Docket: 2016-4759(IT)I

BETWEEN:

ELEANOR MILLER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 27, 2019, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Agent for the Appellant:	Michael Sholanki
Counsel for the Respondent:	Chang Du and Peter Basta

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessment made under the *Income Tax Act* for the 2003 taxation year, by notice dated March 22, 2016, is dismissed without costs.

Signed at Ottawa, Canada, this 1st day of October 2019.

"J.R. Owen"

Owen J.

Citation: 2019 TCC 204
Date: 20191001
Docket: 2016-4759(IT)I

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Appellant,

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REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] This is an appeal by Eleanor Miller (the "Appellant") of a reassessment of her 2003 taxation year by notice dated March 22, 2016 (the "Reassessment"). The Reassessment reduced the charitable donation tax credit allowed to the Appellant for a donation on December 3, 2003 of multimedia courseware (the "Courseware") to the Canadian Charity Association of Ontario ("CCAO").

[2] The official tax receipt issued to the Appellant by the CCAO (the "Receipt") states that the donation amount was $42,000. The Receipt states under the donation amount:

> (F.M.V. described as donation amount determined April 21, 2003 as per appraisal by emc partners)

[3] The Appellant based her claim for the charitable donation tax credit on the donation amount stated on the Receipt. The Appellant reported a capital gain equal to the difference between the $7,000 purchase price paid by her for the Courseware and the $42,000 value attributed to the Courseware in the Receipt.

[4] In reassessing the Appellant by a notice dated March 22, 2007 (the "Initial Reassessment"), the Minister of National Revenue (the "Minister") based the charitable donation tax credit allowed to the Appellant for the donation of the Courseware to the CCAO on the price paid by the Appellant to purchase the Courseware. The Minister did not however eliminate the capital gain reported by the Appellant until the Reassessment was issued, 9 years after the Initial Reassessment. I was provided with no explanation as to why the Minister maintained for 9 years an inconsistent assessing position that exaggerated the Appellant's income tax liability for her 2003 taxation year.

[5] The only issue raised in this appeal is the fair market value of the Courseware at the time that it was donated by the Appellant to the CCAO. The Appellant submits that the correct amount is $42,000 while the Respondent submits that the correct amount is no greater than $7,000.

[6] The Appellant was represented by an agent and testified on her own behalf. I found the Appellant to be a credible and straightforward witness.

[7] The Respondent did not call any witnesses but did tender an affidavit sworn by Larisa Orlov on July 31, 2019 (the "Affidavit"). Ms. Orlov is an appeals officer with the Canada Revenue Agency (the "CRA"). I was advised by counsel for the Respondent that the Appellant was offered the opportunity to cross-examine on the Affidavit but declined the offer. The Appellant did not suggest otherwise.

II. The Facts

[8] In determining the Appellant's entitlement to a charitable donation tax credit for the donations made by the Appellant in her 2003 taxation year, the Minister relied on the assumptions of fact set out in paragraph 16 of the Reply, which I have reproduced as Appendix A to these reasons. In paragraph 16(ll) of the Reply, the Minister assumes that the fair market value of the Courseware donated by the Appellant to the CCAO was no more than $7,000.

[9] The Minister's assumptions of fact are to be accepted by this Court as correct unless the Appellant demolishes the assumptions by making out at least a *prima facie* case that the assumptions are not correct (*House v. The Queen*, 2011 FCA 234 at paragraphs 30 to 32).

[10] In addition to the assumptions of fact, the Respondent relies on the Affidavit. The Affidavit includes as Exhibit C a copy of the amended T5003 filed

for 2003 by the tax shelter identified as Global Learning Systems (the "GLS Program"). The tax shelter was promoted by Global Learning Systems Inc. ("GLS").[1] The amended T5003 form shows GLS's disclosure to the Minister of the magnitude of the GLS Program in 2003, which, according to the form, involved the issuance of 3,850 T5003 slips, software with a cost of $16,326,610 and eligible gifts of $103,440,600.

[11] Counsel for the Respondent stated that the figures in the amended T5003 were provided to correct and supplement the assumption of fact in paragraph 16(cc) of the Reply. While this is a hearsay purpose and GLS is not a party to the appeal, the Court is not bound by the legal or technical rules of evidence in an informal appeal.[2] In any event, in my view the information on the T5003 is unlikely to be available, 16 years after the fact, from a witness with independent knowledge and recollection of the facts stated on the form, and the information on the form was disclosed by GLS to the CRA in circumstances that provide a reasonable assurance of trustworthiness. Accordingly, the principled exception to the hearsay rule applies.

[12] The structure of the GLS Program is described in paragraphs 16(a) through 16(bb) of the Reply. I heard no evidence that casts doubt on those assumptions of fact.

[13] GLS offered to the Appellant and others, in packages described as a "$500 package", a "$1,000 package", a "$5,000 package" and a "$10,000 package", multimedia courseware comprised of computer software training programs. The name of each package reflected the purchase price of that package.[3]

[14] The Appellant purchased from GLS two $1,000 packages and one $5,000 package for a total purchase price of $7,000.[4] Each of the courseware packages was valued by GLS at six times the name of the package. For example, the $1,000 package was valued at $6,000. The total fair market value attributed by GLS to the three courseware packages purchased by the Appellant (i.e., to the Courseware) was $42,000.[5]

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[1] Paragraph 16(u) of the Reply.
[2] Subsection 18.15(3) of the *Tax Court of Canada Act*.
[3] Exhibit A-7.
[4] Exhibits A-7 and R-5.
[5] Exhibit A-7.

[15] The Appellant reviewed in a cursory way the promotional materials provided by GLS[6] and understood that there were tax benefits to the purchase and donation of the Courseware. The Appellant, who holds a PhD, stated that she is a strong believer in education and chose to participate in the GLS Program because it supported education.

[16] The Appellant did not take possession of the Courseware and did not personally use the Courseware. The Appellant executed a Transfer Agent Agreement[7] which authorized GLS to take all proceedings and execute all documents to acquire, transfer and deliver the Courseware. The Appellant also executed in favour of the CCAO a Deed of Gift[8] which appointed GLS as her agent for the transfer and delivery of the Courseware.

[17] The price paid by the Appellant for the Courseware and the fair market value of the Courseware were determined by GLS. The fair market value attributed to the Courseware by GLS was supported by a valuation provided to GLS by emc partners in a letter dated April 21, 2003 (the "Appraisal").

[18] The Appellant submitted a copy of the Appraisal without the 14 appendices referred to in the body of the Appraisal.[9] It appears from the second paragraph of the Appraisal that it was an update of an appraisal by emc partners dated September 9, 2002. The Appraisal attributed the following values to each package of courseware:

Name of Package[10]	Value Attributed to Package[11]
$500 package	$3,260
$1,000 package	$6,678
$5,000 package	$32,600
$10,000 package	$62,170

A. The Positions of the Parties

[6] Exhibits R-2, R-3 and R-4.
[7] Exhibit R-6.
[8] Exhibit R-7.
[9] Exhibit A-1.
[10] The Appraisal refers to these four packages as Package A, Package B, Package C and Package D respectively: page 2 of Exhibit A-1.
[11] Page 4 of Exhibit A-1.

[19] The Appellant submits that the donation amount of $42,000 stated on the Receipt is supported by the Appraisal and that that amount should determine her entitlement to the charitable donation tax credit.

[20] The Respondent submits that the price paid by the Appellant for the Courseware is the best indicator of the value of the Courseware at the time that it was donated by the Appellant to the CCAO. GLS created its own market for multimedia courseware and the Courseware was purchased in that market. The Appellant did not negotiate the purchase price of the Courseware but simply accepted the price fixed by GLS in the market of its own making. In any event, the Appellant has not tendered any expert evidence to rebut the Minister's assumption of fact regarding the value of the Courseware. To the extent that the Appraisal is submitted for the truth of its contents and/or for the opinions expressed in the Appraisal, it is inadmissible as hearsay and opinion evidence.

III. Analysis

[21] In *Attorney General of Canada v. Nash*, 2005 FCA 386 ("*Nash*"),[12] the Federal Court of Appeal stated in paragraph 8:

> The well-accepted definition of fair market value is found in the decision of Cattanach J. in *Henderson Estate and Bank of New York v. M.N.R.* 73 D.T.C. 5471 at 5476:
>
> > The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand.

[12] Leave to appeal to the Supreme Court of Canada refused April 20, 2006.

> Although Cattanach J. expressed the caution that his words did not constitute an "exact" definition, the extent to which his words have been adopted in the jurisprudence without change over some thirty years suggests that his approach, although not necessarily exhaustive, is now considered to be the working definition.[13]

[22] In *Klotz v. The Queen*, 2005 FCA 158 ("Klotz"), the Court stated at paragraph 8:

> Fair market value and how it is calculated are questions of fact. The determination of the appropriate market is part of determining fair market value and is an issue of fact: (*CIT Financial Ltd. v. Canada*, 2004 FCA 201 at paragraph 13, *Connor v. R.*, [1979] C.T.C. 365 at 366 (F.C.A.), *R. v. Friedberg*, 92 D.T.C. 6031 at 6034 (F.C.A.), *R. v. Pustina*, 2000 D.T.C. 6001 at 6009, paragraph 39 (F.C.A.), leave to appeal denied, 266 N.R. 393 (note).).

[23] In *The Queen v. Sackman*, 2008 FCA 177, the Federal Court of Appeal observed at paragraph 6:

> This Court has twice considered similar appeals involving the fair market value of prints purchased and donated by taxpayers through promoters such as Artistic (see *Klotz v. Canada*, 2004 TCC 147, aff'd in *Klotz v. Canada*, 2005 FCA 158 ("*Klotz*") and *Nash v. Canada*, 2005 FCA 386 ("Nash")). In both cases, the determination of the fair market value for the prints was based on evidence establishing the volume and details of the transactions by the promoters.

[24] Both *Klotz* and *Nash* involved the donation of art prints. In *Klotz*, the taxpayer was one of 660 individual Canadian taxpayers who purchased and donated prints. In *Nash*, approximately 480 transactions in prints occurred over a 3-year period.

[25] In both *Klotz* and *Nash* the court heard expert evidence on the value of the prints at the time of the donations. In *Klotz*, the Tax Court judge rejected the expert's opinion that the correct market for determining the value of the prints was the retail market for individual prints. The Federal Court of Appeal found no error in this conclusion.

[26] In *Nash*, the Tax Court judge distinguished *Klotz* and accepted the experts' evidence regarding value, but that decision was overturned on appeal. At the

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[13] The Federal Court of Appeal reiterated its position in *Nash* at paragraph 18 of *The Queen v. Gilbert*, 2007 FCA 136.

Federal Court of Appeal, Rothstein J.A. (as he then was) observed at paragraphs 26, 27 and 29:

> The groups of prints purchased by the taxpayers were donated to charities or universities within two to six months of their purchase. If any of the taxpayers had wished to sell the groups of prints within that time frame, what price could have been obtained? The inevitable answer is that the price would have been, at most, the price for which that group of prints was being sold by CVI. If a higher price was sought, a knowledgeable potential purchaser would buy from CVI. In other words, CVI's price was the highest price each of the groups of prints would bring at or near the relevant time.
>
> If Ms. Tropper's appraised values were the fair market values of the groups as the judge determined, the obvious question is why CVI did not sell for those prices. CVI dealt with the taxpayers at arm's length. It would make no sense for CVI to offer to sell to the taxpayers at one-third of the fair market value, if indeed, the fair market value was as determined by Ms. Tropper and the judge.
>
> . . .
>
> Where there is a gap between the time an asset is acquired and disposed of, the cost of the asset will normally be an unreliable basis for estimating fair market value. **But where the dates of acquisition and disposition are very close in time, barring evidence to the contrary, the cost of acquiring the asset will likely be a good indicator of its fair market value**. . . .
>
> [Emphasis and double emphasis added.]

[27] In this case, there is no expert evidence as to the value of the Courseware at the time it was donated by the Appellant. Even if under the informal procedure rule regarding evidence[14] I were to accept the Appraisal as evidence of the value of the Courseware, that evidence has little or no probative value. The 14 appendices are missing and the author of the Appraisal was not present to explain the basis for the many assumptions made in the body of the Appraisal.

[28] Paragraph 16(cc) of the Reply states:

> 3,813 charitable receipts were issued by charities participating in the Courseware Program in 2003 to individual donors, for a total alleged fair market value of Software in the amount of $102,507,240.

[14] Subsection 18.15(3) of the *Tax Court of Canada Act*.

[29] The T5003 appended to the Affidavit, which was filed with the CRA by GLS, indicates that in 2003 there were 3,850 participants in the GLS Program who purchased multimedia courseware for a total purchase price of $16,326,610. It is therefore apparent that GLS created a significant market for the multimedia courseware in much the same way as markets were created for art prints in *Klotz* and *Nash*.

[30] The Appellant purchased the Courseware from GLS for $7,000 and immediately donated the Courseware to the CCAO. The Minister assumed as a fact that the fair market value of the Courseware at the time that it was donated by the Appellant to the CCAO was no greater than the $7,000 purchase price of the Courseware.

[31] To reject this assumption of fact I would at a minimum require cogent and compelling evidence from a properly qualified expert as to why the purchase price of the Courseware in the market created by GLS is not a good indicator of the fair market value of the Courseware at the time the Appellant donated the Courseware to the CCAO and why the donation amount of $42,000 on the Receipt should be accepted as the fair market value of the Courseware. Since no such evidence has been tendered in this appeal, the Minister's assumption as to the fair market value of the Courseware at the time that it was donated by the Appellant to the CCAO must be accepted as true.

[32] For the foregoing reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 1st day of October 2019.

"J.R. Owen"

Owen J.

Appendix A

16. In determining the Appellant's non-refundable tax credits in respect of donations for 2003, the Minister made the following assumptions of fact:

The Parties

Global Learning Systems Inc.

a) on June 17, 2002, Global Learning Systems Inc. ("GLS") was incorporated in Ontario;

b) the officers and directors of GLS were Robert Lewis and Jack Wilson; and

c) the shareholders of GLS were Robert Lewis (25%), Jack Wilson (25%), and the David Singh Family Trust (50%);

Canadian International Technology Training Inc.

d) on June 13, 2002, Canadian International Technology Training Inc. ("CITTI") was incorporated in Ontario;

e) the shareholders, officers and directors of CITTI were Robert Lewis, Jack Wilson, and their respective spouses;

Infosource Inc.

f) Infosource Inc. ("Infosource") was a Florida corporation;

Canadian Charity Association of Ontario

g) the Canadian Charity Association of Ontario (the "CCAO") was a registered charity;

Ken Williams / English Lake Group LLC

h) Ken Williams was a former employee of Infosource;

i) English Lake Group LLC and Ken Williams were both located in Florida;

The Donation Program

j) on September 5, 2002, CITTI signed a licensing agreement (the "Licensing Agreement") with Infosource;

k) the terms of the Licensing Agreement were that:

   i) CITTI obtained a limited license to market and sell various software programs (the "Software"), along with the option of replicating CD-ROMS of the Software, from Infosource;

   ii) the limited license was for a 2 year period within North America and Internationally (except for the United States);

   iii) Software packages were to be priced on a per-unit basis; and

   iv) CITTI agreed to pay Infosource $1,200,000 over two years;

l) on June 20, 2003, the Licensing Agreement was amended by an addendum (the "Addendum");

m) the Addendum made the following changes to the Licensing Agreement:

   i) CITTI obtained a master license from Infosource to duplicate and sell Software in an unlimited quantity within CITTI's Canadian Charitable Donations Program for the initial two-year term of the Licensing Agreement;

   ii) different prices were agreed to for Software purchased by CITTI for use within its Canadian Charitable Donations Program;

   iii) the payment schedule from CITTI to Infosource was amended; and

   iv) CITTI obtained an option to terminate the agreement after six months with a $100,000 termination fee or after twelve months with a $50,000 termination fee;

n) on September 12, 2002, CITTI entered into a sales agreement (the "Sales Agreement") with GLS;

o) the terms of the Sales Agreement were that GLS agreed to purchase the Software as outlined in the Licensing Agreement for a period of two years for $2,000,000;

p) CITTI contracted with Ken Williams and the English Lake Group LLC to duplicate the Software on CD for a per-unit replication fee;

q) on February 27, 2003, GLS and CCAO issued a letter of understanding (the "Letter");

r) the terms of the Letter were that:

   i) CCAO would receive donations of Software from Canadian donors as arranged by GLS;

   ii) CCAO would distribute the Software; and

   iii) GLS would pledge a cash amount to CCAO equal to 9.5% of the gross donations to CCAO to offset a portion of its administrative costs;

s) on March 7, 2003, Jack Wilson applied for a Tax Shelter Number on behalf of GLS;

t) on March 12, 2004, the CRA assigned a Tax Shelter Number to GLS;

u) GLS commenced promoting its donation program (the "Courseware Program") in 2002 and continued to promote it throughout 2003;

v) the Courseware Program was promoted as follows:

   i) individual donors were offered an opportunity to purchase Software for donation to charities;

   ii) GLS claimed to be in a position to purchase, on behalf of donors, Software significantly below market value;

   iii) payments for the Software would be made to GLS, who would then act as an escrow agent in the acquisition of the Software;

   iv) promotional materials highlighted the tax benefits a donor would receive for participating in the Courseware Program and provided refund and tax calculations for different Canadian provinces;

   v) promotional materials advertised the Courseware Program as a tax-saving and wealth accumulation strategy; and

vi) promotional materials included yearly legal opinions from Fraser Milner Casgrain LLP, tax opinions from Collins Barrow Chartered Accountants, and appraisal opinions of EMC Partners Inc. ("EMC");

w) on June 23, 2003, GLS entered into an escrow agreement with Fraser Milner Casgrain LLC, establishing an escrowed fund of up to $1,000,000 to defend any attack from Canada Revenue Agency on account of any claim for a charitable tax credit by a purchaser;

x) once individual donors agreed to participate in the Courseware Program, they would sign the following documents:

i) a Transfer Agent Agreement with GLS, wherein the donor and GLS would agree that GLS would, on behalf of the donor, acquire and deliver the Software and seek charities to accept donations;

ii) a Tax Shelter Purchase Agreement with GLS, wherein the donor would agree to acquire Software packages containing various combinations of Software products; and

iii) a Deed of Gift, wherein the donor expressed his or her desire to donate the Software to a named charity;

y) the Software acquired by GLS on behalf of the donors was produced by Ken Williams / English Lake Group LLC and received by CCAO;

z) on December 30, 2003, CITTI invoked the early termination clause of the Licensing Agreement, as amended by the Addendum, paid Infosource the $50,000 cancellation fee, and paid Infosource $50,000 as a good faith gesture towards future business;

aa) GLS and CITTI designed the Courseware Program;

bb) with the exception of the amount to be donated by individual donors, all of the steps in the Courseware Program were pre-determined;

cc) 3,813 charitable receipts were issued by charities participating in the Courseware Program in 2003 to individual donors, for a total alleged fair market value of Software in the amount of $102,507,240;

<u>The Appellant's involvement</u>

dd) on a single day in 2003, the Appellant:

i) signed a Transfer Agent Agreement with GLS;

ii) signed a Tax Shelter Purchase Agreement with GLS in the amount of $7,000;

iii) signed a Deed of Gift, purporting to donate Software with a fair market value of $42,000 to CCAO; and

iv) provided a cheque to GLS in the amount of $7,000 to cover the full purchase price of the Software;

ee) the CCAO provided the Appellant with a Tax Receipt identifying a donation amount of $42,000;

ff) extrapolating from the promotional materials, an Ontario resident in 2003 who paid a purchase of price $7,000 to obtain a $42,000 CCAO donation receipt would receive a cash refund of $2,839 in excess of the cost to him calculated as follows:

Purchase price (Cost)	$7,000
Donation Receipt	$42,000
Tax Credit (40.16%)	$16,867
Less Capital Gain of 50% ($42,000 - Cost) x 50% @ 40.16%	$7,028
Net Tax Credit to Donor	$9,839
Less Purchase Price	$7,000
Cash Refund	$2,839

Valuation

gg) all of GLS's sales of Software were in packages;

hh) at no time did GLS sell Software products individually;

ii) all of the Software packages acquired by GLS were purchased under CITTI's Canadian Charitable Donations Program;

jj) GLS's normal course of business was to sell assets in packages / bulk to individuals that donated them to charities;

kk) there was a market of donors for the specific packages of Software sold by GLS;

11) the fair market value of the Appellant's charitable gift to CCAO in the Courseware Program for 2003 was no more than $7,000; and

Normal Reassessment Period

mm) for 2003, the Notice of Assessment was issued on May 13, 2004 and the Notice of Reassessment was issued on March 22, 2007.

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COURT FILE NO.:	2016-4759(IT)I
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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 27, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
DATE OF JUDGMENT:	October 1, 2019

APPEARANCES:

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Counsel for the Respondent:	Chang Du and Peter Basta

COUNSEL OF RECORD:

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Name:

Firm:

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