

Docket: 2008-488(GST)I

BETWEEN:

HENRYK WASSERMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on common evidence with appeal no. 2008-934(IT)G on  
February 10, 2010, at Winnipeg, Manitoba,  
By: The Honourable Justice C.H. McArthur

Appearances:

For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Julien Bédard

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**JUDGMENT**

The appeal from the assessment made pursuant to subsection 323(1) of the *Excise Tax Act*, notice of which is dated February 10, 2008, and bears number 09CR0603065 for the periods ending January 1, 2003 and December 31, 2004 is allowed, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the gross negligence penalties imposed under section 285 of the *Act* are waived.

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

“C.H. McArthur”

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McArthur J.

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Appeals heard on common evidence with appeal no. 2008-488(GST)I on  
February 10, 2010, at Winnipeg, Manitoba,  
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For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Julien Bédard

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**JUDGMENT**

The appeals from reassessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are allowed, without costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim 80% of the automobile expenses for business use, and the penalties imposed under subsection 163(2) of the *Act* are waived.

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

“C.H. McArthur”

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McArthur J.

Citation: 2010 TCC 312  
Date: 20100614  
Dockets: 2008-488(GST)I  
2008-934(IT)G

BETWEEN:

HENRYK WASSERMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **McArthur J.**

[1] These appeals under the *Income Tax Act (ITA)* and *Excise Tax Act (ETA)* are from decisions of the Minister of National Revenue (Minister) for the Appellant's 2003 and 2004 taxation years.

[2] The Minister added to the Appellant's income the amount of \$74,082 in 2003 and \$46,780 in 2004 as unreported income which the Appellant disputes. The Minister determined that a percentage of the Appellant's cash deposits were deemed to have been unreported income and goods and services tax, and imposed gross negligence penalties under subsection 163(2) of the *ITA* and section 285 of the *ETA*.

[3] The Appellant inherited from his parents a pet shop in Winnipeg and has successfully operated it for over 20 years. These appeals follow his first and only audit conducted by an analysis of his bank deposits. Perhaps the common net worth method was not used because of the Appellant's frugal lifestyle and lack of visible assets.

[4] This case is to be determined primarily on its facts. The Minister's counsel acknowledged that the Appellant was telling the truth but, that his bookkeeping was seriously inadequate. He pooled his personal and business money together and treated this amount as his savings but did not keep proper records.

[5] For the 2003 and 2004 taxation years, the Appellant reported the following:

2003 Sales: \$389,870.60 Net Business Income: \$29,326.42  
2004 Sales: \$362,782.16 Net Business Income: \$ 9,530.07

[6] The Minister argues that the Appellant failed to report additional income because deposits to the Appellant's business bank account were significantly higher than the amounts reported above. The unreported amounts are \$84,453 in 2003 and \$53,330 in 2004. The Minister adds that these amounts include unreported provincial sales tax ("PST") and unreported goods and services tax ("GST") based on the unidentified cash deposit amounts.

[7] The Minister reached these conclusions by taking the total deposited into the Appellant's bank account and deducting any loans made to the Appellant and transfers from any other accounts. The net result, the Minister submits, is the unreported incomes for the years in issue.

[8] The Appellant's position is that these amounts are not unreported income but rather reported income from previous years which he held onto as savings. He argues that since he was a sole proprietor, he did not think that he would have to account for his sales to anyone else. Unfortunately, he did not retain cash register receipts or any other documentation nor keep a personal bank account separate from that of his business.

[9] The Minister's counsel stated on page 3, 4 and 5 of the transcript:

... He knew what was going in and out and he had to cover those. He just didn't maintain any records.

... we have a self-reporting system, without accurate records the Minister can use other methods to calculate income, the appellant has the onus to show the assessment is incorrect and must do so with reliable and credible evidence, and penalties will often result when a taxpayer's records are in disarray or are nonexistent, as is the case here.

[10] The Appellant's position, in his own words, includes the following:

I have paid for the reassessment amount and interests \$96432.00 and also \$14654.90 to the GST department. Almost the entire amount is in LOANS, ...

The biggest amounts are for deposits from my personal Savings, which consisted of cash accumulated over 20 years of work,

...

I spent most of the day working, with no time to go and spend money. I only travelled on trips to trade shows paid by suppliers.

...

I have lived in a small room in the back of the store, since 1994.

...

I needed to repair a furnace (boiler), but a new furnace was cheaper than the repairs to the old boiler, needed to dip in to my savings. A roof needed repairs, needed to repair a cracked store front window, and these repairs also needed money from my savings.

[11] The Minister also took issue with some of the business expenses the Appellant claimed. He claimed 100% of his automobile (SUV), and 100% of his television cable and internet expenses. The Minister allowed 50%.

[12] In presenting his evidence, the Appellant impressed me as being open and having convinced himself that his unorthodox methods were valid despite being very self serving. He obviously has a frugal lifestyle, living in less than a 400 square foot space at the back of his store. He appears to have immersed himself in his pet shop business, having a particular interest in birds and fish.

[13] For the most part, the six or seven pages of assumptions of fact contained in the Minister's Replies to the Notices of Appeal are accurate. At page 7, paragraph 16 ee) through to uu) the Minister stated the following:

- ee) he Appellant did not maintain an accurate inventory of the Business merchandise, rather, his statement of business activities contains his estimates;
- ff) Bank deposits were made on a regular basis and consisted of cash deposits of a large number of 20,50 and 100 dollar bills;
- gg) the Appellant failed to report income in the following amounts:

<b>2003 Adjustments</b>	<b>Unreported Sales</b>	<b>GST Collected</b>	<b>PST Collected</b>	<b>Total</b>
Unidentified Cash Deposits	70,133.89	4,909.37	4,909.37	79,952.63
Cash Paid Expenses	3,948.51	276.40	276.40	4,501.30
	<b><u>74,082.39</u></b>	<b><u>5,185.77</u></b>	<b><u>5,185.77</u></b>	<b><u>84,453.93</u></b>

<b>2004 Adjustments</b>	<b>Unreported Sales</b>	<b>GST Collected</b>	<b>PST Collected</b>	<b>Total</b>
Unidentified Cash Deposits	43,086.48	3,016.06	3,016.06	49,118.70
Cash Paid Expenses	3,694.18	258.59	258.59	4,211.37
	<b><u>46,780.76</u></b>	<b><u>3,274.65</u></b>	<b><u>3,274.65</u></b>	<b><u>53,330.07</u></b>

- hh) The Appellant made unidentified cash deposits in the amount of \$79,952.63 in the 2003 taxation year of which \$70,133.89 was unreported revenue, \$4,909.37 was unreported Provincial Sales Tax (“PST”) and \$4,909.37 was unreported Good and Services Tax (“GST”);
- ii) The Appellant made unidentified cash deposits in the amount of \$49,118.70 in the 2004 taxation year of which \$43,086.48 was unreported revenue, \$3,016.06 was unreported PST and \$3,016.06 was unreported GST;
- jj) In the 2003 taxation year, the Appellant paid expenses with cash from unreported revenue in the amount of \$4,501.30, of which \$3,948.51 was unreported revenue, \$276.40 was unreported PST and \$276.40 was unreported GST;
- kk) In the 2004 taxation year, the Appellant paid expenses with cash from unreported revenue in the amount of \$4,211.37, of which \$3,694.18 was for revenue, \$258.59 was unreported PST and \$258.59 was unreported GST;
- ll) In the 2003 taxation year, the Appellant’s unreported sales were in the amount of \$84,453.93, of which \$74,082.39 was unreported business income, \$5,5185.77 was unreported PST and \$5,5185.77 was unreported GST;
- mm) In the 2004 taxation year, the Appellant’s unreported sales were in the amount of \$53,330.07 of which \$46,780.76 was unreported business income, \$3,274.65 was PST and \$3,274.65 was GST;
- nn) The Appellant deposited \$584,990.78 into the Business bank accounts in the 2003 taxation year;

- oo) No more than \$13,000 of the amounts deposited into the Business bank accounts in the 2003 taxation year were from loans made to the Appellant;
- pp) No more than \$44,400 of the amounts deposited into the Business bank accounts in the 2003 taxation year were transferred from another Business bank account;
- qq) The Appellant deposited \$484,924.57 in to the Business bank accounts in the 2004 taxation year;
- rr) No more than \$9,400 of the amounts deposited into the Business bank accounts in the 2004 taxation year were from loans made to the Appellant;
- ss) No more than \$9,627.50 of the amounts deposited into the Business bank accounts in the 2004 taxation year were transferred from another Business bank account;
- tt) Purchases in the amount of \$2,516.78 claimed by the Appellant in the 2003 taxation year as business expenses were not incurred for the purpose of producing or gaining income from a business or property;
- uu) Purchases in the amount of \$17,972.31 claimed by the Appellant in the 2004 taxation year as business expenses were not incurred for the purpose of producing or gaining income from a business or property;

[14] The Appellant having no documentation has to rely on his oral evidence, which consisted of generalities to refute the assumptions.

[15] Amongst other authorities, the Minister cited the following from the Federal Court of Appeal in *Njenga v. The Queen*:<sup>1</sup>

... the Appellant must maintain and have available detailed information and documentation in support of the claims they make. We agree with that finding. Ms. Njenga as the Taxpayer is responsible for documenting her personal affairs in a reasonable manner. Self written receipts and assertions without proof are not sufficient.

[16] While this principle is commonly adopted, there is authority for accepting credible oral evidence to explain unidentified deposits. In his analysis of *Njenga* case, C. Miller J. held in *Fenney v. The Queen*<sup>2</sup> that:

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<sup>1</sup> 96 DTC 6593.

<sup>2</sup> [2001] T.C.J. No. 431 at para 6.

I do not read *Njenga* as an absolute prohibition on allowing undocumented expenses: it should be read in the light of a non-credible witness.

With a credible witness such as Mr. Fenney I am prepared to consider the expenses he raised at trial with a view to assessing the reasonableness of such expenses.

[17] Similarly, Bowie J. in *Wainberg v. The Queen*,<sup>3</sup> commented on the *Njenga* case and wrote:

Counsel for the Respondent referred me to the decision of the Federal Court of Appeal in *Njenga v. The Queen*. That case held that a taxpayer who ignores the requirement under the *Act* to maintain and have available detailed information and documentation to support the claims that they make should expect to have considerable difficulty discharging the burden of proving those claims. The need to support oral testimony with documents is certainly not absolute, however. If the taxpayer is a credible witness, the case may be made simply on oral evidence, if it is sufficiently convincing ...

[18] Mr. Wasserman did all his own bookkeeping and accounting including GST, PST, and income tax returns. He has up to eight employees, five of them relatives.<sup>4</sup> He kept cash in safes and had no cash register tapes except for the debit and credit card sales. He was aware of RRSPs and having declared net incomes of \$35,308, \$29,326 and \$9,530, he purchased \$14,000, \$6,000 and \$3,000 in RRSPs in each of 2002, 2003 and 2004, respectively. He was aware of claiming expenses to reduce his business income including 100% of the cost of a large screen television in his home. He pooled his savings with business income using some of the cash he received for personal and business expenses without any records. Obviously, the Minister had no other option than to analyse his bank deposits. The Appellant had taken a bookkeeping course and had been in business for 20 years. He knew or ought to have known that he had a silent partner in Canada Revenue Agency.

[19] He agrees that he should have kept better records, but thought he had no one to report to. His position is that all deposits were from sales of previous years. This appeal is under the General Procedure of the our Court. The *Fenney* and *Wainberg* cases dealt with much lower amounts and were under the Informal Procedure. To accept oral evidence without any corroboration in this case would be too far a stretch.

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<sup>3</sup> 2003 TCC 610 at para. 3.

<sup>4</sup> His nephew, sister and three of her children.



[20] The only reasonable concessions are with respect to the automobile business use and the gross negligence penalties. I accept the Appellant's evidence that he used his SUV primarily for business and after nine years of use it has only 56,000 kilometres. It is reasonable to increase the business use of his SUV from 50% to 80% in both years.

[21] Dealing with penalties, the Minister's counsel very fairly stated:

I don't think it's that he is deceiving or lying. He has just adopted a system from his parents, he said, and used that system for 20 years, but the system doesn't work. And once he got audited, that's when we realized, oh, your system doesn't comply with the *Income Tax Act*.

I think that's what is at issue here, is a misunderstanding of Canadian tax laws.<sup>5</sup>

[22] I agree with counsel's insight but do not believe that the Minister has met the burden of proof in these appeals. In the often quoted case of *Venne v. R.*<sup>6</sup> Strayer J. wrote the following:

Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, in difference as to whether the law is complied with or not. I do not find that high degree of negligence in connection with the misstatements of business income. ...

[23] The Appellant is credible and did not intentionally fail to maintain records in an effort to evade paying taxes. His procedure did not involve a high degree of negligence. Failing to maintain records is careless and negligent, but it is not "grossly negligent" so as to attract penalties pursuant to subsection 163(2) under the *ITA* and under section 285 of the *ETA*.

[24] There was no evidence that the understatements were made knowingly. In *Farm Business Consultants Inc. v. The Queen*,<sup>7</sup> the Federal Court of Appeal approved of the trial judge, Bowman J., who stated:

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<sup>5</sup> Reference is made to the last eight lines on page 3 of the transcript.

<sup>6</sup> 84 DTC 6247 at 6256.

<sup>7</sup> 96 DTC 6085.

Subsection 163(2) is a penal provision and in applying it if there is doubt as to the type of conduct to which the misrepresentation is attributable the benefit of that doubt should be given to the taxpayer.

[25] Without hesitation, I find that the Minister has not proven his burden of establishing gross negligence.

[26] In conclusion, the income tax appeal is allowed only to increase the automobile business use from 50% to 80% and to waive penalties imposed under subsection 163(2) of the *ITA*.

[27] With respect to the GST appeal, I find that the Appellant failed to keep adequate records to enable the Minister to determine its liabilities, obligations and entitlements under the *Act* as required by section 286 of the *ETA*. It was reasonable for the Minister to rely on the bank deposits to determine the minimum amount of tax collected or collectible by the Appellant. The GST appeal is allowed only to waive the section 285 gross negligence penalties imposed.

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

“C.H. McArthur”

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McArthur J.

CITATION: 2010 TCC 312

COURT FILE NOS.: 2008-488(GST)I  
2008-934(IT)G

STYLE OF CAUSE: HENRYK WASSERMAN and  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: February 10, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: June 14, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Julien Bédard

COUNSEL OF RECORD:

For the Appellant:	
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Firm:	N/A
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