Docket: 2006-2529(IT)G

BETWEEN:

CONG T. NGUYEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Cong T. Nguyen 2006-2528(GST)G
on October 31, 2008 and November 3, 2008
at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	David Everett

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2001, 2002 and 2003 taxation years are allowed and the assessments are vacated, in accordance with and for the reasons set out in the attached Reasons for Judgment.

Costs are awarded in the fixed amount of $500.00 for both the appeals of *Cong T. Nguyen, 2006-2529(IT)G* and *Cong T. Nguyen, 2006-2528(GST)G*.

Signed at Vancouver, British Columbia, this 18th day of December, 2008.

"D.W. Rowe"

Rowe D.J.

Docket: 2006-2528(GST)G

BETWEEN:

CONG T. NGUYEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Cong T. Nguyen 2006-2529(IT)G
on October 31, 2008 and November 3, 2008
at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	David Everett

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated April 27, 2005 and bears number 11G00000949 is allowed and the assessment is vacated, in accordance with and for the reasons set out in the attached Reasons for Judgment.

Costs are awarded in the fixed amount of $500.00 for both the appeals of *Cong T. Nguyen, 2006-2529(IT)G* and *Cong T. Nguyen, 2006-2528(GST)G*.

Signed at Vancouver, British Columbia, this 18th day of December, 2008.

"D.W. Rowe"

Rowe D.J.

Citation: 2008TCC675
Date: 20081218
Dockets: 2006-2529(IT)G
2006-2528(GST)G

BETWEEN:

CONG T. NGUYEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Minister of National Revenue (the "Minister") assessed the Appellant, Cong Thi Nguyen ("Nguyen") by issuing a Notice of Assessment dated April 27, 2005 for net tax in a certain amount respecting Goods and Services Tax ("GST") returns for the period from January 1, 2001 to December 31, 2003 pursuant to section 221 of the *Excise Tax Act (*the *"Act"*). Subsequently, the Minister reassessed the Appellant decreasing the amount payable but maintained the assertion that Nguyen had not reported the proper sum of GST collectible during the period and had failed to remit the additional sum of $10,536.59 as required pursuant to section 221 of the *Act*. The Minister levied a penalty under section 285 of the *Act* on the basis the Appellant knowingly or under circumstances amounting to gross negligence in carrying out her duties or obligations imposed by the *Act*, made false statements or omissions in the GST returns filed in respect of the period under assessment. The amounts at issue are as follows:

Net tax:	$15,416.16
Penalty:	$4,149.84
Interest:	$630.16

[2] Pursuant to a reassessment dated June 1, 2006, the Minister determined the Appellant's taxable supplies including GST from her business were $103,202.23, $58,995.76 and $78,516.66 for the 2001, 2002 and 2003 taxation years, respectively.

[3] The Appellant filed her returns of income for the taxation years 2001, 2002 and 2003 in which she reported business income in the sums of $9,572.00, $6,240.00 and $11,421.00 respectively. The Minister initially assessed the Appellant on May 27, 2003 and included into income in each of those taxation years certain amounts. On June 28, 2006, the Minister reassessed the Appellant with respect to each of those years and included into her business income the following amounts:

2001:	$52,217.68
2002:	$44,041.22
2003:	$59,777.06

[4] Pursuant to subsection 163(2) of the *Income Tax Act ("ITA")*, the Minister levied gross negligence penalties with respect to those taxation years on the basis the Appellant knowingly or under circumstances amounting to gross negligence in carrying out the duties or obligations imposed by the *ITA*, made or participated in, assented to or acquiesced in the making of false statements or omissions in the income tax returns filed for those years. The amount of penalties at issue are as follows:

2001:	$4,994.54
2002:	$3,590.11
2003:	$5,649.57

[5] The Appellant and counsel for the Respondent agreed both appeals could be heard on common evidence.

[6] Nguyen testified in the Vietnamese language and the questions and answers and other aspects of the within proceeding were interpreted and/or translated from English to Vietnamese and Vietnamese to English by Mr. Huu Lam, a Certified Court Interpreter. Nguyen stated she agreed with the assumptions of the Minister as set forth in the following subparagraphs of the Reply to Notice of Appeal ("Reply"):

> 17. In so assessing the Appellant, the Minister relied on the following assumptions:
>
> a) during the 2001, 2002 and 2003 taxation years, the Appellant operated a uniform sewing business (the "Business") in partnership

with her spouse, Hai Vinh Ho, each of whom had a 50% interest in the partnership;

b) at all material times, the Appellant had a subcontract with Tex-Pro Western Ltd. to supply uniforms for various hospitals in the Vancouver, B.C. and environs;

c) the Appellant sewed the uniforms while the Appellant's spouse would transport uniforms to the Appellant's clients;

…

[7] Nguyen stated she and her former spouse – Hai Vinh Ho ("Ho") - had been divorced for many years prior to 2001 but started the sewing business and worked together during the years under appeal but were not living together in a conjugal relationship during those years nor several years earlier. However, she and her husband are currently living together in a common law relationship. Nguyen purchased a residence in 1999 for the sum of $257,944.10 and the amount of financing required was $202,125.00. She and her former spouse did not use a business name or trade name while carrying out the business of manufacturing uniforms. Nguyen confirmed she had reported income for 2001, 2002 and 2003 in the amounts referred to in the Reply. Nguyen stated she understood the issue revolved around the discrepancy between the amounts she reported as business income – which she shared on a 50-50 basis with Ho – and the amounts the Minister had calculated that it would have required to support her during those years as stated in the various Schedules attached to the relevant Reply filed in respect of her appeals from assessments under both the *Act* – for GST – and the *ITA*. Nguyen stated her mother lives in Vietnam and had sold a valuable piece of land near Ho Chi Minh city (formerly Saigon). In 2001, she and her former husband – Ho – went to Vietnam twice and each time received cash in US currency from her mother which they transported back to Vancouver. Nguyen filed – as Exhibit A-1 – photocopies of airline tickets issued in her name and that of Ho pertaining to their visits to Vietnam in February and October, 2001 and for Ho's travel there in January, 2003. Their daughter – Hai-Yen Francis ("Hai-Yen") and her husband – Andrew Francis – travelled to Vietnam in August or September of 2002. Nguyen stated there was a monetary limit on the amount of US dollars one could take out of Vietnam but from the proceeds of the property sold by her mother on December 15, 2000, she was able to bring a total of nearly US$70,000 to Canada. She added that the sum of $50,000 remains in Vietnam which her mother holds in trust for her. Nguyen stated her daughter and son-in law also went to Vietnam together and visited her mother and brought back money to Canada. Nguyen stated the money arrived in certain amounts in order to conform with currency export regulations in Vietnam. She stated she did

not need the money all at once because she was uncertain about whether she would remain in Canada, although she is a Canadian citizen. She used the money from time to time for living expenses and converted the US currency at various currency exchanges in the Vancouver area because it was convenient and she was able to choose the ones which offered a better exchange rate than the Royal Bank of Canada ("Royal") where she had her accounts. She recalled that the usual amount exchanged into Canadian currency was approximately US$500. She did not retain any receipts pertaining to these transactions. The company – Tex-Pro Western Ltd. ("Tex-Pro") – paid her by cheque on delivery and all cheques were deposited into a business account at Royal on which she had sole signing authority. Nguyen had requested that Tex-Pro pay the sum owing for each supply of uniforms upon delivery by issuing a separate cheque to her and to Ho, each for 50% of the total amount due. Nguyen stated she did not maintain business records other than to retain the stubs of the cheques issued in her name by Tex-Pro in each of the years at issue. At the end of the year, the amounts shown in each stub were added up by her accountant who prepared both the GST return and the return of income for each taxation year. The uniforms were assembled in Nguyen's residence from material supplied by Tex-Pro, using machines owned by Nguyen. During the years at issue, she did not purchase any equipment or major supplies and her sole source of income was from sewing uniforms for Tex-Pro. There were certain expenses attributable to the business, particularly arising from the use of a vehicle – Honda Odyssey - to deliver the uniforms, and these were calculated by her accountant – Tina Nguyen ("Tina") (no relation) - and deducted from business income in the course of preparing a return of income for each year. In 2001, the total income generated by supplying uniforms to Tex-Pro was $35,305.00. The net income was $24,142.00 which was divided equally between her and Ho before Nguyen took other personal deductions. In 2002, total partnership income of Nguyen and Ho was $17,335.00 and in 2003 it was $26,030.00. Nguyen stated she was aware of the calculations relied on by the Minister in the various Schedules but did not study them in detail because she did not have the time. She pointed out that she did not pay health care premiums – as assumed by the Minister – because her low income entitled her to receive a subsidy but agreed the food and shelter estimates were accurate because two of her children lived with her in 2002 and 2003 and had contributed to household expenses. During the years under appeal, Nguyen's daughter - born in 1978 – worked as a nurse and her son - born in 1980 – worked in a pizza shop. At one point, her daughter – Hai-Yen lived with her. Nguyen stated she did not fully understand the basis of the calculations relied on by the Minister to claim she had under-reported GST and also her business income in 2001, 2002 and 2003 and asserted she had no other income and that her sole source came from the supply of uniforms to Tex-Pro. She asserted that the discrepancy between her net income and the amount she spent in each year

under appeal was attributable to the sum of approximately US$70,000 brought to Canada from Vietnam between 2001 and 2003 together with contributions of her children and son-in-law to the household.

[8] Nguyen – was cross-examined by counsel for the Respondent. The Appellant had been provided with all of the documents in a binder – Tabs 1 to 24, inclusive - and agreed it should be filed as Exhibit R-1. Nguyen stated she thought her mother's property had been sold for about 4.2 million Dong which was about US$300,000 in late 2000. Nguyen recalled attending an Examination for Discovery ("Discovery") on October 1, 2007 and that she had affirmed to tell the truth. Counsel referred the Appellant to a transcript – page 56 – where she estimated her share of the sale proceeds was about US$100,000 and that the sale price of her mother's property in a resort area called Vung Tau - was about $US800,000. Nguyen responded that she had merely provided her best estimate of the sale price based on information provided by her mother and that her siblings, some of whom still lived in Vietnam received a smaller share of the proceeds because they had their own houses and property and had already received the benefit of property that had been in their mother's family for generations. Counsel pointed out to Nguyen that she testified at Discovery – page 55, question 412 – that the sale proceeds had been divided equally into 8 parts. Counsel referred her to testimony at Discovery – page 62, questions 466-469, inclusive – where she stated that when she and Ho each brought money back to Canada, the sum was limited to US$9,000 because if it had been US$10,000, it would have been necessary to declare it to customs officials. Nguyen stated she had not been asked by Canadian customs officials whether she was bringing currency into Canada. Nguyen agreed that according to the copy of the airline tickets – Exhibit A-1 – that she and Ho and her daughter and son-in-law together made 7 person-trips to Vietnam between February 15, 2001 and February 27, 2003 and that none of the money brought back to Canada had been deposited to any account at any financial institution although some money – in amounts of about $500.00 - was deposited after it had been converted to Canadian currency. Nguyen stated she did not deposit the money into an account because she needed to use it on a regular basis and in order to earn any interest she would have been required to leave it intact for a certain period of time and any withdrawals would have attracted a service charge. Nguyen identified the following documents from Exhibit R-1, as follows:

- Tab 1 – Statement of Business Activities for 2001.

- Tab 3 – Statement of Business Activities for 2002.

- Tab 4 – Personal Account Statement Reconstruct on her Royal account for the period January 1, 2001 to December 31, 2002.

- Tab 5 – Account statement pertaining to the business account in the name of Cong Thi Nguyen for the period from December 6, 2000 to January 5, 2001.

- Tab 6 – Visa statements issued by Royal from January 12, 2001 to May 1, 2003.

- Tab 7 – Royal branch history report pertaining to loan made to Nguyen.

- Tab 8 – Royal history report pertaining to Royal Credit Line account in the name of Nguyen.

- Tab 9 – Mortgage statements in respect of Royal mortgage on Nguyen residence for 2001 and 2002.

- Tab 10 – Royal RRSP investment account statements.

- Tab 11 – Certificate of Divorce issued by Court of Queen's Bench, Province of Manitoba, certifying that as of December 28, 1990, the marriage of Nguyen and Ho – March 26, 1975 - was dissolved.

- Tab 12 – Copy of purchase agreement – in joint names of Nguyen and her daughter Tran Ho ("Tran Ho") - for a 2001 Volkswagen which cost $23,300.00 and was financed 100%.

[9] Nguyen stated her daughter gave her money to make the payments on the Volkswagen in addition to the sum of $500.00 for room and board each month and the sums relating to the car payment and the contribution to household expenses were deposited when convenient. Nguyen stated it was difficult for her daughter to testify in Court because she lives in Surrey and is expecting a baby soon. Nguyen stated she did not recall the telephone interview with Baljeet Chahal ("Chahal") – an auditor employed by Canada Revenue Agency ("CRA") - on July 6, 2004. Nguyen recalled an interview with Chahal and another auditor – Gurwinder Hundle ("Hundle") – and that her own accountant – Tina – was present throughout. Chahal prepared typed notes – Tab 13 – and counsel referred Nguyen to questions asked by Chahal – page C-7 – about the source of any non-taxable funds and to the negative responses by

Nguyen when asked if she had received any inheritance, lottery winnings, gifts, money from gambling or any other non-taxable source. Nguyen stated she understood that an inheritance required the death of the donor and that her mother was alive. Counsel referred her to page C-9 of the notes – where Chahal recorded a response that Nguyen received "10K" – meaning $10,000 – in 1999 from selling property owned in Vietnam. Nguyen denied having made any such statement but agreed she had not otherwise mentioned the source of any non-taxable funds. With respect to monetary contributions to the household during the years under appeal, Nguyen stated that her eldest child – Hai-Yen – lived at home only from September 2002 to October, 2003 and paid a monthly amount when actually living in Nguyen's residence. Nguyen stated she asked her other children – Tien Ho ("Tien") and Tran Ho – to reproduce bank statements on their own accounts to verify monthly withdrawals that they paid her for room and board but they declined to do so because of the fee demanded by their financial institutions to provide this service. Nguyen stated there were some deposits shown in the statement – Tab 4 – that were in the sums of $500.00 or $1,000.00 and these could have been attributable to room and board payments by one or more of her children. In 2001, her son – Tien – was 19 and earned about $14,000.00 gross income but earned only $8,698.00 in 2002. Counsel pointed out that if Tien paid her $500.00 a month in 2002 - $6,000.00 for that year - it would have left him with very little money for his other expenses. Nguyen stated that if Tien did not have the money, he did not pay every month, especially when he was a full-time student in 2003. Nguyen stated she understood that the category "Internet payment" on the table – Tab 2 - represented the aggregate of various payments and was not a single transaction. Nguyen stated she had reviewed the numbers used by her accountant in preparing the GST returns in the income tax return submitted for each year under appeal and was satisfied the information contained therein was correct prior to signing her name on the original of each document. The Appellant identified documents at Tab 21 - all GST returns during the relevant period signed by her, and at Tab 22 – an unsigned copy of her 2001 T-1 General return and at Tab 23 – an unsigned copy of her 2002 T-1 and at Tab 24 – an unsigned copy of her 2003 T-1.

[10] Ho testified that he is self-employed and lives in Surrey, British Columbia. He stated that during three visits to Vietnam, Nguyen's mother handed him the sum of $10,000 cash in American currency which was the limit one person could take out of that country. Most of the bills were in $100 denominations but some were $20 dollar bills. He went to Vietnam three times as documented by the airline tickets included in Exhibit A-1. Each time, he left Vietnam with US$10,000 but spent some money during stopovers in Taipei and Hong Kong. When he made one trip by himself, he carried the money in his pocket and on his return to Vancouver handed the remaining amount – after some travelling expenses – to Nguyen. He advised her to keep the

cash in the house and to exchange it from time to time as the value of the US dollar was increasing in relation to its Canadian counterpart. He knew that Nguyen exchanged the American cash for Canadian money as the rates increased. In his opinion, the number of transactions required each month to provide Nguyen with money from a US dollar bank account would have been too expensive and the banking fees to maintain such an account would have exceeded the slight amount of interest paid on any balance. Ho stated that even though Nguyen did not speak much English, she could carry out banking and deal with financial matters. In his estimate, about US$70,000 was brought into Canada – from Vietnam – by himself, Nguyen and their daughter and son-in-law during a total of 7 trips by that group. Ho arrived in Canada as a refugee in 1982 and knew the property owned by Nguyen's mother near Ho Chi Minh City (formerly Saigon) was old farmland and that it had become valuable in recent years. He was not present at the meeting between Nguyen and her accountant and the two CRA auditors but in his view the cash received by and on behalf of Nguyen was not a gift in the normal sense that one would classify presents of certain personal or luxury items. He identified the Certificate of Divorce – Exhibit A-2 – which certified he and Nguyen were divorced on December 28, 1990. When he worked with Nguyen in the uniform sewing business during the years under appeal, Tex-Pro was their only customer. He retained stubs of the pay cheques issued to him by Tex-Pro for his 50% share of the price of product supplied. He kept Visa slips to record business-related expenses and handed them to his accountant each year to prepare his personal tax return. Ho stated he and Nguyen worked together until some point in 2004 and currently their status is that they "sort-of" live together.

[11] Ho was cross-examined by counsel for the Respondent. Ho confirmed that 100% of his income from 2001 to 2003, inclusive, was from Tex-Pro. During that period, he maintained his own bank account and played a small role in connection with the operation of the Nguyen household. He was aware Nguyen was using money brought to Canada from Vietnam in order to meet her expenses. He stated it was necessary for himself and Nguyen and their daughter and son-in-law to attend personally in Vietnam for the purpose of taking away the maximum amount in US dollars per person – per trip – because in order to have funds wired from Vietnam it is necessary to have a registered business operating there which has a legitimate purpose for sending money to another country. He stated that although he and Nguyen had been divorced in 1990, they worked together in the sewing business, travelled together and he stayed in her house sometimes because their children also lived there at various times during the period at issue.

[12] Chahal testified she has been employed by CRA as an auditor for 7 years. She performed the audit pertaining to the within appeals and conducted the interview with

Nguyen and prepared the notes at Tab 13 of Exhibit R-1. Chahal stated another auditor – Hundle - was present and Nguyen's accountant - Tina - participated in the discussions. Chahal stated Tina spoke fluent English and acted as interpreter for her client – Nguyen – and was fully aware of the purpose of the inquiry which was concerned with the discrepancy between Nguyen's reported income during 2001, 2002 and 2003 and the amount she spent during that period. Chahal stated she asked Nguyen about any money she may have received from non-taxable sources such as inheritances, lottery and/or gambling winnings or gifts. Chahal noted Nguyen's statement that she received the sum of $500.00 every month from each of her three children and had received a loan of $20,000 from her sister in 1999 – which had not been repaid – and that she had sold a $10,000 property in Vietnam that year. Chahal stated there was no representation made by Nguyen directly or through her accountant that she had brought money into Canada from Vietnam at any time during the years under audit. Chahal stated that Nguyen – sometimes - understood the questions and answered in English before Tina had an opportunity to interpret. Chahal stated that at no time subsequent to that interview was any information provided to her about the importation of funds from Vietnam. Chahal stated that in the course of correspondence with Tina, it was apparent she understood the net worth process and the purpose of the audit and that it was incumbent on Nguyen to disclose the source of any non-taxable funds received during that period.

[13] The Appellant did not cross-examine.

[14] Thelma Weisser ("Weisser") testified she is employed by CRA as an Internal Auditor. She occupied the position of Appeals Officer from January, 2004 to July 2006 and earlier in her career had served in that capacity. She was the Appeals Officer assigned to Nguyen's file and reviewed the auditor's working papers. Weisser stated she conducted a separate net worth calculation and made various adjustments as shown on her working papers in Exhibit R-1, Tab 18. On December 14, 2005, Weisser sent Nguyen a 6-page letter – Tab 16 – in which she provided a detailed description of the adjustments she was prepared to make to the net worth schedules concerning the income tax assessment and GST assessments. In said letter, Weisser advised Nguyen the file would remain open until January 9, 2006 and that Nguyen could make additional representations including by telephone to Weisser at her office. Weisser wrote a 4-page letter – dated April 5, 2006 – to Nguyen in which she advised there would be additional adjustments made to decrease the net worth amounts calculated as the basis for both assessments – income tax and GST - as a result of the representations made to her by Nguyen's former husband, Ho. Weisser stated she did not accept that Nguyen had received room and board payments – as alleged or at all – from her children during the assessment period. Weisser referred –

at page 2 of her letter to Nguyen – Tab 17 – to representations made by Ho concerning the trips to Vietnam and the contention that each individual brought back the sum of US$10,000 on his or her return. Weisser stated in said letter that she would consider reducing the assessments if she could determine the funds from Vietnam were deposited in her bank account at or near the return dates of herself, Ho or other family members. Weisser stated she had examined Nguyen's bank statements and was unable to locate any significant deposits that could be linked to funds brought from Vietnam. Weisser stated she based her net worth schedules on the assumption that the opening value of Nguyen's assets in 2000 were $10,000.00 and made an adjustment of $18,500.00 because that sum had been transferred into her account by Ho in 2001. She also took into account a 2001 loan - in the sum of $3,500.00 – that was repaid in 2003. Weisser stated the net worth procedure was restricted to the income and expenditures of Nguyen without any reference to Ho. Weisser stated she utilized actual documented expenditures to calculate living expenses during the period under review rather than relying on estimates or averages compiled by Statistics Canada. She deducted car payments from the auditor's calculations because there was a corresponding decrease in liability on the car loan. Throughout the process of reviewing the file, Weisser made further adjustments as explained in her letters to Nguyen. She did not receive any representations from Nguyen or her accountant with respect to the potential imposition of the gross negligence penalties relating to the income tax and GST assessments. Weisser acknowledged that the auditor did not find any other source of business income and that the revenue received by Nguyen from Tex-Pro was easily verified and there was no reason to question the accuracy and reliability of those sums. As a result, the assessments issued by the Minister were based on the assumptions that the additional money during 2001 to 2003, inclusive, must have been derived from some taxable source other than the sewing business. Weisser stated the Minister does not know the source of any additional income but proceeded on the basis the discrepancy between reported income and expenditures in the absence of any satisfactory explanation must have been attributable to the under-reporting of both income and GST from some other taxable source. Weisser agreed that in the Lower Mainland, it is not unusual to encounter situations where money is brought to Canada from another country in Asia or South Asia. The difficulty she encountered was there had been no declaration to Canada Customs of any money brought to Canada and there was no documentation of any sort to demonstrate it had arrived in the amounts claimed or at all.

[15] The Appellant did not cross-examine.

[16] The Appellant submitted she had not been aware that she had an obligation to reveal the source of the funds brought from Vietnam and had not regarded those

funds as a gift since they flowed from the disposition of property that had been in the family for generations. The funds were not an inheritance as her mother was alive and continued to act as trustee for the balance of her share of the sale proceeds that remained in Vietnam under her mother's control. In her opinion, it was not unusual to deal in cash or to keep it in her residence.

[17] Counsel for the Respondent submitted the assessments were based on net worth calculations which were performed correctly in accordance with the general mechanics of a net worth assessment which was to accept that money is spent to acquire assets, reduce liabilities and for personal expenditures. Counsel conceded the Minister was not taking the position that income received by Nguyen from supplying uniforms to Tex-Pro had not been reported in full. Instead, the Minister had assumed there was additional taxable income from some other source during the years under assessment. He questioned the failure of Nguyen's children to testify about certain matters such as the amount and extent of their monetary contributions to the household and pointed out that each time a reasonable explanation - with supporting documentation – had been provided that Weisser was willing to make an adjustment. Counsel referred to the discrepancy in Nguyen's explanation at Discovery and at trial concerning the amount of the sale proceeds from the Vietnam property and submitted it was reasonable to expect she would have known precise details of that transaction and the large amount of money – in relation to her annual net income – that she received as her share. Counsel submitted the imposition of the gross negligence penalties was justified in both instances since there was a 450% discrepancy in reported income and the amounts ascertained by the net worth process and that the evidence demonstrated that each assessment appealed from should be confirmed in every aspect.

[18] The standard of proof required to demolish the assumptions of the Minister in any net worth assessment is *prima facie.* In the case of *Michael S. Chomica v. Her Majesty the Queen*, 2003 DTC 535, Bowman A.C.J.T.C. (as he then was) reviewed the applicable law and dealt with recent developments in jurisprudence with respect to the onus of proof in net worth assessment appeals. At paragraph 17, and following of his judgment, Justice Bowman stated:

> [17] The fundamental rule in income tax appeals and that is that the taxpayer has the onus of demonstrating that the factual assumptions upon which the assessment is based are wrong or do not support the assessment. This rule is well settled and I need not repeat the usual authorities that are traditionally cited in support of it. However the standard of proof is a civil one and a *prima facie* case, if unrebutted, will entitle a taxpayer to succeed.

[18] The law has been refined somewhat since *Johnston v. M.N.R.* [3 DTC 1182], [1948] S.C.R. 486, and specifically in *Hickman Motors Limited v. The Queen*, 97 DTC 5363 (S.C.C.), where L'Heureux-Dubé, J. said at pages 5376-7:

> K. *Onus of Proof*
>
> As I have noted, the appellant adduced clear, uncontradicted evidence, while the respondent did not adduce any evidence whatsoever. In my view, the law on that point is well settled, and the respondent failed to discharge its burden of proof for the following reasons.
>
> It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco v. M.N.R.*, [1966] S.C.R. 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance v. Dalton Cartage*, [1982] 1 S.C.R. 164; *Pallan v. M.N.R.*, 90 DTC 1102 (T.C.C.) at p. 1106. The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates v. M.N.R.*, 59 DTC 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. M.N.R.*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 DTC 5359 (F.C.A.), at p. 5361). The initial burden is only to “demolish” the exact assumptions made by the Minister but no more*: First Fund Genesis v. The Queen*, 90 DTC 6337 (F.C.T.D.), at p. 6340.
>
> This initial onus of “demolishing” the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case: *Kamin v. M.N.R.*, 93 DTC 62 (T.C.C.); *Goodwyn v. M.N.R.*, 82 DTC 1679 (T.R.B.). In the case at bar, the appellant adduced evidence which met not only a *prima facie* standard, but also, in my view, even a higher one. In my view, the appellant “demolished” the following assumptions as follows: (a) the assumption of "two businesses", by adducing clear evidence of only one business; (b) the assumption of “no income”, by adducing clear evidence of income. The law is settled that unchallenged and uncontradicted evidence “demolishes” the Minister's assumptions: see for example *MacIsaac v. M.N.R.*, 74 DTC 6380 (F.C.A.), at p. 6381; *Zink v. M.N.R.*, 87 DTC 652 (T.C.C.). As stated above, all of the appellant's evidence in the case at bar remained unchallenged and uncontradicted. Accordingly, in my view, the assumptions of “two businesses” and “no income” have been “demolished” by the appellant.

Where the Minister's assumptions have been "demolished" by the appellant, "*the onus shifts to the Minister to rebut the prima facie case*" made out by the appellant and to prove the assumptions: *Maglib Development Corp. v. The Queen*, 87 DTC 5012 (F.C.T.D.), at p. 5018. Hence, in the case at bar, the onus has shifted to the Minister to prove its assumptions that there are "two businesses" and "no income".

Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed: see for example *MacIsaac, supra*, where the Federal Court of Appeal set aside the judgment of the Trial Division, on the grounds that (at pp. 6381-2) the "evidence was not challenged or contradicted and no objection of any kind was taken thereto". See also *Waxstein v. M.N.R.*, 80 DTC 1348 (T.R.B.); *Roselawn Investments Ltd. v. M.N.R.*, 80 DTC 1271 (T.R.B.). Refer also to *Zink v. M.N.R., supra*, at p. 653, where, even if the evidence contained "gaps in logic, chronology and substance", the taxpayer's appeal was allowed as the Minster failed to present any evidence as to the source of income. I note that, in the case at bar, the evidence contains no such "gaps". Therefore, in the case at bar, since the Minister adduced no evidence whatsoever, and no question of credibility was ever raised by anyone, the appellant is entitled to succeed.

In the present case, without any evidence, both the Trial Division and the Court of Appeal purported to transform the Minister's unsubstantiated and unproven assumptions into "factual findings", thus making errors of law on the onus of proof. My colleague Iacobucci, J. defers to these so-called "concurrent findings" of the courts below, but, while I fully agree in general with the principle of deference, in this case two wrongs cannot make a right. Even with "concurrent findings", unchallenged and uncontradicted evidence positively rebuts the Minister's assumptions: *MacIsaac, supra*. As Rip, T.C.J., stated in *Gelber v. M.N.R.*, 91 DTC 1030, at p. 1033, "[the Minister] is not the arbiter of what is right or wrong in tax law". As Brulé, T.C.J., stated in *Kamin, supra*, at p. 64:

. . . . .

the Minister should be able to rebut such [*prima facie*] evidence and bring forth some foundation for his assumptions.

. . . . .

The Minister does not have a *carte blanche* in terms of setting out any assumption which suits his convenience. *On being challenged by evidence in chief he must be expected to present something more concrete than a simple assumption*. [Emphasis added.]

> In my view, the above statement is apposite in the present case: the respondent, on being challenged by evidence in chief, failed to present anything more concrete than simple assumptions and failed to bring forth any foundation. The respondent chose not to rebut any of the appellant's evidence. Accordingly, the respondent failed to discharge her onus of proof.
>
> I note that, in upholding the Minister's unproven assumptions, my colleague Iacobucci, J. may be seen as reversing the above-stated line of caselaw, without explicitly providing the rationale for doing so. With respect for the contrary opinion, in my view, changes in the jurisprudence regarding the onus of proof in tax law should be left for another day. Furthermore, on the facts of the case at bar, sanctioning the respondent's total lack of evidence could seem unreasonable and perhaps even unjust, given that the appellant complied with a well-established line of jurisprudence as regards its onus of proof.

[19] With respect to the task of weighing credibility of witnesses and the need to look at all the evidence to determine whether a *prima facie* case established by the Appellant had been rebutted, Justice Bowman – at paragraph 19 – stated:

> [19] In this case we have the appellant's testimony that he did not earn commissions of $134,712 US from Hi-Tech Trading Corporation and earned no more than about $20,000 for what he did, which did not involve selling. He was, it is true, cross-examined so that I do not think counsel for the respondent was precluded from questioning his credibility in argument on the basis of *Browne v. Dunn* (1893), 6 R. 67 (H.L.) at pages 70-71, discussed at length in *The Law of Evidence in Canada*, second edition, (Sopinka, Lederman and Bryant) at pages 954-957. I do not think, however, that the cross-examination destroyed the *prima facie* made out by the appellant in his examination in chief. I may entertain some lingering doubts about the appellant's reliability as a witness but it would take more than suspicion for me to say that he was lying under oath. As I said in *1084767 Ontario Inc.(c.o.b. Celluland) v. Canada* , [2002] T.C.J. No. 227:
>
> > 8. The evidence of the two witnesses is diametrically opposed. I reserved judgment because I do not think findings of credibility should be made lightly or, generally speaking, given in oral judgments from the bench. The power and obligation that a trial judge has to assess credibility is one of the heaviest responsibilities that a judge has. It is a responsibility that should be exercised with care and reflection because an adverse finding of credibility implies that someone is lying under oath. It is a power that should not be misused as an excuse for expeditiously getting rid of a case. The responsibility that rests on a trial judge to exercise extreme care in making findings of credibility is particularly onerous when one considers that a finding of credibility is virtually unappealable.

[20] In the case of *Anthony A. Ramey v. Her Majesty the Queen*, 93 DTC 791, Bowman T.C.C.J. considered an appeal by a taxpayer who was faced with the task of challenging a net worth assessment issued against his deceased father. At page 793, Chief Justice Bowman stated:

> I am not unappreciative of the enormous, indeed virtually insuperable, difficulties facing the appellant and his counsel in seeking to challenge net worth assessments of a deceased taxpayer. The net worth method of estimating income is an unsatisfactory and imprecise way of determining a taxpayer's income for the year. It is a blunt instrument of which the Minister must avail himself as a last resort. A net worth assessment involves a comparison of a taxpayer's net worth, i.e., the cost of his assets less his liabilities, at the beginning of a year, with his net worth at the end of the year. To the difference so determined there are added his expenditures in the year. The resulting figure is assumed to be his income unless the taxpayer establishes the contrary. Such assessments may be inaccurate within a range of indeterminate magnitude but unless they are shown to be wrong they stand. It is almost impossible to challenge such assessments piecemeal. The only truly effective way of disputing them is by means of a complete reconstruction of a taxpayer's income for a year. A taxpayer whose business records and method of reporting income are in such a state of disarray that a net worth assessment is required is frequently the author of his or her own misfortunes. Mr. Boudreau stated that Mr. Allan Ramey's records were inadequate, that he had a history for years prior to 1981 of being assessed on a net worth basis and that his business, that of owning coin operated machines, such as pinball machines and slot machines of various types, was cash based and was therefore difficult to audit. The Minister had no alternative but to proceed as he did. While I have sympathy for someone in the position of the appellant whose liability for his father's tax is secondary, I can see no basis for adjusting the assessments made against his father to any greater degree than that to which the respondent has already agreed.

[21] The within appeals do not arise as a consequence of non-existent or sloppy - to the point of negligence, ordinary or gross – since the Minister is satisfied that the income earned by the Appellant from her 50% share of revenue derived from supplying uniforms to Tex-Pro was accurately recorded and reported in the Appellant’s income tax returns for the years under appeal. The Minister did not quarrel with the expenses deducted and was not alleging the Appellant had earned additional revenue from Tex-Pro and had no evidence to support the assumption that the discrepancy between her income and expenditures was attributable to another taxable source of income. The facts in the within appeals are not like those in other net worth cases where the taxpayer was operating a cash business or was able to issue a second set of invoices to be paid to another entity or where revenue was deposited in other locations at one or more financial institutions. Even during the last few years

when credit cards and pre-paid cards are ubiquitous and there is a panoply of goods and services that may be obtained by using the internet, there are still certain types of businesses that operate more or less on a cash basis and some may have access to certain sophisticated software capable of fudging the total of sales receipts. In those situations, it is obviously difficult for an Appellant to demonstrate that the methodology of the Minister utilized as a basis for the assessment is incorrect particularly if there are little or no records maintained by the taxpayer and those that are submitted for examination are unreliable for a variety of reasons.

[22] In the within appeals, I am aware that Nguyen denied to the auditor that she had brought a considerable amount of money into Canada between 2001 and 2003.
[23] However, that information was presented to the Appeals Officer who – understandably – required some proof other than a bald assertion to that effect by Ho, the Appellant's former business partner and former spouse. The evidence of Nguyen that Tex-Pro was the sole source of her income during the years under appeal was not challenged by the Minister nor was the evidence of Ho who testified he had no other income and that the amount received from Tex-Pro constituted the entire business revenue of Nguyen and himself. There was a substantial discrepancy between Nguyen's reported income and her expenditures in the three years subject to the net worth assessments. According to the calculations relied on by the Minister, Nguyen must have had access to $156,035.96 during that period in order to spend the money that the auditor and Weisser – Appeals Officer – were able to track based on hard evidence in the form of certain documents or financial records. The evidence of Nguyen and Ho was that they each made two trips to Vietnam and Ho went there once by himself. On each occasion, they arrived in Vancouver with close to US$10,000 since some was spent on their return and their daughter and son-in-law each returned to Canada from Vietnam with a similar sum. According to the testimony of Nguyen and Ho, it is reasonable to find that approximately $67,000 obtained from Nguyen's mother in Vietnam found its way to Canada since their cash expenditures on the return trips were modest according to the testimony of Ho. There was no evidence presented as to the rates of exchange for American and Canadian dollars but one can take judicial knowledge that the Canadian dollar was well below par in relation to the US dollar during the relevant period. Following a Google search, I was directed to a website titled "Canada/US Foreign Exchange Rates"[1] and the source was the Board of Governors of the Federal Reserve System which quoted noon buying rates in New York City for cable transfers payable in foreign currencies. According to the information from said source, the US dollar was worth CDN$1.52 on February 1, 2001 and the rate on December 1, 2001 was CDN$1.57. The average

[1] http://research.stlouisfed.org/fred2/data/Excaus.txt

rate of exchange for that 11-month period was CDN$1.55. On January 1, 2002, the rate was CDN$1.59 – the highest for the year – and on December 1, 2002 it was CDN$1.55. The average rate of exchange that year was CDN$1.57. On January 1, 2003, the rate was CDN$1.54 – the highest during that year – and on December 1, 2003 it was CDN$1.31. The average rate of exchange over the course of 2003 was CDN$1.40. An average rate of exchange over the course of that 3-year period – less one month – was CDN$1.50. The Appellant exchanged money regularly in fairly small amounts and monitored the exchange rate and to some extent relied on the advice of Ho as to the most efficient method of dealing with the money that was brought to Canada over the course of more than 2 years. Although there is some guesswork involved, I believe it is reasonable to infer that the Appellant received approximately CDN$1.48– after paying exchange commissions – for each US dollar she converted to Canadian currency during the relevant period. Therefore, between April 7, 2001 – the date of the return to Canada by Nguyen and Ho - and February 27, 2003 – the date of Ho's return from Vietnam and the ongoing expenditure of that accumulation of money until it ran out at some point, Nguyen would have had the benefit of between $99,000 and $101,000 Canadian dollars.

[24] On the basis of the testimony of Nguyen and by perusing some of her bank statements, I am satisfied that at least two – and sometimes three – of Nguyen's children each paid her the sum of $500.00 per month on a fairly regular basis during a substantial part of that three-year period and these funds were available to Nguyen to operate the household or to expend on personal items.

[25] In order to find that the gap between reported income and expenditure must have been derived from a taxable source, I would have to reject totally the evidence of Nguyen and Ho and to disregard the evidence concerning the primary purpose of those 7 trips to Vietnam taken by them and their daughter and son-in-law. I do not draw any adverse inference against the Appellant for not producing her children as witnesses. She offered an explanation and while it appears her children did not appreciate the seriousness of the litigation, neither did Nguyen until the matter had proceeded to the point where she filed an appeal to this Court against both the income tax and GST assessment. The Minister conceded the extra money was not derived from supplying uniforms to Tex-Pro. The CRA auditor was aware Nguyen did not have any inventory and that everything needed to produce the uniforms was supplied by Tex-Pro except for the sewing machines and other tools situate in the working space within the Nguyen residence. The purchases which were the subject of Input Tax Credits (ITCs) were mainly composed of thread and some fabric. When the auditors – Chahal and Hundle – toured the Appellant's premises in July, 2004, Chahal's notes (Exhibit R-1, Tab 13, page C-11) indicate there were no

advertisements, price lists, cash register tapes, invoices, et cetera and there was no inventory. Chahal noted that Nguyen had 3 work stations with sewing machines in a small room comprising about 140 square feet.

[26] The burning question is this: where did all that extra money come from. The assumptions of the Minister are that the business revenue of the Appellant was as stated in Schedule G, attached to the Reply to the GST appeal. According to the calculations resulting from Weisser's independent analysis of all the relevant material and information, Nguyen – personally – made taxable supplies in the sums of $144,000.15, $78,566.93 and $75,047.86 during the taxation years 2001, 2002 and 2003, respectively. Since the Minister accepts that she was operating the sewing business pursuant to a 50-50 partnership with Ho, those large amounts represent only her share of said taxable supplies during that period. There is absolutely no evidence to support such an assumption and the Minister is satisfied the money earned by supplying uniforms to Tex-Pro was accurately reported and – it bears repeating – has no clue as to the source of any alleged additional taxable revenue.

[27] It is often difficult for a taxpayer to discharge the onus of establishing a *prima facie* case and it is nearly impossible to prove the negative except to testify that there was no extra source of income during the relevant period and to provide an explanation that will serve to explain – to a varying extent depending on the circumstances of each case – the discrepancy between income – taxable and non-taxable – and total expenditure. Having regard to all of the evidence and the nature of the business and the personal circumstances of Nguyen and her background, it is not reasonable to assume that she was able to earn these substantial amounts. Instead, it is reasonable to assume that without the financial assistance of her children and the money received from her mother in Vietnam, she would not have been able to live. Based on the evidence, her English is not sufficient for her to conduct a relatively large-scale enterprise on her own and she needed the assistance of Ho – her former spouse – to deal directly with Tex-Pro and to deliver the uniforms.

[28] The Appeals Officer – Weisser – conducted an extremely fair review of the matters and on each occasion when she was able to do so - based on reliable evidence - made adjustments in favour of the Appellant. To a large extent, the Appellant was responsible for this litigation. Her chosen method of dealing with financial matters was such that the secrecy surrounding the importation of the money to Canada on several occasions – in the form of cash – and the numerous transactions to exchange those funds to Canadian currency and the extent of her personal spending was an invitation to serious scrutiny by CRA.

[29] Even though as noted in *Chomica, supra*, by way of reference to the *Zink* case, there are some "gaps in logic, chronology and substance" in the evidence adduced by the Appellant in the within appeals, the Minister was not able to present any evidence as to another source of her income and was unable to rebut the *prima facie* case made out by her that the amounts she earned from sewing and uniforms and supplying them to Tex-Pro constituted her sole source of business income.

[30] For the reasons, stated herein, and in accordance with the established jurisprudence, I have concluded that neither assessment can stand and both appeals are hereby allowed. The GST assessment issued by way of the numbered notice described in paragraph 2 of the Reply - pursuant to the *Act* is hereby vacated. The assessment issued pursuant to the *ITA* is also vacated.

[31] The Appellant was self-represented and considering that the same net worth assessing method was at issue in both appeals, I award her costs in the fixed sum of $500.00.

Signed at Vancouver, British Columbia, this 18th day of December, 2008.

"D.W. Rowe"

Rowe D.J.

CITATION:	2008TCC675
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