

Docket: 2013-3075(IT)G

BETWEEN:

JOSEPH BUETI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Serafina Bueti (2013-3076(IT)G) on June 24, 2015, at Ottawa, Canada

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant: Frances M. Viele
Counsel for the Respondent: Jack Warren

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year, notice of which is dated July 11, 2011, is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the deemed proceeds of disposition resulting from the gift of 122 Ridgfield Crescent, Ottawa, Ontario (the “Property”) on March 11, 2004 were \$236,500. There shall be no adjustment to the aggregate adjusted cost base of the Property used for the purposes of the reassessment.

Signed at Ottawa, Canada, this 29th day of October 2015.

“J.R. Owen”

Owen J.

Docket: 2013-3076(IT)G

BETWEEN:

SERAFINA BUETI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Joseph Bueti (2013-3075(IT)G) on June 24, 2015, at Ottawa, Canada

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant: Frances M. Viele
Counsel for the Respondent: Jack Warren

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year, notice of which is dated July 8, 2011, is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the deemed proceeds of disposition resulting from the gift of 122 Ridgefield Crescent, Ottawa, Ontario (the “Property”) on March 11, 2004 were \$236,500. There shall be no adjustment to the aggregate adjusted cost base of the Property used for the purposes of the reassessment.

Signed at Ottawa, Canada, this 29th day of October 2015.

“J.R. Owen”

Owen J.

Citation: 2015 TCC 265
Date: 20151029
Docket: 2013-3075(IT)G

BETWEEN:

JOSEPH BUETI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2013-3076(IT)G

AND BETWEEN:

SERAFINA BUETI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Owen J.

[1] The Appellants, Joseph Bueti and Serafina Bueti, are each appealing the reassessment of their 2004 taxation year by notices of reassessment dated July 11, 2011 and July 8, 2011 respectively (the “Reassessments”). The Reassessments increased from \$54,000 to \$260,000 the proceeds of disposition deemed to have been received by the Appellants on a gift of a residential property located at 122 Ridgfield Crescent, Ottawa, Ontario (the “Property”) to their son and daughter-in-law. The Reassessments also reduced the adjusted cost base attributed to the Property by the Appellants from \$150,000 to \$100,930. The appeals were heard together on common evidence.

I. Facts

[2] Mrs. Serafina Bueti testified for the Appellants, and Elizabeth Bernard, an auditor with the Canada Revenue Agency (“CRA”), testified for the Respondent. In addition, Mr. Leonard Carty testified as an expert witness for the Appellants and Mr. Pierre Duckett testified as an expert witness for the Respondent.

[3] The parties submitted a “Statement of Agreed Upon Facts” (partial), which reads as follows:

1. At all material times, Serafina Bue[t]i was married to Joseph Bueti.
2. Serafina’s father, Domenico Papalia, died on August 27, 1999.
3. At death, Domenico owned, among other assets, a residential property at 122 Ridgefield Crescent, Ottawa, Ontario (the “Property”).
4. The legal description of the Property was - Part of Lot 35, Plan 350931, Being Part 4 on Plan 4R-13988, Ottawa (formerly Nepean).
5. At all material times, the Property was comprised of the lot and the house situated on it.
6. Under Domenico’s will, the debts were to be paid first. The residue of the Estate was to be divided into 3 equal parts, Part “A” consisting of 33 1/3% of the residue, Part “B” consisting of 33 1/3% of the residue and Part “C” consisting of 33 1/3% of the residue.
7. Under the will, the Trustees were directed to pay or transfer Part “A” to Diego Papalia, pay or transfer Part “B” to Serafina Bueti and pay or transfer Part “C” to the Grandchildren.
8. On February 29, 2000, the Estate paid probate tax of \$5,125.00 in respect of the Estate, the assets of which had been valued at \$374,608.
9. On May 2, 2000, the Certificate of Appointment of Estate Trustee with a Will was issued to the applicants Serafina Bueti and Diego Papalia.
10. By . . . July 10, 2000, the creditors of Domenico Papalia had been notified and all the debts of the Deceased had been paid.
11. On July 10, 2000, the estate trustees with a will of the estate of Domenic[o] Papalia applied to be registered as owners, as estate trustees with a will, of the Property.

12. The Estate paid [a] registration fee of \$50.00 in respect of the transfer and legal fees.
13. On July 11, 2000, Serafina Bueti and Joseph Bueti obtained from the Scotiabank a \$55,000 mortgage against the Property and then advanced and paid \$50,000 to Diego Papalia.
14. Serafina and Joseph Bueti paid, among other amounts, \$930 in legal and transfer fees in relation to the mortgaging of the Property.
15. On March 11, 2004, Serafina Bueti and Joseph Bueti transferred the Property to their son and daughter-in-law for \$2.00 and natural love and affection.

[4] Following the acquisition of the Property on July 11, 2000, the Appellants first rented it to arm's length tenants for approximately two years. Mrs. Bueti did not recall exactly when the Property was first rented other than to say it was "after a period of time".¹

[5] Mrs. Bueti testified as to the condition of the Property at the time of her father's death:

Q. Can you describe the condition of the house immediately after your father died?

A. Yes. Sorry, my memories, my dad. The house was in its original state that it was from the very beginning. There was nothing done to it virtually, but it was exactly the way it was at the beginning. It was -- the walls were very, very black because he smoked all the time. He lived alone.

Q. How old was he when he died, ma'am?

A. He died when he was 88 years old, 88.

Q. Thank you. Can you describe the basement?

A. The basement was in its original state. It was blocks and cement floor. It had the furnace there. It also had the laundry tubs, a sump pump in the corner. It was unfinished. There was absolutely nothing done to the basement.

Q. Can you describe the garage that was attached to the house?

A. The garage that was attached to the house was on level ground, and there was a door from the garage that walked into the house.

¹ Line 24 of page 131 of the transcript of the hearing of the appeals on June 24, 2015 (the "Transcript").

...

Q. What else was there in this house besides the (inaudible)?

A. The three bedrooms, there is one bathroom which was in its original state. There was a kitchen and a living room. Basically, it was three-bedroom house.

Q. As far as you were aware, were there any structural problems with the house?

A. Do you mean the outside structure?

Q. Outside or inside.

A. No.

Q. Do you have any recollection as to if there was any problem with the roof and when it might have been repaired? There was some discussion, you heard this morning, about an assumption being made that perhaps the roof had been either patched or replaced in the course of these 40 years.

A. I am not aware at all of anything except that they had raccoons in the attic and that had to be -- they had to be removed, and they patched that part where the raccoons had to be removed from.

Q. So as far as you are aware, it was the original roof?

A. I don't know. It could have been in the first -- as far as I can recollect, I don't remember any roof being done.

Q. How about the furnace?

A. The furnace was updated. It was an electric furnace from oil at some point, and again, I am not sure when.

Q. So originally, it was oil?

A. It was oil originally.

Q. And then it was converted to electric?

A. To electric, yes.

Q. But you don't recall specifically when that happened?

A. Not specifically, I cannot say, no.²

[6] Mrs. Bueti also testified that the only improvements prior to renting were a “very, very good clean up, and we painted it”³ and that she visited her father “[t]wice a day every single day”.⁴

[7] In cross-examination, Mrs. Bueti confirmed that the Appellants were able to rent the Property after cleaning and painting the interior, although she did stress that they had to use four or five coats of paint.⁵ When asked whether the reason for acquiring the Property in July 2000 was to rent it, she stated that that was only partially correct and that “[i]t was a sentimental thing with us with the house. I wanted to keep that because it was my parents’ home.”⁶

[8] An attachment to a letter from the solicitors of the Estate of Domenico Papalia (the “Estate”) dated February 29, 2000 (Exhibit A-2) indicates that for probate the Property was valued at \$150,000. In the same attachment, the other assets of the Estate (the “Other Assets”) are described as “Personal Property” (\$1,000), “Bank of Nova Scotia Acct# [omitted]” (\$7,534.58), “Bank of Nova Scotia GIC” (\$16,773.42), “Receivable note from 969270 Ontario Inc.” (\$177,300) and “216 Class “A” Pref. Shares in 969270 Ontario Inc.” The total value attributed to the Other Assets is \$224,608.

[9] Mrs. Bueti identified the assets of the Estate but in cross-examination was not able to explain or even recall what had happened to the Other Assets or how they were distributed.⁷ Mrs. Bueti testified that she also did not recall receiving one-third of the Other Assets.⁸

[10] Mrs. Bueti testified that she and her husband discussed the Property with the other beneficiaries and that she agreed to buy the interests of the other beneficiaries in exchange for payments of \$50,000 to Diego Papalia and \$50,000 to the four

² Lines 13 to 28 of page 132, lines 1 to 6 and 25 to 28 of page 133, page 134, and lines 1 to 5 of page 135 of the Transcript.

³ Lines 7 to 12 of page 133 of the Transcript.

⁴ Line 14 of page 135 of the Transcript.

⁵ Lines 9 to 20 of page 155 of the Transcript.

⁶ Lines 25 to 28 of page 154 and lines 1 to 4 of page 155 of the Transcript.

⁷ Lines 25 to 28 of page 149, page 150, lines 1 to 6 of page 151, lines 26 to 28 of page 153 and lines 1 to 18 of page 154 of the Transcript.

⁸ Lines 7 to 10 of page 151 of the Transcript.

grandchildren.⁹ The purchase price was based on a total value of the Property of \$150,000.

[11] Mrs. Bueti was asked by her counsel about a Transfer/Deed of Land dated July 11, 2000 (Exhibit A-6) (the “Deed”). She testified that the Deed identified a transfer of the Property from the Estate and from herself and Diego Papalia in their capacity as the Estate trustees to herself and her husband as joint tenants for a consideration of \$50,000. She confirmed when asked that the words “Pursuant to the Last Will and Testament of Domenic [*sic*] Papalia (father)” appeared on the Deed and stated that as far as she was aware the transfer of the Property took place in accordance with her father’s will.

[12] Mrs. Bueti testified that the \$50,000 identified as consideration on the Deed was not paid to any of the other beneficiaries of the Estate.¹⁰

[13] Mrs. Bueti was also asked about a lawyer’s letter dated November 13, 2000, which addresses a mortgage transaction with Scotia Mortgage Corporation (Exhibit A-7). Under the heading TRUST LEDGER STATEMENT, the letter states that \$55,000 was received from the mortgagee and that \$50,000 was disbursed to Diego Papalia at the direction of the Appellants.

[14] Mrs. Bueti testified that her husband used the \$50,000 from the mortgage funds as the consideration for his portion of the Property.¹¹ When asked by her counsel if the letter clarified where or to whom the \$50,000 consideration identified on the Deed was paid, she stated that it was “[her] portion”.¹²

[15] In cross-examination, Mrs. Bueti stated that \$50,000 was paid to Diego Papalia from the proceeds of the mortgage placed on the Property and \$50,000 was paid to the four grandchildren from the Appellants’ personal funds.¹³ However, she was unable to recall whether the payment of \$50,000 to the grandchildren was made by cheque or bank draft.¹⁴ Mrs. Bueti also stated that, following the purchases, she and her husband owned the property 50-50.¹⁵

⁹ Lines 5 to 28 of page 129 and lines 1 to 6 of page 130 of the Transcript.

¹⁰ Lines 1 to 6 of page 130 of the Transcript.

¹¹ Lines 19 to 28 of page 130 and line 1 of page 131 of the Transcript.

¹² Lines 2 to 9 of page 131 of the Transcript.

¹³ Lines 22 to 28 of page 151, page 152 and lines 1 to 9 of page 153 of the Transcript.

¹⁴ Lines 17 to 25 of page 153 of the Transcript.

¹⁵ Lines 1 to 6 of page 149 of the Transcript.

[16] Mrs. Bueti explained the circumstances surrounding the gift of the Property to her son and daughter-in-law on March 11, 2004:

Q. Ms. Bueti, in paragraph 13 [of the Notice of Appeal], there are these (inaudible) March 11, 2004, which is the date I understand you transferred 122 Ridgefield to your son and his wife, that you transferred the land portion of the property, and the parties were in agreement that the existing house was to be sold separately. What is your understanding of that, how you transfer the land and not transfer the house on the land?

A. What happened with this, if I can explain?

Q. Please.

A. We took it as a whole and transferred to our son and daughter-in-law. It wasn't "We are going to just give you the land." We transferred as a whole.

They were going to tear it down and build a house themselves on it because that existing house was in no condition. It was too small. They started a family.

I helped my son with was if he wanted me to phone a company that removes houses from the land, and this is what I did. Only because he was busy, we just did it in the family. This is still the way we are.

CDS was the moving company. We had a contract with them. They offered \$14,000 for the house, and they wanted [\$]10,000 to take it away. This is what happened. Then my son took over to build on.¹⁶

[17] Mrs. Bueti testified that the Appellants' T1 tax returns for 2004 were prepared by an accountant. In filing their T1 income tax returns for 2004, the Appellants took the position that the Property had an aggregate adjusted cost base (ACB) of \$150,000 and that they had disposed of the Property for proceeds of \$54,000.

[18] According to an e-mail sent by Ms. Bernard on February 7, 2008 (Exhibit R-3), the \$54,000 proceeds were comprised of a value of \$50,000 for the Property, determined on the assumption that it was a vacant lot, and \$4,000 received from CDS, the house-moving company. The ACB minus the proceeds resulted in a capital loss of \$96,000, which was allocated 50-50 between the Appellants.

¹⁶ Lines 7 to 28 of page 146 and lines 1 to 3 of page 147 of the Transcript.

[19] Mrs. Bueti carried forward \$24,000 of the allowable capital loss reported in 2004 and applied that loss to capital gains realized in 2005 on the disposition of four real properties located in Ottawa and Stittsville.

[20] The Notices of Appeal indicate that the Property was owned 1/3 by Mr. Bueti and 2/3 by Mrs. Bueti at the time of the gift in 2004. However, as noted above, Mrs. Bueti testified that the Property was held equally by her and her husband, which is consistent with the Deed and with the filing position taken by the Appellants in their 2004 T1 income tax returns.

[21] The CRA initially reassessed each of the Appellants to deny the reported capital loss and to attribute to each Appellant a capital gain of \$104,850. The capital gain was calculated using an ACB of \$50,300 and proceeds of disposition of \$260,000. The ACB reflected the amounts shown on the Deed, being consideration of \$50,000, land transfer tax of \$250 and a mortgage registration fee of \$50. The \$260,000 was based on an appraisal report dated February 25, 2008 prepared by Mr. Pierre Duckett (Exhibit R-5).

[22] The Appellants objected to the reassessments and in response to their objections, the CRA reassessed to increase the ACB of the Property to \$100,930, comprised of \$100,000 consideration, the additional \$300 shown on the Deed and legal fees of \$630. The reassessments reduced the capital gain realized by each Appellant to \$79,535.

[23] Ms. Bernard testified that she believed that the revised ACB was wrong on the basis that it incorrectly assumed that the \$50,000 consideration identified on the Deed and the \$50,000 identified as having been paid to Diego Papalia from the proceeds of the mortgage were separate amounts. Be that as it may, the Respondent did not seek to alter the ACB used in the second reassessments currently under appeal. It is trite to say that the Respondent cannot appeal her own assessment.

II. The Expert Evidence

[24] The evidence of the two expert witnesses focused on the fair market value of the Property at the time of the gift on March 11, 2004. Both experts were well qualified to provide an assessment of value, although it appears that Mr. Carty had the most recent experience with the neighbourhood in which the Property was located.

[25] Neither expert had an opportunity to visit the original house on the Property as it had been sold and replaced by the new house erected by the Appellants' son.

