

Docket: 2011-2521(IT)G

BETWEEN:

DANIEL CLÉROUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on October 28, 2013, at Ottawa, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Chantal Donaldson  
Counsel for the Respondent: Sara Chaudhary

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**JUDGMENT**

The appeal from the reassessment dated May 6, 2011, made by the Minister of National Revenue pursuant to the *Income Tax Act* with respect to the appellant's 2003 taxation year, is allowed, without costs, in accordance with the attached Reasons for Judgment and the matter is referred back to the Minister for reconsideration and reassessment based on the consent to judgment dated October 25, 2013, which was filed with the Court at the beginning of the hearing in case the 2003 taxation year was not statute-barred and which provides as follows:

1. The appellant's "other income" is reduced from \$21,995 to \$13,415 for the 2003 taxation year in accordance with section 3 and subsection 9(1) of the *Income Tax Act*.

2. The net rental income (shareholder benefit, personal meals) for the 2003 taxation year is reduced by \$4,130.
3. The penalties imposed on the appellant under subsection 163(2) of the *Income Tax Act* for the 2003 taxation year are cancelled.
4. The appellant waives his right to object to and appeal the reassessment provided for in the consent and he waives possibility of making an application under subsection 220(3.1) of the *Income Tax Act* for the 2003 taxation year.

Signed at Ottawa, Canada, this 20th day of November 2013.

“Réal Favreau”

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Favreau J.

Translation certified true  
on this 27th day of February 2014.

Erich Klein, Revisor

Citation: 2013 TCC 365  
Date: 20131120  
Docket: 2011-2521(IT)G

BETWEEN:

DANIEL CLÉROUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

### **REASONS FOR JUDGMENT**

Favreau J.

[1] This is an appeal from reassessments dated May 6, 2011, made by the Minister of National Revenue (the Minister) pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act), with respect to the appellant's 2002 to 2007 taxation years.

[2] The appeals from the reassessments dated May 6, 2011, for the 2002, 2004, 2005, 2006 and 2007 taxation years were discontinued by the appellant on October 25, 2013.

[3] As a result, this appeal concerns only the 2003 taxation year and the only issue to be determined is whether that year is statute-barred pursuant to subsection 152(4) of the Act. The parties have agreed that, if the Court determines that the 2003 taxation year is not statute-barred, the Court shall render a judgment allowing the appeal for the 2003 taxation year, without costs, and referring the matter back to the Minister for reconsideration and for reassessment on the following basis:

[TRANSLATION]

1. The appellant's "other income" is reduced from \$21,995 to \$13,415 for the 2003 taxation year in accordance with section 3 and subsection 9(1) of the *Income Tax Act*.
2. The net rental income (shareholder benefit, personal meals) for the 2003 taxation year is reduced by \$4,130.
3. The penalties imposed on the appellant under subsection 163(2) of the *Income Tax Act* for the 2003 taxation year are cancelled.
4. The appellant waives his right to object to and appeal the reassessment provided for in this consent and he waives the possibility of making an application under subsection 220(3.1) of the *Income Tax Act* for the 2003 taxation year.

[4] The transaction involved in this appeal is that by which the appellant, while the sole shareholder and director of Les Entreprises de construction Tremesco Inc. acquired all the shares of 6154301 Canada Inc., then a wholly owned subsidiary of Les Entreprises de construction Tremesco Inc., for \$100 when the value of the shares in question was at least \$277,574.

[5] The Minister assessed the appellant pursuant to subsection 15(1) of the Act because Les Entreprises de construction Tremesco Inc. conferred on him a taxable benefit of \$277,474 which the appellant did not report in his income tax return for the 2003 taxation year.

[6] The facts with regard to the transaction are as follows:

- (a) On March 2, 2000, Les Entreprises de construction Tremesco Inc., a company incorporated pursuant to Part 1A of Quebec's *Companies Act*, acquired an eight-unit semi-detached building with the street numbers 15 and 17 on Daniel-Johnson Street in Hull (now Gatineau). The purchase price of the building was \$550,000.
- (b) During the month of November 2003, members of the Sauriol family from Fort-Coulonge showed interest in purchasing the building with the street numbers 15 and 17 on Daniel-Johnson Street, but they wanted to acquire shares in a company whose sole asset was the building they were interested in; apparently, this was to avoid the transfer taxes.

- (c) To meet the purchasers' requirements, on November 20, 2003, Les Entreprises de construction Tremesco Inc. transferred ownership of the building to 6154301 Canada Inc., a company incorporated on October 28, 2003, under the *Canada Business Corporations Act* and wholly owned by Les Entreprises de construction Tremesco Inc. The sale was for \$1 and other good and valuable consideration, including assuming the loan granted by the Toronto Dominion Bank in the initial amount of \$467,425 and guaranteed by a hypothec on the building. In the deed of sale giving effect to this transfer to 6154301 Canada Inc., there is no mention of a consideration in the form of shares or of a rollover under section 85 of the Act.
- (d) As the Toronto Dominion Bank refused to finance the acquisition of shares in 6154301 Canada Inc. by members of the Sauriol family, they acquired the building on December 3, 2003, for \$745,000.00 paid on purchase.
- (e) On December 8, 2003, the appellant acquired from Les Entreprises de construction Tremesco Inc. the 100 class A common shares of 6154301 Canada Inc. for \$100 when the latter's liquid assets were \$277,574, that is, \$745,000 from the sale of the building minus the amount of the hypothec on the building, which was \$467,425.

[7] The sale of the building at 15 and 17 Daniel-Johnson Street, Gatineau, by 6154301 Canada Inc. to members of the Sauriol family on December 3, 2003, was assessed by the Minister as giving rise to unreported business income of \$277,574 and not a capital gain because that corporation's activities were in the field of buying and selling buildings. The penalty provided for in subsection 163(2) of the Act was applied to the unreported income because T2 forms for the 2004 to 2006 taxation years were only produced on October 3, 2008, following requirements for information.

[8] The Minister assessed the sale of the building at 15 and 17 Daniel-Johnson Street, Gatineau, by Les Entreprises de construction Tremesco Inc. to 6154301 Canada Inc. on November 20, 2003, as giving rise to a capital gain under paragraph 69(1)(b) of the Act as a disposition to a related party at fair market value. The Minister therefore assessed the company for an unreported taxable capital gain of \$97,500 and applied the penalty under subsection 163(2) of the Act.

Relevant statutory provisions

[9] The relevant statutory provisions in this case are paragraphs 15(1)(a) and 152(4)(a) of the Act. These provisions read as follows:

15(1) **Benefit conferred on shareholder** – If, at any time, a benefit is conferred by a corporation on a shareholder of the corporation, on a member of a partnership that is a shareholder of the corporation or on a contemplated shareholder of the corporation, then the amount or value of the benefit is to be included in computing the income of the shareholder, member or contemplated shareholder, as the case may be, for its taxation year that includes the time, except to the extent that the amount or value of the benefit is deemed by section 84 to be a dividend or that the benefit is conferred on the shareholder

(a) where the corporation is resident in Canada at the time,

(i) by the reduction of the paid-up capital of the corporation,

(ii) by the redemption, acquisition or cancellation by the corporation of shares of its capital stock,

(iii) on the winding-up, discontinuance or reorganization of the corporation's business, or

(iv) by way of a transaction to which subsection 88(1) or (2) applies;

152(4) **Assessment and reassessment [limitation period]** – The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year.

Analysis and conclusion

[10] According to counsel for the appellant, the appellant did not make a misrepresentation that is attributable to neglect, carelessness or wilful default by not reporting the value of the benefit he received from Les Entreprises de construction Tremesco Inc., for the following reasons:

- (a) The law is not clear; counsel said that she could not find any case law in which section 15 of the Act was used to find that a taxable benefit was received on the sale by a company of shares of a subsidiary to one of the company's shareholders.
- (b) The appellant did not personally have access to the funds held by 6154301 Canada Inc., aside from a director's bonus of \$21,750.
- (c) The appellant will have to pay taxes on the profit he will earn upon resale of the shares.
- (d) The value of the shares in 6154301 Canada Inc., as determined by the Minister, does not take into consideration the underlying taxes that are payable by 6154301 Canada Inc. following the sale of the building to members of the Sauriol family.

[11] According to counsel for the respondent, the appellant was negligent in not reporting the value of the benefit he obtained from Les Entreprises en construction Tremesco Inc. The appellant is an experienced businessman who has carried out many real estate development projects through corporations, and he has personal knowledge of all the transactions involving the building at 15 and 17 Daniel-Johnson Street in Gatineau. The appellant knew or should have known that it is not possible to appropriate property of a company for consideration less than the property's fair market value.

[12] In my opinion, subsection 15(1) of the Act applies to the transaction by which Les Entreprises de construction Tremesco Inc. sold the shares of its subsidiary to the appellant for \$100, an amount well below their fair market value at the time of the sale. Les Entreprises de construction Tremesco Inc. clearly conferred a benefit on its shareholder through the sale of these shares.

[13] Contrary to counsel for the appellant's contention at the hearing, there is at least one case involving a sale of shares that was considered as conferring a

shareholder benefit. It is the decision by the Tax Review Board in *No. 513 v. M.N.R.*, 58 DTC 301. In that case, the appellant and his brother were the sole shareholders of company G, which, in 1941, had acquired from the appellant and related persons 458 shares in company X, a private corporation, for \$151 per share. A few years later, in 1953, G required funds to finance its expansion projects. To obtain additional funds, G sold the 458 shares in X to the appellant for the same price as it had paid, \$151 per share, which the appellant believed was the fair market value of the shares at that time. The Minister did not agree with that valuation and believed the value of the shares in 1953 was actually \$220 per share. The Minister then assessed the appellant for a shareholder benefit of \$31,000. In *No. 513*, the existence of a shareholder benefit was not challenged, since the purpose of the proceeding was to determine the value of the 458 shares that were the object of the transaction.

[14] In the present case as well, the question of the value of the benefit arises because the Minister did not take into account the underlying taxes payable by 6154301 Canada Inc. following the sale of the building to members of the Sauriol family. Regardless of what the actual value of the benefit conferred on him might be, the appellant did not report anything in his 2003 tax return. In fact, 6154301 Canada Inc. never paid the taxes resulting from the sale of the building because it was dissolved on January 11, 2007, two and a half years before it was assessed for that transaction on August 26, 2009.

[15] Counsel for the appellant's argument that subsection 15(1) of the Act cannot apply in this case because the appellant did not personally have access to the funds held by 6154301 Canada Inc. does not alter the fact that the appellant received a benefit from Les Entreprises de construction Tremesco Inc. Access to the funds is not a condition for the application of subsection 15(1) of the Act. Be that as it may, I believe that the appellant did have access to 6154301 Canada Inc.'s funds since he received a \$21,750 bonus as the company's director, had advances totalling \$14,999 made to him, and had a \$192,000 loan made to 6210929 Canada Inc., another company of which he was a shareholder.

[16] The other argument by counsel for the appellant, namely that subsection 15(1) of the Act should not apply to the transaction because the appellant will have to pay taxes on the gain he will realize on the resale of the shares, is not valid since subsection 52(1) of the Act allows an increase in the cost of property (in this case, the shares in 6154301 Canada Inc.) where the taxpayer, in computing the taxpayer's income for a taxation year throughout which the taxpayer was resident in Canada, must add an amount in respect of the value of the property other than under section 7 of the Act. On application of subsection 15(1) of the Act, the appellant's adjusted



cost base of the shares in 6154301 Canada Inc. was increased by the amount in respect of the value of the property that was included in computing his income for 2003.

[17] With regard to the application of subparagraph 152(4)(a)(i) of the Act, it is worth reproducing the following comment, made by Strayer J. in *Venne v. Canada*, [1984] F.C.J. No. 314 (Federal Court, Trial Division), concerning the degree of negligence required in order for the Minister to be able to make a reassessment after the normal reassessment period:

I am satisfied that it is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(a)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the words “misrepresentation that is attributable to neglect” must mean, particularly when combined with other grounds such as “carelessness” or “wilful default” which refer to a higher degree of negligence or to intentional misconduct. Unless these words are superfluous in the section, which I am not able to assume, the term “neglect” involves a lesser standard of deficiency akin to that used in other fields of law such as the law of tort. See *Jet Metal Products Limited v. The Minister of National Revenue* (1979) 79 DTC 624 at 636-37 (T.R.B.).

[18] In other words, the Minister merely has to show simple negligence on the part of the taxpayer in order for subparagraph 152(4)(a)(i) of the Act to be applicable.

[19] In the present appeal, I agree with counsel for the respondent that the appellant showed negligence by not reporting the value of the benefit he obtained on the acquisition of the shares in 6154301 Canada Inc. Considering his real estate experience and his knowledge of all the transactions involving the building on Daniel-Johnson Street, the appellant knew or ought to have known that it is not possible to appropriate a company’s property for consideration less than its fair market value.

[20] For these reasons, I consider the Minister to have been justified in assessing the appellant’s 2003 taxation year after the expiry of the reassessment period. Accordingly, the appeal from the reassessment dated May 6, 2011, for the appellant’s 2003 taxation year is allowed, without costs, and the matter is referred back to the Minister for reconsideration and reassessment based on the consent to judgment dated October 25, 2013, filed with the Court at the beginning of the hearing.

Signed at Ottawa, Canada, this 20th day of November 2013.

“Réal Favreau”

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Favreau J.

Translation certified true  
on this 27th day of February 2014.

Erich Klein, Revisor

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COURT FILE NO.: 2011-2521(IT)G  
STYLE OF CAUSE: Daniel Cl roux v. Her Majesty the Queen  
PLACE OF HEARING: Ottawa, Ontario  
DATE OF HEARING: October 28, 2013  
REASONS FOR JUDGMENT BY: The Honourable Justice R al Favreau  
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APPEARANCES:

Counsel for the appellant: Chantal Donaldson  
Counsel for the respondent: Sara Chaudhary

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