Docket: 2010-3142(GST)I

BETWEEN:

RUPEE BASHIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 15, 2012, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Virginie Falardeau
Counsel for the Respondent:	Jocelyne Mailloux-Martin

JUDGMENT

The appeal with respect to an assessment under Part IX of the *Excise Tax Act* dated September 17, 2009 and bearing number PM-15440 is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 9th day of January 2013.

"François Angers"

Angers J.

Citation: 2013 TCC 6
Date: 20130109
Docket: 2010-3142(GST)I

BETWEEN:

RUPEE BASHIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from an assessment dated September 17, 2009 and confirmed on July 28, 2010 whereby the appellant was assessed for an amount of $26,707.92 with respect to the transfer of various properties to her by her husband Bashir Munshi (the transferor). The assessment was issued under section 325 of the *Excise Tax Act* (*ETA*) on the basis that, at the time of the transfer of the various properties, the transferor was liable to pay the amount now assessed against the appellant and that, as a result of the said transfer, the appellant became jointly and severally liable with the transferor to pay that amount.

[2] It is not disputed that on February 18, 2008, the following properties were transferred to the appellant by the transferor:

1 - a property located on Woodland Street in Montreal;
2 - a property located on Saint-Charles Street in Montreal;
3 - an undivided half of a property located on Workman Street in Montreal (the appellant owned the other half); and
4 - an undivided half of a property located on Lionel-Groulx Street in Montreal (the appellant owned the other half).

These properties are hereinafter referred to as the "four properties".

[3] It is also not disputed that the debt owed by the transferor under the *ETA* was in the amount assessed, which, or a prorata basis, represented 18% of the total indebtedness under both the Quebec tax laws and the *ETA* of $145,706.59.

[4] The transferor was operating a restaurant in Montreal and was registered for the purposes of Part IX of the *ETA*. His business was audited in June 2007 for all its reporting periods in the years 2004, 2005 and 2006. It was determined that GST and Quebec sales tax on all of the business's cash sales had not been remitted during the periods covered by the audit. The cash sales were reconstituted and, to make a long story short, the auditor and the transferor finally agreed to settle the matter. On August 24, 2007, an agreement was signed with Revenu Québec concerning the Quebec sales tax amount owed, and on the same day one was also signed respecting the GST. A further agreement was signed on November 5, 2007 regarding the transferor's personal income tax for the 2005 and 2006 taxation years. Under this latter agreement the Quebec Minister of Revenue was to reassess the transferor for unreported business income of $273,646 for both taxation years. In reaching all these agreements, the transferor was assisted by his accountant.

[5] According to the documents introduced in evidence the appellant married Bashir Munshi (the transferor) on August 3, 1995 in Brahmanbaria, Bangladesh, under the legal regime of partnership of acquests as the transferor was domiciled in the province of Quebec at the time. They have two children, a boy born in 1998 and a girl born in 2004.

[6] According to the appellant, her marriage began to break down as early as her arrival in Canada with the transferor, and things got worse after the birth of their daughter in 2004. It eventually led to their separation and the signature of a separation agreement (hereinafter referred to as the Agreement) on November 4, 2007.

[7] The Agreement was signed in the presence of a consultant who is an accountant and whose name was not disclosed. The witness to the transferor's signature is his brother-in-law and the witness to the appellant's signature is a friend of the brother-in-law's. According to the appellant, the separation agreement was entered into in the presence of community members, as is the tradition in their culture.

[8] In the Agreement, both spouses renounced any claims to alimony. The transferor agreed to transfer the four properties as a lump sum payment of child support for the two children and to forfeit any future claims to those properties and to

their principal residence as well as another property, which was owned by the appellant. Custody of the children was given to the appellant with visiting rights to the transferor.

[9] The transfer of the four properties was made on February 18, 2008. On January 22, 2008, between the date of the Agreement and the date of the transfer, the appellant mortgaged the four properties. A mortgage document (Deed of Hypothec) was signed by the appellant for each of the four properties and she is in each case identified as the only "grantor". The transferor is identified in all four mortgage documents as a non-owner spouse who joins with the "grantor" for the purposes of those documents, confirms that the grantor's declarations regarding her marital status are correct, and also consents to the mortgages. The marital status clause in all four mortgage documents reads as follows:

> 8.2 MARITAL STATUS
>
> (a) of the *Grantor*. said Dame Rupee BASHIR hereby declares that she is married in a first wedlock to Bashir MUNSHI under the legal regime of partnership of acquests by virtue of the Laws of the Province of Quebec where the husband was domiciled at the time of their marriage which was celebrated at Brahmanbaria, Bangladesh, on the 3rd of August 1995, the spouses returning thereafter to the Province of Quebec and residing permanently here until this day, and that neither her civil status nor matrimonial regime has been or is in the process of being changed. Furthermore, said Dame Rupee BASHIR hereby declares that the presently hypothecated does not serve and will never serve as the family residence of the spouses.
>
> (b) of the intervening co-owner (if applicable): (Not applicable).

[10] In addition, clause 6.8 of the four mortgage documents, under the heading Representations, reads as follows:

> 6.8 REPRESENTATIONS
>
> *You* [the appellant] represent to *us* that:
>
> (a) *you* are the absolute and uncontested owner of *your Property*;
>
> . . .
>
> (e) *your* marital status, if applicable, is as indicated in section 8.2 of the *Deed of Hypothec*;

> (f) if *you* are married, no change has occurred in *your* marital status since *your* marriage and no agreement exists between *you* and *your* spouse to change *your* matrimonial regime or *your* marriage contract and no petition seeking the approval of such an agreement and no petition for separation as to property, separation as to bed and board, for annulment of marriage or for divorce is pending.

[11] These mortgages were signed before notary Igor Pryszlak as was the deed of transfer of February 18, 2008. In the deed of transfer, the address for both the transferor and the appellant is the same. It lists each of the four properties and states that the consideration for the transfer is the sum of $1.00 and other good and valuable consideration which the transferor acknowledges having received from the transferee. No mention is made of a lump sum payment in lieu of child support. Although the appellant and the transferor had been separated since November 4, 2007, the deed of transfer still contains a civil status and matrimonial regime clause which reads as follows:

> CIVIL STATUS AND MATRIMONIAL REGIME
>
> Said Bashir Miah MUNSHI, the Transferor, and Dame Rupee BASHIR, the Transferee, hereby declare that, notwithstanding any prior declarations made under previous title deeds, they are indeed married to one another both in a first wedlock under the legal regime of partnership of acquests by virtue of the Laws of the Province of Quebec where the husband was domiciled at the time of their marriage which was celebrated at Brahmanbaria, Bangladesh, on the 3rd of August 1995, the spouses returning thereafter to the Province of Quebec and residing permanently here until this day, and that neither their civil status nor matrimonial regime has been or is in the process of being changed.

[12] When asked why the transfer took place almost three months after the separation agreement, the appellant answered that she was mentally upset at the time and that she had to go to the bank for the mortgages. On cross-examination, she said she had refinanced the properties so that she could pay the transferor's debt and that he would have kept the money for that purpose. As for the same address being given for the transferor and her on the deed of transfer, the appellant was unable to explain why this was so and could only say that the transferor had been living with his sister since November of 2007. The evidence also discloses that in correspondence he received from Revenu Québec and the Canada Revenue Agency after May 14, 2008, the address indicated for the transferor is his sister's, and in one such item of correspondence, his marital status was shown as "separated". The transferor's explanation for the gap between the date of the Agreement and the date of the deed of transfer is that they had to arrange the mortgages. No explanation was given for the fact that his address is stated to be the same as his wife's on the deed of transfer other

than that he knew the notary and that although the deed of transfer indicates the same address, he had actually been living with his sister since November of 2007. The appellant testified that she was not aware that the transferor had been audited, and the transferor testified that during the relevant period he never spoke to his wife about his tax debts.

[13] Neither the appellant nor the transferor has initiated proceedings before the Quebec courts regarding either their separation or a divorce.

[14] On June 10, 2009, the appellant acquired another property in the Montreal area. The transferor intervened in that transaction to consent thereto and to confirm the declaration of civil status and matrimonial regime, which were described in the same terms as those found in the deed of transfer of the four properties and the four mortgage documents referred to above. The appellant testified that she never read the document and that it was her understanding that the transferor had to sign for the purpose of confirming the matrimonial regime. The transferor, on the other hand, said that he had to sign the purchase agreement as his wife would not have been able to get a loan unless he signed. It is interesting to note that, the next day, the transferor made a proposal to his creditors.

[15] The transferor's sister and her husband both testified that the transferor has been living with them since 2007.

[16] Ms. Estelle Darbouze was a collection agent for Revenu Québec. She informed the appellant of her intention to assess her as a result of the aforesaid transfers and asked her to provide evidence regarding her separation. None was provided by the appellant and Ms. Darbouze saw the separation agreement for the first time two weeks before the trial. The appeals officer for Revenu Québec also only saw the separation agreement two weeks before the trial. The existence of a written separation agreement was mentioned in the appellant's notice of objection dated October 20, 2009, but no copy of the agreement was attached or forwarded at that time.

[17] Section 325 of the *ETA* reads as follows:

> (1) **Tax liability re transfers not at arm's length —** Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to
>
> > (*a*) the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,

(*b*) an individual who was under eighteen years of age, or

(*c*) another person with whom the transferor was not dealing at arm's length,

the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of

(*d*) the amount determined by the formula

$$A - B$$

where

A is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the transferee for the transfer of the property, and

B is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the *Income Tax Act* in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and

(*e*) the total of all amounts each of which is

(i) an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or

(ii) interest or penalty for which the transferor is liable as of that time,

but nothing in this subsection limits the liability of the transferor under any provision of this Part.

(1.1) Fair market value of undivided interest — For the purpose of this section, 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.

(2) Assessment — The Minister may at any time assess a transferee in respect of any amount payable by reason of this section, and the provisions of sections 296 to 311 apply, with such modifications as the circumstances require.

(3) Rules applicable — Where a transferor and transferee have, by reason of subsection (1), become jointly and severally liable in respect of part or all of the liability of the transferor under this Part, the following rules apply:

(*a*) a payment by the transferee on account of the transferee's liability shall, to the extent thereof, discharge the joint liability; and

(*b*) a payment by the transferor on account of the transferor's liability only discharges the transferee's liability to the extent that the payment operates to reduce the transferor's liability to an

> amount less than the amount in respect of which the transferee was, by subsection (1), made jointly and severally liable.
>
> **(4) Transfers to spouse or common-law partner** — Despite subsection (1), if at any time an individual transfers property to the individual's spouse or common-law partner under a decree, order or judgment of a competent tribunal or under a written separation agreement and, at that time, the individual and the individual's spouse or common-law partner were separated and living apart as a result of the breakdown of their marriage or common-law partnership (as defined in subsection 248(1) of the *Income Tax Act*), for the purposes of paragraph (1)(*d*), the fair market value at that time of the property so transferred is deemed to be nil, but nothing in this subsection limits the liability of the individual under any provision of this Part.

[18] The appellant's counsel submits that subsection 325(4) of the *ETA* is applicable in this case: the transfer of the four properties was made under a written separation agreement and the appellant and the transferor (the husband) were separated and living apart at the time as a result of the breakdown of their marriage. In the alternative, the appellant's counsel argues that there was a consideration given by the appellant in that she renounced her right to child support for her children, who were four and ten years old at the time. Although this fact is not in evidence, counsel submits that child support for both children adds up to $25,000 a year and that it represents sufficient consideration for the transfer.

[19] The respondent's counsel questions the timing of the separation agreement as it was signed one day before the transferor signed an agreement with Revenu Québec concerning his personal income tax and a little more than two months after he had signed another agreement with Revenu Québec respecting the GST amount he owed. Counsel for the respondent further argues that no mention of the separation is made in the deed of transfer of the four properties and that the address for both the appellant and the transferor is the same more than three months after they say they separated. As an alternative argument, counsel for the respondent submits that the only exception to the application of section 325 is found in subsection 325(4), and it is an exception with regard to any payments made for child support. One must therefore meet the requirements set out in subsection 325(4) if one is to avoid the application of section 325, and therefore the matter of the consideration given and of fair market value with respect to the transferred properties becomes irrelevant.

[20] There is no doubt that the facts of this case leave many questions unanswered. Many of the facts and situations referred to are questionable, particularly with regard to the sequence of events and the reasons given for what was done. It appears strange to me that the transferor never spoke to his wife about his tax problems at any time

prior to the transfers; moreover, the appellant was never made aware of the audit taking place at her husband's restaurant. Yet she testified that the four properties were mortgaged in January 2008 to pay her husband's debts. She did not specify which debts and I suppose one could conclude that they did not include the tax debt as no tax debt payment was made. We do not know which debts needed to be paid. We do not know how the appellant was able to mortgage the four properties on January 22, 2008 when she in fact became their owner only on February 18, 2008, almost a month later.

[21] The advances made on the four mortgages totalled one million two hundred and ninety thousand dollars. In a letter dated July 31, 2009 from the Royal Bank of Canada to Revenu Québec, the balance owed on the mortgages held by the bank on the same four properties is determined as of January 21, 2008, one day before the January 22, 2008 mortgages, and as of February 18, 2008, the day of the transfer. The amounts shown as owing are substantially the same for both dates, except in the case of the Woodland property, which has a new balance of $134,090.61 on February 18, 2008 whereas there is none for January 21, 2008. The letter also indicates that they are joint mortgages while the four mortgage documents produced in evidence show the appellant as the grantor. I reproduce below, without the account numbers, the information given in the letter of July 31, 2009:

Renseignements sur le compte:

Description	**Propriété**	**N^{o} de compte**	**Solde**	
			21/01/2008	18/02/2008
Hypothèque conjointe	Workman	XXXXXX	150,976.13$	150,599.84$
Hypothèque conjointe	Woodland	XXXXXX	s/o	134,090.61$
Hypothèque conjointe	St-Charles	XXXXXX	76,906.41$	76,500.46$
Hypothèque conjointe	Lionel-Groulx	XXXXXX	205,868.50$	204,909.39$

[22] The evidence presented does not enable me to understand how four mortgages totalling over one million dollars in January 2008 can show the same balance due a month later, except for the Woodland property, as before the execution of these four mortgages.

[23] The other inconsistency that the existence of these four mortgages creates is that the appellant stated that she mortgaged the four properties so that the transferor could pay his debts, but the Agreement states that the transfer to her is made for child support. It seems to me that the amount that these four properties were mortgaged for leaves little room for child support in that the income from the rents would

necessarily be applied to the mortgage payments and that, in the event of their sale, there would be hardly any equity in the four properties when one compares the mortgage amounts with their assessed value for property tax purposes.

[24] Subsection 325(4) of the *ETA* clearly indicates that the transfer must be made pursuant to a written separation agreement. In this case, there is no apparent explanation for the fact that the transfer took place on February 18, 2008 other than that it was for the purpose of mortgaging the four properties, and the deed of transfer is silent regarding the existence of the separation agreement. In fact, not only does the deed of transfer contain no reference to the Agreement or to the alleged separation but there is no mention of the consideration of $1.00 and other good and valuable consideration being for child support.

[25] The deed of transfer of February 18, 2008 indicates that the address of the transferor is the same as that of the appellant, and the transferor's explanation for that is that he knew the notary. I do not find that explanation any more reliable than the explanation as to why it took three months after their separation to transfer the four properties. The same so-called mistake regarding the addresses also appears in all four mortgage documents on page 19, where the grantor’s spouse is described as being "of the same place", and in the contract for the purchase of another property entered into by the appellant on June 10, 2009, where her husband, who intervened in the transaction, is again described as being "of the same place".

[26] In none of these documents is it indicated that the appellant is separated from her husband. In fact, the deed of transfer does not even mention the consideration referred to in the separation agreement. It states instead that the consideration is $1.00 and other good and valuable consideration. The civil status and matrimonial regime clauses or marital status clauses found in all of the above-mentioned documents state that neither the spouses' civil status nor their matrimonial regime has been or is in the process of being changed. I can understand that statement being made with regard to their matrimonial regime but not with regard to their civil status, even though they are still legally married.

[27] It is indeed inconsistent that we find no reference to the Agreement or to the alleged separation in any of the documents nor any mention that the deed of transfer was executed pursuant to the Agreement. The declaration in the deed of transfer that they both resided at the same address must not be taken lightly and, as stated by the late Justice Dussault in *Yeramiyan v. Canada*, [1997] T.C.J. No. 1393 (QL), at paragraph 20:

> The declarations by the parties in a [notarial] deed like this – which by its very nature is authentic – must not be taken lightly.

[28] It seems to me that the notary who drafted both deeds of transfer and the four mortgages could have shed some light on the status of both the appellant and her husband and on the state of their affairs. The fact that the transferor was not called as a witness leads me to conclude that his evidence would not have been favourable to the appellant.

[29] It is also strange that the appellant and the transferor signed their separation agreement just one day before the latter reached an agreement with Revenu Québec on the amount of personal income tax he owed.

[30] On considering all of the evidence and the many incongruities it contains, I find as well that the testimony of the transferor's sister and her husband is inconsistent with the documentary evidence and raises other unanswered questions; hence I cannot give any weight to their evidence.

[31] In order to meet her burden of proof, the appellant must, on a balance of probabilities, satisfy this Court that one of the exceptions stated in subsection 325(4) of the *ETA* exists here. I am not satisfied that the evidence adduced permits me to conclude that when the transfer occurred or when the Agreement was signed there had been a breakdown of the marriage in that the appellant and the transferor were living separate and apart, nor do I find that the deed of transfer was a logical extension of the Agreement.

[32] Regarding the alternative argument, raised by the appellant's counsel, as to there having been a valid consideration, I do not find that the facts of this case support such an argument since the only exception to the application of section 325 is that found in subsection 325(4) (see *Yates v. Canada*, 2009 FCA 50).

[33] The appeal is dismissed with costs.

Signed at Ottawa, Canada, this 9th day of January 2013.

"François Angers"

Angers J.

CITATION:	2013 TCC 6
COURT FILE NO.:	2010-3142(GST)I
STYLE OF CAUSE:	Rupee Bashir v. Her Majesty the Queen
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	October 15, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	January 9, 2013

APPEARANCES:

Counsel for the Appellant:	Virginie Falardeau
Counsel for the Respondent:	Jocelyne Mailloux-Martin

COUNSEL OF RECORD:

For the Appellant:

Name:	Virginie Falardeau
Firm:	Starnino Mostovac Montreal (Quebec)

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada