TAX ADVISOR

Legacy or Executor Fees

An uncle's legacy is considered an executor's fee

TAX COURT

BY JAMIE GOLOMBEK

One of the issues that comes up regularly in an estate situation is whether amounts received by the executor from the estate are taxable executor's fees or rather should be properly considered a tax-free legacy from the estate.

It's critically important to ensure that the will is properly drafted to minimize any ambiguity later as to the capacity in which an executor is receiving his or her funds.

A recent tax case decided in June *(Messier et al v The Queen, 2008 TCC 349)* demonstrates how such an ambiguity can arise.

Jean-Claude Messier and Pierre Messier were the liquidators (Quebec terminology for executors) of their uncle's (Raoul Messier) estate.

Raoul died in March 2005 and on May 18, 2005, each of the nephews received $15,000 from the estate. The Canada Revenue Agency included $15,000 in each of their respective incomes for 2005 in respect of remuneration each of them received for their services as liquidators of the estate.

> The nephews argued that since the will clearly stated that the amount is a "legacy," it should not be considered renumeration.

Not surprisingly, the Messiers argued that the $15,000 each of them received was a tax-free legacy bequeathed to each of them by their uncle in his will and was not "remuneration for services rendered" or executor's fees.

It is well-established law in Canada that any additional fees received by a beneficiary of an estate for the performance of executor's duties is fully taxable under the *Act*. What the court had to determine was whether the $15,000 that each executor received was a taxable "remunerative legacy" (akin to an executor's fee) or a tax-free legacy.

The court began the analysis with the presumption that the best way to determine whether the $15,000 was remuneration or a legacy was to examine their late uncle's intention, as demonstrated by any relevant wording in his will.

Article V of the will, entitled "Liquidators" clearly appoints Jean-Claude and Pierre as liquidators of the succession (estate). It then states that in return for services rendered, either in administering or liquidating the estate, they should not only be reimbursed for their "expenses, travelling costs and loss of salary" but, in addition, each liquidator should receive "for fulfilling the duties of his office… a legacy in the amount of $15,000, which may be collected from the succession capital."

The nephews argued that since the will clearly stated that the amount is a "legacy," it should not be considered remuneration but rather a gift from the estate. Furthermore, the notary who drafted the will testified that in her view, their uncle was "very grateful" to his two nephews and "probably wanted to give them an additional gift." She further testified that if the nephews had refused to act as liquidators, the estate's other beneficiaries "would undoubtedly have agreed to give each of them $15,000."

Unfortunately, this was not what was indicated in the will.

As the judge wrote, the notary's "testimony cannot serve to put a different gloss on a testamentary provision which in my view speaks for itself."

The judge concluded that, despite the fact that the term "legacy" was used, the $15,000 was clearly meant to be remuneration for the fulfillment of executor duties and thus fully taxable.

This case is clearly one that could have gone the other way if the wording in the will was less ambiguous. If the $15,000 was truly meant to be a legacy, it likely should have been specifically mentioned in the section of the will dealing with legacies as opposed to the section dealing with liquidator remuneration. AER

Jamie.Golombek@cibc.com
Jamie Golombek, CA, CPA, CFP, CLU, TEP is the Managing Director, Tax & Estate Planning with CIBC Private Wealth Management in Toronto.