

Docket: 2005-2386(IT)G

BETWEEN:

MICHEL GUIBORD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the appeal of
George Szeto 2005-2388(IT)G, *Mei Guibord* 2005-2389(IT)G, *George S.*
Szeto Investments Limited 2005-2390(GST)G and 2005-2392(IT)G
on September 21-25, 2009, January 18-22, 2010,
and January 25, 27, 28, 2010 at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Charles Gibson Ian Houle
Counsel for the Respondent:	Josée Tremblay Marie-Eve Aubry Natasha Wallace

JUDGMENT

The appeal from the reassessments for the 1995, 1996 and 1997 taxation years made under the *Income Tax Act* is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. Personal Assets

- (a) The amounts in Due to Shareholder are to be reduced to the following amounts:

October 31 1994	October 31 1995	October 31 1996	October 31 1997
\$ 97,958	\$135,958	\$160,958	\$160,958

(b) The net worth statement is to be adjusted to include the following loans that Michel Guibord made to Ruby King:

October 31 1994	October 31 1995	October 31 1996	October 31 1997
	\$ 42,000	\$ 54,221	\$ 54,221

(c) The amounts in Unidentified Assets are to be reduced to the following amounts:

October 31 1994	October 31 1995	October 31 1996	October 31 1997
	\$ 20,933	\$ 35,933	\$ 50,625

2. Adjustments to Arrive at Total Income for Tax Purposes

Deductions

In 1997, the Casino Payments are to be increased to \$73,951.

3. The subsection 163(2) penalties are to be deleted.

If the parties are unable to reach an agreement with respect to costs by September 17, 2010, they may present written submissions to me by September 30, 2010.

Signed at Halifax, Nova Scotia, this 19th day of August 2010.

“V.A. Miller”

V.A. Miller, J.

Docket: 2005-2388(IT)G

BETWEEN:

GEORGE SZETO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the appeal of *Michel Guibord* 2005-2386(IT)G, *Mei Guibord* 2005-2389(IT)G, *George S. Szeto Investments Limited* 2005-2390(GST)G and 2005-2392(IT)G on September 21-25, 2009, January 18-22, 2010 and January 25, 27, 28, 2010, at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Charles Gibson Ian Houle
Counsel for the Respondent:	Josée Tremblay Marie-Eve Aubry Natasha Wallace

JUDGMENT

The appeal from the reassessments for the 1995, 1996 and 1997 taxation years made under the *Income Tax Act* is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. Personal Assets

- (a) The amounts in Due to Shareholder are to be reduced to the following amounts:

October 31 1994	October 31 1995	October 31 1996	October 31 1997
\$114,913	\$114,913	\$114,913	\$113,913

(b) The bank account National Trust #04-014034208 is to be deleted from the Personal Assets in the net worth statement.

(c) In 1995, the amount of \$28,000 is to be deleted from the Unidentified Assets.

2. The subsection 163(2) penalties are to be deleted.

If the parties are unable to reach an agreement with respect to costs by September 17, 2010, they may present written submissions to me by September 30, 2010.

Signed at Halifax, Nova Scotia, this 19th day of August 2010.

“V.A. Miller”

V.A. Miller, J.

Docket: 2005-2389(IT)G

BETWEEN:

MEI GUIBORD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the appeal of *Michel Guibord* 2005-2386(IT)G, *George Szeto* 2005-2388(IT)G, *George S. Szeto Investments Limited* 2005-2390(GST)G and 2005-2392(IT)G on September 21-25, 2009, January 18-22, 2010 and January 25, 27, 28, 2010 at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Charles Gibson Ian Houle
Counsel for the Respondent:	Josée Tremblay Marie-Eve Aubry Natasha Wallace

JUDGMENT

The appeal from the reassessments for the 1995, 1996 and 1997 taxation years made under the *Income Tax Act* is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. Personal Assets

- (a) The amounts in Due to Shareholder are to be reduced to the following amounts:

October 31 1994	October 31 1995	October 31 1996	October 31 1997
\$97,958	\$135,958	\$160,958	\$160,958

(b) The net worth statement is to be adjusted to include the following loans that Michel Guibord made to Ruby King:

October 31 1994	October 31 1995	October 31 1996	October 31 1997
	\$ 42,000	\$ 54,221	\$ 54,221

(c) The amounts in Unidentified Assets are to be reduced to the following amounts:

October 31 1994	October 31 1995	October 31 1996	October 31 1997
	\$ 20,933	\$ 35,933	\$ 50,625

2. Adjustments to Arrive at Total Income for Tax Purposes

Deductions

In 1997, the Casino Payments are to be increased to \$73,951.

3. The subsection 163(2) penalties are to be deleted.

If the parties cannot reach an agreement with respect to costs by September 17, 2010, they may present written submissions to me by September 30, 2010.

Signed at Halifax, Nova Scotia, this 19th day of August 2010.

“V.A. Miller”

V.A. Miller, J.

Docket: 2005-2390(GST)G

BETWEEN:

GEORGE S. SZETO INVESTMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the appeal of
Michel Guibord 2005-2386(IT)G, *George Szeto* 2005-2388(IT)G, *Mei*
Guibord 2005-2389(IT)G, and *George S. Szeto Investments Limited* 2005-
2392(IT)G on September 21-25, 2009, January 18-22, 2010
and January 25, 27, 28, 2010 at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Charles Gibson Ian Houle
Counsel for the Respondent:	Josée Tremblay Marie-Eve Aubry Natasha Wallace

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period November 1, 1994 to October 31, 1997 is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons.

Signed at Halifax, Nova Scotia, this 19th day of August 2010.

“V.A. Miller”

V.A. Miller, J.

Docket: 2005-2392(IT)G

BETWEEN:

GEORGE S. SZETO INVESTMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the appeal of *Michel Guibord* 2005-2386(IT)G, *George Szeto* 2005-2388(IT)G, *Mei Guibord* 2005-2389(IT)G, and *George S. Szeto Investments Limited* 2005-2390(GST)G on September 21-25, 2009, January 18-22, 2010 and January 25, 27, 28, 2010 at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Charles Gibson Ian Houle
Counsel for the Respondent:	Josée Tremblay Marie-Eve Aubry Natasha Wallace

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the taxation years ending October 31, 1995, October 31, 1996 and October 31, 1997 is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons.

Signed at Halifax, Nova Scotia, this 19th day of August 2010.

“V.A. Miller”

V.A. Miller, J.

Citation: 2010TCC420
Date: 20100819
Docket: 2005-2386(IT)G

BETWEEN:

MICHEL GUIBORD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2005 2388(IT)G

BETWEEN:

GEORGE SZETO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2005-2389(IT)G

BETWEEN:

MEI GUIBORD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2005-2390(GST)G

BETWEEN:

GEORGE S. SZETO INVESTMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2005-2392(IT)G

BETWEEN:

GEORGE S. SZETO INVESTMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] These appeals were heard on common evidence. The income tax appeal for George S. Szeto Investments Ltd. relates to its taxation years ending October 31, 1995, October 31, 1996 and October 31, 1997 and the GST appeal relates to the reporting period commencing November 1, 1994 and ending October 31, 1997. The appeals for Michel Guibord, Mei Guibord and George Szeto are with respect to their 1995, 1996 and 1997 taxation years.

[2] In 1995, 1996 and 1997, Mei Guibord reported employment income of \$10,600, \$10,400 and \$10,400 respectively; George Szeto reported employment income of \$10,600, \$10,400 and \$10,400 respectively; and, Michel Guibord reported employment income of \$43,933, \$49,111 and \$48,779 respectively.

[3] During an audit of the corporate Appellant, its records were found to be unreliable and incomplete. The Minister of National Revenue (the "Minister") used the net worth method to reassess the individual Appellants' income tax liability. He then reassessed the corporate Appellant to include in its income the total of the unreported income he found for each of the individual Appellants. The following amounts were included in the Appellants' income:

Taxation Year	Michel Guibord	Mei Guibord	George Szeto	George S. Szeto Investments Ltd.
1995	\$157,970	\$157,970	\$ 8,752	\$336,967
1996	\$136,440	\$136,439	\$55,016	\$408,074
1997	\$31,745	\$31,746	\$131,684	\$173,410

The Minister also assessed subsection 163(2) penalties and he relied on subsection 152(4) to reassess the Appellants beyond the statutory limitation period.

[4] The GST liability of the corporate Appellant was reassessed for the period from November 1, 1994 to October 31, 1997 as follows:

GST	\$62,650.00
Interest	\$26,021.46
Section 280 penalty	\$35,722.33
Section 285 penalty	\$15,662.50

[5] The issues are whether the Appellants underreported their income for the years under appeal; whether penalties were properly levied; and, whether the Minister was able to reassess the Appellants beyond the statutory limitation period.

[6] The majority of the evidence in these appeals focused on deposits in the corporate Appellant's bank account which exceeded the sales declared by it. These excess deposits were listed in the corporate Appellant's financial statements as a liability Due to Shareholders. It was the Appellants' position that these amounts consisted of monies belonging to the corporate Appellant and loans which Michel Guibord made to the corporate Appellant. It was also the Appellants' position that Michel Guibord gambled extensively and won copious sums of money.

[7] Each of the individual Appellants testified. They also relied on the evidence of Romeo Pilon, an accountant; Jennifer Guibord, daughter to Mei and Michel Guibord; Nancy Leung, George Szeto's sister; and Mark Szeto, George Szeto's son. The Respondent relied on the evidence of Dan Quinn and William Ott, employees with the Canada Revenue Agency ("CRA"). The parties submitted numerous volumes of exhibits and the hearing lasted thirteen days.

BACKGROUND

[8] The individual Appellants are family members. George Szeto is the brother of Mei Guibord and Michel Guibord is the husband of Mei Guibord. I will hereinafter refer to them by their first names.

[9] George S. Szeto Investments Ltd. was incorporated on October 27, 1982. Its only shareholders are Mei and George who each own 50% of the shares. George is the president and only director of the corporate Appellant. George S. Szeto Investments Ltd. operates a Chinese buffet restaurant under the name of Ruby King Restaurant & Tavern (“Ruby King”) in Orleans, Ontario. (I will refer to the restaurant and the corporate Appellant as Ruby King.) Ruby King is operated out of a building owned by Mei and George.

[10] The evidence presented at the hearing of these appeals painted a picture of a closely knit family where George is the eldest son of eight children. He came to Canada from China in 1956 at the age of thirteen with a grade five education. George enrolled in night classes to learn to speak English and at the same time, he worked seven days a week at a laundry. When he was sixteen, he started to work in a restaurant and has worked in a restaurant ever since that time.

[11] In 1965 George’s father, grandfather, mother, two brothers and five sisters came to Canada to live with him. He supported the entire family and provided them with everything from living quarters to groceries. By 1995, George’s household included George, his wife, their two children and George’s mother.

[12] George opened his first restaurant in 1972. It was called the “Go Sing” and it operated on land owned by George. In 1984, he opened a second restaurant in Orleans. It was called Ruby King (herein referred to as the first Ruby King) and it, as well, operated on land that George owned.

[13] Mei worked with George in the Go Sing; and, in 1984, she invested in the first Ruby King. At the hearing of these appeals, she was not able to recall how much money she had invested in the restaurant but stated that it was money which her husband, Michel, had received from his mother.

[14] Michel owned the property adjacent to the first Ruby King. In 1991, he gave this property to Mei and George and in 1992 they built a new restaurant on this property with the assistance of a mortgage loan from La Caisse Populaire. This new restaurant is the present day Ruby King.

[15] The roles of the individual Appellants in Ruby King's business were described as follows:

a) George purchased all supplies for the restaurant; he was the prep cook in the kitchen; and, he barbequed the meat and seafood in the dining room. At the end of each evening, he, along with others, cleaned the kitchen. Finally, after the cashier closed the cash register and placed the cash register tapes and the contents of the cash register in a plastic bag, George took the plastic bag to Michel and Mei's home as Michel was the bookkeeper for the Ruby King.

b) Mei usually worked from 4p.m. until 8p.m. each day except on Tuesdays when she worked a full day. She did whatever jobs needed to be done in the dining room but on Tuesday she was the cashier when the regular cashier was off.

c) Michel was the only individual Appellant who was not employed by the Ruby King. During the relevant period, he was employed by the Department of National Defence as a computer specialist. However, in 1994, 1995, 1996, and up to February 1997, he was the bookkeeper for Ruby King. He stated that the daily receipts for the Ruby King were placed in a safe in his basement each evening. Periodically, he would enter the amounts from the cash register tapes, the credit card payments and the disbursements into an electronic form which he had on his computer. He also made the deposits to Ruby King's bank account on a periodic basis. He prepared the GST returns for the Ruby King and he paid the amounts due on those returns.

[16] Michel had a stroke in 2005. He said that the effect of the stroke on his memory was like a "mirror hitting the ground". It shattered. Some of the big pieces, he remembers clearly. "When you put some of the small pieces together, some are clear and some pieces aren't". He stated that he can no longer link an event to a date. It was his evidence that he was not able to recall specifically how he did the bookkeeping for the Ruby King. However, his daughter Jennifer, who took over his bookkeeping duties in February 1997, told him what he used to do as the bookkeeper. He knew that he had to have created the daily cash reconciliation form on his computer because no one else in his family had the computer skills to do this. However, in many instances during his testimony, Michel stated that he did not recall or he did not remember an event. When he was shown deposit or withdrawal slips for various bank accounts, he was able to recognize his signature but he could not recall filling out the form or making the deposit or the withdrawal.

ANALYSIS

[17] The Appellants chose to challenge the calculation of the net worth statements by disputing various amounts. In analyzing the evidence and reaching conclusions, I am mindful of the statements of Bowman J. (as he then was) in *Bigayan v. R.*¹ when he said:

This method of challenging a net worth assessment is accepted, but even after the adjustments have been completed one is left with the uneasy feeling that the truth has not been fully uncovered. Tinkering with an inherently flawed and imperfect vehicle is not likely to perfect it.

[18] I echo the statements made by Bowman J. (as he then was) but I have concluded that there must be adjustments to the net worth statements under appeal. The Appellants have presented evidence which showed that some aspects of the net worth statements are in error. I will discuss the individual Appellants' evidence and my conclusions under separate headings. However, I will first address the Due to Shareholder entry which was included under Personal Assets in the net worth statement for the individual Appellants. The amounts included as "Due to Shareholder" were:

	October 31 1994	October 31 1995	October 31 1996	October 31 1997
Mei & Michel Guibord	\$ 97,958	\$290,553	\$401,374	\$482,518
George & Tam Yukam Szeto	\$114,913	\$138,239	\$167,937	\$256,081

[19] Romeo Pilon was the accountant for George and the Ruby King. He started his own bookkeeping/accounting business in 1973. In 1981, he received his IRA designation and this became a Certified Management Accountant (CMA) designation in 1987. He has worked as an accountant for George since 1974-1975. During the relevant years, he prepared the financial statements and income tax returns for the Ruby King; and the income tax returns for George and Tam Yukam.

[20] Mr. Pilon explained the materials he used to prepare the financial statements for the Ruby King. He stated that, at the end of each year, George brought him the monthly sales summaries, the cheque register, suppliers' invoices, bank statements, copies of deposit slips, pay cheque stubs and any other necessary documents. From this basic data, he compiled the information to do the financial statements. He did not check the accuracy of the documents or the figures given to him as that would have

entailed that he perform an audit and, as a CMA, he was not authorized to do an audit. He testified in cross examination that he did not have any personal knowledge with respect to the accuracy of the information in the documents which he used to prepare the financial statements for the Ruby King. At no time did he verify the back-up documents that were used to create the monthly sales summaries. (I note that Mr. Pilon has referred to the exhibits which were entitled monthly cash summaries as the monthly sales summaries. I will use his nomenclature as it is a more accurate description.)

[21] It was his evidence that, in each of the years under appeal, the amount of money deposited to Ruby King's bank account exceeded the sales declared. He spoke to George about this situation and was told that Michel, his brother-in-law, was depositing money into Ruby King's bank account as the restaurant was losing money. Mr. Pilon stated that, at that time, he did not speak to anyone else about the excess deposits. He chose all of the deposits that contained only cash and added them up. He said he was trying to make sense out of it; he was trying to confirm what he had been told. He assumed that the deposits which contained cheques or credit cards were sales. For the amount of deposits that exceeded sales, he took those deposits which consisted of cash only and entered it in the financial statements as Due to Shareholders. He did not designate the amount to be due to either Mei or George but he assumed that Michel was depositing it for the benefit of his wife, Mei.

[22] For the 1995 and 1996 taxation years, Mr. Pilon followed the same procedure of using deposits which consisted of only cash as the amounts he entered in the Due to Shareholder account. However, for the 1997 taxation year, he did not check the deposits individually; he used the difference between the sales and the deposits as the amount he entered in the Due to Shareholders account.

[23] In direct and cross examination, Mr. Pilon stated that he did not discuss the financial statements or the Due to Shareholders account with George, Mei or Michel. He set up this account without input from the individual Appellants. He did not explain the concept of a Due to Shareholder account to any of the individual Appellants. Neither George nor Michel nor Mei ever asked him to do anything out of the ordinary with the financial statements. As well, the only benefit that any of the individual Appellants received from the Due to Shareholder account was a debit for George for a rental payment in the amount of \$8,000 in 1997.

[24] It became apparent, near the end of the hearing, that counsel for the Respondent had evidence which she could have used to try to question Mr. Pilon's credibility. This evidence was also included as a response to undertaking #8 given by

the Respondent at the examination for discovery of the Crown nominee, Peggy Dickie. However, for reasons not stated, counsel did not rely on this information when she questioned Mr. Pilon and his evidence was not shaken on cross examination.

[25] The only concession which Mr. Pilon made in cross examination was that the discrepancy between the deposits and sales could have been unreported sales. However, he countered this concession with the statement that George did not tell him that the discrepancy was unreported sales.

[26] Mr. Pilon stated that George signed both his and Ruby King's income tax returns without asking any questions. It was George's evidence that he did not understand the financial statements and he did not review them. He looked only at the revenues and cost of goods as he understood that if the cost of goods exceeded the revenue he would have to reduce the amount of goods he bought.

[27] The documents used by Mr. Pilon to prepare the financial statements for the Ruby King were prepared by various people. In 1994, 1995 and 1996, Michel prepared the daily cash reconciliations and the monthly sales summaries and made the deposits to Ruby King's bank account. From February 1997 to December 1997, Jennifer Guibord, Mei and Michel's daughter, performed the tasks of the bookkeeper for the Ruby King.

[28] Jennifer stated that she took over as bookkeeper after her father was hospitalized because of diabetes. At that time, he was the only one who knew how to do the bookkeeping and her family wanted someone else to learn. She was the eldest and her father taught her, over a period of a month, how to do the bookkeeping by showing her "what he had done"².

[29] The bookkeeping was done at her parents' home using their computer. Her father had written a program which produced the daily cash reconciliation forms and the monthly sales summaries. To complete the daily cash reconciliation, Jennifer stated that she used the z-tapes from the cash register. This document contained the total revenues from the dining room, take-out orders, and liquor. It also contained the total provincial tax and GST collected. She entered these amounts into the computer and the program automatically added these amounts to arrive at the gross revenue for the day. Jennifer totalled the revenue from the Visa, MasterCharge and American Express charges and entered each of these amounts in the computer. The program automatically calculated the cash that was shown on the daily cash reconciliation form. In other words, Jennifer never counted the cash when she was preparing the

daily cash reconciliation. She never counted the cash to compare it with the z-tapes from the cash register. It was her evidence that she did not do the daily cash reconciliations on a daily basis but on a weekly basis or more. She took all of the cash that was earned on a weekly or bi-weekly basis, counted it and deposited it in Ruby King's bank account.

[30] In cross examination, Jennifer agreed that she made mistakes in completing the daily reconciliations and she was not very dutiful in counting everything. However, her credibility was never challenged and I accept her evidence.

[31] When I consider Mr. Pilon's evidence; the haphazard manner in which Michel and Jennifer both handled Ruby King's cash; and, the excess deposits to the Ruby King bank account, I conclude that many of the deposits to the Ruby King account were unreported sales and not shareholder loans. In particular, I conclude that the deposits by George and Michel that were made up of smaller bills were unreported sales of Ruby King and not shareholder loans. My conclusion is supported by the testimony of Mr. Ott, the auditor from CRA. He also believed that these amounts were unreported sales of Ruby King but, as they were included by Mr. Pilon as Due to Shareholder, he treated these amounts as a shareholder benefit. Mr. Ott also believed that the sales of Ruby King exceeded all of the deposits to its bank account. However, there was no evidence tendered to support his belief that the Ruby King had sales which exceeded the deposits in its bank account.

[32] I have also considered George's evidence in reaching the conclusion that these deposits of small bills into Ruby King's bank account were not shareholders' loans. George denied that the amounts in the Due to Shareholder account were assets to him. He gave specific evidence with respect to those amounts which he had deposited into Ruby King's bank account. He spoke to only one deposit made by Michel, otherwise, he did not know anything about the other deposits made to this account. On January 13, 1995, February 6, 1995 and September 25, 1996, George deposited the amounts of \$8,580, \$10,280 and \$5,000 respectively in Ruby King's bank account. The deposit of \$8,580 was 429 twenty dollar bills; the deposit of \$10,280 was 514 twenty dollar bills; and, the deposit of \$5,000 was 250 twenty dollar bills. It was George's evidence that on each of these occasions, he was notified by the bank that Ruby King's bank account was over drawn. Michel and Mei were out of town, on vacation. He went to their home and took all of the twenty dollar bills out of the plastic bags which contained Ruby King's daily receipts. These bills he deposited into Ruby King's bank account. He stated that Michel was supposed to include these deposits in his reconciliations. I infer from the evidence that George

included the deposit slips with Ruby King's documents so that Michel could enter the amounts as sales.

[33] During cross-examination, Mr. Ott conceded that the only benefit which the shareholders received was the fact that the amounts were included in the Due to Shareholders account. Only George received a debit from this account (see my paragraph 23 above).

[34] In accordance with my conclusions, the deposits which contained small bills are to be deleted from the Personal Assets in the category Due to Shareholder in the net worth statements for the individual Appellants; they remain in the calculation of the net worth statements for Ruby King as unreported sales. Mr. Ott was able to trace amounts which had been deposited into Ruby King's bank account by each of the shareholders. These amounts were actual shareholders loans and are shown in Table I below. These amounts are to be included in the Due to Shareholder account as shown in Table II below.

Table I

Year	George	Mei
1995		\$30,000
		8,000
1996		25,000
1997	\$7,000	
	(\$8,000)	

Table II

Due to Shareholder	October 31 1994	October 31 1995	October 31 1996	October 31 1997
Mei	\$ 97,958	\$135,958	\$160,958	\$160,958
George	\$114,913	\$114,913	\$114,913	\$113,913

[35] On November 20, 1995, Michel made a loan of \$42,000 to the Ruby King. This amount is a Personal Asset to Michel and a liability to Ruby King and should be

reflected as such in the calculation of their net worth statements. As well, in 1996, Michel paid Ruby King's GST liability in the amount of \$12,221. The net worth statements should be amended to reflect this transaction.

George Szeto

[36] The Minister considered the financial affairs of George and his spouse, Tam Yukam in making the net worth calculations. Tam Yukam also worked at the Ruby King and she, as well, reported employment income of \$10,600, \$10,400 and \$10,400 in 1995, 1996 and 1997. George testified that some of the items in the net worth statement did not belong to him. He also disputed the quantum of the "Personal Expenditures" in the net worth.

Bank Accounts

[37] It was George's evidence that two of the bank accounts in his name actually belonged to his sister Nancy Leung. He stated that he had a power of attorney over the accounts. Nancy lived in Hong Kong until December 1995. During the period under appeal, she owned two rental properties in the Ottawa area and George managed them. He collected the rents and deposited the amounts in the account at the National Trust (#04-014034208).

[38] Nancy stated that in 1983 she bought a house in the Chapel Hill region and in 1992 she bought a house on Diane Crescent. She gave George the power of attorney to manage these houses which included paying the taxes, the utilities, the landscaping bills, finding tenants, etc. She stated that she never received any money from the rentals as she totally trusted George with everything that he did for her.

[39] The evidence submitted at the hearing does not totally support George's testimony with respect to the bank accounts. George did not have power of attorney for these accounts. He was the legal owner of them. However, I conclude that George held the account at the National Trust in trust for Nancy. The history of this account is that there were fairly regular deposits up to December 1995. George has identified these deposits as rental amounts and I accept his evidence. As well, George stated that the withdrawals from this account of \$10,000 on September 21, 1995 and \$18,000 on September 29, 1995 were used to replace the carpet and to repair the house on Diane Crescent. This was confirmed by Nancy who now lives in the house on Diane Crescent.

[40] The second account which George disputed was TD # 3101626. On January 31, 1995, this account had a balance of \$25,625.57. During the period, there were several withdrawals from this account and only one deposit. On June 14, 1995, George withdrew \$15,000 from this account. On the same day, there was a payment of \$25,000 made on the Ruby King mortgage loan at La Caisse Populaire. There was evidence that a \$10,000 withdrawal from one of Mei's bank accounts was part of this payment and I infer that the remaining \$15,000 was the amount withdrawn by George from the TD # 3101626 account. George had control of this account long after his sister returned to Canada in December 1995. On March 17, 1997, George transferred \$7,000 from the TD #3101626 account to the Ruby King account. As well, at no time during her evidence did Nancy state that she had lent these amounts to George. All of the evidence indicates that the TD #3101626 account was George's account.

Honda Civic

[41] George's net worth statement also included a 1998 Honda Civic as an asset. It was his evidence that the Honda Civic was in his name but it belonged to his son, Mark Szeto. During direct examination, George stated that he wrote a cheque for the down payment (\$6,960) on this car but his son reimbursed him for \$5,000 of that payment. The monthly payments were \$340 and his son paid the major portion of these payments each month. George stated that he did help his son with the balance of the monthly payments as his son was a student at the time. On cross examination, counsel for the Respondent reminded George that during the discovery on March 12, 2007, he had stated that his son had an old car which had been given to him by his sister and he had used this car as a trade in to purchase the Honda Civic. At the discovery, George stated that he did not contribute any money towards the down payment for the Honda Civic. When confronted with his prior statement, George said that he was mistaken at the discovery. Subsequent to the discovery, he spoke to his son who reminded him that the old car had been sold privately. George stated:

Yes. I talk to my son. But that been so long I don't know what happen in – that is how we sold the other car. We get the money, he put \$5,000 down and the rest I help.

I don't remember what happened so long a time. They – I talked to my son to what happen.

He reiterated that his son gave him \$5,000 and that he paid the rest of the down payment.

[42] It was Mark Szeto's evidence that he had been given an old car by his sister. He stated that she had left it for him after she got married and moved away from home. The car lasted for about two years and then it broke down. The Honda Civic was purchased in 1997 when he started university. He did not have a credit rating and his father put the loan and the car in his name. The arrangement was that Mark would pay his father in monthly instalments to help pay off the car. During both direct and cross examination, Mark Szeto stated that he gave his father \$5,000 towards the down payment on the Honda Civic. He explained how he had accumulated \$5,000. He said that he had saved it over the years. He stated that when he was thirteen years old, he started to work at the restaurant as a busboy and some of the waitresses shared their tips with him. He was not a salaried employee; he just helped out. It was his evidence that he worked at the restaurant on Friday, Saturday and Sunday evenings. As well, over the years he had received money as gifts from his relatives and he saved this money. It was his evidence that he transferred the \$5,000 from his bank account to his father's bank account and his father wrote a cheque for the down payment.

[43] The only evidence that was given to the Court about Mark's bank account was a copy of a National Trust Owl passbook. The balance in that account as of February 9, 1995 was \$301.86. If Mark did, in fact, transfer \$5,000 to his father's account, documents could very easily have been submitted to substantiate his statement. Given George's conflicting evidence, the lack of documentation that Mark indeed had \$5,000 to transfer to his father and the fact that Mark did not have a job until 1999, I conclude that George paid for the entire down payment on the Honda Civic.

[44] Both George and Mark stated that Mark gave his father various amounts towards the monthly payments for the Honda Civic. There was no exact figure given and I will not estimate one. As I noted above, Mark did not get a job until 1999 and he was still in university at that time. In 1997, Mark only earned money if the waiters at the Ruby King shared their tips with him. I find it implausible that, in 1997, Mark had enough money to make the monthly payments on the car. He said that he paid for the gas for the car and I am left to wonder how much money he had to actually put towards the monthly car payment. George always remained liable for the payments on the Honda Civic as shown in the net worth statement and I am not persuaded that the liability should be removed from the net worth statement.

Unidentified Assets

[45] The net worth statement for George contained items labelled Unidentified Assets. They were items which were purchased with George's Visa credit card but

the auditor had not been able to identify the item. On October 30, 1994, George purchased something with his Visa credit card at The Builder's Warehouse for the amount of \$549.62. The item purchased was never identified as George did not remember what he had purchased³. In fact, he had a problem remembering that the Visa number on the statement belonged to him.

[46] In 1995, the amount of \$28,746.35 was listed as an unidentified asset. The amount of \$746.35 was paid to Beam of Canada on December 4, 1995. The reason for the payment was never identified. The amount of \$28,000 consisted of the two withdrawals from the National Trust account (#04-014034208) which were described in paragraph 39 above. These amounts were used to repair damage caused by a tenant to Nancy's house on Diane Crescent. The assets purchased with this amount did not belong to George. The amount of \$28,000 is to be removed from Unidentified Assets in 1995.

Household Goods

[47] On December 13, 1995, there was a purchase made with George's Visa card at Colonial Furniture for the amount of \$5,689.60. It was his evidence⁴ that he purchased appliances for his sister as she did not have a cheque with her at the time they were shopping and he used his Visa card. In direct examination George stated that his sister later reimbursed him for the furniture. In cross examination, he at first said that his sister did not pay him back and then he said that she did repay him. Nancy was never questioned about this purchase from Colonial Furniture. George's evidence was contradictory and I am left with the conclusion that this purchase was made by him for his family.

Loan from Michel Guibord

[48] On June 21, 1996, Michel withdrew \$15,000 from his account to purchase a draft which was made payable to George. The draft was marked "FOR INITIAL DEPOSIT ON HOUSE FOR VIVIAN SZETO". Vivian Szeto is George's daughter. She was married in 1995. It was George's evidence that this amount was borrowed from Michel so that he could help his daughter purchase her first home. There was no evidence presented which contradicted George's evidence on this point. I have not been able to find where this amount was included in the calculation of the net worth statements for George.

Personal Expenditures

[49] The calculation of personal expenditures in the net worth was based on Statistics Canada figures, George's estimates, George's Visa card statements and actual utilities bills. Mr. Ott based his calculations on the Statistics Canada figures for a family of two adults and one child for the years under appeal. According to George, the amounts of "Personal Expenditures" calculated in the net worth statements were too high. As an example, he stated that he paid only \$100 annually for haircuts. He very well may have paid only \$100 for his haircuts but he must also consider the costs of haircuts for his wife and son. The auditor included the amounts of \$425, \$432 and \$439 in the net worth calculation as the cost of haircuts for the family in 1995, 1996 and 1997 respectively. These amounts are not unreasonable for haircuts for a family of three.

[50] The onus was on George to convince the Court that the amounts used for personal expenditures were incorrect. This he has not done. When asked if he bought his teenage son any clothes during this period, George said he didn't remember. I was left with the impression that George would not know the amounts that his family spent on food, clothing or other personal items and Tam Yukam, his wife, who might have been better able to answer counsel's questions, was not called as a witness. I say that she might have been able to answer counsel's questions because when George was asked about certain purchases on his credit card statement, he did not recognize the store where the purchases were made and he stated that his wife also had a Visa credit card for the same account.

Michel and Mei Guibord

Cash on Hand

[51] In the net worth statement, the calculation of Personal Assets included Cash on Hand of \$556, \$775 and \$1,055 in 1995, 1996 and 1997, respectively. It was Michel's evidence that he always had cash in his safe that exceeded these amounts. When he was first presented with the net worth statements, he took the money out of his safe and photographed it. Entered as exhibits were photographs of money with a sign next to the money on which was listed the denomination of the bills, the type of currency, the total currency and the date October 2, 2002. According to Michel, he had \$168,000 CAD and \$5,750 USD on hand on October 2, 2002.

[52] I am not able to infer from this evidence that Michel had these amounts of cash on hand in 1995, 1996 and 1997. I was not presented with any evidence that would allow me to increase the cash on hand. In fact, neither Michel nor Mei gave an estimate of the cash on hand during the relevant period.

Proceeds from Gambling

[53] It was both Michel and Mei's evidence that Michel gambled a lot. He played only the slot machines. He was not addicted to gambling but he was very successful at it. Michel explained the type of slot machines that he played and he was able to discern the type of machine played from the amount he had won. As an example, on April 14, 1996, Michel received a cheque in the amount of \$1,517.86 for winnings from the casino in Hull. He stated that because the last digits ("86") were not divisible by a quarter he knew that the machine was one that is called a "Flat Top". He also knew from the first two digits ("15") that the machine had to be a \$1.00 machine.

[54] Michel received cheques from the casino in Hull which totalled \$70,262 in 1996 and \$73,951 in 1997. I note that in the calculation of his net worth, only \$69,851 was included in 1997. The additional amount of \$4,100 is to be included as a deduction in 1997.

[55] It was Michel's evidence that he won much more money at gambling than he was credited with in the net worth statements. His evidence was that each time a cheque from the casino was deposited into his bank account, the additional money on the deposit slip was also winnings from the casino. However, I do not accept this version of events. Michel stated at the very beginning and throughout the hearings that he had no recollection of filling out the deposit slips or depositing the money into the various accounts. He was able to recognize his signature on the deposit slips and he assumed that he made the deposits. I infer from Michel's lack of memory that he cannot say with any certainty how much he won from gambling. It was also his evidence that he did not keep track of his winnings because he did not have to report them as income.

[56] During the period, Michel had twelve bank accounts, two of which were for US funds. Mei had two or three accounts. There were numerous deposits made into both Michel and Mei's accounts and many of these deposits included \$100 bills and \$1,000 bills. Michel stated that all deposits which contained a \$1,000 bill were winnings from a casino. As well, all deposits into his US bank accounts were winnings from gambling on either a cruise ship or a casino in Las Vegas.

[57] However, there was evidence that Michel not only purchased US dollars but he also purchased \$1,000 bills in US currency. Michel conceded that not all deposits into his US bank accounts were winnings from casinos. As well, there was evidence

that Michel withdrew amounts from his bank accounts and his credit cards in \$1,000 and \$100 denominations. I conclude that, although Michel may recall receiving \$1,000 bills only from casinos, his recollection is incorrect and self serving.

[58] I note as well that the money Michel spent to make his casino winnings have not been taken into account in the calculation of the net worth statements.

Unidentified Assets

[59] Included in Personal Assets in the calculation of the Guibord's net worth were Unidentified Assets of \$63,332, \$78,332 and \$116,267 for 1995, 1996 and 1997 respectively. Counsel for the Appellants was able to trace the documents for some of the amounts included in the unidentified assets. As a result, the Respondent has conceded that in 1995, unidentified assets should be reduced by \$42,399 as this represented an amount that Michel loaned to Ruby King and it has already been included in the net worth calculation.

[60] Counsel for the Appellants attempted to trace the amount of \$20,932.50 which was also included in the category of Unidentified Assets for 1995. He was able to show that Michel deposited \$15,000US (\$20,932.50 CAD) into his account at the Bank of Nova Scotia on March 8, 1995. There was a debit memo for this amount from the Bank of Nova Scotia on March 15, 1995. I was never shown what was purchased with this debit memo or that this amount is duplicated in the net worth calculation. It remains an unidentified asset and there is no adjustment to be made for this amount.

[61] In 1996, Unidentified Assets were increased by \$15,000. This amount was shown to be an amount that Michel gave to George on June 21, 1996 for the initial deposit on a house for Vivian Szeto. This amount was a loan to George and it remains as a Personal Asset which Michel had in 1996.

[62] In the net worth calculation for 1997, the amount of Unidentified Assets was increased by \$37,935. Counsel for the Respondent has conceded that this amount should be reduced by \$16,000. However, the evidence has shown that the amount of \$37,935 should be reduced by \$23,242.61 which represents expenditures for property taxes and credit card purchases which have already been included in the calculation of the net worth under the heading Personal Expenses. As a result, the increase in Unidentified Assets for the 1997 year should be \$14,692.39 and not \$37,935.

Subsection 152(4) and subsection 163(2) of the *Income Tax Act* and subsection 298(4) of the *Excise Tax Act*

[63] Based on the evidence which was before me, I have no difficulty in reaching the conclusion that the Minister was justified in opening the three statute-barred years for all of the Appellants. They made misrepresentations relating to their income which, at the very minimum, were attributable to neglect and carelessness.

[64] However, conduct which allows the Minister to open statute barred years may not necessarily support the imposition of penalties under subsection 163(2)⁵. Pursuant to subsection 163(2), the onus is on the Minister to show that the Appellants knowingly, or under circumstances amounting to gross negligence, made a misrepresentation or an omission in their returns. The Minister has met this onus with respect to the Ruby King. There were large amounts of unreported income in each year. Both Michel and Jennifer treated their duties as bookkeeper and the Ruby King's monies in a cavalier and frivolous manner. The fact that there was an automated form for the daily cash reconciliation where one never had to actually count the cash makes one wary of the true state of affairs. Contrary to the Appellants' evidence, it is obvious that not all sales were rung into the cash register and the z-tapes were incorrect. The penalties against the Ruby King have been properly imposed for both the income tax assessments and the GST assessments.

[65] However, I have concluded that the Minister has not satisfied the onus respecting the imposition of penalties on the individual Appellants. I have not been shown that these Appellants intended to misrepresent their personal income. Once the Due to Shareholder account has been adjusted, the discrepancy in the individual Appellants' net worth is minor. Although I may be apprehensive about Michel's motive in creating a program for the daily cash reconciliation where the cash for the Ruby King did not have to be counted and the cash was never actually reconciled with the cash register tapes, the penalties assessed against Michel were not with respect to the misrepresentations in Ruby King's tax returns. The subsection 163(2) penalties imposed on Michel were assessed with respect to his personal 1995, 1996 and 1997 taxation years.

[66] The appeals are allowed. If the parties are unable to reach an agreement with respect to costs by September 17, 2010, they may send written submissions to me by September 30, 2010.

Signed at Halifax, Nova Scotia, this 19th day of August 2010.

“V.A. Miller”

V.A. Miller, J.

¹ (1999), 2000 D.T.C. 1619 (TCC) at paragraph 4

² Transcript p.1075, line 7

³ Transcript p.414, line 14

⁴ Transcript p.426

⁵ *Dao v. R.* 2010 TCC 84 at paragraph 39

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COURT FILE NO.: 2005-2386(IT)G
2005-2388(IT)G
2005-2389(IT)G
2005-2390(GST)G
2005-2392(IT)G

STYLE OF CAUSE: MICHEL GUIBORD AND
HER MAJESTY THE QUEEN

GEORGE SZETO AND
HER MAJESTY THE QUEEN

MEI GUIBORD AND
HER MAJESTY THE QUEEN

GEORGE S. SZETO INVESTMENTS
LIMITED AND
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REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: August 19, 2010

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