

Docket: 2012-2894(IT)G

BETWEEN:

GURCHARANJIT BUDWAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Paramjit Budwal (2012-2892(IT)G) on June 16, 17 and 20, 2014,
at Victoria, British Columbia.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Karen A. Truscott

JUDGMENT

The appeal from the assessment made under subsection 160(1) of the *Income Tax Act* is dismissed and the assessment is confirmed in accordance with the attached reasons for judgment.

The parties have 30 days to agree on costs, failing which each party is to submit submissions on costs, not to exceed five pages, at the expiration of the aforementioned time.

Signed at Ottawa, Canada, this 19th day of December 2014.

“Robert J. Hogan”

Hogan J.

Docket: 2012-2892(IT)G

BETWEEN:

PARAMJIT BUDWAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Gurcharanjit Budwal (2012-2894(IT)G) on June 16, 17 and 20, 2014,
at Victoria, British Columbia.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Agent for the Appellant: Gurcharanjit Budwal
Counsel for the Respondent: Karen A. Truscott

JUDGMENT

The appeal from the assessment made under subsection 160(1) of the *Income Tax Act* is allowed and the assessment is vacated in accordance with the attached reasons for judgment.

The parties have 30 days to agree on costs, failing which each party is to submit submissions on costs, not to exceed five pages, at the expiration of the aforementioned time.

Signed at Ottawa, Canada, this 19th day of December 2014.

“Robert J. Hogan”

Hogan J.

Citation: 2014 TCC 370
Date: 20141219
Dockets: 2012-2894(IT)G
2012-2892(IT)G

BETWEEN:

GURCHARANJIT BUDWAL,
PARAMJIT BUDWAL,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Overview

[1] The issue in these appeals is whether the Appellants, Gurcharanjit Budwal (“G. Budwal”) and Paramjit Budwal (“P. Budwal”), husband and wife, were correctly assessed under subsection 160(1) of the *Income Tax Act* (the “Act”) with respect to an unpaid tax liability of \$110,052.45 of Budwal Investments Ltd. (“Budwal Investments”) in the circumstances described below.

[2] The appeals were heard on common evidence.

II. Factual Background

[3] Budwal Investments carried on a business in residential construction and real estate, primarily in Victoria, British Columbia.

[4] G. Budwal and P. Budwal owned respectively 60% and 40% of the shares of Budwal Investments.

[5] In 2002, Budwal Investments purchased a parcel of land on Blackberry Road in Victoria, British Columbia, for the purpose of developing a four-unit townhouse project (the “Blackberry Project”).

[6] Budwal Investments sold the first two units of the Blackberry Project during its taxation year ending October 31, 2003.

[7] Budwal Investments then sold the last two units of the Blackberry Project (the “2004 Properties”) during its taxation year ending October 31, 2004. The company failed to report its net profit from these two sales in its income tax return for the 2004 taxation year. As a result, it was reassessed for unreported income in the amount of \$149,054. The company did not succeed in its challenge of this reassessment.

[8] On March 26, 2008, the Minister of National Revenue (the “Minister”) assessed the Appellants under subsection 15(1) of the Act on the ground that they appropriated the net profit of \$149,054 that Budwal Investments had failed to report. The amount that was added to the income of each of the Appellants’ under subsection 15(1) of the Act was based on their respective shareholdings.¹

[9] Although the Appellants filed notices of objection to challenge those assessments, they did not appeal the matter to the Tax Court of Canada upon receiving a notice of confirmation. While an issue arises as to whether the benefit that is the object of the assessments against the Appellants should be reduced by the amount of their liability, if any, under section 160 of the Act, the question is moot because that matter is not before me in the present appeal.²

[10] On May 19, 2011, the Minister assessed the Appellants under subsection 160(1) of the Act with respect to Budwal Investments’ unpaid tax liability of \$110,052.45, using the same methodology as that used to establish the amount of their respective shareholder’s appropriations. The assessment issued was in the amount of \$89,432 for G. Budwal and \$59,622 for P. Budwal in respect of the alleged transfer of property referred to in paragraph 8 above.

III. Positions of the Parties

¹ $\$149,054 \times 60\% = \$89,432$ for G. Budwal and $\$149,054 \times 40\% = \$59,622$ for P. Budwal.

² The argument is that the benefit under subsection 15(1) of the Act should be reduced by the liability under section 160 of the Act because the appropriation carries with it liability under that section. In other words, the value of the benefit received by the shareholders under subsection 15(1) is the net amount. This is analogous to the situation where real estate is encumbered with a mortgage lien. In that particular case, the benefit is the net market value of the property after accounting for the mortgage lien.

[11] The essence of the Appellants' position is that there was an outstanding shareholders' loan balance that was repaid by Budwal Investments with the pre-tax profit earned from the sale of the 2004 Properties. In other words, the Appellants gave valuable consideration for the funds that Budwal Investments transferred to them.

[12] The Respondent's position is that the Appellants' shareholders' loan account was negative when they withdrew the full pre-tax profit earned from the sale of the 2004 Properties.

[13] The Respondent points out that Budwal Investments had no assets and an unpaid tax bill of \$110,052.45, which the Appellants do not deny. The Appellants offered no reasonable explanation as to how Budwal Investments could have found itself in that position. The Respondent points out that the Appellants do not dispute that Budwal Investments was profitable. Therefore, unless Budwal Investments subsequently lost money, which the Appellants have not alleged, it should have had sufficient assets to repay what it owed on its shareholders' loan account and satisfy its unpaid tax liability in full.

IV. Analysis

[14] The relevant parts of section 160 of the Act read 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, or solidarily, 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 for it, and

(e) the transferee and transferor are jointly and severally, or solidarily, 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 (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

[15] The purpose of this section is to prevent a taxpayer from avoiding paying tax by way of a transfer of property to a non-arm's length party. Accordingly, if the transferee fails to give consideration equal to the fair market value of the transferred property, the transferee becomes jointly and severally liable with the transferor for the payment of the transferor's liability up to an amount equal to the shortfall in the consideration paid to acquire the property. This aforementioned purpose, as well as the conditions that give rise to the application of the provision, were summarized by the Federal Court of Appeal in *Canada v. Livingston*:³

17 In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:

- 1) The transferor must be liable to pay tax under the Act at the time of transfer;
- 2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
- 3) The transferee must either be:
 - i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;

³ 2008 FCA 89, 2008 DTC 6233.

- ii. A person who was under 18 years of age at the time of transfer; or
 - iii. A person with whom the transferor was not dealing at arm's length.
- 4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

18 The purpose of subsection 160(1) of the Act is especially crucial to inform the application of these criteria. In *Medland v. Canada* 98 DTC 6358 (F.C.A.) ("*Medland*") this Court concluded that "the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse [or to a minor or non-arm's length individual] in order to thwart the Minister's efforts to collect the money which is owed to him." See also *Heavyside v. Canada* [1996] F.C.J. No. 1608 (C.A.) (QL) ("*Heavyside*") at paragraph 10. More apposite to this case, the Tax Court of Canada has held that the purpose of subsection 160(1) would be defeated where a transferor allows a transferee to use the money to pay the debts of the transferor for the purpose of preferring certain creditors over the CRA (*Raphael v. Canada* 2000 D.T.C. 2434 (T.C.C.) at paragraph 19).

19 As will be explained below, given the purpose of subsection 160(1), the intention of the parties to defraud the CRA as a creditor can be of relevance in gauging the adequacy of the consideration given. However, I do not wish to be taken as suggesting there must be an intention to defraud the CRA in order for subsection 160(1) to apply. The provision can apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax: *see Wannan v. Canada* 2003 FCA 423 at paragraph 3.

[16] The Appellants argue that the evidence shows that they received the transferred funds in repayment of amounts Budwal Investments owed to them. I disagree.

[17] First, the evidence shows that Budwal Investments reported that it had a negative shareholders' loan balance of \$27,752 when it filed its T2 income tax return for its taxation year ending October 31, 2003.⁴ According to this information, the Appellants owed Budwal Investments \$27,752 when they allegedly appropriated Budwal Investments' pre-tax profit earned from the sale of the 2004 Properties. While the Appellants attempted to prove that this was a mistake, I find that the evidence that they presented fell well short of the mark.

[18] Mr. McCoy, the Appellants' accountant and Budwal Investments' external accountant, testified on behalf of the Appellants. The financial information that he presented at the hearing was substantially different than the information he had

⁴ Exhibit R-3.

previously provided to the Minister at the objection stage. I found this evidence to be neither reliable nor credible. He offered no plausible explanation to justify his latest calculations. In addition, he could not explain how Budwal Investments could have ended up with an unpaid tax liability of \$110,052.45 and no assets to satisfy this liability. He acknowledged that the Blackberry Project was a profitable venture, as did G. Budwal during his examination in chief. Therefore, Budwal Investments should have had sufficient funds to repay its shareholders' loan and satisfy its income tax liability in full.

[19] Budwal Investments could only have ended up with a deficit for one of two reasons: either it incurred losses or funds were appropriated by its shareholders. There is no evidence to show that Budwal Investments incurred losses. I surmise that if such had been the case, Budwal Investments would have filed tax returns to report the losses and would have carried those losses back in order to reduce or eliminate its earlier income tax liability. I conclude that the Minister's assumption that Budwal Investments' pre-tax profit was appropriated is correct.

[20] There is one issue that remains for me to determine. The Minister assumed that Budwal Investments' pre-tax profit was appropriated on a 60/40 basis. This mirrors the Appellants' shareholdings in Budwal Investments. However, the evidence presented at the hearing rebuts the Minister's assumption that P. Budwal appropriated 40% of the funds.

[21] At the hearing, Mr. McCoy testified that \$100,000 transited from Budwal Investments to 587667 B.C. Ltd. ("B.C. Ltd.") and then on to G. Budwal. His testimony on this point was corroborated by bank statements showing the deposit in B.C. Ltd.'s bank account and two cheques from B.C. Ltd. to G. Budwal, each in the same amount of \$50,000.⁵ Since these transfers occurred within a few days of the sale of the 2004 Properties, it is reasonable to infer that these amounts were paid out of Budwal Investments' profit earned from those sales. It is clear from the evidence that P. Budwal was a passive shareholder and that her husband controlled all of Budwal Investments' operations. Considering as a whole the evidence submitted, I conclude that G. Budwal was the only person who appropriated funds from Budwal Investments. At the very least, P. Budwal has presented a *prima facie* case that she did not appropriate the funds that the Minister alleged she did.

⁵ Exhibit A-22. Had Mr. McCoy's evidence not been corroborated by these documents, I would have been reluctant to accept it.

[22] For all of these reasons, the appeal of G. Budwal is dismissed and the section 160 assessment made against him is confirmed.

[23] For the same reasons, the appeal of P. Budwal is allowed and the section 160 assessment made against her is vacated.

Signed at Ottawa, Canada, this 19th day of December 2014.

“Robert J. Hogan”

Hogan J.

CITATION: 2014 TCC 370

COURT FILE NOS.: 2012-2894(IT)G
2012-2892(IT)G

STYLE OF CAUSE: GURCHARANJIT BUDWAL and
PARAMJIT BUDWAL
v. THE QUEEN

PLACE OF HEARING: Victoria, British Columbia

DATE OF HEARING: June 16, 17 and 20, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: December 19, 2014

APPEARANCES:

For the Appellant Gurcharanjit Budwal :	The Appellant himself
Agent for the Appellant Paramjit Budwal:	Gurcharanjit Budwal
Counsel for the Respondent:	Karen A. Truscott

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada