Docket: 2005-86(IT)G

BETWEEN:

DAVID SABBAH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on April 24 and May 16, 2007 at Montreal, Quebec

Before: The Honourable Justice G. A. Sheridan.

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Suzanne Morin

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from the assessments made under the *Income Tax Act* for the 1995, 1996, 1997 and 1998 taxation years are dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 11th day of October, 2007.

"G. A. Sheridan"

Sheridan, J.

Citation: 2007TCC601
Date: 20071011
Docket: 2005-86(IT)G

BETWEEN:

DAVID SABBAH,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, David Sabbah, is appealing a net worth assessment pursuant to which the Minister of National Revenue added over $150,000 in unreported income to his income for the years 1995-98. The net worth assessment was conducted following an audit of the Appellant's company. The Appellant's position is that the assessment ought to be reduced by $74,619 as such funds had come from a savings account the Appellant had opened sometime in the mid-1980's. According to the Appellant, during the years 1995-98, funds totalling $74,619 had been withdrawn, as needed, from the savings account to help run his company; personal advances were then taken from the company account in repayment of that loan. The Appellant also contended that the Minister had arbitrarily over-estimated his family's living costs.

[2] As in any tax appeal, the Appellant has the onus of proving wrong the Minister's assumptions. In the present case, the Appellant faced an uphill battle. The bank where his savings were allegedly held had since merged with another financial institution. While that made access to already-dated records all the more difficult, such efforts would not have been necessary had the Appellant kept adequate books and records as required under the *Income Tax Act.* Notwithstanding his insistence that the banking records would prove his case, he had rejected the auditor's offer to authorize her to use her powers under the *Act* to make a search on his behalf. As a result, he was unable to produce, either during the audit or at the hearing of his appeal, corroborative evidence such as bank statements showing withdrawals from the alleged savings account or T-5's for the period showing the interest earned on that account. Nor did he produce his corporate banking records to show deposits to the

company account from the savings account. For proof of his case, the Appellant relied primarily on a letter[1] from an official at the bank stating merely that he had once had a savings account there. It was not sufficient to prove his allegations.

[3] The Appellant also claimed to have relied on his accountant, Haim Pinto, to ensure that his records were in order. His practice was, more or less, to present Mr. Pinto annually with a box of his company's sales receipts, bank statements and other documents for Mr. Pinto's use in preparing the company's financial statements and his personal and corporate tax returns. After completing his testimony on April 24, 2007, the Appellant advised the Court of his concern that his lack of accounting expertise had hampered his ability to explain properly his affairs. He requested an adjournment to call Mr. Pinto as a witness. His request was granted and the hearing was adjourned to May 16, 2007. As it turned out, Mr. Pinto's testimony was not particularly helpful. In addition to being under the (self-induced) misapprehension that he was to testify as an expert witness, Mr. Pinto had no personal knowledge of the savings account or its use as a source of funding for the Sabbah family. Further, his accounting practices were no more rigourous than the Appellant's records keeping system. Finally, Mr. Pinto's strategy in responding to counsel for the Respondent during cross-examination was to go on the offensive rather than giving sensible answers to her quite straight-forward questions. All in all, I gave very little weight to his evidence.

[4] The Respondent called the net worth auditor, Julie St. Amant. I found her to be a very credible witness. Her evidence showed that she had carefully reviewed what little information the Appellant supplied to her and had prepared, with the same diligence, the net worth statement[2]. In her very able argument, counsel for the Respondent reviewed the Appellant's evidence in detail, comparing it to the figures in the net worth assessment and highlighting the numerous flaws in his portrayal of his financial situation in 1995-98. She referred the Court to a passage in *Hsu v. The Queen*[3] reviewing the theory behind the net worth assessment:

> 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

[1] Exhibit A-4.

[2] Exhibit I-2. See also Schedule "A" to the Reply to the Notice of Appeal.

[3] *Hsu v. Canada*, 2001 DTC 5459 (F.C.A.) at paragraph 33.

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.

[5] Like the notional taxpayer described above, the Appellant, to a large extent, was the author of his own misfortune. He failed to keep proper books and records. From the records he did have, the Appellant was selective in what he chose to show to the auditor. A comparison of the net worth assessment figures with the few records the Appellant produced revealed that on more than one occasion, the estimates used by the Minister in the net worth assessment were, in fact, more generous to the Appellant than the figures he had used himself. The Appellant's contention that the Minister had failed to take into account the $36,000 received as family allowance was shown by the auditor's evidence to be, quite simply, incorrect. Another weakness in the Appellant's estimate of his income was his tendency to discount expenditures made in the furtherance of what might be described as "good works": charitable donations, religious and educational costs, a loan to his sister. However, just like mortgage payments and insurance premiums, such disbursements require a source of income. He refused to consent to the auditor making inquiries to financial institutions on his behalf. He rejected her invitation to meet with her, recklessly abdicating that role to Mr. Pinto. I accept the Appellant’s evidence that he and his family lived a modest lifestyle, often relying on their extended family to help out with the necessities. Even allowing for their contribution to the Sabbah family budget,

however, I found inordinately low the Appellant's estimates of the amounts spent on food, clothing and household items for a single-breadwinner family that expanded from five to seven during the taxation years in question. The result is that the Appellant failed to prove wrong the assumptions upon which the net worth assessment was based. Accordingly, the appeals must be dismissed.

[6] The Minister also assessed gross negligence penalties against the Appellant under subsection 163(2) of the *Act*:

> **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 ...

[7] The Minister has the onus of proving such penalties are justified[4]. For many of the same reasons considered above, I am persuaded by counsel's argument that the Respondent's evidentiary burden has been met. The Appellant took little care in keeping records capable of accurately reporting his income. He was not forthcoming, either personally or through his accountant, in his disclosures to the auditor. At the hearing, the Appellant stated that he would not do things any differently in the future, an assertion that may have had more to do with his frustration over the difficulty he found himself in than a true declaration of intent. In any event, I am satisfied on a balance of probabilities that the Appellant acted with a degree of indifference with regard to his obligations under the *Act* sufficient to justify the imposition of gross negligence penalties for the taxation years in question.

[8] The Respondent's request for costs, especially in light of the delay caused by the Appellant's last-minute request for an adjournment to allow his accountant to testify, is also granted.

[9] Accordingly, the appeal is dismissed with costs.

Signed at Ottawa, Canada, this 11th day of October, 2007.

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[4] *Farm Business Consultants Inc. v. Canada*, [1994] T.C.J. No. 760 (T.C.C.) (confirmed F.C.A.); *Bigayan v. Canada*, [1999] T.C.J. No. 778 (T.C.C.); *Bastille v. Canada*, [1998] T.C.J. No. 1080 (T.C.C.).

"G. A. Sheridan"

Sheridan, J.

CITATION:	2007TCC601
COURT FILE NO.:	2005-86(IT)G
STYLE OF CAUSE:	DAVID SABBAH AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	April 24, 2007 and May 16, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	October 11, 2007

APPEARANCES:

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Counsel for the Respondent:	Suzanne Morin

COUNSEL OF RECORD:

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Name:

Firm:

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