

## Bragg-Smith v The Queen, 2012 TCC 252

### When is a Payment Consideration for Purposes of Subsection 160(1)?

[Bragg-Smith v The Queen, 2012 TCC 252](#)

At issue was the amount the taxpayer's was liable to pay as a result of transfer of property to her by her father, pursuant to subsection 160(1) of the ITA.

The taxpayer's father owed about \$478,000.00 in taxes, and the CRA had started collections actions. The father was involved in business deal and had assigned payment of the amounts to his daughter's business. The daughter received the funds from the payor, but also paid a certain amount to a creditor of her father's.

The payment received was on account of "sludge" obtained from a supplier, being the creditor to whom the daughter made payment. The daughter was able to produce a bank draft showing that payment had been made from her account to the creditor.

The taxpayer contended that the amount she received should be reduced by the amount paid to the creditor. The Crown argued that the entire amount if the payment received should be paid on account of her father's tax liability on the basis that her payment to the creditor was not legally enforceable, and as such was not "consideration" within the meaning of subsection 160(1).

The court referred to the words of subsection 160(1) which reads:

*160.(1) 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.*

Justice Hogan identified the purpose of this subsection as preventing the avoidance of tax liability by transfer of property to a non-arm's length person. It works by making the transferee jointly and severally liable for the tax liability of the transferor up to the amount by which the fair market value of the property exceeds the consideration paid by the transferee for the property.

The Crown argued that given the lack of documentation of the agreement to pay the debt, and that the agreement was not legally binding. The Crown relied on the FCA decision in [Raphael v. The Queen, 2002 FCA 23](#), for the proposition that a moral obligation to make payment does not constitute consideration for purposes of subsection 160(1).

Justice Hogan agreed that a moral obligation would not constitute consideration, but concluded as a matter of fact that the taxpayer's had entered into a legally enforceable agreement to pay the amount owed in consideration of being assigned the payment. The finding was based on the fact that materials sourced from one company were sold to another, entitling the supplier to payment, and the daughter made payment to the supplier from funds received from the buyer.