Docket: 2005-745(IT)G

BETWEEN:

GESTION ANDRÉ POMERLEAU INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 9, 2008, at Montréal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Jacques Renaud

Counsel for the Respondent: Nathalie Lessard

JUDGMENT

The appeal from the assessment made under the provisions of section 160 of the *Income Tax Act*, dated January 31, 2003, is dismissed with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 20th day of October 2008.

"François Angers"

Angers J.

Translation certified true
on this 13th day of May 2009.

François Brunet, Reviser

Citation: 2008 TCC 539
Date: 20081020
Docket: 205-745(IT)G

BETWEEN:

GESTION ANDRÉ POMERLEAU INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] Gestion André Pomerleau Inc. (the Appellant) is appealing from its assessment of January 31, 2003, by the Canada Revenue Agency (CRA) under subsections 160(1) and (2) of the *Income Tax Act* (the Act) on the grounds that the Appellant is jointly and severally liable to pay a portion of the tax of Coffrage Universel Ltée (Coffrage). Coffrage paid the Appellant $256,350 in dividends during its fiscal year ended December 31, 1994, and $20,678 in dividends during its fiscal year ended December 31, 1995. On the date the dividends in question were paid, Coffrage owed substantial amounts under the Act. On January 29, 2003, that amount was $898,370.33, broken down as follows:

Taxation year	**Reassessment Amount***	**Reassessment Date**
1986	$363,844.44	June 5, 1995
1987	$53,948.75	June 5, 1995
1989	$18,808.40	October 5, 1998
1992	$181,999.55	October 2, 2002
1993	$29,231.84	October 2, 2002
1994	$9,362.23	August 20, 1997

* The amounts shown in this column do not take into account interest accrued between the date of the reassessment and January 29, 2003.

[2] The fact that Coffrage had a tax liability and the amount of that liability are not disputed and are therefore not at issue in this case. It is also admitted that the transferor (Coffrage) and the transferee (the Appellant) are not dealing with each other at arm's length.

[3] Coffrage was duly incorporated on October 15, 1970. The company's principal business activities consisted of formwork and concreting in the commercial, industrial and institutional sectors until its activities ceased in fall 1995.

[4] During the years relevant to this case, the Appellant was the sole shareholder of Coffrage and André Pomerleau was the sole shareholder of the Appellant. However, since January 16, 1995, all of the Appellant's shares have been held by the Pomerleau Family Trust and the Appellant's class B non-voting preferred shares have been held by André Pomerleau.

[5] André Pomerleau was the director and directing mind of the Appellant and Coffrage during the relevant years. He was responsible for securing contracts and managing and supervising formwork projects. He managed 15 to 20 key employees and Coffrage had up to 300 employees. The financial commitments of Coffrage were made primarily with the bank and surety company for the projects. Mr. Pomerleau would personally endorse the bank's advances to Coffrage. Coffrage had sales of approximately $15 million per year during the relevant years.

[6] In 1994 and 1995, and in the previous two years, Coffrage paid Mr. Pomerleau in the form of salary and advances and he was paid dividends by the Appellant. The income tax returns adduced in evidence show that, in 1992, Mr. Pomerleau received a salary of $30,855 from Coffrage and dividends of $87,500 from the Appellant; in 1993, he received a salary of $35,557 from Coffrage and dividends of $85,285 from the Appellant; in 1994, he received a salary of $43,419 from Coffrage and dividends of $66,774 from the Appellant; and, in 1995, he received a salary of $93,205 from Coffrage and dividends of $50,976 from the Appellant.

[7] Mr. Pomerleau's remuneration was determined on the basis of the requirements of Coffrage in respect of the bank and the surety company at the time of production of the interim financial statements and year-end financial statements with a view to presenting a financial position that was sound for the purpose of the continuation of the financing and bonds of Coffrage. The lower the salary of Mr. Pomerleau, the lower the expenses and the higher the earnings or profits of Coffrage. The final decision concerning the payment of the salary and dividends was

made when the auditors of Coffrage completed the year-end financial statements and only Mr. Pomerleau determined the proportions. It is important to note that the dividends were paid to the Appellant which in turn paid dividends to Mr. Pomerleau.

[8] According to Mr. Pomerleau, a person who performed the same duties as he did at the time would have earned a salary of between $150,000 and $300,000 per year for workweeks of 60 hours spread over 5 to 6 consecutive days.

