

Citation: 2004TCC95
Date: 20040301
Docket: 2003-1831(IT)I

BETWEEN:

BJARNE AASLAND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Agent for the Appellant: Gordon Gillespie
Counsel for the Respondent: Michael Van Dam

REASONS FOR JUDGMENT

**(Delivered orally from the Bench at
Winnipeg, Manitoba, on November 7, 2003)**

Mogan J.

[1] These are appeals with respect to the taxation years 1999 and 2000. For each of those years, the Appellant filed returns of income under the *Income Tax Act* containing only his name and address. The returns did not disclose his sources of income or what his income was. Evidence was called on behalf of Revenue Canada from Mr. Chervinski, a trust examination officer, who stated that the Appellant had not filed an income tax return from 1994 to 1998. When he failed to file returns for 1994 and subsequent years, Revenue Canada completed what are called arbitrary assessments in which they consolidated the sources of income which they had record of from third parties by way of T4 or T5 slips for Old Age Pension, Canada Pension Plan or other pensions; and they added an arbitrary amount of \$2,000 as business income. The Appellant was assessed for 1994 to 1998 on that basis. For the years under appeal, Revenue Canada acted on hard evidence from third party sources, but also added an arbitrary amount for business income.

[2] The Appellant's recollection is that he did not appeal any of those assessments for 1994 to 1998. In the two years under appeal, as I have stated, the Appellant filed returns, but did not disclose any amounts with respect to income or various sources or anything that would permit the Minister of National Revenue to make any determination as to what the Appellant's actual income was. When the hearing commenced, the Appellant's agent, Mr. Gillespie, presented to the Court copies of the tax returns for the years 1999 and 2000 which were also completed by Revenue Canada and marked as exhibits.

[3] Exhibits A-1 and A-2 are the Revenue Canada returns of the Appellant for the 1999 and 2000 taxation years, respectively. On page 2 of the 1999 return, Revenue Canada shows the Appellant as having received Old Age Security pension of \$4,959, Canada Pension Plan benefits of \$6,983 and other pensions of \$18,302, for a total of approximately \$30,000. On line 135, Revenue Canada shows business income of \$5,000, making a total income of \$35,244. For the year 2000, the same kind of operation was performed. Exhibit A-2 shows that Revenue Canada reported Old Age Security pension of \$5,079, Canada Pension Plan benefits of \$7,094, other pensions of \$18,500, again making total income of about \$30,000 from those sources. On the same basis, Revenue Canada added \$5,000 of business income.

[4] The Appellant, through his representative, acknowledged that the computation of income from pension sources in those returns is accurate. In other words, there is an admission by the Appellant that he did receive income of at least \$30,000 in each of the years 1999 and 2000 from the three designated sources, Old Age Security pension, Canada Pension Plan benefits and other pension income. The only amount in dispute is the \$5,000 which appears to be an arbitrary amount added as business income by Revenue Canada.

[5] There was no evidence tendered by or on behalf of the Appellant. No one took the witness box to offer any oral testimony as to what the Appellant did, apart from receiving this pension income, whether he carried on a business and what the nature of the business was. But casual statements made by the Appellant's representative, Mr. Gillespie, and the responses from the Appellant himself to a few questions which I asked him directly, without his being in the witness box, indicate that he is a musician. He played in a military band for about 26 years. He stated that he could play reed instruments like the saxophone and clarinet, and that he could also play the piano and accordion. After he left military life, he used to play what some people call "gigs" which are engagements where a musician will perform either alone or as part

of a group in a social setting like a birthday party, or a wedding, or in a commercial establishment like a bar.

[6] The Minister apparently knew about this activity ("gigs") from the earlier returns because, although the Appellant called no evidence, counsel for the Respondent called an employee of Revenue Canada, Mr. Chervinski, who at the relevant time in 2001 was engaged in a standard operation of Revenue Canada trying to find out why people were not filing returns. He had a number of names assigned to him and the Appellant's name happened to be on his assigned list.

[7] Mr. Chervinski looked into the matter and discovered that no returns had been filed from 1994 to 1998. He knew that in each of those years, the Minister had added an arbitrary amount of \$2,000. He did further leg work and found that the Appellant had filed returns from 1987 to 1993 in which this kind of activity was reported. Mr. Chervinski gave precise amounts for those years taken from the Appellant's returns. In 1987, the Appellant showed gross musician income of \$5,650 and a loss of \$3,024; in 1988, gross musician income of \$4,010 and a loss of \$2,640; in 1989, gross musician income of \$2,185 and a loss of \$3,846; in 1990 and 1991, there were no gross amounts reported, but the Appellant claimed a loss in 1990 of \$2,227 and in 1991 of \$2,023. In 1992 and 1993, the Appellant again reported both gross and net amounts as follows: for 1992, a gross of \$3,986 but a net loss of \$1,692; and in 1993, a gross of \$700 but a net loss of \$1,853. Therefore, from 1987 through to 1993, the Appellant showed commercial activity as a musician with amounts of gross revenue in the range of approximately \$4,000 down to \$2,000 if I exclude the two extreme limits of \$700 in 1993 and \$5,600 in 1987. If I ignore those two extreme amounts for 1987 and 1993, in the other five years, the gross amounts ranged from \$2,000 to \$4,000 for an average of \$3,000.

[8] Then the Appellant stopped reporting after 1993 for whatever reason and the Minister completed unsigned returns using third party information from T4 or T5 slips issued by Canada Pension Plan or Old Age Security. The Appellant was born in 1931 and so in 1996, he would have turned 65. I assume that from 1996, he received Old Age Security pension as well as Canada Pension Plan benefits and probably a military pension of approximately \$18,000 after serving for many years.

[9] Mr. Chervinski said that he discussed the matter with his supervisor, and they decided to increase the arbitrary assessed gross revenue from musician's income from \$2,000 to \$5,000 to try and induce the Appellant to file tax returns. This confirms a document which the Appellant obtained through Access to Information and Privacy and which is apparently a document from the Revenue Canada files because it bears

the name of the Revenue Canada employee, Randy, which is the first name of the only witness who testified here today. That document contains the following sentence:

In addition, \$2,000.00 of musician income was included in arbitraries done in 1994 to 1998 which still did not result in compliance from the client. As a result, I have included \$5,000.00 of self-employed income as a musician in an attempt to induce compliance.

So there is a candid statement by Mr. Chervinski that he increased the amount to try to induce compliance by the Appellant. There is nothing wrong with that.

[10] The Appellant's representative thought that it was an abuse of the process and referred me to subsection 152(7) of the *Income Tax Act* but, in my view, that subsection operates against the Appellant because it contains authority for the Minister to issue arbitrary assessments where no return has been filed. Since the Appellant admits that he filed returns for 1999 and 2000 showing no source of income at all, effectively that is not a return; it is a piece of paper which includes his address.

[11] A return of income is a statutory document prescribed by the *Act* and the form is adopted by *Regulation*. The taxpayer not only discloses his name and address and social insurance number, but also shows his true income or his best estimate of what his income is. If he carries on a business it would be a computation of revenue and expenses. In this case, it is even less excusable for the Appellant not to file a return because he had income from specific, identifiable sources with particular amounts, like the Old Age Security pension, the Canada Pension Plan benefits and his military pension. These are not estimates but actual amounts which are received month by month; and at the end of the year, each of the authorities issuing those pensions sends to each individual in Canada what is called a T4 or T5 slip disclosing who the payor is and the precise amount of what was paid out in the year to the individual.

[12] So this Appellant knew he was receiving about \$30,000 each year from specific sources with specific amounts each month. His failure to file returns is puzzling to say the least, and really inexplicable if he is carrying on a commercial activity at a loss, which might reduce his income. The indications from the evidence of Mr. Chervinski is that, if he had reported his activities as a musician, they probably would have produced a loss and he might have reduced his pension income by having such a loss to write off against part of it. For whatever reason he did not file returns.

[13] The Minister, in my view, is justified in issuing an assessment and adding an arbitrary amount of gross revenue from the Appellant's activities as a musician. If the Appellant was advised by any person not to file a return, he was very ill-advised but that is not the first time a taxpayer has received bad advice.

[14] Be that as it may, I have some compassion for the taxpayer for three reasons. The first is age because he is past the point where he can go out and seek active employment. He is retired, over 70 years of age and has spent his time in the military and other activities. Second, I have reason to believe from what was said in Court today that the Appellant received bad advice and followed it. That is an act of imprudence on his part, but we do not always act in our own best interests. And third, the very honest evidence brought forward by Mr. Chervinski indicates that the Appellant reported losses consistently.

[15] Therefore, I intend to adjust the assessments under appeal. As I look at those seven taxation years on which Mr. Chervinski gave specific evidence, the gross amounts in those years are a high of \$5,650 and a low of \$700. I propose to exclude those, as is often done in attempting to achieve an average. The remaining available amounts are approximately \$4,000, \$2,200 and \$4,000. I am going to strike an average and say that those other five years would indicate an income of approximately \$3,000 gross.

[16] I conclude that the Minister was justified with the limited information he had in assessing this taxpayer and adding the \$5,000. It is difficult to enforce compliance from people when the Minister knows they are receiving about \$30,000 of income from sources that are disclosed to the Minister by third party payors. The Minister has to do what he can to encourage and induce compliance with the *Act*, and so the Minister was justified in upping the ante, if I can use that phrase, from \$2,000 to \$5,000. But having heard the evidence in Court today and having some compassion for the Appellant, partly because of his age, partly because of the track record he showed in those early years, and partly because of the bad advice he received, I am going to reduce the arbitrary estimate of musician's income to \$3,000 and will hold that the appeal is to be allowed in part only. The assessments are sustained in every way, except that the amounts added arbitrarily by the Minister for 1999 and 2000 will be reduced from \$5,000 to \$3,000. Otherwise the penalties are upheld.

[17] There are penalties provided in the *Act* for persons who not only fail to file returns, but who repeatedly fail to file returns after receiving requests and demands; and those penalties are upheld. Those penalties will be somewhat reduced because I

am making a modest reduction in the gross income of the Appellant. I want to go on record as stating that I specifically uphold the penalties even if they have to be reduced when the income is reduced.

Signed at Ottawa, Canada, this 1st day of March, 2004.

"M.A. Mogan"

Mogan J.

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COURT FILE NO.: 2003-1831(IT)I

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APPEARANCES:

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