Docket: 2014-3843(IT)G

BETWEEN:

TAMARA BROWN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 2 and 3, 2019, at Toronto, Ontario

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Domenic Marciano Eric Torelli
Counsel for the Respondent:	Christian Cheong

JUDGMENT PURSUANT TO SUBSECTION 171(2) OF THE *INCOME TAX ACT*

The appeal arising from assessments numbered 1143585, 1143467 and 1140855 made under the *Income Tax Act* for the 2006, 2007 and 2008 taxation years, is allowed with costs. The assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant gave a valid consideration equal in the value of the property transferred. Accordingly, subsection 160(1) does not apply.

Signed at Ottawa, Canada, this 9th day of July 2020.

"Johanne D'Auray"

D'Auray J.

Citation: 2020 TCC 45
Date: 20200709
Docket: 2014-3843(IT)G

BETWEEN:

TAMARA BROWN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

I. INTRODUCTON

[1] The principal question raised by this appeal is whether section 160 of the *Income Tax Act* (the "*ITA*") applies to funds transferred to the Appellant by her spouse, Mr. Gordon Levoy, during the 2006, 2007 and 2008 taxation years.

[2] At the time of the transfers of money to the Appellant's, Mr. Levoy had a tax liability.

[3] Prior to the trial, the parties resolved the appeal insofar as it related to assessments numbered 1116049 and 1233552 by way of a Consent to Partial Judgment pursuant to subsection 171(2) of the *ITA.* The Judgment in accordance with the Consent to Partial Judgment dated November 27, 2019, is attached to these Reasons.

II. FACTS

[4] At trial, the parties filed an Agreed Statement of Fact (Partial). It reads as follows:

AGREED STATEMENT OF FACT (PARTIAL)

The Appellant and the Respondent admit the truth of the following facts for the purposes of the within appeal:

The Subject Assessments

1. This is an appeal from the following Notices of Assessment issued against the Appellant (each a "Subject Assessment", and collectively, the "Subject Assessments"):

   (a) Notice of Assessment dated September 17, 2010, Reference Number 1143585 ("Assessment #1");

   (b) Notice of Assessment dated September 17, 2010, Reference Number 1143467 ("Assessment #2");

   (c) Notice of Assessment dated September 17, 2010, Reference Number 1140855 ("Assessment #3");

   (d) Notice of Assessment dated September 17, 2010, Reference Number 1116049 ("Assessment #4"); and

   (e) Notice of Assessment dated November 22, 2010, Reference Number 1233552 ("Assessment #5").

2. The Appellant objected to the Subject Assessments by way of Notices of Objection dated December 10, 2010.

3. The Subject Assessments were confirmed by way of Notice of Confirmation dated July 29, 2014.

4. The Subject Assessments were issued pursuant to section 160 of the *Income Tax Act* (Canada) (the "ITA"), and section 14 of the *Income Tax Act* (Ontario) (the "OITA"), as follows:

   (a) Assessment #1 derives from a transfer of funds totaling (in the aggregate) $98,063.02 from Gordon Levoy (the Appellant's spouse) to the Appellant in 2006.

   (b) Assessment #2 derives from a transfer of funds totaling (in the aggregate) $51,776 from Gordon Levoy to the Appellant in 2007.

   (c) Assessment #3 derives from a transfer of funds totaling (in the aggregate) $3,348.60 from Gordon Levoy to the Appellant in 2008.

(d) Assessment #4 derives from a transfer of property (19 Mariners Haven) on May 23, 2006, from Steeple Holdings Inc. ("Steeple") to the Appellant at (per the CRA) $105,000 below the property's fair Market value ("FMV") as at May 23, 2006. [This Assessment #4 re: Steeple is no longer in issue in this Appeal. Please see Consent to Partial Judgment referenced below (and attached as Exhibit "A" hereto).]

(e) Assessment #5 derives from a purported transfer of funds totaling (in the aggregate) $61,840 from Steeple to the Appellant in 2005. [This Assessment #5 re: Steeple is no longer in issue in this Appeal. Please see Consent to Partial Judgment referenced below (and attached as Exhibit "A" hereto).]

5. Gordon Levoy ("Gordon") and the Appellant are husband and wife, and were, throughout the years in issue in this appeal, husband and wife.

Consent to Partial Judgement (dated July 24, 2019) Re: Assessment #4 & Assessment #5

6. Assessment #4 and Assessment #5 (both of which deal with transfers from Steeple to the Appellant) have been resolved by the parties via Consent to Partial Judgment dated July 24, 2019, and filed with the Tax Court on November 22, 2019 (copy attached as Exhibit "A" hereto).

7. As such, (i) the tax liability of Steeple, (ii) the transfers from Steeple to the Appellant, and (iii) the section 160 assessments issued against the Appellant and relating to Steeple (being, Assessment #4 and Assessment #5) are no longer in issue in this Appeal.

Remaining Subject Assessments *Currently* in Issue in this Appeal

8. As such, the only Assessments in issue in this Appeal are Assessment #1, Assessment #2, and Assessment #3 (all of which deal with (and only with) transfers from Gordon Levoy (the Appellant's spouse) to the Appellant in the years 2006, 2007, and 2008 respectively (and as aforesaid)).

9. For the purposes of section 160 of the ITA, and the Subject Assessments in issue in this appeal (being Assessment #1, Assessment #2, and Assessment #3):

(a) Gordon Levoy is the "transferor"; and

(b) the Appellant (Tamara Brown) is the "transferee".

Gordon Levoy's (the "Transferor's") Tax Liability

10. According to the "Particulars of Assessment" attached to Assessment #1, Assessment #2, and Assessment #3, Gordon Levoy's tax liability (as at September 17, 2010) (from which the Appellant's section 160 Assessment #1, Assessment #2, and Assessment #3 derives) relates to the years 1997-2007, and was/was broken down as follows:

Taxation year	Tax	Penalty	Arrears Interest	Total
2007	$17.87	$0	$2.62	$20.49
2002	$15,468.39	$2,629.63	$12,344.87	$30,442.89
2001	$170,303.49	$20,463.42	$152,793.41	$343,533.32
2000	$45,974.63	$22,067.82	$65,279.84	$133,322.29
1999	$16,139.37	$8,069.69	$28,204.61	$52,413.67
1998	$16,579.85	$2,894.66	$27,234.44	$46,708.95
1997	$5,254.59	$893.20	$9,802.90	$15,950.77
Total				$622,392.38

11. For the purposes of this Appeal, the parties agree/admit that, as at September 17, 2020, Gordon Levoy's tax liability (for the years 1997 to 2007, and in the aggregate), was $622,393.38, [*sic*] as per the Particulars of Assessment attached to Assessment #1, Assessment #2, and Assessment #3, and as set out in the immediately preceding paragraph.

Transfers from Gordon to the Appellant

12. For the purposes of this Appeal, the parties agree/admit the following:

    (a) Cheques payable to Gordon Levoy and totalling (in the aggregate) $98,063.02 were deposited into the Appellant's bank account in 2006 (various dates), as per Schedule B of the Respondent's Re-Amended Reply dated November 22, 2019. (This was the amount assessed against the Appellant per section 160 of the ITA via Assessment #1 dated September 17, 2010: being the lesser of (i) the amount transferred to the Appellant in 2006, and (ii) Gordon's tax liability as at September 17, 2010).

    (b) Cheques payable to Gordon Levoy and totalling (in the aggregate) $51,776.56 were deposited into the Appellant's bank Account in 2007 (various dates), as per Schedule C of the Respondent's Re-Amended Reply dated November 22, 2019. (This was the amount assessed against the Appellant per section 160 of the ITA via Assessment #2 dated September 17, 2010: being the lesser of (i) the amount transferred to the Appellant in 2007, and (ii) Gordon's tax liability as at September 17, 2010.)

(c) Cheques payable to Gordon Levoy and totalling (in the aggregate) $3,348.60 were deposited into the Appellant's bank account in 2008 (various dates), as per Schedule C of the Respondent's Re-Amended Reply dated November 22, 2019. (This was the amount assessed against the Appellant per section 160 of the ITA via Assessment #3 dated September 17, 2010: being the lesser of (i) the amount transferred to the Appellant in 2008, and (ii) Gordon's tax liability as at September 17, 2010.)

13. For ease of reference, the foregoing transfers from Gordon to the Appellant during the years 2006-2008 (being Assessment #1, Assessment #2, and Assessment #3) amount to $153,188.18 (in the aggregate).

Payments by the Appellant for Gordon expenses

14. For the purposes of this Appeal, the parties agree/admit the following:

(a) In 2006, the Appellant paid $94,995.20 from her bank account towards Gordon's credit card bills/expenses (as detailed in the 2006 summary spreadsheet at Tab 11 of the Joint Book of Documents; together with supporting documents therein).

(b) In 2007, the Appellant paid $88,487.22 from her bank account towards Gordon's credit card bills/expenses (as detailed in the 2007 summary spreadsheet at Tab 11 of the Joint Book of Documents; together with supporting documents therein).

15. For ease of reference, the foregoing payments by the Appellant in 2006 and 2007 amount to $183,482.42 (in the aggregate).

16. The Appellant takes the position that she (the Appellant) legally committed/obliged herself to Gordon to use the amounts transferred by Gordon into her account to pay for Gordon's expenses, and in so doing, provided corresponding consideration (for the purposes of section 160 of the ITA) for the transfers into her account. The Respondent disputes the Appellant's position in this respect.

Gordon Levoy's Bankruptcy Proposal

17. Gordon filed a notice of intention to file a bankruptcy proposal on April 20, 2011.

18. The trustee through which the proposal was filed was MSI Spergel Inc. c/o Christopher Galea (the "Trustee").

19. On May 3, 2011, the CRA filed proof of claim with the Trustee, claiming $642,050.68, as an unsecured claim for/in respect of the years 1997 to 2007.

20. The CRA was the majority creditor within the context of the bankruptcy proposal.

21. On June 20, 2011, Gordon made an (amended) bankruptcy proposal under the *Bankruptcy and Insolvency Act* (Canada) (the "BIA"). This bankruptcy proposal was rejected by the creditors (the "Rejected Bankruptcy Proposal"). (A copy of the Rejected Bankruptcy Proposal (dated June 20, 2011) is contained at Tab 27 of the Joint Book of Documents). The CRA refused to accept the Rejected Bankruptcy Proposal due to the inclusion of paragraph 12.

22. On July 27, 2011, Gordon made a further (amended) bankruptcy proposal under the BIA (dated July 27, 2011, court file 31-1489435)) (the "Accepted Bankruptcy Proposal"), that was ultimately (i) approved/agreed to by the required majority of creditors (*including the CRA)*, and (ii) approved by the Ontario Superior Court of Justice. (A copy of the July 27, 2011, Accepted Bankruptcy Proposal (together with the Court Order approving the proposal dated September 29, 2011) is contained at Tabs 14 and 15, respectively, of the Joint Book of Documents.)

23. Specifically, the July 27, 2011, Accepted Bankruptcy Proposal was: (i) approved/agreed to by Mr. Plaha (on behalf of the CRA) on August 17, 2011, and (ii) approved by the Ontario Superior Court of Justice on September 29, 2011.

24. Pursuant to the terms of the July 27, 2011, Accepted Bankruptcy Proposal:

    (a) Gordon agreed to pay the Trustee $204,000 (in the aggregate, and payable monthly as follows: $3,400 for a period of 60 months), commencing in the month of Court approval; and

    (b) The Trustee was to distribute such funds (net of its fees and expenses) on a pro-rata basis among Gordon's ordinary unsecured creditors who had proved their claims with the Trustee.

25. During the period commencing on or about April 20, 2011, through to on or about January 8, 2016, all amounts payable by Gordon under the July 27, 2011, Accepted Bankruptcy Proposal (being $204,000) were paid to the Trustee.

26. As of January 8, 2016, all amounts payable by Gordon under the terms of the accepted July 27, 2011, Accepted Bankruptcy Proposal (being $204,000) wer paid in full.

27. On January 11, 2016, the Trustee (MSI Spergel Inc.) issued a "Certificate of Full Performance of Proposal" (a copy of which is included at Tab 16 of the Joint Book of Documents) to Gordon under sections 65.3/66.38 of the BIA, certifying that the July 27, 2011, Accepted Bankruptcy Proposal has been "fully performed" as of January 8, 2016.

28. The total payments/disbursements by the Trustee to Gordon's unsecured creditors (derived from the July 27, 2011, Accepted Bankruptcy Proposal, and net of Trustee fees/expenses) were $173,608.53; of which, the CRA received $171,300 (or 98.7% of total dividends disbursed); as confirmed via letter by the Trustee to the CRA dated April 20, 2016 (a copy of which is included at Tab 20 of the Joint Book of Documents).

29. The parties admit/agree that, as at the date of the Certificate of Full Performance (July 11, 2016), and in consequence to Gordon's full performance of the July 27, 2011, Accepted Bankruptcy Proposal, Gordon's tax liability to the CRA for the 1997-2007 taxation years was (and is currently) *nil*.

30. The parties admit/agree that Gordon's tax debts for the 1997 to 2007 taxation years form part of Gordon's bankruptcy proposal and, satisfaction of the bankruptcy proposal reduced Gordon's tax liability to *nil*. However, the Respondent also takes the position that Gordon's 1997 to 2007 tax debts remain enforceable against the Appellant even after Gordon's full satisfaction of the bankruptcy proposal. The Appellant disagrees with the Respondent's position (the second sentence of this paragraph).

31. Enclosed at Tab 18 of the Joint Book of Documents is a copy of a CRA Statement of Account dated August 5, 2016, showing a nil ($0.00) balance owing by Gordon Levoy as at July 29, 2016.

<u>Reference Timeline</u>

32. For ease of reference, the following reference timelines are (without limitation) relevant to this Appeal:

    (a) 1997-2007: relevant Periods re: Gordon Levoy tax liability (from which the Appellant's section 160 Subject Assessments herein under appeal derive).

    (b) 2006-2008: Relevant "Transfer" Periods (for purposes of section 160 of the ITA) from Gordon to Appellant.

(c) September 17, 2010. Date of Issuance of the Section 160 Subject Assessments against the Appellant (herein under appeal).

(d) April 20, 2011: Date of Gordon's filing of a notice of intention to file a bankruptcy proposal.

(e) May 3, 2011: Date CRA files proof of claim with Trustee.

(f) July 27, 2011: Date of Gordon's Accepted Bankruptcy Proposal.

(g) August 17, 2011: Date that the CRA approved/agreed to the July 27, 2011, Accepted Bankruptcy Proposal.

(h) April 20, 2011, to January 8, 2016: Period during which all amounts payable by Gordon under the July 27, 2011, Accepted Bankruptcy Proposal (being $204,000) were paid to the Trustee.

(i) January 8, 2016: Date as at which all amounts payable by Gordon under the July 27, 2011, Accepted Bankruptcy Proposal (being $204,000) were paid in full.

(j) January 11, 2016: Date that the Trustee issues a "Certificate of Full Performance of Proposal" in respect of the July 27, 2011, Accepted Bankruptcy Proposal.

(k) August 5, 2016: Date of CRA Statement of Account, showing a nil ($0.00) balance owing by Gordon Levoy as at July 29, 2016.

. . .

III. Additional Facts

[5] The Appellant and Mr. Levoy were married in 2005.

[6] Mr. Levoy was the sole shareholder and Chief Executive Officer of the Georgian Manor Resort in Collingwood, Ontario.

[7] As part of its operations, Georgian Manor Resort had a call centre for its reservations and promotional activities. Since the call centre did not operate on a full-time basis, Mr. Levoy decided to rent it to others.

[8] The people who rented the call centre used it to perpetrate criminal activities, including the sale of false credit card insurance to citizens of the United States.

[9] Mr. Levoy testified that he was unaware that the call centre was being used to perpetrate criminal activities. However, since he was the sole shareholder and director of the Georgian Manor Resort, criminal charges were laid against him in Canada in 2002, and subsequently in the United States.

[10] After the criminal charges were laid, an external audit firm performed an audit of both the Georgian Manor Resort and Mr. Levoy. The firm advised him to make a voluntary disclosure to the Canada Revenue Agency ("CRA") for taxes owing in preceding taxation years. Mr. Levoy did so in 2002. Mr. Traer[1], a certified professional accountant employed by the Georgian Manor Resort and an advisor and friend of Mr. Levoy dealt with the CRA with respect to the voluntary disclosure. He reassured Mr. Levoy that the tax issues would be resolved. At that time, Mr. Levoy's focus was on the criminal charges. However, at the end of 2006, the CRA informed Mr. Levoy that his 2002 voluntary disclosure request was denied and reassessed him. Mr. Levoy did not file a Notice of Objection against the reassessments.

[11] Mr. Levoy testified that once he was charged, the banks automatically closed his bank accounts and cancelled the insurance on all his properties. He stated that he was not able to open a bank account even after the charges against him were withdrawn in the latter part of 2004 in Canada and in the latter part of 2005 in the United States. His testimony on this point is worth mentioning:

> Well, I didn't have my own personal bank account, and I wasn't able to get a personal bank account. The problem that existed is each time you went in to open a bank account, one of the major questions on the page of the bank was: Have you ever been refused a bank account or have you ever lost your bank accounts? Of course you had to answer honestly that you had. So that automatically brought up the whole charge situation and the issues that were on your credit report.
>
> And quite frankly once the charges were dropped, the documentation that existed against me, it took me probably three or four years to clean up the documentation. I know I had to go to the OPP and -- eventually, and have them make an application to the RCMP to have my fingerprints removed and destroyed. It was just a whole process of stuff because -- and that really caused major issues as well when we travelled. Every time I'd cross a border, there was something that was against my record. Actually, there was some difficulty in expunging those records because nobody seemed to know what the actual problem was. They told me there was a compilation of records between Canada and the US that had occurred. They

[1] Mr. Traer passed away in 2018.

> had merged computer systems and there had been lots of problems with lots of people, and I was only one of them.
>
> . . .

[12] In the latter part of 2005, the Georgian Manor Resort decided to implement new methodologies and systems to improve its operations. One of the improvements involved retaining an external provider, Ceridian, to prepare the payroll. Ceridian's payroll responsibilities include making source deductions and issuing paycheques to employees. The employees, approximately one hundred, could choose to be paid by way of direct deposit or by way of cheque. Mr. Levoy stated that retaining Ceridian was one of the measures taken by Georgian Manor Resort and himself "to clean up the financial statements of the corporation and make sure that everything was run on -- "an easily accountable basis."'"

[13] Not having a bank account, Mr. Levoy opted to receive his salary from the Georgian Manor Resort by way of cheque. From the testimony of Mr. Levoy, I understood that he had not received remuneration from the Manor in the form of a salary before. Receiving a salary with proper source deductions was part of the clean-up of his and the Georgian Manor Resort's operations undertaken in 2005.

[14] Unable to open a bank account, Mr. Levoy needed to find a way to deposit his paycheques and pay his personal expenses namely his credit cards and insurances (collectively "credit cards"). Previously, Mr. Levoy had used his holding corporation's bank account to pay off his credit cards. Mr. Levoy testified that as part of the clean-up, he had decided to get rid of the holding corporation and all of the accounting issues it had created.

[15] To deal with the bank account problem, Mr. Traer suggested to Mr. Levoy that he deposit his paycheques into the Appellant's bank account.

[16] It was clear from her testimony that the Appellant was not keen on this idea because of the police investigation that Mr. Levoy had undergone.

[17] Despite her initial reluctance, the Appellant agreed to meet with Mr. Traer and Mr. Levoy to further discuss the idea. During the meeting, Mr. Traer told the Appellant that she need not worry about Mr. Levoy using her bank account to deposit his paycheques. Since Ceridian had taken over responsibility for the payroll, Mr. Levoy's remuneration was paid by way of salary and therefore, she would have no potential liability. The only thing that she had to do was to deposit

the paycheques and pay Mr. Levoy's credit card bills (he held five cards) from the funds so deposited.

[18] Upon reflection, the Appellant agreed to allow Mr. Levoy to use her bank account and to pay his credit card bills. They both stated that they agreed to this arrangement at the beginning of 2006.

[19] The Appellant explained how the arrangement worked. Mr. Levoy was paid by cheque on a bi-weekly basis. He gave her the paycheque, which she deposited into her bank account. On a monthly basis, Mr. Levoy gave her his credit card statements. On each statement, Mr. Levoy attached a yellow sticker on which he indicated the amount of the payment to be made. The Appellant then paid Mr. Levoy's credit card bills in accordance with those instructions using the Internet. On every credit card statement, she wrote the date of payment, the amount paid and the payment confirmation number provided by the financial institution.[2] The Appellant then filed the statement in a file that she had on her desktop and that she used solely to hold Mr. Levoy's credit card information.

[20] The Appellant stated that even if Mr. Levoy's funds were commingled with her own, the accounting was easy to maintain. Mr. Levoy's paycheques did not really vary. She made two deposits monthly. She also recorded the credit card payments she made on his behalf. She stated that some months, Mr. Levoy's deposits exceeded what he directed her to pay on his credit cards. On those occasions, she applied the excess to the next month's credit card bills. The Appellant stated that if at the end of the year, the paycheque deposits exceeded the amount for the credit card payments; she used the balance to pay the following year's credit card bills. For example, in 2006, Mr. Levoy's paycheques amounted to $98,063.02 and the Appellant made payments totalling $94,995.20 on Mr. Levoy's credit card bills. The difference was rolled over into 2007.

[21] Mr. Levoy also kept an accounting of the deposits and the payments made by the Appellant. For the deposits, he explained he had a rolling total going forward. He was able to confirm that the Appellant had paid his credit cards as directed, as it was reflected on the following month's credit card statement. He testified that his "*only association with his spouse banking was that cheques came in as part of the payroll system, and some bills that I asked her to pay, which only amounted to three, four, five a month. So it wasn't a huge interaction.*"

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[2] Joint Book of Documents Volume 1, Tab 11, pp. 80 and following.

[22] Mr. Levoy did not have access to the Appellant's bank account. Nor was he provided with the Appellant's bank account statements.

[23] Mr. Levoy testified that the Appellant did not have any discretion with respect to the money he deposited into her bank account. He said he could have sued the Appellant if she had refused to act pursuant to his directions.

[24] The Appellant confirmed Mr. Levoy's testimony. She understood that she did not have any discretion with respect to the use of his money. She clearly stated that his paycheque money belonged to him and that she did not use any of it to pay her own expenses. She also never refused to pay his credit cards as directed. Although they had an oral, and not a written agreement, she believed that Mr. Levoy could have sued her if she did not abide by his directions.

[25] The Appellant also worked at the Georgian Manor Resort. She had her own bank accounts and credit cards. She testified that she always paid for her own expenses and Mr. Levoy for his (save in 2007 and 2008 when he was not working full time and the Appellant helped him out). She had never before commingled her money with that of Mr. Levoy. The Appellant stated that Mr. Levoy had never used her bank account before this arrangement, which was brought about by his inability to open a bank account.

[26] The Appellant testified that the criminal charges and the fallout arising from them took a toll on Mr. Levoy. He gained one hundred pounds and became quite depressed. Sometime in 2007, Mr. Levoy stopped working full-time. His salary went from $98,063 in 2006 to $51,776 in 2007 and to $3,348 in 2008. The Appellant used a total of $30,000 in 2007 and 2008 of her personal funds to cover Mr. Levoy's credit card bills.

[27] Both the Appellant and Mr. Levoy testified that the banking arrangement between them was made because Mr. Levoy could not open his own bank account, and not to thwart creditors.

[28] Mr. Levoy had a tax debt at the time his paycheques were deposited in the Appellant's bank account in 2006, 2007 and 2008.

[29] Mr. Levoy testified that he did not want to file for bankruptcy, so instead he decided to file a bankruptcy proposal. The proposal was accepted by his creditors. Mr. Levoy total payments/disbursements under the accepted bankruptcy proposal, net of the Trustee fees/expenses, were $173,608.53, of which the CRA received

$171,300. The CRA Statement of Account dated August 5, 2016, showed a nil balance owing by Mr. Levoy as of July 29, 2016.

IV. Questions in Issue

[30] Does subsection 160(1) of the *ITA* apply in the appeal at bar? More particularly, did the Appellant give adequate consideration pursuant to paragraph 160(1)(e) of the *ITA*?

[31] Does the successful completion of the bankruptcy proposal by Mr. Levoy (the "transferor") have the effect of extinguishing the debt of the Appellant (the "transferee")?

[32] I am of the view that the subsection 160(1) of the *ITA* does not apply in this appeal for the following reasons. Therefore, there is no need for me to deal with the effect of the bankruptcy proposal.

V. Position of the Parties

[33] The Appellant argues that section 160 of the *ITA* is not applicable as there was valid consideration equal in value to the money transferred by Mr. Levoy to the Appellant. In support of this argument, the Appellant submits that the evidence established that: (1) she agreed with Mr. Levoy that she would deposit his paycheques into her bank account and use the money so deposited to pay his credit card bills; (2) she made a legally enforceable promise to pay out the money only on Mr. Levoy's direction and did not have any discretion on how Mr. Levoy's money was to be used; and (3) she did not use Mr. Levoy's money for any purpose other than paying his credit card bills, which in fact were paid.

[34] In addition, the Appellant argues that she and Mr. Levoy's intention in making the banking arrangement was solely to provide a means for Mr. Levoy to deposit his paycheques – he could not open a bank account in his own name. They were not trying to thwart the collection efforts of the CRA. The arrangement was made at a time (beginning of 2006) when Mr. Levoy had not yet been assessed by the Minister of National Revenue (the "Minister") and was under the impression that his voluntary disclosure would be granted thereby resolving any earlier tax indebtedness.

[35] The Appellant also argues that the Respondent conceded in argument that the Appellant had a legal obligation to pay Mr. Levoy's credit cards when she

stated in argument that *"once deposits were made to the personal bank account, to the appellant's personal bank account, Mr. Levoy could instruct the appellant to act. But there was no mechanism, other than a lawsuit, whereby he could force her to act."*

[36] On the other hand, the Respondent argues that section 160 of the *ITA* applies since there was no consideration given by the Appellant in exchange for the money that Mr. Levoy deposited into her account. He pointed out that there was no written contract between the Appellant and Mr. Levoy, that the funds were commingled with her money in the account, and that the amounts deposited did not match the consideration, namely the amounts paid on the credit cards. Therefore, there was no link between the amounts deposited and the credit card bills paid by the Appellant.

[37] The Respondent also points to evidence that for the years 2007 and 2008, the Appellant paid a total of $30,000 of her own money in order to cover Mr. Levoy's credit card bills in 2007 and 2008. Accordingly, the Respondent argues that the Appellant was morally obligated to assist her spouse.

[38] The Respondent also argues that the Appellant was a supplementary cardholder with respect to two of Mr. Levoy credit cards, the American Express (Amex) and the Canadian Tire and that she benefited from the Amex card. In some months, the Appellant spent more money using the Amex card than Mr. Levoy did. Finally, she argues that because some of the credit card statements filed by the Appellant in evidence were incomplete, I should draw a negative inference against the Appellant and conclude that she had not clearly established that all of the expenses paid by her were the personal expenses of Mr. Levoy.

VI. Analysis

[39] First, I will deal with the Appellant's submission that the Respondent conceded in argument that a legal obligation existed between the Appellant and Mr. Levoy. While the Respondent appeared to make this concession at one point in her submissions, I am of the view that the Respondent's overall argument was that there was no legal obligation between the Appellant and Mr. Levoy, but only a moral obligation. In any event, the question of whether a legal obligation existed is one for the Court to decide on the basis of the facts and the law.

[40] In *Livingston* v *R,*[3] the Federal Court of Appeal set out the four key criteria to determining if section 160 applies[4]. They are:

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.

[41] The Appellant admitted that the first three requirements were met. Therefore, the only issue is the fourth requirement; namely, whether the Appellant gave consideration equal to the fair market value of the property transferred to her by Mr. Levoy.

[42] To support her position that the Appellant did not give consideration equal to the fair market value of the property transferred to her, the Respondent relied on the Federal Court of Appeal's decisions in *Raphael v R,*[5] *Livingston*[6] and on this Court's decision in *Pickard.*[7]

[43] In *Raphael*, Mr. Raphael owned a corporation that operated a large number of jewellery stores. Mr. Raphael had guaranteed several hundred thousand dollars

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3 *Livingston* v *R,* 2008 FCA 89, at paragraph 17.

4 The text of subsection 160(1) of the *ITA* is attached as Annex B of the Reasons for Judgment.

5 *Raphael* v *R,* 2002 FCA 28.

6 *Ibid* at note 3.

7 *Pickard* v *R,* 2010 TCC 535.

of leases and loans for which the corporation was liable. He was told by his bank that a number of his creditors had served garnishees on his bank accounts and that any funds in his accounts with the bank would have to be given to the creditors. Mr. Raphael had a RRSP plan and wished to use the monies so that he could honour some of his debts and have the possibility of continuing with the jewellery business. Mr. Raphael knew that if his RRSP funds were deposited into his bank account, the funds would be garnished. In order to prevent this from happening, Mr. Raphael decided to deposit his RRSP into his spouse's bank account. In turn, Ms. Raphael paid the creditors pursuant to the instructions of Mr. Raphael. At the time of the transfer of Mr. Raphael's money into Ms. Raphael's bank account, Mr. Raphael owed income tax. Ms. Raphael was assessed under subsection 160(1) of the *ITA*. Only approximately half of Mr. Raphael funds were used to pay off his existing debt. The funds of Mr. Raphael were commingled with the funds of Ms. Raphael, which made the accounting difficult.

[44] Justice Sexton of the Federal Court of Appeal held in *Raphael* that the Minister correctly assessed Ms. Raphael since she did not have a legally enforceable promise to pay the bills as directed by her spouse. Ms. Raphael testified that she only had a moral obligation to use the funds as her spouse directed and admitted that Mr. Raphael could not compel her to make the payments. The Court held that as Ms. Raphael only had a moral obligation, there was not a sufficient consideration. The Court also noted that Mr. Raphael's money was not used solely for the payment of his debt. The Court concluded that the evidence did not support the alleged promise to use the funds only for the payment of the husband's creditors in amounts equal to the money transferred.

[45] In *Livingston*, the Federal Court of Appeal stated that the purpose of subsection 160(1) of the *ITA* 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 CRA's efforts to collect the money, which is owned to him.[8] The Court also stated that although an intention to defraud the CRA is not a pre-requisite to the application 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.[9]

[46] In *Livingston*, Ms. Davies and Ms. Livingston were friends. Ms. Davies had an income tax debt. The CRA was unable to collect the debt since Ms. Davies had transferred her funds to Ms. Livingston's bank account. While Ms. Livingston was

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8 *Livingston v R*, 2008 FCA 89, at paragraph 18.

9 *Ibid*, at paragraph 19.

the sole holder and signatory of the bank account, she had opened it for Ms. Davies' use. The latter was the only one who used the account, including by depositing cheques into it and by directing other parties to pay amounts owed to her into it. In addition, Ms. Livingston provided Ms. Davies with the only debit card for the account in order to allow Ms. Davies to make withdrawals. Ms. Livingston was aware of Ms. Davies' tax debt.

[47] The Federal Court of Appeal concluded that there was no enforceable contract between Ms. Davies and Ms. Livingston. The latter acted out of a sense of moral obligation. More particularly, with respect to the fourth requirement for subsection 160(1) of the *ITA* to apply, namely whether the consideration given by Ms. Livingston was adequate, the Court held that there was no consideration since what Ms. Livingston gave to Ms. Davies was the ability to withdraw the money from her account, while retaining the power to use the money. Ms. Justice Sexton for the Federal Court of Appeal stated as follows:

> [28] The Tax Court Judge erred in law by failing to conduct any 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. Why would Ms. Davies give an amount of money to the respondent in consideration for the ability to withdraw the money when the respondent retains the power to take the money? No prudent, arm's length purchaser not motivated by the prospect of evading collection of their tax debt would pay the full value of funds in exchange for the right of access that Ms. Davies received. . . .

[48] In *Pickard*, Mr. Pickard was in the construction business. Since the construction business was slow, Mr. Pickard decided to work for Claridge Homes ("Claridge"). When asked by Claridge to authorize the direct deposit of his wages into an account, the evidence was that he inadvertently provided them with a blank cheque for his wife's, Ms. Pickard, personal bank account instead of a cheque from the line of credit accounts. When his spouse noticed, she asked Mr. Pickard to correct the error because it would result in her paying his personal and business bills. However, Mr. Pickard decided to leave things as they were. Accordingly, his paycheques from Claridge were deposited in Ms. Pickard's bank account from November 2003 to February 2005. At the time of the transfer of funds, he had an outstanding tax debt.

[49] Ms. Pickard testified that it had always been agreed that any amount Mr. Pickard caused to be deposited into her account were to be used only in payment of his personal and sole proprietorship expenses.

[50] Justice Sheridan from this Court decided that the Minister correctly assessed Ms. Pickard pursuant to subsection 160(1) of the *ITA*. She found that there was no legally enforceable promise between her and Mr. Pickard and therefore no consideration was given by Ms. Pickard to Mr. Pickard. The latter made an error in providing his employer with Ms. Pickard's personal cheque instead of one from the line of credit accounts. As the evidence revealed, Ms. Pickard was not even aware of her spouse's actions, thus there could have not been an agreement between the two. There was also nothing that prevented Ms. Pickard from dealing with the amounts deposited in any manner she chose. She admitted that Mr. Pickard could not force her to pay the bills which he wanted paid. In addition, Ms. Pickard admitted that she did not keep an account of all the personal expenses she paid on behalf of Mr. Pickard. Ms. Pickard also admitted that she used funds deposited by Mr. Pickard to pay her own expenses. In light of this evidence, Justice Sheridan concluded that there was no link between the amounts deposited by Mr. Pickard and the bills paid by Ms. Pickard.[10]

[51] In my view, in light of the facts in this appeal, the Federal Court of Appeal's findings in *Raphael* supports the Appellant's position. In *Raphael*, Justice Sexton of the Federal Court of Appeal stated that "*if indeed the wife had made a legally enforceable promise to pay out the monies only on the husband's direction to his creditors in amounts equal to the monies transferred this might well have constituted sufficient consideration equal in value to the property transferred, then section 160(1) does not apply*."[11]

[52] I am of the view that there was an enforceable contract between the Appellant and Mr. Levoy. The Appellant undertook to deposit Mr. Levoy's paycheques in her personal bank account. In return, she committed to pay Mr. Levoy credit card bills pursuant to his direction. The evidence established that Appellant could have been forced to pay Mr. Levoy's credit card bills if she had refused to pay. Mr. Levoy could have taken an action against the Appellant to enforce the agreement.

[53] The documents filed by the Appellant during the trial confirmed her testimony and that of Mr. Levoy. The Appellant's bank account statements showed the deposits of Mr. Levoy's paycheques on a bi-weekly basis as well as the withdrawals to pay Mr. Levoy's credit card bills, which bills were also filed.

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10 *Pickard* v *R*, 2010 TCC 535, at paragraphs 15-20.

11 *Raphael* v *R*, 2002 FCA 23, at paragraph 10.

[54] I am also of the opinion that this appeal may be distinguished from the decision of *Livingston* on its facts.

[55] In *Livingston*, the Federal Court of Appeal found that the arrangement to transfer the money between Ms. Davies and Ms. Livingston was put in place in order to thwart the collection efforts of Ms. Davies' creditors, including the CRA. Although defrauding the CRA is not a prerequisite for the application of subsection 160(1) of the *ITA*, it was a factor taken into account by the Court in *Livingston* to gauge the adequacy of the consideration. Also, in *Livingston* Ms. Davies was given control of Ms. Livingston's bank account. Ms. Livingston gave Ms. Davies blank cheques and the only debit card for the account. The Court held that there was no consideration since the Court found that there was no reason for Ms. Davies to give an amount of money to Ms. Livingston in consideration for the ability to withdraw money, while Ms. Livingston retained the power to use that money.

[56] In the present appeal, contrary to *Livingston*, there is no evidence that supports a finding that there was an intention to defraud the CRA. The Appellant agreed to deposit the Mr. Levoy's paycheques into her bank account because the Appellant was unable to open a bank account due the criminal charges. In fact, the agreement between the Appellant and Mr. Levoy was reached at a time (beginning of 2006), when the Appellant was not aware that Mr. Levoy had a tax debt and Mr. Levoy was under the impression that his taxes would be settled pursuant to the voluntary disclosure program. It was only at the end of 2006, that the CRA advised Mr. Levoy that his 2002 voluntary disclosure request had been denied and that a Notice of Assessment would follow.

[57] In addition, unlike the situation in *Livingston*, Mr. Levoy did not have access to the Appellant's personal bank account. He also did not have access to the Appellant's bank account statements. The only interaction Mr. Levoy had with the Appellant's personal bank account was that his paycheques were deposited by the Appellant and his five credit cards were paid by her pursuant to his directions. The Appellant did not benefit from the transfer of money into her account because she committed to pay, and did pay, the personal credit bills of Mr. Levoy. Hence, there was consideration given by the Appellant to Mr. Levoy.

[58] With respect to the *Pickard* decision, I am of the view that it too may be distinguished on its facts. With respect to the consideration, Justice Sheridan noted that it was difficult to establish whether there was a consideration, since only Ms. Pickard testified. Accordingly, there was no corroborating testimony and, moreover, no sufficient corroborating documents.

[59] In this appeal, both the Appellant and Mr. Levoy testified. I do not have any reason to doubt their testimonies. They were credible witnesses who answered the questions asked at trial in a straightforward manner.

[60] Unlike the situation in *Pickard*, the Appellant testified that she could be forced by her spouse, Mr. Levoy, to pay his credit cards. The Appellant never used the money deposited by Mr. Levoy to pay her personal expenses while Ms. Pickard admitted using the money deposited by her spouse for her own personal purposes.

[61] In *Pickard*, no sufficient supporting documents were introduced. Ms. Pickard did not maintain good records of the bills she had paid for her spouse. That is not the situation here. The Appellant maintained detailed records of the funds that belonged to her spouse, namely the funds deposited, as well as the monthly payments she made on his behalf. Not only the documents were more than sufficient, but they also corroborated the testimonies of the Appellant and Mr. Levoy.

[62] The Respondent also argued that subsection 160(1) of the *ITA* should apply because the amounts transferred in 2006 by Mr. Levoy to the Appellant were greater than the amounts paid on the credit cards that year. Relying on *Pickard*, he therefore argued that there was no link between the amounts deposited and the consideration, namely the amounts paid to Mr. Levoy's creditors. I do not agree. The Appellant explained that if there were an excess at the end of a year, she would use the excess to pay the next year's credit card statements. The Appellant used all the money deposited by Mr. Levoy to pay his credit cards. She never used the money belonging to Mr. Levoy for herself. She had her own credit cards and paid her own expenses.

[63] The Respondent also argued that the arrangement between the Appellant and Mr. Levoy was a moral obligation only since the Appellant used $30,000 of her own money to pay Mr. Levoy's credit card bills in the 2007 and 2008 taxation years. On this point, the Appellant explained that Mr. Levoy did not work on a full-time basis in 2007 and 2008. In those years, she used all the money deposited by him to pay his credit card bills. As this was not sufficient, she made a personal decision to pay the additional $30,000 owing. In my view, this payment does not weaken the conclusion that she was obliged under their arrangement to use the money deposited by Mr. Levoy to pay his credit cards, which she did.

[64] The Respondent also submitted that I should draw a negative inference because some of the credit card statements did not show the type of expenses

incurred by Mr. Levoy. I do not agree. In my view, the documentary evidence together with the oral testimony have established that the payments were made to pay the personal expenses of Mr. Levoy. In addition, in the Partial Agreed Statement of Fact, the Respondent admitted that the Appellant paid Mr. Levoy's credit card bills/expenses.[12]

[65] The Respondent argued that the evidence showed that the Appellant was a supplementary cardholder with respect to Mr. Levoy's Amex card. Some invoices in 2006 revealed that she used the credit card a few times, and therefore she would have received a benefit. On this point, the evidence showed that the Appellant reimbursed the amounts she incurred on the Amex, since in the 2007 and 2008 taxation years, the Appellant used her own money to pay Mr. Levoy's credit cards as he could no longer work on a full-time basis.

[66] The consideration in this appeal is that she committed to pay Mr. Levoy's credit card bills as per his instructions with the money that he deposited into her account and the evidence showed that she did.

[67] Therefore, in light of the facts of this appeal, I am of the view that subsection 160(1) of the *ITA* does not apply. There was a legally enforceable contract between the Appellant and Mr. Levoy. The Appellant agreed to deposit Mr. Levoy's paycheque in her bank account. In return, she committed to pay his credit card bills per his directions. Therefore, there was a valid consideration equal in the value of the property transferred.

[68] As I have stated earlier, in light of my conclusion, I will not analyze the second question that was posed in this appeal.

[69] The appeal is allowed with costs.

Signed at Ottawa, Canada, this 9th day of July 2020.

"Johanne D'Auray"

D'Auray J.

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12 Agreed Statement of Fact (Partial), at paragraph 14.

ANNEX A

Tax Court of Canada  Cour canadienne de l'impôt

Docket: 2014-3843(IT)G

BETWEEN:

TAMARA BROWN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Counsel for the Appellant:	Domenic Marciano
Counsel for the Respondent:	Christian Cheong

JUDGMENT IN ACCORDANCE WITH
PARAGRAPH 171(2) OF THE *INCOME TAX ACT*

Whereas the parties have reached a settlement in respect of the assessments numbers 1233552 and 1116049;

Upon reading the Consent to Partial Judgment filed on November 22, 2019 requesting that this Court grant partial judgment, pursuant to section 171(2) of the *Income Tax Act* (the *"Act"*);

The appeal from the assessments number 1233552 and 1116049, made under the *Income Tax Act* for the 2005 and 2006 taxation years, is allowed without costs and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the terms of the attached Consent to Partial Judgment;

The appeal pertaining to the assessments numbers 1143585, 1143467 and 1140855 shall continue, pursuant to section 171(3) of the *Act*.

Signed at Ottawa, Canada, this 27th day of November 2019.

"Johanne D'Auray"

D'Auray J.

ANNEX B

Tax liability re property transferred not at arm's length

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 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 therefore, 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.

CITATION:	2020 TCC 45
COURT FILE NO.:	2014-3843(IT)G
STYLE OF CAUSE:	TAMARA BROWN v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 2 and 3, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	July 9, 2020

APPEARANCES:

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