Docket: 2013-211(GST)G

BETWEEN:

DENISE ARSENAULT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 28, 2015, at Montréal, Quebec.

Before: The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

Counsel for the appellant:	Serge Fournier
Counsel for the respondent:	Marielle Brazzini

JUDGMENT

The appeal from the reassessment made by the Minister of National Revenue (Minister) under section 325 of the *Excise Tax Act*, dated December 4, 2012, and bearing number F-041196 is allowed and the assessment is referred back to the Minister for reconsideration and reassessment for the sole purpose of reducing the assessment amount from $11,287.27 to $10,109.67, as conceded by the respondent at the commencement of the hearing, in accordance with the attached Reasons for Judgment.

The respondent is entitled to her costs.

Signed at Ottawa, Canada, this 13th day of July 2015.

"Lucie Lamarre"

Lamarre A.C.J.

Translation certified true
On this 26th day of August 2015
François Brunet, Revisor

Citation: 2015 TCC 179
Date: 20150713
Docket: 2013-211(GST)G

BETWEEN:

DENISE ARSENAULT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre A.C.J.

[1] This is an appeal from a reassessment made by the Minister of National Revenue (Minister) under section 325 of the *Excise Tax Act* (ETA). According to the reassessment dated December 4, 2012 (number F-041196), the assessment amount is $11,287.27 (Exhibit I-1, tab 4). At the hearing, counsel for the respondent revised the assessment amount to $10,109.67. Martin Rochette, a financial management officer with the Agence du revenu du Québec (ARQ), explained that amount. The calculations are at tab 7 of Exhibit I-1, and Mr. Rochette explained that the assessment amount had been reduced in order to take into account the interest portion only until the date of forfeiture of the property, which I will discuss below and which is the subject of this appeal.

[2] The appellant is married to Jean-Noel Gagné under the regime of separation as to property in the province of Quebec, pursuant to an agreement signed by them on July 5, 1984 (Exhibit A-1). Under the agreement, Mr. Gagné made a [TRANSLATION] "gift *inter vivos* and in fee simple of the amount of [$25,000] to the [appellant], from the date of the solemnization of their marriage, which [would become] payable on the death of the future husband. However, he [reserved] the right to pay that amount, in full or in part, at any time during the marriage, either in money or by transferring movable or immovable property to the future wife" (clause 5).

[3] That agreement was amended on December 18, 1990, following the coming into force of the *Act to Amend the Civil Code of Québec and Other Legislation in Order to Favour Economic Equality Between Spouses* (Exhibit A-2 and the appellant's testimony). Thus, the spouses expressed their wish to not be subject to articles 462.1 to 462.13 of the *Civil Code of Québec* (CCQ) regarding the family patrimony of spouses. They took advantage of it to amend some clauses of their marriage contract. Accordingly, clause 5 cited above now provided, in the same words, that the husband would make a gift of $300,000 (instead of $25,000). Clause 7 provided that, if a judgment of separation from bed and board or of divorce was rendered between the spouses, any gifts executed between the spouses under their marriage contract would be divided in half with the agreement that the spouses' principal family residence should be considered as being given in half to the spouse who is not its registered owner.

[4] On September 26, 2008, Mr. Gagné made a gift *inter vivos* to the appellant of the undivided half of an immovable comprised of a [TRANSLATION] "parcel of land . . . with a building built on the lot" located in St-Ludger, Quebec. The gift was given in execution of the gifts set out in the marriage contract, and, in particular, of a gift of $40,000 (Exhibit A-3).

[5] When he made that gift, Mr. Gagné owed $49,962.07 to the Canada Revenue Agency (CRA) under subsection 323(1) of the ETA. Indeed, according to the assessment dated June 9, 2010, Mr. Gagné was assessed as a director for the amount of net tax that Construction J.N. Gagné Inc. (corporation) should have paid for the periods from October 1, 2003, to October 31, 2008 (Exhibit I-1, tab 5, pages 1-2).

[6] On November 17, 2008, the ARQ, on behalf of the CRA, requested that a certificate stating that the corporation was in default of paying $62,488.58 be registered with the Federal Court under section 316 of the ETA. The certificate was registered on January 22, 2009 (Exhibit I-1, tab 5, page 3).

[7] Mr. Rochette explained that before assessing Mr. Gagné as a director, the ARQ had tried to enforce the execution of the corporation's debt. Because the corporation had filed a Notice of Objection, Mr. Rochette concluded a partial agreement with Mr. Gagné in March 2009 in which the corporation undertook to pay $200 per month while waiting for a final settlement. On September 25, 2009, the corporation allegedly gave an NSF cheque and the partial agreement had ended.

[8] A writ of seizure and sale was then served on the corporation on October 2, 2009 (Exhibit I-1, tab 5, pages 5-6) and a *nulla bona* return of movable property to be seized was prepared by the bailiff on February 23, 2010 (Exhibit I-1, tab 5, page 8).

[9] Mr. Gagné had been the sole director since May 7, 2002 (according to the amending declaration filed with the Inspector General of Financial Institutions of Quebec on May 7, 2002, and after that no amendments were made with regard to Mr. Gagné's withdrawal as director in the amending declaration dated September 24, 2008, in which he still appears to be the sole shareholder (Exhibit I-1, tab 5, pages 46-54). He was therefore assessed under section 323 of the ETA on June 9, 2010 (Exhibit I-1, tab 5, page 1).

[10] According to Mr. Rochette, Mr. Gagné's only asset was his undivided half of the property located in St-Ludger, which he transferred to the appellant on September 26, 2008. That was how the appellant became liable, under section 325 of the ETA for the amount owed by her husband.

[11] The appellant knew that the corporation was having financial difficulties and that it had undergone a tax audit, but did not think that the corporation's debt could be collected from their personal property.

[12] The nature of the assessment made in respect of Mr. Gagné was not explained to the appellant either by Mr. Rochette or by the objections officer, Patrick Palo Fotaras. Mr. Fotaras did not accept that the transfer of the undivided half of Mr. Gagné's property to the appellant was a gift *inter vivos* under the marriage contract. According to him, the gift set out in the marriage contract is a gift *mortis causa*, which was not payable to the appellant before the death of her husband. Accordingly, the ARQ is of the opinion that the appellant gave no consideration for the undivided half of the property transferred to her by her husband.

Statutory provisions

[13] *EXCISE TAX ACT*

> **323(1) Liability of directors.** If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are

jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

323(2) Limitations. A director of a corporation is not liable under subsection (1) unless

(*a*) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;

(*b*) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(*c*) the corporation has made an assignment or a bankruptcy order has been made against it under the Bankruptcy and Insolvency Act and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.

323(4) Assessment. The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.

323(5) Time limit. An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

325(1) Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to

(*a*) the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,

(*b*) a*n* individual who was under eighteen years of age, or

(*c*) ano*t*her person with whom the transferor was not dealing at arm's length,

the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of

(*d*) the amount determined by the formula

where

A
is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the transferee for the transfer of the property, and

B
is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the *Income Tax Act* in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and

(*e*) the total of all amounts each of which is

(i) an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or

(ii) interest or penalty for which the transferor is liable as of that time,.

but nothing in this subsection limits the liability of the transferor under any provision of this Part.

325(2) The Minister may at any time assess a transferee in respect of any amount payable by reason of this section, and the provisions of sections 296 to 311 apply, with such modifications as the circumstances require.

CIVIL CODE OF QUÉBEC

CHAPTER II
GIFTS

SECTION I
NATURE AND SCOPE OF GIFTS

. . .

Art. 1807 A gift *inter vivos* is one whereby there is actual divesting of the donor, in the sense that the donor actually becomes the debtor of the donee.

> The divesting of the donor is not prevented from being actual by the fact that the transfer or delivery of the property is subject to a term or that the transfer is with respect to certain and determinate property which the donor undertakes to acquire or property determinate only as to kind which the donor undertakes to deliver.
>
> **Art. 1808** A gift *mortis causa* is one whereby the divesting of the donor remains conditional upon his death and takes place only at that time.
>
> **SECTION V**
> **GIFTS MADE BY MARRIAGE OR CIVIL UNION CONTRACT**
>
> **Art. 1839** Gifts made by marriage or civil union contract may be *inter vivos* or *mortis causa*.
>
> They are valid only if the contract takes effect.

Issues

[14] The main issue is whether Mr. Gagné's gift of his undivided half of the property constitutes a gift *inter vivos* pursuant to his marriage contract under the Quebec civil law.

