

Docket: 2007-4691(IT)I

BETWEEN:

GIGI GREIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 6, 2008, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant:

Horst Grein

Agent for the Respondent:

Simon Olivier de Launière

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* in respect of the 2002, 2003 and 2004 taxation years is allowed in part in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

Angers J.

Citation: 2008 TCC 573

Date: 20081114

Docket: 2007-4691(IT)I

BETWEEN:

GIGI GREIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal with respect to net worth assessments for the appellant's 2002, 2003 and 2004 taxation years. The Minister of National Revenue increased the appellant's professional income by the amounts of \$14,748 for 2002, \$10,118 for 2003 and \$12,634 for 2004. The appellant was also assessed, pursuant to subsection 163(2) of the *Income Tax Act* (the *Act*), penalties of \$609.54, \$608.95 and \$744.12 for those same taxation years respectively.

[2] During the years in question, the appellant received employment income, worker's compensation benefits and other income she was able to earn doing odd jobs, such as typing papers for students, performing some accounting work and preparing one tax return. She was injured in two motor vehicle accidents, which explains why her income dropped considerably. The work performed at odd jobs was never actually invoiced and it was all paid for in cash. She did not claim any expenses against this business income. She reported both a gross and a net business income of \$2,785 for 2002, \$8,025 for 2003 and \$3,500 for 2004. The breakdown of her other income is as follows: employment income of \$2,515 and worker's compensation benefits of \$5,271 for 2002, employment income of \$323 for 2003 and employment income of \$7,603 for 2004.

[3] At the audit stage, it was noted that the appellant had no internal control in place for her business. She was the only person preparing the cash receipts and the cash payments, from the information in the bank statements and on the deposit slips. The appellant was the only one doing the bank transactions, and she admitted that no invoices were prepared or sent to clients.

[4] As a result, the auditor decided to proceed with an indirect method of auditing and did a net worth assessment on the basis that the appellant's revenue was too low and did not correspond with her cost of living. He also confirmed with third parties the existence of assets and liabilities shown on lists provided by the appellant. In light of the fact that no reliable evidence was produced by the appellant or her representative to contradict his findings of undeclared income at both the audit and objection stages, the net worth assessment was maintained and confirmed.

[5] The appellant was represented by her father at trial and throughout the audit and the objection stages. The appellant nonetheless answered a preliminary interview questionnaire in which she described her principal activities as promotional writing on a part-time basis, for which she received a salary. She also said that she represented businesses occasionally at trade shows and did some bookkeeping, as well as tax preparation, although this turned out to be on only one occasion. It is also stated on the questionnaire that she does such work when she is able to get it. The questionnaire confirms also that she was involved in a bad car accident in 2001 and had to cut back on her work activities due to pain. She acknowledged being paid by cheque, or in cash if the client preferred it. She indicated that all her income was declared, a statement she reiterated when she testified at trial.

[6] The appellant acknowledged that she did not keep a separate bank account for business purposes and that she did not prepare invoices as all her contracts were entered into verbally. She kept a record of her income as she got paid and deposited the cheques, if she was paid by cheque. The appellant testified that the scope of her activities was limited in terms of numbers and that everything she did was far removed from being a big business, as none of her activities were steady.

[7] The appellant, in answering the questionnaire, also provided the auditor with a list of personal disbursements she made for all three taxation years at issue, indicating the amounts paid and whether they were paid in cash, by cheque, by credit card or by more than one of these methods, and indicating as well any other assets, bank accounts, etc. It was from that information that the auditor was able to establish an annual cost of living and eventually to calculate a net worth assessment.

[8] The auditor accepted most of the disbursements indicated by the appellant, except the amounts spent on food, gasoline, car repairs, hairdressing and clothing. He used instead figures provided by Statistics Canada for these categories of expenses for a year. An illustration of this point is the fact that the appellant reported in the questionnaire that she spent \$177.46 on food in 2002, \$326.17 in 2003 and \$784.63 in 2004, but the auditor used an average figure of \$2,493.46 a year for food as determined from Statistics Canada figures. For gasoline and car repairs, the appellant reported spending \$256.09 for gasoline and nothing for repairs for 2002, \$124.60 for gasoline and \$13 for repairs in 2003 and \$227.56 for gas and \$11.50 for repairs in 2004. The Statistics Canada numbers come to an average of \$589.08 for gasoline and \$299.44 for repairs for the three years in question. The auditor simply did not find the numbers provided by the appellant for these items to be realistic.

[9] The appellant's explanation for the low food cost is that she spent a lot of time at her mother's place, which is across the street from her. As for her car, it is a 1992 Toyota that was kept inside and that she hardly used because she worked at home. There was nothing wrong with the car and it did not need repairs as it was a solid vehicle.

[10] The net worth calculations using the cost of living figures from Statistics Canada and using the appellant's figures with respect to the other assets and with respect to liabilities resulted in the amounts for which the appellant was assessed for the three taxation years in question.

