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Issues in Law You Need To Know

When Your Tax Debt Becomes Their Tax Debt

The ability to tax means little without the ability to collect. As a result, the Income Tax Act (the “ITA”) provides a myriad of ways to collect taxes owed that would otherwise not be obtainable when taxpayers attempt to evade their creditors (Canada v. Livingston). It should come as no surprise that the Minister of Revenue (the “Minister”) will vigilantly review any transfer of property of a tax debtor at less than fair market value.



Section 160 of the ITA aims at preventing a tax debtor from transferring property to a spouse or a non-arm’s length individual in an attempt to frustrate the Minister’s efforts to collect taxes. For the Minister to issue a section 160 assessment, the following must have happened:

1. There was a transfer of property;
2. The parties were not dealing at arm’s length;
3. There was no consideration or there was inadequate consideration flowing from the transferee to the transferor (tax debtor); and

4. The transferor was liable to pay tax under the ITA at the time of the transfer.

If the above criteria are met, the transferee becomes personally liable to pay the lesser of the tax debt of the transferor or the shortfall in the consideration paid for the property. In such circumstances, the transferee is jointly and severally liable for the tax debtor’s debt and he or she can only discharge the debt by paying or by challenging his or her assessment or the tax debtor’s underlying assessment.

The typical application of section 160 is where a husband transfers

his interest in the family home to his wife, leaving himself with no assets that the CRA can seize for his tax debt. In such a case, the Minister can assess the wife for the value transferred and any of her assets can be seized for this debt - not just the transferred assets.

The comments we often hear from the transferee is “but we didn’t know there was a tax debt” or “we didn’t want to cheat the Minister.”

Although those may well be the intentions of the parties or ignorance of the tax debt will not prevent the Minister from assessing the trans-

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feree; there is no due diligence defense available.

As long as there was a transfer of property for inadequate consideration between non-arm's length taxpayers, the Minister can assess the transferee under section 160.

There is significant jurisprudence regarding section 160. Here are scenarios where a Court held that section 160 applied:

1. Where the tax debtor makes contribution to his or her spouse's RRSP;

2. If a dividend is paid by a corporation to a shareholder with which it does not deal at arm's length; or
3. To a bequest by a deceased non-resident who left Canada with taxes owing many years ago.

Furthermore, the Minister is not bound by the normal reassessment period and can assess the transferee for a transfer that occurred years ago. Also, the tax debt will not be vacated by a transferor's bankruptcy (which eliminates his

or her tax debt) because the transferee's liability arose at the time of the transfer of property.

If you contemplate transferring property to your spouse or a relative, you should seek legal advice.

If you have questions regarding this issue or any other issue pertaining to tax matters, please contact Sebastien Desmarais, Associate, Tierney Stauffer LLP at (613) 288-3220 or sdesmarais@tslawyers.ca.

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- University of Ottawa, LL.L., 2007
- University of Ottawa, LL.B., 2005
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PRACTICE SUMMARY:

Sébastien joined Tierney Stauffer LLP as an Associate in the Wills, Estates & Trusts Planning & Administrative Practice Group in 2009. His practise focuses on estate planning, will drafting and personal and corporate taxation. Sébastien has experience in resolving disputes with the Canada Revenue Agency (CRA), filing voluntary disclosures, assisting individuals with their tax related issues and tax planning for families and businesses. Sébastien is bilingual and practices in both official languages.

He has spoken at various seminars on estate, trust and tax matters. Sébastien has also appeared on radio and television discussing legal issues. He is a tutor for the Law Society of Upper Canada for the Estate Practice section.

