

Docket: 2011-3996(IT)I

BETWEEN:

LJUPKO ZELJKOVIC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Sladjana Zeljkovic (2012-310(IT)I)
on November 29 and 30, 2012, at Hamilton, Ontario

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agent for the Appellant: Stevan Cenic
Counsel for the Respondent: Tokunbo C. Omisade

JUDGMENT

The appeals with respect to the reassessments made under the *Income Tax Act* for the 2006 and 2007 taxation years are dismissed, without costs.

Signed at Montréal, Québec, this 12th day of February 2013.

"Rommel G. Masse"

Masse D.J.

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SLADJANA ZELJKOVIC,

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Citation: 2013 TCC 48
Date: 20130212
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AND BETWEEN:

Docket: 2012-310(IT)I

SLADJANA ZELJKOVIC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

[1] These appeals were heard together in Hamilton, Ontario on November 29th and 30th, 2012.

[2] The Appellants are appealing income tax reassessments for their 2006 and 2007 taxation years. The reassessments, dated October 11, 2011, for Ljupko Zeljkovic, and November 8, 2011, for Sladjana Zeljkovic, are with respect to allegedly unreported income and disallowed business deductions for those years. There are two trucking partnerships involved as will be explained later.

[3] Originally, there were quite a few items in dispute between the Appellants and

the Respondent. However, as a result of lengthy discussions between Mr. Cenic, agent for the Appellants, and Mr. Omisade, counsel for the Respondent, the total number of items in dispute has been narrowed down to six. This has been of great assistance to the Court and I am thankful to both Mr. Cenic and Mr. Omisade for their cooperation.

Legislation

[4] The relevant provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) are the following:

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

...

12. (1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable

...

(x) any particular amount (other than a prescribed amount) received by the taxpayer in the year, in the course of earning income from a business or property, from

(i) a person or partnership (in this paragraph referred to as the "payer") who pays the particular amount

(A) in the course of earning income from a business or property,

...

(iv) as a refund, reimbursement, contribution or allowance or as assistance, whether as a grant, subsidy, forgivable loan, deduction from tax, allowance or any other form of assistance, in respect of

(A) an amount included in, or deducted as, the cost of property, or

(B) an outlay or expense,

to the extent that the particular amount

(v) was not otherwise included in computing the taxpayer's income, or deducted in computing, for the purposes of this Act, any balance of undeducted outlays, expenses or other amounts, for the year or a preceding taxation year,

...

96. (1) Where a taxpayer is a member of a partnership, the taxpayer's income ... if any, for a taxation year, or the taxpayer's taxable income earned in Canada for a taxation year, as the case may be, shall be computed as if

- (a) the partnership were a separate person resident in Canada;
- (b) the taxation year of the partnership were its fiscal period;
- (c) each partnership activity (including the ownership of property) were carried on by the partnership as a separate person, and a computation were made of the amount of

...

- (ii) each income and loss of the partnership from each other source or from sources in a particular place,

for each taxation year of the partnership;

...

230. (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

Factual Context

[5] The Appellants, Ljupko Zeljkovic ("the Husband"), and Sladjana Zeljkovic ("the Wife") are married to each other. The Husband operates a trucking business in partnership with another person named Bogdan Jovicic under the business name Red Star Trucking ("Red Star"). The Husband owns 50% of this partnership. The Husband and the Wife are also partners together in another trucking business known as S & B Trucking (so named after their two children and hereinafter called "S & B"). The Husband has an 80% interest in this partnership and the Wife has a 20% interest.

[6] As I have already indicated, at the beginning of this hearing, the agent for the Appellants and counsel for the Respondent engaged in discussions which were very helpful in narrowing the items in dispute. There are only six items in dispute; they are set out and highlighted in the following table:

Adjustment	<u>Red Star</u>			<u>S & B</u>		
	2006	2007	Husband's Share (50%)	2006	Husband's Share (80%)	Wife's Share (20%)
Unreported Income	\$8,749	\$6,623	\$7,686	\$3117	\$2,494	\$623
Overstated Expenses						
Fuel				\$7,665	\$6,132	\$1,533
Rent/Lease	\$15,627	\$2,178	\$8,902			
Totals	\$24,376	\$8,801	<u>\$16,588</u>	\$10,782	<u>\$8,626</u>	<u>\$2,156</u>

[7] It cannot be doubted that the Appellants are honest and hard-working people who are doing their best to earn a living in a very competitive and demanding business. They have been at all times very cooperative with the Canada Revenue Agency (the "CRA") during the audit process. They have provided whatever documentation they could in support of their contention that they have not underreported their income and have not overstated their expenses. In essence, it is the sufficiency of their documentation as provided to the CRA that is in issue in this case. They have produced to the Court a series of documents in support of their contentions and these have been filed as Exhibits A-1 through A-7. Reference will be made to these documents as required.

[8] Ms. Hongbo (Alice) Zhang is an auditor with the CRA. She is the auditor responsible for the reassessments of the Appellants. She came to Court with all of her working papers to assist the Court to understand how she arrived at her conclusions. These working papers (Exhibit R-2) are very detailed and they demonstrate that she has made a very comprehensive analysis of the financial records of the Appellants in arriving at her conclusions. The testimony of Ms. Zhang, buttressed by her working papers, provides very compelling evidence of the correctness of the Respondent's position.

[9] I will review the evidence of the Respondent in relation to each partnership.

S & B Trucking

1) Unreported Income

[10] Ms. Zhang performed a bank deposit analysis, which permitted her to compare

bank deposits to the income that was reported by the Appellants. She identified two deposits: one for \$1,488.14 on September 25, 2006; and the other for \$1,831.47 on September 28, 2006. These totaled \$3,319.61. When she deducted the GST associated with this amount, the result was \$3,117 net of GST. It is her position that this was unreported income. She enquired of the Appellants what this was and they responded that it was for reimbursement of the truck maintenance warranty. The Appellants provided her with a statement from HSBC to prove the payment to Expressway Truck, Waterloo, for Invoice No. 112692 (Exhibit A-2). The Appellants indicated to her that they had never claimed the cost of the maintenance warranty as an expense and therefore should not have to claim it as income when the unexpired portion of the warranty expenditure was reimbursed. However, Ms. Zhang determined that the warranty expenditure had already been included as maintenance expense as indicated in the Appellants' General Ledger Journal Entry #78 (page 2, working paper #1001, Tab 9, Exhibit R-2; item 1, page 1, working paper #84, Tab 8, Exhibit R-2 and Exhibit R-3). Since the expense was originally expensed, then any reimbursement would have to be brought back into income; which is what she did.

2) Fuel Expenses

[11] With respect to the fuel costs of \$7,665.00, Ms. Zhang added up all of the receipts for fuel (original source documents) that were provided by the Appellants and they added up to \$77,640.30. However, the Appellants claimed \$85,305.29 for fuel expenses – a difference of \$7,664.99 (item 2, working paper #7050, Tab 15 Exhibit R-2). The Appellants then provided her with additional receipts in support of their claim (Exhibit A-1; and item 2, working paper #84, Tab 8, Exhibit R-2). She cross-referenced these receipts against their truck log to see where the truck was at the time fuel for the truck was purchased and she determined that the vehicle in question was not where the fuel was purchased but, was in fact, in the U.S.A. or off-duty. A review of the truck logbook indicated the pump times and locations on the fuel receipts did not correspond to the time and location in the truck log. For example, a fuel receipt indicating fuel was purchased in Milton at 22:25 on August 22, 2006, yet the truck was in Illinois, U.S.A. at that time and date. Consequently, she disallowed the amount of \$7,665 claimed as fuel expenses since the amount could not be verified with the documentation that had been provided. She could not be satisfied that the claimed expenses were specific to S & B Trucking.

Red Star Trucking

1) 2006 unreported income

[12] For the 2006 taxation year, Ms. Zhang assessed the amount of \$8,749 as unreported income. The Husband's share of that is \$4,375. Again, she performed a bank deposit analysis in order to determine this amount. Her calculations are shown at working paper #1001, Tab 9, Exhibit R-2. She compared each deposit for this partnership business account and she found an unidentified deposit in the amount of \$9,317.40, or \$8,749 net of GST. The Husband advised her that this was a warranty reimbursement from Express Trucking Company. She determined that in September 2006, the business returned an old truck, because repairs and maintenance for this truck was just too expensive. They then obtained a new truck. She determined that warranty payments were being paid as part of the monthly lease payments for the old truck and so these were deducted as business expenses. When the old truck was turned in for a new one, the warranty was not automatically transferable to the new unit, so the truck company reimbursed the warranty and thus the warranty reimbursement should now be included as income. Consequently, the amount of unreported income is \$8,749 and this amount was assessed by her accordingly.

2) 2007 unreported income

[13] The same kind of analysis was done for 2007 and again, the bank deposit analysis revealed unreported income of \$6,623. This was in relation to two pay-cheques received from a trucking company for trucking services provided by Red Star. One pay-cheque deposited on April 4, 2007 was for \$2,432.93 and the other on April 12, 2007 was for \$4,190.09. This gives a total of \$6,623.02. These two deposits were neglected to be included in income. Details of this can be found on page 6, working paper #1001, Tab-9, Exhibit R-2.

3) 2006 rent/lease deductions

[14] Ms. Zhang then detailed for the Court why she disallowed the sum of \$15,627 (the Husband's share being \$7,814) on account of rent and lease deductions for 2006. The details of this are found at pages 3 and 4, working paper #7050, Tab-15 of Exhibit R-2. Reference is also made to page 10, working paper #84, Tab-8 of Exhibit R-2. She conducted a bank withdrawal statement analysis. In 2006, Red Star claimed \$46,252.73 for rental/lease payments. Ms. Zhang totaled up the lease payments made net of GST and came up with \$30,626.10, which was allowed as a proper deduction, leaving \$15,627 unaccounted for. She explains that there were two lease agreements for the year; January to August for the first truck (this lease was terminated early) and another for August to December for the second truck. In August 2006, Red Star terminated the first lease early and entered into a new lease agreement for the second truck. No lease payments were made for April and August, however, two payments

were made in May (the May 1st payment is attributed to the month of April). In addition, when the old truck was turned in, Red Star obtained a lease credit of \$11,330 that was not included in income. The Appellants contend that they had paid this as a down payment, but Ms. Zhang could find no evidence of any disbursement of this amount in her audit. She asked the Appellants to provide some evidence of an actual cash payout, but the Appellants did not provide any satisfactory evidence that they in fact paid this amount. In conclusion, the lease payments were overstated by \$15,627.

4) 2007 rent/lease deductions

[15] For the 2007 taxation year, Ms. Zhang disallowed deductions of \$2,178 for rent and lease expenses. Again, she conducted an analysis by examining bank withdrawals and cross-referencing these with payments claimed to be made. The total rent/lease payments claimed was \$25,584.92; however, an examination of bank records could only confirm payment of \$23,406.96, thus leaving a variance of \$2,178 which was disallowed. This is shown on pages 8, 9 and 10 of working paper No. 7,050, Tab-15, Exhibit R-2.

Analysis

[16] The Supreme Court of Canada instructs us in its decision of *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, that the Minister uses assumptions to make assessments and the taxpayer has the initial burden of demolishing the Minister's assumptions. This burden is met when the taxpayer makes out a *prima facie* case that demolishes the Minister's assumptions. Then, after the taxpayer has met the initial burden, the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and to prove the assumptions. A *prima facie* case is established where there is evidence that establishes a fact until the contrary is proved. In *Stewart v. Canada (Minister of National Revenue – M.N.R.)*, [2000] T.C.J. No. 53, Cain J. stated at paragraph 23 that “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. ...” In *Orly Automobiles Inc. v. Canada*, 2005 FCA 425, [2005] F.C.J. No. 2116, the Federal Court of Appeal stated at paragraph 20 that “... the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted. ...” considering “... It is the taxpayer's business. ...” The Court also stated in the same decision that it is the taxpayer who “... knows how and why it is run in a particular fashion rather than in some other ways. ... He has information within his reach and under his control. ...”

[17] In a self-monitoring taxation system such as we have in Canada, it is incumbent on a taxpayer to maintain records in such form and containing such information as will enable revenue, deductions and the taxes payable to be determined. This much is mandated by section 230 of the *Income Tax Act*. Where an audit is performed on a business by the CRA, it is up to the business being audited to be able to justify to the auditor, and ultimately to this Court, the revenue earned as well as any deductions that are claimed against that revenue. This can only be done by keeping detailed records, including all source documents, of income earned and expenses incurred. A cautionary tale can certainly be seen in the case of *Njenga v. The Queen*, 96 D.T.C. 6593, [1997] 2 C.T.C. 8 (F.C.A.). In that case, the taxpayer claimed deductions that were disallowed on reassessment. The Tax Court Judge held that the taxpayer was required to maintain documentation in support of her claims. He found that the receipts she presented were a “sorry lot” (at paragraph 2). He also found that the taxpayer’s testimony was not credible and she was sufficiently aware of income tax requirements to be responsible for documentation. Justice MacDonald in a brief oral judgment stated as follows at paragraph 3:

The Income tax system is based on self monitoring. As a public policy matter the burden of proof of deductions and claims properly rests with the taxpayer. The Tax Court Judge held that persons such as the Appellant must maintain and have available detailed information and documentation in support of the claims they make. We agree with that finding. Ms. Njenga as the Taxpayer is responsible for documenting her own personal affairs in a reasonable manner. Self written receipts and assertions without proof are not sufficient.

Therefore, where the taxpayer cannot substantiate by means of documentary evidence the revenue earned and the expenses claimed against that revenue, the taxpayer’s tax liability will be assessed accordingly.

[18] In the case at bar, the Appellants have not supplied satisfactory documentary evidence to refute the conclusions arrived at by Ms. Zhang. The conclusions of underreported income and disallowed deductions have not been successfully challenged by cogent and reliable documentary evidence. The Appellants have not discharged the burden of proof that is incumbent upon them.

Conclusion

[19] In conclusion, having considered all of the evidence and the applicable principles to be applied, I am not satisfied that the Appellants have discharged the burden of proof that is incumbent upon them. Even if the evidence was sufficient to

discharge the initial burden that is incumbent upon them, then I come to the conclusion that the evidence supplied by the Respondent is more than adequate to support its position.

[20] Consequently, both of these appeals are dismissed.

Signed at Montréal, Québec, this 12th day of February 2013.

"Rommel G. Masse"

Masse D.J.

CITATION: 2013 TCC 48

COURT FILE NOs.: 2011-3996(IT)I
2012-310(IT)I

STYLES OF CAUSE: LJUPKO ZELJKOVIC AND HER
MAJESTY THE QUEEN;
SLADJANA ZELJKOVIC AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATES OF HEARING: November 29 and 30, 2012

REASONS FOR JUDGMENT BY: The Honourable Rommel G. Masse,
Deputy Judge

DATE OF JUDGMENT: February 12, 2013

APPEARANCES:

Agent for the Appellants: Stevan Cenic

Counsel for the Respondent: Tokunbo C. Omisade

COUNSEL OF RECORD:

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