**CITATION:** YATES *v.* CANADA, 2009 FCA 50, [2010] 1 F.C.R. 436 A-422-07

**Debra Yates** (*Appellant*)

*v.*

**Her Majesty the Queen** (*Respondent*)

***INDEXED AS: YATES V. CANADA (F.C.A.)***

Federal Court of Appeal, Desjardins, Nadon and Blais JJ.A.—Toronto, December 4, 2008; Ottawa, February 20, 2009.

*Income Tax — Reassessment — Appeal from Tax Court of Canada decision dismissing appeals from reassessments made under Income Tax Act (the Act), s. 160(1) — Appellant's spouse having outstanding tax liability over $485 000 — Releasing joint interest in bank accounts in favour of appellant, depositing paycheques in appellant's bank account for over one year — Appellant's account used to pay household expenses — Tax Court of Canada concluding spouse's actions constituting transfer of property, and that while certain limited payments made by spouse for daily living necessities not subject to Act, s. 160(1), expenses made herein going beyond expenditures permitted to satisfy family support obligations — Appellant arguing Tax Court failing to consider, articulate appropriate framework for determining amount of support payments beyond reach of Act, s. 160(1) — Per Desjardins J.A.: Clear on reading of Act, s. 160 that s. 160(4) only exception provided thereunder — Act, s. 160(4) exempting from capture payments made on account of support under separation agreement, court judgment — Line of Tax Court of Canada cases stating payments made by one spouse to another in satisfaction of legal obligation to support family beyond reach of Act, s. 160 not supported by legislation — Appeal dismissed — Per Nadon J.A. (concurring): Court of law not permitted to read in taxation statute provisions that are inexistent in legislation — Tax Court of Canada's approach in determining whether fair market value consideration had been given for property transferred to appellant clearly wrong — View that only those household expenses which could be considered as "vital household expenses" beyond reach of s. 160(1) clearly erroneous — Per Blais J.A. (concurring): Nothing in s. 160(1) permitting court excuse spouse from liability where conditions thereunder met — No mention of family law exception from tax liability in s. 160(1) — Present case not falling under s. 160(4) exception dealing with transfer of property between separated spouses living apart — Tax Court erring in following line of cases concluding certain limited payments by spouse made for household expenses not subject to Act, s. 160, determination must be made as to which household expenditures are vital, may be excluded from reach of s. 160 — S. 160(1) should apply equally everywhere in Canada despite differences in provincial legislation on family law.*

This was an appeal from a Tax Court of Canada decision dismissing the appeals from reassessments made under subsection 160(1) of the *Income Tax Act*. The appellant's spouse had an outstanding tax liability over $485 000. On December 23, 2002, he released his joint interest in two bank accounts for $4 972.30 and $2 406.45 in favour of the appellant. As of December 23, 2002 and throughout 2003, he also deposited his paycheques totalling $54 406.20 in the appellant's bank account, which both had used to pay household expenses for many years prior to December 23, 2002. Between December 23, 2002 and October 31, 2003, the total household expenses amounted to $151 248.08. The appellant's spouse filed for bankruptcy shortly afterwards. The appellant was issued three reassessments under subsection 160(1) of the Act for a total of $61 784.95. The Tax Court found that of the four requirements which must be satisfied under subsection 160(1) only the following two were in question: whether there was a transfer of property and whether the transferee had given no or inadequate consideration to the transferor. The Tax Court concluded that the actions of the appellant's spouse regarding the deposit of funds constituted a transfer of property. As to whether consideration had been given for this transfer, it stated that certain limited payments made for daily living necessities by a spouse who is obligated to support a family are not subject to subsection 160(1). It followed a line of cases from the Tax Court supporting this reasoning, and determined that in this case, the expenditures made did not constitute vital household expenses since they went beyond the expenditures permitted in satisfaction of a person's legal obligation to support his or her family. The appellant claimed that the Tax Court failed to consider or articulate an appropriate framework for determining the amount of payments made by a spouse to support his or her family that are beyond the reach of sub-section 160(1).

NeoVia Document Viewer Pro v6.8

The issue was whether a court of law is permitted to read in to a taxation statute provisions that are inexistent in the legislation and in particular whether some household expenses may be excluded from the reach of subsection 160(1) of the Act.

*Held*, the appeal should be dismissed.

*Per* Desjardins J.A.: Section 160 is an important tax collection tool because it thwarts attempts to move money or other property beyond the tax collector's reach by placing it in presumably friendly hands. A reading of section 160 makes it clear that the only exception provided under the Act is subsection 160(4), which exempts from capture any payments made on account of support pursuant to a separation agreement or judgment of the court. The line of Tax Court of Canada cases illustrated by *Michaud v. Canada*, *Ferracuti v. Canada* and *Laframboise v. Canada*, which takes the position that payments made by one spouse to another in satisfaction of a legal obligation to support his or her family are beyond the reach of section 160, is not supported by the legislation. On the whole, it is for Parliament to articulate an appropriate framework that would give married couples equal treatment to those who come under the purview of subsection 160(4) of the Act.

*Per* Nadon J.A. (concurring): Subsection 160(1) of the Act is clear and unambiguous in that if there is a transfer within the purview thereof, the transferee must satisfy the Court that he or she provided consideration at fair market value. The Act does not provide for any exception other than the one found at subsection 160(4), i.e. that transfers made between spouses "separated and living apart" shall not render them liable under subsection 160(1). A court of law is not permitted to read in a taxation statute provisions that are inexistent in the legislation. While the Tax Court of Canada correctly concluded that there had been a transfer of property, its approach in addressing the issue of consideration was clearly in error. Based on the record, it was clear that no such consideration was provided. Its view that only those household expenses which could be considered as "vital household expenses" were beyond the reach of subsection 160(1) was clearly erroneous. Finally, allowing the appellant's spouse to live in the family residence did not constitute consideration at fair market value.

*Per* Blais J.A. (concurring): There is nothing in subsection 160(1) that permits a court to excuse a spouse from liability where the conditions of the provision are met—there is no mention of a family law exception in this provision. Subsection 160(4) deals specifically with a transfer of property between spouses who are separated and living apart, indicating Parliament's intention to exempt specific transfers in a matrimonial context from the application of subsection 160(1). The present case did not fall under this exemption. In this case, while the Tax Court of Canada correctly dismissed the appeal, it based its decision on some questionable reasoning. It erred in law by following the line of cases which concludes that certain limited payments made for household expenses by a spouse are not subject to section 160. It failed to conduct the proper analysis as to whether the appellant's spouse was given fair market value consideration for the property that was transferred. It made a palpable and overriding error by concluding that the evidence of the taxpayer with respect to household expenditures must be examined to determine which expenses, if any, are the vital household expenses that may be excluded from the reach of section 160. While provincial legislation on family law varies from one province to another, subsection 160(1) should apply equally everywhere in Canada.

STATUTES AND REGULATIONS CITED

*Divorce Act*, R.S.C., 1985 (2nd Supp.), c. 3.

*Family Law Act*, R.S.O. 1990, c. F.3, ss. 30 (as am. by S.O. 1999, c. 6, s. 25; 2005, c. 5, s. 27(7)), 31 (as am. by S.O. 1997, c. 20, s. 2), 33 (as am. *idem*, s. 3; 1999, c. 6, s. 25; 2002, c. 17, Sch. F, c. 24, Sch. B, s. 37; 2005, c. 5, s. 27; 2006, c. 1, s. 5, c. 19, Sch. B, s. 9, Sch. C, s. 1).

*Family Relations Act*, R.S.B.C. 1996, c. 128.

*Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, s. 160 (as am. by S.C. 1998, c. 19, s. 186; 2000, c. 12, s. 142, Sch. 2, ss. 1(*z*.26), 7(*j*)(E), 9(*p*), c. 19, s. 46, c. 30, s. 170; 2007, c. 29, s. 23).

CASES CITED

NOT FOLLOWED:

*Michaud v. Canada*, [1998] 4 C.T.C. 2675, (1998), 99 DTC 43 (T.C.C.); *Ferracuti v. Canada*, [1999] 1 C.T.C. 2420, (1998), 99 DTC 194 (T.C.C.); *Laframboise v. Canada*, [2003] 1 C.T.C. 2672, (2002), 2003 DTC 781 (T.C.C.).

Neevia Document Converter Pro 6.0

DISTINGUISHED:

*Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793, 284 D.L.R. (4th) 385, 65 Admin. L.R. (4th) 1, revg 2006 FCA 207, [2006] 4 F.C.R. 532, 265 D.L.R. (4th) 253, [2006] 3 C.T.C. 95; *Ducharme v. Canada*, 2005 FCA 137, [2005] 2 C.T.C. 323, 2005 DTC 5249, 335 N.R. 175, affg 2004 TCC 488, [2004] 4 C.T.C. 2382, 2004 DTC 3021.

CONSIDERED:

*Fasken, David v. Minister of National Revenue*, [1948] Ex. C.R. 580, [1948] C.T.C. 265, (1948), 49 DTC 491; *Medland v. Canada*, [1999] 4 C.T.C. 293, (1998), 98 DTC 6358, 227 N.R. 183 (F.C.A.); *Livingston v. Canada*, 2008 FCA 89, [2008] 3 C.T.C. 230, 2008 DTC 6233; *Wannan v. Canada*, 2003 FCA 423, 1 C.B.R. (5th) 117, [2004] 1 C.T.C. 326, 2003 DTC 5715; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1.

APPEAL from a Tax Court of Canada decision (2007 TCC 498, 2007 DTC 1446) dismissing the appeals from reassessments made under subsection 160(1) of the *Income Tax Act*. Appeal dismissed.

APPEARANCES

*David M. McNevin* for appellant.

*Steven D. Leckie* and *Pierre Covo* for respondent.

SOLICITORS OF RECORD

*Ducharme Fox LLP*, Windsor, for appellant.

*Deputy Attorney General of Canada* for respondent.

*The following are the reasons for judgment rendered in English by*

[1] DESJARDINS J.A.: It is my view that the appeal should be dismissed. My reasons for this conclusion are the following.

[2] The facts are not in dispute. In brief, Mr. Yates had an outstanding tax liability, at all relevant times, in excess of $485 000. On December 23, 2002, he released his joint interest in two bank accounts for amounts of $4 972.30 and $2 406.45 in favour of his wife, the appellant. Also, as of December 23, 2002, and throughout 2003, Mr. Yates deposited his paycheques for a total amount of $54 406.20 in a bank account owned by his wife. This account had been used by both to pay their household expenses for many years prior to December 23, 2002. The appellant customarily took care of these expenditures. Between December 23, 2002, and October 31, 2003, the total household expenses set out by the appellant amounted to a total of $151 248.08. Mr. Yates filed for bankruptcy on February 16, 2004.

[3] The Minister issued three reassessments against Ms. Yates under subsection 160(1) [as am. by S.C. 2000, c. 12, s. 142, Sch. 2, s. 1(*z*.26)] of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (the Act) on September 12, 2004, for a total of $61 784.95.

[4] The Tax Court Judge whose judgment is reported as *Yates v. Canada*, 2007 TCC 498, 2007 DTC 1446, found at paragraph 12 of his reasons that, of the four requirements which must be satisfied under subsection 160(1) of the Act, only the following two were in question, namely that:

(i) There must be a transfer of property; and

(ii) There must be no or inadequate consideration flowing from the transferee to the transferor.

Neevia Document Converter Pro v6.6

[5] The Tax Court Judge had no difficulty in concluding on the first point that there had been a transfer of property since Mr. Yates had divested himself of property, firstly by the removal of his name from the two joint accounts and, secondly, by the deposits of his paycheques into his wife's account. In doing so, he applied *Fasken, David v. Minister of National Revenue*, [1948] Ex. C.R. 580, endorsed by this Court in *Medland v. Canada*, [1999] 4 C.T.C. 293, at paragraph 14. His approach was consistent with the decision of this Court in *Livingston v. Canada*, 2008 FCA 89, [2008] 3 C.T.C. 230, at paragraph 21, where it was held that "[t]he deposit of funds into another person's account constitutes a transfer of property."

[6] The more difficult issue was whether Ms. Yates had given consideration for these transfers.

[7] The Tax Court Judge explained at paragraph 16 of his reasons:

> The more difficult issue is whether there was consideration rendered by the Appellant for these transfers from Mr. Yates. This boils down to whether these transfers were merely his satisfying his legal obligation to support his wife and family. If so, then the payments in certain restricted circumstances are not subject to section 160 liability. To find in the Appellant's favour, I must find there was adequate consideration flowing from her to Mr. Yates. I agree with the Appellant that there is a legal obligation for support under the *Family Law Act* of Ontario. The greatest disparity between the submission of counsel for the Appellant and the present case law is latitude given to the legal obligation.

[8] He further explained at paragraph 19 of his reasons:

> I accept the second approach to the effect that certain limited payments made for some household expenses by a spouse, who is obligated to support his or her family, are not subject to subsection 160(1). I believe these expenditures should be for daily living necessities as opposed to permitting an accustomed lavish standard of living. The Appellant cited the following cases which support this: *Michaud v. Canada* ([1998] T.C.J. 908), *Ferracuti v. Canada* ([1998] T.C.J. 883), *Laframboise v. Canada* ([2002] T.C.J. 628) and *Ducharme v. Canada* ([2004] T.C.J. 284; [2005] F.C.J. No. 713).

[9] He reviewed the line of cases cited by the appellant and stated at paragraph 29 of his reasons:

> I agree that the function of this Court under section 160 is not to parse a taxpayer's grocery bills in order to determine which food items are reasonable and which are not. Each case must be considered on its own merits. The Court must examine the evidence of the taxpayer with respect to household expenditures to determine which expenses, if any, are the vital household expenses that may be excluded from the reach of section 160. I say this because section 160 is a far-reaching collection tool in the *Act*. It has been described as draconian and Parliament drafted it as such. Accordingly, the exceptions to the reach of this section are narrow. In *Ferracuti*, I attempted to determine which expenditures were made in satisfaction of the person's legal obligation to support his family.

[10] The Tax Court Judge concluded that the expenditures made in the case at bar were not the vital household expenses envisaged in the above line of cases. They went beyond the expenditures permitted in satisfaction of a person's legal obligation to support his family. He consequently dismissed the appeals of Ms. Yates against the Minister's reassessments.

[11] The appellant claims that the Tax Court Judge, although recognizing that at least some payments made by a spouse towards supporting his or her family were beyond the reach of subsection 160(1) of the Act, erred by failing to consider or articulate an appropriate framework for determining the appropriate quantum of such payments. He should, submits the appellant, have adopted an approach consistent with the jurisprudence developed in connection with family law for the determination of support. Indeed, subsection 160(4) [as am. *idem*] of the Act expressly exempts from capture any payments made on account of support pursuant to a separation agreement or judgment of the court. Couples who remained married should be no worse off than those who have separated. Hence, says the appellant, the calculation of support payments should be guided by principles articulated in the family legislation in each province and in the *Divorce Act*, R.S.C., 1985 (2nd Supp.), c. 3.

Neevia Document Converter Pro v6.6

[12] Section 160 [as am. by S.C. 1998, c. 19, s. 186; 2000, c. 12, s. 142, Sch. 2, ss. 1(*z*.26), 7(*j*)(E), 9(*p*), c. 19, s. 46, c. 30, s. 170; 2007, c. 29, s. 23] of the Act is unquestionably a draconian measure. But the issue is whether a court of law is permitted to read in a taxation statute provisions that are inexistent in the legislation.

[13] The Court in *Medland*, at paragraph 14, has explained the policy behind this provision in the following manner:

> It is not disputed that the tax policy embodied in, or the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse in order to thwart the Minister's efforts to collect the money which is owned [*sic*] to him. [Footnote omitted.]

[14] Again, in *Wannan v. Canada*, 2003 FCA 423, 1 C.B.R. (5th) 117, at paragraph 3, this Court recognized that "[s]ection 160 of the *Income Tax Act* is an important tax collection tool, because it thwarts attempts to move money or other property beyond the tax collector's reach by placing it in presumably friendly hands."

[15] In *Livingston*, this Court explained at paragraph 27 that "a transferee of property will be liable to the CRA [Canada Revenue Agency] to the extent that the fair market value of the consideration given for the property falls short of the fair market value of that property." The Court stated in the same paragraph that the "very purpose of subsection 160(1) is to preserve the value of the existing assets in the taxpayer for collection by the CRA."

[16] A reading of section 160 makes it clear that the only exception provided under the Act is that of subsection 160(4) of the Act.

[17] The line of cases illustrated by *Michaud v. Canada*, [1998] 4 C.T.C. 2675 (T.C.C.); *Ferracuti v. Canada*, [1999] 1 C.T.C. 2420 (T.C.C.); and *Laframboise v. Canada*, [2003] 1 C.T.C. 2672 (T.C.C.), which takes the position that payments made by one spouse to another in satisfaction of a legal obligation to support his or her family are beyond the reach of section 160, is not supported by the legislation.

[18] The respondent cited the decision of the Supreme Court of Canada in *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793 in support of a strict interpretation of section 160 of the Act. That case arose out of a dispute as to whether the Minister was barred from acting under section 160 of the Act, due to some limitation period.

[19] The Supreme Court of Canada held in that case that judicial review was not available because the Minister, under section 160 of the Act, could assess at any time since there was no limitation period provided. The Supreme Court of Canada indicated its preference for the minority view expressed in the court below, the Federal Court of Appeal [*Addison & Leyen Ltd. v. Canada*, 2006 FCA 207, [2006] 4 F.C.R. 532] by Rothstein J.A., as he then was. At paragraph 9, the Supreme Court of Canada stated the following:

> Nevertheless, we find that judicial review was not available on the facts of this case. As Rothstein J.A. pointed out, the interpretation of s. 160 *ITA* by the majority of the Federal Court of Appeal amounted to reading into that provision a limitation period that was simply not there. The Minister can reassess a taxpayer at any time. In the words of Rothstein J.A.:
>
> > While in the sense identified by the majority, subsection 160(1) may be considered a harsh collection remedy, it is also narrowly targeted. It only affects transfers of property to persons in specified relationships or capacities and only when the transfer is for less than fair market value. Having regard to the application of subsection 160(1) in specific and limited circumstances, Parliament's intent is not obscure. Parliament intended that the Minister be able to recover amounts transferred in these limited circumstances for the purpose of satisfying the tax liability of the primary taxpayer transferor. The circumstances of such transactions mak[e] it clear that Parliament intended that there be no applicable limitation period and no other condition on when the Minister might assess. [para. 92] [Emphasis added.]

NevaDocument Converter Pro v6.8

[20] The words “no other condition” followed by the words “on when the Minister might assess” make it clear that the *Leyen* case is directed to the concept of a limitation period only. We are not dealing, in the case at bar, with a limitation period but with whether family obligations should be read in subsection 160(1) of the Act. The case does not assist the respondent in his demonstration that Parliament’s intent is to exclude family obligations from the purview of the legislation. The *Leyen* case cannot be read in such a manner.

[21] The appellant claims in her favour the decision of this Court in *Ducharme v. Canada*, 2005 FCA 137, [2005] 2 C.T.C. 323, Rothstein J.A., as he then was, writing for the Court, relied essentially on a finding of fact of the Tax Court Judge [2004 TCC 488, [2004] 4 C.T.C. 2382]. At the time, Mr. Vienneau, the common-law partner of Ms. Ducharme, paid the mortgage payments. As found by the Tax Court Judge, the rent for an equivalent (and apparently average) house in the area the couple was living in ranged two times the amount of money transferred by Mr. Vienneau to Ms. Ducharme. 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 recharacterization 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.

[22] Rothstein J.A. made it clear that in view of the conclusion he had arrived at, it was unnecessary to address Ms. Ducharme’s other arguments based on valuing domestic services or “domestic obligations” of spouses.

[23] The *Ducharme* case rests therefore on its own facts.

[24] For the same reason, 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.

[26] I would dismiss this appeal with costs.

* * *

*The following are the reasons for judgment rendered in English by*

[27] NADON J.A.: I am entirely in agreement with the reasons which Desjardins J.A. gives in support of her view that the appeal cannot succeed. I wish only to elaborate on the following points.

[28] Mr. Yates transferred to his wife’s account the sum of $61 784.95. The appellant says that in releasing his joint interest in two bank accounts in favour of his wife and in depositing his paycheques in a bank account owned by his wife, Mr. Yates did not transfer property which falls within the purview of subsection 160(1) of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c.1 (the Act) and that, in any event, if there is a transfer within the purview of the subsection, adequate consideration was given for the transfer.

[29] In support of her argument that there was no transfer within the meaning of subsection 160(1), the appellant says that by reason of her husband’s obligation pursuant to sections 30 [as am. by S.O.

Neutral Document Conversion Project

1999, c. 6, s. 25; 2005, c. 5, s. 27(7)], 31 [as am. by S.O. 1997, c. 20, s. 2] and 33 [as am. *idem*, s. 3; 1999, c. 6, s. 25; 2002, c. 17, Sch. F, c. 24, Sch. B, s. 37; 2005, c. 5, s. 27; 2006, c. 1, s. 5, c. 19, Sch. B, s. 9, Sch. C, s. 1] of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, to support his family, the deposits made to her account were for the purpose of paying household expenses and that she did pay such expenses, pointing out that the total household expenses during the period at issue exceeded the sum transferred to her by her husband.

[30] With respect to consideration, the appellant again says that her husband transferred money to her by reason of his legal obligation to support his family. She further says that Mr. Yates was allowed to use the matrimonial home during the time that he was making the payments. Thus, she submits that her husband received consideration equal to the funds transferred by him into her bank account.

[31] In my view, these submissions are without merit. As Desjardins J.A. makes clear in her reasons (paragraph 4), only two of the four requirements to be met under subsection 160(1) are at issue in this appeal:

1. whether there is a transfer of property to a spouse and if so,

2. whether the spouse gave consideration amounting to fair market value.

[32] On the facts of the case before us, the answer can only be that there was a transfer and that no consideration at fair market value was given.

[33] At paragraph 47 of her memorandum of fact and law, the appellant summarizes her position as to why subsection 160(1) does not find application in the present matter:

a. the deposit of John Yates paycheque net of deductions for tax does not constitute a transfer;

b. the payments made were made pursuant to Mr. Yates' obligation to support his family;

c. the Yates' family had significant living expenses during the relevant time that the payments were made that exceed the amount deposited;

d. thus, there was no "unjust enrichment" as contemplated by section 160 of the Act;

e. in the alternative and, in any event, the amounts paid were for living expenses that John Yates was duty bound to provide for his family;

f. in the further alternative, John Yates received consideration for the transfer in light of the fact that he enjoyed the use of the matrimonial home in exchange for the payments made; and

g. in the further alternative and, in any event, no tax was payable by John Yates at the time that the deposits were made.

[34] What the appellant is clearly asking us is, in my respectful view, to read subsection 160(1) as if the exception provided at subsection 160(4) applied to spouses who were not separated and living together. At paragraph 50 of the appellant's memorandum of fact and law the appellant clearly invokes the benefit of subsection 160(4):

> The appellant contends that the Court should adopt an approach consistent with the jurisprudence developed in connection with family law for the determination of support. Indeed, subsection 160(4) of the *Income Tax Act* expressly exempts from capture any payments made on account of support pursuant to a separation agreement or judgment of the court. Couples who remain married should be no worse off than couples that have separated when considering the effect of section 160.

Neevia Document Converter Pro v6.6

[35] Subsection 160(1) is clear and unambiguous and the Act does not provide for any exception, other than the one found at subsection 160(4), i.e. that transfers made between spouses "separated and living apart" shall not render them 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 therefore". The provision also provides that for the purposes of paragraph 160(1)(*e*), the fair market value of property transferred after February 15, 1984, shall be deemed to be nil.

[36] The question raised by the appellant is clearly a question of law which calls for review on a standard of correctness. In effect, what we have to decide in this appeal is whether a family law exception can be read into subsection 160(1).

[37] As my colleague Desjardins J.A. says at paragraph 12 of her reasons, "[s]ection 160 … of the Act is unquestionably a draconian measure. But the issue is whether a court of law is permitted to read in a taxation statute provisions that are inexistent in the legislation." The answer to that question is clearly a no.

[38] Whether Mrs. Yates spent the $61 784.95 transferred to her by her husband on holidays, personal items, groceries or other household expenditures is, in my respectful view, of no relevance to the determination of whether there was a transfer. Let us assume, for example, that Mr. Yates had given Mrs. Yates an automobile valued at $61 784.95. Let us also assume that on the day following the gift, Mrs. Yates sells the automobile for its full value and proceeds to defray household expenses with that money. Would we seriously entertain an argument that the gift of the automobile does not constitute a transfer because the monies resulting from its sale served to defray the family's living expenses? I suspect that we would have no difficulty in dismissing such an argument.

[39] Consequently, I see absolutely no basis for the appellant's argument that the nature of the expenses incurred with the money transferred to her by her husband is a relevant factor in determining whether she is subject to subsection 160(1) of the Act.

[40] The Judge correctly concluded that there had been a transfer by Mr. Yates to the appellant in the sum of $61 784.95. He then turned his attention to the issue of consideration, which he considered to be the more troublesome issue. He stated the issue as follows at paragraph 16:

> This boils down to whether these transfers were merely his satisfying his legal obligation to support his wife and family. If so, then the payments in certain restricted circumstances are not subject to section 160 liability. To find in the Appellant's favour, I must find there was adequate consideration flowing from her to Mr. Yates. I agree with the Appellant that there is a legal obligation for support under the *Family Law Act* of Ontario. The greatest disparity between the submission of counsel for the Appellant and the present case law is latitude given to the legal obligation.

[41] In my view, the Judge's approach is clearly in error. As I have already indicated, subsection 160(1) does not contain any ambiguity. If there is a transfer within the purview of the provision, then the transferee must satisfy the Court that he or she provided consideration at fair market value. In view of the wording of subsection 160(1), there is simply no basis for the position taken by the Judge.

[42] The Judge had to determine whether Mrs. Yates had provided consideration at fair market value and, in my view, on the record before him, it is clear that the appellant did not provide such consideration. The Judge reached this conclusion based upon the view that only those household expenses which could be considered as "vital household expenses" were beyond the reach of subsection 160(1). In my respectful view, that approach is clearly erroneous.

[43] To conclude, the appellant submits that she gave consideration at fair market value for the sums received from her husband. I see no evidence in the record to support that view. To make things perfectly clear, let me say that in allowing her husband to live in the family residence, the appellant did not provide consideration at fair market value. This is simply another attempt by Mrs. Yates to benefit from the exception found at subsection 160(4).

Neevia Document Converter Pro v6.6

[44] I therefore agree that the appeal should be dismissed with costs.

* * *

*The following are the reasons for judgment rendered in English by*

[45] BLAIS J.A.: I am in agreement with the disposition of this matter proposed by my colleague Desjardins J.A.; I am of the view that this appeal should be dismissed.

[46] This is an appeal from a decision of the Tax Court of Canada dated August 27, 2007 dismissing the appeals from reassessments made under section 160 of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (the Act).

Relevant Facts

[47] John Yates, the appellant's husband, was a tax debtor who owed the Minister of National Revenue (the Minister) more than $485 000. As of December 2002 and throughout 2003, while he was indebted to the Minister, he transferred money to his wife. The Minister assessed his wife, the appellant, under subsection 160(1) of the Act. The assessment concluded that the appellant should be jointly and severally liable for her husband's tax debt in an amount equivalent to the value of the transferred property. According to the Minister, the appellant is liable to pay $61 784 of her husband's income tax liability because there was a transfer from Mr. Yates to her without adequate consideration, pursuant to subsection 160(1). Mr. Yates filed a personal assignment in bankruptcy in February 2004.

Decision Below

[48] The trial Judge applied a correct test and reached the correct result in holding that John Yates' removal of his name from the joint bank accounts and deposits of his paycheques into Debra Yates' account constituted transfers within the meaning of subsection 160(1).

[49] The trial Judge also decided that certain limited payments made for household expenses by John Yates to Debra Yates are not subject to section 160; specifically, at paragraph 29 of his judgment, he wrote:

> The Court must examine the evidence of the taxpayer with respect to household expenditures to determine which expenses, if any, are the vital household expenses that may be excluded from the reach of section 160. I say this because section 160 is a far-reaching collection tool in the *Act*. It has been described as draconian and Parliament drafted it as such. Accordingly, the exceptions to the reach of this section are narrow. In *Ferracuti*, I attempted to determine which expenditures were made in satisfaction of the person's legal obligation to support his family.

Applicable Legislation

[50] Subsections 160(1) and 160(4) read:

*Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1

> **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,

Neevia Document Converter Pro v6.8

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.

…

(4) Notwithstanding subsection 160(1), where at any time a taxpayer has transferred property to the taxpayer's spouse or common-law partner 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 or common-law partner were separated and living apart as a result of the breakdown of their marriage or common-law partnership, the following rules apply:

(*a*) in respect of property so transferred after February 15, 1984,

(i) the spouse or common-law partner 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, and

(*b*) in respect of property so transferred before February 16, 1984, where the spouse common-law partner would, but for this paragraph, be liable to pay an amount under this Act by virtue of subsection 160(1), the spouse's or common-law partner's liability in respect of that amount shall be deemed to have been discharged on February 16, 1984.

but nothing in this subsection shall operate to reduce the taxpayer's liability under any other provision of this Act.

Issue

[51] In conducting the analysis as to whether a fair market value consideration for the property transferred was given, is the judge entitled to exclude some household expenses from the reach of subsection 160(1)?

Standard of Review

[52] The standard of review applicable depends on the nature of the question. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, teaches us that questions of law are generally reviewed on a standard of correctness, while findings of fact or mixed fact and law will be set aside only if the trial Judge has made an overriding and palpable error.

Neevia Document Converter Pro v6.0

Analysis

[53] Pursuant to subsection 160(1), when a tax debtor transfers property to a non-arm's length person, that person becomes jointly and severally liable with the tax debtor for the tax debt in an amount equal to the difference between the fair market value of the transferred property and the consideration given for the transferred property.

[54] There is nothing in subsection 160(1) that permits a court to excuse a spouse from liability where the conditions of the provision are met; in fact, there is no mention of a family law exception in this provision.

[55] Subsection 160(4) deals specifically with a transfer of property between spouses who are separated and living apart, which shows Parliament's intention to exempt specific transfers in a matrimonial context from the application of subsection 160(1). In my view, our case does not fall under this particular exemption.

[56] The trial Judge erred in law by following the line of jurisprudence which concludes that certain limited payments made for household expenses by a spouse are not subject to section 160 (see reasons for judgment, at paragraphs 19 and 29).

[57] The trial Judge failed in this case to conduct the proper analysis as to whether John Yates was given fair market value consideration for the property that was transferred. In fact, he made a palpable and overriding error by concluding that the Court must examine the evidence of the taxpayer with respect to household expenditures to determine which expenses, if any, are the vital household expenses that may be excluded from the reach of section 160.

[58] In my view, there is no ambiguity in the reading of subsection 160(1); nevertheless, several decisions of the Tax Court of Canada have read a "family law exception" into it.

[59] In *Livingston v. Canada*, 2008 FCA 89, [2008] 3 C.T.C. 230 (*Livingston*), Sexton J.A. held at paragraphs 27 and 28:

> Under subsection 160(1), a transferee of property will be liable to the CRA to the extent that the fair market value of the consideration given for the property falls short of the fair market value of that property. The very purpose of subsection 160(1) is to preserve the value of the existing assets in the taxpayer for collection by the CRA.… However, subsection 160(1) will not apply where an amount equivalent in value to the original property transferred was given to the transferor at the time of transfer: that is, fair market value consideration. This is because after such a transaction, the CRA has not been prejudiced as a creditor.…
>
> The Tax Court Judge erred in law by failing to conduct <u>any</u> analysis of the fair market value of the consideration. He simply concluded that it was "adequate." I fail to see how the fair market value of the consideration, if any did exist, would be equivalent to the funds deposited.… There was no evidence on which the Tax Court Judge could conclude that what was provided by the respondent was equal to the fair market value of the money put into the account.

In that case, my colleague Sexton J.A. made clear that the trial Judge must conduct a proper analysis of the fair market value of the consideration.

[60] In *Medland v. Canada*, [1999] 4 C.T.C. 293 (F.C.A.) (*Medland*), Desjardins J.A. held at paragraph 14:

> It is not disputed that the tax policy embodied in, or the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse in order to thwart the Minister's efforts to collect the money which is owned [*sic*] to him. [Footnote omitted.]

[61] In *Wannan v. Canada*, 2003 FCA 423, 1 C.B.R. (5th) 117 (*Wannan*), Sharlow J.A. held at paragraph 3:

Neevia Document Converter Pro v6.6

Section 160 of the *Income Tax Act* is an important tax collection tool, because it thwarts attempts to move money or other property beyond the tax collector's reach by placing it in presumably friendly hands.

[62] I have no hesitation in concluding that the narrow interpretation provided by the decisions in *Livingston*, *Medland* and *Wannan*, should be followed.

[63] A recent decision of the Supreme Court of Canada, *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793, favoured the dissenting reasons of Justice Rothstein of the Court of Appeal, as he then was, with respect to subsection 160(1). The Supreme Court's decision reflects the narrow approach regarding Parliament's intent. At paragraph 9, the Supreme Court of Canada quoted Justice Rothstein:

As Rothstein J.A. pointed out, the interpretation of s. 160 *ITA* by the majority of the Federal Court of Appeal amounted to reading into that provision a limitation period that was simply not there. The Minister can assess a taxpayer at any time. In the words of Rothstein J.A.:

> While in the sense identified by the majority, subsection 160(1) may be considered a harsh collection remedy, it is also narrowly targeted. It only affects transfers of property to persons in specified relationships or capacities and only when the transfer is for less than fair market value. Having regard to the application of subsection 160(1) in specific and limited circumstances, Parliament's intent is not obscure. Parliament intended that the Minister be able to recover amounts transferred in these limited circumstances for the purpose of satisfying the tax liability of the primary taxpayer, transferor. The circumstances of such transactions mak[e] it clear that Parliament intended that there be no applicable limitation period and no other condition on when the Minister might assess. [para. 92] [My emphasis.]

[64] Even if Justice Rothstein's comment on section 160 refers to whether a limitation period should apply, he nevertheless mentioned that section 160 provides: "no other condition on when the Minister might assess". This again reflects the narrow approach followed so far by our Court, and I see no reason to depart from it.

[65] I believe that the approach taken by our Court in *Ducharme v. Canada*, 2005 FCA 137, [2005] 2 C.T.C. 323, should be distinguished on the basis that the trial Judge's conclusion [2004 TCC 488, [2004] 4 C.T.C. 2382] was motivated by a very fact-specific situation with which the Court of Appeal decided not to interfere.

[66] There is some confusion in jurisprudence since provincial legislation on family law regarding property, family definition, common-law partners and matrimonial homes varies from one province to another. Nevertheless, subsection 160(1) should apply equally everywhere in Canada without exception apart from those specifically described in subsection 160(4).

Conclusion

[67] In my view, the trial Judge arrived at the correct conclusion in dismissing the appeal but based his decision on some questionable reasoning. A plain language interpretation of subsection 160(1) does not allow for a family law exception, nor does it allow for an exception for household expenses. If Parliament had wanted to provide for such exemptions, it would have done so expressly. It is not for our Court to read these exemptions into the Act.

[68] Therefore, I would dismiss the appeal with costs.

Neevia Document Converter Pro