

Docket: 2013-2186(IT)G

BETWEEN:

MANON CAWTHORNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 20, 2015, at Montréal, Quebec.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant: Serge Fournier

Counsel for the Respondent: **Christina Ham**

AMENDED JUDGMENT

The appeal from an assessment, number 1839578, under the *Income Tax Act* is dismissed, with costs to the respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day **of May** 2016.

“B. Paris”

Paris J.

Translation certified true
on this 4th day of August 2016.

François Brunet, Revisor

Citation: 2016 TCC 94

Date: 20160419

Docket: 2013-2186(IT)G

BETWEEN:

MANON CAWTHORNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] This is an appeal from an assessment established by the Minister of National Revenue (the Minister) under subsection 160(1) of the *Income Tax Act* (ITA). In this assessment, the Minister holds the appellant and her common-law spouse, Denis Savard, jointly and severally, liable for Mr. Savard's tax debt of \$178,024 owed under the ITA for the 2000 and 2001 taxation years.

[2] Section 160 of the ITA allows the Minister to recover a tax debt from a person other than the tax debtor if certain conditions of the Act are met. Generally speaking, subsection 160(1) will apply if the tax debtor makes a non-arm's length transfer of property, and if the consideration given for the property is less than the fair market value of the property at the time of the transfer.

[3] According to the respondent, on April 30, 2003, Mr. Savard transferred property to the appellant, specifically, apartment 1209 at 15 rue des Émeraudes, in Repentigny, Quebec (the property) for the sum of one dollar, when he had a tax debt of \$2,009,293.73.

[4] The only issues are whether the property was transferred to the appellant and, if the answer is affirmative, what consideration was given for the property.

Facts

[5] The appellant and Mr. Savard have been in a common-law relationship since 1999.

[6] Mr. Savard acquired the property on May 31, 2000, and, on June 14, 2001, Scotia Mortgage Corporation (Scotia) gave him a \$175,000 mortgage loan on this property.

[7] In 2003, the appellant planned to open a massage therapy centre called Laser Spa, financed, in part, by a small business loan (SBL). However, she says that her financial records were not good enough for her to obtain the SBL.

[8] To help the appellant carry out her project, Mr. Savard offered to sell her the property for one dollar, which would [TRANSLATION] “improve her financial records,” thus allowing her to qualify for an SBL.

[9] At the time, Mr. Savard had been about to list the property for sale and the appellant testified that she and Mr. Savard agreed that, if she sold it at a later date, she would give Mr. Savard the full net value of the property.

[10] Thus, on April 7, 2003, the appellant and her spouse signed an agreement titled [TRANSLATION] “Condo loan to finance Laser Spa.” The relevant stipulation reads as follows:

[TRANSLATION]

1. On or before April 30, 2003, Manon Cawthorne may purchase, for one dollar plus assumption of the \$175,000 Scotia Bank mortgage, the condo owned by Denis Savard located at 15 des Émeraudes, Apt. 1209, Repentigny, Quebec;

2. When the condo is sold or sufficient financing for Laser Spa is obtained, Manon Cawthorne will return the full net equity of the condo to Denis Savard;

3. This loan is for a maximum of three years;

4. This is an interest-free loan.

[11] On the same day, Mr. Savard put the property up for sale.

[12] On April 30, 2003, Mr. Savard transferred the property to the appellant. This transfer was documented in a notarial instrument of transfer, stipulating that the transfer was made for [TRANSLATION] “the sum of one dollar and other good and valuable considerations,” and subject to the condition that the appellant assume the existing mortgage.

[13] After the property was added to her assets, the appellant submitted financial records listing her assets and liabilities to obtain the SBL. The appellant’s obligation to return the net value of the property to Mr. Savard does not appear anywhere on those records.

[14] On May 1, 2003, the appellant incorporated her company and began her operations.

[15] Between April 30 and June 3, 2003, Mr. Savard paid the mortgage and other fees associated with the property.

[16] On June 3, 2003, the appellant sold the property to third parties for \$353,025.

[17] In accordance with the commitment made to her spouse, she gave Mr. Savard the proceeds of the sale after the mortgage of \$181,397.46 was paid off.

[18] On April 30, 2003, Mr. Savard's total tax debt was \$2,009,293.73, comprised of \$1,915,140.72 in taxes, interest and penalties for the 2000 taxation year, and \$94,153.01 in taxes, interest and penalties for the 2001 taxation year.

[19] On June 13, 2013, the Minister assessed the appellant for \$178,024 under section 160 of the ITA, calculated as follows:

Value of the building	\$353,025
(Mortgage on the building)	(\$175,000)
Net value of the building	\$178,025

(Consideration)	(\$1)
Surplus	\$178,024

Appellant's position

[20] The appellant says that the property was not transferred because the legal relationship between the appellant and Mr. Savard in respect of the property was, in substance, in the form of a mandate, as was the case in *La Reine v. Lemire*, 2013 FCA 242.

[21] Alternatively, the appellant states that she provided consideration equal to the property's fair market value, for its transfer. She states that the consideration given included her commitment to return to Mr. Savard the full net value of the property at the time of its sale. Therefore, the appellant asks that the Court dismiss the respondent's argument that the notarial contract was a simulation intended to deceive third parties and that the agreement between the appellant and her spouse regarding repayment of all proceeds of the sale constitutes a counter-letter.

