Docket: 2008-3837(IT)G

BETWEEN:

SYLVIA HANIFF,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Sylvia Haniff (2008-3838(GST)G), on February 9, 2011, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Osborne G. Barnwell
Counsel for the Respondent:	Justin Kutyan

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* with respect to the Appellant's 2002, 2003 and 2004 taxation years is allowed in part only to the extent of allowing additional deductible business expenses of $1,450.97 in 2002, $379.64 in 2003, and $31.70 in 2004.

Costs will be dealt with separately following written submissions to be received on or before March 21, 2011.

Signed at Ottawa, Canada, this 18th day of February 2011.

"Patrick Boyle"

Boyle J.

Docket: 2008-3838(GST)G

BETWEEN:

SYLVIA HANIFF,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Sylvia Haniff (2008-3837(IT)G), on February 9, 2011, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Osborne G. Barnwell
Counsel for the Respondent:	Justin Kutyan

JUDGMENT

The appeal from the reassessments made under the *Excise Tax Act*, notices of which are dated March 16, 2007, for the period from January 1, 2002 to December 31, 2004, is allowed in part only to the extent of recognizing the tax paid on additional supplies of $1,450.97 in 2002, $379.64 in 2003, and $31.70 in 2004.

Costs will be dealt with separately following written submissions to be received on or before March 21, 2011.

Signed at Ottawa, Canada, this 18th day of February 2011.

"Patrick Boyle"

Boyle J.

Citation: 2011 TCC 112
Date: 20110218
Dockets: 2008-3837(IT)G
2008-3838(GST)G

BETWEEN:

SYLVIA HANIFF,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] Ms. Haniff's appeals of her 2002 to 2004 income tax and goods and services tax ("GST") assessments were heard together. In those years she was employed full-time and, in addition, she operated a hairdressing and aesthetician salon in Toronto. The reassessments appealed from relate to unreported income, unsupported expenses and the related GST thereon from her hairdressing salon activities, as well as rental losses from renting out her basement to her mother.

[2] At the opening of trial, the parties agreed that the only additional expenses which should be allowed are $1,450.97 for 2002, $379.64 for 2003 and $31.70 for 2004. Corresponding increases to her GST input tax credits will also result. The taxpayer conceded that 2002 was not statute-barred. The rental losses and rental expenses disputed in the notice of appeal were dropped by the taxpayer at the opening of the hearing. Thus, the only issues remaining for the Court to decide are the taxpayer's unreported income for these three years and whether gross negligence penalties were proper in respect of the reassessed amounts.

[3] The taxpayer's hair salon, Glo-Hair House of Beauty ("Glo-Hair"), did not have a cash register. Ms. Haniff did not maintain any sales invoices, purchase invoices, receipts or other contemporaneous records for the business. She

consistently reported losses from the business. In each of the years in question, Ms. Haniff claimed business losses in the $40,000 range and rental losses in the $10,000 range. For many years prior to those in question, she had claimed comparable business losses and rental losses. As a result, the Canada Revenue Agency ("CRA") audit was based upon an indirect income verification approach. Specifically, in order to verify revenues for 2002 and 2003, the CRA did an analysis of the deposits into the business bank account and, given that she explained she also used her personal accounts for deposit purposes, those personal accounts of which she made the CRA aware. However, since banking records were not received for 2004, the CRA's approach was to extrapolate her revenues based upon the amount of GST collected which she reported in one of her GST returns. This is an even more inaccurate method of estimating one's income and is made all the moreso by the fact that the taxpayer's GST reporting within each year was not consistent in that she reported different amounts in her returns than in her income tax returns or in her Excel spreadsheets amongst other places.

[4] Ms. Haniff had a day job as a computer programmer. She wrote computer programs. She had previously been audited and reassessed by the CRA. Yet, the only record of her businesses revenues and expenses for each of the years in question was a single-page Excel spreadsheet which provided monthly totals which she said she completed contemporaneously. She testified she used those spreadsheets to prepare and file her tax returns in respect of the business each year. I am unable to accept that these spreadsheets were produced during the years in question and finalized before filing each year's tax return. This is because for one of the three years, she managed to produce three significantly and inexplicably different versions of the same spreadsheet, one for the CRA auditor, one for the appeals officer, and one for the Court. Not only am I unable to accept that these Excel spreadsheets were prepared in the years in question, I am unable to assign the numbers in them any reliability whatsoever as a result. Further, her testimony and spreadsheets on this undermine the overall credibility and value of all of her testimony and cause me to carefully consider what supporting or corroborating evidence she puts forth.

[5] Ms. Haniff was the only witness. She did not call her spouse to corroborate any of her testimony even though her testimony implicated him. Her personal account was joint with him and several of the unsubstantiated deposits she explained were his rental receipts for a rental property that he chose to put into this joint account which she controlled and not into one of his multiple accounts of which the Court was given no documentary evidence. This notwithstanding that he was present in the courtroom for the hearing. She did not call her mother who she claimed was also a source of the unexplained deposits, nor did she produce the cheques she said

she wrote on her mother's account to herself to pay for her mother's rental of the basement which generated the abandoned rental loss. Nor did she call either of her adult children even though their regular board/rent was said to be the source of other regular monthly cash deposits into her personal account. I did not see a copy of a lease for the rental property though I was given one for her mother living in her basement.

[6] In her notice of appeal, it is written "she used her personal account to deposit the receipts of the business." In her notice of appeal it also says "[f]or each of the years in question, she delivered her records to her Accountant who prepared her returns." In testimony it was clear she did no such thing. She prepared the returns herself, signed them and indicated as such. Her testimony and her returns confirmed this.

[7] In her tax return for each year, she indicated that she was single. In fact, she acknowledged she has, and had throughout the years in question, a common-law spouse.

[8] At trial she explained one deposit in excess of $4,000 as perhaps being in respect of the insurance reimbursement for a vehicle that had been involved in an accident that year. There was no evidence to corroborate that in the form of a repair bill, an insurance cheque or anything of that nature.

[9] Ms. Haniff acknowledged in cross-examination that she had at least two other personal bank accounts that she had not told the CRA about at the time of the audit and that, at times, those were also used for purposes of the business. The CRA had not made a demand for her banking records but had accepted what she provided it for the audit. She sought to explain other deposits as having been redemptions out of her Canada Savings Bond plan, however she provided no corroborating evidence of the redemptions from a Canada Savings Bonds plan, nor that she even owned such a plan. That is certainly a plausible and possible explanation given the bank's cryptic acronyms, however not even the bank's schedule of acronym definitions or terms which regularly accompanies bank statements and passbooks was provided to confirm that. She sought to explain one deposit to her personal account as having been a transfer from her line of credit, however while the amounts matched up, the dates were more than a month apart and, if that was the full explanation, the bank would have been out $5,500 for more than a month when it posted the corresponding debit to her line of credit. This suggests there is more to that story that was not told by the documents in evidence or by her testimony.

[10] It should also be noted that the taxpayer's business involved the receipt of significant amounts of cash and her evidence, which she did substantiate with two receipts for which two seemingly unrelated companies some time apart seem to have both used the same computer program/template to generate, was that she paid some significant business expenses in cash as well. There was however no corresponding of the expenses reported to the cash she received from any source.

[11] Several of the deposits to her personal account could be explained and were accepted by the CRA at the audit as having been clearly sourced in transfers between her accounts.

[12] The taxpayer's testimony in explaining any entry in her bank records was qualified with the words "might be", "could be" or "may be". This was almost invariably the case except as regards the approximately $1,800 amount deposited relatively regularly each month in the first ten days of the month. These, she testified with a degree of certainty in her mind, were the rental receipts from her spouse's rental property. If credit is not given for these in her assessments and they are treated as Glo-Hair receipts, and her testimony is correct and they are rental receipts already reported and taxed to her spouse, there is a discomforting risk of double taxation of these amounts. However, as noted above, I have been provided with no corroborating evidence of any sort on this point. That was within the control of the taxpayer and her counsel, if not her, could reasonably foresee that some corroboration would be needed.

[13] In the case of a net worth assessment or other indirect verification assessment, it is open to the taxpayer to attack whether such an assessing approach is needed or is the most appropriate method of computing the taxpayer's income from any source. In this case, the taxpayer is not doing that. If the taxpayer does attack whether a net worth assessment is needed or the most appropriate, a taxpayer would need to prove to the satisfaction of the Court with what evidence there is, what records there are and other credible evidence, what the income of the taxpayer is from the source or sources in question. The taxpayer has not done that nor laid any groundwork in the evidence for that. The alternative is for the taxpayer to challenge specific aspects of the net worth or indirect assessment calculation.

[14] In taking the latter approach, the burden is on the taxpayer to satisfy the Court with reasonably consistent and corroborated credible evidence that demonstrate her explanations are probable. To the extent that she is unable to satisfy the Court that plausible and possible versions of events rise to the probable threshold, her attitude

towards filing returns, maintaining adequate books and records and generally complying with the income tax laws makes her the author of her own misfortune.

[15] In this case, the taxpayer challenges the following four amounts:

1. *$5,531 deposited into a personal account that was sourced in a corresponding increase to her line of credit.*

[16] I have already spoken of this above. While it is quite possible that the line of credit was the source of this unexplained deposit, the evidence does not establish that it is probable. What is probable is that there is more to this story to explain the five-week period between the deposit to her credit and the amount drawn on her line of credit. I do not believe I have heard the full story regarding this. I conclude that no adjustment is warranted in respect of this amount.

2. *Rental property receipts*

[17] The taxpayer's position is that most of the unexplained deposits to her personal account were comprised of the $1,800 monthly rent received in respect of her spouse's rental property, $600 a month received from her mother which she paid herself by cheque drawn on her mother's account, and $300 per month, either each or in total, from her two adult children for room and board. She acknowledged that the children's room and board amounts did vary at times from month to month depending upon her children's financial situation. There is no corroborating evidence regarding the amounts received from her children, much less any evidence that would tie such receipts to any particular deposit or deposits during any month. There is no ability to infer from the amount of particular deposits that they would represent this amount. For this reason I am not satisfied that any adjustment is needed to the assessments to reflect any room and board amounts received from her children. My conclusion with respect to her mother living in the basement is to the same effect for similar reasons. For the reasons already set out above, I am similarly not persuaded on a balance of probabilities that there is any adjustment warranted in respect of the rental property receipts.

3. *The daughter's in-trust account*

[18] One of the bank accounts in question was maintained in the name of the taxpayer and her spouse in trust for her adult daughter. All of the deposits into that account were included by the CRA as receipts from the Glo-Hair business. The taxpayer maintained that some of those deposits should reflect the fact her daughter had a modest income at times in the years in question. That is possible but again I have no evidence that the daughter ever used this in-trust account, no explanation of why this account is in the parents' names in trust for the daughter, or whether the daughter also had her own bank account for depositing her earnings and paying her personal expenses (including any room and board she in fact paid). Nor do I have any evidence of her earnings. For these reasons, I am not persuaded that any adjustment is needed in respect of the amounts deposited to this in-trust account.

4. *Vehicle insurance proceeds*

[19] Again, given the total lack of any corroborating evidence whatsoever to support her testimony that a particular deposit might have been the insurance proceeds or reimbursement for damage to a particular vehicle owned as described above, I am not satisfied on a balance of probabilities that any adjustment is needed in respect of that deposit either.

[20] In *620247 Ontario Ltd. v. Canada*, [1995] G.S.T.C. 22, Bowman J., as he then was, wrote:

> 8 The assessment is based upon the assumption that the bank deposits are about as accurate an indication of the sales as one is likely to get, given that the appellant kept no books and its only record of sales was the sales slips, which were incomplete and essentially in an unsatisfactory state. It may be a fair surmise that some of the bank deposits came from sources other than sales but the evidence simply does not establish how much. In a case of this type, which involves an attempt by the Department of National Revenue to make a detailed reconstruction of the taxpayer's business, it is incumbent upon the taxpayer who challenges the accuracy of the Department's conclusions to do so with a reasonable degree of specificity. That was not done here. A bald assertion that the sales could not have been that high, or that some unspecified portion of the bank deposits came from other sources is insufficient. I am left with the vague suspicion that the chances are that the sales figures computed by the Minister may be somewhat high, but within a range of indeterminate magnitude. This is simply not good enough to justify the allowing of the appeal. If I sent the matter back for reconsideration and reassessment the same evidentiary impasse would result. I must therefore conclude that the appellant has failed to meet the onus of showing that the assessment is wrong.

> . . .
>
> 12 . . . There may well be errors in the Minister's calculations, but given the unsatisfactory state of the appellant's records it is difficult to see how he could have made a different determination and while I may not be bound to apply the same rather rigid criteria evidently demanded by the Minister there is no evidence upon which I can arrive at a different figure.

[21] Similarly in *Baker v. The Queen*, 2007 TCC 106, [2007] G.S.T.C. 22, Bédard J. wrote:

> 24 Subsection 286(1) of the Act sets out the obligation of every person who carries on a business to keep sufficient records to allow the Minister to determine the obligations, liabilities and rights of the person under Part IX. If the required information is not adequate or available, the Act specifies at subsection 299(1) that the Minister is not bound by any return and may make his own assessment. Since the information in the present case was not adequate or available, the auditor, as a last resort, used the bank deposit method to establish the appellant's sales related to the operation of his business during the relevant period and made the necessary adjustments. Under the circumstances, this approach was acceptable, indeed necessary.
>
> 25 In this case, the appellant had to demonstrate, on a balance of probabilities, that the Minister's numbers were erroneous, doing so through the use of supporting documentation or through the testimony of independent and credible witnesses. It is incumbent on the taxpayer to establish, on a balance of probabilities, that the assessment is too high in light of the applicable law and the pertinent facts. It is not enough for the taxpayer to demonstrate that it is conceivable that the assessment is too high. The taxpayer cannot use another, equally arbitrary method, to demonstrate that the amount of net tax assessed by the Minister was too high. . . .

[22] These comments from Bowman J. and Bédard J. are entirely applicable in this case.

[23] I am dismissing the taxpayer's appeals with respect to the amount of unreported income from Glo-Hair.

Penalties

[24] The remaining issue is whether the penalties assessed for income tax and GST purposes were warranted.

[25] The classic description of the circumstances in which so-called gross negligence penalties are warranted is set out by the Federal Court of Appeal in *Venne v. The Queen*, 84 DTC 6247:

> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[26] Having heard Ms. Haniff's testimony, and considered the business records and other financial records put into evidence, I am entirely satisfied that her failure to maintain a cash register or other cash receipt books, sales invoices, purchase invoices or virtually any other financial records for her Glo-Hair business was done with the specific intention of cheating on her taxes. She could not put forward, nor could her counsel suggest, any other reason for taking such a cavalier approach to her record-keeping obligations. Indeed, some Canadians may wonder why she was not prosecuted.

[27] The taxpayer's counsel is correct in pointing out that the onus is on the Crown of proving gross negligence in support of such penalties. However, as stated most aptly by Pelletier J.A. of the Federal Court of Appeal in *Lacroix v. Canada*, 2008 FCA 241, 2009 DTC 5029:

> 29 . . . In the case at bar, the Minister found undeclared income and asked the taxpayer to justify it. The taxpayer provided an explanation that neither the Minister nor the Tax Court of Canada found to be credible. Accordingly, there is no viable and reasonable hypothesis that could lead the decision-maker to give the taxpayer the benefit of the doubt. The only hypothesis offered was deemed not to be credible.
>
> 30 The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts, and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanations he gave were found not to be credible. In my view, given such circumstances, one must come to the inevitable conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence. This justifies not only a penalty, but also a reassessment beyond the statutory period.
>
> . . .
>
> 32 What, then, of the burden of proof on the Minister? How does he discharge this burden? There may be circumstances where the Minister would be able to show direct evidence of the taxpayer's state of mind at the time the tax return was filed.

> However, in the vast majority of cases, the Minister will be limited to undermining the taxpayer's credibility by either adducing evidence or cross-examining the taxpayer. Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of subparagraph 152(4)(*a*)(i) and subsection 162(3).
>
> 33 As Justice Létourneau so aptly put it in *Molenaar v. Canada*, 2004 FCA 349, 2004 DTC 6688, at paragraph 4:
>
> > 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.
> >
> > [Emphasis added.]

[28] The comments of Pelletier J.A. in *Lacroix* and Létourneau J.A. in *Molenaar* are wholly applicable in this case.

[29] For these reasons, the taxpayer's appeals are dismissed except to the extent of the additional expenses set out above that have been agreed to.

[30] At the parties' request, the parties are invited to file written submissions as to an appropriate cost award in this case within 30 days of the date hereof.

Signed at Ottawa, Canada, this 18th day of February 2011.

"Patrick Boyle"

Boyle J.

CITATION:	2011 TCC 112
COURT FILE NOS.:	2008-3837(IT)G, 2008-3838(GST)G
STYLE OF CAUSE:	SYLVIA HANIFF v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

Counsel for the Appellant:	Osborne G. Barnwell
Counsel for the Respondent:	Justin Kutyan

COUNSEL OF RECORD:

For the Appellant:

Name:	Osborne G. Barnwell
Firm:	Toronto, Ontario

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada