

Docket: 2007-2132(GST)I

BETWEEN:

MICHEL BEAUCHAMP,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 30, 2007, at Montréal, Quebec
Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Charles Ouellet

Counsel for the Respondent: Nancy Morency

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the assessment made under the *Excise Tax Act*, and dated April 25, 2006, is allowed, and the assessment is vacated.

Signed at Edmundston, New Brunswick, this 19th day of August 2008.

"François Angers"

Angers J.

Translation certified true
on this 14th day of October 2008.

Brian McCordick, Translator

Citation: 2008 TCC 420
Date: 20080819
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BETWEEN:

MICHEL BEAUCHAMP,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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REASONS FOR JUDGMENT

[1] This is an appeal from an assessment made on April 25, 2006, against the Appellant, under section 325 of the *Excise Tax Act* (ETA). Subsection 325(2) of the ETA enables the Minister of National Revenue ("the Minister") to assess a transferee for an amount payable under section 325. Subsection 325(1) sets out the circumstances under which it applies. It is worded as follows:

325. (1) **Tax liability re transfers not at arm's length** – 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.

[2] It must therefore be determined whether, in the instant case, the Appellant is jointly and severally liable for the debt that Groupe Immobilier D.M.A. Inc. ("D.M.A.") owes the Minister. It is important to note that the Reply to the Notice of Appeal was not filed within the time allotted by the *Tax Court of Canada Rules (Informal Procedure)* and that the Court dismissed the Respondent's motion to give the Reply the same effect as though it had been filed within the allotted time.

[3] D.M.A. is a property management corporation that also owns and manages some immovables. At all relevant times, the Appellant and Ronald Duhaime each held 50% of D.M.A.'s voting and participating shares, and both were directors of the corporation. Under a contract of sale dated October 28, 1999, D.M.A. transferred the ownership of three immovables located in St-Jean-sur-Richelieu to the Appellant and Mr. Duhaime. According to the Appellant, Ronald Duhaime simply came to him with the idea, completed transfer document in hand. It was Mr. Duhaime, in his capacity as D.M.A.'s president, who had the power to sign the transfer. The consideration recorded in the transfer document is \$1,498,609. A declaration under section 9 of the *Act respecting duties on transfers of immovables*, R.S.Q., c. D-15.1, states that, according to the parties to the act of sale, the amount constituting the basis of imposition for the transfer of the immovables was \$1,722,000. The basis of imposition of the transfer duties is whichever of the amounts contemplated in section 2 of the Act is greater, and in the instant case, the greater amount is the immovables' market value at the time of the transfer, that is to say, \$1,722,000.

[4] The notary's certificate concerning the contract of sale was signed on July 4, 2001. In the certificate, the notary refers to an application for registration of the contract of sale by D.M.A., and attests that the document accurately reflects the parties' intent. The act of transfer (contract of sale) was published (registered) on April 26, 2002.

[5] The Appellant testified that, prior to the transfer of the immovables in October 1999, there was a third shareholder, who, along with Mr. Duhaime, looked after D.M.A.'s legal and financial affairs. This third shareholder left after certain irregularities, about which the Appellant provided no particulars, were discovered. The Appellant said that his relationship with Mr. Duhaime was initially good, but that things worsened with time, especially after the immovables were transferred. It became increasingly difficult for the Appellant to obtain information about D.M.A.'s activities – so difficult, in fact, that he began to look for a way out. He also had trouble getting information about the three transferred buildings because D.M.A. continued to manage them as though nothing had changed.

[6] A few months before the act of sale was signed, the Appellant learned from Mr. Duhaime that the sale was being suspended and would take place later. However, no document was signed and the Appellant did not cast doubt on that assertion. The Appellant had no contact with D.M.A.'s notary or accountant. The Appellant continued to carry out his duties, but went to the office less and less often. According to his testimony, the Appellant felt uncomfortable dealing with Mr. Duhaime and had trouble finding out what was going on. He described Mr. Duhaime as manipulative and provided a few examples in support of this characterization. The Appellant said that the situation is the cause of his health problems.

[7] It was only in April 2006, when he was assessed, that the Appellant found out about the interval between the date that the immovables were transferred and the date that they were registered. In addition, the Appellant and Mr. Duhaime sold the immovables in question on October 7, 2002, to a third party in consideration of \$1,875,000, and, on the same day, the Appellant sold all his shares in D.M.A. to Mr. Duhaime.

[8] According to the Notice of Appeal, the Appellant never exercised control over D.M.A., and, since October 7, 2002, the Appellant has no longer been a shareholder or director of D.M.A. D.M.A.'s notary was supposed to amend the registers in order

to confirm that the Appellant had withdrawn as shareholder and director of D.M.A., but these amendments have still not been made to the register.

[9] The only person called as a witness for the Respondent was collection officer Guylaine Turbide. Ms. Turbide tendered in evidence the declaration concerning D.M.A.'s GST remittances, and, according to that document, D.M.A. had no net tax to pay on the date that the immovables were transferred. However, the declaration says that, at the time that the transfer of the immovables was registered, D.M.A. owed the tax authorities \$13,475.82 in tax, interest and penalties, a total that was subsequently reduced to \$10,089.80 because D.M.A. made payments on October 31, 2002 and April 27, 2004.

[10] Ms. Turbide testified that her records contained a copy of the act, signed on October 7, 2002, in which the Appellant and Mr. Duhaime transferred the immovables to a third person. She said that when she found out about the document, she requested a copy of the act of transfer or contract of sale of D.M.A.'s immovables to the Appellant and Mr. Duhaime. She said that this enabled her to confirm, in late March 2006, that the transfer actually took place, and that it enabled her to assess the Appellant on April 25, 2006.

[11] As for the points in issue, the first question is whether the transfer of the immovables in question was at arm's length. The second question is whether there was a time limit for the assessment under section 325 of the ETA. The second question is quite important, because the French wording of subsection 325(2) of the ETA does not specify when the Minister can assess a transferee, whereas the English version of the same subsection provides that the Minister may "at any time" assess a transferee. If I find that there was a limitation period, I must ascertain its duration as well as its starting point: was it the date of the transfer, namely October 28, 1999, or the date of its publication, namely April 26, 2002? This requires me to determine when the transfer took place for the purposes of section 325 of the ETA. Did the transfer occur on the date of the act of transfer (contract of sale), namely October 28, 1999, or the date of its publication, namely April 26, 2002?

[12] The constituent elements of section 325 of the ETA are similar to those of section 160 of the *Income Tax Act* ("the Act"). They are measures or mechanisms that facilitate the recovery of one person's principal tax liability from another person where property has been transferred, there is a non-arm's length relationship between the transferor and the transferee, and the value of the consideration is lower than the property's fair market value. The consequence of such a transfer is to impoverish the transferor's patrimony and enrich the transferee's patrimony. Thus, first and foremost, there must be a tax liability at the time of the transfer, and this is why it is important to determine when the transfer in issue took place. The tax liability for the purposes of section 325 is the amount that the transferor owes under the ETA for the reporting period in which the transfer took place and for the prior reporting periods of the transferor. The ETA provides for monthly and quarterly reporting periods.

[13] However, in the case at bar, D.M.A. did not have any liability under the ETA for the reporting period corresponding to the October 28, 1999 transfer date or for its prior reporting periods. Actually, it was only on the date that the transfer was published, that is to say, in April 2002, that D.M.A. became liable to pay an amount under the ETA.

[14] Article 2941 of the *Civil Code of Québec* (C.C.Q.) provides:

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 effects between the parties even before publication, unless the law expressly provides otherwise.

[15] Based on the notary's certificate that the contract of sale reflects the parties' intent, I am satisfied that, on October 28, 1999, a consensual contract, having the effect of transferring D.M.A.'s ownership rights to the Appellant and Mr. Duhaine, was entered into. Based on a transfer date of October 28, 1999, and on the fact that the transferor had no liabilities under the ETA for the reporting periods that included or preceded the time of the transfer, the first condition that must be met in order for section 325 to apply has not been met.

[16] However, the Respondent submitted that such a contract of sale only produces effects if it is registered or published as prescribed by law, and that, consequently, the transfer was only effective on the date of its publication, in April 2002, at which point the transferor had a liability under the ETA.

[17] In *Les obligations*, 5th ed. (Yvon Blais), Justice Jean-Louis Beaudoin of the Quebec Court of Appeal and Professor Pierre-Gabriel Jobin of McGill University wrote the following with respect to the effect of publication on a contract of sale of immovable property:

[TRANSLATION]

. . . However, where third persons, who are not parties to the contract, are involved, there is an exception for immovable property. In Quebec law, immovable property has traditionally been considered the most important type of wealth, and this is why it has been considered important to protect non-parties by giving them notice of transfers of the ownership of immovables. Thus, between the parties to the contract, the ownership of immovables is transferred by mutual consent, just as it is with movables. However, as against third parties, contracts that transfer ownership of immovable property are effective only if they are registered in accordance with the land registration formalities prescribed by law. Thus, registration is not a requirement for a transfer of immovable property between the parties; it is only required in order for such a transfer to be set up against third persons who are in good faith.

[18] In light of this statement, with which I agree, registration or publication is not necessary in order for ownership of an immovable to be transferred. Publication is necessary in order for the rights to be set up against third persons, such as outsiders who have acquired rights in the immovable under a judgment. In my opinion, section 325 of the ETA confers no right to the Canada Revenue Agency in the immovables themselves, and the publication of the transfer is not a condition that must be fulfilled in order for section 325 of the ETA to apply. Failure to publish the contract of sale does not prevent the Minister from assessing the transferee. It is the knowledge of the existence of a transfer that meets the requirements of section 325 of the ETA and causes an assessment of a transferee to be valid, regardless of the type of property transferred. In the case at bar, the Minister was notified of the transfer of the immovables through the publication of the contract of sale, but the discretion to assess the transferee under section 325 of the ETA does not give the Minister a right in the immovable in question and thereby enable the Minister to challenge the transfer.

[19] In fact, this issue was raised at the hearing because the French version of subsection 325(2) of the ETA differs from the English version in that it does not expressly empower the Minister to assess under that subsection at any time. If, under the French version, the Minister cannot assess at any time, counsel for the Respondent submits that the applicable assessment period is four years, because subsection 325(2) refers to sections 296 to 311 of the ETA. Here are both the English and French versions of subsection 325(2).

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.

325. (2) Le ministre peut établir une cotisation à l'égard d'un cessionnaire pour un montant payable en application du présent article. Dès lors, les articles 296 à 311 s'appliquent, compte tenu des adaptations de circonstances

[20] However, counsel for the Respondent submits that Parliament's intent was to empower the Minister to assess a transferee at any time, and that this intent can be seen from corollary legislation, that is to say, the English and French versions of section 160 of the Act and the English version of subsection 325(2) of the ETA.

[21] Since I have found that D.M.A. had no liability to the Minister at the time of the transfer, and, therefore, that section 325 does not apply, it is unnecessary for my reasons to go beyond this. However, based on the principles of interpretation applicable to tax statutes, which were articulated by the Supreme Court of Canada in *Imperial Oil Ltd. v. Canada*, 2006 SCC 46, *per* Lebel J., the strict rule of interpretation is no longer applicable, and is replaced by the modern method of statutory interpretation, in which the wording of the enactment is interpreted as a whole, having regard to the ordinary meaning of words as well as the context in which they appear.

[22] In the case at bar, the context and purpose of the statute are clear, as is Parliament's intent. The English version of subsection 325(2) of the ETA specifies that the Minister can assess "at any time". In addition, its counterpart, section 160 of the Act, clearly shows that Parliament had no intention of subjecting assessments to a limitation period, because the English version contains the words "at any time" and the French version contains the words "*à tout moment*".

[23] Justice Rothstein, then a justice of the Federal Court of Appeal, discussed Parliament's intent in enacting subsection 160(1) of the Act in *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489 (QL), even though he was dissenting on the issue of whether the Minister's delay in issuing a notice of assessment under section 160 of the Act is reviewable by the Federal Court of Appeal. He wrote as follows at paragraph 92 of his decision:

92. While in the sense identified by the majority, subsection 160(1) may be considered a harsh collection remedy, it is also narrowly targeted. It only affects transfers of property to persons in specified relationships or capacities and only when the transfer is for less than fair market value. Having regard to the application of subsection 160(1) in specific and limited circumstances, Parliament's intent is not obscure. Parliament intended that the Minister be able to recover amounts transferred in these limited circumstances for the purpose of satisfying the tax liability of the primary taxpayer transferor. The circumstances of such transactions makes it clear that Parliament intended that there be no applicable limitation period and no other condition on when the Minister might assess.

[24] Reading the words of the statute in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, I am of the opinion that one cannot conclude that the French version prevails. Rather, preference must be given to the persuasive arguments in support of the position that the English version reflects Parliament's true intent. Consequently, there is no limitation period for an assessment under subsection 325(2).

[25] Neither the issue of non-arm's length relationships at the time of the transfer, nor the issue of the fair market value of the immovables, need be addressed. The appeal is allowed, and the assessment against the Appellant is vacated.

Signed at Edmundston, New Brunswick, this 19th day of August 2008.

"François Angers"

Angers J.

Translation certified true
on this 14th day of October 2008.

Brian McCordick, Translator

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