

Muir: Applying Section 160 When the Minister's Collection Powers Have Not Been Stymied

Muir v. The Queen (2020 TCC 8), an informal procedure decision, is an appeal from a November 2016 assessment by the minister under which the appellant—a dentist who practised through the vendor, a professional corporation, and at least one other corporation—was assessed pursuant to section 160 in respect of certain funds transferred to her by the vendor. Although the decision has no precedential value, it provides some interesting comments on section 160 and its application.

On January 13, 2013, the vendor sold all of its assets to another dentist who dealt at arm's length with the vendor for sale proceeds of \$1.2 million. Pursuant to a signed direction and authority to pay, the vendor's law firm paid about \$1.1 million of the proceeds to discharge various obligations of the vendor, including business loans, legal fees, employee wages, vacation pay, termination pay, and an equipment lessor's early buyout fee.

On January 14, 2013, the vendor's lawyer paid \$124,000 ("the funds") directly to the appellant.

On January 14, 2013, the funds were deposited into the appellant's bank line of credit account; on the same day, the appellant transferred \$100,000 to a new bank account and

used it solely to make payments to former patients and the vendor's creditors.

According to the appellant's testimony, the funds were transferred directly to her to allow for the efficient and cost-effective distribution of amounts to persons to whom the vendor owed money (principally the return of in-trust amounts held for the vendor's patients).

The TCC found the appellant to be a credible and reliable witness. The court also held that all of the funds were in fact paid to former patients and to creditors. Boyle J found that the appellant's bank records and cancelled cheques corroborated her testimony that she had bound herself to the vendor to pay the persons to whom the vendor owed money. At the time the appellant paid out the funds, she was not aware that the vendor had a tax debt.

The minister disputed the appellant's statement that she was obligated to use the funds to make payments to former patients and creditors and took the position that payment by the appellant was nothing more than a moral obligation or personal decision. The minister alleged that the appellant did not decide to make payments until she found out that the patients were not continuing with the buyer or were having to pay the buyer more than her original estimate, and that this caused her to feel sorry for them and to start making refunds. The minister provided no evidence to contradict the appellant. The TCC rejected the minister's attack on the appellant's credibility.

In reaching its decision, the TCC relied on *Canada v. Livingston* (2008 FCA 89), in which the court set out the four key criteria to determine whether section 160 applied:

- 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 be
 - a) 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;
 - b) a person who was under 18 years of age at the time of transfer; or
 - c) a person with whom the transferor was not dealing at arm's length.
- 4) The FMV of the property transferred must exceed the FMV of the consideration given by the transferee.

The only issue for the TCC was the fourth requirement. Boyle J held (1) that the funds were transferred by the vendor

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to the appellant upon the sale of the dental practice subject to the requirement that all of the funds be promptly used to refund in-trust amounts to patients and to repay creditors, (2) that this condition was intended and understood by the appellant and the vendor, and (3) that the appellant promptly and fully complied with the condition with respect to the full amount received. Accordingly, the appeal was allowed.

In reaching the decision, Boyle J made some comments in obiter that, in our view, seem unusual. He stated that even though section 160 and similar provisions have results that appear draconian in some taxpayers' circumstances, this was not a reason, in and of itself, not to apply section 160 as worded. However, relying on his earlier decision in *Gambino v. The Queen* (2008 TCC 601), he went on to say that he did not think that "section 160 as interpreted by *Livingston* could be applied in the circumstances where it would have completely nonsensical results."

Boyle J further stated that the arrangements in *Livingston* made by the transferee were designed to allow the transferor "the opportunity to keep [funds] out of creditors' reach including CRA." In *Muir*, however, Boyle J said that

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 [vendor's] unpaid taxes than had the [vendor] not distributed the money to the Appellant first, but had itself directly made the identical distributions. . . .

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 the transferee attempt to place CRA, in any different position whatsoever as a result of the transfer.

We are not sure why Boyle J felt the need to expound in this way regarding the application of section 160, unless he believed that the minister's assessment of the appellant was not appropriate. Boyle J held that the appellant actually had given consideration for the transfer of funds—that is, she assumed the vendor's obligations to make the payments—and allowed the appeal on that basis. Therefore, the obiter comments were, strictly speaking, unnecessary. Perhaps Boyle J's comments were intended as a warning to the minister not to raise section 160 assessments in situations where the impugned transfer did not undermine the minister's ability to collect funds to which it was otherwise entitled.

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