

Dockets: 2013-2091(GST)I  
2014-1493(GST)I  
2016-839(GST)I  
2016-4837(IT)G

BETWEEN:

PAUL BUDAY O/A BUDAY AUTO SALES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on common evidence with the appeal of *Glen Buday*  
(2016-4831(IT)G) on May 29, 30, 31 and June 1, 2018 and May 6, 8, 9,  
10, 13 and 14, 2019, at Thunder Bay, Ontario

Before: The Honourable Justice David E. Graham

Appearances:

Agent for the Appellant:

Glen Buday

Counsel for the Respondent:

Paul Klippenstein

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**JUDGMENT**

1. The appeal of the Appellant's reporting periods from October 1, 2006 to December 31, 2008 is allowed and the matters referred back to the Minister of National Revenue for reassessment on the basis that net tax be reduced by the following amounts in the following reporting periods:

<b>Reporting Period</b>	<b>Reduction in net tax</b>
Oct. 1 – Dec. 31, 2006	\$155
Jan. 1 – Mar. 31, 2007	\$171
Apr. 1 – Jun. 30, 2007	\$416

Jul. 1 – Sep. 30, 2007	\$416
Oct. 1 – Dec. 31, 2007	\$665
Jan. 1 – Mar. 31, 2008	\$496
Apr. 1 – Jun. 30, 2008	\$1,157
Jul. 1 – Sep. 30, 2008	\$182
Oct. 1 – Dec. 31, 2008	\$328

2. The appeal of the Appellant's reporting periods from January 1, 2009 to December 31, 2011 is allowed and the matters referred back to the Minister for reassessment on the basis that net tax be reduced by the following amounts in the following reporting periods:

<b>Reporting Period</b>	<b>Reduction in net tax</b>
Oct. 1 – Dec. 31, 2009	\$2,219
Apr. 1 – Jun. 30, 2010	\$194
Oct. 1 – Dec. 31, 2010	\$506
Oct. 1 – Dec. 31, 2011	\$2,030

3. The appeal of the Appellant's reporting period from October 1 to December 31, 2013 is allowed and the matter referred back to the Minister for reassessment on the basis that net tax be reduced by \$2,799.
4. The appeals of the Appellant's 2006 to 2011 tax years are allowed and the matters referred back to the Minister for reassessment on the basis that:
- (a) the Appellant's only business income in 2006 was his \$59,947 in income from the partnership;
  - (b) the Appellant's only business income in 2007 was his \$60,177 in income from the partnership;
  - (c) the Appellant's only business income in 2008 was his \$107,800 in income from the partnership;
  - (d) the Appellant's only business income in 2009 was his \$33,600 in income from the partnership;

(e) the Appellant's only business income in 2010 was his \$84,421 in income from the partnership; and

(f) the Appellant's only business income in 2011 was his \$72,711 in income from the partnership.

5. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the parties shall have a further 30 days to serve and file written submissions on costs and the parties shall have yet a further 10 days to serve and file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, the parties shall bear their own costs.

Signed at Ottawa, Canada, this 4th day of June 2019.

“David E. Graham”

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Graham J.

Docket: 2016-4831(IT)G

BETWEEN:

GLEN BUDAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on common evidence with the appeals of *Paul Buday o/a Buday Auto Sales* (2013-2091(GST)I), (2014-1493(GST)I), (2016-839(GST)I) and (2016-4837(IT)G) on May 29, 30, 31 and June 1, 2018 and May 6, 8, 9, 10, 13 and 14, 2019, at Thunder Bay, Ontario

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant:

The Appellant himself

Counsel for the Respondent:

Paul Klippenstein

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**JUDGMENT**

1. The appeals of the Appellant's 2006 to 2011 tax years are allowed and the matters referred back to the Minister of National Revenue for reassessment on the basis that:
  - (a) the Appellant had no employment income in 2006, 2007, 2008, 2009, 2010 and 2011;
  - (b) the Appellant's only business income in 2006 was his \$59,947 in income from the partnership;

- (c) the Appellant's only business income in 2007 was his \$60,177 in income from the partnership;
- (d) the Appellant's only business income in 2008 was his \$107,800 in income from the partnership;
- (e) the Appellant's only business income in 2009 was his \$33,600 in income from the partnership;
- (f) the Appellant's only business income in 2010 was his \$84,421 in income from the partnership; and
- (g) the Appellant's only business income in 2011 was his \$72,711 in income from the partnership.

2. The appeal of the Appellant's 2012 tax year is dismissed.
3. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the parties shall have a further 30 days to serve and file written submissions on costs and the parties shall have yet a further 10 days to serve and file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, the parties shall bear their own costs.

Signed at Ottawa, Canada, this 4th day of June 2019.

“David E. Graham”

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Graham J.

Citation: 2019 TCC 128  
Date: 20190604  
Dockets: 2013-2091(GST)I  
2014-1493(GST)I  
2016-839(GST)I  
2016-4837(IT)G

BETWEEN:

PAUL BUDAY O/A BUDAY AUTO SALES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2016-4831(IT)G

AND BETWEEN:

GLEN BUDAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Graham J

[1] Buday Auto Sales is a used car dealership located in Thunder Bay, Ontario. Paul Buday and his son, Glen Buday, both work in the business. The business was registered for GST/HST purposes under Paul Buday's name. The GST/HST returns indicated that the business had approximately \$1,600,000 in sales from 2006 to 2011. However, during those years neither Paul Buday nor Glen Buday reported the business' activities in their income tax returns. The Minister of National Revenue audited the business. As the business did not follow any discernable method of bookkeeping, the Minister used a number of different alternative assessment techniques to determine the business' income and net tax. The Minister concluded that the business had failed to collect approximately \$41,000 in

GST/HST, had inappropriately claimed approximately \$56,000 in input tax credits and had failed to report more than \$1,000,000 in income.

[2] It was unclear to the Minister who the true owner of the business was. Therefore, to be safe, the Minister assessed both Paul Buday and Glen Buday for the entire alleged unreported income. Since Paul Buday was the person registered for GST/HST, the Minister reassessed Paul Buday for the alleged discrepancy in the business' net tax. The Minister imposed gross negligence penalties in respect of all of these adjustments.

[3] In a separate audit, the Minister also reassessed Paul Buday to deny approximately \$11,000 in input tax credits for the business' reporting period from October 1 to December 31, 2013. The Minister also reassessed Glen Buday to recharacterize his 2012 employment income as business income.

[4] The Appellants have appealed all of these reassessments.

#### **A. Issues**

[5] There are four main issues in these appeals:

- (a) What was the business' income and net tax in the years and reporting periods in question?
- (b) To the extent that there was unreported income, who should have reported it?
- (c) Were any of the years or reporting periods statute barred?
- (d) Were the gross negligence penalties justified?

[6] There are also some minor issues regarding the unrelated HST reassessment of the October 1 to December 31, 2013 reporting period and the reassessment of Glen Buday's 2012 tax year.

#### **B. What was the business' income and net tax?**

[7] The Minister determined that the business had unreported income of \$120,742, \$129,497, \$228,098, \$110,432, \$234,472 and \$245,329 in 2006 to 2011 respectively.

[8] The Respondent called the GST/HST auditor, Ken Kemp, as a witness. I found Mr. Kemp to be credible and open minded. It was clear to me from his testimony that he had made significant efforts to determine the business' income and net tax as accurately as possible in difficult circumstances. When I questioned him regarding possible errors in his analysis, he considered my questions and, if my analysis had merit, readily accepted that changes should be made.

[9] Mr. Kemp testified that the Appellants did not provide him with any sort of bookkeeping records by which he could verify the business' income or net tax. He also explained that Glen Buday refused to provide certain records and was unwilling to discuss various findings and issues with him. Mr. Kemp stated that, as a result of this lack of records and assistance, he had to use various alternative assessment techniques to determine the business' income. He used a bank deposit analysis to determine the business' income for 2006 to 2008 and two different types of projection analysis to determine its income for 2009 to 2011.

[10] There are two primary ways in which a taxpayer can challenge an alternative assessment technique. The first is to prove that his or her records were adequate and thus that his or her income should have been determined using those records. The second, and more common method, is to challenge the determination of income made by the Minister under the alternative assessment technique.

#### Inadequate records

[11] I find that the business' records were inadequate. The business' bookkeeping consisted of little more than a single handwritten spreadsheet for each quarter showing the total revenue from vehicle sales, the total cost of the vehicles sold and the total expenses. This limited bookkeeping appears to have been done on a cash basis. There are no worksheets or other bookkeeping records showing how the totals on the quarterly spreadsheets were determined. As a result, it is not possible to determine whether a given vehicle that was sold in the quarter was reported in revenue for the quarter or not. Similarly, it is not possible to determine whether a vehicle purchased in a given quarter was expensed in that quarter or in the quarter in which it was sold. It is also impossible to know whether a given expense was claimed and, if so, when it was claimed. Mr. Kemp explained that the documents he obtained from the Appellants do not support the totals in the Appellants' handwritten spreadsheets.

[12] The Appellants maintained two bank accounts for the business. Neither Appellant had a personal bank account. The Appellants used the business' accounts for any personal transactions. This blending of accounts makes separating business and personal transactions difficult.

[13] The Appellants testified that they kept the documents relating to each vehicle sale in a separate file folder. However, those file folders did not always contain the documents that the Appellants said they should. Furthermore, as is particularly apparent in 2010 and 2011, there were no folders at all for a significant number of vehicles that the business appears to have sold.

[14] Based on all of the above, I am satisfied that Mr. Kemp had no choice but to use alternative assessment techniques to determine the business' income.

[15] The Appellants argued strenuously that Mr. Kemp should have used the business' registration identification numbers ("RINs") to gather information from the Government of Ontario regarding the vehicles that the business had sold. Glen Buday explained that all vehicle sales in Ontario have to be recorded with the government. He stated that all sales that the business made were registered using one of the business' RINs and thus that, using those RINs, it would have been easy to obtain a list of all of the vehicles that the business sold in the years in question. Mr. Kemp testified that he tried several times to obtain this information from the province but was unsuccessful. The Appellants submitted that, in failing to obtain these records from the province, Mr. Kemp had failed to conduct a proper audit. I disagree.

[16] Canada has a self-reporting tax system. It was the Appellants' responsibility to maintain proper books and records from which the business' income could be determined. They did not. If they believed that the province had information which could assist them in the audit, it was up to them to get that information from the province and provide it to Mr. Kemp. Similarly, if they believed that this information would exonerate them, they should have provided it to me. I draw an adverse inference from their failure to do so. The Appellants clearly realized how important this information was and believed that it would definitively reveal that all of the vehicles sold in the business had been reported for GST/HST purposes. I conclude that they did not provide this information to me because, had they done so, it would have shown that the business sold more vehicles than it reported.

[17] Before moving on to review the techniques used by Mr. Kemp, I would like to clarify the basis upon which I approached this analysis. If the Appellants had

been represented by counsel, I would have been reluctant to delve into Mr. Kemp's calculations on my own. I would, instead, have relied on the Appellants' counsel to direct me to any errors that Mr. Kemp made. However, since the Appellants were unrepresented and the calculations were very complex, I felt it would be unfair if I did not review Mr. Kemp's calculations myself. That said, in doing so I looked for any errors in Mr. Kemp's analysis, not just errors that benefited the Appellants. While fairness forced me to take a more active role in the trial, it did not remove the requirement that I maintain my impartiality.

[18] I will now turn to an analysis of the techniques that Mr. Kemp used.

#### Bank deposit analysis (2006 – 2008)

[19] For 2006 to 2008, Mr. Kemp used a bank deposit analysis to determine whether the business had unreported revenue. He verified the business' expenses using traditional audit techniques.

[20] A bank deposit analysis is an alternative method of determining revenue that is sometimes used by the Minister when the Minister believes that a taxpayer's records are inadequate. A bank deposit analysis generally involves asking a taxpayer to explain the source of each deposit to his or her bank account. The Minister includes in revenue any deposits that the taxpayer admits were revenue and any deposits whose source the taxpayer cannot adequately explain. If the taxpayer is able to satisfy the Minister that the deposit comes from a non-taxable source or has already been reported in the taxpayer's income, the Minister ignores the deposit.

[21] I am satisfied that a bank deposit analysis was an appropriate alternative assessment technique for Mr. Kemp to use to determine the business' revenue in 2006, 2007 and 2008. If anything, it was a conservative approach. A portion of the business' sales were cash sales. There is a risk that such sales may not have been deposited into the business' bank accounts. Any such sales would not have been detected by the bank deposit analysis. Thus, if anything, Mr. Kemp's analysis may have underestimated the business' revenue.

[22] Subject to the following, I am also satisfied with the manner in which Mr. Kemp conducted his bank deposit analysis.

[23] At the beginning of the trial, the Respondent conceded that Mr. Kemp had erroneously included Paul Buday's pension payments as unexplained deposits in the deposit analysis. As these payments were being garnished, it was not immediately obvious that they were, in fact, pension payments. Paul Buday reported his pension income when he filed his tax returns so these deposits should not have been included in the revenue determined by the deposit analysis. This concession reduces the unexplained deposits by \$2,100, \$8,219 and \$5,565 in 2006, 2007 and 2008 respectively.

[24] In a bank deposit analysis, after the auditor identifies an unexplained deposit, he or she needs to back out any sales tax associated with that deposit in order to determine the amount of the deposit that actually represents the revenue of the business. While Mr. Kemp realized that he needed to do this, he made several errors in doing so:

- (a) First, he backed the sales tax out at the wrong step in the process. The purpose of a bank deposit analysis is to arrive at total revenue and compare it to the revenue reported by the taxpayer. Mr. Kemp took the total unexplained deposits and subtracted the reported revenue to arrive at what he believed was unreported deposits. He then backed the Ontario retail sales tax and GST out of that figure to arrive at unreported revenue. This methodology was inappropriate. Mr. Kemp should have taken the total unexplained deposits, backed the sales tax out of them to arrive at unexplained sales and then compared those to the sales that the business had reported.
- (b) Second, Mr. Kemp used the wrong fraction to back out the sales tax in 2006 and 2007.<sup>1</sup>
- (c) Third, Mr. Kemp forgot to account for sales to Status Indians. Sales of vehicles to Status Indians do not attract sales tax if the vehicles are delivered on a reserve.<sup>2</sup> Mr. Kemp determined based on a review of sales invoices that were provided to him that, on average, 24% of the business' sales were to Status Indians. However, when backing out the tax, he did not account for the fact that tax would not have applied to 24% of the

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<sup>1</sup> Taking Ontario retail sales tax into account, the correct fraction was 100/114 (8% RST and 6% GST) for 2006 and 2007 and 100/113 (8% RST and 5% GST) for 2008.

Mr. Kemp erroneously used 100/113 for all years.

<sup>2</sup> *Indian Act*, RSC 1985, c I-5, s. 87.

deposits. Similarly, when determining the GST collectible on the resulting unreported revenues, he did not account for the fact that 24% of the sales would not have attracted GST.

[25] I brought these errors to Mr. Kemp's attention. He was quick to acknowledge the errors. I provided the parties with a spreadsheet on which I had calculated the adjustments I believed were necessary to correct the above errors and to implement the Respondent's concession.<sup>3</sup> The Respondent accepts the methodology that I used to correct the errors. The Appellants did not point out any errors in my methodology.

[26] I made one other adjustment to Mr. Kemp's calculations. The Respondent did not agree with this change. A bank deposit analysis will normally reveal unreported revenue for a given period. However, from time to time, it will also reveal that, in a given period, the taxpayer reported more revenue than was deposited to the bank. In other words, the result of the analysis for that period will be a negative number. Typically, the Minister ignores the result for these periods. In doing so the Minister often assumes that the taxpayer must have had cash sales that were not deposited to the account but were reported. While this is one possible explanation, it is equally possible that there was simply a timing difference between the deposits and the reporting. Funds earned in the period may have been deposited in a different period. A bank deposit analysis is a blunt tool. In my view, once the Minister chooses to use that tool, unless she can provide a logical explanation for why the results should be ignored for a given period, she is stuck with the results, both good and bad. Absent such an explanation, she cannot pick the results that benefit her and ignore those that do not.

[27] Once the appropriate adjustments were made to Mr. Kemp's analysis, the results revealed that there were four quarters in which the reported revenue exceeded the bank deposits. The Minister has not satisfied me that these negative results should be ignored. Accordingly, I included them as part of my spreadsheet. While the Respondent takes the position that these quarters should not have been included, she accepts that, having made the choice to include them, my calculations are correct. The Appellants did not identify any errors in my calculations.

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<sup>3</sup> Exhibit CS-2.

[28] Based on all of the foregoing, I determined that the business' income should be reduced by \$848 in 2006, \$9,144 in 2007 and \$12,498 in 2008 and that its net tax should be reduced by the following amounts in the following reporting periods:

<b>Reporting Period</b>	<b>Reduction in net tax</b>
Oct. 1 – Dec. 31, 2006	\$155
Jan. 1 – Mar. 31, 2007	\$171
Apr. 1 – Jun. 30, 2007	\$416
Jul. 1 – Sep. 30, 2007	\$416
Oct. 1 – Dec. 31, 2007	\$665
Jan. 1 – Mar. 31, 2008	\$233
Apr. 1 – Jun. 30, 2008	\$1,157
Jul. 1 – Sep. 30, 2008	\$182
Oct. 1 – Dec. 31, 2008	\$328

[29] I should also discuss an adjustment that I have not made. Mr. Kemp treated all unexplained deposits to the business' bank accounts as revenue from consignment sales. The Appellants objected to this treatment. Glen Buday testified that very few of the business' sales were consignment sales. I am prepared to accept that the sales were consignment sales for two reasons. First, as set out in detail below, I did not find Glen Buday credible. Second, treating the unreported deposits as revenue from consignment sales was a generous approach that benefited the Appellants. If the Respondent is happy with the approach, I see no reason to change it. When a dealer sells a vehicle on consignment, he or she collects GST on the entire sales price but only pays income tax on the commission that he or she earns on the sale. In keeping with this treatment, Mr. Kemp assessed GST on the full amount of the unexplained deposits but only included a portion of the sale price of the vehicle in income. Mr. Kemp did not know how much commission would have been made on these unidentified vehicles. As a result, he made an assumption that it would have been 25% of the sales price. Thus, for every \$100 of selling price, Mr. Kemp included \$25 in the business' revenue. Had Mr. Kemp treated the unreported sales as normal sales, I find that he would instead have included \$71 in the business' income.<sup>4</sup> At the same time, changing the sales to normal sales would have had no effect on the business' net tax. The GST collectible would have remained the same and, without invoices supporting any

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<sup>4</sup> The average purchase price calculated by Mr. Kemp for 2010 and 2011 those years was 29% of the average sale price. Thus, for every \$100 of sales, \$29 would have covered the purchase price leaving \$71 of income.

GST paid on the purchase of the vehicles, no input tax credits would have been allowed.<sup>5</sup>

[30] Glen Buday was also adamant that the commission rate of 25% that Mr. Kemp assumed was inappropriate. He explained that there was no standard percentage commission on a consignment sale. He explained that he and the vendor agreed what the vendor would receive if the business were able to sell the vehicle. He testified that if the business sold the vehicle for more than that, then the business kept the excess. However, he emphasized that there were always expenses associated with preparing and selling the vehicle that had to be paid out of that commission. Glen Buday argued that because the price negotiated with the vendor, the price the vehicle was sold for and the costs of selling the vehicle were all variable, it was impossible to state a standard percentage that his commission represented. He submitted that the only way to accurately determine the profit on each consignment sale was to calculate it based on the facts of the specific sale. I agree. There is no doubt that the most accurate way of determining the business' profits would have been to properly track and account for each sale and all expenses. The Appellants did not do that and their inadequate records did not allow Mr. Kemp to do so. In essence, the Appellants are arguing that they should not have to pay tax on their consignment profits because, due to their poor record keeping, it is too difficult to determine what those profits were. This is not how a self-reporting tax system works. In the circumstances, I am satisfied that the 25% commission used by Mr. Kemp in his calculations was appropriate. I am also satisfied that the method that Mr. Kemp used to determine expenses ensured that the business has received appropriate credit for the expenses that it incurred in making those consignment sales.

[31] Finally, I will turn to the expenses and input tax credits for 2006 to 2008. Mr. Kemp directed me to working papers in which he had identified the input tax credits that he had allowed for the reporting periods from October 1, 2006 to December 31, 2008. He explained that any expenses that he had allowed for input tax credit purposes had also been allowed for income tax purposes.

[32] A transposition error occurred in one of the working papers for the reporting period from January 1 to March 31, 2008.<sup>6</sup> I will adjust the error by allowing an additional \$263 in input tax credits in that reporting period.

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<sup>5</sup> Subsection 169(4) of the *Excise Tax Act*.

<sup>6</sup> Exhibit R-1, Tab 1 pg. 6 and Exhibit R-1, Tab 74.

[33] Glen Buday complained that it was unfair that the Appellants were not provided with a list of the input tax credits that Mr. Kemp had denied. He stated that without such a list he did not know what he needed to attack. His complaints are baseless. The Appellants did not keep records. Mr. Kemp did not provide the Appellants with a list of the input tax credits he denied because Mr. Kemp does not know which input tax credits the business claimed and thus cannot possibly know which ones he denied.

[34] The Appellants did not provide me with any means by which I could determine whether the business was entitled to claim additional input tax credits or expenses. While they may not have had proper books and records when they were audited, they have had ample opportunity since then to review the documents that they had and prepare a properly supported list of input tax credits and expenses for the business. They have not done so. Glen Buday simply directed me to review all of the documents contained in the 19 volumes of documents that the Respondent had entered into evidence. That is not my role. I am neither the business' bookkeeper nor its accountant. The Appellants know what documents they gave to Mr. Kemp. They know what input tax credits he allowed. If they thought that they should have been allowed an input tax credit in respect of some other documented expense, it would have been easy for them to provide me with that evidence. They did not. They clearly believed that someone – Mr. Kemp, the appeals officer, counsel for the Respondent, me, anyone but themselves – should do the work for them. They were repeatedly warned that this was not the case but they stubbornly persisted in their belief. In the absence of any evidence from the Appellants on this point, I find that the business was not entitled to any input tax credits or expenses beyond those already allowed. If this means that the business owes more tax than it otherwise would, the Appellants have no one to blame but themselves.

[35] Mr. Kemp's audit was primarily focused on GST. As a result, when reviewing expenses for 2006 to 2008, he was not concerned with expenses such as wages, interest or insurance that do not attract GST. As a result, he did not make any adjustments for these types of expenses when calculating the business' expenses for income tax purposes. I pointed this fact out to the Appellants and directed them to the working papers where Mr. Kemp had made adjustments for these types of expenses in 2010 and 2011. I suggested that they may want to consider whether similar expenses were incurred in 2006, 2007 and 2008 and, if so, point me to evidence supporting those expenses. They did not do so. I cannot understand why. It appears to me that it would have been relatively easy to do so and would likely have resulted in savings that would have justified the effort.

Whatever the reason, I will not be making any adjustments in respect of these types of expenses in these years.

[36] Given the focus that the Appellants put on this issue in their oral testimony, I feel that I should address the issue of Paul Buday's rent. Paul Buday rented an apartment in Scarborough, Ontario. The apartment was Paul Buday's primary residence. Nonetheless, he claimed that the apartment was used purely for business purposes, that it contained an office and storage area where he stored parts and paperwork and that he should be entitled to deduct his entire rent. The vast majority of Paul Buday's rent expense was clearly a personal expense and thus not deductible. Subsection 18(12) of the *Income Tax Act* sets out specific conditions that must be met for an individual to deduct a portion of his or her home workspace. Paul Buday's use of the office and storage area do not meet these conditions. Thus, no part of his rent is a deductible expense.

#### Projection Analysis (2009)

[37] Mr. Kemp testified that he did not think that a bank deposit analysis was a reliable audit technique to use for the 2009 to 2011 tax years. He explained that he had begun his audit of the 2006 to 2008 tax years in early 2009. Thus, he felt that the Appellants had been forewarned and may have taken steps to hide income in a manner that a bank deposit analysis would not reveal. I understand Mr. Kemp's concerns and accept his decision to use a different technique to determine the business' income for 2009 to 2011.

[38] That said, I am not satisfied that the technique Mr. Kemp used in 2009 was appropriate. It appears to me that, when auditing 2009, Mr. Kemp had not yet fully developed the projection analysis method that he would ultimately use in 2010 and 2011. I am not satisfied that the approach he used in 2009 represents a fair estimate of the business' revenue. I am particularly concerned that the technique was not able to properly account for year-end inventory.

[39] At the beginning of the trial, the Respondent made a concession regarding Mr. Kemp's calculations for 2009. As I have not accepted Mr. Kemp's methodology, I have ignored that concession.

[40] The fact that I do not accept the alternative assessment technique employed by Mr. Kemp in 2009 does not, however, mean that the 2009 reassessments should be reversed. It remains the case that there was a business and that neither of the

Appellants reported that business' income. While neither the Appellants nor the Respondent has presented me with a viable means of determining the income from the business, there is nonetheless ample evidence before me to allow me to do so.

[41] In the circumstances, I chose to use a very rough alternative assessment technique. To calculate the income from the business in 2009, I took the sales reported for GST purposes. I then backed out the amount that Mr. Kemp had determined had been paid out to vendors in consignment sales to arrive at total reported revenue. Mr. Kemp identified a number of vehicle sales that he believed were not reported in 2009. I am satisfied that three of those vehicles were unreported. Mr. Kemp determined an average sale price for reported vehicles sold by the business in 2009. I multiplied that price by the number of unreported vehicles and added the result to the total reported revenue. I compared that amount to the additional revenue assessed by Mr. Kemp and determined that a reduction was necessary. I determined the purchase price for the three unreported vehicles using calculations made by Mr. Kemp regarding 2010 and 2011.<sup>7</sup> I added these additional expenses to the reduction that I had already calculated to determine an overall income reduction of \$43,233. I then made appropriate adjustments to net tax factoring in sales to Status Indians. I did not allow input tax credits on the three unreported vehicle purchases as I had not seen evidence that GST was paid on those purchases.<sup>8</sup> The resulting reduction in net tax was \$2,129. I provided the parties with copies of my calculations.<sup>9</sup> During argument, I pointed out a small error that I had made. While the Respondent takes the position that Mr. Kemp's technique was suitable, once the error in my calculations is fixed, the Respondent accepts that I have done my calculations correctly. The Appellants did not identify any additional errors in my calculations.

[42] The unreported income calculated using my technique is significantly lower than the unreported income for any of the other years. This is because my technique relies on the accuracy of the business' GST returns and, as set out above and in the analysis of 2010 and 2011, the GST/HST returns for the other reporting periods understated supplies and overstated input tax credits. However, in the circumstances, short of trying to create books and records for the business, it is the best calculation that I can make with the evidence available to me.

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<sup>7</sup> Mr. Kemp's analysis shows that the average purchase price for a vehicle in those years was 29% of its sale price. I applied that same percentage to the average sale price that Mr. Kemp had calculated for 2009.

<sup>8</sup> *Excise Tax Act*, s. 169(4).

<sup>9</sup> Exhibit CS-3.

[43] Finally, I will turn to the input tax credits and expenses for 2009. My comments from my analysis of 2006 to 2008 are equally applicable to 2009. I will not be making any adjustments to those amounts.

[44] Glen Buday testified that, starting in 2009, he rented a house near Thunder Bay. The house was his primary residence. He explained that it had a two car garage where he repaired vehicles. He claimed to have worked on four vehicles a week in the garage. He also testified that he had an office in the home and that he stored some inventory on the property. The Appellants submit that the business should be entitled to deduct all of Glen Buday's rent. Clearly that is not the case. A significant portion of it is a personal expense. Furthermore, just as subsection 18(12) of the *Income Tax Act* prevented the deduction of any portion of Paul Buday's rent, it also prevents the deduction of any portion of Glen Buday's rent.

#### Projection Analysis (2010 – 2011)

[45] Mr. Kemp used a projection analysis to determine the business' income and net tax in 2010 and 2011. In essence, he went through every document that he could locate for the business and noted every vehicle that was referred to in those documents. He looked at purchase documents, sales invoices, repair invoices, Kijiji ads, AutoTrader ads, car wash receipts, shipping receipts, parts receipts and many other documents. He then compiled a comprehensive list of all of the vehicles and documents in a spreadsheet. He sorted the list by vehicle type and then went about the painstaking exercise of trying to determine whether the documents for a given vehicle type were for one vehicle or multiple vehicles. Where the information was noted on the documents, he used the vehicle identification number, colour, trim level and number of doors to sort the vehicles. Where Kijiji ads were placed, he distinguished the vehicles using the ad reference numbers. If he was able to determine the purchase or sale date of a particular vehicle, he used that information in the sorting as well.

[46] An example will help clarify Mr. Kemp's methodology. If Mr. Kemp reviewed a receipt for a Kijiji ad that showed that the business had advertised a blue 2000 Dodge Caravan for sale, he would add a 2000 Caravan to the spreadsheet and note its colour. If a repair receipt indicated that the business had repaired a 2000 Caravan, it would be added to the list as well. If the repair receipt described the Caravan as blue, Mr. Kemp would assume it was the same Caravan

as the one that appeared in the Kijiji ad. If it described it as white, he would assume that it was a different vehicle.

[47] Ultimately, Mr. Kemp came up with two very large spreadsheets identifying 158 vehicles that he believed the business had been involved with in 2010 and 173 that he believed the business had been involved with in 2011. From these lists, Mr. Kemp identified 87 vehicles that he believed the business had not reported for GST purposes in 2010 and 90 vehicles that he believed the business had not reported for GST purposes in 2011. Mr. Kemp made an assumption that the business had 20 vehicles in inventory at year end and reduced the unreported vehicle figures in each year accordingly. Mr. Kemp then multiplied the reduced unreported vehicle figures by the average sale price of reported vehicles for the years to arrive at unreported revenue. For GST/HST purposes, he adjusted that unreported revenue to account for assumed sales to Status Indians and arrived at a figure for unreported taxable supplies. He then applied the applicable GST/HST rate to those supplies. Since HST was not introduced in Ontario until July 1, 2010, he assumed that half of the unreported taxable supplies for 2010 occurred in the first half of 2010. On the expense side, Mr. Kemp multiplied the number of unreported vehicles by the average purchase price of reported vehicles for the year. He made the generous assumption that GST/HST had been paid on those purchase expenses.<sup>10</sup>

[48] I find that the system used by Mr. Kemp was a reasonable way to calculate the business' unreported income and net tax. The spreadsheets prepared by Mr. Kemp were both helpful and informative. In essence, Mr. Kemp's analysis is based on the assumption that the business would not have washed, repaired or advertised a vehicle if that vehicle was not part of the business' inventory. This was a reasonable assumption to make. Glen Buday confirmed as much numerous times in his testimony.

[49] The Appellants did not directly challenge Mr. Kemp's methodology. Instead, they focused on challenging whether specific vehicles that Mr. Kemp had identified were, in fact, vehicles that had been sold by the business.

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<sup>10</sup> Mr. Kemp made this assumption without seeing the purchase documentation and thus, without determining whether it complied with subsection 169(4) of the *Excise Tax Act*. As set out above, that was not an assumption I was prepared to make in my calculations for 2009.

[50] At the beginning of the trial, the Respondent conceded that the number of unreported vehicles in 2010 and 2011 should be reduced by 14 and 18 respectively. However, as part of the 2010 concession, the Respondent argued that four vehicles that had appeared in Mr. Kemp's list for 2009 should be moved to 2010. Thus, the net concession for 2010 was 10 vehicles.

[51] During the course of Glen Buday's testimony, the Respondent conceded that an additional vehicle should be removed from the list in 2010.<sup>11</sup>

[52] During the course of Glen Buday's testimony, he identified two occasions that a vehicle that Mr. Kemp had identified was actually two vehicles. As a result an additional two vehicles should be added to the list in 2010.<sup>12</sup>

[53] I have reduced the number of 2011 vehicles by one to account for a sale that the documents indicate resulted in a \$315 loss.<sup>13</sup> Furthermore, as that loss was not otherwise accounted for by Mr. Kemp, I have allowed it.

[54] Glen Buday repeatedly complained that Mr. Kemp's spreadsheets did not contain enough information for the Appellants to accurately identify what vehicles Mr. Kemp was referring to. He stated that Mr. Kemp should have indicated the vehicles' colour, trim level, number of doors and vehicle identification number on his spreadsheets. I find these complaints to be baseless. I am satisfied that Mr. Kemp's spreadsheets reflect the data that was available to him on the documents that he reviewed. If data is missing, it is because it was not on the documents. While there were some errors in the data on the spreadsheets, they were relatively minor and do not affect my overall view of the classifications.

[55] In his direct testimony, Glen Buday went through the spreadsheets in great detail. He spent almost a day and a half doing so. He identified many different vehicles that he said were duplicates of other vehicles or that had not been sold. All or substantially all of Glen Buday's explanations were not supported by documentary evidence. Thus, for me to accept them, I must have found his evidence to be credible and reliable. I did not.

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<sup>11</sup> Vehicle 71.

<sup>12</sup> Glen testified that Vehicle 41 was, in fact, two vehicles. He also testified that Vehicle 81 was two vehicles.

<sup>13</sup> Vehicle 93.

[56] The spreadsheets were not something that was sprung on the Appellants. They were entered into evidence during the first half of the trial. Glen Buday had almost a year to review them and compare them to the supporting documents. When the trial resumed and it became apparent that the Appellants had not properly reviewed the spreadsheets, I gave the parties a day off to allow the Appellants a final chance to properly prepare their evidence. Yet, despite being given all of these chances, Glen Buday still gave conflicting and shifting testimony regarding the vehicles. On a number of occasions, his testimony was directly contradicted by the information in the spreadsheets. Cross-examination demonstrated that a number of his explanations were inaccurate, completely contradicted by documentary evidence or inconsistent with the evidence that he had given on discovery. Glen Buday described several business practices as being invariable but documentary evidence later demonstrated that the practices were not always followed. He was frequently evasive in his testimony. He often chose to answer a question he wanted to answer rather than the one that had been asked. Frequently, he appeared to simply be making up his explanations as he went along. When one explanation was shown to be inaccurate, he seemed to just change his story to something else that he thought might explain the new facts. Ultimately, whether Glen Buday's shifting explanations regarding the vehicles were caused by an intention to deceive, an indifference to the truth, a poor memory or a lack of preparation, the effect is the same. I simply cannot rely on them.

[57] Notwithstanding the foregoing, I have accepted that certain additional vehicles should be removed. I have done so where Glen Buday's testimony was supported by logical inferences that I could make from the information in the spreadsheets and the supporting documents. I have reduced the 2010 vehicles by four on account of duplicate vehicles<sup>14</sup> and by six on account of items such as boats or parts that were not vehicles.<sup>15</sup> I have also reduced the number of 2010 vehicles by two to account for vehicles listed by Mr. Kemp where the description on the supporting document was too vague to determine with any reasonable accuracy whether the document represented a stand-alone vehicle or referred to an already identified vehicle.<sup>16</sup> I have similarly reduced the 2011 vehicles by five on

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<sup>14</sup> I found the following vehicles to be duplicates: Vehicles 44 and 45, 128 and 129, and 138 and 139. I also found that Vehicle 133 from 2010 was the same as Vehicle 144 in 2011 and would not have been part of the 2010 year-end inventory.

<sup>15</sup> Vehicles 145, 146, 154, 155, 156 and 158.

<sup>16</sup> Vehicles 137 and 157.

account of duplicate vehicles,<sup>17</sup> by three on account of items that were not vehicles<sup>18</sup> and by one on account of a vehicle based on a vague description.<sup>19</sup>

[58] Mr. Kemp identified certain vehicles based solely on purchase receipts for parts obtained from two local scrap dealers. Glen Buday testified that those dealers' invoices reflected the vehicle that the parts were taken from not the vehicle that they were going to be used on. The text of the receipts indicates otherwise. Given my concerns about Glen Buday's credibility, I am not prepared to accept his interpretation and have made no adjustments in respect of those vehicles.

[59] Based on all of the foregoing concessions and adjustments, I have reduced the number of unreported vehicles by a total of 21 in 2010 and 28 in 2011.

[60] The number of unreported vehicles is the key factor in Mr. Kemp's projection analysis. The other four factors are the average purchase price, the average sale price, the number of vehicles in inventory at the end of the year and the percentage of sales to Status Indians.

[61] While the Appellants disagree with the average purchase price and sale price figures used by Mr. Kemp, they did not provide me with an alternative method of determining these prices let alone an alternative set of prices to use. Glen Buday testified a number of times that the business did not make that much profit on its vehicles. He justified these statements by referring to the costs that the business incurred cleaning, repairing and advertising each vehicle. None of these costs is part of the purchase price of the vehicle. They have all been dealt with elsewhere in Mr. Kemp's calculations. Glen Buday occasionally pointed to specific vehicles where the difference between the purchase and sale prices was small or negative (i.e. a loss). I understand that when calculating an average there will sometimes be outliers that may skew the average one direction or another. Perhaps it may have been more appropriate for Mr. Kemp to use the median selling and purchase prices rather than the average prices. If so, the Appellants should have shown me what the median prices were. It is not my role to determine those prices for them. Based on all of the foregoing, I accept the average purchase price and sale price figures used by Mr. Kemp.

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<sup>17</sup> I found the following vehicles to be duplicates: Vehicles 2 and 7, 15 and 21, 17 and 18, 58 and 59, and 154 and 161.

<sup>18</sup> Vehicles 9, 172 and 173.

<sup>19</sup> Vehicle 79.

[62] As set out above, Mr. Kemp assumed that the year-end inventory of the business was 20 vehicles. Given the size of the dealership lot and Glen Buday's testimony, I find that 20 vehicles was an appropriate figure to use.

[63] Mr. Kemp assumed that 24% of the sales in 2010 and 29% of the sales in 2011 were to Status Indians. Glen Buday estimated that the actual figure would have been between 30% and 40% but he did not provide me with any documentary support for that estimate. Given my conclusions regarding Glen Buday's credibility, I prefer Mr. Kemp's figures.

[64] Using Mr. Kemp's formulas, I determined that the above reductions in the number of vehicles would result in reductions in income of \$55,520 in 2010 and \$88,799 in 2011 and reductions in net tax of \$194 in the reporting period ending June 30, 2010, \$506 in the reporting period ending December 31, 2010 and \$2,030 in the reporting period ending December 31, 2011. During the trial I provided the parties with copies of my calculations.<sup>20</sup> The Respondent accepts my calculations.<sup>21</sup> The Appellants did not identify any errors in my calculations.

[65] Mr. Kemp assumed that a percentage of the unreported sales would have been commission sales. He made the appropriate adjustments to account for this for GST/HST purposes. However, he did not make the relevant adjustments for income tax purposes. As a result, he erroneously included the full sale price in revenue and included the purchase price as an expense. He should, instead, have included only the assumed commission in revenue and not allowed any expense. I brought these errors to Mr. Kemp's attention. Again, he was quick to acknowledge the errors and to agree that my approach was correct. I prepared a spreadsheet calculating the necessary adjustments to correct this error on the remaining vehicles.<sup>22</sup> I determined that the business' income should be reduced by \$10,110 in 2010 and \$10,794 in 2011. The Respondent accepts that my calculations correct the error. The Appellants did not identify any errors in my calculations.

[66] Finally, I will turn to the input tax credits and expenses for 2010 and 2011. Mr. Kemp did not prepare working papers setting out the input tax credits that he allowed in 2010 and 2011. He prepared monthly adding tapes of those amounts.

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<sup>20</sup> Exhibit CS-4.

<sup>21</sup> For accuracy and simplicity, when making these calculations I duplicated the error (discussed below) that Mr. Kemp made in his calculations. The error was made when the income was included so I needed to make the same error when calculating how much income to remove.

<sup>22</sup> Exhibit CS-5.

The Appellants refused to meet with him to discuss the input tax credits so he took no further steps to document the amounts that he had allowed. While this approach is not generally a desirable way to document an audit, given the history of this matter at audit it is entirely understandable. The result, however, is that I neither have a list of input tax credits that the business claimed nor a list of input tax credits that Mr. Kemp allowed. In the circumstances, the only way that the input tax credits and related expenses could be changed was if the Appellants demonstrated that the business was entitled to more input tax credits or expenses than Mr. Kemp allowed. They did not do so.

[67] My comments above regarding the rental payments for Paul Buday's apartment and Glen Buday's house are equally applicable to 2010 and 2011.

[68] Given the attention that the Appellants paid to fuel expenses for 2010 and 2011, I should address them separately. Starting in 2010, Mr. Kemp took a stricter approach to fuel expenses than he had in prior years. He stopped allowing the business to claim all of Paul Buday's fuel expenses and instead allowed only 50%. He also started denying any fuel purchases that Glen Buday made at a gas station near his home. The Appellants argue that the business should be entitled to claim the fuel expenses that Mr. Kemp denied. The Appellants testified at length about the extent to which the business used fuel and the limited extent to which they did so personally. Given my concerns about Glen Buday's credibility, I am not prepared to allow any additional fuel purchases made by him. Given the fact that the Appellants firmly believed that a business use of a portion of their primary residences entitled them to deduct their entire rent payments, I have no faith in their ability to distinguish personal expenses from business expenses. Even if I accepted that the Appellants were entitled to more fuel expenses, there would be no way for me to determine either how much fuel the business claimed or how much Mr. Kemp denied. If the Appellants wanted the business to be able to claim these additional fuel expenses, they could have gathered all of the receipts for fuel that was purchased and presented them to me along with a calculation totalling them. They did not and it is not my role to do so for them. Accordingly, I will not be making any adjustments to fuel expenses.

[69] While Mr. Kemp did not prepare working papers for input tax credits, he did prepare working papers setting out expenses that did not attract GST/HST but that he had allowed for income tax purposes. The Appellants did not provide me with any evidence which would indicate that any additional expenses of this nature should be allowed so I will not be making any changes to these amounts.

Summary

[70] In summary, after making all of the above noted adjustments, I find that the business earned the following income in the following years:

<b>Year</b>	<b>Income</b>
2006	\$119,894
2007	\$120,353
2008	\$215,600
2009	\$67,199
2010	\$168,842
2011	\$145,421

[71] I also find that the business' net tax should be reduced by the following amounts in the following reporting periods:

<b>Reporting Period</b>	<b>Reduction in net tax</b>
Oct. 1 – Dec. 31, 2006	\$155
Jan. 1 – Mar. 31, 2007	\$171
Apr. 1 – Jun. 30, 2007	\$416
Jul. 1 – Sep. 30, 2007	\$416
Oct. 1 – Dec. 31, 2007	\$665
Jan. 1 – Mar. 31, 2008	\$496
Apr. 1 – Jun. 30, 2008	\$1,157
Jul. 1 – Sep. 30, 2008	\$182
Oct. 1 – Dec. 31, 2008	\$328
Oct. 1 – Dec. 31, 2009	\$2,219
Apr. 1 – Jun. 30, 2010	\$194
Oct. 1 – Dec. 31, 2010	\$506
Oct. 1 – Dec. 31, 2011	\$2,030

**C. Who should have reported the unreported income?**

[72] Having established that the business earned income in the years in question, the next step is to determine whose income it was.

[73] The Respondent takes the position that the Appellants were carrying on business in partnership, that Glen Buday was entitled to two-thirds of the profits and Paul Buday was entitled to one-third.

[74] The Appellants take the position that the business belonged to Paul Buday and that Glen Buday was an employee. Therefore, they submit that any unreported income should be taxed in Paul Buday's hands.

[75] There is no debate that, when the business began, Paul Buday was the owner and Glen Buday was his employee. Paul Buday started the business in 1978. Shortly thereafter, when Glen Buday was 15 years old, he began working for Paul Buday selling cars. The question is whether that working relationship continued in the same manner almost thirty years later.

[76] In the years in question, Glen Buday lived in Thunder Bay and Paul Buday lived near Toronto. Paul Buday would source used vehicles for the business from auctions in Toronto, store the vehicles until he had enough to ship, make any minor repairs that were necessary for shipping purposes and then ship the vehicles to Thunder Bay. Paul Buday testified that he attended these auctions twice or occasionally three times a week.

[77] The entire sales operation occurred on the business' lot in Thunder Bay under Glen Buday's management. Glen Buday would receive the vehicles in Thunder Bay, arrange to have them repaired and cleaned, advertise them and then ultimately conclude the sale with the customer. Glen Buday also bought vehicles from vendors in the Thunder Bay area. Any consignment sales that the business engaged in were for customers or businesses in the Thunder Bay area and were organized by Glen Buday. Glen Buday hired part time workers for the business in Thunder Bay.

[78] The business had two bank accounts. One of those accounts was in Paul Buday's name. The other was in Glen Buday's name. Both Appellants had signing authority over both accounts. The bulk of the business was carried on through Glen Buday's account. The bank statements for both accounts were sent to Thunder Bay. Paul Buday gathered records relating to his purchases of vehicles and sent those records to Glen Buday who stored them in Thunder Bay along with all of the other records of the business. Glen Buday prepared the quarterly handwritten spreadsheets that he then used to prepare GST/HST returns. Paul Buday kept track of his fuel and storage expenses in Toronto himself.

[79] Based on all of the foregoing, I find that Glen Buday did well more than half of the work associated with the business.

[80] I understand that the profits of a business are not allocated based on who works the hardest. Employees are paid a negotiated salary for their services. Business owners take their profits or losses from what remains. Owners are rewarded for the risks they take and the capital they invest. However, for me to believe the Appellants' position, I would have to accept that Glen Buday, who was in his late forties and early fifties in the years in question and was a very experienced salesperson, was happy working six to seven days a week for six years in a row for his father's business doing over half of the work for a salary of approximately \$12,000 per year while his father earned total income of \$763,109.<sup>23</sup> This explanation is simply implausible. What is far more likely is that at some point prior to the years in question Glen Buday became a partner in the business and, from that point forward, the Appellants shared the profits.

[81] The Appellants spoke regularly regarding all aspects of the business. These discussions were described in a way that suggested that the Appellants were consulting each other as equals, rather than that Glen Buday was seeking his father's permission. Glen Buday described withdrawing funds from the business' bank account for personal purposes based on his needs. This is not how I would expect an employee, even a related employee, to deal with the owner's money.

[82] The Appellants' descriptions of the financial arrangements of the business suggest that they viewed each other as equal contributors who were entitled to share the profits of the business. While Paul Buday denies that the business was profitable, he does admit that, had it been profitable, those profits would have been divided between the Appellants.

[83] Glen Buday argues that, if the business were carried on in partnership, Paul Buday would have had to advise various provincial authorities of the change in ownership. Since Paul Buday did not do so, Glen Buday argues that no partnership can have existed. I disagree. A partnership either exists or it does not exist. Advising a third party of its existence may be evidence that the parties thought it existed but a failure to do so is not evidence that it did not exist. The Appellants' complete disregard for maintaining proper books and records or filing tax returns

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<sup>23</sup> In this scenario, I have calculated Paul's income to be the total income of the business from 2006 to 2011 (\$837,309) less the total employment income reported by Glen (\$74,200).

on time gives me no confidence that they would have advised the province of a change in the ownership of the business promptly or at all.

[84] Based on all of the foregoing, I find that it is more likely that the Appellants were carrying on business in common with a view to profit than that Glen Buday was a vastly underpaid employee in Paul Buday's business. Accordingly, I find that the Appellants were partners in the business.

[85] Having determined that a partnership existed, the question that remains is how the business' profits should be divided.

[86] I explained the concept of an alternative argument to the Appellants and gave them the chance to tell me how they believed the income should be allocated if I found that they were partners. They refused to do so.

[87] The Respondent submits that, in the absence of an agreement between the Appellants specifying how the profits would be divided, the best evidence before me is how the funds that the Appellants admit came out of the business were divided. Glen Buday received salary of approximately \$12,000 per year. In addition, the business paid approximately \$12,000 of his rent. Paul Buday claims to have taken nothing out of the business but the business paid approximately \$12,000 of his rent. Thus, two-thirds of the admitted withdrawals from the business were made by Glen Buday and one-third was made by Paul Buday. Based on the foregoing, the Respondent submits that the profits of the business should be divided in a similar manner.

[88] While I agree that the admitted withdrawals from the business suggest a two-thirds, one-third split, I have no confidence that those withdrawals reflect the actual draws from the partnership. There is evidence of the rent payments but no evidence of the salary beyond Glen Buday's testimony. The division of labour within the partnership would suggest that Glen Buday should have had a larger interest. On the other hand, Glen Buday became part of an existing business so Paul Buday could reasonably have expected a higher share to account for the goodwill he contributed. Ultimately, in the absence of any clear evidence of the division of profits, the only reasonable option is to find that the Appellants had an equal partnership.

[89] Based on all of the foregoing, I will allocate half of the business' income to Glen Buday and half to Paul Buday. I will correspondingly back out the employment income that Glen Buday reported on his returns.

[90] The characterization of the business as a partnership causes some complications for GST/HST purposes. The *Excise Tax Act* treats partnerships as persons and requires the partnership, not the partners, to register for GST/HST purposes.<sup>24</sup> Since the partnership was not assessed, I do not have the partnership's reporting periods before me. The reporting periods that are before me are Paul Buday's reporting periods. Anything that Paul Buday collected as or on account of GST/HST must be remitted.<sup>25</sup> However, since I have found that the partnership, rather than Paul Buday, was carrying on a commercial activity, Paul Buday was not entitled to claim input tax credits.<sup>26</sup> On that basis, I could deny all input tax credits claimed by Paul Buday. However, the Respondent did not plead that Paul Buday was not entitled to input tax credits because he was not carrying on a commercial activity. Denying the credits on that basis would be procedurally unfair. It would also be punitive and, in any event, is not something that the Respondent wants me to do. In the circumstances, it would be inappropriate for me to deny the credits on that basis. As a result, the GST/HST adjustments described above will remain.

#### **D. Statute Barred**

[91] Paul Buday's 2006 to 2009 tax years were reassessed beyond the normal reassessment period. Paul Buday was first assessed for these years in May 2010. The reassessments were issued in November 2015.

[92] For the Minister to raise an assessment after the normal reassessment period, the Minister must prove on a balance of probabilities both that the taxpayer made a misrepresentation and that the misrepresentation was attributable to neglect, carelessness or wilful default.<sup>27</sup>

[93] When a taxpayer's records are not adequate for a proper audit and the Minister uses an alternative assessment technique, the Respondent is able to prove that the taxpayer has made a misrepresentation by showing that the technique has demonstrated that there was unreported income and the taxpayer has not provided

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<sup>24</sup> Subsections 123(1) and 240(1).

<sup>25</sup> *Excise Tax Act*, s. 222, 225 and 228.

<sup>26</sup> *Excise Tax Act*, s. 169(1).

<sup>27</sup> *Income Tax Act*, s. 152(4)(a); *Vine Estate v. The Queen*, 2015 FCA 125 at para. 24.

a credible explanation for that income.<sup>28</sup> In Paul Buday's case, the Minister has met that burden.

[94] Paul Buday failed to report the business' income in his returns. While taking the position that he was the sole proprietor of the business, he reported neither the gross nor net income from it. He inserted a single loose sheet of paper into each return that described the business in three lines: revenue, expenses and loss. Yet he neither reported that revenue nor the purported losses on lines 162 and 135 of his returns nor completed a T2125 Statement of Business or Professional Activities.

[95] If I am wrong and the single pages that Paul Buday attached to the returns showing losses are sufficient for Paul Buday to be considered to have reported the business in his returns, then I find that he made omissions by claiming losses in a business that was clearly profitable. To the extent that Paul Buday could be said to have reported anything in his 2006 to 2009 returns it would be losses of \$48,108, \$98,981, \$54,080 and \$51,658 for a business that I have concluded had profits of \$119,894, \$120,353, \$215,600 and \$67,199.

[96] The fact that I do not accept the technique that Mr. Kemp used to determine the business' income for 2009 does not mean that the Respondent has failed to meet her burden of proving that Paul Buday had unreported income in 2009. The Respondent provided me with sufficient evidence to allow me to conclude that Paul Buday had unreported income in 2009 and to estimate the amount of that income. She has thus proven that there was a misrepresentation.

[97] Based on all of the foregoing, I find that the Respondent has met her burden of proving that Paul Buday made misrepresentations in filing his 2006 to 2009 tax returns.

[98] I find that Paul Buday's failure to report his income from the business was due to either neglect or wilful default. By 2006, Paul Buday had been in business for almost 30 years. He was clearly aware of his obligation to report his income and yet failed to do so. The amount of income that Paul Buday failed to report from 2006 to 2009 was substantial. His explanation that he believed the business was losing money is simply not credible. I find that Paul Buday knew the business was making money. To the extent that he was unaware of the exact amount that it was making, I find that it was because he chose not to maintain books by which he could make that determination.

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<sup>28</sup> *Lacroix v. The Queen*, 2008 FCA 241.

[99] Based on all of the foregoing, I find that the Minister is entitled to reassess Paul Buday's otherwise statute barred 2006 to 2009 tax years.

### **E. Gross Negligence Penalties**

[100] I find that the Minister was justified in applying gross negligence penalties against the Appellants.

[101] The Appellants' explanation that they believed the business did not make any money over this period is not credible. The Appellants were both active in the business and had been for years. They knew the volume of sales that the business had and the expenses that it incurred. They communicated about these matters regularly. To the extent that they were unaware exactly how much money the business was making, it was because they chose not to take the steps to figure it out.

[102] Each year Paul Buday reported approximately \$11,000 of pension income and Glen Buday reported approximately \$12,000 of employment income. Paul Buday's modest pension was being garnished by the CRA in respect of prior debts so the funds he had to live on were actually even smaller than his reported income suggests. While there was no evidence that the Appellants were living extravagant lifestyles, they certainly had personal expenses well in excess of their reported incomes. Based on the foregoing, it is clear that the Appellants were living off the profits of the business and were well aware that they were doing so.

[103] As set out above, I find that Paul Buday did not report the business' activities on his returns in 2006 to 2008. He continued this odd method of reporting in 2009, 2010 and 2011. Despite the fact that he concluded that the business made a small profit in 2011, he still did not report that profit on lines 162 and 135 of his returns. He simply purported to use his previously unreported losses to offset the profit.

[104] Neither Paul Buday's nor Glen Buday's reporting represents an actual attempt to report his share of the business' income. The audit of the business' 2006 to 2008 tax years commenced in early 2009. Paul Buday did not file his returns for those years until April 2010. Glen Buday did not file any of his tax returns for the years in question until 2013. The Appellants' delay in filing their returns indicates an indifference to their obligations under the Act. Their filing of inaccurate returns in the face of an ongoing audit can only be seen as intentional.

[105] Paul Buday underreported his 2006 to 2011 income by \$418,654.<sup>29</sup> He reported only 14% of his actual income. Glen Buday underreported his 2006 to 2011 income by \$344,454. He reported only 18% of his actual income.

[106] While the Appellants basically ignored the business for income tax purposes, they diligently filed inaccurate GST/HST returns that garnered Paul Buday refunds.<sup>30</sup> In total, the business underreported its net tax from October 1, 2006 to December 31, 2011 by \$88,405.<sup>31</sup>

[107] Glen Buday should have known how to account for the business' income. He testified that he had taken a number of small business accounting courses at a local college, several motor vehicle dealership bookkeeping courses and a number of courses offered by the CRA specifically addressing GST.

[108] Paul Buday too should have known how to properly maintain books and records for the business. He started the business in 1978. Prior to that, he spent more than 25 years working for a Ford dealership. His positions included service manager, sales manager, used car sales manager and new car sales manager. While Paul Buday may not have been responsible for accounting functions in these roles, I have no doubt that he would have been well aware of the need to create and maintain appropriate paperwork to accurately track a business' revenue and expenses. More importantly, I am certain that Paul Buday knows when a business is making money and when it is not.

[109] The business has been audited several times before. Glen Buday testified that the first audit started in 1995. While the Appellants may at one point have been unsure what books and records the business needed to maintain, there cannot have been any uncertainty in the years in question. Yet the Appellants continued to maintain poor records. As set out below, even the audit in question appears to have had no effect on their bookkeeping practices. If the Appellants were incapable of maintaining proper books themselves, they were certainly aware of the need to retain a bookkeeper or accountant to do so. Ultimately, whether the Appellants' ongoing failure to maintain proper books arose from a desire to deceive or simply

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<sup>29</sup> The Minister applied Paul Buday's penalties on the basis that he had reported no income from the business as opposed to significant losses. The penalties would have been much higher had the losses been taken into account.

<sup>30</sup> The fact that those refunds were applied to pre-existing tax debts does not alter the fact that they were received.

<sup>31</sup> \$97,249 in additional net tax assessed by audit for these reporting periods less \$8,844 removed by me.

an indifference as to whether they complied with their tax obligations, the result is the same.

[110] Based on all of the foregoing, it is not difficult to conclude that the gross negligence penalties imposed by the Minister should be upheld.

**F. HST reassessment October 1 to December 31, 2013**

[111] The Minister reassessed the business' reporting period from October 1 to December 31, 2013 to deny all \$11,210 in input tax credits that the business had claimed. At the beginning of the trial, based on some documents that the Appellants provided in the course of the litigation, the Respondent conceded that that figure should be reduced by \$2,799. The Appellants bear the burden of proving that they were entitled to the remaining denied input tax credits. They did not direct me to any documentary evidence doing so.

[112] By the time the business filed its HST return for this reporting period, Paul Buday had already been reassessed for the reporting periods from October 1, 2006 to December 31, 2011. The Appellants knew that the Minister did not think that the business' accounting records were adequate. They were well aware of the problems that the business' poor bookkeeping system presented. Yet they obstinately continued using the same system.

[113] Glen Buday claims that the business has not been allowed input tax credits for any vehicle purchases in this reporting period. He cannot tell me what vehicles were claimed but he is certain that they were not allowed. I have reviewed the concession made by the Respondent for this reporting period. That concession clearly indicates that, once the Appellants actually provided documents for the Minister to review, the Respondent conceded input tax credits for certain vehicle purchases. The concession also indicates that the Respondent refused to concede input tax credits for certain vehicles purchased from what appear to be non-registrants and other vehicles where the vehicles were not acquired in the reporting period and thus may have been claimed in a prior reporting period. The Appellants have not directed me to any evidence that would indicate that input tax credits should be allowed for these vehicles, nor have they directed me to other vehicles that the Respondent did not consider.

[114] Based on all of the foregoing, the appeal of the reporting period from October 1 to December 31, 2013 will be allowed for the sole purpose of giving effect to the concession made by the Respondent.

### **G. Glen Buday's 2012 tax year**

[115] Glen Buday's 2012 tax year was not part of the audit. The Minister reassessed that year for the sole purpose of recharacterizing \$12,750 that Glen Buday reported as employment income as business income. Glen Buday appealed the reassessment. He neither introduced evidence nor made representations in respect of 2012 at trial. Given my conclusion that he was a partner in the business rather than an employee, I find that the reassessment was appropriate. On that basis, I will dismiss Glen Buday's appeal of his 2012 tax year.

### **H. Conclusion**

[116] In summary:

- (a) the appeal of the reporting periods from October 1, 2006 to December 31, 2008 is allowed and the matters referred back to the Minister for reassessment on the basis that net tax be reduced by the following amounts in the following reporting periods:

<b>Reporting Period</b>	<b>Reduction in net tax</b>
Oct. 1 – Dec. 31, 2006	\$155
Jan. 1 – Mar. 31, 2007	\$171
Apr. 1 – Jun. 30, 2007	\$416
Jul. 1 – Sep. 30, 2007	\$416
Oct. 1 – Dec. 31, 2007	\$665
Jan. 1 – Mar. 31, 2008	\$496
Apr. 1 – Jun. 30, 2008	\$1,157
Jul. 1 – Sep. 30, 2008	\$182
Oct. 1 – Dec. 31, 2008	\$328

- (b) the appeal of the reporting periods from January 1, 2009 to December 31, 2011 is allowed and the matters referred back to the Minister for reassessment on the basis that net tax be reduced by the following amounts in the following reporting periods:

<b>Reporting Period</b>	<b>Reduction in net tax</b>
Oct. 1 – Dec. 31, 2009	\$2,129
Apr. 1 – Jun. 30, 2010	\$194
Oct. 1 – Dec. 31, 2010	\$506
Oct. 1 – Dec. 31, 2011	\$2,030

(c) the appeal of the reporting period from October 1 to December 31, 2013 is allowed and the matter referred back to the Minister for reassessment on the basis that net tax be reduced by \$2,799;

(d) the appeals of Paul Buday's 2006 to 2011 tax years are allowed and the matters referred back to the Minister for reassessment on the basis that:

- i. Paul Buday's sole business income in 2006 was his \$59,947 in income from the partnership;
- ii. Paul Buday's sole business income in 2007 was his \$60,177 in income from the partnership;
- iii. Paul Buday's sole business income in 2008 was his \$107,800 in income from the partnership;
- iv. Paul Buday's sole business income in 2009 was his \$33,600 in income from the partnership;
- v. Paul Buday's sole business income in 2010 was his \$84,421 in income from the partnership; and
- vi. Paul Buday's sole business income in 2011 was his \$72,711 in income from the partnership;

(e) the appeals of Glen Buday's 2006 to 2011 tax years are allowed and the matters referred back to the Minister for reassessment on the basis that:

- i. Glen Buday had no employment income in 2006, 2007, 2008, 2009, 2010 and 2011;
- ii. Glen Buday's sole business income in 2006 was his \$59,947 in income from the partnership;

- iii. Glen Buday's sole business income in 2007 was his \$60,177 in income from the partnership;
- iv. Glen Buday's sole business income in 2008 was his \$107,800 in income from the partnership;
- v. Glen Buday's sole business income in 2009 was his \$33,600 in income from the partnership;
- vi. Glen Buday's sole business income in 2010 was his \$84,421 in income from the partnership; and
- vii. Glen Buday's sole business income in 2011 was his \$72,711 in income from the partnership; and

(f) the appeal of Glen Buday's 2012 tax year is dismissed.

## **I. Costs**

[117] The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the parties shall have a further 30 days to serve and file written submissions on costs and the parties shall have yet a further 10 days to serve and file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, the parties shall bear their own costs.

[118] In attempting to reach an agreement, the parties may wish to bear in mind that my impressions are that:

- (a) despite the significant reductions in income that resulted from the appeals, the Respondent was largely successful as there was never any doubt that half of the income assessed would be reversed;
- (b) at least half of the ten days of trial and the entire day off in the second week of trial would not have been necessary had the Appellants:

- i. taken advantage of the opportunity provided to them in the discovery process to examine Mr. Kemp in order to better understand how he reached the conclusions that he did;
  - ii. made any attempt to determine what expenses and input tax credits the business had claimed;
  - iii. made any attempt to organize documents to support those claims;
  - iv. obtained a RIN search for the business and reconciled it to the vehicles that the business had reported;
  - v. utilized the year between the first part of the trial and the second to familiarize themselves with the documents entered into evidence by the Respondent;
  - vi. avoided repetitive testimony on relatively minor points; and
  - vii. not repeatedly attempted to lead evidence of or opine on how the audit should have been conducted;
- (c) despite the Appellants' beliefs to the contrary, no fault for the unnecessary length of the trial can be placed on the Minister, the Department of Justice or the Court;
- (d) due to the fact that the appeals were heard together, one set of costs would be appropriate rather than two; and
- (e) any costs payable by the Appellants should be payable jointly and severally.

[119] Unless the parties are able to convince me that my impressions are wrong, any decision that I am required to issue in respect of costs will reflect those views. Furthermore, any costs that I award to compensate a party for having to make submissions on costs will take into account whether the parties have paid sufficient attention to the foregoing.

Signed at Ottawa, Canada, this 4th day of June 2019.

“David E. Graham”

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Graham J

CITATION: 2019 TCC 128

COURT FILE NOs.: 2013-2091(GST)I  
2014-1493(GST)I  
2016-839(GST)I  
2016-4831(IT)G  
2016-4837(IT)G

STYLES OF CAUSE: PAUL BUDAY O/A BUDAY AUTO  
SALES v. HER MAJESTY THE QUEEN  
  
GLEN BUDAY v. HER MAJESTY THE  
QUEEN

PLACE OF HEARING: Thunder Bay, Ontario

DATES OF HEARING: May 29, 30, 31 and June 1, 2018 and  
May 6, 8, 9, 10, 13 and 14, 2019

REASONS FOR JUDGMENT BY: The Honourable Justice David E Graham

DATE OF JUDGMENT: June 4, 2019

APPEARANCES:

Agent for the Appellant, Paul Buday o/a Buday Auto Sales:	Glen Buday
For the Appellant, Glen Buday:	The Appellant himself
Counsel for the Respondent:	Paul Klippenstein

COUNSEL OF RECORD:

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