[22] The appellant submits that the consideration indicated in the instrument of transfer included [TRANSLATION] "other good and valuable considerations" and that this phrase took into account the appellant's commitment to repay Mr. Savard the

net value of the property. The appellant asks the Court to consider *Tanguay v. La Reine*, 97 DTC 947, where the Court concluded, on the basis of facts similar to those in this case, that there had been no simulation.

Respondent's position

[23] The respondent maintains that the Minister is not bound by the agreement entitled [TRANSLATION] "Condo loan" (Exhibit A-3) between the appellant and Mr. Savard because it was a counter-letter and the transfer dated April 30, 2003 (Exhibit I-1) whereby the property was transferred constitutes a simulation within the meaning of section 1451 of the *Civil Code of Québec*, R.S.Q. c. C-1991 (C.C.Q.).

[24] Counsel for the respondent also says that *Lemire* is not applicable in this case because the taxpayer in that case was not part of a simulation, as the appellant is here. Faced with simulation, the Minister may consider the apparent instrument, i.e. the notarial transfer of the property for one dollar and assumption of the existing mortgage, to be a counter-letter.

[25] Finally, counsel for the respondent submits that this notarial instrument makes no mention of another instrument or other consideration that may have been

provided by the parties and that the Court must conclude that no consideration was given other than the sum of one dollar and assumption of the existing mortgage.

Applicable Legislation

[26] The relevant parts of subsection 160(1) of the ITA and the C.C.Q. read as follows:

160(1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

(b) a person who was under 18 years of age, or

(c) a person with whom the person was not dealing at arm's length,

the following rules apply:

(d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the

Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and

(e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable

to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

1451. Simulation exists where the parties agree to express their true intent, not in an apparent contract, but in a secret contract, also called a counter-letter.

Between the parties, a counter-letter prevails over an apparent contract.

1452. Third persons in good faith may, according to their interest, avail themselves of the apparent contract or the counter-letter; however, where conflicts of interest arise between them, preference is given to the person who avails himself of the apparent contract.

Analysis

[27] To determine the nature of the legal relationship between the appellant and Mr. Savard with respect to the property and any consideration given to Mr. Savard by the appellant, the issue of simulation must first be considered.

[28] In my opinion, the evidence presented to the Court clearly shows that the agreement dated April 8 concluded between the appellant and Mr. Savard is a counter-letter in which they expressed their true intentions regarding the transfer of the property to the appellant, which were contrary to the terms of the notarial instrument of transfer. According to the appellant herself, she wanted to present a

[TRANSLATION] “improved financial records” to the financial institution to which she had applied for an SBL, by claiming to own the property, and that the net value of the property, after deduction of the existing mortgage, belonged to her. The document titled [TRANSLATION] “Provisional balance sheet at May 1, 2003,” which she admits to submitting to the financial institution in her name, does not list under liabilities her obligation to return the full net value of the property to Mr. Savard at a later date. There is no doubt that the appellant wanted to create a false impression of her net worth and that she attempted to do so by means of the notarial instrument of transfer. It follows that the notarial instrument was a simulation.

[29] I do not accept the submission of counsel for the appellant that the phrase [TRANSLATION] “other good and valuable considerations” included with the price set in the notarial instrument of transfer refers to her commitment to give Mr. Savard the full net value of the property because she wanted to give the impression that this net value belonged to her and not to Mr. Savard. It also contradicts the information in the balance sheet to which I previously referred. In the light of all the evidence, it is my opinion that the agreement titled [TRANSLATION] “Condo loan” was not a complement to the notarial instrument of transfer as the appellant claims, but was, instead, a counter-letter.

[30] Given the counter-letter and simulation, the appellant's case differs from that of the taxpayer in *Tanguay*, in which Mr. Justice Dussault said at paragraph 22:

[TRANSLATION]

Considering the evidence presented, I do not believe that the notarial contract constitutes a simulation intended to deceive third parties, or that the agreement between the appellant and her spouse regarding repayment of her part of the property constitutes a counter-letter. . . .

[31] *Lemire*, decided by The Federal Court, is not applicable here for the same reason. The Federal Court concluded that, on the basis of the evidence accepted by the trial judge, Ms. Lemire [TRANSLATION] “did not take part in a simulation” (*Lemire* decision, paragraph 33).

[32] Thus, faced with a simulation, the Minister may, under section 1452 of the C.C.Q., make use of the apparent contract, to the effect that property was transferred for the consideration of one dollar and assumption of the existing mortgage.

[33] For all these reasons, the appeal is dismissed with costs to the respondent.

Signed at Ottawa, Canada, this 19th day of April 2016.

“B. Paris”

Paris J.

Translation certified true
on this 4th day of August 2016.

François Brunet, Revisor

CITATION: 2016 TCC 94

COURT FILE NO.: 2013-2186(IT)G

STYLE OF CAUSE: MANON CAWTHORNE AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 20, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF AMENDED May 24, 2016

JUDGMENT:

APPEARANCES:

Counsel for the Appellant: Serge Fournier

Counsel for the Respondent: Christina Ham

COUNSEL OF RECORD:

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