

Docket: 2007-2376(IT)G

BETWEEN:

BRIAN M. HILLIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 3, 2008, at Sydney, Nova Scotia
Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: James R. Gogan
Counsel for the Respondent: David I. Besler

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the Appellant's 2000 taxation year is allowed, with costs, and this reassessment is vacated.

Signed at Vancouver, British Columbia, this 27th day of November 2008.

“Wyman W. Webb”

Webb J.

Citation: 2008TCC648
Date: 20081127
Docket: 2007-2376(IT)G

BETWEEN:

BRIAN M. HILLIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant was reassessed tax based on a determination that the accounting firm, Redmond and Hillier, acting on behalf of Brian M. Hillier Inc. (“BMH Inc.”), had conferred a benefit in the amount of \$47,375 on the Appellant during his 2000 taxation year. This assessment was issued after the normal reassessment period for that taxation year had expired. As well, gross negligence penalties were assessed pursuant to subsection 163 (2) of the *Income Tax Act* (“Act”).

[2] Since the assessment of the Appellant was issued after the expiration of the normal reassessment period, the onus would be on the Respondent to establish that the Appellant had made a misrepresentation that was attributable to neglect, carelessness or wilful default or had committed fraud in filing his tax return or in supplying information under the *Act* in relation to his 2000 taxation year (*Mensah v. The Queen* 2008 TCC 378, 2008 DTC 4358). The alleged misrepresentation as described in the Reply was the failure by the Appellant to include the amount of \$47,375 in his income as a benefit. It seems to me that the first issue that needs to be decided is whether any benefit was conferred on the Appellant at all in the year 2000 as a result of the transactions in issue. If a benefit was conferred on the Appellant, then the next question will be whether this misrepresentation would allow the

Respondent to reassess the Appellant after the expiration of the normal reassessment period. If no benefit was conferred on the Appellant, then there is no need to address this question.

[3] The Appellant is a chartered accountant. In the year 2000 he owned shares of the capital stock of BMH Inc., which was a partner in Redmond and Hillier. The Appellant owned a boat but had some interest in acquiring a better boat. The Appellant was contacted by a broker in the spring of 2000 about a boat that was for sale in Rhode Island. The Appellant and the broker travelled to Rhode Island to look at the boat and Appellant decided to submit a bid for the boat. The boat was for sale as a result of foreclosure proceedings by a bank. The Appellant's bid was successful, and the Appellant then found himself in a position in which he had to raise the capital required to pay the purchase price, which was US\$28,000 or approximately CAN\$45,000. The Appellant at the beginning of 2000 had not planned on buying another boat but since the opportunity arose he decided to capitalize on the opportunity and purchase the boat.

[4] In looking for sources of money, the Appellant reviewed the amounts that were payable to him personally by Redmond and Hillier. These were amounts that the Appellant had charged to his personal credit cards but that had been incurred for the benefit of the partnership. The Appellant submitted a list of these expenditures during the hearing. The Respondent did not dispute the fact that these expenditures had been incurred for the benefit of the partnership.

[5] The closing date for the purchase of the boat was May 18, 2000. As of May 3, 2000 the amount that was payable by the partnership to the Appellant personally, in relation to the charges that the Appellant had incurred on his CIBC Aerogold credit card, was \$17,750. In addition to that amount, the Appellant also incurred expenditures on his Scotiagold credit card. As of December 31, 1999, the amount that was payable to the Appellant in relation to the charges incurred on this credit card was \$6,334. No payments had been made by the partnership to the Appellant to reduce these balances before the closing of the purchase of the boat.

[6] These amounts were payable by the partnership to the Appellant personally. These credit cards were the Appellant's personal credit cards. They were not credit cards issued to BMH Inc. The payments on these credit cards were made from personal resources of the Appellant and not from funds of BMH Inc.

[7] These two amounts were not sufficient to cover the cost of the boat. The Appellant also drew down a cash advance against his CIBC Aerogold credit card in

the amount of \$12,000 on May 16, 2000. This amount was paid to Redmond and Hillier. In addition to these amounts, the Appellant also borrowed the sum of \$15,000 from his sister. The Appellant's sister testified and she confirmed that she advanced this amount to the Appellant. This amount was repaid by the Appellant to his sister following the sale by the Appellant of the boat that he owned before he purchased the boat in 2000.

[8] Following the payment to the partnership of the \$12,000 in cash that the Appellant had charged to his personal credit card as a cash advance and the payment to the partnership of the amount of \$15,000 that Appellant had borrowed from his sister, the following was the total amount that was then payable by the partnership to the Appellant:

<u>Item</u>	<u>Amount</u>
Amount payable for expenditures charged to the Appellant's Aerogold credit card	\$17,750
Amount payable for expenditures charged to the Appellant's Scotiagold credit card	\$ 6,334
Cash advance charged by the Appellant to his Aerogold credit card	\$12,000
Amount borrowed by the Appellant from his sister	\$15,000
Total:	\$51,084

[9] In order to complete the purchase of the boat, the Appellant needed a bank draft in US dollars. The Appellant had done some work for a client who had surplus US cash that the client wanted to convert to Canadian dollars. Therefore, the Appellant arranged to have the funds transferred from the partnership to this client in exchange for US dollars that were used to purchase a bank draft to buy the boat. The boat was purchased and the Appellant is the owner of the boat.

[10] The position of the Respondent is that the accounting records reflect that a benefit was conferred on the Appellant by Redmond and Hillier on behalf of BMH Inc. In *Trudel-Leblanc v. The Queen*, 2003 DTC 257, 2004 DTC 3188, [2005] 2 C.T.C. 2361, Justice Tardif stated that:

27 I strongly doubt that the accountants explained the consequences of incorporation. Too often, some accounting and tax professionals have a tendency to assume that the facts should be shaped by accounting entries whereas, in reality, the figures should reflect the facts, not the contrary.

[11] In *VanNieuwkerk v. The Queen*, 2003 TCC 670, [2004] 1 C.T.C. 2577, Associate Chief Justice Bowman (as he then was) stated that:

6 Part of the confusion stems from the accounting records which show either no transfer, or a transfer on December 31, 1998 or January 1, 1998 depending on which version you look at. It has been said on many occasions in this Court that accounting entries do not create reality. They simply reflect reality. There must be an underlying reality that exists independently of the accounting entries. I accept Mr. Goeres' explanation that adjusting entries, such as entries reflecting the transaction involved here or capital cost allowance, are all shown in the general ledger on December 31. That may well be so, but it does underline how unreliable accounting records are in determining when a transaction has taken place.

[12] It is the underlying reality that will determine whether a benefit was conferred on the Appellant and not simply the accounting entries. In any event, the accounting records to which the Respondent was referring relate to the statement of the partners account activity for the period from February 1995 to August 2000. This record shows, in part, that the following entries were included as part of the drawings and contributions in relation to the partnership interest of BMH Inc.:

<u>Item</u>		<u>Amount</u>
Drawings	Boat (Comf. Numb.)	(\$47,375)
Contributions	BMH Inc.	\$41,199
	Aerogold	\$16,407
	Scotiagold	\$ 8,725

[13] The records for the partnership capital account of BMH Inc. reflect a drawing for the boat of \$47,375. This amount exceeded the actual purchase price for the boat because additional expenses had been incurred in relation to the acquisition of the boat. However, the same record shows contributions as having been made by BMH Inc. in the amount of \$41,199 and also in relation to the Aerogold and Scotiagold credit cards. The \$41,199 in contributions by BMH Inc. included the \$12,000 paid to the partnership by the Appellant which was financed as a cash advance on his credit card and the \$15,000 that the Appellant borrowed from his sister. As noted above, the Aerogold and Scotiagold credit cards were personal credit cards of the Appellant. As a result the contributions listed in the capital account for BMH Inc. included, based on the amounts shown above for Aerogold and Scotiagold, \$52,132 that was contributed personally by the Appellant. These personal contributions exceeded the amount shown as a drawing for the boat.

[14] These records in and of themselves do not show any benefit that was conferred on the Appellant. These records only reflect the capital account of the corporate partner. They do not show any transfer of any assets of the partnership or BMH Inc. to the Appellant. It would seem that to properly reflect the transactions in BMH Inc. it would also be necessary to show the acquisition by BMH Inc. of the assets that it would have used to make its contribution to the partnership. As noted above, the sum of \$52,132 of the amount of contributions shown to have been made by BMH Inc. to the partnership was contributed personally by the Appellant. If the contribution of this amount by the Appellant to BMH Inc. would have been reflected in the accounting records of BMH Inc., those records would presumably have shown an acquisition by BMH Inc. from the Appellant of the assets listed above that comprise the amount of \$52,132 and a corresponding amount payable (\$52,132) by BMH Inc. to the Appellant. Therefore if the transfer of the boat is reflected as a drawing from the partnership to BMH Inc. and then is recorded as a transfer from BMH Inc. to the Appellant, it would simply be a repayment by BMH Inc. to the Appellant of most of the amount payable by BMH Inc. to the Appellant.

[15] The Appellant stated that the transactions related to the boat were not reflected in the accounting records of BMH Inc. (including the contributions made by the Appellant financed by a cash advance on his credit card, the contribution from the amount that the Appellant borrowed from his sister, and the Aerogold and Scotiagold amounts) because BMH Inc. was not involved with the acquisition of the boat. It seems to me that if the transactions would have been reflected in the accounting records of BMH Inc. then they would have been reflected as noted above and would have shown that no benefit was conferred on the Appellant by BMH Inc.

[16] It does not seem to me that any benefit was conferred on the Appellant by the BMH Inc., or by the partnership on behalf of BMH Inc. in relation to the acquisition by the Appellant of the boat in 2000. It was the Appellant's own personal assets that were used to purchase the boat. A benefit cannot be confirmed by a corporation on a shareholder if the shareholder's own property (and not property of the corporation) is used to purchase the asset that is alleged to form the basis of the benefit.

[17] As a result, the appeal is allowed, with costs, and the reassessment issued in relation to the Appellant's 2000 taxation year is vacated.

Signed at Vancouver, British Columbia, this 27th day of November 2008.

“Wyman W. Webb”

CITATION: 2008TCC648

COURT FILE NO.: 2007-2376(IT)G

STYLE OF CAUSE: BRIAN M. HILLIER AND HER MAJESTY
THE QUEEN

PLACE OF HEARING: Sydney, Nova Scotia

DATE OF HEARING: November 3, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb

DATE OF JUDGMENT: November 27, 2008

APPEARANCES:

Counsel for the Appellant: James R. Gogan
Counsel for the Respondent: David I. Besler

COUNSEL OF RECORD:

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