Federal Court of Appeal | Cour d'appel fédérale

Date: 20220414

Docket: A-452-19

Citation: 2022 FCA 66

CORAM: **WEBB J.A.**
GLEASON J.A.
MONAGHAN J.A.

BETWEEN:

MICHELLE KUFSKY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 13, 2021.
Additional written submissions filed on February 21, 2022, March 2, 2022 and March 14, 2022.

Judgment delivered at Ottawa, Ontario, on April 14, 2022.

REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	GLEASON J.A.
CONCURRING REASONS BY:	MONAGHAN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The Minister of National Revenue (the Minister) assessed the Appellant under section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). This section, in general terms, allows the Minister to assess a particular person (the transferee) for all or a portion of the unpaid tax debt of another person (the tax debtor), if the tax debtor transfers property to the transferee and they are not dealing at arm's length with each other.

[2] In this case, the Appellant's corporation, Mon Refuge Décor Inc. (the Corporation), had an unpaid tax debt and, in the Minister's view, paid dividends to her that exceeded the amount of the Corporation's unpaid tax debt. As a result, the Appellant was assessed based on the unpaid tax debt of the Corporation. She appealed this assessment to the Tax Court of Canada. The Tax Court dismissed her appeal (2019 TCC 254).

[3] The issues raised by the Appellant are whether:

(a) the amounts paid are dividends for the purposes of section 160 of the Act because, in the Appellant's view, the Corporation did not comply with the applicable corporate law and the applicable corporate law prohibited the payment of a dividend by an insolvent corporation;

(b) the amounts were actually paid to the Appellant;

(c) the payments, if made, were repayment of amounts owing to the Appellant or were paid to her as salary or management fees; and

(d) if the amounts were paid to her as dividends, the taxes payable by the Appellant as a result of the payment of the dividends should be taken into account in determining the amount that could be assessed under section 160 of the Act.

[4] For the reasons that follow, I would dismiss this appeal.

I. Background

[5] The Appellant is the sole shareholder of the Corporation. There is conflicting evidence with respect to whether the Appellant was the sole director of the Corporation or whether she and husband were directors. In any event, nothing in this appeal turns on whether the Appellant was the sole director or whether she and her husband were the directors.

[6] The Corporation provided interior home decorating and furnishing advice and products primarily for condominiums in the Mont-Tremblant area. Following the financial crisis in 2008, the Corporation's business declined and the Corporation ceased operations. The Corporation had a significant unpaid tax debt in respect of its 2008 and 2010 taxation years.

[7] When the Appellant filed her tax returns for 2009, 2010 and 2011, she did not report any dividends. As noted by the Appellant in her memorandum (at paragraph 13), she reported the following amounts of income:

2009 – nil

2010 – Business Income - $20,000
Interest Income - $4

2011 – Interest Income - $4.13

[8] The Appellant testified that her personal living expenses were charged to the Corporation's credit card and each year the accountants would allocate the personal expenditures to her. Her accountants also prepared and filed her tax returns.

[9] T1 adjustment requests were completed by the accountants for the Corporation (who were also her accountants) in July 2012 to reflect the following dividends paid by the Corporation to the Appellant:

2009 – $35,000

2010 – $15,000

2011 – $35,000

[10] The Tax Court Judge stated, in paragraph 6 of his reasons:

> [6] From 2009 to 2011, the Corporation issued T5 slips stating that it had paid dividends to [the Appellant] according to the following schedule:
>
> 2009: $35,000
>
> 2010: $15,000
>
> 2011: $35,000

[11] However, there is nothing in the record to support a finding that the Corporation issued these T5 slips during these years. The assumption made by the Minister in the Reply filed with the Tax Court was only that the Corporation had issued T5 slips, *i.e.* there was no indication of when the Corporation issued these slips. There were only two witnesses at the Tax Court hearing

(the Appellant and her husband) and neither one of them addressed the T5 slips, let alone when these slips were issued. The record includes the T5 summaries and the T5 slips for the three dividends in issue. Each T5 summary is dated July 7, 2012. As a result, there is no basis to find that the Corporation issued the T5 slips from 2009 to 2011; rather, the T5 slips were prepared and issued at the same time that the T1 adjustment requests were prepared and submitted.

[12] The Appellant did not sign the T1 adjustment requests and she did not recall signing any documents, before July 2012, authorizing the payment of the dividends. Nonetheless, the Minister reassessed the Appellant to impose tax based on the amounts as set out in paragraph 9 having been paid as dividends by the Corporation to her in these years. Despite her contention that the accountants should not have filed these T1 adjustment requests and that the dividends were not authorized by the director (or directors) of the Corporation, she paid the amount of tax that was assessed (paragraph 20 of the Appellant's memorandum). The Appellant did not file a notice of objection to any of these reassessments. The validity of these reassessments is not an issue in this appeal.

[13] On June 7, 2013, the Appellant was assessed under section 160 of the Act based on the unpaid tax liability of the Corporation because the total amount of the dividends that were paid to her exceeded this unpaid tax liability. She objected to this assessment. Following the filing of amended T2 tax returns of the Corporation, the Minister reassessed the Appellant under section 160 of the Act to reflect the revised unpaid tax liability of the Corporation of $68,616.
The Appellant objected to this reassessment. By notice of confirmation dated April 21, 2017, the Minister confirmed the reassessment. The Appellant filed an appeal with the Tax Court.

II. Decision of the Tax Court

[14] Before the Tax Court, the Appellant raised a number of arguments. The Appellant argued that there was consideration for the dividends, the amounts paid were not dividends because the Corporation did not comply with the applicable provincial corporate law, and a portion of the dividends were loan repayments.

[15] The Tax Court Judge found that no consideration was provided for the dividends, the amounts in question were still dividends for the purposes of the Act even if the Corporation did not comply with the applicable corporate legislation, and no portion of the dividends were loan repayments.

[16] As a result, the Tax Court dismissed the Appellant's appeal.

III. Relevant Statutory Provision

[17] The Appellant was assessed (and subsequently reassessed) under subsection 160(2) of the Act, on the basis that the conditions set out in subsection 160(1) of the Act were satisfied. Subsections 160(1) and (2) are 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	**160 (1)** Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

(*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

(*b*) a person who was under 18 years of age, or

b) une personne qui était âgée de moins de 18 ans;

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

c) une personne avec laquelle elle avait un lien de dépendance,

the following rules apply:

les règles suivantes s'appliquent :

(*d*) the transferee and transferor are jointly and severally, or solidarily, 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 for it, and

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la Loi de l'impôt sur le revenu, chapitre 148 des Statuts revisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

(*e*) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(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

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

(ii) le total des montants représentant chacun un montant que l'auteur du transfert doit payer en vertu de la présente loi (notamment un montant ayant ou non fait l'objet d'une cotisation en application du paragraphe (2) qu'il doit payer en vertu du présent article) au cours de l'année d'imposition où les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années.

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

Toutefois, le présent paragraphe n'a pas pour effet de limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi ni celle du bénéficiaire du transfert quant aux intérêts dont il est redevable en vertu de la présente loi sur une cotisation établie à l'égard du montant qu'il doit payer par l'effet du présent paragraphe.

…

[…]

(2) 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 (including, for greater certainty, the provisions in respect of interest payable) 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 in respect of taxes payable under this Part.

(2) Le ministre peut, en tout temps, établir une cotisation à l'égard d'un contribuable pour toute somme à payer en vertu du présent article. Par ailleurs, les dispositions de la présente section, notamment celles portant sur les intérêts à payer, s'appliquent, avec les adaptations nécessaires, aux cotisations établies en vertu du présent article comme si elles avaient été établies en vertu de l'article 152 relativement aux impôts à payer en vertu de la présente partie.

IV. Issues and Standards of Review

[18] In this appeal, the Appellant no longer pursued the argument that, if the amounts were paid as dividends, there was consideration for the dividends. However, the Appellant still pursued the arguments that:

(a) the amounts are not dividends for the purposes of the Act because the Corporation did not comply with the applicable corporate law in relation to the declaration and payment of the dividends, as the director (or directors) of the Corporation did not approve the payment of the dividends, and the applicable statute governing the Corporation prohibited the payment of a dividend at a time when the Corporation was insolvent;

(b) the amounts in issue were not paid to the Appellant; and

(c) if the Corporation did pay the amounts in issue to the Appellant, the payments were, in part, repayment of an amount owed to the Appellant or payments of salary or management fees.

[19] The issue in paragraph (c) above will only arise if the amounts were paid and the amounts are not dividends for the purposes of the Act.

[20] The Appellant also raised an additional argument that was raised before the Tax Court but which was not addressed by the Tax Court. The Appellant submitted that, if the amounts were paid as dividends, the fair market value of such amounts, for the purposes of section 160 of

the Act, should be reduced by the amount of tax payable by the Appellant as a result of the payment of such dividends.

[21] The standard of review for any question of fact or mixed fact and law is palpable and overriding error and for any question of law is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

V. Analysis

[22] There is no dispute that the Appellant was the sole shareholder of the Corporation and therefore she was deemed to not be dealing at arm's length with the Corporation throughout the period in issue in this appeal (paragraph 251(1)(*a*) and subparagraph 251(2)(*b*)(i) of the Act). There is also no dispute that the Corporation had an unpaid tax liability for its 2008 and 2010 taxation years in the total amount of $68,616.

[23] The first issue that will be addressed is the Appellant's argument that as a result of the non-compliance with the applicable corporate law, the amounts, if paid, are not dividends for the purposes of the Act.

A. *Non-Compliance with the Applicable Corporate Law*

[24] The Appellant raises two arguments in relation to the applicable corporate law. The first argument is that the Corporation did not follow the appropriate procedure for the declaration and

payment of the dividends because the director (or directors) did not approve the declaration and payment of the dividends. The second argument is that subsection 38(3) of the *Business Corporations Act*, R.S.O. 1990, c. B.16, prohibits the payment of a dividend by a corporation if there are reasonable grounds for believing that the corporation is (or would be after the payment of the dividend) unable to pay its debts. The Appellant submits that the Corporation was insolvent when the dividends were purportedly paid.

[25] The Tax Court Judge relied on the decision of this Court in *2753-1359 Québec Inc. v. Canada*, 2010 FCA 32 (which was referred to as *Larouche v. Canada* in the reasons of the Tax Court Judge and which is referred to herein as *Larouche*) for the proposition that "a reported dividend, even if not in compliance with the provincial statute, remains valid for tax purposes" (paragraph 23 of the Reasons of the Tax Court).

[26] The following paragraphs from *Larouche* are cited for this proposition:

> [9] Dividends are property within the meaning of the Act: see subsection 248(1). According to case law, there is no doubt that the payment of dividends is a transfer of property within the meaning of section 160.
>
> [10] In addition, it is difficult to see how the legal treatment of a dividend under corporate and civil law would prevent Parliament from regarding that dividend, for tax purposes, as a transfer of property without consideration when made by persons who are not dealing at arm's length.

[27] In *Larouche*, there was no dispute that the payment was a dividend. This Court described the issue in *Larouche* in paragraph 3:

> [3] The appeal before this Court raises only one issue: Is the payment of dividends to the appellant a transfer of property without consideration within the meaning of section 160 of the Act?

[28] The comments in paragraph 10 of *Larouche* above must be considered in light of the issue as stated by this Court and the arguments that were submitted by the appellants, which are set out in paragraphs 4 – 7:

> [4] The company 9039-0618 Québec Inc. (the assignor) transferred $141,250 in dividends to appellant Christian Larouche and $41,980 in dividends to appellant 2753-1359 Québec Inc. At the time of the transfer, the assignor owed income tax, interest and penalties to the federal Minister of Revenue.
>
> [5] The fact that a transfer was made between persons who were not dealing at arm's length is not contested. However, the appellants submit that the payment of a dividend should not be considered to be a transfer without consideration as described in section 160. This submission is based on the following two lines of reasoning.
>
> [6] First, legal ownership of a dividend must be determined on the basis of the principles of Quebec corporate and civil law. Corporate law determines the rules that apply when a dividend is illegal. Under article 910 of the *Civil Code of Québec*, a paid dividend is revenue yielded by capital invested in a company.
>
> [7] Second, although the payment of a dividend is a transfer within the meaning of section 160, it is not made without consideration. The declaration of a dividend either creates a debt to the shareholder — in which case the payment of the debt and the release given by the shareholder are consideration, or the dividend is paid in consideration of a corresponding reduction in the value of the shares held by the shareholder — or it represents an income paid in consideration of the capital supplied by the shareholder for use by the corporation.

[29] There was no dispute in *Larouche* that the amounts in question were dividends. The comment in paragraph 10 of *Larouche* was simply that the applicable corporate and civil

law do not change the treatment of the dividend for the purposes of the Act – it was still a transfer of property for no consideration for the purposes of the Act.

[30] Before the Tax Court, the appellants in *Larouche* raised two arguments – that the dividend was not a transfer of property and, alternatively, if it was a transfer of property, there was consideration given for the dividend (2008 TCC 448). The appellants in *Larouche* did not raise before either the Tax Court or this Court the issue of whether an amount that was purportedly paid as a dividend was not a dividend for the purposes of the Act because the corporation did not comply with the applicable corporate law or because the applicable corporate law prohibited the payment of a dividend by that corporation.

[31] *Larouche* does not stand for the proposition cited by the Tax Court Judge in this matter.

[32] Although the Crown, in paragraph 20 of its memorandum, refers to two additional cases (*Royal Bank of Canada v. The Queen*, 2005 TCC 802 and *Boisvert v. The Queen*, 2016 TCC 195) as support for the proposition that the reported dividend should still be treated as a dividend for the purposes of the Act, notwithstanding any non-compliance with the applicable corporate law, neither one of these cases involved a reported dividend that did not comply with the applicable corporate law.

[33] As a result, none of the cases cited by the Tax Court Judge or the Crown address the issue of whether an amount that is stated to be a dividend will be treated as a dividend for the purposes of the Act if the Corporation does not comply with the applicable corporate law or the applicable

corporate law would prohibit the payment of a dividend by the Corporation. In any event, in my view, it is not appropriate to deal with this issue in this appeal.

[34] As noted, the Appellant did not report any amount as a dividend when she filed her 2009, 2010 or 2011 income tax returns. Her accountants prepared T1 adjustment requests based on the dividends in question having been paid to the Appellant in these years. Dividends are taxable in the year in which they are received (section 82 of the Act). The Appellant was reassessed to impose tax for each of her 2009, 2010 and 2011 taxation years on the basis that she had received these amounts as dividends in these years. If the Appellant did not agree that dividends were paid to her in 2009, 2010 and 2011, she could have filed notices of objection to these reassessments. However, she paid the additional tax arising as a result of the reassessments, without filing any notice of objection to these reassessments.

[35] In my view, this concluded the matter for the Appellant in relation to whether, for the purposes of the Act, she had received dividends in these years. To allow the Appellant to now challenge whether these amounts were dividends would be an indirect challenge to the previous reassessments that imposed tax based on these amounts being dividends that she had received in 2009, 2010 and 2011. Since she did not object to these reassessments but instead paid the additional tax liability arising from these reassessments, she has accepted that, for the purposes of determining her tax liability for 2009, 2010 and 2011, she received dividends in these years in the amounts of $35,000, $15,000 and $35,000, respectively.

[36] As noted below in addressing whether the dividends were paid to the Appellant, these dividends reduced the amount that she owed to the Corporation. Therefore, she benefited from the payment of these dividends, as they reduced her debt to the Corporation and reduced the amount that would otherwise be included in her income under subsection 15(2) of the Act. The amount of tax payable under the Act, based on the Appellant having received dividends, would be less than the amount of tax that she would have been required to pay if she had received the same amounts as other income, such as salary or management fees, or if the amounts would have been included in her income as outstanding debts that she owed to the Corporation (*Chan v. The Queen*, 2012 TCC 168, at para. 15). Therefore, the Appellant benefited from paying less tax than if the amounts would have been included in her income under subsection 15(2) of the Act and also, as discussed further below, from deferring her tax liability from the years in which her debts to the Corporation arose to the year in which the dividends were paid.

[37] In *Wolofsky v. Canada*, 2001 FCA 119, the Court stated the following principle based on an earlier decision of this Court in *The Dominion of Canada General Insurance Company v. The Queen*, 86 D.T.C. 6154, [1986] 1 C.T.C. 423 (FCA):

> [29] Properly understood, the proposition for which the *Dominion of Canada* decision stands is that a taxpayer who has benefited from the deduction of an amount on the basis that it was properly deducted in one year is estopped from claiming that it was not properly deducted in order to avoid its inclusion in income in the following year. …

[38] Following the hearing of this appeal, the Court asked the parties for their submissions on this proposition from *Wolofsky*. Both parties provided further written submissions to this Court.

[39] The Appellant submitted that based on the decision of this Court in *The Queen v. Imperial Oil Ltd.*, 2003 FCA 289, she is not precluded from arguing, in relation to the assessment issued under section 160 of the Act, that the amounts were not dividends. However, in *Imperial Oil*, the taxpayers (Imperial Oil Limited and Inco Limited) were challenging the assessments of the taxes payable for the taxation years in issue on the basis that, contrary to their own filing positions, the actual amount of taxes payable should be less than the amount as reported. This Court held that the taxpayers were not bound by their filing positions and could challenge assessments of taxes payable for the particular years on the basis that their filing positions were not correct. This case would have been applicable if the Appellant had objected to the reassessments that were issued for 2009, 2010 and 2011 that imposed tax based on her having received dividends in these years. However, since this is not an appeal from the reassessments that imposed tax based on her having received dividends of $35,000 in 2009, $15,000 in 2010, and $35,000 in 2011, the decision of this Court in *Imperial Oil* is not applicable.

[40] The Appellant noted that the issue arising from the proposition in *Wolofsky* was not raised in the pleadings before the Tax Court, but also acknowledged that “estoppel by representation” was implied in the Crown’s oral argument. Other than this reference to the pleadings and the oral argument, the Appellant did not make any further submissions on this point.

[41] The Appellant also referred to the voluntary disclosure dated August 6, 2013, which was filed in relation to the Appellant’s 2010 taxation year. In her submissions, the Appellant states that, in making the voluntary disclosure, she repudiated the filing position that dividends had

been paid to her in 2009, 2010 and 2011. However, the documents in the record contradict this statement.

[42] The voluntary disclosure consists of a covering letter, a T1 Adjustment Request and a schedule detailing the amounts due to (or from) the shareholder. In the covering letter, the lawyer for the Appellant states:

> … She includes with this letter a T1 adjustment request, in order to add $83,482.00 in management fees to her 2010 income. She further includes company records supporting this amount.

[43] The letter only addresses the addition of $83,482 in management fees to the Appellant's 2010 income. There is no reference to these management fees replacing any dividends or removing any dividends from her income.

[44] The T1 adjustment request only identifies one adjustment - an additional $83,482 to be included as other income (on line 130). The following explanation is provided in the form: "[t]he taxpayer has management fees related to a shareholder loan in 2010."

[45] The schedule, which is included as part of the voluntary disclosure, lists the entries in the shareholder loan account starting on February 3, 2009 and ending on January 31, 2010 (to correspond to the taxation year of the Corporation). There is an entry dated January 31, 2010 that reflects a dividend paid of $15,000. The schedule reflects a reduction in the amount payable by the Appellant to the Corporation, as a result of the payment of this dividend. The balance owing by the shareholder (taking into account the dividend, but not the management fees indicated in

the voluntary disclosure) is $83,482 – the amount of the management fees stipulated in the voluntary disclosure. Therefore, the management fees of $83,482, identified in the voluntary disclosure, were used to eliminate the balance of the debt of the Appellant to the Corporation, after the dividend had already reduced the balance payable by the Appellant to the Corporation by $15,000. If the dividend had not been paid, the balance owing by the Appellant (before reflecting the management fees) would have been $98,482.

[46] The schedule attached to the voluntary disclosure does not include the dividend paid in 2009. The reason that the schedule does not include this dividend is that the dividend paid in 2009 was paid on January 31, 2009, and the first entry in the schedule is dated February 3, 2009. The opening balance in the schedule included with the voluntary disclosure shows an amount payable to the Appellant of $638. This amount is equal to the closing balance as shown on the shareholder loan schedule that was submitted separately, at the Tax Court hearing, by the Appellant for the Corporation's 2009 fiscal year. That amount ($638 payable to the Appellant) was determined by reflecting a dividend of $35,000 paid on January 31, 2009. If no dividend had been paid on January 31, 2009, the Appellant would have owed the Corporation $34,362 as of January 31, 2009.

[47] Therefore, the schedule submitted as part of the voluntary disclosure does not repudiate the payment of the dividends in 2009 and 2010, but rather directly or indirectly confirms the payment of a dividend of $35,000 in 2009 and $15,000 in 2010.

[48] Since the schedule submitted as part of the voluntary disclosure only reflects the transactions that occurred between February 3, 2009 and January 31, 2010, it does not cover the time period when a dividend of $35,000 would have been paid on January 31, 2011.

[49] The documents in the record directly contradict the submissions of the Appellant related to the voluntary disclosure.

[50] In the Crown's written submissions, the Crown stated that there was no detriment to the Crown as a result of the Appellant's representations that she received dividends in 2009, 2010 and 2011. The Crown did not provide any explanation for this statement. This assertion in the circumstances of this case is perplexing.

[51] The Appellant and her husband, at the Tax Court hearing, testified that the corporate credit card was used to pay for business expenditures as well as personal expenditures. The amounts charged to the credit card would be allocated between business expenditures and personal expenditures by the bookkeeper and the accountant. Mr. Kufsky testified that the accountant "would basically tell us how we're going to be reporting to the government" (at page 58, lines 4 and 5, of the transcript of the Tax Court hearing).

[52] The amounts identified by the bookkeeper and the accountant as personal expenditures increased the amount payable by the Appellant to the Corporation. As a result of the provisions of subsections 15(2) and 15(2.6) of the Act, any indebtedness of the Appellant to the Corporation that is incurred in a particular calendar year will be included in the income of the Appellant for

that year, unless that debt is repaid within one year after the end of the taxation year of the Corporation in which the debt was incurred.

[53] Since the corporate credit card was used to pay for personal living expenses, it would be expected that, at the end of each particular fiscal year of the Corporation, an amount would be paid by the Corporation to the Appellant to offset the shareholder debt arising as a result of the payment of the personal expenditures by the Corporation. However, as noted in paragraph 7 above, the Appellant, in her tax returns, did not report any income in 2009, and she reported only $20,000 as business income and $4 as interest income in 2010 and only $4 as interest income in 2011.

[54] As discussed further below in addressing whether the dividends were paid to the Appellant, the shareholder loan schedules submitted by the Appellant show substantial amounts owing by the Appellant to the Corporation as of January 31, 2010 and January 31, 2011, even after the schedules reflected the dividends in issue. Even though the revised shareholder loan schedule for 2010 submitted with the voluntary disclosure reflects a smaller amount owing by the Appellant to the Corporation as of January 31, 2010 (after the dividends for 2009 and 2010 are taken into account), it is still a significant amount.

[55] The T1 adjustment requests that added the dividends in issue to the Appellant's income were filed on July 30, 2012. Prior to filing these T1 adjustment requests, the Appellant would have been indebted to the Corporation, as of January 31, 2009, in the amount of $34,362.14. As of July 2012, this amount would have been outstanding for more than one year after the end

of the Corporation's taxation year that ended on January 31, 2009. Likewise, the amounts payable by the Appellant to the Corporation as of January 31, 2010 and January 31, 2011 would also have been outstanding for more than one year after the end of the taxation year of the Corporation in which these debts arose.

[56] As a result, but for the acceptance by the Minister of the T1 adjustment requests submitted on July 30, 2012, the Appellant would have been required to include the outstanding debts in her income under subsection 15(2) of the ITA. By accepting the T1 adjustment requests that reflected the dividends in issue, the Appellant was able to convert what would have been taxable as unpaid shareholder debt into taxable dividends. Since the taxes payable by the Appellant as a result of receiving the dividends in issue are less than the taxes that would have been payable by her as a result of having unpaid shareholder debt of the same amount added to her income, there was a detriment to the Crown in treating these amounts as dividends in these years.

[57] The Appellant also benefited from a deferral of the tax liability as a result of the Minister accepting the T1 adjustment requests showing dividends paid in 2009, 2010 and 2011. Since the Appellant was regularly using the Corporation's credit card to pay for personal living expenses, she would be incurring debts throughout a particular year. This is also confirmed by the numerous entries with different dates, as set out in the shareholder loan accounts. Therefore, the payment of a dividend on January 31st of each year would have resulted in a repayment of the debts that were incurred in the immediately previous calendar year (or possibly in the year preceding that year).

[58] Under subsection 15(2) of the Act, the unpaid debts would have been included in the Appellant's income in the year in which the debts were incurred. However, the dividends that were used to repay the outstanding debts of the Appellant were included in her income in the year in which the dividends were paid. As a result, for example, while subsection 15(2) of the Act would have required the Appellant to include the amount of debts incurred in 2008 in her income in 2008, the dividend (which was paid on January 31, 2009 and was used to repay these debts) would be included in her income in 2009. The detriment to the Crown was the deferral of the Appellant's tax liability from 2008 to 2009 (and hence a reduction in interest payable by the Appellant). There were similar deferrals for the debts incurred in 2009 and 2010 that were repaid as a result of the payment of the dividends on January 31, 2010 and January 31, 2011.

[59] As a result, by the Minister accepting the T1 adjustment requests that reflected the dividends paid in 2009, 2010 and 2011, there was a benefit to the Appellant and a detriment to the Crown.

[60] The Appellant, in her reply submissions, challenges the Crown's view of the evidence presented at the Tax Court hearing, but does not raise any additional submissions concerning the application of the proposition as set out in *Wolofsky*.

[61] Notwithstanding the submissions of the parties, in my view, the proposition as set out in *Wolofsky* is applicable in this matter.

[62] In this appeal, the dispute does not relate to a deduction claimed by the Appellant in determining her tax liability for 2009, 2010 or 2011. However, the general principle, as stated in *Wolofsky*, as it applies to this case, is that a taxpayer who has benefited from having an amount included in his or her income as a dividend in a particular taxation year (and who has not objected to the assessment of tax based on having received this dividend) is estopped from claiming in any subsequent appeal related to the application of section 160 of the Act, that the previous filing position was wrong.

[63] The Appellant has accepted that she received dividends of $35,000 in 2009, $15,000 in 2010 and $35,000 in 2011 for the purposes of determining her tax liability under the Act. She has therefore accepted that these amounts are dividends for the purposes of sections 82 and 121 of the Act for 2009, 2010 and 2011. She has also benefited from having received these dividends. She cannot now say, for the purposes of section 160 of the same statute, that she did not receive these same amounts as dividends in the same years.

[64] As a result, the Appellant cannot raise, in this appeal, the argument that the amounts in question were not dividends that she received in 2009, 2010 and 2011 because the Corporation did not comply with the applicable corporate law or because the applicable corporate statute prohibited the payment of dividends by the Corporation.

B. *Were the Dividends Paid to Her?*

[65] The Appellant also raised the argument that the dividends were not paid to her. Since, as noted above, she has accepted that her tax liability for 2009, 2010 and 2011 should be determined on the basis that she received these dividends in these years, she cannot now argue that the dividends were not paid to her in these years.

[66] It should also be noted that the Appellant, as part of the documents she submitted at the Tax Court hearing, included shareholder loan schedules for the periods ending January 31, 2009, January 31, 2010 and January 31, 2011. According to these shareholder loan schedules, the Appellant owed the following amounts to the Corporation:

Date	**Amount**
January 31, 2009	($638)
January 31, 2010	$174,185
January 31, 2011	$174,329

[67] The financial statements for the Corporation for the years ending January 31, 2009, January 31, 2010 and January 31, 2011 also include a reference to “Loans Receivable – Related Parties”, which reflects a different amount owing to the Corporation from “Related Parties”:

Year Ending:	**Amount**
January 31, 2009	$38,088
January 31, 2010	$212,910
January 31, 2011	$213,055

[68] No explanation was provided for the discrepancies between the amounts payable by the shareholder to the Corporation based on the shareholder loan schedules and the amounts payable to the Corporation by “Related Parties” based on the financial statements. There is also no indication of whether “Related Parties” includes persons other than the shareholder.

[69] In any event, the shareholder loan schedules indicate that as of January 31, 2009, the Corporation owed the Appellant $638. The same schedule reflects a dividend of $35,000 paid to her to reduce the amount that she owed the Corporation as of January 31, 2009. If this dividend had not been paid, then instead of the Corporation owing her $638, she would be indebted to the Corporation in the amount of $34,362. Similarly, the shareholder loan schedules submitted by the Appellant reflect the dividends of $15,000 for the period ending January 31, 2010 and $35,000 for the period ending January 31, 2011. If these amounts had not been paid and credited to the shareholder loan account, the amount that the Appellant would have owed to the Corporation would have been significantly larger as of January 31st of each year.

[70] The Appellant benefited from a reduction in the amount that she owed the Corporation. As noted above, if an individual shareholder becomes indebted to his or her corporation during a particular calendar year and such debt is not repaid within one year from the end of the corporation’s taxation year in which the debt arose, such debt is included in the income of the shareholder for the calendar year in which the debt was incurred (subsections 15(2) and (2.6) of the Act).

[71] The financial statements for the Corporation also reflect the same dividends as having been paid in these fiscal years. For each fiscal year, the amounts owing by "Related Parties" to the Corporation as stated in the financial statements for the Corporation exceeds the amount owing by the Appellant as the sole shareholder based on the shareholder loan schedules.

[72] As noted above, the Appellant cannot now raise the argument that she did not receive the dividends in question. In any event, there is also no merit to her argument that the dividends were not paid, as they were credited to her shareholder loan account to reduce the amount that she owed the Corporation. The dividends were also reflected in the financial statements of the Corporation and therefore reduced the "Loans Receivable – Related Parties", albeit to a different amount than the amount indicated in the shareholder loan schedules.

C. *Should the Amount Paid be Treated as Repayment of Amounts Payable to the Appellant or as Salary or Management Fees?*

[73] Since the Appellant cannot now argue that, for the purposes of section 160 of the Act, the amounts in issue were not received by her as dividends, these amounts are dividends for the purposes of this section. The Appellant cannot now challenge the classification of the amounts as dividends and attempt to reclassify them as repayment of an amount payable to her or as salary or management fees for the purposes of section 160 of the Act.

[74] In any event, there is no merit to the Appellant's argument that the Corporation was repaying her for an amount that the Corporation owed to her. Despite the Appellant's argument that she was being repaid for an automobile that she purchased for the Corporation in 2010, this

is not reflected in the records that she submitted at the hearing. Neither the shareholder loan schedules nor the financial statements reflect a balance owing to the Appellant by the Corporation in any fiscal year ending in 2010 or later. Rather, both documents reflect large amounts owing by the Appellant to the Corporation as of January 31, 2010 and January 31, 2011, even after the dividends in issue resulted in a reduction in the amounts owing by the Appellant to the Corporation.

D. *Fair Market Value of the Amount Paid*

[75] The Appellant also submitted that, for the purposes of section 160 of the Act, the amounts paid as dividends should be reduced to reflect the tax that she was required to pay as a result of receiving the dividends. However, subparagraph 160(1)(*e*)(i) of the Act provides that the liability of the transferee is based on the fair market value of the property at the time it was transferred. In *Canada v. Gilbert*, 2007 FCA 136, this Court confirmed that, for the purposes of section 160 of the Act, the fair market value of a dividend paid to a shareholder is the amount of the dividend paid, without taking into account the tax consequences to the recipient of the dividend. I agree. The fair market value of property for the purposes of section 160 of the Act is not reduced because the recipient is required to pay tax in relation to the receipt of property from the tax debtor. The Appellant cannot succeed in this argument.

E. *Purpose of Section 160 and Result of the Appellant's Transactions*

[76] In this case, the dividends were paid by setting-off the amount of the dividends against the amount payable by the Appellant to her Corporation. This set-off of debts had the same effect as if both debts had been paid by cross-payments (*Eyeball Networks Inc. v. Canada*, 2021 FCA 17, at para. 63). Although in *Eyeball Networks Inc.* this Court held that "[t]he law is clear that the payment of a *bona fide* debt cannot trigger the application of subsection 160(1)", the set-off in that case did not arise as a result of the corporate tax debtor paying a dividend to reduce the debt payable by the shareholder to that corporate tax debtor.

[77] By setting-off the dividends against the amount payable by the Appellant, her debt payable to the Corporation was reduced and, correspondingly, the assets of the Corporation that would have been available to pay its tax debts were reduced. The amount payable by the Appellant to her Corporation was her liability and the Corporation's asset (a receivable).

[78] As noted in *The Queen v. Hewett* (1997), 98 D.T.C. 6003 (FCA):

> We agree with the learned Tax Court judge that the purpose of section 160 of the *Income Tax Act* is to prevent a taxpayer from defeating the claim of the Minister to unpaid taxes by transfering his assets to a spouse, or certain other persons, for little or no consideration. In our view, this means that the 'property' referred to in the section must be that property interest of the taxpayer that would have been available to the Minister for attachment had the transfer not taken place.

[79] The payments of the dividends by the Corporation to the Appellant were transfers of property for no consideration and reduced the assets of the Corporation (the amount payable to

the Corporation by the Appellant) that would otherwise have been available to pay the Corporation's tax liability.

VI. Conclusion

[80] As a result, I would dismiss this appeal with costs.

"Wyman W. Webb"
J.A.

"I agree
Mary J.L. Gleason J.A."

MONAGHAN J.A. (Concurring Reasons)

[81] I have read the reasons of my colleague, Justice Webb, and agree with him on many issues. I agree with his conclusion that, for purposes of section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp) (the Act), the fair market value of a dividend paid to a shareholder is not reduced by the recipient's tax liability on the dividend.

[82] While I also agree with paragraphs 24–33 of his reasons, I must express disagreement with the Appellant's position that a dividend could not have been declared and paid because doing so would have breached the solvency test under applicable corporate law—in this case subsection 38(3) of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the OBCA). While a breach of the solvency test may be unwise, and have consequences for the directors, shareholders or corporation, that does not mean a dividend was not declared and paid. Section 130 of the OBCA states directors who vote for a resolution authorizing a dividend contrary to the solvency test may be jointly and severally liable to restore the amount of the dividend to the corporation. It does not state the dividend is void. Failure to comply may be an offence giving rise to a fine or imprisonment under section 258 of the OBCA. Violation of the solvency test may give rise to an oppression claim: *SCI Systems Inc. v. Gornitzki Thompson & Little Co*., (1997), 147 D. L.R. (4th) 300, 1 C.B.R. (4th) 164, varied on other grounds (1998) 110 O.A.C. 160 (Ont. Div. Ct.). The Appellant has not pointed to any authority suggesting the declaration or payment of a dividend in violation of the solvency test voids the dividend.

[83] As to paragraphs 34–64 of Justice Webb's reasons regarding the principles of estoppel and collateral attack on the Appellant's assessments for 2009, 2010 and 2011, I am uncertain that

they apply. In my view, it may be open to the Appellant to raise the argument that the amounts were not dividends, notwithstanding that her own tax liability in those taxation years was assessed on the basis that she received dividends.

[84] As Justice Webb states, the validity of those assessments is not an issue in this appeal. There is no doubt that, unless varied or vacated on objection or appeal, or a reassessment is issued, the assessments of the Appellant's 2009, 2010 and 2011 taxation years are deemed valid and binding: subsection 152(8) of the Act. However, an assessment fixes liability for tax, interest and penalties under the Act; it does not establish the veracity of the facts on which it is based. In other words, assessments may be wrong, even if they are binding: *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N. R. 201 at para. 27.

[85] Subsection 152(8) expressly recognizes this by deeming an assessment to be valid and binding "notwithstanding any error, defect or omission in the assessment". Subsection 152(4.2) does as well. Although a taxpayer has no right to remedy errors in assessments beyond the normal reassessment period, in appropriate circumstances it permits a taxpayer to ask the Minister to reassess to correct errors in assessments that would otherwise be statute-barred.

[86] While the Appellant may be unable to challenge the assessments of her 2009, 2010 or 2011 taxation years, that is not what she seeks to do in this appeal. Her objective is to challenge a different assessment—the one issued to her under section 160—and I am not certain estoppel precludes her from doing so. However, I prefer to leave that question for another case because I agree this appeal should be dismissed, albeit for different reasons.

[87] In assessing the Appellant under section 160, the Minister assumed that Mon Refuge Décor Inc. (the Corporation) paid dividends to her. The Appellant disagrees, asserting no dividends were declared, or paid or could be declared or paid because of the solvency test. For reasons I have explained, I reject this latter assertion.

[88] Expressing disagreement with the Minister's assumption is not enough. To successfully challenge the section 160 assessment before the Tax Court, the Appellant bore the burden of "demolishing" that assumption. To do so, she was required to at least make out a *prima facie* case that the Minister's assumption is incorrect*: Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, 148 D.L.R. (4th) 1 at paras. 92–93 [*Hickman Motors*].

[89] In *Amiante Spec Inc. v. Canada*, 2009 FCA 139 [*Amiante*], this Court explained a *prima facie* case as follows:

> [23] A *prima facie* case is one "supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the one established by that evidence" (*Stewart v. Canada*, [2000] T.C.J. No. 53, paragraph 23).
>
> [24] Although it is not conclusive evidence, "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering that "[i]t is the taxpayer's business" (*Orly Automobiles Inc. v. Canada*, 2005 FCA 425, paragraph 20)

[90] Unchallenged and uncontradicted evidence can demolish the Minister's assumptions: *Hickman Motors* at para. 93; *House v. Canada*, 2011 FCA 234, 338 D.L.R. (4th) 436 at para 31. Before the Tax Court, the Appellant's only evidence in support of her position that no dividends

were declared or paid was oral testimony and her initial tax returns for the 2009 to 2011 taxation years. This evidence was both challenged and contradicted.

[91] In his reasons, Justice Webb has reviewed the evidentiary record before the Tax Court in significant detail, relieving me of doing so. However, certain aspects of the oral testimony not described by Justice Webb are important to my conclusion that the Appellant did not make out a *prima facie* case.

[92] First, the Appellant was not asked whether dividends had been declared or discussed. Rather she was asked whether she *recalled* signing documents declaring a dividend before the T1 adjustments in 2012—and said she did not. Similarly, she was asked if she *remembered* having a discussion about dividends; she did not. In fact, the Appellant had difficulty remembering and recalling many things and recognizing documents, including her initial tax return (without the dividends), the shareholder loan ledger, the Corporation's bank statement, and the voluntary disclosure that she signed.

[93] Several times during her testimony, the Appellant testified that her husband was responsible for the accounting and tax matters. She did not work with the accountants; rather, her husband "looked after all the accounting, but we would just submit everything to the accountant and ...[t]hey file your taxes and try to …make you pay as less taxes as possible." She conceded that the accountant was authorized to file their tax documents and that was the way they had always operated.

[94] Her husband, Allan Kufsky, alleged the accountant made many errors leading them to engage a new accountant and to have the financial statements redone. While the former accountant sued the Kufskys and the Corporation for unpaid fees, and the defendants counterclaimed alleging errors by the accountant, that litigation settled. However, the following exchange during the Tax Court hearing between Mr. Kufsky and the Appellant's counsel is relevant:

> MR. AITKEN: And as a result of the work done by your former accountants, was there an amount owing to Revenue Canada.
>
> MR. KUFSKY: Well, Revenue Canada wanted us to pay back all of the dividends because we weren't allowed to take them, and because the company was—really and truthfully, we had no idea. We were not even—you know, we relied on this accountant for 35 years. He would say at the end of the year we're going to allocate dividends, we're going to do a salary. And I've spoken to other business people. We really—most of us don't have a clue what a dividend is, other than it's a lower way, if you own a business, of declaring income at a lower tax level. We don't know what the rules are behind that. So, if it wasn't allowed to be done, then, really the accountants should be responsible. I know they're not, but they should be because they're the experts. We're relying on them to give us proper direction.

[95] Mr. Kufsky, like the Appellant, acknowledges they took the accountant's advice on how the personal expenses, reflected in the shareholder account, should be treated—as dividends or salary. He recognizes that dividends are subject to a lower tax rate. He expresses a concern that the accountants recommended dividends when "it wasn't allowed", not that dividends were not recommended nor that that recommendation was not accepted by the Kufskys at the time.

[96] Mr. Kufsky also denied having ever seen the shareholder loan schedule, describing it as a "back-end document". He "only looked at financial statements". Both the shareholder loan schedule and the financial statements in evidence indicate payment of dividends.

[97] While accounting records do not create reality, they may reflect reality: *VanNieuwkerk* v. *The Queen*, 2003 TCC 670, [2004] 1 C.T.C. 2577, at para. 6. Notwithstanding that Mr. Kufsky testified that the financial statements were redone by a new accountant, none of those revised financial statements were tendered in evidence and so it is not known whether they too reflect dividend payments. Neither Mr. Kufsky nor the Appellant was asked that question. Thus, the only financial statements in evidence show dividends were paid, consistent with the respondent's assumption.

[98] Justice Webb's detailed review of the evidentiary record before the Tax Court demonstrates that the Appellant's own documentary evidence, as well as her actions and inactions, not only contradict her position that dividends were neither declared nor paid, but bolster the Minister's assumption that the Corporation paid her dividends. The respondent's exhibits, consisting of tax filings made by the Appellant and the Corporation, also contradict the Appellant's version of the facts and support the Minister's assumption. The oral testimony was ambiguous at best. The Appellant's position is not "supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved": *Amiante* at para. 23.

[99] In these reasons, I have chosen to refer to a *prima facie* case. That phrase has been used repeatedly to describe what a taxpayer challenging the Minister's assumptions must do. Some commentary suggests that *prima facie* case is intended to mean something less than "on a balance of probabilities". I am not convinced and endorse the approach Justice Webb outlined in *Sarmadi v. Canada*, 2017 FCA 131, 2017 D.T.C. 5081, at paras. 61–63, repeated in *Eisbrenner*

v. Canada 2020 FCA 93, leave to appeal to the SCC dismissed 2020 S.C.C.A. No. 334. However, for the Appellant's benefit, I have assumed that a *prima facie* case requires something less than a balance of probabilities. Nonetheless, she has failed.

[100] In my view, her evidence fell far short of that necessary to make a *prima facie* case that the Minister's assumption that the Corporation paid her dividends is incorrect.

[101] That, in my view, is sufficient to dismiss the appeal and I would do so with costs.

"K.A. Siobhan Monaghan"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED NOVEMBER 7, 2019, CITATION NO. 2019 TCC 254

DOCKET:	A-452-19
STYLE OF CAUSE:	MICHELLE KUFSKY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 13, 2021
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	GLEASON J.A.
CONCURRING REASONS BY:	MONAGHAN J.A.
DATED:	APRIL 14, 2022

APPEARANCES:

George Boyd Aitken	FOR THE APPELLANT
Cédric Renaud-Lafrance	FOR THE RESPONDENT

SOLICITORS OF RECORD:

George Boyd Aitken Professional Corporation Ottawa, Ontario	FOR THE APPELLANT
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT