

Docket: 2005-2484(IT)G

BETWEEN:

JEAN LIVINGSTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on May 7, 2007 at Victoria, British Columbia

Before: The Honourable Justice D.W. Beaubier

Appearances:

Counsel for the Appellant: Andre J. Rachert  
Counsel for the Respondent: Selena Sit **and Michael Taylor**

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**AMENDED JUDGMENT**

The appeals from the reassessments made under the *Income Tax Act* for the 2001, 2002 and 2003 taxation years **pursuant to Notice of Assessment Number 34207** are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

The Appellant is awarded her party and party costs.

**This Amended Judgment and Amended Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment dated May 23, 2007.**

Signed at Saskatoon, Saskatchewan this 15<sup>th</sup> day of June, 2007.

"D.W. Beaubier"

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Beaubier, J.

Citation: 2007TCC303  
Date: **20070615**  
Docket: 2005-2484(IT)G

BETWEEN:

JEAN LIVINGSTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **AMENDED REASONS FOR JUDGMENT**

Beaubier, J.

[1] This appeal pursuant to the General Procedure was heard at Victoria, British Columbia on May 7, 2007. The Appellant testified and called Michele Davies to testify. The Respondent called Andrew Dreher, a Resource and Complex Case Officer, who attended to collection matters for Canada Revenue Agency (“CRA”) respecting Ms. Davies, who owed about \$80,000 in taxes and whose various corporations owed over \$700,000 in taxes and various remissions and interest due on account of employees. As a consequence of the Davies file, he became CRA’s officer respecting Ms. Livingston.

[2] The particulars in dispute are set out in paragraphs 12 to 20 of the Reply to the Notice of Appeal. They read:

12. The Minister assessed the Appellant under subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), as amended (the “Act”), by Notice of Assessment number 34207, dated and mailed on March 1, 2004 (the “Assessment”), for \$36,650.82 in respect of transfers of property from Davies to the Appellant during the period from October 16, 2001 to April 28, 2003 (the “Period”).

13. The Appellant served a Notice of Objection to the Assessment on May 28, 2004.
14. The Minister confirmed the Assessment by Notification of Confirmation dated and mailed April 29, 2005.
15. In confirming the Assessment, the Minister assumed the following facts:
  - a) the Appellant and Davies are friends;
  - b) at all material times, the Appellant and Davies did not deal at arm's length;
  - c) at all material times, the Appellant has resided in Spillimacheen, B.C., in the Western Rocky Mountains;
  - d) prior to April 2003, Davies resided in Port Alberni, B.C., on Vancouver Island;
  - e) in April 2003, Davies moved to Spillimacheen;
  - f) on October 16, 2001, the Appellant opened a bank account in her name only at the CIBC branch in Invermere, B.C. (the "Account");
  - g) during the Period, Davies was liable to pay not less than \$74,460.66, and as much as \$80,341.67, under the *Act* in respect of her 1995, 1996, 1997 and 1998 taxation years;
  - h) during the Period, monies totalling \$36,650.82 (the "Funds") were deposited into the Account, as outlined in the attached Schedule "A";
  - i) prior to being deposited into the Account, the Funds were the property of Davies;
  - j) Davies deposited some of the Funds into the Account personally, and also directed other parties:
    - (i) to pay amounts owed to Davies to the Appellant instead for the Appellant to deposit them into the Account, and

- (ii) to deposit amounts owed to Davies directly into the Account, rather than to pay it to her personally;
  - k) the Appellant opened the Account at Davies' request;
  - l) the Appellant's purpose in opening the Account was to enable Davies to place the Funds beyond the reach of creditors, including the CRA;
  - m) the Appellant had control over the disposition of the Funds upon their deposit into the Account;
  - n) the Appellant provided Davies with a debit card to make withdrawals from the Account;
  - o) the Appellant signed cheques on the Account for Davies' use;
  - p) the Appellant did not give Davies any consideration for the deposit of the Funds into the Account;
  - q) the Appellant and Davies did not conclude any contractual agreement respecting the deposit of the Funds into the Account or their use;
  - r) Davies declared bankruptcy on April 30, 2003; and
  - s) for purposes of her bankruptcy, Davies denied that the Funds were held in trust for her and did not include the Funds in her estate.
16. The assumption of fact outlined in paragraph 15(q) above was first made by the Minister in confirming the Assessment.

**B. ISSUES TO BE DECIDED**

17. The issue to be decided is whether the Appellant is jointly and severally liable, together with Michele Davies, to pay \$36,650.82 pursuant to subsection 160(1) of the *Act*, in respect of the deposit of the Funds into the Account.

**C. STATUTORY PROVISIONS RELIED ON**

18. He relies on subsections 160(1), 248(1) and 251(1) of the *Act*.

**D. GROUNDS RELIED ON AND RELIEF SOUGHT**

19. He respectfully submits that the deposits of the Funds, which were the property of Davies, into the Account during the Period, amounted to transfers of property with a fair market value of \$36,650.82 from Davies to the Appellant, for which the Appellant gave Davies no consideration.
20. He further submits that the Appellant and Davies did not deal at arm's length with respect to those transfers. Therefore, the Appellant is liable, under subsection 160(1) of the *Act*, to pay \$36,650.82 because, at the time of those transfers, Davies was liable to pay a greater amount in respect of the 1995, 1996, 1997 and 1998 taxation years.

[3] Assumptions 15(a), (c) – (j), (m), (n), (r) and (s) were not refuted by the evidence. Respecting the remaining assumptions:

(b) Will be dealt with in what follows.

(k) The Account was opened by the Appellant after mutual discussions between the Appellant and Ms. Davies.

(l) The Court finds on the evidence that this is correct. Ms. Livingston denied that the Account was opened to put the funds beyond the reach of CRA. The Court does not believe this. The two women had been friends for years before the account was opened. Ms. Livingston admitted that she helped Ms. Davies with her income tax problems, which were basically collection problems, at the time that the Account was opened by Ms. Livingston. For these reasons, the Court finds that Ms. Livingston had learned of Ms. Davies' collection problems with CRA before the Account was opened by Ms. Livingston. Moreover, the evidence is that the giant majority of Ms. Davies' indebtedness was to CRA. So, if hiding money from creditors was discussed between them, it was about debts to CRA.

(o) The Appellant opened the Account and immediately gave Ms. Davies blank signed cheques and a bank debit card on the Account.

(p) Is wrong. The Appellant gave Ms. Davies signed blank cheques and a bank debit card for the deposit and removal of the funds in the Account. In fact, Ms. Davies was the only person who used the Account; the Appellant never deposited into, or withdrew funds from the Account or received a benefit from it.

(q) The deposit by Ms. Davies of funds into Ms. Livingston's name and the delivery by Ms. Livingston to Ms. Davies of a bank debit card and signed blank cheques on the Account constitute an exchange of consideration. As a result, there was a form of contractual agreement between the parties.

[4] In *Raphael v. Canada*, [2002] F.C.J. No. 82 at paragraph 4, the Federal Court of Appeal confirmed Mogan, J.'s finding that for subsection 160(1) of the *Income Tax Act* to be complied with, there must be:

1. A transfer of property.
2. Parties not dealing at arm's length.
3. No consideration or inadequate consideration flowing from the transferor to the transferee.
4. A transferor who is liable to pay tax under the *Income Tax Act* at that time.

[5] Respecting these criteria:

1. Ms. Davies did transfer the funds alleged into Ms. Livingston's name.
4. Ms. Davies owed more than that amount in tax to CRA at the times of the transfers, and the Appellant knew that.

3. At all the times that Ms. Davies made the transfers of each sum, Ms. Davies had the ability to take each sum in full by using a signed blank cheque from the Appellant or by using the bank debit card. Ms. Davies even got the bank account statements so she, and not Ms. Livingston, was the person who knew what was in the Account, although Ms. Livingston also had the power to find that out and to take anything in the Account at any time. But, in any event, these findings establish that at all times Ms. Livingston provided adequate consideration to Ms. Davies for the deposit of these funds by Ms. Davies.

2. Based on the findings respecting criteria 4 and 3 herein, the Court finds that Ms. Davies and Ms. Livingston were not dealing at arm's length respecting these transfers. Ms. Davies was the directing mind in respect to all matters relating to the opening and the operation of the Account.

[6] Appellant's counsel argued that the Appellant was a bare trustee of the funds in question. However, the Court accepts the test of *Waters' Law of Trusts in Canada*, 3<sup>rd</sup> Edition, pages 342 and 343 in which Professor Waters writes:

...

F. Intention to Defraud Creditors and the Right to Restitution

If a man transfers his property to another with the intention of prejudicing his creditors, those creditors or his trustee in bankruptcy on discovering the facts can have the transfer set aside under the fraudulent conveyances legislation. However, the facts may not be discovered, and years later when limitation periods have run or creditors are not at hand to object, the transferor seeks to recover his property from the transferee. Can the transferee successfully resist the admission of evidence proffered [*sic*] by the transferor to show that a resulting trust was intended? The transferee argues that the court will refuse its assistance to a man whose claim is essentially the result of his past delict.

In such case, if the transferor is compelled to disclose and rely upon his fraudulent intent, and his fraud achieved its object, it is clearly established that the court will render him no assistance. No declaration will be made in his favour. ...

As stated therein, the Court will not favour the transferor in such a case. But that text implies that any transfer will then accrue to the transferee. In this case, both parties conspired to prejudice CRA. Nonetheless, by virtue of the exchange of consideration found in these reasons, the conditions for the application of subsection 160(1) of the *Income Tax Act* were not met. The Appellant did not obtain any benefit from the transfers by Ms. Davies.

[7] For these reasons, the appeal is allowed.

[8] The Appellant is awarded her party and party costs.

**This Amended Judgment and Amended Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment dated May 23, 2007.**

Signed at Saskatoon, Saskatchewan this 15<sup>th</sup> day of June, 2007.

"D.W. Beaubier"

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Beaubier, J.



CITATION: 2007TCC303

COURT FILE NO.: 2005-2484(IT)G

STYLE OF CAUSE: Jean Livingston v. The Queen

PLACE OF HEARING: Victoria, British Columbia

DATE OF HEARING: May 7, 2007

**AMENDED REASONS  
FOR JUDGMENT BY:** The Honourable Justice D.W. Beaubier

DATE OF  
**AMENDED JUDGMENT:** June 15, 2007

APPEARANCES:

Counsel for the Appellant: Andre J. Rachert  
Counsel for the Respondent: Selena Sit **and Michael Taylor**

COUNSEL OF RECORD:

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