Docket: 2013-3531(IT)G

BETWEEN:

ANN KLUNDERT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 3, 2016, at Victoria, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Peter Blokmanis
Counsel for the Respondent:	Elizabeth (Lisa) McDonald Laura Zumpano

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JUDGMENT

The appeal from the assessment bearing number 11134 and dated June 25, 1999 under the *Income Tax Act* is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the assessment should be reduced by $3,614.51. No costs are awarded.

Signed at Ottawa, Canada, this 26th day of May 2016.

"V.A. Miller"

V.A. Miller J.

Citation: 2016TCC130
Date: 20160526
Docket: 2013-3531(IT)G

BETWEEN:

ANN KLUNDERT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] This appeal is from an assessment dated June 25, 1999 made under subsection 160(1) of the *Income Tax Act* (the "*Act*"). The Appellant was assessed the amount of $959,403.03 with respect to transfers from the Ontario Health Insurance Plan ("OHIP") to her bank account during the period May 25, 1994 to December 31, 1997 ("the relevant period"). The assessment was made on the basis that her spouse, Dr. Jack Klundert, had instructed OHIP to deposit payments for his services into the Appellant's bank account during the relevant period while he was a tax debtor.

Preliminary Matters

[2] At the hearing, counsel for the Appellant raised two issues which I will address in advance of dealing with the merits of the assessment.

[3] One issue was whether the assessment dated June 25, 1999 was mailed and served on the Appellant in 1999. It was her position that she did not receive the assessment in 1999 and she first learned of it when she received a letter dated May 4, 2011 from the Canada Revenue Agency ("CRA") demanding that she pay $147,676.63, the balance owing on her account.

[4] This issue was not properly before me as it was resolved on August 7, 2012 when Hogan J. issued an Amended Order extending the time within which a notice

of objection could be served to the assessment dated June 25, 1999. Neither the Appellant nor the Respondent appealed the Amended Order. The Minister of National Revenue (the "Minister") confirmed the assessment on August 27, 2013 and the present appeal was taken from that confirmation.

[5] The second issue raised by counsel for the Appellant was whether the CRA wrongfully seized funds from the Appellant's bank account in 1999. Mr. Belicka, a resource and complex case officer with the CRA, stated that there were no funds seized from the Appellant's bank account. According to Mr. Belicka, the CRA issued a requirement against the Appellant's bank account in November 1999. However, no funds were received as a result of the requirement because the bank account had been closed.

[6] This issue concerns collection matters and it was also not properly before me because this court does not have jurisdiction with respect to collection procedures employed by the CRA. That jurisdiction lies with the Federal Court: *A & E Precision Fabricating and Machine Shop Inc v R*, 2013 FCA 173 at paragraph 9.

Section 160 Assessment

A. Facts

[7] The evidence at the hearing consisted of a Partial Agreed Statement of Facts and the testimony of the Appellant and John Belicka.

[8] A summary of the Partial Agreed Statement of Facts is included below with the evidence from the hearing of the appeal. It is also attached to these reasons as Appendix A.

[9] The Appellant and Dr. Jack Klundert married on July 25, 1981.

[10] Dr. Klundert is an optometrist and he has operated an optometry business since 1979. At all times relevant to this appeal, he billed and was paid directly by OHIP for all eye examinations he performed.

[11] On March 7, 1990, Dr. Klundert directed OHIP to deposit payments for his services into a savings account with last three numbers 664 ("savings account 664"). This account was held jointly by the Appellant and Dr. Klundert. It was linked to a chequing account which was also held jointly by the Appellant and her spouse.

[12] The Appellant explained that the accounts were set up so that whenever a cheque was presented for payment, the required funds were automatically transferred from the savings account to the chequing account to cover the amount of the cheque. At any given time, there was only a minimal balance in the chequing account and the Appellant estimated that this balance did not exceed $10.

[13] The chequing account was used to pay all expenses incurred for both the optometry business and the family household.

[14] In May 1994, Dr. Klundert asked the Appellant to open a savings account in her name only ("savings account 698"). The Appellant agreed and, on May 18, 1994, Dr. Klundert directed OHIP to deposit all payments for his services into the Appellant's savings account 698. This account was linked to their chequing account so that all family household and business expenses continued to be paid from the chequing account.

[15] Between the months of May, 1994 and December, 1997, OHIP deposited its payments for Dr. Klundert's services into the Appellant's savings account 698. The amount deposited was $959,403.03.

