Docket: 2009-1940(IT)I

BETWEEN:

TERAH-LEIGH DUIVENVOORDE,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Appeal heard on May 6, 2010, at Nanaimo, British Columbia.

Before: The Honourable Justice Gaston Jorré

Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Max Matas

JUDGMENT

In accordance with the attached reasons for judgment, the appeal from the assessment made under the *Income Tax Act* for the 2007 taxation year is dismissed without costs.

I note that the notice of appeal indicates that the appellant is in difficult circumstances.

I wish to point out to the appellant that she can apply to the Canada Revenue Agency (CRA) for interest relief and, depending on the circumstances, the CRA may grant relief.

Information on the provisions can be found in income tax information circular IC07-1, *Taxpayer Relief Provisions*. Form RC4288, *Request for Taxpayer Relief*, can

be used to make a request. The circular, form and other information can be found at: http://www.cra-arc.gc.ca/gncy/prgrms_srvcs/txpyrrlf/menu-eng.html.

Signed at Ottawa, Ontario, this 15th day of November 2011.

"Gaston Jorré"

Jorré J.

Citation: 2011 TCC 525
Date: 20111115
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BETWEEN:

TERAH-LEIGH DUIVENVOORDE,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

REASONS FOR JUDGMENT

Jorré J.

[1] Originally, there was an issue relating to the Canada Child Tax Benefit; however, at the beginning of the hearing the appellant advised the Court that this issue had been resolved.[1]

[2] This appeal was heard under the informal procedure. The original version of these reasons is in English.

[3] The remaining issue relates to the amount of $18,052.06 in business income from a nursery/garden centre in Qualicum Beach (garden centre) included by the Minister of National Revenue (Minister) in the appellant's income.

[4] The appellant's T1 income tax return for 2007 dated October 15, 2008 and received by the Minister on October 20, 2008 shows the appellant as having received $18,052.06 in business income from the garden centre. The Minister included that income in the appellant's initial notice of assessment dated November 10, 2008.

[5] The appellant objected to that initial assessment and the Minister confirmed that initial assessment.

[6] I note that no one took the position that the appellant was an employee of the garden centre.

[1] Transcript, page 5, lines 8 to 10.

[7] The appellant and Erik Duivenvoorde were married in June 2005. They separated in May 2008. Both testified at the hearing.

[8] At the beginning of 2007 the appellant was working as the manager of the flower department at Thrifty Foods. She had worked previously in the flower business when she was younger. She was knowledgeable of the flower business and knew who the suppliers were.

[9] Mr. Duivenvoorde had a horticultural certificate and was knowledgeable about gardening. He had also previously had a flower business in Holland.

[10] The garden centre opened in March 2007 and closed down in its original location in December 2007. It reopened in a new location around Mother's Day of 2008.

[11] Some time around the opening of the garden centre the appellant gave up her job at Thrifty Foods and started to work at the garden centre. Mr. Duivenvoorde also worked at the garden centre.

[12] The revenues and expenses of the business all flowed through a joint bank account belonging to the appellant and Mr. Duivenvoorde. Either of them could sign cheques.

[13] Both of them effectively shared the revenues from the business since they both drew money from the joint account to pay family expenses.

[14] Both the appellant and Mr. Duivenvoorde reported half of the net business income in their tax returns.

[15] The appellant testified that Mr. Duivenvoorde gave all the business information to the accountant who prepared her return and she simply signed the return without reading.

[16] She further testified that she only became aware of the fact that half the business income was included in her return after she got home from meeting the accountant.

[17] At the time, the appellant did not seek to amend her return as a result of this discovery.

[18] However, she did testify that when she asked Mr. Duivenvoorde about the difference in the amount of tax they were paying he said that they would work it out.[2] The testimony at trial does not disclose when this conversation occurred.

[19] Mr. Duivenvoorde testified that he gave all the business information to the accountant, but gave no instructions to the accountant as to how to split the income.

[20] The testimony of the appellant and Mr. Duivenvoorde was diametrically opposed as to what was intended in terms of ownership of the business.

[21] The appellant said that Mr. Duivenvoorde was the sole proprietor.

[22] Mr. Duivenvoorde's testimony was that the plan was for him to help her get the business established, and then for her to take it over while he would go out and get himself another job. He testified that they both made the decision to open the garden centre.

[23] Various elements in the evidence were highlighted in regard to this issue.

[24] Mr. Duivenvoorde had become unemployed either in 2006 or early 2007 and, before the garden centre opened, he attended a program called Community Futures. The program appeared to be designed to help people put together a business plan and seek funding in order to create their own business.

[25] The appellant pointed to the fact that a business plan prepared by Mr. Duivenvoorde as part of the Community Futures program[3] did not in any way suggest that this was anything other than a proprietorship. The plan makes no mention of any partnership.

[26] Mr. Duivenvoorde's testimony was that everything was shown as a proprietorship because this was a requirement of the Community Futures program.

[27] The appellant also testified that the loan made through Community Futures was only in Mr. Duivenvoorde's name; she did acknowledge she had had to sign some documents in respect of the loan because it was guaranteed by a second mortgage against the family house which was jointly owned.

[2] Transcript, page 26, lines 16 to 22.
[3] Exhibit A-5.

[28] Mr. Duivenvoorde was unsure if both names were on the loan itself as opposed to documents relating to the second mortgage, but conceded it might be in his name only.

[29] I note that there was no disagreement that it was intended that both the appellant and Mr. Duivenvoorde would work in the business.

[30] While there was disagreement as to the exact nature of the role of both, there was no disagreement that they both played a significant role in operating the business during 2007. At the very least, the appellant ran the flower side of the business.

[31] In general, the evidence regarding intentions as to whose business it was intended to be and what the overall intentions were is contradictory and ambiguous.[4]

[32] The Minister alleges that there was a partnership between the appellant and Mr. Duivenvoorde.

[33] The British Columbia *Partnership Act*[5] states: "Partnership is the relation which subsists between persons carrying on business in common with a view of profit."

[34] Whatever the intention, what actually happened is clear and it is unnecessary for me to make findings on the parties' original intentions.

[35] There was a business. There was an intention to make a profit and it was carried out in common.

[36] Both spouses made contributions. The appellant gave up her existing job and worked at the garden centre; the husband worked at the garden centre. Property belonging to both of them was used to guarantee a loan. One or both took out the loan.

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[4] For example, there was debate about provisions of the separation agreement (Exhibit A-1), and whether the affirmation at paragraph U on page 4 that the garden centre is being operated as a proprietorship of the husband is proof that it had always been his alone or is simply a statement of the fact that at that point in time he was operating it alone. Similarly, there was debate as to the meaning of paragraph 21 on page 7 whereby the appellant transferred and assigned to Mr. Duivenvoorde all of her rights and interest in the garden centre and Mr. Duivenvoorde assumed responsibility for any debts and obligations of the garden centre. Neither of these two provisions is decisive in itself. On its face, the affirmation at paragraph U is a statement of the current situation and does not answer the question of who has ownership rights. Similarly, while on its face the transfer of the wife's rights and interest in the garden centre seems to suggest that she had property rights, it could of course have been put in for greater certainty. Similarly, a person may or may not carry out a business plan as stated or use a loan in the manner stated to the lender.

[5] R.S.B.C. 1996, c. 348, Part 1, section 2.

[37] Both spouses could write cheques, both had access to the business account and both used money from the account to pay family expenses.

[38] The appellant was not an employee. In addition, the appellant's role in the business was unrelated to her contribution to the running of the household.

[39] In the circumstances, I do not see how I can reach any conclusion other than that there was a partnership between the appellant and Mr. Duivenvoorde.

[40] In her notice of appeal[6] and at the hearing the appellant sought to have the quantum reduced. At the hearing she stated that she felt it was unfair that she wound up with a higher tax bill than Mr. Duivenvoorde.[7]

[41] However, there is nothing in the evidence that would suggest any basis for a split of the partnership income other than on a fifty-fifty basis.

[42] Accordingly, I must dismiss the appeal.

Signed at Ottawa, Ontario, this 15th day of November 2011.

"Gaston Jorré"

Jorré J.

[6] See the last paragraph of the notice of appeal dated May 25, 2009.
[7] This appears to be the result of the fact that she was working at Thrifty Foods in the earlier part of the year whereas, apparently, Mr. Duivenvoorde had no other job during the year.

CITATION:	2011 TCC 525
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PLACE OF HEARING:	Nanaimo, British Columbia
DATE OF HEARING:	May 6, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	November 15, 2011

APPEARANCES:

For the appellant:	The appellant herself
Counsel for the respondent:	Max Matas

COUNSEL OF RECORD:

For the appellant:	
Name:	
Firm:	
For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario