

Docket: 2011-3624(IT)I

BETWEEN:

AMY LE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeals heard on July 4, 2012, at Vancouver, British Columbia.

Before: The Honourable Justice R  al Favreau

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Devi Ramachandran

---

**AMENDED JUDGMENT**

The appeals from the reassessments dated November 8, 2010, made under the *Income Tax Act* by the Minister of National Revenue concerning the 2004, 2005 and 2006 taxation years are dismissed in accordance with the attached **amended** reasons for judgment.

**The appeals from the redeterminations of the Appellant's entitlement to the Canada Child Tax Benefit ("CCTB") for the 2006 base taxation year and to the Goods and Services Tax Credit ("GSTC") for the 2005, 2006, 2007, 2008 and 2009 base taxation years are allowed based on the concession made by the Minister of National Revenue, that the Appellant was single rather than married from March 5, 2006 onward and the matter is referred back to the Minister for reconsideration and redeterminations of the Appellant's entitlement to the CCTB for the 2006 base taxation year and to the GSTC for**

**the 2005 to 2009 base taxation years. The appeals from the redeterminations of the Appellant's entitlement to the CCTB for the 2004 and 2005 base taxation years are dismissed.**

**This Amended Judgment is issued in substitution of the Judgment dated October 17, 2012.**

Signed at Ottawa, Canada, this 30th day of October 2012.

"Réal Favreau"

---

Favreau J.

Citation: 2012 TCC 349

**Date: 20121030**

Docket: 2011-3624(IT)I

BETWEEN:

AMY LE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**AMENDED REASONS FOR JUDGMENT**

Favreau J.

[1] These appeals heard under the informal procedure concern the Appellant's 2004, 2005 and 2006 taxation years, the Appellant's Canada Child Tax Benefit ("CCTB") for the 2004, 2005 and 2006 base taxation years and the Goods and Services Tax Credit ("GSTC") for the 2003, 2004, 2005, 2006, 2007, 2008 and 2009 base taxation years. The appeals with respect to the GSTC for the 2003 and 2004 base taxation years were quashed at the commencement of the hearing as no determinations with respect to the 2003 and 2004 base taxation years were issued by the Minister of National Revenue (the "Minister"). With respect to the Appellant's entitlement to the CCTB and to the GSTC, the Minister conceded that the Appellant was single rather than married from March 5, 2006 onward and that her entitlement to the CCTB for the 2006 base taxation year and to the GSTC for the 2005 to 2009 base taxation years should be redetermined accordingly.

[2] The points at issue concerning the 2004, 2005 and 2006 taxation years are:

- (a) whether the Appellant earned and failed to report incomes of \$24,643, \$5,960 and \$31,271 for the 2004, 2005 and 2006 taxation years, respectively; and
- (b) whether **the Minister** properly assessed gross negligence penalties for the 2004, 2005 and 2006 taxation years.

[3] By reassessments dated November 8, 2010, made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), as amended (the “*Act*”), the Minister included unreported business income of \$24,643, \$5,960 and \$31,271 for the Appellant’s 2004, 2005 and 2006 taxation years respectively and assessed gross negligence penalties on the above unreported amounts. The reassessments for the 2004, 2005 and 2006 taxation years were made beyond the normal reassessment period.

[4] The Appellant reported the following sources of income in computing her income for the 2004, 2005 and 2006 taxation years:

	<b>2004</b>	<b>2005</b>	<b>2006</b>
Other income		\$7,050.00	
Universal child care benefit			\$600.00
Interest income			\$101.00
Total income	\$0.00	\$7,050.00	\$701.00

[5] In determining the Appellant’s tax liabilities for the 2004, 2005 and 2006 taxation years, the Minister made the following assumptions of fact, described in paragraphs 33(a) to (cc) of the reply to the notice of appeal:

2004, 2005 and 2006 Net Worth

- a) Hung owned a business under the name VN Gardening and Landscape (“VN Gardening”);
- b) Hung commenced operations of VN Gardening in June 2003;
- c) the Appellant and Hung were involved in an illegal marijuana grow operation in the Regina, Saskatchewan area (the “Grow-op”) during the 2004, 2005 and 2006 taxation years;

- d) the Appellant and Hung were in receipt of business income earned from the Grow-op;
- e) the Appellant and Hung did not report any income from the Grow-op on their personal income tax returns for the 2004, 2005 and 2006 taxation years;
- f) the Appellant and Hung operated the Grow-op together and each were entitled to 50% of the income from the Grow-op;
- g) the Grow-op ceased operations after a Royal Canadian Mounted Police search was conducted on 12 properties involved in the Grow-op on November 15, 2006 (the "Search");
- h) the Search included:
  - i) an acreage property near Kronau, Saskatchewan, owned by Hung (the "Kronau Property")
  - ii) a property located at 5730 168<sup>th</sup> Street, Surrey, British Columbia, owned by Hung (the "Surrey Property"); and
  - iii) a property located at 2238 Elderkin Drive East, Regina, Saskatchewan owned by the Appellant (the "Regina Property");
- i) cash was seized from the Regina Property during the Search;
- j) the Appellant purchased the Regina Property in 2005;
- k) the Appellant's mother did not give her any funds to purchase the Regina Property;
- l) the Appellant pled guilty to marijuana production, possession of crime proceeds, fraud and conspiracy;
- m) Hung pled guilty to marijuana production, possession of proceeds of crime, money laundering and fraud;
- n) at all material times, the Appellant did not keep or provide records in such form or containing such information as would enable the determination of the Appellant's tax liabilities and obligations;
- o) the Appellant and Hung owned the assets as set out in the attached Schedule A as of December 31<sup>st</sup> of each year listed;
- p) the Appellant and Hung owed the liabilities as set out in the attached Schedule B as of December 31<sup>st</sup> of each year listed;

- q) the Appellant and Hung realized the decreases and increases to their net worth as of December 31<sup>st</sup> of each year listed as calculated in the attached Schedule C;
- r) the Appellant and Hung had and paid the yearly personal living expenditures as set out in the attached Schedule D;
- s) in 2004, 2005 and 2006, the Appellant and Hung funded their yearly changes in net worth and personal living expenditures, less reported incomes, by unreported business income that the Appellant and Hung earned;
- t) in 2004, 2005 and 2006, the Appellant earned and failed to report respective business income of \$24,643.00, \$5,960.00 and \$31,271.00, as set out in Schedule E;

Marital status

- u) the Appellant and Hung have children in common;
- v) the Appellant and Hung's marital status as at December 31<sup>st</sup> of each year, as reported on their respective personal income tax returns, was as follows:

<b>Year</b>	<b>Appellant</b>	<b>Hung</b>
2003	married to Hung	married to Appellant
2004	married to Hung	married to Appellant
2005	single	married to Appellant
2006	single	separated
2007	single	married to someone other than the Appellant
2008	single	separated
2009	single	has not yet filed his personal T1 tax return
2010	single	has not yet filed his personal T1 tax return

- w) at the time of the Search, the Appellant, Hung and their children were residing together at the Kronau Property;
- x) the Appellant and Hung's personal belongings were found at the Surrey Property during the Search;
- y) the Appellant's marital status as at December 31, 2004 was married or common-law partner to Hung;
- z) the Appellant's marital status as at December 31, 2005 was married or common-law partner to Hung;
- aa) on March 26, 2007, the Appellant notified the Minister of a change to her marital status to separated effective March 5, 2006;

- bb) the Appellant's marital status was separated effective March 5, 2006;
- cc) the Appellant's marital status as at December 31, 2006 was married or common-law partner to Hung.

[6] In determining that the Appellant was liable for penalties under subsection 163(2) of the *Act* for the 2004, 2005 and 2006 taxation years, the Minister relied on the following facts described in paragraph 34 of the reply to the notice of appeal:

- a) the facts stated in paragraphs 33 a) to 33 cc) above;
- b) the unreported incomes for the 2004, 2005 and 2006 taxation years were material;
- c) the Appellant knew or ought to have known that her income was underreported for the 2004, 2005 and 2006 taxation years;
- d) the Appellant was aware of the reporting requirements with respect to legitimate sources of income;
- e) the Appellant did not maintain books and records in respect of the Grow-op;
- f) the Appellant's lifestyle was not supported by the income reported by the Appellant;
- g) the Appellant's reported income did not support her ability to purchase assets;
- h) the Appellant should have been aware that most of her income was from illegal activities;
- i) the Appellant choose not to report her income from the illegal activities;
- j) the Appellant made or participated in, assented to or acquiesced in the making of, false statements or omissions in her 2004, 2005 and 2006 income tax returns by failing to report business income of \$24,643.00, \$5,960.00 and \$31,271.00, respectively; and
- k) those false statements or omissions were made by the Appellant knowingly or under circumstances amounting to gross negligence.

[7] The Appellant testified at the hearing and explained that, from March 5, 2006, she lived separately from Hung but that, from September 2006 to March 2007, she lived with Hung on a temporary basis in an attempt to reconcile.

[8] During her testimony, the Appellant denied to have been involved in the marijuana operation and she said that she pled guilty to the charges to get a reduced sentence in order to be able to stay with her children. The Appellant received a two-year conditional sentence, with the first six months spent on electronic monitoring. Other conditions were also imposed such as the requirement to provide a DNA sample, a ten-year firearm prohibition and the forfeiture of items seized on the property where the couple lived at the time of the search.

[9] The Appellant said she disagreed with the fact that she has to pay half of the amounts that have been reassessed for the 2004, 2005 and 2006 taxation years because during those years, she was a stay-at-home mom. She maintained that during the 2004 and 2005 taxation years, she earned no business income at all. Her former spouse paid for everything for their two children and all the family assets were his.

[10] During cross-examination, the Appellant was not able to identify the source of a deposit in the amount of \$21,407.36 made in her personal bank account on July 28, 2006. She could not remember if the money came from her former spouse.

[11] On August 14, 2005, the Appellant signed an offer to purchase a residential property having the civic address of 2238 Elderkin Drive East, Regina, Saskatchewan. The purchase price of the property was \$192,500, to be paid by a \$5,000 deposit payable by cheque, a new mortgage of \$144,375 and the balance in cash of approximately \$43,125. The Appellant maintained that the cash portion came from her bank account in which Government cheques received for the support of her children were deposited. At the hearing, the Appellant did not say that the \$40,000 down payment was a gift from her mother. The Appellant obtained from Crown Mortgage Services Inc., a mortgage in the amount of \$146,250, to buy that property. The said mortgage was obtained by the Appellant as a result of a fraudulent letter dated August 25, 2005, from Regina Investments Holdings Inc. The Appellant pleaded guilty to the fraud charge.

[12] The Appellant did not recognize her implications in the marijuana growth operation and she challenged the Canada Revenue Agency's ("CRA") net worth analysis. The Appellant revised the CRA'S net worth and she submitted her own proposals. The Appellant now wants to change the 50/50 allocation made by the CRA despite the fact that during the audit she never raised that point.



[13] Mr. Lyle Bohay, an appeals officer with the CRA who was, at the time of the audit, a member of the Special Enforcement Program, testified at the hearing. He explained that the audit of the Appellant and of her former spouse began after a referral from the Royal Canadian Mounted Police (the “R.C.M.P.”) advising that they were part of a drug investigation. The net worth audit was based on financial information obtained from the Regina Integrated Proceeds of Crime Section of the R.C.M.P. The net worth analysis revealed a significant discrepancy between the couple’s reported income and their lifestyle expenditures. The source of the unexplained funds could not be related to a non-taxable transaction and the funds were therefore considered to be taxable income as the most likely source was to be from the sale of narcotics. The taxable income was divided equally between the Appellant and her former spouse as the couple’s funds were intermingled.

[14] According to Mr. Bohay, the Appellant made, during the course of the audit, representation that the cash seized in the amount of \$7,030 did not belong to her nor to her former spouse and this amount was removed from the net worth. The Appellant also made a representation regarding the expenditure amounts used for the purpose of the net worth but when confronted with factual amounts of expenditures, she accepted the net worth figure. The Appellant did not dispute at the time of the audit the 50/50 allocation of undeclared income.

[15] Mr. Bohay pointed out that during the course of the net worth audit, the Appellant submitted no records showing that the assets under her name, representing approximately 50% of the assets of the couple, did not belong to her and she made no representation concerning a \$40,000 gift obtained from her mother to buy the residential property located at 2238 Ederkin Drive East in Regina.

### Analysis

[16] I should first mention that the reassessments for the 2004, 2005 and 2006 taxation years were made beyond the normal reassessment period which normally mean that the onus is on the Respondent to establish misrepresentation attributable to neglect, carelessness, wilful default or fraud for the purposes of subparagraph 152(4)(a)(i) of the *Act*. Since this point was not raised by the Appellant in her notice of appeal, the Respondent was not put on notice that such an onus had to be met (*Bigayan v. Canada*, [2000] 1 C.T.C. 29). With respect to the penalties imposed under subsection 163(2) of the *Act*, the onus is clearly on the Respondent to justify them.

[17] A net worth assessment is a method of last resort used by the CRA to verify the income tax returns of a taxpayer. A net worth assessment is, by its very nature, an arbitrary and imprecise approximation of a taxpayer's income. Its purpose is to relieve the Minister of his ordinary burden of proving a taxable source of income. The Minister is only required to show that the taxpayer's net worth has increased between two points in time. Once an increase is demonstrated, the onus is shifted to the taxpayer who has to identify the non-taxable sources of his appreciation in wealth (*Hsu v. Canada*, [2001] 4 C.T.C. 1 at paras. 30 and 31).

[18] In the case at bar, the net worth assessment revealed a significant discrepancy in the unreported incomes of the Appellant based on the financial information and assets obtained from the R.C.M.P. A residential property was acquired by the Appellant in 2005 while very little income was declared for income tax purposes.

[19] No records were provided by the Appellant to demolish the Minister's assumptions. The Appellant challenged the Minister's net worth assessment based on an expenditures chart done by memory only rather than with receipts six years after the litigious years. The Appellant's memory does not appear to be reliable considering the fact that she cannot remember the source of the \$21,407.36 deposited in her bank account in 2005.

[20] Based on the evidence, I have come to the conclusion that the Appellant has not succeeded in showing that one or more of the Minister's assumptions were wrong.

[21] Gross negligence penalties were assessed for each of the 2004, 2005 and 2006 taxation years under subsection 163(2) of the *Act* which reads as follows:

Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of . . .

[22] Subsection 163(3) of the *Act* specifies that the burden of proof is on the Minister to establish the facts justifying the assessment of the penalty. Subsection 163(3) of the *Act* reads as follows:

Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[23] To establish the facts justifying the assessment of the penalty means that the Minister has to prove that the Appellant made a false statement or omission in a tax return and that the false statement or omission was made knowingly or under circumstances amounting to gross negligence.

[24] In *Venne v. Canada*, 84 DTC 6247, [1984] F.C.J. No. 314 (QL), Strayer J. defined “gross negligence” as follows:

. . . 'Gross negligence' must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not. . . .

[25] The evidence provided indicates that the probable source of the unreported income was from unlawful activities in which the Appellant was engaged and convicted of. The Appellant admitted that she pleaded guilty to marijuana production, possessing crime proceeds, fraud and conspiracy. Considering the amounts of unreported income, as determined by the net worth assessment, I conclude that the Appellant has made a false statement or an omission in filing her tax returns and that the false statement or omission was attributable to gross negligence.

[26] Having concluded that the Appellant has made a false statement or an omission in filing her tax returns that was attributable to gross negligence, the Minister was entitled to reassess the Appellant for the 2004, 2005 and 2006 taxation years beyond the normal reassessment period by virtue of subparagraph 152(4)(a)(i) of the *Act* which reads as follows:

The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

- (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or . . .

[27] For these reasons, the appeals **concerning the 2004, 2005 and 2006 taxation years** are dismissed.

[28] **The appeals from the redeterminations of the Appellant's entitlement to the CCTB for the 2006 base taxation year and to the GSTC for the 2005, 2006, 2007, 2008 and 2009 base taxation years are allowed and the matter is referred back to the Minister for reconsideration and redeterminations of the Appellant's entitlement to the CCTB for the 2006 base taxation year and to the GSTC for the 2005 to 2009 base taxation years. The appeals from the redeterminations of the Appellant's entitlement to the CCTB for the 2004 and 2005 base taxation years are dismissed.**

[29] **These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated October 17, 2012.**

Signed at Ottawa, Canada, this 30th day of October 2012.

"Réal Favreau"

---

Favreau J.

CITATION: 2012 TCC 349  
COURT FILE NO.: 2011-3624(IT)I  
STYLE OF CAUSE: Amy Le and Her Majesty the Queen  
PLACE OF HEARING: Vancouver, British Columbia  
DATE OF HEARING: July 4, 2012  
REASONS FOR JUDGMENT BY: The Honourable Justice R  al Favreau

**DATE OF AMENDED  
JUDGMENT: October 30, 2012**

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Devi Ramachandran

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

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