

Docket: 2004-3044(IT)G

BETWEEN:

LEROY PEREIRA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on March 30 and 31, 2009, at Vancouver, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant: Ori J. Kowarsky

Counsel for the respondent: Selena Sit

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**JUDGMENT**

The appeal from the reassessments made under the *Income Tax Act* with respect to the appellant's 1998 and 1999 taxation years is allowed in part and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the reasons herein.

Costs shall be payable by the taxpayer in favour of the Crown.

Signed at Ottawa, Canada, this 6<sup>th</sup> day of August 2009.

"Patrick Boyle"

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Boyle J.

Citation: 2009 TCC 388  
Date: 20090806  
Docket: 2004-3044(IT)G

BETWEEN:

LEROY PEREIRA,

Appellant,

and

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### **REASONS FOR JUDGMENT**

#### **Boyle J.**

[1] The 1998 and 1999 taxation years of Mr. Pereira were reassessed by the Canada Revenue Agency (“CRA”) to include several items of unreported income, including amounts received directly or indirectly by him from his company Tidy Team Building Maintenance Ltd. (“Tidy Team”). Tidy Team was in the business of cleaning commercial and residential units in the Vancouver area following their construction or renovation. In 1999 the taxpayer established Gro-Haven Garden Centre Ltd. (“Gro-Haven”), a greater Vancouver supplier of hydroponic gardening-related items, primarily indoor lighting and fertilizers.

[2] In 1998 and 1999, Mr. Pereira reported income from Tidy Team of \$6,500 and \$18,000, respectively. He did not report any significant other sources of income. In fact Mr. Pereira did not file returns until years later when demanded by the CRA. Returns for the relevant years were also filed late for Tidy Team and for Gro-Haven, some as recently as last fall. These failures to file returns and to prepare financial statements meant that books and records, such as they were, needed to be organized and financial statements had to be prepared much later in time. There have been several attempts to reconstruct financial statements for the businesses since the CRA issued the reassessments. None of these are entirely satisfactory and they are inconsistent with each other on points material to the position now put forward by the taxpayer.

[3] In the reassessments in question, the CRA has essentially added up all of the cash withdrawals made from Tidy Team's bank account by Mr. Pereira, as well as certain cheques or other payments made by Tidy Team to third parties where it appeared Tidy Team was paying Mr. Pereira's personal expenses for his benefit such as university tuition, the drugstore, and truck repairs.

#### I. Shareholder Loans

[4] The taxpayer seeks to explain everything away by reference to pre-existing shareholder loan accounts, which loans to Tidy Team increased during the years in question with money the taxpayer received by way of loans from his parents. Given the inconsistent financial statement portrayal and the need to make material amendments to pleadings, it is clear that this has been an attempt to reconstruct his financial and tax affairs in the most favourable light. The burden is on the taxpayer to satisfy the Court with reasonably consistent and corroborated credible evidence that demonstrates his explanations are probable. To the extent that he is unable to satisfy the Court that possible and plausible versions of events do not rise to the probable threshold, his attitude towards filing returns, maintaining adequate books and records and generally complying with the income tax laws makes him the author of his own misfortune.

[5] The position of the taxpayer's counsel and that of his accountant in evidence is that the amounts reassessed do not account for the shareholder loans made by Mr. Pereira in the years 1998 and 1999. It is their position these should reduce the amounts reassessed as the withdrawals and directed payments could best be characterized as repayments of the shareholder loan balance.

[6] I am unable to accept that there most likely was a positive shareholder loan balance at the opening of 1998. The financial portrayal on behalf of the taxpayer is that the opening 1998 balance was approximately \$10,800. In order to arrive at this number, the accountant obtained from the CRA the 1995 financial statements which were filed with Tidy Team's 1995 tax return. No financial statements were prepared for 1996 or 1997 nor were returns filed. The closing balance on the 1995 financial statements was approximately \$18,000. The accountant's reconstruction of the 1997 Tidy Team year based upon the records and information available to him caused him to estimate another \$8,000 of net withdrawals in 1997. However, the accountant had no information about 1996 and did not make any adjustment to the shareholder loan balance for 1996. He noted in evidence that this was consistent with the fact that for

several years prior, the loan balance had remained flat. However, since he was estimating the loan balance had been reduced by \$8,000 in 1997, it could just as easily have been reduced by \$8,000 or more in 1996. The accountant's choice versus this possibility is simply a reflection of whether one is looking forward from a point in the past or backward from a point in the past and, in either case, assuming that history repeats itself.

## II. Loans from Parents

[7] Related to the shareholder loan scenario put forward on behalf of the taxpayer is the quality of the evidence relating to significant loans, allegedly made by the taxpayer's parents, which were then used by the taxpayer to pay for Tidy Team expenses thereby further increasing the amount of the shareholder loan owing to him by Tidy Team. The constantly shifting and inconsistent testimony, explanations and portrayal of the loans from the parents alone cast serious doubts on that and much of the evidence put in on behalf the taxpayer. His parents had signed a statement to the CRA in the reassessment and objection process regarding their loans to their son which had to be significantly revised both as to amounts and dates shortly thereafter. The taxpayer failed to mention his parents as a source of money he was using to fund Tidy Team's expenses when asked on discovery.

[8] Further it is significant that neither of the taxpayer's parents were called to testify in support of their loans to him. While the taxpayer testified his father could not attend because of significant illness, his explanation as to why his mother did not attend to testify was simply because she worked. In the circumstances, I must infer that, had she been called as a witness, her testimony would not have been helpful to the taxpayer.

[9] For these reasons, serious doubt is cast on all of the evidence, explanations, and *ex post facto* financial presentation of the shareholder loan amounts. It also leaves serious questions as to the source of these large deposits to Mr. Pereira if his parents were not the source. It clearly raises the distinct possibility of Tidy Team as the source of this income. Tidy Team as a source of income would be consistent with the taxpayer's explanation that one of his former accountants, Ms. Ebelling, brought forward to the taxpayer the Gro-Haven business opportunity because as his accountant she could see Tidy Team had money. If Tidy Team was the source of these significant deposits through the taxpayer's personal account, perhaps the expenditures which the taxpayer says were paid personally by him out of this account for the benefit of Tidy Team and were being reimbursed by the withdrawals which

form the subject of the reassessments had already been reimbursed and should not further reduce the reassessments.

### III. Expenses Paid for Personally

[10] The evidence of the taxpayer as supported by that of his accountant is that, based upon a post-reassessment review of the taxpayer's personal banking records, something in excess of \$20,000 of payments could be identified as having been paid for personally by the taxpayer which related to Tidy Team's business. The case put forward was plausible and would be consistent with much of the evidence. However, given (i) the possibility that some of Tidy Team's revenue was already finding its way into the taxpayer's bank account, (ii) the fact that the taxpayer's cheque for the claimed business pager says it is for a second cell phone with his wife's cell phone number, and (iii) the unreasonableness of the taxpayer's explanation that he had Rogers Cable installed in his parents' basement so that his Tidy Team employees could watch television while they were waiting to pick up their pay cheques and while he was doing the business paperwork, I am unable to conclude that the amounts described as "Expenses paid for personally" were Tidy Team's business expenses that had not yet been reimbursed to the taxpayer and they should therefore reduce the reassessments by being treated as in part expense reimbursements. It is also noteworthy that at the objection stage there was no mention made of these expenses paid for personally. The taxpayer's evidence is not sufficiently persuasive to satisfy me on a balance of probabilities that the taxpayer's position at trial is correct.

### IV. Business Expenses

[11] A further adjustment put forward on the taxpayer's behalf was in respect of so-called "Business Expenses". That is, it is the taxpayer's position that these amounts, which were included in the reassessments, were in fact used by Tidy Team to directly or indirectly pay its business expenses, not personal expenses of the taxpayer. In 1998 this consisted of a single payment of approximately \$500 directly to London Drugs. While the payment records could be obtained, no receipt was produced nor could the taxpayer recall what was purchased or explain how it related to the categorization of office supplies. In 1999 the amount was approximately \$3,800 and was withdrawn by the taxpayer from Tidy Team's account. It is said this related to vehicle-related expenditures, perhaps truck repairs or perhaps payments for the purchase of the truck. The truck was personally owned by the taxpayer. Again no

record of the expense was produced. It is certainly possible to acquire office supplies from London Drugs. It is certainly possible that Tidy Team and Mr. Pereira had business-related vehicle expenses in excess of those they ultimately claimed when tax returns were filed. From what I understand of Tidy Team's business, I would assume the use of a vehicle was a necessary part of conducting its business. However, more evidence than was produced would be necessary to support this claim when challenged in Court. I am also somewhat troubled by the fact that his accountant's testimony appeared too desirous of being helpful to his client when parts of his evidence on the supporting evidence for these expenses were shown to be incorrect.

#### V. Loan Payments to Parents

[12] Further adjustments have been put forward on behalf of the taxpayer for cash withdrawn by the taxpayer from Tidy Team's account that was said to have then been used to repay loans to his parents. I am not persuaded on the facts that any adjustment to the reassessments is needed in respect of "Loan payments to parents". If I am correct in my understanding of the evidence, all of the alleged loans in question made by the parents were made to the taxpayer who on-loaned the money to Tidy Team. In Court, there were no loans from the parents to Tidy Team directly. If that is the case, no adjustment would be appropriate or needed even if I were able to accept those as the actual facts. While some of the intervening financial portrayals clearly showed loans from the parents to the company, I was assured in testimony that these had been superseded by the subsequent financial portrayals of the parents' loan transactions. Even had I accepted the evidence presented in Court on the shareholder loans sourced from loans from the taxpayer's parents, no adjustment would have been needed as a matter of law or logic in any event.

## VI. Amounts Paid for Gro-Haven

[13] In early 1999 as the Gro-Haven business was being readied to open, a significant amount of what appears clearly to be Gro-Haven-related expenses were paid by Tidy Team. In the reassessments, the CRA included those amounts in Mr. Pereira's income as indirect withdrawals made for his benefit and with his concurrence. In reassessing the CRA assumed that Tidy Team did not advance funds to Gro-Haven. Gro-Haven's financial statements did not and do not show any amount owing by Gro-Haven to Tidy Team. Nor do any contemporaneous records of Tidy Team, Gro-Haven or the taxpayer indicate Tidy Team intended this to be a loan to Gro-Haven and not a directed benefit by Mr. Pereira. In essence, the question on this issue "Amounts paid for Gro-Haven" is whether Gro-Haven is indebted to Tidy Team or to Mr. Pereira for these amounts. If Gro-Haven is indebted to Tidy Team, these amounts should reduce the personal reassessments of Mr. Pereira. It is the Crown's position, supported by its assumptions, that Gro-Haven was not indebted to Tidy Team for these amounts. Given the lack of contemporaneous corroborating documentation, the shifting financial portrayal and factual position set out in the pleadings and elsewhere since then, and my concerns about the quality of the evidence at trial, I am unable to conclude that it is more likely than not that such payments were intended to create an intercorporate loan to Gro-Haven from Tidy Team and were not directed benefits made at the direction of the taxpayer.

## VII. Amounts on T-4s

[14] The remaining adjustment requested by the taxpayer to the reassessments is in respect of the amounts already included in his income in these years because Tidy Team had in fact issued T-4 slips to him for those amounts. On this point it appears the taxpayer's position is clearly correct and should prevail. The evidence was clear that the reassessments included all amounts which found their way from Tidy Team to Mr. Pereira in the income reassessed to Mr. Pereira. The taxpayer's oral evidence was that he did not receive a regular pay cheque nor did he receive lump sums represented by the distinct amounts for which T-4s were issued. His testimony is in that regard consistent with the evidence of his accountant and all of the documentary evidence introduced by both parties. Indeed, it appears fair to say that the T-4 amounts appear to have been estimates based in part upon information from the taxpayer about what his net withdrawals in these years may have been, as well as an attempt to estimate what a reasonable salary for the owner-operator of such a business might have been in the years in question. To the extent that Mr. Pereira has received T-4 income from Tidy Team and that income has already been included in

the reassessments, it should not be double-counted and also included in the unreported income portion of the reassessments.

[15] It is clear from these proceedings that this has been an attempt to reconstruct the taxpayer's financial and tax affairs in the most favourable light in response to reassessments issued as a result of the failure of the taxpayer and his companies to file tax returns and their failure to maintain books and records in compliance with our tax laws. In appraising the quality, consistency, completeness and correctness of the evidence presented the Court recognizes the real risk of retroactive tax planning based only upon selective evidence which has come to light or been brought forward. In this case I find that the evidence presented by the taxpayer is wanting and does not satisfy me that the plausible and possible explanations put forward on behalf of the taxpayer are more likely than not what in fact occurred nor what was intended. Accordingly, except as regards the potential double-counting of amounts for which the taxpayer received T-4 slips from Tidy Team, which were already included in the income reassessed and were not the subject of an objection or appeal, the taxpayer's appeal is dismissed with costs.

Signed at Ottawa, Canada, this 6<sup>th</sup> day of August 2009.

"Patrick Boyle"

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Boyle J.



CITATION: 2009 TCC 388

COURT FILE NO.: 2004-3044(IT)G

STYLE OF CAUSE: LEROY PEREIRA v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 30 & 31, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: August 6, 2009

APPEARANCES:

    Counsel for the appellant: Ori J. Kowarsky

    Counsel for the respondent: Selena Sit

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