[26] Mr. Carty testified that he made certain assumptions about the condition of the property that were based on the information provided to him by Ms. Bueti through her counsel. In particular, he assumed the house was not well maintained and that the house was in original condition. As to the meaning of original condition, Mr. Carty stated:

Well, in original condition, we would be looking at bathrooms and kitchens, windows that were not updated. The furnace, again, would probably have been replaced at some time during the lifetime of the house. The original electrical panel, roof would have probably been redone at some time due to the age of the house.¹⁷

[27] Mr. Carty testified that he did not ascertain the exact square footage of the house because he did not have access to the Municipal Property Assessment Corporation ("MPAC") records for 2004 and because obtaining the information from the City of Ottawa archives would have taken two or three weeks. He based the assumed square footage of 1,100 to 1,200 square feet on other houses that he has appraised in the area. Mr. Carty also stated that the Appellants were not able to provide him with a single photograph of the house.

[28] Mr. Carty acknowledged that the lot was large for the area and favourably located as it backed on to National Capital Commission lands and was not a corner lot.

[29] As for the valuation methodology, Mr. Carty testified that he reviewed sales in the area from January 2003 to January 2005 and identified 69 properties that had been sold during that period. The prices ranged from a low of \$175,000 to a high of \$345,000 with an average of \$242,324 and a median of \$236,000.

¹⁷ Lines 16 to 21 of page 31 of the Transcript.

[30] In this sampling, he looked for properties that had a similar-sized lot or a lot backing on to green space and a house in similar condition. He identified a total of six properties that he believed met at least one of these criteria. However, he stated that he was not able to find any property with a similar lot size and that he found only one property that backed on to green space. The average price for these six properties was \$188 per square foot, which was based on the area of the homes in the sample. Mr. Carty stated that in his experience a value-per-square-foot approach yielded the most accurate results. He did not make any adjustment to the value of each property.

[31] Mr. Carty testified that typically the condition of the Property would have dictated a fair market value below the average dollar-per-square-foot value. However, he concluded that the lot size and location and the condition of the house balanced each other out so he used the average of \$188 per square foot. He multiplied this by 1,200 square feet to yield \$225,600 and rounded down to \$225,000. I note that if the actual area of the house was used, the result would be \$231,804 (1,233 square feet times \$188 per square foot).

[32] Mr. Duckett testified that he derived his information about the Property from the sources he had available and applied inductive and deductive reasoning to reach certain assumptions about the Property. In particular, he assumed the house on the Property was in good condition given the market-rate rental charged to the tenants and the fact that the house could be sold separately from the lot.¹⁸ In his view, this latter fact suggested that the house had to be “to some extent, a keeper”.¹⁹ In his report, Mr. Duckett states that “the building is assumed to be consistent in terms of quality, and conditions [*sic*] to similar one storey residential dwelling[s] built around the same time period, and sold more recently in the immediate neighbourhood [*sic*].”

[33] Mr. Duckett testified that the CRA maintains a database of data obtained from MPAC since the 1970s and that he referred to the information in that database. Mr. Duckett’s research indicated a lot size of 14,171 square feet, a house size of 1,233 square feet on one floor, a basement of the same size of which 237 square feet was finished, a basement garage of 248 square feet and a detached garage of 284 square feet.²⁰

¹⁸ Lines 12 to 25 of page 65 of the Transcript.

¹⁹ Line 20 of page 65 of the Transcript.

²⁰ Lines 5 to 25 of page 55 of the Transcript.

[34] As for the valuation methodology, Mr. Duckett researched the multiple listing service (“MLS”) data for the period from December 1998 to “about 2004” and identified 25 properties. He then did an analysis of the evolution of the market over time to ascertain if there was a trend in pricing and saw that prices escalated from \$148,000 in 1998 to \$200,000 in 2004. At this point, Mr. Duckett toured the neighbourhood and took pictures of the 25 properties as well as of the Property with the new house on it.

[35] From the data for the 25 properties he concluded that the average lot size in the area was approximately 6,000 to 7,000 square feet and that the average house size was approximately 1,000 square feet. This compared to 14,171 square feet and 1,233 square feet for the Property.

[36] Mr. Duckett then picked the three properties with the largest lot sizes. The lot and house sizes of these three properties were 14,800 square feet and 1,283 square feet for comparable one, which sold for \$248,000 in March, 2004; 14,155 square feet and 1,547 square feet for comparable two, which sold for \$281,000 in May 2004; and 10,527 square feet and 1,100 square feet for comparable three, which sold for \$232,000 in June 2004.

[37] Mr. Duckett opined that it was important to pick properties that were as homogeneous as possible to minimize the adjustments necessary in order to compare the properties. Mr. Duckett also stated that the two most important components of value are the land and the improvements on the land.

[38] Mr. Duckett stated that his next step was to analyze the value of the land separately from the improvements on the land. This, he said, would facilitate any adjustments to value that would have to be made to the comparables. To do this, he used a computer program that performed the analysis by an iterative process.

[39] The end result was a value for the land on a per-square-foot basis and a depreciated value for the improvements. The value of the land so determined was considered a constant. However, for the purpose of adjustments to account for different lot sizes, 50% of the value per square foot was used on the theory that the back half of a large lot is worth one-half the value of the front half. The depreciated value of the improvements was adjusted to account for differences among the improvements on the properties.

[40] Using this approach, Mr. Duckett determined that the adjusted value of comparable one was \$260,000, the adjusted value of comparable two was

\$252,400 and the adjusted value of comparable three was \$261,900. The adjustments are described on the seventh page of Mr. Duckett's appraisal report.²¹ On the basis of the adjusted values, he concluded that the fair market value of the Property in March 2004 was \$260,000.

[41] I note, however, that the adjustment for lot size made for comparable one contains an apparent error. Specifically, Mr. Duckett has added \$15,000 to the sale price of that property to account for a lot size that is 629 square feet larger than the Property. Given the larger size of the lot I would expect a downward adjustment in the sale price of comparable one to factor out the larger size of its lot. Such an adjustment would be consistent with Mr. Duckett's explanation of the objective of the adjustments.²²

[42] The apparent error in the adjustment of comparable one's lot value is highlighted by the adjustment for comparable three's smaller lot: an addition of \$22,000 to the sale price of that property.²³ Using this adjustment to determine the adjustment per square foot applied to the lots, the adjustment to comparable one should have been a decrease in value of approximately \$3,800 for an adjusted value of \$241,200.²⁴

III. The Position of the Appellants

[43] The Appellants submit that the capital gain of each Appellant should be determined using an ACB for the Property of \$152,770.72 and proceeds of disposition of \$225,000. These numbers yield a capital gain of \$72,229.28 or \$36,114.64 for each Appellant.

[44] The Appellants submit that the aggregate ACB of the Property in the hands of the Appellants consists of the ACB of the one-third interest in the Property acquired by Mrs. Bueti from the Estate, the \$100,930 assumed to be the ACB of the Property in paragraphs 12(i) and 12(j) of the Replies of Mrs. and Mr. Bueti respectively and the \$930 referenced in paragraph 21 of each Reply.

²¹ Exhibit R-5 in Tab 1 of the Respondent's Book of Documents, which starts on page 24 of the tab. The seventh page is marked as page 30 of the Tab.

²² Lines 26 to 28 of page 106 and lines 1 to 20 of page 107 of the Transcript.

²³ No adjustment for lot size is made to comparable two, no doubt reflecting the difference in size of only 16 square feet.

²⁴ If one-half of the land value per square foot stated on page 7 is used (i.e., \$6.25 per square foot) the adjustment would be a reduction of \$3,931.25.

[45] The Appellants submit that the ACB of the one-third interest in the Property acquired by Mrs. Bueti from the Estate was \$50,910. This amount is one-third of the ACB of the Estate, which is \$150,000 under paragraph 70(5)(a) of the *Income Tax Act* (“ITA”), plus the probate taxes attributable to that amount plus legal fees of \$630 and a registration fee of \$50.

[46] The Appellants submit that the proceeds of disposition figure of \$225,000 used in the calculation of the aggregate capital gain is supported by the valuation of Mr. Carty and that Mr. Carty’s opinion on the value of the Property at the time of the gift in 2004 is to be preferred over the opinion of Mr. Duckett because of Mr. Carty’s extensive experience with appraisals in the neighbourhood in which the Property is located.

IV. The Position of the Respondent

[47] The Respondent submits that the will of Domenico Papalia did not provide for a specific bequest of the Property to Mrs. Bueti. Rather, it divided the residue of the Estate equally among Mrs. Bueti, Diego Papalia and the four grandchildren. As there was no specific entitlement to the Property, neither paragraph 69(1)(c) of the ITA nor paragraph 70(5)(b) of the ITA applied to deem the property to be acquired by the beneficiaries at fair market value.

[48] The Respondent submits that the Appellants in fact purchased the Property from the Estate for \$50,000 as evidenced by the Deed and the contemporaneous mortgage, which in the normal course would yield an adjusted cost base of \$50,000 plus related expenses for the entire Property. However, the Respondent conceded that she could not at this late stage adjust the ACB below the amount reflected in the Reassessments, which is \$100,930. Accordingly, the position of the Respondent is that the ACB of the Property for the purposes of the appeals is \$100,930.

[49] The Respondent submitted that the gift of the Property by the Appellants to their son and daughter-in-law on March 11, 2004 gave rise to proceeds of disposition of \$260,000, being the fair market value of the Property at the time of the gift. The Respondent submits that the valuation of Mr. Duckett is to be preferred over that of Mr. Carty because it was based on assumptions drawn from objective sources such as MPAC rather than from information provided by Mrs. Bueti, was not rushed and utilized comparables with similar-sized lots. The Respondent submitted that the size and quality of the lot was a significant factor that was not fully taken into account in Mr. Carty’s valuation.

V. Analysis

[50] Subsection 70(5) of the ITA addresses the income tax consequences of the death of an individual who owns capital property at the time of death. That subsection states, in part:

(5) Capital property of a deceased taxpayer - Where in a taxation year a taxpayer dies,

(a) the taxpayer shall be deemed to have, immediately before the taxpayer's death, disposed of each capital property of the taxpayer and received proceeds of disposition therefor equal to the fair market value of the property immediately before the death;

(b) any person who as a consequence of the taxpayer's death acquires any property that is deemed by paragraph (a) to have been disposed of by the taxpayer shall be deemed to have acquired it at the time of the death at a cost equal to its fair market value immediately before the death;

[51] As a result of paragraph 70(5)(a) of the ITA, the Property was deemed to have been disposed of by Domenico Papalia immediately prior to his death for proceeds of disposition equal to the fair market value of the Property at that time. In addition, the person acquiring the Property as a consequence of Domenico Papalia's death was deemed to have acquired it at a cost equal to that same fair market value. I note that in this case the more specific rule in paragraph 70(5)(b) of the ITA overrides the general rule in paragraph 69(1)(c) of the ITA, which applies "[e]xcept as expressly otherwise provided in this Act".

[52] The question raised by paragraph 70(5)(b) of the ITA is who acquired the Property on Domenico Papalia's death? Sections 2 and 3 of the will of Domenico Papalia (Exhibit A-1) state:

2. TRUSTEES AND EXECUTORS

I HEREBY NOMINATE AND APPOINT my son, DIEGO PAPALIA, and my daughter, SERAFINA BUETI, as my Trustees and Executors under this my Will.

I DECLARE that the expression 'Trustee' or 'Trustees' whenever used in this my will shall mean and include the trustee, trustees, executor, executrix, executors or executrices for the time being and from time to time of this my will whether original or substituted.

3. TRANSFER TO MY TRUSTEES

I GIVE, DEVISE AND BEQUEATH all of my property, both real and personal, of every nature and kind, wheresoever situate, including any property over which I may have a general power of appointment, to my Trustees upon the following trusts:

DEBTS & DEATH TAXES

(a) To pay out of and charge to the general capital of my estate all my just debts, funeral and testamentary expenses and all estate, inheritance, succession duties and taxes whether imposed by or pursuant to the law of this or any jurisdiction whatsoever that may be payable in connection with any property passing (or deemed so to pass by any governing law) on my death or in connection with any insurance on my life or any gift or benefit given or conferred by me either during my lifetime or by survivorship or by this my Will or any Codicil hereto and whether such duties or taxes be payable in respect of estates or interest to fall into possession at my death or at any subsequent time; and I hereby authorize my Trustees to defer, commute or prepay any such taxes or duties. This direction shall not extend to or include any such taxes that may be payable by a purchaser or transferee in connection with any property transferred to or acquired by such purchaser or transferee upon or after my death pursuant to any agreement with respect to such property.

RESIDUARY ESTATE

(b) TO DIVIDE the residue of my estate into three (3) equal parts, PART "A" consisting of thirty-three and one-third per cent (33-1/3%) of the said residue of my estate, PART "B" consisting of thirty-three and one-third per cent (33-1/3%) of the said residue of my estate, and PART "C" consisting of thirty-three and one-third per cent (33-1/3%) of the said residue of my estate. My Trustees shall:

(i) Pay or transfer PART "A" to my son, DIEGO PAPALIA, provided that if my said son predeceases the date of division, PART "A" shall be divided equally among the children of my said son living at the date of division, or if there shall be no children of my said son living at the date of division, PART "A" shall be

divided equally among the other parts into which I have hereinbefore directed the residue of my estate to be divided and shall be administered therewith as portions thereof, respectively;

(ii) Pay or transfer PART "B" to my daughter, SERAFINA BUETI, provided that if my said daughter predeceases the date of division, PART "B" shall be divided equally [*sic*] among the children of my said daughter living at the date of division, or if there shall be no children of my said daughter living at the date of division, PART "B" shall be divided equally among the other parts into which I have hereinbefore directed the residue of my estate to be divided and shall be administered therewith as portions thereof, respectively;

(iii) To divide PART "C" equally among those grandchildren of mine, namely, DOMENIC PAPALIA, AGOSTINO PAPALIA, GUISEPPE PAPALIA, and RICHARD PAPALIA, living at the date of my death, provided that if any of my said grandchildren shall predecease me leaving issue alive at the date of my death, the issue of such deceased grandchild of mine as shall then be living shall take in equal shares per stirpes the share of my estate to which such deceased grandchild of mine would have been entitled had he survived me.

[53] It is clear on the face of the will that the property owned by Domenico Papalia on his death was given, devised and bequeathed to the trustees and executors of the Estate named in the will and that Mrs. Bueti was entitled to one-third of the residue of the Estate. It is equally clear that the Property was not given, devised or bequeathed *in specie* to Mrs. Bueti and the other beneficiaries of the Estate.

[54] At the time of his death, Domenico Papalia was resident in Ontario. Consequently, the will must be read in conjunction with the provisions of the *Estates Administration Act* (Ontario) (the "EAA").²⁵ Subsection 2(1) of the EAA states:

All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.

²⁵ R.S.O. 1990, c. E.22.

[55] The effect of this provision is that on his death the real and personal property of Domenico Papalia devolved to and became vested in his personal representatives. Professor Oosterhoff states that “[t]he effect of [sub]section 2(1) . . . is to vest the real as well as the personal property in the personal representative in trust to pay the debts and to distribute the estate”.²⁶ Accordingly, in addition to the will, there are provisions of the EAA under which, on the death of Domenico Papalia, the Property was transferred to and vested in the individuals appointed as his trustees and executors under paragraph 2 of his will.²⁷

[56] As for the nature of the beneficiaries’ interest in the Property immediately following Domenico Papalia’s death, in *909403 Ontario Ltd. v. DiMichele*,²⁸ the Ontario Court of Appeal confirmed that an entitlement to the residue of an estate under a will does not amount to a property interest in specific estate assets. In that case, the Court found that, since the estate assets had not been distributed at the relevant time, the beneficiaries did not have a property interest in the real property held in the estate.²⁹

[57] In the earlier case of *Spencer v. Riesberry*,³⁰ the Ontario Court of Appeal stated that “[u]nless the terms of the trust expressly provide otherwise, a beneficiary has no property interest in any specific asset of the trust, prior to or absent an appropriation of such asset to the beneficiary by the trustee”.

[58] In support of this statement, the Court cited with approval *Gennaro v. Gennaro*,³¹ a decision of the Ontario Unified Family Court that considered whether a beneficiary’s interest in the residue of an estate constituted an interest in the estate’s assets. Justice Steinberg found that the beneficiary under the will did not have a property interest in the real property in question because the will did not bequeath to him a specific interest in the property. During the administration of the estate, the personal representative had full discretion in carrying out his duties under the will and the beneficiary was not entitled to compel conveyance of the real property to him.

²⁶ Albert H. Oosterhoff, *Oosterhoff on Wills and Succession*, 7th ed. (Toronto: Carswell, 2011) at 62.

²⁷ This is also true for the Other Assets that constitute real or personal property.

²⁸ *909403 Ontario Ltd v. DiMichele*, 2014 ONCA 261 at paras 103-104.

²⁹ The principle that the residuary beneficiaries of an estate do not have an interest in the specific property held in the estate can be traced to the decision of the Privy Council in *Commissioner of Stamp Duties (Queensland) v. Livingston*, [1965] A.C. 694.

³⁰ *Spencer v. Riesberry*, 2012 ONCA 418 at para. 37.

³¹ *Gennaro v. Gennaro*, [1994] O.J. No. 183 (QL) at para. 7.

[59] In light of the terms of the will in the present case, the rule in subsection 2(1) of the EAA and the foregoing case law, I have no difficulty concluding that, on the death of Domenico Papalia, the Property devolved upon and vested in Diego Papalia and Serafina Bueti in their capacity as trustees and executors of the Estate.³² However, Serafina Bueti and the other beneficiaries identified in paragraph 3(b) of the will did not acquire the Property as a consequence of Domenico Papalia's death. I therefore reject the Appellants' argument that paragraph 70(5)(b) of the ITA deemed Mrs. Bueti to have a cost of the Property, as she did not, in her personal capacity, acquire the Property on the death of Domenico Papalia.

[60] Paragraph 70(5)(b) of the ITA is, however, relevant to the Estate. Subsection 104(1) states, in part:

104.(1) Reference to trust or estate - In this Act, a reference to a trust or estate (in this subdivision referred to as a "trust") shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property . . .

[61] As a result of subsection 104(1) of the ITA, the Estate is considered to be a trust for the purposes of Subdivision k of Division B in Part I of the ITA.³³ Subsection 104(2) of the ITA in turn deems the Estate to be an individual in respect of the property of the Estate. Accordingly, in general terms, the Estate is subject to tax under the ITA as if it was an individual.

[62] Pursuant to subsection 104(1) of the ITA, a reference to a trust or estate includes a reference to, among others, the trustee or executor who has control over the trust property. The Property devolved upon and was vested in the trustees and executors of the Estate and therefore it is the Estate that is deemed by paragraph 70(5)(b) of the ITA to have a cost of the Property equal to the fair market value of that Property immediately prior to Domenico Papalia's death.

³² The formalization of this ownership is found in Exhibit A-5 titled Document General, whereby Diego Papalia and Serafina Bueti apply to be registered as owners of the Property in their capacity as estate trustees. This takes place on July 11, 2000.

³³ Subsection 248(1) of the ITA adopts this definition for the purposes of the ITA. Effective December 12, 2013, the definition of "trust" in subsection 248(1) of the ITA was amended to add the words "and, unless the context otherwise requires, includes an estate". The technical notes that accompanied this amendment state: "The definition "trust" assigns to that term for the purposes of the Act the meaning it has under subsection 104(1). The definition is amended to clarify that a reference to a trust in the Act includes, unless the context otherwise requires, an estate."

[63] This leaves the question of what happened to the Property after it was acquired by the Estate. The only documentary evidence of a transaction with respect to the Property after it was vested in the trustees and executors of the Estate is the Document General (Exhibit A-5), the Deed (Exhibit A-6) and the lawyer's letter dated November 13, 2000 that provides a trust ledger statement to the Appellants (Exhibit A-7). The Deed was filed in the registry office one minute after the filing of the Document General. The latter named Serafina Bueti and Diego Papalia as the registered owners of the Property in their capacity as Estate trustees.

[64] The Deed, which was filed in the registry office immediately after the filing of the Document General, indicates a transfer of the Property from Diego Papalia and Serafina Bueti in their capacity as Estate trustees to Serafina Bueti and Joseph Bueti as joint tenants. The consideration for this transfer is stated on the Deed to be \$50,000.

[65] Paragraph 5 of the Deed states:

If consideration is nominal, describe relationship between transferor and transferee and state purpose of conveyance. (see instructions)

[66] Under this text appear the words "Pursuant to the Last Will and Testament of Domenic Papalia (father)". The Appellants suggest that this statement is consistent with a transfer of the Property pursuant to the will and that the \$50,000 identified as the consideration for the transfer reflects Serafina Bueti's one-third interest in the Property under the will. In other words, this \$50,000 should be added to the \$100,000 that the Appellants say was paid to acquire the balance of the Property from the other beneficiaries.

[67] I cannot accept that position for four reasons. First, Serafina Bueti did not have a one-third interest in the Property under the will for the reasons already stated and therefore paragraph 70(5)(b) could not apply to attribute a cost of the Property to Mrs. Bueti.

[68] Second, there is no evidence that a one-third interest in the Property was transferred by the Estate trustees to Serafina Bueti as part of a distribution of the Property in kind from the Estate to the beneficiaries of the residue of the Estate. In fact, the Deed clearly indicates that the entire Property was transferred from the Estate to Joseph and Serafina Bueti as joint tenants.

[69] Third, Joseph Bueti was not a beneficiary under the Will and therefore could not be taking a 50% interest in the Property “Pursuant to the Last Will and Testament of Domenic Papalia (father)”.

[70] Finally, the wording of paragraph 5 of the Deed presupposes that the consideration is nominal and additional information is requested. As the consideration was not nominal but was stated on the first page of the Deed to be \$50,000, no response to this question is required and the response entered is unnecessary and inconsistent with the rest of the Deed.

[71] With respect to the actual ACB of the Property for the Appellants, Exhibit A-7 indicates that \$50,000 was paid to Diego Papalia from the proceeds of a \$55,000 mortgage on the Property. Mrs. Bueti testified that this was only part of the consideration paid to the other beneficiaries of the Estate and that she paid a further \$50,000 to the grandchildren from her own funds. I note, however, that there is no evidence that the Property was first transferred to the other beneficiaries of the Estate and then sold to the Appellants. Accordingly, it is entirely unclear to me how the Appellants could have been purchasing the Property from the other beneficiaries. The only registered transfer of the Property was from the Estate trustees directly to the Appellants, and this transfer immediately followed the registration of the Property in the names of the Estate trustees.

[72] In any event, apart from Mrs. Bueti’s testimony, there is no evidence of an additional \$50,000 payment to the grandchildren. Moreover, Mrs. Bueti could not recall any of the details of this payment, including whether it was made by cheque or bank draft. If indeed a further payment of \$50,000 was made, one would expect that some sort of record would exist, whether it be a cancelled cheque, a carbon copy of a bank draft or a copy of a bank statement. Alternatively, one might expect that one or more of the recipients of the payment would be called to testify as to the receipt thereof. No such evidence was presented. Therefore I do not believe that there was any payment other than the \$50,000 payment to Diego Papalia identified in Exhibit A-7. Why this \$50,000 was paid directly to Diego Papalia as opposed to the Estate remains unexplained.

[73] There were other peculiarities regarding the Estate that served to call into question Mrs. Bueti’s testimony and credibility. For example, Mrs. Bueti was not able to recall or explain what happened to the balance of the Estate, valued for probate at \$224,608 (Exhibit A-2). She did suggest that 969270 Ontario Inc. was wound up prior to her father’s death, but this is at odds with the assets identified for probate, which included a “Receivable note from 969270 Ontario Inc.” valued

at \$177,300 and “216 Class “A” Pref. Shares in 969270 Ontario Inc.” valued at \$22,000. For a trustee and executor to have no recollection of the disposition of \$224,608 of assets from an estate of \$374,608 defies belief, even though that disposition did occur some time ago.

[74] Accordingly, the only credible evidence of consideration having been paid for the Property is the \$50,000 consideration identified on the Deed and the contemporaneous payment of \$50,000 to Diego Papalia funded by the mortgage. I find that these are one and the same payment. Accordingly, the cost of the Property to the Appellants was \$50,930, being the \$50,000 identified on the Deed plus the expenses of \$930 associated with the acquisition (i.e., the legal fees of \$630, the land transfer tax of \$250 and the registration fee of \$50).

[75] As for the fair market value of the Property at the time of the gift on March 11, 2004, the expert evidence suggests to me that the value lies somewhere in the range of \$231,804 to \$241,200. These numbers represent respectively the per-square-foot value determined by Mr. Carty multiplied by the actual main floor area of the house on the Property and the value of comparable one in Mr. Duckett’s valuation as adjusted by me to correct the apparent error. I note that comparable one is most similar to the Property in terms of both lot size and house size.

[76] Given the fact that neither expert had an opportunity to see the original house on the Property, the assessment of value in this case is even more of an art than usual because there is little evidence of the condition of the house. Mrs. Bueti testified that the house was in poor condition because it was occupied by an elderly gentleman who was a chain smoker. However, she did not have a single photograph of the house notwithstanding that her father had lived in it for over 40 years and it had sentimental value to her.

[77] Mrs. Bueti also testified that she visited her father “[t]wice a day every single day.” I am skeptical that she would allow her father to live in a below average environment when she was visiting the house twice every day. As well, her description of the house is contradicted by the fact that it was rented for a market rent after being cleaned and painted on the inside and that it was ultimately sold to a third party, separately from the land, rather than being demolished.

[78] Notwithstanding my concerns regarding Mrs. Bueti’s description of the house, I will accept that it may have been on the low side of average condition. Accordingly, I conclude that the value should be fixed at \$236,500, which reflects what I consider to be the mid-point of the two valuations by the appraisers. Given

the fact that neither appraiser had an opportunity to see the house and that the valuations as adjusted by me are quite close, I believe this is a fair conclusion in the circumstances.

[79] For the foregoing reasons the appeals are allowed and the Reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the deemed proceeds of disposition resulting from the gift of the Property on March 11, 2004 were \$236,500. There shall be no adjustment to the ACB of the Property used for the purposes of the Reassessments. In the circumstances, I do not award costs to either party.

Signed at Ottawa, Canada, this 29th day of October 2015.

“J.R. Owen”

Owen J.

CITATION: 2015 TCC 265
COURT FILE NOS.: 2013-3075(IT)G and 2013-3076(IT)G
STYLES OF CAUSE: JOSEPH BUETI v. HER MAJESTY THE QUEEN

SERAFINA BUETI v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Canada

DATE OF HEARING: June 24, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice John R. Owen

DATE OF JUDGMENT: October 29, 2015

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