An Involuntary Dissolution Cannot Justify a Section 160 Assessment

In *Kvas v. The Queen* (**2016 TCC 199**), the court decided that section 160 did not apply when, as a result of an involuntary dissolution, property that had been property of a corporation became property of the former shareholders of the company. Thus, the CRA's attempt to collect the corporation's unremitted employee source deductions from the former shareholders was not successful. However, it appears that the assessment could have been valid if a transfer of property had occurred prior to the involuntary dissolution.

The case dealt with a company (CIA) incorporated by the taxpayers under the OBCA. CIA was in default in filing its corporate tax returns and was involuntarily dissolved by the government of Ontario in 2008. The taxpayers made efforts to bring CIA into compliance and revive it, but the CRA would not consent to the revival. Therefore, to record reflective dividends paid to each of the taxpayers and to reconcile the assets on CIA's balance sheet at dissolution, T5 slips were issued and revised financial statements were prepared.

In 2010, the CRA proposed section 160 assessments with respect to unremitted source deductions. A later letter from the CRA, together with the section 160 assessments ultimately issued, specifically referred to the transfer of dividends in 2008 under subsection 84(2), asserting that it constituted a transfer of property. However, the CRA conceded that the taxpayers received no benefit or money until after the dissolution date.

Section 160 applies if there is a transfer, the parties are not dealing at arm's length, there is an absence or insufficiency of consideration, and the transferor is liable for tax at the time of the transfer. Further, the transferor must perform certain actions: the commission of an act, or the execution of a document, divesting the transferor and investing the transferee with the property; the identification of some memorialized document that has the legal effect of conveyance; and the occurrence of the action at a time when the tax debt is owing. Thus, the issue was whether a company that had been involuntarily dissolved could be a transferor and transfer property within the meaning of section 160.

The court considered three sub-issues: (1) the application of subsection 84(2), (2) the effect of the notice of dissolution, and (3) whether actions occurred that constituted a transfer under section 160. On the first point, the court held that subsection 84(2) involves a more orderly and planned transaction undertaken by directors during windup than occurred in this case. On the second point, the court held that the alleged transferor did not exist after dissolution and that, absent any prior documentation, no transfer was possible after the dissolution date. On the third point, the court held that a retroactive T5 and post facto financial statements cannot create a transfer where none exists; rather, a transfer must be undertaken or effected at the relevant time by the tax debtor/transferor. Thus, section 160 could not apply. The court stressed the fact that the dissolution was not undertaken by CIA, and CIA performed no act that would factually represent a transfer of property (authorizing resolutions, declaration of dividends, etc.).

It is worth noting that Ontario-incorporated companies must annually file schedule 546 with their tax return to avoid being subject to involuntary dissolution; for federally incorporated companies, **a similar form filed separately from the tax return** is required.

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