Docket: 2005-3717(IT)G

BETWEEN:

BENOÎT BERGERON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 11, 2007, at New Carlisle, Quebec.

Before: The Honourable Justice François Angers

Appearances :

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Anne Poirier

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* (the Act) for the 2001 taxation year is dismissed. The respondent is entitled to costs.

The appeal from the assessment made under the Act for the 2002 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 6th day of December 2007.

"François Angers"

Angers J.

Translation certified true
on this 20th day of February 2008.

François Brunet, Revisor

Citation: 2007TCC328
Date: 20071206
Docket: 2005-3717(IT)G

BETWEEN:

BENOÎT BERGERON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from notices of reassessment issued by the Minister of National Revenue (the Minister) on July 21, 2005 for the 2001 and 2002 taxation years. The result of these notices of reassessment was to increase the Appellant's income by $26,844 and $64,691 respectively for each of the years in question. The Appellant was also penalized under subsection 163(2) of the *Income Tax Act* (the Act) for the amounts of $17,517 and $57,916, respectively, added to his income for the years in question. The issue is whether the Minister correctly added the additional income in question, as well as the penalties, to the Appellant's income. The appeals raise six points that the Appellant is asking this Court to examine.

[2] The Appellant is an optometrist by profession. His professional income is drawn from eye examinations reimbursed by the Régie de l'assurance maladie de Québec (RAMQ) in amounts calculated on the basis of RAMQ monthly reports. The Appellant is also the sole shareholder in the Clinique Visuelle Bonaventure inc. (the Clinique), which also constitutes a source of income for the Appellant, through optical sales.

[3] Unable to do a fact-based audit, owing to a complete absence of internal control and no audit trail, records or basic documentation, the Canada Customs and Revenue Agency (the Agency) auditor conducted an audit of the Appellant's net worth. In the auditor's opinion, the income reported by the Appellant, namely $46,177 and $61,127 respectively for each of the years in question, was personal professional income corresponding to the amounts reimbursed by the RAMQ. He

was therefore in a position to state that the undeclared income came from the Clinique, specifically from the sale of eyeglasses, lenses, accessories and repairs. According to the auditor, the Appellant appropriated these funds; accordingly, they were considered to be taxable benefits received as a shareholder and added to his reported income.

[4] As to the objection, the Appellant was granted certain adjustments in response to a number of clarifications, and in the end, the parties settled on the amount of income referred to in the notices of reassessment and paragraph 1 hereabove.

[5] The Appellant is asking the Court to intervene and take into consideration six points that would warrant reducing the income added as a result of the audit. Regarding the first five points, he submits he should be allowed to:

1. deduct $2,892.24 from his taxable income as a salary advance granted by the Clinique to the Appellant's wife;

2. deduct from his 2002 taxable income the amount of a $6,000 loan granted to his wife by CitiFinancial and deposited into her credit line account, for which he has signing authority;

3. deduct from his taxable income the amounts of $6,000 for 2001 and $3,500 for 2002 as rental income for those taxation years in respect of his wife's house. According to the Appellant, these amounts were invested in the household but were not taken into account in the calculation of his net worth;

4. deduct $30,000 from his 2002 taxable income as having been used to pay off the balance (approximately $17,500) of a loan on his truck and a portion of his residential mortgage. According to the Appellant, these were savings made over the course of previous years, and taxes were paid on them;

5. reduce by half the penalties and interest assessed on the amounts remaining after the above deductions are applied on the grounds that the processing of his case was conducted slowly and unconventionally.

[6] At the outset of the hearing, the Appellant sought to invoke a sixth point: he asked the Court to take into account the payment made by the Clinique as an additional assessment following the issuance of 2001 and 2002 reassessments of the Clinique. The Appellant argued that this was double taxation and, therefore, this amount should be deducted from his taxes payable. However, on cross-examination, the Appellant admitted that there was no double taxation and abandoned this last point. He also abandoned the first point, recognizing that his ex-wife's salary was taken into account to reduce the added income at the objection stage.

[7] Before considering the other points, I must state that the Court does not have jurisdiction to reduce the penalties and interest by half. Such an arrangement can be negotiated between the parties with a view to settling out of court, but the Court cannot rule on this. Under the Act, the penalties apply in their entirety or not at all. As for the interest, it can be the subject of a request to the Minister.

[8] The audit in this case was conducted by Marc André Raymond. Auditing the Appellant was easy, but the audit of the Clinique required a good deal more work because of the paucity of information. Mr. Raymond was unable to make any groupings because approximately 80% of the invoices were missing; so he had to resort to the indirect method. He stated that the Appellant cooperated in the audit. He therefore drew up a personal balance sheet of the Appellant's net worth as at December 31 for the two years in question.

[9] For his part, the Appellant testified that he was having problems in his marriage. His wife left him and this caused him financial and other hardships. He admitted that he had not paid taxes on all of his income since 1999, falling short by $3,000 per year. In 2001, that amount was $6,000, and in 2002, it was $16,000. He admitted that it represented on average 5 to 10% per year. He emphasized that he has changed since the audit, that his life is much more stable now. He admitted that when the auditor asked him if he had any undeclared income, he answered in the negative.

[10] The Appellant did his own accounting and he is the only person to have had access to the monies generated by the eye examinations, optical repairs and form-preparation fees; this was the income that was not reported.

Point # 2

[11] The Appellant argues that the sum of $6,000, being a loan granted by CitiFinancial to his ex-wife, should be deducted from his 2002 additional income. This amount was deposited in the line-of-credit account over which he has signing authority and appears in the auditor's worksheets. He claims that he does not use this line of credit and that he is only the guarantor. However, the bank statements indicate to us that it is a joint account that the Appellant shares with his ex-wife. Furthermore, the deposit was made on February 20, 2001, not in 2002. The Appellant appears to have made two repayments to CitiFinancial in the amount of $333.81 on June 7 and July 8, 2002. The Appellant's accountant maintains that the source of the $6,000 has been identified and cannot constitute income. Auditor Raymond, for his part, explained that he does not work on the basis of deposits and that, as a result, he did not take that sum of money into account. Nor did he take into account the two payments of $333.81 made by the Appellant.

[12] There is no doubt that, based on the documents produced, this is a joint line-of-credit account shared by the Appellant and his ex-wife. There is no evidence of the existence of any such loan made to the ex-wife, apart from the deposit made to the line-of-credit account. In any case, the important point is that the increase in net worth is due to the withdrawals—not to the deposits. In the instant case, the only amounts that could reduce the Appellant's net worth are the two payments of $333.81 made by the Appellant to repay the loan. Accordingly, I accept the Appellant's explanations and deduct the sum of those two payments, i.e., $667.62, from his 2002 income.

Point # 3

[13] The Appellant is seeking to have the rental income from his ex-wife's house, $6,000 for 2001 and $3,500 for 2002, deducted from the additional taxable income the Minister is attributing to him. The rental income for 2002 was revised to $3,400 because, according to the evidence adduced by the Appellant, the house was rented for only 8½ months. No documentary evidence was adduced indicating that the house in question was rented in 2001 or during the first months of 2002, and he is asking the Court to rule on this matter arbitrarily. The rent payments were made directly to the bank, and four deposit slips were tendered in evidence, indicating a fortnightly deposit of $200. The Appellant admits that he paid nothing for the upkeep of his ex-wife's house, apart from being the guarantor of the mortgage on it.

[14] The auditor states that he did not take this rental income into account because he never saw the deposits or expenses, not having found any during his verifications. Thus, there is nothing there that could be interpreted as having been factored into the calculation of the Appellant's net worth. My review of the auditor's worksheets and his other findings allow me to accept his statement. As such, there is no reason for the Court to intervene in this regard.

Point # 4

[15] The Appellant is asking the Court to take into account the reduction of his liabilities, namely, the payment of the balance on his truck and a portion of his mortgage, for a total of $30,000. He made these payments in 2002, when his marriage was going through a period of instability. He explains that these funds came from his having deducted $500 from his income every month and placing it in a safety deposit box. He explains this procedure as follows: when he purchased the Clinique, he secured a loan from a credit union. And since the credit union was run by local people, he did not want them making profit from him and wanted to preserve his anonymity. This idea came to him from the former owner of the Clinique. He added that he never invested in RRSPs, so he was able to continue making this $500 deduction every month for six years—from about the time he started practising his profession, in other words. He claims that he completed his education debt-free and that he reported this income.

[16] The Appellant's net income at the start of his practice varied between $40,000 and $49,000. In 2001, he reported a taxable income of $46,178; in 2002, he reported a taxable income of $61,128. The auditor stated that he did not take this $30,000 into account in his audit because the Appellant told him nothing concerning this source of funds and he had not reported any investment income in previous years.

[17] It is very difficult, in my opinion, to justify such monthly savings on the part of the Appellant when one takes into consideration the Appellant's income in the years that he saved this money. It is even more difficult to believe that the appropriate taxes were paid on these amounts when one considers that the Appellant, by his own admission, failed to report income at the rate of $2,000 per year from 1997 to 2002, being amounts received for repairs and forms, and that he received unreported fees of $3,000 in 1999 and 2000, $6,000 in 2001 and $16,000 in 2002. This seems, rather, to explain the discrepancy that emerged as a result of the audit. Furthermore, the evidence revealed that he purchased approximately

$10,000 worth of RRSPs in 2002. I therefore dismiss the Appellant's request to reduce his increased income by $30,000. Ever since the Appellant started doing business, he has failed to report all his income, such that it is clearly impossible to ascertain the exact amount.

Penalties

[18] The penalties were imposed on the basis that this is an educated taxpayer who was taking care of his own internal accounting. There was no system of control, and he knew that not all of his income was being reported. He confessed, but only after he had told the auditor that he reported all his income. The unreported income amounts are quite large in comparison to the amounts that he did report. Documentation and receipts are, for all practical purposes, non-existent. He provided the figures to his accountant and knew very well that he was concealing his income.

[19] In my view, based on the evidence adduced, I can find that, on a balance of probabilities, the Appellant knowingly made a false statement regarding his income. His admission as to his unreported income, which forms part of his statements to the Agency on June 10, 2005, may appear at first blush to demonstrate his good character; nevertheless, it is evidence that gives rise to the application of subsection 163(2) of the Act.

[20] The appeal in respect of taxation year 2001 is dismissed and the respondent is entitled to costs. The appeal in respect of taxation year 2002 is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment, with the condition that the difference must be reduced by $667.62.

Signed at Ottawa, Canada, this 6th day of December 2007.

"François Angers"

Angers J.

Translation certified true
on this 20th day of February 2008.

François Brunet, Revisor

CITATION:	2007TCC328
COURT FILE NO.:	2005-3717(IT)G
STYLE OF CAUSE:	BENOÎT BERGERON and HER MAJESTY THE QUEEN
PLACE OF HEARING:	New Carlisle, Quebec
DATE OF HEARING:	May 11, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	December 6, 2007

COMPARUTIONS :

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Anne Poirier

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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