Docket: 2009-2331(IT)G

BETWEEN:

FIDUCIE FAMILLE GAUTHIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 6, 2011, at Montréal, Quebec

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the appellant:	Wilfrid Lefebvre
Counsel for the respondent:	Simon Petit

JUDGMENT

The appeal of Fiducie Famille Gauthier from the assessment made under the *Income Tax Act* for the 2002 taxation year is dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 23rd day of June 2011.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 30th day of September 2011

François Brunet, Reviser

Citation: 2011 TCC 318
Date: 20110623
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BETWEEN:

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Appellant,

and

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REASONS FOR JUDGMENT

Archambault J.

[1] The Minister of National Revenue (the Minister) made an assessment whereby he increased the amount of the dividend deemed to have been received by Fiducie Famille Gauthier (Fiducie) in respect of the 2002 taxation year, under section 84.1 of the *Income Tax Act* (the Act). Fiducie is contesting this increase. The statement of facts in Fiducie's Notice of Appeal reads:

> [TRANSLATION]
>
> **C. FACTS**
>
> 3. During its 2002 taxation year, the appellant was the owner of 1,250 Class B shares of the capital stock of Groupe Orléans Express Inc. ("Groupe").
>
> 4. On or about April 15, 2002, the appellant disposed of 817 Class B shares of Groupe in favour of Jacques Gauthier (164 shares) and 4041763 Canada Inc. ("4041763") (653 shares).

5. At all relevant times, a non-arm's length relationship within the meaning of the federal *Income Tax Act* ("the Act") existed between the parties.

6. The unit price on which the parties agreed was $6,550.63 per share.

7. On or about April 15, 2002, the appellant disposed of the remaining 433 Class B shares in favour of 4041763 at a unit price of $6,010.71 per share. In consideration for this disposition, 4041763 issued a promissory note in the amount of $2,602,637 to the appellant (that is, 433 shares x $6,010.71).

8. It was understood that the 433 shares were going to be sold to Keolis Canada Inc. ("Keolis"), a party at arm's length from the appellant.

9. The selling price of the 433 shares to Keolis was $2,836,423, which is $6,550.63 per share. The difference between the selling price to Keolis and the selling price to the appellant ($2,836,423 − $2,602,637 = $233,786) consists of professional fees, which were paid by 4041763 upon the disposition, and which would have had to be paid by the appellant if the appellant had sold the shares directly to Keolis.

10. In making its assessment, the CRA made the following assumptions:

    a. It assumed that the fair market value of the shares transferred by the appellant to 4041763 was $2,836,423, not $2,602,637.

    b. For the purposes of paragraph 69(1)(*b*) of the Act, it adjusted the fair market value of the consideration (i.e. the promissory note) received by the appellant on the disposition of the 433 shares in favour of 4041763 to $2,836,423.

    c. Then, for the purposes of subsection 84.1(1) of the Act, it determined that an additional taxable dividend of $291,099 was to be taxed in the appellant's hands, based on the assumption that variable D in the formula in paragraph 84.1(1)(*b*) of the Act – that is to say, the fair market value of the consideration (i.e. the note) received by the purchaser – could, and should, be increased.

11. The assessment issued by the CRA on March 7, 2007, was beyond the normal reassessment period for the appellant's 2002 taxation year.

12. Prior to the expiry of the normal reassessment period, the appellant had filed a specific waiver of the normal reassessment period. The specific subjects covered by the waiver were:

    a. Qualified small business shares.

    b. Capital gains deduction.

    c. Sections 84.1, 85, and 83(2) of the ITA.

    d. Professional fee expenses.

13. The appellant duly objected to the CRA's assessment in a timely manner and, by notice of confirmation dated April 30, 2009, the Minister confirmed the assessment.

[Emphasis added.]

[2] The respondent admitted all these facts, except the ones set out in paragraph 10 and in the last statement made in paragraph 9, which reads: [TRANSLATION] "which would have had to be paid by the appellant if the appellant had sold the shares directly to Keolis." Moreover, the Minister relied on the following facts in his Reply to the Notice of Appeal (the Reply):

> [TRANSLATION]
>
> 10. In making the assessment in issue, the Minister of National Revenue relied on the following assumptions of fact:
>
> . . .
>
> (i) The appellant neither incurred nor paid professional fees in relation to the transactions between the appellant and 4041763.
>
> (j) 4041763 paid the $233,550 in professional fees for the appellant.

[3] At the beginning of the hearing, I asked counsel for the respondent to clarify the meaning of subparagraph 10(j) of the Reply. He said that the Minister's position was not that 4041763 Canada Inc. (**404**) was acting as an agent of Fiducie when it paid the "professional fees" of $233,550. In addition, the respondent's evidence reveals that, at the objection stage, the appeals officer adopted a position different from that of the auditor: the officer did not apply paragraph 69(1)(*b*) of the Act; rather, it was his position that the consideration paid by 404 included not only the $2,602,637 promissory note, but the $233,786 in fees as well.[1]

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[1] Although there are some variances between the amounts set out in paragraphs 7 and 9 of the Notice of Appeal, the amounts set out in the Reply, and the amounts stated in the exhibits, notably in regard to the professional fees, the promissory note, and the selling price of the 433 Class B shares, these variances are minor, and the parties asked the Court not to take them into account because they are not disputing the numbers, but rather are asking the Court to decide the policy issue of whether the Minister was justified in considering the fee amount paid by 404 to be part of the consideration for the purposes of section 84.1 of the Act, and in particular, variable D of the formula therein. Subsection 84.1(1) of the Act provides as follows:

> **84.1 (1) Non-arm's length sale of shares** - Where after May 22, 1985 a taxpayer resident in Canada (other than a corporation) disposes of shares that are capital property of the taxpayer (in this section referred to as the "subject shares") of any class of the capital stock of a corporation resident in Canada (in this section referred to as the "subject corporation") to another corporation (in this section referred to as the "purchaser corporation") with which the taxpayer does not deal at arm's length and, immediately after the disposition, the subject

Position of the parties

[4] Contrary to what the Minister's auditor may have done, neither the appeals officer handling the objection, nor counsel for the respondent before this Court, cited paragraph 69(1)(*b*) of the Act in applying section 84.1, nor did they try to increase, by operation of paragraph 69(1)(*b*), the capital gain amount realized by Fiducie, on the basis that the deemed proceeds of disposition of the 433 shares are greater than the proceeds stated in the contract. Indeed, the Minister acknowledges that he could not do this, because the assessment was made beyond the normal assessment period, and the notice waiving the limitation period did not contain a waiver with respect to the computation of the capital gain, or a waiver in relation to the application of paragraph 69(1)(*b*) of the Act. However, the Minister does argue that he is justified in taking into account not only the promissory note referred to in the contract, that is to

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corporation would be connected (within the meaning assigned by subsection 186(4) if the references therein to "payer corporation" and to "particular corporation" were read as "subject corporation" and "purchaser corporation" respectively) with the purchaser corporation,

(*a*) …

(*b*) for the purposes of this Act, a dividend shall be deemed to be paid to the taxpayer by the purchaser corporation and received by the taxpayer from the purchaser corporation at the time of the disposition in an amount determined by the formula

$$(A + D) - (E + F)$$

where

A s the increase, if any, determined without reference to this section as it applies to the acquisition of the subject shares, in the paid-up capital in respect of all shares of the capital stock of the purchaser corporation as a result of the issue of the new shares,

D is the fair market value, immediately after the disposition, of any consideration (other than the new shares) received by the taxpayer from the purchaser corporation for the subject shares,

E is the greater of

(i) the paid-up capital, immediately before the disposition, in respect of the subject shares, and

(ii) subject to paragraphs 84.1(2)(*a*) and 84.1(2)(*a.1*), the adjusted cost base to the taxpayer, immediately before the disposition, of the subject shares, and

F is the total of all amounts each of which is an amount required to be deducted by the purchaser corporation under paragraph 84.1(1)(*a*) in computing the paid-up capital in respect of any class of shares of its capital stock by virtue of the acquisition of the subject shares.

say, the note for $2,602,637[2] described in paragraph 7 of Fiducie's Notice of Appeal, but also the fees that 404 paid in relation to the sale of the 433 shares.

[5] In support of his position, counsel for the respondent points to the analysis of Judge Lamarre in *Republic National Bank of New York v. Canada,* [1999] T.C.J. No. 183 (QL) (Eng.), [1999] A.C.I. Nº 183 (QL) (Fr.), [1999] G.S.T.C. 32, 7 G.T.C. 3107, where, at paragraphs 91 and 93, she wrote:

> 91 A common definition used for consideration is that given by Lush J. in *Currie v. Misa* (1875) L.R. 10 Exch. 153 at p. 162 (affd. 1 App. Cas. 554 H.L.):
>
> > A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.
>
> This definition was essentially adopted by *Black's Law Dictionary*, sixth edition:
>
> > Consideration. The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. . . . Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.
>
> . . .
>
> 93 Consideration is therefore quite a broad term. As it includes any responsibility undertaken, it most definitely includes debts and charges assumed by the purchaser, such as those claimed by the appellant.

[Emphasis added.]

[6] Counsel for Fiducie submits that the description of the consideration contained in the contract for the sale of the 433 shares (Exhibit A-1, tab 9) is the one that should be relied on. When cross-examining the appeals officer, counsel was careful to ask him to acknowledge that nothing in the drafting of the contract constituted a sham, and that the contract had not been varied by any subsequent agreements. Counsel also noted that fees totalling $233,786 were billed to 404 and that the Minister, in making his assessment, assumed that Fiducie neither incurred nor paid fees in relation to the

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2 $2,602,636 according to the terms of the contract. (See Exhibit A-1, tab 9, page 2.)

transactions between itself and 404.[3] Naturally, counsel noted that the question at issue raised by the operation of section 84.1 is not the question of the fair market value of the 433 Class B shares that Fiducie sold to 404, but rather the fair market value of the consideration that Fiducie received from 404 following the disposition of its 433 shares.

Analysis

[7] In order to ascertain whether the Minister, in determining the fair market value of the consideration received in exchange for the shares, was entitled to take the professional fees paid by 404 into account, it is important to consider all the circumstances of the transactions of April 15, 2002. It must be noted that Fiducie was set up as a trust for the Gauthier family, which held 1,250 Class B shares of Groupe Orléans Express Inc. (Groupe Orléans), a corporation that operated a passenger bus and courier business through subsidiaries (Exhibit A-1, tab 10, page 3). The Gauthier family had apparently decided to dispose of its interest in Groupe Orléans, and had instructed KPMG to find someone to purchase that interest. It appears that KPMG found Keolis, a subsidiary of a French corporation, which purchased the Gauthier family's interest in Groupe Orléans.

[8] It appears that KPMG was also instructed to advise the Gauthier family on the best way to carry out the sale from a taxation standpoint, and that a tax consultant from that major accounting firm proposed a series of transactions to carry out the sale as efficiently as possible from that standpoint.

[9] One of the purposes of Fiducie's sale of 164 shares to Jacques Gauthier was to enable each of his two children, who are beneficiaries of Fiducie, to take advantage of the $500,000 capital gains exemption. The sale of the 653 shares to 404 was designed to crystallize the "safe income" and make it possible to defer the capital gain using the election in subsection 85(1) of the Act (see Exhibit A-1, tab 11). These 653 actions Class B shares were converted into 653 Class K shares that were then sold in two stages to Keolis: first, 567 shares,[4] and second, the remaining 86 shares.[5] Mr. Gauthier also transferred his 164 Class B shares to Keolis. All these transactions took place on April 15, 2002.

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3 It must be noted that this assertion does not apply to the fees "between itself" and Keolis Canada Inc. (**Keolis**).

