Federal Court of Appeal  Cour d'appel fédérale

Date: 20150519

Docket: A-166-14

Citation: 2015 FCA 125

CORAM: **NADON J.A.**
WEBB J.A.
BOIVIN J.A.

BETWEEN:

ESTATE OF STANLEY VINE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on January 27, 2015.

Judgment delivered at Ottawa, Ontario, on May 19, 2015.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NADON J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal arises because the Minister of National Revenue (Minister) reassessed the Estate of Stanley Vine (the Estate) pursuant to the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (*Act*) in relation to the final return for Stanley Vine after the expiration of the normal reassessment period. The Minister included an amount in income for recaptured capital cost allowance in relation to the deemed disposition of the interest of the late Stanley Vine in the

property located at 3000 Victoria Park in Toronto (Victoria Park) and increased the amount for the fair market value of another property (the Wilson Property). The recaptured capital cost allowance in relation to the deemed disposition of the interest of Stanley Vine in Victoria Park will, for ease of reference, be referred to herein as the "Victoria Park Recapture".

[2] The Estate appealed the reassessment to the Tax Court of Canada on the basis that the Minister could not reassess the Estate in relation to the Victoria Park Recapture and that the Minister had not correctly determined the fair market value of the Wilson Property. Campbell J., in a decision reported at 2014 TCC 64, allowed the appeal in relation to the determination of the fair market value of the Wilson Property but dismissed the appeal in relation to whether the Minister was barred from issuing the reassessment in relation to the Victoria Park Recapture.

[3] The Estate has appealed the decision to this Court and the only issue under appeal is whether the Minister was barred from reassessing the Estate in relation to the Victoria Park Recapture because the reassessment was issued after the expiration of the normal reassessment period.

[4] For the reasons that follow, I would dismiss the appeal with costs.

Background

[5] Stanley Vine passed away on July 1, 2003. Immediately before his death he owned several assets including shares in a number of private companies and an undivided one-half interest in Victoria Park, which was a rental property. The only rental income reported on the

final tax return for Stanley Vine is his one-half interest in the net rental income derived from Victoria Park.

[6] As a result of the provisions of subsection 70(5) of the *Act*, there was a deemed disposition of all of the capital property owned by Stanley Vine immediately before his death, which would include the shares of the private companies and his one-half interest in Victoria Park.

[7] Since Mintz & Partners (Mintz) had a long standing relationship with Stanley Vine, the Estate retained Mintz to prepare the final return for Stanley Vine. In order to prepare this return Mintz had to determine the fair market value of several properties – those held by the various companies and Victoria Park. For any real property held by a company, once the fair market value of the property was determined, the fair market value of the shares held by Stanley Vine could then be determined. There was no dispute that Stanley Vine owned the shares of the various private companies as capital property. Therefore, any gain or loss that was realized as a result of the deemed disposition of these shares would result in only a capital gain or capital loss for the purposes of the *Act*.

[8] However, Stanley Vine's interest in Victoria Park was not held by a corporation. The Estate acknowledges that Stanley Vine directly held a one-half beneficial interest in Victoria Park and that he was not a partner in a partnership that held this property. Capital cost allowance had been claimed in previous tax returns in relation to this property. The fair market value of this property was determined to be greater than the adjusted cost base (*i.e.*, the capital cost) of this

property. Therefore, as acknowledged by the Estate, the deemed disposition of this property resulted in both recaptured capital cost allowance (subsection 13(1) of the *Act*) and a capital gain (subsection 39(1) of the *Act*).

[9] The individuals at Mintz who were appraising the properties did not appreciate the significance of the ownership of Victoria Park in relation to the *Act*. They treated Victoria Park for the purposes of the *Act* as if it was held by a partnership of which Stanley Vine was a partner. If this would have been how Victoria Park was held, Stanley Vine would have had a deemed disposition of an interest in a partnership resulting in only a capital gain with no recaptured capital cost allowance.

[10] The final return for Stanley Vine was prepared and filed on the assumption that only capital gains were to be reported as a result of the deemed disposition of his various assets. No amount was included for recaptured capital cost allowance in the statement of real estate rentals attached to his final tax return. Schedule 3 to this return included the following:

> **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	Proceeds of disposition	Adjusted cost base	Gain (or loss)…
Lilliana Buildings Ltd.	585,000	57,000	528,000
Korvin Developments Limited	54,000	12,000	42,000
Thistle Construction Limited	401,000	99,000	302,000
1429806 Ontario Ltd.	770,000	[blank]	770,000
Leadway Apartments Limited	9,111,000	493,000	8,618,000

Name of fund/corp. and class of shares	Proceeds of disposition	Adjusted cost base	Gain (or loss)…
Kleinberg Recreation Centre Limited	16,000	[blank]	16,000
Thistle Construction Ltd. – Preferreds	2,000	2,000	[blank]
Kilbarry Holding Corporation	34,160,800	8,553,000	25,607,800
Total	45,099,800	Gain (or loss)	38,798,800

4. Real estate, depreciable property, and other properties

Address or legal description	Proceeds of disposition	Adjusted cost base	Gain (or loss)…
Dumor Construction – 33.3% Plaza	[blank]	218,000	(218,000)
Total		Gain (or loss)	(218,000)

[11] The columns for the table in section 3 for the "number" and "outlays and expenses" have been omitted as they are blank in the return. The columns for the year of acquisition for both the tables in sections 3 and 4 have been omitted as, although the year of acquisition for the shares of Kilbarry Holding Corporation is shown as 1071, the year of acquisition for all of the other properties is indicated as 1971.

[12] The arithmetic sum of the gains listed in the table in section 3 is $35,883,800 and not $38,798,800 as shown in this table. The difference is $2,915,000, which is the amount that was determined to be the capital gain that would have arisen if Stanley Vine would have had an interest in a partnership that held Victoria Park. As acknowledged by the Estate, Stanley Vine's share of the recaptured capital cost allowance in relation to the deemed disposition of his interest in Victoria Park was $1,995,367 and the capital gain related to this deemed disposition was $1,073,950. It is not clear how this phantom amount of $2,915,000 was determined.

[13] The final return was assessed as filed on June 7, 2004.

[14] Within the first taxation year of the Estate, the Estate realized a capital loss as a result of the disposition of the shares of Kilbarry Holding Corporation. Since the Estate wanted to take advantage of the election available under subsection 164(6) of the *Act* to have the capital loss deemed to be a capital loss of Stanley Vine in his last taxation year, an amended final return for Stanley Vine was required pursuant to paragraph 164(6)(e) of the *Act*. In preparing this amended return, Mintz realized that the Victoria Park Recapture had not been included in his final return. They also noticed that there was no reference to the capital gain related to Victoria Park in the table in section 4 of Schedule 3.

[15] An amended final return for Stanley Vine was prepared and filed. In the amended return, recaptured capital cost allowance of $3,990,733 was included in the Statement of Real Estate Rentals (before adjusting the net income to reflect his one-half interest in Victoria Park). Since one-half of the net rental income was included in his income, recaptured capital cost allowance of $1,995,367 was included in his income.

[16] The table in section 4 was also amended to include a capital gain of $1,073,950 in relation to the deemed disposition of his interest in Victoria Park. However, whoever prepared the amended return did not realize that the total amount shown as capital gains in the table in section 3 was $2,915,000 more than the arithmetic sum of the individual amounts listed in this section. The table in section 3 was only amended to reflect the capital loss of $34,148,186 that was realized on the disposition of the shares of Kilbarry Holding Corporation. As a result, the net

gain as stated in the table in section 3 was $4,650,614 but the arithmetic sum of the amounts as shown in this table was $1,735,614. The difference ($2,915,000) was the same discrepancy as appeared in the original return.

[17] The amended return was filed on September 28, 2004.

[18] It appears that the Canada Customs and Revenue Agency (now the Canada Revenue Agency) commenced an audit of Stanley Vine's final tax return in 2005. On May 20, 2005 the CCRA auditor wrote to the Estate requesting certain information. In the response dated August 31, 2005, Mintz noted that "[t]he deemed disposition of 3000 Victoria Park was originally omitted from the deceased taxpayers [sic] terminal return, but was subsequently reported in the deceased taxpayer's amended terminal return (Subsection 164(6) return)". To illustrate that the amended return now included an amount for the deemed disposition of Victoria Park, a copy of the revised Schedule 3 was included with the letter. Schedule 3 only lists capital gains and losses. The Victoria Park Recapture was not included in Schedule 3. By only including the amended Schedule 3, this would suggest that the only consequence arising from the failure to account for the deemed disposition of Victoria Park was that an additional capital gain should have been reported. There is no specific reference in the letter to the failure to include the Victoria Park Recapture in the original return or that it was included in the amended return nor was there any indication that the amended Statement of Real Estate Rentals (which would have reflected the Victoria Park Recapture) was included with the letter.

[19] A waiver dated May 8, 2007 was filed to waive the normal reassessment period for the final taxation year of Stanley Vine in relation to "Division C – Taxable Capital Gains and Allowable Capital Losses". Subsequent to this, on May 22, 2007 a representative of Mintz called the Canada Revenue Agency to discuss the calculation error in Schedule 3 to Stanley Vine's final return. On May 25, 2007 the representative of Mintz wrote to the Canada Revenue Agency to confirm the discussions of May 22 and that the amount reported as the total capital gains in schedule 3 was $2,915,000 more than the sum of the individual gains and losses listed in the table in section 3.

[20] On June 1, 2009 the final return of Stanley Vine was reassessed, in part, as follows:

- Stanley Vine's share of the net income related to Victoria Park was revised to reflect the Victoria Park Recapture as reported in the amended return;
- the fair market value of Stanley Vine's interest in Victoria Park was increased to $7,000,000; and
- the total amount of capital gains, as determined for the purposes of section 3 of Schedule 3, was reduced by $2,915,000.

[21] Although the Estate originally objected (without success) to the determination of the fair market value of Victoria Park, on the appeal to the Tax Court of Canada the only issue that was raised by the Estate in relation to Victoria Park was the issue of whether the Minister could reassess on June 1, 2009 to include the Victoria Park Recapture. The fair market value issue before the Tax Court of Canada was in relation to the Wilson property.

Statutory Provision Allowing the Minister to Reassess

[22] Subsection 152(4) of the *Act* allows the Minister, in certain circumstances, to make a reassessment after the expiration of the normal reassessment period. The relevant parts of this subsection are as follows:

(4) 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 […], 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	(4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie […]. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :
(a) the taxpayer or person filing the return	a) le contribuable ou la personne produisant la déclaration :
(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	(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,
…	[…]

Decision of the Tax Court Judge

[23] At the start of her analysis, the Tax Court Judge made the following comments on the onus of proof:

> **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.
>
> ...
>
> **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. [...]

[24] The Tax Court Judge first noted that the onus is on the Minister to establish the facts required to justify reassessing after the expiration of the normal reassessment period. She then seems to suggest that, if the Minister is successful in establishing these facts, the onus would shift to the taxpayer. In my view, the first description is correct (*Mensah v. The Queen*, 2008 TCC 378, [2008] T.C.J. No. 302, at paragraph 8 and *Nesbitt v. The Queen*, [1996] F.C.J. No. 1470, 206 N.R. 188 [*Nesbitt*] at paragraph 5). In this case, there is no allegation of any fraud. Therefore, the onus is on the Minister to prove, on a balance of probabilities, that the taxpayer or the person filing the return:

(a) has made a misrepresentation; and

(b) such misrepresentation is attributable to neglect, carelessness or wilful default.

[25] As in any civil case, if a person has the onus of proof for particular facts, the question for the trier of fact is whether, based on all of the evidence admitted during the hearing, that person has proven, on a balance of probabilities, that such facts exist. There is no shifting onus.

[26] The Tax Court Judge in this case found that the failure to include the Victoria Park Recapture in the original final return for Stanley Vine was a misrepresentation. The Tax Court Judge then noted that 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" (paragraph 37). Relying on the decision of Hogan J. in *Aridi v. The Queen*, 2013 TCC 74, 2011 DTC 1189 [*Aridi*], she then found that the Minister would have to establish that the executors of the Estate were careless or negligent in filing the return as it had been prepared. She concluded that the executors had not exercised the required standard of care and, therefore, the Minister could reassess the final return of Stanley Vine to include the Victoria Park Recapture.

Issues

[27] The Estate, in its memorandum of fact and law, stated that "[t]his appeal raises the following questions:

> (a) whether the [Estate] can be said to have made a "misrepresentation," as contemplated by subparagraph 152(4)(*a*)(i) of the [*Act*], where it filed an amended return (as was required by subsection 152(6) of the [*Act*]) in a timely manner that corrected an error made in an original return;
>
> (b) *if* the [Estate] can be said to have made such a misrepresentation, whether
>
> (i) that misrepresentation was attributable to the [Estate's] conduct;
>
> (ii) the [Estate's] conduct amounted to neglect or carelessness; and
>
> (iii) the *net amount* of income not reported (taking into account the amount reported in the original return that ought not to have been reported) is the only amount that the Minister may include in income by reassessment after the expiry of the "normal reassessment period," as contemplated by section 152(3.1) of the [*Act*]."

Standard of Review

[28] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, the Supreme Court of Canada confirmed that the standard of review for appeals from decisions of the lower courts is correctness for questions of law. Findings of fact (including inferences of fact) will stand unless it is established that the Judge made a palpable and overriding error. For questions of mixed fact and law, the standard of correctness will apply to any extricable question of law and otherwise the standard of palpable and overriding error will apply. An error is palpable if it is readily apparent and it is overriding if it changes the result.

Did the Estate make any misrepresentation?

[29] As acknowledged by the Estate, the final return for Stanley Vine, as initially filed, did not include the Victoria Park Recapture. Therefore there was a misrepresentation in this return. However, the argument of the Estate is that this misrepresentation was corrected by filing the amended return and therefore, after the amended return was filed it could no longer be said that there was any misrepresentation in relation to the missing recaptured capital cost allowance.

[30] In its memorandum of fact and law, the Estate asserts that it was required to file the amended return under subsection 152(6) of the *Act*. This subsection provides, in part, as follows:

(6) Where a taxpayer has filed for a particular taxation year the return of income required by section 150 and an amount is subsequently claimed by the taxpayer or on the taxpayer's behalf for the year as	(6) Lorsqu'un contribuable a produit la déclaration de revenu exigée par l'article 150 pour une année d'imposition et que, par la suite, une somme est demandée pour l'année par lui ou pour son compte à titre de :

…	[…]
(h) a deduction by virtue of an election for a subsequent taxation year under paragraph 164(6)(c) or 164(6)(d) by the taxpayer's legal representative by filing with the Minister, on or before the day on or before which the taxpayer is, or would be if a tax under this Part were payable by the taxpayer for that subsequent taxation year, required by section 150 to file a return of income for that subsequent taxation year, a prescribed form amending the return, the Minister shall reassess the taxpayer's tax for any relevant taxation year (other than a taxation year preceding the particular taxation year) in order to take into account the deduction claimed.	h) déduction à cause d'un choix pour une année d'imposition ultérieure effectué par son représentant légal en vertu de l'alinéa 164(6)c) ou d), en présentant au ministre, au plus tard le jour où le contribuable est tenu, ou le serait s'il était tenu de payer de l'impôt en vertu de la présente partie pour cette année d'imposition ultérieure, de produire en vertu de l'article 150 une déclaration de revenu pour cette année d'imposition ultérieure, un formulaire prescrit modifiant la déclaration, le ministre doit fixer de nouveau l'impôt du contribuable pour toute année d'imposition pertinente (autre qu'une année d'imposition antérieure à l'année donnée) afin de tenir compte de la déduction demandée.

[31] This subsection does not require the Estate to file the amended return but rather addresses the consequences that would flow once the required form (in this case, the amended return) has been filed. The event that triggered the preparation and filing of the amended return was the realization of a capital loss by the Estate and the desire to carry this capital loss back to the final return for Stanley Vine, as provided in subsection 164(6) of the *Act*. Under this subsection, the Estate was required to file an amended return as set out in paragraph 164(6)(*e*) of the *Act*. Subsection 164(6) of the *Act* provides, in part, as follows:

(6) If in the course of administering the graduated rate estate of a taxpayer, the taxpayer's legal representative has, within the first taxation year of the estate,	(6) Lorsque, au cours de l'administration de la succession assujettie à l'imposition à taux progressifs d'un contribuable, les représentants légaux du contribuable ont, durant la première année d'imposition de la succession :

(a) disposed of capital property of the estate so that the total of all amounts each of which is a capital loss from the disposition of a property exceeds the total of all amounts each of which is a capital gain from the disposition of a property, or

(a) soit disposé d'immobilisations de la succession de telle sorte que le total des sommes dont chacune représente une perte en capital à la disposition d'un bien excède le total des sommes dont chacune représente un gain en capital sur la disposition d'un bien;

…

[…]

notwithstanding any other provision of this Act, the following rules apply:

les règles suivantes s'appliquent, malgré les autres dispositions de la présente loi :

(c) such parts of one or more capital losses of the estate from the disposition of properties in the year (the total of which is not to exceed the excess referred to in paragraph 164(6)(a)) as the legal representative so elects, in prescribed manner and within a prescribed time, are deemed (except for the purpose of subsection 112(3) and this paragraph) to be capital losses of the deceased taxpayer from the disposition of the properties by the taxpayer in the taxpayer's last taxation year and not to be capital losses of the estate from the disposition of those properties,

c) la partie que le représentant légal choisit, selon les modalités et dans le délai réglementaires, d'une ou de plusieurs pertes en capital de la succession résultant de la disposition de biens au cours de l'année et dont le total ne dépasse pas l'excédent visé à l'alinéa a) est réputée représenter, sauf pour l'application du paragraphe 112(3) et du présent alinéa, des pertes en capital du contribuable décédé résultant de la disposition des biens par celui-ci au cours de sa dernière année d'imposition, et non des pertes en capital de la succession résultant de la disposition de ces biens;

(d) such part of the amount of any deduction described in paragraph 164(6)(b) (not exceeding the amount that, but for this subsection, would be the total of the non-capital loss and the farm loss of the estate for its first taxation year) as the legal representative so elects, in prescribed manner and within a prescribed time, shall be deductible in computing the income of the taxpayer for the taxpayer's taxation year in which the taxpayer died and shall not be an amount deductible in computing any loss of the estate for its first taxation year,

d) la partie de toute déduction visée à l'alinéa b) (ne dépassant pas le montant qui, sans le présent paragraphe, correspondrait au total de la perte autre qu'une perte en capital et de la perte agricole de la succession pour sa première année d'imposition) que le représentant légal choisit, selon les modalités et dans le délai réglementaires, est déductible dans le calcul du revenu du contribuable pour l'année d'imposition où celui-ci est décédé, et non pas déductible dans le calcul de toute perte de la succession pour la première année d'imposition de la succession;

(e) the legal representative shall, at or

e) pour donner effet aux règles

before the time prescribed for filing the election referred to in paragraphs 164(6)(c) and 164(6)(d), file an amended return of income for the deceased taxpayer for the taxpayer's taxation year in which the taxpayer died to give effect to the rules in those paragraphs, and	indiquées aux alinéas c) et d), le représentant légal doit produire, au plus tard à la date prescrite pour la présentation du choix prévu à ces alinéas, une déclaration de revenu modifiée au nom du contribuable décédé pour l'année d'imposition où celui-ci est décédé;
f) in computing the taxable income of the deceased taxpayer for a taxation year preceding the year in which the taxpayer died, no amount may be deducted in respect of an amount referred to in paragraph 164(6)(c) or 164(6)(d).	f) aucun montant n'est déductible au titre d'un montant visé à l'alinéa c) ou d) dans le calcul du revenu imposable du contribuable décédé pour une année d'imposition antérieure à l'année où il est décédé.
(my emphasis added)	(mon souligné)

[32] The amended return contemplated by paragraph 164(6)(*e*) of the *Act* is an amended return "to give effect to the rules" in paragraphs (c) and (d). Those paragraphs deal with the losses that are to be carried back to the deceased person's final tax return, not with correcting errors in that tax return. The covering letter (dated September 28, 2004) that was sent to the Canada Revenue Agency simply refers to "the refund resulting from the amendment (which reflects the paragraph [*sic*] 164(6) election) to Stanley Vine's Terminal Return…". This letter suggests that the amended return only reflects the carry back of losses, which is the only amendment to the return contemplated by paragraph 164(6)(*e*) of the *Act*. The argument that the amended return, filed under paragraph 164(6)(*e*) of the *Act*, in this case nullified the misrepresentation in the original return is without merit.

[33] The principles as set out by this Court in *Nesbitt* are also applicable:

> **8** Even assuming that the letter of August 6, 1986, could be taken to prove the Minister's knowledge by that date (two months prior to expiry of the four-year limitation period) of the true facts and that there had been a misrepresentation, I do not believe this assists the appellant. It appears to me that one purpose of

> subsection 152(4) is to promote careful and accurate completion of income tax returns. Whether or not there is misrepresentation through neglect or carelessness in the completion of a return is determinable at the time the return is filed. 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. 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.
>
> **9** Thus it is irrelevant that the Minister might, despite the misrepresentation on the return form, have ascertained the true facts prior to the expiry of the limitation period. The faulty return was when submitted, and remained, a misrepresentation within the meaning of subparagraph 152(4)(a)(i) of the Act.

[34] Even if, notwithstanding the wording of the covering letter, the Minister could have examined the amended return and discovered that the Victoria Park Recapture was now being included in Stanley Vine's final return, there was still a misrepresentation in the original final return for Stanley Vine that had been filed.

[35] As a result, the Estate, when it filed the final return for Stanley Vine, made a misrepresentation.

The Conduct of the Estate

[36] Although the Estate posed two questions – whether the misrepresentation was attributable to the Estate's conduct and whether that conduct amounted to neglect or carelessness – it would be more efficient to address these two questions at the same time.

[37] As noted above, paragraph 152(4)(a) of the *Act* provides that the Minister may make a reassessment after the expiration of the normal reassessment period if:

> […] 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, …

[38] In *Aridi*, the Crown argued that the person filing the return could include the accountant who prepared the return. Hogan J. analysed this question and determined that the person filing the return does not include the accountant or other professional who prepares the return for the person who is obligated to file such return under the *Act*. Having reached this conclusion, he then states that:

> **34** However, it is not the accountant's neglect that makes it possible to disregard the limitation period under subparagraph 152(4)(*a*)(i) of the ITA. It is the taxpayer's neglect at the time of the misrepresentation that must be analyzed. Can the taxpayer establish his own prudence and diligence and state that the misrepresentation is attributable to his accountant's neglect? The appellant maintains that he can. The respondent maintains that he cannot.

[39] The Tax Court Judge, relying on the decision of Hogan J. in *Aridi*, held that the Estate was the person filing the return and therefore that the misrepresentation had to be a misrepresentation made by the Estate. She also held that such misrepresentation had to be attributable to the neglect, carelessness or wilful default of the Estate. As acknowledged by the Tax Court Judge, the jurisprudence is divided on the question of whether the neglect, carelessness or wilful default must be that of the person filing the return or whether such conduct of another person (for example the accountant who prepared the return) would be sufficient to allow the Minister to reassess after the expiration of the normal reassessment period.

[40] In *College Park Motors Ltd. v. The Queen*, 2009 TCC 409, [2009] T.C.J. No. 316, Bowie J. made the following comments on whether the Minister could reassess after the expiration of the normal reassessment period if the accountant was negligent:

> **13** In examining this question it is important to remember that the purpose of subparagraph 152(4)(*a*)(i) is simply to preserve the Minister's right to reassess a taxpayer in circumstances where the taxpayer has not divulged all that he should have, as accurately as he should have, and thereby has denied the Minister the opportunity to assess correctly all of the appellant's liability under the *Act* in the first instance. It is not at all concerned with establishing culpability on the part of the taxpayer. Other provisions of the *Act* are in place to do that. * Mr. Wintermute relies on the following statement that I made in an oral judgment: *
>
> > There may well be circumstances in which misrepresentations are made in reliance upon the advice of an accountant or other professional where it was reasonable to do so and where the negligence of that professional advisor does not have the effect of establishing misrepresentation for the purposes of subsection 152(4). I am satisfied however, that this is not such a case, ...
>
> Clearly this statement was *obiter dictum*. More important, it does not accord with the decisions of Heald J. in *Nesbitt v. Canada*,* and of Bowman J. (as he then was) in *Snowball v. The Queen*.* Bowman J. explained in *Snowball* the significant difference in the effect of negligence of a taxpayer's accountant or other tax preparer between cases where the assessment is made after the normal reassessment period and those cases where the Minister has imposed a penalty under subsection 163(2):
>
> In any event, even if Mr. Cockburn was negligent it is no answer to an otherwise statute-barred assessment under subparagraph 152(4)(*a*)(i). It is quite true that the negligence of an accountant may be a defence to a penalty under subsection 163(2): *Udell v. M.N.R.*, 70 DTC 6019 (Ex. Ct.). Subparagraph 152(4)(*a*)(i) is not a penal provision. It serves an altogether different purpose from subsection 163(2). Negligence in the preparation of an income tax return retains its consequences under subparagraph 152(4)(a)(i) whether it is the negligence of the taxpayer personally or that of the accountant or other tax return preparer who is his or her agent. In *Nesbitt v. The Queen*, 96 DTC 6045, Heald J. held that a taxpayer could not shield himself from the effect of subparagraph 152(4)(*a*)(i) by blaming his accountant. The same considerations apply here.*
>
> Heald J.'s judgment in *Nesbitt* was affirmed by the Federal Court of Appeal,* but without comment on this point.
>
> (emphasis added)
>
> (* footnotes have not been included)

[41] While Hogan J. in *Aridi* refers to *College Park*, he does not refer to this particular passage.

[42] In the recent case of *Francis & Associates v. The Queen*, [2014] T.C.J. No. 117, [2014] TCC 137, Bocock J. stated that:

> **24** In the present case, the Appellants attributed the errors in the Original Returns to their bookkeeper, Mr. Von Bloedau. As Justice Bowman (as he then was) of this Court held in *Snowball v. R.*, [1996] 2 C.T.C. 25, reliance on a negligent accountant, or in this case, a bookkeeper, is no defence to the claim of neglect or carelessness. The taxpayer is vicariously negligent, careless or in wilful default through the actions of his agent in the preparation and submission of tax returns.

[43] It would seem to me that the wording of paragraph 152(4)(a) of the *Act* could support more than one meaning. One possible interpretation of the phrase "attributable to neglect, carelessness or wilful default" in this provision is that these words only apply to the "misrepresentation" and not to the person filing the return. Therefore, a misrepresentation could be "attributable to neglect, carelessness or wilful default" regardless of whether the person filing the return or someone else was negligent, careless or wilfully in default in making the misrepresentation.

[44] Alternatively, these words could mean that the person filing the return must be the one who was negligent, careless or wilfully in default. Generally "interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 10).

[45] In *Aridi* the main argument of the Crown related to the interpretation to be given to the words "the person filing the return". In relation to the question of whether the negligence of the accountant alone could allow the Minister to reassess after the expiration of the normal reassessment period, Hogan J. noted that in each of the cases that he addressed, the taxpayer was also found to have been careless or "somewhat negligent" (paragraphs 43 and 44). His conclusion appears to be that since this finding was made in each of these other cases, the result would have been different if only the accountant would have been found to have been negligent, careless or wilfully in default.

[46] It is not disputed that if the Estate was careless or negligent, then this would be sufficient to justify the reassessment of Stanley Vine's final return after the expiration of the normal reassessment period. This was the basis upon which the Tax Court Judge decided this case. Since for the reasons that follow, I would dismiss the appeal on this point, it is not necessary to decide whether the comments of Hogan J. in paragraph 34 of *Aridi* are correct or whether this question of statutory interpretation has been conclusively decided as a result of the adoption by this Court of these comments in *Vachon c. Canada*, 2014 CAF 224, [2014] A.C.F. no 1072, at paragraph 4.

[47] As noted by the Tax Court Judge, in determining whether the person filing a return that has been prepared by someone else is careless or negligent, the degree of care that must be exercised is "that of a wise and prudent person" (*Angus v. The Queen*, [1996] T.C.J. No. 883, 96 D.T.C. 1824 at paragraph 29, as cited in the reasons of the Tax Court Judge at paragraph 39). Mr. Glowinsky was the son-in-law of Stanley Vine and one of the executors of the Estate. He was also the President of the property management company for Stanley Vine's real estate holdings.

Schedule 3 to the final tax return lists eight companies. The Tax Court Judge found that Mr. Glowinsky would have known what assets were owned by Stanley Vine. There is no dispute that Victoria Park was not owned by any of the companies that are listed in Schedule 3 and that there is no reference to the interest of Stanley Vine in Victoria Park in Schedule 3.

[48] As a careful and prudent person Mr. Glowinsky should have reviewed the return and noted that Victoria Park was not included. This should have prompted questions, just as Bowie J. indicated would have been prompted in *College Park*. The Estate argued that the Tax Court Judge should not have drawn the inference that even if questions would have been raised about why there was no reference to Victoria Park that it would follow that the failure to include recaptured capital cost allowance would have been discovered. The Estate submitted that in the minds of some of the individuals at Mintz, the difference between the amount shown as the total of the capital gains in the table in section 3 of Schedule 3 and the actual total of the amounts as listed ($2,915,000) was the amount determined as the capital gain related to the deemed disposition of Victoria Park. Therefore the Estate submitted that it should be inferred that the response to any questions related to Victoria Park would have been that the gain related to the deemed disposition of this property was already included in the total amount reported.

[49] In *H.L. v. Canada*, 2005 SCC 25; [2005] 1 S.C.R. 301, Fish J. writing on behalf of the majority of the Supreme Court of Canada noted that:

> **74** I would explain the matter this way. Not infrequently, different inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally - or even more - persuasive inference of its own. This

> fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in Housen.

[50] The question is whether the inference that the missing recaptured capital cost allowance would have been discovered is reasonably supported by the evidence. Since no questions were asked about Victoria Park, this is speculative. However, it seems to me that the best indication of what would probably have been the response to such questions is the response of Mintz when the return was reviewed in relation to the election to carry back the capital loss. The response of Mintz was that not only was the recaptured capital cost allowance not included, but also no amount was included for the capital gain related to Victoria Park. The amended return included both an amount for the recaptured capital cost allowance and an amount for the capital gain. It was not until over two and half years later that it was discovered that the total capital gains in the original final return had been overstated by $2,915,000. The evidence reasonably supports the inference that if questions would have been raised about why Victoria Park was not listed, that the error related to the unreported recaptured capital cost allowance would have been found.

[51] As a result I would not interfere with the finding of the Tax Court Judge that the Estate did not exercise the required degree of care in reviewing the original final tax return for Stanley Vine that it had filed.

Amount of the Reassessment

[52] The last question posed by the Estate is in relation to subsection 152(4.01) of the *Act*. This issue was not raised before the Tax Court Judge nor was it included in the Estate's notice of appeal to this Court.

[53] The issue is whether subsection 152(4.01) of the *Act* would limit the amount that the Minister could assess in this case. This subsection is as follows:

(4.01) Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(a), (b), (b.1) or (c) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,	(4.01) Malgré les paragraphes (4) et (5), la cotisation, la nouvelle cotisation ou la cotisation supplémentaire à laquelle s'appliquent les alinéas (4)a), b), b.1) ou c) relativement à un contribuable pour une année d'imposition ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans la mesure où il est raisonnable de considérer qu'elle se rapporte à l'un des éléments suivants:
(a) where paragraph (4)(a) applies to the assessment, reassessment or additional assessment,	a) en cas d'application de l'alinéa (4)a):
(i) any misrepresentation made by the taxpayer or a person who filed the taxpayer's return of income for the year that is attributable to neglect, carelessness or wilful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this Act, or	(i) une présentation erronée des faits par le contribuable ou par la personne ayant produit la déclaration de revenu de celui-ci pour l'année, effectuée par négligence, inattention ou omission volontaire ou attribuable à quelque fraude commise par le contribuable ou cette personne lors de la production de la déclaration ou de la communication de quelque renseignement sous le régime de la présente loi,
…	[…]

(emphasis added) (mon souligné)

[54] The argument of the Estate is that it reported an extra $2,915,000 in capital gains in the original final return. One-half of this amount would have been included in income or $1,457,500. The amount that should have been included in income was $1,995,367 as recaptured capital cost allowance and $536,985 (one-half of $1,073,970) as a taxable capital gain, or $2,532,352 in total. The difference between these two amounts is $2,532,352 - $1,457,500 = $1,074,852. The argument is the reassessment based on the misrepresentation should be limited to $1,074,852 (and not the full amount of the recaptured capital cost allowance or $1,995,367).

[55] The first issue that arises is whether it is correct that the Estate reported $2,915,000 as a capital gain in relation to the deemed disposition of the interest of Stanley Vine in the original final return, as alleged by the Estate in paragraph 7 of its memorandum of fact and law. As noted above, there is no reference to Victoria Park in Schedule 3 of the final return. To any third party examining this schedule it would appear that there was simply a mathematical error in calculating the total capital gains realized. This would require a particular finding of fact to have been made by the Tax Court Judge. Since the focus at the hearing before the Tax Court was the failure to report the Victoria Park Recapture, it would not be appropriate to read any statements of the Tax Court Judge in relation to the reporting of the capital gain in the original return as conclusions or findings that the Estate had reported the capital gain arising from the deemed disposition of the interest of Stanley Vine in Victoria Park for the purposes of this new argument, which had not been raised before the Tax Court Judge.

[56] Counsel for the Estate at the commencement of oral argument acknowledged that this new issue had not been raised in the notice of appeal to this Court and indicated that he would not be relying on this issue. Since this new argument raises questions with respect to the amount that was reported in the original return and the interpretation of a provision that was not argued before the Tax Court Judge nor referred to in the notice of appeal to this Court, this new argument will not be addressed.

Conclusion

[57] As a result, I would dismiss the appeal, with costs.

"Wyman W. Webb"

J.A.

"I agree
Marc Nadon J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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