

Dockets: 2008-2477(IT)I

BETWEEN:

MANUEL HENRIQUES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with appeal no. *2008-2476(GST)I* on
October 23, 2009, at Toronto, Ontario.

By: The Honourable Justice C.H. McArthur

Appearances:

Agent for the Appellant: Zamir Qureshi
Counsel for the Respondent: Laurent Bartleman

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are dismissed.

Signed at Ottawa, Canada, this 25th day of March, 2010.

“C.H. McArthur”

McArthur J.

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JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act*, for the period from January 1, 2003 to December 31, 2004 is dismissed.

Signed at Ottawa, Canada, this 25th day of March, 2010.

“C.H. McArthur”

McArthur J.

Citation: 2010 TCC 173
Date: 20100325
Dockets: 2008-2477(IT)I
2008-2476(GST)I

BETWEEN:

MANUEL HENRIQUES,

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REASONS FOR JUDGMENT

McArthur J.

[1] These appeals are from a net worth assessment by the Minister of National Revenue (Minister) for the taxation years 2003 and 2004 under the *Income Tax Act (ITA)* and Part IX of the *Excise Tax Act (ETA)* relating to Goods and Services Tax (GST), for the period January 1, 2003 to December 31, 2004. The Minister submits that during the relevant period, the Appellant failed to report income of \$52,580 in 2003 and \$39,510 in 2004 and did not collect and report GST on all his revenues. He was also assessed interest and penalties.

[2] The Minister's assessment, as a last resort, is a net worth based primarily on an analysis of the Appellant's and his spouse's bank accounts. They challenged the Minister's accuracy and conclusions. The Appellant's records lacked precision and his accountant, who was retained for the purposes of the audit and the trial of these appeals, had to resort to generalities and the memory and credibility of the Appellant and his spouse, Maxine Zuniga.

[3] The following is a brief summary of those facts.

[4] The Appellant emigrated to Canada when he was 12 years old. He operated a painting business, primarily painting residential homes, as a sole proprietor. From

time to time, he hired occasional labourers. He and Maxine deposited their funds into three bank accounts as follows:

Deposits	2003	2004
Business Account	\$139,558.35	\$101,697.18
Personal Account	\$70,028.84	\$ 59,465.14
Mortgage Account	\$15,715.00	\$ 26,675.00
Total Deposits	\$225,302.19	\$187,837.32

[5] For the 2003 taxation year, the deposits totalled \$225,302. The Minister, in its assessment, deducted from that amount the Appellant's reported income of \$129,447 and also the amount of \$48,075 attributable to Maxine's income and deposits that were not part of the Appellant's business income. The assessed amount was therefore \$47,780 and adding to that amount, \$4,800 of unreported rental income, from a premises located at 338 Saint Clarens Avenue, Toronto, Ontario, rented to the Appellant's brother-in-law, the Appellant's total assessed income was \$52,580.

[6] For the 2004 taxation year, the total deposits were \$187,837. The Minister, in the assessment, deducted from this amount the Appellant's reported income of \$77,630 and also deducted an amount of \$50,021, attributable to Maxine's income and deposits. Also deducted from the amount was a deposit of \$26,675 to the Appellant's mortgage bank account, which the Minister failed to include in the Appellant's income assessment. The assessed amount was therefore \$33,510 and adding \$6,000 of unreported rental income from the Saint Clarens Avenue property, the Appellant's total assessed income for 2004 was \$39,510.

[7] Counsel for the Respondent referred to the decision in *620247 Ontario Ltd. v. Canada*,¹ where at paragraph 8, Bowman J. stated the following, which is very helpful in the appeals before me:

8 ... In a case of this type, which involves an attempt by the Department of National Revenue to make a detailed reconstruction of the taxpayer's business, it is incumbent upon the taxpayer who challenges the accuracy of the Department's conclusions to do so with a reasonable degree of specificity. That was not done here. A bald assertion that the sales could not have been that high, or that some unspecified portion of the bank deposits came from other sources is insufficient. I am left with the vague suspicion that the chances are that the sales figures computed by the Minister may be somewhat high, but within a range of indeterminate

¹ 1995 CarswellNat 27, 3 G.T.C. 2065.

magnitude. This is simply not good enough to justify the allowing of the appeal. If I sent the matter back for reconsideration and reassessment the same evidentiary impasse would result. I must therefore conclude that the appellant has failed to meet the onus of showing that the assessment is wrong.

[8] The Appellant has the burden of reasonably establishing that the Minister's conclusions are incorrect. He has to analyze the bank deposits and establish, on a balance of probabilities, that the deposits were not unreported business income. The Minister's arbitrary assessment is not much more than an educated guess, but it is the best estimate of the Appellant's income that was presented.

[9] Ms. Zuniga worked in 2003 without declaring positive income. There is no discernable link between her earnings and the Appellant's deposits. Her evidence was not convincing. The Appellant and Ms. Zuniga testified that they received payments in cash from her father which came from overseas,² and \$10,500 in cash from Patricio Zuniga (the Appellant's brother-in-law) throughout the year 2003.

[10] I do not accept the evidence of the Appellant and Maxine to the effect that her father gave them \$50,000 in cash in 2003 and \$35,000 in cash in 2004. Exhibit R-3 purportedly contains notarially witnessed and translated statements from Maxine's father in Puyo Canton Pastaza. I do not give these any weight. There is no corroborating evidence such as conversion of the cash documentation if it is across international borders, or direct evidence from the donor or the attesting attorney. I do not accept that these amounts were transferred from Ecuador to Toronto without any trace of documentation. The declarations state in part:

to my daughter Edith Maxine Zuniga Malo, who resides in 130 Hope, St. PCM 6 and 1K1 Toronto City, Ontario State, Republic of Canada, I made her a gift of thirty and five thousand dollars, in cash, in the years 2003 and 2004, quantity that I obtained them partly of them received inheritance of my dead parents, and part, of my long working years profits; equally I gave some securities to my other children.

...

Sincerely

Mentor Zuniga

² Exhibit R-1, Tab 3, pages 46 and 47.

By this public instrument in a free and voluntarily way, on oath I manifest that: I was the owner of a property of a piece of land and a two floors cement house which is placed on 10 de Agosto and Francisco de Orellana Street, of this Puyo City-Ecuador. I sold this house in 2003 for the value of TWO HUNDRED THOUSAND AMERICAN DOLLARS, this currency I received on cash and FIFTY THOUSAND DOLLARS I share with my daughter MAXINE ZUNIGA MALO and her husband MANUEL ENRIQUES, this amount of money I lent them as a loan without charging them any interest from this loan and about the TERM. They can pay me according to their possibilities.

It is all what I can declare in honour of the truth and I am able to ratify this whenever it can be necessary.

[11] The Appellant's agent indicated in Exhibit R-3 that Anibal Zuniga (the Appellant's father-in-law) gave the Appellant or Maxine the following amounts:

a) 2003	May 26	\$10,000
	June 19	\$10,000
	November 3	\$ 6,000
b) 2004	May 7	\$ 2,000
	November 22	\$ 7,000

These amounts cannot be reconciled with the \$35,000 and \$50,000 referred to earlier. There is no link between the father-in-law's stated cash and the deposits in the Appellant's bank accounts. There is evidence in the form of cancelled cheques for some amounts paid to the Appellant or Maxine by Patricio Zuniga, Maxine's brother. The total amount of the cheques were deducted from the Appellant's income.

[12] The Appellant's agent, accountant Mr. Qureshil, did what he could with the dubious facts he had to deal with. He acknowledged that the Appellant reported gross income of \$139,000 in 2003 and \$169,000 in 2004. He stated "It is very simple. He borrowed \$70,000 from personal friends and \$50,000 from his wife's family and wife's income." He added:³

He is a small businessman. The gross is not the money he pocketed. He had expenses and after expenses his net income is \$25,000 or \$30,000 depending on the year, which he has declared and filed.

Then you have a personal bank account. In the personal account that is not unreported income, but it is actually money that is borrowed from friends to buy the

³ Transcript of Argument, pages 12 and 13, lines 15 to 25 and lines 1 to 9.

house, to renovate the house and to buy furniture that they needed at the time. We gave enough proof to say warrant that claim that that is not income. It is personal money and that is why it was deposited in the personal account.

Then you have the mortgage bank account. Maxine worked in 2003 and 2004 and that money was deposited. In the first year she forgot and, when it came to my attention, I made sure that that amount was included, so it was the correct income. The government chose not to accept that.

[13] The Appellant was a sole proprietor but paid wages to his labourers of \$64,000 and \$36,000 in 2003 and 2004. There was no evidence of borrowing from friends.

[14] Originally, Maxine filed a nil tax return for 2003. This is not an act of forgetting. She testified she worked in 2003 and 2004 in numerous cleaning jobs. However, she produced house cleaning invoices,⁴ all of which purportedly came from a Mr. Raftus. The Raftus invoices match the deposits to the mortgage⁵ bank account at Exhibit R-1, Tab 6.

[15] In 2003, the Raftus invoices from June 1, 2003 to December 31, 2003 total \$15,715. When Mr. Qureshi filed the income tax return for 2003 for Maxine, her net income was \$10,800 after deducting \$5,000 for cleaning supplies. However, cleaning supply costs were already accounted for in the invoices. I doubt the authenticity of these invoices. There are too many discrepancies. For example,

- i) Maxine originally filed a nil return for 2003.
- ii) She testified that in 2003 she worked at numerous homes. I understood for most of the year.
- iii) During or after the audit when she finally filed a tax return through Mr. Qurenshi, she claimed \$5,000 in expenses.

There is no rationale for the discrepancies. I accept the conclusion of counsel for the Respondent, as follows:⁶

⁴ Exhibit R-2.

⁵ It appears to be an account set aside to pay their home mortgage interest.

⁶ Transcript of Argument, pages 6 and 7, lines 17 to 25 and lines 1 to 13.

However, the total payments that were demonstrated in the bundle of invoices at R-2 seem to match the deposits. One cannot explain way these discrepancies. It is more probably that some of the money was collected in cash and paid out, but we don't know exactly what happened to it. There are too many discrepancies to be able to reconcile and, more important for this case, I submit that there are too many discrepancies to accept on a balance of probabilities that she took that money and deposited it into this account and that any of this money reflects her income as opposed to Mr. Henriques' income. This may seem like a harsh result, your honour, but I respectfully submit that it is the only credible result in light of the uncertainty surrounding this matter.

[16] Since the Appellant failed to maintain proper records and also failed to meet the onus of showing that the assessments were wrong, the appeals are dismissed.

Signed at Ottawa, Canada, this 25th day of March, 2010.

“C.H. McArthur”

McArthur J.

CITATION: 2010 TCC 173

COURT FILE NOs.: 2008-2477(IT)G
2008-2476(GST)I

STYLE OF CAUSE: MANUEL HENRIQUES and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 23, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: March 25, 2010

APPEARANCES:

Agent for the Appellant:	Zamir Qureshi
Counsel for the Respondent:	Laurent Bartleman

COUNSEL OF RECORD:

For the Appellant:

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Firm:	N/A

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