Docket: 2006-586(IT)I

BETWEEN:

RAZIEH SHIRAFKAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant:	John van Driesum and Peter Heinen (Student-at-law)
Counsel for the Respondent:	Selena Sit

JUDGMENT

The appeal from the assessment made under section 160 of the *Income Tax Act*, notice of which is dated June 9, 2005, and bears number 25575, is allowed, with costs, and the assessment is vacated.

Signed at Ottawa, Canada, this 25th day of May, 2007.

"E.A. Bowie"

Bowie J.

Docket: 2006-588(GST)I

BETWEEN:

RAZIEH SHIRAFKAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant:	John van Driesum and Peter Heinen (Student-at-law)
Counsel for the Respondent:	Selena Sit

JUDGMENT

The appeal from the Notice of Assessment – Third Party made under section 325 of the *Excise Tax Act*, notice of which is dated June 9, 2005, and bears number A106678, is allowed and the assessment is vacated.

Signed at Ottawa, Canada, this 25th day of May, 2007.

"E.A. Bowie"

Bowie J.

Citation: 2007TCC309
Date: 20070525
Docket: 2006-586(IT)I
2006-588(GST)I

BETWEEN:

RAZIEH SHIRAFKAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] These two appeals are brought from assessments made under section 160 of the *Income Tax Act* (the *ITA*) and section 325 of the *Excise Tax Act* (the *ETA*). The amounts assessed under the two *Acts* are, respectively, $5,654.75 and $21,835.70. These are the amounts that are said to have been owing by the appellant's husband, Abdulvehab Kheari (the husband), on September 3, 2004 under assessments made against him as a director of 632887 BC Ltd. (the company) pursuant to sections 227.1 of the *ITA* and 323 of the *ETA* for unremitted withholdings under the *ITA*[1] and unremitted gst, and interest, under the *ETA* of the company when it ceased to operate. On that date the husband conveyed to the appellant all his interest in their family residence at 1629 Burton Avenue, Victoria, BC (the residence).

[2] Ms. Shirafkan appeals from these assessments under this Court's informal procedure. Her counsel advanced the following grounds of appeal.

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[1] The amount of $5,654.75 includes federal income tax, provincial income tax, employment insurance premiums, *Canada Pension Plan* contributions, and interest on all of those.

(i) The assessments against the company, and therefore those against the husband as a director of it, were not well-founded. Although none of those assessments were appealed, he argues that the decision of the Federal Court of Appeal in *Gaucher v. The Queen*[2] entitles this appellant to challenge the correctness of all the underlying assessments;

(ii) The husband had transferred all his equity in the residence to her in March 1998, before his liability under the *Acts* arose, and he therefore held the legal title in trust for her after that time;

(iii) The husband's indebtedness to the appellant on September 6, 2004 exceeded the value of his interest in the property transferred to the appellant, and the discharge of the debt, or part of it, was adequate consideration for the purposes of sections 160 and 325 of the *Acts*.

In view of the conclusion I have reached on the issue of consideration, it is not necessary for me to deal with the appellant's first two grounds of appeal. Nor is it necessary that I reach any conclusion as to the value in Canadian currency of the Iranian rial – a subject as to which the evidence on both sides was most unsatisfactory.

[3] The history of this matter begins with the marriage of the appellant and her husband in Iran in 1978. The husband at that time bound himself under a written marriage contract to pay to the appellant 1,000,000 Iranian rials and 750 Full Bahar Azadi gold coins in consideration of the marriage. The appellant and her husband were later divorced, and then remarried, entering into a second marriage contract in 1988. The husband again bound himself to pay to the appellant 1,000,000 rials. Soon after the second marriage, the couple immigrated to Canada as refugees and settled in Victoria, BC. There is no doubt that when they started life in Canada in 1988 the husband still owed the appellant at least 1,000,000 rials and 750 Azadi gold coins. Whether he owed an additional 1,000,000 rials under the second marriage contract is something that I do not have to decide, in view of the conclusion that I have come to.

[4] The appellant's husband's brother lived in Victoria at that time, and in 1992, shortly before he passed away, he conveyed the residence to the husband, subject to a substantial mortgage. The Appellant and her husband and children have lived there ever since. In the years between 1992 and 1997 the husband was out of work for all

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[2] 2000 DTC 6678 (FCA).

but a few months. During this difficult period, the appellant trained as a hairdresser, and to make ends meet she frequently borrowed significant amounts of money from her relatives in Iran. The evidence is unclear about the amount borrowed, but it appears to have been about $12,000 to $15,000 per year for several years. All this borrowed money, together with her earnings during this period, went to support the family, and to make payments on the mortgages on the residence.

[5] In 1994, the appellant was injured in an automobile accident. She received a settlement of her claim for injuries caused by the accident at the end of 1997. In the meantime, her husband had refinanced the residence by way of a new mortgage with the Scotia Mortgage Corporation for $150,000. The existing mortgage remained on the title, the amount owing on it being about $14,000. The appellant used the proceeds of her damage claim, some $48,000, to discharge this latter mortgage, to pay a small bank loan, to make some repairs and renovations to the residence, and to pay legal fees for her husband in relation to charges that had been laid against him and were later withdrawn. While the amounts in question are to some extent estimates, I am satisfied that the great majority of the $48,000 settlement proceeds went either directly into the equity in the residence, or into paying family expenses of various kinds. The appellant spent less than $1,000 of this money on herself.

[6] In 1998, the appellant and her two youngest children went to Iran for a visit of some four months with her family. Shortly before they left the appellant and her husband had one of many conversations about the ownership of the residence. There had been some marital discord between them during these difficult years, and the husband had on several occasions told the appellant that he would convey the house to her. The appellant testified that during this conversation in March, 1998 her husband said to her specifically that "… the house is yours …". I accept the appellant's evidence on this point, which was corroborated by her husband, and by her daughter, who was present when the conversation took place. No specific consideration passed at that time, and no conveyance took place, but the context of the conversation was a discussion as to the amount of money that the appellant had paid for repairs to the house, to discharge loans and the mortgage on it, and to support the family and pay her husband's legal fees in connection with the charges that had been laid against him. The appellant regularly reminded the appellant in the ensuing years that he was obliged to transfer the title to the house to her, and he continuously neglected this obligation.

[7] During the years between 1998 and 2002, the husband took several trips to Iran for several months at a time, totaling in all about two years. Throughout this period the appellant worked and looked after their children, paying all the expenses

of the family. In 2002, the husband and a Mr. Singh, who had earlier been his co-accused, decided to purchase a business known as Natalie's Pizza. The appellant advanced $7,000 to her husband for that purpose, thinking that he was buying the sole ownership of the business. She also provided a line of credit to the business for working capital. For the next two years, the appellant worked long hours at Natalie's Pizza, often accompanied by her elder daughter. Her husband spent at least a year of that time in Iran. That was a particularly difficult period for the appellant as she found Mr. Singh to be most uncooperative. He refused to give her any financial information regarding the business, even though she had provided much of the money to acquire and operate it. It therefore came as a surprise to her that the Canada Revenue Agency (CRA) claimed substantial arrears for payroll withholdings and for unpaid gst. Ultimately, Mr. Singh removed most of the equipment from the restaurant, and the CRA took the remainder, effectively closing down the business.

[8] On September 3, 2004, the husband conveyed the residence to the appellant. The consideration stated on the deed was $220,000. It appears that he instructed a solicitor to prepare and register the transfer without telling the appellant. His evidence was that he had intended to transfer the legal title to the appellant ever since the conversation of March 1998, but this was the first time that he had the money necessary to pay the cost of doing so. I doubt that lack of funds was the real reason for his delay; it seems to me more likely that there simply was no urgency about it until the pizza business was failing and debt was piling up. Nothing turns on that, however. The real issue in the case is whether there was adequate consideration for the transfer.

[9] As no cash changed hands on the transfer, the two important determinations that must be made are, first, what was the value of the husband's equity in the residence on September 3, 2004, and second, what was the debt owing from the husband to the wife on that date.

[10] It is pleaded in the Amended Reply at paragraph 13 (q) that at the time of the transfer the value of the residence was $314,000. That is the value at which it was assessed by the British Columbia Assessment Authority for the purposes of municipal taxation, with an effective date of July 1, 2004. It is certainly the highest value for which there is any support to be found in the evidence. The exact amount of the encumbrances on title on the date of the transfer is not established in the evidence with certainty, but it was about $157,000, leaving a total equity of the same amount.

[11] In my view, this case is indistinguishable from *Savoie v. The Queen.*[3] In that case, as here, the husband and wife had both worked to maintain their home and raise their family, commingling their earnings without maintaining any record of their respective contributions to the family welfare or the specific assets in question. Those assets were three parcels of land that were initially registered in the name of the husband, legal title to which he transferred to his wife at a time when he was indebted to the Crown under the *ITA.* Bowman J., as he then was, held, on the authority of the Supreme Court of Canada's judgments in *Pettkus v. Becker,*[4] *Palachik v. Kiss*[5] and *Sorochan v. Sorochan,*[6] that the doctrine of resulting trust, or alternatively the doctrine of constructive trust, entitled the transferor's wife to a one-half interest in the property. There is evidence in this case of a common intention on the part of the appellant and her husband that the residence should be hers, and it is based on the contribution that she made to both the mortgage payments and the other family expenses from three different sources — the money that she obtained from her family in Iran, the proceeds of her personal injury claim, and her wages during the many years that she supported the family by her sole efforts while her husband was unemployed.

[12] Even if the appellant's interest in the residence were limited to one-half, on the basis that they were each entitled to be considered to have made equal contribution to the acquisition of the equity in the property and to the support of the family unit, the husband's equity in the residence would not have exceeded $78,500. The unchallenged evidence of Jack Noble, a well-qualified expert in the value of coins was that an Azadi gold coin was worth $122.79 on September 3, 2004. At the time title to the residence was transferred, then, 750 Azadi gold coins were worth C$92,092.50.

[13] Counsel for the respondent argues that as the transfer of title of the residence states that the interest transferred is the fee simple, and that the consideration for the transfer was $220,000.00, it is not open to conclude either that the husband's interest in the property was any less than the entire fee simple, or that there was consideration in the form of the discharge of some or all of the husband's debt to the appellant. It is quite clear from the evidence that no consideration passed between the parties to the

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3 93 DTC 552.

4 [1980] 2 S.C.R. 834.

5 [1983] 1 S.C.R. 623.

6 [1986] 2 S.C.R. 38.

transfer, however, and I am satisfied as well that neither of them had any understanding of the legal niceties of estates in real property. The transfer, I am sure, was prepared by the husband's solicitor and signed by his client without any serious thought being given to the nature of the estate to be conveyed. It is certainly not clear why the amount of $220,000.00 is shown as consideration, but it is some evidence that the appellant's husband believed that there was consideration involved in the transaction; it is not clear what that could have been other than an estimate, however inaccurate, of the extent of his debt to the appellant under the marriage contract. The evidence before me as to the equivalent of 1,000,000 rials in Canadian currency was quite unreliable. It may well be that the parties considered $220,000.00 to be the outstanding debt between them, taking into account the first, and perhaps the second, marriage contract, and all the other amounts that the appellant had contributed over the years. While I have no way of estimating the accuracy of that estimate, I do accept it as evidence that the parties intended that the existing debt should be extinguished, or at least reduced, by the transfer.

[14] My conclusion, therefore, is that the appellant gave consideration for the transfer that was at least equal to the value of the husband's share of the equity in the residence that he transferred to her. The appeals under the two *Acts* will therefore be allowed and the assessments vacated. The appellant is entitled to her costs under the *Income Tax Act*.

Signed at Ottawa, Canada, this 25th day of May, 2007.

"E.A. Bowie"

Bowie J.

CITATION:	2007TCC309
COURT FILE NO.:	2006-586(IT)I and 2006-588(GST)I
STYLE OF CAUSE:	RAZIEH SHIRAFKAN and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	February 7, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
DATE OF JUDGMENT:	May 25, 2007

APPEARANCES:

Counsel for the Appellant:	John van Driesum and Peter Heinen (Student-at-law)
Counsel for the Respondent:	Selena Sit

COUNSEL OF RECORD:

For the Appellant:

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