Docket: 2007-3070(IT)G
2008-135(GST)G

BETWEEN:

WALTER NICHOLS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 3 & 4, 2009, at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Craig C. Sturrock, Q.C.
Counsel for the Respondent:	Michael Taylor Selena Sit

JUDGMENT

The appeals are dismissed in accordance with the attached reasons.

The Respondent is awarded costs.

Signed at Ottawa, Canada, this 19th day of June 2009.

"V.A. Miller"

V.A. Miller, J.

Citation: 2009TCC334
Date: 20090619
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BETWEEN:

WALTER NICHOLS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Miller, J.

[1] The Appellant's income tax liability for the 2001, 2002 and 2003 taxation years was reassessed on a net worth basis to include in income the amounts of $208,300, $181,720 and $147,229 respectively. He was assessed for failure to remit GST in the amount of $37,607.04 for the period January 1, 2001 to December 31, 2003 in accordance with the *Excise Tax Act* ("the ETA"). He was also assessed gross negligence penalties pursuant to subsection 163(2) of the *Income Tax Act* ("the Act") and section 285 of the ETA and a late filing penalty pursuant to subsection 162(1) of the Act in respect of his 2003 taxation year.

[2] The Appellant's 2001 and 2002 taxation years were reassessed beyond the normal reassessment period pursuant to subparagraph 152(4)(*a*)(i) of the Act.

[3] Both counsel agreed that the focus of the hearing would be the income tax appeals and the same decision should be made in both the income tax appeal and the GST appeal.

[4] At the hearing, the Appellant agreed that the net worth calculations were correct. It was his position that the discrepancies in his income were from non-

taxable sources. He stated that the sources of the funds were a friend whose name is David Grant ("Grant"); his former girlfriend, Ms. Villeneuve; and, winnings from casinos in Las Vegas.

[5] The only income that the Appellant reported on his income tax returns for the three years in issue was refund interest in the amount of $18.39 in 2001.

[6] The Appellant stated that he has a grade seven education. His legal name is Walter Dumonceaux but he uses the name Nichols as that was his stepfather's name. He is a machine operator and as such he has experience in moving asbestos and PCBs. Over the years, he also held various jobs in bars. He has been a DJ, a bartender and a manager of various bars.

[7] It was the Appellant's evidence that he met David Grant in 1995 through mutual friends. In 2001 he and Grant made a business agreement whereby they would purchase vehicles in Canada and export them to the United States (U.S.). The Appellant stated that the exchange rate on the U.S. dollar was approximately 1.50 percent, so that even if he sold a vehicle in the United States for less than the Canadian purchase price, a profit could be made when the funds were transferred to Canadian dollars. The profit from this business venture would be increased by applying for a refund of the GST and PST.

[8] According to the Appellant, Grant agreed to provide the money to purchase the vehicles and to cover all expenses; and, the Appellant would do "the leg work". He testified that during the period 2001, 2002 and 2003, Grant gave him $75,000 on each of five or six occasions. The amounts were always given in cash. The Appellant stated that sometime in 2002, he signed a paper to acknowledge that Grant had given him money. He stated that he was not sure exactly how much Grant had given him at that point in time but he believed that by the end of 2003, Grant had given him a total of $350,000. Neither the Appellant nor Grant had a copy of the document which they say was signed in 2002.

[9] It was the Appellant's evidence that he used the money he received from Grant for personal expenditures. Prior to spending it, he kept some of the money in a safe in his home or in his company's bank account.

[10] During the period 2001, 2002 and 2003, the Appellant had two vehicles, a 1998 Corvette and a 2001 Grand Jeep Cherokee. The Appellant reported the Corvette as a company asset; neither of the vehicles was exported to the U.S. The Appellant never exported any vehicles to the U.S.

[11] According to the Appellant, his second source of money was his girlfriend, Ms. Villeneuve. She was an exotic dancer who worked in the Greater Vancouver Area. It was the Appellant's evidence that Ms. Villeneuve did not have a bank account. He stated that when she was paid, she gave her money (either cash or cheque) to him and he deposited it in his bank account. The Appellant stated that he gave Ms. Villeneuve money "whenever she would ask for it". The Appellant estimated that Ms. Villeneuve earned a minimum of $50,000 each year.

