Docket: 2008-1412(GST)G

BETWEEN:

FRANCINE MOREAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 26, 2010, at Montreal, Quebec.

Before: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the appellant:	Stéphane Rivard
Counsel for the respondent:	Jean Lepage

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act*, the notice of which bears number PL-2007-324 and is dated October 25, 2007, is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of July 2010.

"C.H. McArthur"

McArthur J.

Translation certified true
on this 4th day of January 2011.

Erich Klein, Revisor

Citation: 2010 TCC 371
Date: 20100712
Docket: 2008-1412(GST)G

BETWEEN:

FRANCINE MOREAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

McArthur J.

[1] This is an appeal under the *Excise Tax Act* (ETA).

[2] The appellant, Francine Moreau, is disputing the assessment made by the Minister of Revenue of Quebec (the Minister) on October 25, 2007, under subsection 325(2) of the ETA, in which the Minister is claiming the amount of $24,552.

[3] The only issue is whether, throughout the entire relevant period, the appellant was the true owner of the $56,153 that was used to pay off the balance of her hypothec with CIBC.

[3] This is a question of law and fact.

[4] The appellant is the wife of Arsène Moreau. She was the sole owner of an immovable located at 5390 Paname Street in Laval, on which there was a hypothec, the initial amount of which was $75,000, that had been granted by the appellant to CIBC in 1996.

[5] On June 29, 2005, Mr. Moreau owed the tax authorities $112,753 under section 323 of the ETA.

[6] On June 29, 2005, Mr. Moreau deposited in a joint account at CIBC a cheque for $72,452 signed by a Mr. Beauchamp and payable to Mr. Moreau alone. Of that amount, $56,153 was used to pay off the balance of the hypothec on the immovable belonging to Ms. Moreau.

[7] The appellant disputes the assessment on the ground that the amount of $56,153 used to pay off her hypothec was rightfully hers since it came from the sale of the shares she held in 9011-6203 Québec inc. to Mr. Beauchamp.

[8] The respondent's position is that, on June 29, 2005, Mr. Moreau transferred to his spouse, directly or indirectly, for no consideration, property in the form of $56,153, which was used to repay the hypothec taken out by the appellant. Accordingly, pursuant to subsection 325(3) of the ETA, the appellant is jointly and severally liable with Mr. Moreau for the amounts owed to the Minister by him under the ETA, to the extent of the value of the transferred property.

Statutory provisions

[9] Section 325 of the ETA reads as follows:

> **325. (1) Tax liability re transfers not at arm's length** – Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to
>
> (*a*) the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,
>
> (*b*) an individual who was under eighteen years of age, or
>
> (*c*) another person with whom the transferor was not dealing at arm's length,
>
> the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of . . . .
>
> **(2) Assessment** – The Minister may at any time assess a transferee in respect of any amount payable by reason of this section, and the provisions of sections 296 to 311 apply, with such modifications as the circumstances require.

> **(3)** **Rules applicable** – Where a transferor and transferee have, by reason of subsection (1), become jointly and severally liable in respect of part or all of the liability of the transferor under this Part, the following rules apply:
>
> (*a*) a payment by the transferee on account of the transferee's liability shall, to the extent thereof, discharge the joint liability; and
>
> (*b*) a payment by the transferor on account of the transferor's liability only discharges the transferee's liability to the extent that the payment operates to reduce the transferor's liability to an amount less than the amount in respect of which the transferee was, by subsection (1), made jointly and severally liable.
>
> . . .
>
> **(5) Meaning of "property"** – In this section, "property" includes money.

Analysis

[10] The appellant has the burden of proving that she was the owner of the $56,153 that she used to repay CIBC.

[11] The appellant and her husband testified. In their testimony, they tried to demonstrate that the amount of $56,153 rightfully belonged to Ms. Moreau because it constituted proceeds from the sale of her shares to Mr. Beauchamp and that, consequently, her husband had not made a transfer to her. It is odd that Mr. Beauchamp was not called as witness. In addition, no documentary evidence concerning the sale of the shares to Mr. Beauchamp was produced by the appellant.

[12] During her examination, the appellant testified about the way she had acquired shares in 9011-6203 Québec Inc. First, she stated that, in 1994, she had purchased shares for $30,000 and that she had paid for them with advances on her salary paid by Location de personnel Areau inc. (Exhibit A-1). It is important to note that Mr. Moreau was not only that company's owner but also its bookkeeper. Then, she purchased more of that company's shares from Mr. Sauriol and Ms. Vallée for $6,500 and paid for them with advances on her salary (Exhibit A-2). It is strange that the purchase contract for the shares bought in 1994 (Exhibit A-1) was entered into by the company Location de personnel Areau inc. and Mr. and Ms. Moreau but was signed only by Mr. and Ms. Moreau. In addition, the purchase contract for the shares bought from Mr. Sauriol and Ms. Vallée (Exhibit A-2) was also entered into by Location de personnel Areau inc. and Mr. and Ms. Moreau, but was signed only by Mr. and Ms. Moreau. The drafting of the documents, the error concerning the parties,

and the absence of the sellers' signatures cast doubt on the authenticity of the documents. Furthermore, the cheques filed as proof that Ms. Moreau paid for the shares (Exhibit A-4) were issued by Mr. Moreau himself, including a cheque for $2,500 issued by Promotions R.A.S. 2000 inc. to La Pommerie and dated December 27, 2000, and a cheque for $1,000 issued by Promotions R.A.S. 2000 inc. to 9011-6203 Québec inc. and dated October 7, 2002.

[13] No documents were produced concerning the sale of her shares to Mr. Beauchamp by Ms. Moreau for a selling price of $56,200. The appellant and her husband testified that they had met with Mr. Beauchamp to discuss the sale of the shares. It is unlikely that the parties would have signed no documents at all. In addition, despite being one of the key witnesses, Mr. Beauchamp was not called to testify. What concerns me is that Mr. Beauchamp issued the cheque for the purchase of Ms. Moreau’s shares to Mr. Moreau only, not Ms. Moreau.

[14] Counsel for the appellant insisted that Ms. Moreau had indeed bought the shares, that she had paid for them with salary advances and that the amount disbursed was about $52,000, which corresponds to the amount that the appellant withdrew from the joint account to repay the balance on the hypothec. Even if this was so, which I doubt since there is no evidence, it would not prove that the sale of the shares to Mr. Beauchamp took place or that the selling price was $56,200.

[15] The appellant’s failure to call a witness who has direct knowledge of the facts or to file relevant documents in evidence allows me to make a negative inference with respect to the appellant's evidence. The facts do not support the appellant's testimony that she sold her shares nor do they establish the amount that she sold them for. In light of all of these circumstances, I do not believe the appellant's testimony.

[16] The Court applied this rule in *Schafer v. The Queen*,[1] where the Court wrote the following:

> 27. There is a well-recognized rule that the failure of a party or a witness to give evidence, which was in the power of the party or witness to give and by which the facts might have been elucidated, justifies a court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed. See: *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 at 505-506 . . . .

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[1] No. 95-1730(GST)G, November 16, 1998.

[17] The judgment rendered by the Court in *White v. The Queen*[2] is helpful. In *White*, the husband and wife had a joint bank account in which the husband, the tax debtor, deposited a cheque for a little over $126,000 issued in his name only by the company belonging to him, but the money was used to pay off a mortgage on property owned by his wife. The Court stated the following:

> 10 . . . At the opening of business on March 5, 1984, the balance in the joint account was only $7,500. On that one day, Howard White deposited a cheque for $126,000 payable to himself, and the Appellant immediately issued a cheque for $126,037.74 to pay off the mortgage on the house which she owned alone . . . Howard White divested himself of $126,000 and that amount vested in the Appellant (his wife) as the sole owner of the house at 61 Shallmar Boulevard. Also, the words of subsection 160(1) are very broad concerning the transfer of property "either directly or indirectly, by means of a trust or by any other means whatever". In my opinion, and having regard to the circumstances of the transaction, there was a transfer of property (i.e. $126,000) from Howard White to the Appellant in 1984 within the meaning of subsection 160(1).

[18] The facts of the instant case are different from those in *White*, given that the cheque was issued by a third party. Despite this, the decision in *White* applies by analogy.

[19] In the case at bar, the cheque was issued by Mr. Beauchamp to Mr. Moreau alone. The cheque was deposited in a joint account, and part of that money was used to repay a hypothec granted by Ms. Moreau on an immovable of which she was the sole owner. Even if I accept that Ms. Moreau did in fact buy shares in 9011-6203 Québec inc. in 1994 and 2000, there is nothing concrete in Mr. Moreau’s or Ms. Moreau's testimony that would corroborate either the fact that the transaction took place or the price at which the shares were sold to Mr. Beauchamp. The appellant was unable to say whether the contract for the sale of the shares to Mr. Beauchamp existed. I cite the relevant passages from the hearing transcript.

> Pages 37–38 of the transcript
> Jean Lepage cross-examines Ms. Moreau.
>
> [TRANSLATION]
> Q. Do you know why the cheque dated May 18, 2005, was issued in Arsène Moreau’s name only?
> A. The cheque . . . it was because he was the one who managed things.

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[2] [1994] T.C.J. No. 1042 (QL) (No 91-1442(IT)G, November 10, 1994.)

Q. The cheque from Mr. Beauchamp?
A. The one who managed things was the bookkeeper. Mr. Beauchamp's cheque in total.
Q. The cheque from Mr. Beauchamp?
A. Yes, it's because he was the one who managed things; he was the bookkeeper.
Q. The bookkeeper?
A. And Mr. Beauchamp made it out in his name.
Q. Okay. Do you have a contract of sale between Mr. Beauchamp and you for the sale of those shares?
A. We have an agreement between me and my husband.
Q. Between you and your husband?
A. Yes, for the sale of the shares.
Q. For the sale of the shares.
A. Yes.
Q. Between you and your husband? And you did say that it was Mr. Beauchamp who had bought the shares in 9011-6203?
A. Yes. He was the one who bought our shares.
Q. Okay. But the only agreement you have is with your husband?
A. But there is, we had, we met with Mr. Beauchamp.
Q. You met with Mr. Beauchamp?
A. Yes.

Pages 61–62 of the transcript
Jean Lepage cross-examines Mr. Moreau.

[TRANSLATION]
Q. Mr. Moreau, were you the president of Location Areau?
A. Yes.
Q. So can you explain why the cheque was made out in your name, the cheque for $72,452.20?
A. Well, Mr. Beauchamp made out the cheque that way, maybe without thinking we had undivided shares.
Q. And he knew that?
A. Yes.
Q. You had told him?
A. Yes, he knew that the shares were undivided, but he did not know about the contract between my wife and me, you know, the number of shares my wife owned and the number I owned.

[20] The lack of any relevant documentary evidence regarding that transaction as well as the failure to call Mr. Beauchamp as a witness, especially since he would have known the facts and should have been willing to help the appellant in her case, convince me to draw a negative inference with respect to the appellant's evidence. Obviously, such a failure with respect to the evidence amounts to an implicit admission that Mr. Beauchamp's testimony would not be favourable to the appellant,

or at least would not support her case. In addition, parties not dealing with each other at arm's length must pay attention to how they structure their transactions, because not only the content thereof but also the form will be considered. In *Friedberg v. The Queen*,[3] Justice Linden wrote the following:

> In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *The Queen v. Irving Oil* 91 D.T.C. 5106, per Mahoney J.A.) If a taxpayer fails to take the correct formal steps, however, tax may have to be paid. If this were not so, Revenue Canada and the courts would be engaged in endless exercises to determine the true intentions behind certain transactions. Taxpayers and the Crown would seek to restructure dealings after the fact so as to take advantage of the tax law or to make taxpayers pay tax that they might otherwise not have to pay. While evidence of intention may be used by the Courts on occasion to clarify dealings, it is rarely determinative. In sum, evidence of subjective intention cannot be used to 'correct' documents which clearly point in a particular direction.

[21] I find that the appellant's testimony was self-serving and unconvincing. The share purchases were corroborated by means of documents of doubtful authenticity, while the sale of the shares to Mr. Beauchamp was not corroborated by any acceptable documentary evidence. In addition, Mr. Beauchamp was not called as a witness. The appellant has not discharged her burden of proof.

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[3] No. A-65-89, December 5, 1991 (F.C.A.).

[22] For these reasons, the appeal must be dismissed without costs.

Signed at Ottawa, Canada, this 12th day of July 2010.

"C.H. McArthur"

McArthur J.

Translation certified true
on this 4th day of January 2011.

Erich Klein, Revisor

CITATION:	2010 TCC 371
COURT FILE NO.:	2008-1412(GST)G
STYLE OF CAUSE:	FRANCINE MOREAU v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
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APPEARANCES:

Counsel for the appellant:	Stéphane Rivard
Counsel for the respondent:	Jean Lepage

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