

Transfer & Separated Spouses at Arm's Length - Sas Ansari

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What is a "Transfer"? Are separated but not divorced spouses dealing at arm's length?

Kiperchuk v The Queen, [2013 TCC 60](#)

The Court was faced with two issues:

1. Does the transfer of an RRSP to the designated beneficiary by operation of Provincial law all under subsection 160(1)'s phrase "transfer of property, either directly or indirectly, by means of a trust or by any other means whatever"
2. IF so, are a husband and wife who are separated but not divorced dealing at arm's length for purposes of subsection 160(1).

The TCC concluded that the word "transfer" is very wide, and for purposes of subsection 160(1) includes the passing of property by operation of provincial law to a designated beneficiary under an RRSP. However, the TCC held that at the moment of death (prior to the transfer) the marriage between parties ends, thus at the moment of transfer (immediately after death) the parties are not spouses and thus are NOT at arm's length due to marriage. Also, separated former spouses deal at arm's length, meaning that subsection 160(1) does not apply.

COMMENT

The problem with this decision is that the court did not engage with the question of whether the parties (whose marriage is brought to an end by the death of one of them) are dealing at arm's length in fact. This question was decided in a cursory manner.

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FACTS

The MNR reassessed the defendant under section 160 of the ITA. The Appellant's husband had an RRSP policy, and she was the designated beneficiary under that policy. She was made the designated beneficiary in 1990 (at a time where he was not indebted to the CRA), but her and her husband separated due to marital breakdown in 1996. Her husband dies in 2002 without a will, while the two were separated but still married. The Ontario Court had ordered her husband to not dissipate his property and to designate her as the beneficiary of his death benefits and insurance plans.

Her husband owed the CRA over \$400,000 or a number of tax years. The RRSP, to which the appellant became entitled on the death of her husband, contained about \$75,000. In 2004 she withdrew the funds from the RRSP, but had not provided any consideration for the property (the RRSP).

The MNR assessed the appellant on the basis that her former spouse had transferred property to her for no consideration on his death in 2002 (the RRSP), at a time where he was liable to pay the CRA funds owed.

The Appellant opposed the assessment, arguing that as a named beneficiary under the RRSP, the funds never formed part of the estate of her late husband, and thus creditors of the estate cannot make a claim against those funds. Also, the property of the RRSP vest in the designated beneficiary by operation of section 53 of the *Succession Law Reform Act*, RSO 1990, c S-26, thus there was no transfer of property or purposes of section 160 of the ITA.

ANALYSIS

Subsection 160(1) deals with the tax liability where property is transferred to a non-arm's length person. It requires a person to transfer property, directly or indirectly, by means of a trust or by any other means whatever, with the effect that the transferee is jointly and severally liable with the transferor to pay part of the transferor's tax to the extent that the value of the property transferred exceeds the value of the consideration given for the property.

Subsection 160(4) deals with transfers of property to conjugal partners when the transfer is pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written separation agreement (and some other conditions), and operates to exclude the application of subsection 160(1).

The Ontario Court of Appeal in *Amherst Crane Rentals Ltd. v. Perring*, (2004), 241 D.L.R. (4th)176 at 180-81 (paragraphs 37) and 185-87 (paragraphs 20-25) (leave to appeal refused, [2004] S.C.C.A. No. 430 (QL)), held that by operation of section 53 of the *Succession Law Reform Act*, RSO 1990, c S-26, the legislature had excluded RRSP's from the estates of their owners.

The Court referred to the decision of the FCA in *The Queen v. Livingston*, 2008 FCA 89, where the relevant criteria for subsection 160(1) were set out as:

[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.

The Court in *Fasken Estate v. Minister of National Revenue*, [1948] Ex. C.R. 580, at page 592 (cited with approval by *Yates v. The Queen*, [2009 FCA 50](#), *Tétrault v. The Queen*, [2004 TCC 332](#)) defined the word “transfer” as follows:

The word "transfer" is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer.

The TCC in *Montreuil v. R.*, 1994 CarswellNat 1522, [1996] 1 C.T.C. 2182, stated that a transfer includes the act of giving property under a will, and that property includes a right to property. Based on these cases the FCA held that the passage of property to a designated beneficiary constitutes a transfer of property which took place at the moment of death. The court stated:

[21] I therefore agree with the respondent that the words “directly or indirectly, by means of a trust or by any other means whatever” used in subsection 160(1) are language broad enough to capture the passing of an entitlement to an RRSP from one person to another by way of a designation

There being a transfer, the matter turned on the question of whether the parties were dealing at arm's length at the time of the transfer. The Court stated that assuming that the transferor was the former husband the parties were not related by marriage at the time she became entitled to the RRSP as "the status of marriage is ended by death or by a decree absolute of divorce (*Kindl Estate, Re 1982 CarswellOnt 340*, paragraph 10 (Ontario Supreme Court))." The Court stated:

[26] Therefore, the appellant was not related by marriage to her former husband at the time of the transfer as she was then no longer his spouse (paragraphs 251(1)(a) and 251(2)(a) of the ITA). Nor was she deemed not to have dealt at arm's length with her former husband under paragraph 251(1)(b) of the ITA, as the RRSP did not devolve to her through the estate.

The matter remained to be decided by paragraph 251(1)(c) – whether the parties were in fact not dealing at arm's length. The TCC had difficulty with the Crown's argument that the relevant time was the time that the appellant was designated as the beneficiary, as the words of subsection 160(1) read at subparagraph (e)(i) "at the time it was transferred". Thus, the relevant moment for subsection 160(1) is the time of transfer of the property. The Court then held that the parties were dealing at arm's length, thus subsection 160(1) did not apply.

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