

Docket: 2011-1382(IT)I

BETWEEN:

WARD CARSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 23, 2013, at Halifax, Nova Scotia

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Melanie Petrunia

JUDGMENT

The Appeal from the reassessment made under the *Income Tax Act* for the 2009 taxation year is dismissed.

Signed at Ottawa, Canada, this 1st day of November 2013.

"Campbell J. Miller"

C. Miller J.

Citation: 2013 TCC 353

Date: 20131101

Docket: 2011-1382(IT)I

BETWEEN:

WARD CARSON,

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REASONS FOR JUDGMENT

C. Miller J.

[1] Mr. Carson appeals by way of the Informal Procedure the Minister of National Revenue's (the "Minister") denial of his claim for a charitable donation of \$3,120 in 2009. This amount represented Mr. Carson's estimate of the fair market value of the use by Peaceful Schools International Society ("Peaceful Schools") of two rooms in his home over a two year period. Mr. Carson's wife was the President of Peaceful Schools, a registered charity. She and Mr. Carson married in 2005 although since 2001 she had been using the two rooms in her property at 5532 Granville Road in Granville Ferry, Nova Scotia for the operation of Peaceful Schools. After she and Mr. Carson married, and he moved into that residence, the rooms continued to be so used, one room for an office for Peaceful Schools and the other for storing products and supplies of Peaceful Schools. Mr. Carson's wife remained the registered owner of the matrimonial home in Granville Ferry.

[2] On March 31, 2009, Mr. Carson was issued a receipt for a donation of \$1,950 to Peaceful Schools. On December 31, 2009, he was issued a second receipt for a donation of \$1,170 to Peaceful Schools. Mr. Carson stated the receipts indicated the amounts were "in-kind – rent", though the receipts were not produced at trial. He

calculated the value of the two rooms used by Peaceful Schools to be \$130 a month, though acknowledged there was no lease nor rental agreement. He went on to say that had there been a lease, the monthly expenses for the two rooms would have exceeded the income. He did not report any income.

[3] The simple issue is whether the use by Peaceful Schools of two rooms in Mr. Carson's and his wife's home, valued at \$130 a month, represents a charitable gift from Mr. Carson to Peaceful Schools eligible for tax credits pursuant to subsection 118.1(3) of the *Income Tax Act* (the "Act").

[4] While gift is not defined in the *Act*, total charitable gifts is defined as "the total of all amounts each of which is the fair market value of a gift...". This is not a particularly helpful definition in determining what is meant by gift for purposes of the *Act*. Case law, however, has consistently held that a gift for purposes of the *Act* means a voluntary transfer of property (see for example the cases of *Friedberg v R.*¹ and *Slobodrian v Canada*²). This is certainly the position taken by the Canada Revenue Agency ("CRA") as evidenced in their IT110R3, as well as in their March 2005 newsletter where the CRA specifically addresses the issue of rent-free accommodation:

Q.8. Can a charity issue a charitable receipt to a landlord who provides rent-free accommodations?

A.8. No. One of the criteria for a gift is that there be a voluntary transfer of property. In this situation, no property is being transferred – instead, use of the building is being provided. Since no property is transferred, no "gift" is made. A tax receipt for the value of the loan of property cannot be issued.

Although the loan of property does not constitute a gift, a charity may pay rent on a property to an individual and later accept a gift of all or part of the payment, as long as the gift is voluntary. The charity may then issue a receipt for tax purposes. The donor would have to report the income earned but would be able to claim the tax relief associated with the gift.

[5] This view was also provided in response 2003-0018595 to a request to the CRA as to whether a person who allows a charity to use office space, but does not charge rent, is entitled to a charitable receipt from the charity. The CRA answered:

¹ [1992] 1 C.T.C. 1, 135 N.R. 61, 92 D.T.C. 6031.

² 2003 FCA 350.

A gift for purposes of the *Income Tax Act* requires that there be a transfer of a donor's property. Where a transfer of property constitutes a gift for tax purposes, the charity is entitled, pursuant to paragraph 3501(1)(h) of the *Income Tax Regulations*, to issue an official receipt for income tax purposes to the donor in an amount equal to the fair market value of the property at the time of the gift.

A "transfer of property" in this respect means that the donor is divested of a property and the property vested in the registered charity. A transfer of property does not include a grant of a right to use the donor's property. Moreover, it does not include a donation to the donor's services. For example, see the CCRA Charities Directorate Policy Commentary CPC-017. it is available on the CCRA website at <http://www.ccradrc.gc.ca/tax/charities/policy/cpc/cpc-017-e.html>.

[6] The CRA does not view the provision of office space, apparently even if pursuant to a lease, as a transfer of property, though would accept rent payments returned by the landlord to the charity as an appropriate charitable donation. I am not convinced that this is an accurate reflection of the law. The CRA is presuming that a legal right acquired by lease is not property, only money actually transferring hands is a transfer of property eligible to qualify as a charitable gift. This seems contrary to how Justice Sharlow explained property in the case of *Manrell v Canada*.³

The fact is that in the history of tax jurisprudence in Canada, involving dozens of cases that consider the statutory definition of "property", there is not a single case in which the word "property" has been held to include a right that is not or does not entail an exclusive and legally enforceable claim.

[7] Before addressing the two elements of property (legal right acquired by contract versus payment of rent) and how Mr. Carson's situation may or may not fall into one or the other of those possible views of property, I shall briefly review the one case that directly addresses this issue, *Oloya v R.*⁴ Unfortunately Justice Webb did not ultimately have to decide if the provision of a room to a charity for office space was a transfer of property, as he found the donation receipt was deficient. His comments, however, are worth noting:

16. It is not clear whether the Appellants charged IFAARM rent or were simply making a claim for the equivalent amount that would have been charged for rent. Since the Appellants would have been required to include

³ 2003 FCA 128.

⁴ 2011 TCC 308.

the rental amount in their income on an accrual basis[1] and since they did not include this rental amount in their income, it seems to me that they did not charge rent. If they would have charged rent (and included the rent in their income), then the rental amount receivable would have been property that could have been donated to the charity. However, such property would have to be identified in the receipt.

17. Since presumably the Appellants simply claimed an amount equivalent to rent, one question would be whether any property was given by the Appellants to IFAARM. The definition of property, as noted by the Federal Court of Appeal, in *Slobodrian*, above, is set out in subsection 248(1) of the *Act*. This subsection provides that:

"property" means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes

- (a) a right of any kind whatever, a share or a chose in action,
- (b) unless a contrary intention is evident, money,
- (c) a timber resource property, and
- (d) the work in progress of a business that is a profession;

18. Even if the granting of the right to use the room in the house resulted in a transfer of property to IFAARM,⁵ since the receipt did not identify this property Julia Oloya cannot include this amount as part of her total charitable gifts for 2005.

[8] A couple of points to note. Firstly, Justice Webb concluded that rent was not charged but acknowledged that had rent been charged, the rental amount would have been property that could have been donated. Secondly, in paragraph 18, he appears to leave the door open for a finding that the grant of a right to use the room may be property.

[9] So where does this leave Mr. Carson? Has there been an implicit transfer of money representing rent? Has there been a transfer of property in the form of a right to the use of the two rooms?

[10] Turning first to whether there was a transfer of money, Mr. Carson argues that the arrangement he had with Peaceful Schools has the same effect as if he had entered a rental agreement, accepted rent and paid it back to Peaceful Schools, an arrangement the CRA acknowledges would be acceptable. He suggested that,

⁵ my underlining.

following an approach found in the General Anti-Avoidance Rules ("GAAR") in the *Act*, one should determine the tax consequences as would be reasonable in the circumstances: here, he argues it would be reasonable to give effect to the result not the form. With respect, I disagree. It is inappropriate to rely on the very specific Anti-Avoidance Rules of the *Act* for purposes of a general interpretation of all other provisions of the *Act*.

[11] Mr. Carson agreed there was no lease. He simply let Peaceful Schools use the two rooms. This is not a question of being hung up on form over substance. Yes, clearly, the form had no semblance of a required payment, implicit or otherwise, of rental monies. But neither did the substance. This was not a lease where a landlord accepts payment and returns it, or even where a landlord agrees to forego rent that he could legally demand payment for. There simply was no legal obligation. Indeed, Mr. Carson was not even the registered owner of the property.

[12] Mr. Carson argues that, of course, he would not formalize such an arrangement as he and his wife and the charity were effectively in a non-arm's length arrangement. Why would he contemplate anything so formal? I would turn the tables, Mr. Carson, and suggest for that very reason it would have been in order to formalize the arrangement to make it clear the charity was relieved of a legal obligation to pay rent that you (and more appropriately, your wife) could then demonstrate was a gift of that rent back to the charity.

[13] The arrangement is far too loose to conclude there has been a gift of money by Mr. Carson.

[14] I turn then to viewing the arrangement from the perspective that the property gifted was the right to use the rooms. As indicated in the *Oloya* decision, property is defined to include a right of any kind. At first glance, I can understand why Mr. Carson may conclude that a right to use a room is a right and therefore property. But, in the context of a property transferred as a gift, I do not see the "right" in Mr. Carson's case as falling within the definition of property. I reiterate the explanation of property by Justice Sharlow cited earlier – right is a legally enforceable claim.

[15] Mr. Carson did not divest himself of any right. He simply lived in the matrimonial home owned by his spouse. The rooms were being used by her for her involvement with Peaceful Schools before her marriage to Mr. Carson. Peaceful Schools used the rooms not pursuant to any lease or even pursuant to any licence, but used the rooms with the couples blessing, through their kindness, at their will, on their good graces, choose any expression you like. There was no right, certainly no

transferable right, no property. Peaceful Schools could not assign this purported right to the use of the rooms. Mr. Carson gave nothing to Peaceful Schools that was a property as such. He, or his wife, simply allowed Peaceful Schools the use of the rooms. He, with his wife, could have rented the rooms – they did not. They perhaps could have granted a licence for the use of the rooms – they did not. From both a practical and legal perspective, I fail to see how any property has been transferred.

[16] Failing a transfer of property of any kind, there can be no charitable gift. The Appeal is dismissed.

Signed at Ottawa, Canada, this 1st day of November 2013.

"Campbell J. Miller"

C. Miller J.

CITATION: 2013 TCC 353

COURT FILE NO.: 2011-1382(IT)I

STYLE OF CAUSE: WARD CARSON AND HER MAJESTY
THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: October 23, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF JUDGMENT: November 1, 2013

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Melanie Petrunia

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm:

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada
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