



Probate Fees

Adding fees to the ACB

Probate fees apply in nearly every province and territory, although whether they are true financial burden or merely a minor nuisance depends on both where your client dies and the rate of probate tax levied by that province or territory. For example, there are no probate fees in Quebec, and Alberta levies a flat probate fee of \$400, no matter how large the estate. Compare this to Nova Scotia, which charges 1.645 per cent for estate assets greater than \$100,000.

In my September 2012 column (“Estate Fees”) I wrote about the favourable decision of the Tax Court in *Brosamler Estate v The Queen* (2012 TCC 204), which permitted a portion of the probate fees and legal fees paid by the estate to be added to the adjusted cost base (ACB) of certain properties that were previously owned by the deceased.

TAX COURT DECISION

The case involved Gunnar Brosamler, who died in Germany owning three rental properties in Vancouver that he bought several years earlier. As a result of the deemed disposition upon death, his capital gains on these three properties was substantial, and his executrix and beneficiary decided to sell at least two of the properties to generate cash to pay the tax. As a result, two of the three properties were sold within the first year following Brosamler’s death, and in each case a capital loss was realized.

The executrix used the election under the *Income Tax Act* to carry back a capital loss realized by the estate to Brosamler’s terminal tax return.

Although Brosamler’s will was originally probated in Germany, it was determined that the Estate would not be able to sell the properties to a third party unless the conveyance from the late Brosamler to the Estate was registered in compliance with B.C.’s Land Title Act. This could happen

only if the probate was “resealed” in B.C. legal fees, and B.C. probate fees were then incurred to obtain ancillary probate in B.C.

A portion of these fees were added to the ACB of the properties held by the Estate, which ultimately increased the amount of the capital loss realized by the Estate on the disposition of the properties. This capital loss was then carried back to Brosamler’s terminal tax return to reduce the deemed capital gain upon death.

THE TAKE-AWAY

It will ultimately take another case involving probate and legal fees decided under the Tax Court’s general procedure before we know for certain whether such fees can be added to the ACB of property acquired by an estate.

The Canada Revenue Agency (CRA), following its longstanding position on the tax treatment of probate fees, denied this adjustment to the ACB, claiming that probate fees and legal fees could not be added to the ACB (nor could they be deducted as an outlay or expense incurred for the purpose of disposing of the properties), and reduced the capital loss by the amount of denied expenses.

The judge disagreed with the CRA’s position, and concluded that a portion of the legal and probate fees were incurred to acquire the title to the properties that was sold; this resulted in the capital losses realized by the Estate, and in the realization

that these fees can indeed be added to the ACB of the properties acquired by the Estate.

CRA REJECTS TAX COURT’S DECISION

This victory, however, was to be short-lived. Because the case was heard under the Tax Court’s “informal procedure,” under the Tax Court of Canada Act, “[it] shall not be treated as a precedent for any other case.” That being said, informal procedure decisions, while not technically legally precedential, often influence the decisions of other judges.

At the annual conference of the Society of Trust and Estate Practitioners (STEP) held in Toronto last June, the CRA was asked for its views on the decision. Its response was recently published in a technical interpretation (2013-0480411C6).

The CRA responded that it “generally does not seek judicial review of decisions rendered under the informal procedure since they are not generally regarded as having precedential value ... The fact that CRA did not appeal the *Brosamler* decision should not be regarded as precedential.”

The CRA went on to say that the decision in *Brosamler* was based “on the unique facts of the case and does not represent the CRA’s view on the general rule.” The CRA’s general view is that probate fees can neither be added to the ACB of the estate property nor be considered an outlay or expense incurred to dispose of estate property for the purpose of calculating the gain (loss) on that property.

It will ultimately take another case involving probate and legal fees decided under the Tax Court’s general procedure before we know for certain whether such fees can be added to the ACB of property acquired by an estate. 📌

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