

Docket: 2009-3117(IT)G

BETWEEN:

BA PHAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard together with the appeal of *Ba Phan* (2009-3118(GST)G) on  
July 13, 2011, at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Andrew Majawa

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**AMENDED JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* with respect to the 2003 **and** 2004 taxation years are allowed, without costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

**The appeal from the assessment made under the *Income Tax Act* with respect to the 2006 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.**

Signed at Vancouver, British Columbia, this **14th** day of **September** 2011.

“L.M. Little”

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Little J.

Docket: 2009-3118(GST)G

BETWEEN:

BA PHAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard together with the appeals of *Ba Phan* (2009-3117(IT)G) on  
July 13, 2011, at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Andrew Majawa

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**AMENDED JUDGMENT**

The appeal from the assessment made under the *Excise Tax Act* with respect to the Notice of Assessment dated March 11, 2008, for the period January 1, 2003 to December 31, 2004, is allowed, without costs and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this **14th** day of **September** 2011.

“L.M. Little”

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Little J.

Citation: 2011 TCC 392  
Date: **20110914**  
Dockets: 2009-3117(IT)G  
2009-3118(GST)G

BETWEEN:

BA PHAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **AMENDED REASONS FOR JUDGMENT**

Little J.

#### A. FACTS

[1] The income tax appeals and the GST appeal were heard together on common evidence.

#### Re: Income Tax Assessments

[2] The Appellant said that he was born in Vietnam. He said that he lived in a refugee camp in Malaysia for a brief period of time and immigrated to Canada in 1990. The Appellant said that his mother died in 2006 and his brothers and sisters continue to live in Vietnam.

[3] The Appellant said that he moved to Vancouver in 2000.

[4] The Appellant said that his family owned property (land and buildings) in a city approximately 200 kilometres from Ho Chi Minh City (formerly Saigon). He said that his parents were one of the richest families in this city.

[5] When the Appellant filed his income tax return for the 2003 taxation year, he reported a total income of \$3,787.57, calculated as follows:

|                       |                  |
|-----------------------|------------------|
| Employment Income     | \$6,060.37       |
| Interest Income       | <u>107.23</u>    |
|                       | \$6,167.60       |
| Business Loss claimed | <u>-2,380.03</u> |
|                       | \$3,787.57       |

[6] When the Appellant filed his income tax return for the 2004 taxation year, he reported total income as follows:

|                   |             |
|-------------------|-------------|
| Employment Income | \$10,400.00 |
|-------------------|-------------|

[7] When the Appellant filed his income tax return for the 2006 taxation year, he reported a total income of \$12,437.84 and claimed tuition and education amounts of \$1,324.00.

[8] On April 9, 2008, the Minister of National Revenue (the “Minister”) reassessed the Appellant’s 2003, 2004 and 2006 taxation years (the “Reassessments”).

[9] The said Reassessments contained the following adjustments:

- a) they included unreported business incomes of \$264,798.35 and \$111,135.58 in the Appellant’s 2003 and 2004 taxation years, respectively;
- b) they assessed gross negligence penalties on the above unreported amounts; and
- c) they deleted the tuition and education amount that was claimed by the Appellant for the 2006 taxation year and applied the amount to the 2003 taxation year.

Re: Goods and Services Tax Assessment

[10] The Minister stated that the Appellant did not file Goods and Services Tax (“GST”) returns for the 2003 and 2004 taxation years.

[11] By Notice of Assessment dated March 11, 2008, the Minister assessed the Appellant for the following periods and assessed the following tax:

January 1, 2003 to December 31, 2003:\$18,417.16

January 1, 2004 to December 31, 2004:\$ 7,779.35

B. ISSUES TO BE DECIDED

[12] The issues are whether:

Income Tax

- a) the Appellant earned and failed to report respective business incomes of \$264,798.35 and \$111,133.58 in 2003 and 2004;
- b) the Minister properly transferred the tuition and education amount from the 2006 taxation year to the 2003 taxation year; and

GST

- c) the Appellant collected and failed to report GST of \$18,417.16 and \$7,779.35 for the 2003 period and the 2004 period, respectively.

C. ANALYSIS AND DECISION

[13] During the hearing, Counsel for the Respondent said that the Reassessments issued with respect to the Appellant's 2003 and 2004 taxation years were based upon the results of Net Worth audits carried out by officials of the Canada Revenue Agency (the "CRA").

[14] In his argument, Mr. Majawa, Counsel for the Respondent, said:

Your Honour, obviously the issue on these appeals, the GST and the income tax appeals is whether or not the appellant earned and failed to report income in the amounts of, in 2003 it's \$264,798.35 and in 2004 it's \$111,133.58. And then the GST amounts that are at issue are \$18,417 in 2003, \$7,770 in 2004. The determination of the GST of, as I believe I submitted in the opening statement, just flows directly from your determination on the income tax matter. And then of course the final issue is that tuition credit being applied, moved from 2006 to 2003.

Now, the onus, as I mentioned at one point before and you mentioned on numerous occasions, is on the appellant in a net worth assessment just like any other and I have included the case of *Lacroix* in my book of authorities, which is the 2008

decision of the Federal Court of Appeal and where that -- where the Federal Court said, and I will take you quickly to paragraph 18 at tab 9 of the book of authorities.

(Transcript, page 291, line 8 to page 292, line 1)

[15] At page 300, I said:

JUSTICE: ... There has been some money, witness the currency transaction; there has been some money witness the purchase of the property in Abbotsford, and then there has been some money witness the condominium on Kent Street. So it is not as if there was zero involved.

MR. MAJAWA: No, there's money, I mean obviously --

JUSTICE: What is your answer -- I know he is -- what is your answer, where does the money come from? Does it come from trees? Does it come from his family? Does it come from another business? I know this is not your onus, I am just talking to you generally.

MR. MAJAWA: The assumption is that it comes from a taxable source. I don't know what that taxable source is. As I said before he's gone to school for six years or so for technology studies.

JUSTICE: Right.

MR. MAJAWA: It could be something to do with that.

JUSTICE: Right.

MR. MAJAWA: It could be something to do with something entirely that we have absolutely no idea about. It could be anything. It could be something else to do with financial transactions. I have no idea.

JUSTICE: Okay, well that's fair.

MR. MAJAWA: There certainly is money there, and I take Your Honour's point. You know, the property that was purchased in 2002, as Mr. Lin testified. That ends up having almost no effect on his net worth assessment because all of it ends up going towards the assessment is the amount that the liability is reduced by because it was purchased in a year prior to 2003. So, Mr. Phan does not get dinged, for lack of a better word, for the down payment that he made on that. Obviously he had that at some point.

(Transcript, page 300, line 17 to page 302, line 1)

Comment: In the above statement, Mr. Majawa was referring to the Abbotsford property.

[16] As Mr. Majawa noted, I must deal with the credibility of the Appellant.

[17] During the hearing, the Appellant said that he received gifts of approximately \$200,000.00 from his mother. The Appellant said:

JUSTICE: ... Do you have any idea, before we look at the documents, do you have any idea, sir, how much in the way of funds, in the way of money, you received either from your mother or from friends of your mother over this period? Do you know what the number was?

A Like I said about 200,000, sir.

JUSTICE: How much?

A Around 200,000.

JUSTICE: Two hundred thousand?

A Yes.

(Transcript, page 24, lines 15 to 25)

[18] The following exchange occurred:

JUSTICE: So all of the money, your evidence is that over \$200,000 was received by you either from your mother or from friends of your mother, is that right?

A Yes.

JUSTICE: And the money that -- you received some of the money from your mother when you made trips to Vietnam and you received other amounts from your mother through her friends, mainly when you met with them in Vancouver, is that your evidence? You met the friends of your mother in Vancouver and during those meetings they gave you some money from your mother?

A They just show up -- they just call me saying my mom saying she's going to give me -- she sent me some money and someone is going to show up to give me that money so I can take it.

(Transcript, page 25, line 13 to page 26, line 3)

[19] Mr. Majawa called David Lin as a witness. Mr. Lin is an auditor with the Special Enforcement Program of the CRA. Mr. Lin said:

JUSTICE: This is a note prepared by you, is it?

A [MR. LIN:] Yes.

JUSTICE: These are your notes?

A [MR. LIN:] After the interview, I prepare a memo.

JUSTICE: Okay. What's the date of that note?

A [MR. LIN:] It's April 20, 2007.

JUSTICE: Okay, go ahead.

A [MR. LIN:] He said he could not remember but the maximum average would be about \$50,000 each year.

JUSTICE: By "each year", what do you mean? What do you understand that to mean? He came to Canada in 1990. He came to Vancouver in 1999, as I recall. What years are we -- what do you mean by "each year"?

[...]

JUSTICE: Do you have an explanation of that?

A [MR. LIN:] No, he -- in 2006, say -- I believe he's referring to 2002, '03, '04, '05 and '06.

JUSTICE: '02, '03, '04, '05, '06?

A [MR. LIN:] Yes



JUSTICE: Okay.

(Transcript, page 236 line 4 to page 237, line 6)

[20] Officials of the CRA established that the Appellant was carrying on a currency exchange business in 2002. However, Mr. Lin testified that for administrative reasons, the CRA decided not to reassess the Appellant's 2002 taxation year. The Appellant also testified that he discontinued the currency exchange business in 2002 because he was not making any money from that business.

[21] The Appellant also said that he was operating a manicure and pedicure business ("Fantasy Nail") but that he sold this business in early March, 2003 for \$10,000.

[22] Based on a careful analysis of the evidence, I have concluded that there is no evidence that the Appellant was carrying on any other business activity other than the currency business in 2002 and Fantasy Nail.

[23] While the Appellant said that he received gifts from his mother of approximately \$200,000.00 (U.S.) and while Mr. Lin said that his notes indicated that the Appellant told him that he received \$250,000.00 (U.S.) from his mother, the CRA did not recognize in its Net Worth audit that the Appellant received any gifts from his mother.

[24] Based upon the evidence that was before me, I have concluded that the only way that the Appellant could support his lifestyle is that he did receive significant sums of money from his mother. Although the Appellant's records are deficient, I have concluded that the Appellant received **a total of** \$125,000.00 (U.S.) from his mother in 2003 and 2004. Because of the lack of evidence, I am not prepared to accept the Appellant's statements that he received \$200,000.00 (U.S.) from his mother or the statement made by the Appellant to the auditor that he received \$250,000 (U.S.) from his mother.

[25] During the hearing, Mr. Majawa said:

MR. MAJAWA: In 2003 is that the personal expenses in 2003 should be reduced by \$55,000 and that's in relation to what was originally determined by the auditor to be an unidentified withdrawal. It was able to be matched to the purchase of the Kent Street property.

JUSTICE: Right.

MR. MAJAWA: And then the other concession is with respect to 2004 and that should be reduced -- personal expenses in 2004, should be reduce[d] by \$8,677.64.

JUSTICE: \$8,677.64?

MR. MAJAWA: That's correct. And that's because the mortgage payment -- the mortgage interest payments were calculated twice in that year.

JUSTICE: Right.

MR. MAJAWA: That did not happen in 2003 in fact it was understated in 2003 because he used the wrong number. But we obviously can't ask for an increase.

JUSTICE: \$8,067.64.

MR. MAJAWA: That's correct.

(Transcript, page 314, line 15 to page 315, line 9)

[26] During his argument, Mr. Majawa agreed that the Reassessments for the 2003 taxation year were issued on the basis that the Appellant was married in 2003 and the Respondent now agrees that the Appellant was not married in 2003. At the conclusion of the hearing, I requested that Mr. Majawa provide the Court with his comments in writing to recognize that the Appellant was a single person and not married in 2003.

[27] By letter sent to the Vancouver Registry of the Court by facsimile on July 14, 2011, Mr. Majawa advised as follows:

[...]

Consistent with the testimony of the auditor, David Lin, the respondent subsequently conceded that the appellant's personal expenses in the 2003 taxation year should have been based on a single person household as opposed to a two-person household. Please find attached a personal expense worksheet which contains the 2003 Statistics Canada personal expenses averages for a single person household. As was described by Mr. Lin during his evidence in chief, the calculation of the appellant's personal expenses was based on both Statistics Canada averages and figures from verifiable sources such as bank records and other information obtained from the taxpayer. Mr. Lin has prepared a revised personal expenses worksheet for 2003. The entries where Statistics Canada averages alone were used to estimate the

appellant's personal expenses have been updated to reflect a single person household. Personal expense calculations that were originally calculated using verifiable sources or from the appellant's representations remain the same as they did in the auditor's original calculation. The use of Statistics Canada averages for a single person household in 2003 results in a reduction of \$11,283.01 in personal expenses for the appellant in that year.

The \$55,000 cheque withdrawal from Vancity account #[xxxxxx] which appeared in the original personal expense worksheet at Tab 38 of exhibit R1 has been removed from the enclosed worksheet in accordance with the respondent's concession that that amount was used as part of the purchase price of the Kent St. condominium. The total amount that the respondent concedes should be removed from the appellant's 2003 personal expenses is \$66,283.01 (\$11,283.01 + \$55,000) which results in a reduction from \$159,297.77 to \$93,014.76. The enclosed personal expense worksheet does not contain any double counting and represents the respondent's entire concession with respect to the 2003 taxation year.

[28] The income tax appeals **for the 2003 and 2004 taxation years** are allowed on the following basis:

1. The Court has recognized that the Appellant received \$125,000.00 (U.S.) in gifts from his mother in 2003 and 2004, **to be allocated as follows:**

| <u>Year</u>   | <u>Total Gift Received</u> |
|---------------|----------------------------|
| <u>2003</u>   | <u>US \$ 75,000</u>        |
| <u>2004</u>   | <u>US \$ 50,000</u>        |
| <u>Total:</u> | <u>US\$125,000</u>         |

2. In its letter dated July 14, 2011, Counsel for the Respondent has conceded the following amounts:

|  |                   |
|--|-------------------|
| Double counting re condominium on Kent Street (see letter dated July 14, 2011) | \$55,000.00 (Cdn) |
| Deduction re expenses of a single person                                       | \$11,283.01 (Cdn) |

3. In addition, Mr. Majawa conceded that the personal expenses in 2004 should be reduced by \$8,677.64 (see paragraph [25] above and Transcript, page 314, lines 21-24)

**[29] The appeal filed by the Appellant for the 2006 taxation year is dismissed because the only matter at issue for that year was the application of the tuition credit which was properly applied in the 2003 taxation year.**

**[30] Since I have concluded that the Appellant's taxable income is to be reduced and the Appellant's personal expenses are to be reduced, I have concluded that the GST that was assessed should be reduced in 2003 and 2004 to recognize that the Appellant had received total gifts of \$75,000 (U.S.) in 2003 and \$50,000 (U.S.) in 2004.**

**[31] I have also concluded that the penalties should be applied, but the amounts of the penalties will be reduced to recognize the gifts that were received by the Appellant from his mother.**

Signed at Vancouver, British Columbia, this **14th** day of **September** 2011.

“L.M. Little”

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Little J.

CITATION: 2011 TCC 392

COURT FILE NOS.: 2009-3117(IT)G  
2009-3118(GST)G

STYLE OF CAUSE: BA PHAN AND HER MAJESTY THE  
QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: July 13, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: August 23, 2011

**DATE OF AMENDED**  
**JUDGMENT:** **September 14, 2011**

APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Andrew Majawa

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

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