

BETWEEN:

AHMED OWDA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 24, 2018, at Halifax, Nova Scotia

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Ted Sawa Doug Schipilow
Counsel for the Respondent:	Meaghan Mahadeo Ian Wilenius

AMENDED JUDGMENT

The appeal from the reassessments raised November 27, 2014 under the federal *Income Tax Act* for the Appellant's **2011**, 2012 and 2013 taxation years is allowed and the appealed reassessments are referred back to the Minister for reconsideration and reassessment on the bases indicated in the following sentence, the whole without costs due to the mixed success of both parties.

The bases for reconsideration and reassessment are that the appealed reassessments are to be adjusted to also recognize as follows:

- a) the Appellant's 'RBC joint Visa' credit card balances for the beginning and end of each of the subject three taxation years, having been included in the Appellant's consumer proposal, are to be excluded from the net worth calculation underlying each of the appealed reassessments;

- b) son-in-law Zain Hussina gifted for the benefit of the Appellant and his household cash payments in the amounts of \$2,745, \$11,734 and \$1,568 for the 2011, 2012 and 2013 taxation years respectively;
- c) son-in-law Mohammed Sabra gifted for the benefit of the Appellant and his household cash payments in the amount of \$5,400 for the 2013 taxation year only;
- d) daughter Noor gifted for the benefit of the Appellant and his household cash payments totalling \$834, \$5,061 and \$4,133 in the 2011, 2012 and 2013 taxation years respectively;
- e) daughter Haneen gifted for the benefit of the Appellant and his household cash payments totalling \$83, \$3,188 and \$677 in the 2011, 2012 and 2013 taxation years respectively;
- f) Mr. Karsoua gifted for the benefit of the Appellant and his household cash payments totalling \$700 in each of the 2011, 2012 and 2013 taxation years;
- g) the three gross negligence penalties assessed per subsection 163(2) of the Act for the subject three taxation years are each to be deleted.

This Amended Judgment correcting the first above reference to the 2011 taxation year is issued in substitution for the Judgment dated February 28, 2019.

Signed at Halifax, Nova Scotia, this 13th day of March 2019.

“B. Russell”

Russell J.

Citation: 2019TCC46
Date: 20190405
Docket: 2016-1144(IT)I

BETWEEN:

AHMED OWDA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Russell J.

Introduction:

[1] In this informal procedure appeal the Appellant, Ahmed Owda, contests net worth reassessments raised November 27, 2014 by the Minister of National Revenue (Minister) under the federal *Income Tax Act* (Act) in respect of his 2011, 2012 and 2013 taxation years. The Appellant worked as a taxi driver in those years. He reported net business income of \$8,985 (2011), \$12,243 (2012) and \$5,333 (2013). He was assessed as having had received unreported income of \$42,470 (2011), \$29,203 (2012) and \$5,333 (2013), and was assessed as well a gross negligence penalty for each of those taxation years in the amounts (rounded) of \$2,696 (2011), \$1,411 (2012) and \$2,492 (2013).

[2] Certain ministerial assumptions pleaded in the Respondent's Reply were particularly germane to the dispute, including: the Appellant did not maintain proper books and records; a net worth audit of the three subject years was conducted, involving a review of the Appellant's household assets and liabilities in relation to his household's cost of living and income during the same period, with results as detailed in the annexed schedules as part of the Reply; a previous harmonized sales tax audit had uncovered undeclared income in the Appellant's 2009 and 2010 taxation years; he was informed after that audit of the requirement to maintain proper books and records, and he neglected to do so; and, the

Appellant should have known that the income reported could not support his household's personal expenses and obligations.

Evidence Summary:

[3] The Appellant, a man of mature years, testified that during the subject period he drove taxi for four or five hours, five nights a week. He leased his taxi vehicle. He rented a taxi light to another taxi driver. No records of income from his taxi driving were entered in evidence. He said he sometimes gave a "piece of paper" to his wife Sara as to weekly income and otherwise he reported this information orally to her. Sara prepared his annual income tax returns. English was a second language (Arabic the first) for both husband and wife. The Appellant did not contest that the Minister chose to carry out a net worth audit due to inadequacy of his books and records. He had no separate bank account for business, but rather used a joint account with his wife. Most taxi clients used debit, few paid in cash. He knew his family was in a challenging financial situation during the subject period and that the two eldest of his three daughters had given money gifts to his wife, their mother, to assist the family finances. However, he did not know details of this.

[4] Baha Karsoua testified. He is a friend of the Appellant and wife Sara, having previously operated his business moving junk etc. sometimes in conjunction with Sara's cleaning business. He testified that during the subject period and since then Sara would sometimes prepare home-cooked meals for him and for one, two or three of his workmates or roommates, for which they would pay her approximately \$20 a person. Sometimes an extra amount would be paid as he knew from her telling him that she was financially strapped. No records were filed corroborating such payments made during the subject period. He estimated that as a group he and colleagues would pay \$500 to \$1,000 a month to Sara for these meals. That money was intended to repay the costs of the food.

[5] Mohammed Sabra testified. He married the second oldest daughter, Haneen Owda, in or about 2015. He estimated he would give the family, \$600 to \$1,000 a month during the subject period. It was not always in cash, occasionally he would pay for school items for the youngest daughter. He lived with the family from about the time of their marriage. He testified it was obvious just from looking in the fridge and in his words hearing family members stress about bills that they were financially challenged. He said in his Arabic Muslim culture when you marry the girl you also marry her family. He worked as a mover in Mr. Karsoua's crew and also sold hot-dogs at a university location working for the locally known,

“Dawgfather”, and had two other part-time jobs, not all at the same time. He estimated his monthly income during the subject period was \$2,000.

[6] The Appellant’s wife Sara Dayem testified. They met and married in 1984 in Kuwait and moved to Canada in 1996. She had a Canadian Tire MasterCard for her cleaning business which she started in 2011. A statement for that credit card showed for the monthly period ending January 24, 2012 a balance of \$6,116, and she testified without documentary corroboration that the balance as at December 31, 2013 was \$10,150. She sometimes used her cousin’s credit card with his permission, when her own card was not accepted at a grocery store. She testified she received periodic payments, by mail or by delivery from a Canadian resident relative, totalling \$12,000 per year from a cousin (or other relative) in Kuwait for each of the three subject years. This was part of family support from abroad given her difficult financial circumstances. There was little documentary corroboration, apart from one postal receipt seeming to show the year 2011. She said the payments from Mr. Karsoua for cooking were just intended to repay actual cost of the food. She cooked for them because she liked to help - it was her cultural tradition. Occasionally Mr. Karsoua gave a gift on the Eid holiday to her youngest daughter. She testified that once when she really needed money he gave her \$1,000 in cash and another time an amount exceeding \$1,000 by electronic bank transfer and other times \$200 or \$300. This was mostly in 2012 and 2013. Her husband usually but not always worked five nights a week driving taxi. Her eldest daughter, Noor, paid on her Visa \$3,400 for Sara’s trip to Jordan to visit her ailing mother.

[7] For her cleaning business she started using a business bank account in 2014, hence not during the subject period. She said whatever cash she received mostly was banked. The meal payments from Mr. Karsoua were simply reimbursements for money spent for the food that was prepared. She did not use cash much for personal transactions other than at Tim Hortons. The money in the bank account was firstly for payment of the mortgage on their house, the annual amount being approximately \$16,000. Sometimes a payment was missed. She paid cash to her subcontractor cleaners.

[8] Haneen Owda (second daughter) testified. She lived in the family house during the subject years with her Appellant father and her mother, Sara. She had documentation as to cash withdrawals that in general supported her evidence that on occasion she made cash gifts to her mother to assist the family’s “hard” financial situation. She testified she gave as much as \$4,000 (she could not recall the exact amount) on one occasion; otherwise her individual gifts were in the \$200 range. Her money sources were her work at Tim Hortons (only for 2011) and

otherwise a student loan. She was 19 in 2011. She married Mr. Sabra in 2014. She sometimes received small money gifts from her parents, as needed.

[9] Zain Hussina testified. He is employed as a business development manager for web.com. The Appellant is his father-in-law, and eldest daughter Noor Owda is his spouse. During the subject years Mr. Hussina was employed by Bell Aliant as a travelling salesman. He had a good income and lived with his wife's family throughout the relevant period. He was not required to pay rent or otherwise contribute but he could see the family was financially stretched and he desired to assist financially. He gave cash gifts, and giving cash is a cultural preference. His banking records were put in evidence showing ATM cash withdrawals for payments to Sara of \$400, \$380, \$500, \$40, \$500, \$100, \$500, etc. He observed Sara cooking for Mr. Karsua and his group, fairly often. He testified the Appellant did not work a lot of hours and sometimes Mr. Hussina spotted the Appellant sleeping in his taxi at night when he supposedly was working.

[10] Eldest daughter Noor Owda testified. She lived in her parents' home for the entire subject period except for five months in Alberta in 2012. In 2011 she was employed for two months and otherwise was unemployed. In 2012 in Calgary she worked for Shaw Communications and the Caleo Spine Health Clinic. In 2013 she worked at Centric Health (then Lifemark). Her income for the three years was about \$12,000 (2011), \$27,000 (2012) and \$13,000 (2013). Her banking statements show cash withdrawals which she testified were gifted to her parents for groceries and whatever else was necessary. Her father was not making much money and had medical issues and "was getting assaulted a lot". The family was trying to get him to stop working - they could handle the financial situation. She said her father worked about five times a week, and four to five hours each time, sometimes less. He worked late at night, and usually took Sundays and Mondays off.

[11] She knew but had little interaction with Mr. Karsoua who worked with her mother in the cleaning business. She said she witnessed him giving her little sister hundreds of dollars cash. Her gifts to her mother mostly were made in cash, perhaps ten percent of the time by electronic transfer. When she was in Alberta she withdrew and gave cash to visiting friends to give to her mother upon returning home. She preferred giving cash rather than electronic transfer of money, as more aligned with cultural preference to gift cash. When she was home she would go shopping for groceries or clothes with parents and she generally would do the buying, with her Visa credit card.

[12] When she bought airline tickets for mother and sister to go to Jordan in December 2012 that was by Visa. Her mother subsequently made a partial repayment to her from money from her brother. In 2012 when she was in Alberta her husband Mr. Hussina lived with his wife's family. Sometimes her mother would use Noor's Visa card number, with Noor's standing permission to do so. Her mother also made some transfers to her, particularly when her mother and friends used her Visa for online purchases. Noor got points, and her mother and friends would typically give her the amount of the purchase in cash before proceeding to use her Visa for the on line purchase. She remembers on occasion paying her parents' power bill and water bill with her credit card. She can't remember exactly when.

[13] Appellant's counsel re-called Sara Dayem to the stand. She identified business account statements for her Sara's Cleaning Services for December 2012 to January 2013 and for December 2013 to December 2014. (Exhibit A-11a). She identified several relatively minor cash transactions as being business-related.

[14] Respondent's counsel called one witness, Ms. A. Williams of CRA. She carried out the subject net worth audit. She testified as to aspects of her net worth audit and was cross-examined accordingly.

Issue:

[15] The issues of course are whether and to what extent the subject net worth assessments are valid for the Appellant's 2011, 2012 and 2013 taxation years, and likewise in respect of the subsection 163(2) gross negligence penalty assessment for each of the subject taxation years.

Analysis and Conclusion:

[16] Subsection 152(7) of the Act permits "arbitrary" assessments by the Minister where he or she does not accept as valid information contained in a return or otherwise supplied by a taxpayer. The herein appealed "net worth" reassessments were carried out pursuant to that provision.

[17] Jurisprudence has established that net worth assessments are imprecise approximations of a taxpayer's income. The Minister is not obliged to identify sources of the taxpayer's wealth approximation as arbitrarily determined by the Minister. Failure of a taxpayer to keep adequate books and records for determination of his/her/its taxable income is sufficient to justify use of the net

worth method of assessment. (See *Malone v. R.*, 2006 TCC 133, para. 3 and *Hsu v. R.*, 2001 FCA 240, para. 30.)

[18] In this informal procedure matter I accept the Respondent's concession, at para. 53 of that party's written submissions, that the Appellant's 'RBC joint Visa' credit card balances for the beginning and end of each of the subject three taxation years, having been included in the Appellant's consumer proposal, ought to be excluded from the net worth calculation underlying each of the appealed reassessments.

[19] Having heard and considered the testimony of the several witnesses in this matter, I am satisfied that the Appellant received the benefit of some cash gifts additional to those recognized by the CRA auditor. In particular I believe the two sons-in-law each made such contributions for the benefit of the father and mother of their respective spouses. Due to lack of fully corroborating documentary evidence I conclude that son-in-law Zain Hussina contributed at least 75% of the amounts he believes he contributed - thus I accept that he gifted to the benefit of the Appellant \$2,745 ($\$3,660 \times 75\%$), \$11,734 ($\$15,654 \times 75\%$) and \$1,568 ($\$2,090 \times 75\%$) for the 2011, 2012 and 2013 taxation years respectively. I note that Mr. Hussina's income in 2012 was markedly greater than in either of the other years.

[20] I recognize that this approximation is somewhat arbitrary, but it is so in the context of arbitrary assessments raised per subsection 152(7) of the Act, noted above. It also reflects my best estimation of the true factual scenario, based on the evidence I have heard in the full circumstances of this appeal. The same comment applies with respect to the various further findings of fact I make below.

[21] As for son-in-law Mohammed Sabra, who was a part time student and had estimated monthly income of only **\$2,000**, I believe that most likely he overall contributed a lesser amount than his estimate of \$600 to \$1,000 monthly. I am unsure this happened throughout the entire subject period (2011 to 2013) as opposed to more recently. He apparently became the Appellants' son-in-law, only in 2014 or 2015. I would conclude, again in the absence of clear documentary corroboration, that his average monthly contribution was more likely in the area of \$450 (being 75% of the \$600 bottom of estimated range), and this would be for only the last year in issue being the 2013 taxation year.

[22] For both of these young men I accept that they were in good part motivated to give cash gifts to their in-laws (actual and prospective) given their cultural

traditions (referred to several times by witnesses) and also by just plain kindness, recognizing the family's financial straits. Familial financial transactions typically are not documented nearly to the extent expected in arm's length dealings.

[23] In that regard I take note also of cash contributions by the two elder daughters - Noor and Haneen. Again, documentation is not a hallmark of non-arm's length dealings. I am sure both daughters wished to assist their parents where they could. The CRA auditor has recognized documented electronic transactions. I would recognize also a modest amount of non-documented cash gifts, of 75% of the amounts each claimed for each taxation year - hence, for Noor, \$834 ($\$1,112 \times 75\%$), \$5,061 ($\$6,748 \times 75\%$) and \$4,133 ($\$5,510 \times 75\%$) in the 2011, 2012 and 2013 taxation years respectively; and for Haneen, \$83 ($\$110 \times 75\%$), \$3,188 ($\$4,250 \times 75\%$) and \$677 ($\$902 \times 75\%$) in the 2011, 2012 and 2013 taxation years respectively.

[24] As for Mr. Karsoua, I find the evidence relatively clear that his payments for Sara's home-cooked meals for him and also his group were just to defray the food costs. I agree with the Respondent that the amount used by the auditor for the family's food costs were so modest that they could not have included the food costs associated with this home-cooked meals endeavour. So it was basically money spent being reimbursed. While I accept that he may well have provided cash gifts on occasion I have little to guide what the quantum of such payments might be. I am prepared to accept that the amount of such payments during each of the three years in issue would have been in the order of \$700.

[25] We heard no evidence from either Sara's brother or uncle as to amounts they purportedly gifted to the benefit of the Appellant's household costs. Thus I would not disturb the Respondent's auditor's position as to contributions from these two individuals.

[26] Regarding the Canadian Tire MasterCard credit card, I concur with Respondent's counsel that in the absence of beginning and end of year balances, nothing really can or should be done to include consideration of this credit card in the calculation of net worth.

[27] I also agree with Respondent's counsel that if Appellant's counsel wished to cross-examine the CRA auditor on aspects of the audit, they should have taken pre-hearing steps to obtain the auditor's notes and working papers themselves, to do so. Arguing that the auditor should have had her documentation with her in court, in

the absence of any pre-hearing request by Appellant's counsel for same, is not effective.

[28] Lastly, with respect to the gross negligence penalty assessed for each of the three years, I agree with the Appellant and his counsel that considering the small number of hours the Appellant drove cab weekly, and at night when business would be less busy, it is not readily apparent that he could have driven enough to have earned the amounts of unreported income found by the auditor. Of course also those amounts will be offset to a marked degree by the factual findings set out above. In these circumstances I consider it appropriate to deny the subsection 163(2) penalty assessments. The circumstances are not sufficiently extreme to justify these onerous penalties.

[29] In conclusion I uphold the appealed reassessments, except to the extent of changes I have noted above. As success has been divided there will be no order for costs.

This Amended Reasons for Judgment reflecting a single bolded change in paragraph 21, is issued in substitution for the Reasons for Judgment dated February 28, 2019.

Signed at Ottawa, Canada, this 5th day of April 2019.

“B. Russell”

Russell J.