[16] By June 25, 1999, Dr.Klundert owed and failed to pay the amount of $993,730.31 under the *Act* with respect to the 1993, 1994, 1995 and 1996 taxation years.

[17] On May 20, 2010, Dr.Klundert was convicted, after a third trial, of income tax evasion under section 239 of the *Act* in respect of his failure to report income in the amount of $241,625, $270,403, $434,931, $254,520 and $272,910 in the 1993, 1994, 1995, 1996 and 1997 taxation years, respectively. His appeal of this conviction was dismissed by the Ontario Court of Appeal on September 12, 2011 and leave to appeal to the Supreme Court of Canada was denied on April 5, 2012.

[18] On June 21, 2013, Dr. Klundert's appeal to the Tax Court of Canada in 2012-4293(IT)G for the 1993 to 1997 taxation years was dismissed. This decision was reported with citation 2013 TCC 208. Dr. Klundert appealed this decision to the Federal Court of Appeal. On June 11, 2014, the appeal to the Federal Court of Appeal was dismissed and on December 4, 2014, Dr. Klundert was not granted leave to appeal to the Supreme Court of Canada.

[19] According to the Reply, as of January 6, 2012, the balance owing on the original $993,730.31 that Dr. Klundert owed for the 1993, 1994, 1995 and 1996 taxation years was $145,367.12.

B. Law

[20] Section 160 of the *Act* reads:

> 160. (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> (a) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law partner,
>
> (b) a person who was under 18 years of age, or
>
> (c) a person with whom the person was not dealing at arm's length,
>
> the following rules apply:
>
> (d) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
>
> (e) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
>
> > (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
> >
> > (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[21] In *Livingston v R*, 2008 FCA 89, the Federal Court of Appeal gave four requirements which must be satisfied for subsection 160(1) of the *Act* to apply. They are:

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.

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

[23] Section 160 of the Act has been described as a draconian section: *Wannan v R* 2003 FCA 423 at paragraph 3. However, it is an important tax collection tool and its purpose is to prevent a taxpayer from transferring his property to his spouse (or a non-arm's length party) in order to thwart the Minister's efforts to collect money which is owed to him: *Medland v The Queen* (1998), 98 DTC 6358 (FCA).

Position of the Parties

C. Appellant's Position

[24] It was the Appellant's position that the amount of $959,403.03 was not transferred to her. Counsel for the Appellant argued that because the joint chequing account was linked to the Appellant's savings account, Dr. Klundert always had access to the funds in the Appellant's account and he never lost patrimony over the OHIP funds. He could have removed all of the funds from the Appellant's savings account by writing himself a cheque on their joint chequing account.

[25] As an alternative position, the Appellant argued that, if the amount of $959,403.03 was transferred to her, then she provided consideration to her spouse by paying for all household and business expenses during the relevant time. Both the Appellant and her spouse wrote cheques on the joint chequing account for household and business expenses and the money for these expenses ultimately came from the Appellant's savings account. These expenses totalled $10,000 monthly for the relevant period.

D. Respondent's Position

[26] It was the Respondent's position that (i) Dr. Klundert's instructions to OHIP to deposit the payment for his services into the Appellant's savings account and (ii)

the deposit of those payments into the Appellant's savings account amounted to a transfer. Dr. Klundert divested himself of the OHIP payments and vested them in the Appellant.

[27] Counsel for the Respondent also argued that the Appellant did not give any consideration for the monies deposited into her savings account. Counsel stated that fulfilling domestic obligations does not have a fair market value and cannot be regarded as consideration to reduce a section 160 assessment: *Raphael v The Queen*, 2002 FCA 23. Furthermore, the Appellant has tendered insufficient evidence to establish the amount of any business expenses paid on behalf of Dr. Klundert's optometry business.

Analysis

[28] The essential facts in this appeal are indistinguishable from those in *Livingston (supra)*.

[29] In that case, Ms. Livingston was well-aware of her friend's tax problems and CRA's attempts to collect the tax debt. Ms. Livingston opened a bank account in her name only. She was the sole signatory with respect to the account. The friend deposited her cheques into the account and directed others to pay amounts owed to her into Ms. Livingston's account. Ms. Livingston provided her friend with the only debit card and also signed blank cheques on the account so that her friend could withdraw money from the account.

[30] In the present appeal, the Appellant admitted that she opened her savings account 698 at the request of her spouse. She also admitted that, at the time her spouse requested OHIP to deposit his payments into her account, she knew that her spouse was reporting to the CRA that the *Act* was unconstitutional and he didn't have to pay taxes. It is my view that the Appellant also knew that the CRA would attempt to collect the taxes which her spouse owed. The following exchange took place during cross-examination:

> Q Yes, did you and your husband discuss whether or not the idea behind having the money go into an account only in your name was the -- it would be safe guarded from a creditor of Jack Klundert?
>
> A I don't know.
>
> Q You don't know or you don't remember?

A I don't remember.

Q Did your husband tell you that he was worried that Canada Revenue Agency maybe trying to get after his money because of what he was doing and the way he was reporting his taxes?

A Possibly.

[31] The Appellant's responses were evasive. When she was asked if she made the arrangements to have her savings account linked with the chequing account she jointly held with her spouse, she did not answer the question. However, I have concluded that she authorized the linking of the two accounts. She was the only signatory on the savings account and the only one with the capacity to instruct the bank to link that account with the chequing account.

[32] As in Livingston, the Appellant gave her spouse, the tax debtor, access to the funds deposited in her savings account. This did not alter the fact that the funds had been transferred to her.

[33] It is my view that, each time the OHIP deposited Dr. Klundert's payments into the Appellant's savings account, there was a transfer of those funds to the Appellant and section 160 of the *Act* was engaged. That Dr. Klundert had access to the funds through his chequing account was not sufficient to reverse the triggering of section 160: *Livingston (supra)* at paragraph 24. I have concluded that Dr. Klundert transferred the amount of $959,403.03 to the Appellant during the relevant period.

[34] The Appellant also argued that she did not have beneficial interest in the funds deposited into her savings account; that she did not derive a benefit from the funds; and, that she merely held them in trust for her spouse and paid them out according to his instructions.

[35] I disagree with the Appellant's arguments. First, the Appellant held both legal and beneficial title to the funds deposited in her account. She could have done with them as she chose once they were deposited into her account. Second, it is not necessary that the Appellant receive a benefit in order for section 160 to apply: *Livingston (supra)* at paragraph 24. Third, there was no documentary evidence to support the Appellant's testimony that she held the funds in trust for her spouse. Fourth, she did not have a legally enforceable promise to pay out monies only on her spouse's instructions. Any obligation she had to her spouse was only a moral one: *Raphael (supra)* at paragraph 10.

[36] The Appellant has argued, in the alternative, that she gave consideration for the funds deposited into her savings account. She stated that her account was debited $8,000 each month for her spouse's business expenses and $2,000 each month for household expenses. The consideration she gave consisted of amounts she paid to keep the household running; amounts she paid for her spouse's business expenses; and, services she performed for her spouse's business.

[37] With respect to the payment of household expenses, Counsel for the Appellant relied on the decision in *Ducharme* for support that the Appellant gave valuable consideration in exchange for the funds she received from her spouse. He argued that part of this consideration took the form of the Appellant allowing Dr. Klundert to live in a home which was supported entirely by the funds in her savings account. These funds paid for all household and family expenses.

[38] *Ducharme* has been distinguished so that it is restricted to its own facts: See *Yates v R.*, 2009 FCA 50 at paragraphs 21 to 23. According to *Yates*, paying household expenses is not consideration for the purposes of section 160 of the *ITA*. At paragraph 67 of *Yates*, Blais J.A. stated:

> … A plain language interpretation of subsection 160(1) does not allow for a family law exception, nor does it allow for an exception for household expenses. If Parliament had wanted to provide for such exemptions, it would have done so expressly. It is not for our Court to read these exemptions into the Act.

[39] In support of her position that she paid for her spouse's business expenses, the Appellant submitted bank statements for the chequing account for the periods February to November 1996, inclusive, and February to December 1997, inclusive. For each year, there was a handwritten note that contained the months of the year with an amount adjacent to each month. The totals for these amounts were $174,590 and $227,971 for 1996 and 1997 respectively.

[40] The Appellant could not explain how these amounts were calculated. She stated that the amounts consisted of business expenses and household expenses but she could not give a breakdown of the totals into the individual expenses. The handwritten notes were made by her spouse and he was not a witness at the hearing of this appeal. I have given no weight to these notes and I have drawn an adverse inference from the fact that the Appellant's spouse did not appear to give evidence at this appeal.

[41] However, there was some documentary evidence to support that the funds in the Appellant's savings account was used to pay Dr. Klundert's business expenses. The bank statements showed payments to Visionware in the amount of $1,426.60 in 1996 and $1,611.94 in 1997. There were also three cheques dated July 4, 1997 that represented salary to her spouse's employees. These cheques totalled $575.97.

[42] No argument was made that, in paying for her spouse's business expenses, the Appellant preferred certain creditors over the CRA and this in itself defeated the purpose of section 160: *Livingston (supra)* at paragraph 18. As a result, I conclude that the Appellant has shown that she did give consideration to her spouse in the amount of $1,426.60 in 1996 and $2,187.91 in 1997.

[43] The Appellant also stated that she sometimes made out the payroll cheques for her spouse's business during the period. This, she said, formed part of the consideration she gave for the funds which were deposited into her savings account. However, her evidence was vague. She couldn't remember if she performed these services for the entire period. She did not give a monetary value for these services. On cross examination, she said that perhaps her spouse paid her for these services and she couldn't remember if she received a T4 for the pay she may have received.

[44] I have not been convinced that any services the Appellant performed for the optometry business were consideration for the funds deposited into her savings account.

[45] For the reasons given above, the appeal is allowed and the assessment is referred back to the Minister on the basis that the assessment should be reduced by $3,614.51.

[46] Although the Appellant had a small success in this appeal, I have decided that there will be no costs awarded. In making my decision, I have considered section 147 of the *Tax Court of Canada Rules (General Procedure)*, in particular paragraphs 147(3)(a) and (b).

Signed at Ottawa, Canada, this 26th day of May 2016.

"V.A. Miller"

V.A. Miller J.

Appendix A

PARTIAL AGREED STATEMENT OF FACTS

The parties hereto by their respective solicitors agree on the following facts, provided that this agreement is made for the purpose of this appeal only and may not be used against either party on any other occasion.

The parties, through their counsel, therefore agree as follows:

1. the Appellant married Jack Klundert (the "Spouse") on July 25, 1981 and have remained married;

2. at all material times, the Appellant and the Spouse did not deal with each other at arm's length;

3. the Spouse is an optometrist;

4. the Spouse billed the Ontario Health Insurance Plan ("OHIP") and received payments for his services from OHIP;

5. from March 1990 until May 18, 1994, the Spouse's OHIP payments were deposited into a Bank of Montreal savings account ending in "*64";

6. on May 18, 1994, the Spouse directed OHIP to deposit payments for his services to the Appellant's bank account ending in "*98", located at the Howard Street branch of the Bank of Montreal in Windsor, Ontario (the "Account");

7. between the months of May, 1994 to December, 1997, the Property's fair market value was $959,403.03;

8. by June 25, 1999, the Spouse owed, and failed to pay, $993,730.31 under the Act representing the 1993, 1994, 1995 and 1996 taxation years.

9. On May 20, 2010, the Spouse was convicted, after a third trial, by Mr. Justice Patterson of the Superior Court of Justice, sitting with a jury, of income tax evasion under s. 239 of the Act, in respect of his failure to report income for the 1993, 1994, 1995, 1996 and 1997 taxation years, in the respective amounts of $241,625, $270,403, $434,931, $254,520 and $272,910.

10. On September 12, 2011, the Spouse's appeal from the conviction in respect of the 1993-1997 taxation years was dismissed by the Court of Appeal for Ontario. The Spouse's appeal from sentence was allowed to the extent that the one year imprisonment was replaced with a one year conditional sentence with terms and conditions;

11. On April 5, 2012, the Spouse's application for leave to appeal the judgment of the Court of Appeal for Ontario was dismissed by the Supreme Court of Canada.

12. On June 21, 2013, the Spouse's appeal to the Tax Court of Canada in 2012-4293(IT)G of taxation years 1993 to 1997 was dismissed.

13. On June 11, 2014, the Spouse's appeal to the Federal Court of Appeal from the judgment of the Tax Court of Canada 2012-4293(IT)G, 2013 TCC 208 dated June 21, 2013 was dismissed.

14. On December 4, 2014, the Spouse's application for leave to appeal to the Supreme Court of Canada from the judgment of the Federal Court of Appeal Number A-237-13, 2014 FCA 155, dated June 15, 2014, was dismissed.

CITATION:	2016TCC130
COURT FILE NO.:	2013-3531(IT)G
STYLE OF CAUSE:	ANN KLUNDERT AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	February 3, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
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