

[OFFICIAL ENGLISH TRANSLATION]

2000-2217(IT)G

BETWEEN:

ÉRIC PIUZE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of *Marie-Josée Bonneville* (2000-2218(IT)G) on November 21, 2002, at Montréal, Quebec, by the Honourable Judge P.R. Dussault

Appearances

Counsel for the Appellant: Gaétan Drolet

Counsel for the Respondent: Stéphane Arcelin

JUDGMENT

The appeal from the assessment made under section 160 of the *Income Tax Act*, notice of which is dated March 20, 2000, and bears number 30009, is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment of an amount not exceeding \$18,749.70.

The respondent is entitled to her costs. However, since the appeal was heard on common evidence with that of *Marie-Josée Bonneville* (2000-2218(IT)G), costs relating to the services of a lawyer for the preparation and conduct of the hearing are limited to those that would be applicable to a single appeal.

The whole in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of November 2002.

"P.R. Dussault"

J.T.C.C.

Translation certified true
on this 13th day of January 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

2000-2218(IT)G

BETWEEN:

MARIE-JOSÉE BONNEVILLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of *Éric Piuze* (2000-2217(IT)G)
on November 21, 2002, at Montréal, Quebec, by
the Honourable Judge P.R. Dussault

Appearances

Counsel for the Appellant: Gaétan Drolet

Counsel for the Respondent: Stéphane Arcelin

JUDGMENT

The appeal from the assessment made under section 160 of the *Income Tax Act*, notice of which is dated February 23, 2000, and bears number 18844, is dismissed.

The respondent is entitled to her costs. However, since the appeal was heard on common evidence with that of *Éric Piuze* (2000-2217(IT)G), costs relating to the services of a lawyer for the preparation and conduct of the hearing are limited to those that would be applicable to a single appeal.

The whole in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of November 2002.

"P.R. Dussault"

J.T.C.C.

Translation certified true
on this 13th day of January 2004.

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Date: 20021129
Docket: 2000-2217(IT)G
2000-2218(IT)G

BETWEEN:

ÉRIC PIUZE,
MARIE-JOSÉE BONNEVILLE,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

P. R. Dussault, J.T.C.C.

[1] These appeals from assessments made under section 160 of the *Income Tax Act* (the "Act") were heard on common evidence.

[2] In assessing Éric Piuze, the Minister of National Revenue (the "Minister") assumed that Société Gestion Éric Piuze Inc. ("Gestion") owed the Minister an amount of \$27,965.91 for its 1994 and 1995 taxation years and that it had declared and paid the appellant dividends of \$45,500 and of \$13,812 during its 1996 and 1997 taxation years respectively. The assessment in the amount of \$20,971.65 is therefore only for a portion of Gestion's liability.

[3] In assessing Marie-Josée Bonneville, the Minister assumed that Gestion had the same tax liability and that it had declared and paid the appellant dividends of \$6,560 during its 1997 taxation year. In that case, the assessment in the amount of \$6,560 is therefore for the full amount of the dividends received by the appellant.

[4] The total of the amounts assessed in respect of the two appellants is thus \$27,531.65, an amount slightly less than Gestion's tax liability.

[5] In addition, counsel for the respondent informed the Court at the hearing that the amount of Gestion's tax liability was not \$27,965.91 but rather \$18,749.70. In any case, an adjustment should be made accordingly.

[6] Marie-Josée Bonneville is the spouse of Éric Piuze.

[7] Gestion was incorporated under Part 1A of the Quebec *Companies Act* ("Q.C.A.") on April 1, 1993. Éric Piuze was its sole shareholder, director and officer until May 1, 1997, on which date Marie-Josée Bonneville also became a shareholder and director of Gestion.

[8] From 1993 to July 8, 1997, through Société 2952-3065 Québec Inc., a corporation offering payroll services, Gestion paid Éric Piuze a generally fixed amount every two weeks by cheque drawn on its "payroll account" without source deductions. In 1996, the total amount paid by Gestion was \$45,500. From January to July 8, 1997, it was \$13,812. As to Marie-Josée Bonneville, the total amount paid for the months of May and June 1997 was \$6,560. In the report filed in evidence on amounts paid (Exhibit A-1), payments are simply identified under the heading "OTHER EARNINGS".

[9] Starting on July 8, 1997, the variable amounts paid to both Éric Piuze and Marie-Josée Bonneville were identified as regular remuneration with source deductions (see Exhibit A-1).

[10] The Minister considers the amounts of \$45,500 paid to Éric Piuze in 1996 and \$13,812 and \$6,560 paid respectively to Éric Piuze and Marie-Josée Bonneville before July 8, 1997, to be dividends and thus as the fair market value of property transferred without consideration for the purposes of section 160 of the *Act*.

[11] Éric Piuze testified that the amounts the Minister considered as dividends were in fact a salary that was paid to him regularly every two weeks. He stated that it was Gestion's accountant who had considered those amounts as dividends, whereas he himself viewed them as regular salary and that this was ultimately a simple matter of terms. He asserted that there had never been any resolution by Gestion's board of directors attesting to any declaration of dividends.

[12] In cross-examination, Éric Piuze admitted that he had characterized the amounts received from Gestion from 1993 to July 1997 as dividends in his income tax returns for each year.

[13] It is important at this stage to quote the questions and answers from a written examination for discovery of the appellant Éric Piuze who very clearly describes the *modus operandi* of Gestion, its directors and shareholders. Each answer, which may be found in tab 8 of Exhibit I-1, is reproduced immediately after the corresponding question, which appears in tab 7 of the same exhibit:

[TRANSLATION]

Q 1. Did the amounts that were paid to you by Gestion Éric Piuze Inc. reflect source deductions for the 1997 taxation year?

A. The amounts that were paid to me by Gestion Éric Piuze Inc. in 1997 reflected source deductions starting in July 1997. I began receiving a salary from the corporation of which I am a shareholder in July 1997, after it appeared that Revenue Canada had disallowed Gestion Éric Piuze Inc. the small business deduction. I had previously received my regular remuneration in the form of dividends. Gestion Éric Piuze Inc. was an active business with more than five employees, but Revenue Canada nevertheless considered it to be inactive. That created a tax liability that Gestion Éric Piuze Inc. was unable to pay, resulting in the bankruptcy of the corporation at the end of 1998.

I did not dispute that decision by Revenue Canada since it was part of a comprehensive settlement together with other management businesses providing sales and promotion services to Industries Bonneville Ltée. I therefore accepted the decision in order to close the file, and, at the same time, I amended the remuneration policy for shareholders of Gestion Éric Piuze Inc. so that they would be paid in the form of salary starting in July 1997. Remuneration by dividend had resulted in a combined (corporation-shareholder) tax rate of nearly 60%. A salary remuneration policy therefore had to be established.

(My emphasis.)

Q 2. Did Gestion Éric Piuze Inc. issue you a T4 slip for the amounts that were paid to you for the 1997 taxation year?

A. Gestion Éric Piuze Inc. gave me a T4 slip for the amounts that were paid to me in salary starting in July 1997. That T4 slip was given to me in February 1998, and I have provided a copy of that T4 slip with this statement.

Q 3. Why did Gestion Éric Piuze Inc. characterize those amounts that were paid to you in 1997 as dividends?

A. Since it was founded, Gestion Éric Piuze Inc. had paid me my regular remuneration every two weeks in the form of dividends in accordance with my accountants' recommendations. The policy of paying remuneration in the form of dividends was more advantageous for me because Gestion Éric Piuze Inc. enjoyed the small business deduction. Starting in July 1997, I decided to receive my remuneration in the form of salary because Revenue Canada disallowed the corporation the deduction. Personally, I have always considered the dividend I received since 1993 as my salary since I received my pay regularly every two weeks. Instead of paying income tax at source, I paid it every three months by instalments. That dividend was my regular pay, like a salary, not an occasional, special payment. Starting in July 1997, the amounts that had previously been paid to me as dividends were paid in the form of salary and at the same frequency—every two weeks.

(My emphasis.)

Q 4. Why did you characterize the amounts Gestion Éric Piuze Inc. paid you in 1997 as dividends received?

A. Part of my income was paid in the form of dividends until June 1997. So I reported a dividend in my taxes for that part of my income.

Q 5. Did you receive amounts from Gestion Éric Piuze Inc. as dividends for the 1993 to 1997 taxation years? If so, why?

A. Gestion Éric Piuze Inc. has always paid me my remuneration in the form of dividends from the time it was founded in 1993 until 1997. The amounts received were \$33,800 in 1993, \$45,500 in 1996 and \$15,760 in 1997. I don't have the breakdown for the years preceding 1995.

Q 6. Did you declare employment income from Gestion Éric Piuze Inc. for the years from 1993 to 1997?

- A. I didn't declare employment income from Gestion Éric Piuze Inc. for the years from 1993 to 1997, except for the last month of 1997, when I declared the amount of \$37,506.
- Q 7. Did the cheques for the amounts received from Gestion Éric Piuze Inc. in 1997 bear the notation "salary"? If so, give us copies of those cheques.
- A. The cheques I received from Gestion Éric Piuze Inc. through a pay processing firm bore the notation "salary". Copies of those cheques are appended to this statement.

[14] Marie-Josée Bonneville did not testify at the hearing, counsel for the parties having agreed that her testimony would be similar to that of Éric Piuze. However, as was done for Éric Piuze, I will reproduce the questions and answers from a written examination for discovery. The questions appear in tab 5 of Exhibit I-1 and the answers in tab 6. They read as follows:

- Q 1. Did the amounts that Gestion Éric Piuze Inc. pay you reflect source deductions for the 1997 taxation year?
- A. The amounts that Gestion Éric Piuze Inc. paid me in 1997 reflected source deductions starting in July 1997. I became a shareholder of the company in May 1997 and, from May to June 1997, my remuneration was paid to me in the form of dividends.
- Q 2. Did Gestion Éric Piuze Inc. issue you a T4 slip for the amounts that were paid to you for the 1997 taxation year?
- A. Gestion Éric Piuze Inc. gave me a T4 slip in February 1998 for amounts that were paid to me in the form of salary starting in July 1997. A copy of that T4 slip is appended to this declaration.
- Q 3. Why did Gestion Éric Piuze Inc. characterize those amounts that were paid to you in 1997 as dividends?
- A. Gestion Éric Piuze Inc. paid me my regular remuneration every two weeks from the moment I became a shareholder in May 1997, in the form of dividends for two months, in accordance with the shareholder remuneration policy in effect to that date. The policy of paying remuneration in the form of dividends was more advantageous for me when Gestion Éric Piuze Inc. enjoyed the small business deduction. Starting in July 1997, I decided to receive my remuneration in the form of salary because Revenue Canada disallowed the corporation that deduction. Personally, I considered

the dividend as salary since I received my pay regularly every two weeks. Instead of paying income tax at source, I paid it every three months by instalment. The dividend was my regular remuneration, like a salary, not an occasional, special payment. Starting in July 1997, my remuneration was paid to me in the form of salary with source deductions.

(My emphasis.)

Q 4. Why did you characterize the amounts Gestion Éric Piuze Inc. paid you in 1997 as dividends received?

A. I declared the part that was paid to me in the form of dividends between May and June 1997, that is \$6,560, as a dividend. I declared the part I received as salary starting in July 1997, as employment income.

Q 5. Did you receive amounts from Gestion Éric Piuze Inc. as dividends for the 1993 to 1997 taxation years? If so, why?

A. Since I was not a shareholder of Gestion Éric Piuze Inc. until May 1997, I therefore did not receive dividends from the company during the years from 1993 to 1996. In 1997, I received dividends of \$6,560 for May and June 1997.

Q 6. Did you declare employment income from Gestion Éric Piuze Inc. for the years from 1993 to 1997?

A. I did not declare employment income from Gestion Éric Piuze Inc. for the years from 1993 to 1997, except for the last month of 1997, when I declared employment income of \$37,506.

Q 7. Did the cheques for the amounts received from Gestion Éric Piuze Inc. in 1997 bear the notation "salary"? If so, give us copies of those cheques.

A. The cheques I received from Gestion Éric Piuze Inc. through a pay processing firm bore the notation "salary". Copies of those cheques are appended to this declaration.

[15] I recall that from April 1, 1993, to May 1, 1997, Éric Piuze was the sole shareholder, sole director and sole officer, as president and secretary, of Gestion. Starting on May 1, 1997, Marie-Josée Bonneville became both a shareholder and director of Gestion.

[16] Exhibit I-1, tab 4, contains a certain number of written resolutions of Éric Piuze, sole shareholder and director until May 1997, and also resolutions of the two directors and shareholders, Éric Piuze and Marie-Josée Bonneville, starting on that date.

[17] The purpose of one written resolution by the sole director dated March 15, 1995, was to approve the financial statements for the fiscal year ended on December 31, 1994, and to authorize the sole director to sign them. That same day, a written resolution by the sole shareholder was intended to approve, ratify and confirm those financial statements.

[18] Two similar written resolutions dated March 15, 1996, one by the sole director and the other by the sole shareholder are to the same effect with respect to the financial statements for the fiscal year ended on March 31, 1995.

[19] Two resolutions dated March 14, 1997, are also to the same effect for the financial statements for the year ended December 31, 1996.

[20] In addition, it is clearly stated in Gestion's income tax return for its 1996 taxation year, signed by Éric Piuze himself, that Gestion had paid taxable dividends of \$45,500 during the year. Gestion's financial statements, which were signed by Éric Piuze and included with that return, state just as clearly that dividends of \$45,500 were paid (Exhibit I-1, tab 2).

[21] It is equally clear in Gestion's income tax return for its 1997 taxation year, which was signed by Éric Piuze, that Gestion had paid dividends of \$23,320 during the year. Gestion's financial statements, again signed by Éric Piuze and accompanying the income tax return, state the same thing.

[22] Counsel for the appellants submits that the dividend amounts paid to the appellants in 1996 and 1997 should be considered as salary since there had never been a meeting of directors or any resolution declaring dividends. In his view, the shareholders' approval of the financial statements cannot constitute a valid declaration of dividends. He thus contends that the amounts paid may not be considered as dividends if the formalities required by the *Q.C.A.* are not carried out. He further asserts that declaring such high dividends is in a way nonsensical from a financial standpoint since the dividends paid would represent a disproportionate return on the initial investment of only a few dollars. Lastly, he argues that the payment of dividends cannot be considered as a transfer without consideration for the purposes of section 160 of the *Act* since the work performed

by each of the appellants for Gestion, which constitutes valuable consideration for the transfer, must be taken into account.

[23] In the opinion of counsel for the respondent, the evidence shows that the appellants did in fact receive dividends from Gestion and that, faced with an assessment under section 160 of the *Act*, they are now trying to alter their nature and transform them into salary.

Analysis

[24] It is clearly established that the decision to declare and pay dividends is the responsibility of a company's board of directors (see *Q.C.A.*, sections 81 and 123.6). However, where there is only one director, that person exercises the rights and assumes the obligations of the board (see *Q.C.A.*, section 123.82). The board of directors normally expresses its decisions in the form of resolutions passed at its meetings, and those resolutions are normally recorded in the minutes of those meetings. Certified minutes must be recorded in the books that are to be kept by the company (see *Q.C.A.*, paragraph 107(d)). Those books are *prima facie* evidence of the facts stated therein (see *Q.C.A.*, section 109). Moreover, resolutions in writing, signed by all the directors entitled to vote on those resolutions at a meeting of the board of directors, are as valid as if they had been passed at a meeting (see *Q.C.A.*, sections 89.3 and 123.6). Minutes and resolutions are thus *prima facie* evidence of the decisions made by the board of directors or by the sole director, as the case may be. However, the absence of those minutes or resolutions does not mean that a decision has not been made provided that it can be proven that one has been made by other means. In my view, the problem thus boils down to what is essentially a matter of evidence. We may refer on this point to the decision in *Mullin v. Canada*, [1992] T.C.J. No. 104, and to the authorities cited on this point at pages 8 and following. I have only reproduced the comments by Bayda J. of the Saskatchewan Court of Appeal in *Roman Hotels Ltd. v. Desrochers Hotels Ltd.*, 69 D.L.R. (3d) 126 (Sask.C.A.), concerning the evidence of a decision of a corporation in the absence of a formal meeting or resolution certifying the decision made. Bayda J. wrote as follows at pages 133 and 134 of the decision:

... Apart from any express provision in the company's articles or other rules of administration and procedure is it possible for a binding corporate decision on a matter which requires the decision of the directors, to come into existence without the holding of a formal meeting and the passing of a resolution? In considering the answer to this question, it is important to keep in mind that the existence of a corporate decision is a question of fact, and, further, that there is a distinction to be drawn between the actual existence of a corporate decision and evidence of its

existence. A formal resolution, considered, passed and duly recorded at a formal meeting, properly constituted, is, generally speaking, the best evidence of the existence of the fact of a corporation decision. Although it may be the best evidence of that fact, it is not necessarily the only evidence. Where during the course of an informal consideration of the company's affairs there comes a point at which occurs a meeting of the minds of all those entitled to participate in a decision to do, on behalf of the company, a certain act which is *intra vires* followed by the actual doing of that act, then generally speaking and apart from a specific company rule or statutory provision to the contrary, it may be said that corporate decision came into existence when that meeting of the minds occurred, despite the lack of observance of formalities pertaining to meetings and passing of resolutions. . . .

(My emphasis.)

[25] In *Mulligan v. Canada*, [1999] T.C.J. No. 271 (Q.L.), Judge Rip adopted that same principle in paragraph 41, as follows:

Thus it would appear that the state of corporate law today is that the formalities required by statute or the articles of the corporation may be bypassed if the shareholders or directors who have the power to authorize the action unanimously approve of the action. . . .

[26] A decision of a board of directors or a sole director is thus a fact that can be proven otherwise than by minutes or a resolution in writing. It is not difficult to establish a "meeting of the minds" when only one person was authorized to act as a director and when it may be seen that a measure was in fact taken. In the instant case, the only person who could decide, as a director, that Gestion would pay dividends to its shareholder from April 1, 1993, to May 1, 1997, was Éric Piuze himself as sole director.

[27] Gestion's financial statements and income tax returns signed by Mr. Piuze as director amply attest to the decision to declare and pay dividends, without having to rely on the admission on this point contained in the answers given to the written examination for discovery quoted above. Moreover, with respect to Gestion's documents that the appellant signed, it is worth recalling the rule stated in paragraph 123.31(4) of the *Q.C.A.*, that "Third persons may presume that . . . the documents of the company issued by one of its directors, officers or other mandataries are valid."

[28] According to the answers Marie-Josée Bonneville herself gave at her written examination for discovery, when she became a shareholder and director of Gestion on May 1, 1997, the policy of declaring and paying dividends to shareholders was

still in effect. It was not until later, on July 8, 1997, that she and Éric Piuze apparently decided to receive their remuneration in the form of a salary.

[29] My conclusion is therefore that Gestion in fact declared and paid the appellants the dividends referred to above in 1996 and 1997 by a decision of the sole shareholder, Éric Piuze.

[30] The argument of counsel for the appellants concerning the disproportionate return that the dividends would have given the appellants relative to their initial investment is immaterial and not worth considering.

[31] As to the argument that the payment of dividends does not constitute a transfer of property without consideration for the purposes of section 160 of the *Act* on the ground that the appellant's work constituted valuable consideration, we need only refer on that point to the decision of the Supreme Court of Canada in *Newman v. M.N.R.*, [1998] 1 S.C.R. 770. In that judgment, Iacobucci J. discusses and analyzes certain comments made by Dickson C.J. in *McClurg v. Canada*, [1990] 3 S.C.R. 1020, on the relationship between dividends paid by a corporation and the contribution that the shareholder receiving dividends might have made to the corporation, comments that may have caused some confusion at the time. Iacobucci J. thus made the following point in paragraph 57 of *Neuman, supra*:

...

Dickson C.J. seemed to be of the view that the character of a shareholder's dividend income is to be determined by that shareholder's level of contribution to the corporation. This approach ignores the fundamental nature of dividends; a dividend is a payment which is related by way of entitlement to one's capital or share interest in the corporation and not to any other consideration. Thus, the quantum of one's contribution to a company, and any dividends received from that corporation, are mutually independent of one another. La Forest J. made the same observation in his dissenting reasons in *McClurg* (at p. 1073):

With respect, this fact is irrelevant to the issue before us. To relate dividend receipts to the amount of effort expended by the recipient on behalf of the payor corporation is to misconstrue the nature of a dividend. As discussed earlier, a dividend is received by virtue of ownership of the capital stock of a corporation. It is a fundamental principle of corporate law that a dividend is a return on capital which attaches to a share, and is in no way dependent on the conduct of a particular shareholder. [Emphasis added.]

[32] In law, the allocation of a corporation's profits to shareholders by dividends does not constitute remuneration for their work, any more than that work constitutes consideration for dividends received. On this point, we may also refer to the decisions in *Gosselin v. R.*, [1997] 2 C.T.C. 2830, paragraphs 15 and 16 and to *155579 Canada Inc. v. R.*, [1997] 1 C.T.C. 2011, page 2016.

[33] The appellant Marie-Josée Bonneville was assessed for an amount of \$6,560, the lesser of the fair market value of the dividends received from Gestion and Gestion's tax liability of \$18,749.70, not \$27,965.91, as initially computed. The assessment is consistent with paragraph 160(1)(e) of the *Act* and is thus confirmed. The appeal is accordingly dismissed.

[34] Despite the fact that he received a total of \$59,312 in dividends from Gestion, the appellant Éric Piuze was assessed (subject to an error of \$433.96) only for an amount representing Gestion's tax liability less the \$6,560 for which the appellant Marie-Josée Bonneville was assessed, that is, for an amount of \$20,971.65. In my view, given that the transferee and transferor are jointly and severally liable for the transferor's tax liability, as provided in paragraph 160(1)(e) of the *Act*, that is to say, for an amount not exceeding the amount by which the fair market value of the property transferred exceeds the fair market value of the consideration, if any, Éric Piuze could have been assessed for the full amount of Gestion's tax liability, regardless of the assessment of Marie-Josée Bonneville. It appears that liability is now \$18,749.70, not \$27,965.91, as was initially calculated. Under paragraph 160(1)(e), the Minister could reassess Éric Piuze for the total amount of Gestion's tax liability, that is, \$18,749.98. However, since counsel for the parties made no comments that might justify the lesser amount used in the initial assessment, I find it reasonable to allow the appeal and to refer the assessment back to the Minister for reconsideration and reassessment, simply stating that the amount assessed shall not exceed Gestion's tax liability of \$18,749.70.

[35] The respondent is entitled to her costs. However, since the appeals were heard on common evidence, the costs relating to the services of a lawyer for the preparation and conduct of the hearing are limited to those that would be applicable in the case of a single appeal.

Signed at Ottawa, Canada, this 29th day of November 2002.

"P.R. Dussault"

J.T.C.C.

Translation certified true
on this 13th day of January 2004.

Sophie Debbané, Revisor