Docket: 2009-2238(IT)G

BETWEEN:

SYLVIE LACROIX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 4, 2011, at Ottawa, Ontario

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellant:	Chantal Donaldson
Counsel for the respondent:	Mélanie Sauriol and Boyd Aitken

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2005 taxation year is dismissed, without costs; the Appellant's file shall be referred back to the Canada Customs and Revenue Agency for reconsideration and reassessment on the basis that the Appellant is liable for the amount of $13,966.68, under section 160 of the *Income Tax Act*, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 18th day of February 2011.

"Alain Tardif"

Tardif J.

Translation certified true
on this 20th day of April 2011.

François Brunet, Revisor

Citation: 2011 TCC 111
Date: 2011 02 18
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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal under the general procedure from an assessment for $13,966.68 against the Appellant made by the Minister of National Revenue (the Minister) under section 160 of the *Income Tax Act* (the ITA) for the 2005 taxation year.

[2] The facts are relatively simple and are expressed in clear language in the pleadings, from which it is appropriate to reproduce the Notice of Appeal and Reply to the Notice of Appeal.

[3] The facts relating to the Notice of Appeal are as follows:

[Translation]

> 1. On September 18, 2007, the respondent issued a Notice of Assessment to the appellant respecting the 2005 taxation year for a total amount of $15,000.00, alleging that the appellant was liable under subsection 160(1) of the *Income Tax Act* for the alleged transfer made on February 8, 2005, from Denis Lacroix to the appellant in the same amount, as appears from a copy of said Notice of Assessment, Exhibit R-1;

2. On November 13, 2007, the appellant filed a Notice of Objection against said Notice of Assessment by sending the Chief of Appeals a Notice of Objection, as appears from a copy of said Notice of Objection, disclosed as Exhibit R-2;

3. On April 3, 2009, a decision on the objection was rendered by the respondent, confirming said Notice of Assessment in accordance with subsection 165(3) of the *Income Tax Act*, as appears from a copy of said decision on the objection, disclosed as Exhibit R-3;

4. The appellant submits that the assumptions of fact on which the respondent's decision was based were completely erroneous and unreasonable and that the conditions of application of section 160(1) of the *Income Tax Act* are not met;

5. In February 2005, the appellant's brother, Denis Lacroix, cashed out his Registered Retirement Savings Plan (RRSP) account in the amount of $31,000.00;

6. At the request of Mr. Lacroix, the appellant agreed to deposit said amount of $31,000.00 into her savings account at the Alterna Bank. Thus, she deposited the amount of $16,000.00 on February 3, 2005, and the amount of $15,000.00 on February 11, 2005.

7. On April 18, 2006, again at her brother's request, the appellant withdrew the amount of $16,000.00 from her bank account and gave the full amount to her brother;

8. In April 2006, said amount of $16,000.00 was used by Mr. Lacroix to pay his outstanding tax balance to the Canada Revenue Agency;

9. The appellant's brother also personally used in full the balance of $15,000.00, during the period from August 31, 2005, to June 30, 2006, as appears from a detailed analysis of the appellant's bank account, attached to the Notice of Objection, Exhibit R-2;

10. The appellant submits that she simply accepted to act as a front for her brother at a time when he was experiencing financial difficulties;

11. In fact, no "transfers of property" within the meaning of the Act took place in favour of the appellant by Denis Lacroix;

12. Moreover, the appellant did not use any amount of money for personal use and did not in any way profit and/or benefit from Denis Lacroix's money;

13. The alleged transfer is in fact a loan that was reimbursed in full by the appellant to her brother;

14. The appellant did not benefit from the alleged transfer of money at all;

15. The appellant never considered the money deposited into her bank account as her property and in that respect she is not the "transferee" of the alleged "transfer of property;"

16. When the appellant engaged in banking transactions, she always acted as agent for the benefit and on behalf of her brother;

17. Following an oral agreement between the appellant and her brother, the appellant had no right to use the money deposited into her bank account;

18. All withdrawals from the bank account were made by the appellant with the knowledge and at the specific request of her brother;

19. All amounts withdrawn by the appellant from said bank account were remitted in person to her mandator;

20. Therefore, even if the appellant had the power to withdraw the amounts from her bank account, in the internal reports with her brother she had no more rights than that of a mere agent and was obliged to account to her mandator and remit to him the amounts withdrawn in full;

21. Accordingly, assuming a transfer of property in the amount of $15,000.00 did take place, the appellant gave a consideration of $15,000.00 to her brother by remitting the money to him in full as if the transfer never took place;

22. By accepting to deposit Mr. Lacroix's money into her bank account and then acting as a front and agent for her brother, the appellant never had any intention of defrauding the tax authorities or conspiring with her brother to do so;

23. The Notice of Appeal is valid in fact and in law;

[4] The facts as described in the Reply to the Notice of Appeal:

1. She admits paragraphs 1, 2 and 3 of the Notice of Appeal and notes that the Notice of Objection mentioned in paragraph 2 was received on November 14, 2007.

2. She denies the facts alleged in paragraph 4 of the Notice of Appeal.

3. She admits the facts alleged in paragraph 5 but points out that that the gross amount withdrawn from the Registered Retirement Savings Plan (RRSP) by Denis Lacroix was $45,000.00, whereas the net after-tax amount was $31,000.00.

4. She has no knowledge of the facts alleged in the first sentence of paragraph 6. She admits that the net amount of $31,000.00 withdrawn from the RRSP of Denis Lacroix was deposited into the bank account of Sylvie Lacroix at the Caisse Alterna (Alterna Savings). She admits that said amount was deposited in two stages: $16,000.00 was deposited on February 3, 2005, and $15,000.00 was deposited on February 11, 2005. She has no knowledge of whether the depositor was Denis or Sylvie Lacroix. She has no knowledge of the other facts mentioned and puts the onus on the appellant to provide evidence.

5. She takes note of the facts alleged in paragraphs 7 and 8 of the Notice of Appeal and only admits that an amount of $16,000.00, withdrawn from the appellant's account on April 30, 2006, was used to repay part of Denis Lacroix's tax liability to the Canada Revenue Agency. She admits that the amount was not taken into account in determining the amount transferred under section 160 of the *Income Tax Act* (ITA).

6. She denies the facts alleged in paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 23.

7. She admits that the appellant had the power to withdraw the amounts deposited into her savings account and derived from the Denis Lacroix's RRSP, as mentioned in paragraph 20 of the Notice of Appeal. She denies all the other facts and conclusions alleged in the paragraph.

8. She admits that the appellant accepted to deposit the money of Denis Lacroix into her bank account, as mentioned in paragraph 22 of the Notice of Appeal. She denies all the other facts and conclusions alleged in the paragraph.

9. On September 18, 2007, the Minister issued a Notice of Assessment to the appellant bearing the number 46829 in application of section 160 of the ITA.

10. On or around November 14, 2007, the appellant filed a Notice of Objection against the Notice of Assessment mentioned in paragraph 9.

11. On or around April 3, 2009, the Minister ratified said Notice of Assessment.

12. In making the assessment in issue, the Minister of National Revenue relied on the following facts:

    (a) Denis Lacroix is the appellant's brother;

Bank account

(b) At the time of the facts related below, the appellant had a bank account;

(c) Said bank account was a savings account with the Caisse Alterna (Alterna Savings);

(d) Said bank account was solely in the appellant's name;

(e) The appellant was the only one that could make withdrawals from said bank account;

First transfer

(f) In February 2005, Denis Lacroix cashed out his RRSP;

(g) The gross amount cashed out was $45,000.00;

(h) The net after-tax amount cashed out by Denis Lacroix was $31,000.00;

(i) February 3, 2005, a deposit was made into the appellant's bank account;

(j) The deposit was for $16,000.00;

(k) The amount of $16,000.00 derived from Denis Lacroix's RRSP;

Second transfer

(l) On February 8, 2005, Denis Lacroix had a bank draft for $15,000.00 made out to Sylvie Lacroix;

(m) On February 11, 2005, a second deposit was made into the appellant's same bank account;

(n) The second deposit was for $15,000.00;

(o) The amount deposited derived from Denis Lacroix's RRSP;

Value of the property transferred

(p) On April 18, 2006, Denis Lacroix filed for bankruptcy;

(q) On April 18, 2006, an amount of $16,000.00 was withdrawn from the appellant's bank account;

(r) The amount withdrawn was used to reduce Denis Lacroix's tax liability;

(s) A benefit of $15,000.00 was conferred upon the appellant;

(t) The amount of $15,000.00 was not remitted to Denis Lacroix;

(u) Said amount was not used to purchase goods or services for Denis Lacroix;

(v) Said amount was used by the appellant for personal use;

(w) The appellant did not give a consideration in exchange for the money derived from Denis Lacroix's RRSP;

(x) The Notice of Assessment Number 46829 was issued on September 18, 2007;

(y) The appellant was assessed under section 160 of the *Income Tax Act* for the amount of $15,000.00; and

(z) At the time of the issuing of the Notice of Assessment, Denis Lacroix had a tax liability under the ITA of $125,692.48 for the 1999, 2000, 2001, 2002, 2003, 2004 and 2005 taxation years.

[5] However, the facts established by the evidence are also useful and therefore worth summarizing:

Testimony of the appellant and Denis Lacroix

[6] The appellant testified that her brother, Denis Lacroix, is the tax debtor whose acts led to the application of section 160 of the Act.

[7] During her testimony, the appellant essentially stated that she did not benefit in any way whatsoever from the deposits for which the Notice of Assessment was issued.

[8] She first explained that she deposited $31,000 at the request of her brother, Denis Lacroix, without an express agreement as to the use of that amount. She therefore did not ask her brother any questions because she trusted him.

[9] She also stated that she was not aware of his financial problems at the time, other than there was a problem with his financial institution.

[10] According to her, she did not have to question her brother's intentions and that she was just happy she could be of service to him seeing as their relationship was one founded on respect, harmony and trust. To that end, she very much insisted on the fact that she did not aid her brother, but rather was of service to him.

[11] She then explained that she had three separate bank accounts: the first one, called [Translation] "Savings 01," was used for personal use, the second, called [Translation] "Savings 02" (hereinafter "bank account"), was used for Denis Lacroix's withdrawals, and the third one was for a line of credit.

[12] The appellant stated that almost all the bank withdrawals were made at the express request of Denis Lacroix. She indicated that each time her brother needed money, she would meet him at the teller to withdraw the amounts he needed and she would then give them to him. When she could not go, her brother would go to the teller alone to make the withdrawals with his debit card.

[13] She stated that she made a transfer on August 31, 2005, after obtaining her brother's permission; the amount was required to pay for her daughter's travel insurance policy. She later reimbursed the amount.

[14] She offered a number of specific explanations as to the activity in the account where the transfers totalling $31,000 were made. While making a large withdrawal, she asked her brother why; he indicated to her that he wanted to purchase a camera for purposes of his career transition.

[15] On April 18, 2006, at the request of Denis Lacroix, her brother, the appellant gave him a cheque for $16,000 (Exhibit A-3); the respondent recognizes that the amount was used as partial payment for Denis Lacroix's tax liability. She therefore took into account the payment in the assessment calculation made pursuant to section 160 of the ITA.

[16] Denis Lacroix confirmed the appellant's testimony as to the withdrawal activity and the absence of conditions with respect to the amounts deposited into the bank account. He essentially stated that all the withdrawals made at the teller were made at his request.

[17] When asked about the circumstances that led him to remit the $31,000 derived from his RRSP to the appellant, he stated that he [Translation] "he had no other choice" and that he [Translation] "did not know where to deposit his money" as he

was experiencing serious financial problems at the time. His salary was garnished owing to a significant tax liability.

[18] That was also the reason he did not file any returns for the taxation years from 1999 to 2005 inclusive. He explained that he was not very organized in the management of his affairs. He stated that he displayed a certain indifference toward his income tax liability. Following the collection measures initiated by the taxation authorities, his quality of life deteriorated considerably to the point where he barely received 22% of his salary. He also explained that his financial institution remitted amounts to the taxation authorities without authorization. For all those reasons, he wanted to avoid losing his RRSP amounts.

[19] At the time, he asked his sister, the appellant, if she could deposit his RRSP money in her personal bank account. Without asking any questions, the appellant agreed. He did not give her any specific instructions or guidelines as to the use of the amounts.

Issue

[20] The issue is whether the appellant is jointly and severally liable for Denis Lacroix's $13,966 tax liability under the ITA for the 1999, 2000, 2001, 2002, 2003, 2004 and 2005 taxation years, in accordance with section 160 of the ITA.

The appellant's position

[21] The appellant submits that there was no transfer as she acted as a front or agent for her brother when he deposited the amounts into her bank account. In support of her claims, the appellant relies upon *Gambino v. R.* [2009] 3 C.T.C. 2129 (TCC), a decision of the Tax Court of Canada.

[22] She submits that there can be no "transfer," unless the property moves from one patrimony to another one; she insists that never happened. Therefore, according to the appellant, there was no transfer of property and that she did not acquire the amounts deposited as they remained in the patrimony of her brother.

[23] The appellant submits that she could not spend the money as she wished. Even if she could use the money deposited into her bank account as she pleased, she did not have the right to do so. She adds that if she had not remitted the money to her brother, he could have sued her for the unremitted amounts.

[24] In the alternative, the appellant argues that if the Court were to conclude that a transfer did take place, a valid consideration was paid as, on the one hand, the appellant did not benefit in any way whatsoever, and on the other, the amounts were remitted in full to her brother, in accordance with the brother's very clear instructions. Consequently, the full remittance by the appellant to her brother of the amounts deposited into her bank account constitute a valid consideration.

The respondent's position

[25] The respondent submits that there was a transfer as the deposit of the amounts into the bank account of another person constitutes a transfer of property. She relies upon *Livingston v. R.*, 2008 DTC 6233 (Eng.) (F.C.A.), a decision of the Federal Court of Appeal.

[26] The respondent submits that the transfer was made without a valid consideration, as the transferor did not receive at the time of the transfer consideration for the value of the amounts transferred. She submits that only a valid consideration given by the transferee to the transferor at the time the tax debtor transferred the property is deemed to limit the liability of the transferee under section 160.

[27] The respondent also submits that the consideration the appellant claims to have paid is not consideration within the meaning of section 160 of the Act, as it is not derived from an agreement, but rather from a moral obligation on the appellant to remit the cashed out amounts obtained from her brother.

[28] The respondent bases her submissions on the following decisions of the Federal Court of Appeal: *Rose v. R*, [2009] F.C.J. No. 344 (F.C.A.) and *Livingston v. R.*, 2008 DTC 6233 (Eng.) (F.C.A.) and of the Tax Court of Canada: *Doucet v. R*, 2007 TCC 268, 2008 D.T.C. 4055 (T.C.C.), *Gambino v. R.*, [2009] 3 C.T.C. 2129 (T.C.C.) and *Armenti v. R.*, 2007 TCC 389, [2008] (T.C.C.).

[29] In the alternative, the respondent argues that if the Court were to rule that there was a contract between the appellant and her brother, such a contract should be absolutely null as its object would have been to conceal the money from the tax authorities, which is contrary to public order. The respondent relies upon sections 1411 and 1413 of the *Civil Code of Québec.*

ANALYSIS

[30] The application of subsection 160(1) is subject to four criteria. Those criteria were set out in *Livingston*:

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 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.

[31] It is also important to note the purpose of subsection 160(1). In *Medland v. Canada*, 98 DTC 6358 (F.C.A.) (*Medland*), the Court of Appeal concluded that the the object and spirit of subsection160(1) “is to prevent a taxpayer from transferring his property to his spouse [or a minor or person with whom he or she is not dealing at arm's length] in order to thwart the Minister’s efforts to collect the money which is owned to him.”

[32] In *Livingston v. R.*, 2008 D.T.C. 6233 (Eng.) (F.C.A.), the Court of Appeal reiterated the same idea in paragraph 1:

> [1] The power to tax means little without the power to collect. As a result, the *Income Tax Act* R.S.C. 1985, c. 1 (5th Supp.) (the "Act") provides for a myriad of powers to collect taxes owed that would otherwise not be obtainable when taxpayers attempt to evade their creditors. These powers must be interpreted in light of their

> intended purpose and within the contexts of the factual situations to which they are applied.

[33] Again in *Livingston*, the Court of Appeal also noted, at paragraph 19, that the intention of the parties to defraud the CRA is of relevance but not a determinative element in assessing the adequacy of the consideration given:

> [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 as 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 DTC 5715] 2003 FCA 423 at paragraph 3.

(1) Was there a transfer of property?

[34] Before deciding whether there was a transfer, it is important to carefully review that notion. Although the word “transfer” is not defined in the Act, it has generated a rich case law. In *Fasken Estate v. Minister of National Revenue* (1948), 49 DTC 491 (Can. Ex. Ct.), frequently cited, Thorson J. provided the following definition at page 497:

> The word 'transfer' is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer.
>
> . . .
>
> (Emphasis added.)

[35] In *Livingston*, Sexton J. remarked, at paragraph 21, that a deposit of funds into another person's account constitutes a transfer of property within the meaning of section 160:

> [21] The deposit of funds into another person's account constitutes a transfer of property. To make the point more emphatically, the deposit of funds by Ms. Davies into the account of the respondent permitted the respondent to withdraw those funds herself anytime. The property transferred was the right to require the bank to release all the funds to the respondent. The value of the right was the total value of the funds.

[36] As for the conditions required for a transfer, it is useful to refer to paragraph 22:

> [22] In addition, there is a transfer of property for the purposes of section 160 even when beneficial ownership has not been transferred. Subsection 160(1) applies to any transfer of property -- "by means of a trust or by any other means whatever". Thus, subsection 160(1) categorizes a transfer to a trust as a transfer of property. Certainly, even where the transferor is the beneficiary under the trust, nevertheless, legal title has been transferred to the trustee. Obviously, this constitutes a transfer of property for the purposes of subsection 160(1) which, after all, is designed, *inter alia*, to prevent the transferor from hiding his or her assets, including behind the veil of a trust, in order to prevent the CRA from attaching the asset. Therefore it is unnecessary to consider the respondent's argument that beneficial title to the funds remained with Ms. Davies.

[37] The parties also made reference to the existence of a mandate between the appellant and her brother. Considering the possible impact on the merits of the appeal, it is appropriate to analyze the case from a mandate perspective.

[38] The provisions of the *Civil Code* respecting a mandate are as follows:

> **2130.** Mandate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power.
>
> The power and, where applicable, the writing evidencing it are called the power of attorney.
>
> **2131.** The object of the mandate may also be the performance of acts intended to ensure the personal protection of the mandator, the administration, in whole or in part, of his patrimony as well as his moral and material well-being, should he become incapable of taking care of himself or administering his property.

> **2132.** Acceptance of a mandate may be express or tacit. Tacit acceptance may be inferred from the acts and even from the silence of the mandatary.

[39] In *Tétrault v. Canada, 2004 TCC 332 (CanLII),* 2004 TCC 332, [2004] T.C.J. No. 265 (QL), at paragraphs 39 and 40 of his judgment, Archambault J. examined the notion of transfer used at paragraph 160(1) of the ITA. He recognized that when a transaction between the transferee and the transferor constitutes that of a mandate within the meaning of the *Civil Code of Québec*, there cannot be a transfer within the meaning of that subsection.

> [39] The Fasken and Dunkelman decisions indicate, in my opinion, that in order for there to be a transfer of property for the purposes of the attribution rules, it is essential that the transferor be divested of his ownership and that the property has vested in the transferee. The mere possession of a property that has been loaned with the obligation to return it does not satisfy this condition. That, I think, is the meaning that must be given to the expression "pass the property from himself to her".[19] That is also the appropriate interpretation of subsection 160(1) of the Act. As Madam Justice Desjardins said in Medland, supra, at paragraph 14: "...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 owed to him." The loan of money would not constitute a method of thwarting the collection of the tax owed by the lender. Pursuant to subsection 224(4) of the Act, the Minister could garnish the sum loaned. This notion of "transfer" is therefore reconcilable with the purpose intended by subsection 160(1) of the Act.
>
> [40] It follows from the analysis of the notion of transfer used in subsection 160(1) of the Act that sums paid to a mandatary to be spent for the benefit of the mandator do not constitute a transfer for the purposes of this subsection, either. In such circumstances the mandator is not divested of his ownership of the sums entrusted to the mandatary and they are not vested in the mandatary. The mandator remains the owner of these sums.
>
> (Emphasis added.)

[40] In the case at bar, the appellant attempted to argue that Denis Lacroix gave him a mandate of cashing the funds derived from his RRSP and of later remitting to him the funds so cashed. That argument is not without interest as a mandate may be tacit[1] within the meaning of section 2132 of the *Civil Code*.

[41] In that respect, the evidence is insufficient in that it is essentially based on assumptions and speculation not validated by the facts of record.

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[1] It should be noted that there obviously could not be an express mandate as there was no agreement either.

[42] The exact moment of the transfer is fundamental both in terms of consideration and the intention of the parties. The appellant stated that at the time of the transfer, she did not question her brother, she simply agreed to respond to his request and expectations. She therefore tacitly acquiesced to do what her brother proposed. According to her, her brother had had problems with his financial institution. In her view, that could have explained her brother's request.

[43] As for the intention of her brother, it is clear and unequivocal; he wanted to conceal the content of his RRSP from his creditors, including specifically the tax authorities. Moreover, in that respect, it would have been interesting to see the claim made to the trustee upon assignment into bankruptcy as to the ownership of the amount deposited into the appellant's account.

[44] In her Notice of Appeal, the appellant stated that she acted as a front. The fact that she acted as a front could be explained in a number of different ways in that multiple purposes may exist. Regardless of the purpose, being a front implies a willingness to conceal something from someone.

[45] The person used as a front may or may not know the reason why he plays that role. However, depending on the duration and circumstances, that may constitute or become wilful blindness.

[46] The appellant's main argument is her good faith; she explains it by the fact that she did not gain any advantage or benefit. Then, she insists on the fact that at the time of the transfer, she knew nothing about her brother's tax liabilities. In view of those elements, the appellant is, *prima facie*, a victim.

[47] However, the same facts warrant a completely different conclusion, if we assume that her brother had a clear objective, the removal from his patrimony of the amounts of his RRSP.

[48] To attain that objective, he transferred $31,000 into the bank account of his sister, who agreed to participate and collaborate without asking any questions; she therefore, tacitly at times and expressly at others, approved and contributed to her brother's scheme. One thing is for certain, after some time, she should have seen and realized what her brother's strategy was. At the time of the transfer, the appellant tacitly approved and consented to her brother's scheme; she now cannot plead ignorance.

[49] To deposit into one's bank account an amount which belongs to someone else for a short period of time is something that may be explained, or even, understood. However, ignorance, indifference is likely to transform into complicity if the exercise continues or is prolonged.

[50] The appellant also attempted to argue that she was merely holding possession of the amounts advanced by her brother and that she had an obligation to return them to him, which she did. However, there is no evidence to the effect that Denis Lacroix loaned that money to the appellant.

[51] Moreover, the evidence is to the effect that the bank account was in her name; the appellant could therefore use those amounts as she pleased and only a moral obligation kept her from doing so.

[52] It could not plausibly be a loan, as Denis Lacroix testified that he did not provide his sister with any guidelines as to the use of the amounts. As for the appellant, she claimed that she did not ask any questions as she [Translation] "trusted" him. How could there have been a loan without an agreement or consent by the parties? A mandate may be tacit, but not a loan.

[53] In oral argument, the appellant insisted on the fact that she did not gain any financial advantage. However, that issue is irrelevant as even if Denis Lacroix retook possession of the amounts deposited, the appellant received said amounts at the time of the transfer, which is the relevant amount for the application of subsection 160(1).

[54] In *Livingston*, the Court of Appeal refers to the remarks it made at paragraph 9 of *Heavyside v. Canada*, [1996] F.C.J. No. 1608 (C.A.) [QL]:

> Once the conditions of subsection 160(1) are met. . .the transferee becomes personally liable to pay the tax determined under that subsection. . . . That liability arises at the moment of the transfer. . .and is joint and several with that of the transferor. The Minister may "at any time" thereafter assess the transferee (subsection 160(2)) and the transferee's joint liability will only disappear with a payment made by her or by the transferor in accordance with subsection 160(3)).
>
> (Emphasis added.)

[55] Also, in *Doucet v. R*, 2007 TCC 268, 2008 D.T.C. 4055 (T.C.C.), I made the following remark at paragraph 43:

> 43 In no case is it useful or necessary to determine whether the transferee was enriched or even impoverished in the weeks or moments following a transfer of property. The point in time at which enrichment is assessed is the precise moment of the transfer.

[56] For all these reasons, I conclude that the evidence strongly suggest that there was a transfer within the meaning of subsection 160 (1) of the ITA.

(2) Did the transferee give sufficient consideration to the transferor?

[57] In *Raphael v. R.*, 2002 FCA 23 (Fed. C.A.), at paragraph 10, Strayer J. stated that where there is a contractual arrangement between the transferee and the transferor, a legally enforceable promise by the transferee to pay out monies to the transferor's creditors only on the his direction in amounts equal to the monies initially transferred, this may well constitute a valid consideration within the meaning of section 160 of the Act:

> [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 section 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.[2]

[58] Can the fact that the appellant remitted the amounts to her brother in full constitute a valid consideration? There was no arrangement or agreement to that effect. The appellant had some sort of moral obligation, nothing more. At the time of the transfer, a strategic and fundamental moment for the application of subsection 160(1) of the ITA, the only relevant facts available are that the appellant's brother wanted to divest himself of the content of his RRSP to prevent a possible seizure and conceal it in the patrimony of his sister, to which she tacitly acquiesced.

[59] The appellant invokes *Gambino v. R.*, [2009] 3 C.T.C. 2129 (T.C.C.). In that decision, Boyle J. was satisfied that consideration was given and that a commitment to remit the cash to the transferor or in any event, her actually doing that, was at the

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[2] *Raphael v. The Queen*, 2002 FCA 23, 2002 D.T.C. 6798, para. 10.

time of the transfer to her. However, it is important to note that the facts in that case are quite different from those in issue here.

[60] In that case, the transferee had cashed seven $1,500 cheques for her son who was ill with a leg infection and unable to walk. After endorsing the cheques at the bank, the bank gave her cash against endorsement of the cheque which she gave to her son on the same day. The money was never found in the transferee's bank account.

[61] However, such is not the case here. The amounts that were deposited into the appellant's bank account remained there for over a year before they were remitted in full to Denis Lacroix.

[62] The appellant very much insisted on her good faith and the fact that she was unaware of her brother's tax liability; unfortunately, such arguments cannot be taken into account to avoid the effects of subsection 160(1) of the ITA. In *Wannan v. R.*, 2003 D.T.C. 5715 (F.C.A.), the Federal Court of Appeal stated, at paragraph 3, that subsection 160 may apply to the transferee even if he has no intention of helping the primary tax debtor to avoid paying his taxes:

> [3] . . . There is no due diligence defence to the application of section160. It may apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax. Indeed, it may apply to a transferee who has no knowledge of the tax affairs of the primary tax debtor. However, section160 has been validly enacted as part of the law of Canada. If the Crown seeks to rely on section160 in a particular case, it must be permitted to do so if the statutory conditions are met.

[63] On their face, the explanations provided by the appellant and her brother are very sympathetic, and all nice rhetoric. However, apart from the first impression, when all the relevant elements and the overall context are taken into account, a completely different conclusion is called for.

[64] Denis Lacroix was the holder of an RRSP in which there was an available after-tax amount of $31,000. Undoubtedly concerned that his money would be seized in collection proceedings, he decided to withdraw the amount by way of two cheques. He asked his sister to deposit the amounts in question into one of her bank

accounts, without noting his tax liabilities or the recovery measures. The amounts were deposited in February 2005.

[65] The appellant, who is very close to her brother and was concerned about his problems which she believed involved strained relations with his financial institution, completely trusted him and accepted to be of service to him, without asking any questions. Moreover, she stated that she was happy she could be of service to her brother without questioning him. According to the appellant, it was not for her to inquire about or ask her brother why he was asking her to do it. She believed that her brother had experienced difficulties with his financial institution, nothing more.

[66] Thus, a transfer did take place. The appellant's brother, who was put in a financial bind when the seized amount of his income significantly reduced the funds available to him, wanted to avoid losing the content of his RRSP in which there was an available after-tax amount of $31,000 .

[67] To prevent such a scenario from becoming a reality, he decided to take out the amount in question from his patrimony with the appellant's tacit complicity. The appellant's bank account was used over a long period of time, that is, from February 2005 to April 2006. The appellant was actively involved from beginning to end.

[68] At a given moment, she needed close to $500 to pay an insurance policy. After obtaining her brother's permission, she made the withdrawal but then reimbursed him. When her brother asked for a very large amount, the appellant asked him what the amount was for; her brother told her that he was planning to purchase a camera for purposes of his career transition.

[69] When called upon to explain and define the nature of the activities, the appellant submitted that she acted as a front; she thus stated that she had never had ownership of the amounts deposited into her account. She also insisted on saying that she did not aid him, which was hard to believe under the circumstances.

[70] She also stated that she did not gain any advantage or benefit, other than the satisfaction of having responded to her brother's call for help. She also stated that if the transfer took place, there would be equal consideration, that is to say, the return of all the amounts obtained during the transfers to the transferee's patrimony.

[71] In other words, she suggests all sorts of explanations and assumptions to support her contention that the essential conditions of section 160 of the Act are not met and the assessment ought, therefore, to be discharged.

[72] What is difficult in this case is that each of the assumptions suggested by the appellant to avoid the application of the provisions of section 160 are possible, reasonable even, by virtue of the fact that she did not benefit from the situation and executed her brother's instructions.

[73] The explanations, while touching and corroborated by the evidence, are based solely on a moral obligation.

[74] Indeed, the appellant could have taken or used the funds deposited into her bank account. She could have refused to follow her brother's instructions. There is no evidence that the appellant had no control, power to avail herself of the amounts deposited into her account as she pleased. Because she is honest, she did not.

[75] One question also remains unanswered. Did the appellant's brother transfer his property? In the context of the transfer of property, a significant portion of the amount deposited into the appellant's bank account was returned to the respondent, which reduced the assessment by an equal amount.

[76] However, in the course of the bankruptcy proceedings, the appellant's brother clearly did not claim to be the owner of the full amount in the sister's account, either as an owner, lender, or mandator, as the trustee would have claimed and obtained either the return or reimbursement if the explanations provided by the appellant had been true.

[77] To conclude, I do not doubt that the appellant had noble intentions at the time of the transfer, which stemmed from the respect and admiration she had for her brother. Those noble sentiments, however, caused her to tacitly agree, without asking any questions, to her brother's scheme, whom, for his part, was acting in pursuit of a purpose, a very clear and much less noble purpose, that is, that of preventing the amount of his RRSP from being subject to the respondent's collection actions. In doing so, the appellant consented to the brother's scenario or scheme, which was clear with respect to the transfer that caused the RRSP money to move from one patrimony to another one.

[78] In not asking herself why, the appellant, by her silence and passivity, tacitly accepted her brother's scheme and therefore the conditions provided for in section 160 of the Act make her liable for an assessment for the amount transferred.

[79] Seeing as a payment was disbursed from the account on the transferor's tax liability, the assessment for which the appellant is liable has been reduced by that amount. The assessment in the amount of $13,966.68 established in the appellant's name is therefore confirmed and the appeal is dismissed.

COSTS

[80] The main argument to support that the appeal be dismissed with costs in favour of the respondent is to the effect that the appellant has not been cooperative in these proceedings; although undesirable but understandable, such a reply and undoubtedly is the result of a request to conduct discoveries requiring significant costs in a case that from the beginning should, in my view, have been the subject of an informal procedure, which, I agree, should have been done at the appellant's initiative. Under the circumstances, I do not allow the request and dismiss the appellant's appeal, without costs.

[81] The appeal is therefore dismissed, without costs.

Signed at Ottawa, Canada, this 18th day of February 2011.

"Alain Tardif"

Tardif J.

Translation certified true
on this 20th day of April 2011.

François Brunet, Revisor

CITATION:	2011 TCC 111
COURT FILE NO.:	2009-2238(IT)G
STYLE OF CAUSE:	Sylvie Lacroix and Her Majesty The Queen
PLACE OF HEARING:	Ottawa, Ontario
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