Docket: 2003-4614(IT)G

BETWEEN:

LYNETTE L. MENSAH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 11, 12 and 13, 2008, at Halifax, Nova Scotia.

Before: The Honourable D.G.H. Bowman, Chief Justice

Appearances:

Counsel for the Appellant: Gerard Tompkins, Q.C.

Counsel for the Respondent: John P. Bodurtha

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1994, 1995 and 1996 taxation years are allowed with costs and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the reasons for judgment and to delete the penalties imposed under subsection 163(2) of the *Income Tax Act*.

The statute-barred assessments for 1993 are vacated.

Signed at Ottawa, Canada, this 9th day of July 2008.

"D.G.H. Bowman"

Bowman, C.J.

Citation: 2008TCC378
Date: 20080709
Docket: 2003-4614(IT)G

BETWEEN:

LYNETTE L. MENSAH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowman, C.J.

[1] These appeals are from assessments made under the *Income Tax Act* for the appellant's 1993, 1994, 1995 and 1996 taxation years. The appellant was a professor at Dalhousie University. She also carried on a delicatessen business known as Lyn D's Deli. It is the computation of her income or loss from that business that is in issue in these appeals.

[2] There are several preliminary points that should be mentioned. The first is that for 1993, 1994, 1995 and 1996 the appellant used a fiscal year-end of January 1 for her business. The result of this was that the income or loss from the business for the 1993 taxation year was for the period January 2, 1992 to January 1, 1993. Similarly, the income or loss reported for 1994 was for the period January 2, 1993 to January 1, 1994. In 1995, the *Income Tax Act* required the computation of business income to be on a calendar year basis and so the income or loss reported for 1995 ought to have included that for the periods from January 2, 1994 to January 1, 1995 as well as the period from January 2, 1995 to December 31, 1995. Nevertheless, the appellant only included the loss from the January 2, 1994 to January 1, 1995 period on her 1995 return. She included the loss from the January 2, 1995 to January 1, 1996 period on her 1996 return. Later, she attempted

to file another 1996 return that included the calendar year 1996 loss, but the Canada Revenue Agency ("CRA") refused to accept this return. In continuing to use the January 1 fiscal year-end the appellant was clearly acting in a manner adverse to her own interest.

[3] The second point is that the assessments were made using the "net worth" method. I shall comment further later in these reasons on the appropriateness of the net worth method in the circumstances of this case.

[4] The third point is that the appellant impressed me as a highly credible and honest witness. Her credibility was at no time impugned in cross-examination or argument (See *Browne v. Dunn* (1893) 6 R. 67 (H.L.) at 70-71.) I have no hesitation in accepting her testimony that she conscientiously and carefully recorded the revenues and expenses from the business and reported them.

[5] If mistakes were made they appear to have been minor ones and they were made in good faith. They did not warrant the heavy handed use of the net worth method which has been described as a "blunt instrument". Moreover, it is a method of last resort where other methods of determining income are impossible. See *Ramey v. The Queen*, 93 DTC 791 at paragraph 6.

> **6** I am not unappreciative of the enormous, indeed virtually insuperable, difficulties facing the appellant and his counsel in seeking to challenge net worth assessments of a deceased taxpayer. The net worth method of estimating income is an unsatisfactory and imprecise way of determining a taxpayer's income for the year. It is a blunt instrument of which the Minister must avail himself as a last resort. A net worth assessment involves a comparison of a taxpayer's net worth, i.e., the cost of his assets less his liabilities, at the beginning of a year, with his net worth at the end of the year. To the difference so determined there are added his expenditures in the year. The resulting figure is assumed to be his income unless the taxpayer establishes the contrary. Such assessments may be inaccurate within a range of indeterminate magnitude but unless they are shown to be wrong they stand. It is almost impossible to challenge such assessments piecemeal. The only truly effective way of disputing them is by means of a complete reconstruction of a taxpayer's income for a year. A taxpayer whose business records and method of reporting income are in such a state of disarray that a net worth assessment is required is frequently the author of his or her own misfortunes. Mr. Boudreau stated that Mr. Allan Ramey's records were inadequate, that he had a history for years prior to 1981 of being assessed on a net worth basis and that his business, that of owning coin operated machines, such as pinball machines and slot machines of various types, was cash based and was therefore difficult to audit. The Minister had no alternative but to proceed as he did. While I have sympathy for someone in the position of the appellant whose liability for his father's tax is secondary, I can see no basis for

> adjusting the assessments made against his father to any greater degree than that to which the respondent has already agreed.

[6] As will be seen from the evidence, this case is about as far from the *Ramey* case as can be imagined. However inappropriate the net worth method may be here it is the way in which the Minister chose to proceed. For reasons which I set out below there is a far more acceptable means of determining the appellant's income, specifically the method she herself used. The majority of the Supreme Court of Canada stated in *The Queen v. McLarty*, 2008 SCC 26 at paragraph 75:

> **75** The Minister has numerous basis for challenging the deductions taken by a taxpayer. He may rely on sham or the *GAAR* to name just two. He did not do so in this case. In reassessment cases, the role of the court is solely to adjudicate disputes between the Minister and the taxpayer. It is not a protector of government revenue. The court must decide only whether the Minister, on the basis on which he chooses to assess, is right or wrong. In this Court, the Minister relied on contingent liability and non-arm's length dealing. The liability incurred by McLarty was not contingent and there was no basis to interfere with the findings of the trial judge that McLarty's dealings with Compton were at arm's length.

I do not read the comments of the Supreme Court as meaning that an appellant may not challenge as inappropriate the Minister's method. To put it colloquially, if the Minister chooses to put all his eggs in the net worth basket he may be stuck with that method but it does not mean that the taxpayer is. At all events the respondent has not chosen to support the assessment on any other basis.

[7] In the cross-examination of the CRA assessor, it was admitted by her that there was no falsification of any of the records. From the evidence that I saw Ms. Mensah had adequate records and she based her computation of income or loss from the delicatessen business on those records.

[8] The fourth preliminary point is that the assessment for the 1993 taxation year is statute-barred. The onus is upon the Minister to establish the facts justifying the reassessment of the 1993 taxation year beyond the normal reassessment period. The provisions of the *Income Tax Act* permitting the Minister to open up statute-barred years have evolved and the evolution was summarized in *943372 Ontario Inc. v. R.*, 2007 DTC 1051; [2007] 5 C.T.C. 2001 at paragraph 18:

> **18** The evolution of these provisions can be briefly summarized as follows: originally, subsection 152(4) permitted the Minister to open up a statute-barred year for all purposes if he could find any misrepresentation of the type described in subsection 152(4), however small, and reassess any items whether the subject

> of any type of misrepresentation or not. This obviously appeared somewhat unfair and the result was paragraph 152(5)(*b*) which was introduced in 1973-1974 with effect from 1972. This provision permitted the taxpayer to establish that the omission of an amount of income was not the result of a misrepresentation that was attributable to neglect, carelessness, wilful default or fraud. Nonetheless it did cast on the taxpayer an onus. Subsection 152(4.01) was therefore introduced and its effect, according to Mr. Kutkevicius, is to remove that onus from the taxpayer and put a two-fold onus on the Minister to establish:
>
> (a) that there was misrepresentation, and
>
> (b) that the misrepresentation was attributable to neglect, carelessness, wilful default or fraud.
>
> I think this is the correct interpretation. If the onus that was imposed on the taxpayer under former paragraph 152(5)(*b*) survived the amendment to subsection 152(5) and the enactment of subsection 152(4.01), subsection (4.01) would have no purpose.

[9] We have here the additional complication that the appellant's entire return for 1993 was not put in evidence and indeed the signature page was never located. Moreover, precisely what misrepresentation the appellant is alleged to have made was not established with any degree of specificity, or, for that matter, at all.

[10] In *943372*, *supra*, I raised a question whether a net worth assessment can ever meet the conditions in subsection 152(4.01) at paragraph 10:

> **10** There is one other problem about the Crown's case against Valerie Sr. that I find somewhat troubling. The 2001 assessments against Valerie Sr. are statute-barred and can only be salvaged if the conditions in subsections 152(4) and 152(4.01) are met. The 2001 assessments against Valerie Sr. are net worth assessments. They are arbitrary assessments not based on nay particular sources of income. How can a net worth assessment ever meet the conditions set out in subsection 152(4.01)? To conform to subsection 152(4.01) a reassessment under subsection 152(4) must be limited by the words in subsection 152(4.01) "... to the extent that, but only to the extent that, it [the reassessment] can reasonably be regarded as relating to a misrepresentation attributable to neglect, carelessness or wilful default or any fraud ...". This point was not argued and I express no concluded view on it.

[11] The final preliminary point is that penalties under subsection 163(2) were imposed. Subsection 163(2) reads in part:

> **(2) False statements or omissions** — Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a

> return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of
>
> . . . . .

There follows a complex formula which I need not reproduce. The Minister has the onus of establishing, on a balance of probabilities, that there was a false statement or omission and that it was made "knowingly, or under circumstances amounting to gross negligence". While the standard of proof is a civil and not a criminal one, nonetheless the evidence adduced in support of a penalty must be scrutinized with great care. In *Farm Business Consultants Inc. v. The Queen*, 95 DTC 200 at 205 (aff'd) 96 DTC 6085 (F.C.A.), the following appears:

> A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). Conduct that warrants reopening a statute-barred year does not automatically justify a penalty and the routine imposition of penalties by the Minister is to be discouraged. Conduct of the type contemplated in paragraph 152(4)(*a*)(i) may in some circumstances also be used as the basis of a penalty under subsection 163(2), which involves the penalizing of conduct that requires a higher degree of reprehensibility. In such a case a court must, even in applying a civil standard of proof, scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established.[3] Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted.[4] I think that in this case the required degree of probability has been established by the respondent, and that no hypothesis that is inconsistent with that advanced by the respondent is sustainable on the basis of the evidence adduced.

[3] *Cf. Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; 131 D.L.R. (3d) 559; 25 C.P.C. 72, per Laskin, C.J.C. at 168-171; D.L.R. 562-564; C.P.C. 75-77); *Bater v. Bater*, [1950] 2 All E.R. 458 at 459; *Pallan et al. v. M.N.R.*, 90 DTC 1102 at 1106; *W. Tatarchuk Estate v. M.N.R.*, [1993] 1 C.T.C. 2440 at 2443.

[4] This is not simply an extrapolation from the rule in *Hodge's* Case (1838) 2 Lewin 227; 168 E.R. 1136, applicable in criminal matters such, for example, as section 239 of the *Income Tax Act* where proof beyond a reasonable doubt is required. It is merely an application of the principle that a penalty may be imposed only where the evidence clearly warrants it. If the evidence is consistent with both the state of mind justifying a penalty under subsection 163(2) and the absence thereof -- I hesitate to use the words innocence or guilt in these circumstances — it would mean that the Crown's onus had not been satisfied.

[12] I might add that I have the same type of problem with basing penalties on a net worth assessment as I have with opening up statute-barred years. The principles stated in the passage from *Farm Business Consultants Inc.* were based upon the decisions of the Supreme Court of Canada referred to in footnote 3 and were approved by the Federal Court of Appeal. The expression "on a balance of probability" was discussed in the House of Lords in *In re Doherty*, 2008 UKHL 33 and *In re B UKHL* 35. It is an interesting discussion of the meaning of the expression but of course if the observations made in the House of Lords differ from the principles stated in the Supreme Court of Canada, I am bound by the latter.

[13] In filing her return of income for 1993 the appellant declared, in addition to her salary as a professor and other smaller items of income, a loss of $33,995.17 from the delicatessen business for the period January 2, 1992 to January 1, 1993. The 1993 return was apparently prepared by a bookkeeper or accountant but as stated the copy that was put in evidence does not have a signature page. The incomplete return is found at Tab 13, Vol. 1 of Exhibit R-1. Assuming the statement of business income is that which was filed with the return, it shows sales of $10,985.47, cost of goods sold of $15,252.72 and total expenses of $29,727.92 for a loss of $33,995.17.

[14] The initial assessment for 1993 was, according to the Reply to the Notice of Appeal, dated April 3, 1995, the reassessment for 1993 was issued March 6, 2001 and on objection a further reassessment was issued on October 6, 2003. The reassessment for 1993 that was made in 2001 was out of time and this defect is not corrected by the reassessment made in 2003. Unless the Respondent can justify, under subsections 152(4) and 152(4.01), the out of time assessment made in 2001 (and she has not), the assessments for 1993 made in 2001 and 2003 will be vacated. The reassessment made in 2001 for 1993 increased the appellant's total income by $17,382.40 as "unreported income networth". On objection the Minister reassessed to reduce the adjustment by $1,173.16.

[15] For 1994 the T-1 General filed by the appellant shows that for the period January 2, 1993 to January 1, 1994 the deli business had sales of $37,541.45 less GST of $2,294, cost of goods sold of $42,504 and expenses of $55,862 for a loss of $63,120.76. A large part of the expenses was for rent ($18,860) and salaries ($23,092). It was in 1993 that the business moved to new premises. The Minister added $90,785.89 to her total income on the basis of the net worth calculated and a gross negligence penalty of $10,432.82 was imposed. Following the objection filed

by the appellant, the income was reduced by $5,706.26 and the gross negligence penalty was reduced to $9,800.15.

[16] For 1995, the deli business had sales of $44,756.36 less GST of $53,679.79, cost of goods sold of $32,543 and expenses of $61,983 for a loss of $53,415.10 in the period January 2, 1994 to January 1, 1995. On assessing the 1995 taxation year the Minister added $90,556.16 and imposed a penalty of $11,737. The additional income was reduced by $35,942.94 on objection and the penalty was reduced to $6,145.13. According to schedule A of the reply for the period ending December 31, 1995, the appellant declared a business loss of $47,539. This is not what is shown in the return. The amount of $47,539 was shown as a business loss in 1996. I have not found in the exhibits a copy of the return with the business income or loss calculated for the period December 31, 1995. The figure obviously comes from the 1996 return which includes the financial results for the period January 2, 1995 to January 1, 1996.

[17] For calendar year 1996, the appellant reported a business loss of $22,181.22 calculated as sales of $38,942.12 less GST of $2,700, cost of goods sold of $17,650.41 and expenses of $40,772. For 1996 the Minister reduced the appellant's total income by $9,518.80. What happened is this: the appellant filed a 1996 return showing a business loss of $47,539 for the period beginning January 2, 1995 and ending January 1, 1996. Later, she filed another return for 1996 showing a business loss of $22,181.22 for the calendar year 1996. She should have moved the $47,539 loss back to 1995.

[18] The reason for the problem may in part be explained by the fact that in calculating the net worth assessment, the Minister shifted the business losses into the period in which they arose in order to match the appellant's receipts and expenditures. The net effect of this, however, was to remove the benefit of the January 1 fiscal year-end. Under the net worth method, the business losses were recognized as they occurred and not one year later. This would have posed a greater problem had the business been profitable.

[19] Throughout my preparation of these reasons I have had great difficulty in reconciling the figures in the reply with the documents put in as exhibits. We have a variety of calculations of net worth statements and other calculations made by the representative of the CRA but the only solid bedrock on which I can found any conclusion about the appellant's income is her own figures subject only to the problems of timing that I mentioned earlier. I shall set out below a number of observations that I have on the net worth calculations which make the CRA's conclusions unreliable even if I were to accept the premise that the net worth

method was the only appropriate way to calculate the appellant's income (which I do not).

[20] Let us start with an overview. The appellant is a woman of mature years who came to Canada from Guyana in 1969. She studied in England and her then husband was employed by Dalhousie University in research. She has a bachelor's and master's degree in nursing and a doctorate in education. She was a full-time professor at Dalhousie in obstetrics and community health from 1971 until her retirement in 1998. She traveled extensively throughout the world in connection with her work and was reimbursed by Dalhousie for her expenses.

[21] She started the business in about 1992 and it was run for the first period by her daughter Shelley. The appellant took over the operation in about 1992 or 1993. The genesis of the idea of opening a Caribbean delicatessen had some element of idealism. Ms. Mensah testified in answer to a question by her counsel Mr. Tompkins.

> 33. Q. With your background and your experience and your expertise, why, can you explain to us, did you stay involved in this restaurant business?
>
> A. This restaurant, I started it to have a Caribbean presence here in the - - in Halifax. There was nothing ethnic here. I also wanted to give some jobs to some minorities, and so – because they were not having employment. So maybe there was some altruistic perspective, but I did want it to be a successful business as well. And why I stayed in it that long – tenacity, I presumed. I was always hoping that it would do well, that I could grow it. I'm a persistent person. Part of my training, to make a difference in the lives of people in whatever you do, and I just kept on hoping it would improve.

Nevertheless, the deli business was clearly a business and was operated with the intent of earning a profit. The assessor considered whether to apply the late and unlamented REOP principle, (which has been given a decent burial by the Supreme Court of Canada). She wisely rejected the idea.

[22] Exhibit A-16 shows losses of $198,000 over the four years (actually five calendar years less a day in light of the January 1 year-end). In fact, if we were to put everything on a calendar year basis, which is what the net worth method appears to do, we would move the $33,995 loss back to 1992, the $63,120 loss back to 1993, the $53,418 loss back to 1994, the $47,539 loss back to 1995 and include the $22,181 loss in 1996, for a total loss of $186,256 for the calendar years

1993 to 1996. Either way, the losses claimed were substantial, yet the CRA essentially ignored her figures and, using what it described as a "net worth" method to arrive at a "net worth discrepancy", calculated a total loss of $47,000 over the entire period. The difference between the CRA's and the appellant's conclusions is enormous and it casts doubt in my view on the reliability of the net worth basis in this case. Indeed in the column marked 1994 which covers the January 2, 1993 to January 1, 1994 period, the Crown has come up with a profit of about $22,000 even though it accepts that there were losses in all other years. What is most surprising is that this profit supposedly occurred in the same year that the deli business moved into and renovated the Queen Street location. If nothing else, common sense tells me that this year of all years ought not to have been profitable.

[23] Compared to the net worth basis, the appellant's figures have a realistic ring and, in my view, are far more reliable than the CRA's. No specific attack has been made on the appellant's figures, which she has taken from her records. The appellant kept meticulous records of her expenses (Tabs 31, 32, 33 and 34; Exhibits R-2 and R-3). Her calculation of the business receipts was based on cashier tapes ("Z" tapes) and bank deposits.

[24] The business was a losing proposition from the outset but the CRA has not chosen to deny the losses on the basis that the deli was not a business. The supposed profitability of the business in the year of the move is, to use a hackneyed expression, like the thirteenth gong of a crazy clock. It casts doubt on everything else.

[25] There has been, as I mentioned, no attack on the appellant's numbers. There has been merely a bald assertion by the assessor that the records were inadequate and on this unsubstantiated basis this individual was hit with the juggernaut of a net worth. I cannot accept this in the face of the multitude of records produced by the appellant and put in evidence. There is no suggestion of any falsification of records or dissimulation by the appellant. She was open, cooperative and articulate in her dealings with the CRA. I accept her testimony and in my view her evidence of the expenses and revenues of the business is more reliable than that of the CRA based on the net worth. There is no suggestion in the reply, in the oral testimony or in argument that the alleged "unreported income" arises from any sources other than the deli business.

[26] I have carefully reviewed the appellant's testimony and I am satisfied that the system that she had in place constituted an accurate means of recording and accounting for cash and credit card receipts as well as expenditures. It is worth

observing that this money losing operation was kept afloat by large infusions of cash from the appellant's own personal bank account as well as loans or gifts from family and friends. Some of these infusions were in the form of cash. For example, her salary cheque would be deposited in her bank account at the Credit Union and then cash would be deposited to the business bank account at the Royal Bank. These cash contributions from Ms. Mensah as well as from family members and friends might well have distorted the net worth calculations upwards within a range of indeterminate magnitude but they certainly would not result in an understatement of revenue or an overstatement of expenses. By way of example I have been able to identify about $18,000 in loans over the period, using prevailing US dollar exchange rates. The cash contributions by the appellant herself are of an indeterminate amount but I have concluded that they were substantial.

[27] Nowhere in the evidence or in the argument is it alleged that any specific items of income have been omitted or understated or any specific items of expense have been overstated. In other words nowhere in the evidence is it demonstrated how much of the "net worth discrepancy" the Minister attributes to alleged under-reporting of revenue and how much she attributes to alleged overstatement of expenses. I suppose the imprecise net worth method does not permit of or even contemplate such a degree of specificity. Against the approximation and inexactitude of the net worth method used by the CRA we have the careful and specific recording and reporting of revenues and expenses by the appellant. Most net worth assessments that I have seen involve cases where there are no books or records available or the record-keeping is haphazard or there are no returns filed as in *Ramey*. The net worth method of determining income, for all its deficiencies, may have a place in our tax system but this is not the case where it should have been used.

[28] Even cast in the light most favourable to the respondent, the balance of probabilities in a case such as this means merely this: "Among two or more contradictory or inconsistent hypotheses, which one is the more probable?" That is essentially what the House or Lords cases that I mentioned above are saying. In this case the appellant was an honest and credible witness. I find it highly improbable, indeed inconceivable that she would have misstated her income to the extent the Minister is alleging or for that matter at all. Here, I have no hesitation in finding that Ms. Mensah's method of calculating her income has a far greater degree of probability of being right. In *Ramey* it was stated that the only truly effective way of disputing a net worth assessment is by a complete reconstruction of the appellant's income. That is what we have here. If we are to talk of "onus of proof" (a much overused expression in income tax litigation) the appellant clearly has satisfied the onus. In fact, she has gone beyond a *prima facie* case. She has

overwhelmingly shifted the onus to the Minister to justify the figures in the net worth assessment and the respondent has not met that onus.

[29] Both counsel agreed that the court is faced here with an all or nothing situation, that is to say, I accept either Ms. Mensah's calculations as reported or I accept the result of the CRA's application of the net worth method. This leaves the court little room to make adjustments to the calculations. In most net worth cases there is no viable alternative to the net worth method. That is not the case here, where we have a credible and far more acceptable alternative.

[30] Indeed, even if I were to accept the net worth method as the only appropriate way of determining the appellant's income, which I do not, the CRA's calculations in schedule A to the reply contain a number of errors that make it dangerous to rely upon it. For example they have five years of what they call "personal expenses" crammed into four calendar years. The $37,713.17 amount in the column marked January 1, 1995 on page 2 appears to have materialized out of thin air. Moreover, the figures in the columns marked 1993 and 1994 ought to have been placed in the columns marked 1994 and January 1, 1995 instead. These errors cast doubt on the accuracy of the entire exercise.

[31] It is of course not necessary or even desirable that I refer to all of the evidence supporting my conclusion that the appellant's calculations are more accurate but I shall mention a few.

> 119. Q. Did you review all of the bank information?
>
> A. I reviewed every receipt, every invoice, all the bank statements. Every possible piece of information that I have, I reviewed, and I reviewed it several times.
>
> 120. Q. Ms. Mensah, based on what you've been dealing with for all these years, today – to tell us today, do you feel the loss you claimed in your 1993 tax return is accurate?
>
> A. It is accurate.

Ms. Mensah's reply was the same for the later years as well. While in most cases of net worth assessments such statements should be taken with a grain of salt, I accept the appellant's assertion.

[32] In the examination and cross-examination of Ms. Mensah, only four areas of possible inaccuracy in her record keeping were identified. One was the substantial contributions to the business by the appellant herself and loans by relatives and friends. These went either to pay bills or into the business bank account at the Royal Bank. And while they may have created the appearance of greater business revenues than was in fact the case, they cannot be used to support an allegation of an understatement of revenue.

[33] The second was the receipt of amounts in two years from the Busker's Festival. The appellant, in conjunction with a Mr. Reece, sold Jamaican patties at a street festival of buskers in two years. The net, after deducting expenses, went into the business bank account and was included in the business income. From the evidence, the expenses were paid for by Ms. Mensah and she was apparently not reimbursed. Again, this appears to be an overstatement of income or an understatement of expense. The net worked out to a couple of thousand dollars in the two years.

[34] The next is cash payments out of the till of money for milk, pest control and fire extinguishers. The amounts were minimal and if they reduced sales slightly they were also offset by a corresponding expense deduction.

[35] Finally, there was one instance where there was a suspicion that an employee may have stolen some cash from the till. Again, if this did result in the reduction in income it is minimal and would in any event be offset by the deductible expense.[1]

[36] I cite the above as examples of possible minor discrepancies that have no appreciable effect on the business income. They simply illustrate that Ms. Mensah was running a typical small business. If these are the only inaccuracies the Minister can come up with he certainly should not be hitting her with a net worth.

[37] There has been no evidence adduced to support the allegations of gross negligence or the other conditions needed to justify the penalties and in any event I have found no understatement of income. Moreover, there has been no basis shown

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[1] See Hannan and Farnsworth, The Principles of Income Taxation at p.446

In a case relating to the nature of compensation paid to clients whose money had been misappropriated by the appellant's former partner, Latham C.J. said that 'purloinings by office boys and thefts by shop employees should, *prima facie*, be allowed as deductions; while it appeared to Rich J. that the defalcations of a partner 'stand in a different position from the petty larcenies of servants and the leakages through carelessness or dishonesty to which the revenues of most profit-earning organizations are exposed'.

to justify opening up the statute-barred 1993 taxation year, even if the respondent had been able to find a signed copy of the return.

[38] The appeals are allowed with costs. The statute-barred assessments are vacated and the other reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with these reasons on the basis that the appellant's computation of her losses for the years in question are to be accepted and the net worth basis used by the Minister of National Revenue is to be rejected. The penalties are deleted.

Signed at Ottawa, Canada, this 9th day of July 2008.

"D.G.H. Bowman"

Bowman C.J.

CITATION:	2008TCC378
COURT FILE NO.:	2003-4614(IT)G
STYLE OF CAUSE:	Lynette L. Mensah Her Majesty The Queen
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	June 11, 12 & 13, 2008
REASONS FOR JUDGMENT BY:	The Honourable D.G.H. Bowman, Chief Justice
DATE OF JUDGMENT & REASONS FOR JUDGMENT:	July 9, 2008

APPEARANCES:

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Name:	
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