4 See sale contract, Exhibit A-1, tab 10, second part, page 5.

5 See Exhibit A-1, tab 10, first part.

[10] The agreed unit price for the 164 and 653 Class B shares sold to 404 and the agreed unit price of the 653 Class K shares and the 164 Class B shares sold to Keolis are the same: $6,550.63. However, when Fiducie sold the 433 Class B shares to 404, the amount indicated as the fair market unit value of the shares decreased to $6,010.71. But all these shares were sold on the same day. To justify this reduction of the price in relation to the other shares of the same class, the tax consultant informed the auditor that the selling price had been "voluntary [*sic*] reduced to take the fees into account. If not, GESTION would realize a capital loss" (see Exhibit A-1, tab 12, page 2). In an appendix to the letter, the KPMG tax consultant stated that the $233,550 in fees represents approximately 8% of the proceeds of the sale of the shares sold to Keolis by 404. The breakdown that the tax consultant provided to the auditor is as follows:

GESTION FAMILIALE GAUTHIER MACKINNON INC.

Allocation method used

Number	Share class	Proceeds	Expenses	Proportion
567	K	$3,714,098	$309,879	
86	K	$563,491	$46,527	
653	K	$4,277,589	$356,406	8.33%
433	B	$2,836,186	$233,550	8.23%
		$7,113,775	**$589,956**	

[11] $560,000 of the $589,956 in fees was paid to KPMG. This is the description contained in the statement of account of June 10, 2002, addressed to 404, attention Jacques Gauthier: [TRANSLATION] "Professional services rendered up to April 15, 2002, under the contract of service concerning the disposition of the shares of Groupe Orléans Express Inc."[6] The other fees include professional fees billed to 404 by the law firm of Joli-Cœur, Lacasse, Geoffrion, Jetté, St-Pierre. They are described as follows: [TRANSLATION] "For professional services rendered up to April 15, 2002, including advice, corporate documentation and assistance upon the

[6] Exhibit A-1, tab 12, page 11.

closing of the sale of the shares of Groupe Orléans Express Inc."[7] As for the professional fees of Desjardins Lapointe Mousseau Bélanger, legal advisors and notaries, the statement of account dated June 12, 2002, provides further details, including:

> [TRANSLATION]
>
> . . . [F]amiliarization with draft trust deposit agreement; . . . various discussions and negotiations between each party's representatives; attendance . . . at closings of April 15, 2002; . . . preparation, execution and publication of a discharge by RoyNat Inc. . . . in relation to a hypothec on the immovable located at . . . chemin des Quatre-Bourgeois, Sainte-Foy; and five voluntary cancellation registration applications, signed by RoyNat, in relation to the movable hypothecs previously granted in its favour by Autocars Orléans Express Inc., . . . Gare d'autobus de la Vieille Capitale Inc., . . . Groupe Orléans Express Inc. . . .
> (Exhibit A-1, tab 12, page 8 and page 7)

[12] Furthermore, one of the important reasons for billing the fees to 404, not Fiducie, was to recover the GST and QST on those fees by claiming input tax credits and input tax refunds.

[13] This quick description of the transactions carried out on April 15, 2002, and shortly before shows that 404 was interposed between Fiducie and Keolis for the purpose of minimizing the tax consequences of the sale of the Gauthier family's interests to Keolis, a subsidiary of a French corporation. Plainly, 404 was a corporation under the Gauthier family's control in this tax plan. It is true that KPMG and the two law firms billed their fees to 404, not Fiducie. However, as Fiducie states in its Notice of Appeal, these were fees [TRANSLATION] "that would have had to be paid by the appellant if the appellant had sold the shares directly to Keolis."

[14] Moreover, it seems strange that Fiducie sold 164 Class B shares to Jacques Gauthier and 653Class B shares to 404 at a price of $6,550 per share when the 433 shares of the same class that it sold the same day to 404 were merely worth $6,010 per share. And these same shares were all resold to Keolis at a unit price of $6,550. It seems obvious that the true fair market value of the 433 shares that Fiducie sold to Keolis was $6,550 per share, but that the price was reduced to take account of the fact that 404 would have to pay approximately $233,786 in fees.

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[7] *Ibid.*, page 10.

[15] I can understand that, in his testimony, the tax consultant whose services the Gauthier family retained contended that the market value had to be $6,010 in order to take account of the fact that 404 was to pay the $233,786 in fees. However, in my opinion, it more accurately reflects reality to say that Fiducie transferred 433 shares whose unit market value was $6,550, that the actual selling price of those shares was $2,836,423 (433 X $6,550), an amount which, in fact, 404 obtained when it resold the shares to Keolis, and that the consideration given for this market value of $2,836,423 included two elements: a $2,602,637 promissory note, and 404's agreement to pay the fees that Fiducie would have had to pay if 404 had not been interposed in the series of transactions carried out to sell the shares in question to Keolis.

[16] I accept the definition of consideration laid down in *Currie* and referred to by Judge Lamarre in *Republic National Bank*, above, and the definition in *Black's Law Dictionary,* according to which "consideration" can encompass "[t]he inducement to a contract. . . . [s]ome right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." By agreeing to be billed for the fees related to the sale of the shares in the place of Fiducie, 404 was, in a sense, undertaking Fiducie's responsibility. A benefit therefore accrued to Fiducie. I find that such a description of the situation is more consistent with reality, and the true fair market value of the shares was $6,550 per unit. In order to acquire the 433 Class B shares at their fair value, 404 had to provide the note stipulated in the contract, and undertake responsibility for the fees.

[17] In my opinion, the above description of the transactions is more consistent with reality than the description given in the sale contract, which would hold that the unit value of the 433 Class B shares was $6,010. The fact that the amount of fees incurred by 404 is not referred to in the contract as part of the consideration given to acquire the shares does not, in my view, prevent this Court from finding that, in reality, the parties took 404's acceptance of the liability for the fees into account. This fact is clear from the explanation given by the tax consultant, who told the Minister that the price was reduced to take account of the fees that 404 would have to pay. The fact that this consideration is not expressly referred to in the contract does not mean that the Minister must be limited to the parties' contractual stipulations in determining the amount of the deemed dividend.[8] In this instance, the parties

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8 Sometimes, a written contract does not set out the full consideration for goods sold or services provided. For example, a person who obtains the services of a caterer may decide that, in addition to the price agreed upon in the written contract, they will pay a tip to

preferred to reduce the selling price to reflect the fact that 404 was assuming responsibility for the $233,786 in fees, instead of stating the true unit selling price of the shares, that is to say, $6,550 per share. In my opinion, that does not square with reality.

[18] Courts that are required to distinguish between an employment contract and a service contract are entitled to find, under the reality principle, that a contract described as a service contract is in fact an employment contract, or that the reverse is true, despite the descriptions contained in the contract. For the same reasons, this Court certainly has the authority to conclude that the true consideration given by 404 to Fiducie Gauthier includes 404's agreement to pay the fees that Fiducie would have paid if 404 had not been interposed in the series of transactions leading to the disposition of the shares. The application of this reality principle does not necessarily entail a finding that a sham is involved.[9] A waiter who receives a tip can certainly come before a court and designate the tip as a gift as opposed to remuneration for the quality of service, but if the evidence discloses that the customer paid the tip in consideration for the service rendered, the Court is not bound by the waiter's designation.

[19] For all these reasons, Fiducie has not satisfied the Court that the assessment made by the Minister was in error and, consequently, Fiducie's appeal is dismissed, with costs to the respondent.

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express their satisfaction. The tip is part of the consideration for the caterer's services and constitutes income in the caterer's hands.

[9] See *2529-1915 Québec Inc. v. Canada,* [2008] F.C.J. No. 1701 (QL) (FCA), 2009 DTC 5023, paras. 54-59, in relation to the concept of sham.

Signed at Ottawa, Canada, this 23rd day of June 2011.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 30th day of September 2011

François Brunet, Reviser

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APPEARANCES:

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