Docket: 2007-342(GST)I

BETWEEN:

MARILYN DENHAAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 22, 2007, at London, Ontario

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant:	Fausto Boniferro
Counsel for the Respondent:	Andrew Miller

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated December 9, 2005, and bears number A108105, for the period January 1, 2002 to December 31, 2003, is dismissed.

Signed at Ottawa, Canada, this 28th day of February 2008.

"E.A. Bowie"

Bowie j.

Citation: 2008TCC126
Date: 20080228
Docket: 2007-342(GST)I

BETWEEN:

MARILYN DENHAAN,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] This appeal is brought from an assessment for goods and services tax under the *Excise Tax Act*,[1] Part IX, (the *ETA*) together with interest and penalties. The registrant whose supplies gave rise to the original liability under the *Act* is Huron Tax Consultants (HTC). The liability of the registrant is for the period from January 1, 2002 to December 31, 2003, and computed to December 9, 2005. It amounts to:

Net GST	$13,299.55
Interest	1,107.72
Penalty	2,677.52
Total	$17,084.79

It was not disputed at the hearing that this was a correct statement of the liability of HTC. What is in dispute is the Minister's right to assess the appellant for the debt of HTC.

[2] The Minister's claim to be entitled to assess the appellant for the liability of HTC is found in subparagraphs 6 (a) and (b) of the Reply to the Notice of Appeal:

[1] R.S. 1985 c.E-15, as amended.

6. In so assessing and confirming the Appellant's GST liability under subsection 272.1(5) of the Act, the Minister made the following assumptions of fact:

   (a) Huron Tax Consultants (the "Partnership) operated as partnership for the 2002 and 2003 taxation years;

   (b) The Partnership consisted of two partners, Harry DenHaan and Marilyn DenHaan during the 2002 and 2003 taxation years;

The appellant argues that the Minister is precluded from advancing these two facts because of the position that he had previously taken in assessing Harry DenHaan and Marilyn DenHaan under the *Income Tax Act*.[2] To understand this argument requires a review of the reporting and assessing history of the appellant and her husband Harry DenHaan. The following appears from the evidence of Harry DenHam, the appellant herself, and the documents that were entered in evidence at the hearing.

[3] Harry DenHaan's father operated a consulting business, and Harry took it over and moved it to Seaforth, Ontario in 1979. He changed the name of the business to Huron Tax Consultants. The services it offered to the public included giving advice on tax matters, and preparation of tax returns. In 1985 Harry's wife, the appellant, became a partner in the business. Her evidence was that her duties in the business were related to running the office, including dealing with telephone calls, scheduling appointments, bookkeeping, banking, deliveries and dealing with the mail. Apparently, there was never a written partnership agreement created, but from 1985 to 2003 they both filed income tax returns in which they declared the income of the business on the basis that Harry DenHaan was a partner entitled to 60% of the income and his wife was a partner entitled to 40%. This was accepted by the Canada Revenue Agency (CRA) until 2001, when it conducted an income tax audit of HTC for the 1997 and 1998 taxation years, and a GST audit for the period from 1992 to 1998.

[4] The results of the audit are set out in a letter from the auditor to Harry DenHaan dated August 24, 2001. That letter set out a number of adjustments that the auditor proposed to make by way of reassessments that would result in increased income for Harry DenHaan and increased GST for the business, but the one that is of particular concern for present purposes is expressed in the third paragraph of that letter. It reads:

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[2] R.S. 1985 c.1 (5th supp.), as amended.

> Our review determined that several sole proprietorships are also being reported inside the Huron Tax Consultants partnership. This is incorrect. As Huron Tax Consultants is registered for GST purposes as a sole proprietorship, we are proposing to increase your Net Business Income on your 1997 and 1998 Income Tax returns to reflect a 100% sole proprietorship of the business encompassed as Huron Tax Consultants. We also did not see any explicit evidence that there is a 60-40% partnership with your spouse for the Tax Consulting Business. As a result of this proposed adjustment, along with the proposed increase to business income, we propose to increase your Taxable income by $136,332 in 1997 and $121,648 in 1998. Your spouse's returns will be adjusted accordingly to remove her claim of 40%.

[5] In due course, the Minister did in fact reassess Harry DenHaan in accordance with that proposal. He filed notices of objection, and the Minister confirmed the reassessments. Harry DenHaan appealed to this Court, taking the position that the HTC business was in fact a partnership between him and his wife. These appeals were never heard by the Court. In January 2005 Mr. DenHaan wrote to CRA to indicate that he was withdrawing the appeals. In that letter he made it clear that he did not agree with the assessments, but was withdrawing the appeals because he could not afford counsel, and for reasons of poor health, which he attributed to the ongoing dispute. He went on to request that his wife's returns for those years be reassessed in accordance with his own reassessments.

[6] The response to that request came in a letter of December 8, 2005 from CRA, addressed to the appellant. She was to be reassessed for 1997 and 1998 to remove the partnership income that she had declared. Her request to reassess 1999 and 2000 was refused, as her husband's returns for those years had by then become statute-barred, and she was advised that her request to revise her returns for the years 2001, 2002 and 2003 was under further consideration. By a letter dated December 9, 2005, the appellant's request to amend her returns for 2001, 2002 and 2003 was refused. Although it is lengthy, I shall reproduce that letter in full as it sets out in detail the reasons for the Minister's refusal.

> The audit division has reviewed your request to adjust your 2001, 2002 and 2003 T-1 returns to reflect a change in the classification of the business relationship with your spouse.
>
> The adjustment request is based on the findings from an audit completed by Canada Revenue Agency on the 1997 and 1998 income tax returns, where it was determined that a partnership didn't exist during this period.

- Your spouse had filed a Notice of Objection because he did not agree with the Agency's position regarding the disallowance of the partnership for the 1997 and 1998 taxation years and he had contended that you were in partnership with him since 1981. The notice of objection was confirmed, which resulted in filing a notice of appeal where it stated that:
- You were married in 1981, the same year you moved to Seaforth.
- You and your spouse commenced carrying on professional practice together in partnership as Huron Tax Consultants, with you having a 40% interest and your spouse having 60% interest in the partnership.
- The partnership has from time to time included a tax preparation and bookkeeping practice which was shared and a real estate brokerage, computer sales and servicing business, and a financial services business which, it appears was not shared.
- It was stated that you were actively involved as a partner in the operation of the partnership, including office work and administration.
- While the partnership used employees commencing in approximately 1984, you had continued as a partner of the business, and continued to be active in the business operations of the partnership.
- You and your spouse have consistently filed income tax returns to reflect the foregoing.

In our letter of January 17, 2005 it was indicated that your spouse had withdrew (*sic*) the notice of appeal, due to financial constraints, but your spouse still indicated that he didn't agree with the disallowance of the partnership for the 1997 and 1998 taxation years.

Other facts that have been considered are:

- October 1, 2004, the business known as "Huron Tax Consultants" was sold to Huron Tax Consultants Inc. of which you are a shareholder.
- January 17, 2005 a request was made to adjust your and your spouse's 1999 to 2003 income tax returns to treat the business income as a proprietorship and include all the income in your spouse's returns.
- April 6, 2005 assignment in bankruptcy was filed by your spouse.

The Canadian income tax system is based on self-assessment, which means that individuals complete their tax return to report their annual income and to calculate whether they owe tax or will receive a refund. You had signed your returns, which certified that the information given on the returns and any documents attached is correct, complete and fully disclosed all income. You and your spouse have filed income tax returns, subsequent to the income tax audit, recognizing the business as a partnership and in your notice of objection and notice of appeal you contend that the business operated as a partnership. Your spouse has contended that you were actively involved in the business, which is supported by the fact that the tax preparation business was sold to a corporation incorporated by yourself.

> There is a question of whether there is a retroactive tax planning in your particular circumstances (CRA has, in several Round Table questions, pointed out that retroactive tax planning is not acceptable). Your spouse has contended that he and you had operated the business as a partnership for the years 1999 to 2003 as attested to by him in the notice of objection and the notice of appeal, and by the filing of the income tax ret urns for the same period recognizing the business as a partnership. Three months prior to filing for bankruptcy you had requested that the Agency treat the partnership income as a proprietorship and include all the business income in your spouse's personal income tax returns. This request would have resulted in a refund of taxes paid by yourself and a tax liability against your spouse, which the Agency probably would be unable to collect during the impending bankruptcy. It appears that you are trying to apply the Agency's decision reached during the audit of the 1997 and 1998 income tax returns.
>
> It is the Agency's position that:
>
> - parts a and b of paragraph 3 in the Information Circular 75-7R3 (copy attached) are not satisfied;
> - that no evidence has been provided to deny that a partnership existed during the 2001, 2002 and 2003 taxation years and;
> - your request to adjust these years appears to be retroactive tax planning,
>
> therefore, your request is denied;
>
> We regret that we were unable to provide a more favorable response.

[7] The appellant's income tax returns for the 2002 and 2003 taxation years are in evidence.[3] They were signed by her on April 30, 2003 and April 29, 2004. Each of them contains a Statement of Business Activities in which she states that she is a partner with a 40% interest in the business of Huron Tax Consultants. Each of them contains her certification that the information contained in the return is correct, complete and fully discloses her income. Each of them declares her 40% of the partnership income as her self-employment income. These returns were signed by the appellant long after her husband was reassessed in May 2002. The appellant testified that her involvement in the business of HTC did not change during this period. This evidence all leads inevitably to the conclusion that the appellant was a partner in HTC during 2002 and 2003 when the liability for unpaid GST, interest and penalties arose.

[8] It was not disputed at the hearing before me that a partner is liable to be assessed under the *ETA* for the outstanding GST, interest and penalties of the

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[3] Exhibit R-1, tabs 4 and 3 respectively.

partnership, notwithstanding that registration was effected only in the name of the partnership. That is the effect of subsection 272.1(5) of the *ETA*. For convenience, that section is reproduced as an Appendix to these Reasons.

[9] Counsel for the appellant argued that it is not open to the Minister to take the position in assessing the appellant's husband for income tax for the years 1997 and 1998 that he was a sole proprietor of the business of HTC, and then to take the position for purposes of the *ETA* that HTC was a partnership in 2002 and 2003. As Mr. Boniferro put it in argument, the die was cast by the Minister in assessing Mr. DenHaan, and the appellant now wants only that the consequences of that be applied to her in this appeal. He agreed that the argument is one of estoppel, but he did not make it clear just how, in his submission, estoppel could arise on the facts of this case.

[10] An estoppel, with few exceptions, must be specially pleaded, stating in detail the facts relied upon as giving rise to the estoppel, and the allegations that it is contended the opposing party is estopped from proving.[4] As this is an appeal under the Informal Procedure, I shall overlook the omission and consider the appellant's position on its merits.

[11] There is no question in the present case of an estoppel *per rem judicatam*, as there has been no adjudication of the question in issue at all. Nor can the appellant rely on the doctrine of estoppel by representation. The only representations that have been made and acted upon that relate to the issue in this case are the declarations made by both the appellant and her husband in their income tax returns that they were partners in the business of HTC throughout the years 2002 and 2003, the period for which the appellant has been assessed as a partner.

[12] The appellant's argument really comes down to this: the Minister, having assessed Mr. DenHaan for income tax on the basis that he was not in partnership with the appellant in 1997 and 1998, is barred by equity from assessing the appellant on an inconsistent basis under the *ETA* for 2002 and 2003. There are several reasons why that argument cannot prevail. First, even if it were established that there was no partnership in 1997 and 1998, that is not inconsistent with the position that there was a partnership in the later years. The appellant gave evidence to the effect that the manner in which the business of HTC was conducted did not change between those

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4 Casson, D. B,.*Odgers on High Court Pleading and Practice*, 23rd Ed., London, Sweet & Maxwell/Stevens, 1991, at p. 229.

two time periods. If that evidence is accepted, and there is no reason not to accept it, it simply means that one assessment or the other was wrong. It is trite that the Minister, if he makes a mistake in assessing, is not bound to perpetuate the error in the future: see *First Torland Investments Ltd. et. al. v. M.N.R.*,[5] *Ludmer v. Canada*[6] and *Gelber v. M.N.R.*[7]

[13] Mr. DenHaan might very well have succeeded in his appeal to this Court, had he not chosen to discontinue it when he did. That is not a matter that is before me, and I express no opinion on it. The fact is, however, that in April 2004 the appellant continued to assert that she was a partner in HTC. She did not resile from that position until after her husband had made an assignment in bankruptcy, with the result that he stood to be relieved of the debt of HTC for outstanding GST and penalty and interest. Only then did it become beneficial for her to take the position that she now advances.

[14] My jurisdiction is limited to considering the correctness of the assessment appealed from on the basis of the facts established by the evidence before me and the provisions of the *ETA*. I have no jurisdiction to grant a remedy based upon the position that the Minister may have taken in another case in the past. That principle has been stated and restated repeatedly by this Court, and by the Federal Court of Appeal. A number of those authorities were recently cited by Décary J.A. in *Lassonde v. Canada*,[8] at paragraph 3:

> This appeal must certainly be dismissed, if only on the basis of a lack of jurisdiction. A few weeks before the decision by Lamarre Proulx J. and in the months that followed, our Court pointed out on a number of occasions that the jurisdiction of the Tax Court of Canada, in the context of the appeal of an assessment, is limited to deciding whether the assessment complies with the law, based on the facts and the applicable legislation (see *Milliron v. Canada*, 2003 FCA 283; *Sinclair v. Canada*, 2003 FCA 348; *Webster v. Canada*, 2003 FCA 388 and *Main Rehabilitation Co. v. Canada*, 2004 FCA 403.)

[15] For these reasons, the appeal must be dismissed.

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5 [1969] 2 Ex. C.R. 3 @ 27, aff'd 70 DTC 6354 (S.C.C.).

6 [1995] 2 F.C. 3.

7 91 DTC 1030 @ 1033-4.

8 (2005) 60 DTC 6039 (F.C.A.).

Signed at Ottawa, Canada, this 28th day of February, 2008.

"E.A. Bowie"

Bowie J.

APPENDIX

Excise Tax Act

Part IX: GOODS AND SERVICES TAX

272.1(5) A partnership and each member or former member (each of which is referred to in this subsection as the "member") of the partnership (other than a member who is a limited partner and is not a general partner) are jointly and severally liable for

(*a*) the payment or remittance of all amounts that become payable or remittable by the partnership under this Part before or during the period during which the member is a member of the partnership or, where the member was a member of the partnership at the time the partnership was dissolved, after the dissolution of the partnership, except that

(i) the member is liable for the payment or remittance of amounts that become payable or remittable before the period only to the extent of the property and money that is regarded as property or money of the partnership under the relevant laws of general application in force in a province relating to partnerships, and

(ii) the payment or remittance by the partnership or by any member thereof of an amount in respect of the liability discharges the joint liability to the extent of that amount; and

(*b*) all other obligations under this Part that arose before or during that period for which the partnership is liable or, where the member was a member of the partnership at the time the partnership was dissolved, the obligations that arose upon or as a consequence of the dissolution.

272.1(5) Une société de personnes et chacun de ses associés ou anciens associés (chacun étant appelé « associé » au présent paragraphe), à l'exception d'un associé qui en est un commanditaire et non un commandité, sont solidairement responsables de ce qui suit :

a) le paiement ou le versement des montants devenus à payer ou à verser par la société en vertu de la présente partie avant ou pendant la période au cours de laquelle l'associé en est un associé ou, si l'associé était un associé de la société au moment de la dissolution de celle-ci, après cette dissolution; toutefois :

(i) l’associé n’est tenu au paiement ou au versement des montants devenus à payer ou à verser avant la période que jusqu’à concurrence des biens et de l’argent qui sont considérés comme étant ceux de la société selon les lois pertinentes d’application générale concernant les sociétés de personnes qui sont en vigueur dans une province,

(ii) le paiement ou le versement par la société ou par un de ses associés d’un montant au titre de l’obligation réduit d’autant l’obligation;

b) les autres obligations de la société aux termes de la présente partie survenues avant ou pendant la période visée à l’alinéa *a*) ou, si l’associé est un associé de la société au moment de la dissolution de celle-ci, les obligations qui découlent de cette dissolution.

CITATION:	2008TCC126
COURT FILE NO.:	2007-342(GST)I
STYLE OF CAUSE:	MARILYN DENHAAN and HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	June 22, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
DATE OF JUDGMENT:	February 28, 2008

APPEARANCES:

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