

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160209

Docket: A-123-15

Citation: 2016 FCA 47

**CORAM: RYER J.A.
WEBB J.A.
RENNIE J.A.**

BETWEEN:

M. BERNARD LOATES

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 9, 2016.
Judgment delivered from the Bench at Toronto, Ontario, on February 9, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160209

Docket: A-123-15

Citation: 2016 FCA 47

CORAM: RYER J.A.
WEBB J.A.
RENNIE J.A.

BETWEEN:

M. BERNARD LOATES

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 9, 2016).

RYER J.A.

[1] This is an appeal from an amended decision of Justice Randall Boccock of the Tax Court of Canada (the “Judge”), dated February 12, 2015 and cited as 2015 TCC 30, dismissing an appeal by Mr. M. Bernard Loates (the “Taxpayer”) from an assessment, dated September 30, 2010 (the “Assessment”), issued by the Minister of National Revenue, pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”), in the amount of \$158,058.27.

Unless otherwise indicated, all statutory references in these reasons are to the corresponding provisions of the Act that apply to the Assessment.

[2] In this appeal, the relevant provision is paragraph 160(1)(e), which reads as follows:

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

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 :

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

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

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

b) une personne qui était âgée de moins de 18 ans;

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

c) une personne avec laquelle elle avait un lien de dépendance,

the following rules apply:

les règles suivantes s'appliquent :

...

[...]

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

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 :

(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

(i) 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) the total of all amounts each of which is an amount that the

(ii) le total des montants représentant chacun un montant

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

que l'auteur du transfert doit payer en vertu de la présente loi (notamment un montant ayant ou non fait l'objet d'une cotisation en application du paragraphe (2) qu'il doit payer en vertu du présent article) au cours de l'année d'imposition où les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années.

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

Toutefois, le présent paragraphe n'a pas pour effet de limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi ni celle du bénéficiaire du transfert quant aux intérêts dont il est redevable en vertu de la présente loi sur une cotisation établie à l'égard du montant qu'il doit payer par l'effet du présent paragraphe.

[3] The Judge determined that the criteria to be applied in considering the applicability of subsection 160(1) are those set forth in paragraph 17 of this Court's decision in *Canada v. Livingstone*, 2008 FCA 89, 375 N.R. 309, which reads as follows:

[17] In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:

- 1) The transferor must be liable to pay tax under the Act at the time of transfer;
- 2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
- 3) The transferee must either be:
 - i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;

- ii. A person who was under 18 years of age at the time of transfer; or
 - iii. A person with whom the transferor was not dealing at arm's length.
- 4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

[4] The Judge concluded that only the last of these criteria was in issue. In upholding the Assessment, the Judge found that the Taxpayer's spouse, Ms. Karen Laraine Somerville, transferred a residential property (the "Howe Island Property") to the Taxpayer for an amount that was less than its fair market value at the time of the transfer on March 15, 2005 (the "Transfer Time") by at least \$158,058.27, the amount that Ms. Somerville was liable to pay under the Act at the Transfer Time on account of tax, interest and penalties in respect of her 1998, 1999, 2000 and 2001 taxation years (the "Tax Debt").

[5] In an appeal from a decision of the Tax Court of Canada, questions of law are reviewed on the standard of correctness, while questions of fact and questions of mixed fact and law in respect of which there is no readily extricable question of law are reviewed on the standard of palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33 at paragraphs 8, 10, 36, [2002] 2 S.C.R. 235).

[6] In this appeal, the Taxpayer raises five issues. First, he asserts that the Judge erred by not determining that paragraph 160(1)(e) was inapplicable, by virtue of subsection 160(4), on the basis that the transfer of the Howe Island Property occurred pursuant to a written separation agreement at a time when the Taxpayer and Ms. Somerville were living separate and apart as a result of a breakdown of their marriage. This assertion cannot be accepted.

[7] While the record contains a short written agreement (the “Property Division Agreement”), made in March of 2005, between the Taxpayer and Ms. Somerville that provides for the transfer of the Howe Island Property, the Property Division Agreement contains no indication that the Taxpayer and Ms. Somerville were living separate and apart. In addition, the assertion that they were separated was not raised by the Taxpayer in his notice of appeal against the Assessment and is contradicted by the Taxpayer’s evidence on cross-examination (Appeal Book at pages 80 and 81). Finally, the order of Justice Gauthier, dated June 2, 2015, denied the Taxpayer’s motion to introduce new evidence in this appeal that the Taxpayer intended to use to establish his separation from Ms. Somerville.

[8] Second, the Taxpayer asserts that the Judge erred in concluding that the Taxpayer had not provided consideration to Ms. Somerville for the Howe Island Property. In *Yates v. Canada*, 2009 FCA 50, [2010] 1 F.C.R. 436 [*Yates*], this Court determined that a surrender of matrimonial property rights does not constitute consideration for a transfer of property pursuant to subsection 160(1). The Taxpayer asserts that *Yates* does not apply because he and Ms. Somerville were living separate and apart at the Transfer Time. This assertion must be rejected because, as discussed above, the Taxpayer has failed to establish that he was separated from Ms. Somerville at the Transfer Time.

[9] Third, the Taxpayer asserts that the Judge erred in concluding that the fair market value of the equity in the Howe Island Property was an amount in excess of the Tax Debt at the Transfer Time. On March 3, 2005, Ms. Somerville borrowed \$315,000 (the “Somerville Indebtedness”) from 1159872 Ontario Limited for the purpose of making an investment in a

company that she owned. As primary security for the Somerville Indebtedness, she granted a second mortgage (the “Cochrane Second Mortgage”) on what was then the matrimonial home (the “Cochrane Property”). She also granted a second mortgage (the “Collateral Mortgage”) on the Howe Island Property as collateral security for approximately \$311,850 of the Somerville Indebtedness. The Judge determined that the Collateral Mortgage did not reduce the value of the equity in the Howe Island Property at the Transfer Time because the value of the equity in the Cochrane Property at that time, after taking into account the first mortgage on that property, was at least equal to the amount of the Somerville Indebtedness that was secured by the Cochrane Second Mortgage. In that regard, the Taxpayer’s own evidence was that the fair market value of the Cochrane Property was at least \$1 million at the Transfer Time and that it sold for \$800,000 approximately ten months thereafter. Even using the lower of these two values, the Cochrane Property had sufficient equity to discharge the Cochrane Second Mortgage at the Transfer Time. Having regard to this evidence, it was open to the Judge to make the factual finding that the equity in the Howe Island Property at the Transfer Time was not reduced by the Collateral Mortgage and, in so finding, the Judge committed no palpable and overriding error.

[10] Fourth, the Taxpayer asserts that the Judge erred in concluding that the Taxpayer failed to establish that the transfer of the Howe Island Property by Ms. Somerville constituted a repayment of a number of loans that the Taxpayer had made to her (the “Offset Loans”). In declining to accept the Taxpayer’s uncorroborated evidence as to the existence of the Offset Loans, the Judge observed that no loans were referred to in the Property Division Agreement and that the Taxpayer’s assertions were not supported by loan agreements, bank records or cheques, or evidence from the person who had allegedly made loans to the Taxpayer so that he could

make the Offset Loans. The Judge made no palpable and overriding error in concluding that the Taxpayer had failed to establish the existence of the Offset Loans.

[11] Fifth, the Taxpayer asserts that the Judge erred by not finding that the amount of the Tax Debt at the time of the Assessment was made up wholly or principally of unpaid interest. Even if the Judge was empowered to make such a determination, he was not required to do so because that determination had no bearing on the validity of the Assessment. On the plain wording of subparagraph 160(1)(e)(ii), the amount for which a transferee of property can be assessed is the amount for which the transferor is liable under the Act, regardless of the composition of that amount.

[12] In conclusion, we have not been persuaded that in upholding the Assessment, the Judge made any error that warrants our intervention. Accordingly the appeal will be dismissed with costs.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-123-15

(APPEAL FROM A JUDGMENT FROM JUSTICE RANDALL BOCOCK OF THE TAX COURT OF CANADA DATED FEBRUARY 12, 2015, (DOCKET NUMBER 2012-1517(IT)G))

STYLE OF CAUSE: M. BERNARD LOATES v. HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 9, 2016

REASONS FOR JUDGMENT OF THE COURT BY: RYER J.A.
WEBB J.A.
RENNIE J.A.

DELIVERED FROM THE BENCH BY: RYER J.A.

APPEARANCES:

Murphy Bernard Loates ON HIS OWN BEHALF

Jack Warren FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada