

Docket: 2017-512(IT)G

BETWEEN:

CHRISTINA LÉGARÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 18, 2018, at Québec, Quebec
and arguments submitted by the respondent on November 9, 2018,
and by the appellant on November 21, 2018.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Jean-Philippe Royer

Counsel for the respondent: Pavol Janura

JUDGMENT

The appeal from assessment number 3144079, dated April 7, 2015, made under the *Income Tax Act*, is allowed, but only in the amount of \$1,000, which was conceded by the respondent. Consequently, the assessment is remitted to the Minister of National Revenue for reassessment to decrease the amount assessed under subsection 160(1) by \$1,000, in accordance with the attached reasons for judgment.

Because the appeal is only partially allowed, each party must bear its own costs.

Signed at Québec, Canada, this 9th day of May 2019.

“Réal Favreau”

Favreau J.

Translation certified true
on this 10th day of February 2020.

François Brunet, Revisor

Citation: 2019 TCC 106

Date: 20190409

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CHRISTINA LÉGARÉ,

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REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from assessment number 3144079, dated April 7, 2015, made by the Minister of National Revenue under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), as amended, (the “Act”).

[2] Under this assessment, the Minister is claiming the amount of \$109,438.06 from the appellant under subsection 160(1) of the Act resulting from transfers of funds for no consideration from her mother, France Duchesneau, made between June 21, 2007 and July 23, 2010, while the mother owed the Canada Revenue Agency (the “CRA”) a tax debt for her 2007, 2008 and 2009 taxation years.

[3] In assessing the tax payable by the appellant under section 160 of the Act, the Minister took the following facts for granted:

Non-arm’s length

a) The appellant is the daughter of France Duchesneau (“Ms. Duchesneau”);

Transfer:

- b) Between June 21, 2007 and July 23, 2010, Ms. Duchesneau made a series of deposits into the appellant's account at the Wendake Caisse Desjardins for a total amount of \$124,938.06.

The transferor's debt

- c) On April 13, 2011, the Minister reassessed Ms. Duchesneau for her 2007 taxation year;
- d) On June 28, 2011, the Minister reassessed Ms. Duchesneau for her 2008 and 2009 taxation years;
- e) On June 15, 2011, Ms. Duchesneau objected to the April 13, 2011 notice of reassessment for her 2007 taxation year;
- f) On July 17, 2011, Ms. Duchesneau objected to the June 28, 2011 notices of reassessment for her 2008 and 2009 taxation years;
- g) On March 23, 2012, the Minister confirmed the notices of reassessment for the 2007, 2008 and 2009 taxation years (the "underlying assessments");
- h) On June 21, 2012, Ms. Duchesneau filed an appeal to the Tax Court of Canada ("TCC") regarding the underlying assessments;
- i) On September 22, 2015, Ms. Duchesneau's appeal to the TCC was dismissed with costs;
- j) As at April 7, 2015, Ms. Duchesneau owed the Canada Revenue Agency ("CRA") at least \$271,629.84 for the 2007, 2008 and 2009 taxation years;

Consideration

- k) Between June 21, 2007 and August 18, 2010, the appellant sent Ms. Duchesneau several cash amounts for a total of \$10,000.
- l) The Minister deemed this \$10,000 amount to be consideration for the transfers received by the appellant;
- m) On July 9, 2010, the appellant disbursed \$5,500 to pay for the funeral expenses of her grandfather, Ms. Duchesneau's father;
- n) The appellant did not provide any other consideration for the transfers that Ms. Duchesneau made between June 21, 2007 and July 23, 2010;
- o) The appellant received a total of at least \$109,438.06 in transfers for no consideration

Testimonies

[4] France Duchesneau testified at the hearing. She said she opened an account in 2002 at the Caisse populaire Desjardins de Wendake on behalf of her daughter, Christina Légaré, in which to deposit sums of money to pay for her future studies. Ms. Duchesneau worked as a cashier at a snack bar, Coin de la Patate Inc., which she owned.

[5] The record of transactions in her daughter's bank account for the periods from January 1, 2007 to December 31, 2008, was entered into evidence. Ms. Duchesneau does not dispute that she made deposits in her daughter's account totalling \$124,938.06 between June 21, 2007 and July 23, 2010. However, she contests the fact that she was unable to show that a consideration was given for these transfers in excess of \$15,500.

[6] During her testimony, Ms. Duchesneau explained the origin and purpose of certain transfers. She stated that:

- a) the \$41,163 deposited on June 21, 2007, came from family allowance payments that she had accumulated since the birth of her daughter;

- b) the \$701.32 deposited on December 10, 2009, was a pay cheque for the work the appellant had done at the snack bar. A total of \$6,023.73 in pay cheques was deposited during the period;
- c) the \$4,891.32 deposited on December 18, 2009, was a repayment of up to \$4,190 in advances that her daughter had given her;
- d) the \$16,489.87 deposited on February 3, 2010, and the \$4,970 deposited on February 11, 2010, was to make up for her daughter's disappointment. She had planned trips but was unable to make them because of her father's illness and death. This money would allow her to make the trips later on;
- e) the \$16,366.01 deposited on July 23, 2010, represented the proceeds of a life insurance policy on her father that was paid to her as a beneficiary of the estate and was subsequently deposited in her daughter's account in accordance with her father's last wishes.

[7] Ms. Duchesneau explained that when she transferred funds to her daughter's account between June 21, 2007 and July 23, 2010, she did not owe the CRA any taxes. Ms. Duchesneau's 2007, 2008 and 2009 taxation years were assessed on April 13, 2011, and the 2008 and 2009 taxation years were reassessed on June 28, 2011. The tax amounts assessed for 2007, 2008 and 2009 were as follows:

<u>2007</u>	<u>2008</u>	<u>2009</u>
\$138,701.52	\$57,662.53	\$32.45

As at April 7, 2015, Ms. Duchesneau owed the CRA \$271,629.84 in taxes, interest and penalties.

[8] Ms. Duchesneau filed an appeal to the Tax Court of Canada on June 21, 2012, regarding the April 13, 2011 and June 28, 2011 assessments, but her appeal was dismissed with costs on September 22, 2015.

[9] Ms. Duchesneau also explained that on April 25, 2016, she made a proposal to her creditors, which was subsequently approved, and the decisions made at the creditors' meetings were approved and ratified on March 31, 2017 by a judgment rendered by Yoan Nolit, Registrar of the Superior Court (Commercial Division) of the District of Quebec.

[10] Christina Légaré also testified at the hearing. In 2018, she was a humanities and social sciences student at CEGEP Garneau. She said she knew about the bank account that her mother had opened when she was 7 or 8 years old to pay for her studies. She was aware of her mother's payments (e.g. family allowances, travel expense reimbursements, proceeds from her grandfather's life insurance, etc.), but she did not manage the account and did not have a debit card. She said the account had been frozen since the CRA tax audit and that she did not pay any part of the amount assessed on April 7, 2015.

[11] Brigitte Raynault, a CRA collection officer who was responsible for the appellant's case, said she reviewed the property transferred by her mother into the appellant's bank account. The transfers made between June 21, 2007 and July 23, 2010 amounted to \$124,938.06, of which \$15,500 was debited from the appellant's account to her mother, i.e. \$5,500 to pay for her father's funeral expenses and \$10,000 to reimburse the money she had advanced to her mother to pay for her living expenses during periods when the tax authorities had frozen her mother's bank account.

[12] The appellant was assessed for \$109,438.06, i.e. the amounts transferred for no consideration. The proceeds from the appellant's grandfather's life insurance received the same treatment because the appellant was not a beneficiary of the estate. Reimbursements for prepaid trips that were transferred to the appellant's bank account to make up for her disappointment of not having made the trips and to allow her to make them later were treated as cash transfers for no consideration.

[13] Ms. Raynault specified that the amount of \$18,563.13 that was in the appellant's bank account on May 31, 2007, before the transfers were made by her mother on June 21, 2007, was not assessed. The amount of \$6,023.73 that represented amounts paid for the appellant's work at the snack bar was not taken into consideration as part of the assessment. Only transfers from her mother were taken into consideration in making the assessment.

[14] However, Ms. Raynault pointed out that, in making the assessment, the CRA took into account two amounts of \$500 that should not have been assessed. Consequently, the respondent conceded that the appellant's appeal should be allowed in respect of each of these two \$500 amounts.

Analysis

[15] In the version applicable to the 2015 taxation year, the parts of section 160 that are relevant for the purposes of this case read as follows:

160(1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

- a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,
- b) a person who was under 18 years of age, or
- c) a person with whom the person was not dealing at arm's length,

the following rules apply:

d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and

e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

[...]

(2) The Minister may at any time assess a taxpayer in respect of any amount payable because of this section, and the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152 in respect of taxes payable under this Part.

[...]

(3) If a particular taxpayer has become jointly and severally, or solidarily, liable with another taxpayer under this section or because of paragraph 94(3)(d) or (e) or subsection 94(17) in respect of part or all of a liability under this Act of the other taxpayer,

(a) a payment by the particular taxpayer on account of that taxpayer's liability shall to the extent of the payment discharge their liability; but

(b) a payment by the other taxpayer on account of that taxpayer's liability discharges the particular taxpayer's liability only to the extent that the payment operates to reduce that other taxpayer's liability to an amount less than the amount in respect of which the particular taxpayer is, by this section, made jointly and severally, or solidarily, liable.

[16] Four conditions must be met for subsection 160 (1) of the Act to apply:

- a) the transferor must be liable to pay tax under the Act at the time of this transfer;
- b) there must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
- c) the transferee must be a person who is not dealing at arm's length with the transferor, is a person who was under 18 years of age at the time of the transfer or is a person who has since become the transferor's spouse or common-law partner;
- d) the fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

[17] In this appeal, the parties agree that the first three conditions are met. The question is whether the fair market value of the property transferred by Ms. Duchesneau was greater than the fair market value of the consideration given by the appellant.

[18] In such cases, the appellant is responsible for establishing the fair market value of the consideration that she gave for the amounts deposited in her bank account under a legally binding agreement.

[19] According to the evidence of record, the appellant has not shown that the disputed deposits made by her mother in her bank account were reimbursements made pursuant to a legally binding agreement. According to Ms. Duchesneau's testimony, she made the deposits because she loved her daughter and wanted her to complete her studies and succeed in life.

[20] The respondent clearly demonstrated that Ms. Duchesneau owed taxes for the 2007, 2008 and 2009 taxation years. As at April 7, 2015, Ms. Duchesneau's tax debt was \$271,629.84. Ms. Duchesneau's 2007, 2008 and 2009 taxation years were only assessed in April and June 2011, well after the transfers of money to her daughter's bank account.

[21] Although the money transfers were made before Ms. Duchesneau was assessed for the 2007, 2008 and 2009 taxation years, the law is clear: in tax matters, tax liability arises from the Act, not from the assessment made by the Minister. It follows that even if, at the time of the transfer, the tax debtor has not yet been assessed, subsection 160(1) of the Act applies, and the transferee is deemed to be liable for the tax payable by the transferor for the year in which the transfer occurred.

[22] Since under subsection 160(2) of the Act, the Minister may, at any time, make an assessment in respect of a beneficiary of a transfer of property for any amount payable under section 160 of the Act, the Minister was not required to assess the appellant for the taxation years in which the appellant received transfers of property from her mother. However, the appellant's tax liability arose as soon as the transfers were made, i.e. between June 21, 2007 and July 23, 2010. This was well before Ms. Duchesneau was assessed for the 2007, 2008 and 2009 taxation years and well before any approval of the proposal made by Ms. Duchesneau, who incurred the tax debt. The assessment against the appellant is dated April 7, 2015, prior to any approval of the proposal made by the appellant's mother.

[23] Counsel for the appellant argues that Ms. Duchesneau's tax debt was extinguished when the CRA accepted the proposal and that the CRA voluntarily waived her debt according to the very terms used in the amended proposal, the relevant extract of which reads as follows:

[TRANSLATION]

The Canada Revenue Agency's real estate mortgage on the buildings located at 1882 chemin St-Barthelemy, Quebec; 1884 chemin St-Barthelemy, Québec and 2080 du Beau Site, Québec, all registered under No. 17497028, will be paid out of a sum of \$75,000 to be paid by a third party to the trustee within 48 hours after the court has approved the proposal. This amount will be paid to the Canada Revenue Agency 15 days after the proposal is approved. As consideration for this payment to the Canada Revenue Agency, the CRA will release its mortgage number 17497028. In addition, the Canada Revenue Agency agrees not to make any claims as an unsecured creditor.

[24] According to counsel for the appellant, the terms of the amended proposal mean that the CRA has waived the recovery of amounts other than those obtained under the proposal and that, *ipso facto*, the proceeding initiated by the CRA to recover the tax debt from the appellant is legally without merit.

[25] Counsel for the respondent argues that the amended proposal, which Ms. Duchesneau made under the *Bankruptcy and Insolvency Act* ("BIA"), and its approval and ratification by the Superior Court of Québec, does not release the appellant from her debt, as established by the April 7, 2015 assessment pursuant to subsection 160 of the Act.

[26] Counsel for the respondent's position is essentially based on the principles laid down by the Federal Court of Appeal in *Canada v. Heavyside*, 1996 CanLII 3932, which were followed by the same Court in *Wannan v. Canada*, 2003 FCA 423 and the Appeal Court of Québec in *Ellinakis c. Agence du revenu du Québec*, 2015 QCCQ 487 (CanLII), which affirmed the Court of Québec's 2013 QCCQ 11016 (CanLII) decision in a case similar to the appellant's, i.e. it involved a proposal.

[27] The following principles were laid down in *Heavyside*:

- once the conditions of subsection 160(1) of the Act are met, the transferee becomes personally liable for the tax payable under that subsection;
- the transferee's liability arises at the moment of the transfer of property and is joint and several with that of the transferor;
- the Minister may at any time assess the transferee and the transferee's liability will only disappear with the payment made by the transferor or transferee in accordance with subsection 160(3) of the Act;

- the transferee's liability survives the transferor's bankruptcy and remains in effect despite the discharge obtained by the transferor under the *Bankruptcy Act*. Unless a payment be made under the terms of subsection 160(3) of the Act, a discharge under the *Bankruptcy Act* is simply not a payment under the terms of subsection 160(3).

[28] In *Ellinakis*, the Court of Québec relied on the principles laid down in *Heavyside* and held that the approval of a proposal does not preclude the Minister from making an assessment under section 14.4 of the *Tax Administration Act* (the provincial equivalent of subsection 160(1) of the Act) in respect of transfers of property made prior to the approval of a proposal.

[29] The principles set out by the Federal Court of Appeal in *Heavyside* and *Wannan*, and by the Appeal Court of Québec in *Ellinakis* appear to me to be applicable in the circumstances.

[30] The case law on which counsel for the appellant relies in support of his position that the approval of Ms. Duchesneau's proposal has a releasing effect on the appellant's tax liability, i.e. *Martel v. The Queen*, 2010 TCC 634, does not in any way alter the principles stated in *Heavyside* because, in this case, the disputed transfers were made after the CRA accepted the proposal, and the proposal was approved by the Court. Finally, this Court's decision in *Clause v. The Queen*, 2010 TCC 410 does not in any way support counsel for the appellant's case.

[31] Moreover, the position argued by counsel for the appellant would have the effect of endorsing a practice that section 160 specifically seeks to prevent. It should be noted that the very purpose of subsection 160(1) is to preserve the value of existing assets in the taxpayer for collection by the CRA (*Canada v. Livingston*, 2008 FCA 89, at paragraph 27) and to prevent a taxpayer from avoiding his tax liability by simply transferring his assets to his spouse or to any other person described in this section (*Heavyside* page 3). In such cases, section 160 then allows the CRA to exercise its rights over the property transferred against the transferee.

[32] According to the logic of appellant's counsel, a person could take advantage of his own turpitude and circumvent Parliament's intention, which was clearly expressed when section 160 was adopted. A person with a tax debt could waste his assets by transferring them to related persons and put himself in a situation where he could no longer meet his financial obligations. This would enable him to place himself under the protection of the BIA by making a proposal or declaring bankruptcy. Third parties who benefited from the transfers could then benefit from

the transferor's release, which would amount to condoning a practice that circumvents the intent of the Act.

[33] Regarding the terms found in the proposal, counsel for the appellant argues that they constitute a waiver by the CRA of its rights to recover amounts other than those obtained under the proposal, thereby waiving any recovery from the appellant.

[34] With respect, I do not believe that this argument can be accepted because the waiver clause in question is not expressed in clear, unambiguous terms and because the appellant herself is not a party to this agreement. Regardless of the legality of such a clause, it appears to me to be highly improbable that the CRA intended to waive a remedy to which it is specifically entitled under the Act.

[35] For all these reasons, the appeal is allowed, but only in the amount of \$1,000, which was conceded by the respondent. Consequently, the assessment is remitted to the Minister for reconsideration and reassessment to reduce the amount assessed under subsection 160(1) by \$1,000. Because the appeal is only partially allowed, each party must bear its own costs.

Signed at Québec, Canada, this 9th day of May 2019.

“Réal Favreau”

Favreau J.

Translation certified true
on this 10th day of February 2020.

François Brunet, Revisor

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DATE OF JUDGMENT: May 9, 2019

APPEARANCES:

Counsel for the appellant: Jean-Philippe Royer
Counsel for the respondent: Pavol Janura

COUNSEL OF RECORD:

For the appellant:

Name: Jean-Philippe Royer

Firm: Bouchard, Pagé, Tremblay

For the respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada