Docket: 2008-52(IT)G

BETWEEN

ANNE-MARIE VIAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 12, 2010, at Ottawa, Canada.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the appellant;	Christian-Daniel Landry
Counsel for the respondent:	Julian Malone

JUDGMENT

The appeal from the assessment made by the Minister of National Revenue (**Minister**) pursuant to section 160 of the *Income Tax Act* (**Act**) is allowed with costs to the respondent calculated in accordance with Tariff B of the *Tax Court of Canada Rules (General Procedure)*, and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that the appellant is jointly and severally liable under the Act to pay the amount of $31,725.

Signed at Ottawa, Canada, this 30th day of March 2011.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 27th day of July 2011.

Erich Klein, Revisor

Citation: 2011 TCC 193
Date: 20110330
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REASONS FOR JUDGMENT

Lamarre J.

[1] The appellant is appealing from an assessment of $38,500 dated January 18, 2007, made by the Minister of National Revenue (**Minister**) pursuant to subsection 160(1) of the *Income Tax Act* (**ITA**).

[2] In her Reply to the Notice of Appeal (**Reply**), the respondent conceded that the assessment should be reduced to $37,500. As a result of written representations by the appellant, the respondent reduced the amount of the assessment again, to $31,725.

[3] The appellant, however, disputes the entire assessment. She is of the opinion that section 160 does not apply. She is also of the view that if the Court were to apply section 160, the amount of the assessment should be reduced to $25,950.

UNDISPUTED FACTS FORMING THE BASIS OF THE ASSESSMENT

[4] Only the appellant testified. The evidence shows that she married Michel Dessureault on June 20, 1981 under the regime of the partnership of acquests in force in the province of Quebec. They have two children.

[5] The spouses were co-owners of a property in Gatineau that they acquired from the appellant's parents on June 5, 1990. It was their family residence.

[6] On February 11, 2002, Michel Dessureault transferred his co-ownership right in the property to the appellant by notarized contract (Exhibit I-1, Tab 4). This notarized contract indicates that the [TRANSLATION] "transfer is made for no consideration and final discharge is given by the transferor" and that the value of the consideration is zero dollars. There seems to be no dispute that the market value of the property on that date was $75,000. As a result of the appellant's evidence in the form of bank statements establishing the unpaid balance of a home-equity line of credit at $11,550 at the time the property was transferred, the respondent conceded that the fair market value of the property on that date should be reduced to $63,450.

[7] It is undisputed that on December 21, 2006, Michel Dessureault had an outstanding tax debt of $52,309.80 owing to the Canada Revenue Agency (**CRA**) for the 1998, 1999 and 2000 taxation years.

[8] The appellant and her spouse separated on October 20, 2003, and a divorce judgment was issued on May 17, 2004 (Exhibit I-1, Tab 9).

[9] Since the appellant was still living with her spouse at the time of the transfer on February 11, 2002, the Minister assessed her pursuant to paragraph 160(1)(*e*) of the ITA.

[10] The relevant provisions of section 160 read 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:

> (*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.

160(2) Assessment. The Minister may at any time assess a taxpayer in respect of any amount payable because of this section and the provisions of this Division apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152.

160(3) Discharge of a liability. Where a particular taxpayer has become jointly and severally liable with another taxpayer under this section in respect of part or all of a liability under this Act of the other taxpayer,

> (*a*) a payment by the particular taxpayer on account of that taxpayer's liability shall to the extent of the payment discharge the joint liability; but
>
> (*b*) a payment by the other taxpayer on account of that taxpayer's liability discharges the particular taxpayer's liability only to the extent that the payment operates to reduce that other taxpayer's liability to an amount less than the amount in respect of which the particular taxpayer is, by this section, made jointly and severally liable.

160(3.1) Fair market value of undivided interest. For the purposes of this section and section 160.4, the fair market value at any time of an undivided interest in a property, expressed as a proportionate interest in that property, is, subject to subsection (4), deemed to be equal to the same proportion of the fair market value of that property at that time.

160(4) Special rules re transfer of property to spouse or common-law partner. Notwithstanding subsection 160(1), where at any time a taxpayer has transferred property to the taxpayer's spouse or common-law partner pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written separation agreement and, at that time, the taxpayer and the spouse or common-law partner were separated and living apart as a result of the breakdown of their marriage or common-law partnership, the following rules apply:

(*a*) in respect of property so transferred after February 15, 1984,

(i) the spouse or common-law partner shall not be liable under subsection 160(1) to pay any amount with respect to any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

(ii) for the purposes of paragraph 160(1)(*e*), the fair market value of the property at the time it was transferred shall be deemed to be nil, and

(*b*) in respect of property so transferred before February 16, 1984, where the spouse common-law partner would, but for this paragraph, be liable to pay an amount under this Act by virtue of subsection 160(1), the spouse's or common-law partner's liability in respect of that amount shall be deemed to have been discharged on February 16, 1984,

but nothing in this subsection shall operate to reduce the taxpayer's liability under any other provision of this Act.

[Emphasis added.]

INTERPRETATION OF THE FACTS BY THE APPELLANT

[11] The appellant submits that even if the notarial deed indicates she acquired her husband's share of the family residence for zero consideration, that does not reflect reality. She says that it was on her request that her husband transferred to her his share of the family residence because he had decided to start a business and she panicked at the thought that he might put the residence at risk, at the mercy of future creditors. She claims she promised her husband that she would give back his share if

the residence was sold or upon dissolution of the marriage. She explained that it was a verbal agreement with her husband and, as she recalls, it was discussed in the presence of the notary (transcript, pages 50-51).

[12] On May 7, 2004, the spouses entered into a mediation agreement, which was confirmed by the divorce judgment (Exhibit pièce I-1, Tab 9). In the section dealing with the division of the family patrimony, the family residence is included. Paragraph 26 of the agreement provides:

> [TRANSLATION]
> 26. The wife is the sole owner of the family residence located at 706 rue des Patriotes, in Gatineau, in the province of Quebec, the sale price being $80,000.00; in partial payment for the husband's rights in the family patrimony, the wife shall pay the husband the amount of $30,000.00 as follows: $28,000.00 on the date of the signing of these presents, and $2,000.00 in the thirty days following the judgment to be rendered, which represents an initial amount of $40,000 minus $10,000.00 as the husband's share in the family debts; the spouses accordingly give each other full and final release in this regard.

[13] In her testimony, the appellant explained that they had evaluated the residence at $80,000 at the time of the separation and that she was to pay her spouse half of that amount, or $40,000, minus the $10,000 he was to pay her with respect to the line of credit. She explained that it had been established that her husband had a tax liability of around $26,000 at that time, as indicated in paragraph 39 of the agreement, but her husband had declared himself solely responsible for that debt.

[14] The appellant was not aware at the time of the transfer of her husband's share of the family residence on February 11, 2002, that he had a tax liability toward the CRA.

[15] The appellant also submitted evidence that the spouses had borrowed $54,000 on December 6, 2000, from the Bank of Nova Scotia (Exhibit 2 of Exhibit A-1). According to her, this loan was used to pay off the balance of a first mortgage that had been taken out for the purchase of the house, and to pay family expenses and those incurred by her husband on the line of credit.

[16] On March 10, 2004, the appellant personally took out a new mortgage with the Bank of Nova Scotia of $67,500 (Exhibit 3 of Exhibit A-1). With this money, she paid off the mortgage balance owing from the previous loan of $54,000, for which the bank gave acquittance on April 26, 2004 (see last document in Exhibit 2 of

Exhibit A-1). The appellant also indicated that she had repaid $20,000 on the line of credit, $10,000 of which was paid on behalf of her husband, as mentioned, in fact, in the above-noted mediation agreement. She also paid $30,000 for the partition of the family patrimony, as agreed in the divorce agreement.

[17] Moreover, following the hearing, through her counsel, the appellant sent the Court as further evidence, accepted by the respondent, monthly statements for her husband's personal line of credit, indicating that he owed an amount of $11,549.89 on February 19, 2002. This amount had increased to $13,608.52 on March 19, 2002. Additionally, the appellant repaid her husband's line of credit in full on August 23, 2002, using her personal line of credit to pay $13,303.28.

[18] The respondent agreed to reduce the amount of the benefit the appellant received on the transfer of her husband's share in the family residence in February 2002 by an amount corresponding to half the amount of her husband's line of credit that constituted a charge on the family residence on the date of the transfer, that is, half of $11,550, or $5,775. The appellant feels that the benefit, if there is any, should be reduced by the amount she repaid, corresponding to the entire amount of her husband's line of credit balance constituting a charge on the residence at the time of the transfer, namely, $11,550.

PARTIES' SUBMISSIONS

[19] The appellant submits on the one hand that her husband did not transfer his undivided half interest in the family residence to her on February 11, 2002, because she had made an oral promise to give him back his share at the appropriate time. In fact, she maintains that the transfer actually occurred only at the time the divorce agreement was concluded. She also submits that if there was an actual transfer on February 11, 2002, she did indeed give her husband a consideration when the transfer took place in February 2002, which consideration was paid at the time of the divorce agreement. She says that the existence of the verbal agreement is supported by paragraph 26, reproduced above, of the mediation agreement. According to her, it is clearly indicated therein that the sale price is $80,000, meaning that the 2002 transfer only took effect at the time of the mediation agreement ratified by the divorce judgment in 2004. She referred to *Raphael v. The Queen*, 2002 FCA 23, where, she said, it was accepted that a legally enforceable promise to pay creditors may constitute sufficient consideration. Lastly, she relies on subsection 160(4) of the ITA to argue that subparagraph 160(1)(*e*)(i) cannot apply in her case because the transfer of her husband's share in the family property occurred pursuant to a judgment by a

competent court that confirmed a written separation agreement (mediation agreement) in 2004 and because they were living separate and apart at that time.

[20] The respondent relies on the notarized document of February 11, 2002, under which the appellant received her husband's share in the family residence for zero consideration, at a time when she and her husband were not separated and were still bound to each other by the ties of marriage. There cannot have been a transfer of property after the date of the actual transfer recorded in the notarial deed. The transfer occurred one year before the spouses' separation and two years before the divorce judgment; therefore, the appellant cannot avail herself of the exception provided in subsection 160(4) of the ITA. Moreover, the very agreement ratified by the divorce judgment states at paragraph 26 that the appellant was the sole owner on that date. The respondent does not recognize the existence of a parallel oral promise that would contradict the notarial deed. According to the respondent, the payment made by the appellant following the divorce was not a payment as consideration for the transfer of a property right but a payment as consideration for a personal right that took effect at the time of the separation, which occasioned the partition of the family patrimony. The promise to give back to her husband his financial interest in the residence on dissolution of the marriage cannot be the equivalent of consideration given by the appellant at the time of the transfer in 2002, since the husband, through the dissolution, has a right to the division of the family patrimony. This is a right that belongs to the husband by law (under articles 414, 415, 417 and 419 of the *Civil Code of Québec* (**CCQ**)), and the appellant therefore did not transfer to him anything that did not already belong to him. Thus, the personal right to the family patrimony cannot be considered as consideration given at the time of the transfer in 2002.

[21] The relevant articles of the CCQ are reproduced hereunder:

> **DIVISION II**
> FAMILY RESIDENCE
>
> 404. Neither spouse, if the owner of an immovable with fewer than five dwellings that is used in whole or in part as the family residence, may, without the written consent of the other, alienate the immovable, charge it with a real right or lease that part of it reserved for the use of the family.
>
> A spouse having neither consented to nor ratified the act may apply to have it annulled if a declaration of family residence was previously entered against the immovable.
>
> 1991, c. 64, a. 404.

406. The usufructuary, the emphyteutic lessee and the user are subject to the rules of articles 404 and 405.

Neither spouse may, without the consent of the other, dispose of rights held by another title conferring use of the family residence.

1991, c. 64, a. 406.

407. The declaration of family residence is made by both spouses or by either of them.

It may also result from a declaration to that effect contained in an act intended for publication.

1991, c. 64, a. 407.

. . .

Establishment of patrimony

414. Marriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property.

1991, c. 64, a. 414.

415. The family patrimony is composed of the following property owned by one or the other of the spouses: the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan. The payment of contributions into a pension plan entails an accrual of benefits under the pension plan; so does the accumulation of service recognized for the purposes of a pension plan.

. . .

1991, c. 64, a. 415; 2002, c. 19, a. 3.

Partition of patrimony

416. In the event of separation from bed and board, or the dissolution or nullity of a marriage, the value of the family patrimony of the spouses, after deducting the debts contracted for the acquisition, improvement, maintenance or preservation of the property composing it, is equally divided between the spouses or between the surviving spouse and the heirs, as the case may be.

Where partition is effected upon separation from bed and board, no new partition is effected upon the subsequent dissolution or nullity of the marriage unless the spouses had voluntarily resumed living together; where a new partition is effected, the date when the spouses resumed living together is substituted for the date of the marriage for the purposes of this section.

1991, c. 64, a. 416.

417. The net value of the family patrimony is determined according to the value of the property composing the patrimony and the debts contracted for the acquisition, improvement, maintenance or preservation of the property composing it on the date of death of the spouse or on the date of the institution of the action in which separation from bed and board, divorce or nullity of the marriage, as the case may be, is decided; the property is valued at its market value.

The court may, however, upon the application of one or the other of the spouses or of their successors, decide that the net value of the family patrimony will be established according to the value of such property and such debts on the date when the spouses ceased living together.

1991, c. 64, a. 417.

418. Once the net value of the family patrimony has been established, a deduction is made from it of the net value, at the time of the marriage, of the property then owned by one of the spouses that is included in the family patrimony; similarly, a deduction is made from it of the net value of a contribution made by one of the spouses during the marriage for the acquisition or improvement of property included in the family patrimony, where the contribution was made out of property devolved by succession or gift, or its reinvestment.

A further deduction from the net value is made, in the first case, of the increase in value acquired by the property during the marriage, proportionately to the ratio existing at the time of the marriage between the net value and the gross value of the property, and, in the second case, of the increase in value acquired since the contribution, proportionately to the ratio existing at the time of the contribution between the value of the contribution and the gross value of the property.

Reinvestment during the marriage of property included in the family patrimony that was owned at the time of the marriage gives rise to the same deductions, adapted as required.

1991, c. 64, a. 418.

419. Partition of the family patrimony is effected by giving in payment or by payment in money.

If partition is effected by giving in payment, the spouses may agree to transfer ownership of other property than that composing the family patrimony.

1991, c. 64, a. 419.

. . .

Dissolution and liquidation of the regime

465. The regime of partnership of acquests is dissolved by

(1) the death of one of the spouses;

(2) a conventional change of regime during the marriage;

(3) a judgment of divorce, separation from bed and board, or separation as to property;

(4) the absence of one of the spouses in the cases provided for by law;

(5) the nullity of the marriage if, nevertheless, the marriage produces effects.

The effects of the dissolution are produced immediately, except in the cases of subparagraphs 3 and 5, where they are retroactive, between the spouses, to the day of the application.

1991, c. 64, a. 465.

466. In any case of dissolution of a regime, the court may, upon the application of either spouse or of the latter's successors, decide that, in the mutual relations of the spouses, the effects of the dissolution are retroactive to the date when they ceased to live together.

1991, c. 64, a. 466.

467. Each spouse retains his or her private property after the regime is dissolved.

One spouse may accept or renounce the partition of the other spouse's acquests, notwithstanding any agreement to the contrary.

1991, c. 64, a. 467.

ISSUE

[22] The issue is whether the conditions for the application of subparagraph 160(1)(*e*)(i) of the ITA have been met, and whether the appellant could benefit from

the exemption provided in subsection 160(4) of the ITA such that the assessment at issue should be vacated.

ANALYSIS

[23] First of all, I agree with the respondent that the property transfer did indeed take place on February 11, 2002, by virtue of the notarial deed that attests the transfer, and not later on, in the context of the spouses' separation, as the appellant claims. There is no indication whatsoever anywhere in this notarial deed that the transfer would only take effect later. Moreover, the appellant has not proven that this was the undertaking that she had given to her husband. On the contrary, she stated that the main reason for the notarial deed was to save the family residence from potential seizure by a creditor. Through the execution of the notarial deed and through her testimony, she clearly showed that she wanted the property to be transferred to her on that date to protect it from creditors. However, even if she did not know it at the time, the CRA was already a creditor of her husband, who owed more than $50,000 to the tax authorities.

[24] In *The Queen v. Rose*, 2009 FCA 93, a similar situation occurred, except that the wife was aware, at the time of the transfer, that her husband had a creditor. Mr. and Mrs. Rose were co-owners of the matrimonial home and Mr. Rose had his name removed from title to protect the home from any future commercial creditor. Mr. Rose also owed a significant amount of taxes to the CRA. The issue was whether by registering the property solely in his wife's name, Mr. Rose " transferred property, either directly or indirectly, by means of a trust or by any other means whatever" pursuant to subsection 160(1). If such was the case, Mrs. Rose became jointly and severally liable with her husband for his tax debt up to the amount of the fair market value of the property that was transferred, because she had not paid any consideration for this transfer. Mr. Rose claimed that his intention was only to transfer the legal title to his wife and that their relationship regarding the property remained the same. The Federal Court of Appeal did not accept this argument and stated the following at paragraph 21 et seq. and paragraph 31:

> 21 A determination of whether Mr Rose transferred the entirety of his interest to Ms Rose must start with his reason for making the transfer. On this, the evidence is unequivocal: Mr Rose thought that Mr Holyoak might succeed in his claim against him, and wanted to prevent him from placing a lien on the family home. He had taken his name off the title of his daughter’s house for a similar reason.
>
> 22 Mr Rose’s reason for the transfer is almost conclusive evidence of an intention to transfer his beneficial interest to his wife. Only by divesting himself entirely of his

> interest in the property could Mr Rose put it beyond the reach of Mr Holyoak, subject to the right of the latter, if a defeated, hindered or delayed creditor, to seek to have the transfer set aside as a fraudulent conveyance. It is also clear from the evidence that Ms Rose understood the reason for the transfer of title to her.
>
> 23 The question before us is whether it was open to the Tax Court Judge on the evidence before her to conclude that, despite Mr Rose's stated intention to avoid Mr Holyoak's claim, he had established that he did not transfer his beneficial interest when he removed his name from the title and put it into his wife's. I note that Mr Rose did not allege, and the Tax Court Judge did not find, that Mr Rose intended to cheat Mr Holyoak by hiding the fact that, despite the transfer of legal title to his wife, he retained a beneficial interest in the house.
>
> 24 The Tax Court Judge relied principally on three items of evidence to establish that Mr Rose retained his beneficial interest in the house. First, the Roses asserted that they intended only to change the ownership of the legal title and had no discussions about the terms on which Ms Rose was to hold the title. The inference to be drawn from this evidence does not depend on the Roses' credibility. However, this evidence is inconsistent with Mr Rose's undisputed intention to transfer title in order to defeat Mr Holyoak's claim
>
> . . .
>
> 31 In my respectful view, the Tax Court Judge committed a palpable and overriding error when she inferred from the facts that Mr Rose had discharged his burden of establishing that he had retained his beneficial interest in the house. It [is] an almost inescapable inference from Mr Rose's statement that he transferred title in order to prevent Mr Holyoak from pursuing his claim by placing a lien on the house that he intended to do this in the most effective, and lawful, manner: that is, by transferring his entire interest in the house. The evidence on which the Judge relied as proving that he did not do this is, in my opinion, largely equivocal on the nature of the interest transferred to Ms Rose.

[25] Moreover, the very wording of paragraph 26 of the mediation agreement dated May 7, 2004, clearly indicates that the appellant in this case was the sole owner of the family residence. The fact this paragraph states that [TRANSLATION] "the sale price [was] $80,000.00" does not mean that the appellant did not acquire the family residence on February 11, 2002. On the contrary, it simply indicates, in my opinion, that at the time of the mediation agreement, the partition of the family patrimony was to be done taking into account a sale price of $80,000 attributable to the residence on that date. Indeed, according to articles 416 and 417 of the CCQ, in the event of separation from bed and board, or the dissolution or nullity of a marriage, the value of the family patrimony of the spouses, after deducting the debts contracted for the

acquisition, improvement, maintenance or preservation of the property composing it, is equally divided between the spouses. The net value of the family patrimony is determined according to the value of the property composing the patrimony and the debts contracted for the acquisition, improvement, maintenance or preservation of the property composing it on the date of the institution of the action in which separation from bed and board, divorce or nullity of the marriage, as the case may be, is decided; the property is valued at its market value. In my opinion, because paragraph 26, which deals with the residence, is in the family patrimony section of the mediation agreement, that paragraph must be interpreted in the context of the partition of the family patrimony. The inference to be drawn from this is that the indicated sale price of $80,000 was established to determine the market value of the family residence on the date of the mediation agreement for the purposes of the partition of the family patrimony. This figure was used as a starting point for establishing the amount that the appellant, who was the sole owner of the property on the date of the separation, had to give to her husband according to the terms set out in the CCQ. The appellant therefore cannot claim she acquired her husband's share at the time of their separation.

[26] Accordingly, I am of the opinion that the appellant cannot rely on the exemption in subsection 160(4) of the ITA to argue that the transfer of the family residence took place pursuant to a written separation agreement or a judgment of a competent tribunal at a time when she and her husband were separated and living apart as a result of the breakdown of their marriage, because the transfer occurred well before the separation, on February 11, 2002.

[27] With respect to her argument that she gave consideration to her husband when he transferred his undivided share in the family residence, which consideration consisted of her verbal promise to him to give back his share in the event of the dissolution of the matrimonial regime, the appellant referred to *Raphael v. The Queen*, *supra*.

[28] The Federal Court of Appeal stated the following in *Raphael*:

> 9 The stronger argument put by the Appellant was that there had been valid consideration given by the wife in the form of her promise to pay out monies only on his direction. If there was valid consideration equal in value to the property transferred, then section 160(1) does not apply.
>
> 10 If indeed the wife had made a legally enforceable promise to pay out monies only on the husband's direction to his creditors in amounts equal to the monies transferred, this might well have constituted sufficient consideration in order to

> avoid the application of section 160(1). However, this was not the evidence nor was it the finding of the Tax Court Judge. The Appellant when asked whether she had any legal obligation to pay bills as directed by the husband agreed that she had no such legal obligation and that it was only a moral obligation. She admitted further, that he could not force her to pay bills which he wanted paid. If of course there was a legal obligation based on a trust, he could have compelled such payment. This evidence confirms that the Appellant really only felt a moral obligation and we agree with the Tax Court Judge that that is not sufficient consideration.

[29] I do not believe that in this case it can be said that, at the time of the transfer on February 11, 2002, the appellant made a legally enforceable promise to her husband to give him a consideration. The evidence did not show the existence of a genuine contractual agreement between her and her husband at the time of the transfer, a factor that was emphasized in *Logiudice v. Canada*, [1997] T.C.J. No. 742 (QL), 97 DTC 1462, and again by Campbell J. in *Allen v. The Queen*, 2009 TCC 426, cited by the appellant. At most, she had a moral obligation. As a result of the notarial deed, her husband had no means of forcing her to pay him his share. It was only through the dissolution of the matrimonial regime that the husband could claim his right to the partition of the family patrimony.

[30] Indeed, this right of the husband's to the family patrimony, which includes the family residence, is not a property right but a personal right that only takes effect when an event creates a right to the partition of the patrimony (see *Chamberland v. R.*, 2001 CarswellNat 3307 (TCC), para. 35; and *Richard v. R.*, 2004 CarswellNat 5751 (TCC), para. 5). When a separation takes place, a spouse's right to receive part of the family patrimony from the other spouse is recognized by the CCQ, in particular in the above-quoted rules regarding the partition of the family patrimony in article 414 et seq. of the CCQ. There is in such circumstances a transfer of property under a legal obligation, for no consideration (see *Tétrault v. R.*, 2004 CarswellNat 1781 (TCC), at paragraphs 49 and 50).

[31] In the present case, the appellant cannot claim that she gave her husband, at the time of the transfer on February 11, 2002, a consideration equal to her husband's personal right in the family patrimony, since, on the one hand, they were still married on that date and the personal right simply did not exist at the time, and, on the other hand, this personal right only came into existence upon the separation of the spouses more than one year after the transfer, for which no consideration was given.

[32] To avoid the application of subparagraph 160(1)(*e*)(i) of the ITA, the appellant had to prove that at the time of the transfer she gave a consideration at least equal to the fair market value of the property transferred. In the present case, the transfer deed

clearly indicates that the consideration was nil. The verbal agreement the appellant mentioned, and to which I have referred above, is at most a moral obligation that was not legally enforceable at the time of the transfer on February 11, 2002. Lastly, the amounts the appellant paid to her husband on their divorce were so paid pursuant to the civil regime governing the partition of family patrimonies that applies in the province of Quebec. Under this regime, the right to partition only came into being upon the separation, which occurred well after her husband had transferred his share in the family residence. This partition was done for no consideration, and since the family residence had already been transferred to the appellant in a context other than that of the separation, she cannot escape her joint and several liability with her husband under subsection 160(4) of the ITA.

[33] The respondent agreed to reduce the fair market value of the family residence by the amount of the outstanding balance of $11,550 on a home-equity line of credit at the time of the transfer, which the respondent did on the basis of documentation the appellant provided after the hearing. The respondent therefore concedes that the fair market value of the family residence was $63,450 (and not $75,000) on the date of the transfer. Thus, the respondent now maintains that the appellant is jointly and severally liable for the payment of an amount corresponding to the amount by which the fair market value of the property (her husband's undivided share in the residence) at the time it was transferred (namely, ½ x $63,450 = $31,725) exceeds the fair market value at that time of the consideration given for the property (namely, $0). The respondent submits that the appeal should be allowed for the purpose of the issuance of a reassessment for $31,725.

[34] The appellant considers that she paid a consideration of at least $11,550 because she paid the entire debt of $11,550 that her husband had incurred on his personal line of credit.

[35] In my opinion, the respondent's calculations prevail. At the time of the transfer on February 11, 2002, the appellant gave no consideration. She repaid, several months after the transfer, in August 2002, the home-equity line of credit that constituted a charge on the property of which she was the sole owner. The transfer deed clearly states that no consideration was given and the evidence does not show that the amounts paid several months later were so paid as consideration for the transfer.

[36] For these reasons, the appeal is allowed with costs to the respondent calculated in accordance with Tariff B of the *Tax Court of Canada Rules (General Procedure)*, and the assessment is referred back to the Minister for reconsideration and

reassessment on the basis that the appellant is liable to pay the amount of $31,725 under to section 160 of the ITA.

Signed at Ottawa, Canada, this 30th day of March 2011.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 27th day of July 2011.

Erich Klein, Revisor

CITATION:	2011 TCC 193
COURT FILE NO.:	2008-52(IT)G
STYLE OF CAUSE:	ANNE-MARIE VIAU v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	November 12, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
APPELLANT'S WRITTEN SUBMISSIONS:	November 16, 2010 and January 25, 2011
RESPONDENT'S WRITTEN SUBMISSIONS:	February 1, 2011
APPELLANT'S WRITTEN REPLY:	February 10, 2011
DATE OF JUDGMENT:	March 30, 2011

APPEARANCES:

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Counsel for the respondent:	Julian Malone

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