

Docket: 2008-4008(IT)G

BETWEEN:

ROBERT LAPALME,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence with the appeals of *Gérald Lapalme* (2008-4005(IT)I), *Jacques Lapalme* (2008-4006(IT)I) and *Pierre Lapalme* (2008-4007(IT)I), on October 18, 2010, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Marc Cantin
Counsel for the respondent: Mounes Ayadi

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* dated September 6, 2007, for the 2000 and 2002 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of August 2011.

"Réal Favreau"

Favreau, J.

François Brunet, Revisor

Docket: 2008-4005(IT)I

BETWEEN:

GÉRALD LAPALME,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of *Robert Lapalme* (2008-4008(IT)G), *Jacques Lapalme* (2008-4006(IT)I) and *Pierre Lapalme* (2008-4007(IT)I), on October 18, 2010, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Marc Cantin
Counsel for the respondent: Mounes Ayadi

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* dated December 6, 2007, for the 2002 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of August 2011.

"Réal Favreau"

Favreau, J.

François Brunet, Revisor

Docket: 2008-4006(IT)I

BETWEEN:

JACQUES LAPALME,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of *Robert Lapalme* (2008-4008(IT)G), *Gérald Lapalme* (2008-4005(IT)I) and *Pierre Lapalme* (2008-4007(IT)I), on October 18, 2010, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Marc Cantin
Counsel for the respondent: Mounes Ayadi

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* dated December 6, 2007, for the 2002 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of August 2011.

"Réal Favreau"

Favreau, J.

François Brunet, Revisor

Docket: 2008-4007(IT)I

BETWEEN:

PIERRE LAPALME,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of *Robert Lapalme* (2008-4008(IT)G), *Gérald Lapalme* (2008-4005(IT)I) and *Jacques Lapalme* (2008-4006(IT)I), on October 18, 2010, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Marc Cantin
Counsel for the respondent: Mounes Ayadi

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* dated December 6, 2007, for the 2002 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of August 2011.

"Réal Favreau"

Favreau, J.

François Brunet, Revisor

Citation: 2011 TCC 396
Date: 20110825
Dockets: 2008-4008(IT)G
2008-4005(IT)I
2008-4006(IT)I
2008-4007(IT)I

BETWEEN:

ROBERT LAPALME,
GÉRALD LAPALME,
JACQUES LAPALME,
PIERRE LAPALME,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau, J.

[1] These are appeals heard on common evidence from reassessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (“the Act”), outside the normal reassessment period, in respect of the 2000 and 2002 taxation years in the case of Robert Lapalme and the 2002 taxation year in the case of Gérald Lapalme, Jacques Lapalme and Pierre Lapalme.

[2] On December 6, 2007, the Minister of National Revenue (“the Minister”) issued two notices of reassessment in respect of Robert Lapalme, for the 2000 and 2002 taxation years, outside of the normal reassessment period. In these reassessments, he made the following adjustments:

- (a) The Minister added to Robert Lapalme's income for the 2000 and 2002 taxation years the amounts of \$15,000 and \$43,060 respectively, as an

appropriation of funds from the company Germain Lapalme & Fils inc. (the company), in accordance with subsection 15(1) of the Act.

- (b) The Minister imposed on Robert Lapalme a penalty under subsection 163(2) of the Act, in the amount of \$1,816 for the 2000 taxation year and \$4,972 for the 2002 taxation year for the unreported income mentioned in the preceding paragraph.

[3] On December 6, 2007, the Minister issued a reassessment outside the normal reassessment period in respect of Gérald Lapalme for the 2002 taxation year, making the following adjustments:

- (a) The Minister added to Gérald Lapalme's income for the 2002 taxation year the amount of \$8,430 as an appropriation of funds from the company, in accordance with subsection 15(1) of the Act.
- (b) The Minister imposed on Gérald Lapalme a penalty under subsection 163(2) of the Act in the amount of \$915 for the 2002 taxation year for the unreported income mentioned in the preceding paragraph.

[4] On December 6, 2007, the Minister issued a reassessment outside the normal reassessment period in respect of Jacques Lapalme for the 2002 taxation year, making the following adjustments:

- (a) The Minister added to Jacques Lapalme's income for the 2002 taxation year the amount of \$8,430 as an appropriation of funds from the company, in accordance with subsection 15(1) of the Act.
- (b) The Minister imposed on Jacques Lapalme a penalty under subsection 163(2) of the Act in the amount of \$915 for the 2002 taxation year for the unreported income mentioned in the preceding paragraph.

[5] On December 6, 2007, the Minister issued a reassessment outside the normal reassessment period in respect of Pierre Lapalme for the 2002 taxation year, making the following adjustments:

- (a) The Minister added to Pierre Lapalme's income for the 2002 taxation year the amount of \$8,430 as an appropriation of funds from the company, in accordance with subsection 15(1) of the Act.

- (b) The Minister imposed on Pierre Lapalme a penalty under subsection 163(2) of the Act in the amount of \$915 for the 2002 taxation year for the unreported income mentioned in the preceding paragraph.

[6] To determine the tax owed by Robert Lapalme for the 2000 and 2002 taxation years, the Minister made the following assumptions of fact stated in paragraph 6 of the Reply to the Notice of Appeal filed in respect of Robert Lapalme's appeal:

[TRANSLATION]

- (a) The company was created on March 9, 1976, by Germain Lapalme, the appellant's father;
- (b) During the taxation years at issue, the appellant and his three brothers, Pierre, Gérald and Jacques Lapalme, were shareholders and directors of the company;
- (c) The company is active in excavation and levelling;
- (d) During the taxation years at issue, Réjean Giroux, an insurance broker, offered the company life insurance policies having the following conditions:
 - (i) The company held life insurance with a company called Transamerica;
 - (ii) The type of policy chosen included an insurance portion and an investment portion;
 - (iii) During the first year corresponding to the year that a life insurance policy was purchased, the company had to pay life insurance premiums a significant portion of which was an investment;
 - (iv) A little while after the premium was paid, the broker made a one-time payment in the form of a dividend, which corresponded to almost the entire premium paid;
 - (v) The premiums for the second and third years of the policy were paid by the investment portion, so that the company benefited from insurance for free.
- (e) On November 24, 2000, the company purchased an insurance policy on Gérald [*sic*] Lapalme's life;
- (f) The company paid the insurance premium and was the beneficiary of the insurance policy;

- (g) The appellant signed the insurance application on behalf of the company;
- (h) On November 29, 2000, the insurance broker Réjean Giroux wrote a cheque for \$15,000 payable to the appellant, representing the dividend on the life insurance policy purchased by the company;
- (i) The dividend in the amount of \$15,000 belonging to the company was not repaid to it by the appellant;
- (j) The appellant did not report the amount of \$15,000 he had received from the insurance broker in his income tax return for the 2000 taxation year;
- (k) During the 2002 taxation year, the company purchased eight life insurance policies, insuring the lives of its four shareholders including the appellant.
- (l) The company paid the premiums and was the beneficiary of the insurance;
- (m) On April 18, 2002, the appellant received a cheque for \$8,430 issued by the insurance broker Réjean Giroux, Courtier d'assurance inc., representing the dividend for the life insurance policy purchased by the company on March 26, 2002;
- (n) On August 19, 2002, the appellant received a cheque in the amount of \$34,630 from the insurance broker Réjean Giroux, Courtier d'assurance inc., representing the dividend on the four life insurance policies purchased by the company on August 2, 2002;
- (o) The appellant did not repay the company the \$43,060 that he had received in dividends during the 2002 taxation year;
- (p) The appellant did not report the amount of \$43,060 he had received from the insurance broker in computing his income for the 2002 taxation year.

[7] The Minister made the reassessments outside of the normal reassessment period for the 2000 and 2002 taxation years on the basis of the following assumptions of fact stated in paragraphs 7(a) and 7(c) to (h) of the Reply to the Notice of Appeal filed regarding the appeal of Robert Lapalme:

[TRANSLATION]

- (a) The facts stated above in paragraphs 6(a) through (p);
- (b) . . .
- (c) The appellant took part in the acquisition of the life insurance policies in that he had signed them either as a representative of the company or as the insuree;

- (d) The appellant was aware that it was the company which paid the premiums and was the beneficiary of the life insurance policies;
- (e) When he received cheques directly from the insurance broker only several days after the premium had been paid, the appellant knew or should have known that he had appropriated money belonging to the company;
- (f) The appellant has been in business for several years; he knows how to distinguish between what belongs to him and what belongs to the company;
- (g) The appellant did not ask his accountant about the tax consequences of receiving money directly from the insurance broker;
- (h) The appellant signed his income tax returns for the 2000 and 2002 taxation years.

