

Docket: 2006-824(IT)G

BETWEEN:

9060-8795 QUÉBEC INC. (FERME OASIS),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Gaz Propane Raymond (1996) Inc. (2006-786(IT)G)
on March 10, 2008, at Montréal, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Counsel for the Appellant: Jacques Renaud
Counsel for the Respondent: Christina Ham

JUDGMENT

The appeal of the assessment established under section 160 of the *Income Tax Act*, numbered 30109 and dated February 23, 2005, is allowed and the assessment is vacated. The Appellant has the right to half the costs. All in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of March 2008.

" Louise Lamarre Proulx "

Lamarre Proulx J.

Translation certified true
on this 9th day of May 2008.

Elizabeth Tan, Translator

Docket: 2006-786(IT)G

BETWEEN:

GAZ PROPANE RAYMOND (1996) INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal by
9060-8795 Québec Inc. (Ferme Oasis) (2006-824(IT)G)
on March 10, 2008, at Montréal, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Counsel for the Appellant: Jacques Renaud
Counsel for the Respondent: Christina Ham

JUDGMENT

The appeal of the assessment established under section 160 of the *Income Tax Act*, number 30113 and dated February 23, 2005, is allowed and the assessment is vacated. The Appellant has the right to half of the costs. All in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of March 2008.

" Louise Lamarre Proulx "

Lamarre Proulx J.

Translation certified true
on this 9th day of May 2008.
Elizabeth Tan, Translator

Citation: 2008TCC169
Date: 20080326
Dockets: 2006-824(IT)G
2006-786(IT)G

BETWEEN:

9060-8795 QUÉBEC INC. (FERME OASIS),
GAZ PROPANE RAYMOND (1996) INC.,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] These are appeals from assessments established under section 160 of the *Income Tax Act* (the "Act").

[2] The facts surrounding the establishment of the assessment against the Appellant 9060-8795 Québec Inc. (Ferme Oasis), and then Ferme Oasis, are described at paragraph 10 of the Reply to Notice of Appeal (the "Reply") as follows:

[TRANSLATION]

- (a) Réjean Laliberté was the administrator and shareholder of the company SU-RÉ Inc.;
- (b) the debt for the company SU-RE Inc. for the 1989, 1990, 1991, 1994, 1995, 1996 and 1997 taxation years was \$81,930.46 to December 31, 2001;
- (c) the Appellant's administrators are Sylvain Laliberté, Normand Lefrançois and André Lefrançois;

- (d) Sylvain Laliberté holds 50% of the Appellant's shares, Normand Lefrançois holds 25% of the Appellant's shares and André Lefrançois holds 25% of the Appellant's shares;
- (e) Sylvain Laliberté is Réjean Laliberté's son;
- (f) Normand Lefrançois is Réjean Laliberté's son-in-law;
- (g) Normand Lefrançois and André Lefrançois are brothers;
- (h) income for the company SU-RÉ Inc. was generated through a subcontract with the company Miroirs Laurier Limitée, until 1999 when the company SU-RÉ Inc. ceased operations;
- (i) between 1997 and 1999, income from SU-RÉ Inc. totalling \$188,892.06 was deposited to the joint account held by Réjean Laliberté and Suzanne Laliberté, his spouse;
- (j) a review of the deposits to and withdrawals from this account between 1998 and 1999 showed that the cheques on this account were made out to related persons, including the Appellant;
- (k) between May 1998 and April 1999, the company SU-RÉ Inc. transferred funds indirectly to the Appellant through Réjean Laliberté and Suzanne Laliberté for \$28,500;
- (l) during the audit, no evidence was submitted by the Appellant that would lead to the conclusion that any consideration was given to benefit SU-RÉ Inc.

[3] As for the facts taken into consideration by the Minister of National Revenue (the "Minister") to establish the assessment against the Appellant Gaz Propane Raymond (1996) Inc. (Gaz Propane), the facts that differ from those of the other Appellant concern the shareholders, Normand and André Lefrançois, and the amount of the transfer, which was \$10,881.

[4] The amount of the tax liability of SU-RÉ Inc. was not challenged.

[5] Normand Lefrançois testified. He explained that the Appellant Ferme Oasis acquired a large piece of land with buildings, bearing civic number 3833 Chemin St-Charles, in the city of Lachenaie. According to the witness, the buildings were originally used as stables and a clubhouse for members of a riding club. In 1994, the property was rented by Réjean Laliberté, the witness' father-in-law, to raise ostriches.

[6] The property deed was submitted as one of two documents in Exhibit A-1. At pages 29 *et. seq.* of the bill of sale is a long clause called, "Intervention". This clause states that Réjean Laliberté and Autruches, Émeus les Chenaies Inc., of which Réjean Laliberté is the president and secretary, were beneficiaries of a lease on a building and they agreed to cancel that lease and the purchase option therein in their favour.

[7] The second document in Exhibit A-1 is a lease dated March 4, 1998, between Ferme Oasis and SU-RÉ for storage space for a monthly rate of \$2,000. This document states:

[TRANSLATION]
Lachenaie, March 4, 1998

SU-RÉ Inc.
152, Trésor de l'Ile, apt 302
Charlemagne, Québec
J5Z 4P7

Lease for rental of storage space
To Whom It May Concern:

The company Ferme Oasis inc. (9060-8795 Québec inc) rents, in the Municipality of Lachenaie, to the company SU-RÉ Inc. space for storage.

The monthly rental fee is \$2,000.00.

This lease comes into effect on March 15, 1998, and is of an indeterminate period, except upon notice by one of the parties to terminate the lease by certified mail within 90 days of the desired termination date.

Signed at Lachenaie, March 4, 1998

Normand Lefrançois
9060-8795 Québec inc.

Réjean Laliberté
SU-RÉ Inc.

[8] The explanations given at the hearing do not really correspond to the type of lease, namely storage rental. Mr. Lefrançois spoke of ostriches. It is hard to understand what was stored and how the rental price was determined.

[9] In cross-examination, the witness admitted that the Appellant's financial statements, tab 3 of Exhibit I-1, are not indicative of this rental income but of another rental income from a different source. The witness said that the rental income was not included in the product but was included in the capital paid by Sylvain Laliberté. He could not provide additional explanations.

[10] Gaz Propane received \$5,000 around November 8, 1999. It was a cheque from Réjean Laliberté, (tab 5 of Exhibit I-2). Then, a cheque dated December 2, 1999, from Miroirs Laurier Ltée for \$5,881.03 was signed by the beneficiaries of SU-RÉ Inc. and Réjean Laliberté, and given to Gaz Propane, which deposited it to its account (tab 6 of Exhibit I-2).

[11] As for the first cheque, Mr. Lefrançois explained that it was a payment by his father-in-law to invest in a golf club. The second was a service he carried out for his father-in-law by giving him cash for the amount of the endorsed cheque.

[12] Regarding Ferme Oasis, at tab 1 of Exhibit I-1, we find the reason for the assessment:

[TRANSLATION]

...

The obligation under subsection 160(1) of the Income Tax Act for \$28,500.00 regarding a transfer of funds between May 15, 1998, and April 23, 1999, from "SU-RE INC.", via "Réjean Laliberté" to "Ferme Oasis Inc. (9060-8795 Québec Inc.)"...

[13] In the notice of confirmation, at tab 2, we read again that it is the company SU-RÉ Inc. that is the tax debtor and that carried out the transfer.

[14] At tabs 1 and 2 of Exhibit I-2, regarding the Appellant Gaz Propane, the assessment and confirmation notices say the same thing except with a different name for the assessed person.

[15] Pascal Lapriore, collection officer for the Minister in the SU-RÉ Inc. case, testified. He stated that during the analysis of this case, he realized that the company SU-RÉ Inc. did not have a bank account, or at least none that he could identify. All payments from Miroirs Laurier Ltée. were deposited to Réjean Laliberté's personal account. The witness stated that he spoke by phone with the administrator of Miroirs

Laurier Ltée., who told him the agreement was entered into with the corporation, SU-RÉ Inc.

[16] However, the witness did not explain why the two names appeared on each of the cheques from Miroirs Laurier Ltée, one above the other, as if the cheque had been made out to one or the other. The two names were SU-RÉ Inc and, right underneath, Réjean Laliberté. On the back of the cheques, the two names could also usually be found (tab 9 of Exhibit I-1 and tab 6 of Exhibit I-2).

[17] Mr. Lapriore made note of all the names to whom cheques were written by Mr. Laliberté from his personal account (tab 5 of Exhibit I-1 and tab 4 of Exhibit I-2). He noted that Ferme Oasis received \$16,500 in 1998 and \$10,000 in 1999, and Gaz Propane, \$5,000 and \$5,881.03 in 1999.

[18] At the hearing, the main argument of counsel for the Appellants was that the author of the transfers in question was not SU-RÉ but Réjean Laliberté. It was for his tax liability the Appellants could have been held jointly responsible. According to counsel, the documentary evidence clearly shows that the payments did not come from SU-RÉ, the tax debtor in question for establishing the assessment, but from Réjean Laliberté.

[19] Counsel added that in case this main argument was not accepted, during the hearing, the Appellants continued to claim valuable compensation and provide supporting evidence.

[20] Counsel for the Appellants referred to a decision by this court, *Jurak v. R.*, 2002 DTC 1236, confirmed by the Federal Court of Appeal, 2003 DTC 5145.

[21] I cite paragraphs 14 and 38 of *Jurak* from this court:

14 Counsel for the appellant referred to the decision by Judge Tremblay of this Court in *Nanini v. Canada*, [1994] T.C.J. No. 426 (Q.L.), in which a corporation had paid a dividend to another corporation, which was assessed under section 160 of the *Act*. The shareholders of the second corporation were subsequently assessed under section 160 in respect of a dividend received from that second corporation. It was the judge's view that the first transferee could not himself become a transferor, rendering another transferee jointly and severally liable. According to counsel for the appellant, the facts of the instant case are identical in that they involve a cascading application of section 160.

...

38 With all due deference to Judge Tremblay, I cannot follow his decision in *Nanini, supra*. That interpretation has not been adopted by the judges of this Court. The transferee may himself become a transferor subject to subsection 160(1) of the *Act* if, at the time of the second transfer, he himself is a tax debtor liable either on his own account or jointly and severally with the first transferor.

[22] Counsel for the Respondent addressed the second argument, valuable consideration. I must say that the main argument presented by counsel for the Appellants, that the author of the transfer was not the corporation but its shareholder, and the shareholder was not assessed for appropriation so therefore his tax liability had not been established, was not clear at all in the Notice of Appeal. However, counsel for the Respondent did not complain.

Analysis and conclusion

[23] Subsection 160(1) of the *Act* states:

160(1) Tax liability re property transferred not at arm's length

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

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

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

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

(d) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this *Act* and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

(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.

[24] In my opinion, this provision indicates that the words "directly or indirectly" apply to the author of the transfer and the beneficiary. There may be intermediaries, steps or measures taken between the author and the beneficiary. An intermediary acts on behalf of another person, not on his or her own. A legal example is a mandatary. If a person acts on his or her own behalf, as the owner of amounts appropriated then transferred, this person is the author of the transfer and a tax liability must be established. The taxation of appropriated amounts must be calculated. It is the tax liability of the true author of the transfer for which the beneficiary becomes jointly responsible. It is therefore important to determine who is the author of the transfer, then establish their tax liability.

[25] The description of facts in the Reply to Notice of Appeal and the documentary evidence show that the transfer of funds occurred from Réjean Laliberté to the Appellants, not from SU-RÉ Inc. to the Appellants.

[26] However, the tax liability at the basis of the Appellants' assessment under section 160 is that of SU-RÉ Inc.

[27] It is true that Réjean Laliberté was the main shareholder of SU-RÉ Inc. but it is also true that he is a separate person from SU-RÉ. The company did not have a bank account. Payments came from Réjean Laliberté's personal account. He did not act as mandatary of SU-RÉ Inc. He was the owner of the amounts found in this account. If there was an appropriation of SU-RÉ's income by its shareholder, the tax liability of the shareholder must be determined by assessing based on the appropriation or based on the transfer under section 160.

[28] I must therefore accept that Mr. Laliberté was the author of the transfers and his tax liability must be determined before assessing the Appellants. The main argument by counsel for the Appellants is therefore valid.

[29] As for the secondary argument of valuable consideration, I find there is no need for me to make a finding on it because I accept the main argument. However, my understanding of the evidence in this case would be that the evidence regarding the lease is not very credible. The evidence regarding an investment and cash being returned is more credible.

[30] To conclude, during an assessment under section 160, the author of the transfer must be determined, along with their tax liability. The author of a transfer is the individual who parts from property for the benefit of another. In this case, the person who parted from his property during the transfers in question was not SU-RÉ Inc. but Réjean Laliberté. A determination should therefore have made as to whether he was a tax debtor and what the scope of his debt was.

[31] As a result, the appeals must be allowed. Since the main argument was not clearly explained in the legal grounds of the Notice of Appeal, I grant half the costs to the Appellants.

Signed at Ottawa, Canada, this 26th day of March 2008.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 9th day of May 2008.

Elizabeth Tan, Translator

CITATION: 2008TCC169

COURT FILE NOS.: 2006-824(IT)G and 2006-786(IT)G

STYLES OF CAUSE: 9060-8795 QUÉBEC INC. (FERME OASIS)
v. THE QUEEN
GAZ PROPANE RAYMOND (1996) INC.
v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 10, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Louise Lamarre
Proulx

DATE OF JUDGMENT: March 26, 2008

APPEARANCES:

Counsel for the Appellants: Jacques Renaud
Counsel for the Respondent: Christina Ham

COUNSEL OF RECORD:

For the Appellants

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