Docket: 2005-3701(IT)G

BETWEEN:

VALERIE GAIL ROSE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 8, 2007 at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan.

Appearances:

Counsel for the Appellant:	Gregory A. Swanson
Counsel for the Respondent:	Anne Jinnouchi

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the assessment, number 27301, made under the *Income Tax Act* is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Hally Rose did not transfer to the Appellant his beneficial interest in the property located at 3306 Carnegie Street in Regina, Saskatchewan.

Signed at Ottawa, Canada, this 1st day of November, 2007.

"G. A. Sheridan"

Sheridan, J.

Citation: 2007TCC657
Date: 20071101
Docket: 2005-3701(IT)G

BETWEEN:

VALERIE GAIL ROSE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Valerie Gail Rose, is appealing the assessment of the Minister of National Revenue pursuant to subsection 160(1) of the *Income Tax Act*:

> 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.

[2] Subject to the interpretation of the word "transferred" in subparagraph 10(a), there is no dispute as to the facts assumed by the Minister in paragraph 10 of the Reply to the Notice of Appeal:

> 10. In assessing and in confirming assessment No. 27301, the Minister assumed the same facts, as follows:
>
> (a) on October 19, 2004, Hally Rose transferred property located at 3306 Carnegie Street in the City of Regina, Saskatchewan (the "Property") to the Appellant;
>
> (b) Hally Rose is the Appellant's husband;
>
> (c) at all material times, the Property was occupied as the family home of the Appellant and Hally Rose;
>
> (d) at all material times, the Appellant and Hally Rose were not dealing at arm's length;
>
> (e) at the time of the transfer, the fair market value of the Property was $140,000;
>
> (f) around or at the time of the transfer, there was a $110,000 mortgage on the Property;
>
> (g) there was no consideration given by the Appellant for the Property;
>
> (h) in respect of the taxation years prior to and including 2004, the aggregate of all amounts that Hally Rose was liable to pay under the *Act* was $57,302.89; and
>
> (i) Hally Rose filed an assignment in bankruptcy on June 29 [amended on consent at trial], 2005.

[3] Both the Appellant and her husband, Hally, testified at the hearing. I found them completely credible in their testimony, answering often complex legal questions to the best of their understanding in a straight-forward manner.

[4] The Respondent called Joan Selinger, the Collection Officer at the Canada Revenue Agency who, at all times relevant to this appeal, was handling the collection of Hally Rose's unpaid taxes. Ms. Selinger was equally forthright in the presentation of her evidence.

[5] At the time of the hearing of this appeal, Valerie and Hally Rose had been married for some 34 years, and for the past 23, had lived in the house at 3306 Carnegie Street. In 2004, Hally, a framer by trade, was in severe financial difficulties and behind in his tax payments. He had been working with Ms. Selinger to reduce his indebtedness by establishing a regular payment arrangement with CRA. By September 2004, however, things had gone from bad to worse. Among Hally's many worries at that time was the threat of a lawsuit by a disgruntled customer named Holyoak. Hoping to fend off what he considered Holyoak's "bogus claim", Hally somehow came up with the idea of getting his name off the title of the family home. Accordingly, a transfer[1] was executed and registered at the Province of Saskatchewan Land Titles Registry Office pursuant to which the Appellant became the sole registered owner of their Carnegie Street house.

[6] Around this same time, Joan Selinger on behalf of the CRA, had been preparing the documents[2] necessary to register a lien against the Carnegie Street house. It was then she realized that Hally's name was no longer on the title, a fact he quickly confirmed when she confronted him with her discovery, as shown in Hally's examination-in-chief:

> Q Who all would you have talked about – or talked to about transferring the house out of -- transferring the Title of the house out of your name into just Valerie's name?
>
> A I was in close contact with a lady in Revenue Canada, Joan Selinger --
>
> Q Mmhmm.

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[1] Exhibit A-3.

[2] Exhibit R-2.

A -- and I tried to let her know what I was doing all the way along, and as I was – we were trying to make the payments to the government for our remittances and our GST, and -- and I -- I did tell Joan that I changed the house over, and she was pretty upset with me, and now I can see why.

Q Is Joan Selinger here today?

A Yes.

Q So did she ever explain to you why she was upset with you for doing that?

A Yes, she said it -- it was out of her hands now, but you shouldn't -- she said you shouldn't have done that because it sends a signal to the government that you're trying to cheat them or trying to -- maybe she didn't say cheat, but you're trying to avoid making your payments, the money that you owe them.

It didn't look good.[3]

[7] Later, on cross-examination, Hally further explained that:

Q Are you aware of the Canada Revenue Agency going to register their interest against your home prior to the transfer? Were you aware that –

A No.

Q -- they might do that?

A No.

Q Did it occur to you, though, that they could do that, given that Brian Holyoak was doing that?

A Well, Joan -- Joan gave me -- gave me heck for doing what I did, and I know it was wrong now, but --

Q No, but my question was, did it occur to you that the Canada Revenue Agency could register a lien against your house –

A No.

Q -- with respect to income taxes, given that --

A I never --

[3] Transcript: page 51, lines 9-25 to page 52, lines 1-10.

Q -- Brian [Holyoak] did?

A No, I didn't give it a second thought because I thought by being in contact with the Revenue Agency as much as I was -- like, almost every week or every second week I was in contact with Joan, and I -- I didn't think that it would happen. I really didn't think it would happen.

Q And just to clarify, you've indicated that -- the Canada Revenue Agency, did you inform them prior to actually transferring the property, that you were going to transfer the property?

A No, I --

Q No? It was after you transferred the property –

A Yeah, it was --

Q -- that you told Ms. Selinger --

A Yes.

Q -- that you transferred the property?

A (Witness nods head yes).

Q And, at that time, you had indicated to Ms. Selinger you transferred the property because there was a potential creditor out there, Brian Holyoak, who was going to place a lien against your property?

A That's right. I believe, at that point, we were still -- I was still making payments when I told Joan. I was still trying to -- still trying to dig my way out of the mess that I had gotten myself into.[4]

[8] Ms. Selinger's testimony on examination-in-chief was consistent with Hally's:

Q Okay. So after you certified the debt, then what did you do?

A The -- we have to wait for the certificate to come back from headquarters. Then we have to register through PPSA. So I would have done that when it came back, and I believe it was around October 5th -- no, November 5th because this came -- this was certified October 5th. November 5th we registered through PPSA, and then we used those two documents to attach to land, and, at that time, it didn't attach to land. We did a search. It's because

[4] Transcript: page 60, lines 17-25 to page 62, lines 1-15.

> the Title was transferred. I phoned Hally, why was the Title transferred? He explained, to avoid a creditor. And then we have to proceed with a 160 based on the fact that a property was transferred.
>
> Q And what was the conversation that you had? You indicated -- he indicated that he was transferring the property because a creditor was after him or –
>
> A Yes.
>
> Q -- was going to place a lien against his home?
>
> A Yes.[5]

[9] The upshot of all this was the Minister's assessment against the Appellant under subsection 160(1) of the *Act*.

[10] In *Logiudice v. Her Majesty the Queen* [6] , Bowie, J. explained the purpose of subsection 160(1) as follows:

> ... The obvious purpose of section 160 is to prevent taxpayers from escaping their liability for tax, interest and penalties arising under the provisions of the Act by placing their exigible assets in the hands of relatives, or others with whom they are not at arms' length, and thus beyond the immediate reach of the tax collector. [Emphasis added].

[11] Whether a "transfer" has been made will depend on the situation at hand:

> [...]
>
> The word "transfer" is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any practical form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. ...[7]

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[5] Transcript: page 95, lines 6-25 to page 96, lines 1-4.

[6] 97 DTC 1462 (T.C.C.) at page 1466.

[7] *Fasken Estate v. Minister of National Revenue*, [1948] C.T.C. 265 (Exchequer Court) at page 279.

[12] Similarly, there is no one way in which a beneficial interest may be shown to have been retained. Whether or not a transfer has occurred will be a question of fact in each case. The credibility of the transferor and transferee plays no small role in the determination of this question, as shown by the decisions cited by counsel in their review of the case law[8].

[13] Three of the four requisite elements[9] of subsection 160(1) are admitted: that the Appellant and Hally were not at arm's length; that no consideration was given for the transfer; and that Hally was liable for tax at the time of the transfer. Nor is it disputed that there was a transfer of the *legal* title in the Carnegie Street house from Hally to the Appellant. The only question is whether there was a "transfer" of Hally's beneficial interest in the property; that is to say, whether he divested himself of that interest which then vested in the Appellant.[10]

[14] The Appellant has the onus of showing, on a balance of probabilities, that Hally did not transfer his beneficial interest in the Carnegie Street house to her. Describing the evidence in support of the Appellant's position as "thin", counsel for the Respondent submitted that the Appellant had failed to meet this evidentiary burden. In support of her contention, counsel pointed to the fact that both the Appellant and Hally admitted that they had not, at the time of the transfer, had formal discussions of the terms upon which the transfer of title would be made; that until consulting their lawyer about their tax appeal, they had been unfamiliar with legal terms such as "bare trusteeship" to describe the nature of the transaction; and that Hally's motivation in making the change in the title was to thwart Holyoak's plans to sue him. From this last point, counsel submitted, the existence of a general intention to defeat the interest of creditors, specifically the CRA, could be inferred. Finally, counsel referred to the inconsistencies between Hally's evidence at the hearing and the information reported in his sworn bankruptcy documents. Counsel for the Respondent also invited the Court to draw a negative inference from the failure of the Appellant to call the trustee in bankruptcy.

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[8] *Hurd v. Her Majesty the Queen*, [2001] 2 C.T.C. 2489 (T.C.C.) at paragraphs 4 and 9; *Miller v. Minister of National Revenue*, [1988] 2 C.T.C. 2106 (T.C.C.) at paragraph 14; *Parker v. Her Majesty the Queen*, [2006] 5 C.T.C. 2361 (T.C.C.) at paragraphs 14-21; *Burns v. Canada*, [2006] T.C.J. No. 320 at paragraph 26.

[9] *Burns, supra* at paragraph 18.

[10] *Estate of David Fasken, supra*.

[15] Starting first with the bankruptcy matter, on June 29, 2005, Hally filed a Notice in Bankruptcy[11]. In the "Statement of Affairs" section of that document, opposite the heading "house", the word "nil" appears. This response, according to counsel for the Respondent, is at odds with Hally's evidence at the hearing that he retained his beneficial interest in the house. Counsel argued that he could not have it both ways: his failure to include his beneficial interest in the family home in his bankruptcy proceedings was inconsistent with his later claim of a retained beneficial interest for the purposes of section 160 of the *Act*.

[16] In my view, however, the above characterization does not tell the whole story. It is common ground that when Hally filed for bankruptcy, the Roses' joint equity in the property was not more than $30,000, and that under Saskatchewan law, the matrimonial home was exempt from seizure to a value of $32,000. I accept as reasonable Hally's explanation that he understood from the Trustee that because his one-half interest in the available equity in the house was too low to be exigible by his creditors, there was no need to include the Carnegie Street house in his Statement of Affairs. I do not interpret it as indicative of an intention to keep his creditors in the dark, especially when taken in context with the other disclosures that appear in the Notice of Bankruptcy:

1. in the Liabilities section of Exhibit R-1, Hally disclosed the secured interest of the CIBC of $109,000, the outstanding balance on the mortgage on the Carnegie Street house; and

2. in paragraph (9a) of Exhibit R-1, he disclosed that in the 12 months prior to the Notice of Bankruptcy, he had "sold or disposed" property, the details of which he further described in paragraph (13): "September, 2004, transferred one-half interest in personal residence to spouse. No net proceeds realized".

[17] As for the Trustee not having been called as a witness, while it might have been helpful to hear from him, the force of the documentary evidence and of the testimony of the Appellant and Hally was sufficient to override any negative inference that might otherwise have been drawn.

[18] Turning now to the admissions with respect to the change in the title of the Carnegie Street house, I do not see Hally's amateurish efforts to prevent Holyoak from suing him as being on par with a deliberate scheme to defeat the legitimate

[11] Exhibit R-1.

claims of creditors. Having heard the evidence of the Appellant and Hally on the point, I am satisfied that his purpose was certainly not to avoid paying his tax arrears to the CRA. To conclude otherwise would be inconsistent with their evidence and Ms. Selinger's that throughout the relevant period, Hally had been working with her in an sincere attempt to pay off his tax debt. His candour in advising Ms. Selinger of the change in the title and his motives for doing so is hardly indicative of an intention to thwart the CRA's efforts to collect the taxes owed. Hally was under the mistaken and, some would say, naive belief that the CRA would not seek to put a lien on his property. Being more astute than Hally as to the possible legal ramifications of his actions, Ms. Selinger, as Hally put it, gave him "heck", a reaction manifested at the departmental level in the form of a section 160 reassessment against the Appellant. Only then did Hally begin to realize the consequences of his actions with regard to the Holyoak matter.

[19] His rather delayed reaction had everything to do with Hally's general lack of sophistication and expertise in legal matters, a factor which explains as well why he and the Appellant never discussed the establishment of a "bare trusteeship" or negotiated, with any formality, the terms that would govern the transfer of the property from their joint names to the Appellant's name alone. Their admissions in this regard rendered their evidence more credible, imbuing it with an air of reality that was lacking, for example, in the decision of (*Rochelle) Moss v. Her Majesty the Queen*[12]. In that case, Sarchuk, J. rejected in rather strong language, the testimony of the taxpayer and her husband with regard to an alleged trust arrangement:

> [15] The second position advanced by the Appellant is that she was merely the legal but not the beneficial owner of the deposits in issue. The facts do not support this assertion. From 1988 onward, the Appellant's husband, with her full co-operation, took steps to defeat his creditors by effecting valid transfers of his assets to her (including his profits from his building projects). This was the sole motivating factor behind their actions. I do not believe their testimony that the nature of certain of these funds was discussed and, more specifically, that they were to be held in trust and would not be used for any purpose other than the payment of suppliers and tradesmen. Had the Appellant's husband wished to comply with the requirements of the BLA, he could readily have done so by setting up a separate 'in trust' account at the bank. Given the purpose underlying the transfer of his monies into the Appellant's bank account, I am satisfied that he not only intended to, but did divest himself of all beneficial interest in those monies to the extent that no creditor could readily attach them.
>
> [...]

[12] [2000] 1 C.T.C. 2828.

> [18] The testimony of the Appellant and of her husband[13] was often unreasonable, if not improbable. In the present appeal, the Appellant, on several occasions, stated that she never used any of the funds deposited into her account by her husband for personal matters. She said her budgeting of household expenses was such that she would not have needed to use any of these monies and was confident that she did not even accidentally 'spend any of those funds'. The Appellant also asserted, with specific reference to the funds received by her husband from Barron and Forsyth, that they 'were used in their entirety to construct the said homes'. These statements are quite simply false and indeed were contradicted by the testimony of her husband and that of his clients. The Appellant's testimony that her personal expenses including mortgage payments were approximately $3,000 per month is equally questionable. Summaries prepared by her accountant produced on discovery suggest that the average monthly expenses were closer to $7,000 and the explanation offered was not supported by any direct evidence and in my view, is simply not tenable.[14]

[20] None of the adjectives used by Sarchuk, J. to describe the evidence of Mr. and Mrs. Moss are applicable to the Roses' testimony. In terms of its credibility, their evidence lies at the other end of the spectrum. While they may not have articulated their intentions with any legal precision, I am satisfied that, at the time the change in title was made, Hally and the Appellant clearly understood that they were making a change in name only. That they always intended that Hally would retain his beneficial interest in the Carnegie Street house is shown by his having continued to live there and to contribute, as he always had done, to the expenses of maintaining the residence. While I take the point of counsel for the Respondent that it is possible to divest oneself of beneficial ownership without giving up possession[15] of the property, retaining possession may nonetheless, be indicative of the retention of beneficial interest. On the facts of the present case, Hally's continuing to reside at the Carnegie Street house was yet another factor pointing to his and the Appellant's intention that he retain his beneficial interest in the property.

[21] In respect of Hally's payment of expenses, counsel for the Respondent also argued that the income reported in Hally's 2004 and 2005 income tax returns was too low to have allowed him to do so. This contention fails to take into account Hally's evidence that his gross earnings during this period were significantly higher than the income ultimately realized. As this money came in from framing jobs, he used it to

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[13] (Danny) *Moss v. Her Majesty the Queen*, [2000] 1 C.T.C. 2828, Schedule "A", Docket (97-2294(IT)G).

[14] (Rochelle) *Moss*, *supra*.

[15] *Furfaro-Siconolfi v. Her Majesty the Queen*, [1990] 1 C.T.C. 188 (F.C.T.D.) at paragraph 21.

live on – the result being, of course, that creditors went unpaid and the business ultimately failed.

[22] I accept without doubt the Appellant's evidence on cross-examination that it would never have "crossed her mind" to dispose of the Carnegie Street house without first securing Hally's consent:

> Q But it is the case, though, that given you were the sole owner of the house, you could have sold the house; is that not correct?
>
> A No, I couldn't have sold the house.
>
> Q But you were the only person on Title to the house?
>
> A On Title, but I never sold the property, and no money exchanged hands.
>
> Q No, I realize that, but you could have gone out, given that you were on Title of the property, and sold the property or attempted to sell the property?
>
> A No, I wouldn't have done that.
>
> Q You wouldn't have done that, but –
>
> A No.
>
> Q -- you could have done that, given that you're –
>
> A It never crossed my mind.
>
> Q So when was it that you formulated the idea or the intention that you were going to be a bare trustee of the property, or did you ever formulate that intention?
>
> A No, I did not. I didn't even know what that meant until I asked my lawyer.[16]

[23] I also accept Hally's evidence that he had no concerns that Valerie might attempt to deal with their family home without first consulting him. Although counsel for the Respondent is quite right that, on paper, the Appellant could have sold the house, mortgaged it, rented it – the simple reality is she would not have done so. She and Hally had lived in the house for 23 years of their 34-year marriage, they had worked hard with modest means to acquire and maintain ownership of it, they faced Hally's business and financial difficulties together: in these circumstances, the Appellant's bare legal rights were trumped by their mutual understanding that the

[16] Transcript: page 45, lines 8-25 to page 46, lines 1-6.

nominal change in title did not alter in any way Hally's beneficial interest in the property.

[24] I am satisfied that at no time relevant to this appeal did Hally divest himself of his beneficial interest in the Carnegie Street house; nor did his interest vest in the Appellant. Absent these elements, there cannot have been a "transfer" of property within the meaning of subsection 160(1). Accordingly, the appeal is allowed, with costs, and the assessment referred back to the Minister for reconsideration and reassessment on the basis that Hally Rose did not transfer to the Appellant his beneficial interest in the property located at 3306 Carnegie Street in Regina, Saskatchewan.

Signed at Ottawa, Canada, this 1st day of November, 2007.

"G. A. Sheridan"

Sheridan, J.

CITATION:	2007TCC657
COURT FILE NO.:	2005-3701(IT)G
STYLE OF CAUSE:	VALERIE GAIL ROSE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Regina, Saskatchewan
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DATE OF JUDGMENT:	November 1, 2007

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