[8] In imposing the penalty on Robert Lapalme under subsection 163(2) of the Act for the 2000 and 2002 taxation years, the Minister assumed the facts stated in paragraphs 6(a) to 6(p) of the Reply to the Notice of Appeal filed in respect of the appeal of Robert Lapalme and in paragraphs 7(a) and 7(c) to 7(h) of the Reply to the Notice of Appeal filed in respect of the appeal of Robert Lapalme.

[9] Robert Lapalme testified at the hearing. First, he confirmed that he and his three brothers (Gérald, Jacques and Pierre) were the only shareholders and directors of the company after they had purchased it from their father (Germain) on August 23, 2000. However, their father had retired from business in the 1980s. The appellant dropped out of school at the Secondary II level, while his three brothers finished between Secondary II and Secondary V. In addition to having shares in the company, the four brothers also held shares or interest in the following companies and general partnership:

- Stabilisol Inc. (leasing of buildings);
- 9047-9692 Québec inc. (a subsidiary of Stabilisol Inc. at 50% - construction, leasing and sale of condominiums);
- 9081-2819 Québec inc (leasing of machinery to the company)
- Tecni-Pro Environnement inc. (a subsidiary held at 51% - plumbing fixtures)
- Groupe Lapalme SENC (building management).

[10] At the beginning of the 1990s, on the recommendation of a North Hatley notary, the company and the shareholders concluded an agreement between shareholders providing for the redemption of shares through life insurance policies. The witness stated that he and his three brothers had met the broker Réjean Giroux for the first time in 1999. He believes that his father and his brother Jacques had previously personally purchased life insurance policies from broker Giroux.

[11] The life insurance policy purchased by the company on August 23, 2000, on the life of Germain Lapalme was the only life insurance policy on the father's life in effect at that time. The date on which that life insurance policy was purchased coincides with the date on which Germain Lapalme sold his shares in the company to his sons. The application for life insurance number 080162262 was a temporary life insurance policy renewable annually, payable on death, held with Transamerica Life Canada (Transamerica). The insuree was Germain Lapalme, aged 71 at that time. The insured amount was \$200,000, the initial mode premium was \$11,108 and the projected instalment premiums were \$925.66 payable through pre-authorized monthly payments. The witness signed the application for, and on behalf of, the company.

[12] On November 29, 2000, the application for life insurance policy number 080162262 was amended in order to provide for an additional premium of 200%. The monthly instalment premium became \$1,444.25 or \$17,331 annually. The amendment was signed by Robert Lapalme for, and on behalf of, the company.

[13] Robert Lapalme acknowledged that he had received from the broker Réjean Giroux a cheque for \$15,000 dated November 29, 2000, made out in his name. He endorsed it and deposited it into his personal bank account. According to him, the cheque was a gift from the broker. He submitted that there had been no written agreement with the broker Réjean Giroux about this reimbursement, which represented almost the entire amount of the life insurance premiums for the first year. He was unable to explain why he had been the only one to receive such a gift, while his father and his three brothers had received nothing. According to him, he had discussed the receipt of that cheque with the family accountant, Michel Gagné, but he was unable to provide any evidence of this.

[14] In the spring of 2001, the company purchased four other Transamerica life insurance policies with the help of the insurance broker Réjean Giroux. All of those life insurance policies were signed by Robert Lapalme for, and on behalf of, the company whose annual premiums totalled \$33,720. The key information concerning those life insurance policies is as follows:

Life insurance policy No. 080250868
Date established: March 26, 2002
Insuree: Robert Lapalme
Insured amount: \$1,000,000
Initial premium amount: \$11,450

Life insurance policy No. 080250869
Date established: April 8, 2002
Insuree: Gérald Lapalme
Insured amount: \$1,000,000
Initial premium amount: \$5,240

Life insurance policy No. 080250871
Date established: April 8, 2002
Insuree: Jacques Lapalme
Insured amount: \$1,000,000
Initial premium amount: \$7,570

Life insurance policy No. 080250870
Date established: April 8, 2002
Insuree: Pierre Lapalme
Insured amount: \$1,000,000
Initial premium amount: \$9,460

[15] Following their purchase of the life insurance policies, the four brothers each received \$8,430 by means of cheques dated April 18, 2002, payable to them personally, drawn on the bank account of Réjean Giroux Courtier d'assurance Inc. Those cheques were endorsed by each of the four brothers and deposited into their personal bank accounts. The witness stated that the life insurance policies had been purchased because of growth in the company's sales and that he was not sure of whether or not he had spoken to accountant Gagné about receiving those cheques.

[16] In the summer of 2002, the company purchased four more Transamerica life insurance policies with the help of the broker Réjean Giroux. All those life insurance

policies were signed by Robert Lapalme for, and on behalf of, the company whose premiums totalled \$34,630. The key information concerning those life insurance policies is as follows:

Life insurance policy No. 080251132
Date established: August 2, 2002
Insuree: Robert Lapalme
Insured amount: \$1,000,000
Initial premium amount: \$12,360

Life insurance policy No. 080251130
Date established: August 2, 2002
Insuree: Gérald Lapalme
Insured amount: \$1,000,000
Initial premium amount: \$5,240

Life insurance policy No. 080251133
Date established: August 2, 2002
Insuree: Jacques Lapalme
Insured amount: \$1,000,000
Initial premium amount: \$7,570

Life insurance policy No. 080251131
Date established: August 2, 2002
Insuree: Pierre Lapalme
Insured amount: \$1,000,000
Initial premium amount: \$9,460

[17] Robert Lapalme acknowledged that he had received a cheque for \$34,630 dated August 19, 2002, made out to him, drawn on the bank account of Réjean Giroux courtier d'assurance Inc. and that he had endorsed that cheque. The witness did not remember why that other batch of life insurance policies had been purchased, and he argued that he had shared the reimbursement with his three brothers by giving them each a cheque. Those cheques were not filed at the hearing. The witness thinks that he discussed the receipt of these cheques with accountant Gagné.

[18] Robert Lapalme reminded everyone that the insurance broker Giroux had an excellent reputation at the time when the life insurance policies had been purchased and that he learned from the media only in 2004 and 2005 that the broker Réjean

Giroux had been involved in fraud. Following that information, the witness ended his business relationship with the broker Réjean Giroux and switched insurance companies.

[19] Michel Gagné, chartered accountant, testified at the hearing. He has known the Lapalme family since 1984 and he prepares the financial statements of the companies they control and tax returns for those companies and their shareholders. He confirmed that the organization chart for the companies and entities controlled by the family, filed as Exhibit I-2, appeared to be accurate for the years at issue. He stated that, in 25 years, the company had never been reassessed although it had been audited every 3 to 4 years since 1990. He expressly admitted that Robert Lapalme and his brothers never consulted him concerning the reimbursements they received from the broker Réjean Giroux. However, during the audit, he met with the broker Réjean Giroux on June 14 or 15, 2005, and the broker told him that those amounts were not taxable because they came from his own money and were gifts. In cross-examination, he acknowledged that he had known that Germain Lapalme and Jacques Lapalme had previously purchased personal life insurance policies with the help of the broker Réjean Giroux and that they had obtained reimbursements from the broker, because Germain Lapalme had asked him questions about it. He also indicated that he had prepared Robert Lapalme's income tax return for 2000 without verifying the latter's data.

[20] The insurance broker Réjean Giroux did not testify at the hearing.

[21] Lucie Lambert, an auditor for the Canada Revenue Agency (CRA), testified at the hearing. Her audit of the company's books and records in 2003 did not result in a reassessment. The company's sales in 2002 were \$12,600,000, and the company's books and records were well kept. She indicated that Germain Lapalme had not earned any income from the company in 2002 and that Robert Lapalme had signed his income tax returns for 2000 and 2002 even though they had been prepared by his accountant.

[22] As part of the audit, she reviewed the life insurance policies purchased by the company but did not verify whether the shareholders had received money in relation to those life insurance policies. It was only after the broker Réjean Giroux's affairs had been audited that she was informed that reimbursements had been received by the company's shareholders in relation to the life insurance policies purchased by the company. She did not have access to the audit file of the insurance broker Réjean Giroux or to copies of the reimbursement cheques. However, she saw the list of cheques given to the company's shareholders. On the basis of that information, she

sent Robert Lapalme an information request in a letter dated December 20, 2004, and another information request to all the appellants in a letter dated July 19, 2005. The appellants quickly responded to the last information request by producing, among other things, bank statements showing deposits of the received cheques in their personal bank accounts.

[23] Since the draft assessment was given to the appellants only on May 9, 2007, the CRA waived interest for the period of two years that had elapsed between the time the information had been provided by the appellants and the time the draft assessment had finally been issued.

[24] The auditor acknowledged that she had not verified whether the company's cheques for the life insurance premiums had been made out to Transamerica or to the broker Réjean Giroux. She admitted that she had based herself on the company's T-2 income tax returns under the item "Insurance".

Appellants' position

[25] Counsel for the appellants raised the following arguments in support of the appeals:

- (a) Subsection 15(1) of the Act does not apply in this case because there was no appropriation of the company's property by the shareholders. The company was not entitled to the amounts paid to the shareholders by the insurance broker. The company did not lose the amounts paid to the shareholders.
- (b) The amounts paid to the shareholders are the result of the broker's personal choice. The cheque for \$15,000, dated November 29, 2000, was drawn on the broker's personal bank account. There was no oral or written agreement between the broker and the shareholders whereby he was bound to make such payments.
- (c) The amounts paid by the broker were at his entire discretion. The amounts did not always correspond to the amount of the initial insurance premium (see life insurance policies purchased on March 26 and April 8, 2012);
- (d) The acts and regulations that apply to life insurance brokers do not prevent them from making gifts to their clients;
- (e) Only Transamerica could reimburse premiums or pay dividends and only to the company that had purchased the life insurance policies.

[26] Even if subsection 15(1) of the Act applies, the respondent has the burden of proving that the appellants acted negligently in not reporting as part of their income the gifts received from the insurance broker.

[27] The penalty in subsection 163(2) of the Act should not be applied in this case, since the company and the shareholders had always complied with the tax legislation as shown by the 2003 audit, which had been completed without a reassessment.

Respondent's position

[28] According to the respondent's counsel, the Court must draw an unfavorable inference from the fact that the broker Réjean Giroux did not testify at the hearing. The witness's presence was essential to confirming the "gift" theory propounded by accountant Gagné which was heresy. The Court must find that the testimony of the broker Réjean Giroux would have been unfavourable to the appellants' case.

[29] The broker Réjean Giroux formed a scheme whereby money would be taken out of the company and given to the shareholders while the company would deduct the full amount of the premiums paid.

[30] The broker Réjean Giroux's payments should have been made to the company, which had purchased the life insurance policies and paid the insurance premiums and which was the beneficiary of the life insurance policies. Had the company received these payments, this would have resulted in an equivalent reduction in the deductibility of the insurance premiums paid.

[31] The amounts paid to the appellants by the broker Réjean Giroux a few days after the life insurance policies had been purchased were directly related to the life insurance policies purchased and had been determined on the basis of the premiums paid by the company. The amounts paid to the appellants had been received by them as shareholders and directors of the company, hence, subsection 15(1) of the Act applies.

[32] By not remitting the amounts received from the broker Réjean Giroux to the company and not adding those amounts in the computation of their respective incomes, the appellants made a misrepresentation attributable to neglect knowing that the amounts received were unreasonable under the circumstances.

[33] The appellants' actions following the receipt of the broker Réjean Giroux's payments constitute a type of wilful blindness amounting to gross negligence

considering how significant the unreported amounts were. For the 2002 taxation year, the amounts unreported by Robert Lapalme constituted 45% of his income for that year.

