Citation: 2008 TCC 550
Date: 20081030
Docket: 2005-2304(IT)G

BETWEEN:

JENNIFER COHEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Counsel for the Appellant: Sam Laufer
Counsel for the Respondent: Lorraine Edinboro

REASONS FOR JUDGMENT

**(Delivered orally from the Bench
on August 21, 2008, at Toronto, Ontario.)**

Bowie J.

[1] This appeal is brought from an assessment made under section 160 of the *Income Tax Act* on April 18, 2005, and it arises out of a transfer from the appellant's husband to the appellant of his 50% interest in the matrimonial home, a single-family residence in central Toronto, which they held in joint tenancy. The transfer took place on July 12, 2000.

[2] The respondent's position, and the reason for the assessment, is an assertion that the transfer took place without consideration. The appellant's position is that at the time of the transfer her husband owed her approximately $20,000 more than the value of his interest in the equity of the residence.

[3] I do not propose to go through the evidence in great detail. Both counsel

agreed in argument that the case is entirely one of credibility, and essentially, the issue before me comes down to this: there are a small number of documents in evidence before me which evidence the indebtedness upon which the appellant relies as providing the consideration for the transfer. If those documents are genuine, if they were made at the time they appear to have been made, and if they reflect reality, then the appellant was indeed owed substantially more by her husband than the value of the equity that he transferred to her.

[4] There are essentially two sources of that debt. Not long after they were married, the appellant and her husband decided to purchase a residence. The price they paid for it was $340,000. They were able to arrange a mortgage for $255,000 and to pay $85,000 in cash. It was agreed between them from the start that they would contribute equally to all of their household expenses, and that agreement extended to the purchase price of the house, which, of course, was the major asset that they owned together.

[5] At the time they bought the house, the appellant, for reasons that I do not need to go into in any detail, was in a better position financially to raise cash towards the down payment than was her husband. The result was that from various sources she was able to contribute $71,000 to the $85,000 down payment, and he was able to contribute $14,000. I am satisfied that it was their agreement from the beginning that he would, as and when he was able, repay her the shortfall of his contribution.

[6] Over the next few years, the husband had a number of what I think could be called unanticipated demands on him financially, for family reasons that I needn't go into in any detail. For a period, he had little income, and when his income improved he was in the situation of owing substantial amounts of money, and having to contribute substantially to the support of a parent who had been the victim of an unfortunate and expensive accident.

[7] The long and short of all that is that over a period of years the household expenses were paid to a far greater extent by the appellant than by her husband, notwithstanding their agreement from the outset which subsisted -- and does, as I understand it, subsist to this day -- that they would contribute equally to such things. As husband and wife, they did not keep an accurate-to-the-penny account on a daily basis of their contributions and of the shortfall in the husband's contribution. However, at some point the appellant did start to have some concerns about the extent to which she was finding it necessary to contribute not only her share of expenses, but a good deal of her husband's share as well. I have no doubt

that her anxiety level rose as time went on, and the more so when they had a child dependent upon them.

[8] Again, without going into a great deal of detail as to the reasons for it, the fact is that the document at tab 5 of Exhibit A-1 was created at the appellant's insistence, simply to keep track of the extent to which her husband's indebtedness to her was rising month by month and year by year. That is a handwritten document. It has five columns, the first being the date of each entry on it. It is evident that those dates are approximately two months apart over the page and a half of the document. The second column represents the amount in the period ending on that date by which the husband's debt has risen. The next two columns are initialed by husband and wife and the last column is a running balance, accumulating from December 15, 1995 when this document begins, until August 6, 1999, which is the last entry.

[9] Their evidence as to this document - as to the reasons for creating it and as to the manner in which they kept it - was quite consistent. They both candidly said that while it was intended to maintain a current record of the balance owing, no attempt was made to do it on a daily basis, or with accuracy to the nearest dollar. Indeed, the entries in it are round numbers, presumably to the nearest $10, with an estimate jointly formulated at the end of each period.

[10] For the purposes of trial, they attempted, with only, if I may say, moderate success, to generate some detail to flesh out that document from such bank records, incomplete as they were, that were available to them. They were cross-examined, both on the running balance and on the more detailed document prepared for the purposes of trial. Their evidence was in no way shaken on cross-examination.

[11] By August 1999, the appellant was starting to have some concerns, as well she might, because the running balance they were keeping, to which I just referred, amounted at that point to $58,840. They had some discussion about that, and at her urging, or perhaps insistence, her husband decided to give her a promissory note, and with the marvels of the Internet at his disposal, he found a template with which to do that. He produced a handwritten promissory note dated September 30, 1999, whereby he acknowledged the debt of $58,900 and promised to pay it a year later, on September 30, 2000.

[12] The make-up of that debt is, according to the next significant document, $27,800 being the shortfall in the husband's contribution to the down payment on the house plus the $58,900 accumulated on the previous document, the handwritten

running balance of the debt. It is not exactly clear why the down payment on the property is said to be $27,800, although I would think it a fair inference that the difference between $27,500 and $27,800 would be accounted for by legal fees and other closing costs associated with the original acquisition. In any event, it is insignificant in the context of the magnitude of the numbers involved here. It became apparent over the next 10 months or so that the husband's situation in terms of liquidity had not improved, and was not going to improve before the September due date of the promissory note, a matter which the appellant raised with him. They agreed to resolve it by way of his transfer to her of his equity in the house. I have no doubt that her evidence on this is entirely accurate, which is to say that she was the one who took the initiative and said that she wanted the transfer of the equity because she was becoming increasingly concerned about the magnitude of this debt. Indeed, her husband's evidence was to the same effect.

[13] At that point, the husband had resorted again to the internet, and I can understand his concern not to engage lawyers for this sort of thing, although it may have been wiser in all the circumstances to have had these documents prepared by a lawyer. It also would have cost money, which was relatively in short supply. The result was that with the assistance of the template he found on the internet, the appellant's husband on the 7th of July prepared an agreement whereby he agreed to transfer his one-half interest, including all equity claims in the principal residence currently registered in their joint names, in full and final settlement of the debts currently owed by him to the appellant, as calculated and outlined below. The intent of that paragraph is perfectly clear and that is that she paid him for his equity in the house the amount of $86,700. The appellant’s husband then attempted to register a transfer at the registry office, and discovered that could only be done by involving the services of a lawyer, at which point he telephoned a lawyer, and told that lawyer over the telephone that the purpose of his phone call was his intention to transfer his equity in the house to the appellant. The lawyer asked if any money was changing hands, or if any cheques were changing hands, and was told that that was not the case. They attended a few days later at the lawyer's office and signed the deed, whereby his equity in the house was transferred to the appellant.

[14] The respondent puts great stock, indeed perhaps all her case, upon one piece of paper, and that is the affidavit of residence and value of consideration which forms part of the deed. That affidavit was sworn before the lawyer's clerk on the July 12, 2000, and in paragraph four where the various elements of consideration then that might be paid are listed, the lawyer completed the form, putting throughout "nil".

[15] I am satisfied that the appellant, although she signed that document and recognized that she was doing so under oath, did not recognize fully what its legal significance might be, and in particular did not associate in her mind the discharge of the debt with consideration for the transfer of her husband's equity in the property. It may well be that she was quite wrong in that respect, but it is not surprising. In any event, the document was duly executed, registered, and it gave effect to the earlier agreement whereby her husband had agreed, for the discharge of a debt of $86,700, to make the transfer.

[16] At the time of the transfer, and this I think is not in dispute, the value of the property less the outstanding balance of the mortgage was $134,700, which when divided by two gave each of them an equity of $67,350. So it would appear that the appellant gave consideration of some $20,000 more than the value of the husband's equity.

[17] Now, there may or may not be implications in other areas of the law as to some or all of these events, and I do not purport in dealing with the case before me to express any opinions as to the state of the accounts between the parties at this stage, or anything else. I am, however, totally satisfied that both appellants in giving their evidence were telling the truth, that the running balance of the accounting between them is genuine in that it was created contemporaneously, and that it accurately reflected their agreement reached periodically as to the mounting balance of that debt.

[18] I am satisfied as well that their evidence as to both the manner in which the down payment on the house was paid and their agreement as to the terms on which they acquired the house and the terms upon which they were to defray their joint living expenses during the course of their marriage are truthful and accurate. I find it neither surprising nor significant that the accounting is a rough accounting. I am satisfied from the evidence of the appellant and her husband that the accounting, to the extent that it is not accurate, favoured the husband rather than the appellant.

[19] I note that the both the promissory note and the subsequent agreement to transfer the equity of the house, signed respectively from September 30, 2000, and July 7, 2000, were witnessed by a lawyer, who gave evidence, understandably, not recalling the event with any particularity, but his evidence satisfied me that he did in fact witness those documents. I think it highly unlikely that he would have witnessed them on a date other than the date that appears on the face of the documents. He quite clearly was a careful lawyer who would have noticed the date when he affixed his signature as witness, and I think would not have been inclined

to do so had the date been inaccurate.

[20] All of which leads me to conclude that the transfer of the appellant's husband's equity in the residence that took place in July 2000 did in fact take place for adequate consideration, in fact more than adequate consideration. Without getting into the niceties of the convoluted language of section 160 of *Income Tax Act*, the arithmetic is such that the appellant has no liability under that section and the assessment will therefore be vacated.

[Counsel made submissions as to costs]

[21] The nature of income tax litigation is such that there are often great difficulties in effecting settlement before trial, because often the subject matter of the case has implications for coming years, and so on and so forth. I say all of that only to point out that that is not the case with section 160 assessments, in the sense that they are one-off events, if you like. Or generally, they are one-off events.

[22] This is a straight case of were the people telling the truth or were the people not telling the truth. They had produced, by the point which is relevant for the purposes of this offer the most significant of the corroborating evidence, which is to say the running balance found at tab 5 of Exhibit A-1, and the promissory note and agreement found at tabs 7 and 8. Not too difficult to piece the thing together from there.

[23] I am going to fix the costs payable by the respondent to the appellant -- there is a question of the whole lot of earlier events. The pleadings were prepared by the appellant herself; there were some appearances; there were some interlocutory motions. Frankly, I think all of that should be ignored for purposes of costs. There are factors that cut both ways in all of that, and I think it would be futile to try and sort through it.

JUSTICE BOWIE: I presume there are some disbursements that are not included in the number you gave me, Mr. Laufer?

MR. LAUFER: There would be printing costs.

MS. EDINBORO: There were printing costs, yes.

MR. LAUFER: But –

MS. EDINBORO: Very (inaudible.)

MR. LAUFER: -- again, sixteen-four, I think we can absorb those costs.

JUSTICE BOWIE: I will round it out at $16,500, which is –

MR. LAUFER: Thank you.

JUSTICE BOWIE: -- not a great deal for disbursements, but is reflective of my view of the fact that we had to have this trial today.

[24] The judgment will go in favour of the appellant, allowing the appeal and vacating the assessment, with costs fixed at $16,500 payable by the respondent to the appellant.

Signed at Ottawa, Canada, this 30th day of October, 2008.

"E.A. Bowie"

Bowie J.

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APPEARANCES:

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