

BETWEEN:

SANDRA ELLIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 15, 2015, at Hamilton, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant: John D. Buote

Counsel for the Respondent: Dominique Gallant

JUDGMENT

For the attached reasons for judgment, the appeal from the assessment made under the *Income Tax Act*, notice of which is dated January 19, 2011 and bears number 1153204, is allowed, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment to remove the penalty of \$10,199.73. Interest shall be adjusted accordingly.

Each party is to bear its own costs.

Signed at Ottawa, Canada, this 17th day of November 2015.

“Robert J. Hogan”

Hogan J.

Citation: 2015 TCC 285
Date: 20151117
Docket: 2012-4022(IT)G

BETWEEN:

SANDRA ELLIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] The Appellant, Sandra Ellis, is appealing an assessment made pursuant to section 160 of the *Income Tax Act* (the “Act”) in respect of the transfer to her by her husband, Tom Ellis, of a 50% undivided interest in the matrimonial home.

I. Factual Background

[2] The transfer of the 50% undivided interest in the family home took place on June 2, 2006.

[3] At the commencement of the hearing, the Appellant accepted that she did not pay adequate consideration for the property. In other words, the value of the property that was transferred to her was greater than her husband’s unpaid income tax liability.

[4] At the time of the transfer, Tim Ellis (the “Transferor”) owed the following amounts:

Tax Year	Federal Income Tax	Penalty	Interest	Total
2004	\$12,695.30	\$0.00	\$6,267.70	\$18,963.00
2005	\$13,311.74	\$6,132.52	\$6,189.63	\$25,633.89
2006	\$2,904.34	\$1,794.24	\$1,222.31	\$5,920.89
Total	\$28,911.38	\$7,926.76	\$13,679.64	\$50,517.78

Tax Year	Provincial Income Tax	Penalty	Interest	Total
2005	\$0.00	\$2,142.14	\$0.00	\$2,142.14
2006	\$0.00	\$524.75	\$0.00	\$524.75
Total	\$0.00	\$2,666.89	\$0.00	\$2,666.89

[5] The Respondent called one witness, Wendy Rueger, a complex case officer employed by the Canada Revenue Agency (the “CRA”). Ms. Rueger explained that she was asked to prepare amended particulars of assessment for the purpose of this appeal to take into account reductions to Mr. Ellis’ tax debt after the Appellant was assessed under section 160 of the Act. As a result of these changes, the Respondent now concedes that the Appellant owes \$38,380.65 determined as follows:

Tax Year	Federal Income Tax	Penalty	Interest	Total
2004	\$6,442.53	\$0.00	\$1,904.48	\$8,347.01
2005	\$11,840.70	\$8,024.58	\$5,639.28	\$25,504.56
2006	\$1,465.91	\$2,175.15	\$888.02	\$4,529.08
Total	\$19,749.14	\$10,199.73	\$8,431.78	\$38,380.65

[6] Ms. Rueger confirmed that the above amount included only federal income tax. She presented a complete analysis of how adjustments were made to eliminate Mr. Ellis’ provincial income tax liability. I am satisfied that the assessment under appeal covers only amounts due under the Act.

[7] Considering the above, the issues in dispute can be summarized as follows:

- (a) Were the refunds of tax owed to Mr. Ellis applied to the correct taxation years?
- (b) Does the Respondent bear the initial burden of establishing the Transferor’s tax debt, and if so, has she satisfied her burden in that regard?

II. Analysis

[8] The Appellant's main argument was that the Respondent has the burden of establishing the amount of Mr. Ellis' tax liability and that the Respondent has failed in that regard.

[9] I agree with the Appellant that the Respondent bears the initial burden of establishing the Transferor's tax debt.

[10] In *Beaudry v. The Queen*,¹ my colleague Tardif J. describes the Crown's burden in the context of a subsection 160(1) assessment as follows:

[26] There is an exception, and Archambault J. dealt with that exception in *Gestion Yvan Drouin*:

Since it is the Minister who takes measures against a third party to recover the tax owed to him by the tax debtor, it seems entirely reasonable to me that it should be incumbent on the Minister to provide *prima facie* evidence of the existence of the tax liability. To do this, the Minister usually has in his possession the tax debtor's tax return and, if he has carried out an audit, he may have copies of the source documents or other relevant documents supporting his assessment. He is therefore the one who is in the best position to establish the quantum of the tax liability. I thus conclude that the onus of providing *prima facie* evidence of the tax liability where an assessment has been made under subsection 160(1) of the Act generally falls on the Minister.

... As soon as the Minister has proved *prima facie* the existence of the tax liability, the onus is on the transferee to provide evidence to the contrary.

[Emphasis added.]

[11] I agree with this observation.

[12] Ms. Rueger testified at length on how the Appellant's liability under section 160 was redetermined to take into account the adjustments to Mr. Ellis' tax liability under Part I of the Act brought about by numerous reassessments. Her evidence was not contradicted by the Appellant. Therefore, I am satisfied that the

¹ 2003 TCC 464, 205 DTC 549. See also *Gestion Yvan Drouin Inc. v. Canada*, [2000] T.C.J. No. 872 (QL), 2001 DTC 72.

Crown has met its initial burden with respect to the amounts owed by the Appellant in connection with her husband's Part I liability.

[13] Ms. Rueger, however, provided no explanation as to why Mr. Ellis was assessed gross negligence penalties under subsection 163(1) of the Act. In view of the failure to establish the circumstances that justify the imposition of a penalty, the penalties must be eliminated from the Appellant's assessment.

[14] In her written representations, the Respondent argues that the Appellant did not dispute the Transferor's tax debt in her amended notice of appeal. I observe that the Appellant was not represented by counsel when she prepared her amended notice of appeal. I do not believe that the Respondent suffered prejudice from the aforementioned shortcoming. The Appellant had arranged to call Ms. Rueger as a witness. Her testimony was required to explain the significant changes to Mr. Ellis' tax liability brought about by the numerous reassessments that were issued against him, since the Appellant was assessed under subsection 160(1). In that context, it was clear that Mr. Ellis' tax liability had to be established at trial.

[15] For these reasons, the Appellant's appeal is allowed in part and the matter is referred back to the Minister for reconsideration and reassessment to remove the penalty of \$10,199.73. Interest shall be adjusted accordingly. Each party is to bear its own costs.

Signed at Ottawa, Canada, this 17th day of November 2015.

“Robert J. Hogan”

Hogan J.

CITATION: 2015 TCC 285

COURT FILE NO.: 2012-4022(IT)G

STYLE OF CAUSE: SANDRA ELLIS v. THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: April 15, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: November 17, 2015

APPEARANCES:

 Counsel for the Appellant: John D. Buote

 Counsel for the Respondent: Dominique Gallant

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