from my own calculations, that if he

had calculated the property tax expense based on the MPAC value which his own Report did reference, the FMV of Wilson which he reported would have been reduced by $1,063,779. This represents another significant yet inconsistent calculation affecting the ultimate FMV of Wilson.

[65] Three of the five properties, which Mr. Walsh selected for comparison, were of superior condition and, while he acknowledged that a downward net qualitative adjustment would be required for each of these three properties to be comparable, the Report did not disclose any adjustment for those properties. Mr. Walsh also admitted problems with his graph contained at page 77 of his Report in that he plotted his comparable properties on that graph, based on the sale and NOI data as of the date they sold, while he plotted Wilson based on the hypothetical stabilized NOI that he assumed could be achieved between Years 3 and 4 (or 2006 and 2007). If Wilson had been plotted using a unit NOI based on his Year 1 (2004) as per his Report, the subject property would have placed very differently on the graph for comparison purposes. Again, these problems undermine his analysis and ultimately the strength of his proposed FMV.

[66] Mr. Walsh's explanation of the two valuation methods he employed also contained errors in respect to the future value of rental income and growth potential. He testified that he used the DCF method because it could better account for anticipated rental growth over a ten year period. He used two hypothetical property examples, contained in a flip chart, one with growth potential, one without, to illustrate that the direct capitalization method would not account for anticipated growth potential in one of the property models. In both examples, he applied the same 10 percent discount/capitalization rate to the properties. According to the Appellant's expert, Mr. Atlin, such reasoning is "fundamentally flawed" because Mr. Walsh applied the same capitalization rates to both types of property while ignoring how the direct capitalization method actually accounts for growth potential (Transcript, Volume 4, p. 538). Mr. Atlin's explanation, for why Mr. Walsh's approach does not work, was that "[i]n a zero growth model, capitalization rates equal discount rates" but "[a]s soon as you introduce growth … capitalization rates and discount rates part ways" (Transcript, Volume 4, p. 538). Mr. Walsh was attempting to show that his method, the DCF analysis, should be the preferred method because it gave a better forecast of income over a ten year period. I agree with Mr. Atlin's observation that the flip chart illustrations were "fundamentally flawed" because Mr. Walsh either ignored or did not fully appreciate how the direct capitalization method accounts for property growth potential. Mr. Walsh incorrectly applied the same rates to both property examples even though one had growth potential and the other did not. It makes perfect sense that, with the introduction of

growth potential, the two rates will part ways. I accept that Mr. Atlin's capitalization rates of 7.25 percent and 7.5 percent are appropriate rates because they factor in both the upside to the property plus the risks associated with achieving that upside. The DCF method used by Mr. Walsh is not an appropriate method for multi-residential apartment complexes such as Wilson due to its limited ability to forecast income growth potential.

[67] In addition to this fundamental flaw in Mr. Walsh's flip chart examples, the analysis contains mathematical errors throughout, resulting in completely incorrect calculations too numerous to mention in my reasons. In the end, a "flip" chart meant to assist the Court was nothing but a "flop".

[68] Mr. Walsh's Report contains many unsupported assumptions, inconsistencies, omissions and numerous errors, mathematical and otherwise. I took no level of comfort in his testimony either, as he was unable to provide acceptable explanations for such assumptions and inconsistencies and, overall, was a less than objective witness. I can give no weight to his Report, as I consider his conclusions fundamentally flawed. I accept the FMV of Wilson, as contained in Mr. Atlin's Report, that is, $8.6 million.

[69] Since success is divided with respect to these issues, I make no award as to costs.

Signed at Ottawa, Canada, this 28th day of February 2014.

"Diane Campbell"

Campbell J.

SCHEDULE

TAX COURT OF CANADA

BETWEEN:

ESTATE OF STANLEY VINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AGREED STATEMENT OF FACTS

For the purposes of this appeal, the parties by their respective solicitors hereby agree on the following facts. The parties may adduce additional evidence which is not inconsistent with the facts agreed upon below:

1. The Appellant is the estate of Stanley Vine ("Vine"), who died on July 1, 2003. Immediately before his death, Vine owned, among other things,

   (a) shares of Kilbarry Holding Corporation ("Kilbarry");

   (b) an undivided 50% beneficial interest in a property municipally known as 3000 Victoria Park, Toronto ("Victoria Park"); and

   (c) all of the shares of the capital stock of Leadway Apartments Limited ("Leadway").

2. Leadway owned a property municipally known as 1305/1309 Wilson Avenue ("Wilson"). Wilson consisted of 171 individual rental units in two multi-residential structures located on 2.7 acres of land.

The Original Return

3. A return for the year in which Vine died was filed on or before the due date of April 30, 2004 (the "Original Return").

4. Schedule 3, "Capital Gains (or Losses) in 2003", in the Original Return included the following in sections 3 and 4:

	(1) Year of acquisition	(2) Proceeds of disposition	(3) Adjusted Cost Base	(4) Outlays and expenses (from dispositions)	(5) Gain (or loss) (column 2 minus columns 3 and 4)
3. Mutual Fund units, deferral of eligible small business corporation shares, and other Shares including publicly traded shares.					
Name of fund/corp. and class of shares					
Lililana Buildings Ltd.	1971	585,000.00	57,000.00		528,000.00
Korvin Developments Limited	1971	54,000.00	12,000.00		42,000.00
Thistle Construction Limited	1971	401,000.00	99,000.00		302,000.00
1429806 Ontario Ltd.	1971	770,000.00			770,000.00
Leadway Apartments Limited	1971	9,111,000.00	493,000.00		8,618,000.00
Kleinberg Recreation Centre Limited	1971	16,000.00			16,000.00
Thistle Construction Ltd. –Preferred s	1971	2,000.00	2,000.00		
Kilbarry Holding Corporation	1071	34,160,800.00	8,553,000.00		25,607,800.00
	Total 131	45,099,800.00	Gain (or loss)	132	38,798,800.00
4. Real estate, depreciable property, and other properties					
Dumor Construction – 33.3% Plaza	1971		218,000.00		(218,000.00)
	Total 136		Gain (or loss)	138	(218,000.00)

5. The sum of the amounts in column 5 above line 132 in section 3 of Schedule 3 of the Original Return was $35,883,800, which is $2,915,000 less than the amount on line 132.

6. The sum of the amounts in column 2 above line 131 in section 3 of Schedule 3 of the Original Return was $45,099,800, which is the same amount on line 131.

7. The Original Return did not include any amount for recaptured capital cost allowance in respect of Victoria Park.

8. The Original Return was prepared by the accounting firm of Mintz & Partners ("Mintz"), which has since become part of Deloitte & Touche LLP.

9. Mintz had been engaged by the Appellant's executors and trustees to complete valuations of the corporate shares and the real estate owned by Vine on his death, and to look after tax compliance related to the Original Return.

10. The Minister assessed the Original Return as filed. The Notice of Assessment of the Original Return was dated June 7, 2004 (the "Original Assessment").

The Amended Return

11. The Appellant sustained a capital loss in the amount of $34,148,186 in its first taxation year in respect of the shares of Kilbarry (the "Kilbarry Capital Loss").

12. On September 28, 2004, the Appellant filed an election with the Minister under subsection 164(6) of the *Income Tax Act* (the "Act") to treat the Kilbarry Capital Loss as a capital loss of Vine for the taxation year in which he died, namely, the 2003 taxation year.

13. On September 28, 2004, the Appellant also filed an amended income tax return with the Minister for Vine's 2003 taxation year (the "Amended Return"). The Amended Return was filed within the time set by subsection 152(6) of the Act.

14. Schedule 3, "Capital Gains (or Losses) in 2003", in the Amended Return included the following in sections 3 and 4:

	(1) Year of acquisition		(2) Proceeds of disposition	(3) Adjusted Cost Base	(4) Outlays and expenses (from dispositions)		(5) Gain (or loss) (column 2 minus columns 3 and 4)
3. Mutual Fund units, deferral of eligible small business corporation shares, and other Shares including publicly traded shares.							
Name of fund/corp. and class of shares							
Lililana Buildings Ltd.	1971		585,000.00	57,000.00			528,000.00
Korvin Developments Limited	1971		54,000.00	12,000.00			42,000.00
Thistle Construction Limited	1971		401,000.00	99,000.00			302,000.00
1429806 Ontario Ltd.	1971		770,000.00				770,000.00
Leadway Apartments Limited	1971		9,111,000.00	493,000.00			8,618,000.00
Kleinberg Recreation Centre Limited	1971		16,000.00				16,000.00
Thistle Construction Ltd. –Preferred s	1971		2,000.00	2,000.00			
Kilbarry Holding Corporation	1071		34,160,800.00	8,553,000.00			25,607,800.00
Kilbarry Holding Corporation			12,614.00	34,160,800.00			(34,148,186.00)
	Total	131	45,112,414.00	Gain (or loss)		132	4,650,614.00
4. Real estate, depreciable property, and other properties							
Dumor Construction – 33.3% Plaza	1971			218,000.00			(218,000.00)
3000 Victoria Park Avenue			4,874,450.00	3,800,500.00			1,073,950.00
	Total	136		Gain (or loss)		138	8,555,950.00

15. The sum of the amounts in column 5 above line 132 in section 3 of Schedule 3 of the Amended Return was $1,735,614, which is $2,915,000 less than the amount on line 132.

16. The sum of the amounts in column 2 above line 131 in section 3 of Schedule 3 of the Original Return was $45,112,414, which is the same amount on line 131.

17. The Amended Return included an amount of $3,990,733 for recaptured capital cost allowance ("CCA") in respect of Victoria Park.

18. The Appellant's share of the recapture of CCA deductions was 50% of $3,990,733, *viz.*, $1,995,366.50.

19. The filing of the Amended Return was not an application for a refund under subsection 152(4.2) of the Act.

<u>The Audit</u>

20. In the course of conducting an audit in respect of Vine's 2003 taxation year, the Minister sought and obtained from the Appellant a waiver dated May 8, 2007 for that year (the "Waiver").

21. The Waiver provided that it was made in respect of "Part I - Income Tax, Division B - Computation of Income, Subdivision c - Taxable Capital Gains and Allowable Capital Losses."

<u>Mintz letter of May 25, 2007</u>

22. On May 25, 2007, Mintz wrote to the Canada Revenue Agency indicating that, due to a calculation error, Vine's capital gain had been overstated by $2,915,000, and requested that the calculation of his capital gain be revised to correct this error.

<u>The Reassessment</u>

23. The Minister made a reassessment for the 2003 taxation year (the "Reassessment") by Notice of Reassessment dated June 1, 2009.

24. The "normal reassessment period," within the meaning of subsection 152(3.1) of the Act, for Vine in respect of his 2003 taxation year (the "Normal Reassessment Period") ended three years after the day of mailing of the Original Assessment, *viz.*, on June 7, 2007.

25. In making the Reassessment, the Minister, among other things:

(a) reduced Vine's capital gain by the amount of $2,915,000 as requested in the letter dated May 25, 2007 from Mintz;

(b) recognized the Kilbarry Capital Loss as a capital loss of Vine for the 2003 taxation year;

(c) assumed that, for purposes of calculating the capital gain realized by Vine on the deemed disposition of his interest in Victoria Park and his shares in Leadway, pursuant to subsection 70(5) of the Act,

(i) the fair market value ("FMV") of Vine's interest in Victoria Park immediately before his death was $7 million; and

(ii) the FMV of Leadway's interest in Wilson immediately before Vine's death was $12 million and the FMV of Vine's shares in Leadway immediately before his death was $13.4 million; and

(d) included in Vine's income recapture of CCA deductions in the amount of $1,995,367 in respect of his interest in Victoria Park.

26. In making the Reassessment, the Minister did not find or assume that the Appellant had made a misrepresentation that was attributable to neglect, carelessness or wilful default in filing the Original Return.

27. The Appellant objected to the Reassessment by Notice of Objection dated August 28, 2009.

28. The Minister confirmed the Reassessment by Notice of Confirmation dated October 21, 2011. In the Notice of Confirmation it was stated that:

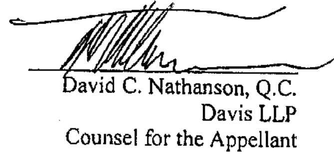
> *1) The FMV of the properties as shown below have been valued correctly and reassessed in accordance with Subsection 70(1) [sic] of the Income Tax Act*
>
> *a) 3000 Victoria Park valued at $15,550,000.*
>
> *b) 1305/1309 Wilson Avenue valued at $12,000,000.*
>
> *2) The inclusion in income of $1,995,367 as recapture on 3000 Victoria Park has been done as per your amended income tax return filed dated September 28, 2004. The recapture has been included in income as per Subsection 13(1) of the Income Tax Act.*

29. The FMV of Vine's interest in Victoria Park immediately prior to his death was $7 million.

30. To determine the FMV of Vine's shares in Leadway immediately prior to Vine's death, the amount of $1.4 million is to be added to the FMV, as determined by the Court, of Leadway's interest in Wilson.

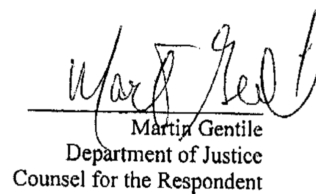
31. The respondent no longer takes the position, set out in paragraph 21 of the Reply, that "the Minister was entitled to reassess Vine for the 2003 taxation year after the normal reassessment period pursuant to paragraph 152(4.2)(a) of the Act."

DATED at the City of Toronto, this 7th day of June, 2013.



David C. Nathanson, Q.C.
Davis LLP
Counsel for the Appellant

DATED at the City of Toronto, this 7th day of June, 2013.



Martin Gentile
Department of Justice
Counsel for the Respondent

TAX COURT OF CANADA

BETWEEN:

ESTATE OF STANLEY VINE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS

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COURT FILE NO.:	2011-3788(IT)G
STYLE OF CAUSE:	ESTATE OF STANLEY VINE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	June 10, 11, 12 and 13, 2013 and September 12 and 13, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	February 28, 2014

APPEARANCES:

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