Docket: 2018-4085(IT)I

BETWEEN:

SHARNELL R. MUIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 6, 2020, at Vancouver, British Columbia

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Kalev A Anniko
Counsel for the Respondent: Kiel Walker

JUDGMENT

The appeal from the section 160 assessment made under the *Income Tax Act* which bears number 4099224, is allowed and that assessment is vacated with costs in accordance with the attached reasons for judgment.

If there is no agreement as to costs, the parties may file written submissions of no more than ten pages each within 30 days.

Signed at Toronto, Ontario, this 22nd day of January 2020.

"Patrick Boyle"

Boyle J.

Citation: 2020 TCC 8
Date: 20200122
Docket: 2018-4085(IT)I

BETWEEN:

SHARNELL R. MUIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] This informal appeal is from a section 160 assessment of the Appellant in respect of an amount transferred to her by a corporation of which she was the sole shareholder and director.

[2] Ms. Muir is a dentist. She carried on her practice through a professional corporation and at least one other corporation. In January 2013 all of the assets of her dental practice were sold to another dentist who was at arm’s length.

[3] Ms. Muir was her only witness. The Crown did not call any witnesses. Ms. Muir was a credible and reliable witness.

[4] All of the assets of Dr. S. Muir Inc. (the “Corporation”) were sold by that Corporation. The sale price was $1.2 million dollars. On closing on January 13 the Corporation’s law firm paid out of that amount received from the purchaser an equipment lessor’s early buyout, a dental centre loan, “Corporate Visas” (I do not know if they were those of the Corporation or another partnership or entity involved in the practice), its legal fees and employee wages vacation pay and termination pay, among other things. These payments totaled nearly $1.1 million dollars. The remaining amount of $124,000 was paid to the Appellant. All of these payments were made in accordance with a Direction and Authority to Pay dated January 4, 2013, addressed to the seller’s law firm and signed by Ms. Muir, the Corporation and another of her corporations.

[5] Ms. Muir's evidence is that the amount of $124,000 was transferred to her to allow for an easy, efficient and cost effective distribution of that amount to others to whom the Corporation owed the money, including the return of 'in trust' amounts held for patients, mostly those with ongoing orthodontic treatments underway. She said she discussed this with her same lawyer and that he was aware of her commitment, obligation, agreement, reasons, and intent to use the money for that purpose. She did in fact use all of the money for that purpose beginning the day after closing. The Crown does not dispute that all of the $124,000 (and about $1,000 more) was paid as described by Ms. Muir to former patients (about 2/3) and to creditors. In addition to the former patients 'in trust' amounts, creditors of the Corporation such as Workplace Safety, CRA for HST owing and source deductions, lab fees, Purolator and Mastercard were paid. None of these were personal. They all related to the dental practice.

[6] At the time Ms. Muir distributed the $124,000 to the former patients and creditors, she was unaware of any tax debt of the Corporation and had no reason to expect there would be one. The Corporation was first assessed the tax debt in question in late June of the following year. The Crown admitted that it did not take issue with the fact Ms. Muir would have been unaware of a potential tax debt in 2013. The Corporation was reassessed for the amount giving rise to the tax debt in late June 2014 and Ms. Muir's section 160 assessment was issued mid-november 2016. I do not know what gave rise to the Corporation's tax debt.

[7] The sale closed on January 13. On January 14 the $124,000 was deposited in Ms. Muir's BMO line of credit account (the "BMO LC"). On that same day $100,000 was transferred by her from the BMO LC account to a new account Ms. Muir opened at TD Bank to be used, and in fact used, solely to make payments to former patients and the creditors in question. On January 14 she also started writing cheques to former patients or their new dentist (whether the buyer or another dentist). The BMO and TD records are in evidence. Ms. Muir could explain them. She also had the cancelled cheques with her in the witness box and could line them up with the statements. This certainly corroborates Ms. Muir's testimony that she bound herself to her corporation to do this.

[8] More patients with 'in trust' amounts than expected decided not to continue with the buyer and wanted amounts paid to a new dentist of their choosing or to be refunded. This made things somewhat more difficult as Ms. Muir had expected to be releasing most of the money to the buyer upon her former clients' instructions. In an email of January 23, her lawyer suggests it is in her best interest to deal with each of the ortho patients and give them refunds directly and they can then decide

where they want to go to complete their treatment. This email exchange further corroborates Ms. Muir's testimony that on closing the lawyer acting for her and her corporations was aware that the $124,000 was to be disbursed as she described in evidence, which in turn is consistent with and corroborates her explanation that it would be easier and cheaper for her to attend to the payments alone than to pay her lawyers, accountants or others to process the payments, which they could not do in any event without consulting her on the patients' and creditors' claims.

[9] The only evidence that the Crown disputes is Ms. Muir's statement that she agreed to, committed to, bound herself or was obligated to use all of the $124,000 to make the payments to the former patients and creditors.

[10] The Crown describes this as nothing more than a moral obligation or personal decision, and put it to Ms. Muir that she did not decide to do that until after she found out patients were not continuing with the buyer or were having to pay more than her original estimate to the buyer, and that this caused her to feel sorry for them and to start making refunds. The latter half of this position makes no sense and is inconsistent with the evidence that she began to refund a number of patients the day after closing. The latter half is also not supported by Ms. Muir's late February letter to the BC Dental Association. That letter is not inconsistent with her testimony that at closing she was not concerned about protecting her patients 'in trust' amounts from other creditor's claims.

[11] The Crown explained that what it meant by a moral obligation was simply that it was a personal discretionary decision of hers to spend the $124,000 in this manner because she was not legally obligated to do so.

[12] The Crown did not put forward any evidence to contradict Ms. Muir nor did her answers to questions about any material aspect of the $124,000 change when she answered questions about it in cross-examination.

[13] The Crown did in argument raise two points about her answers to questions on other topics in cross-examination that it believes goes to Ms. Muir's credibility.

[14] The first is that when asked in a phone call from CRA in the Fall of 2015, if she would voluntarily pay the Corporation's tax debt, she replied that she did not recall how she answered it in that particular call but that over a period of time CRA would certainly have been aware that she wasn't paying it voluntarily nor upon receiving the section 160 assessment in question. The Crown says it was not reasonable to believe she does not remember how she answered the first call for a

$20,000 dollar tax debt seven years earlier and for that reason her overall credibility should be questioned. I do not agree. The Crown did not put in evidence what CRA says her answer was at the time. Whatever the taxpayer's answer in that call may have been, it does not affect the substantive merits of whether the section 160 assessment is valid. A lot can happen in a person's life over a seven year period that would cause them not to recall the answer they gave to an inbound call from CRA. I would not necessarily expect all Canadians to remember how they would have answered such a call unless the answer was extreme, such as agreeing readily to pay it and afterwards perhaps after spending money consulting a professional, realizing it was a voluntary payment that CRA was asking about or, at the other extreme, an answer involving colorful language followed by the telephone handset being slammed into the cradle. Further, the topic is quite distinct from the substantive issue in this case and those aspects of Ms. Muir's testimony. Had she recalled her answer, regardless of what it was, it does not appear it could help me decide this case on its merits.

[15] The Crown's other general credibility concern was that Ms. Muir could not recall why her accountants recommended the use of a professional corporation for her dentistry professional practice decades ago when incorporation was first permitted. She did not venture a guess or any general comments about limited liability, estate planning, retirement planning and deferred or reduced taxes or fees. The Crown thinks this damaged her overall credibility and I should have doubts about her oath to give truthful answers. Again, I do not agree. While I would expect many dentists or other non-lawyer, non-tax professionals could give a general answer if asked what the benefits of a professional corporation are, I doubt any would remember the details of what they were told the first time they were told about professional corporations. In any event Ms. Muir was not asked that general question. More importantly, I have, personally and professionally, been involved with enough dentists, doctors, veterinarians, real estate sale agents etc. to know that it would be unreasonable to expect anything close to all of them to be able to tell me what they understood the benefits of a professional corporation are – much less to get it correct. Ms. Muir was candid in her testimony about what she could not recall and her hesitancy to guess. These were not the only two questions she could not recall the answer to. Again, this is not a question the answer to which would help me decide the merits of the case. It does not cause me to doubt her willingness to give truthful answers to questions asked under oath, nor does it cause me to doubt her testimony about why the $124,000 was transferred on closing to her for prompt distribution, especially given the corroborating evidence.

[16] The Crown highlights the fact that Ms. Muir deposited the extra $124,000 received from the Corporation upon receiving it into her BMO LC account and transferred $100,000 of it into the new TD account. The $24,000 left in her BMO LC account briefly reduced her overdraft/line of credit in that account and resulted in a savings to her personally of the interest that she would have otherwise incurred on her overdraft/line of credit amount. It does not in any way effect the fact she promptly used all of the $124,000 to repay patients and creditors of the Corporation and her dental practice as described above. The patients and creditors are virtually unaffected by this. The result to them is the same as if she had placed the money in her cookie jar, under her mattress, or in a non-interest bearing chequing bank account. I see this as peripheral and unrelated to the substantive issues to be decided. This does raise a distinct shareholder benefit question that is not before this Court and appears to be well out of time to ever get here. Nor do I see how it could effect Ms. Muir's credibility with respect to the evidence she gave this Court: the overdraft/line of credit reduction was obvious from the documents in evidence, she described the account as her line of credit account, and she readily acknowledged the interest saving to her during the distribution period. Further, the evidence shows that the amount distributed for patient 'in trust' amounts that exceeded the $124,000 she received from the Corporation, also came out of this BMO LC account; this amount would offset to that extent any interest savings she may have personally enjoyed which from the statements would be quite modest in any event.

[17] In *The Queen v. Livingston*, 2008 FCA 89 the Federal Court of Appeal set out the four key criteria to determining if section 160 applies. They are:

> [17] In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:
>
> 1) The transferor must be liable to pay tax under the Act at the time of transfer;
>
> 2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
>
> 3) The transferee must either be:
>
> > i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;
> >
> > ii. A person who was under 18 years of age at the time of transfer; or

iii. A person with whom the 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.

[18] The first three are clearly satisfied by the facts of this case. The only issue before this Court is the fourth requirement outlined in *Livingston* – whether the Corporation received full consideration for the amount transferred to Ms. Muir.

[19] I find that the $124,000 was transferred by the Corporation to Ms. Muir upon the sale of her dental practice subject to the requirement that all of it be promptly used to refund patients 'in trust' amounts and to repay creditors.

[20] This condition was intended and understood by the Appellant and the Corporation, and was promptly and fully complied with by Ms. Muir with respect to the full amount received. In addition to my conclusion that she bound herself to such arrangement, I would note that it appears her patients and the Corporation's creditors would have had legal rights to trace any of the monies involved had the Corporation transferred it to her for any other purpose or had she used it for any other purpose. This was not a discretionary, personal, moral decision she made as to how she spent money available to herself personally in her unfettered discretion.

[21] Section 160, and similar provisions in other tax legislation, have been properly described as having results that appear harsh and draconian in some taxpayer's circumstances. That is the result of its scope and breadth and was intended and understood by Parliament when it was enacted to protect the integrity of the Canadian tax system, and this is not a reason to not apply section 160 as worded and as interpreted by the Federal Court of Appeal. I wholly agree and endorse that both as a statement of the law and on a regular basis in tax appeals before this Court. However, I am not aware of any case which said this law can be nonsensical. I tried to make it clear in *Gambino v. The Queen*, 2008 TCC 601, that I did not think that section 160 as interpreted by *Livingston* could be applied in the circumstances where it would have completely nonsensical results:

> IV. Analysis
>
> [19] There are four conditions to be met for subsection 160(1) to apply. These were set out in *Williams v. Her Majesty the Queen*, 2000 D.T.C. 2340 and approved by the Federal Court of Appeal in *Raphael v. Her Majesty the Queen*, 2002 D.T.C. 6798 which upheld the decision of Justice Mogan of this Court. They are:

> 1) There must be a transfer of property;
>
> 2) The transferor and transferee are not dealing at arms length;
>
> 3) There must be no consideration or inadequate consideration flowing from the transferee to the transferor; and
>
> 4) The transferor must be liable to pay an amount under the *Act* in or in respect of the year the property was transferred or any preceding year.

[20] These same four requirements are set out, albeit in different order and words, by the Federal Court of Appeal in *Livingston*.

…

[23] With respect to the third requirement for consideration, it is the taxpayer's position that if there was a transfer of property, sufficient consideration was given by the mother when she promptly did as asked in giving him the cash and in paying off his loan from her.

[24] As stated, the Crown relies heavily on the Federal Court of Appeal's decision in *Livingston*. However, it should be noted that the facts in *Livingston* were quite different from those here. In that case, a scheme was developed with the intention to hide assets in order to avoid creditors and the parties had in fact conspired to prejudice CRA. While this is not a precondition to the application of section 160, the Court of Appeal described it as a "crucial fact" for purposes of the *Livingston* appeal. That knowledge and intention was not present here. The Court in *Livingston* says at paragraph 19 that such knowledge and intention can be relevant in valuing the adequacy of the consideration given.

[25] In *Livingston* the transferee set up a bank account into which the tax debtor could deposit her cheques. The transferee made available to the tax debtor the only bank card for the account and gave her signed blank cheques so the tax debtor could withdraw and use the account as her own and did so over time. Bank statements were sent to the tax debtor.

[26] In *Livingston*, the Court describes the purpose of subsection 160(1) at paragraph 27 as follows:

> Under subsection 160(1), a transferee of property will be liable to the CRA to the extent that the fair market value of the consideration given for the property falls short of the fair market value of that property. The very purpose of subsection 160(1) is to preserve the value of the existing assets in the taxpayer for

> collection by the CRA. Where those assets are entirely divested, subsection 160(1) provides that the CRA's rights to those assets can be exercised against the transferee of the property. However, subsection 160(1) will not apply where an amount equivalent in value to the original property transferred was given to the transferor at the time of transfer: that is, fair market value consideration. This is because after such a transaction, the CRA has not been prejudiced as a creditor. Applying such principles to the case at bar, it is clear that the transaction between Ms. Davies and the respondent left Ms. Davies without anything equivalent to the property transferred that could be collected by the CRA, and thus there couldn't possibly be consideration.

[Emphasis added]

> [27] The Court had earlier referred at paragraph 18 to its statement in *Medland v. Her Majesty the Queen*, 98 D.T.C. 6358 that "the object and spirit of subsection 160(1) is to prevent the taxpayer from transferring property to his spouse [or to a minor or non arm's length individual] in order to thwart the Minister's efforts to collect the money which is owed to him".

[22] While the Federal Court of Appeal summary of the four section 160 requirements in *Livingston* are broadly worded, they were written in reasons that make it clear that the arrangements to transfer the money in that case were put into place by the transferee of the money to assist the transferor to have the opportunity to keep them out of creditors' reach including CRA. In contrast, it is not just that I find the purpose, agreement and distribution was to more easily and inexpensively distribute the money to those with rightful claims to it, in this case CRA would be in absolutely no different position with respect to the Corporation's unpaid taxes then had the Corporation not distributed the money to the Appellant first, but had itself directly made the identical distributions to the patients of their 'in trust' amounts and to the other legitimate suppliers, debts and creditors of the Corporation, or even if the Corporation had left the funds with its lawyers with directions to make such same distributions following closing. I do not accept that it was the intention of Parliament or the Federal Court of Appeal in *Livingston* to have section 160 apply in circumstances where CRA not only wasn't but could never be, nor did the transferor or transferee attempt to place CRA, in any different position whatsoever as a result of the transfer.

[23] The appeal is allowed and the section 160 assessment is vacated, with costs. If the parties cannot agree on costs within 30 days they may file written submissions of no more than ten pages each.

Signed at Toronto, Ontario, this 22nd day of January 2020.

"Patrick Boyle"

Boyle J.

CITATION:	2020 TCC 8
COURT FILE NO.:	2018-4085(IT)I
STYLE OF CAUSE:	SHARNELL R. MUIR AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 6, 2020
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	January 22, 2020

APPEARANCES:

Counsel for the Appellant:	Kalev A Anniko
Counsel for the Respondent:	Kiel Walker

COUNSEL OF RECORD:

For the Appellant:

Name:	Kalev A Anniko
Firm:	Gehlen-dabbs Vancouver, British Columbia
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada