

Docket: 2010-394(IT)G

BETWEEN:

WALEED ELBADAWI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on March 17, 18, 19, 20 and 21, 2014 and on June 23, 24,  
25, 26 and 27, 2014 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Dominique Gallant Gregory B. King

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**JUDGMENT**

The appeals from assessments made under the *Income Tax Act* for the 2002 and 2003 taxation years are allowed in part, without costs: the net proceeds from the sale of the Blithfield property is income to the company, Mobilsa, and not the Appellant; the net proceeds from the sale of the Malabar property is income of the Appellant personally. The assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Summerside, Prince Edward Island, this 27th day of August 2014.

“Diane Campbell”

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Campbell J.

Docket: 2010-538(IT)G

BETWEEN:

MOHAMMED S. ELBADAWI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on March 17, 18, 19, 20 and 21, 2014 and on June 23, 24,  
25, 26 and 27, 2014 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Dominique Gallant Gregory B. King

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**JUDGMENT**

The appeals from assessments made under the *Income Tax Act* for the 2000, 2001 and 2002 taxation years are dismissed in accordance with the attached Reasons for Judgment. The parties shall have 60 days from the date of the within Reasons to provide written submissions on the issue of costs.

Signed at Summerside, Prince Edward Island, this 27th day of August 2014.

“Diane Campbell”

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Campbell J.

Docket: 2010-539(IT)G

BETWEEN:

HANNI ELBADAWI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on March 17, 18, 19, 20 and 21, 2014 and on June 23, 24,  
25, 26 and 27, 2014 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Dominique Gallant Gregory B. King

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**JUDGMENT**

The appeals from assessments made under the *Income Tax Act* for the 2000, 2001 and 2002 taxation years are allowed, with costs to the Appellant, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Summerside, Prince Edward Island, this 27th day of August 2014.

“Diane Campbell”

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Campbell J.

Citation: 2014 TCC 259

Date: 20140827

Docket: 2010-394(IT)G

BETWEEN:

WALEED ELBADAWI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2010-538(IT)G

AND BETWEEN:

MOHAMMED S. ELBADAWI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2010-539(IT)G

AND BETWEEN:

HANNI ELBADAWI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## **REASONS FOR JUDGMENT**

Campbell J.

Introduction

[1] These appeals dealt generally with the issues of unreported income and expenses, matters which are fact driven and, in many instances, can be resolved through negotiation or settlement conferencing prior to hearing. The Appellants

were self-represented and, despite my explanations and repeated redirections, their focus, throughout the hearing, centered upon the conduct of officials of the Canada Revenue Agency (“the CRA”) in completing the assessments. This accounted in large part for the hearing ballooning from its allotted five days for hearing to the ten days it took to complete.

[2] The assessments are in respect to the taxation years 2000, 2001 and 2002 for Mohammed Elbadawi and his wife Hanni Elbadawi, together with the taxation years 2002 and 2003 in respect to their son, Waleed Elbadawi. The appeals involved income from multiple corporations, inter-corporate dealings and a plethora of claimed expenses. While the appeals could have been readily dealt with if the Appellants had introduced the appropriate supporting documentation, there was a notable absence of such records, coupled with contradictory testimony, admissions concerning falsified records and vague and evasive testimony.

### The Facts

[3] During the 1990s, Mohammed Elbadawi operated a highly successful construction business that built custom, high-end homes in the Toronto and Brampton areas. These activities were conducted through a group of companies, referred to as the Sonada Group. The Sonada Group eventually included, among other corporations, 1337526 Ontario Inc. (“526 Ontario”), 1337527 Ontario Inc. (“527 Ontario”), Mobilsa Design/Build Inc. (“Mobilsa”), Salico General Contracting (“Salico”) and Tacona General Contracting (“Tacona”).

[4] According to the testimony of Mohammed Elbadawi, the Sonada Group was one of the top residential builders in Toronto during the 1980s and 1990s. He was the sole shareholder in most of these companies and clearly the controlling and directing mind, even when his wife and son were listed as directors.

[5] In the early 1990s, the Sonada Group became involved in the Cleopatra Resort Project (“the Cleopatra Project”). The factual evidence presented by the Appellants respecting the Cleopatra Project was less than satisfactory and there was little clarification provided on cross-examination. However, it appears that both Mr. and Mrs. Elbadawi were directly involved, with Mohammed Elbadawi being one of the developers and Hanni Elbadawi being a purchaser of one of the townhouse units in the development. When the real estate recession descended upon the market, the Royal Bank withdrew its financing for the Cleopatra Project and purchasers began reneging on their contracts. Mr. and Mrs. Elbadawi sued the bank, as well as the limited partners, for damages. This litigation resulted in the

townhouse owned by Hanni Elbadawi being seized by the bank in 1997. In response, she sued the owners of the Cleopatra Project, with her husband apparently being one of the defendants to this action. In 1998, a settlement, in the amount of \$100,000, was reached with the Royal Bank, although it was unclear from the evidence which of the Appellants' companies was actually involved in this lawsuit. The Appellants also settled their litigation with the Cleopatra Project for \$75,000. This settlement apparently also permitted the release of the further sums of \$10,000 and \$85,000 which had been held in court pending resolution of these matters.

[6] The Appellants' involvement in the Cleopatra Project, together with the litigation proceedings, eventually caused the business to falter. Mohammed Elbadawi testified that he was declared impecunious by the courts after losing 5.5 million dollars. The Appellants claimed that the settlement funds provided them in part with the money necessary to cover their daily living expenses as well as assisting Mohammed Elbadawi in rebuilding the business during the taxation years under appeal. The Respondent questioned whether, in fact, the Appellants received these funds and instead has suggested that it was the unreported income, that is in issue in these appeals, that supported the living expenses and funded the business ventures. The exhibits, however, support that Hanni Elbadawi received \$75,000 in July, 2001 (Exhibit A-89, Full and Final Mutual Release). Mohammed Elbadawi, together with several of his companies, received \$100,000 to settle the lawsuit with the Royal Bank according to Exhibit A-83, Full and Final Release. However, this exhibit does not contain signatures of the Royal Bank and, in an Order of the Ontario Court (General Division), (Exhibit A-84), it stated that the action and the counterclaim of Mohammed Elbadawi and his several corporations were dismissed without costs. These documents were inconclusive in respect to the payment of \$100,000. With respect to the monies paid out of court to the Appellant, an Order of the Superior Court of Justice directed that "... funds, presently in Court to the credit of this action, be paid out to Ezzat Elbadawi, or to whom he might otherwise direct." (Exhibit A-93). It contained no indication of the amount of the funds paid out of court or whether those funds were eventually paid to the Appellants by Ezzat Elbadawi.

[7] While the litigation concerning the Cleopatra Project was still ongoing, Mohammed Elbadawi incorporated 526 Ontario as a means of continuing the business while shielding funds from potential future court orders. The sole shareholder was Mohammed Elbadawi. Hanni Elbadawi agreed to be the director of 526 Ontario provided she had no involvement in the operation of this new company.

[8] On November 10, 2000, another company, Mobilsa, was incorporated (Exhibit A-20) with Mohammed Elbadawi named as its sole shareholder but with his son, Waleed, named as its director. As with 526 Ontario, Mohammed Elbadawi controlled the business activities of Mobilsa. 527 Ontario was also incorporated during this period with Mohammed Elbadawi again named as its sole shareholder and also its director.

[9] Over the next few years, Mohammed Elbadawi conducted most of his construction activities through 526 Ontario and Mobilsa.

[10] According to the evidence, money moved freely and frequently among all of these companies, as well as Mohammed Elbadawi and his companies, through what the Appellants referred to as “inter-company loans” or simply “interactivities”. Records to support this testimony are almost non-existent.

[11] During the taxation years at issue, 2000 to 2003, 526 Ontario built three houses located at 21 Cynthia (“Cynthia”), 48 Forest Grove (“Forest Grove”) and 78 Wedgewood (“Wedgewood”). Compared to the other two properties, Cynthia was uneventful. The house was built in Brampton for \$400,000, with the company reporting a loss of approximately \$125,000, which the CRA allowed.

[12] With respect to the Forest Grove construction, a number of problems were encountered. Initially, the contract with Jinli Ding involved demolishing and renovating part of the home for a price of \$525,000, but the renovations became so complex that Mr. Ding decided he wanted an entirely new house. This meant that Mr. Ding could now access the Ontario New Home Warranty Program. However, the builder, 526 Ontario, was not a registered member of the program, although Mobilsa was. To rectify this problem and fulfill Mr. Ding’s request to access this program, Mobilsa was added as a party to the contract. Mr. Ding eventually accessed this warranty program, claiming deficiencies and late completion. Mohammed Elbadawi stated that Mr. Ding abused this program because there were no serious deficiencies and the late completion date was due to Mr. Ding’s required changes. Nevertheless, the result was that Mobilsa and its director, Waleed Elbadawi, were forced to appear before the program’s tribunal to respond to these charges.

[13] The facts relating to Forest Grove are relevant because the parties dispute the amount of revenue that 526 Ontario received from this contract. While the initial contract price was for \$525,000, the evidence suggests that the final contract price was \$695,000. Although Mr. Ding did not testify at the hearing, apparently

he advised the CRA that Mohammed Elbadawi had requested additional cash payments of \$127,500 so that the construction could be completed more quickly. The cash payments were included in the Appellant's income even though he denied ever receiving the cash.

[14] The Respondent asserted that the CRA's evidence of these payments was supported by Mr. Ding's statements to the CRA and the taped telephone conversations allegedly between Mr. Ding and Mohammed Elbadawi. This tape was not submitted into evidence. Salah Bayoumi, retired Team Leader of the CRA Enforcement Division, testified that Mr. Ding advised him that his practice was to withdraw \$10,000 at a time and from this, \$8,500 cash would be given each time to the Appellant as per their arrangement for these cash payments.

[15] With regard to the expenses for Forest Grove, Mohammed Elbadawi submitted an architect's evaluation that estimated its value at \$900,000. While the CRA allowed expenses of \$443,941.64, he argued that this amount was insufficient and that the actual cost of construction was closer to \$850,000. Mr. Elbadawi did submit a revised list of additional expenses to the CRA, together with invoices which were reviewed by Lynn Kelly. She accepted some but denied others on the basis that they were either duplicates or simply quotes but not actual expenses. Although Ms. Kelly accepted \$74,000 of these additional invoices as expenses, she did so only for the purpose of the criminal tax evasion proceedings that had been commenced against Mohammed Elbadawi, his son Waleed and the companies, pursuant to both the *Excise Tax Act* ("ETA") and the *Income Tax Act* ("ITA"). These criminal charges related to a failure to report business income and GST/HST collectible on the sale of seven houses. Ms. Kelly, however, did not accept these same additional expenses of \$74,000 in respect to the civil tax assessment because of the different burdens of proof in the two proceedings; the criminal proceedings having a higher burden of proof for the Crown to meet.

[16] The Wedgewood house was the third house built by 526 Ontario in this period for a contract price of \$264,000. The CRA accepted expenses of \$69,703 in the construction of this house. Mohammed Elbadawi argued that this 2,500 square-foot house could never be built for so little an amount. He submitted that the construction costs were closer to \$328,000, resulting in a loss of \$122,000. Again, Mr. Elbadawi failed to provide documentation that would support his submissions.

[17] In the year 2000, Mohammed Elbadawi also became partners with Ahmed Ellababidi and together they incorporated Tacona. Tacona built houses at 29 Harrison Road ("Harrison") and 6 Windham Avenue ("Windham"), the latter



eventually becoming the principal residence of Mr. and Mrs. Elbadawi. Funds appear to have flowed in and out of Tacona in much the same manner they did with the other companies. Problems surfaced between the two partners leading to another round of litigation. In 2002, Ahmed Ellababidi obtained a court order to freeze all of the accounts of Mohammed Elbadawi, including those of Tacona, 526 Ontario and Mobilsa. With all of these accounts being frozen, the business activities essentially ceased. Hanni Elbadawi became uncomfortable with her role as director of 526 Ontario and resigned in December, 2002. Mohammed Elbadawi replaced his wife as the sole director. Hanni Elbadawi was eventually assessed 50 percent of the business income in respect to the income earned on the construction and sale of houses built by 526 Ontario.

[18] Because of the litigation with his business partner, Mohammed Elbadawi switched his business activities from these companies to Salico, which had been inactive since the litigation surrounding the Cleopatra Project. When this occurred, he was in the midst of two construction projects, Wedgewood, being completed by 526 Ontario, and 19 Blithfield (“Blithfield”), being completed by Mobilsa. He requested those clients to direct their payments to Salico so that he could complete their houses.

[19] Mobilsa had signed the contract to build Blithfield on September 10, 2002 for an initial contract price of \$350,000. It was Waleed Elbadawi who was personally assessed net income for Blithfield, in the amounts of \$13,375.35 in 2002 and \$19,191.81 in 2003, based on the assumption that he was both a director and shareholder of Mobilsa, even though it was bought and sold by Mobilsa.

[20] The final property that was assessed during this period was 8 Malabar (“Malabar”). Again, Waleed Elbadawi was personally assessed business income from the sale of this house because it was bought and sold in his personal name. It was sold in 2003 for \$1,330,000 and, according to the auditor’s findings, Waleed Elbadawi was assessed net income in the amount of \$150,601.52.

[21] For all three Appellants, the CRA concluded that they had each received unreported business income from these companies and that they had received unreported benefits from the companies by virtue of their roles as employees or officers or shareholders. Consequently, Mr. and Mrs. Elbadawi were each assessed unreported income, in respect to construction contracts completed by 526 Ontario, of \$14,610, \$128,477 and \$78,322 in 2000, 2001 and 2002, while Waleed Elbadawi was assessed unreported income of \$13,375 and \$169,793 in 2002 and 2003, respectively. Notices of Reassessment were issued on August 19, 2005. On

March 5, 2008, Mohammed Elbadawi, as director of 526 Ontario and Tacona, pleaded guilty to criminal charges of tax evasion for not reporting GST/HST on the houses which the companies constructed. Charges pursuant to the *ITA* were dropped, as were the charges against Waleed Elbadawi and Mobilsa.

### The Issues

[22] The issues to be decided are twofold:

- (1) Is the unreported income that has been assessed to each Appellant legally attributable to that Appellant?
- (2) Is the quantum of the income attributed to each Appellant correct?

### Analysis in respect to Mohammed Elbadawi

[23] In respect to the appeal of Mohammed Elbadawi, the CRA attributed 50 percent of the income to Mr. Elbadawi which 526 Ontario earned on its construction and sale of the properties located at Wedgewood, Forest Grove and Cynthia. The Respondent pleaded three assumptions of fact that were relevant in this regard:

8. ...
- a) the Appellant was a director and shareholder of 1337526 Ontario Inc. (“Ontario Inc.”);
- ...
- i) the Companies did not report business income or goods and services tax/harmonized sales tax (“GST/HST”) collectible with respect to the sale of the seven houses;
- j) the Appellant received business income in the amounts of \$14,610, \$128,477 and \$78,322 in the 2000, 2001 and 2002 taxation years, respectively, in relation to the sale of the houses constructed and sold by Ontario Inc. and Tacona;
- ...

During the hearing, the Respondent conceded that, in respect to assumption 8(j), they were not pursuing Tacona, as it was not relevant.

[24] Any assumption of fact that attributed income to a shareholder solely on the basis that the corporation earned that income would not meet the requirement set out at paragraph 29 of *The Queen v Anchor Pointe Energy Ltd.*, 2007 FCA 188, 2007 DTC 5379:

[29] Fairness requires that the facts pleaded as assumptions be complete, precise, accurate and honestly and truthfully stated so that the taxpayer knows exactly the case and the burden that he or she has to meet: *Canada v. Anchor Pointe Energy Ltd.*, *supra*, at paragraph 23; *Holm et al. v. The Queen*, *supra*; *Canada v. Lowen* [2004 DTC 6321] [2004] 4 F.C.R. 3, at paragraph 9, (F.C.A.); *Grant v. The Queen et al.*, 2003 DTC 5160, at page 5163; *First Fund Genesis Corporation v. Her Majesty the Queen*, 90 DTC 6337, at page 6340; *Shaughnessy v. Her Majesty the Queen*, 2002 DTC 1272, at paragraph 13; *Stephen v. Canada*, [2001] T.C.J. No. 250, at paragraph 6.

[25] Following the reasons in *Anchor Pointe*, merely pleading an assumption of fact, as the Respondent did in 8(i) and (j), that assumes that the income went directly through the corporation to the shareholder would be neither sufficiently complete nor precise in establishing the case that the Appellant has to meet. Such assumptions would have to provide details as to when and how the shareholder received those funds and benefits from the company. Failing to do so, the burden of proof would shift to the Minister to demonstrate that, on a balance of probabilities, a taxpayer was in receipt of unreported income from the corporation.

[26] The assumptions of fact contained in the appeals respecting Mohammed Elbadawi also outline that this Appellant used 526 Ontario as a vehicle for committing tax evasion:

8. ...
- k) the Appellant, W. Elbadawi and the Companies were charged with tax evasion pursuant to both the of [sic] the *Excise Tax Act*, R.S.C. 1985, c. c. E-15, as amended (“ETA”) and the *Income Tax Act*;
- l) the charges referenced in paragraph (k) above were in relation to the failure to report business income and GST/HST collectible on the sale of the seven houses;
- m) on or about March 5, 2008, the Appellant, as a director of Ontario Inc., pled guilty to one count of tax evasion pursuant to paragraph 327(1)(c) of the ETA;
- o) charges pursuant to the *Income Tax Act* were dropped against Ontario Inc., the Appellant, W. Elbadawi and Mobilsa and charges pursuant to the ETA were dropped against W. Elbadawi and Mobilsa.

[27] The Appellant did not dispute these assumptions of fact nor did he dispute that he had pleaded guilty to tax evasion charges.

[28] The evidence supported the testimony of Mohammed Elbadawi that he was the controlling and directing mind, not only of 526 Ontario but of the host of other related corporate entities. Although others were charged with tax evasion, he took sole responsibility for the misappropriation of the funds in reaching the plea bargain and he was held solely liable for the fraudulent conduct. The evidence shows that the income earned by 526 Ontario was used by and at the direction of Mohammed Elbadawi. Mr. Elbadawi treated all of his corporate entities, including 526 Ontario, as interchangeable with himself. There was seemingly no clear demarcation between himself and his companies. There was certainly a scarcity of records and supporting documentation. The most glaring examples consisted of payments made by the company for his son’s wedding and for his dental expenses. Although he provided explanations as to why he either considered those as legitimate corporate expenses (as in the case of the dental expenses) or as loans from the company, there were no records to support these allegations, except for a one-page summary drafted by the Appellant. The evidence supports my perception that the revenue moved freely and regularly through 526 Ontario to Mr. Elbadawi. I was given no loan agreements or other supporting legal documentation to suggest

otherwise and the financial summaries provided by the Appellant did not specify which payments from 526 Ontario were loan repayments and which were business expenses.

[29] Mohammed Elbadawi is a well-educated individual who was highly successful in the construction industry in the Toronto area for many years. He retained lawyers and accountants yet he never appeared to grasp the principle that corporations are, in law, separate and distinct entities from their shareholders. If a corporation is to retain this separate status, given to it by statute, it must act as a separate entity from those who possess effective control and be treated as such by those same individuals. Mundane as it may seem, maintaining proper books and records will be of utmost importance. Form does matter. To retain the separate personality of 526 Ontario, so that the assets of the company remain those of the company and are not conferred as benefits upon its shareholders and controlling owners, then 526 Ontario had a legal responsibility to maintain records that would support the Appellant's position that the unreported income remained an asset of the corporation and never found its way to the Appellant's back pocket as the sole shareholder.

[30] I have only the Appellant's self-serving testimony, and very little else, that would support the Appellant's allegation that the revenue earned by 526 Ontario did not pass directly to Mohammed Elbadawi. In these circumstances, the Respondent has met the onus which reverted to the Crown to establish that the Minister's assessment is correct. Without convincing evidence, Mohammed Elbadawi was unable to demolish the assumptions of fact, as inadequate as they were, that the revenue earned by 526 Ontario flowed directly through the company to him in his capacity as a shareholder. Fifty percent of that income will therefore be attributed to him personally as assessed by the Minister.

[31] In respect to the second issue, the correctness of the quantum of income assessed, the burden of proof is upon Mohammed Elbadawi, who should possess the appropriate records that would clarify for the Court the revenue received and the expenses incurred. The CRA assessed revenue and expenses in respect to three properties: Cynthia, Forest Grove and Wedgewood. To successfully dispute the quantum of the income attributed to him, the Appellant must show that either the revenue assessed in respect to these properties was too high or the expenses assessed were too low. The Appellant did not dispute the revenue assessed to 526 Ontario from the sale of Cynthia and he did not make the expenses allocated to Cynthia an issue. However, the Appellant did dispute the quantum of revenue and expenses in respect to Forest Grove and Wedgewood.

[32] The contract price for Wedgewood was originally \$264,000 although the CRA audit reflects that the Appellant received only \$225,000, the amount that was assessed to the Appellant. The revenue assessed is not in dispute and it is supported by copies of deposit slips from the purchaser, the account history of 526 Ontario showing the cheques from the purchaser as well as the contract between the parties. There were no alleged cash payments involved in the Wedgewood construction.

[33] The Appellant did take issue with the revenue assessed to 526 Ontario in the amount of \$987,089.09 in respect to Forest Grove. When the CRA contacted the purchaser, Jinli Ding, he provided the Agency with copies of schedules of payments he made to 526 Ontario, copies of contracts, change orders for additional work and cheque duplicates. A number of payments were in cash and holdback payments were made directly by Mr. Ding to third party subtrades and suppliers on behalf of 526 Ontario, to which Mr. Elbadawi apparently agreed. According to the auditor's notes, banking information and records seized in this regard were reviewed in order to identify cheques and to ensure the cheque amounts were deposited to the appropriate accounts. Documents contained at Tabs 55 and 56 of Exhibit R-4, Volume II, included copies of these cheques, the payments to third parties and records of the cash payments that Mr. Ding alleged he paid to Mohammed Elbadawi. These documents suggest that he paid 526 Ontario the amount of \$606,216.53 by cheques and \$127,500 in cash in order to satisfy the contract with the company. He then apparently paid an additional \$329,465.29 for extras and change orders. Based on this, the CRA assessed Mohammed Elbadawi revenue of \$633,046.73 represented by cheques and cash payments, \$47,532.75 in payments directed to subtrades and suppliers and \$306,509.62 in cheque payments for change orders. Mr. Elbadawi stated that he did not receive the alleged \$127,500 in cash payments from Mr. Ding. Mr. Elbadawi argued that Mr. Ding fabricated this story out of spite because they were involved in a legal dispute.

[34] Of course, there is an evidentiary problem with the evidence provided by the Respondent because much of its origin resides with an individual who was not called to testify and who therefore could not be cross-examined by the Appellant. This would, in most instances, have convinced me to find favourably for the Appellant had it not been for the credibility issues in these appeals. In addition, the documentary evidence that has been submitted is precise and comprehensive, with banking documentation to support some of the submissions. Also, the audit report confirms that the CRA approached Mr. Ding so it was not Mr. Ding chasing after the CRA in order to seek revenge against the Appellant. As stated previously, much of Mohammed Elbadawi's testimony was self-serving, in addition to being

vague and, at times, evasive and contradictory. None of his assertions were supported by documentation, financial or otherwise, and he did not call his accountant to testify. There was also evidence that some of the documentation submitted by the Appellant (Exhibits A-107 and A-108) had been altered and that some of the financial statements, submitted to the Ontario New Housing Warranty Program, misrepresented his son's financial position. When asked about his means of living after he stated he was declared impecunious, he testified that he sold assets, including original paintings from the Group of Seven, but then later recanted and stated that those assets belonged to his wife.

[35] The Appellant, Mohammed Elbadawi, argued that the family members loaned a great deal of money to 526 Ontario and that the CRA mischaracterized these funds as revenue. In respect to the alleged inter-company loans and the loans from the Appellant to the companies, Mr. Elbadawi relied on these alleged loans and the "interconnectedness" of the entire Sonada Group of companies to explain most of the discrepancies in the records, including some of the payments made from 526 Ontario to his son for the wedding. The evidence supports that funds regularly flowed between Mohammed Elbadawi and the company. The only documentation that was submitted was a one-page summary (Exhibit A-23) and unaudited financial statements. However, this documentation is insufficient to enable me to properly assess these alleged loans and repayments in a determination of quantum.

[36] More importantly, Mr. Bayoumi explained why these loans have no direct impact upon the Appellant's assessment. The Appellant was assessed based on the revenue he received through 526 Ontario and that revenue was based on the funds 526 Ontario received from the construction and sale of the houses. Expenses were assessed based on the costs incurred by the company to build those houses. As Mr. Bayoumi pointed out, whether any of the Appellants loaned money to the company to conduct its business activities would not affect the company's profit or losses.

[37] Because of the credibility issues and lack of corroborating evidence, I am unable to give any weight to the testimony of Mohammed Elbadawi and I remain more convinced by the evidence provided by the Respondent. The testimony of Mr. Bayoumi, who is now retired and who was present in Court under subpoena, is to be preferred in these circumstances.

[38] With respect to the expenses, Mr. Bayoumi explained that the CRA Investigations Division obtained 15 boxes, full of thousands of documents, including receipts, invoices and quotes, from the search and seizure executed at the

home of the Appellants as well as the accounting office of Nick De Luca. Although the CRA initially considered using the net worth method to assess the Appellants, they concluded they had sufficient documentation to allocate revenue and expenses.

[39] The Appellant contended that he was assessed using an incorrect method and that a net worth assessment should have been completed. He relied on the decision of *Gregory George Schmidt v The Queen*, 2013 TCC 11, 2013 DTC 1063, in which Justice Hogan stated that, of the various indirect methods used to assess a taxpayer's income, the net worth method is the most accurate. The Appellant therefore contended that the assessments, which were based on a less accurate method, were incorrect and invalid. Justice Hogan compared the various indirect methods and concluded that, where possible, the net worth method should be used over other available indirect methods. In these appeals, however, the CRA applied a direct method based on available documents obtained through the seizure process. For example, receipts paid by 526 Ontario were allocated to the houses where the expense was incurred. If the receipt did not contain an address, then the CRA attempted to allocate it to the appropriate house or prorated the expense to a house based on the revenue associated with that house. Although this was not a perfect method, as admitted by Mr. Bayoumi, it did provide the most accurate result under the circumstances.

[40] Mohammed Elbadawi also contended that the CRA had not attributed sufficient expenses to Forest Grove and Wedgewood because the size and quality of the houses meant that they could never have been built for the costs that the CRA had allocated to each. Although this contention may have had some validity based on the evidence, I was never provided with the documents that would support any of the disallowed expenses, despite repeated requests to do so. It was not sufficient, without the supporting documentation, for the Appellant to argue that the quantum of expenses accepted by the CRA was below the industry standard for similar house construction.

[41] Subsequent to the completion of the initial CRA audit based on the seized documents, Mohammed Elbadawi submitted further documents to the CRA that he hoped would support additional expenses (Exhibit A-103). When the CRA reviewed these documents, a number of problems were uncovered. The CRA discovered that some of the invoices had never been paid, some were duplicates, some had been paid directly by Mr. Ding, the property owner, and some had been paid but the cheque had been returned due to insufficient funds. Some of the invoices had actually been paid but the third party sub-trade or supplier could not



confirm who had actually paid those invoices. In these circumstances, the CRA accepted the invoices as expenses paid by 526 Ontario, but only in respect to the criminal proceedings respecting tax evasion, where the burden of proof is more stringent than in the civil proceedings. Since the burden of proof in the criminal proceedings requires the CRA to prove beyond a reasonable doubt that 526 Ontario had not paid the invoices, in those instances if the invoice was paid and if the CRA was unable to prove who paid it, then those expenses were conceded for the purposes of the criminal prosecution. However, the CRA made it clear to the Appellant that such invoices would not be accepted in the civil proceedings before this Court where the burden of proof was upon Mohammed Elbadawi to show *prima facie* who had paid those expenses, a burden he was unable to meet. He provided no documentation that would show who paid those particular invoices. This was especially pertinent in light of the evidence suggesting that many of the invoices that the Appellant had attempted to claim had, in fact, been paid by Mr. Ding.

[42] Finally, Mohammed Elbadawi asserted that he lost \$233,000 by virtue of losses allegedly incurred by Tacona and that these losses should reduce his income assessment. This is simply incorrect for several reasons. First, I was not provided with evidence that would establish what those losses were and second, even if Tacona had those losses, they are not attributable to Mohammed Elbadawi, as he is a separate and distinct entity from Tacona.

#### Analysis in respect to Hanni Elbadawi

[43] The answer to the first issue in respect to this Appellant is no. The income assessed to her, that is, 50 percent of the income earned by 526 Ontario, is not legally attributable to Hanni Elbadawi personally.

[44] The only two relevant assumptions of fact contained in the Reply to her Notice of Appeal were as follows:

8. ...
  - a) the Appellant was a director and shareholder of 1337526 Ontario Inc. ("Ontario Inc.");
  - ...
  - j) the Appellant received business income in the amounts of \$14,610, \$128,477 and \$78,322 in the 2000, 2001 and 2002 taxation years,

respectively, in relation to the sale of the houses constructed and sold by Ontario Inc. and Tacona;

...

[45] First, there was no evidence to support a finding that Hanni Elbadawi was ever a shareholder of 526 Ontario. All of the Appellants testified that she was never a shareholder and Hanni Elbadawi testified that, in 1999, she agreed to be the director of newly incorporated 526 Ontario, provided she would have no involvement with the corporate business activities. She testified that 526 Ontario was incorporated at the time that her husband was involved in litigation over the Cleopatra Project. This company allowed him to continue his business activities without the fear of accounts being frozen. In late 2002, when a court order did freeze all accounts of Mohammed Elbadawi and his related companies, she no longer wanted "... to be involved, even on paper, for that company either on paper or any further. So I resigned." (Transcript, March 21, 2014, p. 693). The unaudited financial statements for the periods ending December 31, 2002 and December 31, 2003 (Exhibits A-54 and A-55, respectively) would also suggest that she was not a shareholder. Based on the facts before me, I accept that this Appellant was never a shareholder of 526 Ontario. Assumption 8(a) is therefore only partially correct and she cannot be assessed benefits personally as a shareholder of 526 Ontario.

[46] Since there was absolutely no evidence to suggest that she was ever an employee, can the unreported income be considered a benefit to her in her capacity as a director of the corporation pursuant to section 6? Assumption 8(j) is flawed for several reasons. First, this assumption contains insufficient details to satisfy the statements contained in the *Anchor Pointe* decision. Assumptions must contain sufficiently precise and accurate statements so that the taxpayer knows exactly the case that is being alleged and, consequently, the burden which is placed upon them at a hearing. Assumption 8(j) merely assumes that the business income from the sale of the houses flowed through to the Appellant in some manner. Without the specific details surrounding the receipt of those funds from the corporation, the assumption of fact does not meet the requirement for completeness and precision and this shifts the burden of proof to the Respondent. Although the same assumptions of fact concerning the tax evasion charges were included in the Reply to this Appellant's Notice of Appeal, she was never charged personally or otherwise implicated in any manner. The taxpayer is clearly 526 Ontario. This fact was admitted by Respondent Counsel during her submissions:

... The money was made by [the] company. The money was not reported by the company. ...

(Transcript, June 27, 2014, p. 56)

At page 57 of the submissions on that same date, she made the following statement in respect to the appeal of Hanni Elbadawi:

... Mrs. Hanni Elbadawi was clearly a director up to December, 2002. Whether they are assessed as directors or shareholders, the mechanics of it doesn't really matter. The fact is that the affairs of the companies and the family members were so intermingled that it is impossible to determine with certainty what happened.  
...

(Emphasis added)

This statement is simply incorrect and particularly so when different provisions in the *Act* would apply depending on whether it is an assessment directed at a shareholder, employee or director and when the assumptions that might otherwise support this statement have been omitted. The so-called “mechanics of it” do matter, particularly when the Respondent has incorrectly assumed that Hanni Elbadawi was a shareholder and failed to properly plead those specific details in the assumptions that would clearly set out the case that the Appellant had to answer. The Respondent’s pleadings do not include any other assumptions that attribute the income of 526 Ontario to this Appellant. The pleadings do include several grounds for attributing the income to her under the heading “Grounds Relied on and Relief Sought”, that is, that 526 Ontario conferred the income assessed to Hanni Elbadawi in her capacity as an employee or as an officer and the further alternative ground that benefits were conferred upon her as shareholder benefits. However, there were no assumptions pleaded by the Respondent in regard to how and when the Appellant supposedly received the benefits and what those benefits were.

[47] In *Hickman Motors Limited v The Queen*, 97 DTC 5363 at 5376 (SCC), the Supreme Court of Canada made the following statement:

... The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates v. M.N.R.*, 59 DTC 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to “demolish” the Minister’s assumptions in the assessment (*Johnston v. M.N.R.*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 DTC 5359 (F.C.A.), at p. 5361). The initial burden is only to “demolish” the exact assumptions made by the Minister *but no more*: *First Fund Genesis v. The Queen*, 90 DTC 6337 (F.C.T.D.), at p. 6340.

[48] The evidence has established that Hanni Elbadawi was the director of 526 Ontario during the years in question. She worked as a real estate agent and had her own income. However, there is no evidence that she received any specific benefits personally as an employee or officer of the company, even if appropriate assumptions had been pleaded. Funds were clearly moving between these companies and there was evidence that Mohammed Elbadawi directed funds from 526 Ontario to pay some of the family's personal expenses. However, the family expenses, referenced in the evidence, were for dentistry which Mohammed Elbadawi indicated were respecting a work related mishap and the son, Ezzat Elbadawi's wedding. There is no evidence that any benefit was conferred on this Appellant personally.

[49] In summary, Hanni Elbadawi was not an employee or a shareholder of 526 Ontario and therefore could not receive benefits in the capacity of an employee or a shareholder. The Reply contained no detailed assumptions of fact, nor was any evidence produced by the Respondent that would justify a conclusion that the Appellant received benefits as a director. Evidence has not been established by the Respondent to satisfy its burden of convincing me that 50 percent of the income earned by 526 Ontario was attributable personally to Hanni Elbadawi in her capacity of holding the office of director of 526 Ontario. The evidence supports that she held the office of director in name only while her husband continued as the sole directing mind of the corporation.

[50] The appeals are therefore allowed, with costs to the Appellant, Hanni Elbadawi.

#### Analysis in respect to Waleed Elbadawi

[51] This Appellant was assessed business income of \$13,375 in 2002 and \$169,793 in 2003 from the sale of houses located at Malabar and Blithfield. He was personally assessed business income from the sale of Malabar because that house was purchased and sold in his personal name. He was also personally assessed income from the sale of Blithfield, which was purchased and sold by Mobilsa.

[52] Waleed Elbadawi purchased Malabar in March, 2002 in his personal name (Exhibit R-4, Tab 25). The original house located on the property was torn down and a new home was constructed. The home was sold in June, 2003. According to the auditor's findings, the Appellant received a net income of \$150,601.52 (Exhibit R-4, Tab 8).

[53] Essentially, the Appellant's position was that he purchased this property in trust for Mobilsa and that it was his father, Mohammed Elbadawi, who oversaw the construction of the project. There is certainly evidence that Mobilsa was involved in this project and that Mohammed Elbadawi managed it. For example, the building permit was submitted by Mohammed Elbadawi as an officer/employee of Mobilsa (Exhibit R-4, Tab 14). The unaudited financial statements of Mobilsa also list the Malabar property as one of its assets (Exhibit A-29).

[54] However, all of the evidence that would otherwise support the Appellant's position is cancelled by the evidence that was before me respecting the trust agreement that allegedly transferred beneficial ownership of this property to Mobilsa. The evidence that Waleed Elbadawi actually entered into a trust agreement respecting this property is suspect at best. No trust agreement was entered into evidence. Mohammed Elbadawi testified that he directed his son to enter into the trust agreement with Mobilsa and that the agreement was left with Mr. De Luca, their accountant. What I did have in evidence before me were two versions of a direction entered into by Waleed Elbadawi. This direction had allegedly been forwarded by Mohammed Elbadawi to Karen Markham, manager of a residential mortgages company, informing her that his son, Waleed, was acting in the matter as a trustee (Exhibit A-107). However, when I was provided with a copy of this document during the hearing, inadvertently it appears, my copy omitted any reference to Waleed Elbadawi acting as a trustee (Exhibit A-108) in respect to this property and instead referred to Waleed as the sole owner and beneficiary. Exhibit A-111, a direction respecting payment of funds, did include a notation that indicated that Waleed Elbadawi was signing that document as a trustee for Malabar but Waleed Elbadawi testified that the notation appeared to be in his father's handwriting. This raises suspicions as to whether Mohammed Elbadawi may have added this notation for the purposes of this litigation.

[55] It is also interesting to note that this alleged trust arrangement is not referenced in his Notice of Appeal and, in his Notice of Objection, he suggested that this house at Malabar was his principal residence (Exhibit R-4, Tab 30). His explanation for these discrepancies, as well as other discrepancies in the documentation, was that his father, Mohammed Elbadawi, prepared the documents and that he simply followed his father's directions when he signed them. From my perception of the testimony and the interaction of the three Appellants during the hearing, I "sense" that Mohammed Elbadawi was directing his son's actions in respect to the acquisition and sale of this property. However, "sensing" it cannot be a sufficient reason for adopting that conclusion when I have documentary evidence before me that supports the very opposite result.

[56] The Malabar property was purchased and registered in Waleed's name personally. The property was sold and transferred from Waleed to the purchaser. There is no evidence to show that Mobilsa received the funds from the sale. The evidence before me does not support the Appellant's contention that he held this property in trust for Mobilsa. Therefore, the net income realized on this property belongs to its legal owner, Waleed Elbadawi and not to Mobilsa.

[57] With respect to the correctness of the quantum of the assessed income, the records kept in respect to Malabar appeared to be complete with itemized monthly expenses. The CRA denied very few of the expenses that were documented on the seized computers. Since there was no evidence to suggest that the expenses that were assessed were inaccurate or incomplete, there is no justification for interfering with the quantum of the assessment in respect to the sale of Malabar.

[58] The circumstances, surrounding the property at Blithfield, are entirely different from Malabar. It was Mobilsa that executed the contract to build Blithfield in September, 2002. Waleed Elbadawi was personally assessed net income from Blithfield in the amounts of \$13,375.35 in 2002 and \$19,191.81 in 2003. The assessment was based primarily on two assumptions of fact:

- 8. ...
  - d) the Appellant was a director and shareholder of Mobilsa Design/Build Inc. ("Mobilsa");
  - ...
  - j) the Appellant received business income in the amounts of \$13,375 and \$169,793 in the 2002 and 2003 taxation years, respectively, in relation to the sale of the houses constructed by Mobilsa and the Appellant;
  - ...

[59] Assumption 8(d) is only partially correct as the Appellant was not a shareholder of Mobilsa. I accept the Appellant's testimony on this and there was nothing in the documentation or in the testimony that supports a different conclusion. Since he was not a shareholder of Mobilsa, it is inaccurate to assume that Waleed Elbadawi received business income from the sale of Blithfield in that capacity. Assumption 8(j) is neither sufficiently complete nor detailed enough in respect to when and how this income passed from the corporation to the Appellant. There were no other assumptions that attributed income from the sale of Blithfield

to Waleed Elbadawi personally. Without those detailed assumptions, the onus shifts from the Appellant to the Respondent to provide sufficient evidence that would support the flow of the funds to the Appellant. This was not done.

[60] The Respondent did submit alternative grounds in its Reply similar to those in the appeals of Hanni Elbadawi. However, there were no detailed assumptions of fact contained in the pleadings regarding potential benefits conferred on the Appellant as an employee or officer of Mobilsa. As with the appeals of Hanni Elbadawi, the Respondent, therefore, had the burden of establishing that Waleed Elbadawi received benefits from Mobilsa. The Appellant was the director during this period and there was evidence that he was occasionally paid \$500 for labourer's work around the properties. However, the Respondent did not demonstrate, on a balance of probabilities, that any particular payment from Mobilsa to Waleed Elbadawi was a personal benefit to him as opposed to compensation for work he performed on an irregular basis for Mobilsa and the other companies. His father, Mohammed Elbadawi, always retained full control over the corporate activities of Mobilsa. The evidence supports that Waleed Elbadawi had no power whatsoever as a director or otherwise over Mobilsa's assets and income. It remained unclear why Waleed was ever assessed in the first place and why the assessment was not in respect to Mohammed Elbadawi. While the Respondent placed a great deal of weight on the fact that Waleed attended the New Home Warranty Tribunal hearing in a representative capacity for Mobilsa, I believe his attendance and actions in this regard were simply pursuant to the direction of his father. Although the same assumptions of fact concerning the tax evasion charges were included in the Reply to this Appellant's Notice of Appeal, all charges were dropped against both this Appellant and Mobilsa.

[61] For reasons similar to those expressed in the appeals of Hanni Elbadawi, the income earned by Mobilsa, from the sale of Blithfield, will not be attributable to Waleed Elbadawi personally. Since this income is not attributable to Waleed Elbadawi personally, the quantum of the attributed income is not pertinent.

[62] Since success is divided, and due to the problems with the Respondent's pleadings, there will be no award of costs.

Conclusion

[63] The appeals of Mohammed Elbadawi are dismissed. He has been properly assessed 50 percent of the unreported income of 526 Ontario as he received benefits as a shareholder, pursuant to subsection 15(1). In accordance with the Respondent's request, I am providing the Respondent and the Appellant, Mohammed Elbadawi, 60 days from the date of the within Reasons to provide written submissions on the issue of costs in respect to his appeals.

[64] The appeals of Hanni Elbadawi are allowed, with costs. Assumptions of fact were inadequate. The Appellant was not an employee or a shareholder or controlling mind of 526 Ontario and there was no evidence provided that benefits were conferred on her as a director. There was no evidence that she received benefits personally from 526 Ontario.

[65] The appeals of Waleed Elbadawi are allowed in part. Since there was no evidence of the existence of the alleged trust agreement respecting the Malabar property and since the Appellant dealt with the purchase and sale personally and never as an agent or trustee of Mobilsa, the net income is that of the Appellant personally. However, with respect to the Blithfield property, because he was not a shareholder of Mobilsa, but only its director, because the assumptions of fact neglected to sufficiently detail how and when Mobilsa conferred the alleged benefits upon the Appellant and because the Respondent failed to establish evidence that would support that Waleed Elbadawi received benefits from the corporation, as an employee or director, the net income Mobilsa earned from the sale of Blithfield is that of Mobilsa and not the Appellant. The Appellant, much the same as his mother, held the office of director in name only while Mohammed Elbadawi continued to be the directing mind of the corporation.

Signed at Summerside, Prince Edward Island, this 27th day of August 2014.

“Diane Campbell”

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Campbell J.



CITATION: 2014 TCC 259

COURT FILE NOS.: 2010-394(IT)G  
2010-538(IT)G  
2010-539(IT)G

STYLE OF CAUSE: WALEED ELBADAWI,  
MOHAMMED S. ELBADAWI,  
HANNI ELBADAWI,  
and HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 17, 18, 19, 20, 21, 2014  
and June 23, 24, 25, 26, 27, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice Diane Campbell

DATE OF JUDGMENT: August 27, 2014

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