Docket: 2005-4492(IT)G

BETWEEN:

DOMENIC ARMENTI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 12, 2007, at Montreal, Quebec.
Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Daniel Ovadia
Counsel for the Respondent:	Stéphanie Côté

JUDGMENT

The appeal from the assessment made under section 160 of the *Income Tax Act* for the 1999 and 2000 taxation years is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of August 2007.

"Paul Bédard"

Bédard J.

Citation: 2007TCC389
Date: 20070821
Docket: 2005-4492(IT)G

BETWEEN:

DOMENIC ARMENTI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal under the general procedure from an assessment for $53,011 against the Appellant made by the Minister of National Revenue (the "Minister") under section 160 of the *Income Tax Act* (the "Act") for the 1999 and 2000 taxation years.

The facts

[2] The Appellant is the son of Enzo Armenti, the president, director and sole shareholder of Le Groupe Armenti Inc. (the "Corporation"). The Corporation operated an excavation business. It did not file income tax returns for the 1999 and 2000 taxation years. During those years, Les Excavations Super Inc. ("Excavation") granted the Corporation excavation contracts worth approximately $200,000 in total. The income from these contracts was never reported by the Corporation.

[3] The Corporation's banking transactions in 1999 and 2000 were done through an account it had with the Caisse populaire de Notre-Dame-de-Grâce (the "Caisse"). In those same years, Enzo Armenti was the only person authorized by the Corporation to use this account. It should be pointed out that, during those years, the account was subjected to a number of seizures due to the serious financial difficulties with which the Corporation was faced.

[4] During 1999 and 2000, Excavation issued in particular three cheques in consideration of services rendered by the Corporation.

[5] Thus, in September 1999, Excavation issued a cheque[1] for $46,010 drawn on its bank account and payable to the Corporation. This cheque was endorsed first by Enzo Armenti, as authorized by the Corporation, and then by the Appellant, who cashed it at the Caisse, where he himself had a bank account. The Appellant's bank account number also appeared on the back of the cheque.

[6] In November 1999, Excavation issued a second cheque[2] for $2,000 drawn on its bank account and payable to the Corporation. This cheque was likewise endorsed first by Enzo Armenti, as authorized by the Corporation, and then by the Appellant, who cashed it at the Caisse, where he himself had a bank account. The Appellant's and his father's bank account numbers also appeared on the back of the cheque.

[7] The Appellant, whose credibility is not to be doubted, testified that he handed over the entire amount of the cheques thus cashed in to his father. His testimony concerning the circumstances of the cashing of the two cheques is worth quoting:[3]

> Q. Can you tell us the circumstances which led to the cashing in of this cheque?
>
> A. Well, I happened to be going to the bank that day and my father, Enzo Armenti, asked me a favour.
>
> Q. Could you…
>
> A. Oh! I'm sorry, I apologize.

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[1] See Exhibit A-1.
[2] See Exhibit A-2.
[3] See transcript of Appellant's testimony, page 8.

> Q. … speak to the Judge.
>
> A. I apologize, sorry. My father, Enzo Armenti, asked me to do him a favour and exchange a cheque for him, being that I was going to the bank and he was busy that day working.

[8] In August 2000, pursuant to a direction to pay given by the Corporation[4] to Excavation, Excavation issued a cheque for $29,011 drawn on its bank account and payable to Enzo Armenti personally in payment for services rendered by the Corporation. Only Enzo Armenti's signature and the number of his personal account at the Caisse appeared on the back of the cheque. In this regard, Enzo Armenti, whose credibility was not questioned, testified that he had personally cashed this third cheque at the Caisse and had asked the Caisse to deposit part of the amount of the cheque, namely $5,000, in the Appellant's bank account. He explained that this amount of $5,000 was deposited in his son's bank account in partial payment of back rent he owed his son. It should be noted that at the time Enzo Armenti lived in a residence that was owned by the Appellant and that they had entered into a lease that was filed in evidence as Exhibit A-4.

The issue

[9] The only issue is the following: were the three aforementioned cheques transferred within the meaning of section 160 of the Act from the Corporation to the Appellant, with or without adequate consideration?

Respondent's position

[10] The Respondent submits firstly that the answer to the question of whether there was a transfer in this case from the Corporation to the Appellant is to be found in the relevant provisions of the *Bills of Exchange Act*, R.S.C., 1985, c. B-4 (the "BEA"):

> **INTERPRETATION**
>
> **2. [Definitions]** In this Act,

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[4] See Exhibit R-1.

["delivery" *« livraison »*] "delivery" means transfer of possession, actual or constructive, from one person to another;

. . .

Form and Interpretation of Bill

16. (1) **[Bill of exchange]** A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.

. . .

20. (1) **[Transfer words]** When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable.

(2) **[Negotiable bill]** A negotiable bill may be payable either to order or to bearer.

(3) **[When payable to bearer]** A bill is payable to bearer that is expressed to be so payable, or on which the only or last endorsement is an endorsement in blank.

. . .

39. (1) **[Requisites]** As between immediate parties and as regards a remote party, other than a holder in due course, the delivery of a bill

> (*a*) in order to be effectual must be made either by or under the authority of the party drawing, accepting or endorsing, as the case may be; or
>
> (*b*) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

(2) **[Presumption]** Where the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed

40. [Parting with possession] Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

. . .

Negotiation

59. (1) **[By transfer]** A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) **[By delivery]** A bill payable to bearer is negotiated by delivery.

(3) **[By endorsement]** A bill payable to order is negotiated by the endorsement of the holder.

. . .

62. (1) **[Signature sufficient]** The simple signature of the endorser on a bill, without additional words, is a sufficient endorsement.

. . .

66. (1) **[Endorsement]** An endorsement may be made in blank or special.

(2) **[In blank]** An endorsement in blank specifies no endorsee, and a bill so endorsed becomes payable to bearer.

(3**) [Special]** A special endorsement specifies the person to whom, or to whose order, the bill is to be payable.

(4) **[Application of Act]** The provisions of this Act relating to a payee apply, with such modifications as the circumstances require, to an endorsee under a special endorsement.

(5) **[Conversion of blank endorsement]** Where a bill has been endorsed in blank, any holder may convert the blank endorsement into a special endorsement by writing above the endorser's signature a direction to pay the bill to or to the order of himself or some other person.

. . .

[Emphasis added.]

[11] With regard to the first two cheques, relying on the relevant provisions of the BEA, which state that a cheque endorsed in blank is payable to the bearer, that is, to

the person having possession thereof, the Respondent submits that when Enzo Armenti, as the authorized agent of the Corporation's signing officer, gave possession of the two cheques endorsed in blank to his son, the Corporation, through its agent, automatically transferred ownership of the two cheques or the right to receive the proceeds thereof to the Appellant. Moreover, the Respondent claims that these transfers occurred for no consideration since the Appellant handed the entire amount of the cashed cheques over to his father personally, who, according to the Respondent, was not the transferor.

[12] Alternatively, the Respondent submits that the consideration paid by the Appellant was not a consideration within the meaning of section 160 of the Act because it was the result of a moral obligation the Appellant was under to hand the amounts of the cashed cheques over to his father. The Respondent bases this argument on the decision by the Federal Court of Appeal in *Raphael v. Canada*, 2002 FCA 23.

[13] The Respondent also submits that the Corporation, through its agent, Enzo Armenti, did not give the Appellant a mandate to cash the two cheques in question for it, since, under the relevant provisions of the BEA, a transfer of property occurred when the Corporation gave the two cheques endorsed in blank to the Appellant, whereas, in the case of a mandate, there can be no transfer of property.

[14] Finally, the Respondent submits that if I were to find that the transfers took place first between the Corporation and the father and then between the father and his son, there would still be a cascading application of section 160 of the Act. In support of this position, the Respondent relies on the Federal Court of Appeal decision in *Jurak v. Canada*, 2003 FCA 58.

Analysis and conclusion

The law

[15] Subsection 160(1) of the Act states:

> **SECTION 160: Tax liability re property transferred not at arm's length.**
>
> **(1)** Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> > (*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law partner,
> >
> > (*b*) a person who was under 18 years of age, or
> >
> > (*c*) a person with whom the person was not dealing at arm's length,
>
> the following rules apply:
>
> > (*d*) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
> >
> > (*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
> >
> > > (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
> > >
> > > (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.
>
> [Emphasis added.]

[16] The Federal Court of Appeal, in *Raphael*, *supra*, reiterated the conditions to be met for subsection 160 (1) of the Act to apply:

> **4** The Tax Court Judge set out four conditions to be met in order for subsection 160(1) to apply and in so doing he was following a decision of the Tax Court, *Doreen Williams v. The Queen*, [2000] T.C.J. No. 459, File No. 98 1604, July 4, 2000. Those conditions were:
>
> 1) There must be a transfer of property;
>
> 2) The transferor and transferee are not dealing at arm's length
>
> 3) There must be no consideration or inadequate consideration flowing from the transferee to the transferor; and
>
> 4) The transferor must be liable to pay an amount under the Act in or in respect of the year when the property was transferred or any preceding year.
>
> [Emphasis added.]

From *Raphael*, *supra*, I conclude that each and every condition listed must be met for the Appellant to be held jointly and severally liable with the Corporation for the latter's tax debt.

The first and second cheques

[17] We will begin by considering the issue of whether there was a transfer of the first two cheques from the Corporation to the Appellant, that being the first condition for the application of subsection 160(1) of the Act stated in *Raphael*, *supra*. The Respondent submits that it was the Corporation, through its authorized agent, Enzo Armenti, who gave the first two cheques, endorsed in blank, to the Appellant, and not the father in his personal capacity who did so. In other words, the Respondent argues that there was no transfer between the Corporation and the father. The issue of whether it was the Corporation or the father who gave the two cheques to the Appellant would require a determination if giving these two cheques endorsed in blank constituted a transfer within the meaning of subsection 160(1) of the Act. However, in my opinion, giving a cheque endorsed in blank does not automatically constitute a transfer for the purposes of subsection 160(1) of the Act. The Respondent, invoking relevant provisions of the BEA, contends that giving over a cheque endorsed in blank does constitute a transfer because the person thus acquiring possession of the cheque automatically becomes the owner of the cheque or the holder of the right to cash it. In my opinion, the relevant provisions of the BEA merely allow third parties to assume that the person who has possession of a cheque

endorsed in blank is the owner thereof and is also entitled to cash it. The BEA does not enable one to characterize the nature of the transaction that occurred in this case between the person who gave the cheque endorsed in blank and the person who received it. In this case, the evidence showed that the father, regardless of whether he was acting in his personal capacity or as the Corporation's authorized agent, never wanted to transfer ownership of the two cheques to the Appellant, nor did he want ownership of these cheques to pass to the Appellant. At no time did the Appellant have the right to use, enjoy or dispose of these two cheques as he saw fit. Thus, contrary to the Respondent's position that there could not be a mandate here, I am of the opinion that the transaction that occurred between the father ─ whether acting in his personal capacity or as the Corporation's authorized agent ─ and the son was in the nature of a mandate within the meaning of the *Civil Code of Québec*. Indeed, the evidence very clearly showed that in this case, the father, whether personally or as the Corporation's authorized agent, at most gave the Appellant the mandate to cash the two cheques and to hand over to him the amounts thereof, which mandate the Appellant carried out gratuitously. Since in this case there was never a transfer of ownership of these two cheques to the Appellant, I am of the opinion that with regard to these cheques, the Appellant cannot be held jointly and severally liable with the Corporation for its tax debt.

The third cheque

[18] As for the third cheque, for $29,011, the situation is quite different from that existing in the case of the first two cheques. In accordance with a direction to pay given by the Corporation to Excavation, Excavation issued a cheque for $29,011 drawn on its bank account and payable to Enzo Armenti personally in payment for services rendered by the Corporation. In my opinion, this resulted in a transfer from the Corporation to the father of $29,011. The father, subsequently received the proceeds of this cheque at the Caisse, except for an amount of $5,000 that he required that the Caisse deposit directly in the Appellant's bank account at that same institution. In my opinion, this resulted in a second transfer, namely, a transfer by the father to his son of $5,000. I reiterate that the evidence also showed that the father transferred this amount to his son in payment of rent arrears.

[19] Therefore, in the present case, there was a transfer of $5,000 from the father to the son, two people not dealing at arm's length. Still, in order for the Appellant to be held liable under section 160 of the Act for his father's the tax debt, which was not proven, this second transfer would have to have been made for no consideration or for an inadequate consideration. However, in this case, the consideration was adequate because the father, by having the $5,000 deposited in his son's bank account, paid part of the rent arrears he owed his son.

[20] Relying on the pronouncements of the Federal Court of Appeal in *Jurak*, *supra*, confirming in a way the principle of the cascading application of section 160 of the Act, the Respondent argues that the second transfer of $5,000 led to the joint and several liability of the Appellant for an equivalent amount. In my opinion, the principle of the cascading application of section 160 as confirmed in that decision cannot apply in the present case because when the second transfer took place, there was adequate consideration.

[21] For these reasons, the appeal is allowed, with costs.

Signed at Ottawa, Canada, this 21st day of August 2007.

"Paul Bédard"

Bédard J.

CITATION:	2007TCC389
COURT FILE No.:	2005-4492(IT)G
STYLE OF CAUSE:	Domenic Armenti and Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 12, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	August 21, 2007

Appearances:

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