Docket: 2011-2299(GST)I

BETWEEN:

ZT22 HOLDING INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 25, 2012, at Montréal, Quebec.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the appellant:	Stéphane Rivard
Counsel for the respondent:	Nadja Chatelois

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated May 20, 2009, and bears number PL2009-1013, is allowed and the assessment is vacated, with costs against the respondent, in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 21st day of January 2013.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 5th day of March 2013
Daniela Guglietta, Translator

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REASONS FOR JUDGMENT

Masse D.J.

[1] This is an appeal from an assessment dated May 20, 2009, and bearing the number PL2009-1013, made under subsection 325(2) of the *Excise Tax Act* (the ETA) in respect of the appellant, following a transfer of property on March 20, 2003, owing to the tax liability of Antoine Tohme. Mr. Tohme and the appellant are not dealing with each at arm's length within the meaning of subsection 325(2) of the ETA. The amount of the assessment is $18,879.44. The assessment was confirmed by a decision on the objection rendered on August 27, 2009. Hence this appeal.

Factual Background

[2] The appellant, ZT22 Holding Inc. (hereinafter ZT22) is a corporation, incorporated on January 21, 2003. It operates a business in involving the lease of immovables. Antoine Tohme was one of the appellant's three shareholders. Moreover, he was registered with the Registre des entreprises du Québec as secretary of ZT22. It is obvious that he was a related person with respect to ZT22 within the meaning of subsection 325(2) of the ETA and that he was not dealing with the appellant at arm's length.

[3] On March, 20, 2003, Antoine Tohme owed the Minister of National Revenue (the minister) the amount of $34,576.21 under the ETA.

[4] On February 10, 2003, Mr. Tohme purchased condo unit number 508, located at 2555 Havre-des Iles, Laval, Quebec. The purchase price was $75,000. On that same day, he signed two notarial acts with respect to said purchase. In the first deed, he is described as being the condo's purchaser (see Exhibit A-2). The second notarial act is an agreement between Mr. Tohme and ZT22 whereby Mr. Tohme recognizes that he acts as mandatary on behalf of appellant ZT22 and that it is the appellant who shall disburse all sums respecting the purchase and who assumes the hypothec on the condo (see Exhibit A-4).

[5] On February 11, 2003, Mr. Tohme purchased another condo, unit 1417, located at the same address. The purchase price was $72,500. Again, on that day, he signed two notarial acts with respect to that purchase; in the first deed, he is described as the purchaser of the condo (see Exhibit A-1). In the second notarial act, Mr. Tohme again recognizes that he only acts as mandatary of the appellant ZT22, and again, it is the appellant who shall disburse all sums respecting the purchase and who assumes the hypothec on the condo (see Exhibit A-3).

[6] Indeed, by these two notarial acts (Exhibits A-3 and A-4), Mr. Tohme states that he borrowed from the Caisse Populaire de Chomedey the total amount of $100,625 for the purchase of the two condos.

[7] Paragraphs 3, 4 and 5 of the two deeds reveal the real reason for the purchase of the two condos. The paragraphs read as follows:

[TRANSLATION]

> 3. Despite the fact that the hypothecary loan is in name of Antoine TOHME, the parties state that ZT22 HOLDING INC. is indeed responsible for all sums already disbursed or sums to be disbursed.
>
> 4. Despite the fact that the property was acquired by the said Antoine TOHME, the parties state that the property was indeed purchased by ZT22 HOLDING INC., the latter being responsible for all sums already disbursed.
>
> 5. Said Antoine TOHME undertakes and covenants to transfer all the rights, titles and interest that he holds in the foregoing property, upon the simple request of the officer of ZT22 HOLDING INC. for the amount of ONE DOLLAR ($1.00) with the assumption of the hypothec.

[8] As provided for in said notarial acts, a month later, on March 20, 2003, Mr. Tohme transferred the two condos to the appellant by notarial acts (see Exhibits

A-5 for unit 1417 and Exhibit A-6 for unit 508). In those third notarial acts, as provided for, the transfer of the immovables was made in consideration of one dollar and the assumption of the balance of the two hypothecary debts on the condos, which totalled $110,416.68.

The appellant's position

[9] The appellant submits that the assessment made against it should be vacated, as the value of the consideration received by Mr. Tohme was equal to the fair market value of the property transferred. The appellant submits that it assumed the obligations of the transferor that were equal to the price paid for the property transferred.

The respondent's position

[10] The respondent submits that Mr. Tohme sold the two immovables to the appellant for a consideration that was less than their fair market value. The respondent submits that the condos were purchased for a total of $147,500 and were sold to the appellant a month later for $1 each. Furthermore, the appellant was to assume the two hypothecs on the condos. The total balance of the two hypothecs was $110,414.78. At the time of the transfer to the appellant, the fair market value of the two condos was in fact the purchase price that had been paid by Mr. Tohme a month before. Thus, the appellant purchased the condos for a consideration that was $37,085.22 less than their fair market value.

[11] As of March 20, 2003, Mr. Tohme owed the Minister $34,576.21 in duties, interest and penalties under the ETA. Given that Mr. Tohme had a number of tax liabilities in 2003, the Minister prorated the outstanding tax liabilities to make an assessment under the ETA, which represented 51% of the tax liability. The respondent states that the appellant is, therefore, jointly and severally liable for Mr. Tohme's tax liability under subsection 325(2) of the ETA up to the amount by which the fair market value of the properties exceeds the consideration paid, which is the assessed amount of $18,879.84.

[12] The respondent submits that all notarial deeds of purchase and sale are proof of their content. The respondent submits that the counter letters (Exhibits A-3 and A-4) to the effect that Mr. Tohme never was the real owner of the two condo units, but that the appellant was the real owner, cannot be set up against her. The respondent submits that she can avail herself of the "apparent contracts," namely the

notarial deeds of purchase and sale, and that she can indeed ignore counter letters, regardless of the real situation between Mr. Tohme and ZT22.

Statutory provisions

[13] Relevant GST provisions are set out in subsection 325(2) of the ETA. The relevant excerpts are as follows:

> 325. (1) Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to
>
> (*a*) the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,
>
> (*b*) an individual who was under eighteen years of age, or
>
> (*c*) another person with whom the transferor was not dealing at arm's length,
> the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of
>
> (*d*) the amount determined by the formula
>
> A - B
>
> where
>
> A
> is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the transferee for the transfer of the property, and
>
> B
> is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the *Income Tax Act* in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and
>
> (*e*) the total of all amounts each of which is
>
> (i) an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or
>
> (ii) interest or penalty for which the transferor is liable as of that time,

> but nothing in this subsection limits the liability of the transferor under any provision of this Part.
>
> (1.1) For the purpose of this section, the fair market value at any time of an undivided interest in a property, expressed as a proportionate interest in that property, is, subject to subsection (4), deemed to be equal to the same proportion of the fair market value of that property at that time.
>
> (2) The Minister may at any time assess a transferee in respect of any amount payable by reason of this section, and the provisions of sections 296 to 311 apply, with such modifications as the circumstances require.
>
> (3) Where a transferor and transferee have, by reason of subsection (1), become jointly and severally liable in respect of part or all of the liability of the transferor under this Part, the following rules apply:
>
> (*a*) a payment by the transferee on account of the transferee's liability shall, to the extent thereof, discharge the joint liability; and
>
> (*b*) a payment by the transferor on account of the transferor's liability only discharges the transferee's liability to the extent that the payment operates to reduce the transferor's liability to an amount less than the amount in respect of which the transferee was, by subsection (1), made jointly and severally liable.
>
> . . .
>
> (5) In this section, "property" includes money.

[14] Articles 1451 and 1452 of the *Civil Code of Québec* (**C.C.Q.**) provide as follows:

> **1451.** Simulation exists where the parties agree to express their true intent, not in an apparent contract, but in a secret contract, also called a counter letter.
>
> **1452.** Third persons in good faith may, according to their interest, avail themselves of the apparent contract or the counter letter; however, where conflicts of interest arise between them, preference is given to the person who avails himself of the apparent contract.

Analysis

[15] I will begin my analysis by accepting as a general principle the Supreme Court of Canada's statement, as articulated by Justice McLachlin, now Chief Justice, in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. At paragraph 39, Justice McLachlin holds that, in tax cases, courts must be sensitive to the economic realities of a particular transaction, regardless of what appears to be its legal form, provided that it is not contrary to a specific provision of the Act and that it is not a sham. The taxpayer's legal relationships must be respected by the courts in tax cases.

[16] In the case at bar, the respondent claims that, according to the apparent deeds of purchase and sale, there was a transfer of immovable property from Mr. Tohme to ZT22 and, therefore, the latter is jointly and severally liable for Mr. Tohme's tax liability up to the amount by which the fair market value of the condo exceeds the fair market value of the consideration paid by ZT22 to Mr. Tohme for the transfer of the properties. The respondent also submits that the counter letters produced by the appellant (Exhibits A-3 and A-4) cannot be set up against her and the Minister can, therefore, avail himself of the "apparent" deeds of purchase and sale to the effect that Mr. Tohme was the owner of the two condos and that he transferred them to the appellant. The respondent relies on article 1452 of the C.C.Q. According to the respondent, all the conditions provided for in section 325 of the ETA are met and, therefore, the appellant is jointly and severally liable for Mr. Tohme's tax liability to the extent determined by subsection 325(1) of the ETA.

The effect of a counter letter

[17] A counter letter is a private written agreement whose purpose is to discover the real intention of the parties who stipulated otherwise in public. There are two essential components to a counter letter: the material element and the element of intent. These elements are well described by Professor Royer in *La preuve civile*, 2nd ed., Cowansville (QC), Yvon Blais, 1995 at No. 1568:

[TRANSLATION]

> The material element consists in the existence of two separate deeds, the apparent deed, which contains what the parties want the third parties to believe and the secret deed, which expresses the true agreement. If the latter is articulated in writing, it is referred to as a counter letter.
>
> The element of intent consists in the willingness to deceive third parties about the existence or content of an agreement.

[18] Thus, it would appear as though a counter letter is equivalent to somewhat of a sham. A counter letter is a secret document that reflects the existence of a situation or a relationship between the contracting parties which are different from the ones expressed in the apparent contract. The secret or intentional element, to want to deceive third parties, is an essential element of a counter letter. In Quebec case law, it is not necessary for a counter letter to be written; a verbal agreement between the contracting parties is sufficient.

[19] Articles 1451 and 1452 of the C.C.Q provide that counter letters are only enforceable between the contracting parties and not against third parties. Third persons in good faith are may rely on the apparent contract even if no loss has resulted from the simulation. It is not necessary for the simulation or subterfuge to be directed against the person relying on the apparent contract: see *Transport H. Cordeau Inc. v. The Queen*, 99 DTC 5765 (F.C.A.), at paragraph 20. It is not necessary for the third parties to establish that the counter letter originally caused loss: it will suffice if at the time it is set up against them they have an interest in rejecting it: see *Transport H. Cordeau, supra*, at paragraphs 21 and 23. It is not necessary to want to deceive the Revenue Department for article 1452 of the C.C.Q to apply. As stated by Justice Létourneau in *Transport H. Cordeau* at paragraph 29:

> [29] In fact, under art. 1452 the third party in good faith has the option of relying on the apparent contract or the counter-letter, depending on what is in his interest. This is the penalty for simulation by counter-letter, for as the writers Mazeaud, *supra*, mentioned at p. 925, even if the contracting parties did not try to deceive the Revenue Department or their creditors by their simulation, it should not be [TRANSLATION] "forgotten that the parties did not confine themselves simply to not disclosing the contract; they went further: to ensure the contract remained a secret they created a deceptive appearance, they concluded an apparent contract which was incorrect; they deceived everyone who had Encore, on knowledge of that simulated contract". The legislature wished to protect third parties who relied on the apparent contract after [TRANSLATION] "placing in appearances a trust which should not have been deceived.

Again, you can see that deceit or secrecy are part of a counter letter.

[20] Although article 1452 of the C.C.Q. provides that a counter letter is not enforceable on a third person, in the case law, a distinction has been drawn between the role of the Minister (or Deputy Minister) of Revenue as "tax assessor" and his role as "tax collector". In *Bolduc v. The Queen*, 2003 DTC 221, Judge Archambault of this Court ruled that when the Deputy Minister acts as "assessor", the Deputy Minister shall not be considered as a third person for the purposes of article 1452 of

the C.C.Q. In such circumstances, the Deputy Minister must determine the taxpayer's liability based on the real situation. However, when the Deputy Minister acts as "collector", he shall be considered as a third person under article 1452 of the C.C.Q. The decisions rendered in *Richelieu c. Québec (Sous-ministre du Revenu)*, [2001] J.Q. No. 8037, [2002] R.D.F.Q. 303 (rés.) (C.Q.), *Dussault-Zaidi c. Québec (Sous-ministre du Revenu,)* [1996] J.Q. No. 2969, [1996] R.D.F.Q. 73 (C.A. Québec) (Justice Deschamps, dissenting), and *Haeck c. Québec (Sous-ministre du Revenu)*, [2001] J.Q. No. 8038, [2002] R.D.F.Q. 73 (C.Q.), are cited in support of this argument. Moreover, Judge Archambault concluded that section 160 of the *Income Tax Act*, which is equivalent to section 325 of the ETA, provides for collection and not assessment action. Furthermore, it is not necessary, in order for these collection actions to apply, that the transferee received a benefit. All the statutory provisions provide is that

[TRANSLATION]

> . . . the transferee's liability is limited to the amount by which the fair market value of the property transferred exceeded the fair market value of the consideration given by the transferee.

see *Bolduc*, *supra*, at paragraph 13.

[21] In *Haeck c. Québec*, *supra*, the issue involved determining the amount of a capital loss resulting from the disposition of two properties. The parties had agreed on the selling price of $175,000 in the notarial contracts to allow the purchaser to obtain higher financing. However, in a counter letter, the parties had agreed on the real selling price of $148,750. The seller claimed a loss based on that amount. The Deputy Minister of Revenue of Quebec (the Deputy Minister) relied on notarial contracts, therefore on the price of $175,000, to disallow the loss claimed and a calculated the loss based on that amount. The Deputy Minister objected to the evidence of the counter letter and stated that the counter letter could not be used to contradict an authentic deed and that it could not be set up against him given the terms of article 1452 of the C.C.Q. Judge Coté asked the following:

[TRANSLATION]

> [1] Is the Deputy Minister of Revenue obliged to assess taxpayers on the basis of their real situation disclosed at the time of production of a counter letter or can he avail himself of an apparent situation that is more beneficial to him?

Judge Côté held that, in his role as "assessor", the Deputy Minister had to ensure that there was a genuine legal relationship between the parties and to assess accordingly, particularly in the event that the purpose of the taxpayer's actions was not to deceive Revenue Department. Thus, in her view, the Deputy Minister's sole interest was that the tax be determined on the basis of taxpayers' actual, not fictitious transactions. Moreover, Judge Coté stated that, in his "collection role", the Deputy Minister could not be prevented by a counter letter from collecting the previously determined tax. She wrote as follows at paragraphs 30, 32 and 33 of her decision:

[TRANSLATION]

> [30] In the Court's view, the deputy minister's role is not to choose those contracts that are likely to enable him to collect the largest amount of tax possible, but rather to establish the amount of tax actually owed on the basis of the transactions conducted in good faith and proven in accordance with the requirements of the law.
>
> . . .
>
> [32] Thus the deputy minister's interest, where he acts in the role of assessor, is to determine the actual legal relationship between the parties and to assess them accordingly.
>
> [33] Furthermore, once the tax owed has been determined, it is normal for the taxpayer not to be able to enforce on the deputy minister a counter letter preventing him from collecting that tax. The deputy minister is thus a third person who has an interest in using the apparent deed to protect the right that he holds against the taxpayer: the right to obtain, from the taxpayer's patrimony, payment of the tax actually owed.

Thus, the Minister cannot rely on article 1452 of the C.C.Q. in all instances. The Minister can only rely on it when he acts in his role as collector.

[22] However, the Quebec Court of Appeal seems to attach little importance to the difference between "assessor" and "collector" in the case of a verbal agreement similar to a counter letter, between a father and his son. In *Caplan c. Sous-ministre du Revenu du Québec*, [2006] J.Q. No. 11799, 2006 QCCA 1322 (CanLII)(QCA), the taxpayer purchased a rental property in 1989, which was registered in his son's name. Therefore, his son was the apparent owner of the property. However, the taxpayer was the true owner, whereas his son acted as his agent. Even though the property was registered in his son's name, it is the taxpayer who financed and was responsible for the management and administration of the building. He collected and personally declared the rental income. The son, the apparent owner, never paid a penny for the acquisition or expenses. On January 6, 1999, the property was resold at

a loss. In his income tax returns, the taxpayer claimed deductions for the losses incurred in respect of the 1997 and 1998 taxation years as well the terminal loss incurred in 1999. The notices of assessment issued by the Minister disallowed the deductions because the property belonged to his son and not the taxpayer. The taxpayer therefore appealed the assessments. The trial judge refused to vacate the notices of assessment. He found that the Deputy Minister was a third person in good faith within the meaning of article 1452 of the C.C.Q. and, therefore, was not bound by any verbal agreement that may have existed between the taxpayer and his son. The taxpayer appealed to the Quebec Court of Appeal. The issues to be determined by the Court were as follows:

[TRANSLATION]

> (1) Whether the trial judge erred in law in deciding that the respondent should be considered as a third person in good faith who could rely on the apparent deed?
>
> (2) Whether the trial judge erred in law in not distinguishing between the role of the Minister of Revenue as *collector* and his role as *assessor*?

[23] Justice Dufresne of the Quebec Court of Appeal wrote as follows:

[TRANSLATION]

> [30] The answer to the first question, that is, whether the trial judge was correct in finding that the respondent should be considered as a third person in good faith who could rely on the apparent deed, suffices in the case at bar to decide the appeal. The appellant contrasts the apparent deed with the verbal agreement he had with his son which was similar to a counter letter.
>
> . . .
>
> [32] The trial judge wrote the following with respect to the application of article 1452 C.C.Q.:
>
> > [22] In this case, the respondent must be considered as a third person in good faith and is not bound by the apparent contract that may exist between the applicant and his son with respect to the property in question.

[24] Justice Dufresne then referred to the general principle set out by Justice McLachlin in *Shell Canada*, *supra*, and continued as follows:

[TRANSLATION]

> [35] If indeed there was no counter letter in *Shell Canada*, *supra*, the Supreme Court reiterated 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 by the courts in tax cases.
>
> [36] Thus, the respondent had to be sensitive to the appellant's real situation, as the uncontradicted evidence establishes that the appellant did not try to "play both sides" by making a case to the tax authorities for first the apparent contract and then the counter letter. The appellant's son acted as his father's agent and at no time did the appellant or his son rely on the apparent contract to obtain any tax benefits.

[25] Justice Dufresne continued as follows at paragraphs 40 to 53:

[TRANSLATION]

> [40] Unlike the situation in *Zaidi*, never, in the case at bar, did the appellant's son claim any tax benefits from his title on the property, nor is there any evidence to suggest that the appellant and his son played both sides.
>
> [41] The trial judge notes from the evidence "that it is clear and obvious that it is the applicant [appellant] who, for all intents and purposes, financed not only the acquisition of said property but also its subsequent maintenance". The rent was also payable to the appellant. The evidence also reveals that the appellant's son was clearly the appellant's agent.
>
> [42] Moreover, the evidence does not show that they put the property in the appellant's son name to avoid paying taxes. The evidence rather reveals that the appellant chose to proceed with the acquisition of the property in his son's name for practical reasons, such as his son was studying in the Ontario area where the property in question was located. The son could more easily take care of the property by residing nearby, whereas his father lived in Montréal. The successive testimonies of the son and his parents in that regard remained uncontradicted.
>
> [43] Also, this is not a case where a transaction is a scam which prejudices the respondent's rights. . . .
>
> . . .
>
> [45] . . . In short, he always acted towards the tax authorities as the true owner of the building and did not at any time attempt to play both sides by claiming the advantages the apparent contract may have offered and also those of the counter letter. He always presented himself as the true owner to the respondent, evidently by relying on the counter letter. We must recall that additionally, all the costs and expenses associated with keeping and maintaining the building were paid by the appellant and not his son.

. . .

[47] The balance of probabilities shows that the appellant's intention to acquire the building through his son, acting as his agent, is reflected in the counter letter and effectively corresponds to the actual situation the appellant maintained at all times. In the case at bar, the *sham* theory does not apply because there is no element of deceit in the manner in which the operation was concluded.

[48] In the circumstances, it is difficult to claim that the respondent has the required interest to invoke the apparent contract when there is no prejudice to the respondent from the tax treatment the appellant chose based on the counter letter. The respondent simply chose the situation that was most beneficial for him.

[49] It would have been completely different if the evidence had shown that the transaction was merely a sham or that the taxpayer had sought an advantage from first the apparent contract, then the counter letter. . . .

[50] If the evidence had shown the slightest contradiction in the tax treatment by the taxpayer, the decision in the appeal would have been completely different, but the appellant's evidence in this case remained uncontradicted. Each case is inevitably fact-specific: everything is based on the evidence submitted.

[51] In short, in the absence of a sham or proven attempt that the taxpayer played both sides, the respondent must, in accordance with *Shell*, *supra*, make an assessment based on the actual legal situation between the parties, regardless of the content of the apparent contract or counter letter.

[52] With all due respect to the trial judge, the judgment being appealed was an error of law in the characterization of the relationship between the parties: the true owner in the tax authorities' view, given the proposition set out above in *Shell*, *supra*, was the appellant, Howard Caplan. By finding that he was not, the trial judge committed a determinative error of law.

[53] It is not necessary, in view of the conclusion that I have reached with respect to the first issue raised by the appeal, to address the second.

[26] Justice Dufresne did not find it necessary to decide whether the trial judge erred in not making the distinction between the role of the Minister of Revenue as "collector" and his role of "assessor". Justice Dufresne rather relied on the key principle set out by Justice McLachlin in *Shell Canada* which I have already mentioned. Therefore, it would appear as though the distinction between "assessor" and "collector" is no more important than it was before.

[27] The analysis of Justice Dufresne yields a result that is fair and equitable between the tax authorities and the taxpayer. As for me, the courts must be sensitive, in tax cases, to the economic realities between the taxpayers unless there is unlawfulness or deceit. In my opinion, the analysis of Justice Dufresne should not be restricted to cases where the Minister acts in his role as "assessor" . In my view, regardless of the Minister's role, as "assessor" or "collector", the taxpayers' legal relationships must be respected by the Courts and by the Minister of Revenue in tax cases, unless there is unlawfulness or deceit that consequently prejudices the interests of the Minister.

[28] However, and despite my opinion, the state of the case law is such that, in this case, the respondent must be considered as a third person, who, acting as a collector, may avail herself of the apparent deeds, that is to say, the notarial acts dated February 10, 2003 (Exhibit A-2), February 11, 2003 (Exhibit A-1) and also those dated March 20, 2003 (Exhibit s A-6 and A-5), the latter being the notarial acts by which Mr. Tohme transferred the two condos to the appellant. Seeing as there was a transfer of property and that there was a non-arm's length relationship between Mr. Tohme and ZT22, the conditions for the application of section 325 of the ETA have all been met. Thus, ZT22 is jointly and severally liable, with Mr. Tohme, to pay the tax liability of Mr. Tohme up to the amount by which the fair market value of the two condos exceeds the fair market value of the consideration paid by ZT22.

Fair market value of the consideration

[29] Having decided that the conditions for the application of section 325 have been met, the issue to be determined in this case is the amount by which the fair market value of the two condos exceeds the fair market value of the consideration paid by ZT22.

[30] It is undisputed that the fair market value of the two condos at the time of the transfer was $147,500, the total purchase price for the two condos in February 2003 when Mr. Tohme purchased them. We must first determine the fair market value of the consideration paid by ZT22 for the two condos.

[31] The respondent submits that the fair market value of the consideration paid for the condos is more or less the price indicated in the deeds of sale: $1 for a each condo, and in addition, the transferee is responsible for payment of the two hypothecs on the condos. Again, the respondent relies on article 1452 of the C.C.Q. and submits that the counter letters (Exhibits A-3 and A-4) cannot be set up against her to disprove the assessment. The appellant submits for its part that it is the real value of

the consideration, as indicated in the counter letters, which must be taken into account.

[32] It is important to note that the appellant's liability is limited the amount by which the fair market value of the condos exceeds the fair market value of the consideration paid by the appellant for the transfer of the condos. We must therefore ask what the expression "*fair market value of the consideration*" found in paragraph 325(1)(*a*) of the ETA means. The definition of "*fair market value*" in subsection 123(1) of the ETA reads as follows:

> Fair market value of property or a service supplied to a person means the fair market value of the property or service without reference to any tax excluded by section 154 from the consideration for the supply.

[33] As noted by Justice Lamarre-Proulx in *9004-5733 Québec Inc. v. The Queen*, 2003 TCC 327 (CanLII), this definition is of no help in understanding this legal concept.

[34] The definition of "consideration" in subsection 123(1) of the ETA is more specific. It reads as follows:

> Consideration includes **any amount** that is payable for a supply by operation of law.
>
> [Emphasis added.]

[35] Thus, when determining the adequacy or inadequacy of the consideration, it is necessary to consider "**any amount**" that was paid. The term "*consideration*" in paragraph 325(1)(*a*) of the ETA is qualified by the terms "*fair value*". In my view, when determining the adequacy of the consideration for the purpose of establishing the amount by which the fair market value of a property exceeds the fair market value of the consideration paid for the property, it is necessary to refer to "*any amount*" paid and not only to the fictitious amount indicated in the deeds of sale, which is what paragraph 325(1)(*a*) of the ETA requires us to do.

[36] In *The Queen v. Livingston*, 2008 FCA 89, 2008 DTC 6233 (Eng.) (F.C.A.), the Federal Court of Appeal held that the intention of the parties to defraud the Canada Revenue Agency is of relevance but not determinative in gauging the adequacy of the consideration given. The absence of a deceitful intention, while relevant, is not determinative.

[37] In the case at bar, Exhibits A-3 and A-4 are notarial acts and are, therefore, presumed to be authentic (see article 2814 of the C.C.Q), as are the deeds of purchase and sale. It is obvious that Mr. Tohme purchased the condos and transferred them to the appellant shortly thereafter, barely one month later. According to the deeds of sale, the appellant was entitled to the possession of condo No. 1417 as of February 11, 2003, the same date Mr. Tohme purchased it; and the appellant was entitled to the possession of condo No. 508 as of March 10, 2003, well before the date on which the deeds of sale were executed. It is obvious that this allowed the appellant to operate the condos as rental properties as soon as possible. This is in line with an intention to acquire the condos for the appellant's commercial purposes. There is no evidence that the appellant's patrimony was enriched and there is no evidence that Mr. Tohme's patrimony was diminished in any way. There is no evidence that the appellant did not derive any benefit from its acquisition of the condos. There is no evidence that Mr. Tohme attempted to move the property beyond the tax collector's reach by transferring them. There is no evidence that Mr. Tohme or the appellant attempted to "play both sides" by seeking a tax advantage from first the apparent contract and then the counter letter. There is no sham in this case that prejudices the respondent's rights. Exhibits A-3 and A-4 simply confirm ZT22 as being the source from which the amounts paid by Mr. Tohme at the time of acquisition of the condos. By said notarial acts, the appellant admits that it paid a sum to Mr. Tohme and that said payment was reported. I, therefore, reach the conclusion that Mr. Tohme and the appellant had no intention of deceiving the Minister. Mr. Tohme obtained the condos on behalf and as mandatary of the appellant. Although this conclusion is not determinative, it is relevant and fuels the following debate: what is the true consideration paid for the purchase of the condos by the appellant?

[38] In the case at bar, I reach the conclusion that "*fair market value of of the consideration paid*" or in other words "*any amount paid*" by the appellant for the two condos is as indicated in Exhibits A-3 and A-4, and that ZT22 was responsible for all sums already disbursed, and to be disbursed for the acquisition by Mr. Tohme of the two condos. I find that the true consideration paid by the appellant for the condos is equal to the fair market value of the two condos and, therefore, "the amount by which the fair market value of the properties at the time of the transfer exceeded the fair market value of the consideration paid by the transferee for the transfer of the property" is zero.

Conclusion

[39] For these reasons, the Court allows the appeal of ZT22 Holding Inc., and vacates the notice of assessment, with costs against the respondent.

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Signed at Montréal, Quebec, this 21st day of January 2013.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 5th day of March 2013
Daniela Guglietta, Translator

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DATE OF HEARING:	October 25, 2012
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