

Docket: 2008-1259(IT)G

BETWEEN:

CONSTANCE PICKARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on March 15, 2010, at Ottawa, Canada

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant: Al-Nawaz Nanji

Counsel for the Respondent: Pascal Tétrault

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**JUDGMENT**

The appeals from the reassessments made under the *Income Tax Act* for the Appellant's 2002, 2003, 2004 and 2005 taxation years are dismissed, with costs to the Respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 19<sup>th</sup> day of October, 2010.

“G.A. Sheridan”

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Sheridan J.

Citation: 2010TCC535  
Date: 20101019  
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BETWEEN:

CONSTANCE PICKARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Sheridan, J.

[1] The Appellant, Constance Pickard, is appealing the assessment of her 2002, 2003, 2004 and 2005 taxation years. Pursuant to subsection 160(1) of the *Income Tax Act*, the Minister of National Revenue assessed tax in respect of certain cheques which her husband, a tax debtor, had directed to be deposited into her solely held bank account.

[2] The relevant portions of subsection 160(1) of the *Act* are set out below:

160(1) **Tax liability re property transferred not at arm's length.** Where a person has... transferred property ... directly ... by means of a trust or by any other means whatever, to

(a) the person's spouse

...

the following rules apply:

...

(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.

[3] In *Livingston v. R.*<sup>1</sup>, the Federal Court of Appeal enunciated four conditions necessary for the application of subsection 160(1); in the present matter, the only one in dispute is whether any consideration was given by Mrs. Pickard in respect of her husband's transfer of the cheques to her:

In light of the clear meaning of the words of section 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;
  - ii. A person who was under 18 years of age at the time of transfer; or
  - iii. A person with whom the transfer was not dealing at arm's length.
- 4) The fair market value of the property transferred must exceed the fair market value for the consideration given by the transferee.<sup>2</sup>

## Facts

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<sup>1</sup> [2008] 3 C.T.C. 230. (F.C.A.).

<sup>2</sup> Above, at paragraph 17.

[4] Constance and Monte Pickard have been married for over 30 years. For most of that time, Mr. Pickard operated various construction businesses and yet, never had a bank account. It also happens that for most of that time, he had an outstanding tax debt. It was still outstanding during the taxation years under appeal. From 2002 to 2005, he caused certain cheques payable to him to be deposited directly into Mrs. Pickard's personal account: in April 2002, a GST credit of \$1,074 and between 2003 and 2005, wages totalling \$47,744.41. By 2006, Mr. Pickard's tax debt totalled some \$62,000.

[5] Mr. Pickard's primary business operation between 2003 and 2005 was a sole proprietorship ("M.B. Pickard Sole Proprietorship") involved in construction project management but he also had a holding company, Montcom Holdings Inc. ("Montcom"); Montcom was a shareholder of yet another of Mr. Pickard's companies, Capital City Construction Ltd.

[6] Because Mr. Pickard "was terrible with paperwork"<sup>3</sup>, it had been decided early on in their relationship that Mrs. Pickard would look after paying their bills. She had no formal training in bookkeeping or accounting and to her credit, learned to do by doing. Throughout their marriage, Mrs. Pickard maintained her own personal bank account; during the taxation years under appeal, she also had a joint line of credit with Mr. Pickard. Funds from Mrs. Pickard's personal account and the joint line of credit were used for the couple's personal financial needs as well as for M.B. Pickard Sole Proprietorship, Montcom, and Capital City Construction Ltd. Operating in this fashion made records-keeping much more complicated than it would have been had separate accounts been established for their personal use and for each of the business entities. Mrs. Pickard was candid in her testimony that her records were not always current or complete.

[7] In 2003, the construction business was slow. As a result, Mr. Pickard took a job with Claridge Homes ("Claridge"). When asked by Claridge to authorize the direct deposit of his wages into an account, he inadvertently provided them with a blank cheque from Mrs. Pickard's personal bank account. When she noticed the deposit in her account of Mr. Pickard's first pay cheque, she spoke to her husband about correcting the error; apparently because she would be the one paying his personal and business bills, Mr. Pickard decided to leave things as they were. Thus, it was that from November 2003 to February 2005, his employment income from Claridge of \$47,744.71 was deposited into her personal account.

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<sup>3</sup> Transcript, page 14, line 13.

[8] Mrs. Pickard repeated throughout her testimony that it had always been agreed that any amounts Mr. Pickard caused to be deposited into her account were to be used only in payment of his personal and sole proprietorship expenses.

### Appellant's Position

[9] Counsel for the Appellant submitted that there was ample evidence to support the finding that Mrs. Pickard had given consideration for the amounts deposited in her account: firstly, by having promised to pay his personal and sole proprietorship debts and further, by having performed secretarial and bookkeeping services for M.B. Pickard Sole Proprietorship, her income from such activities having been duly reported in 2004 and 2005 as business income of \$30,000 and \$20,000, respectively. The deposited amounts were held by Mrs. Pickard in trust for the exclusive use of paying Mr. Pickard's indebtedness to his business and personal creditors. In these circumstances, counsel contended, it could not be said that Mrs. Pickard had given no consideration for the amounts deposited in her account between 2002 and 2005.

### Respondent's Position

[10] Counsel for the Respondent argued that there was insufficient evidence of any consideration having been given for the amounts deposited in Mrs. Pickard's account and accordingly, the Minister was justified in assessing under subsection 160(1). Counsel put in question the credibility of the Appellant's testimony and asked the Court to draw a negative inference from the fact that Mr. Pickard had not been called as a witness for the Appellant.

### Analysis

[11] In support of Mrs. Pickard's position, counsel for the Appellant made a thorough review of a series of cases involving non-arm's length transfers of property from a tax debtor<sup>4</sup>. In *Livingston*, Sexton, J.A. expressed the purpose of subsection 160(1) as follows:

18 The purpose of subsection 160(1) of the Act is especially crucial to inform the application of these criteria. In *Medland v. Canada* ... this Court concluded that

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<sup>4</sup> *Logiudice v. Canada*, [1997] T.C.J. No. 742. (T.C.C.); *Madsen v. R.*, 2006 FCA 46 (F.C.A.); *Waugh v. Canada*, 2008 FCA 152 (F.C.A.); *Raphael v. Canada*, 2002 FCA 23 (F.C.A.).

“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 owed to him”... 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 Canada Revenue Agency (*Raphael v. Canada* 2000 D.T.C. 2434 ... at paragraph 19).<sup>5</sup>

[12] The present matter is one which, on its face, is caught by that statement of purpose: Mr. Pickard’s direction to deposit his GST cheque and employment income directly into Mrs. Pickard’s solely held account could have thwarted the Minister’s efforts to collect his outstanding tax debt and allowed Mrs. Pickard to prefer certain other creditors over the Canada Revenue Agency.

[13] Within weeks of *Livingston* came the decision of the Federal Court of Appeal in *Waugh v. Her Majesty the Queen*, a case very similar on its facts to the case at bar. In *Waugh*, the tax debtor husband had endorsed cheques payable to him which were then deposited into his wife’s account. On appeal, the wife, like Mrs. Pickard, argued that she had “provided consideration in exchange for the property that was transferred to her by her husband by assisting him in the business venture”<sup>6</sup>. In rejecting this contention, Ryer, J.A. wrote:

[10] In *Machtiger v. Canada* ... this Court held that in the face of an assumption by the Minister that no consideration has been provided for a transfer of property, as contemplated by subsection 160(1) of the *ITA*, the transferee has the burden of establishing the fair market value of any consideration that has allegedly been provided in exchange for the transferred property.

[11] In the circumstances before us, we are unable to conclude that Mrs. Waugh has provided any evidence that would refute the Minister’s assumption that no consideration was provided by her in exchange for any of the funds that were deposited into her account by her husband. We note that if Mrs. Waugh had performed services in respect of the new business venture, as consideration for funds that were deposited into her account, such consideration would constitute employment or business income to her. However, nowhere in the record is there any evidence that any corresponding amount of employment or business income has been reported by her in any tax return or returns for the period in which funds were deposited into her account by her husband. [Emphasis added.]

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<sup>5</sup> Above, at paragraph 18.

<sup>6</sup> At paragraph 9.

[14] In an earlier husband-wife transfer case, *Raphael v. Her Majesty the Queen*<sup>7</sup>, the Federal Court of Appeal rejected the transferee's argument that her promise to pay out the monies received from her husband on his direction was valid consideration under subsection 160(1):

[10] If indeed the wife had made a legally enforceable promise to pay out monies only on the husband's direction to his creditors in amounts equal to the monies transferred, this might well have constituted sufficient consideration in order to avoid the application of subsection 160(1). However, this was not the evidence nor was it the finding of the Tax Court Judge. The Appellant when asked whether she had any legal obligation to pay bills as directed by the husband agreed that she had no such legal obligation and that it was only a moral obligation. She admitted further, that he could not force her to pay bills which he wanted paid. If of course there was a legal obligation based on a trust, he could have compelled such payment. This evidence confirms that the Appellant really only felt a moral obligation and we agree with the Tax Court judge that that is not sufficient consideration.

[11] It is also noteworthy that all of the monies transferred did not go to payment of the husband's debts. The monies were used for other purposes as well. Thus, this evidence does not support the alleged promise to use the husband's funds only for the payment of the husband's creditors in amounts equal to the money transferred. [Emphasis added.]

[15] Applying the principles from *Livingston, Waugh* and *Raphael* to the present case, the onus is on Mrs. Pickard to establish the fair market value of the consideration given for the amounts deposited in her account pursuant to a legally binding agreement and further, that there is a correspondence between that value and the amounts reported as income. That is a difficult onus to meet, especially in a non-arm's length transaction where one of the parties to the alleged agreement does not testify, where there is an absence of corroborating documentary evidence and where, to the extent records do exist, their accuracy is questionable.

[16] It was against this background that Mrs. Pickard testified. I regret to say her evidence left the impression of having been pieced together after the fact to legitimize a course of conduct which, on its face, looked somewhat suspicious. There is no dispute that Mrs. Pickard had known for many years that her husband had an outstanding tax debt. Without explaining why, Mrs. Pickard said that throughout their marriage, their residence had been kept in her name only, as had been property taxes and utility bills. Nor was there any reasonable explanation of why Mr. Pickard, an experienced businessman with at least three commercial enterprises, would not have followed the normal route of establishing a separate account for each business.

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<sup>7</sup> Above.

Equally unusual, a truck he used for his work through M.B. Pickard Sole Proprietorship was registered to Capital City Construction Ltd. even though, according to Mrs. Pickard, that company had not been actively in business for many years. At the same time, Capital City Construction Ltd. continued to be named in invoices as the purchaser of materials which had actually been ordered for and used by M.B. Pickard Sole Proprietorship. Mrs. Pickard's explanation for why this "error" had not been corrected was that the suppliers persisted in using their outdated billing records rather than the new information she had provided. While perhaps not significant individually, these little facts combined to diminish the overall credibility of the Appellant's evidence.

[17] Turning, then, to the question posed in *Raphael*, was there a "legally enforceable promise" between Mrs. Pickard and her husband? In my view, there was not. It is significant that Mr. Pickard's direction to Claridge to deposit his employment cheques in his wife's account was not deliberate; when searching for a blank cheque to provide to his employer, he had mistakenly taken one of Mrs. Pickard's personal account cheques instead of the joint line of credit. At that time, Mrs. Pickard was not even aware of her husband's actions. Thus, it can hardly be said that there was an agreement between them for the treatment of the deposited amounts when the funds first appeared in her account.

[18] It is also noteworthy that there was no written agreement between Mrs. Pickard and her husband to document their arrangement. In 1995 when they wished to clarify their understanding in respect of their respective interests in Montcom (described by Mrs. Pickard as a not very active holding company), that agreement was reduced to writing<sup>8</sup>. Yet, when it came to the terms upon which Mr. Pickard would place virtually all of his income for a three-year period under his wife's exclusive control, they had nothing more than a "verbal understanding". Although Mrs. Pickard recited many times that her husband had deposited the amounts in her account with explicit directions to use it only for the payment of his debts, far more credible was her description of their arrangement that he would earn the income and she would pay the bills. As she described it in the passage below, theirs was an "old-fashioned" marriage:

Q. This arrangement that you had was more of a -- I think you called it a "marital" thing, more than anything else.

A. It was a common understanding, yes, between -- I don't know what marriages are like now, but we are sort of old-fashioned.

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<sup>8</sup> Exhibit R-1, Vol. 3, Tab 1.



Q. Yes. But it is more of an informal thing where you take care of him and he takes care of you and that sort of thing? You are married and –

A. He used to say, “I will go out and earn the money, and you look after the bills.” I was looking after his company.

Q. There wasn't any detailed book where you would say, “Monte, I paid this for you, and I received this,” and some kind of balance?

A. I didn't keep a very good record of it. I used to just have the cheques that were returned in my statement, so I would show him that I have paid this, this, and this for him, and he owed me this much money. I didn't always get it.

Q. But you couldn't tell how much it was?

A. No. It was a lot.

Q. You can't come up with an actual figure?

A. No, only what I have cheques for.

Q. Perhaps we can look at the Appellant's Book of Documents. At tab 17, you spent some time on this.

A. Pardon me?

Q. Tab 17, please.

A. Yes.

Q. This is roughly what I had in mind when I said you don't keep track. I think you agree that you didn't keep track. Right?

A. Not very good, no. I am not a graduate bookkeeper. I was taught a little bit on the One-[Write] System, and it is just sort of self-taught. I don't know how to keep proper bookkeeping procedures the way a qualified bookkeeper would.

Q. This starts in December 9, 2003, and it goes to January 12, 2005. Right?

A. Yes.

Q. These are some payments that you made with respect to various things. Right?

A. Yes.

Q. But you say that is not a comprehensive list?

A. It is not complete. I am sure I have missed a fair bit. I thought I should try and keep some form of record of what I have been lending out of my bank account so that I know what has gone out and for what.<sup>9</sup>

[19] Unlike the transferee in *Raphael*, Mrs. Pickard did not explicitly concede that she had no legal obligation to deal with the funds in her account according to her husband's direction. Her actions, however, speak louder than her words. As the sole account holder, the fact is that only she could control the use of the funds deposited therein. There was nothing in writing to have prevented her from dealing with the amounts deposited in any manner she chose. This is indeed what happened: Mrs.

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<sup>9</sup> Transcript, page 154, lines 11-25 to page 156, lines 1-18.

Pickard testified that as well as paying Mr. Pickard's personal and business expenses, she also used money from the account for her personal use, for example, small purchases at Sears or Zellers, property taxes for the residence and various utility bills which were in her name only. She also made payments for Montcom and Capital City Construction Ltd. and towards their joint line of credit. While there is nothing inherently wrong with Mrs. Pickard having done so, such conduct is inconsistent with her testimony of an agreement whereby all monies deposited by Mr. Pickard in her account were to be used exclusively for the payment of his personal and sole proprietorship debts.

[20] In addition to this weakness in the Appellant's case, as in *Raphael*, there is no clear link between the amounts deposited and the bills paid. This has a lot to do with the Pickards' fiscal management style of constantly moving money around between Mrs. Pickard's personal account, the joint line of credit and Montcom's corporate account and by not maintaining reliable records of such transactions. Further complicating matters is the fact that in 2004 and 2005, M.B. Pickard Sole Proprietorship was receiving payments from clients for various construction projects. In 2004, for example, a certain Mr. Hum made at least one payment for services rendered which apparently made its way into the joint line of credit. Whether such amounts were intermingled with Mr. Pickard's employment income in Mrs. Pickard's account and/or used to pay Mr. Pickard's bills is simply not clear.

[21] It is equally unclear whether Mrs. Pickard provided consideration for the deposit of the funds by performing bookkeeping and secretarial services for her husband's business. It seems more likely that the provision of such services was simply part of their domestic marital arrangement. Although unlike the transferee in *Waugh* Mrs. Pickard reported income in each of the taxation years, the amounts reported bear little correlation to the reality of her situation. Mrs. Pickard admitted that she had no fixed salary. Her practice was simply to take what she needed from funds Mr. Pickard deposited into her account or from the joint line of credit, depending on the availability of funds at any given time. If there were insufficient funds in one account, she would take money from another with a reminder to herself to replace the funds taken when the other account was restored to health. Sometimes she did; other times, not. While she tried to record these transactions accurately and in a timely fashion, she was not always successful:

Q. If we take a look at tab 17, page 150, this is the document, your honour, that counsel had some qualms about.

Can you tell us what this is?

A. I had this on a ledger sheet. I tried to keep track of the things I had paid on Monte's behalf. I started-- but I didn't do a very good job of it because I didn't continue it-- but I kept as much as I could. Whenever I paid anything on his behalf, I would put it in as a payment. Then when I got money, whether it be if I took money out of the line of credit or from Claridge Homes or if he gave me a cheque from there, I would mark it down as a payment towards -- not Claridge Homes, but like a paycheque. Anyway, if Monte gave me back any money out of the line of credit, I would mark it down and show that he paid that off or paid off a certain portion of that balance that he owed. Then I continued it down.<sup>10</sup>

...

Q. Again, why did you prepare this document?

A. So I would know how much he owed me because there was a lot I didn't keep track of. I'm sure there is a lot out there that I don't even have a record of what I have paid for.<sup>11</sup>

[22] At year's end, her notes, together with various invoices and bank statements, were turned over to her husband's accountant who used them in the preparation of her income tax returns. Mrs. Pickard had no involvement in and could not explain the determination of the income amounts shown; she merely accepted whatever amounts the accountant had allocated to any particular source in any particular year. In these circumstances, the amounts reported fall far short of evidence of being a "corresponding amount of employment or business income"<sup>12</sup> capable of establishing the fair market value of services rendered as consideration for the funds deposited in Mrs. Pickard's account.

[23] As for the Appellant's contention regarding the deposited funds having been held in trust, the jurisprudence is clear that subsection 160(1) applies to a transfer of property "by a trust"; in any case, there is no evidence of any such trust agreement.

[24] As Mrs. Pickard has failed to refute the assumptions upon which the Minister's assessment was based, the appeals of the taxation years are dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 19<sup>th</sup> day of October, 2010.

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<sup>10</sup> Transcript, page 41, lines 22-25 to page 42, lines 1-15.

<sup>11</sup> Transcript, page 42, lines 23-25 to page 43, lines 1-3.

<sup>12</sup> *Waugh* above, at paragraph 11.

“G.A. Sheridan”

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Sheridan J.

CITATION: 2010TCC535

COURT FILE NO.: 2008-1259(IT)G

STYLE OF CAUSE: CONSTANCE PICKARD AND  
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PLACE OF HEARING: Ottawa, Canada

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APPEARANCES:

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