

The ACBs of cost

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A recent Tax Court of Canada (“TCC”) decision in [Brosamler Estate v. R.](#)¹ released on June 12, 2012, considered the issue of whether certain amounts so incurred could be added to the adjusted cost base (“ACB”) of the capital property held by the taxpayer.

To the extent that the ACB could be increased then the resulting taxable capital gain on a disposition would be lower or the capital loss would be greater. Section 54 of the *Income Tax Act* (the “Act”) defines ACB, among other things, as “...the cost to the taxpayer of the property adjusted, as of that time, in accordance with section 53...” Basically, subsection 53(1) of the Act provides for specific amounts that are added to the ACB of the property while subsection 53(2) of the Act provides for specific amounts that are deducted from the ACB of the property.

In *Brosamler*, two taxpayers appealed to the TCC: Gunnar Brosamler, deceased (“Brosamler”) and the Estate of Gunnar Brosamler (the “Estate”). The facts are briefly summarized below:

- Brosamler died in April 2008 and was a resident of Germany for income tax purposes at the time of his death;
- Brosamler owned three rental properties in Vancouver, BC (commonly referred to as Taxable Canadian Property (“TCP”));²
- As a result of the deemed disposition rules on death,³ Brosamler was deemed to dispose of his TCP and realized a capital gain of \$6,379,300⁴ on his 2008 personal income tax return;
- Brosamler’s will was subject to probate in Germany;
- The Estate wanted to sell two of the three properties for liquidity purposes. However, the Estate could not dispose of the properties to a third party unless conveyance from Brosamler to the Estate was registered in compliance with the *Land Title Act* (British Columbia) and this could only occur if the probate was resealed in BC. Accordingly, probate and legal fees were incurred and were proportionately added to the ACB of the properties by the Executrix of the Estate ;
- The Estate disposed of two of the three properties during the first year following Brosamler’s death, which resulted in the realization of a capital loss;
- The Executrix of the Estate elected to carry the capital loss back⁵ to the final tax return of Brosamler reducing the tax otherwise payable on the deemed disposition of TCP.

The appellants and the Canada Revenue Agency (“CRA”) agreed with all findings and transactions except for one – the addition of the prorated probate and legal fees to the ACB of the properties disposed by the Estate (which increased the underlying capital loss).

The CRA argued “since the Estate had acquired an interest in the properties under the Estate Administration Act (British Columbia) that ancillary probate was not required in order for the Estate to acquire an interest in the properties.” Accordingly, the CRA concluded that the additions to the Act of the disposed properties were not appropriate.

However, the TCC concluded that the interest in properties that were sold by the Estate “was an interest in the properties that could be registered under the Land Title Act by the purchasers of the properties and to acquire this interest in the properties the Estate had to incur the probate fees and legal fees.”

Accordingly, the probate fees and legal fees were added to the ACB of the properties on a proportionate basis which resulted in a greater capital loss available for carryback by the Estate.

Of further interest is the TCC’s comment that “if the amount for probate fee and legal fees is not added to the adjusted cost base of the properties, these fees were outlays or expenses incurred for the purpose of making the dispositions of the properties. As a result such amounts would be deductible in determining the capital losses realized by the Estate on the disposition of such properties.”⁶

While the outcome of *Brosamler* was clearly a win for the appellants, the decision has no direct precedential value as it was determined under the Informal Procedure of the Tax Court as opposed to General Procedure.

Nevertheless, this is an interesting conclusion and interpretation of subsection 53(1) of the *Income Tax Act*.

1. Estate of the Late Gunnar Brosamler v. HMQ, 2012 TCC 204 (Tax Court of Canada [Informal Procedure]).

2. As defined in subsection 248(1) of the Act.

3. Pursuant to subsection 70(5) of the Act.

4. Deemed proceeds of disposition were \$6,750,000 aggregate ACB of \$370,700.

5. Pursuant to subsection 164(6) of the Act.

6. Pursuant to paragraph 40(1)(a) of the Act.