Date: 20080214

Dockets: A-571-06
A-572-06

Citation: 2008 FCA 60

CORAM: **DESJARDINS J.A.**
NOËL J.A.
PELLETIER J.A.

A-571-06

BETWEEN:

LES CONSULTANTS PUB CRÉATION INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-572-06

BETWEEN:

LOUIS MASSICOTTE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec on February 6, 2008.

Judgment delivered at Ottawa, Ontario, on February 14, 2008.

REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	DESJARDINS J.A.
	PELLETIER J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] These are two appeals filed by Consultants Pub Création Inc. (Pub Création) and Louis Massicotte (Mr. Massicotte) from judgments by Judge Archambault of the Tax Court of Canada (the TCC judge), dismissing Mr. Massicotte's appeal in part and that by Pub Création in its entirety. Mr. Massicotte is objecting to the part of the decision which confirmed the taxable benefit in the order of $239,000 derived from his employment pursuant to paragraph 6(1)(*a*) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the Act), during his 1995 taxation year. Pub Création, for its part, argued that if it conferred such a benefit on Mr. Massicotte it was entitled to deduct this amount in computing its income for 1995, and the TCC judge should have warned it not to withdraw its appeal for the year in question in order to preserve this right.

[2] The two appeals were joined by order of this Court on April 17, 2007, case A-571-06 being designated the lead case. Pursuant to that order, these reasons will be filed in the principal case, and a copy hereof entered in case A-572-06 to be the reasons thereof.

FACTS

[3] I would first note the problems which the TCC judge had unravelling the facts surrounding the transactions which gave rise to the assessments at issue. The TCC judge discussed antedated contracts and provisions not consistent with the facts, adding that the appeals by Mr. Massicotte and

Pub Création raised serious problems of credibility (Reasons, at paras. 57, 64 and 65). It was not until he had heard the witnesses and carefully sifted through the evidence that the TCC judge was able to draw his conclusions. The relevant facts were related with monastic care throughout his reasons. For our purposes we need only mention the following few facts.

[4] In 1990 Mr. Massicotte was president and director of Pub Création. He also held all the shares in Gestion Amadéus-Amadéus Ltée (Amadéus), which in turn held all the shares in Pub Création. In 1990 Mr. Massicotte was approached by Michel Audy (Mr. Audy) suggesting they do business together. An agreement recording their business plan was made in December 1990.

[5] Under that agreement Amadéus sold part of the Pub Création shares to Gestion Cyrano Inc. (Cyrano), a company 100% owned by Mr. Audy, for $350,000. At the same time, Amadéus acquired part of the shares of Im-Média Inc. (Im-Média), a company held 100% by Cyrano.

[6] In June 1994 Mr. Massicotte and Mr. Audy agreed to make a division of their direct or indirect holdings in Pub Création and Im-Média (the separation agreement). For our purposes it is important to note paragraph 3, which reads as follows:

> **[TRANSLATION]**
>
> **3. SALES OF IM-MÉDIA SHARES AND RELEASE OF DEBT**
>
> CYRANO, AUDY undertake to purchase all shares held in Im-Média by Massicotte since October ’93 for the sum of $70,000, thus eliminating any agreement prior hereto between the parties, and in particular the non-competition clause between CYRANO and AUDY and Massicotte in the shareholder agreement of CONSULTANTS PUB CREATION INC.

> AUDY and CYRANO acknowledge owing the capital sum of $240,000, in the form of a note payable, to Massicotte and/or AMADÉUS.
>
> [Emphasis added.]

[7] After the division of June 10, 1994, the situation appears to have returned to what it was originally, in that Mr. Massicotte held 100% of the Amadéus shares, and the latter held 100% of the Pub Création shares.

[8] In late 1994 and early 1995 Mr. Massicotte assigned to Pub Création the debt of $240,000 mentioned in paragraph 3 of the separation agreement. An adjusting entry in the books of Pub Création indicates that the sum of $240,000 was credited to an account designated [TRANSLATION] "employee advance" in Mr. Massicotte's name to offset the transfer of the debt dated December 31, 1995. The amount so credited was allegedly used to wipe out certain loans made to Mr. Massicotte by Pub Création in 1994, 1995 and 1996 (Reasons, at para. 17).

[9] Following an audit, the Minister of National Revenue (the Minister) concluded that the debt assigned by Mr. Massicotte to Pub Création in 1995 had no value. The reassessment issued following this audit taxed Mr. Massicotte for some $240,000 as [TRANSLATION] "allocation of funds from Consultants Pub Création" (appeal record, vol. II, at p. 105). The notice of confirmation issued by the Appeal Division following Mr. Massicotte's objection spoke of a [TRANSLATION] "benefit relating to the transfer of a debt" conferred by Pub Création under subsection 15(1) of the Act (appeal record, vol. II, at p. 109).

[10] Mr. Massicotte appealed the matter and in an initial reply to the notice of appeal filed by Mr. Massicotte, Her Majesty the Queen, acting on behalf of the Minister (hereinafter the respondent or the Crown), took the position that the $240,000 benefit was taxable under subsection 246(1) of the Act. Alternatively, the respondent maintained that this was a benefit conferred by Pub Création as employer of Mr. Massicotte under paragraph 6(1)(*a*) of the Act.

[11] The respondent subsequently obtained leave to amend its reply to the notice of appeal by deleting the allegation that the benefit was taxable under paragraph 6(1)(*a*) of the Act. The respondent then argued solely that the benefit in question was conferred by Amadéus pursuant to subsection 246(1) of the Act. Counsel for the respondent explained that this decision was made to accurately reflect the position taken by the auditor when issuing the assessment. The latter explained in her testimony that it was uncertainty about Mr. Massicotte's status with Pub Création, the fact that he was not a direct shareholder of Pub Création and the method used to obtain the benefit which led her to use subsection 246(1) rather than subsection 15(1) or paragraph 6(1)(*a*) as a basis for the assessment (examination-in-chief of auditor, transcript, vol. III, at pp. 9 to 18).

[12] Accordingly, the only position maintained by the Crown to defend the assessment in the Tax Court of Canada was that, under subsection 246(1), Amadéus had conferred a benefit on Mr. Massicotte by arranging for Pub Création to assign to the debt transferred to it a value of $240,000, when it had no value, and enter a credit equal to that amount in his name (written submissions of respondent, appeal record, vol. I, at p. 4, para. 13).

TAX COURT OF CANADA DECISION

[13] The TCC judge concluded that the origin of the $240,000 debt was the sale of Pub Création shares in December 1990. In the opinion of the TCC judge, this sale was made for an "inflated" amount, which explains why Mr. Audy and Cyrano always believed that the amount of the note would never be paid (Reasons, at para. 78). No credible expert witness could confirm the value assigned to this debt (Reasons, at para. 77). Relying on the expert report filed by the respondent, the TCC judge concluded that the debt had practically no value when assigned to Pub Création. It was thus a benefit which was conferred on Mr. Massicotte.

[14] In the opinion of the TCC judge, the evidence allowed him to conclude that the benefit was conferred by Pub Création pursuant to paragraph 6(1)(*a*) (Reasons, at para. 82). The evidence also supported the conclusion that it was this benefit which was conferred by Amadéus under subsection 246(1), as maintained by the Crown in its pleadings (Reasons, at para. 101). However, the TCC judge said that in his opinion subsection 246(1) could not be used as a basis for assessment if the benefit could be taxed under paragraph 6(1)(*a*) (Reasons, at para. 27).

[15] The TCC judge said he was concerned that Mr. Massicotte could appropriate the sum of $240,000 without paying any tax because of a mistake by the Minister (Reasons, at paras. 43 and 44), and of his own motion undertook to rely on paragraph 6(1)(*a*) (Reasons, at paras. 45 to 48). Based on that provision, the TCC judge concluded that Mr. Massicotte had received a taxable benefit in the order of $239,000.

APPELLANTS' POSITION

[16] Counsel for the appellants questioned only that aspect of the judgment based on paragraph 6(1)(*a*). He acknowledged that a benefit of some $239,000 was conferred on his client, but maintained that the TCC judge could not apply this provision on his own motion in order to tax the benefit.

[17] In the submission of counsel for the appellants, the TCC judge, by relying on paragraph 6(1)(*a*) when the respondent had formally withdrawn it from his pleadings, took upon himself the function of Deputy Attorney General as representative of the Minister. What is more, the Minister himself could not have relied on paragraph 6(1)(*a*), since the normal assessment period had elapsed and paragraph 6(1)(*a*) applies on its face to a particular factual situation which the Crown had expressly withdrawn from its pleadings.

[18] In his submission, the TCC judge committed a breach of the rule of natural justice by allowing Pub Création to discontinue its appeal without regard for the fact that, if applicable, paragraph 6(1)(*a*) would have allowed it to deduct the amount of the benefit in computing its income. As to the latter argument, the respondent conceded that if paragraph 6(1)(*a*) was the applicable provision, Pub Création's appeal should be allowed.

ANALYSIS AND DECISION

[19] I do not have to deal with any of the points raised by the appellants in support of their appeals to dispose of the matter. I need only conclude, as the TCC judge did at paragraph 101 of his reasons, that on the facts in evidence Mr. Massicotte received a taxable benefit in the order of $239,000 under subsection 246(1). I would note that this conclusion was not questioned in the appeals.

[20] The debate before the Tax Court of Canada was conducted on the wrong footing. Counsel for the appellants maintained that the Minister lost his right to rely on subsection 246(1) once it was established that the value of the benefit [TRANSLATION] "could be included" in his client's income under paragraph 6(1)(*a*) (counsel presented the matter the same way on appeal – appellants' memorandum, para. 36). The TCC judge rendered his decision on that basis. That is not the issue.

[21] Subsection 246(1), to be found in Part XVI of the Act ("Tax Avoidance") reads as follows:

Benefit conferred on a person	**Avantage conféré à un contribuable**
246. (1) Where at any time a person confers a benefit, either directly or indirectly, by any means whatever, on a taxpayer, the amount of the benefit shall, to the extent that it is not otherwise included in the taxpayer's income or taxable income earned in Canada under Part I and would be included in the taxpayer's income if the amount of the benefit were a payment made directly by the person to the taxpayer and if the taxpayer were resident in Canada, be	**246.** (1) La valeur de l'avantage qu'une personne confère à un moment donné, directement ou indirectement, de quelque manière que ce soit à un contribuable doit, dans la mesure où elle n'est pas par ailleurs incluse dans le calcul du revenu ou du revenu imposable gagné au Canada du contribuable en vertu de la partie I et dans la mesure où elle y serait incluse s'il s'agissait d'un paiement que cette personne avait fait directement au contribuable et si le contribuable résidait au Canada, être :

(*a*) included in computing the taxpayer's income or taxable income earned in Canada under Part I for the taxation year that includes that time; or	*a*) soit incluse dans le calcul du revenu ou du revenu imposable gagné au Canada, selon le cas, du contribuable en vertu de la partie I pour l'année d'imposition qui comprend ce moment;
(*b*) where the taxpayer is a non-resident person, deemed for the purposes of Part XIII to be a payment made at that time to the taxpayer in respect of property, services or otherwise, depending on the nature of the benefit.	*b*) soit, si le contribuable ne réside pas au Canada, considérée, pour l'application de la partie XIII, comme un paiement fait à celui-ci à ce moment au titre de bien ou de services ou à un autre titre, selon la nature de l'avantage.

[Emphasis added.]

[22] In my humble opinion, the only purpose of the underlined portion is to prevent double taxation. By its broad wording, subsection 246(1) covers practically all situations where a benefit may result in an inclusion under Part I of the Act. Parliament has thus expressly limited the application of this anti-avoidance measure to situations where the value of the benefit is not otherwise "included" in computing the taxpayer's income under Part I.

[23] This is what Judge Tardif of the Tax Court of Canada explained in the decision he rendered in the case at bar, authorizing the respondent to enter subsection 246(1) as the sole basis of its assessment in its amended reply to the notice of appeal (2004TCC558):

> [34] Subsection 246(1) of the ITA is a provision of alternative application since it must be shown that the amount is not otherwise included (for example, under subsection 15(1) of the ITA) and that it would be included if the payment made to the taxpayer was made to him directly.

. . . . .

> [36] Consequently, subsection 246(1) of the ITA will be applied "alternatively". That does not mean that the Respondent may not assess solely on the basis of subsection 246(1) of the ITA, since that provision is sufficient basis for an assessment.
>
> [37] It is enough simply to establish that the amount is not otherwise included, whereas it would be included were it not for the fact that the payment was made indirectly. The way to prove this is to enumerate the facts constituting the basis of the assessment in the Reply to the Notice of Appeal. This proof should normally show that the amount is not included in computing the taxpayer's income, but would have been if the payment had been made directly.

[24] The question the TCC judge should have asked was not whether the benefit "could be included" under paragraph 6(1)(*a*), but rather whether the value of the benefit was "included" in computing Mr. Massicotte's income under paragraph 6(1)(*a*) or any other provision in Part I. While subsection 246(1) is generally used as an alternative basis, nothing prevents the Minister from relying on this provision as the sole basis of assessment when the circumstances require.

[25] As the TCC judge concluded there had been a benefit under subsection 246(1) on the facts in evidence, and the value of that benefit had not been included in Mr. Massicotte's income under Part I, he should have confirmed the assessment. He did not have to go any further.

[26] I therefore come to the conclusion that Mr. Massicotte's appeal cannot succeed. Since the appeal by Pub Création and the concession made by the Crown are based on paragraph 6(1)(*a*) being applicable, they should suffer the same fate.

[27] For these reasons, I would dismiss the appeals with costs in the principal case only.

"Marc Noël"

J.A.

I concur.

Alice Desjardins J.A.

I concur.

J.D. Denis Pelletier J.A.

Certified true translation

Brian McCordick, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-571-06 and A-572-06
STYLE OF CAUSE:	A-571-06 LES CONSULTANTS PUB CRÉATION INC. and HER MAJESTY THE QUEEN A-572-06 LOUIS MASSICOTTE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 6, 2008
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Desjardins J.A. Pelletier J.A.
DATED:	February 14, 2008

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