Docket: 2019-1028(GST)I

BETWEEN:

SABRI BINJAMIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 19, 2019, at Windsor, Ontario
Before: The Honourable Justice B. Russell

Appearances:

Agent for the Appellant:	Alexander Menzies
Counsel for the Respondent:	Anne Maria Konewka

JUDGMENT

The appeal of the 12 assessments each raised June 12, 2018 under Part IX of the *Excise Tax Act* (ETA) for, respectively, 12 quarterly reporting periods extending from January 1, 2011 to December 31, 2013 is denied, without costs.

Signed at Halifax, Nova Scotia, this 20th day of December 2019.

"B.Russell"

Russell J.

Citation: 2019TCC287
Date: 20191220
Docket: 2019-1028(GST)I

BETWEEN:

SABRI BINJAMIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Russell J.

[1] The Appellant, Sabri Binjamin (SB), has appealed under this Court's informal procedure 12 assessments all raised June 12, 2018 under Part IX of the *Excise Tax Act* (ETA) for, respectively, 12 quarterly reporting periods extending from January 1, 2011 to December 31, 2013. SB's HST returns for these 12 quarterly periods were all filed by April 3, 2014. That date was more than one month beyond the end date of each of the said 12 reporting periods, as per paragraph 238(1)(b) of the ETA.

[2] Per paragraph 298(1)(a) of the ETA (being the provision for normal period for assessment) the aforesaid June 12, 2018 assessment date is more than four years after the aforesaid April 3, 2014. That date is the later of the day on or before which the person was required under section 238 to file a return for the period and the day the return was filed. Accordingly the 12 appealed assessments are presumptively "statute-barred".

[3] A primary issue is whether paragraph 298(4)(a) may apply to render the appealed assessed periods not statute-barred. That provision allows that,

> an assessment in respect of any matter may be made at any time where the person to be assessed has, in respect of that matter, made a misrepresentation that is attributable to the person's neglect, carelessness or wilful default;

[4] The issues in this matter are whether SB failed to report $30,432 in filing his returns for the said 12 reporting periods, and if so did he thus make a misrepresentation attributable to neglect, carelessness or wilful default per paragraph 298(4)(a)? Also, did SB incur "gross negligence" penalties per section 285 for the said reporting periods?

[5] The onus of proof is upon the Respondent to justify the appealed statute-barred assessments per paragraph 298(4)(a) and the section 285 gross negligence penalties.

[6] At all material times SB operated a sole proprietorship providing plumbing and heating services for new home construction, and was a registrant under Part IX of the ETA. In prior years he had had issues with Canada Revenue Agency (CRA) related to unreported income, leading to a tax-based bankruptcy. CRA had advised him to keep better books and records.

[7] The CRA auditor, O. McDermott-Berryman, testified that he audited initially for 2012 and 2013, conducting a bank deposit analysis from which he was unable to reconcile deposits with reported sales revenue. The deposits quite materially exceeded reported sales. SB's general ledger, being a large black book with lined pages, was filled out with revenue and expenses by month, but without indication of dates and sources. The books and records were not arranged in a discernible fashion. A box of receipts could not be reconciled with other books and records.

[8] SB reported income averaging less than $20,000 per year, yet maintained a family of six. In addition during the years in issue, without prior savings, he acquired a major asset, being a house. He was asked by the auditor how he could afford to buy the house and the auditor testified he received no clear response.

[9] The auditor testified he had identified several indicators of unreported income - his bank deposit analysis, the inability to reconcile SB's returns with his books and records, and his contact with third parties with whom SB had done business. At the auditor's meeting with SB, SB agreed that his bank deposits did represent sales.

[10] The audit results showed net HST as reported for the 2011 - 2013 three year period of $1,278 and revised net HST of $31,660 that should have been reported – thus indicating additional HST for assessment in the total amount of $30,432 (all dollar figures rounded to nearest dollar). These audit results show a more than 23-fold increase of net tax over what SB had reported. These audit results were left with SB for a response within 30 days. No response was forthcoming.

[11] SB testified that his HST returns were prepared by a bookkeeper, whose name was Denise. He said he did not know her last name. He advised that she could not testify as she had died two years previously. He said she had had a good reputation including in HST work and worked from her residence which was not far from his.

[12] He told the CRA auditor he would sign what Denise prepared without asking questions or reviewing the document including the wording immediately above the CRA form's signature box. Her work was based on what books and records he brought her. SB testified he would give her his work records every three months for HST returns. He stated also that his records were complete. He did not check his sales against his bank statements or HST reported in returns against his client invoices.

[13] SB was unable to clarify details of his above-referenced purchase of the residence. He thought this might have occurred in 2014, *i.e*. after the period here in issue.

[14] In argument SB's representative did not significantly contest that there had been a misrepresentation as to commercial income respecting each of the appealed assessments. He submitted that going back eight years (from the present 2019 back to 2011) "looks just arbitrary". SB's basic submission was that he had entrusted his now supposedly deceased bookkeeper with accurate preparation and filing of SB's HST returns. As such he (SB) was not careless or negligent nor had he engaged in wilful default per paragraph 298(4)(a) so as to cause the appealed period to not be statute-barred, nor so as to render SB liable for the assessed section 285 gross negligence penalties.

[15] In *LaCroix v. R.*, 2008 FCA 241, the Federal Court of Appeal (FCA) discussed how to address an appeal of a net worth assessment of statute-barred years, and where subsection 163(2) gross negligence penalties under the federal *Income Tax Act* (ITA) also have been assessed. The Respondent Crown bears the onus of proof for the issues of statute-barred years and gross negligence penalties for both ITA appeal and ETA appeals. The *LaCroix* reasons for judgment dealt with an ITA appeal, whereas the case at bar deals with an ETA appeal. Subsection 163(2) and subparagraph 152(4)(a)(i), both of the ITA, are substantively identical to, respectively, section 285 and paragraph 298(4)(a), both of the ETA. Therefore the language of *LaCroix* is instructive as well for ETA appeals, including the herein appeal.

[16] In *LaCroix*, the FCA wrote (paragraphs 30 and 32):

> [30] The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts [regarding unreported income], and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanations he gave were found not to be credible. In my view, given such circumstances, one must come to the inevitable conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence. This justifies not only a penalty [per subsection 163(2)], but also [per subparagraph 152(4)(a)(i)] a reassessment beyond the statutory period.
>
> [32] What, then, of the burden of proof on the Minister [per subparagraph 152(4)(a)(i) and subsection 163(2)]? How does he discharge this burden? There may be circumstances where the Minister would be able to show direct evidence of the taxpayer's state of mind at the time the tax return was filed. However, in the vast majority of cases, the Minister will be limited to undermining the taxpayer's credibility by either adducing evidence or through cross-examining the taxpayer. Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of 152(4)(a)(i) and subsection 162(3).

[17] Accordingly, *LaCroix* conveys that in determining whether there is unreported income as ascertained by a net worth reassessment per the ITA for a presumptively statute-barred taxation year, and whether an accompanying gross negligence penalty has been rightly imposed:

> a) the first step is to consider, on the basis of direct evidence adduced by the Respondent Crown and or cross-examination of the Appellant taxpayer (and or of any other taxpayer witnesses), whether on a balance of probabilities there was unreported income;
>
> b) assuming there is a finding of unreported income and in the absence of a credible explanation for same, the Respondent has met its onus of proof for purposes both of the ITA subparagraph 152(4)(a)(i) statute-barred issue and the ITA subsection 163(2) gross negligence penalty issue; and
>
> c) the same would be so in respect of the onus of proof per the ETA paragraph 298(4)(a) statute-barred issue and the ETA section 285 gross negligence penalty issue, of relevance in the herein appeal.

[18] Accordingly I now address whether on a balance of probabilities SB did receive unreported income during his quarterly reporting periods during the three years 2011, 2012 and 2013, and if so whether there was a credible explanation for same.

[19] In considering the evidence before me in this appeal, I find that on a balance of probabilities SB did have unreported business sales income as assessed. I conclude that the Respondent did present sufficient evidence through the testimony and evidentiary documentation of the CRA auditor to satisfy the Respondent's onus of proof. As well, the testimony of SB, particularly on cross-examination, is pertinent.

[20] In essence little was heard from or on behalf of SB attacking the accuracy of the underlying assessments' conclusion that there was unreported income in specified amounts for the three years of quarterly reporting periods. Evidence supporting the correctness of the finding of unreported income as specified included:

> (a) that there was a major discrepancy between amounts reported and amounts assessed as unreported;
>
> (b) the fact that bank deposit analysis indicated major amounts of unreported income;
>
> (c) the fact that SB's books and records were quite inconsistent with the reported income amounts;
>
> (d) the fact that SB's support of a family of six could not reasonably be financed by an annual income of approximately $20,000 as had been reported over the several years;
>
> (e) the fact that during this period SB had bought a house for $90,000 without any clear explanation as to where the funding had come from; and
>
> (f) the fact that he had had previous issues with CRA concerning unreported income, leading to a tax-based bankruptcy and had been advised then by CRA to keep better books and records.

[21] No credible explanation was provided for the amounts of unreported income reflected in the appealed assessments. As stated SB's primary submission was that a bookkeeper he had trusted to prepare and submit accurate HST quarterly reports had

failed to do so. His position is that thus he did not make any misrepresentations respecting reportable income due to carelessness, neglect or wilful default per paragraph 298(4)(a) of the ETA, and so the assessments in issue remain statute-barred.

[22] More particularly, in terms of reliance upon the bookkeeper whose surname SB could not provide, it appears from his evidence that SB signed the returns ostensibly prepared by the bookkeeper without review or question on his part. This is not acceptable, particularly here where the discrepancy between what amounts were reported and what amounts were assessed is vast. Any degree of diligent review of the said prepared returns would have indicated to SB that well less than all his income from his sole proprietorship was being reported. His responsibility to report truthfully and accurately cannot be absolved simply by having a bookkeeper prepare the returns, all the more so where the bookkeeper could base her work only on what books and records SB provided her. Unfortunately the bookkeeper could not testify due apparently to her being deceased, noting also that SB had never authorized her as his representative to deal with CRA during the 2013-2014 audit of this matter, and absent indication then that she was deceased.

[23] Thus, following *LaCroix*, the absence of a credible explanation for the assessed unreported income is sufficient to uphold the appealed assessments, including finding that they are not statute-barred and as well that the assessed gross negligence penalties are appropriate.

[24] On the basis of the foregoing, I will deny this informal procedure appeal, albeit without costs.

Signed at Halifax, Nova Scotia, this 20th day of December 2019.

"B.Russell"

Russell J.

CITATION:	2019 TCC 287
COURT FILE NO.:	2019-1028(GST)I
STYLE OF CAUSE:	SABRI BINJAMIN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Windsor, Ontario
DATE OF HEARING:	September 19, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
DATE OF JUDGMENT:	December 20, 2019

APPEARANCES:

Agent for the Appellant:	Alexander Menzies
Counsel for the Respondent:	Anne Maria Konewka

COUNSEL OF RECORD:

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