Docket: 2003-2410(IT)G

BETWEEN:

3087-8847 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on March 27, 28 and 29, 2006, at Montréal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Eric Azran Marc-André Coulombe
Counsel for the Respondent:	Martin Gentile

JUDGMENT

The appeals from the assessments made pursuant to subsection 227(10) of the *Income Tax Act*, the notices of which are dated May 23, 2002, and bear numbers 18640 and 18641, are dismissed, with costs, and the assessments are confirmed as to the amount of the debt owing by Thomas Lavin to the Minister of National Revenue, that is, $97,472.17.

Signed at Ottawa, Canada, this 6th day of June 2007.

"Lucie Lamarre"

Lamarre J.

Citation: 2007TCC302
Date: 20070606
Docket: 2003-2410(IT)G

BETWEEN:

3087-8847 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from two assessments, numbered 18640 and 18641 and dated May 23, 2002, made by the Minister of National Revenue ("Minister") pursuant to section 224 and subsection 227(10) of the *Income Tax Act* ("*ITA*").

Admissions

[2] According to the corporate minutes book (Exhibit I-2, Tabs 33 and 44), the appellant was incorporated on April 13, 1993, under Part 1A of the Quebec *Companies Act*. At the time of incorporation, there were two equal, unrelated shareholders, Mr. Thomas A. Lavin and Ms. Carolyn Farr. On April 30, 1996, Ms. Farr disposed of the totality of her shares in favour of Thomas Lavin's son, Dominique Lavin. Both Thomas and Dominique Lavin were directors of the appellant from then until January 15, 2000, at which time Dominique Lavin resigned as a director, leaving Thomas Lavin as the sole director. Dominique Lavin, however, remained a 50% shareholder in the appellant.

[3] On April 19, 2001, Thomas Lavin was personally indebted to the Canada Customs and Revenue Agency ("CCRA") for an amount of $97,472.17, representing arrears of income tax, interest and penalties.

[4] The CCRA sent to the appellant, on each of August 21, 2000, September 21, 2000, November 17, 2000, January 24, 2001 and April 19, 2001, a requirement to pay to the Receiver General, on account of Thomas Lavin's liability, the moneys that within 90 days the appellant would otherwise loan or advance to, or pay on behalf of, Thomas Lavin (the tax debtor) (Exhibit I-1, Tabs 1 to 5). The period thus covered by the requirements to pay extended from August 21, 2000 to July 18, 2001 ("period at issue"), and the maximum amount recoverable by the CCRA at the end of the period was $97,472.17 (Exhibit I-1, Tab 5).

[5] The CCRA also sent to the Royal Bank of Canada in Brossard, Quebec, on October 19, 2000, January 24, 2001 and April 19, 2001, three requirements to pay to the Receiver General on account of Thomas Lavin's tax liability any money to be paid to the latter within 90 days. The bank replied to the first requirement to pay that no dealings were anticipated with the tax debtor, and with regard to the next two, the bank simply indicated that there was no account in the name of Thomas Lavin (Exhibit I-2, Tab 30).

[6] It was also put in evidence that on May 29, 2001, Thomas Lavin filed a notice of intent to make a proposal under the *Bankruptcy and Insolvency Act* ("*BIA*") (Exhibit I-2, Tab 46, p. 26). The proposal was refused by the creditors. As a result, Thomas Lavin became bankrupt on August 9, 2001 (see Exhibit I-2, Tab 46, pp. 21-22).

Issues

[7] Following the failure of the appellant to respond to the requirements to pay, the CCRA issued against the appellant on May 23, 2002, two assessments, one for $91,639 (assessment number 18640) and the other for $88,095 (assessment number 18641), pursuant to subsections 224(4), 224(4.1) and 227(10) of the *ITA* (Exhibit I-1, Tab 18 and Exhibit I-2, Tab 34).

[8] The first assessment, for the amount of $91,639, represents money that the appellant is alleged to have made on behalf of Thomas Lavin or to have paid to him from its bank account number 100-563-6 at the Royal Bank of Canada in Brossard during the period covered by the statutory requirements to pay.

[9] The second assessment, for the amount of $88,095, purportedly relates to a debt owing by the appellant to Thomas Lavin that was allegedly paid despite the CCRA's requirements to pay.

[10] The appellant takes issue with these two assessments. With respect to the $91,639 assessment, it states that this amount represents professional income of Thomas Lavin deposited in, and withdrawn from, account number 100-563-6 at the Royal Bank in Brossard, an account originally opened in the name of the appellant but which has always been used by Thomas Lavin personally.

[11] Apparently, none of the deposits in the said bank account originated from the appellant, but came rather from Thomas Lavin's personal law practice and from the estate of his mother (approximately $27,000 was from the estate), and these funds were used to pay, among other things, the current expenses of his law practice and his personal expenses. Consequently, the appellant argues that it never loaned, advanced or paid any sum whatsoever to Thomas Lavin out of the bank account in question, as the moneys belonged from the outset to Thomas Lavin.

[12] With respect to the $88,095 assessment, the appellant states that Thomas Lavin did not advance any such amount to the appellant but rather invested moneys in its share capital, and that, if there were any loan from the shareholder, it was neither due nor payable, nor was it paid, during the effective period of the statutory requirement to pay.

Statutory provisions

[13]

Section 224: Garnishment.

> **(1)** Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections (1.1) and (3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

224(1.1)

> **(1.1) Idem.** Without limiting the generality of subsection (1), where the Minister has knowledge or suspects that within 90 days
>
> (*a*) a bank, credit union, trust company or other similar person (in this section referred to as the "institution") will lend or advance moneys to, or

make a payment on behalf of, or make a payment in respect of a negotiable instrument issued by, a tax debtor who is indebted to the institution and who has granted security in respect of the indebtedness, or

(*b*) a person, other than an institution, will lend or advance moneys to, or make a payment on behalf of, a tax debtor who the Minister knows or suspects

i) is employed by, or is engaged in providing services or property to, that person or was or will be, within 90 days, so employed or engaged, or

ii) where that person is a corporation, is not dealing at arm's length with that person,

the Minister may in writing require the institution or person, as the case may be, to pay in whole or in part to the Receiver General on account of the tax debtor's liability under this Act the moneys that would otherwise be so lent, advanced or paid and any moneys so paid to the Receiver General shall be deemed to have been lent, advanced or paid, as the case may be, to the tax debtor.

224(1.2)

(1.2) Garnishment. Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.4 of the *Companies' Creditors Arrangement Act*, where the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(*a*) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor, the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

224(4)

(4) Failure to comply with s. (1), (1.2) or (3) requirement. Every person who fails to comply with a requirement under subsection (1), (1.2) or (3) is liable to pay to Her Majesty an amount equal to the amount that the person was required

under subsection (1), (1.2) or (3), as the case may be, to pay to the Receiver General.

224(4.1)

(4.1) Failure to comply with s. (1.1) requirement. Every institution or person that fails to comply with a requirement under subsection (1.1) with respect to moneys to be lent, advanced or paid is liable to pay to Her Majesty an amount equal to the lesser of

(*a*) the total of moneys so lent, advanced or paid, and

(*b*) the amount that the institution or person was required under that subsection to pay to the Receiver General.

227(10)

(10) Assessment. The Minister may at any time assess any amount payable under

(*a*) subsection (8), (8.1), (8.2), (8.3) or (8.4) or 224(4) or (4.1) or section 227.1 or 235 by a person,

(*b*) subsection 237.1(7.4) by a person or partnership,

(*c*) subsection (10.2) by a person as a consequence of a failure of a non-resident person to deduct or withhold any amount, or

(*d*) Part XIII by a person resident in Canada,

and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

Preliminary matter

[14] As a preliminary matter, the appellant subpoenaed Mr. Daniel Phaneuf, the collection agent for the CCRA's Sherbrooke division, to testify at the hearing of this case. However, counsel for the respondent filed medical reports from a psychiatrist and a psychologist stating that Mr. Phaneuf was not in a state of mind to work because he was suffering from depression (Exhibit I-3). At the time of the hearing, which had already been postponed in the past because of his absence from work, Mr. Phaneuf was still off work. The appellant took issue with the filing of the medical reports on the basis that the professionals who had signed those reports were not present at the hearing. I nevertheless accepted the reports as satisfactory to establish Mr. Phaneuf's state of mind and as sufficient evidence to explain his absence at trial. Counsel for the appellant was able to call instead Daniel Thibault, another collection agent with the CCRA, who was also involved in the appellant's file in 2002 and has been again since mid-September 2005, when Mr. Phaneuf obtained his leave of absence. Moreover, Mr. Thibault was able to review the file

in order to prepare for the hearing. The appellant also filed as evidence an affidavit completed and signed by Daniel Phaneuf on May 31, 2002, and the transcript of the testimony given by Mr. Phaneuf at the hearing held in the seizure proceedings brought by the CCRA against Thomas Lavin before the Superior Court of Quebec, Bankruptcy (Exhibits A-1 and A-2, Tab 8). I am therefore of the opinion that the absence of Mr. Phaneuf is not detrimental to the appellant's case and does not affect its burden of proving, on the balance of probabilities, that the assessments under appeal are wrong.

Facts

[15] During the period at issue, the appellant operated under the name of Gestion Abacus Management ("Abacus") and rented and managed one building located in Cowansville, Quebec, that it had owned since 1996. Abacus received rental income from two residential leases of premises in that building and from one commercial lease, also of premises in that building, entered into with Lavin, Merovitz, a law firm in which Thomas and Dominique Lavin were nominal partners. Abacus also received management income for the administrative services it rendered to the law firm. Abacus' main operational bank account was with the Royal Bank in Cowansville, which account was opened in 1996.

Facts relating to the first assessment (number 18640) in respect of bank account number 100-563-6 in Brossard

[16] During the period at issue, Thomas Lavin paid all expenses related to his law firm from bank account number 100-563-6 that he had opened in April 1998 in the name of Abacus in Brossard, the funds from which were transferred into the Cowansville bank account. He was billed monthly by Abacus for its operating expenses. Thomas Lavin also withdrew money from Abacus' Brossard account to pay his personal expenses. He explained that that account was his personal account but it was opened under Abacus' name because all his personal accounts and accounts receivable had been seized, and he could not otherwise operate his law firm and cover his personal expenses. As a matter of fact, a summary of the deposits and withdrawals from Abacus' bank account number 100-563-6 with the Royal Bank in Brossard shows total deposits of $119,182.47 and total withdrawals of $92,246.98 for the period from August 10, 2001, to June 29, 2001 (Exhibits I-4 and I-1, Tabs 19 to 29). It is admitted that most if not all of the deposits came from Thomas Lavin personally and all the withdrawals were also made for him personally.

[17] It would appear also that Thomas Lavin had previously opened, in 1994, another bank account under the name of Abacus; this was account number 1062025 with the Royal Bank in St-Lambert (Exhibit I-2, Tab 33, p. 13 et seq.). Thomas Lavin testified that this account was used strictly for his personal affairs. He did not want to mix Abacus' rental and administrative service operations, for which the Cowansville account was used, with the transactions in his personal account. Although in his capacity as a director from April 30, 1996, to January 15, 2000, he had signing authority, Dominique Lavin testified that he was not aware of the accounts in St-Lambert and in Brossard. It is to be noted that he did not sign any document pertaining to the opening of those two accounts. There is no resolution in the minutes book authorizing the opening of these two bank accounts. Paul Dunn, the external accountant who prepared the financial statements for Abacus until April 30, 1999, included the balance in the St-Lambert account on Abacus' balance sheet, as it was opened under the name of Abacus. The CCRA considered the moneys withdrawn from Abacus' account in Brossard as advances made to Thomas Lavin in contravention of the requirements to pay and assessed Abacus for an amount of $91,639 with respect thereto.

Facts relating to the second assessment (number 18641) in respect of a shareholder loan: $88,095

[18] Mr. Thibault, the collection agent for the CCRA, explained that this amount was taken from the unaudited balance sheet filed with Abacus' income tax return for the year ended April 30, 1999 (Exhibit I-2, Tab 37(E), p. 21). This balance sheet was prepared by Mr. Dunn, and the shareholder loan account consists mainly of two items: 1) "Accounts Receivable TAL" (Thomas A. Lavin), $23,535; and 2) "Loan Payable TAL": $64,284 (see Exhibit I-2, Tab 40, p. 2). The balance of $277 bringing the total to $88,096 is referred to as "miscellaneous" (see Exhibit I-2, Tab 40, p. 4).

[19] On the in-house balance sheet for the period ending April 30, 1999 (Exhibit A-2, Tab 5), which was not filed with the tax return, the Accounts Receivable TAL amount is $18,176 (instead of $23,535) while the Loan Payable TAL of $64,284 does not appear. On the other hand, the in-house balance sheet shows total share capital of $63,174.53 ($31,418.64 for Thomas Lavin, $31,418.63 for Dominique Lavin, and $337.26 for Carolyn Farr, who, as indicated above, was no longer a shareholder in 1999).[1] On the balance sheet provided by Mr. Dunn with

[1] It is interesting to note that on the in-house balance sheets for the periods ending April 30, 1998, and February 28, 2001, an amount of $62,837.27 is included in Thomas Lavin's share

the tax return, there is indicated under shareholders' equity share capital of $675 ($337.27 for Thomas Lavin and $337.26 for Dominique Lavin) (Exhibit I-2, Tab 37(E), p. 21 and Exhibit I-2, Tab 40, p. 2).

[20] With respect to the discrepancy between the balance sheet prepared by Mr. Dunn and the in-house balance sheet as to the Loan Payable TAL of $64,284, it appears that it is related to the purchase of the building which is owned by Abacus. That building was first purchased by Carolyn Farr for $125,000 in 1994 (Exhibit I-2, Tab 47). According to Thomas Lavin, he himself invested $62,500 in that purchase and Ms. Farr borrowed the other $62,500, but the building was purchased in Ms. Farr's name only. On August 20, 1996, Carolyn Farr sold the building to the appellant for $125,000 (Exhibit I-2, Tab 48). The appellant borrowed $62,500 to reimburse Ms. Farr and Thomas Lavin did not claim anything from the appellant. Thomas Lavin said that he considered that amount to be a share capital investment in the company. This would explain the share capital amount shown on the in-house balance sheet. However, no resolution in that regard appears in the minutes book, and no additional shares were issued to Thomas Lavin. Mr. Dunn said that he produced the balance sheet from the transaction bookkeeping records. As the amount of $62,500 paid by Thomas Lavin in 1994 for the purchase of the building by Ms. Farr came from Abacus' account in St-Lambert, Mr. Dunn considered it as a "building loan" made by the appellant to Ms. Farr in the appellant's 1995 fiscal year. Concurrently, a shareholder's loan of $51,481 is shown under liabilities (Exhibit I-2, Tab 37(A), p. 20).

[21] When Ms. Farr sold the building to the appellant in August 1996 (fiscal year 1997), the building loan disappeared, but Mr. Dunn increased the fixed assets to include the depreciated value of the building (Exhibit I-2, Tab 37(C), p. 12, showing that the fixed assets went from $7,329 in 1996 to $130,659 in 1997). Mr. Dunn also indicated a "building mortgage loan" of $57,820 for 1997, which would represent the loan taken out by the appellant in order to reimburse Ms. Farr. On the other hand, the shareholder loans amount was increased to $56,951. Mr. Dunn made no entry under capital stock to reflect the $62,500 payment supposedly made by Thomas Lavin, as there was nothing in that regard in the minutes book. He therefore maintained the capital stock figure at $675. Mr. Dunn said that he was never made aware of the in-house statements. Had he known about

---

capital while no share capital is shown for Dominique Lavin (Exhibit I-2, Tabs 39 and 41). As at April 30, 1999, and April 30, 2001, the share capital was divided equally between Dominique and Thomas Lavin (Exhibit A-2, Tabs 5 and 6). There was no balance sheet provided for 2000.

them, he would have asked Thomas Lavin questions, as those statements differed from the information he had on hand at the time he prepared the balance sheet.

[22] With respect to the Accounts Receivable TAL in the amount of $23,535, Mr. Dunn said that that item represented the aggregate of advances by Thomas Lavin to Abacus less withdrawals by Thomas Lavin as per Abacus' general ledger for the fiscal year ending April 30, 1999 (Exhibit I-2, Tab 40, p. 9). Mr. Dunn treated all the advances as demand loans recoverable by Thomas Lavin as a shareholder. He treated them that way because there were no written agreements stating the terms of reimbursement of the loans.

[23] For fiscal year 2000 and subsequent years, no accountant was retained to prepare the appellant's financial statements. The only documents available were the in-house statements. The in-house balance sheet as at April 30, 2001, does not show a shareholder loan but does show share capital of $63,174.53 (Carolyn Farr still being included as a shareholder) (see Exhibit A-2, Tab 6). The bankruptcy statement filed by Thomas Lavin on June 28, 2001, indicates that he had a 50% shareholding in the appellant, the value of which was estimated to be $37,500 (Exhibit I-2, Tab 52).

[24] Thomas Lavin testified that he never answered the requirements to pay sent by the CCRA to the appellant as he felt that it was not necessary to do so, that the collection agent would call him anyway. The signed resolutions in the minutes book all approved the financial statements filed with the tax returns. The resolutions were signed by both Thomas and Dominique Lavin (Exhibit I-2, Tab 44). They did not, however, sign the financial statements; they were signed by Mr. Dunn, who said that he was authorized by Thomas Lavin, who had seen them first, to provide them with the tax returns. The tax returns for the year 2000 and subsequent years were filed following a request to file them sent by the CCRA (Exhibit I-2, Tab 45).

Analysis

Assessment of $91,639 in respect of bank account number 100-563-6 in Brossard

[25] Counsel for the appellant relies on the decision of the Quebec Court of Appeal in *Potvin c. Pouliot*, [2004] J.Q. n^{o} 6828 (QL), in asserting that the moneys deposited in Abacus' account belonged to Thomas Lavin. Indeed, it is admitted by the respondent that, apart from the $27,000 possibly coming from Thomas Lavin's

mother's estate, all the moneys deposited in that account came from Thomas Lavin's personal sources of income.

[26] According to counsel for the appellant, since these sums belonged to Thomas Lavin, the CCRA cannot assess the appellant pursuant to section 224, as it cannot be said that it advanced or lent moneys or made a payment to Thomas Lavin, for the sums in question never belonged to the appellant from the outset.

[27] Counsel for the respondent argues that, officially, the moneys were deposited in the appellant's account, and as far as third parties were concerned these moneys belonged to the appellant. In collection matters, the CCRA is a third party (see *Bolduc v. the Queen.*, 2003 DTC 221). Counter letters, while they have effect between the parties thereto, are not binding on third parties. A third party may thus choose, as suits its interest, to rely on either the apparent contract or the counter letter (art. 1452 *Civil Code of Quebec*):

> **1452.** Third persons in good faith may, according to their interest, avail themselves of the apparent contract or the counter letter; however, where conflicts of interest arise between them, preference is given to the person who avails himself of the apparent contract.

[28] Here, the Minister relied on section 224 to assess the appellant on the basis that it paid the monies deposited in its account to Thomas Lavin, even though it had received a requirement to pay. All the amounts deposited in that account were owed to Thomas Lavin by the appellant. (See in that regard *Potvin c. Pouliot*, referred to by the appellant.) On that basis, according to the respondent, the appellant ought to have paid them to the Receiver General as required by the formal requirements to pay.

[29] I agree with the respondent. It is my understanding that the CCRA had already exhausted virtually all recourses against Thomas Lavin. He had been personally assessed by the CCRA and owed $97,472.17 in taxes, interest and penalties. The CCRA had seized his personal accounts and accounts receivable. Still, he attempted to bypass his obligations by opening under the name of Abacus a bank account for which he, as president of the company, had signing authority.

[30] In tax matters, form is important (see *Friedberg v. Canada*, [1991] F.C.J. No. 1255 (QL) (FCA). When Thomas Lavin decided to deposit all his personal income in the appellant's bank account, he accepted that for third parties, including

the CCRA in this case, the moneys in that account were in the possession of Abacus, which legally had the use of those moneys.

[31] Furthermore, the result of Thomas Lavin's action was that Abacus held the moneys for him and consequently they were owed to him. Once the appellant received the requirement to pay from the CCRA, it was in contempt of that requirement to pay the Receiver General from the very moment the moneys were withdrawn from the account by Thomas Lavin. The failure to comply with the requirement made the appellant liable, pursuant to subsections 224(4) and (4.1) of the *Act*, to pay to the respondent the amount it had paid to Thomas Lavin.

Assessment in respect of shareholder loan: $88,095

[32] Counsel for the appellant argues that the amount of $62,500 that was treated as a "building loan" by Mr. Dunn was always considered as share capital on the in-house balance sheets. Counsel says that the respondent cannot argue that this loan was transferred to share capital after 1999 and thus paid to Thomas Lavin.

[33] It is my understanding that, in fact, Mr. Dunn considered the amount of $62,500 as a "building loan" because he was not aware of any corporate resolution or any issuance of additional shares that would justify treating that amount, paid by Thomas Lavin toward the purchase of the building, as a contribution to share capital. It is also my understanding that Mr. Dunn did not prepare the appellant's balance sheets after April 30, 1999.

[34] The in-house balance sheets prepared internally for the subsequent years still showed that amount in share capital (either all under Thomas Lavin's name or shared between Dominique and Thomas Lavin).

[35] In this regard, I do not think that it can be said that the building loan was paid to Thomas Lavin. The Minister relied on the balance sheet prepared by Mr. Dunn for the year ending April 30, 1999, in considering that amount as a loan. It is to be inferred that, if Mr. Dunn had prepared the balance sheet for the subsequent years, he would not have transferred that amount to share capital, as no additional shares were issued and no resolutions were entered in the minutes book.

[36] It is to be noted also that the building loan disappeared on the 1997 balance sheet, but the amount thereof was entered instead as a fixed asset by Mr. Dunn. It seems that, when the building was sold by Ms Farr to the appellant, Mr. Dunn considered the $62,500 that Thomas Lavin had invested as having come from the

appellant's bank account in St-Lambert. Whether it was included in the shareholder loan payable to Thomas Lavin is not clear, as the shareholder loans for the year 1997 amount to $56,951.

[37] I am not convinced, therefore, that the amount of $62,500 should be considered as a shareholder loan payable to Thomas Lavin at the time the requirements to pay were issued.

[38] However, it is not contested that the difference of $23,812 ($23,535 + $277) did represent shareholder loans attributable to Thomas Lavin. The appellant is of the opinion that these shareholder loans were not payable at the time of the requirements to pay, as Thomas Lavin had not requested payment; therefore, the appellant was not obliged to comply with the requirement to pay issued under section 224.

[39] The appellant also argued that it did not have enough money to repay the loan. This is contradicted by the in-house balance sheet produced for the year ending April 30, 2001, which shows total retained earnings of $26,471.35 (Exhibit A-2, Tab 6).

[40] With respect to the appellant's liability to make a payment on the shareholder's loan, the question that has to be asked is whether the appellant had a responsibility at law to make a payment to Thomas Lavin (the tax debtor) during the period indicated in the requirements to pay. Counsel for the appellant referred to *The Queen v. National Trust Company*, 98 DTC 6409 (FCA), a decision in which McDonald J.A. stated, at paragraph 4 of his reasons, that if there had been no request for payment made by the tax debtor, the person receiving the CCRA's requirement to pay would not have been required to make a payment, as subsection 224(1) would not have applied. This was said in the context of a trustee who held funds that were fully vested in a cestui que trust who could request payments of the funds from his trustee. It was held that until the cestui que trust requested payment of the funds from his trustee, no moneys were payable to him, nor was his trustee liable to make a payment to him within the meaning of subsection 224(1) of the *ITA*. But McDonald J.A. felt it necessary to specify that subsection 224(1) had limited application in trustee and cestui que trust relationship, because a trustee could not be placed in the awkward position of being compelled to breach his or her fiduciary duties to a tax debtor in order to comply with a letter of demand issued pursuant to subsection 224(1). McDonald J.A. said at paragraph 2 of his reasons:

> . . . there is a strong argument to be made that given the equitable obligations placed upon a trustee, in the absence of express language stating that subsection 224(1) applies to a trustee, it should be confined to a creditor-debtor relationship.

It is therefore to be inferred that in the case of a creditor-debtor relationship, there is no need for such express language in order for subsection 224(1) to apply. To the extent that the tax debtor is also the creditor in respect of a demand shareholder loan, it is not necessary that the tax debtor formally demand payment of that loan for the debtor in respect thereof to be required to make a payment under subsection 224(1).

[41] In *Maritime Life Assurance Co. v. Canada*, [1999] F.C.J. No. 2033 (QL) (FCA), also referred to by the appellant, it was held that, when the requirements to pay were served on Maritime under subsection 224(1), the Registered Retirement Savings Plans were fully in existence, and no request had been received by Maritime to pay to the tax debtors the cash value of their respective policies. The court ruled that Maritime was therefore not liable to make to each of the tax debtors a payment within the meaning of subsection 224(1). Again, in that case, the RRSPs included insurance policies to each of which was attached an endorsement to the effect that the right to surrender the registered contract for its cash value could not be exercised. However, the policies themselves each contained a clause permitting the debtor taxpayer to be paid the cash value upon request to Maritime. This is different from the case of a demand loan held by a creditor, where the debtor may be called upon at any time to pay the loan. The situation in the present case is more akin to that in *Hutterian Brethren Church of Smoky Lake et al. v. Provincial Treasurer of Alberta et al.*, 80 DTC 6228 (Alta. C.A.), a decision summarized as follows by the Federal Court of Appeal in *Maritime* at paragraph 5:

> . . . it was decided that the subsection 224(1) requirement, in and of itself, effected a "request" such as rendered the financial institution "liable to make a payment" to the debtor taxpayer of the monies held by it under certificates of deposit. In that case the terms of the deposit agreements were such that the depositor was entitled to withdraw the monies "at any time" subject to a short period of delay in payment in the case of terms exceeding one year. That case, unlike the present one, was not concerned with a prohibition such as that contained in the endorsements attached to the policies . . .

[42] I am therefore of the view that the decision in *Canada v. Bidner*, [1984] F.C.J. No. 1114 (QL) (FCA), referred to by the respondent must be followed here. Indeed, the Federal Court of Appeal stated therein that:

> . . . a debt payable on demand is one which is immediately due, and service of the garnishment in the case at bar operated as a demand. . . .

[43] I therefore do not agree with the appellant when it argues that the demand shareholders' loans were not payable at the time it was served with the requirements to pay. They were payable, and the appellant had an obligation to make the payment requested. The appellant was accordingly obliged to comply with the requirements to pay.

Does the bankruptcy of Thomas Lavin affect the appellant's liability under section 224?

[44] Counsel for the appellant raised at the hearing a new argument that was not mentioned in the pleadings. He argued that the bankruptcy of Thomas Lavin in 2001 released him from his debt to the minister. He therefore submitted that, because Thomas Lavin's (the tax debtor's) obligation was extinguished, the third party's (the appellant's) derivative obligation was extinguished as well. Thus, the assessment made against the appellant for failure to act on the requirements to pay was unfounded.

[45] Counsel for the appellant relied on the case of *Lessard v. Canada*, [2001] T.C.J. No. 805 (QL) (a case dealing with section 224), and on two decisions by this Court on a transferee's liability pursuant to section 160 of the *ITA* when the transferor becomes bankrupt. Those two cases are *Caplan v. The Queen*, 95 DTC 709 and *Gamache v. The Queen*, 97 DTC 32.

[46] Counsel for the appellant forgot, intentionally or not, to mention that those two last decisions were overruled by the Federal Court of Appeal in *Heavyside v. Canada*, [1996] F.C.J. No. 1608 (QL). In that case, it was ruled that an order of discharge does not extinguish the transferee's debt under section 160 of the *ITA* (which section makes the transferee personally liable for the tax due by the transferor). Furthermore, in the *Lessard* case, referred to by counsel for the appellant, Bowman A.C.J. (as he then was) of this Court rejected the argument that the third party's derivative obligation was extinguished when the tax debtor's obligation was extinguished. Bowman A.C.J. relied on the provisions of the *BIA* stipulating that the release of the principal debtor does not release the surety.[2]

---

[2] Bowman A.C.J. alluded to section 179 of the *BIA*, R.S.C. 1985, c. B-3, which reads as follows:

[47] Section 224 creates a personal obligation on the person to whom a requirement to pay is delivered. That liability exists from the moment the Minister requires that person to pay the Receiver General on account of the tax debtor's liability under the *ITA*, forthwith, if the moneys are payable immediately, or in any other case, as and when the moneys become payable to the tax debtor, provided the conditions set out in section 224 are satisfied (cf. *The Queen v. National Trust Company*, *supra*, paragraph 35).

[48] Therefore, as I concluded that the appellant was, when the requirements to pay were served upon it, a person liable to make a payment to the tax debtor — the maximum amount due being, as I here indicated earlier, $97,472.17 — subsections 224(4) and (4.1) impose a penalty for failure to comply with the requirements to pay. That penalty is a civil one and is an amount equal to the amount that is required to be paid pursuant to subsections 224(1) and (1.1) (cf. *The Queen v. National Trust Company*, *supra*, paragraph 36). In the present case, since the appellant ignored the requirements to pay despite being liable to comply therewith, the Minister's assessments pursuant to subsection 227(10) were justified in the circumstances up to an amount of $97,472.17, as agreed by the respondent.

[49] Counsel for the appellant also raised section 69 of the *BIA* to argue that the Minister was precluded from assessing pursuant to section 224 of the *ITA*. Section 69, however, suspends only the application of subsection 224(1.2) of the *ITA*, which is not at issue here.

[50] For all these reasons, the appeals are dismissed, with costs, and the assessments are confirmed as to the amount of the debt owing by Thomas Lavin to the Minister, that is, $97,472.17.

Signed at Ottawa, Canada, this 6th day of June 2007.

---

179. An order of discharge does not release a person who at the date of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with him, or a person who was surety or in the nature of a surety for him.

“Lucie Lamarre”

Lamarre J.

CITATION:	2007TCC302
COURT FILE NO.:	2003-2410(IT)G
STYLE OF CAUSE:	3087-8847 QUÉBEC INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	March 27, 28 and 29, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	June 6, 2007

APPEARANCES:

Counsel for the Appellant:	Eric Azran
Counsel for the Respondent:	Martin Gentile

COUNSEL OF RECORD:

For the Appellant:

Name:	Eric Azran
Firm:	Stikeman Elliott LLP Montréal (Quebec)

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada