Docket: 2016-5215(IT)I

BETWEEN:

PASCAL CYR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of Yann Cyr (2016-5217(IT)I) on September 12 and 13, 2017, at Québec City, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the Appellant:	Marcel Lachance
Counsel for the Respondent:	Julien Dubé-Senécal

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 2010, 2011, 2012, and 2013 taxation years, is dismissed. As for the penalties, the evidence showed that they were well-founded, so they are maintained, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 5th day of January 2018.

"Alain Tardif"

Tardif J.

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Tardif J.

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AND BETWEEN:

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REASONS FOR JUDGMENT

Tardif J.

[1] The appeals concern the appellants' 2010, 2011, 2012, and 2013 taxation years. The parties agreed to proceed with a single hearing on common evidence.

[2] With respect to the 2010 taxation year, the reassessments were done after the usual three-year period; moreover, penalties were imposed on the appellants pursuant to subsection 163(2) of the *Income Tax Act* (the "Act").

[3] For the entire period covered by the reassessments, Pascal and Yann Cyr, the appellants, each held 49% of the shares of the company "Les Toitures Cyr Inc.". The company's activities involved the construction and renovation of properties.

[4] On March 3, 2009, Pascal and Yann Cyr jointly purchased equal shares of a property located at 765 De La Fresnière St., in Québec City. To do so, they spent $155,000.

[5] According to their testimony, it was planned that the company “Les Toitures Cyr Inc.” would acquire the property in question. However, in fact, the appellants purchased it personally. From the time that it was purchased, the objective was to do repairs and improvements to resell it at as soon as possible.

[6] To finance the acquisition, the Caisse populaire des Rivières Chaudières et Etchemin granted them a personal loan for $155,000, the entire amount required for the purchase. The appellants then opened a joint bank account at the same institution.

[7] Pascal Cyr explained that they had to proceed like this because the Caisse populaire did not want to make such a loan to their company. It appears that a personal guarantee was not contemplated. The appellants must, however, have excellent financial credibility since they obtained a loan for the entire purchase price.

[8] Following the purchase, the appellants did $17,850 in renovations. The entire amount invested for the work was assumed by their company; in other words, the company paid for all the expenses to renovate the property that they had purchased in a personal capacity.

[9] After the appellants completed the work, they sold the property on April 26, 2010, i.e. a little more than a year after purchasing it, for $260,000, therefore making a good profit.

[10] Of this $260,000, they deposited $247,136.37 in their joint account through two deposits, the first on April 28, 2010, in the amount of $96,962.20 and the second in the amount of $150,174.17, on April 29, 2010.

[11] The appellants made a joint profit of $92,136.37 ($247,136.37 - $155,000) namely $46,068 each, from the sale of the property.

[12] The income from the profit was not declared by the company or the appellants in their income tax returns. In 2010, Pascal Cyr and Yann Cyr declared total incomes of $27,886 and $29,439, respectively, therefore not taking into account the profit made from the sale of the property on De La Fresnière St.

[13] Between April 29, 2010, and June 22, 2010, the appellants made several withdrawals from the joint account, for a total of $91,698:

- On April 29, 2010, $2,000 was transferred to Yann Cyr's personal account.

- On May 4, 2010, an advance of $30,000, drawn on the joint account, was paid to the company by cheque. In the company's books, this amount was recorded as a $15,000 advance from each of the appellants.

- On May 7, 2010, $9,198 was transferred from the joint account to Pascal Cyr's personal account.

- On May 21, 2010, $15,000 drawn from the joint account was paid to Yann Cyr by cheque.

- On May 21, 2010, $15,000 was paid to Gestion Normand Gouin Inc. by cheque, drawn from the joint account. This payment was for a down payment on the purchase price of land purchased by the company. This amount was recorded in the company's books as an advance from the appellants.

- On June 9, 2010, $13,000 was paid to Stéphane Laroche by certified cheque for the purchase of a "Fifth Wheel" in the name of Pascal Cyr. This amount was drawn from the joint account.

- On June 22, 2010, $7,500 drawn from the joint account was paid to Marc Bertrand by cheque for the purchase of a boat in the name of Yann Cyr.

Pascal Cyr

[14] In 2011, in 2012, and in 2013, Pascal Cyr owned a Ford Focus 2011 and a Kia Sedona 2002. Pascal Cyr's spouse did not own any vehicle during this period. Pascal Cyr also owned two recreational vehicles, namely a "Fifth Wheel" and an ATV; however, he could not use his Ford Focus 2011 or his Kia Sedona 2002 to move his recreational vehicles, in particular the Fifth Wheel.

[15] In the first 95 days of 2011, the company made a 2006 Ford F-350 valued at $41,000 available to Pascal Cyr. In the final 270 days of 2011, 2012, and 2013, the

company made a 2011 GMC Sierra truck, valued at $73,173, available to Pascal Cyr.

[16] In 2011, 58,000 km were put on the Ford F-350 2006 and the GMC Sierra 2011. In 2012, 54,500 km were put on the GMC Sierra 2011 and in 2013, 56,000 km.

[17] Pascal Cyr used the 2006 Ford F-350 and the 2011 GMC Sierra made available to him by the company for personal purposes, including to visit his family in Gaspésie and to transport his "Fifth Wheel" and his ATV. Pascal Cyr did not keep a travel log for the vehicles made available to him by the company and did not declare any automobile benefit in his income tax returns for the taxation years 2011, 2012, or 2013. To justify his claims, he stated that he had family and a business in Gaspésie.

Yann Cyr

[18] In 2011, 2012, and 2013, Yann Cyr did not have any personal vehicle. His spouse had a 2010 Toyota Corolla during this period. Yann Cyr also owned a recreational vehicle, namely a boat, that he stored in Gaspésie.

[19] In 2011, 2012, and 2013, the company made a 2011 Ford F-250 available to Yann Cyr. The vehicle was leased by the company and the monthly lease payments were $1,446.15 ($17,354 annually).

[20] In 2011, 32,500 km were put on the 2011 Ford F-250, in 2012, 60,700 km, and in 2013, 48,500 km.

[21] Yann Cyr used the 2011 Ford F-250 2011 made available to him by the company for personal purposes, including to visit his family in Gaspésie and to transport his boat. Yann Cyr did not keep a travel log for the vehicle made available to him by the company and did not declare any automobile benefit in his income tax returns for the 2011, 2012, or 2013, taxation years.

2010 taxation year

[22] Was the Minister correct to add $46,068 in business income to the income of each of the appellants following the sale of the property that they repaired and improved?

[23] The appellants purchased and sold the property in their own name; the proceeds of the sale were deposited in their joint account. The appellants used these proceeds for personal purposes, including to purchase recreational vehicles, namely a boat and a “Fifth Wheel”.

[24] The only amounts paid to the company were recorded as advances for the benefit of the appellants in the company’s books, with the effect that the appellants could eventually be paid back by the company, tax-free.

[25] In this case, the appellants had the burden of proof with respect to the principal of the assessments under appeal, and the respondent had the burden of proof with respect to the penalties and the limitation period.

[26] In support of the evidence they submitted, the appellants admitted the content of almost all of the relevant documents, hastening to add, however, that the documents had to be interpreted not on their content but rather based on their actual intention, namely that the purchase and sale of the property would be effected through the company and not in a personal capacity.

[27] According to their claims, the appellants submit that the assessments should have been established based on their intention rather than on the true facts, adding that they had not had the time to make the required corrections to their income tax returns for the years at issue.

[28] According to them, the entire responsibility for what they qualify as an error actually results from the negligence and the incompetence of their agents who were entrusted to manage their accounting. The appellants stated that there is no doubt on this point in terms of their instructions to the person responsible for their accounting.

[29] Very critical and excessively harsh toward those who handled their accounting, they repeatedly insisted that they should not have to suffer the consequences of this incompetence and negligence, adding that they were always cooperative, in good faith, and vigilant in the management of their affairs. The appellants argued that their agents had completely ignored their instructions. They placed considerable emphasis on their incompetence and carelessness in managing the accounting of their file.

[30] In fact, the evidence indeed shows that the accounting data of the company was truly an administrative mess. Also, it turned out that the persons who were

taking care of the accounting refused to cooperate during the audit and, specifically, during an audit carried out by Revenu Québec for the Goods and Services Tax (“GST”) and Quebec Sales Tax (“QST”).

[31] Quite surprising, however, they did not have the persons in question testify, which would have allowed the court to carry out its own assessment of the situation with regard to the nature of the mandate conferred and their instructions. It would have been very interesting to compare the appellants’ version to the version of those responsible for managing their accounting.

[32] Pascal Cyr testified; his testimony indicated that he is an articulate person able to express himself in a clear, even refined manner; in other words, this is a person we would qualify as bright, able to understand, analyze, assess, weigh the tax consequences of what he does and does not do in the management of his personal and professional affairs. There is no doubt that the appellants knew very well the significant consequences of what they clearly chose to do.

[33] The appellants invested a lot in all sorts of initiatives intended to show the negligence, intolerance, indeed the incompetence, of the auditors responsible for their file.

[34] According to the evidence, it is appropriate to question whether the appellants intended or indeed sought for there to be confusion. They argued that they had to purchase the property, which generated a significant profit in several months, in a personal capacity, since the financial institution had refused to issue a hypothecary loan to the company that they controlled. They therefore decided to purchase the property in equal shares in a personal capacity. Again, a representative from the financial institution did not come to testify.

[35] On that point, they filed a letter from the financial institution; it would have been relevant to question the person who signed the letter to determine whether the alleged refusal could have been avoided through a personal guarantee.

[36] A simple letter is certainly not a determinative piece of evidence if the person who signed it is not cross-examined. The explanation is even more dubious because the institution granted a loan covering the entire purchase price of the property, attesting to the appellants’ excellent financial credibility.

[37] If the appellants had truly wanted their company to purchase the property that generated a significant profit, why didn’t they deposit the profit in that

company's account, especially since the company in question paid the significant costs for the property's repairs and improvements?

[38] These costs were attributed to their company's operations, reducing the company's tax burden. While increasing the personal profit made on the sale of the property, not only was the profit not attributed to the company, but it was deposited in the appellants' personal joint account to be used in large part to acquire essentially personal property.

[39] With respect to qualifying the profit made, there is no doubt that it was business income. All the facts validate the required criteria and fully satisfy them to be qualified as "business income". The respondent therefore properly added the profits made to each of appellants personally; this was the only conclusion possible based on the facts established by the evidence. In fact, the planning, implementation, and sale were done with the objective to make a personal profit; the intention is unequivocal.

[40] With respect to the other components of the assessments, they are made up by the attribution of benefits resulting from each appellant's use or usage of a motor vehicle for personal purposes.

[41] On this point, the appellants argued that the personal usage was absolutely marginal, namely about 2,500 km per year, a little more than a single trip to Gaspésie every year.

[42] The appellants' claims essentially rest on their word, which they tried to validate with speculation and hypothetical theories, some of which were far-fetched. It would have been simple, easy, and reliable, if they had used a special log just for that purpose, which indeed would comply with the Act in this regard.

[43] Keeping a log is a simple exercise that does not require any particular knowledge, that requires little or no effort, but that is reliable, persuasive, and easy to assess.

[44] I have no doubt that the absence of these logs was voluntary, a decision without a doubt motivated by the chance to eventually downplay the use for strictly personal purposes.

[45] In the event that the use of a vehicle is shared by a company and its officer or officers, this can generate a significant personal benefit for which it is normal

and legitimate to establish a standard to clearly and reliably distinguish between the commercial and personal use, even more so because there can be a strong temptation to attribute personal use to commercial operations.

[46] In Canada, tax liability is based on self-assessment. Self-assessment is based on the State's trust in the human and corporate population.

[47] In consideration of this, every physical or a moral person must file an income tax return every year for its income and expenses, validated by relevant documentation so that it can be audited in accordance with accepted practices.

[48] With regard to the use of a commercial vehicle that is also used for personal purposes, the minimum and essential standard is using a log to collect clear and unequivocal data.

[49] In the absence of adequate annual accounting that is correctly validated by useful and relevant documents, auditing is imprecise, speculative, even arbitrary. The persons affected by an assessment with which they disagree would like to put the auditors on trial to identify the weaknesses of the exercise, thinking they will score points and discredit the validity of the assessment.

[50] The appellant of an assessment has the burden of proof and not the auditor.

[51] Meeting the burden of proof would certainly discredit the proceeding or exercise that led to the contested assessment, but that proceeding alone is not sufficient to discredit the correctness of the assessment under appeal.

[52] It is absolutely essential to establish the validity of ones' claims on a preponderance of the evidence, by showing the weaknesses of the assessment; it is still necessary to establish by a preponderance of coherent, reasonable, reliable, and credible evidence that the true assessment should have been different.

[53] With respect to the vehicle use, the appellants submitted evidence that was entirely unreasonable, arbitrary, and totally implausible.

[54] Among other things, they argue that the vehicles were oversized, not very practical, not very pleasant because of the constant issues with constraints such as the size and length of the parking spaces in public places. Yet, vehicles like this are very comfortable, often very luxurious, practical, and very pleasant for personal trips, and especially very safe for a family.

[55] It would have been wiser, more reasonable, and especially more credible to have assessed the personal mileage more realistically; by calculating a totally ridiculous mileage (2,500 km/year) that is not validated by a log, they themselves discredited their claims at which point the court must validate and accept the assessment of the respondent who, under the circumstances, is reasonable and credible.

[56] The appellants insisted a great deal on the fact that the respondent could have and should have proceeded earlier given that it had all the information required to do so. This argument is not admissible, especially since the evidence clearly established that the respondent proceeded correctly. The respondent can and could establish the assessment in question at any time by showing that there was fault and negligence.

[57] On this point, the respondent met the burden of proof required by showing that the appellants had put a plan into place to avoid their tax obligation. They attempted to discredit the respondent's theory by vehemently stating that the errors and negligence should be attributed to incompetent, negligent, and irresponsible people.

[58] With respect to the burden of proof required for the penalties, the respondent also met the specific burden of proof by showing that the appellants were grossly negligent and committed a serious fault by accepting and tolerating gross irregularities. Indeed, several pieces of evidence suggest that the accounting initiative or complacency was of their own volition.

[59] The evidence establishes that these people clearly acted according to their own instructions; certainly, the appellants accepted and consented at the very least tacitly to the plan that indeed had the effect of substantially reducing their tax burden.

[60] The documentary evidence, the majority of which was admitted by the appellants, is determinative if not catastrophic for the position argued by the appellants. Overall, they contradict valid written instruments; they define themselves as people beyond reproach, and assign complete responsibility for their accounting on their accountants or auditors.

[61] The written instruments in the documentary evidence show, first, the contrary, and, second, certain facts that validate the respondent's position; I am

referring in particular to essentially personal purchases made with the proceeds of sale of the property that generated profit.

[62] Even though the appellants could easily have modified or corrected the alleged errors, they did absolutely nothing.

[63] The preponderance of the evidence strongly indicates that the facts assumed by the respondent are facts that were established by the appellants. The error scenario is an explanation to avoid penalties and the establishment of assessments after the three-year period.

[64] With respect to the other part of the assessments, namely the taxable benefits for the use of a motor vehicle for personal purposes, the preponderance of the evidence militates very strongly in favour of the respondent's position; in fact, in the absence of a reliable and credible log, the respondent took into account the provisions of the Act based on the facts.

[65] It was clear to me that the true facts underlying the notices of assessment are not the result of ignorance, incompetence, or carelessness. If that were the case, everything became so obvious and glaring that the appellants had to and should have made adjustments; they had the knowledge, the time, and the resources to do so; either they themselves were at the root of the situation, or they validated their agents' accounting. In either case, they were totally, personally, liable for the gross negligence committed.

[66] It happens sometimes that an omission or error is overlooked, in particular if it involves trivial details that will have little impact on a future assessment. However, when there are significant elements affecting the tax burden, it is an entirely different matter.

[67] In this case, the fact that expenses were billed to the company for renovations to a property that was acquired in a personal capacity had the effect of reducing that company's tax burden; also, it made it profitable to purchase the property in a personal capacity, in particular to process the transaction.

[68] This is not an isolated trivial act; rather, it involved multiple operations carried out over an extended period, which would normally have given the appellants the time to make a correction or corrections to comply with what they described as their true intentions, namely that the purchase and sale of the property be effected by their company.

[69] I do not accept the appellants' version because it is not credible, or even reasonable, all the more so because there is no valid or credible fact to support their position.

[70] Overall, the appellants want the court to accept their version on the pretext of their good faith and to dismiss and blame all those involved in their case, from the work of the respondent's auditors to the agents who were responsible for their file.

[71] First, the evidence submitted is incomplete and entirely inadequate, and second, it contradicts valid written instruments that were signed by the appellants. The assessments were correctly established based on what was done, and not based on what they would have liked once the audit has begun and was well underway.

[72] The appellants deliberately participated in a bold and totally unacceptable plan whose only objective was to reduce their entire personal tax burden and that of their company in an abusive and malevolent manner. It is entirely improbable that one or more people offering accounting services could have made such gross and obvious errors. They were not trivial or isolated things, to the contrary: this was malevolent planning whose only purpose was to draw significant benefits that were not recorded, personally and for the company that they were responsible for.

[73] With respect to the time chosen to establish the assessments, the appellants have the responsibility to act in a proactive manner rather than gambling with the passage of time and aberrant confusion; they themselves tolerated this, indeed encouraged this, believing without a doubt that they could eventually put all of it on the backs of the agents responsible for managing the accounting of their respective files. According to the appellants' reasoning, all the other parties involved are incompetent and they alone are correct, in good faith, and above reproach.

[74] Finally, I note that the appellants are informed people and, contrary to their claims, they have sufficient knowledge to be aware of and understand the tax consequences of their actions and deeds; moreover, the amounts at issue are significant to the point that indicate true willful blindness.

[75] Their approach was simple and conferred significant tax benefits to them. The appellants hid behind what they qualify as irresponsible and incompetent accounting. These are serious and unproved allegations that establish the

seriousness of the appellants' negligence and substantiate the penalties provided under Act.

[76] For all of these reasons, the appeals in the files of Pascal Cyr, 2016-5215(IT)I, and Yann Cyr, 2016-5217(IT)I, are dismissed. As for the penalties, the evidence showed that they were well-founded, so they are maintained.

Signed at Ottawa, Canada, this 5th day of January 2018.

"Alain Tardif"

Tardif J.

CITATION:	2018 TCC 4
COURT FILE NOS.:	2016-5215(IT)I 2016-5217(IT)I
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PLACE OF HEARING:	Québec City, Quebec
DATES OF HEARING:	On September 12 and 13, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Alain Tardif
DATE OF JUDGMENT:	January 5, 2018

APPEARANCES:

Agent for the Appellants:	Marcel Lachance
Counsel for the Respondent:	Julien Dubé-Senécal

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