Docket: 2009-2462(IT)G

BETWEEN:

CAROL MILLER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 13, 2011, at St. John's, Newfoundland

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant:	Bruce S. Russell, Q.C.
Counsel for the Respondent:	Jan Jensen

JUDGMENT

The appeal from the assessment made under the *Income Tax Act*, bearing reassessment number 48031 and dated May 6, 2009, is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 1st day of September 2011.

"L.M. Little"

Little J.

Citation: 2011 TCC 412
Date: 20110901
Docket: 2009-2462(IT)G

BETWEEN:

CAROL MILLER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The Appellant resides in the City of St. John's, in the Province of Newfoundland and Labrador.

[2] The Appellant was married to Dr. James Miller in 1968.

[3] Dr. Miller was a dentist who specialized in oral surgery. The Appellant testified that her husband pioneered implant dentistry in Newfoundland. The Appellant also said that her husband held a fellowship in implant dentistry.

[4] Dr. Miller operated his own dental clinic at 253 LeMarchant Road, in St. John's, Newfoundland.

[5] Dr. Miller encountered serious financial problems because of an investment that he made in a tax shelter that was not accepted by officials of the Canada Revenue Agency (the "CRA").

[6] Dr. Miller filed for personal bankruptcy on July 7, 2000.

[7] Dr. Miller suffered a heart attack in 1997. Counsel for the Appellant said that Dr. Miller was unable to work for the better part of one year. (See Appellant's Brief of Argument, paragraph 4)

[8] Dr. Miller was discharged from bankruptcy on April 26, 2007.

Note: In his written submissions, Counsel for the Respondent said that Dr. Miller still had an outstanding liability to the Minister of National Revenue (the "Minister") at the time of his discharge. (See Respondent's Written Submissions, dated July 14, 2011, page 4, paragraph 8)

[9] Dr. Miller died from lung cancer on the 10th day of September, 2008.

[10] The evidence indicated that, at the time that Dr. Miller filed for bankruptcy, he had outstanding income tax liabilities from his 1990, 1991, 1994, 1995, 1996, 1997, 1999 and 2000 taxation years of not less than $453,801.22.

[11] The Appellant opened a personal bank account at the Churchill Square Branch of the CIBC, St. John's, Newfoundland, on June 13, 1997 (the "Bank Account").

[12] The Appellant was the only person who had signing authority on the Bank Account.

[13] The Respondent maintains that Dr. Miller deposited the following amounts into the Bank Account between June 1997 and August 2000:

Year	**Amount Deposited**
1997	$ 21,144.67
1998	$ 80,595.87
1999	$149,641.76
2000	$109,203.77
Total	**$360,586.07**

[14] The Respondent admits that, between June 1997 and August 2000, the Appellant withdrew $59,435.63 from the Bank Account to pay for expenses associated with Dr. Miller's dental practice.

[15] On May 6, 2009, the CRA reassessed the Appellant pursuant to subsection 160(1) of the *Income Tax Act* (the "*Act*") in respect of the funds deposited in the Appellant's Bank Account and reduced the amount to $301,150.44.

B. ISSUE

[16] The issue is whether the Minister properly reassessed the Appellant in the amount of $301,150.44, pursuant to section 160 of the *Act*.

C. ANALYSIS AND DECISION

[17] At the commencement of the hearing, Counsel for the Appellant requested that the Notice of Appeal be amended. Counsel for the Respondent opposed the request to amend the Notice of Appeal.

[18] In support of his position to amend the Notice of Appeal, Counsel for the Appellant said:

> Q. Certainly, your honour. Thank you. Your honour, the Notice of Motion to amend has three aspects to it, that is the amendment to reflect three aspects, and I presume, sir, that you would have a copy of the proposed amended [N]otice of [A]ppeal in front of you?
>
> JUSTICE:
> Q. Yes, I have.
>
> RUSSELL, Q.C.:
> Q. Very well. Your honour, the first of the three aspects is, and the major one, the most significant one, is the matter of referring to consideration and we – that is the legal concept of consideration, and in that regard, as you perhaps have noted, that involves changes, slight changes to paragraph 8, the issue of paragraph 10 where we most particularly which [*sic*] to add the statement "the expenses Mrs. Miller has paid on behalf of Dr. Miller constituted consideration for Dr. Miller's transfer to her of funds in equivalent amount." Your honour, I understand that my friend opposes this and I wish to respectfully – I wish to point out, respectfully of course, that if one looks at the Reply to the Notice of Appeal, this is hardly a new concept in terms of this litigation. Looking at the Reply, if you look first at the assumptions of fact which are set out in paragraph 12 and you look at the notice, subparagraphs J and K, the assumption in J is that Dr. Miller deposited 360,000 odd dollars during the relevant years into Mrs. Miller's account and K is that Mrs. Miller withdrew almost [$]60,000 of it, leaving a total of about

[$]301,000 and the [$]301,000 comes together, your honour, in paragraph 15 of the Reply which itself refers to consideration, and I might just read, it's the second sentence. "Dr. Miller transferred money in the amount of [$]360,000 between the years 1997 and 2000 to the appellant of which the amount of [$]301,150 was transferred for no consideration." So, reading this logically, what the Crown is saying, I would submit, is that the other [$]60,000 was for consideration because the [$]301 is reached from [$]360 by subtracting the aforementioned amount of [$]60 odd, [$]59,435, and those are the amounts that are identified in K as being used to pay for expenses associated with Dr. Miller's dental practice. So, there's definitely a clear reading of the Reply to understand that the Crown itself has taken the position in its pleadings in this Court that the [$]59,000 odd is consideration.

So essentially what I'm doing is I'm challenging K. I'm doing two things, I guess. One is I'm completing the legal thought in my own pleading by referring to consideration as well, and secondly, and in any event, I'm challenging, as of course the appellant is able to do, one of the assumptions that the Crown has relied upon, and that is K, which is that the appellant withdrew [$]59,435 to pay for expenses associated with the practice. Our evidence would be that there is a significantly higher amount withdrawn to pay for the expenses and that that is consideration, just as is contemplated in paragraph 15 of the Reply. So, this is hardly a new concept that's coming up, and indeed, I rely on the fact that the Crown itself has accepted the concept of consideration, both as it's recited in this reply, both in its audit and [N]otice of [A]ppeal – sorry, audit and [N]otice of [O]bjection exercises and also as far as pleading in this honourable court. There's no indication in this pleading that the Court or the Crown rejects the concept of consideration. So, I see no harm whatsoever with, as well with respect, with my submission in including that reference in my pleading as well.

The second of the three points, sir, and I can be briefer with those, sir.

JUSTICE:

Q. Go ahead.

RUSSELL, Q.C.:

Q. Thank you, sir. I wish to, in paragraph six, I wish to add the words, as I've underlined them, "variously to the business and to him." Basically – and those are double underlined, of course, sir. Basically, those words are to open this up. If there is consideration, it's not – there's no reason to restrict the consideration to payment for business assets. If there was payment for Dr. Miller's personal needs then that would constitute consideration too, or at least that would be our submission. The fact that

the expenses involved may be deductible or may not be, that is whether they're business or not, is really irrelevant to whether consideration flows.

Now, you may, of course, quite fairly, wonder well, am I not opening up a whole new factual matter. Your honour, I wish to assure the Court, as I've assured my friend, that this submission is based entirely on documentation that is already in the materials that are to be filed on consent with the Court and basically, for the most part, they are a series of Dominion store and Costco receipts for food, et cetera, Brookfield Ice Cream for milk, and all that, and the argument, as my friend knows and I will just say to the Court, is simply that Dr. Miller, as one of four and later one of three residents in the particular family dwelling, was receiving one-fourth benefit of these expenditures and later on, one-third, and that's really what the submission will be. It won't be anything fancier than that and quite straightforward. I would seek to apply that to a limited – there's some limited evidence in here as well with respect to oil expenses for the house and I would likewise say one quarter, one-third for those.

The last of the three, your honour, is in paragraph six, I'm striking out the words "Unaware of any liability of Dr. Miller to the Minister." That's not an admission, but I don't think it's accurate. I'd rather rely on the evidence of the Crown and so, I'm just asking that that come out. I don't know if that's a particular issue with my friend.

There is one, perhaps a fourth one, or three and a half, and that is also in paragraph six. Rather than use the words "agent for Dr. Miller", I say "on behalf of Dr. Miller" and the reason for that is simply that after this was drafted, there was a Federal Court of Appeal decision which takes a narrow and technical view of the meaning of agent. I don't want to get caught up in – that wasn't the intention of using the term in this pleading.

Your honour, those are our submissions. We do hope that we can proceed on that basis and I do not – I think I hopefully have explained why I do not think my friend is prejudiced in any way in these changes, most of which were with the Crown in late February incidentally, as the motion record indicates, with the sole exception of that single additional sentence in paragraph 10. Subject to questions, your honour, those are

> my submissions.

(Transcript, page 3, line 4 to page 9, line 19)

[19] Counsel for the Respondent opposed the Motion and said:

> Well, in terms of the prejudice, without knowing the full bounds of relevancy for discovery, it's difficult to fully discover someone and it would also be difficult for the respondent and the Tax Court today to say well, what's – if I stand up and say "how is this relevant?" then I have to assume it's relevant because it may be somewhere in the document that came to us.
>
> Now, we didn't know my friend's full position. He called it completing the legal file that was there in the Minister's Reply. However, I mean, it starts – the originating document is the Notice of Appeal. The thought should have been completed there in the original Notice of Appeal.
>
> Now, ideally that thought would have been completed, you know, when the Notice of Appeal first came in June 2009 or even better, before discovery, but it did not.

(Transcript, page 19, lines 3 to 23)

[20] After considering the request of Counsel for the Appellant to amend the Notice of Appeal, I concluded as follows:

> In my view, the comments of Merck are correct. In viewing this question, I have considered that the amendment proposed by the Appellant in the Notice of Appeal should be allowed because the amendment will facilitate the Court's understanding of the true nature of the question before the Court.
>
> I would also like to briefly comment on some of the points made by the counsel for the Respondent. He said the amendments sought do not clarify the issue. I disagree. I say again that the amendment may facilitate the Court's understanding of the true nature of the question. I say this because consideration goes to the very heart of the question as to whether Section 160 applies. However, I wish to note that counsel for the Appellant must clearly establish consideration. It is not sufficient to merely allege that consideration was paid.

> The respondent also said neither the respondent or the Court will know what is relevant at the hearing. I disagree. It will depend on the evidence produced.
>
> And I also, in conclusion, I would like to say that while the comments are very helpful, in my view, this amendment should be allowed because it will help me understand the case. So that is my decision with respect to the motion. I accept the motion. The Amended Notice of Appeal is allowed. Please go ahead.

(Transcript, page 25, line 6 to page 26, line 14)

[21] I must therefore determine if subsection 160(1) of the *Act* applies in this situation.

[22] Subsection 160(1) reads as follows:

> **160.** (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> (*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law partner,
>
> (*b*) a person who was under 18 years of age, or
>
> (*c*) a person with whom the person was not dealing at arm's length,
>
> the following rules apply:
>
> (*d*) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
>
> (*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
>
> (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
>
> (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[23] In his argument, Counsel for the Appellant said that the vigorous collection activity of the CRA throughout the mid 1990s and until Dr. Miller declared bankruptcy in July, 2000 restricted his ability to assess proceeds from his dental practice.

[24] In his argument, Counsel for the Appellant said:

> 9. Ultimately, Dr. Miller concluded that he had to operate his dental practice utilizing cash. Cash was required for him to utilize proceeds from his practice with which to pay his employees and dental suppliers and to pay household bills. Dr. Miller and Mrs. Miller agreed that he would provide to her funds from his dental practice that she would put in a bank account of hers, and she would then use those funds to pay expenses of Dr. Miller's dental practice and necessary household expenses.
>
> (Appellant's Brief of Argument, dated June 16, 2011, page 2, paragraph 9)

[25] During the hearing, Mr. John Morgan, Chartered Accountant, testified. Mr. Morgan said that he had acted as Dr. Miller's accountant for many years. Mr. Morgan said that, in the relevant years, there were ongoing substantial cash withdrawals from the Bank Account to pay the salary of certain employees of the dental practice and to pay the Implant Dentistry Centre (the "IDC"). (Transcript, page 72, line 22 to page 73, line 8)

[26] Counsel for the Appellant also called Dr. Larry Bursey as a witness. Dr. Bursey is a dentist in St. John's, Newfoundland.

[27] Dr. Bursey testified that he had worked with Dr. Miller on a complicated dentistry case in 1999/2000. Dr. Bursey confirmed payments that were made to him by, or on behalf of, Dr. Miller in the latter part of 1999 in the amounts of $2,000.00 plus $12,000.00 (total $14,000.00). Counsel for the Appellant noted that such amounts had been withdrawn from the Bank Account.

[28] In his Brief of Argument, Counsel for the Appellant said:

> 29. Mrs. Miller submits that the appealed reassessment is bad because:

> 1) she gave consideration to Dr. Miller for the funds deposited in her CIBC bank account by utilizing the funds for Dr. Miller's purposes; and alternatively
>
> 2) the funds were deposited on resulting trust for Dr. Miller, who retained beneficial use of and title to the funds.

Consideration:

> 30. One of the four requirements for application of subsection 160(1) is that there must be no consideration or inadequate consideration flowing from the transferee to the transferor.
>
> *Gambino v Her Majesty the Queen*, 2008 TCC 601, para. 19
>
> 31. Mrs. Miller submits that in this case there was adequate consideration flowing back to Dr. Miller.
>
> 32. She gave consideration in return for the subject funds, being her commitment to Dr. Miller, which she honoured, to utilize the funds to pay expenses of Dr. Miller's own dental practice and also to pay expenses relating to Dr. Miller's own residential accommodation and board.
>
> 33. This commitment, notwithstanding it was between spouses, was legally binding. It concerned very practical and explicitly "necessary" expenses, which if not paid would have blocked Dr. Miller from being able to gain a livelihood from his dentistry practice. Mrs. Miller herself testified that payment of the expenses was "necessary". This was a serious commitment. This indicates that the agreement between the spouses was considered binding. There was no evidence that Mrs. Miller considered herself not fully bound by her commitment to Dr. Miller to make the dentistry business payments as he directed.

(Appellant's Brief of Argument, dated June 16, 2011, pages 8 to 9, paragraphs 29 to 33)

[29] I have reviewed the evidence very carefully, especially the uncontradicted testimony of the Appellant and I have concluded that the argument made by Counsel for the Appellant regarding "consideration" should be accepted. In my opinion, the Appellant gave consideration in return for the receipt of the subject funds from her husband. The consideration was her commitment to Dr. Miller to utilize the funds to pay expenses of Dr. Miller's dental practice and also to pay certain expenses relating to Dr. Miller's own residential accommodation.

[30] I have also concluded on the evidence that was before me that the Appellant had a legal obligation, not just a moral obligation, to make the payments described above from the Bank Account.

[31] I believe that the decision of the Federal Court of Appeal in *Livingston v The Queen*, 2008 FCA 89, [2008] F.C.J. No. 360, is applicable in this situation because the amount of the expenses that were paid by the Appellant would be equivalent to the value of the funds used by the Appellant to make such payments.

[32] I also cite with approval the decision of Justice Boyle in *Maria Gambino v The Queen*, 2008 TCC 601, [2008] T.C.J. No. 538, which is applicable in this situation.

[33] In my opinion, the following expenses should be deducted from the amounts that are now included in the income of the Appellant:

1997

Expense	Exhibit	Amount
Newtel	R2, tab 19, pp. 52, 56 (bill for office tel number)	$ 859.90
Diner's Club total $1,790.50 paymt	R2, tab 19, pp. 69, 72 (ticket purchased for Dr. Miller's business travel March 2008 for implant dentistry training in San Diego)	1,069.06
"253" payment (Note: The dental office was located at 253 LeMarchant Road)	R2, tab 19, pp. 41, 42 (CRA writing)	239.47
Telegram employee ad	R2, tab 19, p. 53	55.06
	TOTAL:	**$2,223.49**

1998

Expense	Exhibit	Amount
Jack Hill (Note: snow removal at office)	R2, tab 20, p. 27	$103.50
NL Power	R2, tab 20, pp. 28, 34	120.00
Sears ("refrigerator") (Note: at office)	R2, tab 20, p. 27	877.85

Harvey's Oil (Note: to office)	R2, tab 20, pp. 29, 33	735.29
Cdn Dental Service	R2, tab 20, p. 29 (1245.89 + 1905.90)	3,151.79
Newtel	R2, tab 20, pp. 48, 56	439.42
NF Power	R2, tab 20, p. 77 (Dr. Miller wrote the cheque)	135.55
Sears	R2, tab 20, p. 77 (Dr. Miller wrote the cheque)	688.59
Cable Atlantic	R2, tab 20, p. 77 (Dr. Miller wrote the cheque)	77.39
Zellers	R2, tab 20, p. 78 (Dr. Miller wrote the cheque)	226.06
Harvey's Oil (Note: to office)	R2, tab 20, p. 84	960.38
Staples	R2, tab 20, p. 97 – "253"	45.99
Business Depot	R2, tab 20, p. 96	46.10
Sprint, office line	R2, tab 20, pp. 98, 101	86.15
NL Tel, business lines	R2, tab 20, p. 98 - $103.99 is for residence (p. 87) so this is for business lines	681.35
Visa to Business Depot	R2, tab 20, p. 107	144.69
Sprint, business line	R2, tab 20, p. 121	38.78
Ultramar, office	R2, tab 20, pp. 130, 137	350.00
Camera, office	R2, tab 20, pp. 140, 154	430.20
Staples, office	R2, tab 20, pp. 156, 155	135.05
Sprint	R2, tab 20, pp. 140, 147	41.33
Jack Hill (Note: snow removal at office)	R2, tab 20, p. 156	310.50
Sprint	R2, tab 20, pp. 163, 167	58.31
Sprint	R2, tab 20, pp. 182, 188	29.91
Telegram full page ad (Note: The Appellant's evidence is that this was the amount paid for a full page advertisement in the Telegram re dental implants)	R2, tab 20, p. 216	2,470.59
Sprint	R2, tab 20, pp. 198, 203	50.17
Sprint	R2, tab 20, pp. 216, 222	54.77

Sprint	R2, tab 20, pp. 227, 246	41.41
Newtel	R2, tab 20, pp. 244, 251	733.66
	TOTAL:	**$13,264.78**

1999

Expense	**Exhibit**	**Amount**
NL Power, "253"	R3, tab 21, p. 32	$128.16
Arcona (Arcona Dental Equipment) for IDC	R3, tab 21, p. 32	608.76
Jack Hill (Note: snow removal)	R3, tab 21, p. 33	276.00
"CaL", re 253 LeMarchant Rd	R3, tab 21, p. 32	92.20
Paper Plus, re "Dr. J.A. Miller"	R3, tab 21, p. 33	34.00
Costco, "253"	R3, tab 21, p. 37	534.73
NF Exchequer Account, Dr. Miller's driving license # in "memo" line, license need for travel to/from hospitals and office	R3, tab 21, p. 43	770.00
Jack Hill (Note: snow removal)	R3, tab 21, p. 46	379.50
NF Power	R3, tab 21, pp. 45, 47	96.42
Health Care Corp.	R3, tab 21, p. 52	120.00
Cable Atlantic "253 IDC"	R3, tab 21, p. 82	250.00
Dr. Larry Bursey	R3, tab 21, pp. 91, 117	2,000.00
Giltens & Assoc. law firm	R3, tab 21, p. 102	402.50
Dr. Larry Bursey	R3, tab 22, p. 4, R3, tab 21, p. 117	12,000.00
NF Power "253"	R3, tab 21, p. 97	200.00
Nobel Biocare for dental implant materials. Nobel Biocare statement.	 R3, tab 21, p. 4;	9,018.29 2,981.71 12,000.00

Payment dates of November 25, 1999 closely follow transfer to Mrs. Miller's Visa account	R3, tab 21, p. 91	
Ardent Labs	R3, tab 21, p. 117, R3, tab 22, pp. 3, 4	2,120.00
	TOTAL:	**$32,012.27**

2000

Expense	**Exhibit**	**Amount**
Dick's & Co. office stationary supplies	R3, tab 22, p. 7	$218.48
Business Depot	R3, tab 22, pp. 7, 14	37.18
Health Care Corporation	R3, tab 22, p. 11	75.00
Jack Hill	R3, tab 22, p. 16	414.00
Cable Atlantic (note separate cheque 163 to Cable Atlantic for $80, for the home)	R3, tab 22, p. 16	250.00
Newtel, business number	R3, tab 22, pp. 18, 21	183.65
Long's Printing, "IDC"	R3, tab 22, p. 42	201.25
Pack's Plumbing, "Marker"	R3, tab 22, p. 59	632.29
John Morgan, accounting services	R3, tab 22, p. 58	2,000.00
John Morgan, accounting services	R3, tab 22, p. 58	3,000.00
Jack Hill – (Note: snow removal)	R3, tab 22, p. 47	241.50
Newtel, office line	R3, tab 22, pp. 51, 55	184.61
NF Dental Assoc.	R3, tab 22, p. 69	205.00
Newtel, business line	R3, tab 22, p. 71	294.98
Thompson Insurance, Dr. Miller's car	R3, tab 22, pp. 69, 75	2,577.15
Jack Hill (Note : snow removal)	R3, tab 22, p. 69	69.00
Newtel, office line	R3, tab 22, pp. 83, 86	241.72

NF Power, business	R3, tab 22, p. 87	200.00
Cable Atlantic, business	R3, tab 22, p. 87	250.00
Guaranteed Satellite, "IDC"	R3, tab 22, p. 90	86.25
Lorne Brothers, "253"	R3, tab 22, p. 105	12.75
Telegram subscription for office, see Visa statements		593.18 (38 months @$51.31 (1998 price))
	TOTAL:	**$11,967.99**

[34] In reviewing the above numbers, I have attempted to keep the following points in mind:

(1) Based upon the evidence, I am not convinced that any expenses related to the Deer Park Property (i.e., the cottage) should be recognized as business expenses.

(2) In the Appellant's Brief of Argument, Counsel for the Appellant said:

> 27. Mrs. Miller also testified that Costco cheques represented expenses divided between the business and the home, and Dominion and Sobeys cheques and Brookfield Ice Cream cheques were basically for food for the family. These aforementioned cheques are all copied within the evidentiary record.

(Appellant's Brief of Argument, dated June 16, 2011, page 8, paragraph 27)

Comment: I have tried to determine the acceptance of the specific business expenses that are referred to above. I am not prepared to make a general allowance for cheques payable to Costco, Dominion, Sobeys or Brookfield Ice Cream.

(3) During the hearing, there was some discussion concerning certain expenses that were being claimed by the Appellant. However, Mr. Jensen, Counsel for the Respondent, noted that the specific expenses being claimed had already been allowed. Mr. Jensen noted that the amount of $3,888.62 had already been allowed by CRA officials and Mr. Russell agreed.

(Transcript, page 273, lines 7 to 25)

I have not allowed a claim of CDSPI payments in the amount of $12,212.68 for 1999 because I was not satisfied on the evidence that was before me that this amount had been paid by the Appellant. If Counsel for the Appellant can produce evidence acceptable to CRA officials and the Department of Justice, then the amount of $12,212.68 should also be allowed in 1999.

(4) I also wish to note that Mr. Morgan testified that there were ongoing substantial cash withdrawals from the Bank Account to pay the salary of certain employees of the dental practice and to pay the IDC.

(See paragraph [25] above)

If Counsel for the Appellant can produce evidence related to these payments acceptable to the CRA officials and the Department of Justice, then these payments should be allowed as business expenses for the relevant years.

(5) Finally, I wish to note that, at the beginning of the hearing, Counsel for the Respondent confirmed that the amount of $2,417.88 is to be deducted from the reassessment amount.

The Appellant's Alternative Argument

[35] If I am not correct in my conclusion that the Appellant provided consideration, then I believe that the amounts that were transferred by Dr. Miller to the Appellant and that were used to pay the expenses referred to above, were transfers pursuant to a resulting trust on the understanding that Dr. Miller retained a beneficial interest in the use of the funds. On this point, Counsel for the Appellant said in his Brief of Argument:

> 43. In *Rose*, the Federal Court of Appeal held that the argument that the person assessed per subsection 160(1) held property on resulting trust for her husband failed largely because the husband's professed intention of seeking to defeat, hinder or delay a creditor was inconsistent with his claim of only transferring legal title to his wife.
>
> *Rose v. Canada*, 2009 FCA 93, para. 22

> 44. However, this is distinguished from the case at bar. Here, Mrs. Miller testified clearly that the deposit of funds to her account was for the purpose of continuing the family's source of livelihood being the continuation of the dental practice. She did not accede to the Crown's insistent cross-examination seeking that she state that the intent was to defeat CRA.
>
> 45. There is a distinction between intent and effect.
>
> (Appellant's Brief of Argument, dated June 16, 2011, page 12, paragraphs 43 to 45)

[36] The appeal is allowed and the Minister is to make the adjustments referred to above. Since success has been divided between the parties I am not prepared to award costs.

Signed at Vancouver, British Columbia, this 1st day of September 2011.

"L.M. Little"

Little J.

CITATION:	2011 TCC 412
COURT FILE NO.:	2009-2462(IT)G
STYLE OF CAUSE:	CAROL MILLER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	St. John's, Newfoundland
DATE OF HEARING:	May 13, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	September 1, 2011

APPEARANCES:

Counsel for the Appellant:	Bruce S. Russell, Q.C.
Counsel for the Respondent:	Jan Jensen

COUNSEL OF RECORD:

For the Appellant:

Name:	Bruce S. Russell, Q.C.
Firm:	McInnes Cooper
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada