

Docket: 2005-438(IT)G

BETWEEN:

JENNIFER WAUGH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 11, 2007, February 1 and 27, 2007
at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: J. Herbert Rosner

Counsel for the Respondent: Karen A. Truscott

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* in respect of the 2002 and 2003 taxation years are allowed, without costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 24th day of August 2007.

“L.M. Little”

Little J.

Citation: 2007TCC494
Date: 20070824
Docket: 2005-438(IT)G

BETWEEN:

JENNIFER WAUGH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

I. FACTS

[1] At all relevant times the Appellant was either the common law partner or the spouse of Douglas Waugh.

[2] The Appellant married Douglas Waugh on August 17, 2002.

[3] Between February 28, 2002 and May 1, 2003 (the “Period”) Douglas Waugh was indebted to the Canada Revenue Agency (the “CRA”) under Part I of the *Income Tax Act* (the “Act”)¹ in the amount of \$305,794.00. During this Period Douglas Waugh transferred funds in the amount of \$132,992.82 to the Appellant’s personal bank account, for which she had sole signing authority. The funds were transferred via 14 transactions. On November 17, 2004 the Minister of National Revenue (the “Minister”) reassessed the Appellant and included the amount of \$132,992.82 in her income under section 160 of the *Act* (the “Reassessment”).

¹ R.S.C. 1985, c. 1 (5th Supp.), as amended. Unless otherwise stated, statutory references in this memorandum are to the *Act*.

[4] At the outset of trial, the Minister conceded one transaction in the amount of \$350.00 relating to a cheque from Harry Trueman. The 14 transactions that were dealt with in the Reassessment are as follows:

| Amount | Date | Cheque From | Cheque To | Relating To |
|---------------|--------------------|------------------|-------------------|--------------------------|
| \$ 20,000.00 | September 25, 2002 | Rodney Schroeder | Douglas Waugh | \$75,000 Loan |
| \$ 10,000.00 | November 4, 2002 | Rodney Schroeder | Douglas Waugh | \$75,000 Loan |
| \$ 10,000.00 | December 6, 2002 | Rodney Schroeder | Douglas Waugh | \$75,000 Loan |
| \$ 10,000.00 | January 22, 2003 | Rodney Schroeder | Douglas Waugh | \$75,000 Loan |
| \$ 10,000.00 | February 4, 2003 | Rodney Schroeder | Douglas Waugh | \$75,000 Loan |
| \$ 5,561.72 | February 10, 2003 | Rodney Schroeder | Douglas Waugh | \$75,000 Loan |
| \$ 10,000.00 | March 3, 2003 | Rodney Schroeder | Douglas Waugh | \$75,000 Loan |
| \$ 75,561.72 | | | | |
| \$ 25,000.00 | June 3, 2002 | Bruce McDonald | Jennifer McDonald | \$30,000 Loan |
| \$ 2,000.00 | February 28, 2002 | Air Canada | Douglas Waugh | Ms. Hooper |
| \$ 561.10 | February 28, 2002 | Air Canada | Douglas Waugh | Ms. Hooper |
| \$ 1,540.00 | May 2, 2002 | Cycle City | Douglas Waugh | Bike Deposit Refund |
| \$ 14,000.00 | October 8, 2002 | CIBC Draft | Douglas Waugh | Boat Sale |
| \$ 13,980.00 | May 1, 2003 | NWACU Draft | Jennifer Waugh | Sale of Gaming Equipment |
| \$ 132,642.82 | | | | |
| \$ 350.00 | July 2, 2002 | Harry Trueman | Douglas Waugh | Amount Conceded |
| \$ 132,992.82 | | | | |

[5] During the hearing counsel for the Appellant called five witnesses: the Appellant, Mr. Waugh, Ms. Lynne Hooper (the Appellant's mother), Mr. Bruce McDonald (a family friend and business associate of the Appellant and her husband) and Mr. Rodney Schroeder (a business associate).

[6] The following summary represents a brief description of the Appellant's version of the transactions at issue:

1. The amount of \$75,000.00 represented various loans from Mr. Schroeder to the Appellant's husband to enable him to pay expenses associated with the promotion of the Beaver Aircraft Project.
2. The Beaver Aircraft Project was an attempt by Mr. Waugh and Mr. Schroeder to "rectify, manufacture and sell modern versions of the world-renowned Beaver and other utility airplanes to the general commercial and military markets worldwide". (see Exhibit A-1)
3. The amount of \$30,000.00 represented a loan from Mr. McDonald to the Appellant and her husband to enable them to pay their living expenses

after the Appellant's husband lost significant sums of money in the Mexico Casino Project. (Note: The Appellant and her husband each signed the note that was given to Mr. McDonald when the loan was made.) (Exhibit A-2)

3. The amounts of \$2,000.00 and \$561.10 represented amounts given to the Appellant by her mother, Ms. Hooper.

4. The amount of \$1,540.00 represented a refund of a deposit on a bike.

5. The amount of \$14,000.00 represented the proceeds received by Mr. Waugh on the sale of a boat.

6. The amount of \$13,980.00 represented the sale proceeds of gaming equipment that was sold by Mr. Waugh on behalf of a third party.

[7] Counsel for the Respondent called one witness, namely, Mr. Les Kromar, a collections officer with the CRA.

II. ISSUE

[8] The issue in this appeal is whether subsection 160(1) of the *Act* applied to the transactions at issue.

III. ANALYSIS

[9] The purpose of section 160 is to prevent a taxpayer from avoiding tax by transferring his or her property to certain persons or non-arm's length entities.

[10] In general terms, subsection 160(1) is applicable to a direct or indirect "transfer" of "property", including a transfer of property by way of a trust, to a spouse or "common-law partner", minor, or non-arm's length person.

[11] Subsection 160(1) of the *Act* provides as follows:

160. (1) Tax liability re property transferred not at arm's length -- 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:

[...]

(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*]

[12] The essence of subsection 160(1) is found in paragraph (e): the transferee is liable for the value of what was transferred, minus anything given in return, up to a limit of the transferor's tax liability as of the year of the transfer.

Defence of Due Diligence

[13] Counsel for the Appellant also noted that the Appellant was unaware of Mr. Waugh's tax indebtedness. In *Caron v. The Queen*, 2002 DTC 1736, Justice Dussault of the Tax Court held that it was irrelevant whether the transferee was aware of the transferor's tax debt. Counsel for the Appellant relied upon section 2 of the *Fraudulent Conveyance Act of British Columbia*, R.S.B.C. Chapter 163, which reads as follows:

This *Act* does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice of knowledge of collusion or fraud.

[14] It is important to note that section 160 of the *Act* imposes absolute liability. There is no defence of due diligence in section 160 that is similar to the defence available for directors under subsection 227.1(3) of the *Act*. In fact, the transferee does not even have to know about the tax debt in order for subsection 160(1) to apply. In *Wannan v. R.*,² Sharlow J.A. states at paragraphs 2 to 3 as follows:

² 2003 CarswellNat 3515, 2003 F.C.A. 423, 2003 DTC 5715, [2004] 1 C.T.C. 326, C.B.R. (5th) 117, 312 N.R. 247.

Section 160 is one of a number of provisions in the *Income Tax Act* that create vicarious or secondary liability for tax debts. Such provisions permit the Minister to collect a tax debt from someone other than the tax debtor, provided certain statutory conditions are met ...

Section 160 of the *Income Tax Act* is an important tax collection tool, because it thwarts attempts to move money or other property beyond the tax collector's reach by placing it in presumably friendly hands. It is, however, a draconian provision. While not every use of section 160 is unwarranted or unfair, there is always some potential for an unjust result. There is no due diligence defence to the application of section 160. It may apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax. Indeed, it may apply to a transferee who has no knowledge of the tax affairs of the primary tax debtor. However, section 160 has been validly enacted as part of the law of Canada. If the Crown seeks to rely on section 160 in a particular case, it must be permitted to do so if the statutory conditions are met. [*emphasis added*]

[15] Based on the judicial analysis noted above, it follows that the Appellant's evidence, that she had no knowledge of her husband's tax debt to CRA when she quit her job in Toronto and moved to Vancouver to marry him, would not assist the Appellant under a section 160 assessment.

Transfer of Property

[16] The main issue in this appeal turns on whether "property" was "transferred" under subsection 160(1) of the *Act*. Although the term "transfer" is not defined in the *Act*, the term "property" is defined in subsection 248(1) of the *Act* as follows:

"property" means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes,

(a) a right of any kind whatever, a share or a chose in action,

(b) unless a contrary intention is evident, money,

[...]

[17] The question that I must decide is whether, by depositing the various amounts into the Appellant's bank account for her to pay family expenses, the Appellant's husband effectively "transferred" such "property" to the Appellant within the meaning of subsection 160(1) of the *Act*.

[18] With respect to the loan in the amount of \$75,561.72 made by Mr. Schroeder to Mr. Waugh and transferred by Mr. Waugh to the Appellant I believe that section 160 of the *Act* applies.

[19] With respect to the loan of \$25,000.00 made to the Appellant and Mr. Waugh by Mr. Bruce McDonald I have concluded that section 160 does not apply to this loan since the Appellant was personally liable to repay the \$30,000.00 to Mr. McDonald.

[20] The testimony of Ms. Hooper (the Appellant's mother) established that the amounts of \$2,000.00 and \$561.10 were, in fact, monies belonging to Mrs. Hooper which she instructed Mr. Waugh to give to the Appellant. I do not believe that section 160 of the *Act* applies to the transfer of monies by Mrs. Hooper to the Appellant since there is no evidence that Mrs. Hooper had any tax liability during the Period.

[21] The evidence is also clear that Mr. Waugh was retained to sell some used gaming equipment on behalf of a third party and therefore, the proceeds of such sale rightfully belonged to Mr. Waugh. I have concluded that subsection 160(1) of the *Act* would apply to the transfer by Mr. Waugh of \$13,980.00.00.

[22] The evidence indicates that the amount received as a refund of a deposit (\$1,540.00) was initially paid out by Mr. Waugh to purchase a bike for his son from his first marriage. The refund was received by Mr. Waugh. I have concluded that subsection 160(1) would apply to this transaction.

[23] The evidence indicated that \$14,000.00 was received by Mr. Waugh on the sale of a boat and he then transferred this amount to the Appellant. I have concluded that subsection 160(1) would apply to this transaction.

IV. CONCLUSION

[24] I have concluded that section 160 applies to the loans totaling \$75,561.72 from Mr. Schroeder.

[25] I have concluded that section 160 does not apply to the loan of \$25,000.00 from Mr. McDonald.

[26] I have concluded that subsection 160 does not apply to the amounts of \$2,000.00 and \$561.10 transferred to the Appellant by her mother.

[27] I have concluded that section 160 applies to the funds received on the sale of the gaming equipment.

[28] I have concluded that subsection 160(1) would apply to the deposit refund of \$1,540.00 (i.e. the bicycle) and the \$14,000.00 received by Mr. Waugh on the sale of the boat.

[29] The appeals are allowed and the Minister is to reassess in the manner outlined above.

[30] Since success is divided between the parties, I am not prepared to award costs.

Signed at Vancouver, British Columbia, this 24th day of August 2007.

“L.M. Little”

Little J.

CITATION: 2007TCC494

COURT FILE NO.: 2005-438(IT)G

STYLE OF CAUSE: Jennifer Waugh and
Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATES OF HEARING: January 11, 2007,
February 1 and 27, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: August 24, 2007

APPEARANCES:

Counsel for the Appellant: J. Herbert Rosner

Counsel for the Respondent: Karen A. Tuscott

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