Docket: 2006-1900(IT)I

BETWEEN:

JASON GITELMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 15, 2007, at Montreal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Agent for the Appellant:	Frank Pecoraro
Counsel for the Respondent:	Vlad Zolia

JUDGMENT

The appeal from the reassessment made under section 160 of the *Income Tax Act* for the 2004 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of October 2007.

"Paul Bédard"

Bédard J.

Citation: 2007TCC544
Date: 20071012
Docket: 2006-1900(IT)I

BETWEEN:

JASON GITELMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal under the informal procedure from an assessment issued against the appellant by the Minister of National Revenue ("the Minister") pursuant to the *Income Tax Act* (the "*Act*"). By a notice of assessment dated November 2, 2004, the Minister claimed $10,000 from the appellant under section 160 of the *Act*.

The Facts

[2] The evidence showed that:

(i) Rosalind Gitelman is the appellant's mother;

(ii) On June 17, 1998, Ms. Gitelman drew on her bank account a cheque for $10,000 payable to the appellant;

(iii) On June 17, 1998, the appellant endorsed this cheque and deposited it in his personal bank account;

(iv) Ms. Gitelman's debt under the *Act* in the taxation year in which she wrote the cheque for $10,000 was $27,535.58 and this debt remains unpaid;

(v) On June 12, 1998, Ms. Gitelman wrote a letter to the appellant (Exhibit R-12) that stated:

> I, Rosalind Gitelman, give to you the sum of $10,000.00 on the occasion of your June 21, 1998 wedding.

(vi) On September 29, 2004, the appellant wrote a letter to Pierre Lacelle (Exhibit R-8) collection agent for the Canada Customs and Revenue Agency, that stated:

> In reply to your letter of September, 1st 2004 regarding my mother Rosalind Gitelman who in June 1998 wrote me a personal cheque for $10,000.00 as a gift to help defray the costs of my wedding to Aliza Shemi on June 21st 1998.
>
> Since the cheque was not a transfer from a registered R.R.S.P. or from the company (Ravcor Refrigeration), but was given as a personal gift. I should not be held liable under the income tax act. I trust this will put this matter of my liability to rest.

[3] The relevant part of Ms. Gitelman's testimony regarding the reason she drew on her bank account a cheque for $10,000 payable to the appellant is worth citing:

> EXAMINED BY Me VLAD ZOLIA:
>
> It will be very short, your Honour, this is a document that was sent to us by the representative of Jason Giteleman [*sic*].
>
> THE WITNESS: Uh-huh
>
> Me VLAD ZOLIA: We'll introduce it as R-12, the same thing, it's a copy.
>
> THE WITNESS: Okay.
> R-12: Donation dated June 12, 1998.
>
> Me VLAD ZOLIA:
>
> Q. Do you recognize your . . .

A. Yes.

Q. . . . signature here?

A. Uh-huh.

Q. Okay. Would you like to explain to the Court what this document is about?

A. Well, I was talking to my son's future in-laws and we discussed making arrangements for the wedding and I said that I would help to help them to pay for the wedding and I said that I would give them $10,000 to help pay towards the wedding and that's what this is about. And it was, you know, it was just a verbal agreement that we, you know, I said I would help them with the wedding, they weren't, you know.

Q. I'll ask you, was this document signed on June twelfth (12th), 1998?

A. Yes.

[4] The relevant part of the appellant's testimony concerning the reason his mother wrote a cheque for $10,000 check is also worth citing:

Q. Do you admit that these expenses were supposed, were not your expense but were the parents of the bride and the groom?

A. That was agreement they had between them to pay partial each.

Q. Would you agree with me that the reason why your mother gave you the $10,000 was so that you could contract on her behalf as an agent to get this wedding accomplished?

A. This is correct.

[5] In his Notice of Appeal the appellant put forward the following reasons in support of his assertion that section 160 of the *Act* does not apply:

> **Statement of Reasons**
>
> 1. The object of section 160 is to prevent taxpayers from avoiding tax liability by transferring assets to their spouse or to another non-arm's length person. By making the transferee liable, the Minister seeks to make a third person liable for the debt of the taxpayer. In Medland V. The Queen, 98 DTC 6358, the Federal Court of Appeal stated (at page 6362) that the object and spirit of subsection 160(1) was to prevent taxpayer from transferring property to his/her spouse in order to thwart the Minister's efforts to collect from the taxpayer. This is not the case here. It is a simple gesture of monetary assistance from a parent (R.G.) to her offspring (J.G.) in an affair (the wedding) that involves the familial obligations of the whole family.
>
> 2. In a recent decision of the Tax Court of Canada, in Monique Leblanc v. The Queen, 99 DTC 410, (P-1) Judge Hamlyn accepted Monique Leblanc's argument that there was no transfer of money because she was an agent acting on behalf of her husband; and because the money was used exclusively to discharge the husband's legal obligations. In this case, money was used to discharged the wedding's contractual obligations of the son as obliged by the mother (R.G.)
>
> 3. The above sum of money in the amount of $10,000 represents a wedding **gift** by R.G. to her son J.G. (P-2).
>
> 4. Since R.G. is the mother of J.G., the above transfer of property, by way of gift, was not at arm's length.
>
> 5. The CCRA accepts the traditional meaning of the word *gift* as being a voluntary transfer of property without consideration. (IT-209R). If the donor expects some benefit or enjoyment in return, it is not a true gift. (Canadian Master Tax Guide – 59th edition #8175. R.G. did not expect any benefit or advantage when she gifted her son the sum of $10,000 on his wedding day. It was simply a case of a family meeting their familial obligations to their son on his wedding.
>
> 6. The above $10,000 payment falls within the **definition of *gift*** utilized by Canada Customs and Revenue Agency. As such, ***there was no benefit or advantage accruing to the donor*****, R.G.**
>
> 7. Since there was no benefit or advantage accruing to the transferee, the property transferred has no fair market value. Therefore, the $10,000 payment falls outside the scope of section 160(1).
>
> 8. The Assessment number 24401 dated November 2, 2004 erred in truth and in fact in its explanation which is based on misrepresentations, erroneous and

groundless assumptions on the part of Collection Officer, Pierre Lacelle in his letter of September 1, 2004 (P-3) to the effect that this gift resulted in a benefit to J.G.

9. J.G. replied to the above letter on September 29, 2004 (P-4). Pierre Lacelle's response was the assessment dated November 2, 2004.

10. J.G. is not in possession of the facts, alleged or otherwise, which formed the basis of his assessment. Request for such information has been ignored (P-5 & P-6).

11. Since J.G. is not in possession of the relevant facts, possession of which would allow him to defend himself against this assessment, the onus of proof must rest with Canada Customs and Revenue Agency.

12. In Gestion Yvan Drouin In. V. The Queen (1999-1856-IT-G), Judge Archambault of the Federal Court of Appeal ruled that "since it is the minister who takes measures against a third party to recover the tax owed to him by the tax debtor, it seems entirely reasonable to me that it should be incumbent on the Minister to provide *prima facie evidence of the existence of the tax liability*".

13. For all of the above reasons, the Notice of Assessment herein objected to is unfounded in fact and in law and the taxpayer respectfully requests that it be varied.

[6] Moreover, in his arguments, the agent for the appellant laid particular emphasis on the statement at paragraph 2 of the "Statement of Reasons" in the Notice of Appeal. In this regard, the agent for the appellant argued that: (i) the $10,000 was paid by Ms. Gitelman (the mandator) to her son (the mandatary) in the context of a mandate under which he was to use the money to fulfil an obligation she had undertaken pursuant a contractual arrangement with her son's in-laws, namely, to pay half the wedding costs; thus, giving this money to her son could not be considered a transfer under section 160 of the *Act*, since it was used solely to benefit Ms. Gitelman. In other words, the agent for the appellant argued that, in these circumstances, the mandator did not divest herself of ownership of the amount entrusted to the mandatary and this amount did not vest in the mandatary.

Analysis and conclusion

[7] The relevant provision for the purposes of this case is subsection 160(1) of the *Act*, which reads as follows:

> 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 therefor, and
> >
> > (*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
> >
> > > (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
> > >
> > > (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[8] The purpose of this provision is, clearly, to prevent taxpayers from avoiding their tax obligations by transferring assets to their spouse, to a person under 18 years of age, or to a person with whom they were not dealing at arm's length. I

would add that it is not necessary that intent to avoid taxes exist in order for this section to apply. Indeed, no such condition is enunciated in section 160 of the *Act*. This interpretation, according to which no element of intent is required, was moreover adopted by my former colleague Justice Dussault in *Montreuil v. The Queen*., 95 DTC 138 (T.C.C.), at page 145. This approach was also followed by the Federal Court of Appeal in *Wannan v. Canada*, [2003] F.C.J. No. 1693 (Q.L.) (F.C.A.), at paragraph 3:

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

[9] It seems to me that the following conditions must be met for section 160 to apply:

> (i) there must be a transfer of property by one person ("transferor") after May 1, 1951; and
>
> (ii)this transfer must have been for the benefit of one ("transferee") of the following three persons: (a) the spouse of the transferor or a person who has since become the transferor's spouse; (b) a person under 18 years of age; or (c) a person with whom the transferor was not dealing at arm's length.

When these two conditions are met, the following two rules apply. The first of these, which is stated in paragraph 160(1)(*d*) ("paragraph 160(1)(*d*) rule") is that the transferee and the transferor are jointly and severally liable to pay part of tax on the income from the property transferred to the transferee or on the capital gain resulting from the disposition of the property where this income or capital gain is subject to the attribution rules set out in sections 74.1 to 75.1 of the *Act* and in section 74 of the *Income Tax Act*, c. 148, R.S.C. 1952 ("1952 *Act*"). It must be emphasized in this case that it is not a matter of determining whether the fair market value ("FMV") of the property transferred exceeds the FMV of the consideration. Joint and several liabilities are incurred as soon as there is tax to pay on any income or capital gain that is subject to the attribution rules. Moreover, subsection 160(1) of the *Act* applies even if the transferee gave sufficient consideration for the property by transferred the transferor. This is the case notably

with respect to the attribution rule stated in section 74 of the 1952 *Act*. Indeed, even if one of the two spouses paid FMV for the property transferred by the other spouse, the attribution rule would apply, despite the provisions of subsection 74.5(1) of the *Act*.

[10] Under the second rule ("paragraph 160(1)(*e*) rule"), the transferee and the transferor are jointly and severally liable in regard to any amount the transferee must pay under the *Act* during the taxation year in which the property was transferred or a preceding taxation year. However, the transferee's responsibility is limited to the lesser of the following: (i) the amount by which the FMV of the property at the time it was transferred exceeds the FMV at that time of the consideration given for the property and (ii) the amount of the transferor's tax debt.

[11] As regards the concept of transfer, I am of the opinion that, in order for a transfer of property to take place, it is essential that the transferor has divested himself of ownership of the property and that the property has vested in the transferee. As well, it flows from the concept of transfer used in subsection 160(1) of the *Act* that payment of amounts to a mandatary to be used to benefit the mandator or to meet the mandatory's obligations does not constitute a transfer for the purposes of that subsection because in those circumstances the mandator does not divest himself of ownership of the amounts granted or paid to the mandatary and these amounts are not vested in the mandatary.

[12] What emerges from these provisions is that subsection 160(1) of the *Act* can apply whether there has been a transfer with sufficient consideration or without sufficient consideration. Moreover, it is clear that subsection 160(1) of the *Act* applies whether there was a sale of property or a gift of property. It is through the mechanism of calculating the amount of the transferee's liability that the FMV of the consideration, if any, given for the property transferred by the transferor is taken into account. This mechanism only applies for the purposes of the paragraph 160(1)(*e*) rule.

[13] Before applying subsection 160(1) of the *Act* to the facts of this appeal, the nature of the transaction between the mother and her son should first be characterized. The following question must therefore be answered: did Ms. Gitelman give her son a gift of $10,000 or did she pay that amount to her son in the context of a mandate, and if so, was that amount used solely for her benefit? On that point, it is my view that Ms. Gitelman simply made her son a gift of $10,000 to help him pay the costs of his wedding. To be sure, Ms. Gitelman

testified that she gave her son $10,000 in the context of a mandate under which he was to use this amount to meet an obligation she had undertaken pursuant to a contractual arrangement with her son's in-laws. And certainly, the appellant gave the same testimony as his mother in this regard. However, prior written statements (Exhibits R-8 and R-12) by Ms. Gitelman and the appellant make no mention at all of a mandate or a contractual obligation. Indeed, I would point out that these written statements merely refer to a $10,000 gift from Ms. Gitelman to her son to help pay the costs of his wedding. Faced with such contradictions, I simply accept the version of the facts found in the written statements because that version just appears to me to be more credible. I stress that it would have been most interesting to hear the appellant's in-laws' testimony in this regard. The appellant could have produced them as witnesses to corroborate his and his mother's testimony. He did not do so and I infer from this that their evidence would have been unfavourable to him.

[14] Let us now apply subsection 160(1) of the *Act* to the facts in this appeal. Paragraph 160(1)(*e*) of the *Act* is actually the relevant provision here. In terms of the two conditions required for this paragraph to apply, there is no doubt that both have been met. The first condition has been met as the cheque for $10,000 drawn on Ms. Gitelman's bank account and payable to her son was a gift of that amount from mother to son. Ms. Gitelman divested herself of ownership of this amount and the amount vested in her son. I am consequently of the opinion that there was a transfer within the meaning of section 160 of an amount of $10,000 from Ms. Gitelman to her son, and that this transfer occurred in 1998. The second condition has been met since the transfer was made from the mother to her son, that is, a person with whom she was not dealing at arm's length at the time of the transfer.

[15] The following questions should now be answered: did the appellant give a consideration to his mother for the $10,000 she transferred to him on June 17, 1998, and if so, what was the FMV of this consideration? In my opinion, the appellant did not give any consideration to his mother for the $10,000 she transferred to him. The appellant consequently incurred joint and several liabilities for his mother's tax debt up to the amount of $10,000.

[16] The appellant also submitted, in the alternative, that parents have a familial obligation to pay their children's wedding costs and so his mother wrote him a cheque for $10,000 to fulfil this obligation. It is my view that there is no legal obligation for a parent to pay the costs of that parent's child's wedding. In some cultures parents may have such a social or familial obligation in that regard.

However, an obligation of that nature certainly cannot be characterized as a legal obligation in Canada. Accordingly, I am of the opinion that the argument that his mother wrote him a cheque for $10,000 to meet an obligation she had towards him has no merit.

[17] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 12th day of October 2007.

"Paul Bédard"

Bédard J.

CITATION:	2007TCC544
COURT FILE No.:	2006-1900(IT)I
STYLE OF CAUSE:	Jason Gitelman v. Her Majesty The Queen
PLACE OF HEARING:	Montreal, Quebec
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APPEARANCES:

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Counsel for the Respondent:	Vlad Zolia

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