

Docket: 2008-1242(IT)G

BETWEEN:

6149812 CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of Vincent Boivin, 2007-3503(IT)G, and of Maurice Boivin in his capacity as liquidator of the succession of the late Gabrielle Gauthier, 2007-3623(IT)G, on February 13, 2009, at Ottawa, Ontario.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the appellant: Pierre McMartin
Counsel for the respondent: Pascal Tétrault

JUDGMENT

The appeal from the assessment, notice of which is dated July 25, 2007, and bears the number 46818, is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 3rd day of September 2009.

"B. Paris"

Paris J.

Translation certified true
on this 14th day of October 2009

François Brunet, Revisor

Docket: 2007-3503(IT)G

BETWEEN:

VINCENT BOIVIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of 6149812 Canada Inc.,
2008-1242(IT)G, and of Maurice Boivin in his capacity as liquidator of the
succession of the late Gabrielle Gauthier, 2007-3623(IT)G,
on February 13, 2009, at Ottawa, Ontario.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the appellant: Pierre McMartin

Counsel for the respondent: Pascal Tétrault

JUDGMENT

The appeal from the assessment, notice of which is dated December 1, 2005,
and bears the number 42321, is dismissed, without costs, in accordance with the
attached Reasons for Judgment.

Signed at Ottawa, Canada, this 3rd day of September 2009.

"B. Paris"

Paris J.

Translation certified true
on this 14th day of October 2009

François Brunet, Revisor

BETWEEN:

MAURICE BOIVIN IN HIS CAPACITY AS LIQUIDATOR OF THE
SUCCESSION OF THE LATE GABRIELLE GAUTHIER

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of Vincent Boivin,
2007-3503(IT)G, and of 6149812 Canada Inc., 2008-1242(IT)G,
on February 13, 2009, at Ottawa, Ontario.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the appellant: Pierre McMartin
Counsel for the respondent: Pascal Tétrault

JUDGMENT

The appeal from the assessment, notice of which is dated July 12, 2005, and bears the number 19922, is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 3rd day of September 2009.

“B. Paris”

Paris J.

Translation certified true
on this 14th day of October 2009

François Brunet, Revisor

Citation: 2009 TCC 442
Date: 20090903
Dockets: 2008-1242(IT)G
2007-3503(IT)G
2007-3623(IT)G

BETWEEN:

6149812 CANADA INC.,
VINCENT BOIVIN,
MAURICE BOIVIN IN HIS CAPACITY AS LIQUIDATOR OF THE
SUCCESSION OF THE LATE GABRIELLE GAUTHIER,
Appellants,
and
HER MAJESTY THE QUEEN,
Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Paris J.

[1] These appeals are from three assessments made by the Minister of National Revenue under section 160 of the *Income Tax Act* (the Act). The assessments relate to a transfer of \$203,075.54 from Maurice Boivin to the succession of Gabrielle Gauthier (the succession) and to two subsequent transfers from the succession: one to Vincent Boivin of \$40,000 and one to 6149812 Canada Inc. (the company) of \$30,000. The Minister assessed the succession on the basis that the transfer from Maurice Boivin was made without consideration at a time when he had a tax liability.

[2] Vincent Boivin and the company were assessed on the basis that the transfers made to them by the succession were made without consideration at a time when the succession was liable under section 160 of the Act as a result of the transfer from Maurice Boivin to the succession.

[3] The appellants are challenging the assessments on the ground that the property initially transferred to the succession was "exempt from seizure" under the relevant provision of the *Civil Code of Québec* (the Civil Code) and that section 160 of the Act does not apply to property that is "exempt from seizure".

[4] In the alternative, should the Court find that the property transferred to the succession by Maurice Boivin was not exempt from seizure, the company submits that the payment it received from the succession was a loan rather than a transfer without consideration.

[5] The facts of this case are for the most part not disputed.

[6] Gabrielle Gauthier was the spouse of Maurice Boivin and the mother of Vincent Boivin. Ms. Gauthier and Maurice Boivin were shareholders of the company. Ms. Gauthier died on November 4, 2003. Maurice Boivin was her testamentary executor and was named the sole heir in her will. According to Ms. Gauthier's will, all property bequeathed by her in it as well as all property acquired with the proceeds from that property was exempt from seizure.

[7] Article 8 of the will reads as follows:

Article Eight

All the property bequeathed herein as well as that acquired by reinvestment and the proceeds and income from it are bequeathed as support and will be exempt from seizure for any debt whatsoever of my legatees unless they consent to have it seized in whole or in part.

This exemption from seizure is given for the purpose of keeping the legacy in the family for the duration of the life of my legatee or legatees.

[8] At the time of her death, Ms. Gauthier was the sole registered owner of the family residence.

[9] On November 16, 2004, Maurice Boivin made a proposal under section 50 of the *Bankruptcy and Insolvency Act*.

[10] On March 1, 2005, the succession transferred the family residence to Maurice Boivin as the heir named in Gabrielle Gauthier's will. The same day, Maurice Boivin sold the residence to arm's-length purchasers. He deposited the proceeds from the sale, namely, \$203,075.54 in his personal account. On

April 5, 2005, he withdrew that amount from his account and deposited it in the succession's account.

[11] On April 6, 2005, the succession issued a \$40,000 cheque to Vincent Boivin, and on June 15, 2005, it issued a \$30,000 cheque to the company.

[12] On April 5, 2005, Maurice Boivin had a tax liability of at least \$160,257.91. On July 12, 2005, the succession was assessed for that amount under subsection 160(1) of the Act. Vincent Boivin was assessed under the same subsection for \$40,000 on December 1, 2005, and the company for \$30,000 on July 25, 2007.

[13] The appellants submits that the amount received by Maurice Boivin from the sale of the residence is exempt from seizure pursuant to Article 8 of Ms. Gauthier's will and that, as a result, subsection 160(1) of the Act does not apply.

[14] The respondent does not dispute that the property bequeathed by the late Ms. Gauthier to her spouse was exempt from seizure under to Article 8 of the will. The respondent submits, however, that that exemption did not extend to the proceeds from the sale of the property (the property acquired through reinvestment). According to the respondent, after the residence was sold, the proceeds from its sale themselves were not exempt from seizure.

[15] In the event that it is found that the proceeds were not exempt from seizure, the appellants also submit that depositing the proceeds of sale into the succession's bank account did not constitute a transfer within the meaning of subsection 160(1) of the Act. Counsel for the appellants stated that Maurice Boivin had deposited the money in the account in order to be able to identify the proceeds of sale and that he used the money for his own purposes rather than for any purpose related to the succession. In addition, after the deposit, the account itself was never used for any purpose related to the succession. Counsel also submitted that Maurice Boivin never tried to put his property out of reach of the Minister to hinder the collection of his tax liability, because the property in question was already exempt from seizure.

Analysis

[16] The first issue is whether Article 8 of Ms. Gauthier's will makes exempt from seizure the property acquired through reinvestment of the property bequeathed to Maurice Boivin.

[17] Article 553(3) of the Quebec *Code of Civil Procedure* provides that property declared exempt from seizure is exempt from seizure except by a creditor posterior to the opening of the legacy with the permission of the judge and to the extent that he determines.

[18] Article 553(3) reads as follows:

553. The following are exempt from seizure:

3° Property declared by a donor or testator to be exempt from seizure, which may however be seized by creditors posterior to the gift or to the opening of the legacy, with the permission of the judge and to the extent that he determines;

[19] Article 2649 of the Civil Code sets out three conditions for a stipulation of unseizability to be valid: it must be made in an act by gratuitous title, be temporary and be justified by a serious and legitimate interest.

[20] Article 2649 reads as follows:

2649. A stipulation of unseizability is without effect, unless it is made in an act by gratuitous title and is temporary and justified by a serious and legitimate interest. Nevertheless, the property remains liable to seizure to the extent provided in the *Code of Civil Procedure*.

It may be set up against third persons only if it is published in the appropriate register.

[21] It is not disputed that those conditions are met in this case with respect to the property bequeathed to Maurice Boivin by Ms. Gauthier. The respondent submits, however, that the unseizability does not extend to the property acquired through reinvestment, even though Ms. Gauthier stipulated it.

[22] The appellants cited cases where it was found that property acquired through reinvestment of a gift or legacy exempt for seizure was exempt from seizure even without a stipulation of unseizability regarding that property in the deed of gift or in the will (see *Lacroix v. Corbeil*, [1955] C.S. 219). However, that decision does not contain an analysis of that issue; hence, it may not be very authoritative.

[23] More recently, in *Robinovitch v. Bank of Montréal*, [1999] R.D.I. 160 (C.Q.), the Court of Quebec suggested in *obiter dictum* that, in the case of a testamentary gift, the property acquired in replacement of the property stipulated to be exempt from seizure would not be exempt in the absence of a stipulation of unseizability with

respect to the replacement property in the will. In *Robinovitch*, the applicant inherited from her uncle \$125,000 in money under a stipulation of unseizability. The applicant purchased an immovable. She paid for part of the immovable with that money. The Court held that the immovable was not exempt from seizure:

[TRANSLATION]

. . . It was of her own free will that the applicant decided to mix it with another sum of money and to purchase an immovable that was not subject to any particular protection. In doing so, she clearly changed the nature of the property stipulated to be exempt from seizure, resulting in the loss of its unseizability. . . .

[24] The respondent referred to *Poulin v. Serge Morency et associés Inc.*, [1997] J.Q. No. 2950 (QL), in which the Court of Appeal for Quebec ruled on an issue of unseizability. The issue was whether sums of money kept in a pension plan were still exempt from seizure after they had been transferred into an RRSP. The Court (whose decision was affirmed by the Supreme Court of Canada: [1999] 3 S.C.R. 351) held that those sums were not exempt from seizure. According to Justice Deschamps at paragraphs 44, 52, 57 and 74 of the decision,

[TRANSLATION]

Seizability is the rule. Unseizability is the exception and must be authorized by law. Persons or parties cannot decide or agree to put their property out of reach of creditors except to the extent allowed by law.

. . .

Reinvestment cases are exceptional. They are specifically provided for by law in the area of family patrimony . . . and succession

. . .

As reinvestment is an exception, the creditor of protected rights can rely on an exemption from seizure only as long as the sums retain the characteristics that are the reason the law protects them. He can no longer do so when their characteristics have changed.

. . .

Unseizability provisions are restricted to the property designated by the legislature. When the debt is not entered into the debtor's patrimony, it retains its identity. If the payment or remittance is conducted by means of a vehicle or by purchasing property protected against unseizability, the proceeds of the transaction will also be exempt from seizure. If property that is not privileged by the legislature is cashed or transformed, the protection is lost.

[Emphasis added.]

[25] The Supreme Court, affirming the Court of Appeal decision in *Poulin*, rejected the notion of a general rule of unseizability in reinvestment and restricted the unseizability of property acquired through reinvestment to cases where it is explicitly provided for by law.

[26] The following is the conclusion reached by Jacques Auger, full professor at the faculty of law of the Université de Sherbrooke in his article “Les clauses d’insaisissabilité sous la loupe des tribunaux” [unseizability clauses examined by the courts], *Revue du notariat*, vol. 109, March 2007, 87–106. He made the following comments at page 96 of his article:

[TRANSLATION]

. . . Recalling the principle that property can be seized and that unseizability is an exception, the court refuses to recognize the unseizability of transferred amounts unless there is an express legislative provision to that effect.

Extended to the unseizability clause, the *ratio decidendi* of that judgment leads to the same conclusion. Indeed, paragraphs 3 and 4 of article 553 of the *Code of Civil Procedure*, according to which property declared by a donor or testator is exempt from seizure or is support, do not provide for the extension of unseizability to property acquired through reinvestment. Unseizability being the exception, it can only apply when the legislation provides for it, and the will of a testator or donor cannot be of any effect in this respect.

[Emphasis added.]

[27] In the light of the Supreme Court's decision in *Poulin*, I must hold that the stipulation in Ms. Gauthier's will concerning the unseizability of property acquired through reinvestment of the property bequeathed to Maurice Boivin is without legal effect. Consequently, the sum received by Maurice Boivin from the sale of the property is not exempt from seizure and can be assessed under subsection 160(1) of the Act.

[28] In the alternative, the appellants are also submitting that Maurice Boivin's transfer to the succession of the proceeds from the sale of the property was not a transfer provided for in subsection 160(1) of the Act because he did not intend to try to avoid the claims of the Minister of National Revenue.

[29] I cannot accept that argument. First, subsection 160(1) does not require an intention to avoid paying the tax liability (*Addison & Leyen Ltd v. Canada*, 2006

FCA 107; *Canada v. Rose*, 2009 FCA 93). Second, the evidence did not satisfy me that Maurice Boivin did not intend to place the property in question out of reach of the Minister. The reason he gave for the transfer, that is, to keep the money from the sale of the property separate, does not explain why the money was transferred to the succession's account and not to a separate account belonging to Maurice Boivin himself.

[30] With regard to the numbered company, Maurice Boivin testified that the \$30,000 transfer was a loan to that company. In support of his testimony, he submitted an excerpt from the company's records, which shows that the company treated the money received from Maurice Boivin as a shareholder's loan. That evidence was not contradicted, and I accept that it was a loan rather than a transfer without consideration within the meaning of subsection 160(1). It seems to me that amounts advanced to a company would be either loans or capital advances rather than transfers without consideration.

[31] For all of these reasons, the appeal from the assessment regarding the company will be allowed, and the two other appeals must be dismissed.

Signed at Ottawa, Canada, this 3rd day of September 2009.

"B. Paris"

Paris J.

Translation certified true
on this 14th day of October 2009

François Brunet, Revisor

CITATION: 2009 TCC 442

COURT FILE NOS: 2008-1242(IT)G, 2007-3503(IT)G,
2007-3623(IT)G

STYLE OF CAUSE: 6149812 CANADA INC., VINCENT
BOIVIN, MAURICE BOIVIN IN HIS
QUALITY AS LIQUIDATOR OF THE
SUCCESSION OF THE LATE
GABRIELLE GAUTHIER AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 13, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: September 3, 2009

APPEARANCES:

Counsel for the appellants: Pierre McMartin
Counsel for the respondent: Pascal Tétrault

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