Docket: 2008-1212(IT)G

BETWEEN:

CHRISTIANE GAGNON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 15 and 16, 2010, at Québec, Quebec

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the appellant:	Robert Marcotte
Counsel for the respondent:	Marielle Thériault

JUDGMENT

The appeal from the assessment under subsection 160(2) of the *Income Tax Act*, notice of which bears number 30495 and is dated April 12, 2007, is dismissed, with costs to the respondent, in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 24th day of September 2010.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 16th day of December 2010

François Brunet, Revisor

Citation: 2010 TCC 482
Date: 20100924
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BETWEEN:

CHRISTIANE GAGNON,

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REASONS FOR JUDGMENT

Archambault J.

[1] Christiane Gagnon is appealing from an assessment made by the Minister of National Revenue (**the Minister**) pursuant to section 160 of the *Income Tax Act* (**the Act**). The Minister held Ms. Gagnon liable for $22,113.72, which was the tax debt of her common-law partner, Robert Desrosiers, in respect of the 2001 taxation year. On the date the assessment was issued, that is, April 12, 2007, the tax debt could be broken down as follows: $14,855.99 in tax, and $7,257.73 in accrued interest.[1] The assessment was the result of a transfer made by Mr. Desrosiers on March 4, 2001, by means of a notarial deed (**deed of sale**), of his undivided half of the family residence located on Delisle Street in Saint-Augustin-de-Desmaures (**the residence**). The deed of sale was published on March 6, 2001.

[1] Exhibit A-1, tab 1, p. 2 and tab 3, p. 6.

Factual background

[2] Ms. Gagnon and Mr. Desrosiers purchased the residence on July 21, 1997. The price agreed on was $215,000. (See Exhibit A-1, tab 4.) In his testimony, Mr. Desrosiers indicated that, before purchasing it, he had disposed of another residence in 1997, which he had owned alone, even though he had lived there with Ms. Gagnon. Mr. Desrosiers thought it would be appropriate that Ms. Gagnon become a co-owner of the new residence.

[3] A hypothec of $130,000 was granted to Ms. Gagnon and Mr. Desrosiers by the Caisse populaire Laurier on July 11, 1997, in order to finance the acquisition of the residence. On August 22, 1997, Mr. Desrosiers obtained a second loan in the amount of $25.000, the repayment of which was secured by a hypothec on the residence. However, Ms. Gagnon was not personally liable for that loan, but only under that hypothec. (See Exhibit A-1, tab 6.) It seems that the first loan was refinanced with a new hypothec of $175,000 granted by the Caisse populaire Laurier so that Mr.Desrosiers disposed of $45,000 for use in his business. The deed was not offered in evidence; only a financing offer dated April 29, 1999, and addressed to both Mr. Desrosiers and Ms. Gagnon. (See Exhibit A-1, tab 7.)

[4] On March 4, 2001, Mr. Desrosiers transferred all his undivided rights to the residence to Ms. Gagnon, except the right to use the residence.[2] Ms. Gagnon also granted Mr. Desrosiers a right of use, as described in article 13 of the deed of sale:

> [TRANSLATION]
> 13. **RIGHT OF USE**
>
> The transferee grants, for life, the enjoyment, as a right of use, to the transferor, accepting, of the property subject to the instant transfer and described above, without being bound to take out insurance or to furnish to the owner other security guaranteeing the performance of his obligations.
>
> This right of use is thus granted with the only consideration being that the transferor will pay half of the property tax.
>
> This right may not be assigned or seized.

[2] See article 1 of the deed of sale; Exhibit A-1, tab 8; and Exhibit I-1. The exception is described in article 10 of the deed of sale, which deals with the price:

> [TRANSLATION]
> The seller reserves, for life, the enjoyment, as a right of use, of the property subject to the instant sale and described above without being bound to take out insurance or to furnish to the owner other security guaranteeing the performance of his obligations.

[5] The clause regarding price in the deed of sale is worded as follows:[3]

> [TRANSLATION]
> 10. **PRICE**
>
> This transfer is granted for consideration of the transferee's assuming the following payments, and relieves the transferor of all liabilities:
>
> - The amount of EIGHTY-FOUR THOUSAND THREE HUNDRED NINETY-NINE DOLLARS AND FORTY CENTS ($84,399.40), representing the part owed by the transferor to the Caisse Desjardins de Sainte-Foy, in accordance with deed number 495 611, published in Portneuf, of which the total balance as at twenty [*sic*] HUNDRED NINETY-EIGHT [*sic*] DOLLARS AND SEVENTY-NINE CENTS ($168,798.79);[4]
>
> - The amount of TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500), representing the part owed by the transferor to the Caisse Desjardins de Sainte-Foy, in accordance with deed number 485 834, published in Portneuf, the total balance of which, on February twentieth, two thousand-and-one (2001-02-20), was TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), which the transferor undertakes to repay alone and relieves the transferee of all liability. [*sic*]
>
> [Emphasis added.]

[6] Even though there is a conflict between the introductory part of paragraph 10 and the end of the sub-paragraph dealing with the $12,500 hypothec, which stipulates that it is [TRANSLATION] "the transferor [who] undertakes to repay [it] alone and relieves the transferee of all liability", the Minister assumed that Ms. Gagnon undertook to repay the amount of $12,500. Thus, he assumed that Ms. Gagnon had paid a consideration of $96,900 ($84,399 + $12,500). (See paragraph 17(e) of the amended Reply to the Notice of Appeal.) According to Ms. Gagnon and Mr. Desrosiers, Ms. Gagnon had in fact assumed the entire hypothec of $25,000 and not just the $12,500 mentioned in the deed of sale. However, as mentioned earlier, Ms. Gagnon was not personally liable for the $25,000, but only under the hypothec. In addition, no other deed was signed to amend the deed of sale dated March 4, 2001.

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[3] Exhibit I-1, article 10.

[4] The deed of sale is incomplete and full of errors. In particular, the description of the $84,399.40 balance assumed by Ms. Gagnon does not provide details of the initial loan. The balance written in numbers does not match the balance written out in words. It seems probable, however, that it corresponds to the $175,000 loan described in the offer of financing dated April 29, 1999, which included an additional loan of $45,000. Thus, only half of that additional loan was apparently assumed by Ms. Gagnon.

[7] Mr. Desrosiers indicated that he had transferred his undivided half of the residence (except for the right of use) to Ms. Gagnon in order to protect her financial situation because of his own financial problems. However, he did not know at the time that he was indebted to the Minister. Although Mr. Desrosiers did not challenge the Minister's assessment for the 2001 taxation year that increased his business income, it seems that the increase was related to income from alleged sales of property on behalf of third parties.

[8] In the assessment made under section 160 of the Act, the Minister relied on the assumption that the fair market value (FMV) of the transferred property, namely, the undivided half of the residence, was $137,000 at the time of the transfer. In support of this assumption, the Minister provided an appraisal report for the residence, prepared by Patrice Gagnon, accredited appraiser with the Canada Revenue Agency. (See Exhibit I-4.) The appraiser determined that, on March 6, 2001, the FMV of the residence was $274,000. He used the direct comparison method. (See Exhibit I-4 and I-5.) He did not take into account the fact that it was only an undivided half of the residence or that there had been a dismemberment of the right of ownership, given the right of use retained by Mr. Desrosiers. He also did not determine the FMV of the right of use granted by Ms. Gagnon to Mr. Desrosiers.

[9] Ms. Gagnon did not call any expert witnesses or produce an expert's report to contradict the appraisal prepared by Mr. Gagnon. However, she entered data on sales of other properties in the same sector as the residence, which were taken from the real estate broker database known as MLS. The real estate broker who gathered the data testified at the hearing. Jocelyne Savard is an acquaintance of Mr. Desrosiers. She spoke about several real-estate sales in the Saint-Augustin-de-Desmaures sector, for which she provided sale prices and values entered on the municipal appraisal roll. She determined a ratio between the sale price and that value (**price/municipal value ratio**). (See Exhibit A-1, tab 10.)

[10] For example, it is indicated that the first property found in Exhibit A-1, tab 10, page 52, was sold for $175,000, while its municipal value was $142,000. She thus determined that the property was sold at a price/municipal value ratio of 1.23 (175,000/142,000). Ms. Savard stated that she had determined an average ratio of 1.104 based on data from 14 properties.[5] If this ratio were applied to the municipal

[5] The data used by Ms. Savard are on pages 57 to 87 of tab 10, Exhibit A-1: they consist of documents containing complete data sheets for properties sold. The data on pages 52 to 56 are summaries that Ms. Savard used to calculate individual ratios. On the basis of all of these data, I calculated an average ratio of 1.127 based on the individual ratios for the 31 properties for which both the sale price and the municipal assessment were known. Applying this new average ratio to the residence's municipal value of $214,000 results in a higher value, namely, $241,178.

value of the residence, which is $214,000,[6] it would result in a market value of $236,256 would be obtained for the residence. In cross-examination, Ms. Savard acknowledged that the sale price/municipal value ratios that she had used to determine the average ranged from 0.93 to 1.92. Furthermore, the age of the properties concerned ranged from 13 to 18 years, and maybe from 9 to 21 years.

[11] Ms. Gagnon was also issued an assessment dated September 1, 2006, under section 14.5 of the Quebec *Act respecting the ministère du Revenu* (**AMR**) given that Mr. Desrosiers was in default of certain applicable Quebec statutory provisions (see Exhibit A-1, tab 11). The assessment resulted from the transfer of the undivided half of the residence by Mr. Desrosiers to Ms. Gagnon on March 6, 2001. The amount assessed was $12,810.16. A similar assessment in respect of the same transfer was issued on the same day under subsection 325(2) of the *Excise Tax Act* (**ETA**) on behalf of the Minister. The amount of that assessment was $17,815.44. (See Exhibit A-1, Tab 13.) In the memorandum on objection prepared by the objections officer of the Ministère du Revenu du Québec (**Revenu Québec**), the sale price of the residence was set at $199,424.40, and the FMV was a rounded value of $230,000.[7] Accordingly, Ms. Gagnon's benefit was $30,575.60. Thus, the total value of the residence seems to have been attributed to the undivided half.

[12] It should be noted that that FMV was determined by Gilles Vézina, Revenu Québec accredited appraiser, on December 20, 2005. The appraisal date is also March 6, 2001 (Exhibit I-2). Mr. Vézina estimated the value of the residence by applying the rate of increase of house prices in Greater Québec, as determined by the Canada Mortgage and Housing Corporation. Based on that agency's data, the average price of houses rose from $85,000 to $91,600 between 1997 and 2001; that is, it increased by 7%. The appraiser multiplied the 1997 purchase price of $215,000 by 1.07, which gave an estimated value of $230,000.

[13] Mr. Desrosiers made an assignment in bankruptcy on January 30, 2007. (See Exhibit A-1, tab 16.) Revenu Québec filed a notice of objection to the discharge of the bankrupt debtor dated July 27, 2007. In a transaction (settlement) deed signed not only by Revenu Québec, but also by Mr. Desrosiers and Ms. Gagnon, it is indicated that Mr. Desrosiers had transferred to his spouse his undivided half of the residence on [TRANSLATION] "March 6, 2001". In that document, the debt under the AMR and the debt under the ETA are mentioned. The transaction indicates that Christiane Gagnon will pay Revenu Québec an overall amount of $13,000 in order to

[6] See Exhibit I-4; see tab 9 of Exhibit A-1.
[7] See Exhibit A-1, tab 15.

settle the dispute resulting from the two notices of assessment. However, in reality, an amount of $10,900 was paid by Mr. Desrosiers' business. (See Exhibit A-1, Tab 17.) Only $2,100 was apparently paid by Ms. Gagnon. (See Exhibit A-1, tab 16, page 117.)

The issues

[14] Ms. Gagnon's appeal raises several issues, including the following:

(1) Should the assessment be vacated because the Minister assumed that the date of the transfer was March 6, 2001, while the real date was March 4, 2001?
(2) Should the interest amount of $7,257.73 be excluded from the tax debt?
(3) What was the FMV of the right of ownership transferred by Mr. Desrosiers to Ms. Gagnon? Should the right of use reserved by Mr. Desrosiers be taken into account?
(4) What was the FMV of the consideration provided by Ms. Gagnon? Should the other half of the $25,000 hypothec be added even though it was not mentioned in the deed of sale? Should the right of use granted by Ms. Gagnon to Mr. Desrosiers at the time of the transfer be taken into account?[8] Should the amounts of GST, QST and provincial income tax for which Ms. Gagnon was held liable under provisions in the ETA and AMR similar to those in section 160 of the Act also be taken into account?

Analysis

- Invalid assessment

[15] According to Ms. Gagnon's counsel, the Minister had to assess her with great accuracy because section 160 goes beyond what the law ordinarily prescribes, and, essentially, made it possible to expropriate part the Ms. Gagnon's property. This is an

[8] However, the parties did not raise this issue. Since it is immaterial to the solution I propound in these reasons, I did not request the reopening of arguments.

exceptional power. Since the assessment indicates that ownership was transferred on March 6, 2001, while it was actually transferred on March 4, 2001, that error invalidates the assessment.[9] Counsel for Ms. Gagnon was unable to cite any case law dealing with similar facts in support of his claim. In my view, this argument is without merit. It is an immaterial error. There was no prejudice to Ms. Gagnon. In fact, whether the sale took place on March 4 or indeed March 6, 2001, has no impact on the determination of the FMV. It does not significantly change the appraisal process for the residence. Of course, had the sale taken place on March 4, 2002, the situation might have been different. In addition, the provisions in section 166 and subsection 152(3) of the Act should be recalled:

> **166. Irregularities –** An assessment shall not be vacated or varied on appeal by reason only of any irregularity, informality, omission or error on the part of any person in the observation of any directory provision of this Act.
>
> **152(3) Liability not dependent on assessment –** Liability for the tax under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

- Whether the tax debt includes interest

[16] Ms. Gagnon's counsel argued that the assessment could be only for the amount of $14,855, that is, only the tax amount, and that the $7,257 in interest had to be excluded because it was not part of the tax debt that existed during the year of the transfer. In fact, at December 31, 2001, no such obligation existed. Interest started to accrue only on April 30, 2002. In support of his claim, he cited *Currie v. Canada*, 2008 TCC 338, [2008] TCJ No. 266 (QL), where justice Rossiter (as he then was) specifically stated at paragraphs 22 and 27:[10]

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[9] It should be noted that Ms. Gagnon herself signed a transaction deed in which March 6, 2001, was indicated as the date of transfer instead of March 4, 2001.

[10] From what I understand of the facts of that case, the transfers of property took place in 1996 and 1999. The transferee was assessed under section 160 on February 3, 2004. The tax debt he was liable for was $544,146, $321,444 of which was interest. From July 2004 to March 2006, the transferee paid the Minister a total of $620,289 (paragraph 16 of the Reasons). The transferee acknowledged that he was jointly and severally liable with the transferor to pay the Estate's debt up to February 3, 2004, date of the assessment, but argued that he was not liable to pay the interest that had accrued on the debt between February 3, 2004 and the date of payment. Therefore, he was claiming the extra interest he had paid, namely, the amounts accumulated and paid after February 3, 2004. Thus, he acknowledged that he owed the interest incurred after the year in which the transfer had taken place. However, the Court cancelled the interest starting on December 31 of the year of the transfer.

22 Subparagraph 160(1)(*e*)(i) is really not applicable. Under subparagraph 160(1)(*e*)(ii), the Appellant is liable for all amounts which the transferor, that is the Estate, is liable to pay under the *Act* in or in respect of the taxation year in which the property was transferred or in a preceding taxation year - this means any amount owing for the transfer of the Estate up to and including December 31st of the year of the transfer. The Appellant is only liable for that which the Estate was liable as per subparagraph 160(1)(*e*)(ii). The transfer most certainly took place before Assessment #1. As a result, Assessment #1 must be sent back to the Minister for recalculation and reconsideration, on the basis that the Appellant is only liable for the amount owing by the transferor, that is the Estate, up to and including December 31st of the year of the transfer and nothing more. This is certainly consistent with *Algoa Trust, supra*. Also, the Appellant specifically wanted to be repaid the $75,000, paid by him as interest, post the Assessment #1. This amount will be deleted from the assessment, per my previous comment and most certainly should be deleted to be consistent with *Algoa Trust, supra*, in which Dussault T.C.J. set out the inability of the Minister of National Revenue to levy interest against the transferee, at pages 2002 and 2003:

> . . .
>
> 3. The rule stated in s. 160 of the Act does not have the effect of creating a tax debt. The effect of the provision is not to create a second debt: there is only one tax debt. The wording of the Act is quite clear: the purpose of s. 160 is essentially to add another debtor who is jointly and severally liable with the transferor. This new debtor is called the transferee. There is thus no new debt created under the Act and the obligation arises not from the assessment but from the Act itself. Fundamentally, therefore, there is only one debt and only that debt can bear interest.
>
> 4. First, subsection (1) of s. 160 in fact states that the transferee is jointly and severally liable and that his or her liability is limited to the lesser of the two amounts mentioned in s. 160(*e*)(i) and (ii), namely (i) the value of the property transferred less the consideration, and (ii) the total of all amounts which the transferor is liable to pay in or in respect of the year of the transfer or any preceding year, that is to say, for the year of the transfer and for any preceding years.
>
> 5. Secondly, s. 160(2) provides that the Minister of National Revenue ("the Minister") may at any time make an assessment. This is also quite clear. However, the limit imposed in s. 160(1)(*e*) must be observed for each assessment.
>
> 6. Thirdly, I would say that there is no provision of the Act regarding interest that may be applicable to an assessment issued pursuant to s. 160 of the Act. This is logical, since there is no new tax debt and an assessment under s. 160 already incorporates the interest which the transferor owed in addition to the tax. The assessment may also incorporate penalties and interest thereon.

. . .

> **27** The Appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is not liable for interest on the Estate debt from December 31st of the year of the transfer.
>
> [Emphasis added.]

[17] As always, it is important to cite the relevant provisions of the Act as a starting point for any analysis where there is a dispute as to interpretation:

> **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
>
> . . .
>
> (*e*) the transferee and transferor are jointly and severally 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 in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.
>
> **160.** (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :
>
> . . .
>
> *e*) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :
>
> (ii) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,
>
> (ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année

> d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;
>
> aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi.
>
> [Emphasis added.]

[18] In response to *Currie*, counsel for the respondent cited *Montreuil v. R.*, 1994 CarswellNat 2034, [1994] T.C.J. No 418 (QL), [1996] 1 C.T.C. 2182, a decision rendered in 1994 by the late Judge Dussault. In that decision, which is not mentioned in *Currie*, Judge Dussault adopted an interpretation of subparagraph 160(1)(*e*)(ii) that is the opposite of that adopted in *Currie*. Indeed, he held that that subparagraph covered "all interest compounded on an outstanding tax debt for a specified preceding taxation year at the time of the transfer or for the taxation year during which the transfer occurred, whether these are compounded before or after the year of the transfer." [Emphasis added.] Judge Dussault based that ruling on the following analysis, found at paragraphs 43 to 46 CarswellNat (39 to 42 QL):

> 43 On the second question, we need at the outset to recall that on the date of death, which in my view is also the date of the transfer as I explained above, paragraph 160(1)(*e*) of the Act prescribed that the transferee and transferor are jointly and severally liable to pay an amount equal to the lesser of the amounts specified in subparagraphs 160(1)(*e*)(i) and (ii), i.e.:
>
> (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 aggregate of all amounts each of which is an amount that the transferor is liable to pay under this Act or in respect of the taxation year in which the property was transferred or any preceding taxation year.
>
> 44 In view of the facts admitted, the only problem here concerns the interpretation of subparagraph 160(1)(*e*)(ii) for the purpose of establishing the tax liability of the transferor pursuant to this provision because it is used as one of the parameters to determine the quantum of the transferee's liability. The problem stems here from the fact that four different transferees were each entitled to an amount of $70,000 in the will such that even if each were jointly liable with the transferor or his estate[39] for no more than the value of the property received, the payment of an equivalent amount by only one of these transferees would not necessarily extinguish the total debt so that each of the other transferees would also be held liable within the limits set by paragraph 160(1)(*e*) of the Act. This question is also pertinent to establish the effect

of the payment of the amount of $117,239.94 by the Estate in February 1991 pursuant to subsection 160(3) of the Act.

45 Subsection 161(1) of the Act prescribes that interest is payable on any excess unpaid tax for a taxation year and that it is "computed for the period during which that excess is outstanding". In fact interest is compounded daily, and since 1987, compounded daily pursuant to subsection 248(11) of the Act. The rate is prescribed by Part XLIII of the Income Tax Regulations. Interest is payable as provided in subsection 161(1) for as long as the tax payable for a "taxation year" remains outstanding. Hence the only relationship that exists between the interest on an outstanding tax liability and a "specified taxation year" is precisely the relationship established in subsection 161(1) of the Act based on the amount of tax unpaid for this taxation year and "for the period during which" the amount is outstanding. The tax is the principal and the interest is the accessory. In this sense, interest that compounds until full payment of an outstanding taxation amount for a specified "taxation year" prior to the transfer constitutes, whatever the year in which it is compounded, an amount that the transferor is required to pay under the Act "in respect of" this preceding taxation year according to the wording of subparagraph 160(1)(*e*)(ii) as it applied prior to December 17, 1987, or "in or in respect of" this preceding year according to the wording that has applied since that date. Indeed, the Bordas dictionary[40] defines the expression "à l'égard de" in its usual and modern sense as meaning "envers" and "en ce qui concerne". Moreover, the Grand Robert de la langue française[41] gives particularly to the word "pour" the meaning of "en ce qui concerne" and "par rapport à". The English expression used in subparagraph 160(1)(*e*)(ii) "in respect of" has the same meaning and in my view corroborates the interpretation to the effect that these expressions cover all interest compounded on an outstanding tax liability for a specified preceding taxation year at the time of the transfer or for the taxation year during which the transfer occurred, whether these are compounded before or after the year of the transfer. We also know that the words "in respect of" have a very wide meaning, as recognized by the Supreme Court of Canada in *Norwegijick*. In his judgment in this case, Dickson J., who was later to become Chief Justice, analyzed these words in the following terms:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

> 46 In my view, this is enough to dispose of the second point. The question of determining whether an amount assessed under section 160 bears interest by application of section 161 was not raised as such and is not directly in issue here, and I thus need not rule on this question.[11]
>
> [Emphasis added.]

[19] In my view, Judge Dussault's interpretation is entirely consistent with the wording of subsection 160(1) of the Act. Though it is true that, as Judge Dussault held, the meaning of the French expression "pour une de ces années" is broad enough to include the meanings of "en ce qui concerne" and "par rapport à", the English version of subparagraph 160(1)(*e*)(ii) dispels all doubt by defining tax debt, for the purposes of section 160, as "an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year". If the words "in respect of" were not in the provision, it might be argued that the tax debt is that which existed at the end of the year during which the transfer was made. However, Parliament clearly intended, by adding the words "or in respect of", not to impose any such limit.

[20] Not only is Judge Dussault's interpretation more consistent with the wording of the section, it is also more consistent with Parliament's intention. Indeed, when a taxpayer transfers property to a person with whom he or she is not dealing at arm's length for a consideration that is less than the fair market value of the property, the taxpayer is diminishing his or her assets by an amount that could be used to pay off his or her tax debt. A taxpayer's tax debt is not limited to the tax owed, but also includes interest and, if applicable, penalties. Why would Parliament want tax authorities to be unable to recover the interest owed by the tax debtor when the benefit received by the transferee is enough to allow him or her to assume such an obligation?

[21] In addition, I do not accept that Judge Dussault had rejected that interpretation in his opinion for *Algoa Trust*, mentioned in *Currie*. On the one hand, he did not do so explicitly, since he did not cite *Montreuil*. On the other hand, there is nothing in his reasoning in *Algoa Trust* that would lead me to believe that he changed his interpretation of subparagraph 160(1)(*e*)(ii) of the Act.

[22] Let us briefly review the facts of that case. Algoa Trust was a shareholder of the Jaans Leasing. That company had reported dividends totalling $78,000 in

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[11] He would rule on this issue in *Algoa Trust v. Canada*, [1998] TCJ No. 292 (QL), 98 DTC 1614. Judge Dussault's footnotes have been omitted.

May and September 1982 in favour of Algoa Trust. At the time of the transfer, Jaans had a tax debt of $88,244.82, $21,952.37 of which was tax for 1980 and 1981 and $66,292.45 was interest (that is, an amount more than three times as high as the tax) in respect of the 1978 to 1982 taxation years. (See Judge Rip's reasons for *Algoa Trust v. Canada*, [1993] TCJ No. 15 (QL), 93 DTC 405 at page 406.) One of the important issues before Judge Rip was whether the dividends constituted a transfer of property within the meaning of section 160. Judge Rip held that that was the case and confirmed the assessment made by the Minister under section 160. However, payments had been made by Jaans, or by another party on behalf of Jaans, to reduce its tax debt, and those payments had been made during different taxation years from those indicated at the time of payment. Allowing the appeal, Judge Rip referred the notice of assessment back to the Minister in order that he redetermine the interest taking into account the payments made.

[23] In the reassessment resulting from Judge Rip's decision, the Minister determined a tax debt balance of $25,278.60, but Algoa Trust challenged that reassessment. Judge Dussault heard that appeal. At paragraph 8 of his Reasons, Judge Dussault stated that Jaans' tax debt for 1982 and the preceding years was $88,244.82, which was the same amount as that stated by Judge Rip. According to Judge Dussault, Algoa Trust made a payment of $57,387.14 on February 14, 1991. (See paragraph 13 of his decision.) That payment was not acknowledged until 1993 and was applied to reducing Jaans' debt retroactive to February 14, 1991. As the total benefit received by Algoa Trust, which was determined under subparagraph 160(1)(*e*)(i) of the Act, was $78,000, the amount of the tax debt in respect of which Algoa Trust could be held jointly and severally liable, could not exceed $78,000, even though the debt was $88,244.82 and interest continued to accrue. Since it had paid $57,387, Algoa Trust could not have been held liable to pay more than $20,612.86 ($78,000 - $57,387.14).

[24] That being said, there is nothing in Judge Dussault's reasoning that would lead me to conclude that Algoa Trust could not be held liable for interest accrued in respect of the tax debt owed after the year of the transfer. Quite on the contrary, the assessment under section 160 was dated November 20, 1989. On that date, $66,292 in interest had been calculated in respect of the 1978 to 1982 taxation years. Since the transfers were made in May and September 1982, it is quite likely that the interest of $66,292 in respect of the 1979 to 1982 taxation years was for a period that went beyond 1982. In fact, it is quite likely that the interest was calculated up to the date of the assessment made under section 160 and dated February 20, 1989. Judge Dussault wrote at paragraph 14 that, between November 20, 1989 (date of assessment), and February 14, 1991 (date of payment), the debt increased because of interest, and that,

subsequently, the debt, reduced by the payment of $57,387.14, continued to increase, reaching $26,810.36 by December 21, 1995, according to the collection officer's calculations. That was the date of the second assessment before Judge Dussault. He wrote the following at paragraph 14:

> Between November 20, 1989 (the date of the assessment) and February 14, 1991 the total debt increased because of interest, and subsequently the debt reduced by the payment of $57,387.14 continued to increase, reaching $26,810.36 by December 21, 1995 according to Mr. Gélinas's calculations. It is now perhaps $32,000 or $33,000, but again this is not significant. If Algoa Trust were assessed now for the first time and a payment of $57,387.14 were received the same day, clearly Algoa Trust could not be held liable for an amount greater than $20,612.86 pursuant to s. 160(1)(*e*) and (3)(*a*), namely the difference between the amount established under s. 160(1)(e), that is, $78,000, and the amount already paid, namely $57,387.14. Even if nothing were recovered from Algoa Trust for 50 years, in my opinion no more than $20,612.86 could ever be recovered.
>
> [Emphasis added.]

[25] To really understand the meaning of Judge Dussault's comments, it must be understood that he was making a distinction between the interest that could accrue on the amount established under section 160 and that which was being accrued on the transferor's tax debt. Judge Dussault only said that, in the first case, interest was not being accrued, while, in the second case, it was. He wrote the following at paragraph 6:

> 6. Thirdly, I would say that there is no provision of the Act regarding interest that may be applicable to an assessment issued pursuant to s. 160 of the Act. This is logical, since there is no new tax debt and an assessment under s. 160 already incorporates the interest which the transferor owed in addition to the tax. The assessment may also incorporate penalties and interest thereon.
>
> [Emphasis added.]

[26] His reasoning is clearly expressed at paragraph 3,:

> 3. The rule stated in s. 160 of the Act does not have the effect of creating a tax debt. The effect of the provision is not to create a second debt: there is only one tax debt. The wording of the Act is quite clear: the purpose of s. 160 is essentially to add another debtor who is jointly and severally liable with the transferor. This new debtor is called the transferee. There is thus no new debt created under the Act and the obligation arises not from the assessment but from the Act itself. Fundamentally, therefore, there is only one debt and only that debt can bear interest.

[Emphasis added.]

[27] Judge Dussault's reasoning seems to be cogent. If the Minister could charge interest in respect of the amount determined under section 160, he could, in some way, collect interest more than once on the same debt: once from the principal debtor and another time from the transferee (joint and several debtor). If there were several transferees, the Minister could have as many times the interest. In addition, if the interest could be calculated on the amount of the assessment determined under section 160, that could mean that the amount that the transferee may have to pay would exceed the amount of the benefit he or she received, which would be contrary to the intent of section 160. That would be unfair.

[28] On the other hand, nothing prevents the Minister from holding the transferee liable for the interest owed by the transferor under section 160. Thus, he can assess the transferee to pay the interest owed by the transferor for any period after the year of the transfer, including, it would seem, a period following the assessment under section 160, as long as it is interest owed by the transferor. Obviously, as Judge Dussault held in *Algoa Trust*, that interest amount could not exceed the limit prescribed in subparagraph 160(1)(*e*)(i) of the Act, that is, the amount of the benefit received by the transferee.

[29] Accordingly, it cannot be convincingly argued that Judge Dussault held that the transferee could not be held liable for the interest accrued after the year of the transfer with respect to the transferor's tax debt. For these reasons, I rule that Ms. Gagnon is liable to pay the interest indicated in the assessment made by the Minister, namely, $7,257.73.

- Assessment of the FMV of the transferred property at March 4, 2001

[30] Since section 160 applies to transfers of property, it must be determined what the transferred property is in this case. Mr. Desrosiers was not the sole owner of the residence. The *Civil Code of Québec* (**CCQ** or **the Civil Code**) recognizes various modes of ownership, one of which is co-ownership. Co-ownership is ownership of the same property, jointly and at the same time, by several persons each of whom is privately vested with a share of the right of ownership. (See article 1010 of the CCQ.) Co-ownership is called undivided when the right of ownership is not accompanied with a physical division of the property. In this case, Mr. Desrosiers and Ms. Gagnon co-owned the residence. They both had a complete right of ownership, jointly and at the same time. Mr. Desrosiers could transfer only the right that he had to the

property, namely, his undivided half, and the value of that undivided half could not correspond to the FMV of the residence itself. The value of the right that he had to the immovable, which he then transferred, must therefore be determined. Subsection 160(3.1) of the Act provides an explicit rule for an undivided interest. It reads as follows:[12]

> **160 (3.1) Fair market value of undivided interest –** For the purposes of this section and section 160.4, the fair market value at any time of an undivided interest in a property, expressed as a proportionate interest in that property, is, subject to subsection (4), deemed to be equal to the same proportion of the fair market value of that property at that time.
>
> [Emphasis added.]

[31] Therefore, if that rule were followed, the undivided half would be worth half of the value of the residence. In this case, however, from analyzing the deed of sale, it can be seen that Mr. Desrosiers did not transfer all the rights that he had to the residence to Ms. Gagnon. Indeed, Mr. Desrosiers reserved the right to use the residence, use being one of the ingredients of ownership. In Quebec civil law, a complete right of ownership is composed of all the attributes of ownership, which are the right to use, enjoy and fully and freely dispose of the property. Dismemberment occurs when two or more people each have one or more, but not all, of the ingredients of the right of ownership to the same property. (See article 947 of the Civil Code.) In this case, Mr. Desrosiers did not dispose of all of his rights; he disposed only of a dismembered right of ownership, that is, of his right to enjoy and fully and freely dispose of the property. He reserved the right of use. In these circumstances, the dismembered right that Mr. Desrosiers transferred to Ms. Gagnon could not be worth as much as a complete undivided right of ownership he had to the residence, and, in my view, the rule in subsection 160(3.1) of the Act does not apply as to the determination of the FMV of a dismembered right. That subsection applies only to assessing an undivided right. If Mr. Desrosiers had not reserved the right to use the property and had disposed of the entire undivided right of ownership he had to the immovable, the rule would apply. His undivided half would then be worth half of the market value of the residence. However, the right to enjoy and fully and freely dispose of the residence, which he transferred to Ms. Gagnon, is worth less than 50% of the value of the residence.

[32] Those are all the rules that should guide the Court. To determine the FMV of the property transferred by Mr. Desrosiers, it would still be useful to start from the

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[12] It must be noted that the rule found in subsection 160(3.1) has been in force since June 4, 1999.

FMV of the residence. In this case, two approaches were proposed to the Court, one of which was that used by Ms. Gagnon, who had filed in evidence data containing the sale prices of numerous properties in Saint-Augustin-de-Desmaures, from which she had deduced a formula to determine the FMV of the residence. It was the sale price/municipal value ratio. No appraisal experts testified to justify that approach or its results. However, the Minister called the expert, Mr. Gagnon, as a witness. Mr. Gagnon also filed his appraisal report. In that report, Mr. Gagnon used the direct comparison method. He selected 3 of the 17 properties he had compiled. The properties were in the same neighbourhood as the residence. Two of them were located at 3015 and 3063 Delisle Street and one at 257 Alfred Desrochers Street. The three properties were sold close to the appraisal date, which was March 4, 2001. He consulted the contracts of sale concerning those three properties in the Quebec land register.

[33] Even though he did not go inside the residence, Mr. Gagnon was able to obtain data sheets from the municipality describing the interior layout of the residence and the three similar properties. The data sheet for the residence on which he had based himself was dated April 27, 1998, which was the date of the last visit of the City of Québec technician. Mr. Gagnon made adjustments based on the lot sizes of the three similar properties and the age of the buildings built on them. Indeed, he took into account a depreciation factor to achieve the best comparability. He was able to make adjustments to take into account the improvements on and distinctive features of the properties. In particular, in addition to the surface area of the lot, he took into account the surface area of the building, finishing of the exterior and basement, existence of a garage and outbuildings, and equipment.

[34] In his testimony, Mr. Desrosiers explained the differences that existed between the state of the residence in 2007, when appraiser Gagnon took the photo, and its state in 2001. He indicated that the moulding on the walls had been added in 2004, that there was no fence or cedar hedge in 2001, and that a bay window had been added where there used to be a balcony over the garage door. In addition, he indicated the surface area of the finished part of the basement. It was 945 square feet (30 by 31.5 feet), not 1,300 square feet as estimated by appraiser Gagnon. Mr. Gagnon modified his report at the hearing to reflect the smaller surface area. The FMV of the residence thus went from $274,000 to $272,000. (See Exhibit I-5.)

[35] In my opinion, Mr. Gagnon's appraisal is more convincing and has more probative value than the assessment prepared by Ms. Savard based on an analysis of data from MLS. The sale price/municipal value ratio approach can be useful when there is no better method. However, in this case, the appraiser was able to find

three properties on the same street as the residence or in its immediate neighbourhood. He was able to consult data sheets in order to take into account the differences between the properties and was able to take into account the interior layout of the residence and the three other properties. The data used by Ms. Savard to justify the value that she determined are for properties whose age may be significantly different from that of the residence or which are not in the immediate neighbourhood of the residence or which have dissimilar features. For all of these reasons, I accept the value determined by Mr. Gagnon, taking into account the adjustment concerning the smaller finished area in the basement. The FMV of the residence is thus $272,000. Accordingly, the value of the undivided half is $136,000, as per the rule in subsection 160(3.1) of the Act.

- Value of the dismembered right

[36] No experts testified to assess the FMV of the dismembered right transferred by Mr. Desrosiers. Therefore, the Court had no aid in assessing it. In the circumstances, it seemed appropriate to me to take into consideration a minimum value attributable to the right of use, which must be subtracted from the FMV of the undivided half. A minimum value of 5% of the value of Mr. Desrosiers' undivided interest ($136,000), namely, $6,800, seems appropriate to me for taking into account the right of use that he did not transfer to Ms. Gagnon.

[37] It should be mentioned that my colleague Justice Tardif was faced with a similar problem in *Bergeron v. The Queen*, 2003 TCC 286, which counsel for the respondent relied on. In that case, the tax debtor had transferred an immovable property to his spouse using a deed of gift. That gift stipulated that it was [TRANSLATION] "made gratuitously but subject to the donor's right to occupy the immovable during his lifetime". The immovable could not [TRANSLATION] "be sold or otherwise alienated whether for consideration or gratuitously without the written consent of the donor". Justice Tardif had to decide whether such conditions had an impact on the FMV of the transferred property. In ruling that they had no impact, Justice Tardif applied *Hewett v. Canada*, [1997] F.C.J. No. 1544 (QL), [1998] 1 CTC 106, 98 D.T.C. 6003. That decision of the Federal Court of Appeal confirmed a decision by Judge McArthur reported at [1996] T.C.J. No. 355 (QL) [1996] 2 C.T.C. 2560. The issue before the Federal Court of Appeal was whether Judge McArthur was correct in attributing a lower value to the undivided half interest transferred to his spouse. That decision was rendered before subsection 160(3.1) of the Act was adopted. Judge McArthur held that the undivided half interest had a lower value than half of the value of the property, which was $160,000, that is, the FMV was lower

than $80,000. Relying on the testimony of a real estate appraiser, who had indicated that the market value of a 50% share in the house had to be significantly reduced, he found that the FMV was $40,000. According to the appraiser, an investor or purchaser of the husband's undivided half interest would have taken into account the fact that he would be buying only a half interest in a property where the other undivided owner was already living. Judge McArthur ruled as follows:

> **55** A purchaser from him would have to take into consideration that he would obtain a 50 per cent interest as a joint tenant with the appellant in the matrimonial home which she occupied with two dependent children and a dependent grandchild. The purchase would be further clouded by the fact that the appellant may have had a greater interest in the home, given the troubled and inconclusive marriage relationship.
>
> **56** I find common sense dictates that the Minister should find himself with no greater financial interest than that of the appellant spouse at the time of the transfer. I accept the evidence of Mr. Lee that that amount was the discounted sum of $40,000 and not $80,000.
>
> [Emphasis added.]

[38] That decision was upheld by the Federal Court of Appeal as follows: "In this case that interest was the taxpayer's joint tenancy interest in the family home as it existed immediately prior to its release to his wife." ([1997] F.C.J. No. 1541, para. 2, 98 DTC 6003). Justice Tardif used that approach to rule that the right of use should not be taken into account because the time right before the transfer took place should be the time considered. He stated as follows at paragraph 47:

> I believe that the FMV should be assessed immediately before the transfer of the property, that is, before the property becomes part of the transferee's assets. This interpretation appears to me consistent, moreover, with the spirit of section 160 of the Act.
>
> [Emphasis added.]

[39] The solution propounded by Justice Tardif might be the desirable one. However, in my view, without an amendment to the Act, such as the one made by Parliament when it adopted subsection 160(3.1), applicable since June 4, 1999, it is eronious. The time prescribed by subparagraph 160(1)(*e*)(i) to appraise a property is "at the time it was transferred". Clearly, the property that must be appraised is the transferred property, in this case, the dismembered undivided right. If we applied the *Bergeron* doctrine to a case where a person who owned an immovable alone

alienated only one undivided half of it, we would reach, in that case, an FMV of 100% of the value of the property, not 50%. Indeed, before the transfer, the transferor held 100% of the property. Therefore, the solution would not be appropriate.

[40] Accordingly, I find that the FMV of the rights transferred by Mr. Desrosiers to Ms. Gagnon was $129,200 ($136,000 - $6,800).

- The FMV of the consideration given by Ms. Gagnon

[41] The Minister assumed that the FMV of the consideration paid by Ms. Gagnon was $96,900 because of the hypothecs that she assumed, as described in the deed of sale. Ms. Gagnon argued that $12,500 should be added to that amount to take into account the fact that she had assumed the entire hypothec of $25,000, and not only half of it as stipulated in the deed of sale. The evidence offered by Ms. Gagnon did not satisfy me that such was the case. First, the notarial deed of sale was not amended to make Ms. Gagnon responsible for the full amount of $25,000. The deed of sale mentions only $12,500. No evidence was submitted showing that Ms. Gagnon had paid an amount over and above the amount that she had assumed. In my opinion, the Court cannot go beyond the wording of the deed of sale.[13]

[42] However, in addition to the hypothecs that she assumed, Ms. Gagnon, who owned an undivided half of the residence, granted Mr. Desrosiers a right to use her undivided half. She therefore diminished her assets by accepting to reduce the right of ownership she had to the residence. Consequently, the value of the right of use she transferred should be added to the $96,600 consideration acknowledged by the Minister. Her right of use was not appraised. Unlike the right of use reserved by Mr. Desrosiers, the one granted by Ms. Gagnon had been declared non-assignable. In the circumstances, that right did not, in my view, have the same value as the right of use reserved by Mr. Desrosiers. In his case, the right of use may be assigned. Accordingly, an amount lower than the value accepted for the right of use reserved by Mr. Desrosiers should be added to the FMV of the consideration paid by Ms. Gagnon. In the absence of expert evidence, a value of 3% of the FMV of her undivided half seems appropriate to me. Consequently, an amount of $4,080 will be added to the consideration paid by Ms. Gagnon for a total of $100,980 ($96,900 +

[13] The same goes for half of the $45,000 loan that the Caisse populaire granted to Mr. Desrosiers to finance his business.

$4,080). The value of the benefit conferred by Mr. Desrosiers on Ms. Gagnon, determined based on subparagraph 160(1)(*e*)(i) of the Act, is $28,220 ($129,200 - $100,980).

[43] In partial settlement of Mr. Desrosiers' tax debt under other tax statutes, such as the AMR and the ETA (**other tax statutes**), Ms. Gagnon paid $2,100. Can that amount be taken into account as part of the FMV of the consideration she paid to Mr. Desrosiers?

[44] It is clear that Ms. Gagnon had not assumed such a liability when she signed the deed of sale. However, pursuant to the other tax statutes, Ms. Gagnon became jointly and severally liable with Mr. Desrosiers for his tax debt by accepting the transfer of his undivided half of the residence. Can the amount she paid be considered as part of the consideration she had paid for the undivided half of the residence? In my view, the legal liability imposed by the provisions of the other tax statutes and the acquisition of the undivided half are not sufficiently related to make it possible to find that that amount was part of the consideration. In addition, that approach would make it impossible to apply section 160 because, if we considered the legal obligation created by section 160 as being part of the consideration paid by Ms. Gagnon, the result would be part of the calculation of the result, and the application of that provision would be circular.

[45] In these circumstances, it seems to me that there is a significant flaw in the application of section 160 of the Act, which does not take into account that a transferee who was given a benefit by a transferor may be held liable to pay a higher amount than the value of the benefit he or she received. The various tax statutes should provide a mechanism that would make it possible to distribute the benefit conferred by a transferor on a transferee among the various tax liabilities. At the very least, it should be provided that a taxpayer may not be held liable to pay, after taking into account all the tax statutes establishing a similar rule to that established by section 160 of the Act, an amount greater than the value of the benefit he or she received.

[46] In this case, fortunately for Ms. Gagnon, it seems that she suffered no prejudice because the benefit she received following the transfer of Mr. Desrosiers' rights to the residence is $28,220, from which the tax debt of $22,114, resulting from section 160, is subtracted. There is still a benefit of $6,106. As the amount she paid to Revenu Québec was only $2,100, she can still keep a $4,006 benefit. The limit set by subparagraph 160(1)(*e*)(i) of the Act is not exceeded.

[47] For all of these reasons, Ms. Gagnon's appeal is dismissed with costs to the respondent.

Signed at Montréal, Quebec, this 24th day of September 2010.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 16th day of December 2010

François Brunet, Revisor

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APPEARANCES:

Counsel for the appellant:	Robert Marcotte
Counsel for the respondent:	Marielle Thériault

COUNSEL OF RECORD:

For the appellant:	
Name:	Robert Marcotte
Firm:	
For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada