Docket: 2009-2053(IT)G

BETWEEN:

PHILIPPE J. GABRINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 3, 2011, at Kingston, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Marie-Eve Aubry

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's 2005 taxation year is dismissed, with costs, in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 25th day of March 2011.

"Patrick Boyle"

Boyle J.

Citation: 2011 TCC 188
Date: 20110325
Docket: 2009-2053(IT)G

BETWEEN:

PHILIPPE J. GABRINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The issue in this case is whether the taxpayer, Mr. Philippe Gabrini, realized a capital gain in 2005 upon the sale of a family holiday apartment on the French Riviera registered in his name. It is the taxpayer's position that, pursuant to an undocumented oral agreement with his father, the taxpayer was the registered owner however he and his father each held ownership interests and rights in the property.

I. The Facts and Testimony

[2] The clearly established facts in this case are as follows.

[3] At all relevant times the taxpayer was a resident of Canada living in Québec. His parents resided in France just outside Paris. His father is 99 years old and lives comfortably in France. However, at this stage in life, he is not particularly focused on his own tax matters in France, much less those of his son in Canada. For these reasons, he did not testify and that is, in the circumstances, entirely understandable.

[4] In 1981, the taxpayer's grandfather died and each grandchild, including the taxpayer, received an inheritance of 100 000 French Francs ("FF"). At that time, there were currency and exchange controls in place in France such that the taxpayer

could not take his money out of France. The taxpayer opened a bank account in France for the purpose of depositing his inheritance but he not longer has any recollection of those events.

[5] The taxpayer's parents had been vacationing in the Riviera for several years. It was good for his mother who had developed Parkinson's disease. Given the French currency and exchange controls, his mother's health, and his parents' habit of avoiding Parisian winters in the Riviera, the taxpayer decided to use his inheritance to fund the purchase of the apartment in question. He gave his father a duly notarized mandate in August 1983 to sign the purchase agreement and the closing documents. The purchase agreement was signed in October 1983. Once construction was completed in 1984, the property was registered solely in the taxpayer's name.

[6] The taxpayer had earlier opened the bank account into which his 100 000 FF inheritance was deposited. The taxpayer however had no knowledge of what was done with those proceeds other than that his 100 000 FF was used to pay for part of the purchase price of the apartment near Cannes. However, deposits totalling approximately 400 000 FF were also made into this account by other relatives and friends of the family in the period leading up to the purchase of the apartment. The taxpayer claims to have been unaware of these deposits or any withdrawals from this account, including whether it was used to pay for the Le Cannet property, prior the account being closed. He claims to have only recently come upon the banking records such are they are.

[7] The taxpayer attended with his father to arrange a 200 000 FF mortgage of the Le Cannet property with Credit Foncier which mortgage loan documentation shows the taxpayer as borrower and owner. This money was also used to pay for the Le Cannet property.

[8] The taxpayer closed his French bank account in 1988 after the 200 000 FF mortgage had been fully repaid.

[9] The purchase price of the property was 789 000 FF. This included the garage. There was no evidence of any other specific costs associated with the purchase apart from French notary fees.

[10] The taxpayer's father furnished the apartment and his parents resided in it during the winter months each year until 1998 when his mother became too ill to make the trip. Up until then, the parents had paid for all of the upkeep, maintenance and utilities. The taxpayer and his immediate family rarely stayed at or went to the

apartment, having stayed only once briefly in the years his parents made use of it. Some of his siblings and their families stayed there more regularly.

[11] The Appellant sold the property in 2005. He did not consult with his father about the sale terms or timing. He and his wife made the decision to sell. Upon closing the proceeds of sale were paid to him. He has invested them in Canada. He did not consult with or report to his father about the investment of the proceeds.

[12] There was no French tax payable by the taxpayer on the gain realized on the sale. There was no disclosure made to any French official that the taxpayer was not the sole owner of the property. The taxpayer understands that he was not taxed in France on any part of the gain because an exemption applied which effectively makes gains completely free of tax after a 15-year hold period. This exception apparently applied to him even though he was not a resident of France.

[13] The taxpayer did not report any gain from the sale on his 2005 Canadian tax return.

[14] The above are the known facts. However, according to the taxpayer, there was an unwritten oral agreement with his father that they were jointly acquiring the property and that the taxpayer's share was to be proportionate to his investment of his 100 000 FF inheritance. His father was to pay for the balance and the Appellant understood that the 200 000 FF mortgage was used by his father to finance his father's share of the purchase price.

[15] On this basis the taxpayer maintains that he only held an approximate 12% interest in the property and should only be taxed on that portion of the gain. The taxpayer calculated his percentage interest on the basis of a somewhat greater total purchase price than the 789 000 FF, relying upon a brief reference to such a total in one of his father's papers. He could provide no breakdown of this greater amount or other substantiation beyond a 2.5% notary fee. According to the taxpayer, he regarded his interest as an investment which he would reconsider upon his retirement. Until then, his agreement with his father was that his parents would stay there whenever they wished and were to be responsible for the property maintenance, taxes, utilities and similar operating costs. Further, the father's share was to be divided equally upon his death between the taxpayer and his three siblings. This agreement was secret and was not even shared with his siblings who regarded the property as their parents' apartment.

[16] The taxpayer said that in 1998 his parents stopped using the apartment and also stopped paying the operating costs in respect of the upkeep of the property contrary to what he understood he and his father had agreed to.

[17] The taxpayer's brother Michel testified as well. He received a one-page letter in early 1986 from his father regarding some financial matters his father wanted him to be aware of. It addresses two donations made in 1985 by the father to the other two siblings of the taxpayer and Michel, and his recent visit to the notary to make them official.[1] Michel had been aware of these two donations and understood the two paragraphs in the letter addressing them. The letter also addresses the terms of a loan the father had made to one of the other siblings of which Michel had previously been aware and which parts of the letter he also understood.

[18] However the father also wrote about some financial transactions involving the taxpayer, Philippe. The taxpayer maintains that, to his understanding, these paragraphs corroborate his joint investment with his father in the property. They do not mention any purchase of any property. They speak only of the notary considering Philippe to have received a loan from his siblings that he must repay otherwise than through his inheritance from his father estate. These paragraphs did not make any sense whatsoever to Michel. He was not aware his father had made any financial arrangement with Philippe, and Michel did not know how he and his siblings could be considered to have loaned money to Philippe. All he knew was that his father was trying to put him on notice of otherwise secret arrangements with Philippe. Michel discussed the letter with his father when he visited him later that year but did not come away with any clearer understanding. He was not given any details so he still did not understand it had anything to do with the Le Cannet apartment. Michel was told by his father not to worry, he would understand it when he ultimately went to the notary for his father's succession. His father simply wanted a written record informing him and wanted it otherwise left secret.

[19] Michel testified that he supposed it was his father's way of making a donation of his parents' apartment. He presumes it to have been done for a "tax lessening" reason.

[20] Having since heard his brother Philippe's version of the arrangements, he accepts them as a correct explanation and consistent with his father's significant guardedness with his financial matters.

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[1] Apparently the French *Civil Code*, like the Québec *Civil Code*, provides that donations are required to be notarized or else they are invalid. In Québec at least the *Civil Code* includes provisions which make indirect and disguised donations also invalid. See article 1824 of the Québec *Civil Code*.

[21] Michel did not profess any knowledge or understanding of his father's planned terms for his succession.

II. Issue

[22] The only issue that has to be decided in this case is whether the taxpayer is able to show, with a preponderance of credible and corroborating evidence, that he and his father were joint owners of the Le Cannet property.

[23] The pleadings had also framed a number of legal issues relating to conflict of laws, private international law, the Canada-France Tax Treaty and, to the extent Canadian law applied, whether that should be Québec law being where the taxpayer resided in the period in question, or Ontario law, being where the taxpayer resided at the time of the hearing of the appeal.

[24] By the end of the hearing the parties agreed that the only issue to be resolved was the factual issue of whether the evidence established on a balance of probabilities that, notwithstanding the Minister's assumption that the taxpayer was the sole owner in his personal capacity of the property, the taxpayer and his father had jointly purchased and owned the Le Cannet property.

III. Law, Analysis and Conclusion

[25] It is the taxpayer's position that he was the registered owner of the property in the capacity of prête-nom or nominee of his father as to an 88% interest in the property and in his personal capacity as to the remaining 12% interest. Similarly, it is his position that he was acting entirely in the capacity of prête-nom or nominee with the respect to the 200 000 FF Credit Foncier mortgage on behalf of his father.

[26] In order to put the issue in a French and Québec legal perspective, it is appropriate to quote from the Supreme Court of Canada's 1980 decision in *Victuni Aktiengesellschaft c. Le ministre du Revenu de la province de Québec*, [1980] 1 S.C.R. 580, which both parties agreed summarized the law relating to nominees, prête-noms and mandataries (agents or nominees) under French and Québec Civil Codes even though the decision is more than 30 years old and Québec has since replaced its *Civil Code*:

In Quebec law, as in French law, an agreement to act as nominee (*prête-nom*) is a lawful form of the contract of mandate. In the *Civil Code* of Quebec, this appears from art. 1716, which provides:

> Art. 1716. A mandatary who acts in his own name is liable to the third party with whom he contracts without prejudice to the rights of the latter against the mandator also.

With reference to this article, it is stated in the *Traité de droit civil du Québec*, Vol. 13, at p. 70:

> [TRANSLATION] As to nominees, a contract to act as such is a well-recognized form of mandate in our law (*Canuel v. Belzile* (1922), 33 Que. K.B. 355). In effect, a nominee is just a kind of mandatary . . .

