Docket: 2015-1643(IT)I

BETWEEN:

GAIL BAKER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[ENGLISH TRANSLATION]

Appeal heard on December 9, 2015, at Ottawa, Ontario.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Mélanie Sauriol

JUDGMENT

The appeal of the assessment issued under subsection 160(1) of the *Income Tax Act*, the notice for which is dated January 27, 2014, and numbered 2498776, is dismissed without costs.

Signed at Ottawa, Canada, this 16th day of May 2016.

"Guy Smith"

Smith J.

Citation: 2016 TCC 120
Date: 20160516
Docket: 2015-1643(IT)I

BETWEEN:

GAIL BAKER,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Smith J.

[1] Gail Baker (the **appellant**) is appealing the assessment issued by the Minister of National Revenue (the **Minister**) under section 160 of the *Income Tax Act*[1] (**ITA**) after her brother transferred his interest in an immovable while still owing the Minister a tax debt for the 2004 to 2007 taxation years.

[2] The hearing was held following the informal procedure on December 9, 2015. For the reasons that follow, the appeal must be dismissed.

I. Summary of facts

[3] Gervaise St-Amour died on February 16, 2008, leaving her four children, Larry Baker, Terry Baker, Robert Johns-Baker (**Robert**) and the appellant an undivided share in her residence (the **residence**), located in Bois-Franc, Quebec. As will be explained below, the succession was not completely settled until January 2012.

[4] As executors of the succession, the appellant and Larry Baker obtained a clearance certificate from the Minister authorizing the distribution of the goods of the succession. The certificate is dated January 14, 2010.

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[1] RSC 1985, c. 1 (5th Supp.).

[5] Robert then died on November 20, 2011; he did not have a will. Prior to his death, he signed a power of attorney designating the appellant as an attorney without any specific title, with the express mention that his succession duties related to his mother's estate be transferred to the appellant and her two surviving brothers.

[6] Two documents had been prepared to settle the succession of the late Gervaise St-Amour. The first is a Declaration of Transmission by a notarial act on January 16, 2012, through which the right of ownership of the residence is devolved to the appellant and her three brothers, based on the will.

[7] The second document is a notarial act of assignment carrying the same date as that on which Robert, recognizing that he owned an undivided quarter of the residence as an heir to the late Gervaise St-Armour, transferred his interest to the appellant and her two surviving brothers. They therefore each inherited an undivided third from Robert, the whole without consideration. The appellant signed the act of assignment as Robert's attorney in accordance with the terms of the power of attorney.

[8] It is important to add that the appellant and Terry Baker then sold their right of ownership of the residence to Larry Baker for $37,100, an amount that the appellant says was based on the 2012 municipal assessment. The transfer was carried out through a notarial act of assignment on November 23, 2012, which states the origin of the right of ownership as the succession of the late Gervaise St-Amour and of Robert.

[9] Following an assessment by Revenu Québec on October 15, 2012, the appellant and her two brothers jointly paid $19,200 for the acquisition without consideration of Robert's undivided share in the residence.

[10] On January 14, 2013, the appellant, Larry Baker and Terry Baker signed a declaration renouncing Robert's succession, stipulating, based on the wording of the document, that they had not performed [TRANSLATION] "any acts as an heir or any acts likely to lead to tacit, presumed or reputed acceptance of their brother's succession." Given that they had already accepted the transfer of Robert's undivided quarter (on January 16, 2012), it is not clear what the purpose of this document was.

[11] For the purpose of the assessment in question, the Minister assumed that the fair market value of the residence on January 16, 2012 was $130,000 and that

through the transfer of Robert's quarter, the appellant and her two brothers each acquired a third of his part of the undivided share in the residence, amounting to a fair market value of $32,500.

[12] The assessment being appealed here is dated January 27, 2014. The Minister calculated the benefit endowed to the appellant (and her two brothers) as follows:

Benefits to the beneficiaries (1/4)	$32,500
Payment to Revenu Québec	($19,200)
Adjusted benefit	$13,300
Appellant's benefit (1/3)	$4,433

[13] At the time the assessment was issued on January 27, 2014, Robert owed the Minister a tax debt for the 2004, 2005, 2006 and 2007 taxation years, totalling $28,938.46.

II. Appellant's submissions

[14] The appellant claims that she is not bound by Robert's tax debt, and states that she renounced her succession once she learned of it.

[15] She alleges that the residence was never transferred from the succession of the late Gervaise St-Amour to Robert, as he died before the transfer could be carried out. She also maintains that her mother's will stipulated that the assets bequeathed by her will could not be seized because of any of her heirs' debts. She maintains that this includes Robert's tax debt.

[16] The appellant explains that Robert's undivided quarter of the residence was transferred to the appellant and her two surviving brothers to protect their family's estate and not to avoid his debtors.

[17] She further maintains that the payment of $19,200 to Revenu Québec was a final payment, and that she had fulfilled her obligation to pay her brother's tax debt.

[18] Lastly, the appellant claims that she did not receive any benefits from her brother.

III. Minister's submissions

[19] The Minister claims that Robert had a tax debt of $28,938 under the ITA at the time of the transfer on January 16, 2012.

[20] It claims that under article 619 of the *Civil Code of Québec* (the **CCQ**), Robert is an heir who receives a universal legacy by general will and became an heir from the opening of the succession, that is, the day his mother died, in accordance with article 615 of the CCQ.

[21] Under article 630 of the CCQ, Robert had the right to accept or renounce his mother's succession and, under article 632 of the CCQ had six months to do so from the day she died. In accordance with article 646, paragraph 2 of the CCQ, the renunciation must be made by notarial act. If he did not renounce the succession, Robert is presumed to have accepted it under article 633, paragraph 2 of the CCQ.

[22] The Minister therefore claims that the right of ownership of the undivided quarter of the residence was transferred to Robert retroactively from the date his mother died, and that the Declaration of Transmission dated January 16, 2012 confirms the devolution of the property to the four heirs, including Robert.

[23] Furthermore, through the act of assignment dated January 16, 2012, the appellant acquired a third of Robert's undivided quarter of the residence without consideration, and it was therefore a gift under articles 1806 and 1807 of the CCQ.

[24] Under article 1824 of the CCQ, a gift of immovable property must be made by notarial act *en minute* and published at the registry office, which was done in this case. The Minister claims that a notarial act is an authentic act that makes proof against all persons of the juridical act that it sets forth, as stipulated in article 2819 of the CCQ.

[25] The Minister maintains that the appellant's knowledge of Robert's tax debt is not necessarily a condition of the application of section 160 of the ITA, and that the declaration of exemption in Gervaise St-Amour's will has no bearing on the application of the provision in question.

[26] The Minister maintains that the conditions for applying subsection 160(1) of the ITA were met and therefore concludes that in accordance with the provision in question, the appellant owes an amount up to the value of the asset received without consideration.

IV. Applicable legislation and analysis

A. Provisions of the *Civil Code of Québec*

[27] In the context of an assessment issued under subsection 160(1) of the ITA, the Court must refer to the applicable provincial law for issues related to civil law, particularly the administration of a succession and the transfer of movable or immovable property.

[28] In *9101-2310 Québec Inc.*,[2] Mr. Justice Noël of the Federal Court of Appeal (his then title) found it appropriate to refer to the relevant provisions of the CCQ to address issues stemming from transfers of property. He made the following observation:

> 44 A brief comment on the role of provincial law in the application of the Act is also appropriate. It is settled law that unless Parliament provides otherwise, the private law of the provinces plays a suppletive role (see section 8.1 of the *Interpretation Act*, R.S.C., 1985, c. I-21), so that a transfer of the ownership of property for the purposes of the Act takes place where ownership has changed under the civil law of Quebec or the common law of each of the other provinces of Canada depending on where the cause of action arises.
>
> [Emphasis added.]

[29] In light of the relevant provisions of the CCQ cited in the schedule, I conclude that the succession of the late Gervaise St-Amour opened on the day of her death, and that Robert, having had the right to accept or renounce the succession as an heir, is deemed to have accepted it because he did not renounce it within six months.

[30] The Declaration of Transmission dated January 16, 2012, simply confirms the acceptance of the share in the estate by Robert (and the other heirs), which he was deemed to have acquired at the opening of his mother's succession, that is, an undivided quarter of the residence.

[31] It was then that Robert assigned or transferred his quarter to the appellant (and her two surviving brothers) via notarial act of assignment signed by the appellant as attorney. Robert is also designated the [TRANSLATION] "owner" of the residence in the act of assignment. According to the provisions of the CCQ,

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[2] *Canada v. 9101-2310 Québec Inc.*, 2013 FCA 241, at paragraph 44.

particularly article 1807, it is a gift given via notarial act *en minute*, based on the requirements of article 1824.

B. Section 160 of the ITA

[32] This provision is intended to prevent the taxpayer from transferring his or her property to a third party with whom he or she is not dealing with at arm's length in order to thwart efforts to collect a tax debt.[3] The recipient of the transfer of property without consideration becomes solely responsible for the debt of the tax debtor up to the value of the property transferred, minus the consideration, if applicable. Subsection 160(1) is worded as follows:

> **160.** Tax liability re property transferred not at arm's length
> 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
>
> (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, or solidarily, 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 for it, and
>
> (e) the transferee and transferor are jointly and severally, or solidarily, 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

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3 *Medland v. Canada*, 98 DTC 6358 (FCA), at paragraph 14.

> (ii) the total of all amounts each of which is an amount that the 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,
>
> 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.

[33] In *Livingston*,[4] the Federal Court of Appeal listed four criteria that must be met to apply section 160:

> [17] . . .
>
> 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.

[34] As indicated by the Federal Court of Appeal in *Wannan*,[5] it is a draconian provision:

> [3] Section 160 of the *Income Tax Act* is an important tax collection tool, because it thwarts attempts to move money or other property beyond the tax collector's

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4 *Canada v. Livingston*, 2008 FCA 89, at paragraphs 17-19.

5 *Wannan v. Canada*, 2003 FCA 423, at paragraph 3; *Livingston*, at paragraph 3.

> reach by placing it in presumably friendly hands. It is, however, a draconian provision. While not every use of section 160 is unwarranted or unfair, there is always some potential for an unjust result. There is no due diligence defence to the application of section 160. It may apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax. Indeed, it may apply to a transferee who has no knowledge of the tax affairs of the primary tax debtor. However, section 160 has been validly enacted as part of the law of Canada. If the Crown seeks to rely on section 160 in a particular case, it must be permitted to do so if the statutory conditions are met.
>
> [Emphasis added.]

[35] A transfer of property must have taken place for section 160 to apply. It can be moveable or immovable property or any kind of entitlement.

[36] The Federal Court of Appeal explained the notion of transfer under section 160 of the ITA in *Biderman*.[6] It specified that the property can take any particular form and be transferred by any means. Moreover, the provision indicates that a transfer can be made "either directly or indirectly, by means of a trust or by any other means whatever . . ."

[37] Whether or not the taxpayer has received a benefit has no bearing on the application of this provision. The only question is whether the taxpayer has received a property at the time of the transfer. Furthermore, the transferor's intention to avoid a tax debt is not relevant, nor is his or her knowledge of the existence of a tax debt.[7] In *Livingston*, the Federal Court of Appeal examined the taxpayer's intention:

> [19] As will be explained below, given the purpose of subsection 160(1), the intention of the parties to defraud the CRA as a creditor can be of relevance in gauging the adequacy of the consideration given. However, I do not wish to be taken as suggesting as there must be an intention to defraud the CRA in order for subsection 160(1) to apply. The provision can apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax: see *Wannan v. Canada* 2003 FCA 423 at paragraph 3.
>
> [Emphasis added.]

[38] For the purposes of section 160, the fair market value of the transferred property must be determined on the date of the transfer. At paragraphs 18 and 19

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6 *Biderman v. Canada*, [2000] F.C.J. No. 194, at paragraph 40.

7 See note 4, above, at paragraph 19.

in *Riverin*,[8] Mr. Justice Archambault explained that the transfer occurred on the date of the act of assignment (January 16, 2012, in this case) and not on either the date the deceased died or that of the opening of his succession.

[39] In terms of the appellant's argument of exemption, in *Bernier*,[9] this Court specified that exemption clauses have no bearing on the application of section 160. In the decision, Mr. Justice Angers examined whether the amounts from an income replacement benefit from the Commission de la santé et de la sécurité du travail (the Quebec workers' compensation board) were exempt from seizure. He reiterated the principle endorsed by the Court of Appeal of Quebec in *Bruyère*[10] and by the Federal Court of Appeal in *Marcoux*,[11] according to which Parliament is not bound by the exemption rules established by provincial legislation.[12] It was concluded that once tax liability has been established, the exemption of transferred property from seizure has no effect on the application of section 160. Mr. Justice Angers stated:

> [19] In my opinion, once the transferee's tax liability is triggered by section 160, the CRA is not limited to recovering the property transferred by the transferor. All the transferee's assets are within the CRA's reach and their availability for seizure, should the case arise, has nothing to do with the transferee's tax liability under section 160 of the Act.
>
> [Emphasis added.]

[40] I conclude that the exemption clause in the late Gervaise St-Amour's will has no effect on the application of subsection 160(1) of the ITA. The late Gervaise St-Amour's succession was devolved by operation of law (article 615 of the CCQ), as confirmed in the Declaration of Transmission dated January 16, 2012, and the notarial act of assignment carrying the same date, such that the appellant acquired a third of Robert's undivided share. There was therefore a transfer of property and it is this assignment that triggers the application of section 160 and the appellant's responsibility, the exemption clause in the late Gervaise St-Amour's will notwithstanding.

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8 *Riverin v. The Queen*, 1995 T.C.J. No. 1675, at paragraphs 18-19.
9 *Bernier v. The Queen*, 2010 TCC 85, at paragraph 19.
10 *Canada v. Bruyère*, 2009 QCCA 2246.
11 *Marcoux v. Canada* (Attorney General), 2001 FCA 92.
12 See note 9, above, at paragraphs 24 and 25.

[41] The appellant also claimed that the settlement with Revenu Québec was the final settlement, to which the Minister was bound. In *Ouellet*,[13] Mr. Justice Favreau re-examined the potential issue of double taxation:

> [41] The appellant questions the validity of section 160 of the Act, arguing that the combined effect of section 160 of the Act and section 14.4 of the TAA results in "double taxation" that only Quebec taxpayers have the burden of paying. The problem of "double taxation" is very real and arises when the federal and Quebec tax authorities both assess the transferee for the full amount of the same transfer in a case where the tax liabilities of the transferor toward the CRA and the Ministère du Revenu du Québec are both greater than the value of the property transferred.
>
> [42] Despite the lack of clear legislative measures to eliminate the problem, the competent tax authorities tend to be empathetic towards taxpayers who are subject to "double taxation" in such circumstances. Indeed, this is what happened in the appellant's case. . . .
>
> [Emphasis added.]

[42] It is not a matter of double taxation in this case, as the Minister clearly took the payment made to Revenu Québec into consideration. I nevertheless do not accept the appellant's hypothesis that the agreement with Revenu Québec was in some way binding for the Minister.

V. Conclusion

[43] The burden of proof rests on the appellant's shoulders. As mentioned by the Supreme Court of Canada in *Hickman*,[14] the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment by presenting a *prima facie* case.

[44] In this case, I find that the appellant did not succeed in reversing the Minister's assumptions. On the contrary, I find that the overall evidence clearly establishes that she received property following a transfer of the residence without consideration from her brother, and that the four criteria set out in *Livingston* above have been met.

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13 *Ouellet v. The Queen*, 2012 TCC 77, at paragraphs 41 and 42.

14 *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, at paragraphs 92 to 95.

[45] I understand the appellant's frustration over the unexpected and somewhat "draconian" (*Wannan*, above) application of the provision in question. That said, I have to add that if she had obtained a clearance certificate prior to the transfer of her brother's undivided share (which had been done for the late Gervaise St-Amour's succession), she would have known of the tax debt and could have acted accordingly.

[46] For all of these reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 16th day of May 2016.

"Guy Smith"

Smith J.

CITATION:	2016 TCC 120
COURT FILE NO.:	2015-1643(IT)I
STYLE OF CAUSE:	GAIL BAKER v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 9, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
DATE OF JUDGMENT:	May 16, 2016

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Mélanie Sauriol

SOLICITORS OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada

APPENDIX

Civil Code of Québec
SQ, c C-12

613. The succession of a person opens by his death, at the place of his last domicile.

The succession devolves according to the prescriptions of the law unless the deceased has, by testamentary provisions, provided otherwise for the devolution of his property. Gifts *mortis causa* are, in that respect, testamentary provisions.

619. A successor to whom an intestate succession devolves, or who receives a universal legacy or a legacy by general title by will, is an heir from the opening of the succession, provided he accepts it.

625. The heirs are seized, by the death of the deceased or by the event which gives effect to a legacy, of the patrimony of the deceased, subject to the provisions on the liquidation of successions.

Subject to the exceptions provided in this Book, the heirs are not liable for the obligations of the deceased in excess of the value of the property they take, and they retain their right to demand payment of their claims from the succession.

The heirs are seized of the rights of action of the deceased against the author of any infringement of his personality rights or against the author's representatives.

630. Every successor has the right to accept or to renounce the succession.

The option is indivisible. However, a successor called to the succession in several ways has a separate option for each.

632. A successor has six months from the day his right arises to deliberate and exercise his option. The period is extended, by operation of law, by as many days as necessary to afford him 60 days from closure of the inventory.

During the period for deliberation, no judgment may be rendered against the successor as an heir unless he has already accepted the succession.

633. If a successor aware of his heirship does not renounce within the period for deliberation, he is presumed to have accepted unless the period has been extended by the court. If a successor is unaware of his heirship, he may be compelled to exercise his option within the time determined by the court.

If a successor does not exercise his option within the time determined by the court, he is presumed to have renounced.

637. Acceptance is express or tacit. It may also result from the law.

Acceptance is express where the successor formally assumes the title or quality of heir; it is tacit where the successor performs an act that necessarily implies his intention of accepting.

645. Acceptance confirms the transmission which took place by operation of law at the time of death.

641. The transfer by a person of his rights in a succession by gratuitous or onerous title entails acceptance.

The same rule applies to renunciation in favour of one or more coheirs, even by gratuitous title, and to renunciation by onerous title, even though it be in favour of all the coheirs without distinction.

646. Renunciation is express. It may also result from the law.

Express renunciation is made by notarial act *en minute* or by a judicial declaration which is recorded.

648. A successor may renounce the succession provided that he has not performed any act entailing acceptance and that no judgment having the authority of a final judgment (*res judicata*) has been rendered against him as an heir.

1806. Gift is a contract by which a person, the donor, transfers ownership of the property by gratuitous title to another person, the donee; a dismemberment of the right of ownership, or any other right held by a person, may also be transferred by gift.

Gifts may be *inter vivos* or *mortis causa*.

1807. A gift *inter vivos* is one whereby there is actual divesting of the donor, in the sense that the donor actually becomes the debtor of the donee.

The divesting of the donor is not prevented from being actual by the fact that the transfer or delivery of the property is subject to a term or that the transfer is with respect to certain and determinate property which the donor undertakes to acquire or property determinate only as to kind which the donor undertakes to deliver.

1824. The gift of movable or immovable property is made, on pain of absolute nullity, by notarial act *en minute*, and shall be published.

These rules do not apply where, in the case of the gift of movable property, the consent of the parties is accompanied by delivery and immediate possession of the property.

2813. An authentic act is one that has been received or attested by a competent public officer in accordance with the laws of Québec or of Canada, with the formalities required by law.

An act whose material appearance satisfies such requirements is presumed to be authentic.

2814. The following documents in particular are authentic if they conform to the requirements of the law:

(1) official documents of the Parliament of Canada or the Parliament of Québec;

(2) official documents issued by the government of Canada or of Québec, such as letters patent, orders and proclamations;

(3) records of the courts of justice having jurisdiction in Québec;

(4) records of and official documents issued by municipalities and other legal persons established in the public interest by an Act of Québec;

(5) public records required by law to be kept by public officers;

(6) notarial acts;

(7) minutes of boundary-marking operations.

2819. To be authentic, a notarial act shall be signed by all the parties; it then makes proof against all persons of the juridical act which it sets forth and of those declarations of the parties which directly relate to the act.

Where the parties are unable to sign, their declaration or consent shall be given before a witness who signs. Minors, persons of full age who are unable to give consent and persons who have an interest in the act may not be witnesses.