

Dockets: 2007-2125(IT)G
2007-2126(GST)G

BETWEEN:

DONNA HEINIG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 3, 4, 5 and 6, 2010, at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant: Franklyn Cappell

Counsel for the Respondent: Bobby Sood and
Paolo Torchetti

JUDGMENT

The appeals from the reassessments made by the Minister of National Revenue under the *Income Tax Act* for the 2000, 2001, 2002 and 2003 taxation years and under the *Excise Tax Act* for the period from January 1, 2000 to December 31, 2003 are dismissed, with costs to the respondent under Tariff B of the *Tax Court of Canada Rules (General Procedure)*, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 9th day of July 2010.

" Lucie Lamarre "

Lamarre J.

Citation: 2010 TCC 351
Date: 20100709
Dockets: 2007-2125(IT)G
2007-2126(GST)G

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REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from reassessments made by the Minister of National Revenue (**Minister**) under the *Income Tax Act (ITA)* for the appellant's 2000, 2001, 2002 and 2003 taxation years and under the *Excise Tax Act (ETA)* for the period from January 1, 2000 to December 31, 2003.

[2] In reassessing the appellant under the ITA, the Minister added to her income amounts of \$136,999 for 2000, \$135,799 for 2001, \$125,197 for 2002 and \$89,625 for 2003 as undeclared fees paid to her by Heather Mailow (o/a Mailow Enterprises), and imposed penalties pursuant to subsection 163(2) of the ITA with respect to those additional amounts. The Minister also reassessed the appellant for failure to remit goods and services tax (**GST**) in the aggregate amount of \$62,103.67 in respect of the fees received from Heather Mailow, and imposed penalties pursuant to section 280 of the ETA as it read at that time.

[3] Although the appellant does not dispute the fact that she failed to remit GST on fees received from Heather Mailow, where she does take issue with the Minister's reassessments is with respect to the additional income attributed to her and hence with respect to the penalties. Counsel for the appellant stated, however, that if the reassessments are upheld by this Court with regard to the additional income assessed, he will not contest the penalties.

[4] As argued by both counsel, and as will be seen throughout the present reasons for judgment, this case turns solely on a question of fact. It involves mainly the credibility of the two protagonists behind the events in which the appellant, who now has to deal with the reassessments at issue, got caught up. Those two protagonists are Earl Heinig, who is the appellant's husband, and Heather Mailow, who, we will see, took over Earl Heinig's business (which will be referred to as the "Silhouette" business) during the years at issue. The crux of the litigation lies in the assertion by Heather Mailow that during those years she made cash payments to Earl Heinig of \$5,000 per week up to a maximum of \$20,000 per month, and Earl Heinig's response that he received from her no more than \$2,000 per week and that the entire amount received was reported by his wife, the appellant, in her tax returns for all of those years. We will see that the appellant was, during those years, the holder of the licence under which Heather Mailow operated Earl Heinig's former business and that this is why she reported the income received from Heather Mailow in her tax return. Having made these comments, I will now proceed to summarize to the best of my understanding the evidence that I heard over four days.

[5] Counsel for the appellant called Earl Heinig, Donna Heinig, John Agostinelli (the bookkeeper) and Gerald Robert Pettle (a friend) to the witness stand. For the respondent, Heather Mailow, Jeffrey Mailow (Heather's brother) and Liz Mailow (Heather's mother) were called to testify.

Facts

[6] The appellant has been married to Earl Heinig for 40 years. Earl Heinig, whose father is unknown, was born on an Indian reserve. His birth name was Joe Solomon. When his mother remarried, he took the family name of his stepfather, Heinig, and thenceforth was known as Earl Heinig. Earl Heinig is a licensed mechanic. His wife, the appellant, worked as a dental assistant for 13 years and then as a buyer for bookstores for four years. She has two children, the first, a daughter from a previous marriage, and the second, a boy fathered by Earl Heinig.

[7] In 1980, the whole family moved to Florida where the appellant's daughter was studying. Earl Heinig began operating a laundromat there with the help of the appellant. In 1984, they all returned to Canada. The appellant then worked as an administrative assistant in a brokerage firm for three years and finally as a lab assistant at York University, also for three years. She stopped working after 1990, except for doing volunteer work. As for Earl Heinig, he opened a repair shop and tried for three years to purchase a service station-garage, which ultimately never occurred. In 1986, Earl Heinig met a person by the name of Billy Carr who operated

in the municipality of Mississauga, Ontario, a body-rub (massage) parlour under the name of Silhouette Health Club (**Silhouette**), and who wanted to sell his business.

[8] Earl Heinig first declined the offer to sell but finally bought the business three years later, in 1989, for \$60,000. It is the testimony of Earl Heinig that at that time Billy Carr was earning \$4,000 a week in gross revenue with 10 girls, working on two different shifts, who provided massage services to clients six days a week from 11 a.m. to midnight. Mr. Carr rented two units in an industrial mall for the business. The gross revenues were marked down on daily sheets (one sheet per shift, thus two daily sheets per day) and the girls received a 35 per cent commission on gross sales. John Agostinelli, who was the bookkeeper for Mr. Carr and kept that job with Earl Heinig, confirmed all this in court, except that he testified that Billy Carr had paid a 30 per cent commission, which was increased to 35 per cent by Mr. Heinig.

[9] Earl Heinig testified that when he took over, sales went up to \$7,000 or \$8,000 per week. He explained this by stating that he changed the way in which the phone was answered and that he cleaned the place up. John Agostinelli, testified that the cost of advertising was approximately \$20,000 per year (Transcript, Volume 3, pages 646-647). Earl Heinig applied for credit card facilities, which were used by approximately 20 per cent of the customers. Others were paying cash and generally did not ask for a receipt. Earl Heinig also expanded the premises from two units to three, which occupied approximately 4,500 square feet and for which he paid a monthly rent of \$5,700. There were now 18 girls employed at Silhouette to perform the massages.

[10] Earl Heinig said that Heather Mailow joined the business in 1994 (Heather Mailow said that it was in 1992) and worked as a “shift boss”, which mainly involved reception, marking down the clients on the daily sheets, collecting the money and depositing it in a safe on the premises, and answering the phone. It is my understanding that there were three shift bosses altogether for the business. In the case of Heather Mailow, she was paid cash daily and received \$100 per shift for five or six shifts a week. She thus received approximately \$600 a week. Earl Heinig issued her, for the purposes of her tax return, a T4 slip showing a salary of \$29,000 per year. The girls providing the massage services were paid by cheque every Thursday. The payroll and the cheques were prepared by John Agostinelli from the daily sheets. According to Mr. Agostinelli, the daily sheets were reliable because the girls kept track of each customer and their pay was directly linked to the amount each customer was charged.

[11] In 1993, Earl Heinig was convicted of operating a common bawdy house and fined \$2,000. That was his first conviction on such a charge. As of 1995, the municipality required a licence to operate the business.

[12] According to Earl Heinig, in 1998 the business earned between \$500,000 and \$600,000, and he testified during his examination-in-chief that he himself was making about \$140,000 a year. He was able to invest his money but basically lost everything. Apparently, he was first reassessed in 1997 for an amount of approximately \$900,000 in respect of those investments, and made an assignment in bankruptcy in 1999 or early 2000. At the beginning of 2000, he was convicted a second time in relation to Silhouette. He pleaded guilty and was fined \$5,000 and put on probation for one year. He was not allowed to attend at the massage parlour at all during that year.

[13] Faced with that new situation, Earl Heinig consulted various people and one piece of advice that he was given was that he transfer the licence to his wife, who would then receive the very substantial earnings of the Silhouette business. However, Earl Heinig was told that he was not allowed to transfer his licence to operate the business directly to his wife. He therefore arranged to transfer it temporarily to his wife's daughter's then boyfriend, whose name was Robert Leach, for no consideration. A legal agreement was apparently prepared by a lawyer friend (Mr. Shelley Pettle) of the appellant's, and it apparently showed that Leach paid a consideration for the licence (Earl Heinig did not remember whether the amount shown was \$500 or \$5,000). That document was not produced in court. In cross-examination, Earl Heinig acknowledged that that legal document did not reflect the true facts, that it was a sham document that was prepared in order to keep the income from the licence in his family (Transcript, Volume 2, page 320).

[14] Robert Leach subsequently retransferred the licence to Earl Heinig's wife, the appellant in this case.

[15] In early 2000, Earl Heinig asked Heather Mailow to run the business in his place. He testified that he asked her to give him in exchange an amount of \$2,000 per week. Apparently, he had been making \$2,500 per week when he was operating it himself. In handing its operation over to Heather, he would be reducing his own income by \$500 per week, and that \$500 would be added to the \$600 per week she was making as a shift boss. Earl Heinig testified that from that point forward he no longer participated in the business, as he was not allowed to go there, and Heather operated it independently, using her own credit card facilities and bank accounts. There was no formal written document implementing their agreement.

[16] Earl Heinig testified that at that time he worked for his lawyer's brother, Gerry Pettle (who operated a lighting business) for \$100 a day.

[17] Earl Heinig testified that Heather sent the money in cash by Purolator to his home in an envelope marked with his name, but very seldom paid the full \$2,000 (Transcript, Volume 1, page 116). Sometimes, he said, Heather would make a direct deposit in the appellant's bank account (Transcript, Volume 1, page 123). Earl Heinig said that he counted the money received and gave it to his wife (the appellant), who deposited it in her bank account. He said that he did not withhold any of the money from his wife (Transcript, Volume 1, page 125). Earl Heinig testified that it was Heather's decision to send the money in cash (Transcript, Volume 1, page 126). He also said that he never used that money for himself (Transcript, Volume 1, page 126).

[18] Earl Heinig testified that the arrangement with Heather came to an end in May 2006 when he received a call from the landlord of the premises occupied by Silhouette, who told him that Heather owed him \$30,000 in rent. He then replaced her with another shift boss, Gary Bolt (Transcript, Volume 1, page 155).

[19] Earl Heinig acknowledged that his family purchased a condominium in Florida in 2003 for \$135,000 and spent \$30,000 in renovations on it, which was apparently paid out of the appellant's line of credit. That condominium was sold in 2009 at a loss. Earl Heinig's wife also leased a brand new Mercedes in 2001, and bought a time-share in Hawaii for \$35,000 in 2005 or 2006 using of a line of credit.

[20] In cross-examination, Earl Heinig acknowledged that he had previously said under oath at his examination for discovery that the business's gross revenue in 1999 was \$800,000 and that it went up in the years following (Exhibit R-1, Tab 19, and Transcript, Volume 1, pages 174 to 180). \$800,000 per year represented approximately \$15,000 per week.

[21] Counsel for the respondent went through the business expenses for that same year, 1999, with Earl Heinig. The girls received a 35% commission (35% x \$800,000 = \$280,000), the three shift bosses were paid altogether a total of \$1,200 per week (12 shifts per week at \$100 per shift times 52 weeks = \$62,400 for the year), the rent was \$5,700 per month (\$68,400 for the year), the annual licence fee was \$5,000 and utilities came to \$30,000 for the year, which left \$354,000 net in the business. Earl Heinig was asked why he declared only \$140,000 of income for the year. His answer in court was that the business did not generate \$800,000 in gross revenue but that he did not have with him the profit and loss statement for that year to prove that this was so. He said that he "mis-estimated" the annual gross revenue at the discovery (Transcript, Volume 1, pages 182 to 188).

[22] In cross-examination Earl Heinig also testified that when he came to an agreement with Heather Mailow that she would take over the business, he and she

were the only persons present at the discussion of the terms of that agreement. He categorically stated that no one else was present at that meeting (Transcript, Volume 1, pages 201 to 206). He acknowledged that he did not charge her anything up front to take over the business because he did not transfer the licence to her. She was allowed to operate the business for \$2,000 a week¹ (Transcript, Volume 1, page 210).

[23] Earl Heinig also said that he did not think at the time that it was necessary to put the agreement with Heather in writing. However, a year and a half later, on April 18, 2001, the appellant and Heather Mailow signed a handwritten agreement drafted by the appellant, whereby the latter authorized Heather to operate the business as Mailow Enterprises, “at payment schedule to be determined, until further notice” (Exhibit R-2, Tab 21). Earl Heinig and his wife testified that that was done at the request of Heather. Earl Heinig said that the fee to be paid to him by Heather was not written down because in the previous year she had not paid \$2,000 per week. The amount paid fluctuated (Transcript, Volume 1, page 221).

[24] According to Earl Heinig, he received from Heather the amount reported in the appellant’s tax return. Counsel for the appellant produced a document (Exhibit A-5), showing that the appellant reported \$67,500 in 2000 (earnings for a 10-month period), \$75,000 in 2001, \$80,775 in 2002, and \$91,500 in 2003. If they had been paid \$2,000 per week, as Earl Heinig said was agreed with Heather, they should have received \$104,000 per year. It is the testimony of Earl Heinig that even though Heather failed to make her payments in full, he always forgave her until he dismissed her in 2006. He had not let her go prior to that because he felt that what he received was, after all, good money for doing nothing (Transcript, Volume 1, page 229). In fact, it appears that after 2000 he performed repair and maintenance work for Silhouette for which he said he received no consideration (Transcript, volume 2, page 296) (contra, Exhibit R-2, Tab 10).

[25] Earl Heinig also testified in cross-examination that his wife was not present when he opened the envelopes received from Purolator containing the cash and when he counted the money (Transcript, Volume 1, page 241), and that he did not keep a written record of the money received. He also acknowledged that he made loans to friends from time to time during the years 2000 through 2003 and that he gambled at the casino maybe once a month. The money used for those two purposes came from the envelopes received from Heather. Although he won about \$28,000 gambling, he also lost money. That money taken from Heather’s envelopes, obviously was not given to his wife to deposit in the bank account. However, when the loans were

¹ I note that Earl Heinig said at his examination –in-chief that Heather would be receiving approximately \$500 more than the \$600 per week she had been receiving previously, which translates into a total weekly remuneration of \$1,100, not \$2,000.

repaid, he would give the money to his wife (Transcript, Volume 1, pages 242 to 247).

[26] In cross-examination, Earl Heinig was confronted with another contradiction. He first said that in 2000 he did not have signing authority over a bank account (Transcript, volume 2, page 258). However, counsel for the respondent showed him cheques that he had signed in 2000 that were drawn on the Bank of Montreal account held by Silhouette and with respect to which he still had signing authority (Exhibit R-2, Tab 32). These cheques were transfers of funds to Standard Securities in relation to his personal investment portfolio. In court, Earl Heinig explained that that account had been opened by him for Silhouette for the deposit of payments made by clients by MasterCard credit card. From the documentation tendered, it appears that that account was active until August 31, 2001, when it was closed (Exhibit R-3).

[27] Although Earl Heinig had previously testified that Heather did not have access to any credit card facilities and that he had cancelled the MasterCard account at the end of February 2000, Exhibit R-3 shows deposits and withdrawals after February 2000. Earl Heinig's only explanation for this was that he would have given Heather Mailow access to this account for the purpose of operating the business. No cheques were drawn by Earl Heinig on this account after February 2000. It appears that deposits in this account varied between \$10,000 and \$15,000 per month in 2000 and dropped to almost nothing after March 2001.

[28] Earl Heinig also acknowledged that in 1999 he opened a bank account under his birth name, Joseph Solomon, because all his bank accounts had been seized by the Canada Revenue Agency (CRA). He owed the CRA approximately \$1 million at that time. He had fraudulently applied for and received a second social insurance number, which he had for one year until the government found out (Transcript, Volume 2, pages 333-334).

[29] Earl Heinig's tax returns were not tendered. It would seem however, that he reported \$19,800 in 2000, \$15,000 in 2001, \$23,000 in 2002 and \$28,500 in 2003 (see letter from John Agostinelli dated January 5, 2005, Exhibit R-2, Tab 23). The total family income (for the appellant and Earl Heinig together) reported was \$87,300 for 2000, \$88,500 for 2001, \$103,775 for 2002 and \$120,000 for 2003 (Exhibit A-5).

[30] In her testimony, the appellant stated that she had met Heather Mailow only once when Heather, in her black BMW convertible, apparently picked her up somewhere along Highway 401 to drive her to the licensing office in Mississauga to have the business licence changed over to the appellant's name (Transcript, Volume 2, pages 401 – 402). This statement was contradicted by Heather Mailow, who

testified that she met the appellant at the licensing office in Mississauga and did not drive her there (Transcript, Volume 4, pages 814-815).

[31] The appellant testified that Heather Mailow took over the Silhouette business in March 2000 and that she reported as income from that time forward all the money received from Heather in consideration of her right to use the licence, which was supposed to be \$2,000 per week (Transcript, Volume 2, pages 404-405 and 411).

[32] In examination-in-chief, the appellant said that on numerous occasions she witnessed her husband opening the envelopes sent by Heather and that generally speaking he gave her the money and she deposited it in her bank account. She kept track of the amounts received on a calendar that she usually discarded afterwards. She said that Heather made payments regularly, but did not pay the full amount agreed upon (Transcript, Volume 2, pages 412-417).

[33] She went through her TD Canada Trust chequing account (account # 502466) with her counsel for the years 2000 through 2003. She identified deposits made out of Heather's payments, which came to a total of \$64,900 in 2000, \$76,000 in 2001, and approximately \$98,000 in 2002 (Exhibit A-6 and Exhibit A-8, Tabs 173, 174 and 175). For 2003, she took money (\$143,000) from her line of credit to purchase a condo in Florida (Exhibit A-6 for 2003, page 13 of 20), which cost \$135,000 and was sold in 2009 for \$125,000. The appellant also testified that she had another account, a savings account, with the same bank (account # 502467). Exhibit A-8, Tab 177, shows that there was a balance in this account of \$1,282 on March 3, 2000. Exhibit A-7 is a copy of the history of that account for the period from January 1, 2000 to July 31, 2007. However, that document only shows passbook fees from July 23, 2001 to February 5, 2004. From this documentation, it is impossible to see whether there were any deposits in that account between March 3, 2000 and July 23, 2001. However, the passbooks from the chequing account show some transfers from that savings account after March 2000 and in 2001 (Exhibit A-8, Tabs 173 and 174). The appellant said that she could not obtain from the bank more documents than those she filed in evidence.

[34] In cross-examination, the appellant acknowledged that she was not involved in the arrangement that was made with Heather Mailow and did not know what Silhouette's gross revenue was. All she knew was what her husband told her. She also acknowledged that she never witnessed her husband taking from the envelopes and counting the cash sent by Heather by Purolator courier (Transcript, Volume 2, page 478). She was confident that her husband gave her all the money in the envelopes to deposit in the bank account. She knew that her husband made loans once in a while but said that these loans were repaid and the amount also deposited in

her bank account. She was not aware, however, that Earl took money from the envelopes for his gambling activities.

[35] She also acknowledged that her analysis of the bank deposits was not done contemporaneously with deposits, but took place years after the fact, in preparation for this trial. She looked back at the passbook entries and determined what amounts could be loan repayments, deposits from Heather Mailow's business, or deposits of funds from other sources. She also had to agree that the cash withheld by her husband for gambling, did not appear in those deposits in her bank account, but she was nevertheless of the opinion that her summary of the deposits fairly reliably established the amount of income received from Heather Mailow.

[36] However, she could not tell where the money transferred from her savings account (account # 502467) into her chequing account (account # 502466) came from because she did not have the records of the deposits to the savings account. As pointed out by counsel for the respondent during her cross-examination, and as appears from Exhibit A-6, where deposits are identified as "self" the transfers from the savings account were fairly significant.

[37] As an example, in August 2000 alone she transferred \$12,800 from her savings account to her chequing account but she could not remember what the source of those funds was (Transcript, Volume 2, pages 511 and 512).

[38] In fact, the history of that savings account shows that from when it was opened in September 1993 until March 1998 there was never more than \$200 in it. Between March 1998 and September 1998, the balance went up to approximately \$7,000; and thereafter it fluctuated and on March 3, 2000 it was \$1,282 (Exhibit A-8, Tab 177). A deposit analysis of this savings account made by the auditor for the CRA showed that in 2000 there were total deposits of \$59,555 (Exhibit R-5). The appellant could not explain where the deposits came from and although counsel for the appellant first stated that this analysis was not reliable, he did not call the auditor to cross-examine her on that point.

[39] The appellant also acknowledged that she opened an account with ING in January 2001 and that the opening balance was \$17,133 (Exhibit R-6). When asked where the \$17,000 came from, the appellant answered that it was from savings. However, she did not deny that she had no income in 1999 (Transcript, Volume 2, page 529) and that her husband went bankrupt in February 2000 (Transcript, Volume 2, page 530). Still, she insisted that she and her husband had saved that amount of money between February 2000 and January 2001 (Transcript, Volume 2, page 531).

[40] The appellant also stated that Heather would put a note in with the money when she was not sending the whole amount agreed upon, but said she did not keep these notes. She never issued a receipt for the money paid (Transcript, Volume 2, page 555 and 556).

[41] Mr. John Agostinelli testified that when Earl Heinig purchased Silhouette, the gross weekly sales improved right away to \$6,500 and kept climbing to \$7,500 - \$8,000 a week (Transcript, Volume 3, page 589). Mr. Agostinelli was asked by Mr. Heinig to go on the business's premises once a week to complete the weekly summary sheets (which he did by adding up the total sales recorded on the daily sheets) and the payroll account, including deductions at source. He was there every Thursday to pay the girls, and he himself was paid \$75 per week. According to Mr. Agostinelli, the business was open from Monday to Saturday (six days a week). He also said that the gross revenues recorded on the daily sheets had to be very accurate because each girl knew how many clients she had in a week and expected her 35 per cent commission on each sale. He also maintained a general ledger for the business, using for the ledger entries cancelled cheques, receipts for cash expenses paid, and the sales summary. That general ledger was ultimately used for tax purposes.

[42] Mr. Agostinelli testified that in the late nineties the business had on average between \$13,000 and \$15,000 in gross sales per week. It happened once that sales reached \$20,000 for a week, and for a few other weeks there were sales of \$17,000 or so (Transcript, Volume 3, page 599). He said that he prepared Earl and Donna Heinig's tax returns. In 1998 and 1999, Earl Heinig would have earned between \$135,000 and \$150,000 after expenses and whatnot (Transcript, Volume 3, page 600).

[43] Mr. Agostinelli testified that one Thursday at the beginning of 2000 when he went to Silhouette, as he usually did, Earl Heinig met him before he got into the office and told him that he had been barred from the premises for a period of time. That caught Mr. Agostinelli by surprise. He was told by Mr. Heinig that Heather Mailow would be running the operation as her own, would be responsible for all expenses and would pay Mr. Heinig \$5,000 per week. Mr. Agostinelli testified that he thereafter asked Heather (and this angered Earl Heinig) whether she really was going to do this, because \$5,000 was quite a high amount. From his own experience with Silhouette, he did not feel that the business would be able to sustain \$5,000 per week (see Transcript, Volume 3, pages 602-603). He was told shortly thereafter that the payment to Mr. Heinig was amended so that it would not be made every week. In months where there would be five payment days, he would be paid only for four weeks, meaning 48 weeks per year, for a total of \$240,000 per year.

[44] In his view, this was a significant amount and represented much more money than Earl Heinig was actually getting when he himself was running the place. He did not know the exact amount Heather paid Mr. Heinig after he left (Transcript, Volume 3, pages 602 to 606).

[45] Mr. Agostinelli continued working for Heather Mailow in the same capacity as that in which he had worked before for Mr. Heinig. After a while, there was a payroll audit by the CRA and at that time he was advised by Heather that she wanted to change the method of collecting money. Whereas before clients had paid at the desk and then commissions were paid to the girls, from then on the clients would pay the girls directly and would only pay Silhouette a fee for the use of the rooms and supplies (which was approximately half the fee that was previously charged). This meant that there would be no more payroll account, as the girls no longer had employee status (Transcript, Volume 3, pages 608-609). He thought it probable that the change with regard to employee status took place in the first or the second year after the takeover, but he was not sure (Transcript, Volume 3, page 611). After the change, there were still daily sheets showing the room fee charged at the desk. Mr. Agostinelli said that the new daily sheets had to be reliable also as it was the only source of information he would have regarding income (Transcript, Volume 3, page 613). However, he later said that the daily sheets may or may not have been as reliable as before (Transcript, Volume 3, page 615).

[46] After the change, there was no longer any need for Mr. Agostinelli to go in once a week, as there was no payroll account to prepare. He therefore went in a dozen times in a year.

[47] Mr. Agostinelli prepared the tax returns for Heather Mailow from the general ledger that he kept. Her tax return for 2001 was filed in December 2002, and she reported \$361,660 in gross revenue and a net income of \$28,887. In the statement of business activities for that year she deducted \$72,667 as commissions paid to the girls. For 2002, she reported gross revenue of \$301,588 and a net income of \$29,679. In that year, there was no deduction for commissions paid to the girls. For 2003, her tax return was filed on April 6, 2005. Apparently, she was bankrupt at the time (Transcript, Volume 3, page 624). She reported \$500,499 in gross revenue and a net income of \$186,727. Again, there was no deduction for commissions (see Exhibit A-10, Tabs 57, 58 and 59). Heather was reassessed for each of those years. For 2001, the gross revenues were increased by \$351,994, but an amount of \$240,000, being the fee she declared that she had paid to Earl Heinig, was allowed as a deduction. Her net income for that year was reassessed at \$139,385 (Exhibit A-10, Tab 57, T7W-C). For 2002, she was also reassessed and the gross revenue was increased by \$417,314, but a deduction of \$245,000 representing the fee paid to Earl Heinig in that year was allowed. Her net income was established at \$222,730 (Exhibit A-10, Tab 58, T7W-

C). For 2003, she was again reassessed and her gross income was established at \$588,131; her business expenses allowed were \$419,679 and her net income was \$166,649 (Exhibit A-10, Tab 59, T7W-C).

[48] Mr. Agostinelli confirmed that he himself prepared the general ledger for the business. The expenses were established from all paid invoices from each supplier, which were kept by Heather. He said that Heather was very well organized in keeping her business invoices (Transcript, Volume 3, page 632). Some expenses were paid by cheque, others in cash (Transcript, Volume 3, page 644). The sales were calculated from the daily sheets. Some pre-authorized payment amounts, such as the lease payments on the car and the bank charges, were taken from the bank statements.

[49] Referring to the general ledger filed for 2002 (Exhibit A-11, Tab 194), Mr. Agostinelli testified that telephone expenses had been reduced significantly from what they had been in Earl Heinig's time, because advertising in the Yellow Pages was eliminated or reduced under Heather. He also said that the sales entries, totalling \$546,588 in 2002 (Exhibit A-11, Tab 194, page 16) were mostly reliable because the employees (the girls) received a commission out of that amount, and they kept accounts with respect thereto. However, he could not say when the switch to a room fee happened (Transcript, Volume 3, page 650). He acknowledged that the sales figure of \$546,588 was lower than that under Mr. Heinig. One explanation for this, according to Mr. Agostinelli, would be the elimination of the advertising in the Yellow Pages and Ms. Mailow's experience, which was not comparable to Mr. Heinig's (Transcript, Volume 3, page 651). In cross-examination, it was pointed out to him that in her tax return for 2002 she did not claim any amount for commissions paid, which would tend to indicate that the gross sales did not include the amount earned by the girls, contrary to what had been the case in Earl Heinig's time.

[50] In her tax return, Heather reported \$301,588 as gross revenues while gross sales shown in the general ledger were \$546,588. Mr. Agostinelli testified that the latter figure was the right one (Transcript, volume 3, page 655). In cross-examination, it was again pointed out to him that the difference of \$245,000, which is referred to as consulting fees in the general ledger, was not taken as a deduction in Heather's tax return.

[51] Mr. Agostinelli testified that the general ledger for 2002 did not balance and that the discrepancy was approximately \$300,000 (Transcript, volume 3, page 660), meaning that sales less invoiced expenses left a difference of approximately \$300,000. Of that \$300,000, an amount of \$46,800 was attributed to "desk fees paid in cash" (Exhibit A-11, Tab 194, page 17) for the shift bosses and \$245,000 to "consulting fees" that would have been paid in cash to Mr. Heinig. That allocation

was determined by Heather Mailow and recorded by Mr. Agostinelli in the general ledger.

[52] As for the 2003 general ledger (Exhibit A-11, Tab 196), it is incomplete as it does not seem to cover the full year. Mr. Agostinelli said that it did not appear to be reliable (Transcript, Volume 3, pages 664-667). Heather Mailow went bankrupt at the beginning of 2004.

[53] In a letter sent by him to the CRA on January 4, 2005 (Exhibit R-2, Tab 23), Mr. Agostinelli stated that Ms. Mailow's claim of an amount paid to the Heinigs of \$240,000 in 2000 and 2001 and of \$245,000 in 2002 was incorrect. In another letter to the CRA sent on January 6, 2005 (Exhibit R-2, Tab 24), he stated that the fees paid to the Heinigs should be changed to \$103,775 for 2002 and \$90,000 for 2001.

[54] In court, Mr. Agostinelli said that he was caught in the middle of a dispute between the Heinigs and Heather Mailow and that it was a mistake for him to be making submissions to the CRA for both the Heinigs and Heather Mailow (Transcript, Volume 3, page 680).

[55] He prepared the appellant's tax return using the information given to him by Earl Heinig. He erroneously reported the amount received from Heather Mailow as employment income and failed to take into account the GST.

[56] He concluded his examination-in-chief by stating that the amounts of additional income reassessed in 2002 for both the appellant (\$205,972, Exhibit R-2, Tab 1) and Heather Mailow (\$222,730 as per the 2002 T7W-C, Exhibit A-10, Tab 58), which total approximately \$429,000, were not realistic if one takes into account the sales for that year - which were recorded in the general ledger as being \$546,588 - keeping in mind all the other expenses recorded in the general ledger (Transcript, Volume 3, page 697).

[57] In cross-examination, counsel for the respondent showed Mr. Agostinelli Heather Mailow's tax return for 2000 (Exhibit R-2, Tab 33), which was not discussed during his examination-in-chief. Mr. Agostinelli acknowledged that in that return the gross revenue of \$691,579 was accurate, and that it was for a ten-month period, which represented \$15,717 per week (Transcript, Volume 3, pages 722-723). There was deducted in that tax return an amount of \$241,307 for commissions paid to the girls and a consulting expenses amount of \$240,000, which was the fee paid to the Heinig's for the licence. Mr. Agostinelli entered that expense in the statement of business activities without having seen a receipt, as it was paid in cash (Transcript, Volume 3, page 727). Mr. Agostinelli did not recall when Heather Mailow changed

her method of charging fees but agreed that she did so to bring her business practices into line with those in the industry as a whole.

[58] He had to admit that because of that change revenues for the business would have decreased by half if the number of clients remained the same (Transcript, Volume 3, pages 732-733). Counsel for the respondent showed him the statement of business activities for 2002. The gross revenues shown are \$301,588, but there were no commissions paid to the girls and the amount paid to the Heinigs is not shown on that statement.

[59] For 2003, the general ledger prepared by Mr Agostinelli, shows consulting fees in the amount of \$224,299. Mr. Agostinelli said that those fees were paid in cash and they would have been paid to the Heinigs (Transcript, Volume 3, pages 741-742). Mr. Agostinelli made written representations to the CRA, telling them that Heather Mailow did not pay that amount to the Heinigs. He wrote that after Mr. Heinig had told him that he did not receive that amount of money. Mr. Agostinelli just took his word for it and did not verify that new information. He testified that he was confused by the two different versions given to him by Heather Mailow and Earl Heinig (Transcript, Volume 3, page 750). In reality, he said, he really did not know what Earl Heinig received (Transcript, Volume 3, page 751). He did not audit any bank statements and did not personally add up any numbers to show what was actually paid by Heather Mailow to Mr. Heinig. He said:

[. . .] The reality is I really don't know what was paid out. I never saw any scrap of paper in the Mailow office or the Silhouette office - I will call it the Mailow office - which said how much she actually paid out. Nor was I supplied anything from the other side which said, "This is how much I received."

(Transcript, Volume 3, pages 752-753)

[60] Mr. Agostinelli prepared the appellant's tax returns using the information given to him by Earl Heinig, whom he trusted entirely.

[61] Counsel for the appellant also called Gerald Robert Pettle as a witness. He said that Earl Heinig worked as a handyman in his lighting business from 1998 until 2001 or 2002 and was paid perhaps \$1,000 or \$1,500 a month. He said that he then changed his business into buying and selling closeouts. He was in need of cash for short periods of time to do his deals. This is why he borrowed money from Earl Heinig, which he paid back relatively quickly by cheques made out to the appellant. He also said that Heather Mailow was married for a short period of time to a refugee who had given her money to marry him. Although Heather Mailow did not deny that she had married a refugee, she said that she did not receive any money from him. She also admitted that she married this person to help him out for

immigration purposes, at the request of Earl Heinig, and that the marriage did not last long (Transcript, Volume 4, pages 850-852).

[62] In examination-in-chief, Heather Mailow testified, contrary to what Mr. Agostinelli had said, that the agreement between her and Earl Heinig was arrived at at a meeting which took place in Mr. Agostinelli's office in Toronto, and that her brother and Mr. Heinig were present (Transcript, Volume 4, page 800).

[63] During that meeting, the financial arrangement regarding what she was to send to Mr. Heinig every week was discussed. It was decided that she would send \$5,000 in cash to Earl Heinig's residence by Purolator courier every Friday. She was allowed to keep for herself the money for the fifth Friday of every month in which there were five Fridays, and what was left over after the payments to Earl Heinig she could keep to run the business. Contrary to what Earl Heinig said in court, she stated that it was his decision to send the money in cash by Purolator courier (Transcript, Volume 4, pages 801-802). She had been told by him that he wanted the finances of the business to be handled in the same manner as he had handled them in the past and that he wanted the same amount of money to be declared as he had declared in the past, so as not to raise any eyebrows at the CRA (Transcript, Volume 4, pages 802-805).

[64] She was also responsible for paying all the business expenses and was allowed to keep the balance, which included the amount that she would have earned as a shift boss, that is, \$600 a week. In fact, she did not draw that \$600 a week when she started running the business because she made enough money with what was left over.

[65] It was also at the suggestion of Earl Heinig that she used her own business name, Mailow Enterprises, to run the Silhouette business (Transcript, Volume 4, pages 805-806). She said that most of the time she personally counted the money and put it in the envelope for Mr. Heinig (the only two other people who would do it were her brother, Jeffrey Mailow, and her mother, Liz Mailow). She made five bundles of \$1,000 (all twenties). The bundles were laid flat in the envelope, giving the impression that she was sending documents (Transcript, Volume 4, pages 807-808). Earl Heinig had told her to write "documents" as the contents on the waybill, as they were not allowed to send cash (Transcript, volume 4, pages 823-824). She said that she sent the full \$5,000 per week, as agreed, for the first three years and a half. Thereafter, it became harder to send the full \$5,000 per week as the business was having problems. She would then send \$3,000 on Friday and use the money from weekend sales to send the balance on Monday. She said that when she was short, and did not advise him of this, Earl Heinig was very upset and would call her and swear at her (Transcript, Volume 4, page 815). The agreement between her and Mr. Heinig was not put in writing because they trusted each other. The agreement was beneficial

to both. However, she was asked a year after she started running the business to sign an agreement drafted by Donna Heinig (the appellant) authorizing Ms. Mailow to operate Silhouette (Exhibit R-2, Tab 21). This was done to legitimize the operation of the business under the licence held by the appellant, which had to be kept on the premises of Silhouette.

[66] Heather Mailow also testified that when she started operating Silhouette, the customers could pay by credit card and the payments went into Earl Heinig's bank account. She did not have access to that money (Transcript, Volume 4, page 817). In 2003, she got a new terminal with another company for her own use. She also had an ATM machine.

[67] She estimated that for the first three years, the business would earn \$20,000 in a good week. In 2003, revenues started to decrease. She said that in 2005 Gary Bolt entered the premises and told her to take her personal belongings and leave. That was how she was removed from the business (Transcript, Volume 4, pages 825-827).

[68] She went into personal bankruptcy in March 2004. This was her second bankruptcy, the first having been ten years earlier.

[69] In cross-examination, Heather Mailow categorically stated that she never used a Green Card debit card to make deposits into the appellant's bank account (Transcript, Volume 4 pages 836 and 872). Her own bank account was at the Royal Bank.

[70] She testified that she paid monthly rental of \$1,680 for her personal residence and \$1,000 for her leased Cadillac Escalade. She has two children who were minors during the period at issue. She sent her son to a private school, for which she paid \$200 a month and her uncle covered the balance (Transcript, Volume 4, pages 847-850). She also travelled to Jamaica to visit family and went to see her brother once in Hawaii. She stated as well in cross-examination that Silhouette was always open seven days a week, even when Earl Heinig was operating it, but he did not declare the revenues or do the books for Sundays (Transcript, Volume 4, page 854).

[71] Counsel for the appellant asked Ms. Mailow to comment on the 2002 general ledger (Exhibit R-2, Tab 36). Ms. Mailow confirmed that all cash expenses shown corresponded to the receipts that she had kept. She also confirmed that Kathryn Medland, one of the shift managers, was paid \$650 per week by cheque, as Ms. Medland did not want to be paid cash. The rest of the desk staff was paid in cash, and the amount so paid was \$46,800 in 2002 (Exhibit R-2, Tab 36, page 17). She confirmed that the amount of \$245,000 appearing as consulting fees was the total for

the year of the cash put in the envelope that was sent to Earl Heinig every week (Transcript, Volume 4, page 861).

[72] Ms. Mailow acknowledged that she definitely profited from taking over Earl's business but said she did not know what her annual income was. She admitted that she only declared \$28,000 or so in 2000, 2001 and 2002, which was in the range of what she made before taking over the business. She said that she was advised by Earl Heinig to report the same income as she always had reported in the past (Transcript, Volume 4, page 869). He asked her to lie on her tax return and she did so because she wanted to keep her job (Transcript, Volume 4, page 873). She said that John Agostinelli "was in on the . . . conversation of the terms of [her] taking over the business", and that she, John Agostinelli and Earl Heinig all knew that the amount paid to Earl Heinig was \$245,000. Mr. Agostinelli entered that amount as consulting fees in the general ledger and, being in constant contact with Earl Heinig, he would also have been told by him that this was the right amount (Transcript, Volume 4, pages 873-874). She confirmed that she changed the payroll system, and believed that it was done in 2003. She denied that she was dismissed from Silhouette because the rent was not paid. She said she always paid the rent when she was running Silhouette (Transcript, Volume 4, page 893).

[73] She also stated that the \$20,000 gross revenue figure for a week was for a busy week, and that average gross revenues of \$15,000 per week would be more accurate (Transcript, Volume 4, page 896).

[74] In re-examination, counsel for the respondent pointed out to Ms. Mailow that in her 2000 tax return she reported \$241,307 in commissions paid to the girls (Exhibit R-2, Tab 33), and \$72,667 in her 2001 tax return (Exhibit R-2, Tab 34). She acknowledged that the "door policy change" (the change in the pay system) could have occurred in 2001 (Transcript, Volume 4, page 903). She also said in re-examination that Earl Heinig was very upset by the fact that she reported in her 2000 tax return the consulting fees paid to him (Transcript, Volume 4, pages 902-903).

[75] Finally, counsel for the respondent pointed out to Ms. Mailow that she paid the full amount of rent (\$66,676) in 2002, as is shown in the general ledger for that year (Exhibit R-2, Tab 36, page 22).

[76] Mr. Jeffrey Mailow also testified. He said that his sister Heather asked him to be present at the meeting at which the terms of the arrangement with Mr. Heinig were discussed. His recollection is that Heather had to pay Mr. Heinig \$20,000 a month (\$5,000 a week up to a total of \$20,000 per month). It was Mr. Heinig who set that fee schedule. He testified that Mr. Heinig also stated at that meeting that the previous years' earnings from the business were \$800,000, and that the weekly expenses were

in the range of \$5,000 to \$6,000 (which would include rent, wages, supplies and utilities).

[77] Jeffrey Mailow testified that his sister asked him to replace her once in a while when she was going on vacation or was going to be absent for any other reason. He had access to the safe and, to the best of his knowledge, only he and his sister had such access. When he was replacing her, he was the one who put \$5,000 in an envelope and sent it to Mr. Heinig on Mondays. He did that perhaps as many as nine times over the years. He counted out the \$5,000 by taking the hundreds and fifties first and then twenties if necessary (Transcript, Volume 4, pages 922-923).

[78] Jeffrey Mailow said that it happened sometimes that he put less than \$5,000 in an envelope to be sent to Mr. Heinig. This would have been when there was not enough money or, on one occasion, when his sister told him that she had already paid \$3,000, and that the balance of \$2,000 had to be sent to make up the \$5,000 (Transcript, Volume 4, pages 924-925). He did not witness his sister counting out the money and putting it in the envelope.

[79] Ms. Liz Mailow, Heather's mother, also testified. She said that Heather sent money to Mr. Heinig on a daily basis by Purolator courier (Transcript, Volume 4, page 935). She witnessed her daughter counting \$5,000 in bundles of \$1,000 each and placing it in an envelope that she (the mother) took to the Purolator office on several occasions. She said that she witnessed her daughter doing that maybe 50 times over the years.

[80] In cross-examination, she said that she thought that the money was sent daily although she was not there daily.

[81] In re-examination, she said that when she was there, envelopes were sent, that this was something that was going on all the time, and that she witnessed the amount going into the envelopes.

Counsel's arguments

[82] In his argument, counsel for the appellant stated that it was confirmed by Heather Mailow that the change in the pay system occurred after 2002. Mr. Agostinelli suggested that it was in 2003, but was not certain.

[83] At the same time, counsel for the appellant stressed the lack of credibility of Heather Mailow, whom he referred to as a sophisticated or a naïve liar. He suggested that she would lie about everything and pointed to her audacity in reporting the same amount of income no matter what she was making.

[84] According to counsel for the appellant, the sole general ledger which is reliable is the one for 2002. It provides the one undeniable fact in all of the evidence, namely that the sales for that year were just over \$546,000. Counsel said that until Heather Mailow's confirmation that the change in the pay system occurred in 2003, there might have been a small shadow of a doubt about the reliability of that \$546,000 figure, but, relying on this part of the testimony of Heather Mailow, he argued that it is a firmly established fact that the sales for 2002 taken from the daily sheets came to \$546,000.

[85] According to counsel for the appellant, there was only one independent witness in this case, who happened to be John Agostinelli, because he had nothing to gain or lose or fear from his testimony. Counsel said that Mr. Agostinelli and Mr. Heinig agreed on one essential relevant fact, which is that Earl Heinig's income in his last year in the business was in the range of \$140,000. That is probably why Mr. Agostinelli told Heather Mailow right away that \$5,000 a week was not realistic, and counsel emphasized that indeed it was not realistic given gross sales of \$546,000.

[86] Counsel for the appellant argued that we can infer from the sales for 2002, and from the fact that Earl Heinig was making \$140,000 yearly and Heather Mailow \$30,000 before the years at issue, that it would be reasonable to say that he accepted payment of about \$100,000 from the business after his conviction in 2000, which would have left perhaps \$70,000 for Heather. With \$546,000 in sales in one year, it was certainly not possible to pay \$240,000 in fees to the Heinigs, considering the rent (\$65,000), the commissions to the girls (about \$185,000), and all other expenses.

[87] Counsel for the respondent argued not only that John Agostinelli had nothing to gain or lose in testifying, but that this was equally true of Heather Mailow, Jeffrey Mailow and Liz Mailow, as this Court's decision in this case will not have any impact on them.

[88] The four of them testified that the amount agreed upon that was to be paid to Mr. Heinig was \$5,000 per week. The appellant never witnessed the money being put in the envelope, nor did she count it with her husband. Only Earl Heinig testified that he never asked for \$5,000 per week. Counsel for the respondent is of the view that Earl Heinig has proven not to be credible in many ways, or at least has proven not to be ashamed of lying. The phoney transfer of the licence to Robert Leach in order to avoid losing it through bankruptcy and the dishonest act of obtaining illegally two different social insurance numbers are but two examples. Counsel reminded the Court that Earl Heinig admitted that he was prepared to circumvent the rules and disregard the law so long as it served his financial interests. Earl Heinig operated a cash business and had a motive for understating his revenues in order to pay less tax.

Dealing in cash implies lack of a paper trail and makes it more difficult to trace revenues.

[89] Earl Heinig contradicted himself regarding the gross revenues of the business. Counsel for the respondent stated that there is some independent measure of what the gross revenues were in the 2000 statement of business activities filed with Heather Mailow's tax return for 2000 (Exhibit R-2, Tab 33). For a 10-month period, the gross revenues reported were \$691,579, which translates into \$15,717 a week, and that would give \$817,000 for 12 months. That is consistent with the figures as represented by Earl Heinig at the meeting with Heather and Jeffrey Mailow.

[90] The appellant testified that Earl Heinig gave her all the money sent by Heather Mailow, and she was not aware that he kept some of it for his gambling activities.

[91] Furthermore, if Earl Heinig is right in saying that Heather Mailow was constantly falling short in her payments, it is inconceivable that he would simply forgive the amounts of the shortfalls and in addition provide her with free maintenance and repairs and allow her to continue operating the business for five or six years, bearing in mind that he was barred from the premises for one year only.

[92] With respect to the appellant herself, she was not able to explain where the monies deposited in her bank account, supposedly from her savings, came from. She could not specify the source of her savings. Her analysis of her chequing account records was not done contemporaneously with the deposits, but was done long after the fact as part of this litigation. Counsel submitted that this analysis is hardly reliable, hardly unbiased.

[93] With respect to the gross revenue figure of \$546,588 for 2002, counsel for the respondent argued that:

That is the figure that was in the 2002 general ledger. That is after you have accounted for commission expense, because there is no entry for commissions paid to the girls in this general ledger. That is either after the commission expenses were paid or this is the sales for the gross revenues from a period in time after the transition, when the girls were no longer paid a commission by the business. (Transcript, Volume 4, page 963)

[94] Therefore, the \$546,588 figure must not be reduced by the amount of the commissions to be paid to the girls, as we can infer from the general ledger that in 2002 the pay system had already been changed. Thus, \$546,588 would have been

enough money to allow the payment of \$240,000 to the Heinigs with sufficient left over for Heather Mailow.

Analysis

[95] In her pleadings, the respondent assumed that the appellant failed to include in her income for the taxation years 2000, 2001, 2002 and 2003 all of the fees paid to her by Heather Mailow (o/a Mailow Enterprises) and understated her income by \$136,999 for 2000, \$135,799 for 2001, \$125,197 for 2002 and \$89,625 for 2003. It does not seem to be disputed that she declared income from that source in the amounts of \$67,500 for 2000, \$75,000 for 2001, \$80,775 for 2002 and \$91,500 for 2003 (Exhibit A-5 and Exhibit R-2, Tabs 5,6,7 and 8).

[96] Thus, the Minister assumed that the total income received by the appellant from Mailow Enterprises was the sum of what she reported and what the Minister reassessed. If we add those amounts, the total received by the appellant from Mailow Enterprises would be \$204,499 for 2000, \$210,799 for 2001, \$205,972 for 2002 and \$181,125 for 2003. Although this was not in the Minister's assumptions, I made a quick calculation and these figures would translate into approximately \$4,000 per week.

[97] In *Amiante Spec Inc v. R*, 2009 FCA 139, at paragraphs 15, 23 and 24 the Federal Court of Appeal reminds us of the mechanics of the burden of proof in tax matters. These paragraphs read as follows:

15 *Hickman [Motors Ltd. v. Canada., [1997] 2 S.C.R. 336]* reminded us that the Minister proceeds on assumptions in order to make assessments and that the taxpayer has the initial burden of demolishing the exact assumptions stated by the Minister. This initial onus is met where the taxpayer makes out at least a *prima facie* case that demolishes the accuracy of the assumptions made in the assessment. Lastly, when the taxpayer has met his or her onus, the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and prove the assumptions (*Hickman, supra*, at paragraphs 92, 93 and 94).

[. . .]

23 A *prima facie* case is one " supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the

one established by that evidence"(Stewart v. Canada Minister of National Revenue), [2000] T.C.J. No. 53 (T.C.C. [Employment Insurance]), paragraph 23).

24 Although it is not conclusive evidence, "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering that "[i]t is the taxpayer's business" (*Voitures Orly Inc. / Orly Automobiles Inc. v. R.*, 2005 FCA 425, [2005] G.S.T.C. 200 (F.C.A.), paragraph 20). This Court stated that the taxpayer "knows how and why it is run in a particular fashion rather than in some other ways. He [or she] knows and possesses information that the Minister does not. He [or she] has information within his [or her] reach and under his [or her] control"(*ibid.*).

[98] Thus, the appellant had the initial onus of proving that she did not understate her income from Mailow Enterprises by the amounts reassessed by the Minister. She had to demonstrate by *prima facie* evidence that the Minister's assumptions were not accurate. The question, therefore, is whether she has succeeded in establishing with a sufficient degree of probability that she did not receive the amounts of income reassessed by the Minister. This is not an easy task in a case like this one in which the payments were all made in cash, without any receipts or written agreement. As was said in *Amiante Spec*, normally the taxpayer possesses the information that the Minister does not have and that is why there is a heavy burden on the taxpayer that cannot be "lightly, capriciously or casually shifted" to the Minister (see *Voitures Orly Inc. / Orly Automobiles Inc. v. R.*, 2005 FCA 425).

[99] The task is all the more difficult in the present case as the witnesses contradicted themselves on many points.

[100] As I said at the beginning of these reasons, the two protagonists, Earl Heinig and Heather Mailow, presented two opposing versions. It appears that the Minister was more inclined to accept Heather Mailow's version, as the appellant was assessed as if she had received more than \$200,000 per year from Mailow Enterprises. The result is that the appellant now has the burden of showing that Heather Mailow is wrong and her and her husband are right. Although married for 40 years to Earl Heinig, she did not appear to know much about the Silhouette business. At least, she gave the impression that she knew nothing about the profits earned from that business.

[101] Furthermore, there is one point that does not seem to be contradicted in the evidence and that is the fact that the appellant was not part of the arrangement that was made between Earl Heinig and Heather Mailow.

[102] Nevertheless, the appellant certainly demonstrated a certain bias toward her husband when she testified that she deposited the whole amount received by her husband from Heather Mailow in her bank account and that they did not receive anything more. She had difficulty explaining what the source of other deposits was, although these were quite significant amounts, but simply stated that she and her husband had savings, even though Earl Heinig was bankrupt in 2000 and she herself was not working. Still, she and her husband had a very good lifestyle.

[103] The appellant did not help her case by destroying the notes she wrote on her calendar when the money was received from Heather Mailow. Nor did she keep the notes written by Heather whenever she did not send the entire amount agreed upon. She consented to acquiring the licence in order to help her husband. She even drafted the agreement by which she authorized Heather Mailow to operate the business and in which she failed to specify the amount to be paid by Heather.

[104] Counsel for the appellant emphasized on Heather Mailow's lack of credibility. At the same time, he clung to her testimony that the change regarding the payroll could have occurred in 2003 in order to demonstrate that Silhouette's gross sales were \$546,588 in 2002 and that the girls' commissions still had to be paid out of those gross revenues in 2002. Counsel for the appellant stressed that after the commissions and all other business expenses were paid there was no way that Silhouette could have afforded to pay Earl Heinig \$240,000 that year.

[105] My own analysis of the documents filed in evidence leads me to conclude that the change in the payroll occurred sometime in 2001. It was shown that the commissions paid to the girls dropped considerably from \$241,000 or so in 2000 to \$72,667 in 2001 and to nothing at all in 2002. At the hearing, Mr. Agostinelli was not sure of the year of the change and Heather Mailow recognized in cross-examination that it could have happened in 2001.

[106] Therefore, if Silhouette did not have to pay the girls out of the revenues of \$546,588 in 2002 and since the other business expenses were approximately \$5,000 per week or \$260,000 per year (as appears from the general ledger and the statement of profit and expenses), there would have been \$286,588 left to be distributed between Heather Mailow and Earl Heinig. In his testimony, Earl Heinig stated that he calculated that after taking over the business Heather could earn \$500 on top of the \$600 weekly remuneration she had earned previously as a shift boss. That would give her \$1,100 per week, or \$57,200 per year, thus leaving \$229,388 for himself. In the reassessment for 2002, the Minister determined the appellant's total income from Silhouette to be \$205,972, which is less than the above calculation.

[107] Objectively speaking, it is very difficult to establish real income in a cash business. I did the above calculation to see whether the appellant's own counsel's argument held water. Unfortunately, that is not the case. In fact, the Minister determined Silhouette's gross revenues to be \$718,902 when he audited Heather Mailow for 2002 (see Exhibit A-10, Tab 58). The evidence did not reveal, however, how the Minister reached that conclusion. The evidence before me is not very helpful for the purpose of determining whether the Minister's figure is too high. Nevertheless, in my view, that figure becomes irrelevant in the present case, as even with the figure provided by the appellant I still find it possible that Earl Heinig received the amounts reassessed. To say the least, Earl Heinig himself did not help his wife's case much.

[108] Indeed, Earl Heinig's testimony clearly establishes his lack of scruples in dealing with his financial and tax obligations. He did not hesitate to transfer the licence indirectly to his wife, although he knew that he was thereby bending the rules, in order to keep the considerable income from Silhouette. He did not hesitate to use a second name to obtain a second social insurance number, although he knew perfectly well that this was illegal. He did not hesitate to give contradictory versions concerning Silhouette's gross revenues either to Heather and Jeffrey Mailow or to the CRA or in court. He did not hesitate to gamble with money received from Heather Mailow, without telling his wife.

[109] Heather Mailow, for her part, did not hesitate to report a low income in her tax return when she knew perfectly well that the figure she reported was not accurate. Indeed, she was reassessed and had to bear the consequences of her own acts. However, her testimony is in line with that of John Agostinelli and Jeffrey Mailow with respect to the amount agreed upon that was to be paid to Earl Heinig. It is true that Mr. Agostinelli testified that he did not believe that Silhouette could afford to pay that amount. However, Mr. Agostinelli's testimony appeared somewhat weak as he acknowledged that he trusted everyone without verifying anything. He first accepted Heather Mailow's version in preparing the general ledger and the statement of business activities. He later changed his mind after talking to Earl Heinig. He finally acknowledged in court that he did not have a clue as to the amounts paid by Heather to Earl Heinig. He realized a little bit too late that he was in a situation of conflict of interest.

[110] If it is true that Earl Heinig did not make more than \$140,000 per year before 2000, it is rather surprising that John Agostinelli, the one who had prepared Silhouette's books in the past, did not verify more closely whether Earl Heinig was really receiving \$240,000 as Heather Mailow had told him.

[111] I find it almost impossible to determine the truth in this case. I do not believe that Earl Heinig received only what was reported by his wife, the appellant, in her tax returns. The impression I have is that, in fact, Silhouette's business always remained under the control of Earl Heinig for all the years in question. He arranged things so that he would receive the profit from that business without running any risk of being convicted a third time. Heather Mailow agreed to take that risk for him, one obvious reason being that she also benefited from the arrangement. Ultimately, she was let go by Earl Heinig, which leads me to believe that she never controlled anything. The total income as reassessed works out to \$4,000 per week received from Silhouette.

[112] In my view, this is not unreasonable, taking into account the representations made by Earl Heinig before this trial that this business grossed up to \$800,000 per year, which was confirmed by Mr. Agostinelli. In any event, the appellant has not raised such a degree of probability in her favour that I should believe that she did not understate her income by the amounts reassessed by the Minister. She has not convinced me on the balance of probabilities that the reassessments are wrong.

[113] Counsel for the appellant having conceded that the GST is payable on the income earned from Silhouette and having indicated that the penalties would not be contested if the assessment of additional income was upheld, I will therefore dismiss the appeals, with costs to the respondent in accordance with Tariff B of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 9th day of July 2010.

" Lucie Lamarre "

Lamarre J.

CITATION: 2010 TCC 351

COURT FILE NO.: 2007-2125(IT)G, 2007-2126(GST)G

STYLE OF CAUSE: DONNA HEINIG V. HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 3, 4, 5 and 6, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: July 9th, 2010

APPEARANCES:

Counsel for the Appellant: Franklyn Cappell
Counsel for the Respondent: Bobby Sood and Paolo Torchetti

COUNSEL OF RECORD:

For the Appellant:

Name: Franklyn Cappell
Firm: Cappell Parker LLP
Toronto, Ontario

For the Respondent:

Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada