

Docket: 2006-882(GST)I

BETWEEN:

JAMES KAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on common evidence with the appeal of *James Kan*  
(2007-528(IT)I), on July 26, 2007, at Toronto, Ontario

Before: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant: Sean Hu  
Counsel for the Respondent: Lesley L'Heureux

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**JUDGMENT**

The appeal from the assessment made under the *Excise Tax Act* which bears number 05CP0118101 and is dated January 28, 2005 is allowed, without costs, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant's business income be decreased by \$10,890 in 2001 and \$29,899 in 2002.

Signed at Ottawa, Canada, this 2<sup>nd</sup> day of August 2007.

“Campbell J. Miller”

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C. Miller J.

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Agent for the Appellant: Sean Hu  
Counsel for the Respondent: Lesley L'Heureux

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**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2001 and 2002 taxation years is dismissed.

Signed at Ottawa, Canada, this 2<sup>nd</sup> day of August 2007.

“Campbell J. Miller”

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C. Miller J.

Citation: 2007TCC449  
Date: 20070802  
Dockets: 2007-528(IT)I  
2006-882(GST)I

BETWEEN:

JAMES KAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

C. Miller J.

[1] Mr. James Kan appeals, by way of the informal procedural, the Minister's assessment pursuant to the *Income Tax Act* and *Excise Tax Act* for the period of 2001 and 2002. Mr. Kan seeks additional deductions from his business income as a realtor for meals and entertainment expenses and legal fees. This has an impact on Mr. Kan's GST position.

[2] A couple of preliminary points: First, the Minister had by Notice of Reassessment dated December 27, 2006 varied Mr. Kan's income tax liability for 2001 and 2002 by decreasing business income by \$10,890 and \$29,899 respectively. These amounts have not yet been reflected in the *Excise Tax Act* assessment. The Crown concedes the GST appeal should be allowed to reflect that adjustment.

Second, Mr. Kan's 2001 income tax assessment was a nil assessment and he has conceded no appeal lies from that assessment.

Facts

[3] Mr. Kan is a realtor. He markets his business by holding one or two parties a year for his clients. His objective is to get to know his clients better. He claimed \$611 in 2001 and \$3,090 in 2002 for the costs of such parties. While he indicated he provided receipts for the cost of such parties to the Canada Revenue Agency (CRA), he did not produce them at trial. Nor was he sure whether he had one or two parties. He also did not provide any dates or client lists, again claiming he had provided lists to CRA. The auditor from CRA testified that she had not been convinced the receipts provided represented costs incurred for business purposes. Mr. Kan provided no further detail regarding these expenses.

[4] With respect to Mr. Kan's claim for meals and entertainment of \$1,626 in 2001 and \$3,356 in 2002, again he provided receipts to CRA but provided no such receipts at trial. The auditor testified that many of the receipts were from McDonalds, and included costs of kid meals. Mr. Kan had two children under 10 years old at the time. He stated that he would occasionally take clients out for a coffee and snack.

[5] Mr. Kan initially sought to claim legal fees of \$43,993 as deductible expenses. He reduced that amount at trial to \$33,702. He provided invoices for legal expenses which I totaled to be \$30,340.

[6] The background to the lawsuit that resulted in Mr. Kan incurring these fees is confusing. Even Mr. Kan's agent acknowledged that fact. Mr. Kan's testimony was not as enlightening as it might have been.

[7] One of Mr. Kan's clients was the Ho family. One of the Ho family members, Jenny Ho, was interested in starting an esthetician business under the name Seville Beauty Spa Inc. She approached Mr. Kan, he maintains, to help her acquire property for the business. Mr. Kan, interested in getting a commission on the purchase of the property, agreed to help. The nature of that agreement suggested far more involvement than the acquisition of a property for the simple purpose of getting commission. Mr. Kan offered his premises to Ms. Ho for the training of staff and also agreed to advertise positions for estheticians for her. Mr. Kan incorporated a new company, 1473139 Ontario Inc., in April 2001, of which he was the sole shareholder and director. In an affidavit in 2003, Mr. Kan stated that the purpose of using the company was for swapping of Seville's shares with Jenny Ho in the future. It appears from a Memorandum of Understanding between Mr. Kan and Ms. Ho, dated April 20, 2001, that the company was incorporated because the original company intended to be used for the new business had no Minute Book or records. The same memo indicated that Ms. Ho advanced \$69,105.22 to Mr. Kan by way of gift, but Mr. Kan asserted that any monies received from Ms. Ho went to acquire the

property for her business. The Memorandum of Understanding also stated that Mr. Kan and Ms. Ho agreed to form a new partnership under “Seville Institute of Aesthetician”.

[8] The property at 7780 Woodbine Avenue was acquired by Mr. Kan’s company, 1473139 Ontario Inc., in May 2001 at a stated consideration of \$165,000.00. Mr. Kan’s position is that he did this as Ms. Ho could not otherwise have obtained financing. 1473139 Ontario Inc. obtained a mortgage but no details were provided. Mr. Kan claims to be a guarantor on the mortgage, details of which were likewise not presented at trial.

[9] Mr. Cheung commenced a lawsuit in October 2001. He claims to have financially backed Ms. Ho in her new venture through a company, Multi-User Business Solutions Inc. Mr. Kan indicated that Mr. Cheung was Ms. Ho’s boyfriend. In this lawsuit, Multi-User claims Mr. Kan “in his capacity as real estate agent on behalf of Ms. Ho and Multi-User had a duty of good faith”. Multi-User alleged it paid over \$200,000 to Ms. Ho for her intended new business, and sought both financial compensation and a transfer of the property to it.

[10] Mr. Kan went to Hong Kong for part of the summer of 2001. On his return, he noted some work had started on the property but had stopped. He was unable to locate Ms. Ho. Mr. Kan indicated he wished to get out of the arrangement by transferring the property to Ms. Ho, provided she could get him off the guarantee. Unable to locate her, he put the property up for sale. He was then sued by Multi-User. Mr. Kan hired the firm of Himelfarb Proszanski to defend him in the Multi-User lawsuit.

[11] The issues are whether the meals and entertainment expenses, party costs and legal expenses are deductible expenses pursuant to section 18(1)(a) of the *Act*, which reads:

**18.** (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

General limitation

(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

[12] Mr. Kan’s argument was that the meals and entertainment related directly to maintaining his clients, as did the costs of the parties. This was how he

marketed. With respect to the legal costs, he argues that the reason he incurred the legal expenses was because he entered an arrangement for the purpose of earning commission income, and the lawsuit was directed at that arrangement.

### Meals, Entertainment and Party Costs

[13] I do find it credible that a real estate agent would buy the odd snack for his client. I also find credible Mr. Kan's explanation that his major marketing effort was to hold one or two parties a year for his clients. Unfortunately for Mr. Kan, he has been unable to connect the dollar amount of his claims for these expenses to any specific clients, dates, invoices or business records of any kind. He has provided me with nothing other than his bold assertion that these were legitimately incurred expenses. This is not sufficient. I also have some concerns that a good deal of a \$3,356 expense (which only represented fifty percent of actual meal costs) pertained to McDonalds, and that part of that was for kids' meals. In such circumstances I need to see more collaborative documentary evidence on the expenditures and their relation to clients. Mr. Kan simply has not provided anything to support these expenses.

### Legal Expenses

[14] With respect to legal expenses, can they said to have been incurred for the purpose of gaining and producing income, in this case commission income of Mr. Kan's real estate brokerage business? Mr. Kan claims it was for the purpose of earning that commission income that he entered the arrangement with Ms. Ho, and he would therefore not have been sued and incurred these costs but for attempting to meet that commission-earning purpose. I read these somewhat sketchy and convoluted facts as suggesting quite a bit more than just earning a commission. There are a number of possible explanations as to why Mr. Kan got involved with Ms. Ho:

- 1) He is simply helping a member of a family who were good clients of his;
- 2) He was looking to obtain shares as an investor in the new business; and
- 3) He was joining Ms. Ho as a partner in the business.

[15] Indeed, incorporating a company, entering into the Memorandum of Understanding, signing a guarantee and providing premises for training go well beyond the normal responsibilities of an agent earning his commission. No, there was something considerably more going on here. A lawsuit made no

mention of a commission improperly obtained. The lawsuit sought a declaration that Multi-User was the beneficial owner of the property and an order transferring title to Multi-User. The lawsuit was about the capital property. In these circumstances I am not satisfied, on balance, that Mr. Kan's legal expenses related to his business of earning commission income.

[16] The appeals pursuant to the *Income Tax Act* are dismissed.

[17] The appeals pursuant to the *Excise Tax Act* are allowed to reflect the decrease of business income by \$10,890 and \$29,899 in 2001 and 2002 as allowed by the Canada Revenue Agency.

Signed at Ottawa, Canada, this 2<sup>nd</sup> day of August 2007.

“Campbell J. Miller”

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C. Miller J.

CITATION: 2007TCC449

COURT FILE NOS.: 2007-528(IT)I  
2006-882(GST)I

STYLE OF CAUSE: JAMES KAN AND HER MAJESTY THE  
QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 26, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF JUDGMENT: August 2, 2007

APPEARANCES:

Agent for the Appellant: Sean Hu  
Counsel for the Respondent: Lesley L'Heureux

COUNSEL OF RECORD:

For the Appellant:

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Firm:

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