Docket: 2002-675(IT)I

BETWEEN:

RÉGIS DELAUNIÈRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal by
9039-0402 Québec Inc. (2002-676(IT)I) on August 25, 2003,
at Chicoutimi, Quebec

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Régis Gaudreault

Counsel for the Respondent: Nancy Dagenais

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1999 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of November 2003.

"François Angers"

Angers J.

Translation certified true
On this 30th day of March 2009
Monica Chamberlain, Translator

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REASONS FOR JUDGMENT

Angers J.

[1] The appeals were heard on common evidence in Chicoutimi. The taxation years in question are 1999 in the case of Régis Delaunière (the Appellant) and 1999 and 2000 in the case of 9039-0402 Québec Inc. (9039). In an assessment dated May 25, 2001, and confirmed on November 20, 2001, the Minister of National Revenue (the Minister) added $25,078 in computing the Appellant's income as additional income for the 1999 taxation year. The Minister also imposed a penalty for the same taxation year under subsection 163(2) of the *Income Tax Act* (the Act).

[2] With respect to the Appellant 9039, the Minister added $4,180 and $20,898 for the taxation years ending on February 28, 1999, and February 29, 2000, respectively, as income from a business, by assessments dated June 1, 2001, and confirmed on November 20, 2001. For the fiscal year ending on February 28, 1999, that figure represents 2/12 of the Appellant's unreported income for the 1999 taxation year, and for the taxation year ending on February 29, 2000, represents 10/12 of the Appellant's unreported income. As he did in the case of the Appellant Régis Delaunière, the Minister imposed a penalty under subsection 163(2) of the Act.

[3] The Appellant is the sole shareholder of 9039, which operates a restaurant and bar under the name La Broue and occupies a building owned by a company called Aspirateurs Chicoutimi Inc. Nancy Tremblay, an auditor with the Canada Customs and Revenue Agency (CCRA), was instructed to audit 9039's tax returns. She then determined the Appellant's income using the net worth method.

[4] The information used to determine the Appellant's income by the net worth method was supplied to the auditor by the Appellant, whom the auditor asked to fill out the calculation form and enter the amounts of his personal expenses. The auditor changed some amounts after comparing them with certain data from Statistics Canada, in order, she said, to strike a fair balance. The final figures were entered in evidence as Exhibit I-4. The auditor did a similar exercise for the Appellant's 1998 taxation year, but the Appellant's explanation was satisfactory and accordingly he avoided reassessment.

[5] This is not the Appellant's first audit. For 1992 and 1993, Revenue Canada assessed him using the net worth method, and $3,912 and $4,197 were added to his income for those years, respectively. Revenue Canada audited the income reported by the Appellant for the years 1997 to 2000, inclusive, but the year now in issue, 1999, was the only one for which a reassessment was made.

[6] The Appellant testified regarding each of the personal expenses he is disputing, and the auditor also testified on that subject. Their respective positions are as set out below.

Transportation

The amount in issue is $5,400, consisting of $4,800 in gasoline and maintenance expenses and $600 for vehicle insurance. These two expenses represent the expenses associated with the use of a Jeep TJ that the Appellant leased at the time. On this item, the Appellant testified that not only did he find the amount for gasoline expenses excessive, but his *de facto* spouse was the person who was responsible for all of those expenses at the time, because she was the only one who used the vehicle and she only used it to drive between the restaurant and the house. The Appellant used the truck belonging to Aspirateurs de Chicoutimi Inc. to install vacuum systems and the expenses associated with it were paid by that company. However, he acknowledged that he had used the Jeep on Saturday nights and Sundays for personal purposes. In the audit, he did not give the auditor that information

or provide any documentary or other evidence that his spouse actually paid the expenses associated with the Jeep in question.

Ms. Tremblay had some difficulty justifying the $4,800 added for gasoline and maintenance expenses but said it was the amount the Appellant had given her.

Entertainment

Under this item, the Appellant stated that he had a television but did not subscribe to cable. Under [TRANSLATION] "sports events, tickets, recreation centre, etc.", he testified that he did not participate in those things and did not go to shows. The auditor stated that the amounts she used had been given to her by the Appellant.

Tobacco and Alcohol

The figure given under this item is $473.72. The Appellant disputes that amount, and claims that he does not drink. The auditor's position, again, is that the amount comes from figures given to her by the Appellant.

Other

There are five things under this item. The Appellant agreed with the first figure shown, $16,900, which represents support payments made. For the next three figures, representing interest paid by him on various loans, the Appellant had nothing to add. On the last figure, $5,072.04, he said that this represented the cost of leasing the Jeep TJ for the year. The lease contract is in his name and he makes the monthly payment by direct payment. However, he stated that his spouse reimburses him for that amount every month in cash.

The auditor testified that when she met with the Appellant he never mentioned the arrangement he had with his *de facto* spouse for her to reimburse him for the lease expense. She did not dispute the deposits made by the Appellant, which related to reimbursement of the lease expenses. The *de facto* spouse did not testify.

Other Amounts

The Appellant testified that during the taxation year in issue he received a $15,000 sum that he reported at one time as a loan and another as a gift. The money was lent or given to him by an Étienne Tremblay, a friend he had known for seven years, and who was until 1997 the manager of the Appellant's establishment. He was described by the Appellant as a person with an alcohol dependency problem who had a lot of trouble managing his money.

The Appellant testified that Étienne Tremblay had quit his job in 1997 to go and work in Algeria for an engineering firm, and that when he returned in 1999 he had saved $175,000. He was walking around with a lot of cash on him, as was confirmed by the witness Pierre Deschênes.

The facts surrounding the $15,000 received by the Appellant are somewhat contradictory. The Appellant stated that at the time the advance was made to him, his friend was walking around with $30,000 in cash on him because he wanted to buy a cottage. The Appellant allegedly received $5,000 cash on May 12, 1999, which he deposited into his bank account on that date, according to his bankbook, which was entered in evidence. The next day he received $10,000 cash, of which he deposited $4,100 on June 28, 1999, and $5,000 on July 27, 1999, again according to his bankbook.

[7] In a letter dated September 12, 2001, addressed to the Canada Customs and Revenue Agency, the Appellant summarized the facts as follows:

> [TRANSLATION]
> On about May 12, 1999, Étienne Tremblay took out $5,000 from his safety deposit box and gave it to me, and I deposited it in my account. The next day, he took out $30,000 at the counter, put $15,000 in his safety deposit box and gave me $10,000, which I kept in cash for some time. On June 28, 1999, I deposited the remaining $4,100 in my account.

[8] In the course of the audit, a letter dated March 6, 2001, signed by Étienne Tremblay, was given to the auditor. The letter certifies, among other things, that Étienne Tremblay gave the Appellant $15,000 on May 13, 1999, and that that money had been withdrawn from his personal account at the National Bank of Canada on boul. Talbot in Chicoutimi. The money given to the Appellant was part of a bank withdrawal of $30,000. A photocopy of his account shows that

Étienne Tremblay made a $30,000 withdrawal on May 13, 1999. Two copies of the March 6, 2001, letter were entered in evidence: the original filed by the Appellant and a photocopy filed by the Respondent. Étienne Tremblay's signature is not on the same place on the photocopy, suggesting that it is not a photocopy of the original filed by the Appellant, and the two signatures are slightly different. The Appellant was unable to explain this anomaly, except that he admitted that he and Étienne Tremblay had tried to reconstruct what had happened at the time.

[9] According to the Appellant, no document was signed by him and Étienne Tremblay in relation to the advance of the funds in question. He admitted he had never discussed with his friend whether this was a loan or a gift, but said he had repaid a part of it, which he described as very little. Étienne Tremblay has not been seen in a year and a half and did not testify.

[10] On the question of repayment, the Appellant denied that in a conversation with the auditor he told her that he had repaid the loan in full. He also denied threatening her over the telephone by saying he was going to speak to her nose to nose with a 12, which I understand to be a 12-gauge shotgun. The Appellant stated he had been direct with the auditor because he was disappointed with the turn of events. He explained his conduct at that time by saying he was going through a rough time.

[11] At a meeting with Étienne Tremblay, the auditor, Nancy Tremblay, received confirmation that the letter of March 6, 2001, was genuine, and he told her that he had withdrawn the money from his personal account and it was a gift. He did not mention a safety deposit box at a bank. Ms. Tremblay was unable to reconcile the date of the gift with the dates of the deposits made by the Appellant, in particular the $5,000 deposit made on July 27, 1999.

[12] The auditor entered her report dated April 20, 2001, in which she recommended that the penalty be applied on the grounds that this was not the Appellant's first offence, that the amount in question was nearly half of the Appellant's reported income and the Appellant had access to all accounting services needed. The auditor concluded her testimony by saying that the Appellant's conduct during the audit had been acceptable, except for the telephone conversation in which he threatened her.

[13] The Appellant testified in rebuttal that a secretary had handled his accounting for seven years, the accounting is done on computer, and the figures are sent to the chartered accountancy firm with which he does business. His *de facto*

spouse worked for him in 1999 for a salary of $10,800, and in addition received unemployment insurance benefits. They each wanted to be independent of the other in order to preserve the insurability of their employment.

Analysis

[14] The principles that apply in cases involving assessments based on net worth have been cited in several decisions of this Court and the Federal Court of Appeal. In *Hsu v. Canada*, [2001] F.C.J. No. 1174 (QL) at paragraphs 29 and 30, Madam Justice Desjardins of the Federal Court of Appeal summarized them as follows:

> 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.

[15] I would also note the following passage from the decision in *Bigayan v. Canada*, [1999] T.C.J. No. 778 (QL) (2000 DTC 1619), in which Judge Bowman stated, at paragraphs 2 to 4:

> 2 The net worth method, as observed in Ramey v. The Queen, 93 D.T.C. 791, is a last resort to be used when all else fails. Frequently it

> is used when a taxpayer has failed to file income tax returns or has kept no records. It is a blunt instrument, accurate within a range of indeterminate magnitude. It is based on an assumption that if one subtracts a taxpayer's net worth at the beginning of a year from that at the end, adds the taxpayer's expenditures in the year, deletes non-taxable receipts and accretions to value of existing assets, the net result, less any amount declared by the taxpayer, must be attributable to unreported income earned in the year, unless the taxpayer can demonstrate otherwise. It is at best an unsatisfactory method, arbitrary and inaccurate but sometimes it is the only means of approximating the income of a taxpayer.
>
> 3 The best method of challenging a net worth assessment is to put forth evidence of what the taxpayer's income actually is. A less satisfactory, but nonetheless acceptable method is described by Cameron J. in Chernenkoff v. Minister of National Revenue, 49 D.T.C. 680 at page 683:
>
> > In the absence of records, the alternative course open to the appellant was to prove that even on a proper and complete "net worth" basis the assessments were wrong.
>
> 4 This method of challenging a net worth assessment is accepted, but even after the adjustments have been completed one is left with the uneasy feeling that the truth has not been fully uncovered. Tinkering with an inherently flawed and imperfect vehicle is not likely to perfect it. The appellant chose to use the second method.
> …

[16] It is therefore up to the Appellant to establish on a balance of probabilities that the Minister acted without justification in adding the $25,078.19 established using the net worth method to his income. To prove that, the Appellant disputed some of the figures used in calculating his personal expenses and asserted that he had paid his expenses using a $15,000 gift from one of his friends.

[17] In this case, the net worth calculations were done using the information the auditor obtained on a form filled out by the Appellant. As well, and according to her testimony on this subject, she had confirmation of some of the figures she used, from people she had contacted herself. She could not find the form the Appellant had filled out, which she had used, but nonetheless I have no reason to believe that the information she obtained is not the information she used in calculating the Appellant's personal expenses.

[18] This is the context in which I conclude that the expenses shown under the items "Entertainment" and "Tobacco and Alcohol" are reasonable. The auditor obtained those figures from the Appellant himself. How would she have arrived at a figure of $473.72 under the heading "Tobacco and Alcohol" if the Appellant had not given it to her himself?

[19] Under the item "Transportation", the Appellant maintained that his spouse covered all the expenses recorded under that item herself. He added that because the Jeep in question is new and under warranty, there should be no maintenance expenses. According to the auditor, the amounts shown come from the Appellant and, based on the evidence presented, I cannot change them. The Appellant did not submit any documentary evidence relating to that item, and although at first blush the total expenses for gas and maintenance seem high, I have nothing on which I could rely to rectify the situation.

[20] Under the item "Other", regarding the lease of the Jeep, I reject the Appellant's version, that it was his spouse who paid for it. If it was so important to him and his spouse to keep their affairs separate in order to ensure that their employment was insurable, there would have been documentary evidence to support his assertion that she reimbursed him for the monthly payments and he would certainly have informed Ms. Tremblay of this during the audit. In my opinion, the expenses shown are expenses incurred by the Appellant himself and they were therefore properly attributed to him.

[21] The support expenses that appear under the item "Others" were admitted by the Appellant, and the interest expenses relating to three loans were verified by the auditor with the financial institutions concerned. The amounts shown are therefore accurate and attributable to the Appellant. No evidence was led on which I could have concluded otherwise.

[22] The Appellant said that during the taxation year in issue he received a $15,000 loan or gift from his friend Étienne Tremblay and that, he explained, was his source of money for paying his expenses. Even if I accept that Étienne Tremblay may have had substantial sums of money, at least during the period from December 1998 to May 1999, I have serious questions as to the truth of that story. Is it a gift or a loan? If it is a loan, has it been almost entirely repaid, as the Appellant said in the version he gave the auditor, or paid in part, as he stated in the version he presented at the trial? If it has been repaid, what did the Appellant use to pay his expenses?

[23] The letter from the Appellant to the CCRA dated September 12, 2001, referred to a $5,000 withdrawal by Étienne Tremblay from his safety deposit box at the bank on about May 12, 1999, while in his letter of March 6, 2001, Étienne Tremblay talks about a $15,000 gift made on May 13, 1999, out of the funds withdrawn from his personal account at the National Bank. What really happened?

[24] In his testimony, the Appellant stated that on June 27, 1999, he made a third deposit of funds from the $15,000. Why did he not mention that in his letter of September 12, 2001? If he deposited that money, why do the three deposits total $14,100, and how was he able to deposit $5,000 on May 12, 1999, when Étienne Tremblay said he gave him $15,000 on May 13, 1999?

[25] Étienne Tremblay could not testify because he cannot be found. His credibility was not tested at the hearing of this case, but the evidence provided by Mr. Tremblay contradicts the Appellant's evidence and casts doubt on his statements. Why were the two identical letters from Étienne Tremblay signed in different places? Is it the same signature in each case? Why was the Appellant so reluctant to admit the threats he made to the auditor in a conversation with her? The Appellant says a lot of things and shows little concern for their veracity. The consequence of all this is that his credibility is in doubt and the entire story he recounted seems to be entirely implausible. Accordingly, I reject his version of the facts. Because he has not discharged his burden of proof, I conclude that the $25,078 was properly added as unreported income in computing the Appellant's income for the 1999 taxation year.

[26] For the reasons set out above, I conclude that the unreported income of the Appellant Régis Delaunière in the amounts of $4,180 for his 1999 taxation year and $20,898 for his 2000 taxation year, 2/12 and 10/12, respectively, represent the portion of the Appellant's unreported income that is attributable to him, and were therefore properly added as unreported business income in computing 9039's income for the 1999 and 2000 taxation years.

Penalties

[27] The Minister imposed a penalty on each Appellant under subsection 163(2) of the Act. That subsection reads as follows:

> **(2)** **False statements or omissions.** Every person who, knowingly, or under circumstances amounting to gross

> negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of:
> . . .

[28] The onus is therefore on the Respondent to establish on a balance of probabilities that the Appellants made a false statement in their income tax returns for the years in issue and that the statement was made knowingly or in circumstances amounting to gross negligence.

[29] I concur in the remarks of Mr. Justice Strayer in *Venne v. Canada,* [1984] F.C.J. No. 314 [QL] (84 DTC 6247) regarding the concept of gross negligence:

> "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.

[30] In this case, the Respondent has established that this was not a first offence for the Appellant Régis Delaunière. In 1992 and 1993, Revenu Québec audited him and assessed him using the net worth method. The amount of his assessment in this case is nearly half of the income he reported, and the evidence is that the Appellant had access to bookkeeping services, even though it was a secretary who handled the accounting. Based on the Appellant's attitude and the fact that he scarcely bothered to give truthful testimony, I am justified in concluding that he is indifferent about complying with the law. The same is true of the Appellant 9039. The Respondent has therefore discharged his burden of proof and the penalties for the taxation years in issue that the Minister imposed on the two Appellants under subsection 163(2) of the Act are justified.

[31] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 14th day of November 2003.

"François Angers"

François Angers J.

Translation certified true
On this 30th day of March 2009
Monica Chamberlain, Translator

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APPEARANCES:

For the Appellant:	Régis Gaudreault
For the Respondent:	Nancy Dagenais

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