

BETWEEN:

YIM SAN CHOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 16, 2009 at Vancouver, British Columbia

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: Gary Liang

Counsel for the Respondent: Selena Sit

JUDGMENT

The appeal with respect to assessments made under the *Income Tax Act* for the 2003 and 2004 taxation years is allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that, subject to the restrictions on relief that are provided for in the informal procedure, none of the deposits should be included in the appellant's income and gross negligence penalties should be deleted.

The appellant is also entitled to costs in accordance with the tariff.

The Registry is directed to refund the Court's filing fee to the appellant.

Signed at Toronto, Ontario this 9th day of February 2009.

“J. Woods”

Woods J.

Citation: 2009TCC90
Date: 20090209
Docket: 2008-1145(IT)I

BETWEEN:

YIM SAN CHOW,
and
HER MAJESTY THE QUEEN,
Appellant,
Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] This is an appeal by Yim San Chow in respect of assessments made under the *Income Tax Act* for the 2003 and 2004 taxation years.

[2] There are two issues: (1) do certain amounts deposited in Mrs. Chow's bank accounts represent income to her; and (2) are gross negligence penalties appropriate.

Background

[3] According to Mrs. Chow's testimony, she is a stay-at-home housewife and mother. Only small amounts of interest income have been reported in her income tax returns for the relevant years.

[4] For reasons that were not explained at the hearing, the Canada Revenue Agency conducted an audit of Mrs. Chow in 2006 which commenced with a visit to her home.

[5] Two auditors came to Mrs. Chow's home, one of whom had a limited role as an interpreter because Mrs. Chow does not speak English well.

[6] During this visit, the auditor reviewed Mrs. Chow's bank books and determined that there were numerous deposits in varying amounts up to \$40,000.

[7] The auditor requested to take the books away for the purpose of making photocopies. Mrs. Chow did not want the books removed from the home and she informed the auditor that she would make the photocopies herself.

[8] Upon receiving the photocopies, the auditor was not satisfied with their completeness and the auditor then obtained the relevant deposit information directly from Mrs. Chow's banks.

[9] The audit investigation led to reassessments which added to Mrs. Chow's income amounts that were deposited into several bank accounts that Mrs. Chow kept, either on her own or jointly with her husband or other relatives.

[10] The amounts that were added to Mrs. Chow's income were \$138,980 for the 2003 taxation year, and \$29,000 for the 2004 taxation year. Gross negligence penalties were also imposed due to the large under-reporting of income.

[11] At this point, Mrs. Chow retained the assistance of her accountant, Gary Liang, to assist her with this matter. Mr. Liang also represented Mrs. Chow at the hearing.

[12] Detailed submissions were made to the Canada Revenue Agency at the objections stage with Mr. Liang's assistance. The general thrust of the submissions was that none of the deposits were sourced from income. Most of the money came from relatives, often elderly, or close family friends, it was suggested.

[13] As a result of the submissions, revised reassessments were issued which deleted some of the deposits from income. Although the testimony was not as clear on this point as I would have liked, it appears that the appeals officer removed an item from income if there was sufficient proof that the deposit came from relatives or friends.

[14] The adjustments were significant. The new reassessments reduced the additional income to \$52,941 and \$19,000, for the 2003 and 2004 taxation years respectively. The gross negligence penalties were also adjusted to take the reductions into account.

[15] For the most part, the deposits for which no adjustment was made represented deposits in cash which were difficult to verify. For many of these, Mrs. Chow claims that funds were received either from elderly family members or close family friends who either needed, or might need, assistance with finances.

Analysis

[16] For the reasons that follow, I have concluded that the appeal should succeed.

[17] The appellant in my opinion has made a *prima facie* case that the deposits which are the subject of this appeal are either gifts or loans from relatives or close friends or are monies held in trust for the benefit of such persons.

[18] When a *prima facie* case has been established, the burden shifts to the respondent to provide some evidence to the contrary: *Hickman Motors Ltd. v. The Queen*, 97 DTC 5363 (SCC), at 5376. The respondent has not been able to satisfy this burden.

[19] During the respondent's argument, it was made clear that the respondent was not alleging that Mrs. Chow's testimony was deceitful. If the testimony was not intentionally deceitful, it is difficult to understand how income could have been earned.

[20] Either Mrs. Chow's testimony was intentionally deceitful, or the deposits do not represent income. It is difficult to imagine another plausible scenario.

[21] In coming to the conclusion that Mrs. Chow has made a *prima facie* case that the deposits do not represent income, I have also taken the following factors into account.

- 1) There was a significant amount of supporting evidence provided by Mrs. Chow, including evidence of withdrawals from other bank accounts, which amounts were allegedly given to Mrs. Chow. This evidence was not perfect, but it does suggest that Mrs. Chow made a *bona fide* effort to provide the Court with supporting documentation.
- 2) The appeal was heard under the informal procedure and some tolerance for deficiencies in evidence should be given.
- 3) Mrs. Chow has no obvious source of income other than the interest income that was reported. The facts in this appeal are quite different from other cases in which there is an obvious source of income, such as a cash business. The respondent introduced into evidence a bank form in which Mrs. Chow's occupation was listed as babysitter. During cross-examination, she testified that she had no idea where that statement

came from. It is reasonable to believe that this was a misunderstanding with the bank due to language difficulties.

- 4) Mrs. Chow provided plausible explanations for not having further supporting documentation from her relatives. The explanations were consistent with the evidence as a whole.
- 5) During the objections stage, the reassessments were reduced significantly because the Canada Revenue Agency was satisfied that the majority of the deposits came from relatives.

[22] For these reasons, I conclude that Mrs. Chow has satisfied the burden of making a *prima facie* case, and that the respondent has not been able to rebut it.

[23] In this case it is possible that some or all of the assessed amounts represent income to Mrs. Chow.

[24] However, Mrs. Chow did present a significant amount of evidence in support of her position. In these circumstances, it is appropriate in my view that the respondent be required to provide greater evidence that there has in fact been unreported income.

[25] For these reasons, the appeal will be allowed. The reassessments will be referred back to the Minister for reassessment on the basis that, subject to the restrictions on relief that are provided for in the informal procedure, none of the deposits should be included in Mrs. Chow's income and gross negligence penalties should be deleted.

[26] Mrs. Chow is also entitled to costs in accordance with the tariff.

Signed at Toronto, Ontario this 9th day of February 2009.

“J. Woods”

Woods J.

CITATION: 2009TCC90
COURT FILE NO.: 2008-1145(IT)I
STYLE OF CAUSE: YIM SAN CHOW AND
HER MAJESTY THE QUEEN
PLACE OF HEARING: Vancouver, British Columbia
DATE OF HEARING: January 16, 2009
REASONS FOR JUDGMENT BY: The Honourable Justice J. Woods
DATE OF JUDGMENT: February 9, 2009

APPEARANCES:

Agent for the Appellant: Gary Liang

Counsel for the Respondent: Selena Sit

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada