Docket: 2017-130(GST)I

BETWEEN:

ASSUNTA NELSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 27, 2017, at Vancouver, British Columbia

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellant:	Michael Wasserman
Counsel for the Respondent:	Spencer Landsiedel

JUDGMENT

The appeal from the assessment made under subsection 325(1) of the *Excise Tax Act*, the notice of which is dated September 11, 2015, and bears number 3392887, and which was confirmed by the notice of confirmation dated September 28, 2016, is allowed, without costs, and the assessment is vacated in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 11th day of September 2017.

"Dominique Lafleur"

Lafleur J.

Citation: 2017 TCC 178
Date: 20170911
Docket: 2017-130(GST)I

BETWEEN:

ASSUNTA NELSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lafleur J.

I. OVERVIEW

[1] This appeal relates to an assessment dated September 11, 2015, the notice of which bears number 3392887, made by the Minister of National Revenue (the "Minister") under subsection 325(1) of the *Excise Tax Act* (RSC, 1985, c. E-15, as amended) (the "Act"). Mrs. Assunta Nelson was assessed for an amount of $27,306.18 in respect of a transfer by her spouse, Mr. Richard Nelson, of his interest (the "Interest") in a property, the civic address of which is 6256 Mystic Way, Nanaimo, British Columbia (the "Property"), while her husband had a tax debt in the amount of no less than $27,306.18.

II. FACTS

[2] At the beginning of the hearing, the parties submitted a Partial Agreed Statement of Facts under Exhibit AR-1 which reads as follows:

1. At all material times, the Appellant was married to Richard Nelson (the "Spouse").

2. On or about August 21, 2002, the Appellant and the Spouse each acquired a 50% undivided interest in the property described as PID: 015-785-254 LOT 62 DL 48 WELLINGTON DISTRICT PLAN 50009 and located at 6256 Mystic Way, Nanaimo, British Columbia (the "Property").

3. At all material times, the Appellant and the Spouse jointly held a Royal Bank of Canada line of credit and a MasterCard credit card.

4. On or about July 18, 2013, the Spouse transferred his 50% interest in the Property to the Appellant (the "Transfer").

5. The Appellant did not pay any real estate commissions or legal fees in respect of the Transfer.

6. If the Appellant had employed the services of a realtor and a lawyer, the following costs would have been payable by the Appellant:

Real estate commissions	Legal fees
7% on the first $100,000 of value, plus 3% on the balance	$1,000

7. At the time of the Transfer:

   a) the value of the Property was $357,000.00;

   b) the value of the mortgage on the Property was $150,238.40; and

   c) the value of the home equity line of credit on the Property was $152,149.24.

8. On or about September 5, 2014, the Spouse filed an assignment in bankruptcy.

9. At all material times, the Spouse was the director and shareholder of CV Home & Auto Glass Ltd. (the "Company").

10. The Company carried on the business of home and automobile glass installation and repair.

11. The Company was required to collect and remit GST/HST on its taxable supplies.

12. The Company failed to remit GST/HST on its taxable supplies for the reporting periods ended April 30, 2012, July 31, 2012, January 31, 2013, and October 31, 2013.

13. In or about September 2013, the Company ceased operations.

14. On January 28, 2015, a certificate for the Company's net tax liability for unremitted GST/HST in the amount of $39,634.33 was registered in the Federal Court.

15. On January 28, 2015, a Writ of Seizure and Sale was issued by the Federal Court in respect of the Company's net tax liability.

16. On April 7, 2015, execution of the Writ of Seizure and Sale was returned unsatisfied in whole.

[3] By notice of assessment dated May 22, 2015, Mr. Nelson was assessed by the Minister under subsection 323(1) of the Act on the basis that CV Home & Auto Glass Ltd. (the "Company") failed to remit an amount of net tax as required under subsection 228(2) of the Act in the amount of $40,277.07 (the "Underlying Assessment").

[4] Exhibit A-1 containing various documents was produced at the hearing.

[5] Mrs. Nelson testified first at the hearing, while her husband, Richard Nelson, was excluded from the courtroom and testified after Mrs. Nelson. The Respondent did not call any witness. Written submissions were made by the parties and were received by the Court in the course of the month of July 2017.

[6] Mr. and Mrs. Nelson were credible witnesses. Their respective testimonies corroborated one another and I did not find any contradiction between their respective versions of the facts.

[7] Mr. and Mrs. Nelson have been married for 23 years and they have two children now aged 11 and 13. Mrs. Nelson works as an investment advisor assistant since 2000; however, she did not work in 2009 and part of 2008. Her salary and commissions which varied from $53,000 to $66,000 a year were paid directly into her Canadian Imperial Bank of Commerce bank account (the "CIBC Account"). The household expenses are paid from the CIBC Account and the RBC Chequing Account (as defined below). Mrs. Nelson takes care of the household finances.

[8] Mr. Nelson testified that the Company became active in 1993, and ended its activity in 2014. The Company, wholly-owned by Mr. Nelson, had cash flow issues, as it had expanded in the late 2007 and beginning of 2008 and new equipment was bought. Its customers were mostly retired people and, with the financial crisis of 2008, they had less funds available for renovation. Mr. Nelson had hopes that the Company would be able to recover as he was able to renegotiate banks' terms repayment, landlord rents, as well as suppliers' payments. However, there was one receivable of approximately $60,000 that was never paid, and the Company was forced to shut down. Mr. Nelson testified that the Company was

indebted to the Canada Revenue Agency (the "CRA") and to various suppliers and banks. Mr. Nelson also testified that he had borrowed various amounts from Mrs. Nelson. As mentioned above, Mr. Nelson confirmed Mrs. Nelson's testimony.

[9] Mrs. Nelson testified that four transfers of money totaling $143,000 were made to the Company during 2008, 2009 and 2011 as described below (collectively, the "Transfers"). Mrs. Nelson explained that she agreed to the Transfers since her husband explained to her that he needed funds for the Company's business as he was having cash flow issues. Mrs. Nelson testified that she wanted to support her husband's business. She was of the view that half of the amount transferred was hers.

[10] Prior to each Transfer, Mr. Nelson had asked for Mrs. Nelson's authorization to borrow the funds. The evidence showed that at any time, Mrs. Nelson was not a shareholder, nor a director or officer of the Company and that she was not employed by or involved in the day-to-day activities of the Company.

[11] Mrs. Nelson testified that the Transfers were not recorded in writing, no promissory notes were issued and no security taken as she did not think it was necessary between husband and wife. She testified that they had an oral agreement that the Transfers were loans.

[12] It was agreed between Mr. and Mrs. Nelson that interest would be paid every month and a $1,000 capital repayment would be made each month when the Company's business would be profitable. A few payments have been made over the years. Mrs. Nelson testified that, as of January 2011, the Company had made some interest payments, but no repayment of capital. Mrs. Nelson stated that, in 2013, the Company had made some interest payments and some small capital repayments to her. However, the balance of the Line of Credit (as defined below) in the amount of $152,149.24 as at the time of transfer of the Interest relates substantially to the amount Mrs. Nelson agreed to transfer to Mr. Nelson and the Company.

[13] The Transfers were as follows:

i) A transfer of $50,000 was made by a cheque (dated December 15, 2008) in that same amount to the Company's name drawn from Mr. and Mrs. Nelson's joint Royal Bank of Canada ("RBC") chequing account

(the "RBC Chequing Account"). The funds originated from the RBC joint line of credit (the "Line of Credit"). The cheque bearing Mrs. Nelson's name and address was signed by Mr. Nelson. According to Mrs. Nelson, Mr. Nelson signed the cheque because she was not available then to sign it. However, she testified that they had a discussion before Mr. Nelson signed the cheque as half of the funds were hers.

ii) A transfer of $50,000 was made by a cheque (dated February 12, 2009) in that same amount to the Company's name drawn from the RBC Chequing Account. The funds originated from the Line of Credit as to $40,000 and from Mr. and Mrs. Nelson's joint RBC savings account (the "RBC Savings Account") as to $10,000. The cheque bearing Mrs. Nelson's name and address was signed by Mr. Nelson.

iii) A transfer of $19,000 was made on January 14, 2011, to the Company by a charge in the same amount on the MasterCard credit card (the "Credit Card") jointly-held by Mr. and Mrs. Nelson.

iv) A transfer of $24,000 was made by a cheque (dated January 17, 2011) in that same amount to the Company's name drawn from the RBC Chequing Account. The funds originated from the Line of Credit. The cheque was signed by Mrs. Nelson.

[14] Mrs. Nelson testified that, from the bank's perspectives, both she and Mr. Nelson were fully responsible for the amounts drawn from the Line of Credit. As to the Credit Card, she stated that she was the primary holder and her husband was added later as a secondary card holder; she testified that she was fully responsible for the amount owed on the Credit Card as she is the primary holder.

[15] Mrs. Nelson also testified as to the events preceding the transfer of the Interest in the Property by her husband in July 2013. The Company was not in a good financial position and her husband was very stressed by the whole situation. As Mr. Nelson did not own any asset other than the Interest, he offered to transfer the Interest to Mrs. Nelson in order to pay back a portion of the Transfers. After the transfer of the Interest, Mrs. Nelson was able to pay the balance on the Credit Card, but the balance of the Line of Credit is still owed. Furthermore, Mr. Nelson did not pay his half of the mortgage on the transfer of the Interest.

[16] Finally, Mrs. Nelson explained that, in her letter dated June 9, 2015, and addressed to the CRA (the "CRA Letter"), which was filed at the hearing under

Exhibit R-2, she did not refer to the Transfers because she did not think she had to since the Trustee in the matter of the bankruptcy of Mr. Nelson had told her that the transfer of the Interest was null and void. In that letter, Mrs. Nelson had indicated that the consideration given on the transfer of the Interest was $1 and she referred the CRA officer to the Trustee in bankruptcy to obtain additional information.

[17] Various bankruptcy documents were filed as part of Exhibit A-1 (Tab 29). On December 9, 2015, the Supreme Court of British Columbia issued an order under which Mr. Nelson was ordered to pay to the Trustee in the matter of the bankruptcy of Mr. Nelson an amount of $12,000 for the Interest as it was an asset transferred under fair market value prior to filing Mr. Nelson's assignment in bankruptcy.

[18] The Respondent filed a Form A, which is the transfer document registered with the Victoria Land Title Office, under Exhibit R-1 (the "Form A"). According to this document, the consideration for the transfer of the Interest is "$1.00 and other love and consideration".

III. ISSUE

[19] At the hearing, the parties admitted that the amount of the underlying debt of the Company owed to the CRA and the validity of the Underlying Assessment issued to Mr. Nelson were not in issue.

[20] Therefore, the sole issue before me is to determine, at the time of the transfer of the Interest to Mrs. Nelson, whether the fair market value of the Interest exceeds the fair market value of the consideration given by Mrs. Nelson, if any.

IV. POSITION OF THE PARTIES

A. Appellant's position

[21] According to the Appellant, the Transfers represent loans made by Mrs. Nelson to Mr. Nelson and the Company and more specifically, half of the amount so transferred, being $71,500, constitutes such loans. An oral agreement existed between Mr. and Mrs. Nelson that the Transfers were loans made by Mrs. Nelson.

[22] According to the testimonies of Mr. and Mrs. Nelson, the transfer of the Interest was made by Mr. Nelson in repayment of a portion of the loans as the Company was not in a position to reimburse Mrs. Nelson. The Appellant cited *Connolly v The Queen*, 2016 TCC 139, 2016 DTC 1094 [*Connolly*], in support of her position.

[23] According to the Appellant, the following elements are indicia that the Transfers were loans:

i) while Mr. Nelson could have taken the funds from the Line of Credit and the Credit Card on his own accord, the evidence showed that Mr. and Mrs. Nelson had a discussion before each Transfer took place;

ii) repayment terms were agreed upon by Mr. and Mrs. Nelson for each Transfer;

iii) a legal and beneficial claims arise in favor of Mrs. Nelson as the Company is wholly-owned by Mr. Nelson; and

iv) payments were made by the Company to Mrs. Nelson in 2011, 2012 and 2013. The evidence showed that Mrs. Nelson was not an employee nor a shareholder, director or officer of the Company and, accordingly, there is no other basis to these payments than a repayment of the loans. The General Ledger of the Company filed under Tab 28 of Exhibit A-1 showed a total of 22 payments made by the Company to Mrs. Nelson and the Toronto Dominion Bank Statements filed under Tabs 30 and 31 of Exhibit A-1 set out some of the payments made. It is of importance to note that these payments were made well before Mrs. Nelson was made aware of any possible liability under the Act.

[24] In the alternative, if no loan is found to exist, the Appellant is of the view that the fair market value of the Interest was decided by the Supreme Court of British Columbia (Tab 29, Exhibit A-1) as being of an amount of $12,000. If I were to make an alternate finding, that would be inconsistent with the doctrine of the Supreme Court of British Columbia and of this Court. Furthermore, since the Respondent did not contest the prior proceedings before the Supreme Court of British Columbia, the Appellant could argue abuse of process or alternatively issue estoppel.

[25] Therefore, the Appellant is of the view that either Mrs. Nelson should not be required to pay any amount to the Minister under the Act as to do so would amount to double payment; or her liability should be limited to $12,000 as that amount was the fair market value of the Interest as determined by the Supreme Court of British Columbia in Mr. Nelson's bankruptcy proceedings; or her liability should be reduced by $12,000 to reflect the amount to be paid by Mr. Nelson in accordance with the bankruptcy proceedings, thereby avoiding double payment for the same property. For all purposes, the Appellant is of the view that the legal fees and the realtors' commissions are amounts properly deductible from the calculation of the fair market value of the Interest.

B. Respondent's position

[26] According to the Respondent, Mr. Nelson did not transfer the Interest to Mrs. Nelson in order to repay loans made by Mrs. Nelson to Mr. Nelson or to the Company. Rather, Mr. Nelson transferred the Interest to Mrs. Nelson for a consideration of $1.00, as indicated on Form A. The Transfers "were not the source of a debt between husband and wife, but were indicative of a family managing its shared finances and moving money around various accounts in order to help support the Company, which was the source of a significant portion of the family's income".

[27] In support of that position, the Respondent noted the absence of documentary evidence of a contractual debt: there were no written agreement, no mention of a debt owed to Mrs. Nelson on the Company's financial statements and no reference to debts on the cancelled cheques issued by the Company.

[28] Further, the Respondent noted the fact that all property were jointly-held by Mrs. and Mr. Nelson and that the conduct of Mr. and Mrs. Nelson did not show that there was an outstanding debt or even an expectation of repayment.

[29] The Respondent did not dispute that money was transferred from the Company to Mrs. Nelson. However, according to the Respondent, these sums did not represent repayment of loans but only showed that the Company was an income source for the family.

[30] Furthermore, according to the Respondent, Mrs. Nelson's submission that their finances were split evenly does not pass muster as they conducted their financial affairs as a couple. To show the intertwined nature of the family's finances, the Respondent noted the fact that Mr. Nelson's paycheques were

deposited in the RBC Chequing Account. Further, the Respondent noted the fact that two cheques evidencing two Transfers were in Mrs. Nelson's name but signed by Mr. Nelson. However, since Mrs. Nelson was handling all the family's finances, it follows logically that the majority of the cheques were under her name.

[31] According to the Respondent, it is not consistent with commercial reality to continue to advance large sums of money when the previous advanced sums have not been repaid.

[32] Further, the fact that Mrs. Nelson did not refer to the Transfers in the CRA Letter indicates that she did not intend to consider the Transfers as loans and did not expect to be repaid.

[33] Finally, according to the Respondent, the fair market value of the Interest is $27,306.18 as determined by the Minister. Potential costs associated with a notional disposition of the Property such as legal fees and realtors' commissions are not to be taken into account for determining fair market value of the Interest. Furthermore, the Respondent argued that I should not take judicial notice of the determination of the fair market value of the Interest made by the Supreme Court of British Columbia in Mr. Nelson's bankruptcy proceedings: that value is a fact that remains to be decided by this Court. A plea of issue estoppel cannot be successful in this matter as there is no identity of parties. Further, the Respondent is of the view that the argument of abuse of process should not be accepted in these particular circumstances.

V. DISCUSSION

[34] Section 325 of the Act is a tax collection tool which prevents taxpayers who have incurred a tax liability from transferring property to certain non-arm's length individuals in an attempt to shield the property from the collection of a tax debt (*Canada v Livingston*, 2008 FCA 89 at para 18, 2008 DTC 6233 [*Livingston*], in respect of a similar disposition found in the *Income Tax Act*, RSC, 1985, c. 1 (5th supp.), as amended). When section 325 of the Act correctly applies, a transferee becomes liable for the amount the transferor is liable to pay or remit under the Act for the reporting period of the transferor that includes the date of transfer of the property or any preceding reporting period of the transferor to the extent that the fair market value of the property transferred exceeds the consideration paid by the transferee.

[35] Subsection 325(1) of the Act reads as follows:

325 (1) Tax liability re transfers not at arm's length — Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to

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

(*b*) an individual who was under eighteen years of age, or

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

the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of

(*d*) the amount determined by the formula

A - B

where

A is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the transferee for the transfer of the property, and

B is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the *Income Tax Act* in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and

(*e*) the total of all amounts each of which is

(i) an amount that the transferor is liable to pay or remit under

325(1) Transfert entre personnes ayant un lien de dépendance — La personne qui transfère un bien, directement ou indirectement, par le biais d'une fiducie ou par tout autre moyen, à son époux ou conjoint de fait, ou à un particulier qui l'est devenu depuis, à un particulier de moins de 18 ans ou à une personne avec laquelle elle a un lien de dépendance, est solidairement tenue, avec le cessionnaire, de payer en application de la présente partie le moins élevé des montants suivants :

a) le résultat du calcul suivant :

A - B

où :

A représente l'excédent éventuel de la juste valeur marchande du bien au moment du transfert sur la juste valeur marchande, à ce moment, de la contrepartie payée par le cessionnaire pour le transfert du bien,

B l'excédent éventuel du montant de la cotisation établie à l'égard du cessionnaire en application du paragraphe 160(2) de la *Loi de l'impôt sur le revenu* relativement au bien sur la somme payée par le cédant relativement à ce montant;

b) le total des montants représentant chacun :

(i) le montant dont le cédant est redevable en vertu de la présente partie pour sa période de déclaration qui comprend le moment du transfert ou pour ses périodes de déclaration

this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or

(ii) interest or penalty for which the transferor is liable as of that time,

but nothing in this subsection limits the liability of the transferor under any provision of this Part.

antérieures,

(ii) les intérêts ou les pénalités dont le cédant est redevable à ce moment.

Toutefois, le présent paragraphe ne limite en rien la responsabilité du cédant découlant d'une autre disposition de la présente partie.

[36] For subsection 325(1) of the Act to apply, four conditions must be met: (*Livingston*, *supra* at para 17):

i) The transferor must be liable to pay or remit an amount under the Act for the reporting period that includes the time of transfer or any preceding reporting period;

ii) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever, from the transferor to the transferee;

iii) The transferee must either be 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, be a person who was under 18 or be a person with whom the transferor was not dealing at arm's length; and

iv) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee at the time of transfer.

[37] In this appeal, it is not disputed that the first three conditions are met. The sole issue before me is to determine whether the fair market value of the Interest at the time of the transfer exceeds the fair market value at that time of the consideration given by Mrs. Nelson, if any. In order to make that determination, I will first determine the fair market value of the consideration given by Mrs. Nelson, if any, for the transfer of the Interest. If I conclude that the fair market value of the consideration given by Mrs. Nelson for the transfer of the

Interest is less than $27,306.18, I will examine, in a second step, the fair market value of the Interest at the time of the transfer.

[38] As indicated in the Reply (para 18), in determining Mrs. Nelson's liability under the Act, the Minister had made various assumptions of fact that include the following:

> e) on July 18, 2013, the Spouse transferred his 50% interest in the Property to the Appellant for consideration of $1.00 (the "Transfer");
>
> f) the Appellant gave no other consideration for the Spouse's 50% interest in the Property;
>
> g) the Spouse did not owe the Appellant money when he transferred his 50% interest in the Property to her;
>
> …
>
> n) the fair market value of the Spouse's 50% interest in the Property was $27,306.18, as set out in Schedule "F";
>
> …

[39] As explained by Justice L'Heureux-Dubé in *Hickman Motors Ltd v Canada*, [1997] 2 SCR 336 at paras 92–95, 97 DTC 5363, the initial onus of the taxpayer consists in demolishing the assumptions relied upon by the Minister to issue the assessment by making out a *prima facie* case that said assumptions are inaccurate. Then, the burden of proof shifts to the Minister, who must prove the assumptions relied upon.

[40] It is also very important to keep in mind that the shifting of the burden of proof to the Minister cannot be lightly, capriciously or casually done, since the taxpayer typically has the information within his reach and under his control. Absent exceptional circumstances where facts are peculiarly within the Minister's knowledge, the onus on an assessment of tax owing should be the result of demolishing the Minister's assumptions (see *Canada v Anchor Pointe Energy Ltd*, 2007 FCA 188 at paras 35–36, 283 DLR (4th) 434).

[41] 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 (Minister of National*

Revenue – MNR), [2000] TCJ No 53 (QL) at para 23 (TCC), cited with approval by Trudel JA in *Amiante Spec Inc v Canada*, 2009 FCA 139 at para 23, [2010] GSTC 26).

[42] Keeping in mind these principles, after reviewing the evidence adduced at the hearing, I conclude that Mrs. Nelson has shown, on a balance of probabilities that half of the amount of the Transfers constituted loans made by her to her husband and the Company. I also conclude that Mrs. Nelson had given consideration in exchange for the transfer of the Interest and that the fair market value of said consideration, namely half of the amount of the Transfers which amounted to $71,500, exceeded the fair market value of the Interest at the time of the transfer which was established at $27,306.18. The Respondent did not succeed in rebutting the credible and reliable evidence given by Mr. and Mrs. Nelson at trial.

[43] When assessing credibility, I can consider inconsistencies, the attitude and demeanour of the witness, motives to fabricate evidence, and the overall sense of the evidence (*Nichols v The Queen*, 2009 TCC 334, 2009 DTC 1203 (para 23)). The evidence before me established, on balance, that Mrs. Nelson had loaned money to her husband and the Company in an amount equal to $71,500 which is equal to half of the amount of the Transfers.

[44] According to the Respondent, the Transfers "were indicative of a family managing its shared finances and moving money around various accounts in order to help support the Company, which was the source of a significant portion of the family's income". I reject that argument.

[45] The fact that there is no written agreement and no promissory note to acknowledge the loans or no security taken is not a bar to my finding, as I found that the testimonies of Mr. and Mrs. Nelson were credible and reliable and showed that an oral agreement had been reached between Mr. and Mrs. Nelson. Mrs. Nelson testified that she did not think that a written agreement was necessary between husband and wife. Also, the evidence showed that Mr. Nelson had consulted with Mrs. Nelson before each Transfer was implemented, and repayment terms were agreed upon between Mr. and Mrs. Nelson. As mentioned above, I did not find any contradiction between the testimonies of Mr. and Mrs. Nelson. Justice Favreau, of our Court, had stated in *Pelletier v The Queen*, 2009 TCC 541, 2009 DTC 1365 [*Pelletier*], that:

> 13 In tax matters, documentary evidence is almost always required from taxpayers where the evidence submitted is not sufficient or is vague, where the

> witnesses are not credible or where there are contradictions in the information provided by the taxpayers.…

[46] After citing *Pelletier*, *supra*, a case that he had decided, Justice Favreau concluded in *Connolly*, *supra*, that "one should abstain from concluding that documentary evidence is always necessary, as it is well recognized that verbal contract may be as valid as if it was set out in writing. However, the difficulty of establishing the existence of such a verbal contract will lie on the testimonial evidence submitted by a witness – thus his or her credibility" (para 27).

[47] The Respondent argued that as the financial statements of the Company for the period ending April 30, 2010, do not refer to a debt owed to Mrs. Nelson, it is not possible to conclude that Mrs. Nelson had loaned any money to Mr. Nelson and the Company. However, I note that the financial statements are not audited and that the liabilities of the Company include a shareholder loan in an amount of $193,435. I am of the view that, given the testimonies of Mr. and Mrs. Nelson, the fact that the financial statements of the Company did not refer specifically to a debt owed to Mrs. Nelson is not conclusive as the various ledgers of the Company produced at hearing indicate that Mrs. Nelson is owed money by the Company.

[48] Further, various payments were made by the Company in favor of Mrs. Nelson over the years and, in my view, these payments are indicative of a debt owed by Mr. Nelson and the Company to Mrs. Nelson. Mrs. Nelson was not a shareholder of the Company nor a director or officer. Mr. and Mrs. Nelson also testified that Mrs. Nelson was never an employee of the Company and she was never involved in the day-to-day activities of the Company. Accordingly, the Company could not be paying a dividend or a salary to Mrs. Nelson. The Respondent also submitted that, as Mrs. Nelson was handling all of the family's finances, it was not unreasonable for money moving from the Company to Mrs. Nelson. I fail to see the relevancy of that argument. In addition, Mrs. Nelson also testified that she was an independent woman and, indeed, the evidence clearly confirms that. Mrs. Nelson worked as an investment adviser's assistant since 2000 and still is. She testified that it is only in 2009 that she was not employed and stayed at home to take care of their two children.

[49] In support of her position, the Respondent also noted that there is no reference to debts on the copies of the cancelled cheques issued by the Company to Mrs. Nelson. I fail to see how that fact could be relevant as all cheques issued by the Company and produced at trial, including cheques issued to Mrs. Nelson, did not bear any mention of the object for the payment. I further note that there is no room on the various cheques to add any mention of the object of the payment.

[50] Furthermore, I fail to see, on the basis of the testimonies of Mr. and Mrs. Nelson, how I can conclude that, as they were acting as one unit in dealing with the family's finances, it is not possible to infer that loans were made by Mrs. Nelson to Mr. Nelson and the Company. The Respondent argued that the fact that all property were jointly-held by Mrs. and Mr. Nelson is of great importance in this appeal and this is a fundamental difference with the facts in *Connolly*, *supra*. The Respondent noted that the Transfers came from accounts held jointly by Mr. and Mrs. Nelson; in addition, the Property was jointly-owned by them. Further, Mr. and Mrs. Nelson both testified that if one of them was to fail to make a payment on the Credit Card or the Line of Credit, the other would be fully responsible for the payments; hence, according to the Respondent, Mr. and Mrs. Nelson conducted their financial affairs as a couple and, accordingly, no loan could be found to have been made by Mrs. Nelson to Mr. Nelson and the Company. The Respondent referred to *Ferraro-Passarelli v The Queen*, 2013 TCC 26 at para 21, [2013] GSTC 23 [*Ferraro*], where this Court held that the fact that property were jointly-held was of particular importance in making that determination.

[51] In *Ferraro*, *supra*, the Court dismissed the appeal of the taxpayer having found that on the facts of that case, there was no evidence of a mutual contract between husband and wife for each to be responsible for his or her share of the mortgage. The facts in *Ferraro*, *supra*, are significantly different from the facts herein as the subject matter of the debt in *Ferraro*, *supra*, was for a joint asset (the family home) and the debt was composed of amounts paid for property taxes and mortgage. In the present case, the Transfers are of significant amounts and were paid directly to the Company which is wholly-owned by Mr. Nelson.

[52] In addition, I am of the view that while the testimonies showed that, toward the banks, each of Mr. and Mrs. Nelson was fully responsible for the debts under the Line of Credit and the Credit Card, that has no bearing on the obligations between Mr. and Mrs. Nelson, as "a co-debtor, while liable to the creditor for the full amount, is only liable as among the co-debtors for his or her share" (*Lafrentz v M & L Leasing*, 2000 ABQB 714 (CanLII) at para 32, 275 AR 334). I am of the view that the evidence showed that the agreement between Mr. and Mrs. Nelson was that, between themselves, half of the money borrowed under the Line of Credit and withdrawn from the Credit Card was the responsibility of Mrs. Nelson and the other half, of Mr. Nelson.

[53] It is worth noting that the 2 cheques issued for the Transfers made in 2008 and 2009 were made by cheques under Mrs. Nelson's name and signed by

Mr. Nelson. The Respondent argued that this is another fact showing the intertwined nature of the family's finances. I do not agree. I find that those cheques tend to confirm the testimonies of each of Mr. and Mrs. Nelson to the effect that money was lent by Mrs. Nelson to Mr. Nelson and the Company.

[54] The Respondent further argued that it was not consistent with commercial reality to continue to advance large sums of money when the previously advanced sums have not been repaid. I do not find that argument relevant since we are dealing with transactions between husband and wife.

[55] I did not give a lot of weight to the CRA Letter, where Mrs. Nelson did not make reference to the Transfers. Firstly, Mrs. Nelson was not represented at that stage of the matter. Secondly, no evidence was adduced as to the content of the conversation Mrs. Nelson had with the CRA officer and the request made by the CRA officer. In addition, I am not prepared to conclude that Mrs. Nelson understood the tenor of subsection 325(1) of the Act. Finally, Mrs. Nelson gave a credible explanation as to why she did not refer to the Transfers.

[56] I am of the view that the indication found on Form A that the consideration was "$1.00 and other love and consideration" is not conclusive as to the fair market value of the consideration given by Mrs. Nelson on the transfer of the Interest, especially in a non-arm's length transaction like the one under review in this appeal.

[57] Furthermore, I am of the view that the fact that Mrs. Nelson was not identified as a creditor on Mr. Nelson's bankruptcy documents is not conclusive as to the existence of a debt.

[58] Finally, the evidence showed that the transfer of the Interest to Mrs. Nelson was made to repay a portion of the amounts owed to Mrs. Nelson in respect of the Transfers as the Interest was the sole asset owned by Mr. Nelson. Mr. Nelson testified that the transfer of the Interest was made so as to comfort Mrs. Nelson since she was concerned in that respect.

[59] Having concluded that the fair market value of the consideration given by Mrs. Nelson in exchange for the transfer of the Interest was equal to half of the amount of the Transfers, namely $71,500, it is not necessary for me to determine whether the fair market value of the Interest was equal to $12,000 or $27,306.18 and I decline to do so.

VI. CONCLUSION

[60] For the foregoing reasons, the appeal from the assessment made under subsection 325(1) of Act, the notice of which is dated September 11, 2015, and bears number 3392887, and which was confirmed by the notice of confirmation dated September 28, 2016, is allowed, without costs, and the assessment is vacated.

Signed at Montréal, Quebec, this 11th day of September 2017.

"Dominique Lafleur"

Lafleur J.

CITATION:	2017 TCC 178
COURT FILE NO.:	2017-130(GST)I
STYLE OF CAUSE:	ASSUNTA NELSON AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 27, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Dominique Lafleur
DATE OF JUDGMENT:	September 11, 2017

APPEARANCES:

Counsel for the Appellant:	Michael Wasserman
Counsel for the Respondent:	Spencer Landsiedel

COUNSEL OF RECORD:

For the Appellant:

Name:	Michael Wasserman
Firm:	Ramsay Lampman Rhodes Nanaimo, British Columbia

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada