

Docket: 2011-1635(IT)G

BETWEEN:

ELEANOR MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on January 9, 2013 at Toronto, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: David Piccolo  
Jonathan Crangle (Student-At-Law)

Counsel for the Respondent: Stan W. McDonald

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**JUDGMENT**

The appeal with respect to the Notice of Assessment dated July 25, 2008 is allowed and the reassessment is vacated.

It is also ordered that the parties shall have 30 days from the date of this Judgment to file and serve their written submissions on costs in accordance with the Reasons for Judgment.

Signed at Montréal, Québec this 4<sup>th</sup> day of February 2013.

"Patrick Boyle"

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Boyle J.

Citation: 2013 TCC 38  
Date: 20130204  
Docket: 2011-1635(IT)G

BETWEEN:

ELEANOR MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Boyle J.

[1] This is an appeal by the Appellant, Eleanor Martin, of a section 160 transferee liability assessment in respect of transfers allegedly made to her without consideration by her late husband at a time when he was in arrears in his taxes. Two appeals, that of the Appellant and that of her late husband's estate, were to be heard together over two days. The parties filed a Partial Joint Statement of Facts which is appended hereto. Early on the first day the parties communicated that the estate's appeal had been settled and consented to judgment in accordance with that settlement. The hearing of the Appellant's appeal did not require a full day.

[2] Mrs. Martin is an elderly woman at this stage. She holds a university degree. In spite of her age and the long period of time to which her testimony related, I accept generally that all of her evidence is correct to the best of her recollection of the events and conversations she participated in, and what she was told. Her credibility was not challenged, her version of the events is largely consistent with the written evidence presented (especially on the significant issue of having been told very clearly different things by the Canada Revenue Agency ("CRA") auditor in writing than orally on the material issue of the salary paid to her as described below). I accept fully her version of the events.

[3] It is the Appellant's position that the section 160 reassessment ignores the consideration she provided for the amounts transferred in the form of services provided in his medical practice, and of premises made available to his medical practice.

[4] It is her position that (i) she was owed for accrued unpaid work prior to the years of her husband's tax arrears and the transfers, and (ii) that she had been unpaid for certain work, and underpaid for other years, during the years of her husband's transfers to her while he had unpaid tax debts. The CRA has recognized the latter unpaid years at the Objections level for years during which her husband made transfers to her. However, CRA has not made any comparable recognition for her accrued unpaid work for prior years nor for the alleged underpaid work in the latter years.

[5] The unpaid and underpaid employment work provided by Mrs. Martin to her husband's medical practice was argued as an accrued debt, as current consideration, as unjust enrichment and on a constructive trust basis relying upon the decisions of Webb J., as he then was, in *Darte v. The Queen*, 2008 TCC 66, and of Bowman J., as he then was, in *Savoie v. The Queen*, 93 DTC 552. I do not need to deal with the constructive trust arguments in the circumstances but have concerns that, unlike unjust enrichment, constructive trust is an equitable in rem claim for an interest in a property subject to the alleged trust and I fail to see how that fits the facts before me relating to unpaid services.

[6] The second consideration for the transfers put forward by the Appellant is in respect of unpaid rent for the Fenwick property of which she was the sole registered owner, had made significant financial contributions for its purchase, and which she claimed was beneficially owned only by her prior to the year in which her husband's accrued unpaid tax debts arose. She claims her husband gifted his interest in the property long prior to any tax arrears and that her husband's share of the mortgage repayments in his pre-tax debt period reflected his use of the property in those years for his professional practice.

[7] The only consideration for the transfers put forward by the Appellant are these two distinct items for services genuinely rendered to, and premises genuinely made available and used by, her husband's medical practice.

Mrs. Martin's Professional Services:

[8] Mrs. Martin was able to describe in her testimony and in her written summary her daily work duties in the years in question in considerable detail. I accept that to be entirely factual and without question. The only issue is what would have been a reasonable salary for her to have been paid for that work.

[9] This is made easier by the facts that (i) prior to the years in question, her husband had paid her a salary, some of those payments were challenged by CRA on audit, and CRA set out in a letter following its audit what it felt the reasonable arm's length value for the services rendered was, and (ii) in two of the six years in question Dr. Martin paid his wife a salary.

[10] CRA's written audit letter sets the arm's length value of Mrs. Martin's services at \$30,000 for the year 1989 rising by \$2,000 per year to \$36,000 for 1992. The salary set by Dr. Martin, deducted by him and included in Mrs. Martin's income in 2001 and 2002 was \$25,000 and \$24,700.

[11] I do not accept that the more recent \$25,000 or \$24,700 number should govern. It is not at all unusual within family businesses for salaries to be lowered to below market to reflect the then current capital needs, cash flows, or other financial performance or realities of the business. Also, it undoubtedly reflected a balancing of CRA wrongly telling them nothing was deductible and their accountant then telling them that CRA was wrong.

[12] Judicial determination after the fact based on evidence available and presented can not be expected to fix an entirely accurate and correct amount. After considering the evidence before me, including the possible explanations for both sets of numbers, the services rendered, Mrs. Martin's accrued experience before 1995 in managing her husband's practice, the effects of inflation on salaries, et cetera, I find that for each year in the period 1995 to 2004 the reasonable amount of salary which would have been paid in an arm's length relationship would have been \$38,000 annually.

[13] Dr. Martin made transfers to his wife while he had an unpaid tax liability during the six years 1999 to 2004. For the years 1999, 2000, 2003 and 2004, the Respondent only recognized consideration of \$100,000 (\$25,000 annually). I therefore find additional unrecognized consideration from her to him of \$52,000 during this period.

[14] For the 2001 and 2002 years in which she was paid \$25,000 and \$24,700 annually during this period I similarly find additional consideration of \$26,300.

[15] With respect to the prior unpaid years I find that, in the four years (1995 to 1998) prior to the husband's transfers to her while he had tax arrears, that she had provided services to him worth \$38,000 annually and that she was therefore owed \$152,000 by him at the time of the transfer. The Respondent's position was that the accrued amount for unpaid services for the prior period was not relevant since it predated the years the husband had tax arrears and made transfers. For this reason it did not give any credit or assign any recognizable value to this. There is no apparent reason for this inconsistency. Had Mrs. Martin loaned Dr. Martin money in the period, that was settled by the later transfers, that would be valuable consideration for section 160 purposes. I see no reason to treat her unpaid services during the years immediately preceding the transfers any differently than her unpaid services in the years that the transfers occurred. Nor when pressed, could counsel for the Respondent articulate one to the Court. CRA had correctly reassessed her following her Objection to allow this for the later years; this was done on a principled basis and not as a settlement. At the time Dr. Martin transferred money to her, she had a claim for unpaid services she had performed for his business. That amount was four years at \$38,000 or \$152,000 which should also be recognized.

#### Fenwick Property Rentals:

[16] I find on the evidence presented that Mrs. Martin paid at least 25% of the Fenwick property acquisition cost. The proceeds of the sale of the Australian home which they owned jointly and for which she paid at least one-half of the mortgage was used to finance the Fenwick property down payment. Mrs. Martin had also gone back to work in the years 1986 through 1988 while they were still living in the Fenwick property so that the family could save money to repay the mortgage on the Fenwick property on an accelerated basis. Mrs. Martin was the sole registered owner of the house and I therefore find that she had at least a 25% ownership of the house. Rent paid in years prior to 1995 had also been the subject of the earlier CRA audits of Dr. and Mrs. Martin. It can be noted that in the CRA audit previously discussed, the CRA's final position was described as her having a 25% ownership in the property and not the 100% ownership previously claimed. I do not need to decide if she was the 100% beneficial owner in order to vacate this assessment.

[17] The house was used entirely by her husband as a medical office in all of the relevant years.

[18] There is little evidence available to me regarding the fair market value rent which should have been paid in the years in question. The amount of rent previously

paid to a commercial landlord for her husband's medical practice was approximately \$2,500 a month. This is the amount that was paid and deducted in those prior years.

[19] Being conservative to account for possible differences between the commercially rented premises and the converted home as to size, services included, utilities included and the like, I can conservatively estimate that the fair market rental value of the Fenwick property in the years in question was at least half of the approximately \$30,000 annually that had until then been paid to the commercial landlord for nearby premises for a similar use. Her share of the unpaid rent assuming only a 25% ownership would be \$3,750 per year over the ten unpaid rental years in question (being 1995 through 2004). This amounts to a further \$37,500 of consideration from her for the transfers by her husband. This would be the total unpaid rents owing to her for the years 1995 through 1998 before he fell into tax arrears and for the years 1999 through 2004 during the period he made transfers to her.

[20] In total I have found at least an additional \$267,800 of consideration from Mrs. Martin to Dr. Martin for the transfers. That is sufficient to allow the appeal and to vacate the assessment.

[21] As mentioned above there is some considerable concern raised by the CRA correspondence with Dr. Martin and the Appellant in relation to the 1994 resolution of the prior audit of 1990 to 1992. There is a shocking difference between what CRA communicated in writing regarding the acceptable reasonable arm's length salary to be paid to Mrs. Martin for her work at her husband's dermatology practice, and what has now been confirmed by CRA to have been told to the Martins by that CRA auditor. This is not a case of a CRA auditor writing something incorrect or stating something incorrectly. It appears that it can only be considered to have been intentionally deceitful. Such actions by public servants are entirely inexcusable. The Court is very surprised that the CRA would in these circumstances have pursued its section 160 case against Mrs. Martin with such vigour given that the deceit related precisely to the most significant issue in this case being the worth of Mrs. Martin's services to her husband's practice. The Court has accepted Mrs. Martin's version that in 1994 the auditor told them in relation to the resolution of both her and her husband's audits that he could no longer deduct any portion of any salary he chose to pay her. The CRA has since acknowledged in writing that in fact that was what they were told, notwithstanding what the same auditor wrote. According to the Appellant this is what led her to continuing to work for her husband but to not be paid for the years prior to the years of her husband's tax arrears and transfers to her, and to be paid a much lesser amount in some of the later years after her husband's business

accountant advised them that a reasonable salary was in fact properly deductible and always had been. I accept this explanation fully and believe this reinforces overall Mrs. Martin's credibility.

[22] The appeal is allowed and the assessment is vacated.

[23] I will allow 30 days to receive written submissions from the parties on costs. I would ask to be told by the Appellant what the total amount of Mrs. Martin's legal costs have been in this appeal. I would ask to be told by the Respondent what the date was of CRA's confirmation (referred to in the Report on Objection dated June 20, 2008) that the Martins were clearly misled at the conclusion of the 1994 audit.

Signed at Montréal, Québec this 4<sup>th</sup> day of February 2013.

"Patrick Boyle"

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Boyle J.

# Appendix

**2011-1635(IT)G**

**TAX COURT OF CANADA**

**BETWEEN:**

**ELEANOR MARTIN**

**APPELLANT**

**-and-**

**HER MAJESTY THE QUEEN**

**RESPONDENT**

## **PARTIAL JOINT STATEMENT OF FACTS**

The Appellant and the Respondent, by their solicitors, admit the truth of the following facts with respect to the above appeals in conjunction with any other evidence put before the Court, provided that such admissions are made for the purpose of this proceeding and any appeal there from:

1. By Notice dated September 28, 2006, the Minister of National Revenue (the “Minister”) assessed the Appellant in the amount of \$614,892.00 in respect of transfers of property to the Appellant pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended (the “Act”).
2. The Appellant filed a valid Notice of Objection on November 16, 2006.

3. By Notice dated July 25, 2008, the Minister reassessed the Appellant in the reduced amount of \$175,314.00 pursuant to section 160 of the Act, the specifics of which are as follows:

	Card Payments	Home Maintenance	Lump Sums	Total
Previously assessed	\$199,700	\$56,482	\$358,710	\$614,892
<i>Adjustments:</i>				
1-Salary for 2001 was paid in 2002 and had been reported in her income			-25,000	
2-Allowance for unpaid secretarial services the taxpayer rendered for 1999, 2000, 2003 & 2004			-100,000	
3-Home maintenance payments in satisfaction of Julius Martin's civil obligation to his wife and family		-56,482		
4-Purchases made on behalf of Julius Martin for family expense: groceries, clothing, gifts, vet expenses	-151,560			
5-Payments of Julius Martin's medical bills, funeral expenses and other debts			-106,536	
<b>Revised assessment</b>	<b>\$48,140</b>	<b>\$0</b>	<b>\$127,174</b>	<b>\$175,314</b>

4. The Appellant filed a valid Notice of Objection to the July 25, 2008, Notice of Reassessment on November 24, 2009.
5. By Notice of Confirmation dated February 22, 2011, the Minister confirmed the Reassessment.
6. At all material times the Appellant was the spouse of Julius Martin ("Dr. Martin").
7. At all material times, the Appellant was not dealing at arm's length with Dr. Martin.

8. In 1979, the Appellant and Dr. Martin moved into a property on Fenwick Street (the “Fenwick Property”) which was registered in the Appellant’s name.
9. In the 1985 taxation year, Dr. Martin began practicing as a specialist dermatologist in Halifax, Nova Scotia, and the surrounding areas.
10. In the 1987 taxation year, Dr. Martin purchased a house in Halifax on South Street and registered the legal title in the Appellant’s name.
11. Dr. Martin paid the utilities, taxes and other expenses associated with maintaining the South Street home, including the Appellant’s credit card charges.
12. Dr. Martin made lump-sum payments to the Appellant from time to time.
13. In the 1987 taxation year, the Fenwick Property was converted to house Dr. Martin’s medical practice.
14. Dr. Martin travelled to various clinics in various towns in Nova Scotia, including Dartmouth, Sackville, Bridgewater, Lunenburg, Kentville, Truro, Glace Bay and Digby to treat patients in need of his specialty.
15. In the 1987 taxation year, the Appellant began to assist Dr. Martin with his medical practice and was paid for her services.
16. The Appellant assisted Dr. Martin in the operation of all his clinics.
17. In the 1994 taxation year, the Minister completed an audit of Dr. Martin’s 1990, 1991 and 1992 taxation years. The audit reviewed certain deductions claimed by Dr. Martin including the salary paid to the Appellant in those years.
18. For the 1995 through to the 2000 taxation years and for the 2003 and 2004 taxation years, the Appellant did not receive employment income for her services rendered to Dr. Martin’s medical practice.

19. For the 2001 and 2002 taxation years, the Appellant did receive employment income for her services rendered to Dr. Martin's medical practice in the amounts of \$25,000.00 and \$24,700.00 respectively.
20. On December 3, 1999, notices of reassessment for the 1990 and 1991 taxation years were issued to Dr. Martin reducing the amount of net tax assessed for those years.
21. On May 24, 2005, Dr. Martin passed away due to cancer.
22. Between January 1, 1999 and December 31, 2004, Dr. Martin transferred property to the Appellant in the total amount of \$614,892.00 in the form of credit card payments, home maintenance payments and lump-sum payments.
23. Of the amount transferred by Dr. Martin to the Appellant, \$125,000.00 was payment of employment income for clerical services rendered to Dr. Martin's medical practice.
24. The aggregate of all amounts that Dr. Martin was liable to pay under the Act in or in respect of the 1999, 2000, 2001, 2003, 2004 and 2005 taxation years was not less than \$1,129,563.82 as of September 18, 2006, subject to the outcome of the corresponding appeal by the Estate of Julius Martin also currently before the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, in the Province of Ontario, this 9<sup>th</sup> day of January, 2013.



David Piccolo  
Counsel for the Appellant

DATED at Halifax, in the Province of Nova Scotia, this 9<sup>th</sup> day of January, 2013.



Stan W. McDonald  
Counsel for the Respondent

CITATION: 2013 TCC 38

COURT FILE NO.: 2011-1635(IT)G

STYLE OF CAUSE: ELEANOR MARTIN AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 9, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: February 4, 2013

APPEARANCES:

    Counsel for the Appellant: David Piccolo  
    Jonathan Crangle (Student-At-Law)

    Counsel for the Respondent: Stan W. McDonald

COUNSEL OF RECORD:

    For the Appellant:

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