

Docket: 2001-2961(GST)G

BETWEEN:

ANDRÉ CHARTRAND, EXECUTOR OF
THE ESTATE OF MONIQUE CHARTRAND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 18, 2006, at Ottawa, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:

Pierre McMartin

Counsel for the Respondent:

Gérald Danis

JUDGMENT

The appeal from the assessment made under section 325 of the *Excise Tax Act*, notice of which is dated August 21, 2000, and bears the number PL-2000/176, pertaining to a transfer made on March 27, 2000 between André Chartrand and Monique Brassard Chartrand of the property located at 285 Maple, Gatineau, is dismissed with costs.

Signed at Ottawa, Canada, this 12th day of June 2007.

“Lucie Lamarre”

Lamarre J.

Translation certified true
on this 20th day of February 2008

François Brunet, Revisor

Citation 2007TCC327
Date: 20070612
Docket: 2001-2961(GST)G

BETWEEN:

ANDRÉ CHARTRAND, EXÉCUTEUR AND THE
ESTATE OF MONIQUE CHARTRAND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] André Chartrand was the sole shareholder and director of 126257 Canada Inc. (the “Company”), who operated Dépanneur Chartrand (“Dépanneur”), in the city of Gatineau, Quebec, since 1983. This Company was struck from the list of the Inspecteur général des institutions financières (“IGIF”) on January 21, 2002 (Exhibit I-1).

[2] On August 27, 1999, a reassessment was made by the Ministère du Revenu du Québec (the “Minister”) against the company, for unpaid goods and services tax (“GST”) with interest and penalties during the period from December 1, 1994, to September 5, 1998, for a total of \$36,848.96 (Exhibit A-4).

[3] On July 21, 2000, Mr. André Chartrand was personally assessed for \$36,010.88 under subsection 323(1) of the *Excise Tax Act* (ETA) as director of the Company (Exhibit A-8), in respect of GST not paid by the Company and subject to the assessment of August 27, 1999.

[4] On March 27, 2000, André Chartrand and his spouse, Monique Brassard, who had been married since June 24, 1972, without a prior marriage contract and

who were therefore governed by the regime of the partnership of acquests in the province of Quebec, signed before Quebec notary Claudine Cournoyer an agreement by which they adopted the regime of separation of property for the future, pursuant to the provisions of *Civil Code of Québec* (CCQ) (Exhibit I-2).

[5] On the same day, March 27, 2000, the two spouses signed a partition of acquests agreement as a result of the previously signed agreement that modified their matrimonial regime and by which the partnership of acquests which previously governed them was dissolved (Exhibit A-11). By this agreement, Monique Brassard became the creditor of André Chartrand for the amount of \$71,600 and he accepted to settle his debt to her by transferring the entirety of his property rights to the family residence located at 285 Maple, Gatineau, Quebec, which was valued at \$94,200 at the time. This property had been received in 1979 by André Chartrand from his father's estate (Exhibit A-10).

[6] On August 21, 2000, Monique Brassard received a notice of assessment by which the Minister was claiming from her \$22,407.48 under the terms of section 325 of the ETA. The Minister considered that she had Mr. Chartrand's property transferred to her, without consideration, while Mr. Chartrand owed a tax debt to the Minister. The amount of the tax debt related to unpaid GST representing 23 per cent of the entire debt owed by Mr. Chartrand to tax authorities, Ms. Brassard was assessed for an amount equivalent to 23 per cent of the advantage received by her. This advantage was evaluated by the Minister at \$94,200, the value of the property on Maple Street on the date of the transfer, March 27, 2000 (see the Reply to the Notice of Appeal, paragraph 7(k) and Exhibit A-11). On October 16, 2000, Monique Brassard contested this assessment and signed under her married name, Monique Chartrand (Exhibit A-12). On April 5, 2001, the Minister confirmed the assessment, concluding that he could not consider that the Maple Street property had been transferred to Ms. Brassard by Mr. Chartrand following an order or judgment by a competent court or following a written separation agreement and that, at the time of the transfer, the two spouses lived apart due to the breakdown of the marriage (Exhibit A-13). It is precisely on this point that the Appellant challenges the assessment.

[7] In his testimony, André Chartrand said that since 1995, he and his spouse no longer lived as a couple. Each of them occupied their own separate room in the family residence, i.e. the Maple Street property, which this dispute relates to. The couple had two children, born in 1973 and 1975, and in 1998, both of them had left the family home. Mr. Chartrand said that at that time, in 1998, he had moved into the basement, to which he had a direct outside entrance. There was no kitchen in

the basement, but Mr. Chartrand said that he rarely ate at home. Starting in 1998, he and his spouse no longer went out socially as a couple. They only saw each other to discuss the finances of the house and the Dépanneur. Already in 1998, Ms. Brassard's health was deteriorating. She had an operation to remove a large tumour and spent four months in hospital. She then had two consecutive hip operations. She was then diagnosed with brain cancer that killed her on November 24, 2003, according to the death certificate attached to Exhibit A-9. During this period, i.e. in 2000, the Company went bankrupt and Ms. Brassard, despite her declining health, bought back the Dépanneur from the trustee. Mr. Chartrand operated it because Ms. Brassard had no idea how the business ran. In February 2001, they ceased operating this business and Mr. Chartrand personally went bankrupt in 2003.

[8] Mr. Chartrand explained that he stayed in the family residence to take care of Ms. Brassard, whose health was deteriorating day by day. In addition, as Revenu Québec had seized all his assets, he had no money for accommodations elsewhere. He did not file a petition for divorce or separation from bed and board because he did not see the point of doing so.

[9] On January 11, 2003, Ms. Brassard added to her will, before Quebec notary Michel Blais, a codicil by which she bequeathed the Maple Street property to her children. Also she said she bequeathed by particular title to André Chartrand, her spouse, her rights to her pension fund and the remainder of her moveable and immovable property. In it she declared that she was married to André Chartrand under the regime of the partnership of acquests (see codicil to the will, in Exhibit A-9). Not only is there no indication of a change of matrimonial regime, but Ms. Brassard declares at the third paragraph of this codicil that her marital status and matrimonial regime have not changed and are not being changed. At the hearing, Mr. Chartrand said that when he and Ms. Brassard met the Quebec notary Cournoyer on March 27, 2000, they wanted everything to be settled between him and his spouse and considered that they were putting an end to their conjugal relationship.

Submissions of the parties

[10] Counsel for the Appellant invokes subsection 325(4) of the ETA to argue that Ms. Brassard was not jointly responsible for the tax debt owed by Mr. Chartrand. Subsection 325(4) reads as follows:

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) an individual who was under eighteen years of age, or

(c) another 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

$$A - B$$

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.

...

(4) Despite subsection (1), if at any time an individual transfers property to the individual's spouse or common-law partner under a decree, order or judgment of a competent tribunal or under a written separation agreement and, at that time, the individual and the individual's spouse or common-law partner were separated and living apart as a result of the breakdown of their marriage or common-law partnership (as defined in subsection 248(1) of the *Income Tax Act*), for the purposes of paragraph (1)(d), the fair market value at that time of the property so transferred is deemed to be nil, but nothing in this subsection limits the liability of the individual under any provision of this Part.

[11] According to counsel for the Appellant, the two agreements signed by Mr. Chartrand and Ms. Brassard on March 27, 2000, in fact constitute a separation agreement even though this is not specifically stated. He suggests that the testimony of Mr. Chartrand that he no longer cohabitated with Ms. Brassard, in conjunction with the partition of acquests by the agreement of separation of acquests (Exhibit A-11), prove that the spouses in fact entered into a written separation agreement due to the dissolution of their marriage. He notes that the phrase "separation agreement" is defined at subsection 248(1) of the *Income Tax Act* as follows:

248. (1) In this Act.

...

"separation agreement" includes an agreement by which a person agrees to make payments on a periodic basis for the maintenance of a former spouse or common-law partner, children of the marriage or common-law partnership or both the former spouse or common-law partner and children of the marriage or common-law partnership, after the marriage or common-law partnership has been dissolved, whether the agreement was made before or after the marriage or common-law partnership was dissolved;

[12] According to him, this definition is not exhaustive: the word "includes" makes it clear that there may be several forms of separation agreement. He cites Jean-Marie Fortin and André Lareau, *Fiscalité matrimoniale*, loose-leaf (Farnham, Québec: Publications CCH/FM Ltée) at page 2234, and argues that an agreement indicating the parties' desire to live apart can be verbal and can result from the facts. He argues that the courts have held that two spouses could be separated while living under the same roof (see for example *Boos v. M.N.R.*, 61 DTC 520;

M.N.R. and Longchamps et al., 86 DTC 1694; *Kelner v. Canada*, [1995] T.C.J. No. 1130 (QL)).

[13] According to counsel for the Appellant, the evidence revealed that there was a separation agreement and that by this agreement, Mr. Chartrand indebted himself to Ms. Brassard and paid his debt by transferring the Maple Street property.

[14] According to counsel for the Respondent, the evidence does not reveal that the spouses intended to separate. If this had been the case, it would have clearly shown in the notarized documents. Moreover, if their intention had been to separate, they would not have opted for the regime of separation of property. The two agreements signed before the notary had the effect of dividing their property specifically to be governed in the future to the regime of separation of property. Moreover, the two spouses mutually helped one another until the death of Ms. Brassard: she by accepting to buy back the Dépanneur so that Mr. Chartrand could continue to run it, and he by supporting his spouse until the end of her days. Even if they slept in separate rooms, counsel for the Respondent argues that it cannot be concluded that they behaved as a couple who had ended their marriage. The notarized documents cannot be made to say what they do not say. According to him, the evidence does not show that the parties intended to sign a separation agreement or that they lived apart at the time of the transfer.

Analysis

[15] I agree with counsel for the Respondent. Certain criteria have been established by the case law (see *Lavoie v. R.*, 1999 CarswellNat 2113, [2000] 2 C.T.C. 2137 (T.C.C.), in which our Court referred to *Molodowich v. Penttinen*, (1980), 17 R.F.L. (2d) 376, cited in *Milot v. R.*, 1995 CarswellNat 1987, [1996] 1 C.T.C. 2247 (T.C.C.), to determine whether individuals are living in a conjugal relationship:

1. Shelter:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

2. Sexual and Personal Behaviour:

- (a) Did the parties have sexual relations? If not, why not?

- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?
- (f) What, if anything, did they do to assist each other with problems or during illness?
- (g) Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

- (a) preparation of meals;
- (b) washing and mending clothes;
- (c) shopping;
- (d) household maintenance; and
- (e) any other domestic services?

4. Social:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning the children?

[16] In this case, the Appellant did not convince me that he no longer lived in a conjugal relationship with Monique Brassard in March 2000. I would add that in the codicil signed in January 2003, filed on consent as Exhibit A-9, Ms. Brassard referred to Mr. Chartrand as still being her spouse. In addition, the notary, Mr. Blais, who drew up the codicil to the will, did not seem to be aware of the change of matrimonial regime since, according to the codicil, the spouses were governed by the regime of partnership of acquests and neither their marital status nor their matrimonial regime were changed. It would appear that the two agreements signed in March 2000 (Exhibits I-2 and A-11), were not registered in the register of personal and movable real rights, as required by articles 2934 and 2941 of the CCQ to be effective against the world.

[17] Articles 2934 and 2941 CCQ read as follows:

2934. The publication of rights is effected by their registration in the register of personal and movable real rights or in the land register, unless some other mode is expressly permitted by law.

...

2941. Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect.

Rights produce their effect between the parties even before publication, unless the law expressly provides otherwise.

[18] In addition, in this codicil, Mr. Chartrand, as spouse, is the beneficiary of Ms. Brassard's retirement plans, thereby benefiting from a tax break, since as spouse, he can inherit Ms. Brassard's retirement fund without tax implications, tax-free.

[19] In my opinion, Mr. Chartrand cannot "win them all". If he was still considered Ms. Brassard's spouse at her death, and thereby benefits from her retirement plans without tax implications, he cannot argue at the same time that he was no longer her spouse in March 2000, in order to avoid the tax consequences of the transfer of property, while he owed a tax debt to the government.

[20] Therefore, at the end of the day, I hold that since the spouses did not live separately at the time of the transfer of the house and that the agreements signed

before the notary were not agreements of separation from bed and board, the conditions of the exception set out in subsection 325(4) of the ETA have not been met and subsection 325(1) is therefore applicable.

[21] Since we have no evidence and since there is reason to believe that the modification of the matrimonial regime was not published in the register of personal and movable real rights, the spouses were still under the regime of partnership of acquests when the property was transferred in March, 2000, with regard to third parties, including the Minister. As this modification of matrimonial regime was not effective against the world, it cannot be said that Mr. Chartrand owed Monique Brassard \$71,600 for the purposes of the application of section 325 of the ETA. The value of the advantage received by Monique Brassard was \$94,200, of which 23% or 21,666 was owed to the Minister in respect of Mr. Chartrand's debt for unpaid GST.

[22] I therefore rule that the Appellant cannot benefit from the exemption provided for in subsection 325(4) of the ETA and that the assessment under appeal (for the amount of \$22,407.48, including interest) must be confirmed.

[23] The appeal is dismissed with costs.

Signed at Ottawa, Canada, this 12th day of June 2007.

“Lucie Lamarre”

Lamarre J.

Translation certified true
on this 20th day of February 2008

François Brunet, Revisor

CITATION: 2007TCC327

COURT FILE NUMBER: 2001-2961(GST)G

STYLE OF CAUSE: ANDRÉ CHARTRAND, EXECUTOR OF
THE ESTATE OF MONIQUE
CHARTRAND AND HER MAJESTY THE
QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE HEARING: May 18, 2006

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: June 12, 2007

APPEARANCES:

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