

Docket: 2014-3960(IT)G

BETWEEN:

JUN LI YU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 31 and November 1, 2016 and
decision rendered orally at the hearing on November 3, 2016,
at Vancouver, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: J. Herbert Rosner
Counsel for the Respondent: Whitney Dunn

JUDGMENT

For the attached reasons rendered orally at the hearing, the appeal from the assessment made under the *Income Tax Act*, notice of which is dated December 5, 2012 and bears number 2016880, is dismissed with costs.

Signed at Ottawa, Canada, this 21st day of November 2016.

“Patrick Boyle”

Boyle J.

Docket: 2014-3960(IT)G

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JUN LI YU,

Appellant,

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**EDITED VERSION OF TRANSCRIPT
OF ORAL REASONS FOR JUDGMENT**

Let the attached edited transcript of the reasons for judgment rendered orally at the hearing on November 3, 2016 at Vancouver, British Columbia be filed. I have edited the transcript (certified by the Court Reporter) for style, clarity and to make minor corrections only. I did not make any substantive changes.

Signed at Ottawa, Canada, this 21st day of November 2016.

“Patrick Boyle”

Boyle J.

Citation: 2016 TCC 276
Date: 20161121
Docket: 2014-3960(IT)G

BETWEEN:

JUN LI YU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Appeal heard on October 31 and November 1, 2016
and decision rendered orally at the hearing on
November 3, 2016, at Vancouver, British Columbia)

Boyle J.

[1] The Appellant is appealing a section 160 assessment of December 2012 in respect of \$119,500 transferred to him in four tranches in January through March of 2010. The transferor of the money was Yan Siang Yu, who at the time of the transfers was the sister of Mr. Yu's wife, Yan Hong Yu. One of the Minister's assumptions, which was not disputed, is that Mr. Yu and Yan Siang Yu had been married to each other before 2010.

[2] In 2010, Yan Siang Yu was living with her mother in her mother's house in Vancouver. Jiao Zhen Huang is the mother of these two Yu sisters, and a third daughter. She explained that she is a widow, that her husband died in China before she emigrated to Canada in 2000. She explained that Huang was her maiden name, and she still used her married name, Mrs. Yu.

[3] In 2010, Mr. Yu's wife, Yan Hong Yu, was living in China with their son. Mr. Yu was living in Canada. His wife's immigration process may have been started by then. Mr. Yu later sponsored his wife and son. His wife is now a Canadian permanent resident.

[4] The underlying assessment of the transferor, Yan Siang Yu, was issued in August 2010 in respect of the years 2006 through 2008. It included approximately \$400,000 in income for each year and assessed penalties. These net worth assessments were in respect of a marijuana grow operation at a Vancouver house on West 53rd Avenue owned by the transferor.

[5] It followed a search warrant executed at the house in May 2009 which located approximately 1,000 marijuana plants and an electrical diversion at the house. The West 53rd Avenue house was later forfeited to the Crown. The transferor declared bankruptcy in February 2012 and was discharged in June 2013.

[6] The transferor's unpaid liability under the *Income Tax Act* resulting from the underlying assessment was approximately \$1,000,000. Apparently this would have been much higher had CRA not overlooked a multiplication step of a factor of four in its grow operation revenues calculation to reflect the fact that CRA had in the very same table assumed there would be four crops each year from these plants.

[7] The Appellant does not dispute that the transferor transferred \$119,500 to him for no consideration, nor does he dispute that he is related to the transferor. At the opening of the hearing, the Appellant's counsel indicated that the Appellant was no longer contesting the validity of the underlying assessment of the transferor. The Appellant's counsel confirmed that the only issue described in the notice of appeal to be determined in this appeal is whether the transferor had any beneficial interest in the money she transferred to the Appellant, as it was the Appellant's position that the money was placed by his mother-in-law with his sister-in-law for the benefit of his wife and their son when she sold her house on West 46th Avenue in Vancouver.

[8] On this basis, it is the Appellant's position that when the transferor transferred \$119,500 to him for the benefit of his wife and son, she only transferred her legal interest which had no value, given the beneficial owner of the money was his wife throughout.

[9] The Appellant's counsel conceded at trial that the Appellant cannot be successful unless he can satisfy the Court this was a valid trust in law. Given the lack of certainty or consistency of the amount that was said to be settled on such trust by the Appellant's mother-in-law, the Appellant's counsel argued that it was a valid trust of at least \$100,000.

[10] Each of the Appellant, his wife, his sister-in-law and his mother-in-law testified. They each testified through an interpreter. The only documentary evidence was one page of an HSBC bank statement of the Appellant which appears to show the \$100,000 tranche being transferred from the transferor's HSBC account to the Appellant's HSBC account, followed by the purchase by the Appellant of a \$100,000 bank draft.

[11] The Respondent only cross-examined the mother-in-law. The Respondent did not put in any evidence.

[12] I will next go through the evidence relating to the proceeds of the sale of the mother-in-law's house from each witness in the order they testified. Mrs. Yu, who is now 79 years old, said that when she sold her house on West 46th Avenue, which had been the family home, and moved to a little bit smaller house on East 60th, she was left with about \$200,000. Mrs. Yu also uses HSBC as her bank. She gave that money to her oldest daughter, Yan Siang Yu, who had an HSBC account at the same branch. She asked her daughter to give "about \$100,000" to her second daughter for her grandson's medical expenses.

[13] Mrs. Yu explained that she gave the whole \$200,000 to her daughter because it was the Chinese custom to leave the oldest child in charge. Nothing was put in writing. Mrs. Yu testified that the \$200,000 was all spent on her grandson and his medical bills. She also said she was unaware her oldest daughter would have first given her money to the Appellant to send to her daughter, his wife, in China.

[14] The Appellant, Mr. Yu, acknowledged receiving from the transferor a \$100,000 transfer, believes he received a \$2,000 transfer, remembers the \$7,500 transfer, and acknowledged receiving a \$10,000 transfer. He said that whenever his sister-in-law had the ability, she would give him the money from time to time for the purpose of him sending to his wife. He said he would wire the transferred money to his wife, at times combined with other amounts. Specifically with respect to the \$100,000 transfer, he clearly remembered wiring that on to his wife from RBC in two \$50,000 tranches to Bank of China.

[15] The transferor, Yan Siang Yu, said that she lived with her mother and would help her mother with her finances as instructed by her mother. The transferor said she received probably \$285,000 from her mother when her mother sold the family home and bought the new one. She also explained that the Chinese tradition is usually for parents to ask their oldest child to handle money.

[16] She said her mother told her to use “the money” to help her sister pay medical bills and to invest “some” for living expenses. I understood this to mean her mother’s living expenses, since no mention was made of any amount being for her third daughter, the youngest child, and since the transferor’s legal and financial problems resulting from the grow operation began the year before, but that is not certain.

[17] The transferor said that the \$100,000 transfer and the \$10,000 transfer were from her mother’s money, and that the remaining \$9,500 transferred was from her own money, not her mother’s, because she wanted to help her sick nephew also.

[18] The Appellant’s wife, Yan Hong Yu, testified that the only amount she ever received from her family was \$100,000 that she received from her husband at the Bank of China, and that no one ever sent her any other money at any other time. She recalls this happened before she arrived in Canada in 2011.

[19] She also recalled that her sister said she would give her \$7,500 but that she asked her sister to give it to her husband instead. There was no suggestion that this was used for their son’s medical expenses.

[20] She said she spent the \$100,000 to see doctors, for the hospital stay and for living expenses.

[21] The Appellant’s wife said their son was not very healthy when he was born in 1998, and was hospitalized for almost 10 years for a kidney disease. Her mother had testified her grandson stayed in hospital when he was born. The Appellant said their son had kidney problems at birth and was hospitalized for six or seven years, starting when he was four years old. The Appellant said their son basically became okay once he came to Canada and started Grade 8. The Appellant’s wife said their son is attending school, almost 18, and goes for regular checkups.

[22] The relevant legal preconditions for section 160, transferee liability, are set out by the Federal Court of Appeal in its 2008 decision in *Canada v. Livingston*, 2008 FCA 89. I refer specifically to the following paragraphs:

17 In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:

- 1) The transferor must be liable to pay tax under the Act at the time of transfer;

- 2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
- 3) The transferee must either be:
 - i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;
 - ii. A person who was under 18 years of age at the time of transfer; or
 - iii. A person with whom the transferor was not dealing at arm's length.
- 4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

18 The purpose of subsection 160(1) of the Act is especially crucial to inform the application of these criteria. In *Medland v. Canada*, 98 DTC 6358 (F.C.A.) ("*Medland*") this Court concluded that "the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse [or to a minor or non-arm's length individual] in order to thwart the Minister's efforts to collect the money which is owned to him." See also *Heavyside v. Canada*, [1996] F.C.J. No. 1608 (C.A.) (QL) ("*Heavyside*") at paragraph 10. More apposite to this case, the Tax Court of Canada has held that the purpose of subsection 160(1) would be defeated where a transferor allows a transferee to use the money to pay the debts of the transferor for the purpose of preferring certain creditors over the CRA (*Raphael v. Canada*, 2000 D.T.C. 2434 (T.C.C.) at paragraph 19).

19 As will be explained below, given the purpose of subsection 160(1), the intention of the parties to defraud the CRA as a creditor can be of relevance in gauging the adequacy of the consideration given. However, I do not wish to be taken as suggesting as there must be an intention to defraud the CRA in order for subsection 160(1) to apply. The provision can apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax: see *Wannan v. Canada*, 2003 FCA 423 at paragraph 3.

...

22 In addition, there is a transfer of property for the purposes of section 160 even when beneficial ownership has not been transferred. Subsection 160(1) applies to any transfer of property — "by means of a trust or by any other means whatever". Thus, subsection 160(1) categorizes a transfer to a trust as a transfer of property. Certainly, even where the transferor is the beneficiary under the trust, nevertheless, legal title has been transferred to the trustee. Obviously, this constitutes a transfer of property for the purposes of subsection 160(1) which, after all, is designed, *inter alia*, to prevent the transferor from hiding his or her assets, including behind the veil of a trust, in order to prevent the CRA from attaching the asset. Therefore it is unnecessary to consider the respondent's argument that beneficial title to the funds remained with Ms. Davies.

[23] In law a valid trust must meet what are called the three certainties: certainty of intention to create a trust, certainty of the subject matter of the trust, and certainty of the beneficiaries or object of the trust. The Appellant faces a number of problems, given the evidence before the Court.

1. The terms of the transfer in trust to Yan Siang Yu by her mother remain questionable. There is nothing in writing. The amount is uncertain. Was the total \$200,000 or \$285,000? Was \$100,000, neither more nor less, for her second daughter? The mother said it was “some” of the money. The transferor said she sent \$110,000 from her mother’s money. Was the balance held for the mother-in-law or for Yan Siang Yu? And was it to be invested for the mother-in-law’s living expenses, or her oldest daughter’s?

No statement of adjustment and no HSBC account records of the mother or older daughter attested to this transfer. The oldest daughter said she received the amount to act on her mother’s instructions in helping with her finances. This is inconsistent with her mother not even being aware the money was first sent to the Appellant to transfer to his wife.

2. The receipt of the money by the Appellant’s wife, which was said to have always been beneficially owned by her, remains unclear. The wife was certain she only ever received \$100,000. The Appellant says he sent her the \$100,000 and also the other \$19,500, though perhaps combined with other amounts. The transferor says that \$9,500 was her own money, not from her mother’s money at all. Again, no banking documents whatsoever with respect to the Appellant’s transfers to his wife were put in evidence.
3. The transferor’s handling of her mother’s money appears inconsistent with a trust. The Appellant testified that the transferor would transfer money when she had the ability, not when her sister asked for it, or when it was needed for his son’s medical expenses.
4. The testimony regarding the use of funds by the Appellant and his wife leaves me wondering if I have been told the whole story. The Appellant and the transferor said the money was used for the son’s medical and hospital bills. The Appellant’s wife said it was also used for their living expenses. The Appellant says his son was hospitalized

for six or seven years, once he was four. The Appellant's wife says he stayed in the hospital for 10 years. Her mother said he remained in the hospital at birth. I am surprised that parents would not be able to clearly remember if their son spent his first four years of life in a hospital or not.

5. No reason was given for the money being first transferred to the Appellant to transfer to the Bank of China for his wife. His mother-in-law was not aware this step was happening.
6. No reason was given for the delayed and broken-up transfers of the money from her mother to the Appellant, other than that it was when the transferor had the ability to transfer some money.
7. The transferor could hardly have behaved less like a trustee. She was not certain of the amount in trust. She did not clearly know if it was \$100,000 or \$110,000. She did not maintain the amounts separate and available for distribution to the beneficiary. She made no attempt to ensure the money was used for its stated purpose, and it is unclear that it in fact was.
8. No explanation was given for the absence of documents that must have existed with respect to:
 - (a) the sale of one house and the purchase of another, which could be expected to ascertain what amount the Appellant's mother in fact had to transfer;
 - (b) the mother-in-law's HSBC statement, which could confirm the amount she transferred to her oldest daughter;
 - (c) the transferor's HSBC or other banking documents that would confirm what amount her mother gave her, and whether she set the \$100,000 or any other amount in trust for her sister aside, and whether she used that amount to make any of these four transfers;
 - (d) the Appellant's HSBC or other banking documents which would confirm that all four transfers came from his sister-in-law, and from which account;

- (e) the Appellant's RBC account documents which could confirm that he transferred all or any of these four amounts on to his wife in China at the Bank of China.

Instead, the HSBC page in evidence shows he received the \$100,000 in his account by transfer from another HSBC account and that he promptly used that money to purchase a \$100,000 bank draft.

The Bank of China account documents of his wife's could have been able to clarify whether she received \$100,000 or \$119,500, or some other amount, and corroborate whether she received anything at all. It could also tie in the timing of the transfers received by the Appellant from his sister-in-law to the Appellant's transfers to his wife.

Instead, I have no disinterested corroborating evidence on these points in circumstances where the Appellant and his wife testified materially differently on the amounts transferred to her.

I am left with only the testimony of the Appellant, his wife, his sister-in-law and his mother-in-law. None of these are disinterested parties. Their testimony is not consistent on key points.

I have no idea why the Appellant and his counsel did not provide any of this to me. It was clear that a number of pages comprising some of it was in the courtroom and available to Appellant and his counsel.

[24] In these circumstances, I am simply unable to conclude on a balance of probabilities that the Appellant's mother-in-law set \$100,000 or \$119,500 or any other amount aside in trust for her second daughter. There is simply insufficient credible and consistent testimony to allow me to conclude that is what probably happened, and what I have is uncorroborated by virtually any written evidence.

[25] I should add that, in response to counsel's argument, even if I am satisfied that \$100,000 found its way to the Appellant's wife to pay their son's medical bills, that does not prove on a balance of probabilities that it came from a trust, and a legal interest in the transferred amount therefore had no value. It could just as easily reflect a family choice of how to spend its available money.

[26] I should also add that the position of the Appellant's counsel, given the noise in the numbers, that I could find a valid trust of at least \$100,000 appears to work very strongly against the trust requirement of certainty of amount.

[27] Since the Appellant does not dispute that the four bank transfers totalling \$119,500 were transferred to him, that the transferor was his sister-in-law, and that she had a tax liability greater than \$119,500, I must dismiss his appeal.

[28] The appeal is dismissed with costs.

Signed at Ottawa, Canada, this 21st day of November 2016.

“Patrick Boyle”

Boyle J.

CITATION: 2016 TCC 276

COURT FILE NO.: 2014-3960(IT)G

STYLE OF CAUSE: JUN LI YU v. THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATES OF HEARING: October 31, November 1 and 3, 2016

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: November 21, 2016

APPEARANCES:

 Counsel for the Appellant: J. Herbert Rosner
 Counsel for the Respondent: Whitney Dunn

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