

Docket: 2019-3217(IT)G

BETWEEN:

TIM FUHR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

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Appeal heard on common evidence with the appeal of 1499546 Alberta Ltd. (2019-3215(IT)G) on January 15 and 16, 2024, at Edmonton, Alberta

Before: The Honourable Justice Gabrielle St-Hilaire

Appearances:

Counsel for the Appellant: Robert A. Neilson  
Counsel for the Respondent: Paige MacPherson

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**JUDGMENT**

In accordance with the attached reasons for judgment, the appeals from the reassessments made under the *Income Tax Act* for the 2011, 2012 and 2013 taxation years are allowed with costs to the Appellant.

The parties shall have 30 days from the date of this Judgment to reach an agreement on costs and to so advise the Court, failing which the Appellant shall have a further 20 days to serve and file written submissions on costs and the Respondent shall have a further 20 days to serve and file a written response. Any such submissions shall not exceed ten (10) pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are

received within the applicable time limits, costs shall be awarded to the Appellant in accordance with the Tariff.

Signed at Ottawa, Canada, this 11<sup>th</sup> day of April 2024.

“Gabrielle St-Hilaire”

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St-Hilaire J.

Docket: 2019-3215(IT)G

BETWEEN:

1499546 ALBERTA LTD.,

Appellant,

and

HIS MAJESTY THE KING,

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Appeal heard on common evidence with the appeal of Tim Fuhr  
(2019-3217(IT)G) on January 15 and 16, 2024, at Edmonton, Alberta

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Appearances:

Counsel for the Appellant: Robert A. Neilson  
Counsel for the Respondent: Paige MacPherson

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**JUDGMENT**

In accordance with the attached reasons for judgment, the appeals from the reassessments made under the *Income Tax Act* for the taxation years ending on September 30, 2012, and 2013 are allowed with costs to the Appellant.

The parties shall have 30 days from the date of this judgment to reach an agreement on costs and to so advise the Court, failing which the Appellant shall have a further 20 days to serve and file written submissions on costs and the Respondent shall have a further 20 days to serve and file a written response. Any such submissions shall not exceed ten (10) pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the applicable time limits, costs shall be awarded to the Appellant in accordance with the Tariff.

Signed at Ottawa, Canada, this 11<sup>th</sup> day of April 2024.

“Gabrielle St-Hilaire”

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St-Hilaire J.

Citation: 2024 TCC 43

Date: 20240411

Docket: 2019-3217(IT)G

BETWEEN:

TIM FUHR,

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Docket: 2019-3215(IT)G

BETWEEN:

1499546 ALBERTA LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

### **REASONS FOR JUDGMENT**

St-Hilaire J.

#### I. Introduction

[1] Tim Fuhr appeals from reassessments made under the *Income Tax Act* (ITA) for his 2011, 2012 and 2013 taxation years. With respect to 1499546 Alberta Ltd. (1499), the appeals are from reassessments for its taxation years ending September 30, 2012, and 2013 (the 2012 and 2013 taxation years). The appeals were heard together on common evidence. At times, I will refer to Tim Fuhr and 1499 collectively as the Appellants.

[2] Mr. Fuhr has been involved in the hospitality industry throughout his working life, first as a dishwasher and then working his way up to management roles and eventually, ownership in restaurants. Over the years, he was a direct or

indirect owner of several restaurants, including Rempel's Pub, Chef Café, Urban Lounge, Fargo's, The One on Whyte and Fat Boyz (some of these names were transcribed phonetically).

[3] During the relevant taxation years, 1499 owned and operated Overtime Broiler and Taproom (Overtime). UL Investments Inc. (UL) was a shareholder of 1499. Tim Fuhr was the sole shareholder and director of UL. He was also the sole director of 1499 and the manager of Overtime.

[4] Using net worth and bank deposit analyses, the Minister of National Revenue (Minister) reassessed Tim Fuhr to include unreported income for the 2011, 2012 and 2013 taxation years as well as to include shareholder benefits for the 2012 and 2013 taxation years. In addition, the Minister assessed penalties under subsection 163(2) of the ITA.

[5] The Minister reassessed 1499 to include unreported income and to disallow expenses for the 2012 and 2013 taxation years. The Minister also assessed penalties under subsection 163(2) of the ITA.

[6] It is undisputed that the reassessments were all made beyond the normal reassessment period for each Appellant.

## II. Issues

[7] The issues to be determined are as follows:

- i) Was the Minister justified in reassessing the Appellants beyond the normal reassessment period for all the taxation years under appeal?
- ii) Was the Minister justified in reassessing Tim Fuhr to include unreported income of \$211,522, \$194,852 and \$514,785 for the 2011, 2012 and 2013 taxation years respectively as well as shareholder benefits of \$264,600 and \$14,700 and other benefits of \$10,014 and \$7,600 for the 2012 and 2013 taxation years respectively?
- iii) Was the Minister justified in reassessing 1499 to include unreported income of \$316,696 and \$395,502 and to disallow expenses in the amount of \$141,119 and \$99,865 for the 2012 and 2013 taxation years respectively? and

- iv) Was the Minister justified in imposing penalties pursuant to subsection 163(2) on both Appellants for all the taxation years under appeal?

### III. Facts and Evidence

[8] At the outset, it bears mentioning that the evidence about the alleged unreported income, disallowed expenses, share ownership of various corporations as well as some of the submissions surrounding the net worth analysis were, to say the least, unclear and confusing.

[9] Counsel for the Appellants called two witnesses, Tim Fuhr and Wayne Herbert, a chartered professional accountant.

[10] Mr. Herbert was the external accountant for 1499 and UL. He prepared their corporate income tax returns as well as the personal income tax returns for Tim Fuhr and members of his family. Mr. Herbert testified in a forthright and forthcoming manner. He answered questions directly, and in cross-examination, he did not hesitate to indicate the limits of his involvement in reviewing the information that was provided by 1499's bookkeeper.

[11] Tim Fuhr's testimony was not consistently or completely forthcoming. He did not testify in a straightforward and forthright manner. His answer to many important questions about several cheques and bank drafts of significant amounts paid to his order was that he did not remember. This seriously damaged his credibility. I will address specific examples in the reasons below.

[12] The Respondent did not call any witnesses. Counsel for the Respondent stated that she had been unable to secure the attendance of their witness. She stated that the Respondent would rely entirely on cross-examination of the Appellants' witnesses. I also note that net worth schedules were not attached to either Reply.

[13] The following information serves as the context in which the Appellants were reassessed and grounds these appeals. In filing his returns for the 2011, 2012 and 2013 taxation years, Tim Fuhr reported income of \$25,000, \$100,549 and \$141,762 respectively (Exhibit A-2, Tabs 7-9; I note that these amounts vary slightly from the amounts found in different parts of the Reply). The Minister performed net worth and bank deposit analyses on Tim Fuhr's household and found that he had personal expenses of \$429,539, \$908,173 and \$1,393,603 for the 2011, 2012 and 2013 taxation years respectively (see Exhibit A-2, Tab 10). In

response to a proposal letter, Tim Fuhr provided information that caused the Canada Revenue Agency (CRA) to make some adjustments to the net worth. In the end, Tim Fuhr was reassessed for unreported income and benefits in the amounts of \$211,522, \$469,466 and \$537,085 for the 2011, 2012 and 2013 taxation years respectively.

[14] Tim Fuhr was the manager of Overtime, a restaurant and bar owned and operated by 1499. As mentioned earlier, Tim Fuhr was not a shareholder of 1499 but he was its sole director. In addition, he was the sole shareholder of UL which was a shareholder of 1499. I understood that at one time, Fuhr Holdings Ltd., an investment company owned by Tim Fuhr, his mother and his sisters, was a shareholder of 1499. During the relevant years, Overtime had sales of over 2 million dollars but ended up with a small profit of about \$44,000 in 1499's 2012 taxation year and a deficit of about \$25,000 in its 2013 taxation year. 1499 was reassessed for unreported income on the basis that Tim Fuhr's unreported income must have come from funds obtained from 1499, as well as for disallowed business expenses for each of its 2012 and 2013 taxation years.

[15] Tim Fuhr's mother, Jeannette Fuhr, passed away on December 12, 2012. He testified that before she passed away, his mother's estate was valued at around 11 million dollars. Because Jeannette Fuhr had dementia, Tim Fuhr and his two sisters had power of attorney. Gifts were made to Jeannette Fuhr's children before she died. Tim Fuhr stated all three siblings agreed on amounts paid out of the estate but that he did not keep track of those amounts. Tim Fuhr testified that in 2011, he received about \$225,000, and in the early part of 2012, he received \$1,000,000 in addition to a cheque for \$500,000.

[16] When Jeannette Fuhr died, Tim Fuhr and his two sisters became executors of her estate, which was worth over \$6.6 million. Tim Fuhr testified that he and his sisters received about \$2.2 million each.

[17] It is not disputed that Tim Fuhr received money from his mother's estate but the parties do not agree on the amounts so received. Tim Fuhr's gifts and inheritance from his mother's estate form a crucial part of his explanation for the discrepancy between his reported income and his personal expenditures.

#### IV. Reassessments Beyond the Normal Reassessment Period



[18] In addressing the first issue in these appeals, the Court must determine whether the Minister was justified in reassessing the Appellants beyond the normal reassessment period for the relevant taxation years.

*The Applicable Law*

[19] Subsection 152(4) of the ITA sets out the Minister's right to reassess beyond the normal reassessment period determined under subsection 152(3.1). More specifically relevant to this appeal, subparagraph 152(4)(a)(i) provides as follows:

**152 (4)** 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

**152 (4)** Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

- a) le contribuable ou la personne produisant la déclaration :
- (i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

[20] Under subsection 152(4), the Minister bears the burden of establishing both that the Appellants made a misrepresentation *and* that it is attributable to neglect, carelessness, wilful default or fraud. In these appeals, the Minister has not alleged fraud.

[21] In *MF Electric Incorporated v R*, 2023 TCC 60, at paras 31-33 [*MF Electric*], I discussed the principles which I believe should apply to the

determination of whether the Minister is justified in reassessing beyond the normal reassessment period, as follows:

[31] The wording of subparagraph 152(4)(a)(i) is such that it is sufficient for the Minister to establish neglect or carelessness without having to consider whether there was wilful default or fraud (see *Deyab v Canada*, 2020 FCA 222 at paras 58-61 [*Deyab*]). Having said this, the burden is on the Minister to establish both that the taxpayer or the person filing the return has made a misrepresentation and that it is attributable to neglect, carelessness, wilful default or fraud (see *Vine v R*, 2015 FCA 125 at paras 23-24).

[32] The Minister's burden is to establish that there has been a misrepresentation at the time the return is filed. In commenting on the issue of timing in *Nesbitt v Canada*, 96 DTC 6588 at para 8, the Federal Court of Appeal expressed its view of the purpose of subsection 152(4) as follows:

It appears to me that one purpose of subsection 152(4) is to promote careful and accurate completion of income tax returns. Whether or not there is misrepresentation through neglect or carelessness in the completion of a return is determinable at the time the return is filed. A misrepresentation has occurred if there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment. It remains a misrepresentation even if the Minister could or does, by a careful analysis of the supporting material, perceive the error on the return form. It would undermine the self-reporting nature of the tax system if taxpayers could be careless in the completion of returns while providing accurate basic data in working papers, on the chance that the Minister would not find the error but, if he did within four years, the worst consequence would be a correct reassessment at that time.

[Underlining added]

[33] Courts have consistently held that the threshold for establishing misrepresentation is low. In support of this view, in *Francis & Associates v R*, 2014 TCC 137 at para 20, Justice Boccock wrote as follows:

A misrepresentation is any statement that is "incorrect.": *Minister of National Revenue v. Foot*, [1964] C.T.C. 317 (Can. Ex. Ct.). Also, several cases have indicated that "any" error made in a return filed is tantamount to a misrepresentation, *Minister of National Revenue v. Taylor*, [1961] C.T.C. 211 (Can. Ex. Ct.), *Nesbitt v. R.*, and *Ridge Run Developments Inc. v. R.*, [2007] 3 C.T.C. 2605 (T.C.C. [General Procedure]). Therefore, the threshold to establish a misrepresentation is low.

[...]

[35] [...] Courts have found that “where a taxpayer thoughtfully, deliberately and carefully assesses the situation and files on what he believes *bona fide* to be the proper method there can be no misrepresentation as contemplated by section 152” (see *Regina Shoppers Mall Ltd v R* [1991] F.C.J. No 52 (FCA) at para 7 [*Regina Shoppers*]). [...]

[36] To borrow the words of Justice Muldoon in *Reilly v R*, [1984] CTC 21 at para 51 (FCTD), “wisdom is not infallibility and prudence is not perfection”. However, in the present case, the Appellant has fallen far short of exercising reasonable care (see *Venne v R*, [1984] FCJ No 314 (FCTD) at para 16). In *Regina Shoppers, supra* at para 7, the Federal Court of Appeal agreed that it had been established “that the care that must be exercised must be that of a wise and prudent person and that the report must be made in a manner that the taxpayer truly believes to be correct”. [...]

[22] With these principles in mind, I turn to the issue of misrepresentation in these appeals.

#### *Misrepresentation by 1499*

[23] The Minister reassessed 1499 to include unreported income of \$316,696 and \$395,502 for the 2012 and 2013 taxation years respectively. My understanding is that the Minister based this assessment on the net worth and bank deposit analyses of Tim Fuhr and more specifically on the discrepancy between his reported household income and significant personal expenditures. It does not appear that a net worth analysis was performed on 1499. At the hearing, there was no evidence of a net worth analysis conducted with respect to 1499, neither were there net worth schedules, nor any witnesses to testify that one had been conducted. The Respondent submitted that the unreported income represents revenue earned by 1499 but appropriated by or paid to Fuhr.

[24] When making her submissions on the issue of misrepresentation, counsel for the Respondent focussed on Tim Fuhr and on the discrepancy between “the money coming in” and “the verifiable documentary evidence showing that money went out” and stated, “that was the misrepresentation” (see Transcript, January 16, 2023, at p 105 [*Transcript Day 2*]). Counsel went through the numbers, acknowledging that these had changed during the hearing. I note that a review of the transcript reveals a complete focus on the alleged misrepresentation by Tim Fuhr such that in over twenty pages of discussion of the numbers there is not one mention of 1499 (see *Transcript Day 2* at pp 105-128). In discussing the appropriateness of using the net worth method in the circumstances, the Respondent submitted it was their position that the money that came into Tim Fuhr’s hands, but that could not be

accounted for, came from 1499. Counsel stated, “[t]he Respondent recognizes this is the weak link in the case. The specific tying of this unreported income in Mr. Fuhr’s hands to 149 is difficult. [...] The best I can do is offer possibilities” (*Transcript Day 2* at p 128).

[25] The Respondent acknowledged the weak link in their position. I find it to be a fatally weak link. Assuming that the Respondent can show that Tim Fuhr made misrepresentations and had unreported income, an issue I will address below, the Respondent has introduced no evidence to show that the unreported income in Tim Fuhr’s hands necessarily came from 1499. In light of the evidence, although somewhat incomplete, about other corporations, including Fuhr Holdings Ltd., Fuhr Farms Ltd. and UL, the money could have come from his involvement in any one of these corporations or from somewhere else for that matter. Counsel went on to suggest ways in which the money could have flowed from 1499 to Tim Fuhr but I find that these were pure conjecture. The Respondent suggested that there was a possibility that the work done by the bookkeeper for 1499, the work product on which Mr. Herbert relied to prepare 1499’s financial statements and income tax returns, contained misrepresentations.

[26] Mr. Herbert’s testimony about his involvement as the external accountant for 1499 was unwavering. He expressed his view that the internal bookkeeper was a good bookkeeper with whom he continued to work on different files. Mr. Herbert stated that 1499’s books and records were very complete, the bank statements properly reconciled. Mr. Herbert testified that the bookkeeper would put together a binder including a complete copy of the general ledger and accounting records. He added that he would not do a deep dive into the monthly sales reconciliations, as the cost of doing so would be prohibitive but that he did look at things on an aggregate basis. Mr. Herbert would then have a conversation with Tim Fuhr, going over the financial statements and what was trending. Mr. Herbert was not involved in any way with Fuhr Farms Ltd. or Fuhr Holdings Ltd. nor with the Fuhr family trust.

[27] When asked whether he ever saw instances of unreported income, Mr. Herbert candidly replied that it might be difficult to see, as he was not doing the bookkeeping. However, he asserted that 1499 had a sophisticated point-of-sale system and that when analyzing the financial statements and looking at revenue and cost of goods sold, he did not see anything in terms of wild fluctuations in gross margins. It did not appear to him that any funds were taken out.

[28] In reassessing 1499, the Minister also disallowed the deduction of business expenses in the amount of \$141,119 and \$99,865 for the 2012 and 2013 taxation years respectively. These expenses were disallowed on the basis that they were not incurred at all, were not incurred for the purpose of gaining income or were personal in nature, and in particular because there was no supporting documentation. According to read-ins introduced by the Appellants at trial, the CRA appeals officer was repeatedly asked the following question, or a variation thereof, regarding various expenses: “Can you confirm that the only reason for the disallowance of these expenses was that no supporting documents were provided to the auditor?” (Exhibit A-3, Appellant’s Read-ins at pp 17-21 [Read-ins]). She responded yes every time. For 2013, the appeals officer confirmed that, with respect to some expenses, the auditor simply took the percentage of expenses disallowed in 2012 and applied it to 2013. I note that a lack of documentation supporting expenses is not in and of itself proof that the expenses were not incurred or that they were not incurred for the purpose of gaining income. The Respondent introduced no evidence to support a finding that the expenses deducted were improper. In fact, I find that the evidence introduced through the testimony of Mr. Herbert provides sufficient support for the deductibility of the interest expense as well as the vehicle expenses for both the 2012 and 2013 taxation years.

[29] In addition, pursuant to subparagraph 152(4.01)(a)(i) of the ITA, a finding of misrepresentation does not justify reopening statute-barred taxation years to reassess any or all amounts of income or expenses that were assessed. Subsection 152(4.01)(a)(i) provides that a reassessment under subsection 152(4) may be made to the extent, but only to the extent, that it can reasonably be regarded as relating to a misrepresentation attributable to neglect, carelessness, wilful default or fraud. If I were to find that there was misrepresentation regarding some business expenses, it would only justify reopening a taxation year to make adjustments that can reasonably be regarded as relating to the matters for which the taxpayer has misled the Minister.

[30] As explained by Justice Bowie in *Hans v R* (2003 TCC 576 at para 8):

[s]ubparagraph 152(4)(a)(i) creates an exception to permit reassessment in those cases in which the taxpayer has misled the Minister. Subparagraph 152(4.01)(a)(i) was enacted to ensure that the effect of any such reassessment is confined to those matters as to which the taxpayer has misled the Minister. In other words, proof that the taxpayer misled the Minister as to one category of expenses does not become a licence for the Minister to disallow some or all of the expenses of another category that were allowed in arriving at the previous assessment, and

require that the taxpayer discharge the onus of proving each one of them on appeal.

[31] I adopt the words of Chief Justice Bowman, as he then was, in *Mensah v R* (2008 TCC 378 at para 9) and find that precisely what misrepresentation 1499 is alleged to have made was not established with any degree of specificity, or for that matter, at all. I find that, based on the credible testimony of Mr. Herbert, 1499 kept good books and records such that if the Respondent wanted to attack the numbers in 1499's income tax returns, it had to provide the Court with evidence that those books and records were not reflective of the real numbers. Bald assertions that 1499 misrepresented its income on the basis that the alleged unreported income of Tim Fuhr must have come from unreported income of 1499 are insufficient. Bald assertions that 1499 made misrepresentations based on a lack of documentation provided to the auditor in support of the business expenses claimed are insufficient, especially in light of the testimony of Mr. Herbert that supported some of the expenses.

#### *Conclusion on Reassessing Beyond the Normal Reassessment Period – 1499*

[32] I find that the Respondent has not presented sufficient evidence in support of a finding that 1499 made a misrepresentation attributable to neglect, carelessness or wilful default in filing its income tax returns. As acknowledged by the Respondent, the assumption that any reported income by Tim Fuhr had to come from 1499 was a weak link in its case. I conclude that the Respondent has not satisfied its burden to justify reassessing 1499 beyond the normal reassessment period such that 1499's appeals for its 2012 and 2013 taxation years are allowed with costs against the Respondent.

#### *Misrepresentation by Tim Fuhr*

[33] I now turn to whether the Minister was justified in reassessing Tim Fuhr beyond the normal reassessment period for his 2011, 2012 and 2013 taxation years.

[34] Clearly, the income Tim Fuhr reported in his income tax returns in the amounts of \$25,000, \$100,549 and \$141,762 for the 2011, 2012 and 2013 taxation years respectively, together with the income reported by his spouse, are insufficient to support the household's personal expenses of \$429,539, \$908,173 and

\$1,393,603 respectively, as established by the net worth analysis (Exhibit A-2, Tab 10). During cross-examination, Tim Fuhr acknowledged that, at the audit stage, he did not make any representations to the CRA to suggest that the expenditure amounts were wildly inaccurate (Transcript, January 15, 2024, at p 163 [*Transcript Day 1*]). In addition, at trial, when reviewing a few specific larger expenses in the executive summary of the net worth and cross-checking them with the list of specific personal expenditures, Tim Fuhr recognized the amounts as expenses he did make, for example, for a private jet and for other trips (*Transcript, Day 1* at pp 176-183). In response to cross-examination questions regarding the summaries of personal expenditures by category, Tim Fuhr testified that the numbers seemed reasonable to him. In fairness, I note that there are 162 pages listing personal expenditures made over three years, including many for less than \$10 to \$50 such that taking issue with all those amounts would have been a monumental task.

[35] Tim Fuhr's position is that the money he claims to have received from his mother's estate explains the discrepancy between the household income reported and the much larger personal expenditures. However, the evidence, both *viva voce* and documentary, regarding the amounts he received from his mother, both before and after she passed away, is inadequate and unreliable.

[36] For example, Tim Fuhr could not remember receiving a cheque from his mother for a half a million dollars dated May 29, 2012, even though he co-signed the cheque. He could not remember a July 2013 cheque for \$266,666 from his mother's estate that he also co-signed. Nor did he have any recollection of a bank draft dated April 1, 2011, for \$225,000 to the order of Tim Fuhr from an account held by his mother at the Canadian Western Bank (Exhibit A-1 and Exhibit A-2, Tab 18).

[37] Tim Fuhr remembered receiving a cheque for \$1,000,000. But there was no documentary evidence to support the existence of a cheque or bank draft to the order of Tim Fuhr for \$1,000,000. Tim Fuhr testified that his two sisters had also received \$1,000,000 and that he and his sisters had authorized the million-dollar payments. Neither of Tim Fuhr's sisters testified. When asked what he would have done with the million-dollar bank draft, Tim Fuhr replied that he could not remember. In cross-examination, Tim Fuhr was asked whether he received a cheque for \$1,000,000 in addition to the cheque for \$500,000 received in May of 2012, bringing the total to \$1.5 million, or whether he was perhaps mistaken and had received only one cheque for half a million dollars. He replied, "No, I'm pretty sure there was another million" (*Transcript Day 1* at p 143-144). The uncertainty

in his answer does not inspire a lot of confidence in support of the existence of another cheque or bank draft for \$1 million.

[38] Although much time has passed between the relevant events and the hearing, such that it might be difficult to remember details of exactly what transpired, I find that it is unlikely that one would not remember a little bit more about transfers in such significant amounts. The answer to the question of whether Tim Fuhr received a cheque or bank draft for half a million dollars or whether he received one for half a million dollars *and* one for one million in 2012 remains elusive.

[39] Before determining whether Tim Fuhr made misrepresentations attributable to neglect, carelessness or wilful default, I must take a closer look at the evidence introduced at trial regarding the alleged amounts of unreported income.

*Unreported Income and Shareholder Benefits – Tim Fuhr*

[40] Counsel for Tim Fuhr argued that the use of the net worth method was not appropriate in this case. I find that the following pronouncement from the Federal Court of Appeal in *Lacroix v Canada* (2008 FCA 241) addresses this issue head on:

[18] In my view, this jurisprudence does not establish a rule to the effect that the Minister may not use the net worth method to add unreported income to a taxpayer's income unless the Minister can establish the source of the unreported income. Our tax collection system is based on the taxpayer's self-reporting of the income he or she has earned during a taxation year. Should the Minister doubt, for whatever reason, the accuracy of the taxpayer's return, the Minister may conduct an investigation in such manner as deemed necessary. The Minister may then make a reassessment. [...]

[Underlining added]

In my view, the Federal Court of Appeal's statement in *Lacroix* quoted above is sufficient to support my finding that the Minister was justified in conducting a net worth analysis in the circumstances of this case wherein the Minister had reason to doubt the accuracy of Tim Fuhr's income tax returns.

[41] According to the proposal letter, the CRA made adjustments to the net worth calculations on the basis of information Tim Fuhr provided regarding shareholder loan accounts, noting that he did not provide the required additional support for the inheritance amounts he claimed to have received. Unlike the taxpayer in *Mensah, supra*, Tim Fuhr did not keep "meticulous records". The documentary evidence



regarding deposits in his bank accounts and what he did with the various cheques or bank drafts received was inadequate, his oral evidence in this respect, unreliable.

[42] Counsel for the Appellants argued that the obligation to keep adequate books and records is not the same for a taxpayer earning employment income as that of a taxpayer earning business income. However, since Tim Fuhr's explanation for the discrepancy between the household's reported income and the personal expenditures relies completely on the existence of funds received from his mother, he would have had to provide adequate documentation and/or credible oral evidence of his having received those very funds.

[43] I adopt the words of Justice Bowman, as he then was, in *Ramey v R* (93 DTC 791 at para 6), wherein he asserted that the net worth method is a blunt instrument providing an unsatisfactory and imprecise way of estimating income and net worth assessments may be inaccurate within a range of indeterminate magnitude (see also *Mensah, supra* at para 5).

[44] The evidence in this case does show that the net worth analysis is flawed in some respects such that some of the amounts assessed as unreported income are not justified. I will address the evidence and submissions of the parties regarding the reassessments for each of the three taxation years in issue. In light of the differences between the taxation years, I will address the taxation years out of order, beginning with the 2012 taxation year.

#### *The 2012 Taxation Year*

[45] On the basis of the answer to an undertaking made at discovery, the Respondent conceded that the shareholder draws in the amount of \$321,649.31 should not have been included in the personal expenditures (Exhibit A-3, Tab 2 and *Transcript Day 2* at p 109). This significantly reduced the personal expenditures for 2012 from \$908,173 to \$586,524 (Exhibit A-3, Tab 1). Respondent's counsel stated that accounting for this reduced amount in personal expenditures, adding the increase of around \$128,000 in the shareholder loan account and subtracting the reported income and the amounts received from his mother more than accounts for the alleged unreported income and the shareholder benefits assessed. In light of the Respondent's concession and submissions, I find that Tim Fuhr did not make any misrepresentations in the filing of his 2012 return. This is sufficient to allow the appeal of Tim Fuhr for the 2012 taxation year, with costs against the Respondent.

*The 2011 Taxation Year*

[46] With respect to the 2011 taxation year, the Minister reassessed Tim Fuhr to include unreported income in the amount of \$211,522. At audit, when doing the net worth analysis, the Minister was aware that Tim Fuhr had a bank draft dated April 1, 2011, in the amount of \$225,000 issued from Jeannette Fuhr's Canadian Western Bank account. It appears that the auditor treated \$25,000 of the \$225,000 as part of his inheritance but not the balance because they could not trace where it had been deposited (see Read-ins at p 29). The Respondent's brief submissions on this issue are not straightforward. Counsel for the Respondent stated as follows (*Transcript Day 2* at p 110):

Turning, then, to the inheritance side of it, the non-taxable source of funds, the evidence concerning the \$225,000 cheque is before the Court. I don't have any specific instructions to concede on that point, but I don't intend to raise an argument about the exclusion of the \$200,000.

[47] I hasten to add that I did not hear any evidence on the appropriateness of the auditor's decision to treat two portions of the bank draft differently.

[48] In light of the bank draft and the parties' submissions, I find that Tim Fuhr received \$225,000 from his mother in April 2011 and that the whole amount, as opposed to only \$25,000, must be treated as a non-taxable source of income. Counsel for the Respondent made some quick on the spot calculations and suggested as follows (*Transcript Day 2* at p 113):

Taking the personal expenses of \$430,000, approximately, less the \$225,000 of inheritance, less the reported income of approximately a hundred and twenty-thousand dollars, we are left with a shortfall of \$85,057.

It appears that those calculations fail to take into account other adjustments made in the net worth analysis. In my view, the more appropriate way to calculate any amount still in dispute is to start with the Respondent's assumption that Tim Fuhr failed to report income in the amount of 211,522 and account for a reduction of \$200,000 (the portion of the \$225,000 bank draft from his mother that was not treated as a gift). This leaves a balance of unreported income assessed for 2011 of \$11,522.

*The 2013 Taxation Year*

[49] Based on the concession made at discovery and discussed above, the Respondent further conceded that shareholder draws in the amount of \$245,763.67

should not have been included in the personal expenditures for 2013 (Exhibit A-3, Tab 2 and *Transcript Day 2* at pp 109-110). This significantly reduced the personal expenditures for 2013 from \$1,393,603 to \$1,147,839.

[50] The Respondent attempted the same type of calculation as that for the 2011 taxation year discussed above. According to those loose, on the spot, calculations and starting with the new amount of \$1,147,839 for personal expenditures for 2013, adding the increase in the shareholder loan account and subtracting the inheritance cheques for about \$1.5 million and the reported household income of about \$285,000, we are left with a shortfall of \$293,572. I am not confident that these calculations do not suffer from the same type of error as I found existed for the 2011 taxation year such that the shortfall as calculated by the Respondent would likely be lower.

*Conclusion on Reassessing Beyond the Normal Reassessment Period – Tim Fuhr*

[51] I do not accept Tim Fuhr's testimony that he received a cheque or bank draft for \$1,000,000 in addition to the cheque for \$500,000 in 2012, before his mother passed away. His oral testimony on this issue defied common sense and credibility. There was no documentation to support this assertion and no other witness testimony to assist. However, the existence of this additional million dollars is less critical to his explanation for the discrepancy between the household income reported and personal expenditures as there is no longer a discrepancy that even comes close to that amount for the three taxation years combined.

[52] Having said this, I reiterate that the Minister must meet its burden to show that Tim Fuhr has made misrepresentations and that they are attributable to neglect, carelessness or wilful default. I find that the Minister has not done so.

[53] After a careful review of the evidence, I find that the net worth analysis, which underlies the reassessments of Tim Fuhr, is seriously flawed. It is so deficient that the amount in dispute for 2011 is reduced from more than \$200,000 to \$11,000, very loosely calculated. What is more, it is so deficient that the Respondent has conceded that there is now no amount of unreported income for 2012. In addition, I find that the evidence introduced through the testimony of Mr. Herbert has provided sufficient credible information to support a finding that the auditor was incorrect in its treatment of the vehicle benefit amounts included in the reassessments for 2012 and 2013. Although the vehicle benefit represents a small amount relative to other amounts in issue, it adds to the erosion of the confidence one might have in the analysis that was intended to support the reassessments in

these appeals. I hasten to add that Mr. Herbert's testimony revealed other errors, which further contribute to this erosion.

[54] The Respondent has not pointed to misrepresentations made by Tim Fuhr in filing his income tax returns with any degree of specificity and soundness to support a finding of misrepresentation by this Court. Hence, I find that the Minister was not justified in reassessing Tim Fuhr beyond the normal reassessment period such that his appeals for the 2011, 2012 and 2013 taxation years are allowed with costs against the Respondent.

#### V. Penalties – Tim Fuhr

[55] Pursuant to subsection 163(2) of the ITA, the Respondent has the burden of establishing the facts that justify the assessment of a penalty. I note that the Respondent made no submissions on the penalties imposed on Tim Fuhr. In any event, in light of the findings above, the assessment of penalties is no longer in issue.

#### VI. Conclusion

[56] The appeals from the reassessments of Tim Fuhr for the 2011, 2012 and 2013 taxation years are allowed with costs against the Respondent.

[57] The appeals from the reassessments of 1499546 Alberta Ltd. for its taxation years ending September 30, 2012, and 2013 are allowed with costs against the Respondent.

[58] The parties shall have 30 days from the date of this judgment to reach an agreement on costs and to so advise the Court, failing which the Appellants shall have a further 20 days to serve and file written submissions on costs and the Respondent shall have a further 20 days to serve and file a written response. Any such submissions shall not exceed ten (10) pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the applicable time limits, costs shall be awarded to the Appellants in accordance with the Tariff.

Signed at Ottawa, Canada, this 11<sup>th</sup> day of April 2024.

“Gabrielle St-Hilaire”

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St-Hilaire J.

CITATION: 2024 TCC 43

COURT FILE NO.: 2019-3217(IT)G  
2019-3215(IT)G

STYLE OF CAUSE: TIM FUHR AND HIS MAJESTY THE KING  
1499546 ALBERTA LTD. AND HIS MAJESTY THE KING

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: January 15 and 16, 2024

REASONS FOR JUDGMENT BY: The Honourable Justice Gabrielle St-Hilaire

DATE OF JUDGMENT: April 11, 2024

APPEARANCES:

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