Docket: 2007-3727(IT)G

BETWEEN:

SANDY KOZAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on March 29, 30 and 31, April 1, June 9, 10 and 11, 2010, at Windsor, Ontario

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	John Mill
Counsel for the Respondent:	Nicolas Simard

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2001 and 2002 taxation years are allowed and the reassessments are vacated.

Costs are awarded to the Appellant on a solicitor and client basis.

Signed at Ottawa, Canada, this 19th day of July 2010.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2010 TCC 389
Date: 20100719
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BETWEEN:

SANDY KOZAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

The Issues:

[1] The Appellant appeals from reassessments issued by the Minister of National Revenue (the "Minister") for unreported income regarding the 2001 and 2002 taxation years totalling $220,595 and $135,488 respectively. The Appellant also appeals the Minister's right to reassess the Appellant with respect to the 2001 taxation year, being an otherwise statute-barred year, pursuant to subsection 152(4) of the *Income Tax Act* (the "*Act*") and further appeals the Minister's assessment of penalties pursuant to subsection 163(2) of the *Act* for the 2001 and 2002 years, totalling $29,936 and $17,135 respectively for those years.

Background:

[2] The Appellant was a registered nurse during the years in question and reported income in her income tax returns of $44,659 for 2001 and $42,403 for 2002, representing employment income from the Windsor-Essex County Health Unit for whom she has worked for the past eleven years. The Minister initially assessed the Appellant's tax liability for the years in question by notices of assessment dated April 15, 2002 and March 24, 2003 respectively based on her income from her nursing employment as reported. By notices of reassessment dated October 11, 2005, the Minister reassessed the Appellant's tax liability by

increasing the Appellant's income substantially and assessing gross negligence penalties on the basis of net worth assessments pursuant to subsections 152(7) and (8) of the *Act* and, after the filing of notices of objection by the Appellant on December 19, 2005, the Minister reassessed the Appellant's total income and penalties to those stated in the first paragraph of this decision above.

[3] The Appellant, now a single mother of two, reconnected with her high school boyfriend, Sang Nguyen, in the year 2000 and became engaged to him in 2001. On August 10, 2002, the Appellant married Mr. Nguyen. During the years in question until failure of the business in May 2002 (resulting in the appointment of receivers), Mr. Nguyen operated a satellite receiver decoding business, known as Pirate Satellite Receivers, first in partnership with a Mr. P. Reid, then in proprietorship, and then in incorporated form after October 2001. The Appellant was neither a partner, nor a shareholder, officer or director of her spouse's satellite business and the Respondent pleaded that the Appellant's fiancé was the sole shareholder of the business when it was operated in corporate form. The Appellant and her husband separated in August of 2009, after which her husband returned to Vietnam for the balance of the year and returned in the following year. The evidence of the Appellant is that she and her husband are not in contact, with the husband only sparingly phoning to speak with his children, and that she has no address for him nor would he agree to testify at this trial.

[4] The Canada Revenue Agency ("CRA") audited Pirate Satellite Receivers and expanded their inquiries to the Appellant as a result of investigating her husband's business. Due to several unexplained bank deposits into the Appellant's accounts and those the Respondent alleges were the Appellant's accounts, and due to the CRA's allegation that the Appellant was not cooperative throughout the audit, an allegation strongly disputed by the Appellant, in addition to the cash nature of the satellite business which placed it in a higher risk category, the CRA's Special Investigations Branch audited and assessed the Appellant on a net worth basis. The Respondent's net worth assessment is based on the assumption of facts contained in paragraph 13 of the Amended Reply, and in particular the following paragraphs:

> a) in all relevant years, the Appellant and her spouse were involved in the programming and selling of satellite receivers;
>
> …
>
> f) <u>at all material times, the Appellant was an employee of business</u>;

g) the Appellant's tasks involved the programming of satellite receivers' cards;

h) the Appellant was remunerated for her work by cash and cheques;

i) during the 2001 and 2002 taxation years, the Appellant was paid at least $220,595 and $135,488 respectively for her work;

…

m) the understated amounts were determined by the net worth method (a copy of the Statement of Personal Net Worth is attached as Schedule "I");

n) during the 2001 and 2002 taxation years, the Appellant's personal expenses were equal or superior to the amounts of $16,086 and $108,248 respectively.

Position of the Parties:

[5] The Appellant's position is that she was not an employee of the business and never received any remuneration of any kind in such capacity, directly or indirectly, and that she was not very computer savvy, had very little to do with her then-fiancé's business, rarely attending at the store location, and at best only answered the phone once and passed the line to another party or may have helped distribute the satellite cards on a few extremely busy days. Her testimony is that she was a full-time registered nurse working 8:30 a.m. to 4:30 p.m. shifts and had no time to take other employment, and hence, was never an employee of the business nor received compensation from the business as assumed by the Respondent. She advised never having attended at the business location when it was located on Shephard Street and only recalls ever having attended several times when at the newer location on Howard Street.

[6] The Respondent's position is that the Appellant was involved in the programming and sale of satellite receivers and was at all times an employee of the business who was paid by cash or cheque the entire amount of income, directly or indirectly, that the Respondent alleges was unreported income calculated using the net worth reassessment method.

The Burden of Proof and Order of Presentation:

[7] There is no dispute between the parties as to which party bears the burden of proof with respect to the issues to be decided. The Respondent bears the burden of proving that the taxpayer has made any representation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing a return as required under subsection 152(4) of the *Act* in opening up a statute-barred year, namely the 2001 taxation year of the Appellant. The onus is on the taxpayer to demolish the assumptions made by the Minister in assessing the taxpayer pursuant to the section 152 reassessment. Finally, the onus is on the Respondent to establish the facts justifying the assessment of the penalties under subsection 163(2). While I will make reference to the onus applicable to the issues in the context of the law and evidence shortly, it should be noted that due to the fact the Respondent has the onus to prove a misrepresentation contemplated under subsection 152(4), the Appellant sought at the beginning of the hearing, by way of motion, to have the Respondent present his evidence of misrepresentation with respect to the 2001 statute-barred year first, which motion was opposed by the Respondent. I dismissed the motion of the Appellant by oral decision at the commencement of the hearing on the basis I would provide more detailed reasoning within the judgment on this matter and now propose to provide such more detailed reasons.

Reasons for Dismissing the Preliminary Motion:

[8] Rule 135(2) of the *Tax Court of Canada Rules (General Procedure)* reads as follows:

> 135(2) Unless the judge directs otherwise, the parties shall put in their respective cases by evidence or by putting before the Court the facts on which they rely, in the following order,
>
> *(a)* the appellant,
>
> *(b)* the respondent, and
>
> *(c)* the appellant in respect of rebuttal evidence.

[9] The Appellant in effect asked this Court to “otherwise decide” and require the Respondent to lead evidence of the misrepresentation alleged on the basis of both case law argued and in the interests of practicality.

[10] The Appellant relied on the case of *Minister of National Revenue v. Maurice Taylor*, 61 DTC 1139 (Exch Ct), which required the Respondent to proceed first and on *943372 Ontario Inc. v. Canada*, 2007 TCC 294, 2007 DTC 1051. *Re Maurice Taylor* only dealt with the issue of misrepresentation with no underlying dispute as to an assessment so it would make sense for the Crown to proceed first in those circumstances as there was only one onus of proof involved and it was on the Crown. The Respondent referred to paragraph 11 of former Chief Justice Bowman's decision in *943372 Ontario Inc.* where he simply stated:

> 11 Since the initial burden lies upon the Crown to justify the statute-barred assessments and the penalties, counsel for the respondent opened …

[11] Unfortunately, the former Chief Justice Bowman undertook no detailed review of the law that would be of assistance to this Court in deciding the issue and dealt with a non-suit motion that was adjourned for further argument, and accordingly such case is of little assistance here.

[12] On the other hand, the precedents relied upon by the Respondent in my view support the Respondent's position as a more acceptable view of the law on this matter. In *The Queen v. Wellington Taylor*, 84 DTC 6459 (F.C.T.D.), Rouleau J. decided that in the case of an assessment of taxes in dispute with subsection 163(2) penalties also assessed, the taxpayer should proceed first and stated at page 6463:

> Where there is an onus on each party, the taxpayer shall begin first. …

[13] Rouleau J. reasoned at page 6461 that:

> … On an appeal, the burden is on the taxpayer to overturn the assessment. It is deemed valid because of subsection 152(8) of the *Act*; it is the taxpayer's appeal and he must therefore show that the impeached assessment is an assessment which ought not to have been made; …

[14] While one might argue that *Re Wellington Taylor* did not deal with the issue of a statute-barred year, in the case of *Levy v. The Queen*, 89 DTC 5385 (F.C.T.D.), a case similar to the one before us in that it did deal with a statute-barred year, a disputed assessment and an issue of unreported income and penalties under subsection 163(2), Teitelbaum J. stated at page 5389:

> After the procedural issue was raised, I decided that notwithstanding that the onus to prove misrepresentation is on the Crown for the 1976 and 1977 taxation years,

> the taxpayer who has the onus to prove an assessment for income tax invalid must proceed first. The issue of “statute-barred” is a secondary issue.

[15] That Court too found that a reassessment under subsection 152(8) is deemed valid notwithstanding an error, defect or omission until the taxpayer proves he does not owe the tax.

[16] It should be noted that Rouleau J., in *Can-Am Realty Limited v. The Queen*, 94 DTC 6069 (F.C.T.D.), at page 6070 relied on *Re Wellington Taylor* and *Re Levy* as correct statements of the law and the Federal Court of Appeal in *Pompa v. Canada*, 94 DTC 6630 (F.C.A.) confirmed same in paragraph 17 wherein it stated:

> 17 … the applicable rules as to the Minister’s burden of proof in cases of a penalty and when s. 163 of the *Income Tax Act* is in question were correctly stated by Rouleau J. in *The Queen v. Taylor*, 84 D.T.C. 6459, …”

[17] The above cases confirm in my view that due to the validity of assessments of the Minister under subsection 152(8) of the *Act*, the main issue in all such appeals also containing issues of statute-barred years and penalties will still be whether the underlying assessment is valid. It should be noted that assessments for statute-barred years where the Minister relies on subsection 152(4) are assessments “under this part” pursuant to subsection 152(8), and accordingly, are deemed valid until found otherwise, as reasoned by Teitelbaum J. in *Re Levy* above.

[18] Notwithstanding that a taxpayer may fail to meet the onus to rebut the assumptions of the Minister in a section 152 assessment, the possibility is still open that due to the onus on the Minister under subsections 152(4) and (4.01) or subsection 163(3) that the taxpayer may still succeed in not having a statute-barred year opened for reassessment or not being assessed the gross negligence penalties. The Court still has a duty to decide whether the Minister has met his onus in both situations. Moreover, the onus with respect to the underlying assessment in a section 152 assessment is a shifting onus as made clear in *Dick v. Canada (Minister of National Revenue – M.N.R.)*, [1991] 2 C.T.C. 2034, 91 DTC 811, also a case of a net worth assessment with no admission as to unreported income, where it may fall to the Crown to prove his assumptions where the Appellant can provide evidence regarding a source of funds different than the Crown’s.

[19] I should also make reference to the case of *Farm Business Consultants Inc. v. Her Majesty the Queen*, 95 DTC 200, brought to the Court’s attention by the Respondent, and in which former Chief Justice Bowman, after considering

Re Wellington Taylor and *Re Levy* above, found for the Appellant and ordered the Respondent to proceed with his case first. As Counsel for the Respondent noted, that case is also distinguishable from the case at hand, and from the above cases themselves in that there was no issue as to unreported income in that case, but rather a dispute as to the value of goodwill. Moreover, the former Chief Justice Bowman relied on *Re Maurice Taylor*, which as stated above was a case that dealt only with the issue of misrepresentation where no competing onus regarding the underlying assessment was in issue and which was found in *Re Wellington Taylor* and *Re Levy* to not be applicable in cases where each of the parties has a different onus to deal with.

[20] The Appellant's secondary argument for the motion brought was that practicalities would favour the Crown proceeding first. The Appellant argued firstly, to know the Crown's evidence first would assist the Appellant in knowing the case it has to meet rather than simply try to prove a negative; secondly, would expedite the case since the Appellant, if successful, would not need to call all its witnesses; and thirdly, would leave the option open to exercise a motion of non-suit if the Crown failed to establish evidence of misrepresentation.

[21] In the case at hand, the source of income alleged by the Respondent was pleaded. In fact, on a motion by the Appellant before Justice Webb of this Court, the Respondent was ordered to amend its Reply to identify such source. Moreover, the parties have had discoveries in this case. I do not accept that the Appellant does not know the case it must meet.

[22] I also do not consider this to be a case where the Appellant must, as stated by her counsel, prove a negative. The Appellant must demolish the assumptions of the Respondent, particularly that the Appellant received employment income, by cash or cheque, being the source of income for the entire amount of the alleged unreported income. The Appellant need only establish, on the balance of probabilities, that she received such funds from other non-taxable sources or that there were no sources for all or part of the funds. The onus, as earlier referred to in *Re Dick*, then shifts to the Crown to prove otherwise. The Appellant has in fact pleaded that the sources of the income were loans or gifts, or property that did not belong to her or incorrect assumptions on personal expenditures by the Crown. I do not see this as having to prove a negative in the sense argued.

[23] From a practical perspective, the Court must hear all the evidence dealing with the issue of income for the statute-barred year in order to determine both the amount and source of income for the 2002 year and whether the issue becomes

redundant or not and to determine whether the different onuses were met. It is, as referred to in the above cases, still possible that the Appellant may not satisfy its onus to rebut the assumptions on which the reassessments were made, but still not be liable for penalties or still have the statute-barred year reassessment vacated. This Court has a duty to and is able to deal with the different onuses in its judgment.

[24] As for the Appellant's concern that she would be deprived of her ability to motion for non-suit if the Crown is not required to go first, an Appellant is always free to motion before submitting any evidence if it feels appropriate having regard to the pleadings or evidence on discovery or after it submits its evidence. In any event, such issue would have existed in any of the above cases cited which dealt with the issue of who goes first and were decided despite such expressed potential procedural matter.

[25] In *Lennox v. Arbor Memorial Services Inc.*, (2001) 56 O.R. (3d) 795 (C.A.), 2001 O.J. No. 4725 (C.A.) (QL), the Court held at paragraph 13 that:

> 13. A trial judge is expected and entitled to take reasonable steps to ensure that the issues are clear, that evidence is presented in an organized and efficient manner and that the trial runs smoothly and proceeds in a timely manner. …

[26] All the issues in this case are, to put it simply, interconnected and in my view the most efficient and fairest way to deal with these appeals is to have the Appellant follow the ordinary rules of the Tax Court of Canada and go first and deal with the primary issue of the underlying assessment.

<u>2001 and 2002 Reassessments:</u>

Burden of Proof

[27] As I stated above and as confirmed by the Supreme Court of Canada in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, relying on its decision in *Johnston v. Canada (Minister of National Revenue – M.N.R.)*, [1948] S.C.R. 486, the onus is on the Appellant to demolish all the exact assumptions made by the Minister in supporting the reassessments and no more and such initial onus is met where the Appellant makes out at least a *prima facie* case. As the Appellant pointed out in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, the Supreme Court of Canada confirmed that there is only one standard of proof in civil cases and that is proof on a balance of probabilities, the standard of proof necessary to establish a *prima facie* case. In paragraph 49 of such decision, Justice Rothstein went on to say:

> 49 … In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[28] As confirmed in paragraph 94 of *Re Hickman Motors* above, the onus is a shifting onus:

> 94 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: …

[29] There is no dispute between the parties as to the application of the above law pertaining to the burden and standard of proof as relates to the 2002 taxation year. With respect to the 2001 taxation year however, the Respondent takes the position that in light of the fact the onus is on the Respondent to prove a misrepresentation by the Appellant in order to meet the requirements of subsection 152(4) in order to assess outside the normal assessment period, the onus is on the Respondent first to prove the Appellant's source of income was from employment as pleaded and not on the Appellant to demolish the assumptions of the Minister. There is no dispute the 2001 reassessment was outside the normal reassessment period defined in subsection 152(3.1) of the *Act*.

[30] With respect to the Appellant, to some extent, this goes back to the same chicken and egg issue the Appellant raised on the preliminary motion at the start of this hearing for which my reasons were given above, as well as before Justice Margeson on a pre-trial motion. For my same reasons above, it is not necessary that I first must find a misrepresentation as proven by the Respondent before considering the validity of the assessment based on a net worth analysis pursuant to subsection 152(7) of the *Act*, from which the Minister derives his power to assess on a net worth basis and which is not disputed by the parties. As stated in my earlier reasons dealing with the motion brought at the beginning of this trial, subsection 152(8) presumes that an assessment, including one under subsection 152(7) which is under the same part, is deemed to be valid and binding notwithstanding any error, defect or omission in the assessment until found otherwise and as per *Re Wellington* and *Re Levy* above, the issue of statute-barred is a secondary issue to the first issue of whether the assessment is valid, hence I am not required to address the statute-barred issue first as a matter of order as earlier explained.

[31] As to whether the onus shifts when dealing with a statute-barred year, I am satisfied the onus is on the Appellant to demolish the assumptions made by the Minister, even in cases where the net worth assessment is the basis for calculating the assessment. This has been confirmed by the Federal Court of Appeal in *Lacroix v. Canada*, 2008 FCA 241, 2009 DTC 5029 (F.C.A.), where Pelletier J.A., who relied on *Re Hickman Motors* and *Re Johnson* above, stated in paragraph 18 thereof:

> 18 In my view, this jurisprudence does not establish a rule to the effect that the Minister may not use the net worth method to add unreported income to a taxpayer's income unless the Minister can establish the source of the unreported income. Our tax collection system is based on the taxpayer's self-reporting of the income he or she has earned during a taxation year. Should the Minister doubt, for whatever reason, the accuracy of the taxpayer's return, the Minister may conduct an investigation in such manner as deemed necessary. The Minister may then make a reassessment. If the taxpayer appeals the reassessment, the Minister does not have to prove the facts giving rise to the reassessment. In the reply to the notice of appeal, the Minister need only set out the presumptions of fact used in the reassessment. The onus is on the taxpayer, who knows everything there is to know about his or her own affairs, to "demolish" the Minister's assumptions; otherwise, they are presumed to be true.

[32] The Court in *Re Lacroix* above adopted the reasoning of Létourneau J.A. of the Federal Court of Appeal in *Molenaar v. Canada*, 2004 FCA 349, 2005 DTC 5307 (F.C.A.) where for statute-barred years, counsel for the Appellant submitted that in a net worth method assessment the Minister should have the burden of proving the source of income was from taxable income. Létourneau J.A. responded to the position in paragraphs 2 to 4 of his judgment as follows:

> 2 … In other words, in order to limit the application of the net worth method, there would be a presumption in the taxpayer's favour that unreported and unexplained "cash in" comes from non-taxable income.
>
> 3 With respect, such a presumption would make the net worth method useless and inapplicable for all practical purposes. Additionally, it would undermine the very basis of our taxation system, which is founded on voluntary reporting, since it would amount to favouring a crafty taxpayer who is best able, most effectively and for the longest time, to conceal his or her income and his or her failure to report it.
>
> 4 Once the Ministère establishes on the basis of reliable information that there is a discrepancy, and a substantial one in the case at bar, between a taxpayer's assets and his expenses, and that discrepancy continues to be unexplained and inexplicable, the Ministère has discharged its burden of proof. It is then for the taxpayer to identify the source of his income and show that it is not taxable.

[33] This approach was also considered by the Federal Court of Appeal in *Hsu v. Canada*, 2001 FCA 240, 2001 DTC 5459 (F.C.A.) where Desjardins J.A. in paragraph 29 states:

> 29 … The net worth method is premised on the assumption that an appreciation of a taxpayer's wealth over a period of time can be imputed as income for that period unless the taxpayer demonstrates otherwise (*Bigayan, supra*, at 1619). Its purpose is to relieve the Minister of his ordinary burden of proving a taxable source of income. The Minister is only required to show that the taxpayer's net worth has increased between two points in time. In other words, a net worth assessment is not concerned with identifying the source or nature of the taxpayer's appreciation in wealth. Once an increase is demonstrated, the onus lay entirely with the taxpayer to separate his or her taxable income from gains resulting from non-taxable sources. …

[34] There is ample evidence and admission by both parties that the Minister established the discrepancy in net worth between the years in issue through examination and use of the information provided by the Appellant and her bankers under Requests for Information issued by the Minister, all of which are clearly reliable information for the purposes of so doing.

[35] In order to determine whether the Appellant successfully discharges her onus, the Court in *Re Hsu*, at paragraph 35, effectively explained that this burden can be satisfied in three ways:

> 35 …
>
> (a) challenging the Minister's allegation that he did assume those facts;
>
> (b) assuming the onus of showing that one or more of the assumptions were wrong; and
>
> (c) contending that, even if the assumptions were justified, they do not of themselves support the assessment.

Facts:

[36] As stated above, the Respondent takes the position the Appellant was an employee of Pirate Satellite Receivers and, as assumed by the Minister, received $220,595 in 2001 and $135,488 in 2002 as remuneration for her work by cash or cheque, either directly or indirectly through payments made to her parents. The aforesaid figures in the Minister's assumptions are based on the net worth analysis of the Minister, and according to the audit report and the testimony of the Respondent's witness, the audit officer, it was unexplained deposits into the Appellant's bank accounts of $76,640.50 in 2001 and $10,969.52 in 2002 discovered on the bank deposit analysis conducted by the Minister that gave rise to the Minister proceeding with a net worth analysis.

[37] It should be noted, as will be examined later, that the Minister conceded that with respect to the 2002 unexplained bank deposits of $10,969.52, $9,900 was a money order representing a wedding gift, and accordingly there seems little to explain in respect to the 2002 taxation year. There is also evidence of cash gifts from the Appellant's parents that would certainly account for the difference and there was absolutely no evidence whatsoever linking the balance to any amount

received from Pirate Satellite Receivers. In fact, the business ceased operating in early 2002.

[38] With respect to the 2001 year, deposits totalling $23,475 were deposit activities into a TD Canada Trust bank account No. 526177 which was in the name of the Appellant's mother and the Appellant jointly.

[39] The position of the Respondent was that these funds belonged to the Appellant and not to her mother and hence could not be a gift or loan. The Respondent based its position on the fact there were three unexplained cash deposits into that bank account by the Appellant's fiancé to the Appellant's mother, totalling $15,000 as alluded to earlier and that there were further deposits and almost immediate withdrawals by the Appellant both totalling $8,475, for a total of $23,475. In addition, there were two transfers of $30,000 and $35,000 respectively for a total of $65,000 from the Appellant's parents' joint bank account to this bank account, which the Respondent suggested were initially "parked" into the parents' joint bank account since the Appellant failed to prove the parent's initial source of such funds.

[40] The evidence was that this account was opened in 1994 and was in joint names only for estate planning reasons, to enable the Appellant to assist her mother with financial matters and allow ownership to pass on her death. The Appellant tendered evidence that her T4s were issued in at least five years to her mother and that her mother's SIN appeared on all T4s for all years except one. She also submitted evidence her mother claimed all interest income from this account when filing taxes. Moreover, the evidence is that the majority of funds in this account, namely the $65,000 representing the two transfers above, came from a different bank account owned by the Appellant's parents jointly and I fail to see why the Appellant should have to explain her parents' source of funds in this regard although a satisfactory explanation was provided in paragraph 65 hereof. There is evidence the Appellant's fiancé gave the Appellant's mother funds for the $5,000 deposits which the Respondent contends is proof it was not the mother's account. However, this was explained by the Appellant as contributions her fiancé wished to make towards the purchase of the lot which was to be funded by her parents and I see no reason why this is not a credible explanation in the circumstances of two young people about to get married and build their home. When one considers that the Respondent's pleadings themselves evidence that the Appellant's fiancé earned $160,966.39 in 2001, it certainly seems credible he would have been in a position to make a contribution towards the lot. As for the deposits made into the account totalling $8,475 made by the Appellant, the Appellant explained that these funds

were deposited in error into the joint account by the bank and immediately taken out of the account and deposited into her own personal account on discovery of the error, almost immediately. The Appellant has explained the source of funds in the mother's account and the questionable deposits, if one can even call them that, to the satisfaction of this Court and the Respondent gave no evidence whatsoever to contradict or disprove these explanations. In my view, the Appellant has explained to this Court's satisfaction that this account belonged to her mother and satisfactorily explained the so-called unexplained deposits.

[41] As for the balance of the deposits, the sum of $36,970 represents deposits into the Appellant's TD Canada Trust account No. 531661 and the sum of $16,195.50 into the Appellant's CIBC account No. 67229169.

[42] Dealing with the TD Canada Trust account, the deposit analysis revealed the following deposits into the Appellant's bank account in 2001:

April 25	$9,000	Cheque issued by Pirate Satellite Receivers
April 27	$3,000	Cash deposit
June 9	$9,500	Cheque issued by Pirate Satellite Receivers
Sept. 18	$1,820	Cash deposit
Nov. 5	$13,100	Cash deposit

[43] Dealing with the CIBC account, the deposit analysis revealed the following deposits into the Appellant's bank account in 2001:

$4,800	Total cash deposits in January deposited on three separate days; and
$11,395.50	Cheque from Pirate Satellite Receivers

[44] The Appellant's explanation for these deposits was as follows.

[45] The three cheques received from Pirate Satellite Receivers totalling $29,895.50 together with all the cash deposits, with the exception of $7,920 of the November 5, 2001 cash deposit which represented a deposit of her cash engagement shower gifts to be discussed later, were contributions by her fiancé for

her to apply towards their future expenditures in connection with creating their new home together as a married couple including the purchase of furniture and other home expenses. Her fiancé was the owner of the business and chose to have cheques issued from it to her. Frankly, the Respondent admits her fiancé was the owner of the business, first in partnership with a Mr. P. Reid, then as sole proprietor and later as sole shareholder after October 2001 and further admitted he had taxable income of $160,966.39 in 2001 as earlier stated. I find nothing sinister in such transactions and find the Appellant’s explanation credible in the circumstances of their upcoming wedding. The Respondent led no evidence whatsoever, notwithstanding its admission that the fiancé was also audited, to suggest these payments were to her from a taxable source but instead admits her fiancé had sufficient income from his taxable source to be able to give the money out. Moreover, the Respondent could have made inquiries of the former partner, P. Reid, by way of Request for Information, but decided not to do so, passing on an opportunity to prove otherwise once the Appellant satisfied her onus.

[46] I also note that these deposits were not made over the length of the year on any periodic payment basis nor in identical amounts to suggest payment of wages or salary and moreover accept the Appellant’s testimony that she was employed full-time as a registered nurse with the Windsor-Essex County Health Unit. I do not accept that just because the Appellant visited her fiancé at his place of business from time to time and ran errands such as picking up lunch for her fiancé on occasions or even that she assisted in handing out programmed cards during busy times on three occasions to be evidence of employment with Pirate Satellite Receivers as alleged by the Respondent, and in fact found the evidence of the Appellant and her friend and co-worker at the Windsor-Essex County Health Unit that she was computer illiterate and had no time to work at her fiancé’s business very credible. Moreover, the contention of the Respondent that the Appellant knew the business hours of operation, the names of the other employees, the name of the person who cleaned the premises, who handled the cash payments and similar general knowledge of the business suggesting she was an employee is simply not sufficient evidence of such status and frankly is more consistent with information any casual observer or visitor to the business premises could easily absorb.

[47] I also note that the three cheques and several deposits above alluded to are the only payments received by the Appellant that could be said to link her to her fiancé’s place of business and total less than 25% of the alleged wages and salaries presumed by the Respondent to have been paid to the Appellant and all explained by the Appellant as not relating to same.

[48] In the case at hand, I find that the Appellant met the onus of proving on the balance of probabilities that she was not in the employment of Pirate Satellite Receivers nor received any wages or salaries from it, which in and of itself would, in my view, demolish the assumptions of the Minister who assumed employment income to be the sole source of funding the discrepancies in her net worth. However, she also provided evidence, beyond a balance of probabilities, in establishing that she received such funds or assets from other non-taxable sources, which as adjustments to the Minister's assessment would in my view render it bare and unsupportable. The Appellant's evidence was credible and logical and the Respondent led no evidence to prove otherwise.

[49] The Supreme Court of Canada in *Re Hickman Motors*, made it clear that where the *Income Tax Act* does not require supporting documentation, credible oral evidence from a taxpayer is sufficient notwithstanding the absence of records. I do not accept the Respondent's argument that the Appellant, in her alleged role as employee, should be the one who should produce documentary employment evidence. The Respondent pleaded she was an employee only and not a director, shareholder, officer or partner of the business, so why would it be her obligation to keep any such records? In *Re Hickman Motors*, the Court also said at paragraph 48:

> 48 … Moreover, the respondent adduced no evidence whatsoever that could be weighed against that of the appellant. … Therefore, the appellant's evidence must stand, …

And in paragraph 93:

> 93 … The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions: …

[50] A similar sentiment was echoed in *Zink v. Canada (Minister of National Revenue – M.N.R.)*, 87 DTC 652, quoted by the Supreme Court of Canada in *Re Hickman Motors* above, where the Court held, in relation to Mr. Zink's oral evidence at paragraph 3:

> 3 … his statement under oath, … should suffice to favour his appeal, unless that statement is appropriately challenged and refuted by the Minister. …

[51] It should be noted that in *Re Zink* above, the Court reasoned that the evidence of the Appellant should be accepted even where there are large gaps in logic, chronology and substance, where the Minister fails to explain why the amounts in issue are assessed as the type of income pleaded.

[52] In the case at hand, I find no large gaps in logic, chronology or substance. The Appellant lead direct evidence as to the source of the unexplained deposits that led to the net worth analysis and in my view proved well beyond a balance of probabilities that she was not an employee and received no funds from employment.

[53] As mentioned above, the Appellant has the onus to demolish each of the Minister's assumptions of fact. It is clear she has clearly demolished items 13(a), (f), (g), (h) and (i). I would also find that since the assumption in 13(m) refers to "the understated amounts", which reference payments respectively for work, that she has in fact demolished that assumption as well. However, the Respondent argued that even if the Minister pleads a source of funds, it was not really required to, based on the reasoning of the *Lacroix*, *Molenaar* and *Hsu* cases relied on by the Respondent. I would agree that if a source of income was not pleaded, the Minister could rely on the discrepancy in income pleaded as in those cases, but in this case the only source of funds identified were income from employment so it seems redundant to move to a detailed analysis of the net worth assessment when the underlying basis for it has been demolished.

[54] Notwithstanding such finding however, in the event I am wrong, I will also deal with the various adjustments resulting from the non-taxable sources or non-sources of income herein, many of which were conceded by the Minister during the course of the trial in relation to the net worth assessment and the assumptions of the Minister in relation thereto:

1. Wedding Gifts

[55] The Appellant claimed that she received wedding gifts from her wedding on August 10, 2002 totalling $77,725 from gifts of cash and money orders which the Minister disputed on the basis that no evidence of bank deposits was provided for same. The Minister only allowed her credit for $7,484.99 as these represented actual cheques received by the Appellant and deposited into her account; which amount was not included in the $77,725 figure still in dispute.

[56] The evidence of the Appellant was that there were over 400 guests at her wedding, most of whom gave cash gifts. A list of the donors was provided to the Court setting out the contributions of the guests. The evidence of the Appellant and four other witnesses corroborated that it was the practice of Croatian families to give cash gifts at events such as showers, engagement parties and weddings and

that these gifts were recorded so that in the future, the happy couple or their families would make sure they matched such gifts when invited to the events pertaining to the guests or their families. The Appellant produced not only the list summarizing the gifts, but independent witnesses confirmed their gifts were essentially as listed. The Appellant even produced the wedding cards where the gift amounts were noted thereon. I note with interest that the CRA auditor even went to the extent of calling the wedding hall to confirm the number of guests who attended. The CRA auditor testified that the Appellant had not provided this list to him until a few weeks before the trial and was uncooperative in giving him the information when asked earlier on, which the Appellant acknowledged, but explained it was because she feared embarrassment at the prospect of having a CRA auditor call her wedding guests to confirm their gifts. Frankly, I find that explanation totally understandable and have some concerns over the extent CRA went to deal with the issue. It seems common information that many European and Asian cultures provide cash gifts on these occasions and events and the Crown's solicitor even suggested he was aware this was a well-know Italian custom but not so for Croatians. I disagree. The fact he allowed several cheques to be counted totalling $7,484.99 as wedding gifts certainly supports the reasonable conclusion it was a common practice in the Croatian community, and the CRA auditor even admitted on cross-examination that he made a sampling test of comparing some of the cheques received as presents to the amounts recorded on the wedding cards and found they matched, which further adds to the credibility of the Appellant's testimony regarding the list.

[57] Of the $77,725 disallowed initially, there was a money order given as a wedding present for $9,900 from the Appellant's mother-in-law and two aunts, which was conceded by the Crown during the trial, and a bank draft for $20,000 from the Appellant's parents which the Crown still disputed on the basis that it was odd the parents simply would not have written a cheque instead of giving a bank draft and because there were three unexplained deposits of $5,000 each, which were deposited into the joint bank account earlier discussed and given to her from the Appellant's fiancé, Sang Nguyen, who was the initial target of the CRA investigation. The bank draft was clearly issued by the parents and purchased just before the wedding and other funds were in the account aside from the three unexplained deposits in issue. The Appellant explained a bank draft was used because there were no cheques on that account and that the three deposits were contributions by her husband-to-be to her parents who were going to fund the purchase of their lot which was discussed earlier. The Appellant has provided satisfactory explanations for these issues and I find them totally acceptable as proof of a wedding gift from her parents, especially since the Crown provided no

reasonable proof to the contrary notwithstanding its suggestion funds coming from the son-in-law-to-be must have been laundered, without any proof whatsoever of same. The balance of the total wedding gifts amount consisted of the individual cash gifts recorded on the wedding cards after the wedding and listed on the list submitted as evidence and I accept this as satisfactory and very strong, even conclusive evidence of such gifts. In summary, I accept the Appellant received $77,725 in cash and money order wedding gifts in 2002.

[58] It should also be noted that for 2002, CRA assessed the parents' $20,000 wedding gift as cash on hand of the Appellant and accordingly this, being a wedding gift, must be removed from the calculation to avoid treating the gift as being from a taxable source.

2. Engagement Shower cash gifts

[59] The Appellant was thrown a wedding shower in October 2001 and claimed she received cash gifts of $7,920. The Appellant's maid of honor was charged with recording the shower gift donations on the shower cards and testified she did so and a list of shower donors and the gifts given was rendered as evidence. I accept these as strong evidence she received those cash gifts in keeping with her cultural background as discussed in relation to her cash wedding gifts above. The CRA officer testified he disallowed these gifts because there was no evidence of a deposit to her bank account of this amount and because in an initial interview with the Appellant he advised her there was no such deposit and she agreed. The Appellant explained that there was a cash deposit of $13,100 deposited about one week later which included the shower gifts, with the balance being a gift or contribution from her husband-to-be, and that at the initial interview she could not remember depositing the cash years before and did not have the benefit of preparing for the myriad of questions posed by the auditor. I find her evidence collaborated by her brother, maid of honour and aunt very credible and find she received cash shower gifts of $7,920 for 2001.

3. Wedding Shower Appliances gifts

[60] The Appellant had a wedding shower on May 5, 2002 and claimed she received shower gifts by way of appliances purchased by various family members from Essex Appliances which were denied by the CRA to the extent of $6,155.15. The Appellant testified she registered with Essex Appliances for shower gifts and produced the invoice from Essex Appliances which identified four appliances purchased by different credit card numbers and cash. The Appellant also produced

shower cards identifying such gifts and her brother and mother-in-law testified they in fact made such shower gifts. Moreover, when the CRA refused this evidence during the investigation, especially with respect to the mother-in-law whom CRA suggested used a fraudulent credit card or could not have afforded it, the Appellant produced to CRA the actual credit card statements of her mother-in-law which listed the item. Apparently CRA still refused to accept this as evidence and the Appellant went so far as to produce a letter from her mother-in-law's banker confirming the credit card was valid. At trial, the Respondent conceded the mother-in-law's appliance gift of $1,804.35. In my opinion, the Appellant went far beyond what was necessary here in establishing these gifts and I find the refusal of the strong evidence provided to the CRA officer by the Appellant here incredulous. The Appellant has satisfied me she received those shower appliance gifts totalling $6,155.15 above those allowed by CRA in 2002 and the Respondent had no evidence to the contrary.

4. Loan from Parents

[61] The Appellant claimed that she received a loan from her parents in the amount of $71,429.85 which she described more as a forgivable loan which was drawn by bank cheque from a joint account with TD Canada Trust No. 526177 in the names of the Appellant's mother and the Appellant. The evidence is that these funds were used to purchase a building lot on which the Appellant and her husband-to-be were going to construct their residence, and evidence was tendered of the Solicitor's trust account showing it received these funds and disbursed them for the purpose of the lot purchase.

[62] The Respondent's position was that funds from this account belonged to the Appellant and not her mother as discussed in more detail in paragraphs 38 to 40 above.

[63] I note as well that the evidence of both the Appellant, her brother and her aunt was that the Kozars, the Appellant's parents, were hard-working people who saved extensively throughout their lives, never spending money on themselves or on restaurants and always being generous with their children, in fact living to ensure their children succeeded and were attended to in life. While Mrs. Kozar was too ill to testify and Mr. Kozar did not, not being the family member in charge of family finances, a role occupied by Mrs. Kozar with the assistance of her two children, I accept that such a loan or forgivable loan and hence a form of gift would be consistent with their cultural and personal characters. In any event, on the clear evidence at trial, I accept that the TD Canada Trust account was the property

of Mrs. Kozar and not of the Appellant and that the lot was purchased with funds through such account. The evidence of the auditor that Mr. Kozar earned an average between $40,000 and $50,000 per year, sometimes up to $60,000 does not in my opinion provide any useful evidence to suggest that the Kozars, over their lifetime, could not have accumulated the necessary wealth to fund such generous gifts is a speculative argument at best. Accordingly, the Appellant should be credited with a loan or gift (and I see no difference in their characterization) of $71,429.85 in 2001. It should also be noted that CRA included the amount of $1,605.78 in the net worth assessment in 2001 on the basis that this represented the difference in contributions to the account and monies removed, hence were characterized as "Additional Payments to Parents" under Personal Expenditures. Having found the account belonged to her mother, the Appellant cannot be charged with giving her mother her own money and such inclusion should also be removed.

[64] Aside from the facts of this case which led me to the above conclusion that the TD Canada Trust account was the property of the Appellant's mother, I also accept the Appellant's argument that based on the case of *Madsen Estate v. Saylor*, [2007] 1 S.C.R. 838, the Supreme Court of Canada confirmed that with respect to funds held in a joint bank account between parent and child there is a presumption of resulting trust in favour of such funds belonging to the mother. Accordingly, this presumptive trust would in my view also satisfy the Appellant's onus of making out a *prima facie* case such loan amount in question was from her mother's property, a non-taxable source. The Respondent has not then satisfied its onus to prove otherwise.

[65] Finally, I wish to comment on the evidence submitted that the Appellant borrowed money from her line of credit and paid her mother back the loan with a $100,000 payment which the Appellant explained included interest and thanks for her generosity. The amount was subsequently returned by the mother further evidencing the fact it was considered a gift. The explanation for the transaction by the Appellant was that the CRA auditor explained it would be in her favour if the funds were categorized as a loan and he would do so if she could provide evidence of a repayment. Consequently she arranged to borrow such funds and give it to her mother, who, she testified, was reluctant to take it but understood it would be of assistance to her daughter. Once she sought proper legal and accounting advice, the Appellant realized it was not necessary and the funds were returned by her mother. The entire transaction does not detract from the fact her mother owned the funds to begin with and loaned or gifted them to her child and so seems redundant. The Respondent asked the Court to draw the inference that such transaction only proves the Appellant was manipulating her own funds but the only reasonable

explanation in the circumstances for the transaction was to act on the CRA auditor's advice to her benefit, which she did, and then reversed herself once she found out it simply was not necessary. No other reasonable explanation or evidence in connection with the matter was proffered so I accept the explanation of the Appellant in this matter as credible. Moreover, the Respondent's auditor's testimony that he was not aware of an actual repayment cheque of $100,000 having been drawn by the Appellant to her mother, hence the reason he could not consider it a loan, is not credible. He testified he was in charge of the file and that any documents requested under the Access to Information process would be taken from his file yet he knew nothing of the actual repayment cheque copy delivered to the Appellant in respect of her Access to Information Request, a copy of which cheque was in evidence. The evidence is also that the said auditor made a Request for Information upon the CIBC, the Appellant's banker, for information regarding the CIBC account from which this cheque was written, so it seems highly probable that the auditor must have received this cheque information as part of that disclosure. I accept the Appellant's testimony that she did not provide a copy of this cheque to the auditor. While the issue of such loan repayment is redundant to my reasoning as stated earlier, it does go to the issue of the auditor's credibility.

[66] Having found above that the funds in this joint account belonged to the Appellant's mother, for the reasons above explained, the Appellant should be credited with $44,326.75 in 2001 and $19,231.76 in 2002, representing the year-end bank balances in this account which were treated as assets of the Appellant by the Respondent. Likewise, there must be a reduction in the amount of $35,529.70 for the 2000 base year list of assets, representing the year and bank balance for such account incorrectly attributed to the Appellant.

5. RRSPs

[67] The Minister conceded that the Appellant was entitled to a $2,000 credit for the purchase of AGF RRSPs in 2001.

[68] The Minister also conceded during the trial that the Appellant's value of her personal RSPs as at December 31, 2000 was $9,689 instead of $4,000, and accordingly, she should be given credit of $5,689 in the 2000 taxation year base assets to compensate. There is some issue as to the value of the credit since the Appellant claims it should be $6,027 on the basis the amount of the RSP at December 31, 2000 was $10,027. The rationale offered by the Minister for the discrepancy is that the difference would have represented contributions made by the Appellant in that year which would have been tax-deductible and hence

reflected in her income for that year, which seems reasonable to avoid double crediting that difference to the Appellant, which counsel for the Appellant conceded.

[69] In total, the Appellant should be entitled to RSP credits totalling $7,689 to give effect to the above adjustments.

6. Acura Automobile

[70] The Minister added the value of an Acura automobile totalling $57,500, representing its purchase price of $50,000 plus applicable taxes, to the Appellant's 2001 asset list on the basis she admitted during audit that the automobile was registered in her name. The Appellant claims she felt obliged to claim his automobile as her property in light of the fact title was registered in her name and, having been issued a Request for Information on September 11, 2003, felt obliged to. She adduced evidence that the automobile was purchased by her fiancé, through his own funds, and sold in 2002 by him and that she only took title to take advantage of better insurance rates from her insurance company. The Crown conceded there was no evidence of any withdrawal from her bank accounts for the purchase of the automobile or the deposit of any proceeds on its sale. The Appellant testified that she could not drive a standard transmission automobile and that she only attempted to drive it about three times, being times her fiancé attempted to give her driving lessons on the standard transmission shift. Furthermore, the Appellant testified that upon receiving professional advice from her accountant, she agreed the automobile was held by her in trust for her fiancé and was not beneficially hers. I accept her evidence as credible on this matter and frankly considering there is no evidence of withdrawals from her bank accounts to purchase same nor deposits into her bank account upon the sale, it seems wholly consistent with her explanation. Moreover, the Respondent's admission that her former husband's *modus operandi* was to place assets he purchased into the names of others and the auditor's testimony of his suspicion the husband owned it confirmed the Appellant's position and credibility on this issue. Accordingly, she should be credited the sum of $57,500 as a deduction against her 2001 assets and the sum of $21,701, representing a non-deductible loss on the sale of the vehicle which was added as an expense on her 2002 year, should also be deducted from 2002 in order to neutralize the impact of attributing the automobile and its proceeds to her.

[71] The Respondent was quite aggressive on cross-examination with respect to attacking the Appellant's credibility by suggesting she lied to her insurance

company in order to get better insurance rates for her fiancé if the car was his and hence should not be believed with respect to ownership of the vehicle. I do not find it strange that a couple about to be married would conduct their affairs in such a manner as to save them both money as a couple. Moreover, the Appellant testified she answered all the insurance company's questions honestly and was able to get insurance on the vehicle. Accordingly, I am not prepared to draw the inference that she had no credibility because of her conduct since her explanation is both credible and logical, and the Respondent submitted to evidence proven otherwise.

7. Long-Term Investments

[72] The Appellant objected to the inclusion of a $50,000 CIBC GIC as her asset in 2002 on the basis it belonged to her mother and evidence of her mother's ownership of the investment certificate was tendered in Court. The Minister conceded this was an asset of her mother, and accordingly, the Appellant should be credited with $50,000 for 2002 as a deduction against the Long Term/Fixed Assets added by the Respondent to her personal assets.

[73] While this was yet another item conceded by the Respondent, it is interesting to note that this amount was not included as the Appellant's asset in 2001, despite evidence it belonged to her mother before that time, but was only included in 2002. The inconsistency not only adds to the evidence it never belonged to the Appellant, but raises some real concerns as to the adequacy and credibility of the Respondent's net worth analysis as a whole.

8. CIBC Equities/Mutual Funds

[74] The Appellant was credited $50,000 and $1,000 in 2000, being the year of comparison for the 2001 taxation year in the net worth assessment, for GTD Investment Certificates by the Respondent which the Appellant stated should have properly been reflected as $55,401 and $1,488 to reflect their value as at December 31, 2000. The Respondent explained, after aggressive cross-examination of the auditor, that the difference in the amounts represents the increase in such Certificate's value since the date of initial purchase in 1996 which was taxable as interest income to the Appellant in each and every year and hence tax paid by the Appellant. Accordingly, such increase in value was credited to her in the calculation for such year and could not be included again to avoid double counting, which position I accept as sound.

[75] The Respondent conceded that the Appellant should receive a credit of $488 in 2000, $801 in 2001 and $498 in 2002 with respect to the Appellant's CIBC Mutual Funds, which increases were not added to taxable income in previous years in order to be consistent with their approach regarding the equities above.

9. Property Taxes

[76] The Respondent included an amount of $5,492.76 as property taxes expended by the Appellant for the 2002 taxation year on the basis the amount was factually found. The evidence is that the Appellant provided the Respondent with what I consider conclusive evidence from the City of Windsor by way of written receipt that taxes were only $2,449.96 for the year. This was rejected by the auditor who testified that CRA sent their own officer to the City to confirm taxes and assessed the larger amount as "factually found". Such CRA officer did not testify. The Appellant then went to the extent of obtaining a letter from the Finance Department of the City of Windsor which also confirmed the Appellant's amount which was given to the CRA during the appeals process and still not accepted. During the trial, the Respondent however conceded the Appellant should receive a credit of $3,042 representing the difference which includes a small amount for interest penalty. While the amount was conceded, I must add that I have some serious difficulties with the approach of the CRA and the auditor's credibility on this issue as well. It seems even a tax receipt during audit and a letter from the City of Windsor was not enough for the auditor to concede this prior to trial. The tax receipt is clear on its face that "Final Taxes" were $2,449.96 in 2002 and the auditor's suggestion that the "Current Transactions" section on such receipt listed payments from July to December also suggested to him that the receipt was for an interim account is inconsistent with the face of the document and should at the very least have raised the issue in his mind to further inquire with the City. He instead appears to have steadfastly relied on his colleague's note that he confirmed the taxes for "2002", when on its face, it seems to have referred to the "2003" year, although I agree such colleague's writing was unclear. Faced with the City's tax receipt and the Appellant's strong disagreement as to the amount, one would have to conclude it was incumbent upon the auditor to inquire further.

10. Honeymoon Expenses

[77] The Appellant objected to the cost of her honeymoon totalling $7,896 being added to her wedding and honeymoon expenses on the grounds it was a gift from her parents. She provided the CRA with a bank statement showing the trip was paid by cheque from a different account that was not hers but CRA rejected this on

the basis the form did not indicate who owned the account. The Appellant then provided the cancelled cheque to CRA, drawn on her parents' account, who refused to accept such evidence on the grounds the Appellant failed to provide evidence of her parents' source of funds. In my view, a cheque issued from an account held by her parents jointly is strong *prima facie* evidence of the gift and the taxpayer should not, in my view, be required to provide any further evidence on that matter unless the Respondent leads evidence that the source of funds were not that of her parents, which it did not. Frankly, short of evidence to the contrary being led by CRA, and in the absence of specific pleadings alleging the fact of illegality in connection with these transactions, the Appellant should not have to prove the source of funds on gifts given by third parties. The CRA seems to have taken this position several times regarding her parents' gifts to her on the occasion of her engagement, shower and wedding, putting the Appellant to an embarrassing and unnecessary burden of proof that is not acceptable and is rather abusive in my mind. The Appellant should be allowed an adjustment of $7,886 for 2002 for Honeymoon Expenses.

11. Cash On Hand Expense - $56,866.50

[78] The Respondent included the sum of $56,866.50 as an asset of the Appellant for 2002 on the basis this amount represented all cash withdrawals from her personal bank account with TD Canada Trust and must represent assets not otherwise included in her net worth calculation. The Appellant argued these withdrawals were used to pay cash to the trades constructing her new home. The Respondent argued that none of the cash withdrawals matched any of the trades' invoices so the Appellant's position is not credible. In fact, the Appellant pointed out that the Respondent also included in her Personal Expenditures for 2002 a variance of $84,634.20 representing the difference between her construction costs and payments proven by cheque, consistent with the GST rebate application submitted by the Appellant, and argues the cash withdrawals represented part of that variance, with the balance paid from cash she had from wedding gifts so that in fact the Respondent double counted that asset. The Appellant's position is logical and constitutes *prima facie* evidence of her position. The Respondent led absolutely no evidence to contradict this explanation, and in fact admitted on cross-examination that the Appellant's explanation was a possibility. Accordingly, I find the Appellant's evidence acceptable as well as credible. The Appellant should be allowed a credit against 2002 assets of $56,866.50.

12. Other Personal Expenses

[79] There are several expenses assumed by the Respondent to have been expended by the Appellant in the 2001 and 2002 taxation years, many of which of course have been estimated by CRA based on empirical data used to calculate such living expenses for taxpayers in a net worth analysis when a factual finding is not available or accepted. The Minister conceded that $764 and $776 in union dues should be credited to her personal living expenses in 2001 and 2002 respectively, and also made certain concessions on appeal reflected in credits on appeal given to the Appellant agreeing the purchase of men's clothing of $312 was not expended and agreeing that a $2,269 purchase of china was a gift and should not have been included in furniture purchases. We have already discussed the 2002 adjustment to property taxes of $3,042 above and the 2001 adjustment to loans to parents of $1,605 above which must be credited to the personal living expenses of the Appellant in those years.

[80] The Appellant also argued the Respondent was incorrect in assuming she expended $2,379.66 for food in 2001 as she lived with her parents who paid for essentially all the living expenses including groceries, which fact was confirmed in her evidence and that of her brother and which I accept. Likewise, the Minister assessed her $4,456.60 for food in 2002 and the Appellant argued she lived with her parents until August of such year and her parents paid for all the groceries until then. Again, I accept her evidence and accept that for 2002 she only expended $1,000 as claimed in her Personal Expenditure worksheet. Accordingly, she should also receive a credit against personal expenses of $2,379.66 for 2001 and $3,456.60 for 2002. While the Appellant's counsel did not address these items in argument, they were addressed in examination in chief of the Appellant.

[81] The Appellant was also charged $4,155.46 for vacation expenses in 2001 which the Appellant claimed was a vacation taken by her and her fiancé for which she paid and for which she testified she received one–half reimbursement from her fiancé. I also accept her testimony in this regard as credible as well, as was her entire testimony during the trial and credit her the sum of $2,077.50 in 2001 against her living expenses.

[82] While these latter adjustments to the personal living expenses are minor in relation to the amounts claimed to have been spent and not in dispute, they show just how arbitrary a net worth assessment can be and the potential for abuse such a method entails.

[83] A summary of the adjustments referred to in the above paragraphs is found in Schedule “A” to this decision. As is evident, the Appellant has succeeded in establishing that adjustments to the 2002 taxation year exceed the assessed income of $135,488. Adjustments to the 2001 taxation year of $244,525.04 net of increases to the Appellant’s net worth in the year 2000 of $29,352.70, effectively reduce the Appellant’s assessed income by $215,172.34, to approximately $5,423 before taking into consideration the conceded adjustments for china gifts of $2,269 and other minor personal expenditures that were the subject of disagreement between the parties. The Respondent acknowledged a net worth analysis is an estimate and imperfect, and accordingly, the minor discrepancy is not in my mind relevant. The Appellant has satisfied me, on more than a balance of probabilities, that all assessed income was credibly explained as coming from non-taxable sources. Before allowing this appeal, however, it is important to address the arguments of credibility and good faith, or lack thereof, raised by the parties throughout the trial.

Credibility and Good Faith:

[84] It is clear from the volumes of exhibits and the testimony of the Appellant and her several witnesses just how much of an onus was placed on her resulting from the decision of the Minister to impose a net worth assessment on her. It is abundantly evident that the Minister in total had very little evidence from which to proceed to a net worth analysis, making that decision, as based on the testimony of the Respondent’s appeal officer, on the basis of several unexplained bank deposits totalling about a quarter of the assessed income and the Respondent’s position that the Appellant was uncooperative, a reference found throughout the auditor’s report of August 23, 2005 who also stated that “Sandy thought the process was an invasion of her privacy …”.

[85] The Appellant strongly disagreed she was uncooperative, and testified she provided the information requested from CRA on the Statement of Assets and Liabilities and the Personal/Living Expenses worksheet in response to the Respondent’s Request for Information issued pursuant to paragraph 231.2(1)(*a*) of the *Act* on September 11, 2003 and February 4, 2004 respectively, which is admitted by the auditor in the auditor’s report and formed the basis of his rough net worth assessment. There is also evidence in the auditor’s report suggesting her reply did not answer the requirements, but there is also a short letter by the auditor’s predecessor in evidence suggesting she did in fact provide all the details. The Appellant did testify in fact that she was reluctant to provide her guest list from her wedding at the beginning out of embarrassment and fear the auditor would contact them or ask her parents for their bank statements; the latter who

were already issued a Request for Information from CRA. Furthermore, she testified that when she did provide information it was never enough and provided evidence of this on several issues. As an example, in relation to her property tax bill discussed earlier, she provided a tax receipt from the Finance Department of the City of Windsor which was disputed by the auditor and then obtained a letter from the Finance Department to confirm same which was still not acceptable to CRA. She provided balance statements of her personal GIC investment in January of 2001 and then for December 29, 2000 confirming the amounts for December 31, 2000 and the CRA wanted more. When she finally did provide her wedding list, the auditor took a copy but chose not to act on it, testifying that it was given too late, yet the evidence was that the auditor went to the extent of calling the reception hall to confirm the number of guests at her wedding and went to the trouble of matching the amount of some cheques received as wedding gifts to the comments shown on the wedding cards, which were consistent. Moreover, the evidence of the Appellant and the Respondent's auditor as well was that the Appellant was constantly being asked to prove the source of funds of third parties such as her parents, her mother-in-law, her wedding guests, even though she provided evidence they themselves were the source of funds via herself. Short of pleadings addressing third party source of funds in relation to the Appellant, CRA should have taken issue with such third parties directly if it had a problem with their source of funds. The evidence also discloses the CRA issued Requirements to the Appellant's two bankers and received detailed bank records used by the auditor to construct its deposit analysis and the auditor's T2020 form does not indicate he needed any further information on such bank statements to proceed to make his calculations, so it seems incredible that the Appellant was then asked for her bank passbooks in the circumstances. The sheer volume of material provided by the Appellant in the exhibits tendered by both her and the Respondent do not suggest a taxpayer being uncooperative but perhaps one placed in the unenviable situation of being asked to audit her source of funds, even in some cases, when the CRA was already in the process of doing so in relation to her parents and fiancé and mother-in-law. There is admittedly evidence of some reluctance to have cooperated at the beginning due to the Appellant's money concerns and counsel for the Appellant suggested the Court should not draw a negative inference from this as the Appellant's right not to talk is a right conferred by the Supreme Court of Canada in *R. v. Rothman*, [1981] 1 S.C.R. 640.

[86] On the whole, I find that the Appellant could not be said to be uncooperative, but rather the opposite. Accordingly, I do not draw any negative inference from the Appellant's initial reluctance to provide information on her wedding guests or materials in order to provide the source of funds of third parties

which, as I said, should not be the responsibility of the Appellant in the circumstances of this case.

[87] From a general perspective however, I would not be prepared to say a Court cannot ever draw a negative inference where a taxpayer invokes his or her right not to provide information to the CRA where there is no statutory obligation to do so, such as in the case of a Requirement served on a taxpayer under section 231.2 of the *Act*. There was no dispute by the Respondent of a taxpayer's right not to provide information to the CRA save in the case of a specific statutory requirement as espoused in the *Rothman* case. I agree with counsel for the Respondent, however, that where the onus is on a taxpayer to demolish the assumptions of the Minister for normal tax assessments, the consequences of a taxpayer invoking such right may mean that he has not satisfied such onus to the satisfaction of the CRA at the audit or appeal stage and thus may find himself or herself saddled with a costly trial that could have been avoided; but that of course is up to the taxpayer.

[88] In the case at hand, however, I am satisfied the Appellant cooperated more fully than the CRA had the right to expect or demand, especially in obtaining third party information, which it seems CRA was not prepared to accept regardless, it seems, of how reasonable and reliable it appeared to be. The Appellant could not talk if the auditor was not prepared to listen.

[89] In *Norwood v. Canada*, [2001] 1 C.T.C. 299 (F.C.A.), the Federal Court of Appeal, in addressing the actions of an auditor in taking notes from a taxpayer without the taxpayer's notice or permission, commented in paragraph 17 thereof upon such auditor's behaviour:

> 17 …
>
> I believe that a more candid approach and higher standard is expected of Revenue Canada auditors.… This is not dealing in good faith. …

[90] I believe the Federal Court of Appeal decision stands for the obligation of CRA employees to act and perform their duties in good faith, and not just in the narrow confines of the conduct complained about in *Norwood*.

[91] In the case at hand, the disposition of the auditor to label the Appellant with criminality or illegality as the basis for assessment, amend its Reply when it could provide no particulars of same, and refuse to listen when the Appellant actually exercised her right to talk, all the while expecting the Appellant to prove third

party sources of funds, is, on the whole, indicative of bad faith in its dealings with the Appellant and beyond the obligations of the Appellant at law.

[92] It is also important to note that CRA was proceeding on the belief the Appellant's source of funds was laundered or illegal money. In the auditor's report, the auditor states in paragraph B. I):

> B. I) The auditor received information from various other enforcement agencies (RCMP, OPP, Windsor Police, CBSA) that Sang Nguyen [the Appellant's fiancé] was involved in the illegal satellite business along with other various illegal activities (alien smuggling, money laundering and in the production and trafficking of drugs). Sang does not own any assets in his name (See Exhibit #15L), as he uses people close to him to sign for them as if they were their own assets. This is the case with Sandy Kozar.

[93] In paragraph D. I), the auditor states:

> D. 1) … Sandy Kozar was involved in a business operation that is operated underground. Customers could only pay by cash and it was the intention of Sandy and her spouse Sang Nguyen to not report the income from this operation or any other illegal venture they might be involved in. …
>
> … In addition it seemed that Sandy was either directly or indirectly involved with other illegal activities that also involved Cash transactions.

[94] Even with respect to the Appellant's mother-in-law's gift of appliances discussed earlier, the auditor seemed anxious to find the Appellant's connection to some illegal activities. In paragraph F. 11., in discussing the Appellant's mother-in-law's appliance shower gifts, which were conceded by the Respondent during the trial, the auditor concludes:

> F. …
>
> 11 …
>
> - … sources to the auditor stated that the card was from a fraudulent card. In addition her mother-in-law does not report substantial income to afford these appliances, therefore it could be concluded the money came from her illegal dealings as she has been charged (See Exhibit 14L). Therefore Sandy would have received assets from illegal activities. …

[95] The evidence of course was that the mother-in-law paid for the appliances using a valid card, as proven by the Appellant before trial and still not accepted by the Respondent until after the mother-in-law's oral testimony at trial.

[96] In paragraph G of the audit report, the auditor reviewed the cases of *Philip v. Canada*, [1996] 2 C.T.C. 2174 and *Wammes v. Canada*, [2001] 3 C.T.C. 2559, and concluded:

> G. … In both cases Net Worth's were used to reassess and their source of income was from illegal activities. …

[97] Clearly, the auditor proceeded to assess on the assumptions of the Appellant's source of income being from illegal activities.

[98] The Respondent, in its initial pleadings, alleged the Appellant and her fiancé were involved in the illegal satellite business and on a pre-trial motion before this Court to provide particulars in their pleadings of the illegalities or remove reference to it, were ordered to remove reference to such activities and filed an Amended Reply. In fact, the evidence on such motion was that the CRTC did not rule until the end of 1994 that such satellite business would then be illegal. The Appellant was put to the cost and effort of forcing the CRA to disclose the particulars or amend their pleading and the CRA obviously had no basis for their position and amended their pleading. The parties were advised to keep their argument within the pleading and were not allowed to deal with the issue of any illegal activities except as they might relate to credibility. In my view, the credibility of the Respondent is in serious question in a proceeding when the initial basis for proceeding on a net worth assessment in the first place is found to be lacking and the CRA proceeded anyway. As counsel for the Appellant noted, the Respondent had muddied the waters on its reasons.

[99] In *Re Dick* above, Taylor J. expressed his concerns on the abusive potential of a net worth assessment when there is no linkage established between the net worth analysis provided in support of the assessment of tax, and the alleged source of income, as follows at page 814:

> A "net worth" assessment is at best only an approximation, it may also be a frustration for all concerned. It is virtually a "last resort" method available in dealing with complex, poorly documented or highly contested financial situations. The task facing a taxpayer in dealing with any assessment of the Respondent is challenging enough - the onus of proof is on that taxpayer. But in a "net worth" assessment where there is a clear conflict between the parties regarding the

“source” of discrepancies, then a major factor in the determination of the issue might be any substantiation provided by the respective parties in support of each of the alternative “sources”.

[100] In quoting from the Tax Court of Canada in *Shlien v. The Minister of National Revenue*, 88 DTC 1152, at page 1155, Taylor J. went on to say:

> Admittedly the Respondent is vested with wide powers under the *Act* … His right to determine a taxpayer's income for a taxation year on the basis of a net worth analysis cannot be denied, but the exercise of such a determination must be in compliance with the provisions of the *Act* and in accordance with the principles laid out in the jurisprudence. To issue an assessment knowingly which does not meet this test amounts to abusing the application of the pronouncement of the Supreme Court of Canada referred to above that the onus of challenging the validity of an assessment rests with the Appellant.

[101] In the case at hand, the linkage initially established by the Respondent to a source of funds was an illegal source from her husband's activities, which was revoked in the Amended Reply and replaced by a simple assertion the source was from employment with his business, which I found was strongly successfully rebutted by the Appellant. The Minister commenced its attack under one pretence and continued under another, without any direct or sound evidence of same. Accordingly, I also find that the Appellant has also succeeded in challenging, on a *prima facie* basis, that the Respondent's underlying assumptions in its Amended Reply could not be said to be those facts relied upon and assumed by the Minister. The Minister initially proceeded and reassessed on the basis of the source of funds being from illegal activities, not employment, which would be sufficient for the Appellant to have discharged its onus according to the first method or doing so under *Re Hsu* above.

<u>Statute-barred Year and Penalties:</u>

[102] Having found that the Appellant has met the onus of rebutting the Minister's assumptions above and that the Minister provided no satisfactory proof to the contrary, it stands to reason that the Appellant did not make any misrepresentations as to her income for the years in dispute, and accordingly the 2001 year must by default be considered statute barred under subsection 152(4) of the *Act*. There would also obviously be no penalties under subsection 163(2) of the *Act* either.

[103] The Respondent did not lead any evidence to substantiate their alleged source of funds from employment or any other taxable source, illegal or otherwise, and made no credible documented challenge to the Appellant's evidence. Accordingly, I find for the Appellant and the appeals are allowed. The Appellant shall be entitled to costs on a solicitor and client basis.

Signed at Ottawa, Canada, this 19th day of July 2010.

"F.J. Pizzitelli"

Pizzitelli J.

Schedule "A"
Adjustments to Income

	2000	2001	2002
Wedding gifts			$77,725.00 +$20,000.00 (cash on hand)
Engagement Shower Gifts		$7,920.00	
Appliance Shower Gifts			$6,155.15
Lot Loan/Gift from Parents		$71,429.85	
Gift to Parents		$1,605.78	
Year-end Bank Balance Re: Trust Account	($35,529.70)	$44,326.75	$19,231.76
RRSP	$5,689.00	$2,000.00	
Acura Vehicle		$57,500.00	$21,701.00
Long-Term Investments			$50,000.00
CIBC Mutual Funds	$488.00	$801.00	$498.00
Property Taxes			$3,042.00
Honeymoon Expenses			$7,896.00
Cash on Hand			$56,866.50
Sang's Cash Contributions		$23,825.00	
Pirate Satellite Cheques and Cash		$29,895.00	
Personal Expenditures (Union Dues)		$764.00	$776.00
Food		$2,379.66	$3,456.60
Vacation Expenses		$2,077.50	
Totals	**($29,352.70)**	**$244,525.04**	**$267,348.01**

CITATION:	2010 TCC 389
COURT FILE NO.:	2007-3727(IT)G
STYLE OF CAUSE:	SANDY KOZAR and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Windsor, Ontario
DATES OF HEARING:	March 29, 30 and 31, April 1, June 9, 10 and 11, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice F.J. Pizzitelli
DATE OF JUDGMENT:	July 19, 2010

APPEARANCES:

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Counsel for the Respondent:	Nicolas Simard

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