

**Date: 20080422**

**Docket: A-396-07**

**Citation: 2008 FCA 152**

**CORAM: NOËL J.A.  
NADON J.A.  
RYER J.A.**

**BETWEEN:**

**JENNIFER WAUGH**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Vancouver, British Columbia, on April 22, 2008.

Judgment delivered from the Bench at Vancouver, British Columbia, on April 22, 2008.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**RYER J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Vancouver, British Columbia, on April 22, 2008)**

**RYER J.A.**

[1] This is an appeal from a decision of Justice Little of the Tax Court of Canada (2007 TCC 494), allowing, in part, the appeal of Mrs. Jennifer Waugh against a reassessment in the amount of \$132,992.82 that was issued to her in 2004 by the Minister of National Revenue (the “Minister”), pursuant to subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) (the “ITA”).

[2] Subsection 160(1) of the ITA provides that where a person has transferred property to that person’s spouse, or to certain other related parties, at a time when the transferor has an outstanding

liability under the ITA, the transferor and the transferee can be jointly and severally liable to the Minister for the amount of the liability of the transferor. Of particular relevance to this appeal are the provisions of paragraph 160(1)(e) of the ITA which stipulate that the joint and several liability of the transferor and the transferee will be limited to the lesser of two amounts. The first amount is the amount, if any, by which the fair market value of the transferred property at the time of the transfer exceeds the fair market value, at that time, of the consideration that has been given by the transferee to the transferor for the property. The second amount is, essentially, the amount of the outstanding liability of the transferor under the ITA.

[3] The relevant portion of subsection 160(1) of the ITA reads as follows:

160.(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:

...

(1) Lorsqu'une personne a, depuis le 1<sup>er</sup> mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes:

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

b) une personne qui était âgée de moins de 18 ans;

c) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

[...]

e) le bénéficiaire et l'auteur du

(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.

transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;

aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi.

[4] It is undisputed that during the period from February 28, 2002 to May 1, 2003, Mr. Waugh endorsed a number of cheques, which were payable to him, in favour of Mrs. Waugh and that those cheques were deposited into her personal bank account. It is equally undisputed that at all relevant times, Mr. Waugh was liable to pay an amount under the ITA that exceeded the amount specified in the reassessment. In making and confirming the reassessment, the Minister assumed that no consideration was provided by Mrs. Waugh to Mr. Waugh in respect of the funds that were deposited into her account.

[5] The Tax Court of Canada confirmed the reassessment in relation to most of the items that were deposited into Mrs. Waugh's account. In total, it confirmed the applicability of subsection 160(1) of the ITA in respect of \$105,081.72 and denied the applicability of that provision in respect of \$27,911.10.

[6] Mrs. Waugh raises two issues in this appeal. The first is that subsection 160(1) of the ITA cannot apply with respect to funds in the amount of \$75,561.72 that were provided by Mr. Rodney Schroeder, in essence, because those funds were not the property of Mr. Waugh. The second issue is that, with respect to any funds that belonged to Mr. Waugh that were transferred by him to Mrs. Waugh, consideration of an amount equal to the amount transferred was provided by Mrs. Waugh. As such, the amount determined under subparagraph 160(1)(e)(i) of the ITA is zero and, therefore, there is no amount in respect of which subsection 160(1) of the ITA could apply.

[7] With respect to the first issue, counsel for Mrs. Waugh argues that the funds provided by Mr. Schroeder were loaned by him to Mr. Waugh and such funds were impressed with a "Quistclose trust". In effect, the argument is that those funds did not belong to Mr. Waugh in the sense that he was not free to deal with them because of the trust condition that attached to them, namely, that he was obligated to use the funds only in the promotion of a particular business venture.

[8] The materials in the record do not support the assertion that the funds provided by Mr. Schroeder to Mr. Waugh were subject to any trust conditions. There was no written loan agreement that spells out any trust conditions. More importantly, in correspondence to the Canada Revenue Agency, Mr. Schroeder characterized \$50,000 of the funds that he provided as consulting fees and the remaining \$20,000 as a personal loan. This evidence belies any suggestion that the funds provided by Mr. Schroeder were subject to any trust conditions.

[9] With respect to the second issue, counsel for Mrs. Waugh contends that she provided consideration in exchange for the property that was transferred to her by her husband by assisting him in the business venture.

[10] In *Machtinger v. Canada*, [2001] D.T.C. 5054, [2001] 1 C.T.C. 137, this Court held that in the face of an assumption by the Minister that no consideration has been provided in exchange for a transfer of property, as contemplated by subsection 160(1) of the ITA, the transferee has the burden of establishing the fair market value of any consideration that has allegedly been provided in exchange for the transferred property.

[11] In the circumstances before us, we are unable to conclude that Mrs. Waugh has provided any evidence that would refute the Minister's assumption that no consideration was provided by her in exchange for any of the funds that were deposited into her account by her husband. We note

that if Mrs. Waugh had performed services in respect of the new business venture, as consideration for funds that were deposited into her account, such consideration would constitute employment or business income to her. However, nowhere in the record is there any evidence that any corresponding amount of employment or business income has been reported by her in any tax return or returns for the period in which funds were deposited into her account by her husband.

[12] Accordingly, for the foregoing reasons, the appeal will be dismissed with costs in the appeal, but not in the Tax Court of Canada.

"C. Michael Ryer"

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J.A.

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-396-07

**STYLE OF CAUSE:** Jennifer Waugh v. Her Majesty the Queen

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** April 22, 2008

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

**DELIVERED FROM THE BENCH BY:** RYER J.A.

**DATED:** April 22, 2008

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