Docket: 2009-1884(IT)G

BETWEEN:

MARC BARIBEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on December 1, 2010, at Rouyn-Noranda, Quebec

Before: The Honourable Justice C.H. McArthur

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Chantal Roberge

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2003 taxation year is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant did not have to add $40,000 to his income for the 2003 taxation year, and the penalty imposed by the Minister for unreported income is cancelled.

Signed at Ottawa, Canada, this 28th day of February 2011.

"C.H. McArthur"

McArthur J.

Translation certified true
on this 13th day of February 2015

François Brunet, Revisor

Citation: 2011 TCC 125
Date: 20110228
Docket: 2009-1884(IT)G

BETWEEN:

MARC BARIBEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

McArthur J.

[1] This is an appeal from an assessment made in respect of the appellant for the 2003 taxation year and from the penalty imposed on the appellant for failure to report $40,000 in income. The reassessment was issued four days after the normal assessment period.[1] The respondent consented to judgment for the penalties.

[2] The issue is whether the Minister of National Revenue was justified in adding $40,000 to the appellant's income for 2003.

[3] On December 2, 2003, (the company) 9098-3016 Québec Inc. (9098) sold the Courville-Maruska mining property to Ressources Mirabel Inc. (Mirabel) for $140,000 through the appellant. In 2004, Mirabel issued 350,000 shares of its capital stock to 9098. In 2008, 9098 transferred 100,000 Mirabel shares[2] to the appellant for

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1 Subsection 152(3.1) of the *Income Tax Act*.

2 At that time, Mirabel was called Rocmec Mining Inc. Litigation between the appellant and others caused the over four-year delay.

his services with respect to the sale. The Minister calculated that the sale price for the mining property was $140,000 and that the number of shares issued by Mirabel in consideration for that sale was 350,000. The value of each share was thus $0.40 on December 2, 2003. Therefore, the value of 100,000 Mirabel shares was $40,000 on December 2, 2003. The Appellant did not report the commission income of $40,000 for services rendered in his tax return for the 2003 taxation year because he had concluded that the 100,000 shares had no value.

[4] The appellant represented himself without witnesses. The following facts were taken from the Notice of Appeal:

> [TRANSLATION]
>
> C. Revenue Canada based its assessment on commission paid in money, but what I received were escrowed shares, which were thus impossible to sell. Following the litigation between parties, the shares were in my possession five years later, namely, on January 5, 2009.
>
> D. Revenue Canada taxed me on $40,000, while the amount I actually received was $13,000, and not in 2003, but in January 2008. I have all the evidence.

In his testimony, he repeated several times that the shares had no value in 2003.[3]

[5] The Minister's counsel based her argument on the appellant's admission that paragraphs 11(c) and (d) of the Reply to the Notice of Appeal were accurate.[4] Perhaps the appellant was agreeing to the fact that these statements (c) and (d) were in fact contained in the Reply or that this was the value agreed to for the purpose of the sale. His prior and subsequent testimony is overwhelmingly to the effect that he is convinced beyond any doubt that, on December 2, 2003, the 100,000 shares (that he did not receive until January 2008) were of no value. The shares were not released by the Autorité des marchés financiers until July 2004. Before then, their value was questionable, and $0.40 was more a wish than reality. Again, the shares were not released to the appellant until 2008. I do not accept the respondent's counsel's argument at page 154 of the hearing transcript:

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[3] Reference is made to pages 10 and 11 and 22 to 25 of the transcript.

[4] Reference is made to pages 24 and 25 of the transcript, lines 23 and 24.

[TRANSLATION]

> The evidence as to admissions, we also had an admission that, in December 2003, the fair market value of the shares was $0.40 at that time.

[6] The Minister cited sections 3 and 9, paragraph 12(1)(*b*) and subsections 152(4) and 248(1) of the *Income Tax Act*. Even though it was not stated in her argument, the Minister's counsel referred to section 35, which I am not taking into consideration. I do not believe that that section applies to this case.[5] The Minister's position is clearly set out at page 5 at paragraph 17 of the Reply which includes that the amount in issue is $40,000 citing primarily paragraph 12(1)(*b*) without any reference to section 35. It is too late to refer to this section, for the first time, in final argument.

[7] In any case, the respondent did not meet the burden of proof pursuant to subsection 152(4). The test pertaining to subsection 152(4), according to the Act, is the degree of care that a reasonably prudent person would have exercised. In order to answer the appellant outside of the three year period (152(3)) the Minister had the burden of proving that the appellant did not exercise the degree of care required in subsection 152(4), which reads in part as follows:

[TRANSLATION]

> . . . the appellant failed to take the steps that a reasonably prudent and law-abiding person would have taken in order to ensure that it was the right way to report commission income for services rendered. (152(4) of the *Income Tax Act*).

[8] Although he is not a lawyer, the appellant did his best to represent himself. His occupation is diamond drilling and he prospects with a view to finding mining properties.

[9] The appellant had difficulty expressing himself, and his evidence was difficult to follow. That is understandable given that his background and expertise is in the rough and tumble world of prospecting, diamond drilling and dealing with mining properties. He is unaware of the effect of paragraph 12(1)(*b*), section 35 or any other legislation.

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[5] [TRANSLATION] Section 35 describes the tax treatment of mineral rights . . .
At the time of disposition, the prospector must include in his or her income an amount corresponding to the lesser of the fair market value of the shares at the time of exchange or at the time of disposition . . . (hearing transcript, page 156, lines 1 and 2 and 15 to 21).

[10] Naturally, his approach is one of common sense. He facilitated the sale of a mineral property from 9098 to Mirabel (now named Rocmec Mining Inc.). The transaction closed on December 2, 2003. 9098 received 350,000 Mirabel shares in 2004. The shares were not marketable until mid-2004. Litigation over the shares followed and the appellant did not receive 100,000 shares for services rendered until January 2008 when he sold them for approximately $13,000. He reported this amount in his income tax return for 2008. There was a refusal from 9098 to give him the shares.

[11] He takes the position that he had no amount in 2003 and there was no need to include any amount in his 2003 taxable income. According to the respondent, [TRANSLATION] "the provision at issue here is really subsection 9(1) and paragraph 12(1)(*b*)".[6] At page 102, at lines 16 to 25 of the hearing transcript, Chantal Roberge stated the Minister's position as follows:

> [TRANSLATION]
>
> CHANTAL ROBERGE: . . . in income in shares for services rendered in December 2003 and that those shares were valued at $40,000 in 2003 and, in accordance with paragraph 12(1)(b), which is an accrual accounting principle, which is a principle that has been recognized in tax law for a very long time, the income must be reported at the time it is earned even if it cannot be received immediately. That is the . . . the basis for the assessment, in a few words, can be summed up this way.

[12] The appellant is an expert in mining claims. It was clear that he was not at ease in the courtroom. He stated: [TRANSLATION] "I have no knowledge as to things legal." I believe that he knew the value of mining shares and, in particular, the value of his 100,000 Mirabel shares. Paragraph 12(c) of the Reply to the Notice of Appeal indicates that [TRANSLATION] "The appellant had good knowledge of the business world". That sentence reflects the fact that the appellant knew about mining in his region, Abitibi-Témiscamingue. At times, he was a successful day trader in this field.[7]

[13] He repeated several times, referring to several documents, that he could not sell his shares in 2003, and I quote: [TRANSLATION] "I could do nothing with . . . in 2003 . . . the shares did not get released until July 2004 . . . no one would give me

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6 Hearing Transcript, page 101, lines 15 to 17.

7 His 2005 income tax return reflects a gross gain of over $215,000 from trading in shares of over 50 corporations with names such as Ressources Pardon Inc. Kinross Gold Corporation and Levon Resources.

five cents for the shares; it was impossible to sell them; there was no market in 2003". In fact, the 100,000 Mirabel (Rocmec) shares were not released to him until March 2004. (See Exhibit I-3).

[14] As mentioned hereinabove, the appellant was not aware of paragraph 12(1)(*b*) of the Act, upon which the Minister cites and in particular its deeming provisions. In essence, it states that there shall be included in a taxpayer's income any amount receivable even though the amount is not due until a subsequent year. Section 12(1)(*b*) reads as follows:

> . . . any amount receivable in computing the taxpayer's income for a taxation year unless it has been received in the year, and for the purposes of this paragraph, an amount shall be deemed to have become receivable in respect of services rendered in the course of a business on the day that is the earlier of:
>
> . . .
>
> (ii) the day on which the account in respect of those services would have been rendered had there been no undue delay in rendering the account in respect of the services;

[15] The question boils down to what was the "amount receivable" by the appellant. The appellant asserts that "the day on which the account in respect of the services rendered" (the amount being 100,000 Mirabel shares), was of no value because the shares could not be dealt with. In fact the shares were not issued in 2003. Considering the definition of "amount" in subsection 248(1), I accept that it includes the value of the shares. He stated he sold the shares in 2008 for $13,000 which was his first opportunity to do so. There is no paper trail of a fixed amount being rendered to the appellant by either Mirabel or 9098. In fact, the Mirabel shares were of dubious value in December 2003. It is illogical to attach a value of $40,000.

[16] The following ministerial assumption of fact at paragraph 12(d) of the Reply to the Notice of Appeal crucial to the Minister's assessment is incorrect:

> [TRANSLATION]
>
> (d) Since the sale price for the mining property was $140,000 and the number of shares issued by Mirabel in consideration for that sale was 350,000, the value of each share was $0.40 on December 2, 2003.

That conclusion is illogical. There was no acceptable evidence with respect to the market value of the property and no evidence of the market value of the shares.

[TRANSLATION]

> (e) . . . the value of 100,000 Mirabel shares was $40,000 (100,000 shares X $0.40/share) at the time when the appellant rendered his services to 9098-3016 Québec inc. on December 2, 2003.

[17] The Minister's premise that the shares had a value of $0.40 per share is merely speculative. The $0.40 a share attributed by Mirabel in December 2003 accepted by the Minister is closer to an imaginary figure than reality. I interpret the word "amount" as used in paragraph 12(1)(*b*) for the present purposes to mean the "value"[8] of the shares as of December 2, 2003. I accept the appellant's evidence that the share value was not $40,000. In 2003, the shares had not been issued. There was no apparent market value for the non-existing shares. There was no evidence that $40,000 was an "amount receivable by the taxpayer in respect of property sold or services rendered in the course of a business in the year"[9] 2003.

[18] The Minister's counsel submits that the appellant's position is of no use to him because of the deeming provision of subparagraph 12(1)(*b*)(i). The appellant is deemed to have received the shares for services rendered by him:

> (i) the day on which the account in respect of the services was rendered, and,
>
> . . .

[19] December 2, 2003, was the date of sale of the property that gave rise to the account receivable for the 100,000 shares. The appellant pointed out that the value of penny stocks is volatile and had the shares been tradable (which they were not) on December 2, the $0.40 per share was not necessarily fixed throughout the day. Paragraph 12(1)(*b*) reads as follows:

> (*b*) **Amounts receivable** − any amount receivable by the taxpayer in respect of property sold or services rendered in the course of a business in the year, notwithstanding that the amount or any part thereof is not due until a subsequent year, unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require the taxpayer to include any amount receivable in computing the taxpayer's income for a taxation year unless it has been received in the year, and for the purposes of this paragraph, an amount shall be deemed to have become receivable in respect of services rendered in the course of a business on the day that is the earlier of

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8 *The Canadian Oxford Dictionary* (1998).

9 Paragraph 12(1)(*b*) of the *Income Tax Act*.

> (i) the day on which the account in respect of the services was rendered, and,
>
> (ii) the day on which the account in respect of those services would have been rendered had there been no undue delay in rendering the account in respect of the services;

[20] There was no evidence that an account was ever "rendered" within the meaning of sub-paragraph 12(1)(*b*)(i) and (ii).

[21] Throughout the hearing, I took into account that the appellant had no legal training or understanding of the Act or procedures. He was entitled to act on his own behalf.

[22] I believe that a "reasonable man" would have come to the same common sense conclusion that the appellant came to. Why include in income an amount that did not exist in reality during his 2003 taxation year? It is not reasonable to assume that he would be aware of the deeming provisions in 12(1).

For these reasons, the appeal is allowed with costs to the appellant.

Signed at Ottawa, Canada, this 28th day of February 2011.

"C.H. McArthur"

McArthur J.

Translation certified true
on this 13th day of February 2015

François Brunet, Revisor

CITATION:	2011 TCC 125
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PLACE OF HEARING:	Rouyn-Noranda, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice C.H. McArthur
DATE OF JUDGMENT:	February 28, 2011

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Chantal Roberge

COUNSEL OF RECORD:

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Firm:	N/A

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