Analysis and conclusion

[34] The first issue to be dealt with concerns the application of subsection 15(1) of the Act. The relevant portion of that statutory provision reads as follows:

Section 15: Benefit conferred on shareholder

(1) Where at any time in a taxation year a benefit is conferred on a shareholder, or on a person in contemplation of the person becoming a shareholder, by a corporation . . . the amount or value thereof shall . . . be included in computing the income of the shareholder for the year.

[35] As surprising as that may seem, the case law to the application and interpretation of that subsection is meagre. The leading case relevant herein is *Chopp v. Canada*, [1997] F.C.J. No 1551, 98 D.T.C. 6014, rendered by the Federal Court of Appeal, which confirmed not only the decision rendered by Judge Mogan of the Tax Court of Canada but also his interpretation of subsection 15(1):

4. In allowing the taxpayer's appeal, Mogan J.T.C.C. interpreted subsection 15(1) as follows:

"I think a benefit may be conferred within the meaning of subsection 15(1) without any intent or actual knowledge on the part of the shareholder or the corporation if the circumstances are such that the shareholder or corporation ought to have known that a benefit was conferred and did nothing to reverse the benefit if it was not intended. I am thinking of relative amounts. If there is a genuine bookkeeping error with respect to a particular amount, and that amount is truly significant relative to a corporation's revenue or its expenses or a balance in the shareholder loan account, a court may conclude that the error should have been caught by some person among the corporate employees or shareholders or outside auditors. Shareholders should not be encouraged to see how close they can sail to the wind under subsection 15(1) and then plead relief on the basis of no proven intent or knowledge."

...

7. As to Judge Mogan's interpretation of subsection 15(1) of the *Income Tax Act*, we find no reason to intervene.

[36] In the same case, the Federal Court of Appeal referred to the following comments of Justice Cattanach in *M.N.R. v Pillsbury Holdings Ltd.*, 64 D.T.C. 5184

(Ex.Ct.), concerning the former subsection 15(1) of the Act, which the Court considered to be still good law:

In applying paragraph (c) full weight must be given to all the words of the paragraph. There must be a 'benefit or advantage' and that benefit or advantage must be 'conferred' by a corporation on a 'shareholder'. The word 'confer' means 'grant' or 'bestow'. Even where a corporation has resolved formally to give a special privilege or status to shareholders, it is a question of fact whether the corporation's purpose was to confer a benefit or advantage on the shareholders or some purpose having to do with the corporation's business such as inducing the shareholders to patronize the corporation. If this be so, it must equally be a question of fact in each case where the Minister contends that what appears to be an ordinary business transaction between a corporation and a shareholder is not what it appears to be but is in reality a method, arrangement or device for conferring a benefit or advantage on the shareholder qua shareholder.

[37] I agree with Justice Cattanach's interpretation. In this case, we are dealing with an arrangement or device for conferring a benefit or advantage on the shareholders as shareholders. When purchasing life insurance policies from Transamerica through the broker Réjean Giroux, the members of the company's board of directors and therefore the company, knew very well or, at the very least, should have known, that payments would be made to the shareholders by the broker Réjean Giroux. They had tried it before 2000 with personal life insurance policies purchased by Germain Lapalme and Jacques Lapalme.

[38] The amounts paid by the broker Réjean Giroux to the company's shareholders were too significant and too regular to be mere gifts. Let us recall that those payments had been made by the broker Réjean Giroux several days after the life insurance policies had been purchased.

[39] As suggested by counsel for the respondent, the Court will draw an unfavorable inference from the fact that the broker Réjean Giroux did not testify at the hearing to confirm the "gift" theory put forward by the appellants, and the Court finds that the broker's testimony would have been unfavourable to the appellants' case.

[40] The second issue to examine concerns the application of subsection 152(4) of the Act, which allows the Minister to make a reassessment outside of the normal reassessment period. The relevant part of this statutory provision reads as follows:

Assessment and reassessment. The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

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

[41] In *Venne v. Canada (Minister of National Revenue – M.N.R.)*, (F.C.T.D.), [1984] F.C.J. No. 314 (Q.L.), Justice Strayer made the following comments in regard to the degree of negligence required for the Minister to make a reassessment after the normal reassessment period.

I am satisfied that it is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(a)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the words "misrepresentation that is attributable to neglect" must mean, particularly when combined with other grounds such as "carelessness" or "wilful default" which refer to a higher degree of negligence or to intentional misconduct. Unless these words are superfluous in the section, which I am not able to assume, the term "neglect" involves a lesser standard of deficiency akin to that used in other fields of law such as the law of tort. See *Jet Metal Products Limited v. The Minister of National Revenue* (1979) 79 DTC 624 at 636-37 (T.R.B.).

[42] In other words, the Minister has only to show the negligence of the taxpayers. In the case at bar, Robert Lapalme was involved every time the company purchased a life insurance policy in 2000 and 2002 as the company's authorized signatory, and on two occasions in 2002, as the insuree, just like his three brothers. The appellants knew very well that the company owned these life insurance policies and that it paid the premiums. The appellants have been in business for several years and hold shares in several companies as well as one general partnership. They know very well how to distinguish between what belongs to the company and what belongs to them personally.

[43] When they received cheques made out to them personally from the broker Réjean Giroux or from the company Réjean Giroux Courtier d'Assurance Inc. a few days after the company had purchased the life insurance policies, they should have

consulted their accountant or tax specialist about the tax implications of receiving those cheques the amounts of which were significant. According to the evidence, they did not consult anyone; they endorsed the cheques and deposited them into their respective personal bank accounts, except for one cheque received by Robert Lapalme. None of the appellants included the amounts received from the broker Réjean Giroux or from Réjean Giroux Courtier d'Assurance Inc. in the computation of their income for the 2000 and/or 2002 taxation years, as the case may be. For these reasons, I find that the appellants made a misrepresentation of facts attributable to neglect in their respective income tax returns.

[44] The third and final issue concerns the application of the penalty in subsection 163(2) of the Act. The relevant part of this statutory provision reads as follows:

False statements or omissions - Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of . . .

[45] Once again, I must refer to *Venne, supra*, where Justice Strayer made the following comment concerning "gross negligence".

"Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[46] In *Villeneuve v. Canada*, 2004 FCA 20, Justice Létourneau of the Federal Court of Appeal specified that gross negligence could be a result of wilful blindness. His comment reads as follows:

6. With respect, I think the judge failed to consider the concept of gross negligence that may result from the wrongdoer's wilful blindness. Even a wrongful intent, which often takes the form of knowledge of one or more of the ingredients of the alleged act, may be established through proof of wilful blindness. In such cases the wrongdoer, while he may not have actual knowledge of the alleged ingredient, will be deemed to have that knowledge.

[47] In view of the facts stated above, I am satisfied that the appellants, knowingly, or under circumstances amounting to gross negligence, made an omission in their tax returns for the 2000 and/or 2002 taxation years, as the case may be. They evinced a

high degree of negligence tantamount to intentional acting, or at least an indifference as to whether the Act was complied with or not. Accountant Gagné was categorical: the appellants had not consulted him concerning the life insurance policies purchased by the company in 2000 and 2002. In addition, the appellants did not tell him that they had received money from the broker Réjean Giroux or the company Réjean Giroux Courtier d'Assurance Inc.

[48] The penalties imposed under subsection 163(2) seem justified to me in the circumstances, given that the scheme was used by Robert Lapalme at least three times and that the amounts received by the appellants were significant (\$58,060 in total in the case of Robert Lapalme).

[49] For the reasons stated above, the appeals are dismissed. Costs are awarded in Robert Lapalme's case.

Signed at Ottawa, Canada, this 25th day of August 2011.

"Réal Favreau"

Favreau, J.

Translation certified true
on this 7th day of November 2011

François Brunet, Revisor

CITATION: 2011 TCC 396

COURT FILE NOs.: 2008-4008(IT)G; 2008-4005(IT)I; 2008-4006(IT)I
and 2008-4007(IT)I

STYLES OF CAUSE: Robert Lapalme, Gérald Lapalme, Jacques
Lapalme and Pierre Lapalme v. Her Majesty the
Queen

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 18, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: August 25, 2011

APPEARANCES:

Counsel for the appellants: Marc Cantin
Counsel for the respondent: Mounes Ayadi

COUNSEL OF RECORD:

For the appellants:

Name: Marc Cantin
Firm: Martel, Cantin
City: Montréal, Quebec

For the respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada