

ADDITIONAL DEFENCES TO TAX ASSESSMENTS ARISING FROM CONVEYANCES OF ASSETS TO RELATED PERSONS - PART 2

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm about additional defences which can be successfully used to deal with assessments issued in respect of non-arm's length property transfers pursuant to section 160 of the Income Tax Act (the "Act"). Alpert Law Firm is experienced in providing legal services to its clients in tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions and estate administration.

A. GIVING CONSIDERATION OR PAYING FAIR MARKET VALUE

Pursuant to subparagraph 160(1)(e) of the Act, in the case of any transfer to any of the non-arm's length persons specified in subsection 160(1) of the Act, the transferor and transferee are *jointly and severally liable* for either the income tax liability of (i) the transferor at the date of the transfer or (ii) for the value of the property the transferee received less any *consideration* paid, whichever is less.

Thus, if a taxpayer can prove that consideration was paid towards the transfer of the asset, then the Court will take into account the amount of consideration paid in calculating the assessment against the taxpayer for the purposes of subsection 160(1) of the Act. Furthermore, if fair market value is paid by the transferee for the transfer of the property then the transferee will not be jointly and severally liable for the income tax liability of the transferor under subsection 160(1) of the Act.

Case law has indicated that consideration can be given, not only in the form of direct payment to the transferor, but also in the form of credit owing to the transferee (i.e. the transferor owes a debt to the transferee).

B. BASIS OF ASSESSMENT

The Courts have stated that a transferee who is assessed under section 160 of the Act has the right to challenge the *bona fides* of the Minister's claim, i.e. challenge the Minister's claim that the transferor actually had a tax liability at a particular point in time. The assessed transferee has available all the rights of any taxpayer, including the opportunity to dislodge the basis for the liability.

Courts have also found that a transferee who has been assessed vicariously liable under section 160 of the Act can challenge the transferor's liability, irrespective of whether the transferor has appealed his own assessment within the time period allowed.

Recent case law has extended this principle further. More specifically, a transferee who is assessed under section 160 of the Act, still maintains the right to question the transferor's initial assessment and liability as a challenge to the transferee's own appeal, even when the transferor's tax liability has already been determined by another Court.

C. TRANSFERS UNDER A COURT ORDER OR SEPARATION AGREEMENT

Pursuant to subsection 160(4) of the Act, there is an exemption from joint and several liability under subsection 160(1) of the Act where the property is transferred (i) pursuant to a Court order or a written separation agreement and (ii) at a time when the taxpayer and his spouse or common-law partner were living apart as a result of the *breakdown* of their marriage or common-law partnership. In such limited circumstances, the tax liability from the property transfer would fall solely on the transferor, excluding the transferee (i.e. the spouse or common-law partner) from joint and several liability. As a result, if the taxpayer is able to show that they acquired the property as a result of a transfer under a court order or separation agreement, they will also avoid tax liability.

Recent case law has shown that Courts use subsection 160(4) of the Act as an exclusion from joint and several liability espoused in subsection 160(1) of the Act.

This issue of the Legal Business Report is designed to provide information of a general nature only and is not intended to provide professional legal advice. The information contained in this Legal Business Report should not be acted upon without the further consultation with professional advisers.

Please contact Howard Alpert directly at (416) 923-0809 if you require assistance with tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions or estate administration.

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