Docket: 2010-1444(GST)G
Docket: 2010-1445(IT)G

BETWEEN:

PARIS DRYDEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence on August 19 and 20, 2013, and December 3, 4 and 5, 2013 at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Diana Aird

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2003, 2004, 2005 and 2006 taxation years and from the reassessments made under the *Excise Tax Act*, notices of which are dated February 29, 2008 and February 1, 2010, with respect to the periods ending December 31, 2003, 2004, 2005 and 2006 are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the unreported income of the appellant will have to be recalculated on the following basis:

ITA

a) the appellant's cash on hand at the end of 2002 is $ 39,476;

b) that the expenditures in net worth assessment are $95,542.77 for the 2003 taxation year, $162,991.79 for the 2004 taxation year,

$105,643.07 for the 2005 taxation year and $100,834.71 for the 2006 taxation year;

c) for the 2005 taxation year, the ending balance on the asset sheet of the net worth assessment for the Toronto Dominion bank account xxxx822 is $5;

d) for the 2006 taxation year the ending balance on the liability sheet of the net worth assessment for the Line of Credit Visa xxxx337 is $19,810.62;

e) the appellant is liable to pay the Good and Services Tax on his unreported income;

ETA (Part IX-GST)

f) the appellant is liable to pay GST based on his unreported income determined for income tax purposes adjusted according to this judgment;

g) the appellant is also liable for penalties under subsection 280(1) of the *ETA* for failure to remit and under section 280.1 of the *ETA* for failure to file GST returns as adjusted by this judgment.

Costs are awarded to the respondent.

Signed at Ottawa, Canada, this 29th day of July 2014.

"Johanne D'Auray"

D'Auray J.

Citation: 2014 TCC 241
Date: 20140729
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Docket: 2010-1445(IT)G

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PARIS DRYDEN,

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and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

Background

[1] By way of reassessment dated March 13, 2008, the Minister of National Revenue (the "Minister") using the net worth assessment method added to Mr. Paris Dryden's income (the "appellant") for the taxation years 2003, 2004, 2005 and 2006 the following amounts as unreported business income:

2003	$61,209
2004	$283,496
2005	$441,467
2006	$45,188

[2] The Minister also reassessed Goods and Services Tax ("GST") on the unreported business income.

[3] In addition, the Minister reassessed the appellant for gross negligence penalties under subsection 163(2) of the *Income Tax Act* (the "*ITA*"), and failure to file GST returns within the time limits, make GST remittances and instalments under sections 280 and 280.1 of the *Excise Tax Act* (the "*ETA*").

[4] The Minister's reassessment of the appellant's 2003 taxation year was issued beyond the normal reassessment period contemplated under subparagraph 152(4)(*a*)(i) of the *ITA*.

[5] Following the appellant's objection dated May 21, 2008, the Minister varied the reassessments by decreasing the net business income for the 2005 taxation year by $36,253 and increasing the appellant's net business income for the 2006 taxation year by $27,695. The Minister also varied the reassessments under the *ETA* to reflect the changes made for income tax purposes.

[6] At the beginning of the trial the respondent stated that all withdrawals, transfers from one bank account to another, cheques, drafts and debit memos made by the appellant from his bank accounts were considered personal expenditures. The auditor did not take into account the transfers that the appellant had made between his bank accounts (the "inter-account transfers"). For example, if the appellant transferred $100 from one bank account to another bank account, the auditor would consider it to be a personal expenditure of the appellant. Accordingly, the respondent correctly conceded that the personal expenditures contained in the net worth assessment were too high and had to be decreased to reflect the inter-account transfers by the following amounts:[1]

2003	
Expenditures as reassessed	$103,597.00
Less concessions	
Citizenship & Immigration	$(4,600.00)
Transcription errors	$(982.13)
Expenditures after the concessions	$98,014.89

2004	
Expenditures as reassessed	$378,991.79
Less concessions	
Gareene Home	$(106,000.00)
Inter-account transfers	$(99,000.00)
Expenditures after the concessions	$173,991.79

[1] The amounts conceded with respect to the expenditures are reflected in the schedule to the net worth assessment submitted by the respondent at the hearing.

2005	
Expenditures as reassessed	$203,312.52
Less concessions	
Inter-account transfers	$(99,000.00)
Plus	
Excess payment on the Gareene Home	$26,511.33
Expenditures after the changes	$130,023.85

2006	
Expenditures as reassessed	$108,021.09
Less concessions	
Inter-account transfers	$(7,186.38)
Expenditures after the concessions	$100,834.71

[7] The respondent also submitted that the ending balance on the asset sheet for the Toronto Dominion bank account xxxx822 should be decreased from $74.64 to $5. She also stated that the ending balance on the liability sheet for the Line of Credit Visa xxxx1337 for 2006 should be increased from $9,294.23 to $19,810.62.

[8] Consequently, in light of the concessions made by the respondent at the beginning of the trial, the appellant's unreported business income using the net worth assessment method for the taxation years under appeal was as follows:

2003	$56,589.80
2004	$189,060.49
2005	$241,658.97
2006	$56,807.23

[9] At the end of the trial the respondent also conceded that the amounts reflecting mortgage payments in the personal expenditure form should be $28,772 for the 2003 taxation year and $30,339 for the 2005 taxation year instead of $31,244.10 and $30,519.78, respectively.

Facts

[10] From 1990 to 1997 the appellant worked for the Department of Citizenship and Immigration Canada.

[11] After the appellant ceased his employment with the Department of Citizenship and Immigration Canada, he started his own business. The appellant worked as a full-time immigration consultant and to that end he had incorporated Paris International Inc. on November 4, 1996.

[12] Around 2000 the appellant purchased a house with Ms. Elaine Ricketts ("Ms. Ricketts") at 18 Hillhurst, Richmond Hill, for an amount of $507,000 (the "personal residence"). At the time of purchase, the appellant and Ms. Ricketts paid an amount of $100,000 as down payment on the house.

[13] On August 11, 2001 the appellant and Ms. Ricketts were married.

[14] In 2003, which is the first year under appeal, the appellant and Ms. Ricketts had three children aged between two and nine years old. By 2005, they had four children.

[15] During the years under appeal Ms. Ricketts was a school teacher. She earned approximately $40,000 per year. From September 2003 to June 2004, Ms. Ricketts did not work as she was attending university on a full-time basis.

[16] During the years under appeal the appellant's mother was also living at the appellant's residence and was not working.

[17] According to the appellant, the Government of Canada introduced licensing requirements for immigration consultants sometime in 2003. As a result of these regulations, the appellant decided to stop working as an immigration consultant and go back to school to pursue a law degree. Nevertheless, the appellant stated that the Government of Canada grandfathered the applications that he had started before the immigration consultant regulations came into force.

[18] On April 9, 2003 the appellant incorporated Paris International Legal Services Inc. The appellant stated that he had incorporated Paris International Legal Services Inc. to keep himself active and finance his lifestyle since, at that time, he did not know if he would be admitted to law school. He further stated that he wanted Paris International Legal Services Inc. to offer services similar to the

services offered by paralegals, such as incorporation of companies and contestation of parking tickets.

[19] The appellant was the director of both corporations, namely Paris International Inc. and Paris International Legal Services Inc. Paris International Inc. was dissolved in 2006.

[20] From September 2004 to August 2005 the appellant was a part-time student at York University in Toronto. From September 2005 to June 2007 the appellant was a full-time law student at the University of Birmingham in England. From September 2007 to October 2008 the appellant pursued a master degree in laws at the University of Westminster in England.

[21] In 2004 the appellant made an offer to purchase a house (the "Gareene Home") from Gareene Homes Ltd. for investment purposes. The purchase of the Gareene Home was closed in 2005 and the cost was $463,405 - including legal fees and adjustments. The appellant stated that he and his spouse financed the purchase of the Gareene Home by using his line of credit, increasing the mortgage loan on their personal residence and requesting financial assistance from his father.

[22] The appellant did not report any employment or business income in his income tax returns during the years under appeal.

[23] Neither corporation filed corporate income tax returns until the Canada Revenue Agency (the "CRA") requested them to do so in 2007. Paris International Inc. filed corporate tax returns on March 27, 2007. Paris International Legal Services Inc. filed corporate tax returns on September 28, 2007. The corporations did not report any income.

[24] The appellant was not a GST registrant and did not file GST returns with the Minister. As a result, the Minister created a GST account for the appellant.

Questions at issue

[25] Did the Minister correctly reassess the appellant through the net worth assessment method by adding business income to the appellant's income for the taxation years 2003, 2004, 2005 and 2006?

[26] Did the Minister correctly reassess the appellant for GST on the business income reassessed by the Minister through the net worth assessment method?

[27] Was the Minister allowed to reassess the appellant after the normal reassessment period for his 2003 taxation year pursuant to subsection 152(4) of the *ITA*?

[28] Did the Minister correctly reassess the appellant for gross negligence penalties under subsection 163(2) of the *ITA* for the taxation years 2003, 2004, 2005 and 2006?

[29] Did the Minister correctly reassess the appellant for penalties for the appellant's failure to file GST returns within the time limits, and make GST remittances and instalments under sections 280 and 280.1 of the *ETA*?

Position of the parties

[30] The appellant's position is that he did not carry on any form of business during the years under appeal.

[31] He submitted that due to the new licensing requirements issued for immigration consultants in 2003, he stopped working as an immigration consultant sometime in 2003.

[32] The appellant submitted that he did not work during the years 2004 to 2008 since he was attending school in Canada and in England. He stated that his family's living expenses were financed through cash that he and his spouse had saved in previous years, and from cash loans they had received from the appellant's father during the years under appeal.

[33] The appellant submitted that he did not report any income since he did not earn any "material income" during the years under appeal; he further argued that the net worth assessment was flawed because:

- it does not reflect the cash on hand he had by December 31, 2002, the base year, and
- not all the inter-account transfers were taken into account.

[34] The respondent's position is that the appellant earned business income during the taxation years under appeal. She argued that he could not have supported his lifestyle without earning any business income. She also argued that

all the inter-account transfers were taken into account through the concessions she had made at the beginning of the trial.

[35] The respondent also argued that the amount of cash on hand included in the net worth assessment should not be varied. She argued that the testimonies given at trial by Ms. Ricketts, Mr. Egbert Dryden Sr. ("Mr. Dryden Sr.") (the appellant's father), and Mr. James Craig (his friend and colleague) should be discarded. The respondent argued that there was self-interest involved in their testimonies and - in her view - the witnesses were trying to assist a family member. In addition, she submitted that there were inconsistencies and a lack of documents to corroborate the witnesses' testimonies. Overall, the respondent submitted that the witnesses' testimonies were not credible.

[36] Consequently, the respondent argued that the appellant did not receive gifts in cash from his father, his sister or his sister-in-law, or loans in cash from his father during the years under appeal.

Issues of credibility and onus of proof

[37] Before analysing the facts of this appeal, it is important to mention that in most net worth assessment cases the appellant's and the witnesses' credibility and explanations as to why the Minister's net worth assessment is flawed are usually the determining factors.

[38] In assessing the credibility of witnesses, I am guided by two decisions. The first one is *Faryna v Chorny*,[2] a decision from the British Columbia Court of Appeal. Speaking for the majority of the Court, Justice O'Halloran identified what the Court should consider when assessing the credibility of witnesses; at paragraphs 10 and 11 he held:

> 10 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident

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2 *Faryna v Chorny*, [1952] 2 DLR 354, 1951 CarswellBC 133.

> witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> 11 The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[39] In *Nichols v The Queen*,[3] Justice V. Miller set out a useful overview of what the Court should consider when assessing the credibility of witnesses. In *Nichols*, the issue to be decided was also whether the Minister's net worth assessment was flawed. At paragraph 23 of her reasons, Justice V. Miller held:

> In assessing credibility I can consider inconsistencies or weaknesses in the evidence of witnesses, including internal inconsistencies (that is, whether the testimony changed while on the stand or from that given at discovery), prior inconsistent statements, and external inconsistencies (that is, whether the evidence of the witness is inconsistent with independent evidence which has been accepted by me). Second, I can assess the attitude and demeanour of the witness. Third, I can assess whether the witness has a motive to fabricate evidence or to mislead the court. Finally, I can consider the overall sense of the evidence. That is, when common sense is applied to the testimony, does it suggest that the evidence is impossible or highly improbable.

[40] In tax appeals, unless the taxpayer makes a *prima facie* case, the onus of proof is on the taxpayer; he or she has to "demolish" the Minister's assumptions of fact.[4] The Minister's factual assumptions are taken as true.[5] However, since the appellant's 2003 taxation year was reassessed after the normal reassessment period, the respondent will have to prove that in filing his 2003 income tax return, the appellant made a representation that was attributable to neglect, carelessness or

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3 *Nichols v R*, 2009 TCC 334, 2009 DTC 1203 (General Procedure) [*Nichols*].

4 *Hickman Motors Ltd v Canada*, [1997] 2 SCR 336 at para 92.

5 *Orly Automobiles Inc v Canada*, 2005 FCA 425 at para 20; *Transocean Offshore Ltd v Canada*, 2005 FCA 104 at para 35; *House v R*, 2011 FCA 234 at para 30 [*House*].

wilful default, or that he committed fraud in filing his returns or in supplying information under the *ITA*.

[41] For to the penalties under subsection 163(2) of the *ITA* to be upheld, the burden of proof is also on the respondent. She will have to prove that in filing his income tax returns, the appellant knowingly, or under circumstances amounting to gross negligence, made a false statement or an omission in those returns.

[42] To avoid the penalties under section 280 of the *ETA*, the appellant will have to prove that he was diligent with respect to his GST payments and remittances. However, the penalty for failure to file a GST return will apply if the respondent is able to prove that the appellant did not file his GST returns within the time limits prescribed by the *ETA*.

Analysis

> Did the Minister correctly reassess the appellant through the net worth assessment method by adding business income to the appellant's income for the taxation years 2003, 2004, 2005 and 2006?

1. Personal Expenditures – Inter-Account Transfers (Net Worth Assessment - Personal Expenditure Form for the Years 2003, 2004, 2005 and 2006)

[43] The appellant argued that in addition to the amounts the respondent conceded, other inter-account transfers should have been taken into account to reduce his personal expenditures for the years under appeal.

1.1. Transaction for the amount of $20,000 (Savings Account TD xxx822)

[44] The appellant submitted that the amount of $20,000 as a personal expenditure should be removed from the net worth assessment for the 2004 taxation year since it was an inter-account transfer. I do not agree with the appellant; the evidence shows that the bank draft in question for $20,000 was made to the order of Dona Mason in Trust for the acquisition of the Gareene Home. Therefore, the $20,000 was not an inter-account transfer.

1.2. Transaction for the amount of US $6000 (US Account TD xxxx000)

[45] The appellant also submitted that the amount of US $6,000 should be removed as a personal expenditure from the net worth assessment for the 2004

taxation year because the amount was an inter-account transfer. The respondent conceded that it was an inter-account transfer, but stated that the US $6,000 was already removed from the net worth assessment. I agree with the respondent; it is clear from Exhibit R-3 at page 5 that the amount of US $6,000 had already been removed as a personal expenditure from the net worth assessment for the 2004 taxation year.

1.3. Transaction for the amount of $11,000 (Savings Account TD xxxx822)

[46] The appellant submitted that $11,000 should be removed as a personal expenditure from the net worth assessment for the 2004 taxation year since it was an inter-account transfer. I agree with the appellant, the evidence shows that there was a transfer of $11,000 on the same date from the TD account xxxx822 to the CIBC account xxxx439. Therefore, the personal expenditure form for the net worth assessment for the 2004 taxation year should be reduced by the amount of $11,000.

1.4. Transaction for the amount of $25,000 (Savings Account TD xxxx822)

[47] The appellant submitted that the amount of $25,000 should also be removed as a personal expenditure from the net worth assessment in the 2005 taxation year because the amount was an inter-account transfer. The appellant explained that he deposited a bank draft for the amount of $25,000 from the TD account xxxx822 to the CIBC account xxxx439. In addition to the $25,000 bank draft, the appellant stated that he deposited $5,500 in cash for a total deposit of $30,500. All the transactions were done on March 1, 2005. He argued that the $25,000 was an inter account transfer.

[48] The respondent submitted that there were no records to substantiate the appellant's position. She argued that the appellant had gone over the records after the facts to try to find ways to argue that the amounts were inter-account transfers rather than expenditures.

[49] The records showed that both transactions occurred on the same day. I believe the appellant when he stated that he transferred the amount of $25,000 from one account to another and that the amount of $25,000 was included in the $30,500 deposit. Therefore, the personal expenditure form for the net worth assessment for the 2005 taxation year should be reduced by the amount of $25,000.

2. Double-Counting of the Child Tax Benefit (Net Worth Assessment – Schedule III)

[50] The appellant submitted that the amount he and his wife received as Child Tax Benefit during the taxation years under appeal had been double-counted. I do not agree with the appellant. It is clear from Schedule III of the net worth assessment that the amounts of $7,931.40, $7,972.85, $8,955.33 and $9,700.42 received as Child Tax Benefit for the taxation years 2003, 2004, 2005 and 2006, respectively, were removed from the net worth assessment.

3. The Excess Payment with respect of the Gareene Home

[51] As I have already stated, the appellant purchased the Gareene Home as an investment property in 2005. At trial both parties agreed that at the closing of the transaction in 2005 the total cost of the Gareene Home was $463,405, including legal fees and other adjustments. However, the evidence shows that the appellant paid to his lawyer, Dona Mason, an amount of $489,916.33.

[52] I agree with the respondent that the excess payment in the amount of $26,511.33 was correctly included in the net worth assessment as the appellant's personal expenditure for the 2005 taxation year. It is worth mentioning that at trial it was established that the excess payment to Ms. Donna Mason was not $26,511.33, but rather $56,511.33. A bank record dated September 20, 2004 was tendered in evidence showing another payment to Donna Mason in Trust to Gareene Homes Ltd. for an amount of $30,000.

4. Personal Liabilities (Schedule II of the Net Worth Assessment)

4.1. Gareene Home

[53] The appellant submitted that to purchase the Gareene Home, he approximately used $36,000 from his line of credit and increased the mortgage loan on his personal residence by $49,000. The appellant argued that the respondent omitted to include these amounts as liabilities in his net worth assessment for the 2005 and 2006 taxation years, for a total amount of $85,000.

[54] The respondent argued that the amount of $85,000 had already been included as liabilities in the appellant's net worth assessment for the 2005 and 2006 taxation years.

[55] I agree with the respondent, the net worth assessment shows that the appellant's line of credit increased by $102,860 in 2005; namely, from $69,981 in 2004 to $172,841 in 2005. The appellant's mortgage on his personal residence also

increased by $49,000 in 2005; namely, from $300,816 in 2004 to $349,137 in 2005. Therefore, the amount of $85,000 had already been included in the appellant's liabilities for the 2005 and 2006 taxation years. Therefore, no adjustments to the net worth assessment are required.

5. Cash on hand

[56] The appellant argued that the net worth assessment should reflect the approximately $105,000 cash on hand he had at the end of 2002. According to the appellant, this amount of money came from money his spouse received from her sister before she passed away, gifts the appellant and his wife received for their wedding, monetary gifts that his father gave him, money he had in cash at the end of 2002, and money he received from his sister before she passed away.

[57] The appellant testified that his sister-in-law, Ms. Janet Ricketts, passed away in 2000. Prior to her passing and in contemplation of her death, Ms. Janet Ricketts gifted the amount of $45,000 in cash to his spouse, Ms. Ricketts. The appellant submitted that the $45,000 should be part of the cash on hand he had by the end of 2002.

[58] The appellant also submitted that when Ms. Janet Ricketts passed away in 2000, his spouse inherited from her sister an amount of $50,201.39 as proceeds from her insurance policy and an amount of $15,758 as proceeds from her pension plan.

[59] However, the appellant then submitted that the insurance proceeds of $50,201.39 should not be included in the net worth assessment as cash on hand since the amount was deposited in a bank account and not kept as cash on hand. He also submitted that from the amount of $15,758 received by his spouse from the proceeds of the pension plan, only $10,000 should be part of the net worth assessment as cash on hand since he deposited the entire amount in his bank account, but he then withdrew an amount of $10,000 that he kept in cash in a safe at home. Accordingly, he submitted that from the amount of $50,201.39 only the amount of $10,000 should be part of the cash on hand in 2002.

[60] The appellant also submitted that he and his spouse received $35,000 in cash as wedding gifts in 2001, and this amount should also form part of the net worth assessment as cash on hand in 2002.

[61] In addition, the appellant stated that his father gave him an amount of $27,000 in cash during the years under appeal. The appellant submitted that he received from his father a first instalment for an amount of $5,000 in 2002. He explained that his father set aside all the monetary gifts that the appellant had received from his relatives during his childhood and all the money the appellant had earned from working while he was a teenager. The appellant argued that he received the $27,000 from his father by way of instalments. Accordingly, the appellant submitted that the first instalment of $5,000 should also be part of the net worth assessment as cash on hand in 2002.

[62] The appellant further submitted that in 2002 he also had an amount of $11,796 in cash that he had accumulated from previous years and this amount should also be included in the net worth assessment as cash on hand in 2002.

[63] The appellant also argued that the cash gifts he received in other taxation years should be included in the net worth assessment for the years in which they were received. He submitted that he received from his father, as part of the $27,000, instalment amounts of $10,000 in the 2004 and in the 2005 taxation years, and of $2,000 in the 2006 taxation year.

[64] The appellant also submitted that when his sister Lorna Dryden came to Canada from Jamaica in 2004, she was terminally ill and knew she was going to die. In contemplation of her death, she gave him $15,000 in cash. The appellant argued that this amount should also be reflected in the net worth assessment as cash on hand in the 2004 taxation year.

5.1. Loans from the appellant's father

[65] On the liabilities side of the net worth assessment, the appellant stated that his father assisted him in pursuing his law degree by loaning him an amount of $85,000. The appellant argued that the loans should be reflected in the net worth assessment as liabilities in the years during which the loans were made, namely:

June 29, 2003	$12,000
January 29, 2004	$21,000
July 27, 2004	$15,000
January 9, 2005	$27,000
June 15, 2005	$10,000

[66] The appellant stated that the loans he received from his father also increased the cash on hand he had and this should be reflected in the net worth assessment for the years during which the money was received.

5.2. Cash on hand - Analysis

[67] The respondent's net worth assessment with respect to the appellant's cash on hand shows an amount of $100 for the 2002 base year and for each year under appeal.

[68] I find that the respondent's position with respect to the appellant's cash on hand is not in line with her position in this appeal namely, that he was carrying on a cash business. If the appellant was carrying on a cash business, there would be a strong probability that he had more than $100 as cash on hand for the 2002 base year and for each of the years under appeal.

[69] With this in mind, I will first deal with Ms. Ricketts' inheritance. The documents filed by the appellant showed that Ms. Ricketts received an inheritance from her sister for the amount of $50,201 as life insurance proceeds and an amount of $15,758 as pension plan proceeds. The appellant stated that out of the amount of $65,959, $10,000 was kept in cash and the balance of $55,959 was deposited. Although the evidence given by Ms. Ricketts was somewhat confusing with respect to how much money she and the appellant kept in cash from the inheritance and how that money was used, I am of the opinion that at least $10,000 was kept in cash by the appellant and his spouse, and that the amount of $10,000 should be reflected in the net worth assessment as cash on hand for the 2002 base year.

[70] However, for the following three reasons I find it improbable that in contemplation of her death Ms. Janet Ricketts gave $45,000 in cash to Ms. Ricketts. First, Ms. Ricketts was not the only beneficiary under Ms. Janet Ricketts' will. Ms. Janet Ricketts had four other siblings who were also beneficiaries under the will. Second, the will had a residual clause whereby the remainder of Ms. Janet Ricketts' estate would be divided among her three sisters and her brother. Ms. Ricketts testified that only a small amount of money was distributed under that clause. The fact that only a small amount of money was distributed under this clause of the will and that Ms. Janet Ricketts was not a high income earner confirms my view that Ms. Janet Ricketts probably did not have the means to give Ms. Ricketts the amount of $45,000 in cash. Third, because Ms. Janet Ricketts had a will, it is difficult to understand why she did not leave the amount of $45,000 to Ms. Ricketts through her will and why she gave Ms. Ricketts

the $45,000 in cash rather than by cheque. In light of the above, I find it improbable that Ms. Ricketts received the amount of $45,000 in cash from her sister. Therefore, the amount of $45,000 should not be included as cash on hand for the 2002 base year.

[71] With respect to the wedding gifts, no documents were tendered in evidence to prove that the appellant and Ms. Ricketts received a cash amount of $35,000 as wedding gifts in 2001. I find it difficult to believe that such a high amount could have been received in cash. In addition, in light of Ms. Ricketts' testimony, I also find it difficult to believe that the amount of $35,000 remained untouched. Considering that 250 people attended the wedding and that it is probable that some of the gifts were in cash, I will allow cash on hand for half of the amount claimed by the appellant, namely $17,500.

[72] The appellant also submitted that by the end of 2002, he had accumulated an amount of $11,976 in cash from previous years. As I stated before, in my view the appellant had more than $100 as cash on hand at the end of the 2002 base year. Therefore, it is probable that the appellant would have accumulated such an amount from previous years. In order to operate a cash business, cash is needed. I will therefore accept that the appellant had $11,976 as cash on hand at the end of the 2002 base year.

[73] However, I am not convinced by Mr. Dryden Sr.'s testimony that, over the years, he had collected an amount of $27,000 from monetary gifts the appellant received during his childhood from relatives and the appellant's earnings from working while he was a teenager. If Mr. Dryden Sr. had wanted to assist his son in attending law school, I find it difficult to understand why he would not have given the appellant outright the amount of $27,000 that belonged to him. Instead, he chose to give the appellant the amount of $27,000 by way of instalments and loaned the appellant money during the years under appeal. I also find it difficult to believe that since Mr. Dryden Sr. did not trust banks, he kept the $27,000 in cash under his bed for at least 12 to 15 years and then decided to give the money to his son during the years under appeal while his son was in his 30s. In my view, on a balance of probabilities, this fact situation is highly improbable. Therefore, the amount of $27,000 should not be part of the net worth assessment for the years under appeal.

[74] The appellant also submitted that while his sister was in Canada, she gave him $15,000 in cash in contemplation of her death. The appellant's sister, Ms. Lorna Gordon, came from Jamaica to Canada in October 2004. At that time

she had terminal cancer and knew she was going to die. Shortly after she returned to Jamaica, she passed away. When the appellant was asked if his sister brought more money to Canada in addition to the amount of $15,000, the appellant's answer was "not to the best of his recollection". Accordingly, Ms. Lorna Gordon would have given the appellant all the money she brought with her to Canada. I find the appellant's testimony difficult to believe: Ms. Lorna Gordon had many siblings in Canada, why would she have singled out the appellant and given money only to him? In addition, the appellant did not explain why her sister was carrying $15,000 in cash when she came to Canada. I find this fact situation highly improbable. As a result, the amount of $15,000 should not be part of the cash on hand for the net worth assessment for the years under appeal.

5.3 Loans from the appellant's father - Analysis

[75] The appellant also argued that the loans received from his father, Mr. Dryden Sr., should be part of the net worth assessment as liabilities.

[76] Mr. Dryden Sr. is in his seventies. He immigrated to Canada from Jamaica with the appellant in the 70s. The evidence did not reveal if his other children also came with him and the appellant at that time. At the time of the trial four of Mr. Dryden's children – including the appellant - were living in Ontario. Mr. Dryden Sr. worked for the City of Toronto for approximately 40 years. During the years near to his retirement, he earned approximately $40,000 per year. He retired either in 2003 or 2004 and since then he has been receiving pension income for the amount of $900 per month or $10,800 per year.

[77] Mr. Dryden Sr. seems to have lived and continue to live a frugal lifestyle. He stated that because of the way the black community had been treated in the past and in light of the culture instilled to him by his parents, he felt more secure by keeping his savings under his bed than at the banks.

[78] While Mr. Dryden Sr. was working his salary was deposited directly in his bank account; now his pension income is deposited in his bank account. Mr. Dryden Sr. stated that he left enough money in his bank account to pay his bills, but he withdrew the balance in cash and put it under his bed.

[79] However, Mr. Dryden Sr.'s bank statements were not filed in evidence to prove that he withdrew most of his money from his bank account and kept the money in cash under his bed.

[80] Mr. Dryden Sr.'s testimony is also at odd with Mr. James Craig's with respect to the loan agreements the appellant submitted as evidence. Mr. Dryden Sr. forcefully stated that he insisted in documenting the loans he made to his son. He also stated that the loan agreements were prepared and signed by him and the appellant at the time the money was exchange.

[81] Mr. James Craig, who was present for two of the loans, testified that the appellant and his father did not sign loan agreements at the time the appellant received the money from his father. He stated that he had advised the appellant that written loan agreements should be prepared to better protect the appellant and his father. Mr. James Craig also stated that he had learned from the appellant, and possibly after the CRA started its audit, that the loans had been documented. Mr. James Craig was also not familiar with the amounts of the loans, he stated that he saw large sums of money being exchanged between the appellant and his father.

[82] With respect to the source of the money, the appellant stated that his father did not spend any money and that he made a profit when he sold a house in 2003. In addition, he stated that his father inherited properties from his mother and father in Jamaica. He argued that his father had the means to loan him money. According to the appellant, Mr. Dryden Sr. loaned to the appellant the amount of $85,000 between June 29, 2003 and June 25, 2005.

[83] Mr. Dryden Sr. stated that he received $57,000 from the sale of a house that he jointly owned with Ms. Arthens Walters. According to him, he made a profit of $43,000 on the sale of the house and was given an additional $13,000 for maintenance work he did on the house. No documents were filed to establish that Mr. Dryden Sr. made a profit of $43,000 on the sale of the house or that he earned $13,000 for the maintenance work he performed. These documents were not difficult to obtain; it is difficult to understand why the appellant did not file these documents to support Mr. Dryden Sr.'s testimony. The only documents filed by the appellant were the deed of transfer of land signed by Mr. Dryden Sr. and Ms. Walters dated June 23, 1992, and a document from Service Ontario showing that Mr. Dryden Sr. sold his half of the property to Ms. Arthens Walters and Ms. Brown in 2003.

[84] Mr. Dryden Sr. also testified that he inherited land in Jamaica from his father and his mother in the 70s and in the 80s, which he eventually sold. He stated that each time he travelled to Jamaica he brought $10,000 from these inheritances to Canada. He also stated that he gave some of the money from the sale of the land to his relatives in Jamaica since they needed the money more than he did. His

testimony was so convoluted on these inheritances that it is impossible to determine how much money he made from the sale of the lands, how much money he gave to his family in Jamaica, how much money he kept, and how much money he brought to Canada. In addition, no documents were filed to prove the inheritances. I understand that he received the inheritances in the 70s and the 80s, and that Mr. Dryden Sr. would not have expected to need the documents for a trial in 2013. With or without documents to prove the inheritances, I find it difficult to believe that the money - if there was any - would still be available in 2003 taking into account that he received the inheritances in the 70s and the 80s. Mr. Dryden Sr. was not a high income earner, and he had to support himself, the appellant and possibly his other children.

[85] I also find it unusual that the appellant is borrowing money from his father in 2005, but at the same time he is loaning money to a friend. As I previously mentioned, the appellant made an excess payment in the amount of $56,511 to his lawyer Ms. Dona Mason with respect the Gareene Home in 2005. When he was asked why he paid more than the purchase price for the Gareene Home, the appellant stated as follows:

> that the difference was a retainer of funds on hand for a certain legal action she was supposed to perform for me and also with regard to a partial deposit for a colleague who asked me to give him a small loan.

[My emphasis.]

[86] The appellant is asking me to believe his and his father's versions of the facts with respect to the loans from his father, even if the documents that could have been easily filed - such as his father's bank statements to prove the withdrawals and documents pertaining to the gain his father made on the sale of the house - were not filed. The appellant is also asking me to ignore that there were inconsistencies between his testimony, and Mr. Dryden Sr.'s and Mr. James Craig's testimonies. Furthermore, the appellant wants me to believe that his father loaned him $85,000 in the years 2003, 2004 and 2005, while he was himself loaning money to a friend in 2005. In addition to this, Mr. Dryden Sr.'s income in 2003 and 2004 decreased considerably. I am, therefore, not convinced by the appellant's and Mr. Dryden Sr.'s testimonies. Consequently, the amounts of $12,000 for 2003, $36,000 for 2004 and $37,000 for 2005 should not be included in the net worth assessment as liabilities.

6. Was the appellant conducting a business during the years under appeal?

[87] The respondent stated that although the appellant incorporated two businesses, in reassessing the appellant, the Minister took the position that the appellant acted as a sole proprietor and reassessed the appellant accordingly. The appellant did not address this issue during the trial.

[88] The appellant admitted that prior to 2003 he was carrying on an immigration consulting business under the name of Paris International Ltd.

[89] In 2003, the appellant decided to make a career change and wanted to become a lawyer. That said, not knowing what would happen, he incorporated Paris International Legal Services Inc. in April 2003, opened a bank account in May 2003, and created a website for Paris International Legal Services Inc.

[90] Over the years, the appellant used approximately three business addresses. First, he used the address at 275 King Street in Toronto, then the address at 32595 Village Gate in Richmond Hill and later on the address at 6478 Yonge Street in Toronto. The appellant stated that he always worked from his residence, but the addresses were used to have packages and faxes received. Some locations also offered the services of a receptionist. The evidence revealed that the appellant was using some of the addresses during the years under appeal.

[91] The appellant also kept during the years under appeal a pager, a cellular phone and a US phone number; the appellant's company, International Legal Services Inc., also kept its website active. During the years under appeal, invoices for the pager and the cellular phone were sent to the different addresses mentioned above, and the appellant paid the invoices from his personal bank account. The appellant stated that he had to keep the business addresses since he had to complete the immigration work he had commenced before the new immigration rules came into force in 2003. According to the appellant, the Department of Citizenship and Immigration Canada grandfathered the applications the appellant had started before the new rules came into force so he could complete them. The appellant did not call as a witness any person from the Department of Citizenship and Immigration Canada to explain the new regulations with respect to immigration consultants. In addition, the documents submitted by the appellant did not address the grandfathering provisions. The appellant's Book of Documents also shows that the new rules came into force in April 2004, rather than in 2003 as the appellant stated.

[92] Furthermore, at one point during the years under appeal, some of the invoices for the services were mailed to the Sutton Group. The appellant stated that he had a friend working for the Sutton Group and at a certain point he decided to

use that mailing address for his business as well. During the years under appeal, the appellant also used one of his friend's cellular phone and had the invoices with respect to that cellular phone sent to a mail box. The appellant paid all the bills from his personal bank account.

[93] During trial, much time was spent discussing whether the appellant was present in Canada or living in England for the school years 2005 and 2006. The respondent tendered in evidence some deposit slips proving that the appellant made deposits in person in Canada during the school years. The appellant argued that the deposit slips were not signed by him, but rather by his father or his spouse. However, both his father and his spouse testified that they never made any deposits on behalf of the appellant.

[94] In my view, even if the appellant did not spend as much time in Canada as argued by the respondent, the evidence tendered during trial reveals that he was conducting a business during the years under appeal in Canada. Why would the appellant keep the business addresses, the pager, the cellular phone, and the US phone number if he was not conducting any business? More particularly, if the appellant had financial concerns, why would he maintain all these services for which he had to pay all the expenses?

[95] The appellant's bank account statements also reveal that during the years under appeal there were payments made from the appellant's bank accounts to the Department of Citizenship and Immigration Canada. I find it difficult to believe – as the appellant explained - that all these payments were limited to the immigration applications the appellant completed for his mother and his sister.

[96] In addition, there is a significant number of cash deposits during the years under appeal. The evidence shows that more than $40,000 was deposited in cash in each 2004 and 2005. Moreover, by way of example, the respondent pointed out that during the month of March 2005, the amount of cash and non-cash deposits in the appellant's bank account amounted to $53,294. The money had to come from a source.

[97] In addition, the appellant had four children to support and his mother was living with him. The appellant also stated that his father spent a lot of time at the appellant's residence. The appellant's expenditures were at least $100,000 per year. A source of income was needed to support his and his family's livelihood. Therefore, I am of the view that the appellant was conducting business activities and earning business income during the years under appeal. As a result, the

appellant is liable to pay income tax on the business income earned during the taxation years under appeal.

> Did the Minister correctly reassess the appellant for GST on the business income reassessed by the Minister through the net worth assessment method?

[98] In light of my conclusion that the appellant was conducting a business, the appellant had to collect and remit the GST on his taxable supplies. Therefore, the Minister's reassessment was correct. It is not clear if input tax credits were allowed to the appellant. In the Reply to the Notice of Appeal filed by the respondent, one of the facts assumed by the Minister was that the appellant did not incur expenses with regard to the immigration / legal consulting services for which the appellant could have claimed input tax credits. However, there is a note on Exhibit R-3 at Schedule V, stating "Deduct: additional GST/HST expenses allowed (per Schedule VII)". At trial, neither the appellant nor the respondent dealt with the issue of input tax credits. In my view, the schedule stating that the appellant was entitled to GST/HST expenses is more in line with the respondent's position that the appellant was carrying on a business. However, the appellant did not argue that he was entitled to claim input tax credits, the burden of proof was on him.

> Was the Minister allowed to reassess the appellant after the normal reassessment period for his 2003 taxation year pursuant to subsection 152(4) of the *ITA*?

[99] In light of the facts, I am of the view that the Minister was entitled to reassess the appellant's 2003 taxation year. As mentioned above, the appellant's Book of Documents shows that the new regulations governing immigration consultants were enacted in April 2004. Accordingly, the appellant was entitled to work as an immigration consultant in 2003. In addition, in light of my findings that the appellant was carrying on business activities during the years under appeal, I agree with the respondent when she argued that the appellant's misrepresentation was his complete failure to report any income for his 2003 taxation year and that this failure was attributable to wilful default.

> Did the Minister correctly reassess the appellant for gross negligence penalties under subsection 163(2) of the *ITA* for the taxation years 2003, 2004, 2005 and 2006?

[100] In *Lacroix c R.*,[6] the Federal Court of Appeal held that where a large amount of income is unreported and the taxpayer is found not credible, that will be sufficient to discharge the respondent's burden of proof:

> What, then, of the burden of proof on the Minister? How does he discharge this burden? There may be circumstances where the Minister would be able to show direct evidence of the taxpayer's state of mind at the time the tax return was filed. However, in the vast majority of cases, the Minister will be limited to undermining the taxpayer's credibility by either adducing evidence or cross-examining the taxpayer. Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of subparagraph 152(4)(*a*)(i) and subsection 162(3).

[101] In *Venne v R.*,[7] Justice Strayer set out the test for the imposition of gross negligence penalties under subsection 163(2) of the *ITA*:

> With respect to the possibility of gross negligence, I have with some difficulty come to the conclusion that this has not been established either. "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[102] In my view, the penalties were correctly reassessed: the appellant knew he earned unreported income. The discrepancy between his reported income, which was zero, and what he should have reported is significant. In addition, some of the appellant's explanations to justify his position were not credible. The appellant showed indifference as to whether the law was complied with.

> Did the Minister correctly reassess the appellant for penalties for the appellant's failure to file GST returns within the time limits, and make GST remittances and instalments under sections 280 and 280.1 of the *ETA*?

[103] For the years under appeal, subsection 280(1) of the *ETA* reads:

> 280(1) Subject to this section and section 281, where a person fails to remit or pay an amount to the Receive General when required under this Part, the person shall pay on the amount not remitted or paid

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6 *Lacroix c R,* 2008 FCA 241 at para 32.

7 *Venne v R,* 84 DTC 6247 at para 37, 1984 CarswellNat 210 (Federal Court-Trial Division).

> (a) a penalty of 6% per year, and
>
> (b) interest at the prescribed rate,
>
> computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

[104] In light of my conclusions that the appellant carried on a business during the years under appeal and that the appellant provided taxable supplies under the *ETA*, the appellant was required to collect and remit to the Receiver General GST on his taxable supplies. I am of the view that the penalties under subsection 280(1) of the *ETA* were properly assessed by the Minister as the appellant failed to remit or pay to the Receiver General the required amounts. The appellant also failed to make instalment payments to the Receiver General.

[105] With respect to the appellant's failing to file GST returns, section 280.1 of the *ETA* reads:

> 280.1 Every person who fails to file a return for a reporting period as and when required under this Part is liable to pay a penalty equal to the sum of
>
> > (a) an amount equal to 1% of the total of all amounts each of which is an amount that is required to be remitted or paid for the reporting period and was not remitted or paid, as the case may be, on or before the day on or before which the return was required to be filed, and
> >
> > (b) the amount obtained when one quarter of the amount determined under paragraph (a) is multiplied by the number of complete months, not exceeding 12, from the day on or before which the return was required to be filed to the day on which the return is filed.

[106] Section 280.1 came into force in April 2007; according to section 280.1 a penalty will be assessed for failure to file a return within the time limits prescribed by the *ETA*. This section was enacted in 2006 and stated that the penalty to file a return would be applicable in the following situations:

a) in respect of any return that is required to be filed under Part IX on or after April 1, 2007 and;

b) in respect of any return that is required to be filed under Part IX before that day if it is not filed on or before March 31, 2007, in which case the day on or before which the return is required to be filed is deemed to be March 31, 2007, for the purposes of calculating any penalty under that section.

[107] The respondent established that the appellant did not file any GST returns. Therefore, he is deemed to have filed his GST returns on March 31, 2007 for the purposes of calculating the penalty. As a result, the Minister has correctly reassessed the penalty.

Disposition

[108] The appeal for the 2003, 2004, 2005 and 2006 is allowed, the unreported income of the appellant will have to be recalculated on the following basis:

ITA

a) the appellant's cash on hand at the end of 2002 is $ 39,476;

b) the expenditures in net worth assessment are $95,542.77 for the 2003 taxation year, $162,991.79 for the 2004 taxation year, $105,643.07 for the 2005 taxation year and $100,834.71 for the 2006 taxation year, calculated as follows:

2003

Expenditures as reassessed	$103,597.00
Less concessions by the respondent	
Citizenship & Immigration	$(4,600.00)
Transcription errors	$(982.13)
Mortgage reduction	$(2,472.10)
Expenditures after concessions	$95,542.77
Expenditures 2003	$95,542.77

2004

Expenditures as reassessed	$378,991.79
Less concessions by the respondent	
Gareene Home	$(106,000.00)

Inter-account transfers	$(99,000.00)
Expenditures after the concessions	$173,991.79
Reasons for judgment	
Less Inter-account transfers	$(11,000.00)
Expenditures 2004	$162,991.79

2005

Expenditures as reassessed	$203,312.52
Less concessions by the respondent	
Inter-account transfers	$(99,000.00)
Mortgage reduction	$(180.78)
Plus	
Excess payment on the Gareene Home	$26,511.33
Expenditures after the concessions	$130,643.07
Reasons for judgment	
Less Inter-account transfers	$(25,000.00)
Expenditures 2005	$105,643.07

2006

Expenditures as reassessed	$108,021.09
Less concessions by the respondent	
Inter-account transfers	$(7,186.38)
Expenditures after the concessions	$100,834.71
Expenditures 2006	$100,834.71

c) for the 2005 taxation year, the ending balance on the asset sheet of the net worth assessment for the Toronto Dominion bank account xxxx822 is $5;

d) for the 2006 taxation year, the ending balance on the liability sheet of the net worth assessment for the Line of Credit Visa xxxx337 is $19,810.62;

e) the Minister properly reassessed the appellant for penalties under subsection 163(2) of the *ITA* and such penalties will have to be adjusted to reflect the changes made to the appellant's net worth assessment;

ETA (Part IX – GST)

f) the appellant is liable to pay GST based on his unreported income determined for income tax purposes adjusted according to this judgment;

g) the appellant is also liable for penalties under subsection 280(1) of the *ETA* for failure to remit and under section 280.1 of the *ETA* for failure to file GST returns as adjusted by this judgment.

[109] Costs are awarded to the respondent.

Signed at Ottawa, Canada, this 29th day of July 2014.

"Johanne D'Auray"

D'Auray J.

CITATION:	2014 TCC 241
COURT FILE NO.:	2010-1444(GST)G 2010-1445(IT)G
STYLE OF CAUSE:	PARIS DRYDEN v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 19 and 20, 2013 and December 3, 4 and 5, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	July 29, 2014

APPEARANCES:

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Counsel for the Respondent:	Diana Aird

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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