

BETWEEN:

PHILIP CARLINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 19 and December 5 and 7, 2017,
at Windsor, Ontario

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Jack Warren

JUDGMENT

The appeal of Philip Carlini's 2001 tax year is dismissed.

The appeals of Mr. Carlini's 2002 and 2003 tax years are allowed and the matters referred back to the Minister of National Revenue for reassessment on the basis that Mr. Carlini's income should be reduced by \$43,074.83 in 2002 and \$52,500 in 2003.

Costs are awarded to the Respondent. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Respondent shall have a further 30 days to file written submissions on costs and Mr. Carlini shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 27th day of December 2017.

“David E. Graham”

Graham J.

Citation: 2017 TCC 259
Date: 20171227
Docket: 2014-3780(IT)G

BETWEEN:

PHILIP CARLINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] In 2001, 2002 and 2003, Philip Carlini worked in the auto body business. Mr. Carlini was the president of a company named Carlini Collision Ltd. (“Collision”) and a shareholder of a company named Carlini Bros. Body Shop Ltd. (“Body Shop”). The Minister of National Revenue reassessed Mr. Carlini to include substantial amounts of money in his income and to impose gross negligence penalties.

[2] The amounts for which Mr. Carlini was reassessed fall into three categories: alleged unexplained deposits to Mr. Carlini’s personal bank accounts; alleged appropriations from Body Shop; and alleged payments by Collision of amounts owing on Mr. Carlini’s personal credit card that related to personal expenses.

[3] There are six key issues in this appeal:

- a) Was Body Shop carrying on business in the years in question?
- b) Should the alleged appropriations from Body Shop be included in Mr. Carlini’s income?
- c) Should the alleged unexplained deposits in Mr. Carlini’s personal bank accounts be included in his income?

- d) Should the alleged payments of amounts owing on Mr. Carlini's credit card be included in his income?
- e) Do any of the other issues raised by Mr. Carlini have any impact on his reassessments?
- f) Are gross negligence penalties justified in respect of the above amounts of alleged unreported income?

[4] Before turning to the issues, I would like to make some general observations about the audit methodologies employed by the Minister. The audit involved the tracing of money from multiple different sources using a number of different audit methodologies. There is always a risk of double counting when different audit methodologies are used together. A Canada Revenue Agency appeals officer named Colette Poisson testified on behalf of the Respondent. Ms. Poisson was the appeals officer who dealt with Mr. Carlini's objections. I found Ms. Poisson to be a credible witness. The overall impression that I have is that Ms. Poisson did not simply take the auditor's work at face value but rather conducted a serious review of it and gave real consideration to potential problems that could have arisen as a result of the different methodologies the auditor employed. That analysis led to a number of adjustments being made. I am satisfied that the adjustments made by Ms. Poisson have ensured that the different audit methodologies employed have not resulted in double counting.

A. Was Body Shop carrying on business?

[5] Body Shop was incorporated in 1970. Its original shareholders were Mr. Carlini and his four brothers. By the years in question, three of Mr. Carlini's brothers had passed away. Mr. Carlini and his brother Antonio Carlini were the only remaining shareholders of Body Shop.

[6] Collision was incorporated in 1990. Its shareholders were Mr. Carlini's wife, Antonio Carlini's wife and the wives of their three deceased brothers. None of those women was active in Collision's business. For ease of reference, when referring to the shareholders of Collision, I will describe the four shareholders who were not Mr. Carlini's wife as the "sisters-in-law" and the three shareholders who were the widows of Mr. Carlini's deceased brothers as the "Widows".

[7] In the years in question, auto body shops were being operated under the Carlini name at two locations in Windsor, Ontario. Mr. Carlini takes the position

that Collision and Body Shop both carried on separate body shop businesses at both of these locations. To be clear, he is not suggesting that Collision carried on a body shop business at one location and Body Shop carried on a body shop business at the other location. Rather his testimony is that Collision carried on a body shop business at both locations and, at the same time, Body Shop carried on a body shop business at both locations.

[8] The Respondent takes the position that only Collision was carrying on the body shop business. The Respondent argues that Body Shop was inactive. I find that the Respondent's version is the more likely of the two.

[9] Mr. Carlini was very evasive when testifying on this issue. He repeatedly asserted that it was important to distinguish between Collision and Body Shop, yet he provided no plausible means by which I could do so. In his direct testimony he stated that the two companies were working together. Mr. Carlini provided no explanation of how customers, revenue, expenses, employees, equipment or physical space was shared between Collision and Body Shop. He was very evasive when pushed on this point. Then, on the second day of trial, Mr. Carlini suddenly introduced the idea that Collision operated from 8:00 a.m. until 4:30 p.m. and that Body Shop operated from 4:30 p.m. until 11:00 p.m. He provided no explanation as to how this arrangement could possibly work or why he had not mentioned it previously. It appeared to be something that he had just invented on the spot.

[10] Mr. Carlini's explanations are implausible. The five wives of the Carlini brothers were all shareholders of Collision. By contrast, in the years in question only Mr. Carlini and Antonio were shareholders of Body Shop. Thus, while Mr. Carlini and Antonio Carlini had a family interest in both companies, the Widows only had an interest in Collision. It seems very unlikely that the Widows would agree to Body Shop operating what amounted to a competing business out of the same premises as Collision.

[11] Even if Mr. Carlini's explanation had been plausible, I would still not have accepted it as I did not find him to be a credible witness. His testimony was full of inconsistencies, implausible stories and evasive responses. Mr. Carlini would have needed to support his position with documentary evidence or through other witnesses.

[12] In appropriate circumstances, an adverse inference may be drawn against a taxpayer who fails to call a witness to testify as to the other side of a transaction or relationship. I draw an adverse inference from Mr. Carlini's failure to call the

Widows as witnesses. The Widows could have offered significant insight into the question of whether Body Shop was carrying on business or not. Mr. Carlini and Antonio Carlini were fired by the Widows in October 2003. Mr. Carlini did not provide any explanation for their firing. He simply described it as a family problem, although he later described suing Collision for wrongful dismissal. Given the fact that the Widows fired Mr. Carlini, it is not difficult to conclude that their testimony would not have assisted him.

[13] Body Shop was charged with tax evasion in 1990. The trial ended with a conviction in 1992. Collision began carrying on business the following year. These facts strongly suggest that, in the early 1990's, faced with tax and criminal problems in respect of Body Shop, the five Carlini brothers decided to move the body shop business from Body Shop to Collision and that, from that point forward, Body Shop was inactive.

[14] Mr. Carlini entered into evidence a handwritten spreadsheet that he says is Body Shop's financial statements sheet for the year ending July 31, 1997. He relied on this document for other reasons, but it is relevant to this issue. The financial statements are completely inconsistent with the idea that Body Shop carried on business after Collision began its operations. The balance sheet lists no assets other than taxes receivable and states that Body Shop had no income or expenses in the year.

[15] Mr. Carlini was very evasive when asked whether Body Shop had reported income for its 2001, 2002 and 2003 tax years. He testified repeatedly that Body Shop had reported all of its income for the years in question but did not elaborate on what that income was. Ms. Poisson stated that she had reviewed the CRA's records and had determined that Body Shop did not report any income in the years in question. I accept Ms. Poisson's testimony on this point over that of Mr. Carlini and find that Body Shop did not report any income for its 2001, 2002 and 2003 tax years.

[16] Based on all of the foregoing, I find that Body Shop was not carrying on business in the years in question.

B. Appropriations from Body Shop

[17] If Body Shop was not carrying on business, this begs the question of how the money that Mr. Carlini is alleged to have appropriated came to be in Body Shop. I do not need to answer this question. Whatever occurred, the money ended

up in Body Shop's hands. From there, some of the money ended up in Mr. Carlini's hands. All that I need to decide is whether Mr. Carlini appropriated the money he received or whether there was some other reason why he received it.

[18] Ms. Poisson explained that the auditor had concluded that Mr. Carlini had appropriated significant amounts of money from Body Shop. She explained that, during the appeals process, she had reduced the amounts assessed in light of various explanations provided by Mr. Carlini and her own analysis. I am satisfied that the appropriate adjustments were made. After those adjustments were taken into account, \$345,992, \$285,553 and \$87,824 in appropriations remained for Mr. Carlini's 2001, 2002 and 2003 tax years respectively.

[19] Mr. Carlini does not deny receiving money from Body Shop. He raises four arguments. First, he says that he was reassessed for appropriating money from Collision, not Body Shop. Second, he says that some of the funds the Minister believes he appropriated were not paid to him. Third, he says that Body Shop was repaying his outstanding shareholder loan. Finally, he says that Body Shop was reimbursing him for expenses that he incurred on its behalf.

From where were the funds appropriated?

[20] Mr. Carlini takes the position that he was reassessed for appropriating money from Collision, not Body Shop. He submits that there is no evidence that he appropriated any money from Collision and thus the reassessment of the appropriated amounts should be reversed. He says that he came to court expecting to dispute accusations that he appropriated funds from Collision. Without explicitly saying so, Mr. Carlini argues that the Minister has changed the basis of the assessment and that he was unprepared to dispute it. I do not accept Mr. Carlini's position. In my view, he is simply playing games.

[21] I find that Mr. Carlini was fully aware that the issue was whether he appropriated funds from Body Shop. He has been dealing with this matter for years both civilly and criminally. The Respondent provided him with copies of all of the relevant working papers and cheques years before the trial commenced.

[22] The auditor reviewed Body Shop's bank account, totalled all of the cheques that came out of that account that he believed were payable to or for the benefit of Mr. Carlini and assessed Mr. Carlini a benefit on those amounts. The fact that the money came from Body Shop was not a surprise to Mr. Carlini. He signed the cheques.

[23] Mr. Carlini is a shareholder of Body Shop, not Collision. Thus, of the two companies, the only one from which he could have made a subsection 15(1) appropriation was Body Shop.

[24] Mr. Carlini's argument hinges on three T7W-C forms that were issued to him following the audit. Those forms erroneously state that he has been reassessed for appropriating funds from Collision. While I accept that that error may have initially confused Mr. Carlini, I do not accept that he was confused by the time he finished the objection process, let alone by the time he got to trial. While he made a number of statements at trial that might suggest he was confused, I think that confusion was staged for my benefit.

[25] Mr. Carlini clearly knew that he needed to show that he had not appropriated funds from Body Shop. As discussed in detail below, he focused a great deal of his testimony on trying to show that Body Shop owed him money. The only reason to give that testimony would have been to explain why the funds that he took from Body Shop were not appropriations.

[26] While I can certainly see how aspects of the Reply could have been confusing,¹ Mr. Carlini did not argue that the Reply confused him.

[27] Based on all of the foregoing, I find that Mr. Carlini was fully aware of both the issue that was in dispute and what he needed to do to dispute that issue at trial.

Were the funds paid to Mr. Carlini?

[28] Of the amounts that Mr. Carlini is alleged to have appropriated in 2002, \$33,400 was in respect of four cheques payable to an individual named William Oneschuk. Mr. Carlini takes the position that this amount should not have been included in his income. Mr. Carlini did not provide me with any oral testimony on this issue. As a result, I do not know who Mr. Oneschuk is.

[29] The Reply does not contain any assumptions of fact regarding Mr. Oneschuk. Paragraph 14(k) of the Reply states that the Minister assumed that the appropriations were in the form of cheques payable to Mr. Carlini or cheques

¹ Assumption 14(k) refers to the appropriations coming from Body Shop and/or Collision. Paragraph 23 indicates that the appropriations were from Collision as set out in Schedule "D" to the Reply. However, Schedule "D" clearly states that the appropriations were calculated by adding up cheques issued by Body Shop.

payable to his CIBC Visa account. There is no mention of cheques payable to Mr. Oneschuk.

[30] Thus, I am left with the simple fact that Mr. Carlini has been assessed a shareholder benefit under subsection 15(1) in respect of a payment to Mr. Oneschuk. Absent an assumption of fact indicating how Mr. Carlini benefited from Mr. Oneschuk receiving money, the inescapable conclusion is that the amount has been improperly assessed. There is no assumption for Mr. Carlini to demolish. The only evidence before me is that the cheques were not payable to him. That is sufficient to prove on a balance of probabilities that he did not benefit from those cheques. Accordingly, I will remove \$33,400 from Mr. Carlini's 2002 income.

Did Mr. Carlini have an outstanding shareholder loan?

[31] I find that Body Shop did not owe Mr. Carlini any money in 2001, 2002 or 2003. There is simply no credible evidence of the existence of any such debt.

[32] As discussed above, Mr. Carlini introduced into evidence Body Shop's financial statements for the period ending July 31, 1997. Those statements show that Body Shop had shareholder loans payable of \$187,278. This statement does not assist me. The loan is from a time fourteen years before the period in question and, more importantly, the financial statements do not indicate which of Body Shop's shareholders this balance was owed to. As I have not found Mr. Carlini to be credible, I am not prepared to accept his testimony that the loan was owed entirely to him.

[33] Mr. Carlini asserted that the lawyer who had been retained to defend against the 1990 tax evasion charges had insisted on being paid by Body Shop. Mr. Carlini submitted that he and his brothers borrowed \$550,000 from a cousin in Detroit and then advanced those funds to Body Shop so that Body Shop could pay the legal fees. Mr. Carlini did not provide any documentary evidence to support any of this. I note that the 1997 financial statements that Mr. Carlini entered into evidence do not reflect the existence of such a loan. Furthermore, Mr. Carlini seemed to somehow believe that he should be credited for the entire \$550,000 amount despite clearly stating that it had been borrowed by all of the brothers. Based on all of the foregoing, I find that no such loan was made.

[34] Mr. Carlini asserts that, shortly after he was fired, the Widows destroyed all of the records of Body Shop. As a result, he says that he is unable to produce

documents to support his shareholder loan. Again, I draw an adverse inference from Mr. Carlini's failure to call the Widows as witnesses.

[35] I note that, despite the supposed destruction of all of Body Shop's records, Mr. Carlini produced documents that he claims are a series of receipts signed by him acknowledging that each amount he received from Body Shop was a repayment of his shareholder loan. I find it very unlikely that these purported receipts happen to have escaped the supposed destruction of Body Shop's records. As a rule, people who retain records are more likely to keep records proving that they have lent money than to keep records proving that they have been repaid. At best these documents are self-serving. I give these documents no weight.

[36] Based on all of the foregoing, I find that Mr. Carlini did not have an outstanding shareholder loan to Body Shop in the years in question.

Did Mr. Carlini spend money on behalf of Body Shop for which he was reimbursed?

[37] Since I have concluded that Body Shop was not carrying on business in the years in question, I cannot accept that any amount that Mr. Carlini claims to have spent for Body Shop's business purposes was actually spent for those purposes. Therefore, I cannot accept that Body Shop was required to reimburse him for any such expenses.

[38] If I am wrong and Body Shop was carrying on business in the years in question, then I still would have found, for the reasons set out below, that there was insufficient evidence of the expenses in question for me to reduce the alleged appropriations.

[39] Mr. Carlini identified cheques drawn on his personal bank account payable to an individual named Jim Skinner, who he said worked for Body Shop. Mr. Carlini indicated, without explicitly saying so, that Mr. Skinner wanted to be paid under the table. Mr. Carlini explained that he therefore used his personal cheques to pay Mr. Skinner. Mr. Carlini further explained that there was a second individual who also wanted to be paid under the table. Mr. Carlini stated that the cheques that he gave to Mr. Skinner included the money Body Shop owed to the second individual. I draw an adverse inference from Mr. Carlini's failure to call either of these individuals as witnesses. I note that the amounts of many of the cheques are inconsistent with the types of amounts one would expect for an under-the-table payment to two hourly employees. Under-the-table payments are

specifically made to avoid payroll taxes and thus are unlikely to result in payments that have been calculated to the penny. Furthermore, it seems implausible to me that someone who wants to be paid under-the-table would accept payment by personal cheque. In light of all of the foregoing, had I accepted that Body Shop was carrying on business, I would still have found that these amounts were not expended for the benefit of Body Shop.

[40] Mr. Carlini testified that he personally paid the liability insurance for the two auto body locations. He entered two cheques into evidence to support this assertion. The cheques appear to be payable to an insurance company but I have no way of knowing what or who was being insured or even who was liable to pay the insurance. For all I know these could be life insurance payments for Mr. Carlini's personal insurance. I am not going to take Mr. Carlini's word that the insurance was for business purposes. In view of all of the foregoing, had I accepted that Body Shop was carrying on business, I would still have found that these amounts were not expended for the benefit of Body Shop.

[41] Mr. Carlini also claims to have spent significant funds on behalf of Body Shop purchasing season's tickets and playoff tickets for various Detroit-based professional sports teams. Mr. Carlini's testimony on this point was very inconsistent. He asserted that Body Shop used these tickets for promotional purposes. However, at one point he testified that half of the tickets had been for personal purposes. He characterized the purchases as business purchases for which Body Shop needed to reimburse him but, when dealing with unexplained deposits to his personal accounts, he characterized refunds relating to those same tickets and proceeds of sale from disposing of those tickets as being non-taxable personal deposits. Given these inconsistencies and given my overall assessment of Mr. Carlini's credibility, I am unwilling to accept that these ticket purchases were business expenses. Considering all of the foregoing, had I accepted that Body Shop was carrying on business, I would still have found that these amounts were not expended for the benefit of Body Shop.

[42] Mr. Carlini testified that he took money from Body Shop, deposited that money in his personal account and then wrote cheques on that account to pay the sisters-in-law's personal car insurance payments. He testified that a previous audit of Collision had resulted in the deduction of car insurance payments for Collision's shareholders' personal vehicles being disallowed. He explained that, as a result, the sisters-in-law had demanded that he personally pay for their personal car insurance. Even if I accepted this as true, it is unclear to me how it would change the fact that Mr. Carlini appropriated money from Body Shop. It seems to me that,

unless he put the money to use in Body Shop's business, the use that he put the money to is irrelevant. It is enough that he took it.

[43] Mr. Carlini testified that he took \$45,000 from Body Shop and then used that money to pay some taxes that one of the sisters-in-law owed. He offered no documentary evidence to support that fact other than a \$45,000 cheque payable to the CRA. Ms. Poisson testified that she had reviewed the CRA's records and had determined that \$22,042 from the cheque was used to pay Mr. Carlini's personal taxes and the remaining \$22,958 was used to pay a long-overdue tax debt of Body Shop. She explained that one of the adjustments that she made to Mr. Carlini's income was to reduce his appropriations by the amount of the Body Shop tax payment. Mr. Carlini argued that the payment could not have been used to reduce his personal taxes because he did not owe any personal taxes at the time. The documents he directed me to did not support his position. They showed refunds owing to him in April 1997 and May 2002. The payment in question was made in January 2001. Furthermore, even if I had accepted Mr. Carlini's position, no adjustment would have been necessary. He would still have appropriated the money even if he had used it for his sister-in-law's benefit.

[44] Mr. Carlini testified that a number of workers had worked for Body Shop over the Christmas holidays in 2000 and he had paid them using his own funds in 2001. He introduced a number of cancelled cheques which he said represented these payments. Four of the cheques are dated in December or January but one is dated in March and another is dated in July. The March cheque is deposited to the account of a company that appears to sell fruits and vegetables. Mr. Carlini was evasive when I asked him to clarify why he had made these payments personally. I see no reason why I would believe any of Mr. Carlini's story regarding these cheques.

[45] Based on all of the foregoing, I find that Mr. Carlini did not spend any money on behalf of Body Shop in the years in question for which he was not reimbursed.

C. Unexplained Deposits

[46] The auditor conducted a bank deposit analysis of Mr. Carlini's personal bank accounts. A bank deposit analysis is an alternative method of determining income that is sometimes used by the Minister when the Minister believes that a taxpayer's records are an inadequate means of verifying the taxpayer's income. A bank deposit analysis generally involves reviewing each deposit that a taxpayer has

made to his or her bank account. The Minister asks the taxpayer to explain the source of each of those deposits. To the extent that the taxpayer cannot explain the source, or provides an explanation that the Minister does not believe, or admits that the source of the money is taxable and that the income was not reported, the Minister includes the deposits in the taxpayer's income. If the taxpayer is able to satisfy the Minister that the deposit comes from a non-taxable source or has already been reported in the taxpayer's income, the Minister ignores the deposit.

[47] Ms. Poisson explained that she had reviewed the unexplained deposits identified by the auditor and had made one adjustment to back out an amount that she believed had been adequately explained by Mr. Carlini. She further explained that, after taking that adjustment into account, \$74,311 in unexplained deposits remained for Mr. Carlini's 2002 tax year and \$42,993 in unexplained deposits remained for his 2003 tax year. I note that none of the amounts that Mr. Carlini is alleged to have appropriated from Body Shop were included as income under the deposit analysis.

[48] The assumption of fact set out in paragraph 14(i) of the Reply regarding the unexplained deposits is not well phrased. It states that Mr. Carlini received deposits from Collision which he failed to report as income. This suggests at first glance that the deposits were cheques from Collision. That is not, however, how I have interpreted the assumption. As discussed above, much of Collision's revenue was diverted to Body Shop. It is clear to me that the assumption made by both the auditor and Ms. Poisson was that the unexplained deposits were funds that they believed Mr. Carlini diverted from Collision to himself instead of to Body Shop. Read in this context, the assumption in paragraph 14(i) makes sense.

[49] The most common way for a taxpayer to challenge a bank deposit analysis is to provide a credible explanation for the deposits that the Minister has treated as income. This is the approach that Mr. Carlini chose. I will review each of the deposits for which he provided an explanation.

[50] The first unexplained deposit identified by the auditor was an amount of \$10,325.17. Ms. Poisson had already removed this amount after conducting her review. However, I raise the amount because Mr. Carlini's testimony regarding it is an excellent example of the type of inconsistent testimony that caused me to conclude that Mr. Carlini was not credible. In his direct testimony Mr. Carlini testified that he had received a \$10,000 cheque from this brother that he thought had been included in his income. On cross-examination, he testified that that cheque was part of the \$10,325.17 deposit. Then, later in his cross-examination, he

mistakenly thought that he had to explain the full \$20,000 that had been deposited on that day. He did not have to do so as the remaining \$9,674.83 had already been accepted by the auditor. Nonetheless, he changed his story to fit the \$20,000 that he now thought he had to explain. He testified that he remembered winning at least \$20,000 at a casino at that time and taking twenty \$1,000 bills to his bank to deposit. When he later realized that he did not have to explain the full \$20,000, he changed his story yet again and testified that he must have only deposited ten \$1,000 bills. This type of flexibility with the facts was common throughout Mr. Carlini's testimony. Although it does not matter because the amount has already been removed from his income, I find that the deposit included the \$10,000 cheque from Mr. Carlini's brother. The back of the cheque indicates that it cleared the day after the deposit was made. I make this finding only to clarify that the cheque does not need to be accounted for elsewhere.

[51] The second unexplained deposit was an amount of \$9,674.83. Mr. Carlini stated that this was a deposit of his and his wife's paycheques. I note that an identical amount was accepted by the auditor, with the identical explanation, as part of the above-noted \$20,000 deposit. In the circumstances, I cannot see any reason why that explanation would not be acceptable for this deposit. Accordingly, I will reduce Mr. Carlini's 2002 income by \$9,674.83.

[52] The third unexplained deposit is a deposit of \$1,394.19. This cheque ties in with Mr. Carlini's convoluted explanation regarding the car insurance payments that he says he made for his sisters-in-law. Mr. Carlini says that one of his sisters-in-law received a refund of her car insurance premiums and paid it back to him. He has no documentary evidence to support this and did not call the sister-in-law in question as a witness. I am mindful of the fact that most of Collision's revenue came from car insurance companies that were paying to have their customers' cars repaired so I am very reluctant to accept that a deposit of a cheque from a car insurance company was anything more than another diversion of Collision's revenue. Accordingly, I am not prepared to make an adjustment based solely on Mr. Carlini's testimony.

[53] A fourth unexplained deposit is a deposit of \$8,094.55 that Mr. Carlini says also relates to car insurance. In this instance, Mr. Carlini explained that one of his nephews was in a car accident, that the insurance company paid the insurance proceeds to his sister-in-law, who gave them to him to deposit to his account so that he could combine them with his own money to buy his nephew a replacement car. Mr. Carlini did not introduce any documentary evidence to support this position. Again, I am reluctant to treat a deposit of a cheque from a car insurance

company as being anything other than a diversion of Collision's revenue. Mr. Carlini did not call the sister-in-law or his nephew as a witness. I draw an adverse inference from his failure to do so. I am not prepared to make an adjustment based solely on Mr. Carlini's testimony.

[54] A fifth unexplained deposit is a deposit of \$16,371.84 that Mr. Carlini claims was a workers' compensation payment. Mr. Carlini reported \$32,312 in workers' compensation benefits in his 2002 tax return. He testified that this \$16,371.84 deposit represented half of those payments. He did not explain how the payments were made or why approximately half of the payment would have come as a lump sum. He provided no documentary evidence to support his position. The auditor identified a deposit of \$12,082.58 as being a workers' compensation payment. This indicates to me that the auditor was aware of this issue and nonetheless concluded that the \$16,371.84 was not such a payment. I am not prepared to make this adjustment based solely on Mr. Carlini's word.

[55] Mr. Carlini deposited fourteen different money orders to his bank account in 2003. The money orders totalled \$27,213.34. Mr. Carlini testified that in late 2002 he and some friends went gambling in Niagara Falls. He explained that one of those friends was in the produce business. Mr. Carlini said that the friend had introduced him to one of his suppliers. Mr. Carlini could not remember the supplier's last name but said his first name was Jack. Jack needed some money to continue gambling. Mr. Carlini said that he had been having a good night and was flush with cash. He explained that, while he would not normally lend money to a gambler that he had just met, his friend effectively guaranteed the loan by telling him that, if Jack did not repay Mr. Carlini, the friend would repay him out of monies that the friend's business owed Jack. Mr. Carlini stated that, on the strength of this assurance, he lent Jack \$25,000. He explained that the above money orders were the means by which Jack repaid him. The money orders do not contain any description of what they are for. They could easily be payments for work performed by Collision. He did not explain why the repayments totalled more than \$25,000. To the extent that the extra payments might have been interest, he neither pointed out where he had reported that interest income on his return nor conceded that he would have been taxable on the excess. I am not prepared to accept Mr. Carlini's explanation without something more.

[56] Mr. Carlini explained that a number of the deposits related to proceeds from the sale of various tickets to sports events. As set out above, his explanation regarding sports tickets was very inconsistent. Mr. Carlini did not provide any documentary evidence that would have allowed me to confirm his story. His

attempts to show through cross-examination of Ms. Poisson that these amounts were not income were unsuccessful. To put it bluntly, I do not believe anything that Mr. Carlini has told me about sports tickets. Accordingly I am not prepared to make the requested adjustments.

[57] There are two unexplained deposits of cash. One is an amount of \$500 and the other is an amount of \$3,000. Normally, when an auditor performs a deposit analysis, he or she will exclude deposits smaller than a certain amount on the basis that it is unreasonable to expect a taxpayer to remember each small deposit. In the circumstances, the \$500 deposit is small enough that I am willing to exclude it. I am not, however, prepared to give Mr. Carlini the benefit of the doubt on the \$3,000 deposit.

[58] Mr. Carlini asked me to remove a number of other amounts from the list of unidentified deposits. His explanations included explanations that the deposits were refunds of condo fees, rental revenue from a condo in the United States and proceeds from the sale of a half interest in a racehorse. Mr. Carlini did not offer sufficient documentary support for any of these adjustments. Again, I am not prepared to make an adjustment based solely on Mr. Carlini's word.

[59] Based on all of the foregoing, I will reduce Mr. Carlini's income from the unexplained deposits by \$9,674.83 in 2002 and \$500 in 2003.

D. Credit Card Payments

[60] Ms. Poisson explained that the auditor determined that Collision had made significant payments on Mr. Carlini's personal credit card and that he treated these payments as an employment benefit. She explained that the auditor reviewed all of the transactions on Mr. Carlini's credit card and categorized those transactions either as being personal expenses or as relating to Collision's business. Ms. Poisson further explained that the auditor had assessed Mr. Carlini to the extent that the payments made by Collision exceeded the business expenses charged to the card. She noted that, during the appeals process, she had made two types of adjustments to correct what she saw as being potential problems with the auditor's approach. The adjustments that she made were, in my view, entirely appropriate. The first adjustment was to back out any payments that Mr. Carlini had personally made on the assumption that those amounts were to cover his personal expenses. The second adjustment was to back out payments that Body Shop had made as those amounts were already being taxed as appropriations and should not be taxed a second time. After those adjustments were taken into

account, \$211,818, \$310,223 and \$89,711 in payments remained for Mr. Carlini's 2001, 2002 and 2003 tax years respectively.

[61] Mr. Carlini raises a number of issues. First, he argues that certain payments that he made against the credit card have not been accounted for. Second, he argues that the amount assessed should be reduced to account for money that Collision owed to him. Third, he argues that certain charges that were incurred on the credit card were incurred for business purposes. Finally, he argues that charges that were incurred by or for the benefit of others should not have been treated as personal charges.

Have all payments been accounted for?

[62] Mr. Carlini submits that he made other personal payments against the credit card that should have been backed out. He identified twenty-one specific payments.

[63] Two of those payments were supported by duplicate cheques showing that \$25,000 and \$27,000 had been paid from Mr. Carlini's account. These payments appear on the audit working paper which summarizes all of the transactions for the credit card.² I am satisfied that those payments were made by Mr. Carlini and should be removed from the total assessed. As a result, I will decrease Mr. Carlini's 2003 income by \$52,000.

[64] I have reviewed the remaining nineteen payments identified by Mr. Carlini. The credit card number in question ended in "8014". None of the payments that Mr. Carlini relies upon identifies that it is being made against the 8014 account. They either refer to a credit card ending in different numbers (i.e. 0013 or 4016) or they make no reference to a credit card number. Furthermore, none of these payments appears on the audit working paper. That indicates that they were not payments against the 8014 account. Mr. Carlini has not provided me with any documentary evidence showing that these payments were applied to the 8014 account. As a result, I am not prepared to make any adjustments for these remaining nineteen payments.

Should the amount assessed be reduced to account for money that Collision owed Mr. Carlini?

² Working Paper #8680.

[65] Mr. Carlini submits that Collision owed him money in the years in question. Without explicitly saying so, Mr. Carlini is arguing that the amounts assessed against him should be reduced by those outstanding loans. Mr. Carlini appears to be attempting to apply the reasoning of the Federal Court of Appeal decisions in *Chopp v. The Queen*³ and *The Queen v. Franklin*⁴ to employment benefits. I do not have to decide whether the reasoning in *Chopp* and *Franklin* is applicable to employment benefits as Mr. Carlini has failed to satisfy me that Collision owed him money in the years in question.

[66] Mr. Carlini testified that, as of July 31, 2003, Collision owed him \$161,054. This testimony was not supported by any documentary evidence. I did not find Mr. Carlini to be credible so I am not prepared to conclude that such a loan existed solely on the basis of his testimony.

[67] Mr. Carlini testified that he paid \$11,848 of his own money to employees of Collision, was only repaid \$6,000 by Collision and was thus owed \$5,848 by Collision. Mr. Carlini entered receipts from those employees into evidence. The receipts state that the employees were paid by Collision. They do not say anything about Mr. Carlini. Mr. Carlini did not direct me to any evidence of the \$11,848 that he says he advanced or the \$6,000 that he says he was repaid. The audit working papers show Mr. Carlini receiving both \$6,000 and \$11,488 (a number similar to \$11,848) from Collision in October 2003 but not any corresponding funds flowing out in September. In the circumstances, without better documentary evidence, I am not prepared to conclude that Mr. Carlini lent \$5,848 to Collision.

[68] Mr. Carlini testified that he deposited \$27,501.50 (being \$18,000 USD) into Body Shop's bank account in 2002. He went into great detail about how these funds were part of \$325,000 in gambling winnings that he had in Las Vegas and about the various challenges he had in cashing the chips in and getting the cash home. The \$27,501.50 was actually deposited to Collision's bank account, not Body Shop's, which is why I am considering it in this portion of the analysis rather than in the portion dealing with purported loans to Body Shop. The audit working papers contain no detail about the nature of the deposit. Mr. Carlini's gambling story was full of holes and inconsistencies, including the fact that the win he was describing occurred three months after this deposit was made. This is yet another example of Mr. Carlini appearing to simply make stories up to suit his purposes. I am not prepared conclude that Mr. Carlini lent these monies to Collision.

³ 1997 CarswellNat 1768 (FCA).

⁴ 2002 FCA 38.

[69] Mr. Carlini testified that he deposited \$14,500 in Collision's bank account in November 2002 and \$30,000 (consisting of two \$15,000 deposits) in August 2003. He provided copies of the cancelled cheques. I am satisfied that these deposits were made but I have no evidence, besides Mr. Carlini's oral testimony, that would show the purpose of the deposits. Accordingly, I am not prepared to conclude that they were loans.

[70] Mr. Carlini testified that he paid for various petty cash items on behalf of Collision and that those amounts were credited to his wife's shareholder loan account. I am unclear what Mr. Carlini wants me to do with this information. It appears that the transactions have already been accounted for in his wife's account and thus that they would not represent a loan made by Mr. Carlini.

[71] Mr. Carlini testified that his mother had lent approximately \$92,000 to Collision and that he had withdrawn those funds shortly before being fired. I do not have any evidence of the loan being made. Even if I accepted this testimony as true, I cannot see how it would help Mr. Carlini. If Collision owed someone money, it was Mr. Carlini's mother, not him.

[72] Overall, even if I accepted that Mr. Carlini had deposited all of the above amounts to Collision's account, he did not provide any financial records of Collision that would show that the company owed him money. The funds he deposited to Collision's account may have been loans but they may also have been repayments of funds that Collision had advanced to him. If they were loans, they may have remained outstanding throughout the period in question but they may also have been repaid using other means. Furthermore, like the petty cash referred to above, they may already have been accounted for as part of Mr. Carlini's wife's shareholder loan. Without some sort of accounting, I have no way of knowing whether Mr. Carlini had an outstanding loan balance big enough to cover the amounts owing on the credit card or not.

[73] Based on all of the foregoing, I will not be reducing the employment benefit from the credit card payments to account for any loans owing to Mr. Carlini.

Were charges identified as personal charges actually business charges?

[74] Mr. Carlini also made a number of submissions regarding specific charges on the credit card which the auditor identified as being personal but which Mr. Carlini says were business expenses.

[75] I am not going to review each individual expense. Over the course of the trial Mr. Carlini demonstrated a willingness to fabricate explanations, often elaborate ones, when it suited him. My impression is that he did exactly that when describing the credit card charges in question. While many of his explanations seem reasonable at first glance, I am unwilling to accept them without corroborating evidence. For example, Mr. Carlini testified that charges for hotels in London, Ontario were incurred as a part of business trips to meet with insurance companies located there. This seems reasonable on its face. However, there are also many personal reasons why someone might stay in a hotel in London. Mr. Carlini attempted to mislead me too many times for me to be willing to give him the benefit of the doubt in these circumstances.

[76] Based on all of the foregoing, I will not be making any adjustments to the amounts included in Mr. Carlini's income with respect to expenses he says were business expenses.

Were charges incurred by or for the benefit of others properly treated as personal?

[77] Mr. Carlini testified that he had a second credit card on the same account. He stated that he gave that card to his nephew. His nephew worked in the body shop business with him. Mr. Carlini testified that his nephew made personal purchases using the card. He also explained that his nephew regularly took cash advances in the amount of \$1,000 and that he believed his nephew used those cash advances to give \$300 a week to each of the Widows.

[78] Without explicitly saying so, Mr. Carlini appears to be arguing that his nephew and the Widows were using the credit card as a means to appropriate funds from Collision. Mr. Carlini argues that the Minister should have assessed his nephew or the Widows for these amounts. Again, I draw an adverse inference from the fact that Mr. Carlini did not call his nephew or the Widows as witnesses. I am unwilling to make any adjustment for these amounts.

E. Other Issues

[79] Mr. Carlini raised a number of other issues that do not fit into the foregoing categories.

[80] The Minister reassessed Collision to include significant amounts of unreported revenue in its income. Mr. Carlini raised a number of questions about how the Minister calculated that unreported revenue. I do not need to answer those

questions. Collision's reassessments are not before me. Whether the Minister calculated that unreported revenue correctly or not has no bearing on the amounts that were included in Mr. Carlini's income. Even if none of that money should have been included in Collision's income, that does not change the fact that Collision paid for personal expenses incurred on Mr. Carlini's credit card, that Mr. Carlini appropriated funds from Body Shop or that Mr. Carlini has not been able to explain various deposits to his personal bank account.

[81] Mr. Carlini testified that two of his nephews borrowed a total of \$12,000 from Collision and that he repaid their loan in 2002. He provided copies of the cancelled cheques. I do not see how this would affect his income. What essentially happened is that he either lent \$12,000 to his nephews or he gave \$12,000 to his nephews. Neither of those transactions would have any effect on funds that he owed Collision or on his income.

F. Gross Negligence Penalties

[82] There is no question in my mind that the application of gross negligence penalties is appropriate in these circumstances. Mr. Carlini failed to report more than \$1.3 million in income over three years. I am convinced that he knowingly failed to report that income. He reported less than 9% of his income over those years.

[83] Mr. Carlini pled guilty to tax evasion in respect of \$118,287 of unreported income in his 2003 tax year. He tried to convince me that he did not understand what he was admitting to, did not really care that he was sentenced to one year's house arrest because he was unable to leave home for health reasons at the time, and did not care about the \$30,000 fine that was imposed because he was told by both his lawyer and the prosecutor that he did not actually have to pay it. I do not believe any of this. That said, Mr. Carlini's conviction has not influenced my decision to uphold the penalties. I would have upheld them even if he had not been convicted.

Conclusion

[84] Based on all of the foregoing, the appeal of Mr. Carlini's 2001 tax year is dismissed. The appeals of his 2002 and 2003 tax years are allowed and the matters referred back to the Minister for reassessment on the basis that Mr. Carlini's income should be reduced by \$43,074.83 in 2002 and \$52,500 in 2003.

Costs

[85] Costs are awarded to the Respondent. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Respondent shall have a further 30 days to file written submissions on costs and Mr. Carlini shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 27th day of December 2017.

“David E. Graham”

Graham J.

CITATION: 2017 TCC 259
COURT FILE NO.: 2014-3780(IT)G
STYLE OF CAUSE: PHILIP CARLINI v. HER MAJESTY THE QUEEN
PLACE OF HEARING: Windsor, Ontario
DATE OF HEARING: October 19 and December 5 and 7, 2017
REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham
DATE OF JUDGMENT: December 27, 2017

APPEARANCES:

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COUNSEL OF RECORD:

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