In spite of the absence of a similar provision in the *Code Napoléon* we find the following in the *Traité de droit civil* of Planiol and Ripert, Tome 11, para. 1505 (at pp. 956-957):

> [TRANSLATION] 1505. Validity of a contract to act as nominee.—The contract to act as nominee is subject to the general rules governing simulated deeds (*Traité*, VII, Nos. 333 *et seq.*, 971 *et seq.*): accordingly, it is not unlawful in itself. The mandator and mandatary are not required to make their relationship public. Third parties may not object to the simulation when they have no legitimate interest injured . . .
>
> However, the agreement is void if it seeks through the nominee to make a contract which would have been beyond the capacity of the mandator by an ostensible mandate (Baudry-Lacantinerie and Wahl, Nos. 883 *et seq.*; Josserand, II, No. 1436). Its purpose then is to circumvent the law and it constitutes a fraud.

Under the general principles of the law of mandate, it is clear that the obligation of a mandatary towards the mandator is not a debt. The person who has bought property on behalf of a third party who wishes to remain unknown is no more indebted for the price paid than he is the owner of the property. The true owner is the mandator, and the obligation of the mandatary nominee is to render an account to the mandator and deliver over what he has received on his behalf (*C.C.*, art. 1713). What he receives, even if it is money, does not belong to him: he is obliged to keep it separate from his own property. It is a crime for him to take control of it so as to make himself a debtor thereof instead of a mandatary: *R. v. Légaré* [[1978] 1 S.C.R. 275]. In the recent decision of this Court, *Canadian Pioneer Management Ltd. v. Saskatchewan Labour Relations Board* [[1980] 1 S.C.R. 433], Beetz J. pointed out the importance of this distinction, citing *inter alia* the decision of the Privy Council on unclaimed deposits: *Attorney General for Canada v. Attorney General for the Province of Quebec* [[1947] A.C. 33].

[27] Specifically, there is no dispute that under French law, as under Québec law, a mandatary agreement need not be in writing or made public and can be a secret agreement that supersedes the simulation of a public written agreement to different effect. (See for example article 1451 of the Québec *Civil Code*).

[28] The Respondent assessed the taxpayer on the basis that he personally was sole owner of the property. Apart from the taxpayer's own testimony, all of the evidence is consistent with that. The official documents make no disclosure otherwise and the taxpayer did not advise his notary otherwise when he gave his father his authority to purchase it on his behalf, nor did he advise his French notary when he sold the property. None of the other documents, including the father's letter to Michel, or Michel's testimony are necessarily inconsistent with the taxpayer being the sole owner. For example, most of the evidence is just as consistent with the father and mother being allowed to stay in an apartment owned by the taxpayer provided they pay its annual operating costs even though it was bought and paid for by the taxpayer.

[29] The taxpayer's position is that he and his father were joint owners as described above notwithstanding that he was the sole registered owner. There does not appear to be any legal impediment to that which would have prevented such an agreement being valid and legally effective. None of the written evidence refers to such an arrangement. However, none of the evidence is necessarily inconsistent with such an agreement having been reached.

[30] In the circumstances, and having regard to the totality of the evidence, the taxpayer has simply been unable to satisfy the Court on a balance of probabilities, that he and his father jointly owned the Le Cannet apartment. In reaching this conclusion, the following observations can be made:

i. No writing or official mention of such an arrangement was ever made before this Canadian tax dispute arose;

ii. The taxpayer did not file his Canadian tax return on a basis consistent with him having owned 12% of the property;

iii. His brother Michel did not understand this to be the case after receiving his father's letter and discussing it with his father;

iv. The taxpayer said his father did not abide by the terms of this agreement known only to the two of them when he stopped paying the property's operating costs in 1998 once his parents no longer stayed there;

v. The father was assumed by Michel to be doing something with the Le Cannet property and Philippe for tax lessening reasons;

vi. The taxpayer did not consult with his father with respect to the sale of the property;

vii. The taxpayer did not consult with or report to his father with respect to the investment of the sale proceeds in Canada. He continues to hold the proceeds in his sole name.

[31] Overall the evidence simply does not lead me to the conclusion that it is more likely than not that the taxpayer and his father each owned interests in the Le Cannet apartment. However, none of the evidence is entirely inconsistent with this and no finding is made that the taxpayer was not credible, simply that his evidence has not discharged his burden of proof in this appeal. For this reason, the appeal will be dismissed, with costs.

Signed at Ottawa, Canada, this 25th day of March 2011.

"Patrick Boyle"

Boyle J.

CITATION:	2011 TCC 188
COURT FILE NO.:	2009-2053(IT)G
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APPEARANCES:

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