[9] As for the Appellant, it is a management company with very few activities and of which Mr. Pomerleau is the sole director. In its income tax returns for the fiscal year ending November 30, 1994, the Appellant reported a dividend income of $256,350 from Coffrage, and in its fiscal year ending November 30, 1994, the Appellant reported a dividend income of $20,678 from Coffrage.

[10] Of the dividends of $256,350 paid to the Appellant at its fiscal year end on November 30, 1994, $66,752 was passed on by the Appellant to Mr. Pomerleau in the form of dividends during its 1994 taxation year. The difference of $189,598 represents a dividend paid to the Appellant following a transaction involving Coffrage, the Appellant and Location d’échafaudage universel Inc. Equipment was indeed sold by Coffrage to Location d’échafaudage universel Inc. for about $191,000. That sale created an account receivable for that same amount for Coffrage which was sold to Gestion André Pomerleau Inc. In order pay for that purchase, Coffrage paid the Appellant a dividend of $189,598, thus providing the money it needed to pay for the account purchased from Coffrage. This entire series of transactions took place through account transfers and accounting entries in the companies' financial statements and books.

[11] In 1995, the payment of the Coffrage dividend to the Appellant was made through accounting entries in the companies' books, after conversion of $14,300 in salary into dividends, and by wiping out a debt through the payment of another dividend in the amount of $5,277. Michel P. André, controller of the various companies, including those of which André Pomerleau and his wife were shareholders, testified as to how remuneration was paid to André Pomerleau by way of salary, shareholder advances or dividends. He reiterated the fact that the decision as to how much would be paid in salary, advances or dividends was made after a meeting of Mr. Pomerleau, the auditors and himself in March, April or May of the following year. This explains why some of Mr. Pomerleau's T4 slips and T5 slips were amended. He also acknowledged that some of the entries in the book of Coffrage were made after the end of the year so as to regularize the decisions taken. When all is said and done, the declarations and payments of dividends by Coffrage to

the Appellant for the two years in question were so recorded by Coffrage and so reported by the Appellant in their respective fiscal years.

[12] Richard Téoli was a chartered accountant with Mallette Maheu during the years in question. He confirmed that prior to signing the financial statements of Coffrage ending December 31, 1994, that is, prior to May 15, 1995, he had a meeting with André Pomerleau to determine the apportionment of the salary and dividend to be paid. If changes were necessary, he would modify the accounting entries accordingly. He added that the decision concerning the apportionment of the salary and dividend rested with Mr. Pomerleau.

[13] The issue is whether, under section 160 of the Act, the Appellant and Coffrage are jointly and severally liable to pay the amount of $277,028 which Coffrage owes in tax debt pursuant to the Act for its 1986, 1987, 1989, 1992, 1993 and 1994 taxation years. Section 160 reads as follows:

> **Tax liability re property transferred not at arm's length**
>
> (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 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.

[14] Following the Appellant's admissions regarding the criteria for the application of section 160, what remains to be determined is whether the payment of dividends during the two years in question constitutes a transfer of property for which no consideration was given.

[15] Counsel for the Appellant submits that according to the accounting records, there was indeed a payment of dividends by Coffrage in favour of the Appellant, but that the evidence adduced shows that the salary paid to André Pomerleau and the dividends paid by Coffrage to the Appellant and subsequently by the Appellant to André Pomerleau are really the total remuneration paid by Coffrage to André Pomerleau for the services he rendered to Coffrage in his capacity as CEO of the company. In other words, counsel submits that Coffrage received consideration in the form of services rendered by André Pomerleau in exchange for the salary and dividends it paid and that there is definitely a connection between the services rendered and this form of remuneration. In the alternative, counsel for the Appellant is asking the Court to reduce the amount of the dividend for 1994 by subtracting the amount that was used to pay for the Appellant's purchase of the account receivable of Coffrage following its sale of equipment to Location d'échafaudage universel Inc. According to counsel, it was merely a question of accounting entries and that should suffice to reduce the dividend by that amount.

[16] As for the year 1995, the amount of $5,277 is derived from an accounting entry in the records of the Appellant and Coffrage to transform an advance between companies into a dividend. The difference, that is, the dividend of $15,400, still constitutes, according to counsel for the Appellant, payment for the services rendered by André Pomerleau and there is valuable consideration in return for the payment of a dividend.

[17] The Respondent submits that the Appellant made choices and those choices entail legal consequences. As for the accounting entries concerning the dividends of $189,598 paid in 1994 and $5,277 paid in 1995, they are payments made by set-off. The payment of a dividend is made without consideration according to the present state of the law. The Respondent also submits that the state of the law is such that, in

order for section 160 to apply, it is not necessary to prove that the transfer was made to avoid paying taxes.

[18] What counsel for the Appellant is asking is that the Court completely ignore what was entered in the records and financial statements of Coffrage and the Appellant for the two years in question as well as the information the two companies and André Pomerleau provided in their respective income tax returns regarding the salary Coffrage paid to Mr. Pomerleau and the dividends declared by Coffrage and the Appellant and paid to the Appellant and André Pomerleau. For the purposes of this case, counsel submits, it was remuneration for services rendered by André Pomerleau to Coffrage and paid partly in the form of salary and partly in the form of dividends.

[19] It is true that the portion paid in the form of salary to André Pomerleau may be much lower than the salary an executive could receive in a substantially similar situation. I cannot however ignore the fact that the amount of the salary paid by Coffrage to André Pomerleau was set by Mr. Pomerleau and that it was he who made the decision to opt for the payment of a dividend in lieu of a higher salary. It should be recalled that that decision was taken to make both interim and year-end financial statements look more sound and impressive to the bank and the surety company. That decision was on some occasions taken after the end of the financial year, requiring amendments and adjusting entries to reflect those changes. Subsequently, the tax returns of Coffrage, the Appellant and André Pomerleau were completed so as to reflect the decisions taken. The advantages of that method were that the financial statements for Coffrage were more impressive and the tax rate on dividends was more advantageous than on a salary for André Pomerleau and the Appellant.

[20] Today, the Court is being asked to view the dividends paid as salary, and hence to find that there was valuable consideration after the declaration and payment of a dividend. In order to do so, I would have to consider the payment of the dividend as salary or payment for services rendered by André Pomerleau or ignore the financial statements or income tax returns of each party involved and characterize the amounts as salary paid to André Pomerleau.

[21] The first problem with these two scenarios is that, above all, the dividends were paid by Coffrage to the Appellant and not to André Pomerleau. However, the Appellant did not render any services to Coffrage and therefore, Coffrage did not owe the Appellant any funds. The dividends cannot be considered salary. The second problem is that the declaration and payment of a dividend cannot be likened to a salary or payment for services rendered. Such a finding would be contrary to the case

law and would disregard the very nature of a dividend, which is the allocation of a company's undistributed profits to its shareholders in proportion to the shares held by them. The third problem is that the taxpayer's legal relationships must stand in tax matters. In the case at bar, the financial statements and income tax returns truly reflect the will of Coffrage, the Appellant and André Pomerleau in the way they did business with each other and they benefited from it. Their way of doing things truly reflects the will expressed by André Pomerleau at the time. On this last issue, I must quote a passage by Linden J. in *Friedberg v. R.*, 92 D.T.C. 6031, at page 6032:

> 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.

[22] Once a taxpayer makes a choice, namely to transform what he or she wants to call salary into a dividend in order to make his or her company's financial performance more impressive and enjoy the tax advantages that result, he or she must also accept whatever consequences that choice may bring.

[23] In the case at bar, dividends were indeed declared and paid by Coffrage to the Appellant during each of the years in question as indicated in the financial statements and income tax returns of Coffrage and the Appellant.

[24] The case law and present state of the law are such that there is no consideration for obtaining a dividend as dividends arise from ownership of the shares. See *Algoa Trust v. The Queen*, [1993] 1 C.T.C. 2294, *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489, *Neuman v. MNR*, [1998] 1 S.C.R. 770, *The Queen v. Gilbert*, 2007 FCA 136, *Gosselin v. Canada*, [1996] T.C.J. No. 206, *Côté v. Canada*, [2002] T.C.J. No. 76 and *Larouche v. The Queen* dated September 3, 2008.

[25] Accordingly, since all the relevant elements of section 160 are met, the appeal is dismissed with costs.

Signed at Ottawa, Canada, this 20th day of October 2008.

"François Angers"

Angers J.

Translation certified true
on this 13th day of May 2009.

François Brunet, Reviser

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APPEARANCES:

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