

Docket: 2008-3339(IT)G

BETWEEN:

NATHALIE DION, EXECUTOR
OF THE ESTATE OF RENÉ DION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on November 3, 2011, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the appellant: Sylvain Lacombe
Counsel for the respondent: Simon Petit

JUDGMENT

The appeals from the reassessments made pursuant to the *Income Tax Act* for the 2003 and 2004 taxation years are dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 9th day of January 2012.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 21st day of February 2012.

Erich Klein, Revisor

Citation: 2012 TCC 6
Date: 20120109
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REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from reassessments made by the Minister of National Revenue (Minister) pursuant to the *Income Tax Act* (Act), whereby there was added to the income of René Dion (R.D.), among other things, business income of \$65,961 and \$53,711 for 2003 and 2004 respectively.

[2] R.D. died in September 2009 and his estate took over the appeals against these assessments.

Facts

[3] The evidence shows that R.D. was the sole shareholder and director of the company Entreprises d'excavations René Dion inc. (company). The company had owned a 10-wheel truck for a number of years and in May 2002 it purchased a second, 12-wheel, truck, which was registered in the company's name with the Société de l'assurance automobile du Québec (SAAQ) (Exhibit A-1).

[4] The company held a bulk trucking permit issued by the Commission des transports du Québec (CTQ) for the 10-wheel truck, with respect to which it was registered as an "operator" with the bulk trucking broker Sous-poste de camionnage en vrac Terrebonne inc. (Exhibit A-2(2)).

[5] When the second truck was purchased, the trucking permit for this second truck was requested by R.D. himself, and once the permit was obtained, it was he who was registered with the same broker, Sous-poste de camionnage en vrac Terrebonne inc. (Exhibit A-2(1)). It is the income generated by this second, 12-wheel, truck that was added to R.D.'s income and is the subject of this appeal.

[6] According to R.D.'s explanations in his notice of appeal, he acted as a *prête-nom* for the company so that the company could benefit, for the second truck as well, from the privileges reserved for members of the brokerage service who were on the priority list. All expenses for both trucks (including wages for the drivers) were paid by the company and all income from both trucks was reported in the company's income (according to the company's ledger, Exhibit I-1, Tab 5).

[7] According to the respondent, the income generated by the second truck should have been included in R.D.'s personal income, with appropriate expenses being deducted. The Canada Revenue Agency (CRA) auditor, Abel Nefouci, explained that since the trucking permit was in R.D.'s name and he was registered with the brokerage service as the operator of the second truck (see Exhibit A-2(1)), and the brokerage paid R.D. directly by cheque, R.D. was considered to be operating his own business and was thus required to include the income from this source in his personal tax return.

[8] The appellant, for his part, maintains that the income generated by the second truck should be included in the company's tax return because it was the company that owned and operated the truck. Moreover, the appellant provided evidence that the cheques R.D. received were deposited directly into the company's bank account (see Exhibit A-1) and that the company paid R.D. a salary and dividends (Exhibits A-3 and I-1, Tabs 1 and 2).

[9] Gaétan Légaré, Executive Director of the Association nationale des camionneurs artisans inc. (LANCAI) testified for the appellant. LANCAI includes all the brokerage services that hold CTQ permits. LANCAI has a uniform internal code of ethics throughout the province. He explained that all CTQ permit holders must register with a brokerage service, which cannot deny access to any applicant, if the applicant has a permit. These brokerage services put their members on a priority list.

A member with more than one truck cannot register other trucks on this first list. The member's second or other truck will only be requested if the first list is exhausted during the day.

[10] Moreover, Mr. Légaré explained that if a member has interests in several entities, this group of entities cannot register more than three trucks, and each truck must be registered under a different entity in order to be included on the first priority list. He explained that the CTQ verified and managed the truck owners' relationships.

[11] The brokerage services are non-profit organizations that collect contributions from their members. These organizations distribute the jobs according to the priority list, and collect the revenues from the contractors who use the truckers' services. The brokerage services also collect the taxes and hand over to the members indicated on the trucking permit the income generated by their trucks as well as the taxes collected.

Statutory provisions on bulk trucking in Quebec applicable in this case

Transport Act, R.S.Q., c. T-12
DIVISION V
COMMISSION DES TRANSPORTS

...

§ 4.2. — *Bulk trucking register*

Register.

47.9. The Commission [des transports du Québec] shall keep and maintain a bulk trucking register for the registration of operators of heavy vehicles to whom a stipulation, contained in a government contract, for the benefit of small bulk trucking enterprises applies.

