Docket: 2010-3246(IT)G

BETWEEN:

JAN OSINSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on August 20, 21, 22 and 23, 2012, and
January 22, 23, 24 and 25, 2013, at Toronto, Ontario.

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Yan David Payne and Richard Yasny
Counsel for the Respondent:	Elizabeth Chasson and Jenna L. Clark

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JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2001 and 2002 taxation years are allowed, and the reassessment dated August 9, 2010, is vacated.

Costs are awarded to the Appellant.

Signed at Ottawa, Canada, this 27th day of February 2013.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2013 TCC 71
Date: 20130227
Docket: 2010-3246(IT)G

BETWEEN:

JAN OSINSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] The Appellant was assessed unreported income of $2,697,914 and $55,059 and gross negligence penalties of $390,049 and $7,983 for the 2001 and 2002 taxation years respectively pursuant to reassessments dated August 9, 2010, on the basis he received a shareholder appropriation pursuant to subsection 15(1) of the *Income Tax Act* (the "*Act*") or, in the alternative, on the basis these sums were employment income from 1457223 Ontario Limited operating as Impact Services ("145") or were benefits conferred on him by another person pursuant to subsection 246(1) of the *Act*.

[2] The issues to be decided in this matter are whether the Appellant was properly assessed the income and gross negligence penalties above and whether the reassessments dated August 25, 2008, as amended after the Objection stage on August 9, 2010 against him for the 2001 and 2002 taxation years are statute barred under the *Act* pursuant to subsection 152(4).

[3] The facts not in dispute or clear from the evidence are the following applicable to the taxation years in dispute. The Appellant was a resident of Toronto and married

to one Barbara Osinski who was at least a 50% shareholder of 145 although it is in dispute as to whether she was the sole shareholder or not and whether the Appellant was a shareholder or not. The Appellant was the sole director and officer of 145, an Ontario corporation amalgamated on January 2, 2001 by articles of amalgamation pursuant to which four corporations were amalgamated; namely Impact Demolition & Restoration Management Inc., Planland Contracting Limited, Plan A Services Inc. and Impact Demolition Services Limited (the "Predecessor Corporations").

[4] 145 carried on business at a location municipally known as 89 Shorncliffe Road in the Etobicoke area of Toronto (the "Premises"), which was owned by Barbara Osinski. Of the four offices located at the Premises, Barbara Osinski occupied the largest office, J.M., the office manager of 145 another office, A.G., an engineer and Vice-President who assisted Barbara with estimating, another office and the fourth by the Appellant although it is in dispute as to whether others also shared his office and the one desk located within it. An office without a door in the rear section of the building was also constructed and used by the son of the Appellant and Barbara Osinski, one N., starting in 2002.

[5] An audit was conducted by the Workplace Safety and Insurance Board ("WSIB") under the *Workplace Safety and Insurance Act* of Ontario relating to the periods 2001 and 2002 pursuant to which 145 and the Appellant as its director were charged with various violations of such Act including several charges relating to a failure to disclose the full extent of 145's payroll, in effect in the amount of $5,844,425 for the period from March 1, 2001 to January 7, 2003, as effectively admitted by the Appellant in an Agreed Statement of Facts signed as part of a plea bargain with the WSIB. Based on the WSIB audit and plea bargain, the Canada Revenue Agency ("CRA") audited 145 and concluded, mainly relying upon the WSIB unreported payroll assessment and on a "Profit Sharing Analyses" document seized during the WSIB audit that led them to conclude unreported sales of two of the Predecessor Corporations which continued to operate were deposited into accounts as a scheme to hide 145's unreported income and were appropriated or found their way into the Appellant's hands thus resulting in the reassessments against the Appellant being appealed in this matter.

[6] It should be noted that only the Appellant and not his spouse was reassessed as having received the shareholder benefits or income from the unreported sales of 145 and that 145 did not object to or pursue an appeal of the assessment against it for unreported income and penalties.

[7] For greater certainty, it should be noted that the Appellant was reassessed unreported income of $5,372,074 for 2001 and $104,815 for 2002 with interest and penalties on those amounts which reassessment was amended after the Appellant filed a notice of objection so as to reassess the Appellant's unreported income of $2,697,914 and $55,059 and gross negligence penalties of $390,049 and $7,983 for the 2001 and 2002 taxation years on the basis that 145 should have been treated as reporting the unreported sales net of the Cost of Sales for the labour assessed as unreported payroll. In effect, CRA gave the Appellant credit for the amount of the payroll it says 145 failed to report as a deduction from the unreported sales it had assessed 145 and no other amounts, the sufficiency of which is also in issue between the parties.

[8] As suggested in the above summary of facts, it is clear that there was substantial disagreement between the parties as to many of the facts assumed by the Respondent in its Reply to the Amended Notice of Appeal (the "Reply"), including whether the Appellant was a shareholder, whether the difference between the unreported sales and unreported payroll of 145 was correctly calculated as this is the basis for the amounts assessed against the Appellant and whether they were in fact the sales of 145 or other entities, whether the Appellant was in charge of the financial and administrative functions of 145 and hence the role of the Appellant and his spouse in 145, and whether in fact any funds were in fact appropriated by or for the benefit of the Appellant or his spouse, Barbara Osinski. There was a large amount of contradictory evidence in connection with these matters heard in this appeal and the credibility of many of the witnesses are in issue, although it is safe to say that many of the witnesses had credibility problems on at least some of the issues but not all. All of these issues relating to the assumptions made by the Minister of National Revenue (the "Minister") in its Reply filed as part of the pleadings in this matter must be determined to the extent necessary and will be addressed in the analyses of the facts as they relate to the applicable law in this matter. I will first discuss the applicable law in this matter including the issue of who has the burden of proof relative to the issues in dispute.

The Law

1. Appropriation of Funds

[9] The Minister relies on subsection 15(1) as the basis for its shareholder appropriations argument, sections 3, 5, 6 and 9 as the basis for its income from office or employment argument and subsection 246(1) as the basis for its conferred taxable benefit argument which provisions are set out below:

> **Benefit conferred on shareholder**
>
> **15.** (1) Where at any time in a taxation year a benefit is conferred on a shareholder, or on a person in contemplation of the person becoming a shareholder, by a corporation otherwise than by
>
> (*a*) the reduction of the paid-up capital, the redemption, cancellation or acquisition by the corporation of shares of its capital stock or on the winding-up, discontinuance or reorganization of its business, or otherwise by way of a transaction to which section 88 applies,
>
> (*b*) the payment of a dividend or a stock dividend,
>
> (*c*) conferring, on all owners of common shares of the capital stock of the corporation at that time, a right in respect of each common share, that is identical to every other right conferred at that time in respect of each other such share, to acquire additional shares of the capital stock of the corporation, and, for the purpose of this paragraph,
>
> (i) where
>
> (A) the voting rights attached to a particular class of common shares of the capital stock of a corporation differ from the voting rights attached to another class of common shares of the capital stock of the corporation, and
>
> (B) there are no other differences between the terms and conditions of the classes of shares that could cause the fair market value of a share of the particular class to differ materially from the fair market value of a share of the other class,
>
> the shares of the particular class shall be deemed to be property that is identical to the shares of the other class, and

(ii) rights are not considered identical if the cost of acquiring the rights differs, or

(*d*) an action described in paragraph 84(1)(*c.1*), 84(1)(*c.2*) or 84(1)(*c.3*),

the amount or value thereof shall, except to the extent that it is deemed by section 84 to be a dividend, be included in computing the income of the shareholder for the year.

Income for taxation year

3. The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(*a*) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

(*b*) determine the amount, if any, by which

(i) the total of

(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and

(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,

Exceeds

(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

(*c*) determine the amount, if any, by which the total determined under paragraph (*a*) plus the amount determined under paragraph (*b*) exceeds the total of the deductions permitted by subdivision e in computing the taxpayer's income for the year (except to the extent

that those deductions, if any, have been taken into account in determining the total referred to in paragraph (*a*), and

(*d*) determine the amount, if any, by which the amount determined under paragraph (*c*) exceeds the total of all amounts each of which is the taxpayer's loss for the year from an office, employment, business or property or the taxpayer's allowable business investment loss for the year,

and for the purposes of this Part,

(*e*) where an amount is determined under paragraph (*d*) for the year in respect of the taxpayer, the taxpayer's income for the year is the amount so determined, and

(*f*) in any other case, the taxpayer shall be deemed to have income for the year in an amount equal to zero.

…

Income from office or employment

5. (1) Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year.

Loss from office or employment

(2) A taxpayer's loss for a taxation year from an office or employment is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying, with such modifications as the circumstances require, the provisions of this Act respecting the computation of income from that source.

Amounts to be included as income from office

6. (1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable

Value of benefits

(*a*) the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment, except any benefit

(i) derived from the contributions of the taxpayer's employer to or under a deferred profit sharing plan, an employee life and health trust, a group sickness or accident insurance plan, a group term life insurance policy, a pooled registered pension plan, a private health services plan, a registered pension plan or a supplementary unemployment benefit plan,

(ii) under a retirement compensation arrangement, an employee benefit plan or an employee trust,

(iii) that was a benefit in respect of the use of an automobile,

(iv) derived from counselling services in respect of

(A) the mental or physical health of the taxpayer or an individual related to the taxpayer, other than a benefit attributable to an outlay or expense to which paragraph 18(1)(*l*) applies, or

(B) the re-employment or retirement of the taxpayer, or

(v) under a salary deferral arrangement, except to the extent that the benefit is included under this paragraph because of subsection 6(11);

[none of the exceptions apply]

Personal or living expenses

(*b*) all amounts received by the taxpayer in the year as an allowance for personal or living expenses or as an allowance for any other purpose, except

[none of the exceptions apply]

…

Director's or other fees

(*c*) director's or other fees received by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment;

[none of the remaining provisions were argued so are not included]

…

Income

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

Loss

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

Gains and losses not included

(3) In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

…

Benefit conferred on a person

246.(1) Where at any time a person confers a benefit, either directly or indirectly, by any means whatever, on a taxpayer, the amount of the benefit shall, to the extent that it is not otherwise included in the taxpayer's income or taxable income earned in Canada under Part I and would be included in the taxpayer's income if the amount of the benefit were a payment made directly by the person to the taxpayer and if the taxpayer were resident in Canada, be

(*a*) included in computing the taxpayer's income or taxable income earned in Canada under Part I for the taxation year that includes that time; or

(*b*) where the taxpayer is a non-resident person, deemed for the purposes of Part XIII to be a payment made at that time to the taxpayer in respect of property, services or otherwise, depending on the nature of the benefit.

[10] The following provisions of the *Act* are relevant to the issues of whether the reassessments are statute barred and the issue of penalties assessed.

Assessment and reassessment

152.(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(*a*) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

(*b*) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and

(i) is required pursuant to subsection 152(6) or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in that subsection on or before the day referred to therein,

(ii) is made as a consequence of the assessment or reassessment pursuant to this paragraph or subsection 152(6) of tax payable by another taxpayer,

(iii) is made as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length,

(iii.1) is made, if the taxpayer is non-resident and carries on a business in Canada, as a consequence of

(A) an allocation by the taxpayer of revenues or expenses as amounts in respect of the Canadian business (other than revenues and expenses that relate solely to the Canadian business, that are recorded in the books of account of the Canadian business, and the documentation in support of which is kept in Canada), or

(B) a notional transaction between the taxpayer and its Canadian business, where the transaction is recognized for the purposes of the computation of an amount under this Act or an applicable tax treaty.

(iv) is made as a consequence of a payment or reimbursement of any income or profits tax to or by the government of a country other than Canada or a government of a state, province or other political subdivision of any such country,

(v) is made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66, or

(vi) is made in order to give effect to the application of subsection 118.1(15) or 118.1(16);

(*c*) the taxpayer or person filing the return has filed with the Minister a waiver in prescribed form within the additional 3-year period referred to in paragraph (*b*); or

(*d*) as a consequence of a change in the allocation of the taxpayer's taxable income earned in a province as determined under the law of a province that provides rules similar to those prescribed for the purposes of section 124, an assessment, reassessment or additional assessment of tax for a taxation year payable by a corporation under a law of a province that imposes on the corporation a tax similar to the tax imposed under this Part (in this paragraph referred to as a "provincial reassessment") is made, and as a consequence of the provincial reassessment, an assessment, reassessment or additional assessment is made on or before the day that is one year after the later of

(i) the day on which the Minister is advised of the provincial reassessment, and

(ii) the day that is 90 days after the day of sending of a notice of the provincial reassessment.

…

Alternative basis for assessment

152.(9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act

(*a*) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and

(*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

…

False statements or omissions

163.(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of

(*a*) the amount, if any, by which

(i) the amount, if any, by which

(A) the tax for the year that would be payable by the person under this Act

exceeds

(B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year

if the person's taxable income for the year were computed by adding to the taxable income reported by the person in the person's return for the year that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission and if the person's tax payable for the year were computed by subtracting from the deductions from the tax otherwise payable by the person for the year such portion of any such deduction as may reasonably be attributable to the false statement or omission

exceeds

(ii) the amount, if any, by which

(A) the tax for the year that would have been payable by the person under this Act

exceeds

(B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year

had the person's tax payable for the year been assessed on the basis of the information provided in the person's return for the year,

(*b*) [Repealed, 1994, c. 7, Sch. VII, s. 17(1)]

(*c*) the total of all amounts each of which is the amount, if any, by which

(i) the amount that would be deemed by subsection 122.61(1) to be an overpayment on account of the person's liability under this Part for the year that arose during a particular month or, where that person is a cohabiting spouse or common-law partner (within the meaning assigned by section 122.6) of an individual at the end of the year and at the beginning of the particular month, of that individual's liability under this Part for the year that arose during the particular month, as the case may be, if that total were calculated by reference to the information provided

exceeds

(ii) the amount that is deemed by subsection 122.61(1) to be an overpayment on account of the liability of that person or that individual, as the case may be, under this Part for the year that arose during the particular month,

(*c.1*) the amount, if any, by which

(i) the total of all amounts each of which is an amount that would be deemed by section 122.5 to be paid by that person during a month specified for the year or, where that person is a qualified relation of an individual for the year (within the meaning assigned by subsection 122.5(1)), by that individual, as the case may be, if that total were calculated by reference to the information provided in the prescribed form filed for the year under section 122.5

exceeds

(ii) the total of all amounts each of which is an amount that is deemed under section 122.5 to be paid by that person or that qualified relation during a month specified for the year,

(*c.2*) the amount, if any, by which

(i) the amount that would be deemed under subsection 122.51(2) to be paid on account of the person's tax payable under this Part for the year if the amount were calculated by reference to the information provided in the return

exceeds

(ii) the amount that is deemed under subsection 122.51(2) to be paid on account of the person's tax payable under this Part for the year,

(*c.3*) the amount, if any, by which

(i) the total of all amounts each of which is an amount that would be deemed by subsection 122.7(2) or (3) to be a payment on account of the person's tax payable under this Part or another person's tax payable under this Part for the year if those amounts were calculated by reference to the information provided in the return

exceeds

(ii) the total of all amounts each of which is an amount that is deemed by subsection 122.7(2) or (3) to be a payment on account of the person's tax payable under this Part and, where applicable, the other person's tax payable under this Part for the year,

(*d*) the amount, if any, by which

(i) the amount that would be deemed by subsection 127.1(1) to be paid for the year by the person if that amount were calculated by reference to the information provided in the return or form filed for the year pursuant to that subsection

exceeds

(ii) the amount that is deemed by that subsection to be paid for the year by the person,

(*e*) the amount, if any, by which

(i) the amount that would be deemed by subsection 127.41(3) to have been paid for the year by the person if that amount were calculated by reference to the person's claim for the year under that subsection

exceeds

(ii) the maximum amount that the person is entitled to claim for the year under subsection 127.41(3),

(*f*) the amount, if any, by which

(i) the amount that would be deemed by subsection 125.4(3) to have been paid for the year by the person if that amount were calculated by reference to the information provided in the return filed for the year pursuant to that subsection

exceeds

(ii) the amount that is deemed by that subsection to be paid for the year by the person and

(*g*) the amount, if any, by which

(i) the amount that would be deemed by subsection 125.5(3) to have been paid for the year by the person if that amount were calculated by reference to the information provided in the return filed for the year pursuant to that subsection

exceeds

(ii) the amount that is deemed by that subsection to be paid for the year by the person.

…

Burden of proof in respect of penalties

162.(3) Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[11] Subsection 15(1) taxes a person who is a shareholder of a corporation and has a benefit conferred on him by the corporation. The Appellant argues that both these requirements have not been met for the subsection to apply.

[12] Sections 3, 5 and 6 are general taxing provisions that require a taxpayer to include any income for the year (section 3), including income from office or employment which is salary, wages and other remuneration (section 5) and specific amounts from office or employment as set out in section 6 which include in paragraph (b) all amounts received by the taxpayer in the year as an allowance for personal or living expenses or for any other purpose not excepted therein and in paragraph (c) directors fees or other fees received by the taxpayer by virtue of an office or employment. Although section 6 refers to other more specific items that would be included in amounts received from office or employment, no specific arguments were made by the Respondent in this regard and any arguments made were in the general sense captured by the above paragraphs.

[13] Subsection 9 includes into income a taxpayer's income from a business or property for the year, presumably to cover the possibility that the Appellant may have been in business for his own account in respect to the assessed amounts.

[14] Subsection 246(1) is a catch-all provision that basically provides that if the taxpayer receives a benefit conferred by another person, directly or indirectly, that was not otherwise included in his income or taxable income pursuant to other provisions of the *Act*, then such amount is included in the taxpayer's income if it would be had he received it directly from the person. In effect, the Minister says that if the Corporation made payments to or conferred other benefits on the Appellant that would not be included as a shareholder benefit pursuant to subsection 15(1) above nor as income from an office or employment or business pursuant to sections 3, 5, 6 or 9 above, then they are caught by subsection 246(1).

[15] Subsections 152(4) and (9) are the basis for permitting the CRA to reassess the Appellant beyond the normal three-year period of the initial assessment and there is no dispute the onus is on the Minister to prove the Appellant made a representation that is attributable to neglect, carelessness or wilful default or has committed a fraud in filing his return or supplying information.

[16] Subsection 163(2) contains the gross negligence penalty provisions relied upon by the Minister to effectively assess a 50% penalty on the amount of tax that would have additionally been charged had the unreported amount been reported but was not and the person knowingly made or due to gross negligence was involved in making a

false statement or omission in a return. The onus of establishing that such person knowingly or under circumstances amounting to gross negligence was so involved is on the Minister pursuant to subsection 163(3).

2. Burden and Standard of Proof

[17] There is really no dispute as to who bears the burden of proof in the issues in dispute in this matter although there is disagreement as to what constitutes sufficient evidence to meet the standard of proof related to such burden.

[18] With respect to the main issue of whether the reassessment against the Appellant is correct or not, both sides have relied on the established case law set out by the Supreme Court of Canada in *Hickman Motors Limited v. Canada*, 97 DTC 5363 (S.C.C.) which has been relied upon by the Federal Court of Appeal decisions in *House v. Canada*, 2011 FCA 234, [2012] 1 C.T.C. 13 (F.C.A.) and *McMillan v. Canada*, 2012 FCA 126, 2012 DTC 5105 (F.C.A.), argued by the Appellant and which I had cause to summarize in *Sandy Kozar v. Her Majesty the Queen*, 2010 TCC 389, 2010 DTC 1251, relied upon by the Respondent at paragraphs 27 and 28:

> [27] As I stated above and as confirmed by the Supreme Court of Canada in *Hickman Motors Ltd. v. Canada*, [97 DTC 5363] [1997] 2 S.C.R. 336, relying on its decision in *Johnston v. Canada (Minister of National Revenue - M.N.R.)*, [3 DTC 1182] [1948] S.C.R. 486, the onus is on the Appellant to demolish all the exact assumptions made by the Minister in supporting the reassessments and no more and such initial onus is met where the Appellant makes out at least a *prima facie* case. As the Appellant pointed out in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, the Supreme Court of Canada confirmed that there is only one standard of proof in civil cases and that is proof on a balance of probabilities, the standard of proof necessary to establish a *prima facie* case. In paragraph 49 of such decision, Justice Rothstein went on to say:
>
> > 49 … In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not than an alleged event occurred.
>
> [28] As confirmed in paragraph 94 of *Re Hickman Motors* above, the onus is a shifting onus:
>
> > 94 Where the Minister's assumptions have been "demolished" by the appellant, "*the onus shifts to the Minister to rebut the prima facie case*" made out by the appellant and to prove the assumptions: …

[19] The Appellant argues that in the case at hand, where the Appellant is effectively being asked to prove a negative – that it did not receive funds or a benefit from 145 - that the Appellant's oral evidence denying same should be sufficient to meet that standard of proof relying on the *House* decision above of the Federal Court of Appeal, where at paragraph 60 thereof, the Court held that the Court must look to evidence on the part of the Appellant demolishing the Minister's assumptions, not for positive evidence that the Appellant had not received the funds. The Respondent argues that a mere denial is not sufficient and that the Appellant must tender credible evidence to support a position that he did not appropriate funds from 145.

[20] With respect to both parties, the law in my opinion is simply as stated in *F.H. v. McDougall* above by Justice Rothstein in paragraph 49 and I repeat, "the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred".

[21] All relevant evidence must be scrutinized including oral evidence not necessarily supported by other documentation. In *House*, the Court was clear that oral evidence cannot be presumed to be of insufficient quality where a finding of credibility was not made as to the witnesses' testimony. The Court specifically found at paragraph 62 that the trial judge erred in that "… the appellant had offered evidence which, unless disbelieved or rebutted, was capable of establishing a *prima facie* case 'demolishing' the Minister's assumptions".

[22] Accordingly, the Appellant is correct is taking the view that credible oral evidence is sufficient to demolish the Minister's assumptions and in fact the Respondent agreed with this position in paragraph 16 of its written submissions wherein it stated:

> 16. … The appellant must tender credible evidence to support a position that he did not appropriate funds from 1457223 Ontario Limited. …

[23] Clearly the law is clear that credible evidence, whether oral or documentary, is required and that is why, as Justice Rothstein stated in *F.H. v. McDougall* above, the judge "must scrutinize the relevant evidence to determine whether it is more likely than not that an alleged event occurred". The parties are not in my view stating different understandings of the standard of proof, only their different views as to the credibility of the evidence offered, which of course is my role to scrutinize.

[24] With respect to the issues as to whether the assessment against the Appellant is statute barred, there is no dispute that the onus of proving that the taxpayer made any representation that is attributable to neglect, carelessness or wilful default or fraud as contemplated under subsection 152(4) is on the Minister. Likewise, under subsection 163(3) of the *Act*, the onus is on the Minister to establish the facts necessary to justify the assessment of penalties under subsection 163(2).

[25] In considering the fact the onus falls on different parties for different issues above, it is clear that even if the taxpayer fails to meet the onus to rebut the assumptions of the Minister in relation to the correctness of the reassessment against the Appellant in issue here that the possibility is still open to find that the Appellant may still succeed in not having statute-barred years opened for reassessment or not being assessed gross negligence penalties. In the case at hand, however, as the Respondent has argued, the facts are all intertwined between the issues and due to the nature of the assumptions that the Appellant failed to report income he is assumed to have appropriated from 145 through the scheme described, the onus of the Minister with respect to the statute-barred years and gross negligence penalties will realistically be met or not depending on whether the Appellant is found to have appropriated the funds and not reported them.

Position of the Parties

[26] The Appellant takes the position the Appellant's spouse was the sole shareholder of 145 and hence he cannot be assessed a shareholder benefit under subsection 15(1) of the *Act* and that he never received any additional income from 145 or to which 145 was entitled that is employment income to him other than the income reported in his tax returns of $42,192 in 2001 and $110,249 in 2002 (the latter year which included some dividend income). In addition, the Appellant denies that 145 had unreported sales as well as the amount of the unreported net income assessed against 145 being the underlying basis for the amount of the Appellant's misappropriations reassessment. Accordingly, the penalties should not be assessed and there being no misrepresentation or fraud by the Appellant, the Minister should be barred from reassessing the 2001 and 2002 taxation years of the Appellant outside the normal three-year assessment period and no penalties are appropriate.

[27] The Respondent takes the position the Appellant received the reassessed amounts and hence is subject to both the gross negligence penalties under subsection 163(2) as well as subject to reassessment outside the normal assessment period for his misrepresentation and fraud in not reporting such income. The Respondent also takes the position that 145 was credited, as deductible expenses, the full amounts paid

to its subcontractors in respect of which the WSIB allocated as payroll of 145 for the purposes of determining its underreported payroll for the purposes of the *Workplace Safety and Insurance Act, 1997* ("WSIA"), which amounts were treated by the Minister as increasing the Cost of Sales of 145 by an amount of the difference between the cost of sales actually reported and the cost of sales determined to be ultimately expended by the Appellant, but that, notwithstanding such increased deduction there was still unreported net income. Accordingly, the Respondent says the amount assessed as income to the Appellant was net income; i.e., net of the deductions for amounts paid to all these subcontractors, to clarify its position that there is no double counting in the amounts assessed against the Appellant.

Analyses

1. Issue of Whether the Appellant was a shareholder

[28] The assumptions of the Minister relevant to this issue are found in paragraphs 11(a), (b), (cc), (ee), (ff) and (gg) of the Minister's Reply, a copy of which is attached as a Schedule to this decision and which particular paragraphs are also listed below for convenience.

> 11. In determining the Appellant's tax liability for the 2001 and 2002 taxation years, the Minister made the following assumptions of fact:
>
> a) The Appellant was a shareholder of four corporations, Plan A Services Inc., Impact Demolition & Restoration Management Inc., Planland Contracting Limited, and Impact Demolition Services Limited (the "Predecessor Corporations");
>
> b) On January 2, 2001 the four Predecessor Corporations amalgamated to form 1457223 Ontario Ltd., operating as Impact Services ("Impact Services");
>
> …
>
> ***Appellant Was Shareholder of Impact Services***
>
> cc) The Appellant reported dividend income from Impact Services in 2002;
>
> …
>
> ee) the Appellant and his spouse Barbara Osinski were each 50% shareholders of Impact Services at the date of its incorporation;

ff) Impact Services reported that the Appellant was a 50% shareholder in its T2 returns for the taxation periods ending June 30, 2001 and June 30, 2002;

gg) in December of 2001 the Appellant transferred his shares to his spouse Barbara Osinski;

[29] There is no dispute that the Appellant was at least a shareholder of some of the Predecessor Corporations prior to their amalgamation as set out in paragraphs 11(a) and (b) of the Reply. Frankly, the evidence of both the Appellant and his spouse supports these assumptions as well, in that they both testified the businesses were family-owned businesses and that based on the advice of legal counsel prior to the amalgamation of the Predecessor Corporations into 145, they decided that the assets of the family would be put in the name of Barbara Osinski and that Jan Osinski would be the sole officer and director and hence take responsibility for the liabilities as part of their creditor-proofing plan.

[30] Notwithstanding the above, the Appellant takes the position that Barbara Osinski was the sole shareholder during the years in question, partly due to their agreement on the creditor-proofing plan above, but also because of her subsequent assertions that she was the sole shareholder. In furtherance of the creditor-proofing arrangement, the Appellant argues that notwithstanding the fact that his shares, representing 50% of the issued shares of 145, were not formally transferred to Barbara Osinski until December 1, 2001, that he in fact had executed a document dated January 2, 2001 at the offices of R.S., a lawyer, in the presence of K.I., whom I will describe as the payroll officer/bookkeeper of 145. The said document, which is not sworn, is a one-paragraph confirmation where the Appellant states:

> I JAN OSINSKI, of 5 Pearl Gate CT … hereby confirm that I am the sole registered director of 1457223 … and also confirm that the sole shareholder of the said company is BARBARA OSINSKI. …

[31] As I indicated, it is witnessed by K.I.

[32] It is clear that the lawyer did not prepare this document as he testified he had no recollection of it and frankly from the wording it is reasonable to assume that the document was prepared by Jan Osinski directly or on his behalf. Accordingly the Appellant's testimony that he attended at the lawyer's office, whom the evidence shows was not the corporate lawyer for 145 (although he testified he did some minor filings for the corporation evidencing changes of officers and directors) to sign such document is not credible. As for the testimony of K.I that she attended with the Appellant at the offices of R.S. to witness this document, such testimony is highly

suspect, not only because the lawyer had no recollection of it, but because in general I find the evidence of K.I. to be highly suspect and she to be a witness whose testimony overall is not very credible at all. Although I will make further reference to the credibility issues I have in this matter with K.I. later in this decision, suffice to say at this point that it makes no sense that K.I. would be attending the offices of the corporation's non-corporate lawyer to execute a document he did not prepare when the evidence of Barbara Osinski was that she would attend the offices of the corporate lawyer to execute corporate documents from time to time as required. Why she would not have attended directly when the document concerns her makes the entire document suspect?

[33] I should also add that the actual transfer of shares and special resolution of 145, pursuant to which the Appellant transferred his shares to Barbara Osinski on December 1, 2001, recites that at that date the Appellant is the registered holder of the shares and desires to transfer them to Jan Osinski at such time. There is no mention that he held them in trust for Barbara Osinski or even of the earlier document or that such transfer was to effect a transfer that took place in January of 2001. In my opinion, the transfer and resolution as corporate records speak for themselves and are evidence of the shareholdings of the Corporation as at December 1, 2001.

[34] Based on these corporate documents, it is clear that the Appellant was a shareholder in 2001 but not the calendar year 2002. However, since there is no dispute the financial year-end of 145 is June 30 of each year as assumed in the Reply, then it is also clear the Appellant was a shareholder during all of the corporation's 2001 fiscal year and almost half of the corporation's 2002 fiscal year, which commenced July 1, 2001 and ended June 30, 2002. This fact is relevant because the Respondent has assumed in paragraph 11(ff) of the Reply that 145 reported that the Appellant was a 50% shareholder in its T2 returns for the taxation periods ending June 30, 2001 and June 30, 2002 and that the Appellant reported a dividend from such corporation in his 2002 personal tax return. These latter assumptions appear to suggest the Appellant was a shareholder in calendar year 2002, however, I cannot agree such assumptions support such conclusions for a few reasons. Firstly, such conclusion would be inconsistent with the Minister's assumption that the Appellant transferred his shares to Barbara Osinski on December 1, 2001 above. Secondly, I note that it is technically possible that a dividend could have been declared during the corporation's 2002 taxation year while the Appellant was a shareholder and paid in the 2002 calendar year at a time the Appellant was not, but the Appellant would still be able and be required to report such dividend in income. If, it was the case that dividends were not so paid, then the Appellant could have been reassessed to re-

characterise such payments as ordinary income but was not. It would also not appear illogical to me that the names of any shareholders during the taxation year would be set out in such return if a dividend was paid so the fact the Appellant was shown as a shareholder in the 2002 T2 return of the corporation is not determinative. Thirdly, the Respondent's own witness, Barbara Osinski, testified the transfer was delayed and not effected until December 2001 notwithstanding the creditor-proofing plan and her solicitor's correspondence to the CRA, making submissions as to why Barbara Osinski should not be assessed for any appropriation of funds from 145, confirms that Jan Osinski transferred his shares on that date. Finally, when asked during the discovery process whether he believed it to be true that the Appellant continued to be a 50% shareholder for the duration of the 2002 taxation year, the Respondent's witness, the CRA auditor in the matter, answered that he did not believe such to be true although earlier deposed that he believed the allegation that the Appellant transferred his shares to his spouse in December, 2001 to be true. Even the CRA did not believe the Appellant was a shareholder in calendar year 2002.

[35] Notwithstanding the above evidence, the Appellant also argued that Barbara Osinski claimed she was and had always been the owner of 145 in a letter dated August 16, 2004 addressed to J.M. the office manager and K.K. a supervisor and copied to the Appellant and his son. In addressing a dispute regarding her son's activities and payments to him, she stated:

> On my part, I would like to stress that the fact I gave my consent to the "reorganization" of the Impact Services does not deprive me its ownership. Legally I have always been and I am the only owner of the company that I have built for so many years. I would wish that no one forgets this.

[36] The letter was written technically following the transfer of Barbara Osinski's shares to Jan Osinski on June 30, 2004 as part of the marriage break-up which according to the uncontested evidence of Barbara Osinski actually occurred in August with the transfer back dated hence explaining the reference to her "consent to the reorganization" in her letter. Barbara Osinski testified that she wrote the letter while upset about her marriage break-up and the allegations by her husband against her son and there is no dispute the Appellant and his spouse were in the midst of attending to their separation issues at such time. I accept this evidence as credible and uncontradicted, and do not find it can serve as credible evidence to contradict the strong evidence of the shareholdings for the 2001 and 2002 years above described.

[37] On the totality of such evidence, I must find that the Appellant was only a shareholder until December 1, 2001 and hence was not a shareholder during the 2002

calendar year. It follows then that under subsection 15(1), the Appellant cannot be said to have had a shareholder benefit for the 2002 calendar year at least.

2. Appropriation of Funds

[38] As indicated earlier in a discussion of the law, in order for the Appellant's reassessment to be valid, there must be some appropriation of the assets of 145 to or for the benefit of the Appellant, either under subsection 15(1), sections 3, 5, 6 and 9 or subsection 246(1). It should be noted at the outset that while the Respondent indicates in its Reply that it was relying on section 9 of the *Act*, being the provision that taxes income from business or property, the Respondent in fact made no argument as to its applicability nor even made any assumption that the Appellant earned business from income or property in its Reply so I do not consider this section to be a basis for any appropriation of funds in the case at hand. Likewise, there is no dispute that the Appellant was the President and sole officer of 145 as assumed in paragraphs 11(v) and (w) of the Reply and the evidence clearly establishes that the Appellant was a director and employee of the Appellant during the years in issue as well. Accordingly, the conditions for potentially finding the Appellant received income from office or employment or as a director under sections 5 and 6 of the *Act* are not in dispute; only whether he appropriated any funds not already reported as income.

[39] The Respondent's case is based on the assumptions that 145 failed to report sales as set out in the assumptions found in paragraphs 11(f) to (t) of the Reply and that in fact these unreported sales, net of allowed Cost of Sales, resulted in unreported income to 145 that the Appellant is assumed to have appropriated. While the Appellant challenges the assumptions on unreported sales as well, I will first deal with the assumptions pertaining to funds being appropriated to or for the benefit of the Appellant since if the Appellant is able to demolish these assumptions then the reassessment against the Appellant would likely fail. I say this because the auditor for CRA, the Respondent's chief witness, admitted he found no direct evidence of any cheque or document evidencing funds were actually transferred or evidencing any appropriation by the Appellant nor was the Respondent's other main witness, Barbara Osinski, by her testimony aware of any payments to the Appellant either.

[40] The assumptions made by the Respondent that are relevant to the issue of appropriation of funds by the Appellant are found in the following paragraphs under section 11 of the Reply and not necessarily under the heading "The Appellant Received Unreported Amounts" therein:

(q) the unreported amounts were not deposited into Impact Services' [i.e. 145's] bank account;

(r) three bank accounts were used to hide Impact Services' unreported income including the Appellant's personal bank account;

…

(u) funds from the unreported sales were appropriated, or otherwise received as shareholder benefits, by the Appellant in his 2001 and 2002 taxation years in his capacity as shareholder;

…

(y) the Appellant had primary responsibility for the finances of Impact Services;

(z) Impact Services retained some of the under reported sales and the remainder was appropriated by the Appellant in the following amounts:

	Total Unreported Net Income	**Income Reported by Impact Services**	**Income Assessed to Appellant**
2001	$5,372,074	$2,674,160	$2,697,914
2002	$104,815	$49,756	$55,059

(aa) The value of the benefit appropriated by the Appellant was equal to $2,697,914 in the 2001 taxation year, and $55,059 in the 2002 taxation year;

(bb) The Appellant accumulated a significant real estate portfolio including 89 Shorncliffe Road, a condo in Toronto, a condo in Collingwood and a residence that sold for $650,000 in 2006.

…

(hh) Barbara Osinski did not receive any appropriated amounts from Impact Services in 2001 or 2002;

[41] From the auditor's evidence, it is clear that he assumed that since the assumed unreported sales of 145 were not reported and thus did not find their way into the bank accounts of 145, that they must have found their way into the personal accounts referred to in paragraph 11(r) above owned by the Appellant. He also testified that he assumed that the Appellant's lavish lifestyle, namely in accumulating the properties

referred to in the assumption found in paragraph 11(bb) supports his conclusion that he must have used the unreported income to accumulate then. Finally, as part of the overall reasons for assessing the Appellant alone, he assumed Barbara Osinski did not receive any appropriated amounts on the basis of her representations that she had no other bank accounts and was not a director or officer nor involved in the financial or administrative management of 145; hence had no involvement in such scheme he attributes to the Appellant. I will now examine these assumptions under three categories; Bank Accounts, Accumulated Assets and Barbara Osinski appropriations.

Bank Accounts

[42] On page 4 of the auditor's letter of October 4, 2006, proposing a reassessment against 145, the auditor stated:

> A review of the payroll records seized by WSIB was done and it was determined from the cheques seized that three (3) different accounts were used at the Royal Bank of Canada, Queensway and Kipling Branch, Etobicoke, Ontario. One account was a business account of Impact Services, another was a personal account of Jan Osinski, and the third was an unnamed account. Therefore, it appears that multiple accounts, both business and personal, are being used to facilitate the scheme.

[43] This was his chief assumption for supporting his conclusion that the Appellant alone has appropriated the funds in question and that Barbara Osinski did not receive any such funds. It is crucial then that the evidence surrounding these bank accounts be analysed.

a) Royal Bank Impact Services Account

[44] The auditor testified he reviewed this company account to satisfy himself that the unreported payroll did not flow through this account and hence concluded that it represented unreported payroll and hence there were unreported sales. While the auditor may have had cause to arrive at his conclusion, which the Appellant also takes issue with, it is clear that no appropriated funds from this account were linked to the Appellant.

b) Royal Bank Bank Account-#501-543-3

[45] The auditor assumed the above bank account belonged solely to the Appellant due to his discovery that the cheques drawn on that account show only Jan Osinski at the top as payor. He acknowledged in his testimony that this is the account he refers to above as the personal account of the Appellant that was used to facilitate the so-

called scheme. There is no dispute, however, that the payees of all these cheques were identified as workers in respect of which 145 was deemed to have underreported its payroll for WSIB purposes and of course for the reassessment of the Appellant. The auditor testified all such unreported payroll was credited to unreported sales as Cost of Sales so that that such portion of the sales were treated as if received by 145. This is supported as well from the assumption of the Minister in paragraph 11(z) as well.

[46] Having regard to the fact that all amounts paid to workers were treated as unreported payroll and sales of 145, and hence as expenses of 145, it is clear they did not form the basis of nor were included in the calculation of appropriated funds assessed against the Appellant. What is also clear, however, is that the auditor was treating this bank account as evidence the Appellant was funnelling the unreported sales through accounts other than accounts identified as belonging to 145, which assumption found in paragraph 11(q) may be said not to be rebutted at this time, but which I might add is not sufficient on its own to support a finding of any appropriation of funds by the Appellant either.

[47] The evidence adduced by the Appellant, however, clearly establishes, by way of the bank statements for such account, that the account was a joint account of both the Appellant and Barbara Osinski. At the very least, the Appellant has rebutted the assumption that his account was his sole account and that Barbara Osinski may be said to have received company funds together with the Appellant. As I said however, the treatment of these funds by the Minister was as an expense to 145 and not as an appropriation of funds to the Appellant so it can be concluded that the Appellant has demolished any assumption of appropriation of funds from this account.

c) Cheques from Blank account

[48] The auditor testified that there were three accounts used by WSIB and relied upon by him to establish unreported payroll but there was absolutely no evidence led with respect to this third account by the auditor. The assumption in paragraph 11(r) of the Reply above merely states there were three accounts including "the Appellant's personal account". These words suggest there was only a singular personal account which is obviously referenced in (b) above. The only other evidence regarding such blank account is found in an exhibit of the Respondent (R-1, Tab 7 entitled "WSIB Doc Listing"), showing the documents seized by the WSIB as part of its investigation and provided to the auditor, which describes the third account as "Unknown cheques of Impact Services, RBC, Queensway & Kipling Branch …". The evidence of the

Respondent clearly establishes this was not a personal bank account of the Appellant but an account of Impact Services, which the parties agree is 145.

[49] Having regard to the above analyses, it is clear that the Appellant has rebutted the assumption that any unreported amounts assessed against the Appellant came from these accounts. The onus to establish same would then shift to the Respondent.

Accumulated Assets

[50] The auditor assumed 89 Shorncliffe was accumulated by the Appellant. The evidence is clear that such property was owned by Barbara Osinski, pursuant to a transfer dated December 28, 2000, prior to the amalgamation and the taxation years in question and accordingly could not have been acquired by unreported income that was not even yet alleged to be earned by the Appellant.

[51] The auditor assumed the principal residence of the Appellant and his wife was accumulated by the Appellant from the appropriated funds. In fact, the auditor testified he assumed the property was owned by both of them during the taxation years in question and that significant funds were spent to upgrade the residence shortly before its sale in 2006; assumedly from the appropriated funds of the Appellant. The evidence, however, is clear that the principal residence was transferred to Barbara Osinski alone on December 21, 2000, so that it could not be accumulated by the Appellant during the taxation years nor could any unearned income have been used to acquire it at that time or beforehand when it was jointly owned by the couple. Moreover, the evidence is clear from the auditor's testimony that any renovations to the residence were done shortly before its sale in 2006 as per the listing agreement, a few years after the Appellant and his wife had separated, and during which time Barbara Osinski was given full rights to the matrimonial home pursuant to their separation agreement. It is interesting to note that the only basis the auditor had for suggesting unreported income of the Appellant was used to fund the renovations is that he reviewed the MLS listing for the home sold in 2006 that listed substantial renovations and his assumption, without any other evidence, that the Appellant would have funded it, even though he acknowledged the parties had divorced by that time.

[52] The auditor also assumed the Appellant had accumulated the Collingwood Property that was put in the name of N., the son of the Appellant and Barbara Osinski. On cross-examination, he acknowledged he was not aware that in fact it was Barbara Osinski who entered into the agreement of purchase and sale to acquire the property for $486,900 in May of 2004, shortly before the separation of

the couple, and that both the possessory and final closing of the condominium unit occurred after the couple had separated. Barbara Osinski testified she paid for the down payment of $20,000 pursuant to the agreement of purchase and sale from funds she accessed from her TD Bank Account, as well as the balance of cash on closing of about $80,000 and placed a mortgage of $395,900 on the unit for the balance of the price, paid its instalments and even paid it off from her funds from that same account. Barbara Osinski acknowledged that although the purchase of the condominium unit was initially intended as a vacation or retirement property for the couple, that she lived in it as her principal residence and caused title to be transferred from her son's name and later into her own name. With the possible exception of the initial downpayment of $20,000 referred to in the agreement of purchase and sale dated before their separation, it is *prima facie* clear to me that the Appellant did not fund the balance of the purchase price and that Barbara Osinski did. Moreover, Barbara Osinski admitted the deposit also came from a bank account registered only in her name so the Appellant has *prima facie* established funds for even the deposit were sourced from her funds. There was no evidence led by the Respondent to suggest otherwise.

[53] The only other asset the auditor suggests was accumulated by the Appellant was a Toronto condominium purchased by the Appellant for $350,000 in March 2005, with $150,000 down and a Vendor take-back mortgage of $200,000. The Appellant's evidence is that he had worked for many years prior to its purchase and had the means from his equity to pay for the down payment. There is evidence that prior to their separation, the couple was earning in excess of $148,000 on average since the year 2000 alone as reported income which in my view is *prima facie* evidence the Appellant had in all probability the means to put $150,000 down on a condominium. The auditor confirmed he conducted no net worth assessment of the Appellant or his spouse to determine what they were capable of affording and the Respondent provided no evidence to the contrary. While the auditor testified he saw no evidence of interest or other investment income on any equity the Appellant may have had, that in my view is not sufficient to prove he did not otherwise have the means to fund that amount. Frankly, when one considers the extent to which the auditor had no basis for concluding, let alone justifying, that the Appellant had accumulated all of the other assets, the fact he accumulated a modest condo funded mainly by a mortgage is not enough to make his assumption worthy of concluding it was more likely true than not.

[54] The auditor suggested another reason for him assuming the Appellant received unreported amounts from outside 145 is because the shareholder loan account of 145 increased from $597,744 to $696,187 from the 2001 to 2002 taxation years, an

increase of almost $100,000. This, of course, suggests the shareholders must have advanced funds to 145 in this amount. On cross-examination, however, the auditor admitted he did not analyse the details of the shareholder loan account and hence whether it was an asset of the Appellant or Barbara Osinski, the other shareholder or credited to them for other reasons.

[55] Accordingly, the Appellant has met the onus of rebutting this suggestion, which was not assumed per se, as well by suggesting there are various other explanations for its increase. It should also be noted that the following year, the shareholder loan account decreased by $179,858 which suggests those with funds in the shareholder loan accounts, whether existing or previous shareholders, withdrew them. As the Appellant has suggested, the withdrawal of funds from such account may also explain where the Appellant's equity may have come from to counter the above suggestion only appropriated funds could have funded such expenses.

[56] In my view, the Appellant has more than adequately rebutted any assumption that unreported income was used to accumulate the above assets and the Minister has led no evidence to the contrary.

Appropriations by Barbara Osinski

[57] One of the most important assumptions made by the Minister in its Reply to justify why only the Appellant was reassessed the full amount of unreported income by 145 as above explained, is that Barbara Osinski did not receive any appropriated amounts from 145 in the years in question as per paragraph 11(hh) of the Reply.

[58] In a letter dated September 5, 2007, sent by the auditor to Barbara Osinski advising her that the Minister was withdrawing its proposed reassessment against her for 50% of the unreported income, the CRA auditor, the same auditor who testified on behalf of the Respondent at trial, wrote:

> The explanation for this decision is as follows:
>
> Even though you were a part and later full shareholder of Impact Services during the above noted audit period and were involved in the procurement of revenue and establishing quotations for tenders, you have confirmed that you did not partake in the financial aspects of the business since this was done solely by your ex-spouse, Jan Osinski, including the preparation of the financial statements and the T2 Corporate returns of the company. Furthermore, you did not have any knowledge of the unreported income or that any monies were appropriated nor were you aware of any bank accounts other than your joint personal and corporate accounts with the

> Royal Bank of Canada, Queensway branch. And lastly, you did not receive nor were you given access to any monies other than the dividends and remuneration from the company as reported on you [*sic*] T1 income tax returns.

[59] In short, the auditor accepted the representations made by Barbara Osinski in full and decided only the Appellant was aware of and in receipt of the appropriated funds.

[60] The evidence shows that in 2001 and 2002 Barbara Osinski reported Total Revenue of $76,699 and $56,250 respectively which was also her net income for those years. The Appellant tendered evidence of two cheques drawn from the business account of 145 payable to Barbara Osinski, each in the amount of $60,000 and dated December 24, 2001 and September 30, 2002. There is evidence these cheques were deposited into the personal account of Barbara Osinski at TD Canada Trust on December 24, 2001 and October 11, 2002 respectively. Barbara Osinski had no conclusive explanation for these deposits on cross-examination. For the year 2002 at least, it is quite clear that Barbara Osinski appears to have received an amount in excess of her reported income. When confronted with these cheques on cross-examination, the auditor testified he assumed they were representative of her reported income and made no investigation into her personal bank account. The existence of these cheques, singular cheques which would not seem to be periodic salary payments, are *prima facie* evidence Barbara Osinski did receive other funds from 145, contrary to her representation to the auditor or evidence to the contrary at trial. Her suggestion that she knew nothing of them and that her husband must have arranged to deposit them without her knowledge does not seem credible in light of her testimony that this was her personal account that she deposited all her income into even after her separation from her husband. She testified she used this account to make down payments on her Collingwood condominium, live on after she left 145, deposit rent cheques from 145 in connection with her ownership of 89 Shorncliffe and deposit the proceeds of her house sale into as well as draw the funds to pay off her mortgage on the Collingwood condo. She was involved in all respects in using and controlling this account yet suggests she had no knowledge of it or even the balance in such account at the time of her separation. Frankly, Barbara Osinski was just not credible in my view in regards to her recollection of these funds or details of her personal account before separation. Moreover, these cheques alone are *prima facie* evidence she did receive funds beyond her reported income and hence may have received appropriated funds. Accordingly, the Appellant has rebutted this assumption.

[61] In evaluating any other evidence of the Respondent to otherwise prove the assumption after the onus shifted to the Respondent thereon, it is safe to say that the only other evidence appears to confirm that Barbara Osinski received other substantial funds. In 2003, the Appellant provided evidence that numerous cheques were drawn on 145's Royal Bank Account totalling $560,000 of which $350,000 was deposited into a Credit Union Account No. 31231 belonging to Barbara Osinski; of three money orders issued by Royal Bank totalling $150,000 without evidence of the source of those funds or where they were deposited on their face; and a receipt from the same Credit Union evidencing a deposit of $100,000 into the Credit Union account.

[62] Barbara Osinski testified that the signature at the back of the cheques deposited into the Credit Union Account was not hers but that the deposit receipt for $100,000 was hers and she attended with her husband at the Credit Union once or twice including to open that account which she indicates was opened at his suggestion and was to be used to fund real estate acquisitions. She also testified that some of these funds were deposited to her TD Bank Account and were a repayment of her shareholder loans from 145, again suggesting same was her husband's idea. She also testified she attended to find out what was in the bank account at the time of her separation but found no funds. On the one hand, Barbara Osinski effectively agrees these accounts were in her name only and were planned as part of the agreement with her husband to isolate the assets in her name as part of an overall credit-proofing scheme, for the purpose of funding property acquisitions, while at the same time she denies any knowledge of the details of the accounts, including their balances. Frankly, I found her testimony vague and inconsistent in this regard.

[63] While the existence of these personal bank accounts do not conclusively prove an appropriation of funds by Barbara Osinski, particularly to the extent they were drawn from the business account of 145, the cheques and deposits have not been adequately explained by Barbara Osinski, particularly the $100,000 deposit to the Credit Union account she signed the receipt for.

[64] More importantly, the auditor testified he was not aware of the existence of these bank accounts nor investigated the business account of 145 during the 2003 year or after so as to have been made aware of large payments going to Barbara Osinski nor did he investigate the source of these funds to evaluate her assets or acquisitions unlike in the case of his investigation of the properties he assumed were those of the Appellant after the time periods. It is clear that the underlying rationale applied to implicate the Appellant was not applied to Barbara Osinski notwithstanding that the facts point to actual payments and deposits made to her over

and above her reported income for those years. Frankly, in my view, the auditor failed to apply a consistent approach to the shareholders and failed to investigate sufficiently in order to make the assumptions he did as against only the Appellant. I agree with the Appellant's counsel's description of the situation which he described as relying only on speculation to assess the Appellant.

[65] In my mind, the Appellant has demolished the assumption that Barbara Osinski did not receive appropriated funds and the evidence of Barbara Osinski or the auditor do not amount to credible proof no such appropriations were made. It is, of course, not necessary for the Appellant to prove that Barbara Osinski received the appropriated funds, only that it is more likely than not that he did not receive them and I believe he has satisfied this burden of proof, however I also believe he has made a *prima facie* case for supporting the assumption that Barbara Osinski likely did receive at least some of it.

[66] On the totality of the evidence, it is clear to me that the Appellant has rebutted any assumptions that could be the basis of finding more likely than not that he received any appropriated funds and the Respondent has admitted it has no other evidence to prove otherwise. On this basis alone, the appeals of the Appellant should be allowed and it is not necessary to dwell further into the remainder of the Minister's assumptions as to whether or not there were any unreported sales of 145 and/or the correctness of the unreported income of 145 which formed the underlying basis for the reassessment against the Appellant. A tremendous amount of evidence was heard in connection with these other assumptions dealing with the underlying basis for the reassessment against the Appellant and although it is not necessary for me to explore them further in order to arrive at the conclusion I have arrived at, I do believe addressing some of these issues will further support my conclusion as well as highlight the issues of credibility that were raised in this matter.

Underlying Assessment and Credibility Issues

[67] The Respondent's case is based on the assumptions that 145 failed to report sales as set out in the assumptions found in paragraphs 11(f) to (t) of the Reply attached as Schedule "A" hereto and that in fact these unreported sales, net of allowed Cost of Sales, resulted in unreported income to 145 that the Appellant is assumed to have appropriated.

[68] The Appellant has challenged both the amount of sales the Respondent has assumed as well as the calculation of net unreported income by 145 so I will analyze the evidence with respect to both.

a) Amount of Sales of 145

[69] Paragraph 11(l) of the Reply assumes that the total underreported sales of 145 for the calendar years 2001 and 2002 before deduction of any Cost of Sales allowed was $9,615,005 being $8,931,080 for 2001 and $683,925 for 2002. The onus of demolishing this assumption is of course on the Appellant who argued both that the Respondent's basis for arriving at this amount was unfounded as well as argued that indeed any such sales were not the sales of 145 but were the sales of subcontractors of 145, particularly of two subcontractors that were operating out of the Appellant's place of business as well.

[70] With respect to the Total Sales figure assumed, the evidence is that the Appellant relied upon documents seized by the WSIB during execution of their search warrant from the Appellant's office in particular referred to as the "Profit Sharing Ledger". Although there is no such title on the document, the auditor for WSIB testified that that was the title found on the binder which contained this document, as well as other documents, and even though he took no copy of such title, I am nonetheless inclined to accept his testimony as credible in this regard. The auditor testified in a straightforward and consistent capacity and I found him to be a knowledgeable and credible witness. He and his search team, of which he was in charge, took pains to label and record all evidence seized as well as draw sketches of the locations or rooms at the Premises where they were seized. Notwithstanding this however, the fact is that it is the contents of the document, not any purported title that clearly suggests the CRA was reasonable in assuming the sales figures it did. In short, the document contained various notations showing the sales split between Impact Services or Impact Demolition or I/S or I/D which I accept referenced the prior two, both because one of the stick-on tabs says "ID and Impact Demolition" and because even the Appellant and K.I., his witness, made reference to those initials during their own testimony. More importantly, the sales are listed monthly and summarized by quarter and are on a calendar-year basis and there is specific reference to "April Sales", not April projections.

[71] Frankly, the Minister may assume whatever facts it chooses and the Appellant may challenge those facts. In the case at hand, the Appellant has tendered no evidence whatsoever to suggest these figures are incorrect.

[72] Moreover, the Appellant, in arguing that the Minister erred in calculating the Appellant's Cost of Sales, which will be discussed, accepts and strenuously insists that the Minister accept the estimates of the various components of Cost of Sales

testified to by both the Appellant, the bookkeeper K.I. and even Barbara Osinski, the witness for the Respondent. In the evidence of all these witnesses, one of the few facts on which they seemed to agree, is that labour constituted approximately 50% of the Contract Price or Sales. The evidence is that the WSIB assessed 145 as underreporting Salaries and Wages of $4,852,673, which the Appellant, in his personal capacity and as a representative of 145, effectively agreed to in an Agreed Statement of Facts executed by him as part of a plea bargain. If unreported salaries and wages was $4.85 Million dollars and represents one-half of sales, then twice that amount would be $9.7 Million dollars. The CRA assumed Sales, based only on the figures it copied from the so-called Profit Sharing Ledger, at $9,615,005, clearly almost twice the salary and wages admitted to. This clearly supports the reasonableness of the Respondent's assumption as to sales. As I said, the Appellant provided no other evidence whatsoever that amounts to credible evidence to rebut this assumption.

[73] The Appellant also argues that notwithstanding the WSIB audit and admission, that the effect of the WSIA legislation, which was not contested by the Respondent, is that a contractor, like 145, will be treated as being an employer of each subcontractor it uses who is not registered as an "Employer" under such legislation. Both the WSIB auditor who testified and R.C, the lawyer for 145 who specializes in WSIA matters, confirmed this.

[74] The Appellant, of course, goes on to take the position that numerous other subcontractors worked for 145 and that such sales belonged to them and not 145. In fact, the Appellant has suggested that two entities in particular, Impact Commercial Demolition Inc., whom it suggested could be the Impact Demolition or I/D referred to in the Profit Sharing Ledger above and 1294987 Ontario Inc. ("129"), were amongst many contractors also operating out of the Premises that had substantial sales. Both the Appellant and K.I., the bookkeeper testified as to these facts and K.I. testified that she was the bookkeeper for these entities and that 129 itself had sales between $1.5 to $2.0 Million dollars a year during the relevant period itself.

[75] The corporate profile reports entered into evidence by the Appellant indicate that 129 was incorporated as Best of All In One Inc. on May 12, 1998, before it changed its name to 129 on January 23, 2004 while Impact Commercial Demolition Inc. was incorporated September 12, 2000 and dissolved on January 26, 2006.

[76] Barbara Osinski on the other hand testified that although it was common knowledge some of the employees had trade names or companies, none of them

operated any business out of the Premises owned by her to her knowledge. Moreover, both the WSIB auditor and CRA auditor, who visited the Premises, albeit after the years in question, testified they saw no signage or indication of any other company operating out of the Premises during such period. The evidence, like so much of the evidence given by the parties in this trial, is at odds.

[77] Frankly, the mere fact two corporations, which show K.K., a senior employee of 145, as the officer and director, indicate their registered office as the Premises is not sufficient evidence such entities were active subcontractors during the years in question, let alone earned any of the sales attributed to the Appellant. There was no evidence of such entities having paid Barbara Osinski rent or sharing utilities or other expenses of the Premises or of any arrangement for use of space either. One would think that if several entities operated out of the Premises it would be a simple matter to provide some documentary evidence of it.

[78] The only evidence that such entities may have earned these sales is that of the Appellant and K.I., none of whom I find to have been credible in this matter and the evidence of R.S., the lawyer earlier referred to who testified for a brief period and indicated he had provided services to these other entities including 129. R.S. did not provide the details of any of these services, any proof of statements of accounts nor testify as to when any specifics services may have been provided, so I am not able to draw the conclusion any such services pertained to sales attributed to 145 in question from his evidence.

[79] K.I. testified she commenced working for 145 in 2000 and worked throughout 2001 and 2002 for 145 as well as did the books for these other entities and claimed 129 had substantial sales as aforesaid. She testified these entities had their own customers, issued their own invoices, had their own bank accounts and, with respect to 129, received T5018s from "different companies" showing payments to it, not one iota of which was tendered into evidence by the Appellant. She could not recall how many employees any of these entities had even though she admitted to being their bookkeeper.

[80] The documentary evidence is that K.I. had no income from employment with 145 indicated in her tax return for the year 2000, had only $3,201 of income in 2001 while earning the bulk of her income from an insurance company for whom she admitted to have worked full-time for in that year, suggesting she did very little work for 145 in that year and had income of $27,156 in 2002 from 145. She declared no income from 129, Impact Commercial Demolition Inc. or from any other parties in any of her tax returns for those years notwithstanding that she indicated she kept the

books for them and prepared their tax returns, cheques and bills during any of those years. I find it incredulous that she would have undertaken such a significant level of duties for such entities without remuneration and she confirmed she received no cash payments. I also find it incredulous that she had any significant knowledge of the affairs of 145 in 2001 or even 2002 as Barbara Osinski testified K.I. was originally hired as a payroll clerk and 145 had its own bookkeeper at the time whom K.I. eventually replaced. Such evidence is certainly consistent with the above facts including K.I.'s level of pay and lack of work in 2001 especially.

[81] At this point, I might also add that as far as K.I's credibility goes, I do not place any weight on her evidence supporting the Appellant's evidence that it was Barbara Osinski alone and not the Appellant that was in charge of the financial and administrative aspects of 145, partly because of her lack of credibility as discussed above, but also because the Appellant himself, during examination for discovery for which part of the transcript was read into evidence by the Respondent, admitted that he hired employees, hired subcontractors and signed all the cheques and paid the bills, contrary to K.I.'s testimony that instructions to issue any cheque including payment of bills came from Barbara Osinski alone.

[82] In the context of evaluating the testimony of the Appellant and that of Barbara Osinksi, which were at polar opposites on their respective roles as far as who was in charge of the finances and administrative functions of 145, I am of the view that neither of their testimony is to be believed in its entirety. The evidence is clear that Barbara Osinski was a founder of 145, via its predecessors, and that her training and qualifications were that of a civil engineer who thus had the ability and knowledge to review tenders and prove estimates and bids for the contracts obtained by 145 of which there is really no dispute by the Appellant. The Appellant, however, takes the position that he basically ran the offsite operations and was more on site than in office, which frankly is not supported by his background in chemical engineering and management. He had no history to suggest he had any operative knowledge of construction while he did have management experience and had no problem describing the different stages of obtaining contracts as well as documenting them. He admitted to paying bills and signing all cheques for the company as well as hiring employees and subcontractors and so it would seem that he did spend a large portion of his time attending to administrative and financial matters.

[83] Barbara Osinski on the other hand attempts to distance herself from these functions, notwithstanding she was involved in the business long before her husband and testified that as the person in charge of the team that did the estimating and project management work for the business she was aware of the sales levels of the

business. Moreover, she testified she attended with her husband to open bank accounts discussed earlier and sometimes made deposits, visited the company's corporate lawyer as needed and spent most of her time in the office, while occupying the largest of the offices in the premises.

[84] The Appellant and his former spouse have clearly attempted to point the finger at each other and feign ignorance of matters pertaining to linking them to the unreported sales and any appropriation thereof, but it is clear to me that both of these individuals had some knowledge and participation in the financial and administrative affairs of 145, albeit in different respects as Barbara Osinski was more involved in the sales function and management of the project management team, while Jan Osinski was more involved in the day-to-day administrative function of the business. As both parties testified, the business was a family business until their marriage break-up in 2004 and I believe they both had knowledge of the overall affairs of the business. Accordingly, I have been cautious to accept their oral evidence outright without credible corroboration.

[85] As far as the evidence pertaining as to whether there were other entities to which the sales could be attributable, I find Barbara Osinski's position, that there were none, to be more credible because it is borne out by the evidence.

[86] The Appellant has not met the onus of rebutting the assumption as to the quantum of unreported sales. I should add that even if I had found that the Appellant had succeeded in so doing, the evidence of the Respondent would clearly have proven more likely than not that the sales were not attributable to any other party. The Respondent called the CRA investigator who controlled the file throughout the appeal process who testified that he searched the tax returns of 129 and Impact Commercial Demolition Inc., whom the Appellant suggested were the main entities to which sales of 145 could be attributed. His evidence is that 129 had a September 30 year-end and in the year 2000 reported gross revenue of $10,682 and a loss of $1,744; in the year 2001 reported gross revenue of $30,907 and a loss of $2,806 and in 2002 reported gross revenue of $32,153 with taxable income of $527; a far cry from the revenue of $1.5 to $2 million dollars testified to by K.I. above as the Appellant's witness. While I appreciate the investigator under cross-examination confirmed he did not investigate the revenue of a number of individual or smaller other subcontractors, it seems highly unlikely that if the two main entities the Appellant held up to be its subcontractors had no meaningful income that the smaller parties did not either.

[87] In any event, the investigator also testified that 145 did not file any T5018 forms listing any payments to subcontractors in 2001 or 2002 thus *prima facie* establishing that 145 had none.

[88] The Respondent also led evidence from the auditor who testified that he searched the T5018s issued by contractors or owners engaged primarily in the construction business to ascertain what payments were made to 145 and its Predecessor Corporations and found that such documentation indicated that payments were made to Impact Demolition with corresponding business account numbers that belonged to two of the Predecessor Corporations; namely Impact Demolition Services Limited and Impact Demolition & Restoration Management Inc., thus suggesting the Minister was correct in concluding 145's funnelled sales through its Predecessor Corporations.

[89] I agree with the Appellant that the level of such T5018s cannot be used to calculate unreported income with any accuracy since as the Appellant demonstrated at trial, the T5018s are reported on a calendar-year basis and 145 reports its income on a fiscal-year basis, hence it would be inaccurate to apply all T5018 contract payment amounts in calendar year 2001 to the company's 2001 year-end. The Appellant demonstrated that by only applying half the calendar year T5018 amounts to 2001 and shifting the unapplied half to 2002 and repeating the process for 2002 onwards that almost no unreported income would appear. Both parties are in fact in agreement that it would be grossly inaccurate to try to add the T5018 contractor payment amounts indicated to be for the Predecessor Corporations or 145 as unreported sales due to the timing issues.

[90] The Appellant also suggested any such amounts pertaining to the Predecessor Corporations might also be indicative of holdbacks owing to such Predecessor Corporations before the amalgamation date and received afterwards. Frankly, the Appellant has provided no evidence in this regard either so has not demonstrated that any of these amounts paid to the name of the Predecessor Corporations were on account of holdbacks. Frankly, as the Respondent has pointed out, the fact T5018s show payments to Impact Demolition with predecessor business account numbers over three years after amalgamation makes the suggestion they were all for holdbacks unlikely to be true considering holdback legislation requires holdbacks for 45 days after substantial completion of work in Ontario. While I appreciate holdbacks may not be released so quickly, the fact payments were made to the Predecessor Corporations' account numbers three years later suggests an ongoing activity and the Minister was not unreasonable in concluding such payments confirmed his suspicions. Moreover, the Respondent demonstrated that one of the payments

evidenced in a T5018 was made by a corporation which was not even in existence prior to the amalgamation so such payment could not have been a holdback. I am not satisfied that the Appellant has met the onus of establishing any such payments to Impact Demolition were not unreported sales.

b) Calculation of Unreported Net Income

[91] The Minister assumed the Appellant's unreported income totalled $2,752,973.20 for the two years in question as per paragraph 11(p) of the Reply, which was split in the reassessment between the two years as $2,697,914 for 2001 and $55,059 for 2002.

[92] The Minister also assumed in paragraph 11(n) that the difference between unreported sales and the sales reported by 145 during the period was $4,698,594.49 and that under paragraph 11(o) of the Reply, the wages paid by 145 were understated by $1,945,621.49 thereby giving the Appellant a net credit to its cost of sales for those years by that amount. Clearly, if one deducts the wages credit in paragraph 11(o) from the assumed unreported net sales in paragraph 11(n), the difference is the Appellant's unreported net income assumed in paragraph 11(p).

[93] The evidence, however, indicates that the WSIB investigation concluded there was unreported wages and salaries totalling $4,852,673 which it assessed against 145 in its matter. The difference between the total amount of wages and salaries found to be unpaid above and the amount of the credit CRA gave to 145 was $2,907,052, being the exact amount of Cost of Sales reported by 145 in its T2 returns for the 2001 and 2002 taxation years. The Minister in effect reduced the credit for unreported wages and salaries by the total amount of Cost of Sales reported by the Appellant, because, as the auditor testified, to avoid duplication of expenses.

[94] The Appellant objects to the above approach as being an inaccurate manner to calculate unreported net income for two reasons. Firstly, argues the Appellant, the evidence of both the Appellant's witnesses; namely the Appellant and K.I., and the Respondent's witness; namely Barbara Osinski was that such wages and salaries account for approximately 50% of sales as earlier discussed. By deducting the Cost of Sales already claimed as filed from the finding of unreported wages and salaries on which the underlying assessment relied on, the Appellant is not receiving full credit for this finding.

[95] Frankly, I must agree with the Appellant in this regard. The Respondent relied on the agreed statement of facts and plea bargain as well as the Profit-Sharing Ledger

documents which referred to both sales and unreported wages and salaries. In paragraph 11(l) of its Reply, the Minister assumes that the Cost of Sales per WSIB was the full amount of the unpaid wages and salaries. Based on the Minister's own assumptions, the Appellant has raised a *prima facie* case that the Minister erred in its calculation.

[96] In examining other evidence in this regard, the Minister's position appears to be that since the Appellant already claimed Cost of Sales in its returns, then wages and salaries paid would be a component of such amount claimed and so should not be duplicated. I do not feel, however, that the Minister's position can be supported in this way. The Minister's witness herself testified that wages constitute about 50% of sales as indicated. The Minister assumed in paragraph 11(l) that total sales for the years was not that reported but was actually $9,615,005 as discussed earlier. Clearly, 50% of such sales would total $4,807,500, much closer to the amount of unreported wages and salaries determined by the WSIB of $4,138,115, as adjusted by the CRA to match unreported salaries to the calendar-year periods of the Appellant in issue here. At the very least, the Appellant has indicated that the labour component for the assumed sales should be the amount found to be unreported by the WSIB on which the CRA relied; namely $4,138,115 to be consistent. By its calculation, the CRA really only allowed a total of $4,852,673 for total Cost of Sales, which included other components such as disposal fees which the evidence indicated was between 25% to 30% on each job, equipment rentals the amounts of which depend on each job and other expenses. If one subtracts the cost of sales for wages and salaries determined by the WSIB above from total cost of sales allowed for the entire assumed sales by the CRA above, then the difference of $714,000 effectively is available to cover all the remaining components of Cost of Sales on assumed sales of $9,615,005 by the Minister. This amounts to approximately 7.2425% and seems extremely unreasonable having regard to the evidence tendered at trial by both sides.

[97] As I mentioned above, the relative percentages of the components forming part of the Cost of Sales was about the only issue Jan and Barbara Osinski were able to agree upon.

[98] To explore the issue further, the evidence at trial was that Cost of Sales was usually 80% to 90% of sales since net profit was usually 5% to 10% and other expenses not included in Cost of Sales; namely administrative and office expenses amounted to 5% to 10%. I should note that it was Barbara Osinski, the Respondent's witness, who was adamant that the industry is so competitive that a 5% profit is the norm on a contract. If I accept the most generous percentages in the Minister's favour, Cost of Sales should account for 80% of sales and if I accept the most

generous position in favour of the Appellant, Cost of Sales should account for 90%. This would yield total Cost of Sales of between $7,692,000 and $8,653,500 or a Solomon-like average of $8,172,750 if we use 85%, of which at least $4,138,115 was found to be for labour and wages alone. This would mean that on average, based on the assumed total sales per the Profit-Sharing Ledger assumed by the Respondent, that total unreported income for the two combined years would only be $1,442,255 before deduction of administrative and overhead expenses, which of course would be divided between the two years.

[99] Using these analyses for the level of total sales assumed by the CRA for 2001 of $3,612,388, the Cost of Sales using 85% would be $3,070,529 before administrative expenses for a Gross Profit of $541,859. For total sales assumed by CRA for 2002 of $6,002,617, the Cost of Sales would be $5,102,224 before administrative expenses for a Gross Profit of $900,393. The Financial Statements for 145 entered as evidence show that such overhead and administrative expenses not included in the Cost of Sales as being $590,000 for 2001 and $1,246,474 for 2002. Frankly, it is evident that in these analyses 145 would have had losses for both years.

[100] The Appellant argued that there would be no unreported income if the CRA had allowed all of the Cost of Sales it argues the evidence supports. Frankly, I am in agreement with this statement. Even if I had used the more generous position of allowing only 80% for Cost of Sales, I think it is fair to say the Appellant would have roughly broken even as opposed to reporting the small profits of $26,293 and $144,000 it actually reported for those years.

[101] I appreciate, of course, that the above analyses cannot be taken as an accurate calculation of alternative unreported income, however, if I accept the evidence as to the Cost of Sales percentages brought forth by the parties at trial, which witnesses for both sides appear to agree on, then I must conclude the Appellant has met the onus of rebutting the assumption of the Minister as to the amount of assumed unreported income. I am inclined to accept such evidence as credible, not just because witnesses from both sides, with whom I had serious credibility issues regarding other evidence, were in agreement on the Cost of Sales calculation, but also because the Minister himself relied on the Profit-Sharing Ledger as evidence of sales and used the 45% labour component to substantiate the level of sales. The Minister implicitly acknowledged at least 45% for labour would be an acceptable level and relied, as did the WSIB, on such percentage found in the Payroll Strategy part of the document to justify its assumption for unreported wages and salaries. In addition, I recall the argument of the Respondent, relying on the *House* decision above, where the Federal Court of Appeal ruled that "the appellant's burden was to demonstrate that the

Minister's assumptions were incorrect," and not to establish a specific amount. The Appellant here has demonstrated that it is more likely than not that the Minister's assumption as to the stated unreported amount is incorrect and it then falls to the Minister to establish what that amount might actually be if he can. The Minister has led no evidence to do so.

Conclusion

[102] On the totality of the evidence, I find that the Appellant has rebutted the Minister's assumptions that he received appropriated funds and that the unreported income of the Appellant was incorrect as analysed above and that the Minister has not proven otherwise on the balance of probabilities that its assumptions are correct. Accordingly, these appeals are allowed with costs to the Appellant.

Signed at Ottawa, Canada, this 27th day of February 2013.

"F.J. Pizzitelli"

Pizzitelli J.

SCHEDULE "A"

Paragraph 11 of the Reply to the Amended Notice of Appeal

11. In determining the Appellant's tax liability for the 2001 and 2002 taxation years, the Minister made the following assumptions of fact:

a) The Appellant was a shareholder of four corporations, Plan A Services Inc., Impact Demolition & Restoration Management Inc., Planland Contracting Limited, and Impact Demolition Services Limited (the "Predecessor Corporations");

b) On January 2, 2001 the four Predecessor Corporations amalgamated to form 1457223 Ontario Ltd., operating as Impact Services ("Impact Services");

c) Impact Service's fiscal year end was June 30;

d) Impact Services was involved in the construction business, specifically, interior stripping and retrofitting;

e) Impact Services' address was 89 Shorncliffe Road, Toronto, Ontario;

Impact Services Fails to Report Sales

f) Impact Services was the subject of an investigation pursuant to the *Provincial Offences Act* for violations of the *Workplace Safety and Insurance Act*, relating to reporting periods in 2001 and 2002;

g) sixteen counts of infractions of the *Workplace Safety and Insurance Act* were raised against both Impact Services and the Appellant, including several charges relating to a failure to disclose the full extent of Impact Service's payroll;

h) Impact Services admitted that it paid premiums to the WSIB on only a small portion of its actual payroll;

i) the Appellant, on his own behalf and on behalf of Impact Services, plead guilty to most of the charges;

j) the Appellant admitted, for the purposes of a plea agreement, that Impact Services failed to accurately report payroll in the amount of $5,844,425 for the period March 1, 2001 to January 7, 2003;

k) the Appellant signed cheques for premiums paid to WSIB, on behalf of Impact Services;

l) Impact Services failed to report sales and the cost of sales in the following amounts:

	Total Sales	**Cost of Sales per WSIB**	**Net Unreported Sales**
Jan-June 2001	$3,612,388	$1,428,543	$2,183,845
July-Dec 2001	$5,318,692	$2,130,463	$3,188,229
Total 2001	$8,931,080	$3,559,006	$5,372,074
Jan-March 2002	$683,925	$579,109	$104,816
Total Unreported Sales			**$5,476,889**

m) Impact Services did not report all of the sales listed above in its income tax returns for the years ended June 30, 2001 and June 30, 2002;

n) the difference between the unreported sales and the sales reported in Impact Services' T2 returns was $4,698,594.49;

o) wages paid by Impact Services were understated by the amount of $1,945,621.49;

p) the difference between unreported sales and unreported wages was $2,752,973.20;

q) the unreported amounts were not deposited into Impact Services' bank account;

r) three bank accounts were used to hide Impact Services' unreported income including the Appellant's personal bank account;

s) payments for services rendered by Impact Services were made to the Predecessor Corporations, after they had been deregistered;

t) payments to the deregistered Predecessor Companies were not reported as income of Impact Services;

The Appellant Received Unreported Amounts

u) funds from the unreported sales were appropriated, or otherwise received as shareholder benefits, by the Appellant in his 2001 and 2002 taxation years in his capacity as shareholder;

v) from January 2, 2001 through to the end of the 2002 taxation year, the Appellant was the president of Impact Services;

w) from January 2, 2001 through to the end of the 2002 taxation year, the Appellant was the sole officer of Impact Services;

x) the Appellant reported receiving employment income from Impact Services during the period January 2, 2001 through to the end of the 2002 taxation year;

y) the Appellant had primary responsibility for the finances of Impact Services:

z) Impact Services retained some of the under reported sales and the remainder was appropriated by the Appellant in the following amounts:

	Total Unreported Net Income	**Income Reported by Impact Services**	**Income Assessed to Appellant**
2001	$5,372,074	$2,674,160	$2,697,914
2002	$104,815	$49,756	$55,059

aa) The value of the benefit appropriated by the Appellant was equal to $2,697,914 in the 2001 taxation year, and $55,059 in the 2002 taxation year;

bb) The Appellant accumulated a significant real estate portfolio including 89 Shorncliffe Road, a condo in Toronto, a condo in Collingwood and a residence that sold for $650,000 in 2006;

Appellant Was Shareholder of Impact Services

cc) The Appellant reported dividend income from Impact Services in 2002;

dd) Impact Services was the Appellant's primary source of income during the 2001 and 2002 taxation years;

ee) the Appellant and his spouse Barbara Osinski were each 50% shareholders of Impact Services at the date of its incorporation;

ff) Impact Services reported that the Appellant was a 50% shareholder in its T2 returns for the taxation periods ending June 30, 2001 and June 30, 2002;

gg) in December of 2001 the Appellant transferred his shares to his spouse Barbara Osinski;

hh) Barbara Osinski did not receive any appropriated amounts from Impact Services in 2001 or 2002;

ii) the Appellant and his spouse separated on August 10, 2004 and divorced on December 1, 2005;

jj) in 2004, Barbara Osinski transferred her shares in Impact Services back to the Appellant pursuant to the terms of a divorce agreement;

kk) the Appellant was responsible for preparing the financial statements and income tax returns for Impact Services; and

ll) the Appellant signed Impact Services' income tax returns for the 2001 and 2002 taxation years, certifying that they were correct.

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APPEARANCES:

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