Docket: 2006-765(IT)G

BETWEEN:

HARISH KADOLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of *Slrender Kadola*
(2006-766(IT)G)
on July 10, 2008, at Vancouver, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Andrew Davis
Counsel for the Respondent:	Johanna Russell

JUDGMENT

The appeal from the assessment made under the *Income Tax Act*, notice of which is dated May 4, 2005, and bears number 35735 is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 22nd day of August 2008.

"B.Paris"

Paris J

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Citation: 2008 TCC 474
Date: 20080822
Dockets: 2006-765(IT)G
2006-766(IT)G

BETWEEN:

HARISH KADOLA
SLRENDER KADOLA,

Appellants,

and

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Respondent.

REASONS FOR JUDGMENT

Paris, J.

[1] The issue raised in these appeals is whether the Appellants are liable to pay $66,000 pursuant to assessments made by the Minister of National Revenue under subsection 160(1) of the *Income Tax Act*.

[2] The Appellants Slrender Kadola and Harish Kadola are mother and son. They were assessed on the basis that Jagir Kadola (Slrender's husband and Harish's father) transferred property with a fair market value of $66,000 to them for no consideration while he had an unpaid income tax liability in excess of $93,000.

[3] The Appellants take the position that the transfers were made to the Appellants for consideration, in part as repayment of a loan owing by Jagir to Slrender and in part as payments made by Jagir to meet his statutory obligations to support his family.

[4] Many of the facts in the case are not in dispute. The Appellants admit that in 2002, 2003 and 2004 Jagir gave Slrender 37 cheques totalling $66,000, which she deposited in an account at the CIBC that had been opened by Harish on December 14, 2000, when he was 13 years old. In October 2003, Slrender added herself to the account as a joint account-holder with Harish. In 2002, 2003 and 2004, Slrender withdrew the $66,000 from the bank account. It was also admitted that Jagir owed not less than $93,578.53 under the *Income Tax Act* in each of those years.

[5] In 2002 Jagir and Slrender lived with their four children and Jagir's mother in a house owned by Jagir's mother. In February 2002, their eldest daughter Shawna got married and moved out of the family home. She was 25 years old at the time. Their two other daughters were 24 and 18 years old, respectively, in 2002 and Harish was 15 years old.

[6] Shawna gave evidence that her mother paid for her and her siblings' expenses, and gave them spending money, bought food for the family and paid for gas for the family car. She said her father did not pay any of the children's expenses.

[7] She and Harish both testified that their parents' marriage had broken down, that their relationship was "pretty well non-existent" and that they slept apart.

[8] Harish also testified that he opened the bank account into which the cheques in question were deposited by his mother, but that he was unaware that she was using his account or that she became a joint account-holder. He said he was also unaware that his mother was receiving cheques from his father in 2002, 2003 and 2004.

[9] He said that he opened the account in 2000 to deposit money he received as birthday gifts, but that he stopped using the account after 6 months or a year.

[10] Slrender testified that she was married to Jagir in 1974 but that by 2002 their marriage had deteriorated and they were sleeping apart. She said she did the cooking and cleaning for the entire family, including her husband, although the family did not eat together ever. During the years in issue she worked in a clothing boutique and earned from $10 to $12/hour. She said that Jagir gave her money for family expenses and that she also used her earnings to pay the household bills. She estimated she spent $2,000/month on food, $4,000/year for her son's private school tuition, $25,000 for her daughter's wedding in 2002. She drove a 2002 Mercedes automobile on which her husband made the down payment and she made the monthly payments of approximately $800.

[11] Slender testified that she used the $66,000 from the cheques Jagir gave her for groceries, household bills and items for her children and for her daughter's wedding.

[12] Slender admitted that after June 18, 2002 she made all of the deposits and withdrawals from the CIBC bank account that Harish had opened. She said that she knew all of the people who worked in the CIBC branch at which the account was opened and they let her deposit and withdraw funds from the account whenever she wanted. However, in October 2003 a teller she did not know refused to let her use the account unless she became a joint holder of the account, which she did. She said she used her son's account to deposit the cheques because her bank "gave her the run around" when she tried to deposit them to her own account.

[13] Most of the cheques were certified and made out to J.Kadola but two were made payable to Damon Consulting, which Slrender said was operated by her husband. A number of the cheques were drawn on the account of Karnail Logistics Ltd. and the remainder appear to be bank drafts where the payor is not shown. Slrender did not have any knowledge of Karnail Logistics.

[14] Slrender also identified a document purporting to be a guarantee and promissory notes from Jagir to her. She said it was written and signed by him on April 19, 2000. That document reads:

> To Slrender Kadola
>
> This is a personal guarantee, and promissory note, if Vertex Transportation does not pay back to Slrender Kadola, the sum of $40,000 plus interest, I Jagir Kadola shall be fully responsible for the monies and interest, and shall pay it back to Slrender Kadola.

[15] The document also shows the signature of two witnesses which Slrender said were friends of hers.

[16] She also identified a letter from a Vancouver law firm to Vertex Transportation ("Vertex") as a demand letter written on her instruction. That letter reads:

> File No. 1900
>
> June 7, 2000
>
> PERSONAL & CONFIDENTIAL
> Via Courier

Vertex Transportation Services Inc.
12640 Mitchell Road
Richmond, B.C.
V6V 1M8

Attention: Jerry Kadola

Dear Sir:

RE: Loan Agreement Dated April 19th, 2000

We are solicitors for Slrender Kadola who lent to you $40,000.00 with interest at 15% per annum. Such loan is evidenced by a Demand Promissory Note and Loan Agreement both dated April 19, 2000.

In accordance with the terms of the Demand Promissory Note and Loan Agreement, we, on behalf of our client, hereby demand immediate repayment of the principal amount of the loan, $40,000.00 plus interest to the 10th of June, 2000, in the amount of $854.79 for a total of $40,854.79, per diem interest after June 10, 2000 will be $16.44.

Yours truly,

KAMBAS GALBRAITH
Per:

Nick Kambas
NK/ml

cc Slrender Kadola

[17] No copy of the loan agreement referred to in this letter was produced and Slrender admitted in cross-examination that she had never lent any money to Vertex, and said that Jagir gave her the guarantee after she threatened to divorce him if he did not give her money she felt was due to her after thirty years of marriage. She said she wanted something she could keep in her file so that she could get money from of Jagir. Slrender said that when she would ask Jagir to give her money after he gave her this document, he would say that he was paying it to her by giving her money for the “house costs”.

Legislation

[18] Subsection 160(1) read as follows for the years in issue:

160(1) Tax liability re property transferred not at arm's length. 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 therefore, 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 the 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.

Appellants' Arguments

[19] The Appellants take issue only with the Minister's determination that no consideration was given for the transfers of the funds from Jagir to Slrender.

[20] The Appellants' counsel argued that the transfers made by Jagir to Slrender in this case were made in part as repayment of a loan. He said that the promissory note and lawyer's letter were evidence that Jagir and Slrender entered into a loan agreement, and did so well before Jagir got into tax trouble, and that these documents showed that Slrender had given valuable consideration for the payments from Jagir.

[21] Counsel also contended that the amounts transferred by Jagir to Slrender were made partly to meet Jagir's statutory obligation to support his spouse and children. He referred to sections 88 and 89 of the *Family Relations Act* R.S.B.C. 1996 c. 128, which read as follows:

> **Obligation to support child**
>
> **88** (1) Each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of the child.
>
> (2) The making of an order against one parent for the maintenance and support of a child does not affect the liability of another parent for the maintenance and support of the child or bar the making of an order against the other parent.
>
> **Obligation to support spouse**
>
> **89** (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:
>
> (a) the role of each spouse in their family;
>
> (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
>
> (c) custodial obligations respecting a child;
>
> (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
>
> (e) economic circumstances.
>
> (2) Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

[22] Counsel said that Slrender was unaware of Jagir's tax problems when he made the payments to her and there was no complicity in trying to defeat the Crown's claims to Jagir's property. He said that the payments were no more than what was

necessary to support Jagir's family and that they were made for good consideration according to the provisions of the *Family Relations Act*.

[23] Counsel relied on the decisions of this Court in *Michaud v. R.* 99 DTC 43, *Dupuis* v. *The Queen* 93 DTC 723 and *Ferracuti v. R.* 99 DTC 194 in which it was held that payments made by one spouse to the other or for the other's benefit in order to fulfill a legal obligation to provide spousal or family support were made for valuable consideration.

[24] Counsel also brought to my attention the decision of this Court in *Raphael* v. *The Queen* 2000 DTC 2434. There, Mogan, J. held that no consideration was given by a spouse to whom property was transferred by the other spouse pursuant to an obligation to support his spouse. Although the case was appealed to the Federal Court of Appeal, this point was not argued and the appeal was decided on other grounds. Counsel said, however, that the Court distanced itself from the comments of the trial judge relating to the issue of whether fulfillment of a family support obligation constituted consideration and referred to the following comments at paragraph 12 of the Reasons:

> We do not wish to be taken however, as agreeing with all of the comments of the Tax Court Judge relating to whether there can be a consideration given between husband and wife so as to preclude the application of section 160(1).

Analysis

[25] With respect to the Appellants' first argument, I find that it has not been shown that part of the amounts Slrender received from Jagir between 2002 and 2004 were repayments of a loan. The Appellant admitted that she had not loaned any money to Vertex, and there was no evidence produced to show that Jagir had personally borrowed money from Slrender. While counsel maintained that the promissory note and demand letter were written before Jagir became indebted for taxes, Jagir was first assessed for director's liability in 1998. In this light, a promise to repay a loan that was admittedly never made in the first place is hightly suspect and is by all appearances a sham.

[26] Even if I were inclined to accept Slrender's explanation for the creation of the promissory note, her explanation does not satisfy me that she gave any consideration for the note, and any payments made pursuant to the note would therefore not have been made for any consideration.

[27] I am of the view that the Appellant's second argument cannot succeed either. I am aware of the conflicting decisions in this Court on the point of whether payments of amounts by one spouse to the other spouse or for the other spouse's benefit as family support are made for consideration. The relevant jurisprudence was fully reviewed by Archambault, J. in *Tétrault v. R.* 2004 TCC 332, and I agree with his conclusions at paragraphs 47 to 50 which read as follows:

> [47] The contribution to the expenses of the marriage is, in my opinion, in the nature of a donation by which a property is given without any consideration.[27] This analysis of the domestic obligation concurs with that made by Judge Mogan in the *Raphael* decision, where he says "[t]hose same domestic obligations, however, cannot be 'consideration' within the meaning of section 160...." (paragraph 27 of the decision). It also concurs with that in *Logiudice*, where it is explained that "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" and that "The limiting provision in subparagraph 160(1)(*e*)(i) of the Act is to protect genuine business transactions from the operation of the section" (paragraph 16 of the decision). It is also consistent with the analysis made by Judge Sobier in *Sinnott v. The Queen*, *supra*, at paragraph 19 (Q.L.), page 598 DTC:
>
> The Appellant's counsel put a good deal of emphasis on the argument that consideration was given for the transfer. But what was that consideration? Can it be said that the paying of household expenses is consideration for the transfers? Subparagraph 160(1)(e)(i) states that the joint liability of the transferor and transferee is 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 at that time of the consideration given for the property. At the time the transfers were made, no consideration was given.
>
> [Emphasis added.]
>
> [48] The absence of any consideration given in return for the performance of the domestic obligation readily explains why it highly problematic, if not impossible, to determine what the FMV would be of the transferee's right to receive the property transferred by the transferor pursuant to the latter's domestic obligation. Furthermore, as Judge Mogan said, even if a FMV could be determined, this right would not constitute "consideration given for the property".[28]
>
> [49] Not only does this interpretation seem to me to be in greater harmony with the language of section 160 of the Act, but it is unavoidable in light of the interpretative presumption that the law is coherent and systematic.[29] Section 160 must be considered as a whole if we are to determine its scope. Subsection 160(4)[30] of the Act provides that the paragraph 160(1)(*e*) rule is of no effect when a spouse transfers property to the other spouse as a result of the breakdown of the

marriage. For the purposes of this rule, the FMV of the transferred property is deemed to be nil. If the reasoning adopted in the *Ferracuti*, *Michaud* and *Dupuis* decisions were adopted, one would have to conclude that subsection 160(4) is of no use, for upon separation,[31] the spouse's right to receive a portion of the other spouse's domestic estate is recognized by law, in this case the *Civil Code*, in particular in the rules governing the partition of the family patrimony set out in articles 414 et seq. of the Code. It then involves "a transfer of property ... in performing [a] legal obligation".[32] Furthermore, if the right to receive this property under the *Civil Code* constituted consideration, the FMV of which is equal to the FMV of the transferred property, it would not have been necessary to enact that the FMV of the transferred property is nil. On the contrary, I think Parliament assumed that such a transfer upon a separation constitutes a transfer without consideration and, were it not for subsection 160(4) of the Act, the transferee could have been jointly and severally liable for any tax debt of the transferor.

[50] Consequently, the conclusion is unavoidable: the transfer of property under a legal obligation (as in the partition of the family patrimony) constitutes a "transfer" for the purposes of section 160 of the Act and is subject to that section. The mere right to be the beneficiary of this obligation does not constitute a particular consideration. Likewise, the transfer of property to the other spouse in performance of a domestic obligation constitutes a transfer for which no consideration has been given, and there is nothing in section 160 that would allow this Court to exempt this transfer from its operation.[33]

---

[27] Strictly speaking, it can be argued that the liberality that is necessary for the existence of a donation is missing here. However, most people who live together would contribute quite voluntarily to the expenses of the marriage, even in the absence of such a domestic obligation; it is generally during a separation or a divorce that the situation becomes conflictual and the existence of this obligation becomes significant.

[28] Paragraph 27 of Raphael and subparagraph 160(1)(*e*)(i) of the Act.

[29] See in particular Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000), at pages 308 *et seq.*

[30] This subsection reads as follows:

> (4) **Special rules re transfer of property to spouse** - Notwithstanding subsection 160(1), where at any time a taxpayer has transferred property to the taxpayer's spouse pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written separation agreement and, at that time, the taxpayer and the

> spouse were separated and living apart as a result of the breakdown of their marriage, the following rules apply:
>
> (a) in respect of property so transferred after February 15, 1984,
>
> (i) the spouse shall not be liable under subsection 160(1) to pay any amount with respect to any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
>
> (ii) for the purposes of paragraph 160(1)(*e*), the fair market value of the property at the time it was transferred shall be deemed to be nil,
>
> ...
>
> but nothing in this subsection shall operate to reduce the taxpayer's liability under any other provision of this Act.

[31] The transfer after divorce is generally not subject to section 160 since the transferee is no longer the spouse of the transferor.

[32] To use the words of the *Michaud* decision, paragraphs 19 and 20.

[33] In my opinion, an amendment to the Act, like the one enacted by S.C. 1984. c. 45, subsection 65(1), applicable after February 15, 1984, for subsection 160(4), would be needed to exempt from the operation of section 160 the property transferred in performance of a domestic obligation. Parliament could draw on provisions such as articles 552 et seq. of the Quebec *Code of Civil Procedure*, which list the exemptions from seizure, such as "The food, fuel, linens and clothing necessary for the life of the household".

[28] Even if I had accepted that payments made by a spouse pursuant to a legal obligation to pay his or her share of family expenses were transfers made for consideration, it would still not have been possible on the evidence before me to determine what portion of the funds transferred to Slrender by Jagir were used by her for expenses that Jagir was required to share under the *Family Relations Act* provisions.

[29] I note firstly that many of the expenses that she paid would appear to have benefited all members of the household equally, including Slrender and Jagir’s adult children, Jagir’s mother and Jagir himself. The Appellants’ counsel did not produce any authority to show that Jagir’s support obligations extended to these individuals.

For the purposes of section 88 of the B.C. *Family Relations Act* the term "child" is defined in section 87 as including "a person who is 19 years of age or older and, in relation to the parents of the person, is unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life." Subsection 90(2) of that *Act* provides that a child is liable to maintain and support a parent where the parent is dependent on an adult child because of age, illness or infirmity. In this case, however, there was no evidence led to show that the adult children were unable to withdraw from their parents' charge or that Jagir's mother was dependent on him because of age, illness or infirmity.

[30] Furthermore, only a few of the household and family expenses paid by Slrender with the transferred funds were quantified to any extent by her or corroborated by any other evidence. Slrender estimated that she spent $2,000 a month on groceries, $4,000 a year on Harish's private school fees, and $25,000 on Shawna's wedding. As well, some credit card statements that were put into evidence showed that her monthly payments on the Mercedes-Benz car were about $800 a month. She did not quantify any other expenses that she incurred or paid in 2002, 2003 or 2004 such as cable, hydro or gasoline. In cross-examination, Slrender was shown a withdrawal slip for the bank account in issue that indicated $2,000 was used to purchase U.S. dollar travellers cheques. She said she had no recollection of the transaction or what the funds were used for.

[31] I am therefore left without any means of determining what Jagir's support obligations were or what portion of the funds transferred by Jagir to Slrender would have related to those support obligations.

[32] With respect to Harish's appeal I would note that his lack of knowledge of the deposits to his bank account would not preclude the application of subsection 160(1). The funds deposited to his account were available to be withdrawn by him at any time and no consideration was given by him. In the decision of the Federal Court of Appeal in *Livingston v. The Queen* 2008 FCA 89 the Court made the following comments concerning deposits into another person's bank account:

> **21** The deposit of funds into another person's account constitutes a transfer of property. To make the point more emphatically, the deposit of funds by Ms. Davies into the account of the respondent permitted the respondent to withdraw those funds herself anytime. The property transferred was the right to require the bank to release all the funds to the respondent. The value of the right was the total value of the funds.

[33] For all of these reasons both of the appeals are dismissed, with costs.

Signed at Vancouver, British Columbia, this 22nd day of August 2008.

"B.Paris"

Paris J.

CITATION:	2008 TCC 474
COURT FILE NOs.:	2006-765(IT)G 2006-766(IT)G
STYLE OF CAUSE:	HARISH KADOLA and SLRENDER KADOLA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 10, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	August 22, 2008

APPEARANCES:

Counsel for the Appellant:	Andrew Davis
Counsel for the Respondent:	Johanna Russell

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