Docket: 2014-1420(IT)I

BETWEEN:

MARCEL SBROLLINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 30, 2015, at Ottawa, Canada.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Joseph W.L. Griffiths
Counsel for the Respondent:	Paul Klippenstein

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* with respect to the Appellant's 2006 and 2007 taxation years is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of July 2015.

"Patrick Boyle"

Boyle J.

Citation: 2015 TCC 178
Date: 20150710
Docket: 2014-1420(IT)I

BETWEEN:

MARCEL SBROLLINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] Mr. Sbrollini appealed from the assessment of so called gross negligence penalties under subsection 163(2) of the *Income Tax Act* (the "*Act*") in respect of unreported income in the amount of approximately $100,000 in each of 2006 and 2007. This appeal was heard in Ottawa under the Court's informal procedure.

[2] Mr. Sbrollini is not appealing the unreported income reassessed, only the related penalties. The onus in this case is therefore on the Minister of National Revenue (the "Minister").

[3] The only witness was the taxpayer, who was called by the Crown. A Joint Book of Documents was agreed to and entered in evidence.

Facts

[4] Marcel Sbrollini is a sales professional. When he left PepsiCo North America after more than a decade he was its Director of Sales and Marketing for the Québec region with a staff of 15. He was with Proctor & Gamble prior to Pepsi for about five years and was Unit Manager Business Development responsible for Key Account Development when he left. After leaving PepsiCo, Mr. Sbrollini established his own consulting business named Step-by-Step Consulting. (It remains unclear whether this was a sole proprietorship or an incorporated entity.) In the years since leaving PepsiCo he also held several significant executive

positions with different companies, however the details of these other business interests and activities remain sketchy as he acknowledged his LinkedIn profile used by Respondent's counsel in his questioning was intentionally unduly slanted favourably towards being successful.

[5] Mr. Sbrollini holds a Bachelor of Commerce degree from Concordia University with a major in Marketing and a minor in Finance.

[6] According to the taxpayer, he had successfully self-directed his own investment funds and built them up to $2.1 million after leaving PepsiCo. However, after he hired an investment broker, his investments somehow went to zero. Within a year or two he declared personal bankruptcy.

[7] Beginning about a year after his bankruptcy, Mr. Sbrollini claims to have loaned $300,000 to a fireplace log venture known as Java Logs operated by Java Products Inc. According to the taxpayer, all the funds came from family and friends. The terms on which they advanced these funds are entirely unclear. The loan to Java Products was documented in late 2005 after the funds had all been advanced.

[8] According to the Appellant, he was diagnosed with melanoma in 2006. According to the Ottawa Hospital records put in evidence, the initial diagnosis of Stage 2b melanoma was in 2004 with the treatment tentatively to begin in January 2005. The other Ottawa Hospital record in evidence indicates that in October 2006 his melanoma had by then worsened to Stage 2e. It also indicates he had regular visits to the Ottawa Cancer Center Clinic for chemotherapy, radiation treatments, doctors' visits or procedures in 2006, 2007 and 2008. There were four dates in December 2006, 29 in 2007, and 9 in the first seven months of 2008 (the taxpayer filed his 2006 and 2007 tax returns in early August and late July of 2008, respectively).

[9] In preparing his 2006 and 2007 tax returns in mid-2008, Mr. Sbrollini provided his accountant with an estimate of $12,000 of gross business income. This estimate was not based on any slips, sales records, money going into his bank account, or cheques or payments received from clients. It was simply, in his words, a number that he and his accountant came up with.

[10] In contrast, the taxpayer itemized a large number of very specific amounts for expenses related to the business use of his home and automobile in arriving at nil net income. In 2006, his total home expenses were approximately $21,000

according to his tax return schedule (which did not include any principal repayments) and his total car expenses were approximately $8,500. He financed the purchase of a new $35,000 car in 2006.

[11] His 2006 income as reported was $174. He indicated on his return that the income of his wife, Heather Pugh, was $200.49. The 2007 incomes were similarly insignificant.

[12] The taxpayer's 2006 and 2007 years were the subject of an audit by Canada Revenue Agency ("CRA"). The resulting reassessments of unreported income were approximately $210,000 for 2006 and $170,000 for 2007. Additional information and submissions were made to CRA at the objection stage, at least some of which is in evidence. The significantly reduced reassessments in question and described at the outset were issued by CRA Appeals.

[13] The detailed submissions at the objection stage to CRA Appeals indicate that Mr. Sbrollini had reported estimated taxable income in his returns and "it was his intention to correct the tax return once his life returned to normalcy. …" The taxpayer's accounting firm further confirms in that document that it has completed a review and bank deposit analysis and has found certain deposits to be business income of the taxpayer that was not reported. With respect to approximately $175,000 in 2006 and 2007, the taxpayer's submissions indicate they are in agreement that it is unreported business income.

Law

[14] The relevant portion of subsection 163(2) of the *Act* provides as follows:

> *False statements or omissions*
>
> 163(2) 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 …

[15] This penalty provision reflects the significance and importance of the requirements of honesty and accuracy in the Canadian self-reporting income tax system. Fairness to all taxpayers requires that such penalties be payable by those unscrupulous Canadians who would seek to take advantage of our self-reporting system and cross this line.

[16] Such penalties are properly payable by Mr. Sbrollini if he knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in, the making of false statements or omissions in his returns.

[17] It is the Crown who bears the onus with respect to penalties to establish, on a 'balance of probabilities'/'more likely than not' standard, that a false statement or omission was made, and that it was made knowingly or under circumstances amounting to gross negligence.

[18] Gross negligence involves a high degree of negligence, tantamount to intentional acting, and indifference as to whether the law is complied with or not: *Venne v. Canada (Minister of National Revenue)*, 84 DTC 6247 (F.C.T.D.).

[19] Wilful blindness involves a person choosing to remain ignorant when one is aware of the need to make an inquiry on a matter, but would prefer not to know the correct answer. Actual knowledge will be imputed to a taxpayer where circumstances suggest an inquiry should be made with respect to his tax situation if he does not make such an inquiry without reasonable justification: see *Panini v. Canada*, 2006 FCA 224.

[20] In *Lacroix v. Canada*, 2008 FCA 241, the Federal Court of Appeal wrote the following on the Crown's burden of proof with respect to such penalties:

> 32 What, then, of the burden of proof on the Minister? How does he discharge this burden? There may be circumstances where the Minister would be able to show direct evidence of the taxpayer's state of mind at the time the tax return was filed. However, in the vast majority of cases, the Minister will be limited to undermining the taxpayer's credibility by either adducing evidence or cross-examining the taxpayer. Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of subparagraph 152(4)(*a*)(i) and subsection 162(3).
>
> 33 As Justice Létourneau so aptly put it in *Molenaar v. Canada*, 2004 FCA 349, 2004 D.T.C. 6688, at paragraph 4:
>
> > 4. Once the Ministère establishes on the basis of reliable information that there is a discrepancy, and a substantial one in the case at bar, between a taxpayer's assets and his expenses, and that discrepancy continues to be unexplained and inexplicable, the

> Ministère has discharged its burden of proof. It is then for the taxpayer to identify the source of his income and show that it is not taxable.
>
> [Emphasis added.]

[21] According to the Federal Court of Appeal, in circumstances where the Crown satisfies the Court on a balance of probabilities that a taxpayer earned unreported income, the taxpayer must then provide a credible explanation for the discrepancy between reported and actual income. It will not be sufficient to come up with a possible or even plausible explanation, as that would very significantly increase the Crown's burden of proof which is clearly no greater than a balance of probability standard. The Crown's standard of proof is no greater because it involves a penalty or a degree of culpability. The taxpayer must satisfy the Court that his or her explanation for not reporting the additional income, whatever the reason is, was itself reasonable for the particular taxpayer in the particular circumstances at the time of filing his or her return, on a preponderance of the evidence relevant to his or her explanation.

Analysis

[22] In this case the taxpayer is not taking the position that the impact or effect of his cancer diagnosis and treatment interfered with his abilities to reason and/or function to an extent that justified his non-reporting any income in each of two years in which he earned about $100,000. Rather, he maintains that he did not make any misrepresentation or omission because he really did only earn no more than $12,000 of gross revenue and probably substantially less. He maintains this, notwithstanding that he is not appealing the unreported income inclusions, and notwithstanding the written evidence of his own accountant described above. I find that, on the evidence, it is very clearly established that his income was very significantly under-reported at least to the extent reflected in the reassessments appealed from. I agree with taxpayer's counsel that the issue before me therefore becomes whether it is credible that Mr. Sbrollini reasonably believed at the time that he filed his returns that additional amounts he knew he had received and spent in 2006 and 2007 were not required to be reported or reflected in any way in his return.

[23] Mr. Sbrollini testified that in the years in question he was unable to service his existing Step-by-Step consultancy clientele. In order to fulfill his obligations and maintain his clients' goodwill he hired other consultants to actually perform the services. He said that he knew he received about $40,000 of revenue from

those clients, but he maintains he believed that he did not need to include it as gross business revenue because he paid the bulk of that amount to his subcontracted consultants. I do not accept this explanation as either reasonable or credible in the circumstances. Mr. Sbrollini met with his accountant at the outset of getting his returns prepared. He said he had a discussion with his accountant about how to estimate his gross consulting revenue in his particular circumstances. He apparently told his accountant he did not think his consulting generated any net income. He said the accountant told him to estimate $12,000 of revenues each year in order to show that the business was still viable. That answer frankly makes little sense and is entirely uncorroborated. More importantly, it appears Mr. Sbrollini did not mention the $40,000 of revenue he knew he had received or the professional expenses he paid to others. He apparently did not question how the $12,000 estimate accounted for or related to the $40,000 actually received. He seemingly did not mention $40,000 of revenues to his accountant when discussing the businesses revenues, nor did he mention the subcontractor payments when preparing his detailed listing of expenses.

[24] The obvious result of omitting the business' revenue and related expenses was the omission of including this net income from his consulting business which was instead reported as nil. That alone clearly constitutes at the very least wilful blindness and an indifference to whether he was complying with the law or not. That also makes his explanation neither reasonable nor credible.

[25] Most of the reassessed unreported income was made up of regular monthly bank deposits of approximately $8,100 or $8,300. Mr. Sbrollini explained that he was well aware he was receiving these amounts, but maintains they were loan repayments from Java Products Inc. There is no corroborating evidence to establish that was the source of the deposits. His accounting firm's report simply reports that they found the deposits to have been business income and that they agree they were unreported. There was no evidence from Mr. Sbrollini or otherwise that he raised these payments at all or in any way with his accountant in 2008 in connection with his 2006 and 2007 returns.

[26] The only evidence corroborating in any way the loan to Java Products Inc. is the 2005 Operating Loan Agreement. That agreement does provide for monthly prepayments of $8,100, and an annual minimum repayment amount of $50,000 plus the 7% accruing interest thereon. The borrowing clearly bears interest at 7% per annum. There is nothing to suggest the monthly payments are to be principal repayments only and do not include the payment of accrued current interest. At the very least, and even if one accepts Mr. Sbrollini's version of the source of these

payments – which I do not, one would expect someone in Mr. Sbrollini's circumstances, aware of the loans and the provisions of the agreement, to seek clarification or advice, or to otherwise inform himself, on the inclusion of interest paid or, at least, on the allocation of payments to interest on debts. Yet, it appears he did not. Again, that makes his explanation neither reasonable nor credible in the circumstances.

[27] Further, the Operating Loan Agreement in evidence is between Java Products Inc. and Step-by-Step Consulting Inc. Mr. Sbrollini confirmed he had incorporated Step-by-Step Consulting Inc. as a corporation of which he was the sole shareholder. He confirmed that this corporation had made the loan to Java Products Inc. and was thereby entitled to the required loan repayments and interest. He was clear this was intended by him at the outset and was not a mistake. Yet his evidence is also that these amounts ended up in his personal bank account each month and that he used these amounts for his personal living expenses as well as his business expenses. There was no evidence to show or explain how this was accomplished. There was no evidence of salaries, shareholder loans or repayments, or dividends, redemptions or capital reductions. Yet he never inquired about any of this of his accountant, nor anyone else, in preparing his tax returns. Again, this renders his explanation neither credible nor reasonable in the circumstances he was aware of and found himself in when filing his returns in 2008.

[28] Mr. Sbrollini explained that notwithstanding his minimal taxable income, he and his wife were also living in part off loans and gifts from friends and family. There was absolutely no detail or supporting documentation to corroborate this. When pressed, he could come up with a single $1,000 gift or loan, relatives providing groceries and contributions to mortgage payments at times, and that his in-laws let him and his wife live with them for a period (which appears to pre-date the years in question). This does not rise to the level of being a credible, reasonable explanation that is material to the discrepancy between his reported income and his available cash in 2006 and 2007.

[29] The preceding reasons are sufficient to dispose of Mr. Sbrollini's appeal even if I accepted his version of events as factual. However, I must add that I have significant concerns with the taxpayer's evidence relating to weight and overall credibility and reliability given his testimony and the almost complete lack of corroboration, whether by way of other witnesses or supporting documentation:

1) Mr. Sbrollini maintains that he did not dispute the unreported income amounts as reassessed by CRA Appeals Division because he was advised

(not by his current counsel) he could not succeed without the supporting documents or evidence he was unable to obtain. He still maintains the $12,000 estimate of gross revenue was incorrect only because it was actually much too high. When faced with the written findings of his own accountant described above, he blamed the accountant and said he later fired him. In his testimony he blamed others more than once: his accountants and other advisers (not his current counsel) used in the course of his tax dispute, his broker for the unexplained complete loss of his investment portfolio, his business associates for the financial misfortunes of his other business ventures.

2) He said that he and his accountant "came up with" his many business expense numbers despite their apparent specificity. There was no basis described for how he and his accountant came up with these numbers. He had earlier said that he, or probably his wife, had actually located all the bills or receipts. He testified to the same effect about him and his accountant "coming up with" the $4,300 of medical and dental expenses for himself and his wife.

3) As mentioned above, he was very candid about the overall reliability of his LinkedIn profile.

4) I saw no backup financial documentation in the form of bank statements, cheques, invoices et cetera to corroborate or support Mr. Sbrollini's explanations on the flow of funds he testified to – yet I see in evidence more than one of his bank statements provided to CRA at the objection stage to successfully support his expense claim reimbursements from Java Products Inc.

5) I did not see any documentation to corroborate or even summarize the amounts received from his consulting clients or the amounts paid to the subcontracted consultants, nor any retainer with either party. I did not hear from any clients, nor from any subcontractors. I was not even given an estimate of what he meant by the "bulk of" the $40,000 having been paid to his sub-consultants.

6) I did not see any documentation to corroborate the loan advances to Java Products Inc. nor any of their repayments, nor the loans or gifts from his family and friends to fund the Java Products loans.

7) I did not hear from his wife, his parents or his in-laws, although they were said to be the source of the amounts loaned, nor did I see any of their cancelled cheques or bank statements. None of his family were called to confirm their loans or gifts, whether cash or kind. I did not hear from his accountant regarding his discussions with the taxpayer at the time the returns were prepared. I did not hear from anyone from Java Products about the $8,100/$8,300 regular monthly payments or the loan itself. While I am sometimes loathe to make adverse inferences for the failure to call a witness given that either party is free to call any witness, in this case the contents of the Notice of Appeal would not have reasonably indicated to the Crown that anyone else's testimony would be relevant. The Notice of Appeal, prepared by prior counsel, suggested the primary focus would be on the taxpayer's health circumstances which limited his ability to attend as closely to his financial affairs as he would have liked and caused him to estimate his income. As already described, that was not the major thrust of the taxpayer's position at trial.

8) There was no corroborating documentation about Step-by-Step Consulting Inc. At the end of this testimony, Mr. Sbrollini said that not only did his corporation make the Java Products Inc. loan, he continued on to say that it also carried on his consulting business and reported all the income from both sources. He did not seem to notice this was inconsistent with him having reported Step-by-Step Consulting income on his personal return. Again, there is no documentation such as financial statements, tax returns or assessments, banking records, contracts or incorporating documents to substantiate his sudden new explanation that would mean virtually all of the unreported income was in fact earned by his corporation. This came across as a Hail Mary pass.

[30] Overall, Mr. Sbrollini's testimony – its unsupported nature, its inconsistencies – along with his frequent evasiveness, vagueness and deflections – leaves me entirely uninclined to accept any material portion of Mr. Sbrollini's testimony that is not corroborated. In the circumstances where there is a paucity of documentary evidence and no other witness, this does not leave me with much credible evidence at all on the material points.[1]

[1] In the end, I am left reminded of what Oscar Wilde wrote in The Decay of Lying: "If a man is sufficiently unimaginative to produce evidence in support of a lie, he might just as well speak the truth at once."

[31] For all of the above reasons, I must dismiss this appeal.

Signed at Ottawa, Canada, this 10th day of July 2015.

"Patrick Boyle"

Boyle J.

CITATION:	2015 TCC 178
COURT FILE NO.:	2014-1420(IT)I
STYLE OF CAUSE:	MARCEL SBROLLINI AND HER MAJESTY THE QUEEN
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