Docket: 2007-1754(IT)G

BETWEEN:

ROBERT ANTHONY MANSOUR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 23, 2009, at Montreal, Quebec.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Daniel Bourgeois
Counsel for the Respondent:	Simon-Nicolas Crépin

JUDGMENT

The appeal from reassessment made under the *Income Tax Act* with respect to the Appellant's 2000 taxation year is allowed in full.

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's 2001 taxation year is allowed only to the extent of vacating the penalties assessed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the reasons herein.

All without costs.

Signed at Ottawa, Canada, this 12th day of March 2009.

"Patrick Boyle"

Boyle J.

Citation: 2009 TCC 141
Date: 20090312
Docket: 2007-1754(IT)G

BETWEEN:

ROBERT ANTHONY MANSOUR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The taxpayer, Mr. Mansour, was engaged in a number of Montreal rental real estate ventures together with his partner, Mr. Oberman, during the period from 1994 to the end of 2000. For each of the properties a separate partnership was established. In some cases and for some periods of time, one of the partners' fathers was also a partner. Each of the partners shared in the rental income on a pro rata basis according to the cash each had invested in a particular property. In most cases, Mr. Mansour was a one-third investor. Each of the partners received an equal management fee for his non-financial contributions to the venture, without regard to the amount invested. Mr. Mansour was primarily responsible for ensuring the properties were maintained, renovated and rented, for collecting the rents, etc. Mr. Oberman, an accountant by training, was responsible for the books and records, the accounting and dealing with the outside accountants.

[2] Mr. Mansour was reassessed for 2000 and 2001. According to the Canada Revenue Agency ("CRA") auditor it was Mr. Oberman who had been selected for audit, but Mr. Mansour was also audited once his relationship with Mr. Oberman became apparent in the course of the audit of Mr. Oberman.

[3] Mr. Mansour's reassessment for 2000 was issued after that year became statute-barred. The reassessment for 2000 raises two issues. The first is whether the property on Queen Mary disposed of in 2000 was disposed of in December as

reported or in July as determined by the Minister of National Revenue (the "Minister"). Mr. Mansour's gain was $150,000. The timing is significant because in 2000 there were three different capital gains inclusion rates: 75%, 66 2/3%, and 50%. A related issue is whether an offsetting capital loss of $35,000 was also realized on the disposition of another property on Côte-St-Luc in 2000. The second issue is whether the management fees received by Mr. Mansour in 2000 were $44,200 as indicated in the return filed or $75,595 as assessed by the CRA. The respondent has the burden of showing that Mr. Mansour's conduct permits the reopening of his 2000 taxation year beyond the normal reassessment period, as provided for in subsection 152(4) of the *Income Tax Act* (the "*Act*"). Subsection 152(4.01) requires that the Minister be able to demonstrate misconduct by Mr. Mansour in respect of each of the issues.

[4] Mr. Mansour's reassessment for 2001 is in respect of an additional $22,390 of management fees assumed by the Minister to have been received by Mr. Mansour from his Queen Mary real estate venture with Mr. Oberman. Mr. Mansour did not report any management fees for 2001 and points out that he had disposed of his interest in the property to Mr. Oberman by the end of 2000 (according to the Minister that disposition took place even earlier). The reassessment for 2001 was issued within the normal reassessment period. It is Mr. Mansour who bears the onus in respect of the 2001 reassessment of additional income.

[5] The CRA also assessed against Mr. Mansour so-called gross negligence penalties under subsection 163(2) in respect of the assumed unreported management fees. It is the respondent who bears the burden of proof in respect of the penalties.

[6] Mr. Oberman did not testify although both parties indicated they hoped he would. The respondent attempted twice to serve a subpoena upon him. Both times it was in the week leading up to the trial. On the first occasion the official attempting service was told by the occupant that Mr. Oberman had not lived at that address for two and a half years. A few days later service was attempted at another address, where Mr. Oberman's ex-wife advised that Mr. Oberman had not lived there for two years.

[7] Mr. Oberman's evidence would have been helpful to test the correctness of both parties' positions on the issues. I was not asked to make an adverse inference against either party resulting from the failure to call Mr. Oberman as a witness, nor would I be prepared to in the circumstances. However, as discussed in greater detail below, the absence of Mr. Oberman has left each party unable to meet its burden of proof. Given the relatively scant and conflicting evidence in this case, absent

Mr. Oberman, neither party has been able to demonstrate that its position is more than possible or even plausible and is in fact probable.

[8] This is a most unfortunate and unsatisfactory result. I offered to consider adjourning the trial to allow Mr. Oberman to be located so that a subpoena could be served, but both parties preferred to proceed.

I. The 2000 capital gain and loss

[9] The taxpayer entered as an exhibit a sale agreement dated July 28, 2000 for the sale of Mr. Mansour's interest in the Queen Mary property to Mr. Oberman. The agreement expressly provides for a closing date of December 31, 2000 and specifies that the $150,000 cash portion of the purchase price would be payable on closing. This formed the basis of the taxpayer's reporting the disposition in his 2000 tax return as a December 2000 transaction.

[10] The respondent takes the position that the disposition occurred in July. Counsel for the respondent points out that a cheque for $150,000 was given to Mr. Mansour by Mr. Oberman on July 7 and the reference line on the cheque shows a sale of the Queen Mary property to Mr. Mansour. The taxpayer says that this was a loan to him by Mr. Oberman in the anticipation or expectation that the Queen Mary sale would occur, and that the loan was made because Mr. Mansour was in pressing need of cash at the time. Mr. Mansour's position is consistent with the clause requiring payment of the purchase price on closing in December. The Crown suggests − and nothing more − that the agreement could have been written up after the October 2000 Economic Statement so as to take advantage of the reduced capital gains inclusion rate. In fact, the Crown is alleging fraud without being prepared to actually say there was fraud. Since the Crown has no evidence to support any such thing, the mere suggestion that it could have happened and that, if it did happen, it would be consistent with what other evidence there is, is simply insufficient to satisfy me that it probably happened. Since the agreement to sell the Queen Mary property also provided for the sale of the Côte-St-Luc property which gave rise to the capital loss, would a smart cheat not have let that loss be realized in July when the allowable capital loss would have been greater? Mr. Mansour's position that the closing was in December is consistent with the evidence before me that he continued to receive and report management fees as well as his share of the net rental income in respect of the Queen Mary property through to the end of December.

[11] The Crown's position with respect to the capital loss on the disposition of the Côte-St-Luc property, namely that there was misrepresentation entitling it to reassess

beyond the normal reassessment period, is much less satisfactory. Mr. Mansour reported the disposition and reported the $35,000 loss. There was some written evidence relating to the accounting for the sale that put at $35,000 the financial loss realized by Mr. Mansour as a result of the sale of his interest for one dollar. If everything was on the up and up, I would take this to mean that the capital to be returned to him by the partnership was to be $35,000 less than the aggregate amount he invested, and thereafter his interest was to be transferred for a dollar. The Crown's position is that Mr. Mansour could not show his capital loss to have been $35,000. However, since the burden is on the Crown, such an approach is inappropriate. The CRA auditor indicated that he was not shown any calculation of the property's adjusted cost base, the proceeds of disposition or the resulting capital loss, that he could not find one in the box of documents he received from Mr. Oberman, and that he had not attempted to prepare one, or reconstruct one, himself as part of the audit. In these circumstances, the respondent has not discharged the burden of demonstrating the required gross negligence or wilful misconduct. The Crown cannot meet its burden by trying to reverse that burden. It must begin with a *prima facie* case of misconduct which ultimately holds up as probable.

[12] In argument, the Crown maintained that all partners in a partnership should be required to monitor and review that partnership's financial accounting each year before accounting for their partnership income or loss in their individual tax returns, and that failure to do so is misconduct of the type that would always allow the Minister to reassess beyond the normal reassessment period even if there were no reason to doubt the accuracy of the information provided by the partnership to its partners. Such an extreme position is entirely untenable. It would of course be quite different if there was reason for partners to doubt the accuracy or correctness of the information provided to them by the partnership, or if it was otherwise unreasonable for a partner in particular circumstances to accept such information as correct.

II. <u>The 2000 management fees</u>

[13] The amount of additional management fees added to Mr. Mansour's income for 2000 was said to be additional amounts recorded in the books and records of the venture as management or administration fees paid to Mr. Mansour. The CRA auditor testified that the books and records maintained by Mr. Oberman and provided to him by Mr. Oberman were neither complete nor adequate for the business. Mr. Mansour testified that one of the principal reasons for his falling-out with Mr. Oberman was that Mr. Oberman ended up spending very little time on, and therefore perhaps giving very little attention to his contribution of accounting and record-keeping for the ventures. The additional amounts, unlike the amounts of

management fees reported, are neither regularly occurring nor modest. They are significant lump sum cheques. If these additional amounts were truly management fees it would also mean the management fees were far from being distributed roughly equally between the partners.

[14] Mr. Mansour said these amounts were loan repayments. There was evidence that he capitalized the partnership. The CRA auditor said he did not see any evidence of loan accounts or partner advance accounts in the books and records. However, it is clear from the exhibits filed by the Crown that loans (other than mortgage loans), inter-company loans and shareholder loans were recorded. The evidence presented does not allow me to conclude that the Minister has demonstrated probable misconduct on Mr. Mansour's part entitling the Minister to reassess for a statute-barred year.

[15] Since the Minister has not discharged his burden of showing misrepresentation or misconduct on the taxpayer's part in reporting the timing of the capital gain, the amount of the capital loss reported, or the amount of management fees reported, the appeal concerning the 2000 taxation year will be allowed in full.

III. The 2001 management fees

[16] The Minister's reassessment for 2001 added $22,390 in management fees to Mr. Mansour's income. Mr. Mansour had reported none. The amount in question was recorded by Mr. Oberman in his records for 2001 as having been paid to Mr. Mansour as management fees in respect of the Queen Mary property. Mr. Mansour received a $20,000 cheque (no. 1177) dated February 16, 2001 from the Queen Mary partnership. On the same day a $16,000 cheque (no. 1179) was issued to Mr. Oberman. According to the CRA, Mr. Oberman reported this amount as management fees in his tax return.

[17] Mr. Mansour points out that this cheque, unlike others, bears no indication that it was in respect of management or administration fees, and was not a regular payment of a modest amount. More importantly, he points out that he did not have any interest in the Queen Mary property at any time in 2001. He says that this was a post-dated cheque he received in 2000 as part of his final accounting. He points out that both his and Mr. Oberman's signatures are on the cheque made out to him whereas only Mr. Oberman's signature is on the cheque for Mr. Oberman.

[18] While Mr. Mansour certainly raises doubt about the correctness of the 2001 reassessment, the evidence giving rise to my doubts and concerns does not rise to the

level needed to satisfy me on a balance of probabilities that Mr. Mansour's position is the more likely. All I can conclude is that the evidence is insufficient to satisfy me that I know what likely happened to give rise to the entries or the cheques in question. Since the onus is on Mr. Mansour to satisfy me that the reassessment for 2001 and the assumptions on which it is based are not correct, his appeal in respect of the unreported management fee income for 2001 must be dismissed.

IV. Penalties

[19] Just as the taxpayer was unable to satisfy me on the totality of the evidence presented that he had not received any management fees in 2001 in respect of the Queen Mary property, the Crown was unable to satisfy me that Mr. Mansour misrepresented his 2001 income in that regard. While this leaves Mr. Mansour unsuccessful on the merits of his appeal for 2001, it leaves the respondent unable to have the penalties assessed for that year upheld by this Court.

V. Option-C Printouts

[20] The Crown introduced into evidence Option-C or OpC printouts to establish the information reported by the taxpayer in his 2000 tax return, which had been filed electronically. The taxpayer's counsel took the position that the Crown's Option-C printouts do not constitute evidence of what was in Mr. Mansour's e-filed return. He put forward several reasons. The starting point is paragraph 9 of the 1986 decision of this Court's current Chief Justice in *Markakis v. M.N.R.*, 86 DTC 1237. Following that decision, subsection 244(22) was added to the *Act*. That subsection requires that a CRA printout must be a printout of the information received electronically. The CRA's Option-Cs are awkward documents to work with in part because they consolidate post-filing assessment and reassessment amounts. Counsel for the taxpayer takes the position that an Option-C printout is not a printout described in subsection 244(22) because it includes much information other than that which was filed electronically by the taxpayer. Counsel's further argument is that in this case the Option-C printout for Mr. Mansour's 2000 taxation year does not even show a capital gain or capital loss as having been reported.

[21] In this case nothing turns on the 2000 Option-C printout. Mr. Mansour introduced his copy of his 2000 tax return in evidence. Further, I have allowed his appeal for 2000 for other reasons. While I do not need to decide the point, I must say I certainly have difficulty seeing how a printout that does not indicate capital gains and losses where such have been reported can be a printout of the information filed

electronically by the taxpayer for the year that meets the requirements of subsection 244(22).

[22] In the result, the appeal for 2000 is allowed in full and the appeal for 2001 is allowed only to the extent of vacating the penalties assessed.

[23] In the circumstances, there will be no order as to costs.

Signed at Ottawa, Canada, this 12th day of March 2009.

"Patrick Boyle"

Boyle J.

CITATION:	2009 TCC 141
COURT FILE NO.:	2007-1754(IT)G
STYLE OF CAUSE:	ROBERT ANTHONY MANSOUR v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
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APPEARANCES:

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