Public information.

The name of an operator and the address of the operator's main establishment constitute public information.

Public information.

The Commission may, by regulation, after consulting the Commission d'accès à l'information, prescribe that the other personal information contained in the register which it determines constitutes public information.

Tabling.

The opinion of the Commission d'accès à l'information shall be tabled in the National Assembly within 15 days of receiving it or, if the Assembly is not sitting, within 15 days of resumption.

Registration.

47.10. Operators of heavy vehicles who, on 31 December 1999, were authorized to transport all the bulk materials described in Group 1 of section 3 of the Regulation respecting bulk trucking (R.R.Q., 1981, c. T-12, r.3), either as holders of a bulk trucking permit issued under this Act or as holders of an intra-provincial truck transport licence issued under Part III of the Motor Vehicle Transport Act, 1987 (Revised Statutes of Canada, 1985, chapter M-12.01), shall be registered.

Information to be recorded.

The Commission shall, for each registration, record in the register the number corresponding to the operating region for which the permit or licence was issued and in which the operator subscribes to the brokerage service operated by a brokerage permit holder.

Information to be recorded.

Where the operator was the holder of more than one permit or licence issued for more than one region, the Commission shall indicate in the register the numbers corresponding to those regions; the numbers shall be replaced by the number corresponding to the region in which the operator registers with the brokerage service. In addition, the Commission must indicate in the register the number of trucks operated under the permits or licences; that number shall be reduced, where applicable, to correspond to the number of trucks registered by the operator with the brokerage service.

Transfer of registration.

Subject to a removal from the register under section 47.13, the registration may be transferred by the Commission at the request of the transferor and the transferee.

...

Requirements.

47.12. To maintain registration, an operator of heavy vehicles must

(1) subscribe to the brokerage service, if any, operated by a brokerage permit holder in the zone or, where applicable, the territory determined by regulation, in which his principal establishment is located, and, where applicable, register his trucks with the inter-zone brokerage service operated by the regional association recognized in his operating region;

(2) maintain his principal establishment in his operating region or, where applicable, in the territory determined by regulation or, in the case of an operator referred to in section 47.11, maintain his principal establishment outside Québec;

(3) register with the brokerage service only trucks registered in his name and the number of which corresponds to the number furnished to the Commission for his operating region;

(4) pay annually the duties fixed by regulation to the Commission, according to the terms and conditions determined by the Government.

Removal from register.

47.13. The Commission may, on its own initiative or at the request of a brokerage permit holder, a recognized regional association or an interested person, remove from the register

(1) an operator who does not satisfy the requirements of section 47.12;

(2) an operator referred to in section 47.11 who is a legal person more than 50% of the voting rights attached to the shares of which are held directly or indirectly by a person whose principal establishment is in Québec or in respect of which a majority of the directors can be elected by the latter person or, in the case of a natural person, who is associated with a person whose principal establishment is in Québec;

(3) an operator that has been assigned an “unsatisfactory” safety rating under the Act respecting owners, operators and drivers of heavy vehicles (chapter P-30.3);

(4) an operator whose acts or omissions led to his expulsion from the brokerage service;

(5) an operator who uses intimidation, threats or reprisals, or causes them to be used, in order to compel an operator or a brokerage permit holder to refrain from or cease exercising a right arising from this Act or a regulation;

(6) an operator who fails to comply with an enforceable decision of the Commission;

(7) an operator who is an officer of a brokerage permit holder that fails to comply with an enforceable decision of the Commission, and who prescribed, authorized,

consented to, acquiesced in or participated in the act or omission contravening the decision.

The Commission may, on its own initiative or on request, take any other measure it deems appropriate or reasonable in respect of an operator for the purposes of this subdivision.

Notification.

Before removing an operator from the register or taking any other measure in respect of the operator, the Commission shall notify him in writing as prescribed by section 5 of the Act respecting administrative justice (chapter J-3) and give the operator at least 10 days to present observations.

Reason.

The Commission may grant time to enable the operator to remedy the situation, where the reason for the failure that would entail his removal from the register or the imposition of any other measure is a reason determined by regulation.

§ 4.3. — *Brokerage services*

47.13.1. Before being approved under section 8, a by-law concerning transport brokerage services under a government contract adopted by a brokerage permit holder must be approved by at least two thirds of the permit holder's subscribers in attendance at a special meeting where at least one fourth of the subscribers are present.

The special meeting takes place following a notice sent to the subscribers, at least 15 days before the date of the meeting, at the last address given to the brokerage permit holder. The notice must state the date, time and place of the meeting, and the agenda. It must also mention any new by-law or amendment to a by-law that may be approved at the meeting. The notice must be accompanied by the by-law to be submitted for approval at the meeting.

In the case of a by-law referred to in the first paragraph that accompanies an application for a brokerage permit, and for the purposes of the first and second paragraphs, "subscribers" means all the operators of heavy vehicles registered in the bulk trucking register who, during the subscription period, signed a contract with the applicant for the brokerage services offered under the permit to which the application refers.

47.13.2. A brokerage permit holder may submit to the approval prescribed in section 8 a by-law that has been approved in accordance with section 47.13.1 and that provides that all the permit holder's by-laws in force concerning transport brokerage

services under government contracts, and only those by-laws, also apply to contracts other than government contracts to which the permit holder is a party.

If the by-law is approved under section 8, the Commission, each of its members, any person designated under section 17.8 and any person authorized to act as an inspector under section 49.2 have the powers provided in this Act to ensure compliance with the by-law as if the permit holder and the subscribers were acting under a government contract. The provisions of this Act, and those of the regulations, that govern brokerage services offered under government contracts then apply, with the necessary modifications, to services offered under other contracts to which the permit holder is a party.

Priority listing.

47.14. The holder of a brokerage permit shall establish, at the times determined in the holder's by-laws, a single priority listing classifying all subscribers' trucks according to their order of priority and, where applicable, their class. The order of priority of the trucks belonging to the same subscriber shall be furnished by the subscriber to the holder of the brokerage permit in accordance with the operating rules of the brokerage permit holder.

Working time.

The time worked by a subscriber while operating a truck assigned by a brokerage permit holder shall be compiled with the working time allocated to the subscriber pursuant to the operating rules and disciplinary measures provided for in the by-laws of the brokerage permit holder. The brokerage permit holder shall allocate to a new subscriber the average working time of the other subscribers or, in the case of a transfer, the working time of the transferor.

Priority.

The order of the trucks on the priority list gives priority to subscribers having accumulated the least working time with their first trucks.

Distribution of requests.

47.15. Except to satisfy the specific requirements of a request made in accordance with his by-laws, the brokerage permit holder shall distribute the requests for bulk trucking services among his subscribers according to the order of their trucks on the priority list. The assignment is valid for the duration of the service requested or, where applicable, until a new priority list is implemented.

Request not satisfied.

If the subscribers are unable to satisfy the request, the brokerage permit holder shall call upon the services of another brokerage permit holder through the recognized regional association, if any.

Exclusivity rules.

47.16. The operating rules to which the second paragraph of section 47.14 refers may, in particular, include exclusivity rules that, in the contracts of adhesion between the subscribers and the brokerage permit holder,

(1) impose on the subscriber the obligation to refer to the brokerage service any request for service received directly from a customer of the brokerage permit holder or any other person to whom the holder has submitted a written offer for the supply of the services concerned;

(2) prohibit the subscriber from having a third person transport bulk material, without first having solicited the services of the brokerage permit holder.

By-laws.

47.17. For the purposes of sections 47.14 to 47.16, the by-laws of the brokerage permit holder may provide that the trucks of a group of subscribers who are related corporations within the meaning of the Taxation Act will be classified as if they belonged to a single subscriber, and that the group may designate, as first trucks of the group of related corporations, the number of trucks determined in the by-laws of the holder, without exceeding three.

[Emphasis added.]

Taxation Act (Quebec), R.S.Q., c. I-3

[12] Quebec's *Taxation Act* defines related persons and related groups as follows at sections 17 and 19:

17. In this Part a group is related when each person forming it is related to each other person of the group.

19.(1) For the purposes of this Part, related persons or persons related to each other are

(a) individuals connected by blood relationship, marriage or adoption;

(b) a corporation and

(i) a person who controls that corporation.

[13] Section 1 defines "individual" as follows:

"individual" means a person other than a corporation.

[14] Section 1.7 is also worth citing:

1.7. In this Act and the regulations, a legal person, whether or not established for pecuniary gain, is designated by the word "corporation".

Issue

[15] Could R.D., as the operator of the second truck (the 12-wheeler) legally act as a *prête-nom* for the company? If so, did the income he generated in that manner have to be reported in his personal tax return, or could the company include it in the calculation of its income?

Analysis

[16] In *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, the Supreme Court of Canada stated the following at paragraph 39:

39 This Court has repeatedly held that courts must be sensitive to the economic realities of a particular transaction, rather than being bound to what first appears to be its legal form: *Bronfman Trust*, *supra*, at pp. 52-53, *per* Dickson C.J.; *Tenant*, *supra*, at para. 26, *per* Iacobucci J. But there are at least two *caveats* to this rule. First, this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* legal relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect: *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, at para. 21, *per* Bastarache J.

[17] Moreover, in *Victuni v. Minister of Revenue of Quebec*, [1980] 1 S.C.R. 580, the Supreme Court of Canada held that the tax authorities must give effect to the *prête-nom* agreement between the parties, but at the same time recognized the mandatary's obligation to inform the tax authorities of his role. The Court stated the following at pages 584 and 585:

Under the general principles of the law of mandate, it is clear that the obligation of a mandatary towards the mandator is not a debt. The person who has bought property

on behalf of a third party who wishes to remain unknown is no more indebted for the price paid than he is the owner of the property. The true owner is the mandator, and the obligation of the mandatary nominee is to render an account to the mandator and deliver over what he has received on his behalf (*C.C.*, art. 1713). What he receives, even if it is money, does not belong to him: he is obliged to keep it separate from his own property. It is a crime for him to take control of it so as to make himself a debtor thereof instead of a mandatary: *R. v. Légaré* [[1978] 1 S.C.R. 275]. In the recent decision of this Court, *Canadian Pioneer Management Ltd. v. Saskatchewan Labour Relations Board* [[1980] 1 S.C.R. 433], Beetz J. pointed out the importance of this distinction, citing *inter alia* the decision of the Privy Council on unclaimed deposits: *Attorney General for Canada v. Attorney General for the Province of Quebec* [[1947] A.C. 33].

With regard to the nature of the tax in question, another decision of the Privy Council respecting the first Quebec statute in this matter clearly stated that the tax in question is a personal tax not property tax: *Bank of Toronto v. Lambe* [(1887), 12 A.C. 575]. This is therefore not a kind of tax of the same nature as the real property taxes levied by municipalities, which of course are payable by the apparent owner, since they are [a] charge on the realty. The tax on the paid-up capital of companies, like the tax on their income, is on the contrary a levy imposed on the person exactly like the income tax on individuals. Any mandatary, apparent or covert, who holds property on another's behalf is required to report to the tax authorities what he receives on his mandator's behalf, but he is not liable for the tax.

[18] However, if the simulated deed (counterletter) is used to circumvent a prohibitive legislative provision or a public order provision, the counterletter will be null and void. This results from the principle that one cannot do indirectly that which it is prohibited to do directly (see article 9 of the *Civil Code of Québec* and Pierre-Gabriel Jobin and Nathalie Vézina, *Baudouin and Jobin: Les obligations*, 6th ed. (Cowansville, Quebec: Éditions Yvon Blais, 2005), nos. 512 and 519, pages 526, 527, 529 and 530). Thus, an agent cannot have a legal capacity that exceeds that of the principal. A principal can only appoint an agent to make a contract which the principal himself has the capacity to make (*1524994 Ontario Ltd v. Canada*, [2007] F.C.J. No. 234 (QL), para. 18).

[19] So, although the counterletter establishes the true agreement between the parties, and while the tax authorities are required to take it into consideration when making an assessment (see also *Transport Desgagnés v. M.N.R.*, 91 DTC 270; *Caplan c. Québec (Sous-ministre du Revenu)*, 2006 QCCA 1322, [2006] R.D.F.Q. 40), if the counterletter is null and void, it cannot be invoked against the tax authorities.

[20] In the present case, the appellant showed that the company was the registered owner of the second truck and that, despite the apparent subscription contract, the company was the true operator (see letter regarding leasing, and the registration in the company's name (Exhibit A-1); expenses paid and income recognized by the company (Exhibit I-1, Tab 5); income from the second truck deposited to the company's bank account (Exhibit A-1)).

[21] Considering this evidence and the state of the law, it could be argued that the company was justified in declaring the income generated by the second truck in its tax return. This is true, however, only inasmuch as I am satisfied that the apparent deed is not contrary to any legislative provision or to public order.

[22] In the present case, R.D. and the company seem to have contravened the regulations on bulk transportation in certain respects. Indeed, the bulk trucking register, in which operators of trucks under a government contract are registered, was created for the benefit of small bulk trucking enterprises (section 47.9 of the *Transport Act*). Thus, under that Act, the holder of a brokerage permit (the brokerage service) must establish a single priority listing classifying all subscribers' trucks according to their order of priority. A subscriber with more than one truck must give the brokerage service the order of priority of its trucks, in accordance with the operating rules of the brokerage service. The order of the trucks on the priority list gives priority to subscribers having accumulated the least working time with their first trucks (section 47.14). This section, combined with Gaétan Légaré's explanations, presupposes that the owner of several trucks cannot register more than one first truck on the priority list. This is logical to the extent that I understand from the Act that it is aimed at regulating bulk transportation in order to evenly distribute work among the various subscribers.

[23] In this context, it seems to me that the company, which was controlled by R.D., did not have the right or ability to register the second truck (the 12-wheeler) in its name as a first truck on the priority list since it had already registered a first truck (the 10-wheeler) on the list. The company could not mandate R.D. to register the second truck on the priority list in his own name either. Moreover, under section 47.12, an operator must register with the brokerage service only trucks that are registered in the operator's own name, and a violation of this provision may lead to the operator's removal from the register (section 47.13).

[24] In this case, R.D. was clearly in violation of that provision because the truck was not registered in his name.

[25] Moreover, section 47.17 seems to allow "a group of subscribers who are related corporations" within the meaning of the *Taxation Act* to designate as first trucks the number of trucks determined in the by-laws of the brokerage service, without exceeding three. I note in this regard that the by-laws of *Sous-poste de camionnage en vrac Terrebonne inc.* were not filed in evidence, making it difficult for me to determine whether a group of subscribers having such a related corporations relationship could register more than one truck with this brokerage service. In any event, the section would not have prevented R.D. from registering a truck he owned, since section 47.17 is aimed only at corporations (which do not include individuals).

[26] The problem R.D. faced was that he was not the owner of the truck and that, in the circumstances, he could not personally register as an operator. Nor could he register as a mandatary of his company under a *prête-nom* agreement, because the company itself did not have the right to register a second truck on the priority list.

[27] Counsel for the appellant submitted that it was for the CTQ to issue or revoke permits and if one was issued to R.D., then he acted lawfully. I cannot subscribe to this argument. As the Quebec Court of Appeal stated in *Association des transporteurs en vrac de l'Outaouais c. 3503623 Canada Inc.*, 2011 QCCA 1206, at para. 18, the *Transport Act* is a public statute setting out government policy on bulk transportation in relation to government contracts. This Act implemented a preferential system for independent truckers and small transportation companies in the context of public works, a system which is aimed at giving them financial security. Dalphond J.A. stated the following at paragraphs 3 and 4:

[TRANSLATION]

3 In Quebec, the 5,000 independent truckers benefit from some preferences in the context of public works, which are aimed at giving them financial security.

4 This preferential system is based on two elements. First, there is the presence in each region of the province of one or two brokerage permit holders responsible for fairly distributing bulk transport needs for government contracts among member truck drivers. Second, there is the requirement for the giver of work (ministry, municipality, etc.) to the successful bidder to give at least a predefined percentage of the bulk transportation work to members of the brokerage services; this requirement is often called a stipulation for the benefit of independent truckers.

[28] Since the *Transport Act* is a statute enacted in the public interest, it follows that its provisions are public order provisions (see *Garcia Transport Ltée v. Royal Trust Co.*, [1992] 2 S.C.R. 499, p. 524).

[29] In these circumstances, the appellant cannot invoke against the tax authorities the counterletter between R.D. and the company. The CRA was therefore justified in adding to R.D.'s income the amounts he received from operating the second truck because it was he who was officially registered as the operator of the truck, and on that basis the brokerage service paid him the amounts that were attributed to that truck. R.D. was the beneficiary and owner of the income and he was therefore obligated to include them in the computation of his income (even though, theoretically, he was not legally entitled to that income (see *R. v. Poynton*, 1972 CarswellOnt 205, para. 8 (Supreme Court of Ontario); *Smith v. Canada (Attorney General)*, 1924 CarswellNat 5, paras. 8 and 9, [1917-27] C.T.C. 240, p. 242, (Exchequer Court of Canada)).

[30] For these reasons, the appeals are dismissed with costs to the respondent.

Signed at Ottawa, Canada, this 9th day of January 2012.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 21st day of February 2012.

Erich Klein, Revisor

CITATION: 2012 TCC 6

COURT FILE NO.: 2008-3339(IT)G

STYLE OF CAUSE: NATHALIE DION, EXECUTOR OF THE
ESTATE OF RENÉ DION v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: November 3, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: January 9, 2012

APPEARANCES:

Counsel for the appellant: Sylvain Lacombe
Counsel for the respondent: Simon Petit

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