[15] Indeed, the respondent agrees in saying that, if the gift set out in the marriage contract is in fact a gift *inter vivos*, the assessment against the appellant would not stand because Mr. Gagné would have transferred his half as consideration for fulfilling his obligation to make a gift in the same amount. However, the respondent argues that the gift set out in the contract was a gift *mortis causa* and was not payable to the appellant during the husband's lifetime. According to the respondent, Mr. Gagné did not irrevocably divest himself of the gift amount when the marriage contract was signed, which would have made him the appellant's debtor for life. Accordingly, Mr. Gagné had no obligation or debt to the appellant. In giving the appellant his undivided half, he did so of his own free will, not under a contractual obligation.

[16] For her part, the appellant argues that it was a gift *inter vivos* because the payment obligation began on the day that the marriage contract was signed, but that the obligation is subject to a term in the sense that it may be fulfilled at the time of death.

[17] Alternatively, the appellant submits that the onus is on the respondent to prove the existence of Mr. Gagné's debt, not on her to prove that the debt does not exist. She cites cases decided by this Court: *Gestion Yvan Drouin Inc. v. The Queen*, 2000 CanLII 407, 2001 DTC 72, and *Mignardi v. The Queen*, 2013 TCC 67.

Analysis

Alternative argument

[18] I will first discuss the alternative argument raised by the appellant. In *Gestion Yvan Drouin*, the company appellant was assessed under section 160 of the *Income Tax Act* (ITA) for a related company's unpaid assessment. The Court accepted the argument that the onus was on the respondent to establish the existence of the related company's tax debt. The underlying reasoning is that the Minister is in a better position than the third party who was assessed under section 160 of the ITA (since the third party does not have access to the related company's documentation) to establish a *prima facie* case for the existence of the debt.

[19] In *Mignardi*, the taxpayer was assessed under section 323 of the ETA for the unpaid tax of a corporation of which he was a director. However, the Court warned against a systematic shifting of the burden of proof. The burden of establishing the tax debt is on the Minister only when he has exclusive or particular knowledge of the facts related to the underlying tax debt. Indeed, when the taxpayer is able to obtain this information from the original tax debtor, there is no need to shift the initial burden of proof. The onus is therefore on the taxpayer to rebut the Minister's assumptions of fact.

[20] In this case, the Minister established in his assumptions of fact that Mr. Gagné owed an unpaid amount under the ETA. Mr. Gagné was the sole shareholder and the sole director of the corporation, which was in default of its tax payments. The appellant is Mr. Gagné's wife. She was aware of the corporation's financial difficulties. Her husband, Mr. Gagné, was present in the courtroom with her. She was certainly able to obtain the information needed to challenge the underlying assessment. To quote the Federal Court of Appeal in *Orly Automobiles Inc. v. Canada*, 2005 FCA 425, the burden of proof that rests on the taxpayer to rebut the Minister's assumptions of fact is not to be lightly, capriciously or casually shifted. Any shifting of the taxpayer's burden to provide and to report

information that he knows or controls can compromise the integrity and the credibility of the system (paragraph 20).

[21] In addition, the respondent has proven that a certificate stating the amount owed by the corporation had been registered and that execution for the amount had been returned unsatisfied before an assessment was made in respect of Mr. Gagné under subsections 323(1) and (2) of the ETA.

[22] I am therefore of the opinion that no evidence was submitted to show that the original assessment in respect of Mr. Gagné was erroneous.

Main argument

[23] The respondent cites a landmark case, *Hennebury c. Hennebury*, Soquij AZ-81011092, decided by the Quebec Court of Appeal on April 2, 1981, which discussed the principles to extract when determining whether a gift by marriage contract is a gift *inter vivos* or a gift *mortis causa* under the Quebec civil law. The Quebec Court of Appeal made the following comments regarding the nature of gifts (at page 5):

> [TRANSLATION]
>
> The nature of gifts
>
> The nature of the gift must be sought in the actual terms of the marriage contract given the principles found in the doctrine and jurisprudence.
>
> When the clause does not include an actual obligation and an actual divestment, even if the parties made the effort to specify that it was a gift *inter vivos*, the gift is considered to be a gift of future property *mortis causa* (Roger COMTOIS, *Essai sur les donations par contrat de mariage*, Montréal, 1968). According to the same author, the criteria for distinguishing between these two types of gifts are associated with divestment, irrevocability, the terms used and the facts and circumstances relative to the transaction to determine the parties' intention (Ibid., p. 124).
>
> Merely mentioning death in a gift, however, is not sufficient for it to be regarded as a gift *mortis causa*. A gift *inter vivos* may require death as a term of becoming exigible (Ibid., p. 132).

[24] In that case, the marriage contract stipulated, among other things, that the gift *inter vivos* was irrevocable and payable at any time after the solemnization of

the marriage (except for the gift of movable property, for which a term of 10 years was stipulated). The right of return in favour of the donor was also provided in case the donee predeceased the donor. In consideration, the donee (the wife) forfeited the dower.

[25] The Quebec Court of Appeal, on the basis of the wording of the marriage contract, eventually concluded that this was a gift *inter vivos* by which the donor had actually irrevocably divested himself of the amounts in question. The Court held that there was no pure condition precedent. It also stated that the right of return was incompatible with a gift *mortis causa*. The Court stated the following (at page 6): [TRANSLATION] "It was only because the donor stopped being the owner that he wants to ensure that the property will come back to him after the donee's death".

[26] The Court concluded that the donor became the debtor for the amounts in question and that the donee could collect them starting after the solemnization of the marriage and after the term of 10 years expired for the movable property.

[27] The Court also stated that the forfeiture of the dower, agreed to by the wife as consideration, was significant in that the dower was a survival benefit; it was more logical to forfeit it for an immediate benefit than a benefit on death.

[28] It is also worth recalling that in *Hennebury* there was no clause providing that the amount provided for was payable on death.

[29] In *Droit de la famille – 2806*, Soquij AZ-97011827, dated October 14, 1997, the Quebec Court of Appeal analyzed a gift by marriage contract the terms of which were analogous to those in this case. The Court summarized the doctrine and the case law as follows at page 6:

> [TRANSLATION]
>
> - A gift is not necessarily *mortis causa* just because the clause mentions the donor's death.
>
> - Even though the words "gift *inter vivos*" are written, the clause will be interpreted as being *mortis causa* if:
>
> - it does not include an actual obligation;
> - it does not include an actual divestment; or
> - there is a pure condition precedent.

- The facts and circumstances must be examined to determine the parties' intention;

- Even if the gift becomes exigible at the time of death, it can still be *inter vivos*.

[30] In that case, the Quebec Court of Appeal concluded that the gift set out in the marriage contract (in similar terms to those in this case) did not result in any divestment or create any immediate obligation for the donor and that the condition of becoming exigible was the donor's death. Death was not simply a term of performance. The fact that the parties to the contract had stipulated that this was a gift *inter vivos* could not override the actual terms of the obligation. The Court held therefore that this was a gift *mortis causa*.

[31] In this case, the appellant, citing a more recent case of the Quebec Court of Appeal, *Follows v. Follows*, 2012 QCCA 1128, wanted to show that death was not a condition of the gift becoming exigible but simply a term. She argues that death in this case is the term by which the gift becomes exigible, not a formal condition of the gift's existence. The gift is therefore a gift *inter vivos* with death as the term of becoming exigible, not a gift *mortis causa* conditional on death.

[32] *Follows* describes the characteristics of a gift *inter vivos*, namely, divestment, irrevocability, the terms used and the designation of the contract, the determinative facts and the parties' intention. It is acknowledged that the fact that a gift is described as being *inter vivos* may be a potential but not necessarily determinative indication of the parties' intention. A gift described by the parties as being *inter vivos* can, however, be a gift *mortis causa* (paragraph 51, which quotes Professor Pierre Ciotola). That case was not about a gift by marriage contract, however. It was about a discharge from debt. The Court found that the donor (creditor) had not made the discharge from debt subject to her death occurring before a certain date. The Court considered that death was a term and that it was, therefore, a gift *inter vivos*.

[33] Regarding other cases to which the appellant referred, I am of the view that they are of no assistance in her case. I will analyze some of them.

[34] In issue in *Droit de la famille – 131134*, 2013 QCCS 2167, was a gift *inter vivos* clearly stipulated as being irrevocable, which is not the case here.

[35] In *Droit de la Famille - 092725*, 2009 QCCS 5127, the judge referred to a Quebec Court of Appeal case (*Droit de la famille - 2369*, dated February 26, 1996, 200-09-000454-956) which analyzed a gift by marriage contract that stipulated the future husband made a gift *inter vivos* after the solemnization of the marriage, which [TRANSLATION] "[would] become exigible after the future husband's death unless, in the event of the future spouses' divorce, it [was] ruled by a competent tribunal that said amount [would] become exigible before the future husband's death". The future husband reserved the right to pay the amount at any time during the marriage. The contract specified that the gift was thus made by the future husband to the future wife on the express condition that, should the marriage be dissolved by divorce, the gift would become a gift *inter vivos* between the spouses, exigible immediately, except for the right of a court to postpone or reduce its payment or declare it forfeit. The future spouses agreed that, should their marriage end in divorce, they would then be able to establish between them a new due date for the gift, which would then become a gift *inter vivos*.

[36] The Quebec Court of Appeal concluded in that case that it was clear that, without that part of the clause concerning potential divorce, the wife was not entitled to request the payment of the gift before the husband's death. The Court concluded that there was no actual divestment or obligation to make the gift. The Court added that, before the term of the donor's death, the donee could not require its payment. Citing *Hennebury*, *supra*, the Court held that it was a gift *mortis causa*.

[37] The appellant also referred to *O c. V.*, [1997] RL 590 (S.C.). In that case, there was in issue a stipulation analogous to the one in issue herein. The Superior Court came to the conclusion that there was a gift *inter vivos* since there was divestment and a real obligation for the future husband. Before making that ruling, the judge referred to a case decided by the Quebec Court of Appeal in *Droit de la famille - 2538*, dated November 1, 1996 (J.E. 96-2179). In that case, the future husband made the future wife a gift *inter vivos* in fee simple starting from the solemnization of the marriage of a sum of money that he promised to pay her [TRANSLATION] "at any time after the solemnization of the future marriage". If that gift was not made during the husband's lifetime, it would be payable on his death. In addition, the husband had a right of return if the wife predeceased him. The Court of Appeal concluded in that case that the option reserved by the husband to pay on his death did not affect the nature of the gift, which did not become a gift *mortis causa* as would have been the case if he had undertaken to pay it on his death but with the option of paying before it.

[38] In my view, the decision rendered by the Superior Court of Québec in *O. c. V.* does not reflect the doctrine propounded by the Quebec Court of Appeal. It states that if the donor undertakes to pay on his death, but with the option of paying before death, as is the case here and in *O. c. V.*, it is a gift *mortis causa*.

[39] To return to the issue in the present case, upon reading the two contracts filed in evidence (the most recent amending only a few clauses of the original marriage contract, the other provisions of which remained in force as long as they did not contradict the amendments), I note the following points: there is no mention that the gift is irrevocable; the wife does not forfeit the dower in consideration of the gift; there is no right of return in favour of the husband in case his wife predeceases him; it is clearly stipulated that the gift will become exigible only upon the husband's death (even though he reserves the right to pay the gift amount during the marriage). With respect to the clause in article 7 of the contract, which provides that the family residence will have to be considered as having been given one-half to the spouse who was not its registered owner, in case of a judgment of separation from bed and board or of divorce, it can give rise to a gift *inter vivos* only when a judgment of separation or divorce is handed down, not before (see *Droit de la famille - 092725* (QCCS), *supra*, page 11); *B. (F.) c. L. (C.)*, 1997 CarswellQue 977, paragraphs 3 and 4).

[40] In my view, in the absence of a judgment of separation or divorce, this is a gift *mortis causa* within the meaning given to that phrase by the doctrine and the case law. In the present case, death is not a term, as the appellant submits, but a condition of exigibility.

[41] Accordingly, Mr. Gagné's transfer to the appellant of his undivided half of the property located in St-Ludger was not made in consideration of the discharge of his obligation to make a gift *inter vivos* to his wife under a marriage contract.

[42] The appeal is allowed for the sole purpose of reducing the assessment amount as requested by the respondent at the start of the hearing. The appellant is therefore liable for an amount of $10,109.67 under section 325 of the ETA.

[43] The respondent is entitled to her costs.

Signed at Ottawa, Canada, this 13th day of July 2015.

"Lucie Lamarre"

Lamarre A.C.J.

Translation certified true
On this 8th day of January, 2016
François Brunet, revisor

CITATION:	2015 TCC 179
COURT FILE NO:	2013-211(GST)G
STYLE OF CAUSE:	DENISE ARSENAULT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 28, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	July 13, 2015

APPEARANCES:

Counsel for the appellant:	Serge Fournier
Counsel for the respondent:	Marielle Brazzini

COUNSEL OF RECORD:

For the appellant:

Name:	Serge Fournier
Firm:	BCF, LLP Montréal, Quebec

For the respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada