

Docket: 2008-2034(IT)G

BETWEEN:

XIU J. GUAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 12, 2011, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Sheherazade Ghorashy

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2002, 2003, 2004, 2005 and 2006 years is dismissed with costs in accordance with the attached Reasons for Judgment.

Signed at Toronto, Ontario, this 10th day of November 2011.

“V.A. Miller”

V.A. Miller J.

Citation: 2011TCC518
Date: 20111110
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XIU J. GUAN,

Appellant,

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REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue under appeal is whether the Appellant had unreported income from the sale of alcohol in each of the 2002 to 2006 taxation years. The Minister of National Revenue (the “Minister”) reassessed the Appellant’s 2002 to 2006 taxation years as follows:

Taxation Year	Reported Income	Unreported Net Income	Gross Negligence Penalties
2002	\$14,500.00	\$ 47,505.61	\$ 4,491.00
2003	\$28,150.00	\$165,969.08	\$21,950.00
2004	\$28,150.00	\$ 39,018.38	\$ 3,978.00
2005	\$0.00	\$ 44,348.47	\$ 2,639.00
2006	\$0.00	\$126,325.11	\$12,763.00

The reassessment for the 2002 taxation year was made beyond the normal reassessment period pursuant to subsection 152(4) of the *Income Tax Act* (the “Act”).

[2] It is the Minister’s position that, during the years under appeal, the Appellant purchased alcohol in New Brunswick and sold it in either Quebec or Ontario for twice¹ her purchase price. Consequently, the Minister estimated that the Appellant’s unreported net income was equal to her purchase price for the alcohol. I note that in the Audit Report², the auditor conjectured that some of the alcohol may have been sent out of the country to Hong Kong where the alcohol purchased by the Appellant

sold for ten times her purchase price. However, the assessment was not based on this assumption.

[3] The witnesses at the hearing were the Appellant; Martin Béliveau, a Sergeant Supervisor with the Sûreté du Québec; Veronica Hatt, an audit team leader with the CRA; William Hatfield, a former store manager with the New Brunswick Liquor Corporation; John Boise, an assistant manager with the New Brunswick Liquor Corporation; and, Richard Potvin, a staff sergeant with the RCMP.

[4] As with many cases where the issue is unreported income, the outcome in this appeal rests on a finding of credibility. After assessing all of the evidence, I have found that the Appellant's evidence is not trustworthy. The evidence I received follows.

[5] The Appellant is also known as "Jenny" and "Hsui Kin Kwan".

[6] During the period under appeal, the Appellant and Weng Sang Wong were co-owners of a Chinese take-out restaurant located in Saint John, New Brunswick. The restaurant was known as the Hong Kong Take-Out Corporation (the "Restaurant").

[7] The Appellant worked in the Restaurant during the period under appeal and until the Restaurant was sold in September 2009. Her reported income in 2002, 2003 and 2004 was from the Restaurant.

[8] The Restaurant did not have a licence to sell alcohol; it did not have the facility to sell alcohol; and, it did not sell alcohol.

[9] During an investigation in 2004, the RCMP discovered that Weng Sang Wong had a marijuana grow operation in a house owned by the Appellant. During the same investigation, the RCMP also learned that the Appellant was purchasing large amounts of expensive alcohol (mostly cognac) with large amounts of "cash". Most of the Appellant's purchases were made at the New Brunswick liquor store #36 ("Store #36") located at the Parkway Mall in Saint John.

[10] In 2004, the RCMP asked the New Brunswick Liquor Corporation for copies of receipts for all sales of alcohol to the Appellant in 2002 to 2004 from Store #36. They also requested that the New Brunswick Liquor Corporation keep copies of receipts from all future sales to the Appellant.

[11] William Hatfield, manager of Store #36 during the period under appeal, testified that he knew the Appellant from her visits to Store #36. He had been

instructed by his head office to keep copies of the receipts from the Appellant's purchases and he, in turn, gave the same instructions to his employees.

[12] Richard Potvin, an RCMP staff sergeant who worked with the Integrated Proceeds of Crime Division, said that, until May 2006, he received all of the requested receipts from the manager of store #36. The RCMP could not identify a substantive offence from the evidence they had gathered and they referred the matter to the Canada Revenue Agency ("CRA").

[13] An auditor with the CRA requested financial information from the Appellant which would allow a net worth assessment to be made. She did not give any of the requested information nor did she respond to a subsequent letter in which the Minister proposed to reassess her 2001 to 2006 taxation years. In cross examination, the Appellant stated that she did not give any bank statements because it would have cost her \$300 to receive copies of her bank statements from each of the banks where she had accounts.

[14] The Appellant's evidence disclosed that, during the period, she had two credit cards and bank accounts at six different banks. The Minister only knew about two of the bank accounts and the two credit cards. He received the Appellant's bank statements for these accounts pursuant to a Requirement to the banks.

[15] In reassessing the Appellant's tax liability for the 2002 to 2006 taxation years, the Minister assumed the facts that I have written above and the following:

- h) in addition to working in the Restaurant, the Appellant was involved in the purchase and resale of liquor;
- i) during the Period Under Appeal, the Appellant purchased high-end liquor in New Brunswick for resale in Quebec and Ontario;
- j) the Appellant transported the liquor she purchased in New Brunswick to Quebec and Ontario;
- k) the Appellant sold the liquor she purchased in New Brunswick at various locations in Quebec and Ontario;
- l) the Appellant deposited money from her liquor sales in Quebec and Ontario into her RBC Account via several Royal Bank of Canada branches;
- m) the aforementioned deposits were made at various Royal Bank of Canada branches along the Appellant's liquor transportation routes from New Brunswick to Quebec and Ontario;

- n) the Appellant made several of her liquor purchases using significant amounts of cash;
- o) the Appellant purchased the majority of the liquor from New Brunswick Liquor Corporation Store #36 located at the Parkway Mall in Saint John, New Brunswick;
- p) New Brunswick Liquor Store #36 is less than 5 kilometers from the Restaurant and less than 1 kilometer from the Royal Bank of Canada which held the Appellant's RBC Account;
- q) the majority of the liquor purchased by the Appellant was Remy Martin XO, Hennessy XO, and Courvoisier;
- r) the liquor purchased by the Appellant was not for personal consumption, gifts, or collection;
- s) the Appellant paid for the liquor in New Brunswick through various methods including her RBC Account, BMO Visa Account, and cash;
- t) the Appellant sold the liquor she purchased in New Brunswick at a mark-up of 100% at various locations in Quebec and Ontario;
- u) the Appellant did not report income with respect to liquor sales in the amounts of \$47,505.61, \$165,969.08, \$39,018.38, \$44,348.47, \$126,325.11 on her income tax returns for the 2002, 2003, 2004, 2005, and 2006 taxation years, respectively;
- v) the Appellant operated her own business;
- w) on October 26, 2005, the Appellant and an associate, Dazhen Lin, were stopped while driving in Quebec by the Sûreté du Québec and found to be in possession of 165 bottles of liquor;
- x) on October 26, 2005, the Appellant was arrested by the Sûreté du Québec and charged for transporting liquor from New Brunswick;
- y) the aforementioned liquor found in the possession of the Appellant by the Sûreté du Québec was worth \$30,412.00 (\$16,515.56 in New Brunswick);
- z) the Appellant's deposits into her RBC Account were significantly greater than what she earned from the Restaurant;
- aa) the Appellant was aware that the deposits into her RBC Account were significantly greater than what she earned from the Restaurant;
- bb) the Appellant used funds from the Restaurant to purchase liquor for resale; and

cc) from December 2005 onwards, the sales and revenue from the Restaurant were deposited into the Appellant's personal RBC Account.

Appellant's Evidence

[16] The Appellant's evidence with respect to the Minister's assumptions was as follows:

(a) She agreed that she purchased alcohol but she denied that she sold it. It was her evidence that she purchased the alcohol for Dazhen Lin who was the manager of the Restaurant. She was helping him and she had no idea that he would sell it. She insisted that it was legal to purchase alcohol and she was only doing what she was told. Later in her testimony, the Appellant stated that she ordered the alcohol from Store #36 on behalf of other people and sometimes she went to the store to purchase it; while on other occasions, other people went to the store to pay for it. She stated that these other people were Vietnamese. She did not purchase the alcohol for personal consumption but for her friends.

(b) She did not transport alcohol to Quebec and Ontario and she has never deposited money into her Royal Bank of Canada (RBC) account through a RBC branch in Quebec. She did occasionally deposit money into her RBC account through RBC branches in Ontario. The reason she gave for making the deposits in Ontario was that her mother and daughter lived there.

(c) The Appellant agreed that some of her purchases of alcohol were made with large amounts of cash while other purchases were made by debit from her RBC account, by cheque and/or by her credit card. She did purchase alcohol with \$10,000 in cash but she could not remember the frequency of the purchases with \$10,000 in cash. She disagreed that the majority of the alcohol purchased was cognac and stated that she purchased various types of alcohol, even red wine.

(d) The Appellant denied that she was with Dazhen Lin when he was arrested in Quebec for transporting alcohol from New Brunswick. It was her evidence that Dazhen Lin had her car but the woman with him was his daughter and not her. She was never arrested and charged by the Sûreté du Québec. She insisted that if she had been charged, she would never have received her Canadian citizenship.

(e) It was impossible that the deposits into her RBC account were significantly greater than what she earned at the Restaurant as there was very little money in her account. She only earned approximately \$25,000 each year from the Restaurant.

(f) The bank account for the Restaurant was at the same RBC branch as her personal account but it was under the name 510594 New Brunswick Inc. She denied that from December 2005 the revenue from the Restaurant was deposited into her personal RBC account.

(g) She stated that her only income in 2002 to 2006 was from the Restaurant.

[17] The Appellant tendered three exhibits:

(a) Her Chinese passport which was issued on March 10, 2003 and expired on March 9, 2008. She said that the passport would demonstrate that she was not in Canada on many occasions when the alcohol was purchased;

(b) A letter dated November 15, 2007 from the Appellant to Store #36 asking for confirmation that:

- (i) She had an account at the store since 2002;
- (ii) She, her friends and Andrew Dazhen Lin purchased alcohol in her name using her account;
- (iii) Her friends used her account while she was not in Saint John.

The letter had a post script which read – “confirming this situation”. It was signed by W. Hatfield.

(c) A letter dated March 15, 2010 from the Appellant to the CRA which basically reiterated the contents of the letter dated November 15, 2007 which was referred to above.

[18] The onus was on the Appellant to show that the Minister’s assessment of income was incorrect. She could have done this by giving evidence to demonstrate that she did not have unreported income or that the amount assessed was too high.³

[19] However, the evidence given by the Appellant was contradicted by the documents and by other witnesses. I found that her evidence was not credible.

[20] She stated that she purchased the alcohol for her friends and yet she did not ask any of her friends to give evidence on her behalf. When asked what benefit she received for making the purchases, she said that she did it so that she would receive

the boxes for free from the liquor store. She used the boxes for take-out orders at the Restaurant. However, it was William Hatfield's evidence that it was not necessary to make a purchase in order to get the boxes from the store and the store did not charge for empty boxes.

[21] Both William Hatfield and John Boise confirmed that the only receipts kept and given to the RCMP were those from purchases made by the Appellant. William Hatfield said that he saw the Appellant in the store with Dazhen Lin but no receipts were kept when others purchased alcohol. John Boise did not remember anyone purchasing alcohol on behalf of the Appellant. He said that, on occasion, people came into the store with the Appellant but it was always the Appellant who purchased the alcohol.

[22] It was John Boise's evidence that the Appellant's purchases were predominately Remy Martin XO and during the period 2002 to 2006, she was the only person who made purchases of large quantities of cognac. This evidence was corroborated by William Hatfield who stated that the majority of the Appellant's purchases were for expensive cognac and she was the only person who purchased cognac in bulk from Store #36. In fact, the store did not carry a large inventory of cognac and the Appellant called the store to order the cognac. Mr. Hatfield ordered the cognac for the Appellant and called her when it came in.

[23] The documentary evidence also showed that the Appellant purchased large quantities of cognac, especially Remy Martin XO. The number of bottles of Remy Martin XO purchased in 2002, 2003 and 2006 was 424, 1473 and 847. There was no evidence of the number of bottles purchased in 2004 and 2005.

[24] Mr. Hatfield stated that the Appellant did not have an account with Store #36. Only businesses which had a licence to sell alcohol had an account with the store. It was his evidence that the contents of the letter dated November 15, 2007 were not true; he doesn't know why he signed the letter; and, at the time, he didn't see anything wrong with signing the letter.

[25] I found that the Appellant's statement that she was not with Dazhen Lin when he was arrested in Quebec was refuted by the evidence given by Martin Béliveau, a Sergeant Supervisor with the Sûreté du Québec. He testified that he participated in the arrest of two people, one man and one woman, on October 26, 2005 near Quebec City on highway 20. The people had 165 bottles of alcohol (mostly cognac) in the car and they were arrested for the transportation of alcohol. He said that the file with respect to this matter has since been destroyed but he still has his notes from the arrest. According to his notes, the woman in the car was its owner who was Hsui Kin

Kwan. The man, Dazhen Lin, was charged and convicted for the transportation of alcohol. Both of the occupants of the car were arrested but the woman was not charged because Dazhen Lin said he was the owner of the alcohol.

[26] I am satisfied from the evidence that the unreported income included in the Appellant's income did not include any amounts for alcohol purchased by others. Likewise, I am satisfied that the purchase price of the alcohol which was seized from Dazhen Lin was not included in the unreported income assessed to the Appellant.

[27] A review of the bank statements for the Appellant's RBC account showed that the deposits into this account totalled \$76,788.63, \$51,553.29 and \$23,271.45 in 2002, 2003 and 2004 respectively. Some of the deposits were made at other branches of the RBC but there was no evidence presented with respect to the location of those branches. As of December 2005, the sales and revenue from the Restaurant were also deposited into the Appellant's RBC account.

[28] Many of the Appellant's answers to questions were evasive and flippant. As an example, when asked to read the portions of her passport which were in a language other than English, she stated that I could consult an immigration officer. The immigration stamps which I could read showed that the Appellant made six visits to Hong Kong in 2003 and one visit to Hong Kong in 2005. In most instances she entered and departed from Hong Kong on the same day. In addition, none of these entries supported the Appellant's evidence that she was out of the country when the purchases of alcohol were made.

[29] My analysis of the evidence, the Appellant's lack of documents, the evasiveness of her evidence and the absence of essential witnesses have lead me to the conclusion that the Appellant has not met the onus on her.

[30] The 2002 taxation year was reassessed beyond the statutory time period and the onus is on the Minister to show that the Appellant, in filing her tax return, made a misrepresentation that is attributable to neglect, carelessness or wilful default or fraud.

[31] In *Lacroix v. R.*⁴, the Federal Court of Appeal discussed how the Minister can discharge the burden of proof in a situation where the taxpayer has been assessed on a net worth basis and beyond the normal assessment 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 explanation he gave was found not to be credible. In those circumstances, the conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence, is inescapable. 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).

33 As Justice Létourneau so aptly put it in *Molenaar c. R.*, 2004 CAF 349, 2004 D.T.C. 6688 (F.C.A.), at paragraph 4:

4. Once the Ministère establishes on the basis of reliable information that there is a discrepancy, and a substantial one in the case at bar, between a taxpayer's assets and his expenses, and that discrepancy continues to be unexplained and inexplicable, the Ministère has discharged its burden of proof. It is then for the taxpayer to identify the source of his income and show that it is not taxable.

[32] I have concluded that the Appellant has not provided a credible explanation for the discrepancy between her reported income and the income assessed by the Minister. The unreported income was significantly greater than her declared income. The Appellant's failure to include the unreported income was not a mere oversight. She was a business person with several years experience. She employed an accountant to help her prepare her tax returns. 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*.

[33] The appeal is dismissed with costs.

Signed at Toronto, Ontario, this 10th day of November 2011.

“V.A. Miller”

V.A. Miller J.

¹ An auditor with the CRA compared the price of each type of alcohol purchased by the Appellant in New Brunswick with its price in Ontario and Quebec. He found that, on average, the alcohol purchased by the Appellant in New Brunswick sold in Ontario and Quebec for twice the price paid in New Brunswick.

² Exhibit R-1, tab 29

³ *Commercial Hotel Ltd. v. M.N.R.*, [1948] Ex. C. R. 108

⁴ 2008 FCA 5625

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STYLE OF CAUSE: XIU J. GUAN AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 12, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: November 10, 2011

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