

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20120307**

**Docket: A-254-11**

**Citation: 2012 FCA 76**

**CORAM: NOËL J.A.  
GAUTHIER J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**FIDUCIE FAMILLE GAUTHIER**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Montréal, Quebec, on February 29, 2012.

Judgment delivered at Ottawa, Ontario, on March 7, 2012.

**REASONS FOR JUDGMENT BY:**

**NOËL J.A.**

**CONCURRED IN BY:**

**GAUTHIER J.A.  
MAINVILLE J.A.**

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**BETWEEN:**

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**Appellant**

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**Respondent**

**REASONS FOR JUDGMENT**

**NOËL J.A.**

[1] This is an appeal filed by Fiducie Famille Gauthier (the appellant) against a decision by Justice Archambault of the Tax Court of Canada (the TCC judge) confirming an assessment made under paragraph 84.1(1)(b) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) by which tax was levied on a dividend deemed to have been received by the appellant following a sale of shares that took place in its 2002 taxation year.

[2] The appellant is challenging the amount of the deemed dividend. It contends that the TCC judge erred in concluding that the consideration the appellant received following the sale of shares included the amount of \$233,786 representing the amount of professional fees (fees) paid for the appellant in the context of this sale. The amount of these fees is sometimes stated as \$233,550 in the evidence, but since the parties maintained that this difference was insignificant, I will refer to the amount of \$233,786 throughout the analysis.

[3] The provisions of the Act that are relevant to the analysis are appended to these reasons.

## **BACKGROUND**

[4] The facts that led to the assessment's being made are set out in detail in the summary of facts found in the Notice of Appeal filed by the appellant, which is reproduced in full at paragraph 1 of the TCC judge's reasons (2009-2331(IT)G). For our purposes, suffice it to say that the transaction which resulted in the deemed dividend is part of an arm's-length sale of all of the shares of Groupe Orléans Express Inc. (Groupe Orléans Express) to Keolis Canada Inc. (Keolis), a company owned in part by the appellant. To obtain certain tax advantages, the 433 shares held by the appellant were sold to 4041763 Canada Inc. (4041763), a corporation with which the appellant had a non-arm's length relationship, which sold them to Keolis the same day.

[5] The dispute arises from the fact that, according to the price set out in the contract of sale, 4041763 acquired those shares from the appellant for a price that was lower than the price for which it sold them to Keolis. At paragraph 9 of the appellant's statement of facts, this difference is explained as follows (Reasons, paragraph 1):

9. The selling price of the 433 shares to Keolis was \$2,836,423, which is \$6,550.63 per share. The difference between the selling price to Keolis and the selling price to the appellant ( $\$2,836,423 - \$2,602,637 = \$233,786$ ) consists of professional fees, which were paid by 4041763 upon the disposition, and which would have had to be paid by the appellant if the appellant had sold the shares directly to Keolis.

[Emphasis added]

[6] Of the facts set out in this paragraph, the only one that attracts dispute is the assertion at the very end. The respondent states in its Reply to the Notice of Appeal that the appellant remained liable for paying the fees in the context of the sale to Keolis through 4041763, and that it was for the appellant that 4041763 made this payment (Reasons, paragraph 2).

### **DECISION UNDER APPEAL**

[7] The TCC judge agreed with the respondent's position on this point. It seemed obvious to him that the reduction in the price of the shares sold by the appellant to 4041763 was done to reflect that 4041763 had agreed to pay the fees for the appellant (Reasons, paragraph 14) and that it had, in a sense, undertaken the appellant's responsibility by paying the bill (Reasons, paragraph 16).

[8] On the basis of that finding, the TCC judge had no trouble concluding that the consideration received by the appellant for the purposes of applying paragraph 84.1(1)(b), or, more precisely, the fair market value of that consideration, included the amount that it was paid for the shares and the value of the services paid on its behalf. According to the TCC judge, this did not unduly adjust the transaction between the appellant and 4041763, but rather took the transaction into account such as it was conducted between the parties.

[9] By concluding that the consideration included the fees, the TCC judge also dismissed the argument that paragraph 84.1(1)(b) could not allow this addition without paragraph 69(1)(b) also being applied.

### **GROUND FOR APPEAL**

[10] In support of the appeal, the appellant is challenging the TCC judge's conclusion that the appellant was liable for the fees and that 4041763 had paid those fees on its behalf (Appellant's Memorandum, paragraphs 21 and 24). The appellant emphasizes that the account statements were sent to 4041763 and that it is this company that sold the shares to Keolis (Appellant's Memorandum, paragraph 23). Therefore, according to the appellant, the fees were not part of the "consideration" it received for the purposes of Part D of the formula set out at paragraph 84.1(1)(b).

[11] In any event, the amount of the consideration identified in the contract of sale cannot be adjusted unless the fair market value of the shares sold under paragraph 69(1)(b) of the Act is called into question. The appellant adds that paragraph 69(1)(b) cannot be applied since the assessment was made outside the normal assessment period, and paragraph 69(1)(b) is not among the provisions in respect of which the appellant signed a waiver (Appellant's Memorandum, paragraph 26).

### **ANALYSIS AND DECISION**

[12] Since this is an appeal of a TCC decision, the applicable standard of review is the one established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: questions of law are reviewable on a standard of correctness, and this Court must defer to the decision of the TCC for questions of fact and questions of mixed fact and law unless it can be shown that a palpable and overriding error has been made.

[13] The question of who, between 4041763 and the appellant, was responsible for the payment of the fees raises a question of fact or, at most, a question of mixed fact and law. As a result, it was up to the appellant to show, first, that the TCC judge made a palpable and overriding error by concluding that 4041763 paid those fees on behalf of the appellant.

[14] It has not been shown that any such error was made. The TCC judge made the finding of fact that the appellant agreed to reduce the selling price paid by 4041763 by an amount equal to

the fees related to that sale, and that the appellant was the one who was liable for those fees (Reasons, paragraph 17). He also relied on the testimony of the tax professional who acted on behalf of the holders of Groupe Orléans Express' shares, who explained that the selling price paid by 4041763 had been voluntarily reduced to take into account the fees that it had paid (*ibidem*).

[15] Nothing would have prevented the parties from allocating the fee charges differently if that had been their agreement. However, given the evidence, the onus was on the appellant to show that the reduction of the share price, as explained by the tax professional, was not intended to reflect the fact that 4041763 had made the payment on its behalf. This the appellant has not done.

[16] Given this conclusion, it was open to the TCC judge to conclude that the fair market value of the "consideration" received by the appellant for the shares sold, for the purposes of paragraph 84.1(1)(b), was equal to the total amount of what it received following this sale, that is, the price set out in the contract of sale and the value of the services paid for on its behalf.

[17] Last, it was neither necessary nor useful to rely on paragraph 69(1)(b), since the value of this consideration tallies with the price at which the shares were sold by 4041763 as part of the arm's-length transaction that took place the same day and is therefore equal to their fair market value.

[18] I would therefore dismiss the appeal with costs.

“Marc Noël”

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J.A.

“I agree  
Johanne Gauthier J.A.”

“I agree  
Robert M. Mainville J.A.”

Certified true translation  
Sarah Burns



## APPENDIX

**69.** (1) Except as expressly otherwise provided in this Act,

...

(b) where a taxpayer has disposed of anything

(i) to a person with whom the taxpayer was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time the taxpayer so disposed of it,

(ii) to any person by way of gift *inter vivos*, or

(iii) to a trust because of a disposition of a property that does not result in a change in the beneficial ownership of the property; and

the taxpayer shall be deemed to have received proceeds of disposition therefor equal to that fair market value; and

...

**69.** (1) Sauf disposition contraire expresse de la présente loi :

[...]

b) le contribuable qui a disposé d'un bien en faveur :

(i) soit d'une personne avec laquelle il avait un lien de dépendance sans contrepartie ou moyennant une contrepartie inférieure à la juste valeur marchande de ce bien au moment de la disposition,

(ii) soit d'une personne au moyen d'une donation entre vifs,

(iii) soit d'une fiducie par suite de la disposition d'un bien qui n'a pas pour effet de changer la propriété effective du bien;

est réputé avoir reçu par suite de la disposition une contrepartie égale à cette juste valeur marchande;

[...]

**84.1 (1)**

...

*(b)* for the purposes of this Act, a dividend shall be deemed to be paid to the taxpayer by the purchaser corporation and received by the taxpayer from the purchaser corporation at the time of the disposition in an amount determined by the formula

$$(A + D) - (E + F)$$

where

A

is the increase, if any, determined without reference to this section as it applies to the acquisition of the subject shares, in the paid-up capital in respect of all shares of the capital stock of the purchaser corporation as a result of the issue of the new shares,

D

is the fair market value, immediately after the disposition, of any consideration (other than the new shares) received by the taxpayer from the purchaser corporation for the subject shares,

E

is the greater of

(i) the paid-up capital, immediately before the disposition, in respect of the subject shares, and

**84.1 (1)**

[...]

*b)* pour l'application de la présente loi, un dividende, calculé selon la formule suivante, est réputé avoir été versé par l'acheteur au contribuable et reçu par celui-ci au moment de la disposition :

$$(A + D) - (E + F)$$

où :

A

représente le montant correspondant à l'augmentation — conséquence de l'émission des nouvelles actions — du capital versé au titre de toutes les actions du capital-actions de l'acheteur, calculée sans que le présent article soit appliqué à l'acquisition des actions concernées,

D

la juste valeur marchande, immédiatement après la disposition, de toute contrepartie, à l'exclusion des nouvelles actions, reçue de l'acheteur par le contribuable pour les actions concernées,

E

le plus élevé des montants suivants :

(i) le capital versé au titre des actions concernées immédiatement avant la

(ii) subject to paragraphs 84.1(2)(a) and 84.1(2)(a.1), the adjusted cost base to the taxpayer, immediately before the disposition, of the subject shares, and

F

is the total of all amounts each of which is an amount required to be deducted by the purchaser corporation under paragraph 84.1(1)(a) in computing the paid-up capital in respect of any class of shares of its capital stock by virtue of the acquisition of the subject shares.

...

disposition,

(ii) le prix de base rajusté des actions concernées pour le contribuable immédiatement avant la disposition, sous réserve des alinéas (2)a) et a.1),

F

le total des montants dont chacun représente un montant que l'acheteur doit déduire selon l'alinéa a) dans le calcul du capital versé au titre d'une catégorie d'actions de son capital-actions à cause de l'acquisition des actions concernées.

[...]

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-254-11

**APPEAL OF A JUDGMENT BY THE HONOURABLE JUSTICE ARCHAMBAULT  
OF THE TAX COURT OF CANADA, DATED JUNE 23, 2011, DOCKET  
NO. 2009-2331(11)G.**

**STYLE OF CAUSE:** FIDUCIE FAMILLE  
GAUTHIER and HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** February 29, 2012

**REASONS FOR JUDGMENT BY:** NOËL J.A.

**CONCURRED IN BY:** GAUTHIER J.A.  
MAINVILLE J.A.

**DATED:** March 7, 2012

**APPEARANCES:**

Wilfrid Lefebvre FOR THE APPELLANT

Simon Petit FOR THE RESPONDENT

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