

Docket: 2013-2647(IT)I

BETWEEN:

DIETER BACHMANN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2013-2652(IT)I

AND BETWEEN:

ALFONS BACHMANN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2013-2773(IT)I

AND BETWEEN:

BACHMANN AUTOMOTIVE LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on common evidence on February 13, 2015  
at Hamilton, Ontario

Before: The Honourable Justice Judith Woods

Appearances:

For the Appellants: Dieter Bachmann

Counsel for the Respondent: Tokunbo C. Omisade

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**JUDGMENT**

IT IS ORDERED THAT:

1. the appeal by Dieter Bachmann with respect to assessments made under the *Income Tax Act* for the 2007 and 2008 taxation years is allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that penalties should not be imposed with respect to the incorrect additions to the shareholder loan account;
2. the appeal by Alfons Bachmann with respect to assessments made under the *Income Tax Act* for the 2007 and 2008 taxation year is allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that penalties should not be imposed with respect to the incorrect additions to the shareholder loan account;
3. the appeal by Bachmann Automotive Limited with respect to assessments made under the *Income Tax Act* for the 2007 and 2008 taxation year is dismissed; and
4. the parties shall bear their own costs.

Signed at Toronto, Ontario this 27th day of February 2015.

“J.M. Woods”

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Woods J.

Citation: 2015 TCC 51  
Date: 20150227  
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Respondent.

### **REASONS FOR JUDGMENT**

Woods J.

[1] These are appeals of assessments made under the *Income Tax Act* concerning alleged unreported income. For the most part, the assessments are based on a bank deposit analysis.

[2] The appellants are two brothers, Dieter and Alfons Bachmann, and a corporation wholly-owned by them, Bachmann Automotive Limited. The assessments relate to the 2007 and 2008 taxation years.

[3] In the bank deposit analysis, the appellants' bank deposits were compared with the gross income reported by the corporation. To the extent that the deposits were not explained to the satisfaction of the Canada Revenue Agency (CRA), the amounts were added to the corporation's income on the assumption that the source of the funds was revenue from the corporation's business. In addition to assessing the corporation, the shareholders were assessed on the assumption that unexplained deposits in the shareholders' personal bank accounts were benefits received by the shareholders from the corporation.

[4] The assessments also included relatively small amounts that were added to the shareholders' income on the assumption that benefits were received as a result of incorrect accounting entries to the shareholders' loan accounts.

[5] The Minister also assessed gross negligence penalties with respect to all of the amounts added to income.

[6] The main submission of the appellants is that they had reported all business income and that the deposits were from personal sources such as savings and proceeds from the sale of personal assets.

[7] For ease of reference, in these reasons Bachmann Automotive Limited will be referred to as the "Corporation," and Dieter and Alfons Bachmann will be referred to as "Dieter," "Alfons," and collectively, the "Shareholders."

### Background

[8] In the relevant period, the Corporation's business consisted of auto repairs and used car sales in Caledonia, Ontario. The Shareholders formed the Corporation in 2003 as equal shareholders.

[9] The Shareholders were the only persons working in the business and they were both active. Dieter was the president of the Corporation and part of his duties involved doing the banking. A significant amount of the Corporation's business was transacted in cash.

[10] The financial records for the Corporation were prepared by third parties. Once a month, a bookkeeper prepared a general ledger based on invoices and receipts provided by the Shareholders. Once a year, the financial statements were prepared by a certified general accountant who also prepared income tax returns for all three appellants.

### The assessments

[11] This section describes the amounts added to income by the Minister as well as the income reported in the income tax returns by the appellants.

[12] With respect to the Corporation's income, for the 2007 and 2008 taxation years the Corporation reported gross business income of \$82,388 and \$87,024 and net business income of \$2,165 and \$1,203, respectively.

[13] In the assessments, the Minister assumed that the gross and net income of the Corporation were each under-reported by \$44,440 and \$39,504 for the 2007 and 2008 taxation years, respectively, and these amounts were added to income pursuant to section 9 of the *Act*.

[14] As for the Shareholders, their income tax returns did not report any income from the Corporation. However, the returns did report income from a partnership involved in scrap sales. Each Shareholder's share of the partnership income was reported to be \$3,000 and \$3,500 for the 2007 and 2008 taxation years, respectively.

[15] The assessments issued to Dieter assumed that he received shareholder benefits in the amounts of \$20,529 and \$15,255 for the 2007 and 2008 taxation years, respectively. The bulk of these amounts represent deposits that were not explained to the satisfaction of the CRA and amounts incorrectly added to a shareholder's loan account in the amounts of \$2,507 and \$2,206, respectively.

[16] The assessments issued to Alfons assumed that he received shareholder benefits in the amounts of \$22,412 and \$25,968, respectively. As with Dieter, the bulk of these amounts represent deposits that were not explained to the satisfaction of the CRA and amounts incorrectly added to a shareholder's loan account in the amounts of \$2,507 and \$2,206, respectively.

[17] All of these amounts were added to the Shareholders' income pursuant to subsection 15(1) of the *Act*.

[18] I am not aware of the amount of penalties that were assessed. The Reply indicates that gross negligence penalties were assessed pursuant to subsection 163(2) of the *Act* with respect to all of the amounts that were added to income.

Discussion re unreported income

[19] The general basis for the assessments was a bank deposit analysis. In the relevant taxation years, each of the appellants had made bank deposits which were not explained to the satisfaction of the CRA and the CRA assumed that these deposits (as well as some expenses paid with cash) were sourced from revenue from the Corporation's business.

[20] This Court has recognized that in an appropriate case a bank deposit analysis is an acceptable method to compute income. In this case, there is a large discrepancy between the gross income reported by the Corporation and the amounts added to income pursuant to the bank deposit analysis. I accept that it was appropriate to use this method in this case.

[21] The unexplained deposits in the Corporation's bank account are relatively small, \$5,147.67 for the 2007 taxation year and \$1,877 for the 2008 taxation year (includes a deposit prepared but not deposited).

[22] The unexplained deposits in the Shareholders' personal bank accounts make up the majority of the amounts assessed. Deposits were generally made by the Shareholders once a month or more.

[23] The appellants submit that there was no business income that was not reported.

[24] The Shareholders testified that the so-called unexplained deposits were sourced from an accumulation of savings and sales of personal assets over the years. Alfons stated that the Corporation went through tough times during the well-publicized aboriginal dispute in Caledonia and that he had to sell personal assets that were accumulated during many years of employment. Each Shareholder provided a rough handwritten list of personal assets that were sold and they provided evidence of significant RRSP withdrawals in 2003. In addition, Dieter introduced evidence of a \$6,000 insurance payment that was received in 2005 relating to a stolen vehicle.

[25] The appellants have the burden to establish a *prima facie* case. That burden has not been met.

[26] In order for the appellants to succeed, I would have to accept that the Shareholders kept substantial amounts of cash on hand over the years and deposited it into bank accounts in later years. Alfons testified that the deposits were made when funds were needed to pay bills.

[27] On its face, the Shareholders' testimony is far-fetched and defies common sense. I find it extremely unlikely that the Shareholders would acquire significant amounts of cash and keep it on hand, sometimes for several years, until needed for expenses.

[28] In addition, the testimony was not sufficiently detailed to be believable and there is no reliable supporting evidence to link the deposits to a source of funds.

[29] Based on the evidence as a whole, I find that the appellants have failed to satisfy the burden of proof.

[30] The appellants made several arguments in support of their position. They submitted that taxpayers are not required to keep receipts of sales of personal assets. I accept that taxpayers often do not keep receipts for sales of personal assets. However, the lack of reliable supporting evidence is just one factor in these appeals. There are other reasons for my conclusion that the appellants' evidence is not believable.

[31] The appellants also submit that the bank deposit analysis uses faulty methodology in that the Minister failed to adjust a variance in the 2007 taxation year of the Corporation that was offset in the subsequent year. I accept the respondent's explanation of this point. Counsel noted that the 2008 variance was credited against the Shareholder deposits for the 2008 taxation year. It would be double counting to make a further adjustment for 2007.

[32] The appellants further submit that a supporting calculation undertaken by the Minister, called "Rough Source and Application of Funds" is misleading because it uses Statistics Canada information as to expenses rather than using actual figures. As I understand it, this calculation was used to provide additional information, and it was not the primary basis for the assessments which was the bank deposit analysis. Accordingly, any deficiencies with the supplementary method do not justify vacating the assessments.

[33] Before leaving this issue, it is appropriate to consider whether the Minister correctly characterized the Shareholder deposits as “benefits” that should be added to income. This issue was not addressed by the parties.

[34] There is case law to the effect that amounts appropriated by shareholders are not necessarily benefits when there are outstanding amounts owed by a corporation to the shareholders. This case law is relevant in these appeals because the financial statements of the Corporation indicate that substantial amounts are owed to the Shareholders.

[35] This case law would be applicable if the appropriations by the Shareholders were due to inadvertence: *The Queen v. Franklin*, 2002 FCA 38. However, in *Franklin*, Rothstein J.A. pointed out that the decision was not to be interpreted to condone negligent record-keeping or deliberate actions (at para. 8). This exception is applicable in this case, because the evidence as a whole suggests that the failure to report the income was deliberate. Accordingly, I would conclude that the appropriations by the Shareholders determined by the bank deposit analysis are “benefits” which are to be included in income pursuant to subsection 15(1) of the *Act*.

[36] I now turn to the relatively small amounts that were incorrectly added to shareholder loan accounts. The question is whether these amounts were correctly added to income as shareholder benefits.

[37] These amounts relate to fuel expenses paid for by the Corporation, but were recorded in the financial statements as if they were paid for by the Shareholders. The financial statements reflected these amounts as due to the Shareholders.

[38] The testimony regarding the shareholder loan accounts was extremely brief. The Shareholders basically claimed to have no understanding of the accounting treatment.

[39] The Shareholders impressed me as being capable businessmen, although not sophisticated in financial matters. When the circumstances of this case are viewed as a whole, I find that the Shareholders did not take sufficient care to ensure the accuracy of the shareholder loan accounts. The incorrect entries to the shareholder loan accounts were an appropriation of corporate funds that was made either knowingly or negligently. In either case, the amounts were properly added to the Shareholders’ income as a benefit.



[40] In summary, I would conclude that none of the appellants have satisfied the burden with respect to any of the amounts added to income.

#### Discussion re penalties

[41] The appellants did not make a separate argument with respect to penalties. Their main argument was that there was no unreported income. To the extent that penalties are at issue, the Crown has the burden of proof.

[42] In light of my conclusion that the Shareholders' explanation of the deposits was not credible, it follows that each of the appellants likely knew that income was under-reported in their income tax returns by the amounts reflected in the bank deposit analysis. I find that the Crown has satisfied its burden in this respect.

[43] However, it is appropriate to vacate penalties with respect to the incorrect additions to the shareholder loan accounts. The Crown has not provided sufficient evidence to establish gross negligence with respect to this accounting entry. The evidence as a whole supports a finding of negligence, but there is not sufficient evidence to support a finding of gross negligence. I note in particular that the amounts involved are quite small. Accordingly, the penalties assessed to the Shareholders should be vacated to the extent that they relate to the incorrect additions to the shareholder loan accounts.

[44] Finally, I would mention that the Crown did not lead evidence as to the amounts of the penalties or how they were calculated. If this had been an issue in these appeals, the Crown would not have satisfied its burden in this respect (See *Urpesz v. The Queen*, [2001] 3 C.T.C. 2256 (T.C.C.), at para. 15).

[45] However, the appellants did not raise this as an issue, and therefore it was not necessary for the Crown to lead any evidence in this respect.

#### Other submissions

[46] At the commencement of the hearing, the appellants submitted that the assessments should be reversed because of the lack of due process by the CRA and lack of cooperation by the Department of Justice. It was mentioned that a judge of this Court at an earlier hearing suggested to the parties that they try to settle, but the Department of Justice were not interested in pursuing this.

[47] It is well-established that misconduct on the part of the CRA during the audit and objection stages, even if proven, is not grounds for giving relief in this Court: *Ereiser v. The Queen*, 2013 FCA 20. This submission is therefore rejected.

[48] As for the lack of interest by the Department of Justice in pursuing settlement, settlement discussions are generally encouraged by this Court. However, if the Department of Justice chose not to discuss settlement in this case, I see nothing wrong with this decision on the facts of these particular appeals.

[49] The appellants also submit that it is unfair for the Court to rely on assumptions made by the Minister. I do not agree. The burden of proof that is imposed on taxpayers to refute assumptions made by the Minister reflects the reality that it is usually the taxpayer, and not the Minister, who knows the relevant facts. It is fair for the burden to be imposed on the taxpayer in these circumstances. The role of pleaded assumptions in a tax appeal is designed to assist the taxpayer because it informs the taxpayer of the case that it has to meet in order to succeed in the appeal.

### Conclusion

[50] In the result, the appeal of the Corporation will be dismissed and the appeals of the Shareholders will be allowed only to delete the penalties with respect to the incorrect additions to the shareholders loan accounts.

[51] The parties shall bear their own costs.

Signed at Toronto, Ontario this 27th day of February 2015.

“J.M. Woods”

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Woods J.

CITATION: 2015 TCC 51

COURT FILE NO.: 2013-2647(IT)I  
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STYLE OF CAUSE: DIETER BACHMANN and HER  
MAJESTY THE QUEEN  
ALFONS BACHMANN and HER  
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BACHMANN AUTOMOTIVE LIMITED  
and HER MAJESTY THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: February 13, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice Judith Woods

DATE OF JUDGMENT: February 27, 2015

APPEARANCES:

For the Appellants:	Dieter Bachmann
Counsel for the Respondent:	Tokunbo C. Omisade

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	n/a

For the Respondent:

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