

Docket: 2006-2507(GST)I

BETWEEN:

PETER MILOJEVIC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 25, 2008, at Hamilton, Ontario

Before: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant: Louie Milojevic
Counsel for the Respondent: Sandra K.S. Tsui

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated October 13, 2005, and bears number GB08GP0105315, for the period from January 1, 2001 to December 31, 2003, is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the unreported GST collectible is reduced by \$3,975, with resulting section 280 penalties and interest to be calculated. The section 285 penalties are waived.

Signed at Ottawa, Canada, this 6th day of October 2008.

“Campbell J. Miller”

C. Miller J.

Citation: 2008 TCC 564
Date: 20081006
Docket: 2006-2507(GST)I

BETWEEN:

PETER MILOJEVIC,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Miller J.

[1] Mr. Milojevic appeals a GST assessment covering the period January 1, 2001 to December 31, 2003. The Minister of National Revenue increased the GST payable by \$9,430.12, allowed additional input tax credits of \$1,675.13, assessed late remittance penalties and interest in the amounts of \$1,888.09 and \$811.24 respectively, and imposed gross negligence penalties of \$2,173.82 for a net assessment of \$12,628.14. Mr. Milojevic believes the Government has incorrectly estimated his revenues from his pizza business in coming to this assessment. It was clear from Mr. Milojevic and his son, who acted as Mr. Milojevic's agent, that they were particularly distressed by the manner in which the Canada Revenue Agency official conducted the audit. As I have said on several previous occasions, it is the correctness of the assessment that is before me, not the behaviour of the Canada Revenue Agency representative.

[2] Mr. Milojevic operated Star Pizza as a sole proprietor during the period in question. However, he left the operation of the restaurant completely to an individual by the name of Oliver Jovancevic. Mr. Milojevic did not pay Mr. Jovancevic a salary but allowed him to live at the back of the pizza shop. Mr. Jovancevic did not testify.

[3] Star Pizza was the second pizza place that Mr. Milojevic owned, the first was for the three years preceding the years in question. He operated the first pizza place with his father without much success. He believed Star Pizza was in a better location. Certainly this is what Mr. Jovancevic advised him, notwithstanding there were three or four other pizza places in very close proximity.

[4] Mr. Milojevic left it to Mr. Jovancevic to regularly amass the necessary papers to submit to his accountant to prepare Star Pizza's tax filings for GST and income tax purposes. The accountant also did not testify. It was clear, however, that the auditor for the Canada Revenue Agency had a number of meetings and discussions with Mr. Milojevic's accountant.

[5] During the relevant period, Mr. Milojevic was going through some marital strife, which ultimately led to divorce. My impression was that this conflict consumed him, and he gave little attention to his business affairs. He acknowledged that he did not keep very good books and records. Whatever records he might have had were destroyed in a flood in the fall of 2003. He sold his business to Mr. Jovancevic for a minimal amount in 2005 and suggested perhaps that Mr. Jovancevic had some remaining books and records. Mr. Milojevic provided no books and records at trial.

[6] During 2001, 2002 and 2003, Mr. Milojevic reported GST payable of \$16,508 with input tax credits of \$16,716. From his testimony, I gather this reporting was a result of information submitted to his accountant by Mr. Jovancevic.

[7] Mr. Milojevic testified that business was never very good. He reported in his income tax returns sales of \$52,684 in 2001, \$74,740 in 2002 and \$90,704 in 2003, with corresponding losses of \$15,648, \$6,299 and \$10,452, respectively. While he had a liquor license for the 65-seat restaurant, he had had the license revoked three times for not renewing it on a timely basis. He suggested that he sold very little liquor in the business as it was mainly a take-out business.

[8] Notwithstanding a price list which offered four sizes of pizzas at differing prices, Mr. Milojevic insisted that he only sold large pizzas at \$4.99 a pizza and later in the period at \$5.99 a pizza. The auditor noted that Mr. Jovancevic confirmed that mainly large pizzas were sold.

[9] The Milojevics seemed quite disturbed that the auditor did not spend more time with Mr. Milojevic, appreciating his marital difficulties and allowing him more time to put his evidence together. I find this concern rings somewhat hollow for four reasons. First, Mr. Milojevic himself had advised the Canada Revenue Agency that it was Mr. Jovancevic and, interestingly, Mrs. Milojevic, who were the persons to contact about the pizza business. Second, as Mr. Milojevic acknowledged at trial, he did not have any records in any event to put evidence together. Thirdly, it was clear from the auditor's evidence that the auditor was in contact with Mr. Milojevic's accountant, who was making representations on Mr. Milojevic's behalf, which representations resulted in the assessment being significantly lower than first proposed. Fourthly, this was not a short-term audit. I have no doubt marital breakdown can be the most stressful time in an individual's life and certainly Mr. Milojevic made it clear this was so in his case. Yet, this audit went on for over a year, with Mr. Milojevic being afforded several opportunities to make representations. To now suggest the auditor was mean-spirited in proceeding expeditiously, ignoring Mr. Milojevic's fragile state is an emotional, but not rational, reaction. I have no doubt these were difficult times for Mr. Milojevic, but I find his attack on the auditor's approach is ill-founded. So, notwithstanding Mr. Milojevic's son's concern that his father has been thwarted in being given an opportunity to present his case, I just do not buy it. The real issue in my view is the reasonableness of the auditor's findings.

[10] The Federal Court of Appeal indicated in the case of *Hsu v. R.*¹ the following:

31 By its very nature, a net worth assessment is an arbitrary and imprecise approximation of a taxpayer's income. Any perceived unfairness relating to this type of assessment is resolved by recognizing that the taxpayer is in the best position to know his or her own taxable income. Where the factual basis of the Minister's estimation is inaccurate, it should be a simple matter for the taxpayer to correct the Minister's error to the satisfaction of the Court.

[11] Justice Tardif also pointed out the following in the case of *Bastille v. R.*:²

¹ 2001 FCA 240.

² [1999] 4 C.T.C. 2155.

6 A *NET WORTH* assessment can never reflect the kind of mathematical accuracy that is both desired and desirable in tax assessment matters. Generally, there is a certain degree of arbitrariness in the determination of the value of the various elements assessed. The Court must decide whether that arbitrariness is reasonable.

7 Moreover, use of this method of assessment is not the rule. It is, in a way, an exception for situations where the taxpayer is not in possession of all the information, documents and vouchers needed in order to carry out an audit that would be more in accordance with good auditing practice, and most importantly, that would produce a more accurate result.

8 The bases or foundations of the calculations done in a *NET WORTH* assessment depend largely on information provided by the taxpayer who is the subject of the audit.

9 The quality, plausibility and reasonableness of that information therefore take on absolutely fundamental importance.

[12] Clearly, the Courts have recognized that these net worth assessments are subject to review by this Court, based on evidence the Court hears at trial that might cast some new light on the correctness of the assessment. I believe that is the situation before me with respect to the auditor's determination of revenues from the sale of pizzas.

[13] The auditor took two approaches to estimating pizza sales: one based on information from suppliers regarding the number of pizza boxes supplied to Star Pizza, and one based on Mr. Jovancevic's estimate of pizzas sold during a week and consequently over the year. The auditor determined the second approach was more reliable. She then applied prices to the pizzas relying on the price list, estimating that 50% of the pizzas were large with four toppings, and consequently were sold for \$9.99, and just 30% were large pizzas with three toppings sold at \$5.99. This conclusion is contrary to Mr. Milojevic's evidence at trial, that all large pizzas were sold at the special price (he indicated initially \$4.99 and then in the later years at \$5.99). Having enjoyed more pizzas than I dare to admit over the years, common sense suggests that a pizza purchaser would not pay four or five extra dollars to get one extra topping. I accept Mr. Milojevic's evidence that the large pizzas were sold at \$5.99 and not \$9.99. This has a significant impact on the auditor's conclusions. Relying upon her numbers of 50% of 11,180 pizzas, or 5,590 pizzas, being sold at \$9.99, I find she has over-estimated by \$4.00 per pizza or \$22,360. For the years 2002 and 2003, this results in there being no under-reported GST on pizza sales

(\$894.58 in 2002 and \$1,515.56 in 2003). The effect in 2001 is to reduce GST by 7% of \$22,360 or \$1,565, resulting in taking the under-reported GST collectible in 2001 from \$3,154.57 to \$1,589.57.

[14] The other aspect of the audit which resulted in unreported GST collectible relates to liquor sales. Mr. Milojevic's evidence was that his restaurant was mainly a takeout pizza business with very little liquor sales. There was some suggestion that some of the liquor purchased may not have been sold commercially. The auditor based her estimate of liquor sales on information received from the suppliers, LCBO and the Beer Store. Mr. Milojevic was unable to provide any evidence to contradict these figures. His only evidence was that he lost his license three times as a result of late renewals, which suggested that he garnered little profit from liquor sales. However, this evidence is not sufficient, nor specific enough, to counter the auditor's findings. Nor did Mr. Milojevic provide any specifics as to the level of non-commercial consumption, though this may not have assisted him in any event due to the application of subsection 172(1) of the *Excise Tax Act*³ which reads:

172(1) For the purposes of this Part, where a registrant who is an individual and who has, in the course of commercial activities of the registrant, acquired, manufactured or produced any property (other than capital property of the registrant) or acquired or performed any service appropriates the property or service, at any time, for the personal use, consumption or enjoyment of the registrant or another individual related to the registrant, the registrant shall be deemed

- (a) to have made a supply of the property or service for consideration paid at that time equal to the fair market value of the property or service at that time; and
- (b) except where the supply is an exempt supply, to have collected, at that time, tax in respect of the supply, calculated on that consideration.

[15] I have concluded that no adjustments are warranted with respect to the auditor's findings of unreported GST collectible as it relates to the liquor component of Mr. Milojevic's business.

[16] With respect to penalties, I am satisfied Mr. Milojevic cannot avail himself of any due diligence defence to avoid the impact of the section 280 penalties and

³ R.S.C. 1985, c. E-15 as amended.

interest. They are to be redetermined on the basis that the amount not remitted is reduced by \$1,565 in 2001, \$894.58 in 2002 and \$1,515.56 in 2003.

[17] The final issue is the imposition of \$2,173.82 as gross negligence penalties. Section 285 of the *Excise Tax Act*, imposing such penalties, reads in part as follows:

285 Every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer (each of which is in this section referred to as a “return”) made in respect of a reporting period or transaction is liable to a penalty of the greater of \$250 and 25% of the total of...

[18] There has been considerable case law dealing with what is meant by gross negligence in the context of the *Income Tax Act*.⁴ The same criteria apply when dealing with the *Excise Tax Act*. The older case of *Venne v. Her Majesty the Queen*⁵ is often relied upon in establishing the principle that gross negligence involves greater neglect than simply failure to use reasonable care. It involves a high degree of negligence tantamount to intentional acting. What did Mr. Milojevic do? He relied upon the operator, Mr. Jovancevic, to assemble the necessary records which were regularly submitted to professional accountants for appropriate filings. His records may not have been extensive, but his understanding of the volume of liquor sales, taking into account the non-commercial use of a portion of the liquor, does not show any disdainful disregard for complying with the tax laws. This is an individual with less than high school education and very limited English skills, going through a most stressful time in his life. Under these circumstances I find the Respondent has not proven on balance that section 285 is applicable.

[19] In summary, the appeal is allowed and referred back to the Minister of National Revenue for reassessment on the basis that the unreported GST collectible amounts are reduced by \$1,565 in 2001, \$894.58 in 2002 and \$1,515.56 in 2003, with the corresponding reduction in section 280 penalties and interest. The section 285 penalties are waived.

Signed at Ottawa, Canada, this 6th day of October 2008.

⁴ R.S.C. 1985, c. 1 (5th Supp.), as amended.

⁵ [1984] C.T.C. 223 (F.C.T.D.).

“Campbell J. Miller”

C. Miller J.

CITATION: 2008 TCC 564

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STYLE OF CAUSE: PETER MILOJEVIC AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: September 25, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF JUDGMENT: October 6, 2008

APPEARANCES:

Agent for the Appellant: Louie Milojevic
Counsel for the Respondent: Sandra K.S. Tsui

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