Date: 20081211

Docket: A-564-07

Citation: 2008 FCA 393

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

MARIO BOILY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on October 1, 2008.

Judgment delivered at Ottawa, Ontario, on December 11, 2008.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of Justice Bédard of the Tax Court of Canada, 2007 TCC 603, dated January 21, 2008, confirming the assessment of the Minister of National Revenue (the "Minister"), according to which the appellant had to add $34,500 in income from a registered retirement savings plan ("RRSP") to his income for the 1999 taxation year, in accordance with paragraphs 146(10) (*a*) and (*c*) of the *Income Tax Act* (the "Act").

[2] The issue before the Tax Court of Canada arises from the acquisition by the MRS Trust Company ("MRS Trust"), the trust company for the appellant's RRSP, of 34,500 class "B" shares (the "shares") in a company named Les Immeubles R.V. 1986 ("Immeubles R.V."). The judge had to determine whether this acquisition would meet the criteria for a qualified investment within the meaning of subsection 146(1) of the Act and sections 4900 and 5100 of the associated Regulations.

[3] The judge ruled that MRS Trust had acquired a non-qualified investment because Immeubles R.V. did not operate a business or hold any interest in a company operating a business or any type of debt obligation issued by such a company. Accordingly, the judge ruled that the appellant had to add $34,500 to his income for the taxation year in question, in accordance with paragraphs 146(10)*(a)* and *(c)* of the Act.

[4] In spite of this conclusion, which should have settled the issue, the judge, acting on his own initiative, raised a second issue at the hearing, namely whether MRS Trust had acquired the shares of Immeubles R.V. during the 1998 or 1999 taxation year. If the answer to this question was 1998, the judge was of the opinion that he had to allow the appeal because the Minister had not assessed the appellant for the 1998 taxation year within the time specified under the Act.

[5] After studying the relevant exhibits filed on record, the judge concluded that MRS Trust had acquired the shares of Immeubles R.V. in 1999. According to the judge, the evidence supported the respondent's submission that Immeubles R.V.'s having cashed a cheque for $34,500 issued by MRS Trust was the only evidence on record showing that MRS Trust had been advised

of the issue of the shares and that Immeubles R.V. had accepted its offer to acquire them. More specifically, the judge reached the following conclusions:

(i) MRS Trust was the shares' subscriber because the share certificate showed that it held the shares of Immeubles R.V. and that the appellant had instructed it on December 1, 1998, to acquire the shares;

(ii) the issuance of the share certificate on December 1, 1998, led him to conclude that, for lack of better evidence, the offer by MRS Trust to purchase shares had been accepted by Immeubles R.V. on December 1, 1998;

(iii) MRS Trust had been advised by Immeubles R.V. of the acceptance of its subscription until January 1999, when it cashed its cheque for $34,500 issued on January 25, 1999.

[6] At paragraph 23 of his decision, the judge explained his reasoning as follows:

> [23] The first question to ask in this case is: who was the subscriber, or in other words, who made the offer to purchase the shares in RV? The December 1, 1998, letter (Exhibit I-1, Tab 1) and the issuance of the share certificate (Exhibit A-3) attesting that on December 1, 1998, Fiducie MRS held 34,500 class "B" shares, without more compelling evidence, lead me to believe that the subscriber was Fiducie MRS. The issuance of the share certificate also leads me to believe, without more compelling evidence, that the offer by Fiducie MRS to purchase shares was accepted by RV on December 1, 1998. However, counsel for the Respondent claimed that Fiducie MRS did not become the owner of the shares in 1998 because there is nothing in the evidence submitted indicating that Fiducie MRS was advised of such an issuance in 1998. Counsel for the Respondent claimed that a subscriber does not become the owner of the shares even if the offer was accepted by the company unless and until the subscriber is advised that there was issuance, meaning the purchase offer was accepted. Counsel for the Respondent claimed that the only evidence submitted showing that Fiducie MRS was advised there had been issuance of the 34,500 class "B" shares of RV and that RV had accepted its offer to purchase shares was when RV collected the price of the subscribed shares by Fiducie MRS in 1999. As a result, I find that Fiducie MRS acquired a non-qualified investment in 1999, in this case, 34,500 class "B" shares in RV, for which the FMV at the time of acquisition was $34,500 and, therefore, the

> Appellant must add $34,500 to his income for the 1999 taxation year in accordance with paragraphs 146(10)(*a*) and (*c*) of the Act.

[7] Accordingly, the judge confirmed the Minister's assessment for the appellant's 1999 taxation year.

[8] This appeal raises only one issue, that is, whether the judge erred in concluding that MRS Trust had acquired the shares of Immeubles R.V. during the 1999 taxation year.

[9] A few preliminary comments are called for. The first is that this case proceeded before the Tax Court of Canada under the informal procedure. Accordingly, the judge was not bound by the rules of evidence at the hearing. In fact, subsection 18.15(4) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, provides the following:

18.15(4) Notwithstanding the provisions of the Act out of which an appeal arises, the Court, in hearing an appeal referred to in section 18, is not bound by any legal or technical rules of evidence in conducting a hearing for the purposes of that Act, and all appeal referred to in section 18 shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit.	**18.15(4)** Par dérogation à la loi habilitante, la Cour n'est pas liée par les règles de preuve lors de l'audition d'un appel interjeté en vertu de cette loi et visé à l'article 18; ces appels sont entendus d'une manière informelle et le plus rapidement possible, dans la mesure où les circonstances et l'équité le permettent.

[10] My second comment concerns the fact that after their respective memoranda were filed, the parties successively applied to the Court for leave to file new evidence. On June 9, 2008, Justice Noël granted the respondent leave to adduce new evidence, and on August 28, 2008,

Justice Létourneau granted the appellant leave to adduce new evidence. Accordingly, the appeal will be decided not only on the basis of the exhibits before Justice Bédard, but also on the basis of the new evidence.

[11] As a third comment, I would note that neither the notice of appeal nor the amended notices filed by the appellant in the Tax Court of Canada against the Minister's assessment, nor the Minister's reply to the amended notice of appeal, raise the issue that is the subject of this appeal. In my opinion, this explains why only Michel Leduc, an investigator with the Canada Customs and Revenue Agency, testified at trial. In fact, because the parties did not raise the issue of the year in which the shares of Immeubles R.V. were acquired, they did not submit any testimony in support of their respective claims in that regard. Accordingly, not only did the appellant not testify, but no representative of MRS Trust, Immeubles R.V. or Peak Investment Services Inc. ("Peak Investment"), the brokerage firm representing the appellant in dealings with MRS Trust, testified either. Because of this, the judge did not have the benefit of testimonial evidence about the documents that were filed at the hearing. Of course, the same observation applies to the documents that were submitted to us with the new evidence.

[12] A brief summary of the facts assist not only in understanding the issue before us, but also in placing in their proper context the findings of fact that led the judge to rule that MRS Trust had acquired the shares during the 1999 taxation year.

[13] I will begin my summary of the facts by noting that among the documents that Justice Létourneau allowed to be filed by his order dated August 28, 2008, is a letter dated December 6, 2007, from Jean-Marie Ouellet of Peak Investment to Yvan Tremblay, the appellant's accountant. It appears that this letter was to advise the appellant of the procedure applied [TRANSLATION] "in the MRS files concerning the private companies". I am satisfied on the basis of the evidence adduced before us that even though Mr. Ouellet's letter is dated December 6, 2007, the procedure followed by the appellant in 1998 is the one explained in Mr. Ouellet's letter. Accordingly, I reproduce the letter in its entirety:

> [TRANSLATION]
> WITHOUT PREJUDICE
>
> As discussed by telephone, this is to advise you of the procedure used in the MRS files concerning the private companies.
>
> On receipt of the documents at my office, we check whether all the documents required by MRS have been completed. These documents are then forwarded to MRS, which has them checked by its legal department to be sure that the companies are qualified.
>
> The documents required are the following:
> - Opening of an MRS account (registered plan application)
> - A form entitled "Admissibilité des actions de sociétés fermées" (qualification of shares of private companies)
> - A letter of indemnity for the investment of assets of a small company in a self-directed RRSP
> - A letter signed by the accountant of the company subject to the application
> - A letter signed by an officer confirming that the company meets government standards
> - A share certificate from the company in which the customer wants to invest.
>
> <u>Following a study of these documents and if everything is in order, the customer's request is processed.</u>

> You must realize that a certain amount of time is necessary to study each file, which may explain certain delays between when the documents are received and when the cheque is issued (SWAP).
>
> [Emphasis added]

[14] On October 25, 1998, the appellant signed an RRSP application and transferred the RRSP he held with the Royal Bank of Canada, in the amount of $34,500, to a self-directed RRSP account with MRS Trust. This application clearly shows that the appellant appointed Jean-Marie Ouellet from Peak Investment to act as his mandatary in dealings with MRS Trust. Clauses 11(b) and 11(c), under the heading [TRANSLATION] "Account Agreement", read as follows:

> [TRANSLATION]
> **11. Account Agreement**
> In consideration of the acceptance of this account by Compagnie de Fiducie, M.R.S. (the Trustee) and by Multiple Retirement Services Inc. (MRS), I agree
> . . .
> b) That for their own protection and without any obligation on their part, the Trustee and/or MRS are entitled to refuse any direction or to sell any securities in my account,
> c) That the directions I give are valid until the end of the day, unless specified otherwise, and I am responsible for any order placed, regardless of the date on which I receive confirmation of the transaction.
> . . .

[15] On December 1, 1998, the appellant forwarded to Mr. Ouellet a letter to MRS Trust with directions to immediately purchase 34,500 shares of Immeubles R.V. and issue a cheque in an amount of $34,500 payable to that company. Along with his letter, the appellant sent Mr. Ouellet the following documents:

(a) a letter signed by the appellant and dated December 1, 1998, exonerating MRS Trust from liability for any non-qualified investment in a small business and a growing business;

(b) a letter of indemnity signed by the appellant on December 1, 1998, releasing MRS Trust from any liability resulting from the purchase of the shares in Immeubles R.V.;

(c) a certification letter, dated December 1, 1998, from Lucie Lauzon, Chartered Accountant, certifying that the shares of Immeubles R.V. are a "qualified investment" for the purposes of the relevant sections of the Act, along with a questionnaire entitled [TRANSLATION] "Qualification of shares of private corporations in registered MRS accounts", duly filled out by Ms. Lauzon;

(d) a letter dated December 1, 1998, from Lucie Lauzon, Chartered Accountant, stating that in her opinion the shares of Immeubles R.V. are a "qualified nvestment" within the meaning of subsection 4900(12) of the Regulations, that following the purchase of the shares in Immeubles R.V., the appellant is not a specified shareholder , that following the acquisition of the shares of Immeubles R.V. by the appellant's RRSP, the total assets of Immeubles R.V. would not exceed $10 million and, finally, that the fair market value of the shares in Immeubles R.V. when the shares were deposited on December 1, 1998, was $1 per share.

(e) an offer to purchase shares between Immeubles R.V. and the appellant, dated December 1, 1998, signed by the appellant;

(f) a contract for the sale of shares between the same parties, dated December 1, 1998, signed by the appellant;

(g) a certificate issued by Immeubles R.V. on December 1, 1998, confirming that the appellant held 34,500 shares in Immeubles R.V.;

(h) a share certificate dated December 1, 1998, issued by Immeubles R.V., certifying that [TRANSLATION] " the company MRS Trust Inc., a trustee for Mario Boily, RRSP No. 6043927, holds 34,500 class "B" shares in Immeubles R.V.";

(i) a document entitled [TRANSLATION] "Delivery", confirming receipt of the share certificate by the appellant; and

(j) an MRS Trust questionnaire completed by accountant Lucie Lauzon, dated December 1, 1998, concerning the qualification of [TRANSLATION] "private company shares in the MRS registered accounts".

[16] The new evidence shows that documents (b), (c), (d) and (j), above, were received by Peak Investment on December 9, 1998. This evidence also shows that these documents were sent by Peak Investment to MRS Trust, which received them on December 17, 1998. As regards the other documents mentioned above, there is no direct evidence of their receipt by Peak Investment and MRS Trust. Notwithstanding this lack of evidence, it is probable that all of these documents, including the share certificate, which I will address farther on, were received by peak Investment and MRS Trust on the dates stated above.

[17] On December 22, 1998, Lisette Lalancette, the president of Immeubles R.V., signed a letter to MRS Trust certifying that she had held this position for two years and that her interest in Immeubles R.V totalled 6% of its shares. She also certified that she did not have any family or business relationship with the persons investing part of their RRSPs in the shares of her company.

[18] On December 30, 1998, MRS Trust sent a document to the broker Peak Investment (which is part of the new evidence) entitled [TRANSLATION] "One-Time Notice", requesting a letter of direction from the appellant authorizing it to purchase the shares of Immeubles R.V. On January 19, 1999, after MRS Trust sent that letter of direction, the appellant signed a second letter authorizing MRS Trust to send a cheque for $34,500 to Immeubles R.V. [TRANSLATION] "in exchange for a share certificate for 34,500 class "B" shares in the company."

[19] On January 25, 1999, MRS Trust issued a cheque payable to the order of Immeubles R.V. in the amount of $34,500. The cheque was cashed by Immeubles R.V. a few days later.

Analysis

[20] There is no doubt that on December 1, 1999, the appellant firmly intended to have his RRSP acquire shares in Immeubles R.V. In fact, he did make an offer to purchase the shares, and this offer was accepted on December 1, 1998. However, since the$34,500 that he planned to use to purchase these shares was invested in a self-directed RRSP with MRS Trust, the trustee's consent to this purchase was required. In addition, as specified in clause 11(b) of the registered retirement savings plan application signed by the appellant on October 25, 1998, the trustee was entitled to [TRANSLATION] "refuse any direction or to sell any securities" in the appellant's account.

[21] In fact, as the trustee of the appellant's RRSP, MRS Trust had to ensure before purchasing the shares in Immeubles R.V., that they were a qualified investment by a trust. This is why before respecting the appellant's directions to purchase the shares, MRS Trust required a certain number

of documents, including a letter of indemnity, a letter signed by Ms. Lalancette confirming that Immeubles R.V. complied with government standards and a letter from the accountant Lucie Lauzon according to which the shares in Immeubles R.V. were a qualified investment within the meaning of the Act.

[22] When its documentary requirements had been met at the end of December 1998, MRS Trust sent Peak Investment a document entitled [TRANSLATION] "One-Time Notice", requesting that the appellant forward a letter of direction so that it could [TRANSLATION] "proceed with the transaction in this file", namely the purchase of the shares in Immeubles R.V.

[23] In my opinion, this request for new directions by the appellant is explained by clause 11(c) of the registered retirement savings plan application, which provides the following: [TRANSLATION] "that the directions I give are valid until the end of the day . . .". Accordingly, the directions given by the appellant in his letter of December 1, 1998, to purchase the shares in Immeubles R.V., were no longer valid. Therefore, new directions were required to allow MRS Trust to proceed with the purchase of the shares in Immeubles R.V.

[24] New directions were given by the appellant to MRS Trust in a letter dated January 19, 1999, and as mentioned above, on January 25, 1999, MRS Trust issued a cheque in an amount of $34,500 payable to the order of Immeubles R.V. (considering clause 11(c) of the RRSP application, the appellant's letter was likely received by MRS Trust on January 25, 1999).

[25] Although I do not entirely agree with the reasoning of Justice Bédard, I cannot conclude on the basis of all the evidence that he erred in determining that MRS Trust had acquired the shares of Immeubles R.V. during the 1999 taxation year. Allow me to explain.

[26] Justice Bédard concluded that MRS Trust was the subscriber of the shares in Immeubles R.V. He came to this conclusion because the share certificate issued on December 1, 1998, certified that on this date MRS Trust held 34,500 shares. In my opinion, the evidence on record did not allow the judge to reach this conclusion.

[27] In fact, the evidence shows that on December 1, 1998, the appellant had made an offer to purchase 34,500 shares in Immeubles R.V. and that this offer was accepted by Immeubles R.V., as appears from the contract of sale of shares dated December 1, 1999, under which Immeubles R.V. agreed to sell those shares to the appellant.

[28] Accordingly, in my opinion, there is no doubt that as of December 1, 1998, the subscriber of these shares was the appellant himself. This explains why Immeubles R.V. delivered a share certificate for 34,500 shares to the appellant on December 1, 1998.

[29] The second conclusion reached by the judge was to the effect that MRS Trust's offer to purchase the shares had been accepted by Immeubles R.V. on December 1, 1998. Once again, I consider that the evidence does not support the judge's conclusion in this regard. The only offer to purchase shares received by Immeubles R.V. on December 1, 1998, was the one made by the

appellant. Therefore, on December 1, 1998, MRS Trust had not made any offer to purchase shares to Immeubles R.V.

[30] The only inference that could be drawn from the preceding is that the appellant, as subscriber of the shares, asked Immeubles R.V. to allot the shares to MRS Trust. At page 262 of *Précis de droit sur les compagnies au Québec*, Montréal, Wilson & Lafleur, Martel ltée, 2000, author Paul Martel writes the following:

> [TRANSLATION]
>
> **Definition: *issue and allotment*** – *Issue* means that shares are taken from the authorized share capital to be remitted to someone. At that time, these shares become issued capital, and then paid-up capital once they are fully paid.
>
> *Allotment* means the issued shares are assigned or attributed to persons. These persons are not necessarily the subscribers themselves, as one person may subscribe to shares and request that these shares be allotted to one or more other persons. Allotment means that shares are attributed to persons for whom the subscription is made.

[31] The record clearly shows that it was only around December 30, 1998, that the examination of the documents required by MRS Trust was completed. Accordingly, satisfied that it could proceed with the purchase of the shares in Immeubles R.V., MRS Trust forwarded the One-Time Notice to the appellant, requesting directions. After it received the appellant's letter on January 19, 1999, MRS Trust consented to his directions by sending a cheque for $34,500 to Immeubles R.V.

[32] According to the last finding of fact reached by the judge, MRS Trust was not advised of the acceptance of the subscription by Immeubles R.V. until Immeubles R.V. had cashed its cheque issued on January 25, 1999. In reaching this conclusion, the judge seems to have taken for granted

that MRS Trust had not received the certificate during the 1998 taxation year. The letter sent by the appellant to MRS Trust on January 19, 1999, seems to suggest that the share certificate would not be delivered to MRS Trust until the shares in Immeubles R.V. had been paid for. The letter reads as follows:

> [TRANSLATION]
> On receipt of this letter, I ask you to send a cheque in the amount of $34,500 to Les Immeubles R.V. (1986 Inc.) at the following address: 1174 Sacré-Cœur Blvd., St-Félicien G8B 2R2. This is in exchange for share certificates for $34,500 in class B shares in the company.

[33] However, at paragraph 16 of my reasons, I conclude that the share certificate had probably been received by MRS Trust on December 17, 1998. This conclusion is based on my assessment of the documents filed as new evidence, although this evidence is far from being satisfactory. In my opinion, whether the share certificate was received by MRS Trust before the end of the 1998 taxation year or in January 1999 does not change the outcome of the appeal because there can be no doubt, given all the evidence, that it is impossible to conclude that MRS Trust acquired the shares in Immeubles R.V. in 1998. In fact, the first and only contact between MRS Trust and Immeubles R.V. took place when MRS Trust sent its cheque dated January 25, 1999. Accordingly, in spite of a certificate showing that it was the owner of 34,500 shares in Immeubles R.V., it was not until January 25, 1999, that MRS Trust acquired these shares.

[34] In addition, the appellant, who had never raised the issue of the taxation year against the Minister's assessment, had the burden of persuading Justice Bédard and this Court that MRS Trust

had acquired the shares of Immeubles R.V. during the 1998 taxation year. The appellant did not persuade the judge of that, nor did he persuade me.

Disposition

[35] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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