Docket: 2009-1419(IT)G

BETWEEN:

MARIO CÔTÉ INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on December 6, 2010, at Montréal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the appellant:	Aaron Rodgers
Counsel for the respondent:	Simon-Nicolas Crépin

JUDGMENT

The appeal by Mario Côté Inc. under the *Income Tax Act* for the 2008 taxation year is dismissed, with costs.

Signed at Ottawa, Canada, this 17th day of February 2011.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 9th day of May 2011.

François Brunet, Revisor

Citation: 2011 TCC 105
Date: 20110217
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REASONS FOR JUDGMENT

Archambault J.

[1] Mario Côté Inc. (MCI) is appealing from an assessment made by the Minister of National Revenue (Minister) under section 160 of the *Income Tax Act* (Act), whereby the Minister claims payment of $1,243,589.95. The assessment results from a dividend of $6,000,000 that MCI received from 2635-8838 Québec Inc. (2635). As shown in the partial agreed statement of facts filed by the parties (Exhibit A-2), 2635 apparently paid that dividend on December 6, 2005. Contrary to the usual situation, 2635's tax liability to the Minister has nothing to do with unpaid tax on income earned during the relevant year; rather, it results from a refund of $1,372,972 paid by the Minister under section 129 of the Act, that is, a tax refund corresponding to the balance of the refundable dividend tax on hand (RDTOH).

[2] The parties agree that MCI was not entitled to the refund. The Minister made the refund on the basis of an income tax return filed by 2632-7841 Québec Inc. (2632) for the taxation year ending on December 31, 2005, on which the sum of $1,372,972 was entered in error as RDTOH on line 485. However, on line 784, 2632 did not claim any dividend refund. In fact, the outside accountant who prepared the tax return should have shown the amount in question for the purpose of computing the cumulative eligible capital expenditures, as shown in the amendment found in Schedule 10, "Cumulative Eligible Capital Deduction", produced in Exhibit A-1,

Tab 9. The dividend refund was paid to 2635 because 2632 had been liquidated and absorbed into 9145-6020 Québec Inc. (9145) on January 1, 2005, and 9145 had been liquidated and absorbed into 2635 on December 1, 2005.

[3] I reproduce the agreed statement of facts (Exhibit A-2) below:

[TRANSLATION]

1. Mario Côté Inc. is a company that holds the shares of numerous companies doing business in livestock and is wholly owned by Mario Côté;

2. On January 1, 2005, 2632-7841 Québec Inc. (2632) and 9141-5018 Québec Inc. ~~merged to become~~ [were dissolved into] 9145-6020 Québec Inc. (9145);

3. 9145 was a hog business and a subsidiary of Mario Côté inc.;

4. On December 1, 2005, 9145 and 9154-0542 Québec Inc. (9154) ~~merged to become~~ [were dissolved into] 2635-8838 Québec Inc. (2635);

5. 9154 was an agricultural production company and a subsidiary of Mario Côté Inc.;

6. 2635 is a poultry company and a subsidiary of Mario Côté Inc.;

7. The appellant is the sole shareholder of 2635.

8. On December 1, 2005, 2635 acquired all of the shares of 9145 and 9154 by tax rollover and both 9145 and 9154 were liquidated into 2635, resulting in ~~a merger~~ [the consolidation] of the three subsidiaries of the taxpayer Mario Côté Inc., as shown in the 2005 financial statements of 2635 and Mario Côté Inc.;

9. When 2632 filed its income tax return for the taxation year ending on December 1, 2004, it entered a refundable dividend tax on hand (RDTOH) of $0;

10. When 2632 filed its income tax return for the taxation year ending on December 31, 2005, it erroneously entered an RDTOH balance of $1,372,972;

11. As a result of the ~~merger~~ [dissolution] on December 1, 2005, 2632's RDTOH balance of $1,372,972 became the opening RDTOH for 2635;

12. On December 6, 2005, 2635 paid a dividend of $6,000,000.00 to Mario Côté Inc,. as shown on lines 200 to 270 of Schedule 3 to the T-2 return filed by Mario Côté Inc. for 2005;

13. On July 25, 2006, 2635 filled out the application form for financing from La Financière agricole du Québec (La Financière);

14. The application resulted in compensation of $947,690.900 [*sic*] being paid to 2635;

15. On September 20, 2006, the Minister issued a notice of assessment to 2635 and paid it a tax refund equivalent to the RDTOH balance of $1,372,972;

16. The cheque from CRA was received by 2635 on September 29, 2006;

17. 2635 confused that cheque from CRA with the compensation expected from La Financière, and therefore used the amount refunded by CRA to meet its deadlines, as if that amount had been the amount granted by La Financière;

18. On October 16, 2006, 2632 and 2635 sent the Minister requests to correct their income tax returns, as shown at Tab 9 of the joint book of exhibits;

19. 2635 was not entitled to the tax refund of $1,372,972;

20. 2635 has not repaid that amount to the Minister, in spite of repeated requests.

21. On December 6, 2006, CRA issued a "Corporate Notice of Reassessment" in the amount of $1,435,235.32, consisting of $1,372,971.00 in principal and $62,264.32 in interest, as a result of a change in the net RDTOH, in respect of 2635's 2005 taxation year;

22. On May 26, 2008, CRA issued notice of assessment 679586 to Mario Côté Inc. for the amount of $1,243,589.95.

23. On August 28, 2007, 2635 received the compensation from La Financière, in the amount of $714,696.52.

[4] According to the testimony of the in-house accountant, it was the outside accountants who requested the correction.

[5] No explanation was given at the hearing for why the $1,435,235 was reduced to $1,243,589 ($1,052,348 + interest of $191,241) in the assessment made under section 160. It might be thought that there was partial payment of the tax liability. The assessment of 2635 that shows $1,435,235 as owing to the Minister relates to the taxation year ending on December 16, 2005 (Exhibit A-1, Tab 2).

Submissions of the parties

(a) The respondent

[6] Counsel for the respondent submits that section 160 governs in this case. That section provides, in particular, as follows:

> **160. (1) Tax liability re property transferred not at arm's length** -- 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:
>
> …
>
> (*c*) a person with whom the person was not dealing at arm's length,
>
> …
>
> (*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
>
> …
>
> (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.
>
> [Emphasis added.]

> **160. (1) Transfert de biens entre personnes ayant un lien de dépendance** -- Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :
>
> …
>
> *c*) une personne avec laquelle elle avait un lien de dépendance,
>
> …
>
> *e*) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

…

(ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;

aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi.

[Emphasis added.]

[7] Counsel for the respondent submits that the assessment whereby MCI is held solidarily liable with 2635 for the overpayment of the tax refund refers to an amount to be paid "*pour*", or, in the English version, "in respect of", 2005. First, that is shown in the assessment of 2635 made by the Minister on December 6, 2006 (Exhibit A-1, Tab 2). That assessment is for the taxation year ending on December 16, 2005. Counsel for the respondent submits that the facts that resulted in the tax refund provided for in section 129 of the Act occurred in 2005, that is, a dividend was paid on December 6, 2005, and the tax return was filed by 2632 for the taxation year ending on December 31, 2005, showing, by error, that there was an RDTOH. Counsel submits that the overpayment of the refund is a relevant amount for the computation of the tax applicable to the investment income earned by 2635 in 2005 and the previous years or for the computation of the tax applicable to the investment income of 2632, which had been dissolved and then absorbed in two stages, first into 9145 on January 1, 2005, and then into 2635 on December 1, 2005.

[8] Moreover, it is submitted that interpretation is fair, because if MCI were to succeed, the result would be contrary to the spirit of the Act, since 2635 paid a dividend of $6,000,000, creating an entitlement to a tax refund that, in the particular circumstances of this case, was without basis, but enabled 2635 to avoid repaying an amount that it obtained by reason of that dividend.

(b) Position of the appellant

[9] Counsel for MCI stressed the wording of subsection 160.1(1) of the Act, according to which the tax liability resulted, for the purposes of section 160.1, from an overpayment of the refund to 2635 by the Minister. Subsection 160.1(1) reads as follows:

> **160.1 (1) Where excess refunded** -- Where at any time the Minister determines that an amount has been refunded to a taxpayer for a taxation year in excess of the amount to which the taxpayer was entitled as a refund under this Act, the following rules apply:
>
> (*a*) the excess shall be deemed to be an amount that became payable by the taxpayer on the day on which the amount was refunded; and
>
> (*b*) the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess (other than any portion thereof that can reasonably be considered to arise as a consequence of the operation of section 122.5 or 122.61) from the day it became payable to the date of payment.
>
> **160.1 (1) Remboursement en trop** -- Lorsque le ministre détermine qu'un contribuable a été remboursé pour une année d'imposition d'un montant supérieur à celui auquel il avait droit en application de la présente loi, les règles suivantes s'appliquent :
>
> *a*) l'excédent est réputé représenter un montant qui est payable par le contribuable à compter de la date du remboursement;
>
> *b*) le contribuable doit payer au receveur général des intérêts sur l'excédent, sauf toute partie de l'excédent qu'il est raisonnable de considérer comme découlant de l'application des articles 122.5 ou 122.61, calculés au taux prescrit, pour la période allant du jour où cet excédent est devenu payable jusqu'à la date du paiement.

[10] Counsel for MCI submits that the tax liability in issue has nothing to do with the tax applicable to a particular taxation year, since it is the result of an amount that was not owing being paid by the Minister to MCI because of an error in 2632's income tax return.

[11] Counsel for MCI admitted that section 160 applies to a dividend payment, in view of the case law: *Algoa Trust* v. *Canada*, [1993] T.C.J. No. 15 (QL), 1993 CarswellNat 881 (Eng.), [1993] 1 C.T.C. 2294 (Eng.), 93 DTC 405 (Eng.). Counsel also cited *R.* v. *Simard-Beaudry*, 1971 CarswellNat 239F, [1971] F.C. 396, 71 DTC 5511 (Eng.), and *Trust* (CarswellNat), second paragraph of the headnote and paragraphs 29 and 30.

Analysis

[12] In my opinion, the argument presented by counsel for the respondent is more persuasive than MCI's argument. It is consistent with the interpretation adopted by Dussault J. in *Montreuil* v. *R.*, 1994 CarswellNat 2034, at paragraph 45, [1996] 1 C.T.C. 2182 (Eng.), of the terms "*pour*" "*l'année d'imposition*" or, in the English version, "in respect of the taxation year", used in section 160 of the Act:

> … The tax is the principal and the interest is the accessory. In this sense, interest that compounds until full payment of an outstanding taxation amount for a specified "taxation year" prior to the transfer constitutes, whatever the year in which it is compounded, an amount that the transferor is required to pay under the Act "in respect of" this preceding taxation year according to the wording of subparagraph 160(1)(*e*)(ii) as it applied prior to December 17, 1987, or "in or in respect of" this preceding year according to the wording that has applied since that date. Indeed, the Bordas dictionary defines the expression "à l'égard de" in its usual and modern sense as meaning "envers" and "en ce qui concerne". Moreover, the Grand Robert de la langue française gives particularly to the word "pour" the meaning of "en ce qui concerne" and "par rapport à". The English expression used in subparagraph 160(1)(*e*)(ii) "in respect of" has the same meaning and in my view corroborates the interpretation to the effect that these expressions cover all interest compounded on an outstanding tax liability for a specified preceding taxation year at the time of the transfer or for the taxation year during which the transfer occurred, whether these are compounded before or after the year of the transfer. We also know that the words "in respect of" have a very wide meaning, as recognized by the Supreme Court of Canada in *Norwegijick*. In his judgment in this case, Dickson J., who was later to become Chief Justice, analyzed these words in the following terms:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.*
>
> [Emphasis added, footnotes omitted.]

[13] Moreover, the dividend refund provided for in section 129 of the Act is one of the elements in the computation of the tax applicable to investment income. It is part of the mechanism commonly referred to as "integration mechanism", the purpose of which is essentially to ensure that an individual can earn investment income through a company without being assessed higher taxes than what they would have had to pay if the investment income had been earned directly by them. Investment income is first taxed at the normal tax rate payable by investment companies, and when the

dividend is paid, part of the tax is refunded under section 129, which reduces the effective tax applicable to investment income. That tax is refundable only when a company has an RDTOH and pays a dividend to its shareholders. That is the event that gives rise to the reduction. Moreover, an RDTOH cannot be created unless investment income is earned by the company.

[14] Since the dividend was paid on December 6, 2005, by 2635, and the Minister believed, on the basis of the income tax return filed by one of the companies that was liquidated and ultimately absorbed into 2635, that 2635 had an RDTOH of $l,372,972, he refunded the amount provided for in section 129 to 2635. If 2635 (or one of the companies that had been liquidated and then absorbed into 2635) had earned investment income in 2005 and the previous years, it would have been granted a reduction in the effective tax rate applicable to its investment income. We may therefore conclude that the dividend refund resulting from payment of the $6,000,000 dividend on December 6, 2005, is a relevant amount in the computation of the tax applicable to the investment income earned by 2635 (or one of the liquidated companies) in the taxation year ending on December 16, 2005, or in previous taxation years.

[15] The fact that this tax was refunded on September 20, 2006, does not change the fact that it relates to the computation of the tax applicable in respect of the 2005 and previous taxation years. The amounts taken into account in the computation of the refunded tax were the amount in the RDTOH account at the end of 2005 and the amount of the dividend paid on December 6, 2005. The fact that the Minister made an assessment requiring repayment of the overpaid tax in respect of the taxation year ending on December 16, 2005, corresponds to those facts.

[16] In my opinion, the argument made by counsel for MCI based on the language of section 160.1 is of no relevance. The purpose of that section is simply to determine the point at which interest begins to run. It is self-evident that interest cannot run before the date corresponding to the point at which a taxpayer had the use of the amount in question. However, the tax liability, which arose in 2006, can be considered to be “in respect of the taxation year” in which the dividend was paid, that is, 2005.

[17] In my opinion, the tax refunded by the Minister in 2006 can be considered to be an amount that 2635 was liable to pay in respect of the taxation year in which the property (the $6,000,000 dividend) was transferred.

[18] For all these reasons, the appeal by MCI is dismissed with costs.

Signed at Ottawa, Canada, this 17th day of February 2011.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 9th day of May 2011.

François Brunet, Revisor

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APPEARANCES:

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