

Docket: 2008-1683(IT)G

BETWEEN:

MARIO BRUNEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 12, 2009, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Sarom Bahk

JUDGMENT

The appeal from the assessment dated March 2, 2007, the notice of which bore the number 43344, whereby the Minister of National Revenue claimed payment of \$18,348 from the Appellant in connection with non-arm's length transfers of property made during the 1999, 2000 and 2001 taxation years, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of March 2010.

"Réal Favreau"

Favreau J.

Translation certified true
on this 31st day of May 2010.

Erich Klein, Revisor

Citation: 2010 TCC 145
Date: 20100311
Docket: 2008-1683(IT)G

BETWEEN:

MARIO BRUNEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal under the general procedure from an assessment dated March 2, 2007, the notice of which bore the number 43344, whereby the Minister of National Revenue ("the Minister") claimed payment of \$18,348 from the Appellant in connection with non-arm's length transfers of property during the 1999, 2000 and 2001 taxation years. These transfers were made in the form of dividends paid by 2635-9257 Québec Inc. ("the Corporation").

[2] The Corporation was constituted on December 22, 1988, under Part 1A of the *Quebec Companies Act* and was registered on March 4, 1995. Its principal activity consisted in holding an investment in a partnership doing business as "Services de prévention, d'évaluation et de ressources" ("SPER") and whose principal activity consisted in providing professional therapeutic aid services to businesses. SPER's fiscal year ended on December 31 of each year, while the Corporation's fiscal year ended on March 31 of each year.

[3] During the 1999, 2000 and 2001 taxation years, the Appellant was the sole shareholder and sole director of the Corporation and held a 5% interest in SPER, while the Corporation held a 95% interest. The Appellant was SPER's manager and its principal therapist.

[4] According to the Corporation's financial statements as at March 31, 1999, 2000 and 2001, and according to the income tax returns (T2) filed by the Corporation for each of those taxation years, the Corporation paid the following dividends on the Class "A" shares of its capital stock:

1999:	\$10,160
2000:	\$15,000
2001:	\$15,001

[5] The Appellant was late filing his income tax returns (T1) for the 1999, 2000 and 2001 taxation years; his returns for 1999 and 2000 were filed on June 15, 2001, and his return for 2001 was filed on April 22, 2003. For each of those years, the Appellant claimed and received a federal dividend tax credit, as shown hereunder:

	<u>Claimed</u>	<u>Allowed</u>
1999	\$1,693.33	\$1,148.56
2000	\$2,500.00	\$2,290.34
2001	\$1,666.67	\$1,154.20

[6] As at March 2, 2007, the Corporation owed the Minister the following amounts for the 1999, 2000 and 2001 taxation years:

Federal tax:	\$9,448.42
Penalties:	\$969.48
Interest:	<u>\$7,930.10</u>
Total:	\$18,348.00

[7] The only issue to be decided here is whether the Appellant is required to pay the amount of \$18,348.00, that is, the amount of the Corporation's tax liability for the 1999, 2000 and 2001 taxation years, in view of the fact that he received dividends paid to him by the Corporation during those taxation years.

[8] The Appellant's tax liability, if any, arises through the operation of subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended ("the Act"). Subsection 160(1) reads as follows:

160. 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.

[9] For subsection 160(1) of the Act to apply, there must be, between persons not dealing with each other at arm's length, a transfer of property without consideration or a transfer for which the fair market value of the consideration is less than the fair market value of the property at the time of the transfer.

[10] To determine whether persons are not dealing with each other at arm's length, it is necessary to look at the provisions of section 251 of the Act. Under paragraph 251(1)(a) of the Act, related persons are deemed, for the purposes of the Act, not to deal with each other at arm's length. According to the definition of "related persons" found in subsection 251(2), "related persons" or "persons related to each other" are a

corporation and a person who controls the corporation, if it is controlled by one person. In the present case, there is no doubt that the Appellant was not dealing with the Corporation at arm's length during the 1999, 2000 and 2001 taxation years, since he was the Corporation's sole shareholder. The Appellant and the Corporation were therefore related persons who were deemed not to be dealing with each other at arm's length.

[11] Another condition for the operation of subsection 160(1) is that there have been a transfer of property in a case where a dividend was paid. The question of whether the payment of a cash dividend can constitute a transfer of property for the purposes of subsection 160(1) has been the subject of a number of decisions of this Court, the Federal Court of Appeal and the Supreme Court of Canada.

[12] In *Algoa Trust v. The Queen*, [1993] 1 C.T.C. 2294, Judge Rip of this Court held that section 160 of the Act applied to a dividend, so that payment of the dividend constituted a transfer of property. That conclusion was confirmed by, among others, Madam Justice Sharlow of the Federal Court of Appeal in *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489, in these words:

60 . . . Thus, the 1993 decision of the Tax Court in *Algoa Trust* is the leading authority for the proposition that section 160 may apply to a dividend.

[13] Madame Justice Sharlow's decision was upheld by the Supreme Court of Canada at [2007] 2 S.C.R. 793, although that court's judgment was based on other reasons.

[14] In addition to considering the payment of a dividend as a transfer of property for the purposes of section 160 of the Act, the courts have held that a dividend paid to shareholders constitutes a transfer without consideration for the purposes of section 160. It was so held, in particular, in *The Queen v. Gilbert*, 2007 FCA 136, where Justice Nadon of the Federal Court of Appeal upheld the decision of Justice Lamarre Proulx that the dividends paid constituted a transfer without consideration for the purposes of section 160 of the Act.

[15] As Justice Angers of this Court so well put it in *Gestion André Pomerleau Inc. v. The Queen*, [2009] DTC 1208, at paragraph 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*, [93 DTC 405] [1993] 1 C.T.C. 2294, *Addison & Leyen Ltd. v. Canada*, [2006 DTC 6248] [2006] F.C.J. No. 489, *Neuman v. MNR*, [98 DTC 6297]

[1998] 1 S.C.R. 770, *The Queen v. Gilbert*, [2006 DTC 6248] [2006 DTC 6248] 2007 FCA 136, *Gosselin v. Canada*, [1996] T.C.J. No. 206, *Côté v. Canada*, [2003 DTC 13] [2002] T.C.J. No. 76 and *Larouche v. The Queen* [2009 DTC 1206] dated September 3, 2008.

[16] According to the Corporation's financial statements and the income tax returns filed by the Corporation and the Appellant, the Corporation paid dividends to the Appellant during each of the taxation years in issue. All of the conditions for the application of subsection 160(1) of the Act are therefore met.

[17] Since the Appellant cannot be considered to have provided any consideration for the payment of the dividends, the fair market value of the property transferred exceeded the fair market value of the consideration given for that property. The Minister was therefore justified in assessing the Appellant for the tax, penalties and interest owed by the Corporation for the 1999, 2000 and 2001 taxation years.

[18] In his Notice of Appeal, the Appellant asked the Court to consider the amounts paid in the form of dividends as fees for the 50 hours of work per week he performed as manager of SPER. That is clearly not possible because the services to which the Appellant refers were rendered to SPER and not to the Corporation. The Corporation is a legal entity separate and distinct from SPER. The Appellant provided no service to, and performed no work for, the Corporation, which merely held an interest in SPER.

[19] For these reasons, the appeal is dismissed, with costs.

Signed at Ottawa, Canada, this 11th day of March 2010.

"Réal Favreau"

Favreau J.

Translation certified true
on this 31st day of May 2010.

Erich Klein, Revisor

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APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Sarom Bahk

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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