Docket: 2007-4643(IT)G

BETWEEN:

JUDITH MACLEOD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 11, 2012, at Fredericton, New Brunswick

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Jack M. Blackier
Counsel for the Respondent:	Stan W. McDonald

JUDGMENT

The appeal from the assessment made under subsection 160(1) of the *Income Tax Act* for the period from January 2, 1998 to November 5, 2002 is dismissed in accordance with the attached Reasons for Judgment.

Costs are awarded to the Respondent.

Signed at Ottawa, Canada, this 29th day of October 2012.

"V.A. Miller"

V.A. Miller J.

Citation: 2012TCC379
Date: 20121029
Docket: 2007-4643(IT)G

BETWEEN:

JUDITH MACLEOD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] This appeal is from an assessment by the Minister of National Revenue (the "Minister") made under subsection 160(1) of the *Income Tax Act* (the "*Act"*). The Appellant was assessed the amount of $58,794.77 in respect of money her spouse deposited into her bank account between January 2, 1998 and November 5, 2002 while he was a tax debtor.

[2] It is the Appellant's position that the money was never transferred to her and, if it was, then she gave her spouse consideration for the amount transferred.

Facts

[3] The parties submitted a Partial Joint Statement of Facts which reads:

1. By Notice of Assessment dated August 11, 2004, the Minister of National Revenue (the "Minister") assessed the Appellant in the amount of $58,794.77 in respect of transfers of property to the Appellant from Wilber MacLeod pursuant to section 160 of the Act.

2. The Appellant filed a Notice of Objection on September 10, 2004.

3. By Notice of Confirmation dated September 21, 2007, the Minister confirmed the Notice of Assessment.

4. At all material times, the Appellant was the spouse of Wilber MacLeod.

5. At all material times the Appellant and Wilber MacLeod were deemed to be dealing with each other not at non-arm's length pursuant to paragraphs 251(2)(a) and (1)(a).

6. Prior to January 13, 1994, the Appellant and Wilber MacLeod jointly owned the martial home at 5 Station Road, Rothsay (*sic*), New Brunswick (the "Property").

7. On January 13, 1994, Wilber MacLeod conveyed his interest in the Property to the Appellant for no consideration.

8. On January 13, 1994, the Appellant mortgaged the Property to the Bank of Montreal ("BMO") in exchange for a loan (the "Mortgage Loan").

9. On January 13, 1994, Wilber MacLeod guaranteed the Mortgage Loan.

10. At all material times, the Appellant held full legal title to the Property, subject only to the outstanding balance of the Mortgage Loan.

11. Between January 2, 1998, and November 5, 2002, Wilber MacLeod was the source of a total of $58,794.77 (the "Payments") that was deposited into a bank account at the bank (*sic*) of Montreal held solely in the name of the Appellant.

12. The BMO withdrew the Payments from the Appellant's bank account to service the Mortgage Loan.

13. At all material times, the Property was occupied by the Appellant and Wilber MacLeod as their family residence.

14. The Appellant has been and remains personally liable for the mortgage liability on the Property.

15. At no time during the appeal period did BMO call upon Wilber MacLeod to honour his personal guarantee on the Mortgage Loan.

16. The aggregate of all amounts that Wilber MacLeod was liable to pay under the Act in or in respect of the 1995, 1996, 1997, 1998, 2000 and 2002 taxation years was not less than $116,816.81 as of August 11, 2004.

[4] The Appellant was the only witness at the hearing of this appeal and a summary of her evidence follows.

[5] The Appellant graduated from Dalhousie University in 1964 and she taught nursing at the Victoria Hospital in Halifax, Nova Scotia until 1976.

[6] She and her spouse, Wilber (referred to as Wilbur in some of the documents submitted to the court) MacLeod, moved to Rothesay, New Brunswick in 1976; and, in 1979, they purchased a home, as joint tenants, at 5 Station Road in Rothesay (the "Home"). The cost of the Home was $63,000; the Appellant provided $15,000 for the down payment; and, she and her spouse gave the CIBC a mortgage against the Home in exchange for a loan of $48,000.

[7] In 1990, 1992 and 1993, the Minister registered judgments against Wilber MacLeod for his outstanding income tax liability. By January 1994, Wilber MacLeod was also liable for amounts of GST which had not been remitted by him from his law practice. On January 13, 1994, his total income tax and GST liability was $47,115.31.

[8] In early 1994, the Appellant made enquiries with various financial institutions in an attempt to negotiate a new mortgage on the Home. One of the reasons she wanted to renegotiate the mortgage was to get funds to pay her spouse's tax debt. A branch of the Bank of Montreal (the "BMO") agreed to give a loan for $115,000 in exchange for a mortgage on the Home.

[9] According to the Appellant, the bank manager suggested that the Home should be held in the Appellant's name only. On January 13, 1994, Wilber MacLeod transferred his interest in the Home to the Appellant. She gave the BMO a mortgage on the Home for the loan of $115,000 and Wilber MacLeod gave a personal guarantee for the mortgage.

[10] On January 14, 1994, the proceeds of the loan were used, in part, to pay off the outstanding mortgage to the CIBC in the amount of $51,950.90 and to pay Wilber MacLeod's tax debt of $47,115.31.

[11] Wilber MacLeod was the source of all payments which were made on the mortgage. Between January 2, 1998 and November 5, 2002, $58,794.77 (the "Funds") was deposited into the Appellant's bank account so that she could pay the mortgage.

[12] I gathered from the Appellant's evidence that she earned little income during the period 1998 to 2002. In answer to a question from counsel for the Respondent, she stated that her husband earned the money and she spent it.

Law

[13] As stated earlier, the Appellant was assessed the amount of $58,794.77 pursuant to subsection 160(1) of the *Act*. That provision reads 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.

[14] Four requirements must be satisfied for subsection 160(1) of the *Act* to apply: *Williams v. R.*, [2000] 4 C.T.C. 2115 (TCC).

(a) There must be a transfer of property;
(b) The transferor and transferee must not have been dealing at arm's length;

(c) There must be no or inadequate consideration flowing from the transferee to the transferor;

(d) The transferor must have been liable for tax when the property was transferred.

[15] In this appeal only the requirements at (a) and (c) were at issue.

Analysis

(a) Transfer

[16] In support of the Appellant's position that the Funds were never transferred to her, counsel for the Appellant reviewed the decisions in *Wannan v R.*, 2003 D.T.C. 76 (TCC), *Pickard v. R.*, 2010 TCC 535, *Woodland v. R.*, 2009 TCC 434 and *R. v. Livingston*, 2008 FCA 89. He then submitted that there was no transfer of the Funds to the Appellant because Wilber MacLeod had a legal obligation under his guarantee to the BMO. In the alternative, he argued that if there was a transfer of the Funds to the Appellant, she was merely acting as a *de facto* agent or a conduit for either or both Wilber MacLeod and the BMO. In conclusion, he argued that the Appellant never acquired beneficial interest in the transferred Funds as those Funds merely moved through her account for the benefit of the BMO.

[17] The Appellant cannot succeed on her arguments with respect to the transfer of the Funds. When Wilber MacLeod was making deposits into the Appellant's bank account, he was not satisfying his guarantee of the mortgage as the bank had not called upon him to honour his guarantee. There was no evidence that the bank has ever called upon him to honour that guarantee.

[18] The Appellant was not acting as an agent for her spouse or the BMO. Wilber MacLeod was not liable to make payments to the BMO on the mortgage. The Appellant was the only mortgagor named on the mortgage.

[19] The deposit of the Funds into the Appellant's bank account constituted a transfer of those Funds: *R. v. Livingstone*, 2008 FCA 89. She had both legal and beneficial ownership of the Funds as she had complete control over them. It was her evidence that she, on occasion, used some of the Funds to pay other family expenses.

[20] The Appellant definitely benefited from the deposit of Funds in her bank account. Each time the mortgage was paid her equity in the Home increased.

(b) Consideration

[21] Counsel for the Appellant also argued that the Appellant had provided consideration for the transfer of the mortgage payments. The consideration took three forms. (1) It was the amount of $47,115.31 which the Appellant had paid on January 13, 1994 on her spouse's tax debt. (2) The consideration also consisted of the

services which the Appellant provided to Wilber MacLeod both in his law practice and in the maintenance of their home: *R. v. Ducharme*, 2005 FCA 137. (3) Counsel also argued that the Funds were rent payments made by Wilber MacLeod to the Appellant.

[22] In answer to the Appellant's submissions, it was the Respondent's position that the Appellant had been compensated prior to 1998 for the amount she gave her spouse to pay his tax debt. In addition, there was no evidence to value any services provided by the Appellant to her spouse and the Funds were not given to the Appellant in exchange for rent.

[23] The evidence has supported the Respondent's position.

[24] In the Partial Joint Statement of Facts, the parties agreed that Wilber MacLeod transferred his interest in the Home to the Appellant for no consideration. The evidence did not support that statement.

[25] When he transferred his interest on January 13, 1994, Wilber MacLeod knew that the Appellant would pay off his tax debt. He knew this because the mortgage from the BMO was conditional on that requirement. The Appellant gave consideration for the transfer of the Home; it was the promise to pay her spouse's tax debt.

[26] There was no evidence of the fair market value of the Home on January 13, 1994. However, I assume that it was at least $115,000 as the bank was willing to lend the Appellant that amount in exchange for a mortgage. The value of Wilber MacLeod's equity in the Home on January 13, 1994 was at minimum $31,524.55. (To calculate that value, I have subtracted the CIBC mortgage of $51,950.90 from $115,000 and divided the result by 2.)

[27] After the Appellant paid her spouse's tax debt, he was in debt to her for $15,590.76 ($47,115.31 - $31,524.55).

[28] For clarity, I repeat that the Appellant was assessed the amount of $58,794.77 in respect of Funds her spouse deposited into her bank account between January 2, 1998 and November 5, 2002.

[29] The first payment on the mortgage was due on March 1, 1994. I have concluded that from March 1, 1994 to December 31, 1997, Wilber MacLeod more than repaid his debt to the Appellant. He made 46 monthly deposits to the Appellant's bank account and he deposited an amount in excess of $15,590.76 into

her bank account so that she could pay her commitment under the mortgage. My conclusion is based on the following.

[30] Wilber MacLeod made deposits to the Appellant's bank account to cover all mortgage payments. He began to make monthly deposits of $971.96 into the Appellant's bank account on March 1, 1994. I note that the term of the mortgage was only 6 months and I do not know what the instalment payments were when the mortgage was renewed. However, the mortgage renewal agreements for the 6 month periods from September 1996 and March 1997 were in evidence and the instalment payments for those agreements were $1,105.75 and $1,084.47. To cover the mortgage payments for these eighteen months, Wilber MacLeod deposited $18,973.08 into the Appellant's bank account. In addition to this amount, he deposited an unknown amount of money into the Appellant's bank account for 28 extra months.

[31] There was no evidence that the mortgage payments between September 1994 and August 1996 were less than $971.96. There was no evidence that the mortgage was ever in default.

[32] It is my view that the Appellant had been fully reimbursed prior to January 1998 for the amount she paid on her spouse's tax debt.

[33] Counsel for the Appellant relied on the Federal Court of Appeal decision in *Ducharme* for support that the Appellant gave valuable consideration in exchange for the Funds. According to him, this consideration took the form of maintaining the Home by cooking, cleaning, doing laundry and providing primary care to the children of the marriage.

[34] I disagree with his interpretation of the decision in *Ducharme*. It was not based on valuing domestic services and *Ducharme* has been distinguished so that it is restricted to its own facts: See *Yates v. R.*, 2009 FCA 50 at paragraphs 21 to 23.

[35] Counsel for the Appellant also submitted that the Appellant provided services to her spouse in his law practice for no compensation. However, there was no evidence given with respect to the length or value of these services.

[36] Counsel's last argument with respect to consideration was that the mortgage payments were rent paid to the Appellant by her spouse. This argument was not supported by the evidence. On cross examination, the Appellant agreed that the Funds deposited into her bank account were not rent payments from her spouse.

[37] In conclusion, there was a transfer of the Funds from Wilber MacLeod to the Appellant when they were deposited into her bank account and she did not give any consideration for the Funds. All of the requirements of subsection 160(1) have been met and the appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 29th day of October 2012.

"V.A. Miller"

V.A. Miller J.

CITATION:	2012TCC379
COURT FILE NO.:	2007-4643(IT)G
STYLE OF CAUSE:	JUDITH MACLEOD AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	June 11, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
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APPEARANCES:

Counsel for the Appellant:	Jack M. Blackier
Counsel for the Respondent:	Stan W. McDonald

COUNSEL OF RECORD:

For the Appellant:

Name:	Jack M. Blackier
Firm:	Barry Spalding

For the Respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada