Docket: 2006-3716(IT)I

BETWEEN:

MUNIR ALTAMIMI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 20, 2007, at Ottawa, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Ryan R. Hall

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's 2000 taxation year is allowed and the reassessment of the Minister of National Revenue is vacated.

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's 2001 taxation year is allowed in part and the matter is referred back to the Minister of National Revenue for reassessment to reduce the unreported income to $3,732 and to delete the penalty.

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's 2002 taxation year is allowed in part and the matter is

referred back to the Minister of National Revenue for reassessment to reduce the unreported income to $21,424;

All without costs.

Signed at Ottawa, Canada, this 13th day of September 2007.

Patrick Boyle

Boyle J.

Citation: 2007TCC553
Date: 20070913
Docket: 2006-3716(IT)I

BETWEEN:

MUNIR ALTAMIMI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] In the years in question, the taxpayer operated a barber shop. The Canada Revenue Agency believed he had under-reported his income from his business. CRA was not satisfied it could conduct an audit of the business based upon the business records produced and so proceeded with what is commonly referred to as a net worth assessment.

[2] This informal appeal gives rise to three issues:

1) Are the net worth assessments correct?
2) If the taxpayer's income was under-reported, was the assessment of penalties by CRA appropriate or did the taxpayer exercise "due diligence" to try to properly report and comply; and
3) The reassessment for the 2000 taxation year was beyond the normal reassessment period and will only be valid if the taxpayer made a misrepresentation in reporting his income that is attributable to neglect, carelessness or wilful default.

[3] The Court acknowledges both the correctness and the fairness of Crown counsel in raising items 2 and 3 above even though they do not appear to have been raised directly by the taxpayer in his notice of appeal.

Onus/burden of proof:

[4] The onus or burden of proof to satisfy the Court that the amounts assessed under the net worth method are incorrect is on the taxpayer. This is like the onus with respect to any other assessment challenged by a taxpayer. The onus or burden of proof to satisfy the Court that the taxpayer's original reporting of his income warrants the assessments of penalties, and entitled the CRA to reassess the 2000 year after the normal reassessment period had expired, is on the Crown.

The reassessments:

[5] The additional income reassessed in each of the years 2000, 2001 and 2002 is $17,079, $19,094 and $30,129 respectively. This is a total of $66,302 of income. In addition to the tax, penalties for each of those three years in the amounts of $1,627, $1,530 and $1,800, for a total of $4,957 were assessed. The amounts originally reported by the taxpayer as his net income from the barber shop business was $372 in 2000, being his first part year in business and $5,891 in 2001. It is impossible to determine from the information in the documents before the Court what the 2002 net income originally reported was although the gross income reported was $10,000. The CRA "Option C" printouts for the taxpayer's taxation years do not clearly provide this information and, when the CRA auditor was asked to explain, clarify or reconcile these numbers, it was clear that the reassessments were not summarized in a consistent fashion in the Option Cs for these three years.

The taxpayer:

[6] The taxpayer had recently immigrated to Canada as a refugee in the period prior to the years in question. He had arrived in Canada in 1995 with virtually no personal possessions or household goods. There was no testimony as to whether he had financial assets or resources at the time he immigrated to Canada.

[7] The CRA auditor testified that both the taxpayer and his spouse were cooperative with his audit from the outset and throughout. The taxpayer and his spouse testified that their home was very sparsely furnished, largely with other people's cast-offs with the exception of an apartment-sized washer/dryer unit and a microwave that they had purchased new. They did not have couches in their living areas. Instead, they had mattresses on the floor which doubled as beds for themselves, their three children, the taxpayer's mother who was ailing and resided with them and one or more of the taxpayer's brothers who also shared the home at

various times during the period in question and before. The taxpayer and his spouse received social assistance and attended at community food banks in the years in question. Their home was subsidized social housing.

[8] The evidence of the considerable sparseness of their home furnishings was corroborated by the evidence of a friend of the taxpayer and his spouse who had known them throughout that period, and had visited their home. She was also, coincidentally, an employee of the Canada Revenue Agency. This is also consistent with the taxpayer and his spouse having invited the CRA auditor to their home when he commenced the audit and again when he decided to proceed to a net worth audit review. The CRA auditor did attend their home and, when asked in cross-examination, could not contradict the evidence regarding the home's furnishings.

[9] The taxpayer testified that his barber shop business was very slow in the years in question and he called the successor barber in that location as a witness to testify that the business continues to be slow. Haircuts are $9 apiece. The taxpayer's witness and friend who worked at CRA also confirmed that she was outside the barber shop numerous times in the years in question, usually around 3:30 to 4:30 as her bus stop was nearby. It was her testimony that the barber shop appeared very quiet.

[10] The taxpayer testified that, in order to comply with his income tax reporting obligations, he retained and paid a tax return preparation service in each of the years in question to whom he provided what he believed were adequate books and records to prepare an income computation for his barber shop business. From the testimony it sounded like the records were more in the nature of sales receipts and receipts for expenses than any formal books, schedules or ledgers. The taxpayer said his tax return preparer, who held himself out as somewhat knowledgeable and experienced in the business, told him to simply estimate the total amount of his revenue and the total amount of his expenses in 2001 and 2002. The taxpayer did receive back from the tax return preparer his sales and expense receipts that he had provided but did not receive a copy of any schedule or other information assembled by the tax return preparer.

[11] According to the CRA's witness, its records are that a paper return was filed in 2000 whereas an electronic return was filed 2001 and 2002. The taxpayer testified that his tax return preparer had since gone out of business and was unable or unwilling to provide him with any information or documentation requested from his files for those years. CRA confirmed it had received a profit and loss statement

for the 2000 year and that it would not expect to have and did not receive one for the later years which were electronically filed. Neither party provided the Court with a copy of the 2000 profit and loss statement. Neither party provided the Court with a copy of any detailed information or summary or actual copies of any sales receipts or expense receipts.

[12] The taxpayer testified that he provided to his tax return preparer each year the same financial records that he provided to the CRA auditor and that, in the taxpayer's view, these records were such that they both could and should have enabled the tax return preparer to compute his income from the barber shop and enabled the CRA to properly audit his income reported.

[13] It can be observed that at $9 per haircut, in order for the taxpayer to have earned an additional $66,000 of income from his barber shop business in the three years in question, an additional 7,000 haircuts would have had to have been performed and not reported. This would be more than 2,400 haircuts each year which translates to approximately 50 a week or 10 a day. Assuming each haircut takes about a half-an hour, this would have required the taxpayer to have his cash register turned off and his shop full for an additional five hours each week day. This strikes me as unlikely given the evidence of low activity in what was described as a "plain old barber shop". The barber shop's low level of activity was corroborated by the taxpayer and all three of his witnesses, the barber who worked with him and now operates the business, his wife and his friend the CRA employee. The CRA auditor had also attended at the barber shop and could not, when asked in cross-examination, provide any evidence or recollection to the contrary.

CRA auditor's testimony:

[14]The CRA auditor testified that the taxpayer was very cooperative throughout the audit. When he commenced his audit, he asked for a copy of the books and records to allow him to audit the income reported from the barber shop business. Since the taxpayer could not obtain any records from the tax return preparer he had used, he did provide the auditor with what were described as two grocery bags of sales and expense records. The auditor told the taxpayer it was not his job to assemble books and records and income statements from such supporting documents, it was the taxpayer's responsibility. The taxpayer's position appeared to be that those were his books and records, that is what was used and that is therefore what should be audited. If that involved additional work, that formed part of the CRA's audit. The taxpayer did agree with the auditor to put the records

together better but the auditor remained unsatisfied. The auditor did review the records provided to the extent of totalling the sales receipts and identifying discrepancies in each of the years in question between the gross revenue reported by the taxpayer in his returns and the sales receipts totals as computed by him from the taxpayer's daily sales book. In 2000 this discrepancy was an over-reporting of gross income of less than $150 which CRA concluded was immaterial. The discrepancy for 2001 was slightly in excess of $4,000 and for 2002 was slightly in excess of $2,300. There was no evidence from the CRA auditor that he tried to otherwise test or identify gross revenues. There was virtually no evidence that he audited or attempted to audit the expenses or expense receipts. If he did deal with them to any greater extent, that was not adequately brought out in his testimony. I am sympathetic to CRA auditors' frustrations when faced with books and records kept in shoeboxes or grocery bags and not assembled into schedules or ledgers or statements. However, if they are not dealt with by CRA at the audit stage, they move on to have to be dealt with by CRA appeals officers, Department of Justice lawyers, and, too often, this Court.

[15] The CRA auditor testified that, having identified the material discrepancies between the gross sales reported and the sales based on the taxpayer's working papers, he concluded that the books and records maintained by the taxpayer did not permit him to audit the business and proceeded to a net worth assessment of the taxpayer.

Net worth assessments:

[16] Net worth assessments are necessarily default processes relied on in circumstances where, due to the state of the taxpayer's books and records, or otherwise, the income reported by a taxpayer cannot be audited in the ordinary course. Net worth audits and assessments are probably by definition unsatisfactory and are undoubtedly imprecise tools for measuring income. They have been described as "a last ditch attempt to establish a fair basis on which to assess in the absence of acceptable bookkeeping records" in *Urchyshyn v. MNR*, 71 DTC 234 (T.A.B.), as being "in reality a makeshift method" in *Zagumeny v. MNR*, 63 DTC 718 (T.A.B), and as a "blunt instrument" of last resort in *Ramey v. MNR*, 93 DTC 791 (TCC). Nonetheless, they may prove necessary and CRA may assess taxes on that basis. Once assessed on a net worth basis, it is open to the taxpayer to proceed to CRA Appeals and this Court with a view to either (i) establishing what the income from the business or other source was based upon acceptable evidence, or (ii) challenging the components and inputs and the related assumptions used by

CRA in making its net worth calculations to support the assessments in question: *Fortis v. MNR*, 86 DTC 1795 (TCC).

[17] Described simply, the methodology followed by CRA in preparing a net worth assessment involves several steps for a particular taxation year. Firstly, CRA has to determine what the taxpayer's net worth was at the end of the immediately preceding year. In the taxpayer's case, this necessitated CRA to determine his net worth at the end of 1999. CRA then goes on to determine the taxpayer's net worth at the end of the relevant taxation years, in this case 2000, 2001 and 2002. This allows CRA to determine the increase in net worth of the taxpayer in the years in question which is presumed to have come from the taxpayer's sources of income used in its broadest sense, reported or otherwise, taxable or not. The CRA calculates the net worth at the end of each year by assembling a balance sheet that reflects the known and identified assets and liabilities of the taxpayer, both business and personal. This is shown in Schedules I and II of Exhibit R-4 which is CRA's calculations of the taxpayer's increase or decrease in net worth over the periods in question.

[18] In this case, CRA's calculation of the taxpayer's increase in net worth over the three years was $1,750.80 in 2000, $1,882.70 in 2001 and $7,679.78 in 2002. (One has to question the use of the cents columns in net worth assessments). Much of this could be attributable to the fact that $6,300 of "household assets" are listed by CRA in his 2000 and subsequent personal assets but were not listed in his 1999 year-end personal assets. These "household assets" or furnishings were acquired in 1999 according to the taxpayer. The balance is explained by the taxpayer's evidence as liabilities in the form of debts that CRA's schedules do not reflect including student loan debt, credit card debt, bank debt and borrowings from family members.

[19] The second step in computing a net worth assessment involves the CRA determining the total personal spending of the taxpayer, or himself and his household, on the assumption those expenditures were also funded by the taxpayer and his family members out of his sources of income broadly defined, reported and unreported, taxable or not. The initial inputs to assemble this are prepared by taxpayers using CRA's Personal Expenditure Worksheet which asks taxpayers to identify by various categories of food, shelter, transportation and clothing, etc. what amounts they are spending. This Worksheet is Exhibit R-3. CRA then reviews this Worksheet and prepares its own Summary of Personal Expenditure, which is Schedule IV of Exhibit R-4, making revisions the CRA auditor feels appropriate based on his audit.

[20] In this case, the initial Personal Expenditures Worksheet (Exhibit R-3) was prepared at the request of the CRA auditor. The taxpayer's wife filled it out. She testified that she had been told by the CRA auditor that in completing this form "the more the better" and that approach would help her husband's case. It was clear from her testimony that she understood this to mean the greater the amount estimated the better the results would be. She did not understand that the greater the amount estimated the greater her husband's problems would be. While he did not testify to this point, although he was asked in cross-examination, the CRA auditor must have meant to convey that the more *information* provided the better. In any event, the taxpayer insisted that this entire worksheet was prepared incorrectly by her because of her incorrect understanding.

[21] In terms of specifics, she was able to point to the annual expenditure on telephones of $3,000 and on tobacco of $2,640 as being significantly overestimated. Her testimony was that she only smoked one-half pack per day and her husband testified he did not smoke. Mrs. Altamimi also testified that she had overstated the telephone in the initial worksheet at $3,000 per annum and that it would more accurately have been estimated to have been in the range of $50 to $60 per month. There was no corroborating evidence on the telephone expenditures. The information the CRA auditor obtained from Statistics Canada (Exhibit R-7) for an average Canadian family of five had approximately $1,000 per year for telephone.

[22] The taxpayer and his wife also disputed several other revisions made by the CRA auditor in revising the information provided by the taxpayer's wife in the Personal Expenditures Worksheet for purposes of Schedule IV of his net worth assessment papers. There were three items specifically disputed.

[23] Firstly, the CRA auditor increased their 2001 gifts and contributions by the amount of $1,129 on the basis that it was an additional gift they had made to a relative. The auditor's testimony was unclear although he referred to his records. His testimony was very confused as to whether he was dealing with a gift received by the taxpayer or a gift made by the taxpayer. The taxpayer and his wife testified consistently that this related to the repayment of a loan her grandfather had advanced them.

[24] Secondly, the taxpayer and his spouse disagreed with the increase in their 2000 and 2002 transportation amounts from the $6,600 estimated in their worksheet. These were increased by $1,620 by the CRA auditor for 2000 and $715

for 2002. The taxpayer and his spouse testified that the 2002 amount represented a repayment to her grandfather of monies borrowed to repay the debt owing to the Government of Canada for the taxpayer's airfare upon immigration to Canada and that the 2000 amount related to the repayment of a Zellers card debt for earlier air travel in a prior year. Since both of these would, on this view, represent the repayment of debt for transportation expenses incurred in prior years, they should not have been reflected in the annual summary of personal expenditures for the years in question (although they perhaps should have been reflected in the Schedule III liabilities).

[25] Lastly, the taxpayer disputes the addition by the CRA auditor of $2,650 in each of 2001 and 2002 for student loan repayments of principal and interest. Firstly, such amount is at odds with the amount of $500 which they listed under miscellaneous/interest on their Personal Expenditures Worksheet. The testimony of the taxpayer's wife was that they paid $50 a month, which would be $600 a year. The CRA auditor's testimony was that he did not put the student loan on the balance sheet in Schedule II because he was unaware of it at the time he prepared that portion. He instead put the principal and the interest through as an adjustment to the personal expenditures. By adding it to the Summary of Personal Expenditures Schedule IV, the CRA auditor is acknowledging that there was a student loan. He testified that he did confirm with the financial institution that it was only taken out in 2001 and for that reason he reduced the 2000 estimate of $500 from the taxpayer's worksheet to zero for 2000 to the taxpayer's benefit.

[26] The next step in issuing a net worth assessment involves adding (i) the increase in net worth, (ii) the personal expenditures and (iii) expenditures by the taxpayer and his contributing family members, in this case his spouse, on Canada Pension Plan, employment insurance and income tax paid. This total provides an estimate of the income or cash spent by the taxpayer and his contributing family members in each year in question.

[27] The next step, also on Schedule III of Exhibit R-4, involves deducting all of the known and reported sources of income that would have been available to the taxpayer and his spouse to meet their spending in the years in question. In addition to the taxpayer's reported income and the spouse's reported income, are added income tax refunds, GST credits, child tax benefits, gifts from family members, etc. In this case, the only family member contributing to his family's household expenses that was accepted by CRA was his spouse. He did not document for CRA any sources of income to his mother from which she could have contributed, nor did he document any gifts or contributions from his mother. The same was the case

with respect to his brothers who at times lived with them. The taxpayer did not bring any evidence of any such sources of income from his mother or brothers to Court.

[28] In cross-examination, Crown counsel put to the taxpayer's wife a revised Personal Expenditure Worksheet (Exhibit R-9) which she had prepared subsequent to the one relied upon by the CRA auditor showing significantly reduced numbers. This had been prepared during the course of the taxpayer's administrative objection process with the CRA. The Crown did not use this schedule to directly challenge her on credibility nor did he do so in argument. She explained that the revised worksheet more accurately estimated their expenditures in the years in question. Indeed, it appears to me that it would have eliminated the net worth assessments for 2000 and 2001 and would have reduced 2002 to about $6,000 of under-reported income. She also explained that the appeals officer had heard her explanation of misunderstanding what the CRA auditor had meant by "the more the better" and had asked her to prepare this. She also testified that, following his review of this schedule and their objection, the appeals officer proposed a reassessment that would have reduced the under-reported income for the years in question by approximately one-half.

[29] In the net worth computations, Schedule III showed the spouse's reported income at $1,563, $392 and $8,217 in the years 2000, 2001 and 2002, respectively. The CRA auditor testified that these amounts came out of CRA's summary information available to him in the CRA's Option Cs for the spouse (Exhibit R-8). However, in cross-examination, Crown counsel brought out from the spouse that those amounts were significantly less than her actual income in 2000 and 2001 by approximately $1,500 in 2000 and by approximately $5,600 in 2001. She deferred to him as having the best information available of her tax years with answers to the effect of "you say so" and "you're CRA". The Crown carried on looking for confirmation or corroborative evidence that her income in those two years was greater. Having refreshed her memory with a review of some of the papers at her counsel table, she testified that the higher numbers Crown counsel put to her appeared correct. Whatever she looked at was not put in evidence by either party. It is not entirely clear to me why the Crown brought out this evidence as he did not challenge her credibility in argument although, on this point, his questioning of her appeared to challenge her credibility. He was perhaps responding to numbers put to the CRA auditor in cross-examination by the taxpayer. In any event, if her income in any of the years in question was in fact higher than that used by the CRA auditor in his Schedule III, this would have the effect of further reducing the net worth assessments for under-reported income.

[30] There were several shortcomings in the evidence before the Court. Most notably, the taxpayer did not provide the Court with any documents corroborating his version of any of the items he took issue with. This may well have caused him to lose this appeal entirely had CRA's evidence gone in better or had he not called credible corroborating witnesses. Nonetheless, it has made the Court's deliberations more difficult than perhaps they needed to be.

[31] Further, the differences between the amounts estimated by the taxpayer's spouse in her first and second Personal Expenditures Worksheets are so large that I must conclude that, in at least one of them, she did not attempt to make reasonable estimates but gave in to temptation and wishful thinking.

[32] There was also significant confusion or errors in the Crown's evidence. Key concerns are:

(i) The auditor admitted in cross-examination that he had made a $21,000 mistake on the Withdrawal Analysis portion of his net worth audit;

(ii) The confusion and uncertainty concerning the adjustment appropriate for gifts received versus gifts made was almost inexplicable;

(iii) The auditor's explanations of the Option C forms, if correct, mean the forms are quite misleading. Of particular relevance is that the witness' explanation of Line 150 Total Income of the taxpayer's Option C is this was really net after-tax income, not total income reported on a tax return. Yet both the CRA auditor and the Crown sought to use Line 150 Total Income from Mrs. Altamimi's Option Cs as her total income reported on her tax returns;

(iv) Entirely unsatisfactory reasons were given for the Canada Student Loan debts not being shown as liabilities on CRA's net worth assessment balance sheet Schedule II and for the principal and interest repayments instead being added to the Summary of Personal Expenditures Schedule IV; and

(v) The evidence of what adjustments would be needed and what the impact would be if the $6,300 of furnishings had been purchased in the base year 1999 was unsatisfactory.

Analysis:

[33] The first issue that needs to be decided is whether the reassessment of the taxpayer's 2000 year after the expiry of the normal reassessment period should be upheld. It can only be upheld according to subsection 152(4) if Mr. Altamimi "has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing a return or in supplying any information under this Act".

[34] I am satisfied that the taxpayer misrepresented his income from his barber shop in the years in question. However, to the extent he did so in 2000, I am not satisfied that his misrepresentation was attributable to neglect, carelessness or wilful default. The Crown has not alleged any fraud. The evidence is that the taxpayer chose a tax return preparation business to prepare his 2000 returns and that he gave him the sales and expense receipts and records with which he could have and should have done so. It appears, at least with hindsight, that his choice of tax preparation service provider was unwise. The taxpayer was a recent immigrant to Canada at that time. If his tax advisor told him that the appropriate method was followed, I do not believe that in his first year in business in Canada that would, in these particular circumstances, constitute neglect, carelessness or wilful default. In the circumstances, I do not find that the Crown has satisfied its burden of proof to reassess the taxpayer's 2000 taxation year. The taxpayer's appeal for his 2000 taxation year will be allowed in full.

[35] With respect to the taxpayer's 2001 and 2002 taxation years, I am satisfied that the taxpayer did under-report his income from his barber shop business. However, for the reasons given, I am not satisfied that the amounts reassessed for those years by the Minister using the net worth calculations in question estimate those understatements with reasonable accuracy. Specifically, I believe the taxpayer has satisfied the burden on him to show that those calculations are, in some specific respects, incorrect and need to be further revised.

[36] With respect to the Schedule I balance sheet of business and personal assets, I am satisfied that it was incorrect of the CRA to assume that all of the taxpayer's household assets (totalling $6,336.81) were acquired in the year 2000 and that he and his family had nil household assets in 1999. The evidence is that the only household assets of material value acquired in the years 2000 and 2002 were an apartment-sized washer and dryer and a microwave acquired from Leon's. The computer acquired in 2002 is listed separately and is not disputed. The taxpayer's 1999 household assets should reflect $5,000. This would reduce the taxpayer's

2000 assessment by a corresponding amount and will not affect the 2001 or 2002 assessment. However, as I have already concluded, the 2000 year reassessment cannot be supported at all because it is statute-barred.

[37] With respect to the Schedule IV Summary of Personal Expenditures, I am satisfied that, to the extent the initial inputs were based upon the first Personal Expenditures Worksheet prepared by the taxpayer's wife, she tended to overstate some of the categories. Specifically, I am satisfied that Line 11 for tobacco and alcohol should be reduced to $1,000 for each of the years. This will have no effect for 2000 and will reduce the assessments by $1,640 for 2001 and $1,140 for 2002.

[38] Similarly, Line 3 household operations should be reduced to reflect telephone at $1,200 per year instead of $3,000. This will not affect 2000 and will reduce each of 2001 and 2002 by an additional $1,800.

[39] I accept the testimony of the taxpayer and his spouse that the additional amount of $1,620 of transportation expenses that the CRA auditor added to their estimate for 2000 related to the repayment of debt in 2000 for travel incurred in 1999. Debt repayments affect the balance sheet portion of a net worth calculation and should not also be shown as a current personal expenditure. However, because the 2000 reassessment is statute-barred, this will have no effect. I am also satisfied with their evidence that the additional $715.39 of transportation expenses added by the CRA auditor to 2002 income related to repayment of debt in 2002 for travel in an earlier year. This will have the effect of reducing the 2002 reassessment by a like amount.

[40] With respect to Line 12 of Schedule IV for gifts and contributions, I am satisfied with the evidence of the taxpayer and his wife that the correct number should be the $200 set forth in their initial worksheet. The additional $1,129 added by the CRA auditor could not be explained satisfactorily by CRA. Even in his direct examination, the CRA auditor was very confused between whether the $1,129 was a gift received or a gift made by the taxpayer. I did not find the CRA's evidence or explanation satisfactory. The taxpayer and his spouse on the other hand were clear that a payment of that order of magnitude had been made to a relative in repayment of a loan. This will have the effect of reducing the 2001 reassessment by a like amount of $1,129.

[41] The final adjustment in favour of the taxpayer on the Schedule IV Summary of Personal Expenditures will be in respect of his Canada Student Loan. The Altamimis showed student loan as one of the loans reported under Heading 14

Interest on Personal Loans for a total of $500 in each of the three years. The CRA auditor had determined that the student loans were only taken out in 2001 and therefore reduced their interest on personal loans to $0 for that year, which appears to be inconsistent with the fact they had other personal debt. More troubling however is that, when he became aware of them, instead of going back and adding the student loans to Schedule II as a personal liability, he ran the principal as well as the interest through the summary of personal expenditures, directly contrary to CRA's own forms. That strongly calls into question CRA's treatment on this point and I am left with the evidence of the taxpayer and his wife, although otherwise uncorroborated, that their student loan payments were $50 a month. This adjustment will have the effect of reducing each of the 2001 and 2002 assessments by $2,050.

[42] I have dealt with the revisions I feel are needed to CRA's Schedule IV Summary of Personal Expenditures to the extent specific categories which were adjusted from the worksheet initially prepared by the taxpayer's spouse were challenged in the evidence of the taxpayer and his spouse. There remains the troubling question of the second personal expenditure worksheet put in evidence by the Crown in cross-examining the taxpayer's spouse. I am not satisfied that either attempt at reconstruction does, or could ever, accurately reflect reality years later. I am mindful of the fact that the CRA auditor testified that the Statistics Canada personal expenditure average for a family of five in Canada is in the range of $60,000 a year. He provided a detailed exhibit in support of this. He accepted their family expenditures should be lower based on their circumstances but he was not asked nor did he offer how much lower beyond saying he accepted the numbers in his Schedule IV Summary of Personal Expenditures which were in the $42,000-$44,000 range. What is the significance of this later worksheet that the taxpayer's spouse who prepared both said was more accurate and was prepared once she properly understood what she was being asked?

[43] One thing is clear from the evidence. These were not average income Canadians. The taxpayer was a recent immigrant who had arrived with little or no household goods. He and his family were on social assistance. They lived in subsidized housing. Their home was at best sparsely furnished in the years in question. The taxpayer's witness who was a friend and CRA employee confirmed that they had mattresses on the floor which doubled as couches as there were no couches in the living rooms. They also cared for an ailing mother. CRA accepted their household personal expenditures were as computed in the first schedule prepared, with some increases, most of which have already been discussed. This number was at 70% or higher of the Statistics Canada $60,000 number. The second

worksheet prepared came in at about one-third of the Statistics Canada numbers. Once the adjustments described above are made to the taxpayer's 2001 and 2002 reassessments, the Schedule IV personal expenditures as revised will be approximately 60% of that or $36,000. Based upon the evidence of all of the witnesses in this case, including this second personal expenditures worksheet, I find a further reduction of $3,000 each year is needed to the Schedule IV Summary of Personal Expenditures used by CRA in issuing the 2001 and 2002 net worth assessments.

[44] The final adjustment to the income inclusions is in respect of the Schedule III Total Income reported by spouse. For 2001, CRA used the amount of $392 which it took from the Option Cs for Mrs. Altamimi at Exhibit R-8. As mentioned above, I found CRA's explanation of the Total Income line of the Option C forms completely contradictory to it being total pre-tax income reported. I am therefore left with the evidence of the taxpayer's spouse that her income for 2001 was $6,135.30. Given that she checked this against documents she had with her and that she said were T4s, and given that Crown counsel did not challenge that description or put the documents into evidence, I find it credible. The 2001 income inclusion should be reduced by a further $5,743.

[45] This leaves the issue of penalties for the 2001 and 2002 years. The Crown's assessment of penalties under subsection 163(2) requires the Crown to satisfy the Court that the taxpayer knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to, or acquiesced in the making of a false statement or omission in a return. This is a higher standard than that required under subsection 152(4) to open an otherwise statute-barred year after the expiration of the normal reassessment period. It is the Crown's position for the purposes of subsection 163(2) that the taxpayer, at least under circumstances that amounted to gross negligence, assented to the omissions in his return which resulted from his providing estimates of gross income and net income. I am satisfied on the evidence that the taxpayer participated in or assented to such an omission. I am also satisfied that under-reporting income earned from a business in these circumstances is also a false statement for purposes of subsection 163(2). However, the important question is whether the Crown has, through the evidence, proven on a balance of probability that the omission or false statement was made knowingly or under circumstances amounting to gross negligence in each of the years 2001 and 2002. In essence, the question becomes whether it was reasonable for Mr. Altamimi to rely on his tax return preparer who advised Mr. Altamimi to provide estimates to him of the business' gross income and its net income, together with the income and expense receipts and slips provided, which estimates were

ultimately used on the taxpayer's return. As set out above, with respect to the issue of the 2000 year's normal reassessment period, I have concluded that it was not unreasonable for the taxpayer, a recent immigrant, to rely upon the advice of a paid Canadian tax return preparer in seeking to comply with Canadian reporting requirements in his first year of business. For 2000, Mr. Altamimi had provided the sales and expense receipts and slips to his tax return preparer and reported a specific number for gross income detailed to the dollar. It appears from the evidence that it was the years 2001 and 2002 in respect of which the taxpayer was advised by his tax return preparer to estimate. In my view, it was not clearly unreasonable for Mr. Altamimi to rely on that advice for 2001, being the first year he was asked to provide an estimate of income from a business he was identifying and reporting in his return. I conclude that for 2002 it no longer remained reasonable for him to credibly rely on that advice, especially since the estimate he provided for 2002 was identical to the gross revenue estimated by him in his prior year. That confirms to me that for 2002 his estimate could not likely have been made with any reasonable degree of accuracy intended. For that reason, I am upholding the assessment of penalties for the 2002 taxation year.

Conclusion:

[46] The taxpayer's appeal for 2000 is allowed in full because it is outside the normal reassessment period and the Crown could not satisfy the Court that it had the right to reassess outside that period.

[47] The taxpayer's appeal for 2001 is allowed only to the extent of reducing the income inclusion from $19,094 to $3,732 and vacating the penalty.

[48] The taxpayer's appeal for 2002 is also allowed, but only to the extent of reducing the income inclusion from $30,129 to $21,424.

[49] No costs will be awarded in the circumstances.

Signed at Ottawa, Canada, this 13th day of September 2007.

"Patrick Boyle"

Boyle J.

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