[11] The appellant testified that, in order to make ends meet, she used money from a loan she made to her father in May 2000 when she sold a property in Mascouche, Quebec. She received \$37,850.81 from the notary after the sale. A copy of the cheque she received was produced at trial. The money was deposited in her father's account. The loan bore interest of 4.5%. A spreadsheet from the appellant's computer indicates that her father paid back the sum of \$6,000 on April 15, 2002 and another \$6,000 on October 15, 2002, \$2,850 on December 15, 2002, \$5,200 on April 15, 2003, \$5,050 on August 15, 2003, \$5,751 on April 15, 2004, \$5,000 on August 14, 2004 and \$2,000 on December 14, 2004. All these payments were made in cash and no corresponding deposits in the appellant's bank account were found. No interest was paid. The appellant, in her evidence, also referred to this money as money given to her father for him to invest for her.

[12] The appellant produced as well a list of items, such as furniture, jewelry and other personal items, which she sold during 2002. The total sales came to \$17,910. The representations made to the auditor by the appellant's father were that these

items had been sold in flea markets. When the appellant testified, she corrected those representations by saying that these personal items were sold in the course of the year, through word of mouth or advertisements in grocery stores, to people who went to her house. The items were sold as a result of the appellant's divorce in 1995 after a ten-year marriage and most of them were gifts. There are no records of these sales in terms of who bought the items and when, except for the list produced by the appellant. All sales were cash sales.

[13] At the audit stage, the auditor was unable to verify any of the sales of the appellant's personal items as they were all cash sales, and he concluded that the prices obtained were above what could be had in flea markets. As for the loan to her father, the auditor was not told of its existence by the appellant's father, and in the questionnaire the appellant referred to a loan made to her brothers and nothing more.

[14] On the issue of the penalty for gross negligence, the auditor relied on the fact that the unreported income was more than 50% of the appellant's total net professional income for each taxation year. In addition, he relied on the fact that the appellant was a professional and well aware of fiscal matters and of the amount of her income for each of the years at issue. The appellant's representative admitted these facts at trial, except as regards the percentage by which unreported income exceeded the net reported professional income.

[15] At the objection stage, the appellant's representative presented a series of explanations, but was unable to substantiate any of them with documentary or other evidence. After extensions of time had been granted in order to allow the appellant's representative to produce supporting evidence, the assessments were confirmed.

[16] The issues are whether the Minister was justified in assessing the appellant for additional income in the amounts of \$14,748, \$10,118 and \$12,634 for the 2002, 2003 and 2004 taxation years respectively, and whether the Minister properly assessed penalties on this unreported income pursuant to subsection 163(2) of the *Act*.

[17] Net worth assessments have been defined by many, and in many different ways. Madam Justice Desjardins of the Federal Court of Appeal referred to some of these definitions in *George R.H. Hsu v. The Queen*, 2001 FCA 240, writing as follows:

Net worth assessments are a method of last resort, commonly utilized in cases where the taxpayer refuses to file a tax return, has filed a return which is grossly inaccurate

or refuses to furnish documentation which would enable Revenue Canada to verify the return (V. Krishna, *The Fundamentals of Canadian Income Tax Law*, 5th ed. (Toronto: Carswell, 1995) at 1089). The net worth method is premised on the assumption that an appreciation of a taxpayer's wealth over a period of time can be imputed as income for that period unless the taxpayer demonstrates otherwise (*Bigayan, supra*, at 1619). Its purpose is to relieve the Minister of his ordinary burden of proving a taxable source of income. The Minister is only required to show that the taxpayer's net worth has increased between two points in time. In other words, a net worth assessment is not concerned with identifying the source or nature of the taxpayer's appreciation in wealth. Once an increase is demonstrated, the onus lay entirely with the taxpayer to separate his or her taxable income from gains resulting from non-taxable sources (*Gentile v. The Queen*, [1988] 1 C.T.C. 253 at 256 (F.C.T.D.)).

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.

[18] Another interesting passage in the above decision and one that may benefit the appellant and her representative, is the following:

The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act. If the taxpayer makes no return or gives incorrect information either in his return or otherwise he can have no just cause for complaint on the ground that the Minister has determined the amount of tax he ought to pay provided he has a right of appeal therefrom and is given an opportunity of showing that the amount determined by the Minister is incorrect in fact. Nor need the taxpayer who has made a true return have any fear of the Minister's power if he has a right of appeal. The interests of the revenue are thus protected with the rights of the taxpayers being fully maintained. Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to prove it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper account or records with which to support his own statements, he has no one to blame but himself.

[19] The auditor in the present case was, in my opinion, justified in his decision to proceed using an indirect audit method and to do a net worth assessment. It was admitted by the appellant that the internal control for her business was weak. The

appellant did not prepare, nor did she provide to her clients, any invoices. She was the only one preparing the cash receipts and the cash payments, from the information in the bank statements, on the deposit slips and on the cheques issued.

[20] Notwithstanding that conclusion, it is clear from the evidence that the appellant's capability of earning income was somewhat diminished as a result of a car accident in 2001 which forced her to cut back on her work activities due to pain. In the auditor's report (Exhibit R-5), it is noted that the appellant earned \$30,232 in employment income in 2000, but that in 2001, her income was what he termed modest income. In 2002, she received worker's compensation benefits and employment income of \$2,515. It was only in 2004 that she was able to increase the employment income to \$7,603.

[21] As for her business income, 2003 is the only year for which she reported anything substantial. The appellant did not claim any business expenses. I find that to be somewhat compatible with her testimony describing her business activities as being odd jobs that she did when asked. She worked mostly from her home, except on a few occasions when she went to trade shows.

[22] At the hearing, the appellant had her first opportunity to explain what she did for a living, in terms of her business activities during the three taxation years under appeal. Given that she describes these activities as consisting of occasional odd jobs, it does not appear to have been a very active business, a circumstance that may be consistent with her health problems and her inability to get steady employment. As we know, it was only in 2004 that she was able to earn employment income of \$7,603.

[23] The onus is on the appellant to show that the amount determined by the Minister is erroneous and this must be established on a balance of probabilities. The appellant strongly suggested that her cost of living as determined by the auditor with respect to certain items, namely food, gasoline and car repairs, was grossly exaggerated as he relied on figures from Statistics Canada. On the other hand, the numbers provided by the appellant were grossly exaggerated as well, particularly as regards the food item. Net worth assessment is not an exact science and the taxpayer is the only person in a position to explain and support any figures he or she may advance in determining his or her cost of living. In this instance, the appellant's explanations for such low food costs are unacceptable, as are those concerning her automobile costs. I am prepared to recognize, in the circumstances of this case, that the Statistics Canada numbers may be on the high side for this appellant. I can only

arbitrarily reduce her cost of living with regard to these items by using a lump sum amount which I will do in general terms later on in these reasons.

[24] The explanations provided by the appellant for the discrepancy determined through the net worth assessment are restricted to assertions that she sold some of her personal belongings in 2002 and that her father repaid a loan she had made to him when she sold a house in May 2000. Both explanations were rejected at the audit and the objection stages, as the appellant's representative was unable to substantiate them with any acceptable corroboration. In addition, the matter of the loan by the appellant to her father was only raised at the objection stage. As already mentioned, the first time that the appellant gave her version of events, other than in the questionnaire she answered at the audit stage, was at trial. She was thus able to explain how she actually proceeded with the sale of her personal assets in 2002, specifying that they were actually sold not at flea markets but through private sales at her home in the course of the year. The inconsistencies in the evidence were between the statements made by the appellant's father to the auditor and the appellant's version given at trial. Although the sales were not documented, which is usually the case when one sells one's personal belongings, it is probable that the appellant had furniture and jewelry she did not want to keep as a result of her divorce and that she decided to sell it. Unless the proceeds of disposition exceeded fair market value, the revenue derived from these sales is not taxable as it sometimes is with second-hand furniture and jewelry sold below fair market value. The sale of these items, in my opinion, does justify a substantial reduction of the discrepancy obtained through the net worth assessment.

[25] On the other hand, the evidence adduced by the appellant with regard to payments made to her by her father in repayment of the loan of May 15, 2000 may not be as conclusive. The first contradiction concerns the loan itself. Was it actually a loan made to her father which bore interest at 4.5% or was he given the money to invest on her behalf? Did her father have the financial means to pay back the loan or the money advanced and were the payments actually made, as the appellant suggested, at the times that she said she noted on her computer? Why was this loan not disclosed by her representative at the audit stage and why was it not disclosed in the questionnaire in the early stages of the audit? Also, it would have been easy for the appellant's father to corroborate the fact that he did pay back the loan or his daughter's money at the suggested dates, but he chose not to testify. The evidence is therefore insufficient, on a balance of probabilities, to permit any adjustments to the net worth assessment with regard to the loan or advance.

[26] I am therefore prepared, upon considering the evidence, to reduce arbitrarily the discrepancy determined in the net worth assessment by \$5,000 for each taxation year. The appellant has not been able to establish on a balance of probabilities that the remaining discrepancies or increases in her net worth are attributable to something other than income earned in the taxation years at issue.

[27] In light of the above conclusions, the respondent has established on a balance of probabilities that there was a false statement or an omission in the appellant's tax returns, as there was a source of income and the income from that source was not declared. The respondent was therefore justified in assessing penalties and these should be adjusted in accordance with these reasons. The appeal is allowed in part.

Signed at Ottawa, Canada, this 14th day of November 2008.

“François Angers”

Angers J.

CITATION: 2008 TCC 573
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APPEARANCES:

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Agent for the Respondent: Simon Olivier de Launière

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