Dockets: 2011-3294(GST)G,
2011-3296(GST)G, 2011-3293(GST)G,
2011-3288(GST)G, 2011-3295(GST)G

BETWEEN:

MASIH BOROUMAND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals numbered **2011-3310(IT)G**, **2011-3311(IT)G, 2011-3312(IT)G, 2011-3313(IT)G and 2011-3314(IT)G** on April 9 and 10, 2015, at Toronto, Ontario.

Before: The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Osborne G. Barnwell
Counsel for the Respondent:	John Grant
	Rishma Bhimji

AMENDED JUDGMENT

Upon counsel for the respondent having informed the Court by letter dated October 27, 2015 that a minor typographical error had occurred in the spelling of her name;

This amended judgment is issued to correct that error.

The appeals from the reassessments made under *Excise Tax Act*, the notices of which are dated January 7, 2010, for the periods from January 1, 2003 to December 31, 2003, from January 1, 2004 to December 31, 2004, from January 1, 2005 to December 31, 2005, from January 1, 2006 to December 31, 2006 and from January 1, 2007 to December 31, 2007 are dismissed with respect to 2004, 2006

and 2007 and allowed for 2003 and 2005 only for the purpose of adjusting the underreported income as follows to reflect concessions made by the respondent:

Taxation year	**Underreported income**
2003	$ 207,722.16
2005	$ 755,230.96

The respondent is entitled to her costs under the Tariff B of the *Tax Court of Canada Rules* (*General Procedure*).

This amended judgment is issued in substitution to the judgment dated October 15, 2015.

Signed at Ottawa, Canada, this 5th day of November 2015.

"Lucie Lamarre"

Lamarre A.C.J.

Dockets: 2011-3310(IT)G,
2011-3311(IT)G, 2011-3312(IT)G,
2011-3313(IT)G, 2011-3314(IT)G

BETWEEN:

MASIH BOROUMAND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals numbered **2011-3288(GST)G**, **2011-3293(GST)G, 2011-3294(GST)G, 2011-3295(GST)G and 2011-3296(GST)G** on April 9 and 10, 2015, at Toronto, Ontario.

Before: The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Osborne G. Barnwell
Counsel for the Respondent:	John Grant
	Rishma Bhimji

AMENDED JUDGMENT

Upon counsel for the respondent having informed the Court by letter dated October 27, 2015 that a minor typographical error had occurred in the spelling of her name;

This amended judgment is issued to correct that error.

The appeals from the reassessments made under the *Income Tax Act* for the 2004, 2006 and 2007 taxation years are dismissed and those for 2003 and 2005

taxation years are allowed only for the purpose of adjusting the underreported income as follows to reflect concessions made by the respondent:

Taxation year	Underreported income
2003	$ 207,722.16
2005	$ 755,230.96

The respondent is entitled to her costs under Tariff B of the *Tax Court of Canada Rules* (*General Procedure*).

This amended judgment is issued in substitution to the judgment dated October 15, 2015.

Signed at Ottawa, Canada, this 5th day of November 2015.

"Lucie Lamarre"

Lamarre A.C.J.

Citation: 2015 TCC 239
Date: 20151015
Dockets: 2011-3310(IT)G, 2011-3311(IT)G,
2011-3312(IT)G, 2011-3313(IT)G,
2011-3314(IT)G, 2011-3288(GST)G,
2011-3293(GST)G, 2011-3294(GST)G,
2011-3295(GST)G, 2011-3296(GST)G

BETWEEN:

MASIH BOROUMAND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre A.C.J.

Introduction

[1] These appeals relate to net worth assessments issued against Masih Boroumand under the *Income Tax Act* (**ITA**) and the *Excise Tax Act* (**ETA**) for the 2003, 2004, 2005, 2006 and 2007 taxation years (**period**). The Minister of National Revenue (**Minister**) also assessed interest and penalties (including gross negligence penalties pursuant to subsection 163(2) of the ITA) for all of those years.

[2] During the period, the Appellant acquired significant assets and spent substantial sums of money. His only significant liability was a mortgage that was taken out and paid off during the period. According to the Minister's net worth assessment nearly all of the Appellant's income during the period was unreported. It is my understanding that the Appellant disputes the personal expenditures that the Minister included in the net worth assessment, as well as the sources of his

unreported income, which he states were not taxable. The amounts at issue are as follows:

Taxation Year	Reported Income	Unreported Income
2003	$ 777	$ 207,722
2004	$ 1,975	$ 1,151,643
2005	$ 5,752	$ 755,231
2006	$ 10,700	$ 795,217
2007	$ 21,152	$ 759,645
TOTAL	$ 40,356	$ 3,669,458

[3] Furthermore, for the years 2003, 2004 and 2005, the Minister reassessed the appellant outside the normal reassessment period under the ITA. Subparagraph 152(4)(*a*)(i) of the ITA allows reassessment outside the normal period where the Minister establishes that the taxpayer has misrepresented his income in a way that can be attributed to carelessness, neglect or wilful default.

[4] If the Minister gets beyond that first threshold for the years 2003 through 2005, it is then up to the appellant to establish, on the evidence, that the Minister miscalculated the net worth discrepancies, and that the source of the funds generated no taxable income during the whole of the period. The Minister will then have to establish that the gross negligence penalties are appropriate in the circumstances.

[5] Finally, I will be required to make a determination as to the admissibility of certain evidence presented by the appellant at trial.

Parties' Positions

[6] The appellant's main position is that the funds came from non-taxable sources, namely: primarily an inheritance from family in Iran; loans and repayment of loans from his brother and friends; and the return of funds invested in Apex Fine Cars (**Apex**), a company he had started. The appellant says he was not working during the period.

[7] The respondent argues that, although a net worth assessment is a blunt instrument, it produces a close approximation of the taxpayer's actual income in the

present case, as disclosed by the auditor's analysis of the appellant's bank statements and investments and of the property held in his name. Furthermore, the respondent notes that subsection 152(8) of the ITA deems the assessments to be correct unless the appellant can discharge his onus of rebutting the Minister's assumptions.

The Net Worth Methodology

[8] There were two witnesses at trial: the appellant and the auditor. The appellant conceded both the existence and the value or amount of assets (bank accounts, investment accounts) and liabilities (a line of credit, several credit cards, and a mortgage) recorded on the net worth worksheets. Nevertheless, the appellant stated that the auditor employed an imprecise and incorrect approach in determining the net worth discrepancies in the net worth statement. The appellant did not really challenge the amount of "personal expenditures", although counsel argued that there was some double counting of such expenditures, as will be discussed below, and also argued that some of the expenses were paid on Apex's behalf.

[9] The auditor was first assigned to work on the file in 2009 following a referral received from the Toronto Police Service – Proceeds of Crime (see Penalty Recommendation Report, Exhibit R-7). In her testimony, she noted that the appellant's income tax returns reported interest but no other source of income to support the underlying investments. She mailed a request for personal books and records to the appellant, but received no response. She then obtained the documents from the banks by means of requirements (transcript, volume 2, page 158). After completion of the bank statement analysis, the appellant was reassessed.

[10] The auditor explained how she calculated the appellant's income during the period. She crystallized the starting position in 2002 (the base year) by looking at the year-end balances for his bank accounts and investments, as well as at property registered in his name. She determined the changes in his assets and liabilities by analyzing his bank statements.

[11] Likewise, personal expenditures were calculated by analyzing the appellant's bank statements. The auditor attempted to categorize the expenses as being for food, shelter, clothing, and so on where she could glean such information from the bank records. However, the vast majority of expenses fell into the category

"Other", as she was unable to identify what they were for (transcript, volume 2, page 164 and Exhibit R-2, Tab 5).

[12] The auditor testified that she avoided double-counting by eliminating transfers of funds between accounts belonging to the appellant (transcript, volume 2, page 165).

[13] Finally, adjustments were made to account for reported income and for tax refunds.

[14] Prior to trial, the net worth schedules (filed as Exhibit R-2, Tab 1) were revised slightly in favour of the appellant and filed as Exhibit R-1. The auditor explained that, when she transcribed certain of the credit card balances, she originally failed to reverse the amounts so that they would show as an asset (where the balance was negative) or as a liability (where there was an amount owing on a credit card). She noticed the error in preparing for trial and corrected it. (See transcript, volume 2, pages 155-156).

[15] Counsel for the respondent invited the Court to make a finding that the revised unreported income figures are the lower of figures given in the two sets of net worth statements filed as Exhibits R-1 and R-2, Tab 1 (transcript, volume 2, page 189). Accordingly, the "underreported business income per net worth" at issue is as follows:

2003	$ 207,722.16	(Exhibit R-1, Schedule 5)
2004	$ 1,151,643.62	(Exhibit R-2, Tab 1, Schedule 5)
2005	$ 755,230.96	(Exhibit R-1, Schedule 5)
2006	$ 795,217.77	(Exhibit R-2, Tab 1, Schedule 5)
2007	$ 759,645.25	(Exhibit R-2, Tab 1, Schedule 5)

The Evidence

[16] As alluded to earlier, the chief issue at trial was the source of the funds used during the period. I will go through the evidence on this point year by year.

2003

[17] The appellant's reported income for 2003 consisted solely of interest. According to the net worth assessment, the most significant indicator of unreported

income was the appellant's personal expenditures for the year, which were $255,118.

[18] In 2003, the appellant had a used car business, Apex, a limited company of which he was the sole director, shareholder and manager. The appellant testified that he started Apex in 1998 with $200,000 that he had in GICs, with options from Royal Bank in the amount of approximately $175,000 or $200,000, with $110,000 from his personal line of credit, and with his personal assets and Visa card. His testimony was that he made no further contribution to Apex after his initial investment in 1998 (transcript, volume 1, pages 20-21, 25).

[19] The appellant testified that he was forced to shut down Apex in April 2003 because one of his salespeople did not have the required licence to sell used cars. He testified that, upon winding it down, he took an amount – $230,000, $189,000 or $183,000 – from Apex as a return on his initial investment (transcript, volume 1, pages 25, 97, 101, 102). It is unclear whether the amount he took from Apex was the repayment of a loan, a shareholder benefit, salary or something else, nor is it clear exactly how much was taken.

[20] He further testified that he sometimes took about $2,000 or $2,500 a month from Apex to cover his personal expenses, but otherwise he tried to keep as much money as possible in the business. He testified that he had taken money from 1999 up until 2003, when the business was shut down (transcript, volume 1, pages 99-102).

[21] The appellant had no documentary evidence to support his version of events. In fact, the financial statements for Apex, which were prepared by the appellant's accountants, paint a different picture. According to those statements, the appellant's shareholder loan amount as of October 31, 2003 was $72,406. According to the financial statements for 2004, the amount in the shareholder loan account was $68,595 (Exhibit A-1, Tab 20, fourth page and Tab 21, fourth page). This suggests a running balance. The appellant testified that he had reviewed these documents in his role as sole director, but he could offer no explanation as to the discrepancy (transcript, volume 1, pages 103-105). When asked, he first said that the $72,406 represented cars that he had been unable to sell and which would have to be sold by auction or at wholesale (transcript, volume 1, page 26). Later, he said that he was not sure what the number represented (transcript, volume 1, page 105). The accountants were not called as witnesses to help explain the situation.

[22] A letter to the appellant's accountant in 2011 adds a further layer of confusion. In that letter, the appellant stated that when Apex's business was wound down he had cash and inventory remaining, which he used to survive (Exhibit R-3, Tab 17, page 79). During cross-examination, the appellant stated that by "cash" he meant money that he had given to his friends as loans, money in his bank accounts, and GICs. He said he had $220,000 to $230,000 in total. However, he was vague as to the source of those amounts, except to state that he had a GIC for US$60,000 in an account about which he was unsure and that there was about $20,000 or $25,000 in cash from Apex which he kept at home in a kitchen cabinet. When asked why he was making loans when he had earlier stated that he used the money to survive, he explained that it was part of his culture to help family and friends (transcript, volume 1, pages 109-114).

[23] After Apex ceased operations in April 2003, the appellant helped his brother, Mansour Boroumand, build a house (transcript, volume 1, pages 32-33). Going through the records for his CIBC personal line of credit, the appellant testified that he used the account for the construction of his brother's house.

[24] The house was in his brother's name and it had not been sold at the end of 2007. It is not clear what the relevance of the house was in contesting the net worth assessment, apart from bolstering the Minister's claim that the appellant had significant personal expenditures.

[25] When asked where he got the money to fund the construction of his brother's house, the appellant again referred to the US$60,000 GIC and said he received repayment of a loan he had made to a friend, whose name was Havani. He also testified that he made loans in 2003 to Fantastic Auto, a used car dealership, and to unnamed others (transcript, volume 1, pages 43-46). The terms and existence of the loans are unclear and no one was called nor was any documentation provided to confirm those assertions.

2004

[26] For 2004, the appellant reported solely interest income. However, the relevant net worth schedule showed the appellant as having acquired several significant assets, including a $240,000 GIC, another of $187,000 and a house at 86 Thornridge Drive purchased for $750,000 on which a mortgage of $560,204 was taken out. His personal expenditures for the year, according to the net worth schedule, were $612,127.

[27] The appellant agreed that he acquired the above assets in that year. He testified that he had received money from his uncle in Iran as well as loans from his brother and his brother's friend Ali Mojarad (transcript, volume 1, pages 49 and 66-67).

[28] According to his testimony, the money the appellant received from Iran was transferred to him through several money services businesses beginning in 2004 and continuing through 2007. His testimony was that the money represented his share of an inheritance from his grandmother, who had died. The appellant's mother decided to send his share of the inheritance to him in Canada. The appellant testified that his grandparents had a farm and a house in Iran (transcript, volume 1, pages 49-50). He appears to have received this inheritance bit by bit, in amounts ranging from approximately $5,000 to $200,000. The appellant did not say what his total inheritance was, but he did present records purporting to show that he received dozens of money transfers from Iran between 2004 and 2007 through three different money services businesses, and that these transfers totalled $1,938,538 (Exhibit A-1, Tab 11), of which approximately $400,000 would have been received in 2004.

[29] The respondent objected to the admission of those records into evidence, as will be discussed below. Apart from those records, the appellant offered nothing to support his position that the money he received was an inheritance. His uncle did not testify, nor was a will provided.

[30] Regarding the loan from his brother, the appellant likewise had no documentation. He said he was paid by cheque, but no cheque was presented at trial. He testified that he was given the loan to buy the house at 86 Thornridge Drive (transcript, volume 1, pages 62-63). According to the transcript of the examination for discovery, his explanation at that time was that he held the money as a trustee for his brother, who was going away on vacation (transcript, volume 2, pages 135-137 and Exhibit R-6, page 32.). His brother was unavailable to corroborate his evidence.

[31] The appellant also testified that he made a loan of $25,300 to someone named Richard Avanes in 2002, which was paid back in 2004 (transcript, volume 2, pages 127-128). There were no documents to support this, and the appellant explained that Mr. Avanes would not be coming to court to testify because he was not feeling well that day (transcript, volume 2, page 142).

[32] The appellant testified regarding a third loan, of US$26,000, which was made to him by his brother's friend Ali Mojarad. The appellant said that he did not know Mr. Mojarad well (transcript, volume 2, page 139). Again, there was no documentary evidence to support this loan, and Mr. Mojarad did not testify.

2005

[33] In 2005, the appellant reported income from interest and from painting. His testimony was that he spent a week painting a house for a friend whose last name he could no longer remember (transcript, volume 1, pages 89-91). According to the relevant net worth schedule, his personal expenditures for the year were $901,218.

[34] The appellant suggested that his chief source of financial support for that year was money from Iran. He testified that he cashed in the GIC of about $187,000, which he had acquired in 2004. According to the appellant, he had no other source of income in 2005 (transcript, volume 1, page 70).

2006

[35] In 2006, the appellant reported rental and business income. He paid off the mortgage on 86 Thornridge Drive that year and his personal expenditures were $439,901.

[36] The appellant testified that his main sources of income for that year were money from Iran, although he could not remember how much he received from that source, and loans that were paid back to him (transcript, volume 1, page 72). He did not say who paid him back, or when or how much he was paid. He also received some money from renting 86 Thornridge Drive, which was reported on his T1 for the year (transcript, volume 1, page 92).

[37] Regarding the business income of $6,000 that he reported on his T1, he said at trial that it was actually a GIC. On his signed tax return, he stated that the money was from renovations (transcript, volume 1, page 93 and Exhibit R-3, Tab 2, page 31).

[38] The appellant also testified that he registered a car detailing business, but that he earned no income from it because he never detailed any cars, nor did the business have any employees or purchase any supplies (transcript, volume 2, pages 125-127, 141).

2007

[39] In 2007, the appellant reported income of $21,152 (Exhibit R-3, Tab 16, page 76), which was possibly interest income (transcript, volume 1, page 96). He acquired significant assets in that year, including $26,828 deposited in a bank account and GICs worth $203,378, $158,087 and $18,035. His personal expenditures for the year were $435,576.

[40] The appellant's testimony was that his sole source of income for the year was money from Iran (transcript, volume 1, pages 74-76).

Analysis

Objection Regarding Hearsay Documents

[41] As indicated above, the respondent objected to the admission of alleged records from three money services businesses, which the appellant tried to introduce under the business records exemption to the hearsay rule. The records consist of transaction records which purport to show the appellant receiving nearly $2 million from Iran (those records were introduced in the appellant's book of documents, Exhibit A-1, at Tabs 14, 15 and 16).

[42] The basis of the respondent's objection is that the documents are hearsay. Documents are normally inadmissible for the truth of their contents unless the person who created the documents testifies as a witness.[1] Section 30 of the *Canada Evidence Act* provides an exception to this rule in the case of business records. It is reproduced at the end of the present reasons.

[43] The respondent argues that the appellant has not established the reliability of the documents, either by oral testimony or by affidavit attesting to the circumstances surrounding the creation of the documents in the usual and ordinary course of business. Furthermore, the respondent says she was not given notice of the appellant's intention to have the documents admitted in evidence, as is required under subsection 30(7).

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[1] *R. v. MacMullin*, [2013] A.J. No. 1454 (QL), 2013 ABQB 741, par. 50, which refers to *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at paras. 56-59.

[44] Subsection 30(6) of the *Canada Evidence Act* allows a trial judge to look at the circumstances in which the business records were made and to draw a reasonable inference as to their reliability.

[45] Subsection 30(7) requires a party who seeks to introduce documents under the business records exception to give notice of the party's intention to do so at least seven days before attempting to produce them at trial. This the Appellant did not do.

[46] The Appellant's counsel states that the documents were provided to the respondent pursuant to undertakings given during discovery. He submits that there was no need for him to provide formal notice of his intention to rely on the documents and that there are no concerns regarding the reliability of the documents. He also notes that section 30 gives this Court discretion to allow the documents.

[47] Under the common law principled approach, documentary evidence may be admissible for the truth of its contents if it is shown that it is necessary and reliable (*MacMullin*, *supra*, paragraph 69). Hearsay records can be admitted only if they have come into existence under circumstances which make them inherently trustworthy (*R. v. Monkhouse* (1987), 83 A.R. 62, 56 Alta. L.R. (2d) 97 (Alta. CA)).

[48] The trial judge acts as a gatekeeper in assessing the threshold reliability of the hearsay statement. The judge's function is to guard against the admission of hearsay evidence the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. (See *R. v. Khelawon*, *supra*, paragraphs 2-3).

[49] Here the trial was under the general procedure, with all the formal requirements that this entails. The respondent was entitled to notice under subsection 30(7) of the *Canada Evidence Act*, which she did not receive. Further, in this case the appellant offered no explanation as to the circumstances in which the records were made, and the respondent has raised serious concerns regarding

the reliability of those records. Some of them show the appellant as both the sender and the recipient of funds (transcript, volume 2, page 131). Furthermore, the appellant's own testimony was that he occasionally made loans — in particular one of $59,000 — to one of the money services businesses involved (transcript, volume 3, pages 133-134), which raises questions about the relationship between the appellant and that money services business.

[50] In that context, I do not believe this is an appropriate case in which to relax the rules of evidence. To admit these unproven documents for the truth of their contents would deprive the respondent of the opportunity to challenge the evidence and the Court of the ability to adequately assess its worth. I therefore decline to admit these records into evidence.

The Net Worth Assessments

[51] I now turn to the substance of the assessments, that is, to the net worth audit itself. Subsection 152(7) of the ITA empowers the Minister to issue arbitrary assessments using any method that is appropriate in the circumstances, and mostly it is the net worth method that is used, as is the case here.

[52] In *Hsu v. Canada*, 2001 FCA 240, [2001] F.C.J. No. 1174 (QL), 2001 DTC 5459, the Federal Court of Appeal analyzed the burden of proof related to such arbitrary assessments as follows:

> **22** Subsection 152(7) of the Act empowers the Minister to issue "arbitrary" assessments using any method that is appropriate in the circumstances. That subsection reads thus:
>
> > 152(7) Assessment not dependent on return or information. The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.
> >
> > 152(7) Cotisation indépendante de la déclaration ou des renseignements fournis. Le ministre n'est pas lié par les déclarations ou renseignements fournis par un contribuable ou de sa part et, lors de l'établissement d'une cotisation, il peut, indépendamment de la déclaration ou des renseignements ainsi

> fournis ou de l'absence de déclaration, fixer l'impôt à payer en vertu de la présente partie.

Subsection 152(8) grants a presumption of validity to these assessments and places the initial onus upon the taxpayer to disprove the state of affairs assumed by the Minister (*Dezura v. M.N.R.* (1947), 3 D.T.C. 1101 at 1102 (Ex. Ct.)). Notwithstanding the fact that such an assessment is "arbitrary", the Minister is obliged to disclose the precise basis upon which it has been formulated (*Johnston v. M.N.R.* (1948), 3 D.T.C. 1182 at 1183 (S.C.C.)). Otherwise, the taxpayer would be unable to discharge his or her initial onus of demolishing the "exact assumptions made by the Minister but no more" (*Hickman Motors Ltd. v. The Queen* (1997), 97 D.T.C. 5363 at 5376 (S.C.C.)).

23 Subsection 152(7) of the Act does not establish a specific method for determining the tax payable by a taxpayer. In most cases, the Minister follows the "net worth method". The Taxpayers Operations Manual prepared by National Revenue describes the net worth method as follows:

> The use of a net worth approach to major income is based on the premise that a client's income for a period is the increase in the client's net worth (financial position) between the beginning and end of a particular period. A client's net worth is the excess of his total assets, business and personal, over his total liabilities, business and personal, at a specific date.

24 Simply put, the amount by which the taxpayer's net worth increases over a particular period is imputed to the taxpayer as income.

. . .

29 Net worth assessments are a method of last resort, commonly utilized in cases where the taxpayer refuses to file a tax return, has filed a return which is grossly inaccurate or refuses to furnish documentation which would enable Revenue Canada to verify the return (V. Krishna, *The Fundamentals of Canadian Income Tax Law*, 5th ed. (Toronto: Carswell, 1995) at 1089). The net worth method is premised on the assumption that an appreciation of a taxpayer's wealth over a period of time can be imputed as income for that period unless the taxpayer demonstrates otherwise (*Bigayan, supra*, at 1619). Its purpose is to relieve the Minister of his ordinary burden of proving a taxable source of income. The Minister is only required to show that the taxpayer's net worth has increased between two points in time. In other words, a net worth assessment is not concerned with identifying the source or nature of the taxpayer's appreciation in wealth. Once an increase is demonstrated, the onus lay entirely with the taxpayer to separate his or her taxable income from gains resulting from non-taxable sources (*Gentile v. The Queen*, [1988] 1 C.T.C. 253 at 256 (F.C.T.D.)).

30 By its very nature, a net worth assessment is an arbitrary and imprecise approximation of a taxpayer's income. Any perceived unfairness relating to this type of assessment is resolved by recognizing that the taxpayer is in the best position to know his or her own taxable income. Where the factual basis of the Minister's estimation is inaccurate, it should be a simple matter for the taxpayer to correct the Minister's error to the satisfaction of the Court.

. . .

33 I would add that it was open to the Tax Court judge to conclude that the Minister's method for determining the appellant's income was reasonable and logical in the circumstances of this case. Although the Minister's reassessments were clearly arbitrary, it cannot be forgotten that this approach was the direct result of the appellant's refusal to disclose any financial information or documentation. In *Dezura*, *supra* at 1103-1104, the President of the Exchequer Court of Canada explained:

> The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act. If the taxpayer makes no return or gives incorrect information either in his return or otherwise he can have no just cause for complaint on the ground that the Minister has determined the amount of tax he ought to pay provided he has a right of appeal therefrom and is given an opportunity of showing that the amount determined by the Minister is incorrect in fact. Nor need the taxpayer who has made a true return have any fear of the Minister's power if he has a right of appeal. The interests of the revenue are thus protected with the rights of the taxpayers being fully maintained. Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to prove it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper account or records with which to support his own statements, he has no one to blame but himself.

[53] In *Bigayan v. Canada*, [1999] T.C.J. No. 778 (QL), 2000 DTC 1619 at paragraph 3, Judge Bowman, as he then was, stated that the best method of challenging a net worth assessment is to put forth evidence of what the taxpayer's income actually is. In the absence of records, an alternative course open to the

taxpayer would be for him to prove that even on a proper and complete net worth basis the assessments were wrong.

[54] Finally, in *Lacroix v. Canada*, 2008 FCA 241, [2008] F.C.J. No. 1092 (QL), 2009 DTC 5029 at paragraph 18, the Federal Court of Appeal confirmed that there is no rule that says that the Minister may not use the net worth method to add unreported income to a taxpayer's income unless the Minister can establish the source of the unreported income. Where the Minister presumes that the income detected using the net worth method is taxable income, the onus is on the taxpayer to demolish this presumption. If the taxpayer presents credible evidence that the amount in question is not income, the Minister must then go beyond the assumptions of fact and file evidence proving the existence of this income (*Lacroix*, paragraph 20).

[55] In the present case, the Minister made the assumptions that the appellant did not maintain appropriate books and records and that the income reported for the years at issue was inadequate to support the increases in his net worth and the level of his personal expenditures during those years. The Minister made several further assumptions on which was based the conclusion that the appellant's unreported income established by the net worth assessments significantly exceeded his reported income, that this excess income was not received by way of inheritance, from gifts or from lottery or gambling winnings, and that it did not pertain to any loans made or received by him.

[56] The appellant's main position is that the substantial increase in his net worth came from money owed to him by Apex, from other loans that were repaid to him by friends, from a loan received from his brother and from an inheritance from his grandmother in Iran.

[57] The appellant also challenged the net worth discrepancies determined by the Minister in the net worth statement as a result of scrutinizing his credit card and line of credit statements. He raised as well some concerns with regard to possible double-counting by the auditor in establishing the net worth.

[58] In my view, the evidence does support the conclusion that the appellant misrepresented his income in such a way that the respondent was entitled to reopen the statute-barred years under subparagraph 152(4)(*a*)(i) of the ITA, as will be discussed below. Having said that, I do not find the appellant has met his onus of establishing that the Minister miscalculated the discrepancies determined by the net worth method and that the source of the funds was such that those funds were not taxable income. In the appellant's testimony, more than half of the amount assessed as unreported income is not addressed at all, let alone explained. There were serious inconsistencies in his evidence, which was vague and sometimes evasive. No clear picture emerged as to the real state of his affairs; no plausible explanation was provided for the increase in net worth. His version of events was not supported by proper and reliable documentation and, in fact, was in conflict with documents prepared by his own accountants and with his statements on signed tax returns and in letters to his accountants.

[59] The appellant's explanation for the vast majority of the accretion to his net worth was the inheritance he said he received from his grandmother in Iran. The circumstances of this inheritance strain credulity. It was allegedly a multi-million-dollar share of an estate, which was transferred to the appellant by his uncle in Iran, acting on behalf of the appellant's mother, in many small transactions occurring over a period of several years. As indicated earlier in my reasons, the records from the money services businesses tendered by the appellant were inadmissible in evidence. There was no will. Given the large amount of money at issue, the respondent asks that I draw an adverse inference from the fact that the appellant's uncle was not called to testify, perhaps through videoconference as provided for in the *Tax Court of Canada Rules* (*General Procedure*). I agree that such an inference is appropriate. The circumstances of the inheritance are implausible and beg for corroboration. I draw an adverse inference from the fact that no relative was asked to testify regarding the existence of the inheritance.

[60] Counsel for the respondent asks me to draw adverse inferences from the fact that the appellant did not bring Richard Avanes and Ali Mojarad to testify regarding repayment of loans, or loans allegedly made to them, or ask the accountants to testify regarding the discrepancy between Apex's financial statements and his own version. It was not asserted that these persons were not available to testify. The appellant said that Mr. Avanes did not feel well the day of the hearing, but nothing was provided to support this, nor was Mr. Avanes

subpoenaed. Accordingly, I do draw an adverse inference from the failure to produce these witnesses.

[61] Counsel for the appellant argued that at least $20,000 had been double counted in the net worth schedule because $10,000 that was transferred out of one of the appellant's accounts was in fact an inter-account transfer. As discussed above, the auditor explained that she had sought to eliminate from her analysis all transfers between accounts belonging to the appellant. She explained that the amount in question was transferred to an unknown account; it may have belonged to the appellant, but she did not have that information. I accept the auditor's explanation, and note that although the onus was on the appellant to establish that the unknown account belonged to him, he provided no evidence or documentation to show that the account was in fact his.

[62] As for the auditor's approach in this net worth determination, the appellant argues that her approach was "quite novel and frankly wrong" (appellant's written submissions, page 6, note 4). He submitted that cash advances from credit cards, although used to pay expenses, should decrease the discrepancy as those cash advances were in the form of a debt. I find that the appellant did not prove this point. According to the net worth determination, most of the cash advances were repaid and the appellant did not establish with which funds they were repaid. As the Federal Court of Appeal said in *Molenaar v. Canada*, 2004 FCA 349, [2004] F.C.J. No. 1731 (QL), 2005 DTC 5307 at paragraph 4:

> 4 Once the Ministère establishes on the basis of reliable information that there is a discrepancy, and a substantial one in the case at bar, between taxpayer's assets and his expenses, and that discrepancy continues to be unexplained and inexplicable, the Ministère has discharged its burden of proof. It is then for the taxpayer to identify the source of his income and show that it is not taxable.

[63] I find that the appellant did not identify the source of the above-mentioned funds nor did he show that they do not represent taxable income.

Statute-Barred Years and Gross Negligence Penalties

[64] I now turn to the question of whether the Minister was justified in reassessing the 2003, 2004 and 2005 taxation years outside the statutory period

under subparagraph 152(4)(*a*)(i) and in imposing penalties under subsection 163(2). Subparagraph 152(4)(*a*)(i) allows the Minister to reassess outside the normal period where the taxpayer has misrepresented his income in a way that can be attributed to carelessness, neglect or wilful default. Subsection 163(2) allows the Minister to impose penalties where a taxpayer has made a false statement or omission in his tax return in circumstances amounting to gross negligence.

[65] It is well known that the Minister bears the onus of justifying both reassessment outside the statutory period and the assessment of gross negligence penalties, even in the case of a net worth assessment. This is true even where the Minister is unable to identify the true source of a taxpayer's income. The Federal Court of Appeal in *Lacroix*, *supra*, had the following to say about how the Minister can discharge that burden of proof in cases involving a net worth assessment:

> [30] The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts, and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanations he gave were found not to be credible. In my view, given such circumstances, one must come to the inevitable conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence. This justifies not only a penalty, but also a reassessment beyond the statutory period.
>
> . . .
>
> [32] 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). (*sic*)

[66] In *Venne v. R.*, (1984), 84 DTC 6247 (Fed.T.D.), Strayer J. at page 6256 defined gross negligence as follows:

> . . . "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. . . .

[67] As explained above in my reasons, I am satisfied that the appellant earned unreported income and did not provide a credible and plausible explanation for the discrepancy between his reported income and his net worth.

[68] Counsel for the appellant argued that more is required in order to reassess after three years. He suggested that there must be some deficiency on the face of a return in order for an audit to be commenced outside the statutory period; otherwise no one would be able to invoke the protection of the limitation period. He argued that, although the Minister is not required to prove the precise source of income, she must nevertheless be able to show that there was a taxable source of income.

[69] With respect, I think the law is quite clear: the Minister is not obligated to identify a source of income underlying a net worth assessment. Our system of taxation is a self-assessing one. The taxpayer is in the best position to know the sources of his income; if that income is non-taxable, he is in the best position to establish that fact by showing where the income came from through credible and plausible evidence provided in accordance with the rules of law.

[70] Here, the magnitude of the omissions in relation to the income declared is significant and occurred over a number of years. In the appellant's testimony, more than half of the amount assessed as unreported income was not addressed. There were serious inconsistencies in his evidence and his version of events was in conflict with documents prepared by his own accountants and with some of his previous statements. I am satisfied that the respondent has met her burden of proof of both showing that the appellant made a misrepresentation of his income in a way that is attributable to carelessness, neglect or wilful default, but also in a way that involved a high degree of negligence tantamount to intentional acting, or indifference as to whether the law is complied with or not.

[71] I therefore conclude that the respondent was entitled to reopen the statute-barred years under subparagraph 152(4)(*a*)(i) of the ITA and to impose penalties under subsection 163(2) of the ITA.

Conclusion

[72] For these reasons, the appellant's appeals are dismissed for the 2004, 2006 and 2007 taxation years and allowed for the 2003 and 2005 taxation years only for the purpose of adjusting the underreported income as follows to reflect concessions made by the respondent:

Taxation year	Underreported income
2003	207,722.16
2005	755,230.96

[73] The respondent is entitled to her costs under Tariff B of the *Tax Court of Canada Rules* (*General Procedure*).

Signed at Ottawa, Canada, this 15th day of October 2015.

"Lucie Lamarre"

Lamarre A.C.J.

CANADA EVIDENCE ACT

Business records to be admitted in evidence

30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

> (*a*) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or
>
> (*b*) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

> (*a*) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or
>
> (*b*) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(*a*) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,
(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
(iii) a record in respect of the production of which any privilege exists and is claimed, or
(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(*b*) any record the production of which would be contrary to public policy; or

(*c*) any transcript or recording of evidence taken in the course of another legal proceeding.

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

(*a*) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or

(*b*) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

(12) In this section,

"business"
« affaires »
"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

"copy" and "photographic film"
« copie » et *« pellicule photographique »*

"copy", in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and "photographic film" includes a photographic plate, microphotographic film or photostatic negative;

"court"
« tribunal »

"court" means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

"legal proceeding"
« procédure judiciaire »

"legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

"record"
« pièce »

"record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4).

[Emphasis added]

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