

Docket: 2009-1160(IT)G

BETWEEN:

AZIZULLAH HAFIZY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Foroozan Honari 2009-1159(IT)G and *Melanie Tacanay* 2009-1148(IT)G
on February 8, 2012 at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Alisa Apostle

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from the reassessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are allowed, without costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment to give effect to the Minister's concessions as set out below:

MR. HAFIZY

EXPENSE

	<u>2003</u>	<u>2004</u>
Advertising	\$18,630	\$14,583
Professional Dues	\$2,390	\$2,490
Phone	\$2,615	\$2,346

3 rd Party Payments	\$602	\$567
Meals	\$5,200	\$5,200
Supplies	\$2,400	\$2,400
Parking	\$640	\$640

Signed at Ottawa, Canada this 16th day of February 2012.

“G. A. Sheridan”

Sheridan J.

Docket: 2009-1159(IT)G

BETWEEN:

FOROOZAN HONARI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Azizullah Hafizy 2009-1160(IT)G and *Melanie Tacanay* 2009-1148(IT)G
on February 8, 2012 at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Alisa Apostle

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from the reassessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are allowed, without costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment to give effect to the Minister's concessions as set out below:

MS. HONARI

EXPENSE

	<u>2003</u>	<u>2004</u>
Advertising	\$25,017	\$15,054
Phone	\$2,417	\$2,027
3 rd Party Payments	\$571	\$516

Meals	\$5,200	\$5,200
Supplies	\$2,400	\$2,400
Parking	\$640	\$640

Signed at Ottawa, Canada this 16th day of February 2012.

“G. A. Sheridan”

Sheridan J.

Docket: 2009-1148(IT)G

BETWEEN:

MELANIE TACANAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Foroozan Honari 2009-1159(IT)G and *Azizullah Hafizy* 2009-1160(IT)G
on February 8, 2012 at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Alisa Apostle

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from the reassessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are allowed, without costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment to give effect to the Minister's concessions as set out below:

MS. TACANAY

EXPENSE

	<u>2003</u>	<u>2004</u>
Advertising	\$8,941	\$16,022
Phone	\$ 0	\$ 887
3rd Party Payments	\$1,020	\$1,219

Supplies	\$1,200	\$0
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Signed at Ottawa, Canada this 16th day of February 2012.

“G. A. Sheridan”

Sheridan J.

Citation: 2012 TCC 56
Date: 20120216
Docket: 2009-1160(IT)G

BETWEEN:

AZIZULLAH HAFIZY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-1159(IT)G

AND BETWEEN:

FOROOZAN HONARI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-1148(IT)G

AND BETWEEN:

MELANIE TACANAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

Introduction

[1] The Appellants, Azizullah Hafizy, Foroozan Honari and Melanie Tacanay, are appealing the reassessments of the Minister of National Revenue under the *Income Tax Act* of their 2003 and 2004 taxation years disallowing various expenses claimed

in respect of their real estate business. The main basis for the Minister's decision was the insufficiency of supporting documentation and the dubious quality of such documents as were eventually produced by the Appellants at the audit and objection stage.

[2] The appeals were heard together on common evidence. The Appellants agreed that, as the person responsible for the management of the business, Mr. Hafizy would give evidence on behalf of all three Appellants, subject to the right of Ms. Honari and Ms. Tacanay to add their own evidence at the conclusion of his testimony. Ms. Tacanay ultimately declined to do so but Ms. Honari testified briefly to provide some additional information in respect of certain points raised in Mr. Hafizy's testimony. More will be said about their evidence below.

Analysis

[3] All three Appellants claimed various amounts in respect of the following categories of expenses: advertising, professional dues, phone, parking, client incentives, gifts for referrals, client meals and office supplies. Mr. Hafizy also claimed amounts for management/third party costs and a capital cost allowance; Ms. Honari, third party costs only.

[4] At the commencement of the hearing, counsel for the Respondent conceded that the following amounts ought to be allowed for each of the Appellants in the 2003 and 2004 taxation years in respect of the categories set out below:

MR. HAFIZY

<u>EXPENSE</u>	<u>2003</u>	<u>2004</u>
Advertising	\$18,630	\$14,583
Professional Dues	\$2,390	\$2,490
Phone	\$2,615	\$2,346
3 rd Party Payments	\$602	\$567
Meals	\$5,200	\$5,200
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MS. HONARI

<u>EXPENSE</u>	<u>2003</u>	<u>2004</u>
Advertising	\$25,017	\$15,054
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MS. TACANAY

<u>EXPENSE</u>	<u>2003</u>	<u>2004</u>
Advertising	\$8,941	\$16,022
Phone	\$ 0	\$ 887
3rd Party Payments	\$1,020	\$1,219
Supplies	\$1,200	\$0

[5] For the reasons set out below, the Appellants have not persuaded me that they are entitled to more than the amounts conceded by the Minister. Accordingly, the appeals are allowed and the reassessments referred back to the Minister for reconsideration and reassessment only to give effect to the above concessions.

[6] As was explained at the hearing, the onus was on the Appellants to show that they had incurred the expenses claimed and that such expenditures had a business purpose. Before itemizing some of the weaknesses of their evidence, I would note the following positive elements flowing from their testimony: I accept that Mr. Hafizy worked hard to establish his business and that he is a man who ensures his business creditors are paid. I also believe Ms. Honari's evidence that she and Ms. Tacanay find him to be a respectful and fair person and that they enjoy a good working relationship with him.

[7] The difficulty is, however, that the Appellants' failure to keep proper books and records coupled with their practice of dealing in cash has made it impossible for them to prove their claims. No explanation was given for not having kept records. As for the numerous cash transactions, Mr. Hafizy testified that certain suppliers insisted on cash before they would give him a 'discount' on the amount due. He did not expand on the nature of such a discount. Both Mr. Hafizy and Ms. Honari also tried to justify their cash dealings by explaining that in their particular niche of the real estate market, they were expected to offer incentives to their clients, for example, paying for such client costs as moving expenses, legal fees, home staging, house cleaning, new appliances or other gifts for the new home. Mr. Hafizy said they were also expected to reward individuals who referred clients to them. The client incentives were almost always in cash; the referral rewards were paid in cash and sometimes by cheque.

[8] In the recent Federal Court of Appeal decision, *House v. Canada*, [2011] F.C.J. No. 1220, the Court noted at paragraph 80:

80 ... that, depending on the circumstances of the case, a taxpayer may be required, in addition to his oral testimony, to adduce supporting documents to prove a given point. In both *Njenga* and *Scragg* [discussed by the Court in the preceding paragraphs], the Court was not satisfied with the taxpayer's credibility. In *Redrupp*, the Tax Court Judge was of the view that the nature of the claims being made by the taxpayer required supporting documents.

[9] Here, I would not go so far as to say Mr. Hafizy and Ms. Honari were not credible but their testimony was not strong enough to make their case without supporting documentation. Their practice of dealing in cash and not keeping records left too many gaps and unanswered questions in their evidence.

[10] Mr. Hafizy was cross-examined in his capacity as the member of the business responsible for paying the bills and managing the bank accounts of the business. In support of the Minister's contention regarding the unreliability of the materials produced by the Appellants, counsel for the Respondent took him carefully through some of the Appellants' exhibits; following the hearing, I made my own review of the documents filed by the Appellants. In my view, the testimony of Mr. Hafizy and Ms. Honari did not serve to correct or justify the various irregularities identified in the Appellants' documentary evidence:

1. For some invoices, there are no cheques or other proof of payment of any kind (Exhibit A-5, Ms. Tacanay's 2003 expenses). Mr. Hafizy's explanation was it must have been paid in cash but he had no receipts for such payments.
2. In many cases, there is a lack of correspondence between the amount shown in the invoice and the amounts in the cheques attached thereto (Exhibit A-7, "Afghan Hindara"). Mr. Hafizy's explanation was that the balance must have been paid in cash. He had no receipts and also admitted there would be no corresponding cash withdrawal from his bank account because he often took out an amount well in excess of the amount due in a particular invoice to distribute among other suppliers and/or clients.
3. Many of the invoices are not dated and rather than showing a specific billing date for the supply or service rendered, indicate a global billing period, generally, the full year (Exhibit A-7, "Resale Homes"; Exhibits A-1 and A-4, "Zarnegaar" for 2003 and 2004, respectively). Over the

course of Mr. Hafizy's cross-examination, it finally came out that having no records of his own, to comply with the Canada Revenue Agency's demand for documentation he had to request invoices from suppliers after the fact. While there is nothing wrong, in principle, with going to a secondary source, to be reliable, such documents ought to be copies of the actual invoices originally sent to the taxpayer on a certain date for a specific billing period, not a newly created summarizing invoice.

4. In some cases, the cheques produced as proof of payment of certain invoices are dated prior to the date on the invoice (Exhibit A-7, "Likha"; Exhibit A-2, "Taliba"). Mr. Hafizy's explanation was that he sometimes paid amounts in advance of the invoice, a kind of payment on account of what he knew would be billed later. In other cases, he would be late in paying invoices but his suppliers knew him well enough to know they would ultimately be paid.
5. Some of the cheques attached to the invoices were for the wrong year or had been paid on Ms. Honari's account instead of Mr. Hafizy's account (Exhibit A-3). Some were made out to individuals instead of the company name on the invoice (Exhibit A-3, "Communications Depot", "Philippine Reporter"; Exhibit A-1, "Balita"). Mr. Hafizy's explanation was that these were the owners of the companies; he had simply made the cheques payable to them rather than using the business name.
6. Also included among the Appellants' documents were a bundle of photocopied cheques payable to various individuals (Exhibit A-14). Mr. Hafizy's evidence was that these were to third parties for client referrals or incentives. However, he did not identify the payees as being related to any particular real estate transactions and had no records that could provide such information. Furthermore, with the exception of cheque #088 to "Jessica Topaz" bearing the vague memo "for the house for Melanie", there is nothing in the cheques themselves to link them to a business purpose. In these circumstances, there is no way of verifying that the amounts paid to these individuals had anything to do with the Appellants' business.
7. Finally, Exhibit A-17 contained copies of cheques made out to 'cash' ranging in amount from \$350 to \$4,000. Again, there is no way to connect any of these cheques to a particular business expense.

[11] Considered against this backdrop, it seems to me that the concessions presented by the Minister at the hearing are more than fair. In her testimony, the Appeals Officer in charge of the Appellants' files stated that given the lack of documentation in general and the discrepancies in the various documents produced by the Appellants from time to time, she could only estimate what expenses ought to be allowed on the best information available. In doing so, she reviewed the copies of all cancelled cheques and the credit card statements. All amounts that, on the face of it, could reasonably be attributed to business-related creditors (for example, advertising or office supplies) were accepted. In the absence of documentation, she relied on averages from Statistics Canada, the auditors' conclusions and/or her own judgment of what was reasonable based on her 9 years' experience as an Appeals Officer. She was further guided by the desire of the Canada Revenue Agency to reach a reasonable settlement with the Appellants.

[12] Even leaving aside the methodology and motivations of the Appeals Officer, the Appellants have failed to meet their onus of showing that they are entitled to any amounts in excess of those conceded by the Minister at the hearing. Accordingly, the appeals of each Appellant are allowed, without costs, but only to the extent contemplated by the Minister's concessions as set out above.

Signed at Ottawa, Canada this 16th day of February 2012.

"G. A. Sheridan"

Sheridan J.

CITATION: 2012 TCC 56

COURT FILE NO.: 2009-1160(IT)G; 2009-1159(IT)G;
2009-1148(IT)G

STYLE OF CAUSE: AZIZULLAH HAFIZY AND HER
MAJESTY THE QUEEN; AND BETWEEN
FOROOZAN HONARI AND HER
MAJESTY THE QUEEN; AND BETWEEN
MELANIE TACANAY AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 8, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: February 16, 2012

APPEARANCES:

For the Appellants:	The Appellants themselves
Counsel for the Respondent:	Alisa Apostle

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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Ottawa, Canada