Docket: 2012-3414(IT)G

BETWEEN:

ELIZABETH HARDTKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 4, 2014, at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	D. Kenneth Gibson Ryan Flewelling
Counsel for the Respondent:	Ryan R. Hall

JUDGMENT

The appeal from the Notice of Assessment number 1492994 pursuant to section 160 of the *Income Tax Act* is dismissed.

Costs are awarded to the Respondent.

Signed at Halifax, Nova Scotia, this 3rd day of June 2015.

"V.A. Miller"

V.A. Miller J.

Citation: 2015TCC135
Date: 20150603
Docket: 2012-3414(IT)G

BETWEEN:

ELIZABETH HARDTKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The Appellant was assessed pursuant to section 160 of the *Income Tax Act* (*"ITA"*) for the amount of $249,999 with respect to the transfer of the matrimonial home (the "Property") from her spouse to her on September 29, 2000 while he was a tax debtor.

[2] The only issue in this appeal is whether the fair market value of the Property exceeded the fair market value of the consideration given by the Appellant for the transfer of the Property.

[3] The Appellant asserts that she provided consideration in excess of the fair market value of the Property for its transfer to her. The consideration was her assumption of the mortgage on the Property; her unregistered equitable interest in a resulting or constructive trust in the Property which was relinquished at the time of the transfer; and, cash contributions she made both before and after the transfer to her spouse and his businesses.

[4] The witnesses at the hearing were the Appellant; Lori Kimball, Field Officer with the Canada Revenue Agency and, Keely Moure, Certified Financial Planner.

[5] The parties submitted an Agreed Statement of Facts (Partial) which I have attached as Appendix A to this decision. A summary of the facts from the hearing and the Agreed Statement of Facts is as follows.

Facts

[6] The Appellant and Dieter Hardtke (the "spouse") were married on August 27, 1977 and they are still married to each other.

[7] The spouse started to practice as a chiropractor around 1975 and he continued his business as a chiropractor during the relevant period. I gather from the evidence that initially he carried on his business as a chiropractor as a sole practitioner. He later carried on his business through one or more corporations in which he was the sole shareholder and officer.

[8] From 1980 to 2000, the Appellant was employed full time as a chiropractic assistant in her spouse's businesses.

[9] The parties gave details of the properties acquired by the Appellant's spouse. There are two properties which are relevant to this appeal:

a) On or about October 20, 1978, the spouse acquired sole title to a residential property in the Village of Winchester (the "Winchester Property"). The purchase price of the Winchester Property was $80,000 which was paid by $24,000 in cash and $56,000 in mortgage proceeds.

b) The spouse operated his chiropractor business on the first level of the Winchester Property and the Appellant and her spouse lived on the second level until the Winchester Property was sold on September 1, 1983 for $100,000. This amount was paid to them with cash of $45,133.42 and the assumption of the mortgage of $54,866.58.

c) On September 2, 1983, the spouse used the cash from the sale of the Winchester Property and he acquired sole title to the residential property in Manotick which became the matrimonial home and which is the subject of this appeal (the "Property"). The purchase price for the Property was $180,000 and it was paid by $55,000 in cash and $125,000 in mortgage proceeds.

d) From the date of purchase to September 2000, four mortgages were granted on the Property. The Appellant was not a mortgagor/chargor under any of these mortgages but she did consent to the mortgages and she signed as spouse of the mortgagor. The four mortgages were as follows:

(i) on August 11, 1983, the spouse granted a mortgage to the Royal Bank of Canada for proceeds of $125,000 which was used to acquire the Property ("the first mortgage");

(ii) on January 6, 1987, the spouse granted a mortgage to the Royal Bank of Canada for proceeds of $160,000 which was used in part to repay the outstanding balance of the first mortgage ("the second mortgage");

(iii) on June 20, 1989, the spouse granted a mortgage to the Royal Bank of Canada for proceeds of $250,000 which was used in part to repay the outstanding balance of the second mortgage ("the third mortgage");

(iv) on February 20, 1996, the spouse granted a mortgage to the Bank of Montreal for proceeds of $65,000 ("the fourth mortgage").

[10] The Appellant recalled that some of the proceeds of the second mortgage were used to purchase a clinic in Manotick (the "Manotick clinic"). This clinic was purchased in the name of a numbered company which was wholly owned by the spouse. A portion of the proceeds from the third mortgage on the Property was used to renovate the Manotick clinic and the fourth mortgage was used to establish a line of credit for the clinic.

[11] In 1995, the Appellant's spouse purchased a second clinic in the name of a numbered company which he wholly owned. This clinic was located in Winchester (the "Winchester clinic"). The consideration given for this clinic was $155,000 and it was paid by cash.

[12] The Appellant's spouse transferred the Property to her on September 29, 2000. At the time of transfer, the fair market value of the Property was $315,000 and all mortgages, except the fourth mortgage of $65,000, had been discharged. As consideration for the transfer, the Appellant assumed the mortgage and gave her spouse $1 in cash.

[13] According to the Appellant, the Property was transferred to her to shield it from potential lawsuits by her spouse's patients. At the time, the spouse had just finished defending a lawsuit from a former patient who had accused him of improper conduct. The lawsuit had lasted three years and was resolved prior to the transfer of the Property to the Appellant.

[14] At the time of the transfer, the Appellant and her spouse were not living separate and apart.

[15] In 2002, the Appellant became aware that her spouse's 1994 to 2000 years were being audited by the Minister and he was reassessed for these years by notice dated March 19, 2003.

[16] The Appellant and her spouse executed a separation agreement on September 7, 2006 and the spouse transferred his businesses and real property to the Appellant or to corporations which she owned. The following transfers were made pursuant to the separation agreement:

a) in March 2007, the Manotick clinic was transferred from the spouse's corporation to a corporation which was wholly-owned by the Appellant;

b) in April 2007, the Winchester clinic was transferred from the spouse's corporation to a corporation wholly-owned by the Appellant; and,

c) in April 2007, the spouse's 50% interest in a cottage real property located in the Thousand Islands was transferred to the Appellant.

[17] According to the Appellant, the Manotick clinic and the Winchester clinic were appraised and they along with the Property were mortgaged so she could pay for the transfer of the clinics to her wholly owned corporations.

[18] However, the judge who heard the spouse's application for discharge from bankruptcy found that the appraisal of the spouse's interest in the clinics was improper. He concluded that the fair market value in the appraisal was too low.

[19] In the separation agreement, the Appellant and her spouse agreed to continue to live in the Property but to maintain separate residences therein. The Appellant was aware of her spouse's tax debt at the time she signed the separation agreement.

[20] The Appellant and her spouse continue to live in the Property but they are no longer separated. There was no testimony as to when they resumed living as husband and wife but I have inferred from the evidence that their separation was short lived.

[21] On December 18, 2009, the spouse filed for bankruptcy.

[22] The Appellant was assessed on September 29, 2011 for the amount of $249,999 on account of the transfer of the Property.

[23] According to the Reply, the spouse's tax debt was $833,060.19 at the time the Property was transferred in 2000. In the Agreed Statement of Fact, the parties wrote that the spouse made no efforts to pay the tax debt. They also agreed that when the Appellant was assessed on September 29, 2011, her spouse's income tax debt was $778,511.56. As a result, I am not sure of the exact amount of the spouse's tax debt at the date of the transfer. Regardless, both parties agreed that the spouse's tax debt, at the time the Property was transferred, exceeded the amount of $249,999 which was the amount assessed against the Appellant.

Law

[24] Subsection 160(1) of the *ITA* provides:

> 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, 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
>
> (*e*) the transferee and transferor are jointly and severally, or solidarily, 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 (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,
>
> 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.

[25] Subsection 160(1) imposes joint and several liability for unpaid taxes on a person to whom property is transferred if four conditions are met:

a) There must be a transfer of property;

b) The transferor must be liable to pay income tax at the time of transfer;

c) The transferor and transferee must not have been dealing at arm's length;

d) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee: *The Queen v Livingston*, 2008 FCA 89 at paragraph 17.

[26] In this appeal, only the fourth of these conditions is in dispute.

Appellant's Position

[27] As stated earlier, it was the Appellant's position that the consideration provided by her for the transfer of the Property exceeded the fair market value of the Property at the time of the transfer. She argued that the consideration she gave consisted of amounts she paid towards the down payment on the Winchester Property and the Property; amounts she paid on the various mortgages which had been held on the Property prior to its transfer to her; amounts she paid on behalf of her spouse and his businesses both prior to the transfer and after the transfer; her assumption of the mortgage of $65,000; and, the rights she relinquished to apply for a declaration that she had a resulting or constructive trust in the Property.

Respondent's Position

[28] It was the Respondent's position that the Appellant gave only $65,001 as consideration for the transfer of the Property. If, however, I conclude that she gave consideration beyond $65,001, then the amount of that consideration is either incapable of being valued or is valueless.

[29] Counsel for the Respondent argued that this Court does not have the jurisdiction to grant the equitable remedies of resulting or constructive trust. However, if I conclude that the Tax Court does have jurisdiction, then the Appellant has not satisfied the requirements of a constructive or resulting trust.

Analysis

A. Interpretation of subparagraph 160(1)(*e*)(i)

[30] Counsel for the Appellant argued that the consideration given for the transfer of the Property can consist of amounts which the Appellant gave to her spouse both before and after the transfer of the Property occurred. He stated that both subparagraph 160(1)(*e*)(i) of the *ITA* and the definition of "value of the consideration" in the *Land Transfer Act*, R.S.O. 1990, c.L6 support his position.

[31] For ease of reference, I have recopied subparagraph160(1)(*e*)(i) which reads as follow:

> (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 (**emphasis added**)

[32] Counsel for the Appellant stated that the phrase "at that time" in subparagraph 160(1)(*e*)(i) modifies the phrase "fair market value" and not the word "consideration". Therefore any consideration given at any time for the Property must be considered for purposes of subsection 160(1). In particular, the Appellant submitted cheques dated both prior to and after the transfer of the Property. These cheques allegedly represented payments made on behalf of the spouse and formed part of the consideration for the Property.

[33] I disagree with the Appellant's interpretation. The phrase "at that time" cannot just speak to only the phrase "fair market value". It has to be the "fair market value" of something "at that time" and the something is "the consideration given for the property". The sentence must be read in its entirety. I interpret subparagraph 160(1)(*e*)(i) to mean that the Appellant and her spouse are jointly

and severally liable to pay an amount equal to the lesser of: the amount by which the fair market value of the Property at the time it was transferred exceeds the fair market value of the consideration given at the time that the Property was transferred. "At that time" refers to the time the Property was transferred and it modifies the "fair market value of the consideration". This interpretation is consistent with the Federal Court of Appeal's decision in *Madsen v R*, 2006 FCA 46 where it was stated that:

> 7 In these circumstances, in valuing the consideration given for the British Columbia property in 1989, the court could not take into account the transfer of the Arizona property interest that occurred five years later. It is the fair market value of the consideration at the time of the transfer which governs.

[34] Consequently, any amounts which the Appellant may have given to her spouse after the transfer of the Property and which were not part of the contract at the time of the transfer were not consideration for the transfer.

B. Definition of Consideration

[35] The Appellant also relied on the definition of "Value of Consideration" in the Ontario *Land Transfer Tax Act* to state that the consideration for the transfer can include amounts paid prior to the transfer. It is my view that this definition does not support the Appellant's position. The portion of that definition which counsel relied on reads:

> "value of consideration" includes,
>
> (a) the gross sale price or the amount expressed in money of any consideration given or to be given for the conveyance by or on behalf of the transferee and the value expressed in money of any liability assumed or undertaken by or on behalf of the transferee as part of the arrangement relating to the conveyance and the value expressed in money of any benefit of whatsoever kind conferred directly or indirectly by the transferee on any person as part of the arrangement relating to the conveyance,

[36] According to the *Land Transfer Tax Act*, consideration for the transfer of property includes the gross sale price or amounts already given or to be given or liabilities assumed or benefits given for the conveyance. However, as I read the definition, all of those types of consideration must be expressed "in money" for the purposes of that Act and declared in an affidavit of the transferee. Subsections 5(1)

and (2) of that same Act stipulate that the transferee must make an affidavit in which the true value of the consideration for the conveyance is declared. The relevant portions of that section read:

> Statement or affidavit re conveyance
>
> 5.(1)The following information respecting a conveyance shall be provided to the Minister in the form and manner required by subsection (1.1) or (1.2):
>
> 1. The true value of the consideration for the conveyance.
>
> 2. The true amount in cash and the value of any property or security included in the value of the consideration.
>
> 3. The amount or value of any lien or encumbrance subject to which the conveyance is made.
>
> Maker of statement or affidavit
>
> (2) The statement or affidavit required by this section shall be made by,
>
> …
>
> (c) each transferee named in the conveyance to which the affidavit relates;

[37] In the present appeal, the Appellant's spouse transferred the Property to her on September 19, 2000. In the deed they stated that the consideration given was $65,001. On that same date, the Appellant as transferee swore an Affidavit of Residence and of Value of the Consideration for purposes of the *Land Transfer Tax Act* in which she declared that the total consideration for the transfer of the Property was $1 cash and the assumption of a mortgage of $65,000. She said that the consideration was nominal because the transferor and transferee were husband and wife and the transfer was a gift of land for natural love and affection.

[38] Counsel for the Appellant also argued that transfers of property between spouses are treated differently for purposes of the *Land Transfer Tax Act*. He relied on a bulletin called "Transfers of Land Between Spouses" for this proposition. This bulletin does not assist the Appellant's position.

[39] The bulletin states that its purpose is to outline the application of the *Land Transfer Tax Act* to registered conveyances and unregistered dispositions of land between spouses and former spouses. It repeats the definition of "Value of Consideration" and states that "the amount expressed in money of any

consideration given or to be given, as well as any benefit given to any person as part of the arrangement, must be included" in the consideration. The bulletin also informs that unless there is a specific exemption, transfers between spouses are subject to land transfer tax. In the circumstances of this appeal, the transfer of the Property to the Appellant was exempted from land transfer tax because "the only consideration given" was the assumption of the mortgage.

[40] Neither the *Land Transfer Tax Act* nor the bulletin relied on by the Appellant support her position that the consideration for the transfer consisted of amounts not declared in her affidavit which accompanied the deed.

[41] As stated by Bonner J. in *Ruffolo et al v The Queen*, 99 DTC 184 (TCC), the term "consideration" in subparagraph 160(1)(*e*)(i) is to be given its ordinary meaning, namely, something given in payment.

[42] In *Logiudice v The Queen*, 97 DTC 1462 (TCC) at paragraph 16, Bowie J. made the following comments:

> 16 **The word consideration, as it is used in the context of section 160 of the Act, in its ordinary sense refers to the consideration given by one party to a contract to the other party, in return for the property transferred.** The obvious purpose of section 160 is to prevent taxpayers from escaping their liability for tax, interest and penalties arising under the provisions of the Act by placing their exigible assets in the hands of relatives, or others with whom they are not at arms' length, and thus beyond the immediate reach of the tax collector. The limiting provision in subparagraph 160(1)(*e*)(i) of the Act is to protect genuine business transactions from the operation of the section, to the extent of the fair market value of the consideration given for the property transferred. It is apparent, therefore, that for a transferee to have the benefit of this saving provision she must be able to prove that the transfer of property to her was made pursuant to the terms of a genuine contractual arrangement. (**emphasis added**)

C. Amounts Paid Prior to Transfer of Property

(1) Cheques written in 1999 and 2000

[43] The Appellant produced copies of cheques which she had written on her chequing account to her spouse's businesses, BMO Mastercard, the Bank of Montreal and Scotiabank Visa in 1999 and 2000. Those cheques were as follows:

Date	Payable to		Date	Payable To	
05-Mar-99	Manotick	$4,000.00	10-Jan-00	Manotick	$3,000.00

	Chiropractic			Chiropractic	
12-Apr-99	BMO Mastercard	298.00	18-Jan-00	Manotick Chiropractic	6,000.00
05-Aug-99	Winchester Chiro	4,300.00	04-Apr-00	Bank of Montreal	2,500.00
12-Nov-99	Manotick Chiropractic	5,000.00	11-Apr-00	Bank of Montreal	6,700.00
13-Dec-99	Manotick Chiropractic	13,000.00	11-Apr-00	Scotiabank Vi	7,216.00
	Total	$26,598.00		Total	$25,416.00

[44] It is my view that the amounts on these cheques were not consideration for the transfer of the Property. It is clear from the deed and the Appellant's affidavit that the consideration given for the transfer was $65,001. There is no documentation or corroboration to support the Appellant's contention that the amounts in these cheques were part of the price she paid for the transfer. In cross examination, she admitted that at the time the Property was transferred to her she did not promise her spouse that she would make payments to his businesses or on behalf of his businesses. The Appellant testified that money was transferred to her spouse's business or on loans at the request of the bookkeeper who would phone her to say that an injection of cash was needed for the businesses.

[45] The total amounts on the cheques which the Appellant alleged were part of the consideration for the transfer of the Property were $26,596.60 and $25,416 in 1999 and 2000. However, according to the Agreed Statement of Facts, the taxable income of the Appellant and her spouse was as follows:

	Appellant	Spouse
2000	$23,448	$ 84,081
1999	23,345	83,066
1998	21,875	159,538
1997	32,268	106,375
1996	23,154	135,322
1995	25,461	261,279
1994	29,146	144,547
1993	20,784	147,136
1992	17,979	143,315
1991	16,586	89,122
1990	17,022	61,094

1989	15,840	57,119
1988	15,505	44,610
1987	6,624	46,621
1986	7,639	75,131
1985	19,480	68,891
1984	7,869	54,078
1983	9,607	39,746
1982	9,790	33,798
1981	9,475	8,105
1980	6,183	56,863
1979	-	72,138
1978	-	33,619

[46] Clearly, the Appellant's taxable income in 1999 and 2000 was less than the total amounts in the cheques for those years. The evidence consisted of only five cheques for each year and there was no evidence as to the total number of cheques written on this account each year. The total amount payable pursuant to these five cheques for each year exceeded the Appellant's taxable income in 1999 and 2000 and according to the Appellant she also contributed to the household expenses and the mortgage on the Property. She did not submit the bank statements for these years which may have shown the source of the deposits in her account or the quantum of money deposited and withdrawn from her account in 1999 and 2000. The Appellant stated that some of the funds in her chequing account came from her RRSP. However, she submitted no documents to corroborate her testimony.

[47] In direct examination, the Appellant stated that none of the money in her chequing account came from her spouse. However, in cross examination, she admitted that her spouse did deposit money in her account because he did not have a chequing account. Aside from her spouse's businesses, she held the only chequing account for the couple. Based on the evidence presented at the hearing, it is implausible that the Appellant had the funds to give $26,596.60 and $25,416 to her spouse in 1999 and 2000.

(2) Down Payment on Winchester Property and mortgage payments

[48] It was the Appellant's evidence that she worked prior to her marriage in 1977 and she had savings but her spouse did not have savings. The Winchester Property was purchased in 1978 for $80,000 with a cash down payment of $24,000 and a mortgage of $56,000. The Appellant stated that she used some of her money

to purchase this first home but she was not sure how much she contributed to the cash down payment. She submitted no documentation or brought any witnesses to corroborate her testimony that she contributed any amount of cash towards the down payment. The Appellant did not quantify the savings she may have had and she could not quantify how much she may have contributed to the purchase of the Winchester Property or as payments on the mortgage.

[49] In cross examination, the Appellant agreed that all payments for the pre-transfer mortgages were made by cheque. She also agreed that half of the time those payments were made by cheque drawn against her spouse's business' account and the other half of the time, the payments were made by cheque drawn from her chequing account. The other household expenses were also paid by cheques drawn against the Appellant's account. The Appellant also admitted that the funds in her chequing account were from her income and her spouse's income.

[50] Counsel for the Appellant argued that the Appellant's contributions to the down payment on the Winchester Property and her contributions to the mortgages on both the Winchester Property and the Property are part of the consideration she provided for the transfer of the Property. He stated that the Appellant had to be given credit for the actual cash consideration she provided for all marital and business properties which were registered in her spouse's name. The problem I have with this argument is that any payments which the Appellant may have made towards the down payment and the mortgages on the Winchester Property and the Property were not quantified. I have no way of valuing these contributions when the Appellant herself could not quantify them and could not remember any amounts which she allegedly paid. The Appellant's evidence on these matters was vague and self-serving. There were inconsistencies in her evidence regarding the deposits in her chequing account and I have rejected her evidence that all amounts withdrawn from this account were her monies only.

(3) Amounts Paid After the Transfer

[51] The Appellant submitted that the following cheques which were written on her chequing account in 2001 and 2002 were payments she made on behalf of her spouse. It was her position that these amounts were part of the consideration she paid for the transfer of the Property in 2000.

Date	Payable to		Date	Payable to	
16-Feb-01	Manotick Chiropractic	$ 2,200.00	08-Jan-02	Manotick Chiropractic	$ 8,000.00

01-May-01	Manotick Chiropractic	6,000.00	31-Jan-02	Manotick Chiropractic	9,000.00
11-May 01	BNS Visa	2,000.00	27-Feb-02	BMO Nesbitt Burns	218.00
28-May-01	Manotick Chiropractic	7,000.00	21-Mar-02	Bank of Montreal	7,648.00
27-Jun-01	BNS Visa	6,072.09	21-May-02	Winchester Chiropractic	5,000.00
08-Aug-01	Manotick Chiropractic	3,000.00	12-Jun-02	Manotick Chiropractic	5,000.00
17-Aug-01	Citifinancial	4,905.00	04-Jul-02	Winchester Chiropractic	5,000.00
27-Sept-01	Ryan Barber	5,440.00	09-Jul-02	Winchester Chiropractic	5,000.00
11-Oct-01	Manotick Chiropractic	11,000.00	09-Aug-02	Manotick Chirpractic	4,500.00
23-Oct-01	State Farm Insurance	147.34	03-Sept-02	Manotick Chirporactic	4,000.00
01-Dec-01	BMO Nesbitt Burns	133.75	10-Sept-02	Winchester Chiropractic	5,000.00
			08-Nov-02	Manotick Chiropractic	4,000.00
			11-Dec-02	Manotick Chiropractic	10,000.00
Total		$47,898.18			$72,366.00

[52] There was no evidence that the Appellant and her spouse had an oral or written contract at the time the Property was transferred to her that any consideration would be paid by her at a future date. There was also no evidence regarding the Appellant's income in 2001 and 2002. It was clear from the Appellant's evidence that her spouse also deposited funds into her chequing account. As a result of all of the above, I have disregarded all cheques which the Appellant produced which were made in 2001 and 2002.

D. Constructive or Resulting Trust

[53] Counsel for the Appellant relied on the decision in *Darte v R*, 2008 TCC 66 to argue that the Appellant relinquished her right to apply to a superior court for a

declaration that she had a resulting or constructive trust in the Property. He submitted that the right which she relinquished was valued at 50% of the fair market value of the Property at the time of the transfer. In the circumstances of this case, that right was valued at $124,999.50.

[54] I disagree with the Appellant's position for several reasons.

[55] There was no evidence that the Appellant paid any consideration by forbearing to seek the remedy of constructive trust. As in the case of *Pliskow v The Queen*, 2013 TCC 283, there was no evidence of any contract, waiver or other agreement that the Appellant agreed to refrain from pursuing her right for declarative relief under the doctrine of constructive trust: *The Queen v Livingston*, 2008 FCA 89 at paragraph 29; *Pliskow* at paragraph 27.

[56] The Appellant testified that prior to the transfer she did not consult anyone concerning any rights she may have had to claim an interest in the Property. She and her spouse never discussed what interest in the Property she was entitled to claim. Prior to the transfer, she did not threaten to bring a claim in resulting or constructive trust. There was no forbearance in this case.

[57] Counsel for the Appellant has requested that I declare that prior to the transfer, the Appellant held 50% of the Property by way of a constructive trust. It is my opinion that this court does not have the jurisdiction to grant the equitable remedy of constructive trust. Although the Tax Court is a superior court, it was created by statute and unlike the provincial superior courts it does not have inherent equitable jurisdiction. I agree with Webb J., as he then was, that the Tax Court is not a court of equity and cannot grant or declare the equitable remedy of a constructive trust: *Darte* (*supra*) at paragraph 21.

[58] Even if I had the jurisdiction to declare a constructive trust, this would require an analysis of the entire relationship between the Appellant and her spouse; the contributions each made to their assets and their liabilities; whether there were any agreements, marriage contracts, separation agreements or in general, any factors the parties would utilize in arguing for the division of their property rights: *Kardaras v Canada*, 2014 TCC 135. That analysis would have been impossible to make in the present case because the spouse was not a witness at the hearing and the evidence was lacking.

[59] The Appellant never gave a reason why she and her spouse did not hold the Winchester Property or the Property as joint tenants. However, after a review of

the evidence in this appeal, it appears to me that up until the Property was transferred to the Appellant, she and her spouse arranged their affairs so that he alone held title to all real property while she controlled their financial affairs. Both the Appellant and Keely Moure testified that the Appellant was responsible for the couple's financial matters. The Appellant was the person who was contacted by the bookkeeper when the businesses required a deposit of money. The Appellant then wrote a cheque on her chequing account for deposit into the clinic's account. Between her and her spouse, only the Appellant had a chequing account. There was no evidence that either she or her spouse had a savings account. Her spouse had RRSPs and the Appellant deposited money into his RRSP from her chequing account. There was no evidence whether the RRSP was a spousal RRSP.

[60] In conclusion, the Appellant has not adduced sufficient evidence to show that she provided consideration in excess of $65,001 for the transfer of the Property. Documentary evidence was lacking and clear testimony was lacking. She said that she paid a portion of the down payment on the first matrimonial home and she contributed to the mortgages on each of the homes. However, she couldn't even hazard a guess as to how much she contributed. The Appellant's testimony was vague on key items. The Appellant has not discharged the onus which she had and the appeal is dismissed with costs to the Respondent.

Signed at Halifax, Nova Scotia, this 3rd day of June 2015.

"V.A. Miller"

V.A. Miller J.

Appendix A
AGREED STATEMENT OF FACTS
(PARTIAL)

For the purposes of this proceeding and in addition to any evidence that may be adduced at the hearing, the appellant and the respondent agree to the following facts:

1. On August 27, 1977, the appellant and Dieter Hardtke (the "spouse") were married, and have been married ever since.

2. At all material times, the spouse carried on a chiropractor business, whether directly or through one or more corporations.

3. On or about October 20, 1978, the spouse acquired title in fee simple to the residential property described as Lot 42, North of Main Street in the Village of Winchester, according to Purvis Plan No. 34 (the "Winchester Property").

4. The Winchester property was acquired for a purchase price of $80,000, which was paid for by way of $24,000 in cash and $56,000 in mortgage proceeds.

5. On or about September 1, 1983, the Winchester property was sold for proceeds of $100,000 by way of a deed of transfer dated August 29, 1983.

6. The consideration for the sale of the Winchester property was paid for by way of $45,133.42 in cash and $54,866.58 in mortgages assumed.

7. On or about September 2, 1983, the spouse acquired title in fee simple to the residential property described as Lot 14, Plan 804, township of Rideau Municipality of Ottawa-Carleton (the "Manotick property" or the "property").

8. The Manotick property was acquired for a purchase price of $180,000, which was paid for as follows:
   a. $125,000 in mortgage proceeds obtained by the spouse; and

   b. $55,000 in cash.

9. From August, 1983 to September 2000, four mortgages had been granted on the Manotick property:

   a. on or about August 11, 1983, the spouse granted a mortgage to the Royal Bank of Canada for proceeds of $125,000, which were used to acquire the property (the "first mortgage");

   b. on or about January 6, 1987, the spouse granted a mortgage to the Royal Bank of Canada for proceeds of $160,000, which were used in part to repay the outstanding balance of the first mortgage (the "second mortgage");

   c. on or about June 20, 1989, the spouse granted a mortgage to the Royal Bank of Canada for proceeds of $250,000, which were used in part to repay the outstanding balance of the second mortgage (the "third mortgage"); and

   d. on or about February 20, 1996, the spouse granted a mortgage to the Bank of Montreal for proceeds of $65,000, (the "fourth mortgage")

   (collectively the "pre-transfer mortgages")

10. The appellant was not a mortgagor/chargor under any of the pre-transfer mortgages, though she did consent as the spouse of the mortgagor/chargor to each of those mortgages and signed each Charge/Mortgage of Land documents.

11. All principal and interest payments under the pre-transfer mortgages were made after title to the Manotick property had been transferred to the spouse in 1983.

12. On or about September 29, 2000, the spouse transferred the Manotick property to the appellant (the "transfer").

13. The transfer was not made pursuant to the separation agreement between the appellant and her spouse dated August 15, 2006 and executed on September 7, 2006.

14. At the time of the transfer, the fair market value of the Manotick property was $315,000.

15. At the time of the transfer, all but the fourth pre-transfer mortgages had been discharged and the balance outstanding on that mortgage was $65,000.

16. At the time of the transfer and in exchange for the property, the appellant gave her spouse consideration of $65,001, $1 in cash and $65,000 in assuming the outstanding balance of the fourth pre-transfer mortgage. (In so admitting, the appellant does not admit that she gave no additional consideration for the property.)

17. No tax was paid on the transfer under the *Land Transfer Tax Act*.

18. The taxable income of the appellant the spouse was as follows for the following years:

	Appellant	Spouse
2000	$23,448	$ 84,081
1999	23,345	83,066
1998	21,875	159,538
1997	32,268	106,375
1996	23,154	135,322
1995	25,461	261,279
1994	29,146	144,547
1993	20,784	147,136
1992	17,979	143,315
1991	16,586	89,122
1990	17,022	61,094
1989	15,840	57,119
1988	15,505	44,610
1987	6,624	46,621
1986	7,639	75,131
1985	19,480	68,891
1984	7,869	54,078
1983	9,607	39,746
1982	9,790	33,798
1981	9,475	8,105
1980	6,183	56,863
1979	-	72,138
1978	-	33,619

19. From 1980 to 2000, the appellant was employed full time as a chiropractic assistant.

20. In respect of the Manotick property,

    a. on or about October 9, 2007, the appellant granted a mortgage to the Royal Bank of Canada for proceeds of $400,000 (the "first post-transfer mortgage"),

    b. on or about October 24, 2007, the Bank of Montreal discharged the fourth mortgage of $65,000,

    c. on or about January 5, 2009, the Royal Bank of Canada discharged the first post-transfer mortgage of $400,000,

    d. on or about March 8, 2010, the appellant granted a mortgage to the Royal Bank of Canada for proceeds of $750,000 (the "second post-transfer mortgage"), and

    e. on or about March 9, 2010, the Royal Bank of Canada discharged a mortgage registered as OC934667 on December 4, 2008.

21. In respect of the real property located at 569 Main Street, Winchester, Ontario (the "other Winchester property"),

    a. on or about September 11, 2006, title in fee simple was transferred from 1091973 Ontario Inc. to 2086751 Ontario Inc., for consideration totaling $190,000, including $39,388.18 in assumed mortgages and $83,212.84 in a mortgage given back to the vendor, and

    b. on or about September 11, 2006 2086751 Ontario Inc. granted a mortgage to 1091973 Ontario Inc. for proceeds of $83,212.84.

22. In respect of the real property located at 5482 Main Street, Manotick, Ontario (the "other Manotick property"), on or about December 4, 2008, Hard Key Health Care Inc. granted a mortgage to the Royal Bank of Canada for proceeds of $210,000, which charge was registered as OC934668.

23. In the 1990s, the Canada Revenue Agency commenced an investigation and audit of 115 chiropractic clinics in Ontario.

24. The common factor in the audits was an accountant named Leo Sabourin.

25. Mr. Sabourin was eventually charged and convicted for, among other things, fraud relating to the tax returns he prepared, or directed to be prepared, for 115 chiropractor clients from across Ontario for the 1994 to 1999 taxation years.

26. Mr. Sabourin was the spouse's accountant during those years.

27. On or about December 18, 2009, the spouse filed for bankruptcy.

28. The spouse made no efforts to pay the tax debt.

29. On September 29, 2011, the appellant was assessed under section 160 in the amount of $249,999 in respect of the transfer.

30. As at the date of the assessment, the spouse's liabilities under the *Act* for the 1994 to 2000 taxation years totaled $791,467.96 (i.e., excluding any liabilities in respect of provincial tax)(the $791,467.96 amount being the "tax debt").

31. The tax debt arose from reassessments of the 1994 to 2000 taxation years dated March 19, 2003.

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DATE OF HEARING:	November 4, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	June 3, 2015

APPEARANCES:

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