Docket: 2009-177(IT)G

BETWEEN:

BRADMAN LEE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 8, 9, August 28, 29, 2012 and February 6, 2013
at Toronto, Ontario

By: The Honourable Justice Judith M. Woods

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Darren Prevost

JUDGMENT

It is ordered that the appeal with respect to assessments made under the *Income Tax Act* for the 1999, 2000, 2001 and 2002 taxation years is allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

(a) for the 1999 taxation year, the net income that should be added is $59,985.74 and the gross negligence penalty should be adjusted accordingly;

(b) for the 2000 taxation year, the net income that should be added is $29,189.36 and the gross negligence penalty should be adjusted accordingly;

(c) for the 2001 taxation year, the net income that should be added is $59,448.47 and the gross negligence penalty should be adjusted accordingly; and

(d) for the 2002 taxation year, the net income that should be added is $62,472 and the gross negligence penalty should be deleted.

Signed at Toronto, Ontario this 16th day of September 2013.

"J. M. Woods"

Woods J.

Citation: 2013 TCC 289
Date: 20130916
Docket: 2009-177(IT)G

BETWEEN:

BRADMAN LEE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Bradman Lee, appeals from reassessments made under the *Income Tax Act* for the 1999, 2000, 2001 and 2002 taxation years. The appeal relates to commission income that was earned by Mr. Lee as a real estate salesman with Sutton Group Commitment Realty Ltd. ("Sutton Group").

[2] This is not the first court proceeding in relation to this income. Previously, there was a criminal proceeding and an appeal to this Court from GST assessments.

[3] In 2007, Bradman Lee was found guilty of tax evasion by an Ontario court for failing to report commission income paid by Sutton Group. The reasons of Cowan J. are reported as *R v Lee*, [2008] GSTC 65; [2008] 5 CTC 117. It is my understanding that there are no appeals currently outstanding from this decision. The taxation years involved in the criminal proceeding are the same as in this appeal, except that the criminal matter did not involve the 2002 taxation year.

[4] In addition to disputing the criminal charges, Mr. Lee also filed objections to the assessments of income tax and GST relating to the Sutton Group income. The CRA considered the objections and confirmed the assessments after Mr. Lee was found guilty in the criminal proceeding.

[5] Appeals to this Court were then filed. The GST appeal came before me first and involved four separate days of hearing.

[6] The outcome in the GST appeal is that the assessments were generally upheld, except for a portion of input tax credits that had not been at issue in the criminal proceeding. The GST decision is reported as *Lee v The Queen*, 2010 TCC 400.

[7] This matter is the income tax appeal that was scheduled subsequently and also came before me. The hearing lasted five days, and had to be scheduled over a fairly lengthy period of time.

[8] Mr. Lee represented himself at the hearing. His notice of appeal raises a number of issues, as follows:

(a) whether the reassessments are statute barred;

(b) whether the Minister correctly calculated taxable income;

(c) whether there is any amount of tax owing; and

(d) whether gross negligence penalties were properly imposed.

[9] Before discussing these issues, it is useful to comment on the criminal proceeding.

Criminal proceeding

[10] The basis for the criminal charges was that Mr. Lee failed to report any commission income from the Sutton Group in his income tax returns. He was convicted of offences under paragraphs 239(1)(a) and (d) of the *Income Tax Act* that he knowingly made false statements in income tax returns and willfully evaded the payment of tax.

[11] Subsection 239(1) provides in part:

> **239. (1) Other offences and punishment** - Every person who has
>
> > (a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or

> made as required by or under this Act or a regulation,
>
> […]
>
> (d) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act,
>
> […]
>
> is guilty of an offence [...]

[12] It was agreed for purposes of the criminal proceeding that the initial tax returns did not include income from the Sutton Group. The issue really boiled down to whether Mr. Lee was aware of the failure. His counsel argued at the criminal trial that the tax return preparer inadvertently omitted these amounts from the returns (*R v Lee*, para. 85).

[13] The tax return preparer, Farooz Mohamed, testified in the criminal proceeding that he included all the income that was provided to him and the judge found his testimony credible.

[14] Mr. Lee also testified at the criminal trial. His evidence was disbelieved, as illustrated by the excerpts below from the criminal decision.

> 114 On the other hand. I found Lee to be an extremely evasive witness. He was a man with wide experience in the field of real estate involving not only in buying and selling houses but also the financial aspects of arranging financing and running his own business. But on the stand he sought to portray himself as heavily reliant on accountants, who on two occasions died suddenly in the midst of preparing his late filings. Strangely, on both occasions no record could ever he found of the work they had been doing nor any backup documentation he had left with them.
>
> 115 When confronted with his lack of payment of income taxes and GST on substantial earnings, he verbally ventured into convoluted visits with unnamed but numbered representatives of the CRA who, despite all his efforts, rejected his efforts to pay. His evidence was inconsistent, unresponsive at times to the questions and evasive.
>
> 116 If I accept his evidence, I would have to find that despite him leaving the proper T4A slips with Mohamed and after spending about half an hour, reviewing his returns, that he did not see that there was no mention, in any of the returns, of the large amounts of commissions that he received.

[…]

> 120 He would further have me believe that having not reported income in the amount of $148,623.57 over three years that he believed he owed no taxes and was owed money by the government.
>
> 121 He stretches my credulity beyond its limits.
>
> 122 I simply do not believe his evidence, nor does it leave me in doubt that he knew the information provided in these returns was false and deceptive and he thereby committed the offences charged.

Are reassessments statute barred?

[15] Mr. Lee asserts in the notice of appeal that the "Notice of Reassessment" is statute barred since it was issued after the expiration of the normal reassessment period. No facts or arguments were provided except to state that the Crown has the burden to establish the necessary facts.

[16] In general, the Crown has the burden to establish that the Minister issued and mailed a notice of reassessment in time, provided that the taxpayer alleges that he has not received the notice of reassessment and that none was ever issued: *Aztec Industries Inc. v The Queen*, 95 DTC 5235 (FCA), at p 5237.

[17] In this case, Mr. Lee did make allegations that the reassessments were not received, but these allegations were made in cross-examination and not in the notice of appeal. It is questionable whether the principle from *Aztec* applies in this case.

[18] Nevertheless, I have concluded that the Crown has established that the relevant reassessments are not statute barred.

[19] In the absence of a misrepresentation in the return, the Minister has three years from sending an assessment to make a further reassessment. The relevant provisions are set out below.

> **152(3.1) Definition of "normal reassessment period"** – For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is
>
> […]
>
> (b) in any other case, the period that ends 3 years after the earlier of the day of

> mailing of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of mailing of an original notification that no tax is payable by the taxpayer for the year.
>
> **152(4) Assessment and reassessment [limitation period]** – 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
>
> (ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year; […]

[20] The evidence establishes that the initial income tax returns were received by the Canada Revenue Agency (CRA) in June of 2003 for 1999, 2000 and 2001 and in May of 2004 for 2002 (Ex. R-2, Tabs 1-4).

[21] The evidence also establishes that the CRA received notices of objection to reassessments for the 1999, 2000, 2001 and 2002 taxation years on March 18, 2005 (Ex. R-1).

[22] It is clear from this evidence that the relevant reassessments dated March 5, 2005 were received by or on behalf of Mr. Lee within three years of the initial tax returns. It is unlikely that the CRA issued assessments prior to the filing of the initial tax returns and Mr. Lee has not asserted that they did. Accordingly, I find that the relevant reassessments were issued within the normal reassessment period.

[23] Before leaving this issue, I would comment that I had difficulty with some of the evidence led by the Crown respecting the statute bar issue. The Crown led evidence that established the date on which notices of assessment were issued, but the evidence did not establish that the notices were actually mailed or otherwise sent by the CRA. If it had been necessary for the Crown to establish this, I would have found the evidence to be unsatisfactory.

[24] Nevertheless, I am satisfied that all of the relevant reassessments were made in

time and are not statute barred.

Did the Minister correctly calculate taxable income?

[25] In the notice of appeal, Mr. Lee submits that the Minister incorrectly calculated taxable income. As with the statute bar issue, there are no material facts in the notice of appeal to support the allegation.

[26] The income that is in dispute was earned by Mr. Lee as a commission real estate salesman with the Sutton Group from 1999 to 2002.

[27] The 1999, 2000 and 2001 tax returns did not report any income from the Sutton Group. The Minister submits that the income from the Sutton Group is $60,126 for 1999, $36,985 for 2000, $67,703 for 2001.

[28] For the 2002 taxation year, Mr. Lee reported gross income from Sutton Group in the amount of $121,830 and net income in the amount of $15,804. The Minister assessed on the basis that gross income was underreported by the amount of $5,350[1] and improper deductions were claimed in the amount of $57,122 (Reply, para 12(e) and (f)). Based on these amounts, the Minister made an aggregate adjustment to the net income for 2002 in the amount of $62,472.

[29] Mr. Lee has the burden to establish what the proper amounts of taxable income should be. The evidence was completely insufficient to satisfy this burden.

[30] At the hearing, Mr. Lee seemed to focus more on establishing that he reported, or attempted to report, the Sutton Group income rather than in trying to disprove the amount of taxable income that was assessed. In other words, Mr. Lee appeared to have his sights on proving that he was wrongly convicted of tax evasion. Mr. Lee suggests that he gave the proper amounts to the tax preparer and that the tax preparer failed to include them in the initial returns. Mr. Lee also submits that he filed proper amended returns with the CRA and that he paid all the tax that was owing.

[31] None of this is helpful in disputing the amount of taxable income as determined by the Minister.

[32] Notwithstanding the inadequacy of Mr. Lee's evidence, that is not the end of the matter because I have concerns about possible unfairness caused by differences in the calculation of income for purposes of the assessments and for purposes of the criminal charges.

[33] The relevant amounts for purposes of the criminal charges are set out in the first paragraph of Cowan J.'s decision. It reads:

> 1 Bradman Lee is charged with three counts of unlawfully making, participating in, assenting to or acquiescing in the making of false or deceptive statements in his T1 individual income tax returns for the taxation years 1999, 2000 and 2001 by understating his taxable income for those years in the amounts of $59,985.74, $29,189.36 and $59,448.47 respectively, thereby committing an offence in each case under paragraph 239(1)(a) of the Income Tax Act.

[34] These amounts are all less than the amounts referred to in the Reply.

[35] As far as I can recollect, this discrepancy was not mentioned at the hearing. In my view, it would not be fair to change the allegations without some explanation so that Mr. Lee could deal with it at the hearing.

[36] I propose, therefore, to require an adjustment to the reassessments for 1999, 2000 and 2001 so that the amounts correspond with the amounts on which Mr. Lee was convicted of tax evasion.

[37] Before leaving this issue, I would also comment that the Crown took the position at the hearing that the criminal convictions were only *prima facie* proof that income was falsely reported. It was submitted that Mr. Lee has the opportunity to rebut the criminal findings at this hearing.

[38] I am not clear why the Crown took this position because the authority that counsel relied on concluded that a criminal conviction may be dispositive and not merely *prima facie* proof: *Toronto (City) v Canadian Union of Public Employees Local 79 ("CUPE")*, 2003 SCC 63, [2003] 3 SCR 77, para 56 – 58.

[39] If Mr. Lee had presented persuasive evidence which called into question the criminal convictions, this Court would be in a difficult position of potentially undermining a finding of a competent court reached on a very high standard of proof. The Supreme Court of Canada in the *CUPE* decision makes it clear that this situation undermines the integrity of the criminal justice system.

[40] In any event, in light of the conclusions that I have reached regarding the evidence in this case, I am not faced with a situation of casting doubt on the criminal convictions.

Is any amount owing to the Minister?

[41] In the notice of appeal, Mr. Lee seeks relief on the ground that no amounts are owing to the Crown.

[42] The problem with this submission is that this Court has no jurisdiction to determine whether taxes have been paid. Reference may be made to my reasons in Mr. Lee's GST appeal.

Were penalties properly imposed?

[43] Mr. Lee was assessed penalties under subsection 163(2) for making false statements in income tax returns. The amount of the penalty is 50 percent of the tax which was underreported. The relevant provision is reproduced in part below.

> **163. (2) False statements or omissions** - 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
>
> (a) the amount, if any, by which
>
> (i) the amount, if any, by which
>
> (A) the tax for the year that would be payable by the person under this Act
>
> exceeds
>
> (B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year
>
> if the person's taxable income for the year were computed by adding to the taxable income reported by the person in the person's return for the year that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission and if the person's tax payable for the year were computed by subtracting from the deductions from the tax otherwise payable by the person for the year such portion of any such deduction as may reasonably be attributable to the false statement or omission
>
> exceeds

> (ii) the amount, if any, by which
>
> > (A) the tax for the year that would have been payable by the person under this Act
>
> exceeds
>
> > (B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year
>
> had the person's tax payable for the year been assessed on the basis of the information provided in the person's return for the year,
>
> […]

[44] The evidence to support the imposition of penalties for 1999, 2000 and 2001 is overwhelming. Tax returns were filed which failed to include any commission income from the Sutton Group.

[45] Mr. Lee's defence is based largely on a conspiracy theory involving the CRA, the tax return preparer, and his lawyer in the criminal proceeding. This testimony was so far-fetched as to be completely unreliable.

[46] The penalties for 1999, 2000 and 2001 should be upheld, except that they should be based on the unreported income as determined by the criminal proceeding.

[47] The 2002 taxation year is different because income was reported from the Sutton Group and no criminal charges were laid for false statements in this income tax return.

[48] I have several difficulties with the position of the Crown with respect to the imposition of penalties for this year.

[49] First, the Reply did a poor job of describing the amount of the penalty that was imposed and how it was calculated. Paragraph 17 of the Reply states that the false statement for 2002 is failing to report income of $5,952. Paragraph 18 then states that the difference in the federal tax that was paid and should have been paid is $11,751 and that the penalty should be at least $1,117.86. This is not satisfactory disclosure regarding this penalty.

[50] Second, the tax return that was filed for 2002 was introduced into evidence. It

includes the T4A from the Sutton Group which shows the full income. This amount was also included in the statement of business income attached to the return. I have a hard time concluding that Mr. Lee was grossly negligent in not reporting this amount.

[51] As for the expenses, these were no doubt wildly inflated, but there is not sufficient evidence before me that penalties were assessed with respect to the expenses. It appears that the penalty for 2002 may have been imposed only on the failure to report gross income in the amount of $5,952.

[52] In the circumstances, I propose to delete the penalty for the 2002 taxation year.

Conclusion

[53] In the result, the appeal will be allowed on the following basis:

(a) for the 1999 taxation year, the net income that should be added is $59,985.74 and the gross negligence penalty should be adjusted accordingly;

(b) for the 2000 taxation year, the net income that should be added is $29,189.36 and the gross negligence penalty should be adjusted accordingly;

(c) for the 2001 taxation year, the net income that should be added is $59,448.47 and the gross negligence penalty should be adjusted accordingly; and

(d) for the 2002 taxation year, the net income that should be added is $62,472 and the gross negligence penalty should be deleted.

[54] As for costs, counsel for the Crown should provide written submissions as to costs within 20 days of the date of these reasons. Mr. Lee may file written submissions in response to the Crown's submissions within 20 days of the filing of the Crown's submissions.

[55] Finally, I would comment that it seemed to be very inefficient to have separate GST and income tax hearings in this matter. The issues overlapped to a great extent.

Signed at Toronto, Ontario this 16th day of September 2013.

"J. M. Woods"

Woods J.

[1] The figure of $5,350 in paragraph 12(e) of the Reply is inconsistent with other parts of the Reply. It appears that this amount should be $5,952 as reflected in paragraph 17 of the Reply.

CITATION:	2013 TCC 289
COURT FILE NO.:	2009-177(IT)G
STYLE OF CAUSE:	BRADMAN LEE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	March 8, 9, August 28, 29, 2012 and February 6, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice J.M. Woods
DATE OF JUDGMENT:	September 16, 2013

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Darren Prevost

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario