Docket: 2011-4100(GST)I

BETWEEN:

ANGELA FERRARO-PASSARELLI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 7, 2012, at Montreal, Quebec.

Before: The Honourable Jean-Louis Batiot, Deputy Judge

Appearances:

Counsel for the Appellant: Carmine Iovino

Counsel for the Respondent: Jean Duval

JUDGMENT

The appeal from the assessment made pursuant to section 325 of the *Excise Tax Act*, notice of which bears No. PL2007-43 and is dated May 8, 2007 is dismissed.

Signed at Montréal, Quebec, this 5th day of February 2013.

"J.-L. Batiot"

Batiot D.J.

Citation: 2013 TCC 26
Date: 20130205
Docket: 2011-4100(GST)I

BETWEEN:

ANGELA FERRARO-PASSARELLI,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Batiot D.J.

[1] Ms. Ferraro, also known as Ms. Ferraro-Passarelli, or Ms. Passarelli, appealed on December 27, 2011, a Notice of Assessment in the amount of $31,789.93.

[2] The Respondent assessed the Appellant for having received from Mr. Michele Passarelli, her husband, his undivided half-interest in their home at less than market value, and thus is *jointly and severally liable* to the Minister of National Revenue (the "Minister"), pursuant to section 325 of the *Excise Tax Act*, ("*ETA*").

[3] The Minister based this assessment on the following facts, presumed to be valid pursuant to subsection 299(4) of the *ETA*:

1. Mr. Passarelli, the Appellant's husband, is indebted to the Respondent for at least the amount of the assessment.

2. He transferred his undivided half interest in their home to the Appellant on the 21st of April 2005.

3. Its market value, on the date of the transfer, was $269,500.

4. That undivided half interest was thus worth $134,750.

5. The value declared by the Appellant and her husband in the "Contrat de vente", $107,578.73, was inferior to that market value.

6. The undivided half interest was subject to a joint mortgage, with an outstanding balance on that date of $56,933.42 (half of $113,866.84).

7. Mr. Passarelli received an advantage worth $77,817 ($134,750 – $56,933).

8. The Appellant is thus liable for Mr. Passarelli's indebtedness to the Respondent to the extent allowed by s. 325 of the *ETA*, thus the Notice of Assessment with respect to Mr. Passarelli's indebtedness for the unpaid GST.

[4] The Appellant has the onus to "demolish" these facts, on the balance of probabilities; if she does, the Respondent must demonstrate, on a balance of probabilities, their correctness: *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336.

[5] The parties are in agreement that Mr. Passarelli transferred to the Appellant his undivided half interest in 2570 Rue des Pintades, Laval, Quebec on 21st day of April 2005. At issue are: 1) the market value of the property; and 2) the validity of the stated consideration for its transfer on that day.

FAIR MARKET VALUE

[6] We do not have an appraisal of the market value of this property, only appraisals for assessment purposes, which may, in the absence of an arm's length transaction, be an estimate, at best.

[7] The Appellant said all along it was worth between $220,000 and $230,000 when making her representation to the Respondent's counsel; $231,400 at the hearing; in the "Contrat de vente" of April 6th, 2005, its value is stated at $215,157.46 ($107,578.73 x 2). The Appellant did not provide independent and reliable evidence to justify these different values.

[8] We do have the Account for Municipal Taxes (Exhibit A-14) for the year 2005 showing the different adjusted values for tax purposes (Valeurs imposables ajustées), as of December 31st of each year;

2003	$196,300
2004	$208,000
2005	$219,700
2006	$231,400

[9] We also have the testimony of Ms. Geneviève Robidoux, an appraiser for the City of Laval, called to testify by the Respondent. In light of the information available to her about the particulars of the property, including the renovation approved in 2004 and completed in February 2005, she establishes the market value at $269,500 for the 21st of April, 2005, the date of transfer.

[10] That value may be more; it is unlikely less. It is the best objective evidence of value. It justifies the assessment in the case at bar, which remains undisturbed. Therefore, the market value of Mr. Passarelli's undivided half interest is $134,750.00.

CONSIDERATION FOR THE TRANSFER

[11] The Appellant says that she paid valuable consideration for her husband's undivided half interest for the following reasons:

1. Her income was much greater than her husband's; some years, the only family income.

2. It was deposited directly in their joint bank account.

3. She paid the totality of the mortgage payments, including property taxes, since 1999, even though she and her husband together were equally responsible to repay that debt.

4. Her husband's share of these payments, $50,645.31, contained in the "Contrat de vente", was a debt he owed to her.

5. By Article 1656 of the *Civil Code of Quebec* ("*Civil Code*"), she had a right of subrogation, and thus a priority over the Respondent's claim.

[12] Of the Appellant's 15 exhibits, the more relevant describe their financial dealings with each other and third parties. There are: Exhibit A-1, Statements of their joint bank accounts; Exhibit A-2, her remuneration; Exhibit A-3, revenues and

mortgage payments, Exhibit A-4, 1997 request for bank loan, Exhibit A-5, sale agreement regarding the property in question (Contrat de vente); Exhibit A-7, real property index (Index des immeubles); Exhibit A-8, 1994 request for a mortgage; Exhibit A-11, bank acceptance of mortgage assumption (Acceptation d'une alienation hypothécaire); Exhibits A-12 and A-13, mortgage statements at time of assumption; Exhibit A-14, municipal taxes account. All but one, Exhibit A-5, the sale agreement, show that the Appellant and her husband acted jointly, in disbursing or receiving funds, or in assuming or alienating an interest in property.

[13] Ms. Ferraro and her husband, Mr. Michele Passarelli purchased that property together on April 11, 1988. It was then, and continues to be, their residence.

[14] The Appellant was a successful business woman, involved in the fashion industry, assuming increasing responsibilities, with a corresponding income, until her employer, Consoltex Inc., was taken over or sold. She was the main breadwinner and looked after all the expenses for the home and her family. She continues to do so.

[15] Mr. Passarelli was also involved in the clothing industry, as an employee or in his own business. Over his years of self-employment through a company, he has been unable, in spite of his efforts, to comply with the GST regime. This has left him with a substantial GST debt to the Respondent, well before the transfer of property in question, valued in excess of the assessment in question. His income was minimal, $25,000 in 1999, $202 in 2000, $163 in 2003, $8,972 in 2004 and $2,092 in 2005, for a total of $36,429.00 for the period of time.

[16] By contrast, the Appellant's income from 1999 to 2005, inclusively, averaged $266,954.28 per annum.

[17] Her evidence is most telling: clearly she was the financial mainstay of the family, and so at least since 1999; theirs was a traditional "*Italian*" family (her description). All monies and properties were held together.

[18] On April 21st, 2005, both signed a Contrat de vente, registered on April 25th, 2005, whereby Mr. Passarelli "sold" his undivided half interest in the said property to Ms. Ferraro for $107,578.73, the Appellant assuming sole responsibility for his 50% share of the mortgage of $113,866.84, i.e., $56,933.42; and forgiving the advances of $50,645.31, i.e. the total of mortgage payments she has made.

[19] There is no evidence explaining the latter sum, and why it would equal so exactly an amount due to her, and so complementary to the outstanding mortgage balance and the stated market value, unsupported by extrinsic evidence.

[20] The Appellant relied a great deal on her accountant who prepared different exhibits, based on accounts she held jointly with her husband, to explain the financial dealings of the couple. Indeed she could not explain the different transactions in and out of their joint chequing account.

[21] Of particular importance is the description on their relationship with respect to their property: all were held jointly, home, cottage, accounts, cars (it appears), mortgages and credit cards, etcetera.

[22] There is simply no evidence, until the "Contrat de vente" of April 21st, 2005, that Mr. Passarelli owed any debt to the Appellant, or that she expected repayment of any money she may have paid on his behalf. There is no evidence of a contractual debt between them, or of a mutual understanding to that effect pre dating April 21st, 2005. On the contrary, they both seem to access their joint account as they wish. Indeed she would even cash his cheques, amounting to over $36,000 for the six year period, into the joint account and give him back immediately the corresponding cash for his own needs. That fact alone does show she did not require any repayment from her husband.

[23] Ms. Ferraro has been a successful business woman for several years, who has assumed increasing business responsibilities commensurate with her considerable professional achievements and income. It is obvious from the evidence she was the main financial anchor for this family of five.

[24] The "Contrat de vente" came to pass three weeks after the mailing of the Notice of Assessment – Third Party (Avis de cotisation – Tierce personne), mailed on March 31st, 2005. She may have considered a change of ownership of the property before, but nothing had been done, for various reasons (busy lives, travels). I find the catalyst for this transfer was the Notice. I do not accept that this Notice had nothing to do with their decision and action, as they stated.

[25] The Appellant invokes Article 1656 of the *Civil Code*:

> **1656.** Subrogation takes place by operation of law
>
> …

> 3) in favour of a person who pays a debt to which he is bound with others or for others and which he has an interest in paying;

for the proposition that by making such mortgage payments, she is subrogated to the right of the mortgagee, Banque Laurentienne. She cites in support *Forget c. Lamoureux*, (REJB 1999-11802, Cour du Québec), where Gosselin, J.C.Q. reviewed the jurisdiction of a régisseur of the Régie du logement dealing, upon their separation, with the subrogation right of a renter, the Demandeur/Plaintiff, who had retained possession of the rental premises, against his co-renter, the Défenderesse/Defendant, who had vacated the premises. The régisseur had declined to consider the evidence of the Defendant, who alleged she was no longer responsible to the landlord because she and the Plaintiff had agreed the latter would stay in sole possession of the premises, and be solely responsible for the rent. They lived, but for an attempt to reconcile, apart.

[26] The learned Judge reviewed the jurisprudence and the requirements of the *Civil Code*, and held (at paragraph 41) that, since there were in effect two contracts, one between the two parties and the landlord, and another between the Plaintiff and the Defendant, it was incumbent upon the régisseur to consider her evidence with respect to any variation as to this second contract. Absent a decision on that point, in light of the delays, costs and minimum sums at issue ($3,125), Gosselin, J.C.Q. resolved the issue in favour of the Defendant: the contract had been varied on the facts adduced; there was no right to subrogation.

[27] This case is of course to be distinguished from the case at bar on the facts. Here, there is no evidence of a mutual contract, for each to be responsible for her/his share of the mortgage; theirs was a joint responsibility to a mortgagee, with a joint title. The fact the Appellant and her husband continue to share the same home, presumably on the same terms, shows a clear intent that their financial affairs were common and not separate.

[28] The Appellant relies also on *Ducharme v. Canada*, 2005 FCA 137, where the Appellant argued, successfully, that the mortgage payment she had received from her common law partner [Vienneau] amounted to, as found as a fact at the hearing in the Tax Court, to be reasonable consideration for the use of her own home. The Federal Court of Appeal in *Yates v. The Queen*, 2009 FCA 50. Desjardins J.A., for the majority, commented as follows, at paras 21, 24 and 25:

> [21] … Rothstein J.A. felt a reasonable inference could be drawn from these facts, namely that Ms. Ducharme gave to Mr. Vienneau the availability and use of the house she owned in consideration for his payments on the mortgage. The amounts paid by Mr. Vienneau were considered tantamount to rent. Rothstein J.A. was careful to add that identifying the amounts paid by Mr. Vienneau as rent was not a re-characterization of the legal effects of transactions. It was simply a way of explaining that Mr. Vienneau received consideration equivalent to or greater than the amounts he transferred to Ms. Ducharme.
>
> ….
>
> [24] … I cannot agree with the respondent that Rothstein J.A. implicitly found that there was a legally enforceable agreement between Ms. Ducharme and Mr. Vienneau according to which each had promised to give the other something they did not already have under the British Columbia legislation which did not give common law spouses the right to use and enjoy the matrimonial home (*Family Relations Act* [R.S.B.C. 1996] c. 128).
>
> [25] I find on the whole that it is for Parliament to articulate an appropriate framework that would give married couples the equal treatment the appellant wishes they should enjoy by comparison to those who come under the purview of subsection 160(4) of the *Act*.

[29] Both cases dealt with section 160 of the *Income Tax Act* ("*ITA*"), the non-arm's length provision, quite similar in wording to subsection 325(1) applicable to the case at bar. Both sections only provide one exception, transfers between spouses or common-law partners, upon separation, *under a decree, order or judgment of a competent tribunal or under a written separation agreement* (subsection 325(4) *ETA*; subsection 160(4) *ITA*). It is clear from *Yates* that only Parliament can *provide an appropriate framework* to deal with a situation such as the one presented in the case at bar.

[30] The appeal is dismissed.

Signed at Montréal, Quebec, this 5th day of February 2013.

"J.-L. Batiot"

Batiot D.J.

CITATION:	2013 TCC 26
COURT FILE NO.:	2011-4100(GST)I
STYLE OF CAUSE:	ANGELA FERRARO-PASSARELLI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	November 7, 2012
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DATE OF JUDGMENT:	February 5, 2013

APPEARANCES:

Counsel for the Appellant:	Carmine Iovino
Counsel for the Respondent:	Jean Duval

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