

Docket: 2008-2725(IT)G

BETWEEN:

AWNI SHAIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on April 8 and 9, 2010, at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant: Richard G. Pyne

Counsel for the Respondent: Samantha Hurst

JUDGMENT

The appeals against the reassessments dated February 7, 2003, in respect of the appellant's 1998, 1999 and 2000 taxation years, made by the Minister of National Revenue (**Minister**) under the *Income Tax Act* are allowed and the reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the unreported income of the appellant shall be reduced to take into account the following changes in the net worth as determined in Exhibit A-2:

Working paper 8800:

- 1) the personal expenditures are modified as indicated in paragraph 20 of the Reasons for Judgment (**Reasons**);

- 2) the cash advance from MBNA in the amount of \$11,477 for 1999 shall be deleted;
- 3) the Save-a-Center item shall be reduced from \$6,108 to \$418;
- 4) the "other expenditures" (referred to as "large periodic payments" in working paper 8814) shall be modified as indicated in paragraph 25 of the Reasons;

Working paper 8814:

- 5) the cost of Shair Investments for the years 1997, 1998, 1999 and 2000 shall be reduced as indicated in paragraph 32 of the Reasons;

and that the penalties assessed shall be deleted.

Each party will bear its own costs.

Signed at Ottawa, Canada, this 14th day of May 2010.

"Lucie Lamarre"

Lamarre J.

Citation: 2010 TCC 264
Date: 20100514
Docket: 2008-2725(IT)G

BETWEEN:

AWNI SHAIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from reassessments made by the Minister of National Revenue (**Minister**) under the *Income Tax Act (ITA)* for the appellant's 1998, 1999 and 2000 taxation years. The Minister used the net worth method to include unreported income totalling \$93,451.65 in 1998, \$60,548.71 in 1999 and \$54,845.51 in 2000 and to impose penalties pursuant to subsection 163(2) of the ITA.

[2] The appellant was the sole shareholder of A&C Auto Repairs Ltd (**A&C**). He and his corporation had previously been reassessed under the net worth method (for the years 1994 to 1997 in the case of the appellant and for the years 1994 to 1998 in the case of A&C). The audit process was still under way for those years when the Minister started a new audit for the appellant's 1998, 1999 and 2000 taxation years. The Minister invoked the same reasons for starting the new audit, namely that the appellant operated a mainly cash business and that he did not keep adequate books and records, which the appellant denies.

[3] The reassessments issued by the Minister following the first audit were appealed before this Court. At that time, there remained in issue only the reassessments for the appellant's 1996 and 1997 taxation years and A&C's 1996, 1997 and 1998 taxation years. In a judgment delivered on May 10, 2006, McArthur J. of this Court allowed the appellant's appeals only to the extent of deleting the penalties; he left unchanged the reassessed unreported income of \$14,882 in 1996

and \$20,909 in 1997 assumed to have come from A&C and Shair Investments Ltd. (Exhibit R-1). In the present appeals, counsel for the appellant began his argument by stating that there were huge disparities along the continuum of amounts reassessed for the years in issue.

[4] Mr. Joseph Martins, the auditor for the Canada Revenue Agency (**CRA**) testified that he was assigned the goods and services tax (GST) portion of the previous tax audit (1994 to 1997) and was instructed to audit three more years (1998 to 2000) for the purpose of determining the appellant's income through the net worth method. Mr. Martins said that the appellant had not changed his bookkeeping and record-keeping methods but acknowledged that the appellant may not have had the chance to do so since the first audit was still going on when he himself started the second audit. However, Mr. Martins had to issue requirements to the appellant's banks in order to obtain information on the appellant's assets as the appellant did not provide that information voluntarily.

[5] Mr. Martins testified that he analysed each of the years 1998, 1999 and 2000 independently without relying on the previous audit. This statement appears to be contradicted, however, by numerous remarks in his working papers making reference to the previous audit (Exhibit A-2). Mr. Martins acknowledged that it was one of his first net worth audits with the CRA.

[6] In doing the net worth assessments, he included the appellant's wife and mother in the household, and took into account the income reported by all three.

1. Term deposits

[7] The first item which is disputed by the appellant is the term deposits of \$33,400 in 1997, \$71,172.66 in 1998, \$74,286.46 in 1999 and \$77,703.64 in 2000 that were included in his assets (see Exhibit A-2, working paper 8811).

[8] The appellant contended that these term deposits belonged to his brother Adel Shair. Adel Shair signed an affidavit, and gave testimony in Court, confirming this. Although these term deposits were either solely in the appellant's name or in both Adel and Awni Shair's names, it was Adel who reported the interest income in his tax returns for all those years (Exhibit A-1, Tab 1).

[9] Mr. Martins did not accept the term deposits as belonging to Adel, considering the low income reported by Adel and his family for tax purposes. Adel's income for the years 1986 to 2001 totalled \$391,176, which represents an average annual income

of \$26,000. Taking into account as well the fact that it had been accepted in the first audit that he had loaned \$107,000 to the appellant in 1994, Mr. Martins considered that Adel did not have the means to acquire investments totalling \$77,000 between 1997 and 2000. Mr. Martins determined that Adel and his family had made barely enough over the previous 20 years to support their personal lifestyle and the purchase of a home valued at \$185,000 (see Exhibit A-2, working paper 8816).

[10] In fact, Mr. Martins noticed that some \$49,000 of the term deposits was initially drawn from the appellant's personal bank account at the CIBC. In Mr. Martins' opinion, if the term deposits were subsequently put under Adel's name, it was either because the appellant was reimbursing the \$107,000 loan to his brother or because he wanted to hide personal assets on account of large income tax assessments issued against him and A&C. He did not accept Adel's explanation that he put the term deposits in the appellant's name because he (Adel) did not want his wife to have access to the money.

[11] The appellant provided documentation showing that Adel Shair invested \$81,645 in his own name on January 24, 2003, that he withdrew an amount of \$22,251 on June 25, 2003, and that, on that same day, he withdrew an amount of \$44,338 in order to pay his lawyer, Neil Boyko, in trust, an amount of \$44,200 for the purchase of a property (see Exhibit A-1, Tab 1).

[12] The appellant also filed a receipt (Exhibit A-4) showing that his brother gave him \$40,000 on April 19, 1995. The appellant testified that with this money he was able to make the \$33,000 term deposit at the CIBC in 1997. However, in cross-examination, counsel for the respondent produced an extract from an expert report, which had been tendered at trial before McArthur J., concerning the 1994 through 1997 reassessments. In that report, reference was made to the same receipt (Exhibit A-4) and it was stated that the amount of \$40,000 shown thereon was used by the appellant to pay down his PowerLine line of credit balance (Exhibit R-2, page 7).

[13] Considering Adel's income over the years and the fact that it was accepted that he had loaned an amount of \$107,000 to the appellant in 1994, I agree with the auditor that it would appear that the term deposits for which the funds were initially drawn from the appellant's CIBC personal account belonged to the appellant and that the money was invested in Adel's name in repayment of the previous loan. Furthermore, the appellant gave two different versions with respect to the \$40,000 (Exhibit A-4). Under those circumstances, the appellant failed to satisfy me on the balance of probabilities that Adel had the means to invest another \$77,000 of his own

during the years at issue before me. Although Adel testified that he had held the same job for 20 years, and that he received a settlement amount of \$33,000 in 1995 or thereabouts, the low income he reported does not demonstrate that he could afford to accumulate an amount of \$77,000 in term deposits on top of the \$107,000 that he had loaned to the appellant in 1994. The fact that he declared the interest income in his tax returns is not sufficient, in my view, to reverse the onus of proving that he himself provided the amounts invested in the term deposits. In fact, because his low income, Adel paid less tax on the interest income than the appellant, with his higher income, would have paid. I therefore accept the inclusion of the term deposits in the assets of the appellant in the years at issue.

2. Personal expenditures

[14] Counsel for the appellant asserted that the appellant was asked to fill in a schedule of his personal expenditures without being told why he had to do so. The schedule for each of the years at issue is found in Exhibit A-1, Tab 5. For some items, Mr. Martins did not find the numbers given by the appellant reasonable and so preferred to use the Statistics Canada figures.

[15] According to counsel for the appellant, the appellant and his wife are immigrants with little education and live a very frugal life with the help of their siblings. The appellant and his wife testified that they do not go out, that they eat at home, that they do not drink nor smoke, that they do not buy flowers and toys, that they do not buy plastic and foil, and that they do not have a car as the appellant owns a garage where he does all the mechanical work. They live very close to the garage and use clients' cars once in a while. The appellant's wife is an aesthetician and she helps her husband in the garage. They do not go to the hairdresser as she takes care of their hairdressing needs herself. They ask me to accept their figures, even though, for example, the appellant stated that he sometimes overestimated their expenses (for instance, the cost of women's clothing, estimated at approximately \$1,600 per year).

[16] The appellant is also asking me to subtract the \$1,500 home entertainment expense for 2000 as it has already been included elsewhere in the net worth calculation, which is conceded by the respondent.

[17] The appellant also testified that the \$13,276 expense in 2000 for his mother's funeral was not all paid by him. As a matter of fact, an amount of \$9,428.07 from a life insurance policy was used to pay those expenses. That amount has however, already been taken into account by the auditor as a deduction from net worth (Exhibit A-2, working paper 8814). The appellant and Adel testified that Adel paid

\$2,500 and that their three sisters together paid \$600 toward the funeral expenses. This would mean that the appellant would have paid approximately \$750.

[18] While I am prepared to accept the appellant's and his wife's versions that they do not go out, they in turn must admit that the CRA's estimate of the cost of food purchased from stores, based on Statistics Canada figures, is not too high and, if they always stay at home, they must accept as well the CRA's estimate of the cost of cleaning supplies, which seems to be a reasonable one.

[19] With respect to the mother's funeral, I am prepared to accept that the sisters together paid \$600, but I do not see why Adel would have paid \$2,500 and the appellant only \$750. Considering the vagueness of their testimony on this point, I find it more reasonable to conclude that the two brothers shared equally the balance of the cost of their mother's funeral.

[20] I will therefore reduce the personal expenditures to reflect the fact that I accept the appellant's figures for the following items:

	1998	1999	2000
Food from restaurants	\$500	\$550	\$600
Paper, plastic & foil	\$60	\$70	\$80
Clothing (men's)	\$225	\$250	\$270
Laundry	NIL	NIL	NIL
Auto operation (gas)	\$300	\$330	\$360
Auto maintenance & repairs	NIL	NIL	NIL
Auto insurance premiums	NIL	NIL	NIL
Hair cuts, etc.	\$80	\$80	\$80
Recreation, etc.	\$165 ¹	NIL	NIL
Flowers & toys	NIL	NIL	NIL
Home entertainment	\$300	\$300	NIL ²
Mother's funeral	NIL	NIL	\$11,052 ³

3. Cash advance from MBNA

[21] This is an amount of \$11,477.75 that was added to the appellant's income in the 1999 taxation year (Exhibit A-2, working paper 8800). It is my understanding

¹ Exhibit A-1, Tab 3, page 19 (Visa statement)

² The amount of \$1,500 was conceded by the respondent.

³ I include the amount of \$9,428 because that amount was deducted from net worth elsewhere, and I consider that the appellant and his brother each paid \$1,624 and the three sisters together paid \$600.

that the amount was borrowed by the appellant to make a \$10,000 term deposit for his brother-in-law, who needed that amount for immigration purposes. The term deposit was cashed and the money reimbursed within the same year. The respondent conceded that this amount should be removed from the total additions to net worth for that year.

4. Receipt for Save-a-Center: \$6,108.15 (Exhibit A-2, working paper 8800)

[22] The appellant and his wife testified that in 1998 they borrowed that amount of money on their CIBC Visa card to send to the appellant's brother-in-law, who needed it for personal purposes. His brother-in-law repaid that loan a few weeks later, but the amount repaid was only \$5,690 (Exhibit A-1, Tab 3). The respondent is prepared to concede that \$5,690 should be excluded. The balance (\$418) will still be included in additional expenses for the purpose of establishing the undeclared income.

5. Large periodic payments (Exhibit A-2, working paper 8814) (also referred to by the auditor as "other expenditures" in Exhibit A-2, working paper 8800)

[23] The amounts of \$2,957, \$2,958 and \$5,031 were added to the appellant's net worth in the years 1998, 1999 and 2000 respectively.

[24] Mr. Martins, on his worksheets, stated that these were large periodic payments that had not already been included in personal expenditures. Those payments of expenses were made out of the appellant's wife's account, the appellant's mother's account and the appellant's account. One of these expenses is a \$1,000 "Payment made to Freddie" in 2000. The appellant said that this was a wedding gift and that it was already accounted for in personal expenditures. The same applies to the insurance item, a portion of which has apparently already been accounted for in personal expenditures. I am prepared to reduce the large periodic payment amounts by the amounts that have already been included in personal expenditures. I will therefore delete the \$1,000 for the payment to Freddie in 2000 and I will reduce the amounts for insurance by half for 1998 and 1999.

[25] Thus, the large periodic payments will be reduced by \$315 for 1998, giving a total of \$2,642, by \$508 for 1999, giving a total of \$2,450, and by \$1000 for 2000, giving a total of \$4,031.

6. Receivable from A&C: \$26,040 in 2000 (Exhibit A-2, working paper 8811)

[26] Mr. Martins explained that this amount was recorded as shareholder's advances on A&C's balance sheet as at February 28, 2001. The amount was \$31,697 as at March 31, 2000 (Exhibit A-1, Tab 8, page 40). Mr. Martins said that since the appellant was the sole shareholder of A&C, the amount was considered as being an asset to him. Ms. Maureen McCullough, CA, the appellant's ex-wife, testified that this amount should be nil because A&C had ceased its operations in 2000 and there were no more assets in A&C with which the appellant could recoup his investment.

[27] Mr. Martins's response to that was that A&C did not go out of business in 2000, as can be seen from the financial statements showing sales as at February 28, 2001 of \$134,362 and gross income of \$87,228 before operating expenses were subtracted (Exhibit A-1, Tab 8, page 41). The financial statements state that the business closed permanently on February 28, 2001 (Exhibit A-1, Tab 8, page 42). Mr. Martins said that it was up to the appellant to claim a business loss in 2001, but that 2001 is not in issue here.

[28] I agree with Mr. Martins that the evidence does not reveal that A&C was out of business in 2000 and Ms. McCullough's assertion that the value of the receivable was nil as at December 31, 2000 has not been verified. I will therefore not modify the net worth in this regard.

7. \$10,000 payment from account 594866 to Shair Investments in 2000 (Exhibit A-2, working paper 8800) and cost of Shair Investments Ltd.: \$293,319 (Exhibit A-2, working paper 8811)

[29] The payment of \$10,000 is from the appellant's wife's account, and Mr. Martins was told by the appellant that it was a payment to Shair Investments. Nothing significant having been added in evidence with regard to that payment, I will leave that amount in.

[30] With respect to the cost of Shair Investments Ltd, Mr. Martins was told during his audit that the appellant had purchased a building in 1994 and transferred it to Shair Investments Ltd. The purchase price was \$293,319. In Court, Mr. Martins said that this figure was substantiated by the previous audit and he kept it as a constant figure over the years at issue. As he was not provided with Shair Investment's financial statements, he was not able to decrease the balance over the years.

[31] Ms. McCullough provided that corporation's balance sheet and said that the shareholder's advances declined from \$278,366 in 1998 to \$269,489 in 2000 (Exhibit A-3, Tab G). She said that this decline was not recognized by the assessor.

[32] I am prepared to accept that the amount of \$293,319 shown in the net worth calculation be reduced to \$282,368 in 1997, \$278,366 in 1998, \$269,384 in 1999 and \$269,489 in 2000, as reflected on the balance sheet provided.

8. Net expenditures not included in shareholder account (Exhibit A-2, working paper 8814)

- a) Transfer of account payable as at March 31, 1999 to shareholder account: \$18,000.

[33] Mr. Martins included this amount as an additional expenditure of the appellant because it was an account payable by A&C as at March 31, 1999, and Mr. Martins was told that the appellant was paying on behalf of A&C and that it should have been reflected in the shareholder's loan account, which it was not.

[34] Ms. McCullough testified that sufficient advances were made by the appellant as a shareholder to settle the corporation's trade payables. She said that in November 1999 the appellant borrowed \$25,000 (Exhibit A-1, Tab 8, page 31), which he advanced to A&C (Exhibit A-1, Tab 8, page 33, and Tab 9, page 43), a fact that was ignored by the assessor.

[35] On this point, I must disagree with Ms. McCullough. In fact, Mr. Martins deducted an amount of \$27,066 in establishing the net worth for 1999 (Exhibit A-2, working paper 8811), which is the exact amount found in the PowerLine monthly statement (Exhibit A-1, Tab 8, page 31) referred to by Ms. McCullough.

[36] Ms. McCullough said that the shareholder's loan balance of \$31,697 reflected in A&C's books as at March 31, 2000 (Exhibit A-1, Tab 9) already included the company's debt of \$18,000, and therefore this latter amount should not be added back into the appellant's net worth. In my view, there is no evidence of such inclusion. Ms. McCullough has not pinpointed on what basis I should draw the conclusion sought. Furthermore, the \$18,000 account payable related to A&C's year ended March 31, 1999, and for that year the shareholder's loan account balance in A&C's books was only \$8,627. As a consequence, I am not in a position to challenge Mr. Martins' treatment of A&C's \$18,000 account payable in including it in the shareholder's loan account. I will therefore change nothing with regard thereto.

- b) Management fees: \$20,000 in 1998
\$28,000 in 2000

[37] Mr. Martins considered the difference between the management fees that were supposed to be paid to the appellant by A&C and what was actually paid - that is, a difference of \$11,000 in 1998 and \$17,657 in 2000 - as amounts owed by the company that had to be included in the shareholder's loan account (Exhibit A-2, working papers 8800 and 8814).

[38] Ms. McCullough said that these amounts should not be included in the assets of the appellant as they are income items that were reported by the appellant. Indeed, the appellant did report income of \$20,000 in 1998 and \$28,000 in 2000.

[39] However, I accept Mr. Martins' explanation that the amounts not paid to the appellant are amounts owed to him, which must be recorded in the shareholder's loan account. No evidence was given to substantiate that A&C did pay the totality of the management fees, as claimed by Ms. McCullough. The amount reported by the appellant was applied in reduction of the unreported income.

9. Penalties pursuant to subsection 163(2) of the ITA

[40] In view of the fact that I will be reducing the reassessments by modifying the net worth calculations, and considering that Mr. Martins himself recognized that the second audit started while the first was not yet finished and that the appellant did not have time to reorganize his books and records in a manner satisfactory to the CRA, I will delete the penalties.

Decision

[41] The appeals will be allowed and the reassessments referred back to the Minister for reconsideration and reassessment on the basis that the unreported income of the appellant shall be reduced to take into account the following changes in the net worth as determined in Exhibit A-2:

Working paper 8811:

- 1) the personal expenditures are modified as indicated in paragraph 20 of these reasons;
- 2) the cash advance from MBNA in the amount of \$11,477 for 1999 shall be deleted;
- 3) the Save-a-Center item shall be reduced from \$6,108 to \$418;

4) the “other expenditures” (referred to as “large periodic payments” in working paper 8814) shall be modified as indicated in paragraph 25 of these reasons;

Working paper 8814:

5) the cost of Shair Investments for the years 1997, 1998, 1999 and 2000 shall be reduced as indicated in paragraph 32 of these reasons;

and that the penalties assessed shall be deleted.

Each party will bear its own costs.

Signed at Ottawa, Canada, this 14th day of May 2010.

“Lucie Lamarre”

Lamarre J.

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DATE OF JUDGMENT: May 14, 2010

APPEARANCES:

Counsel for the Appellant: Richard G. Pyne
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