[12] The Appellant stated that in 2000 he won approximately $40,000 at the Desert Inn in Las Vegas. On cross-examination, he admitted that he had spent most, if not all, of this $40,000 prior to the years in issue. He also stated that in 2001 or 2002 or 2003, he won either $15,000 or $20,000 at the Mirage in Las Vegas. He did not know the exact amount that he had won or when he had won it. However, when his counsel presented him with various exhibits, the Appellant stated that he had won $10,000 in 2001 at the Mirage.

[13] The Appellant was the sole shareholder and director of Dalsea Holdings Ltd. ("Dalsea"). He testified that Dalsea was a company he "bought off the shelf" and it never carried on any business. When he was asked how he determined the amount of money he deposited into Dalsea's bank account, he stated:

> "Well, I have no business experience, but, you know, just for like bookkeeping and certain things that were costs, I would deposit money into -- cash into that account and then write cheques on costs, to like the bookkeeper and whatever else I had to -- whatever other expenses I had."

[14] The Appellant stated that he wrote cheques on the company bank account but none of these cheques were for personal expenses. He wrote several cheques payable to himself and in the re-line on the cheques, he wrote "Pay Day". When asked why he wrote "Pay Day" if Dalsea was not carrying on business and he was not receiving a salary from Dalsea, the Appellant stated that he just wanted to withdraw some money from the account.

[15] At all relevant times, the Appellant had a personal bank account.

[16] On November 10, 2003, the Appellant was charged in Los Angeles, California with possession of marijuana for sale, possession of money over $100,000 which was obtained as a result of trafficking of marijuana and three other counts. On March 15, 2004, the Appellant plead "no contest" to these two counts. The Superior Court of the

State of California found that there was a factual basis for the Appellant's plea and it accepted the plea.

[17] At the hearing of these appeals, it was the Appellant's evidence that he went to Los Angeles on holiday with his girlfriend, Ms. Villeneuve. He was only in possession of the marijuana and the money because he was doing a favour for a friend. According to the Appellant, his friend asked him to rent a car and to exchange the key to that car for a box that he would receive from a person whom he would meet in the lobby of a hotel. The Appellant was to be paid $60,000 for doing this favour. The Appellant stated that he did not realize when he agreed to this favour that it involved marijuana.

[18] The Appellant explained that he only entered a guilty plea to the counts because he did not want to spend time in the Los Angeles County Jail awaiting a trial.

[19] David Grant testified on behalf of the Appellant. He confirmed the Appellant's testimony about the agreement between him and the Appellant. He stated that he was looking for a legitimate business to be involved in and he gave the Appellant $374,000, in cash, over the period of three years. He did not keep a record of the amounts that he gave the Appellant nor did he sign a partnership agreement with the Appellant.

[20] Grant stated that, in 2000, he used money which he had inherited to expand an ATM business which he had started in 1997. In 2002 he incorporated the business and it was called ATM Network Inc. He expanded this business from one machine in 1997 to thirty-two. He stated that the revenues from one machine were $3,000 each month and by the time he had 32 machines, his revenues were between $16,000 and $40,000 each month. There was no evidence as to which year Grant had 32 machines.

[21] In 2001, Grant started, what is colloquially called, marijuana grow-ops with several partners. He described the grow-ops as "basically farming operations". He stated that he earned revenues of several million dollars from this business. On September 7, 2007, Grant was charged with committing the indictable offences of unlawful production of and trafficking in Cannabis (Marihuana). Grant stated that he will go to trial on these charges in September of this year.

Analysis and Conclusion

[22] This is a case where the decision depends entirely on my findings of credibility taken in the context of all the evidence adduced at the hearing. I must determine whether the Appellant has shown on a balance of probabilities that the Minister's assessments are incorrect. In considering the evidence adduced, I may believe all, some or none of the evidence of a witness or accept parts of a witness' evidence and reject other parts.

[23] In assessing credibility I can consider inconsistencies or weaknesses in the evidence of witnesses, including internal inconsistencies (that is, whether the testimony changed while on the stand or from that given at discovery), prior inconsistent statements, and external inconsistencies (that is, whether the evidence of the witness is inconsistent with independent evidence which has been accepted by me). Second, I can assess the attitude and demeanour of the witness. Third, I can assess whether the witness has a motive to fabricate evidence or to mislead the court. Finally, I can consider the overall sense of the evidence. That is, when common sense is applied to the testimony, does it suggest that the evidence is impossible or highly improbable.

[24] When I consider the totality of the evidence presented, I conclude that neither the Appellant nor Grant is credible. In particular, some of the evidence that has led to my conclusion is as follows.

Dalsea

[25] The Appellant has stated that Dalsea did not carry on business. Yet, he had a bank account opened in Dalsea's name; he hired a bookkeeper and an accountant to prepare Financial Statements, accounts, trial balances, journal entries and general ledger for 2001, 2002 and 2003. The Appellant also filed income tax returns ("T2s") for Dalsea in 2000 and 2001 wherein he declared that Dalsea was in the business of auto racing and consulting. The Appellant signed the T2s and he reported that Dalsea had revenues of $75,052 and $43,169 for the years ending September 30, 2000 and September 30, 2001 respectively.

[26] If Dalsea did not carry on business, then the only other conclusion which I can draw from the evidence is that the business records were produced to give the appearance that Dalsea was in business. This suggests to me that Dalsea was a front for some activity. I need not speculate on the activity.

Ms. Villeneuve

[27] Ms. Villeneuve was not a witness at the hearing of these appeals. It was the Appellant's evidence that he had not seen Ms. Villeneuve since he was released from jail in Los Angeles. However when Grant was asked in cross-examination whether the Appellant continued his relationship with Ms. Villeneuve after he got out of jail, Grant answered yes. He stated:

> Q Do you remember when she and Mr. Nichols' relationship finally broke down?
> A Yeah, it I think it was two years ago, at least a year and a half ago. Possibly three. I didn't really pay a whole lot of attention when that happened, but it's been a while.
> Q Do you remember whether he continued the relationship after he got out of jail?
> A After he got out of jail he certainly did try and get together with her, yes.
> Q Do you remember whether they actually did reconcile for some time, after his jail term?
> A You know what? When you say "reconcile", I'd have to say they were together but she wasn't living there.
> Q All right.
> A I don't know details of reconciliation in the words that you put it, so.
> Q So together for a while.
> A Yeah. It's possible. I never witnessed her moving in there, so I don't know. But they were, you know, together.

U.S. Conviction

[28] The Appellant stated that he entered a plea of "no contest" in the U.S. because he did not want to spend time in the Los Angeles County Jail awaiting a trial. He described the jail as a horrific place. I accept his evidence with respect to his description of the jail. However, the court in the U.S. found that there was a factual basis for the Appellant's plea and it accepted the plea. As well, on the Declaration for Bail Deviation sheet, the reason given for deviating from the bail set in the Felony Bail Sheet confirmed that the authorities in the U.S. considered the Appellant to be a leader in the conspiracy. They wrote:

> "Defendant is Canadian Citizen. No local ties other than narcotics co-conspirators. Defendant held leadership position in narcotic conspiracy involving international transaction. Defendant possessed over $100,000 in narcotic proceeds and conspiracy involved well over 100 lbs. of high grade marijuana. Defendant participated in two transactions on two separate occasions."

[29] At the hearing in the U.S., the Appellant stated that he understood that a plea of “no contest” had “the same force and effect as a guilty plea”.

The Vehicles

[30] At the hearing of this appeal, the Appellant first stated that he had only purchased a truck to export. After further questions from counsel for the Respondent, the Appellant recalled that he had paid out the lease on his 1998 Corvette with the intention to export the Corvette to the U.S. At the discovery which was held in this matter, the Appellant stated that he had purchased or leased three vehicles with the intention of exporting them.

[31] The evidence disclosed that the Appellant originally leased the 1998 Corvette in August 1999 under the name of Dalsea. He bought out the lease in June 2002 using the proceeds of a loan in the amount of $30,000 from the Toronto Dominion Bank (“the TD”).

[32] On cross-examination, he stated that he used the money he received from Grant to make the lease payments on the Corvette. Then he stated that the lease payments were being made by the car dealership, Totem Mercury Sales Limited, from whom he leased the vehicle.

[33] At the hearing when the Appellant was asked if he used the money from Grant to pay for the 2001 Grand Jeep Cherokee (the “Jeep”), he agreed. At the discovery in this matter, the Appellant was asked how he paid for the Jeep and he answered:

> 352 Q How did you pay for it?
> A I think how that one was, is there was somebody -- somebody else that was into the car business and they had actually purchased it, and I was to give them the money for it and what happened -- I can't really remember. Like the actual purchase, I know it was purchased at Maple Ridge Chrysler, but when it was actually bought and purchased from Maple Ridge Chrysler I wasn't -- I didn't do it personally. Somebody else did it. But if I can, I'm not sure.”

[34] In conclusion, the Appellant’s evidence was vague, confusing, nonsensical and contradictory.

Loans from the TD Canada Trust

[35] On September 27, 2000, the Appellant applied for a mortgage in the amount of $330,000 from the TD Canada Trust ("TD"). According to the application, the Appellant's previous employer was the Pink Panther Showroom Pub ("the Pub") where he earned $80,000 and his present employer was Unique Loading Services Inc. ("Unique") where he earned $145,200. He stated that he had been employed by the Pub for 4 years and by Unique for 10 months. His assets were listed as Automobiles - $110,000, Other - $100,000.

[36] In cross-examination, the Appellant stated that he thought he was the club manager at the Pub and that he never "drew a cheque". He first stated that he received free room and board in exchange for managing the Pub. On further questioning, the Appellant admitted that he received cash but he did not receive $80,000.

[37] The Appellant also admitted that he did not receive $145,200 from Unique. He stated that he worked for Unique in 2000 and he received approximately $8,000.

[38] The Respondent also submitted documents from the TD concerning the loan which the Appellant acquired to pay out the lease on the Corvette. One document reads: "Client looking to buy out a friend's lease. Full buy out is $42,365 which includes $5365 GST/PST. Client will put down $12,365 which will come from his TD account."

[39] In his loan application dated June 18, 2002, the Appellant stated that he was a consultant with Unique Loading for 2 years 6 months and that his gross monthly salary was $9,167.

[40] To support his application for the loan, the Appellant gave TD a letter dated June 18, 2002 from Unique Loading Services Inc. which read:

> "This letter is to certify that Walter Nichols of Dalsea Holdings Ltd. has been employed by Unique Loading services Inc. as a sub contractor for the last 3 years.
>
> Walter is an excellent employee and we do not foresee any problems with his employment with us in the future. He presently earns an average of $9850.00 @ month gross."

[41] When he was questioned about the loan documents, the Appellant stated that he was confused. He ultimately agreed with counsel for the Respondent, that each time he needed money, he went to Randy Murphy (the owner of Unique Loading) to get a letter which would state that he had a job. The Appellant agreed that he and Randy Murphy intentionally misled the bank.

Grant's Testimony

[42] Grant stated that he earned thousands each month from his ATM Network Inc. business. I have no doubt that this was true; but, the evidence showed that his business did not report a substantial amount of these revenues in the 2003 and 2004 taxation years.

[43] The Respondent tendered two documents which were titled "Cortax Return and Schedules" as an exhibit. Chris Lew, a litigation officer, with the Canada Revenue Agency ("CRA") stated that the documents were computer printouts from the CRA's system. The information on the printouts is from the tax return filed for ATM Network Inc. ("ATM"). Counsel for the Appellant objected to the entry of these documents as exhibits on the basis that the Respondent did not call, as a witness, the person who entered the information into the computer.

[44] I allowed the documents to be entered as an exhibit (exhibit R-3)[1].

[45] For the taxation years ending January 31, 2003 and January 31, 2004, ATM reported revenues of $36,679 and $62,931, respectively. For the same years it reported net income/loss of $0 and -$49,027.

[46] It was Grant's testimony that the Appellant owned a "couple of strip clubs in the old days". He stated that he trusted the Appellant and he did not require that the Appellant give collateral for the $374,000 nor did he keep a log of the amount that he gave to the Appellant. He always gave the Appellant cash which was from ATM and/or the marijuana business.

[47] When he was asked if he knew how the Appellant was spending the money, Grant stated:

> A Well, he told me he was investing in cars and purchasing them and sending them up -- to the United States. I didn't know what he did with the money. I had a bit of an idea towards the end of 2003.
>
> Q So do you know which vehicles he bought to resell?

> A I have no idea.
> Q Do you know whether he sold any vehicles?
> A Do not know.
> Q Did you ever ask him to report back on what he was doing with the money?
> A No, I did not.
> Q Didn't you become concerned that you weren't seeing any results?
> A Yes, I started becoming concerned in 2003.
> Q By that point you'd already put in how much?
> A 200,000 for sure, 250 maybe, by 2003.
> Q And you never asked for any of the money back? Or be repaid?
> A Not, not at that point, no. Not until he had been arrested, then when he was released I just asked him if he had any idea if he could ever repay the money, and he said, "There's no possible way," and I didn't pursue it after that. I knew that there was no way I was going to see the money.

[48] It is unbelievable that Grant would become concerned in 2003 about the money he had allegedly given to the Appellant ($250,000) and then he would continue to give the Appellant a further $124,000 in that same year. I agree with counsel for the Respondent that the absence of any documentation to corroborate the Appellant's explanation is significant.

[49] This entire explanation has the blush of a tall tale. It does not have the ring of commonsense. I find it impossible to believe that Grant would continue to give money to the Appellant over a period of three years without asking the Appellant to account for it. According to Grant he didn't even ask the Appellant what he was doing with the money.

[50] My analysis of the evidence has led me to conclude that the Appellant's explanation for the discrepancy between his reported income, which one must remember was essentially nil, and his net worth is implausible and an affront to common sense.

Conclusion

[51] The income tax reassessments for the 2001 and 2002 taxation years were made beyond the normal reassessment period pursuant to subparagraph 152(4)(*a*)(i) of the Act and the onus is on the Respondent to show that the taxpayer has made a misrepresentation that is attributable to neglect, carelessness, wilful default or fraud in filing his return.

[52] In its recent decision in *Lacroix v. The Queen*[2], the Federal Court of Appeal discussed how the Minister of National Revenue (the "Minister") can discharge the burden of proof in a situation where the taxpayer has been assessed on a net worth basis beyond the normal reassessment period. Pelletier, J.A. speaking for the court stated:

> [30] The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts, and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanations he gave were found not to be credible. In my view, given such circumstances, one must come to the inevitable conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence. This justifies not only a penalty, but also a reassessment beyond the statutory period.
>
> …
>
> [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).** (emphasis added)

[53] I have concluded that the Appellant has not provided a credible explanation for the discrepancy between his reported income (which was nil) and his net worth. There was no credible evidence to counter the Minister's assumptions. I am satisfied that the Appellant earned unreported income. As a result, the Minister has discharged its burden with respect to subparagraph 152(4)(*a*)(i), subsection 163(2) of the Act and section 285 of the ETA. The late filing penalty for the 2003 taxation year was properly assessed in accordance with subsection 162(1) of the Act.

[54] The appeals are dismissed with costs.

Signed at Ottawa, Canada, this 19th day of June 2009.

"V.A. Miller"

V.A. Miller, J.

[1] It is my opinion that both subsection 244(9) of the Act and section 30 of the *Canada Evidence Act* allow for these documents to be entered as exhibits without calling, as a witness, the person who entered the data into the computer. See as well, Sopinka et al: *The Law of Evidence in Canada*, at paragraphs 6.173 and 6.174.

[2] 2008 FCA 5625

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DATE OF JUDGMENT:	June 19, 2009

APPEARANCES:

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