Docket: 2016-1057(IT)G

BETWEEN:

JUDY TONG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 10 and 11, 2019, and January 28, 2020 at Toronto, Ontario

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

Counsel for the Appellant:	Joseph G. LoPresti
Counsel for the Respondent:	Tony Cheung

JUDGMENT

In accordance with the attached reasons for judgment:

The appeal from reassessments made under the *Income Tax Act* for the Appellant's 2011 and 2012 taxation years is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The Appellant did not have unreported income; and

2. The Appellant is not liable for penalties under subsection 163(2) of the Act.

The parties shall have 30 days from the date of this Judgment to make written submissions on costs, and such submissions shall not exceed 10 pages.

Signed at Ottawa, Canada, this 24th day of July 2020.

"K.A. Siobhan Monaghan"

Monaghan J.

Citation: 2020 TCC 70
Date: 20200724
Docket: 2016-1057(IT)G

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JUDY TONG,

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and

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REASONS FOR JUDGMENT

Monaghan J.

I. OVERVIEW

[1] The Minister has reassessed Judy Tong's 2011 and 2012 taxation years by notice dated January 22, 2015. Mrs. Tong objected to the reassessments in 2015 but the Minister confirmed them on January 4, 2016, resulting in this appeal.

[2] The reassessments increase Mrs. Tong's income by $58,489 in 2011, and by $59,999 in 2012, on the basis that she has unreported business income from a restaurant business that she owned but that was always operated by her husband, Ivan Tong. The reassessments also impose penalties under subsection 163(2) of the *Income Tax Act* (Canada) (the "Act").

[3] Three witnesses testified at the appeal: Mr. and Mrs. Tong for the Appellant, and Ms. Datu for the Respondent.

[4] Although Mrs. Tong was the owner of the restaurant, it is clear from the evidence that she had very little to do with its operation. Accordingly, while

Mrs. Tong testified, in many respects she was unable to answer detailed questions about the restaurant, deferring to her husband who was responsible for all aspects of the restaurant operation and family financial matters.

[5] Mr. Tong operated the restaurant, maintained the restaurant books and records, completed the requisite reporting for sales taxes and source withholdings, arranged for payment of all expenses associated with the restaurant, purchased food and supplies for the restaurant and prepared Mrs. Tong's income tax returns.

[6] Ms. Datu is the auditor with the Canada Revenue Agency who completed the audit that led to the reassessments.

II. BACKGROUND FACTS

[7] Mrs. Tong is a registered nurse employed by two hospitals. She works full-time at Credit Valley Hospital where she has been employed since 1997, and part-time at St. Joseph's Hospital. Her employment income is deposited directly into a bank account, at HSBC Bank (HSBC) in the case of Credit Valley Hospital, and at The Toronto-Dominion Bank (TD) in the case of St. Joseph's Hospital. Both of these bank accounts are joint accounts with her husband.

[8] In the relevant years, Mrs. Tong also had a bank account at the Bank of Montreal (BMO) established for, and restricted to, the restaurant business. The BMO bank statements have both her name and the name "All in One Fast Food Restaurant" on them. The address on them appears to be the restaurant's address.

[9] Mrs. Tong met Mr. Tong in 1990 while she was visiting Canada from Hong Kong, where she was working as a nurse. At that time, Mr. Tong was a restaurant owner, operating a fast food restaurant and a buffet restaurant, both known as SuperWok. They decided to marry and did so in Hong Kong in 1991. Mrs. Tong immigrated to Canada and obtained her Canadian nursing licence but it took some time to find a nursing position in a hospital because she had no Canadian experience and needed to improve her English language skills. She initially worked at a physician's office.

[10] The Tongs have two children, a son born in 1992 and a daughter born in 1994. In the taxation years in issue, their son started university and their daughter was in high school.

[11] In the early years of their marriage, Mrs. Tong said Mr. Tong's restaurants did well enough to support the family. They purchased a house in 1997 in Mrs. Tong's name but sold it in 2009. Since then they have lived in rental accommodation. The net proceeds from the sale of the house, after fees and repaying the mortgage, were approximately $200,000[1] which the Tongs used to purchase term deposits and to invest through an investment account.

[12] The restaurants owned by Mr. Tong when he met Mrs. Tong were located in shopping malls. The first, started in 1985, was in the South Common Mall in Mississauga. The second, started about 5 years later with a partner, was in Meadowvale Town Centre.[2] However, sometime around 2000, a new very large mall, Erin Mill Town Centre, located between the two malls where Mr. Tong's restaurants operated, opened. Anchor tenants left the two malls which therefore decided to proceed with rebuilding and redevelopment efforts. The SuperWok restaurants had to be closed, the first one in 2000 and the second one in 2002.

[13] In 2003, Mr. Tong identified a restaurant in Hamilton located near the Stelco operations. Mrs. Tong purchased the Wayside Restaurant for $40,000. Mr. Tong explained this restaurant was put in Mrs. Tong's name at their accountant's suggestion. The accountant suggested this because losses might be incurred at the beginning and the funding for the purchase was coming from Mrs. Tong. Mr. Tong said that the restaurant started slowly, but then started to turn around with more customers patronizing the restaurant. However, about two years after the restaurant was purchased, U.S. Steel acquired Stelco. As a result, the number of Stelco employees in Hamilton declined from 10,000 to 3,000. This had an adverse effect on the Wayside Restaurant. When the lease ended in 2008, the Tongs walked away from the Wayside Restaurant with nothing. The restaurant never made a profit.

[14] Mr. Tong was too young to retire, but given his age and the fact that he had worked for himself for so long, they looked for another restaurant. In 2009,

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[1] Mr. Tong testified the net proceeds were about $200,000. Mrs. Tong said they had paid $180,000 for the house in 1997, had lived in the house for 12 years, and sold it for $320,000. She said they had decided to sell because the markets kept rising and they had a good profit. Although they had a mortgage, she did not know how much it was. She said her husband took care of all of the money matters for the family. Mrs. Tong said she could remember acquiring a $20,000 term deposit after the house sale. A $20,000 term deposit is consistent with Mr. Tong's testimony regarding the proceeds from the sale of the house, even Mrs. Tong could not remember that the total net proceeds were higher.

[2] The second restaurant was owned by a corporation owned by Mr. Tong and his partner.

Mr. Tong located a Pizza Boy restaurant in an industrial area in Brampton. Mr. Tong had experience with pizza, as he had owned a Pizza Pizza franchise before starting SuperWok. Mrs. Tong purchased the restaurant for $18,000. Although the restaurant initially continued as a pizza restaurant, Mr. Tong said that he discovered that an independent pizza restaurant could not compete with the pizza franchises. As a result, about nine months after they purchased Pizza Boy, they decided to change to a breakfast and lunch menu. The restaurant's name was changed to All in One. All in One was open six days a week, from 7am to 3pm on weekdays and 7am to 2pm on Saturdays. No menu item cost more than $8.[3]

[15] Mrs. Tong was unable to provide much in the way of useful testimony regarding the restaurant business because Mr. Tong operated it. He was at the restaurant every day, maintained the books and records, and prepared Mrs. Tong's income tax returns. While Mrs. Tong sometimes assisted at the restaurant, she had two nursing jobs and so relied entirely on Mr. Tong. Their children helped at the restaurant from time to time. Mr. Tong's salary was set at $24,000 a year, but the children were paid based on the hours they worked. For a short period of time, the restaurant also had a part-time employee.

[16] Customers at All in One could pay cash or use a debit or credit card. Credit and debit card sales were processed through Elavon, which supplied the terminal for those sales. Elavon deposited the debit and credit card sales directly into the BMO bank account once a week. However, although most of the sales at the restaurant were cash, that cash was not deposited to the BMO account. Rather, Mr. Tong said that he emptied the cash register each night and took the cash home. He said he used that cash to pay various expenses related to the restaurant, including food, supplies, some office and maintenance expenses, and salaries for himself and his children.

[17] The only expenses paid from the BMO account were the rent for the restaurant (paid by cheque), Elavon's fees (direct withdrawal), the utilities for the restaurant (direct withdrawal), the salary of the part-time employee (paid by cheque) and certain other expenses (*i.e.*, ADT security, garbage pick-up service, WSIB payments and advertising in the Yellow Pages).

III. FACTS NOT IN DISPUTE

[3] See Exhibit A1. Breakfast combo meals ranged in price from $3.99 to $7.99.

[18] Mrs. Tong agreed with many of the facts asserted by the Respondent. The parties agree that:

1. Ms. Tong had a restaurant business offering breakfast, lunch and take-out meals operating under the trade name “All in One”;
2. Ms. Tong was employed as a registered nurse and earned employment income of $104,131 in 2011 and $106,074 in 2012;
3. Mr. Tong operated the restaurant for Mrs. Tong (*i.e.*, did the cooking and operated the cash register, and purchased food and supplies) and was responsible for maintaining the books and records;
4. The Tong children worked in the restaurant;
5. Cash from sales at the restaurant was not deposited to the BMO bank account;
6. Salaries for the Tongs and expenses often were paid directly from the cash sales; and
7. Mrs. Tong claimed losses from the restaurant business in every year from 2003 to 2012.

IV. THE REPLY AND THE ASSUMPTIONS ON WHICH THE REASSESSMENT WAS BASED

[19] In reassessing Mrs. Tong, the Minister did not dispute any of the expenses Mrs. Tong deducted in computing income from the restaurant business. Ms. Datu testified that all of the expenses were considered valid; Mr. Tong had provided her with receipts for the various expenses and the salary expense claimed matched the T4s issued to Mr. Tong, the Tong children and the part-time employee.

[20] However, the Minister assumed that many expenses associated with the operation of the restaurant were paid for in cash and that such cash represented unreported sales from the restaurant. In particular, paragraph 24 i) of the Reply states:

> i) salaries and expenses were often paid directly from the cash sales, and those cash sales were not recorded in the Appellant’s books and records, as follows:

Salaries Paid in Cash	2011	2012
Salary Ivan Tong	$24,000	$24,000
Salary Tong Child	$1,500	$3,200
Salary Tong Child	$4,510	$3,800
Total Salaries:	**$30,010**	$31,000

[21] The other expenses the Respondent alleges were paid in cash are described in paragraph 24 j) of the Reply. It states:

> j) the following other expenses were paid in cash:

Expense Paid in Cash	2011	2012
Food purchases	$16,302	$17,803
Office Expenses	$1,997	$2,394
Supplies	$2,744	$2, 821
Maintenance and Repairs	$3,887	$2,710
Vehicle (Fuel)	$3,549	$3,271
Total Other Expenses	**$28,479**	$28,999

[22] Unlike paragraph 24 i), paragraph 24 j) does not state that the cash used to pay the identified non-salary expenses were from cash sales, or from cash sales not recorded in the books and records. Nonetheless, it is clear that the Minister reassessed Mrs. Tong on that basis. The reassessments claim Mrs. Tong had unreported income in 2011 of $58,489 (*i.e.*, the sum of $30,010 and $28,479) and unreported income of $59,999 in 2012 (*i.e.*, the sum of $31,000 and $28,999).

[23] In this respect, the Reply is not very well drafted. Paragraph 24 j) can be read as assuming only that the identified expenses were paid in cash. That alone would not be sufficient to support the reassessments. In fact, as will be seen, Mrs. Tong does not dispute that most of those expenses were paid in cash. What is critical though is the source of that cash, and the Reply says nothing about the source of the cash for the expenses identified in paragraph 24 j).

[24] In stating this, I am cognizant that paragraph 24 i) refers to both salaries and expenses often being paid directly from the cash sales, but the only cash sales that the Reply asserts were not recorded in Mrs. Tong's books and records are those

used to pay the salaries of Mr. Tong and the Tong children: "those cash sales were not recorded . . . as follows:" Put another way, the Reply assumes salaries and expenses were often paid directly from cash sales, but the only cash sales assumed not to be recorded were those used to pay the salaries identified in paragraph 24 i).

[25] The Reply also assumes that the restaurant had a "high level of cash sales". It is not clear to me what this statement means. Does "high level" refer to dollar value or percentage of total sales? To the extent it refers to the latter, I think the parties agree. Mr. Tong said 75-80% of the restaurant customers paid cash[4] and his daily sales records[5] suggest cash represented approximately that same percentage of total reported sales. To the extent it refers to the former, the statement is too vague because there is no reference as to what a high dollar value is. High compared to what? In order to decide what is high, one needs to know what is "normal" or "average" or "low". And, all of that may well depend on the circumstances. This too is poor drafting.

[26] Although not stated in the Reply, it is also clear that the auditor assumed that all deposits made to the BMO bank account represented revenues from the restaurant, so that the restaurant's sales were the total of (i) all deposits to the BMO bank account, and (ii) restaurant expenses assumed to have been paid with cash not deposited to the BMO bank account. Because that total exceeded the reported gross sales from the restaurant, Mrs. Tong was reassessed for unreported income equal to the expenses assumed to have been paid in cash.

[27] Because of the weaknesses in the Reply, in my view the Respondent bears some of the burden of proof relating to the assumptions.[6] In particular, the Respondent bears the burden of establishing the expenses identified in paragraph 24 j) were paid from unreported sales and that all deposits to the BMO account were from sales. Nonetheless, Mrs. Tong attacked the reassessments with evidence to show that the assumptions, stated and unstated, were incorrect.

V. <u>CHALLENGES TO THE REASSESSMENTS</u>

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[4] Although it is unclear whether he meant as a percentage of customers or of sales.

[5] See Exhibit A9.

[6] See *MNR* v. *Pillsbury Holdings Ltd.* [1964] CTC 294 (Ex Crt) at p. 302; *Kit-Win Holdings (1973) Ltd*. v. *The Queen* [1981] CTC 43 (FCTD); and *Andersen* v. *The Queen* 2020 TCC 51.

[28] While Mrs. Tong agrees that her husband's and children's salaries and many of the non-salary expenses identified in the Reply were paid in cash, she disputes the reassessments on the following three grounds:

(a) Deposits to the BMO bank account included funds transferred from the Tongs' personal joint accounts and those funds did not represent restaurant revenues;

(b) All sales, whether cash or credit/debit card, were recorded in the books and records of the restaurant and were reported as revenues in computing Mrs. Tong's income from the restaurant business; and

(c) Certain expenses that the Minister assumed were paid in cash from the cash register were paid directly from a bank account or from cash withdrawn from a bank account.

In simple terms, Mrs. Tong's position is that she reported all sales from the restaurant in computing her income.

[29] Let me review the evidence regarding each of these grounds.

(a) Deposits to the BMO Bank Account:

[30] The parties agree that all of the withdrawals from the BMO account paid expenses related to operating the restaurant, that proceeds from debit/credit card sales were deposited in the BMO account and that cash sales were not deposited to the BMO account. The disagreement concerns the source of other deposits to the BMO account.

[31] Ms. Datu testified that she assumed all deposits to the BMO bank account represented sales from the restaurant. When she added all of the deposits made in 2011 and 2012, the totals exceeded the revenues reported by Ms. Tong.[7] Ms. Datu also identified expenses claimed but not paid from the BMO account. This suggested to her significant unreported cash sales.

[32] Mrs. Tong does not agree that all deposits to the BMO account represented revenues from the restaurant. Rather, Mr. Tong testified that funds were transferred from their personal joint bank accounts at HSBC and TD, to the BMO account, in

[7] See Exhibits R4 and R5.

order to pay expenses of running the restaurant. The transfers occurred when the funds in the BMO account were insufficient to pay expenses that had to be paid from that account, either because the payee required a cheque (*i.e.*, the landlord for the restaurant[8]) or did not accept cash (*e.g.*, utilities and WSIB). Because substantially all of the funds deposited to the joint bank accounts were Mrs. Tong's salary or her tax refunds, Mrs. Tong's position is that she was funding the restaurant-related expenses using her personal funds transferred to the BMO account.

[33] Ms. Datu agreed that Mr. Tong had told her that funds were transferred from the personal joint account to the BMO business account. However, because Ms. Datu did not see any transfers to the BMO account, she assumed all deposits were cash from restaurant sales.

[34] The evidence indicates that Ms. Datu was mistaken. Mr. Tong testified that cheques totalling $34,500 drawn on the HSBC account were deposited to the BMO business account in 2011. In 2012, $34,900 was transferred from TD or HSBC to the BMO account (all but $4,000 of this amount was from HSBC). In support of this testimony, Mr. Tong presented copies of the relevant HSBC cheques, each made payable to All in One Restaurant, copies of the HSBC bank account statements showing these cheques[9] clearing that account, and copies of the BMO bank account statements showing deposits of the same amounts.[10] While he did not have a copy of the $4,000 TD cheque, the TD bank statement for February 2012 shows a $4,000 cheque clearing that account on February 22, 2012 and the BMO bank statement shows a deposit of the same amount on the same day.

[35] When shown a cheque and corresponding bank statements on cross-examination, Ms. Datu explained she was looking for bank transfers, not bank deposits. I accept Mr. Tong may have used the word "transfer" to describe the movement of cash. But, Ms. Datu appears to have interpreted that word very literally in the context, *i.e.*, as meaning only direct bank-to-bank transfers, rather than a movement of money by any other means, including by cheque. In fact, Ms. Datu's description of her deposit analysis of the BMO bank account suggests

[8] The lease stipulates post-dated cheques. See Exhibit A4.

[9] The cheque number on the cheque matches the cheque number noted on the HSBC bank statement.

[10] See Exhibits A1, A2 and A3.

she did not make any real effort to identify the nature of the deposits, but simply assumed they were sales.

[36] The Reply contains no assumption regarding the source of deposits to the BMO account, yet it is clear that Ms. Datu assumed all of the deposits came from sales at the restaurant. To the extent the reassessment was based on that unstated assumption, the Respondent bore the onus of establishing those facts, and has failed to meet that onus.

[37] On reviewing the BMO account statements, it is clear that there are two primary sources of deposits but only one represents sales. Elavon deposited amounts directly, representing the credit and debit card sales, to the BMO account and those amounts represented revenues. Based on the evidence presented to me, it is clear that deposits to the BMO bank account of $34,500 in 2011, and of $34,900 in 2012, were cheques drawn on the HSBC or TD bank accounts. Those are not revenues.

(b) Expenses Not Paid in Cash from the Cash Register but from a Bank Account:

[38] It is clear that the expense amounts in paragraph 24 j) of the Reply were derived from Ms. Datu's working papers and summarized in a working paper, dated October 7, 2014,[11] since the amounts match exactly. Ms. Datu testified that during the audit she confirmed those amounts were paid in cash and noted that in her working paper.

[39] Mrs. Tong's position is that certain of the maintenance expenses and all of the fuel expenses identified in the Reply were not paid directly with cash taken from the cash register. As to expenses paid in cash, the cash came from cash sales or withdrawals from their personal joint bank accounts. The latter she states represented funding she provided to the business.

(i) Maintenance:

[40] Mr. Tong agreed that some maintenance expenses were paid using cash but not all. In particular, he asserts garbage pick-up and ADT security costs, totalling approximately $1,165 in 2011 and $1,270 in 2012,[12] were paid by cheque from the

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[11] Exhibit R5.

[12] See Exhibit A1, pages 252 and 253, for a summary prepared by Mr. Tong. In computing these amounts, I have excluded amounts paid to the Yellow Pages included in the summary, but that

BMO business account. While only a few examples of the cheques were tendered in evidence, the amounts Mr. Tong described as being paid from the BMO account on account of these expenses, and identified as such expenses in his monthly record of expenditures,[13] match cheques indicated as drawn on the BMO bank account in the relevant months.[14]

[41] Maintenance and repair expenses deducted in computing Mrs. Tong's income from the restaurant in 2011 and 2012 match exactly the amounts that the Reply assumes as were paid in cash.[15] In her working paper, Ms. Datu's note beside maintenance expenses is "proof of payments/cash". I am not satisfied that Ms. Datu's notes are sufficiently detailed to allow her to state with certainty, five years later, that all of those expenses were paid in cash. On cross-examination when asked about whether she had seen particular receipts for the maintenance, Ms. Datu stated:

> "I wouldn't remember. There were tons of receipts so I can't think if this was one of them."[16]

[42] Her inability to remember the exact details is perfectly understandable, and it is possible she did not look at every receipt. But, her evidence does call into question her assumption that all of the maintenance expenses identified in her worksheet were paid with cash. In my view, her note in the worksheet is as consistent with some, even significantly all, of the relevant expenses being paid with cash as it is with all of them being paid with cash. Mr. Tong's evidence convincingly establishes that at least some of the maintenance expenses were paid by cheque from the BMO bank account.

(ii) Fuel:

Mr. Tong agreed had been misclassified there as maintenance expenses, and should have been characterized as advertising.

[13] See Exhibit A12.

[14] See Exhibits A2 and A3, respectively, for 2011 and 2012 BMO bank account statements.

[15] See Exhibits A6 and A5, respectively, for 2011 and 2012 T2125 Statements of Business or Professional Activities. Ms. Datu also testified that she used the amounts from the Statements of Business or Professional Activities for these expenses.

[16] Transcript page 292 at lines 14-15.

[43] The Reply assumes that fuel expenses of $3,549 in 2011 and $3,271 in 2012 were paid with cash. Both Mrs. Tong and Mr. Tong claim that an Esso credit card[17] was used. Although Mrs. Tong deferred to her husband regarding the details of how the Esso card invoices were paid, she said that card was used to purchase fuel and she thought amounts owing on it were paid from their personal bank account, not with cash.[18]

[44] Mr. Tong also said fuel was purchased using the Esso credit card and that the Esso invoices were paid from their personal joint bank account. Mr. Tong identified several Esso Business Card invoices (monthly statements) showing fuel purchases in 2011 and 2012. HSBC and TD bank account statements also show payments to the Esso Business Card which match[19] amounts on the Esso invoices.[20] He was not asked any questions regarding payments for fuel in cross-examination.

[45] In her direct testimony, Ms. Datu said that in the course of the audit she looked at the various receipts for expenses Mr. Tong provided to her and confirmed the fuel receipts showed cash payments. However, she was less convincing on cross-examination.

[46] She initially agreed she had seen the Esso Business Card statements in the course of her audit. But when pressed, said she did not remember seeing them but did remember seeing Esso gas receipts that indicated cash was used to pay for fuel. Unfortunately, no copies of those receipts were in evidence.

[47] In her working papers, while Ms. Datu made a note next to several categories of expenses indicating proof of payment in cash, next to vehicle

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[17] The Esso credit card is labelled an Esso Business Card. While the card is in Ivan Tong's name, Mrs. Tong said it was a business card not a personal card. It is not clear what she meant by this, other than perhaps it is labelled as such. In my view, nothing turns on the fact the card is in Mr. Tong's name.

[18] With assistance from her counsel, she was able to identify one payment on account of the Esso credit card made from a bank account.

[19] In some cases the balance due, in some cases a combination of amounts due on two statements, and in some cases payments made in a prior period as indicated on the Esso invoices.

[20] See Exhibits A1 and R1.

expenses there is no note concerning method of payment.[21] Her only note next to vehicle expenses is “85% business use.”

[48] Of course the Tongs might have purchased other fuel using cash. In this regard, two other pieces of evidence are relevant. First, in her direct testimony, Ms. Datu said that the vehicle was 85%[22] business use. The amount demonstrated as paid on account of the Esso credit card from the Tongs’ personal bank accounts in 2011 exceeds the 2011 fuel expense identified in the Reply as paid with cash by several hundred dollars,[23] presumably reflecting personal expenditures for fuel on the Esso credit card. Secondly, the amount the Reply identifies as fuel paid with cash exceeds the amount Mrs. Tong deducted in computing income from the restaurant. That is, the Reply uses the gross fuel expense associated with the vehicle used for business purposes,[24] rather than the business-related fuel expense. Thus, the payments from the personal bank accounts made towards the Esso card invoices are for personal use fuel purchases of more than $1,000 in 2011.

[49] The evidence for 2012 is less compelling. While the documents establish more than $2,300 was paid on the Esso credit card from the HSBC account, they also suggest that at least some fuel was purchased with cash, or at least not with the Esso credit card.[25] In particular, the total fuel purchased on the Esso card in 2012 appears to be less than the amount Ms. Tong deducted in computing her business income, and less than the gross fuel costs in the 2012 T2125 for the relevant vehicle.[26] This may explain Ms. Datu’s recollection that she saw gas receipts that indicated fuel had been purchased for cash. But, it is clear not all fuel was

[21] See Exhibit R5.

[22] The T2125s filed by Mrs. Tong with her income tax returns suggest something closer to 80%. See Exhibits A5 and A6.

[23] The personal joint bank account statements for 2011 show payments to Esso in January, March, April, June (a combined payment of May and June invoices), September, October and December. Neither all of the TD bank account statements nor all of the Esso statements for 2011 or 2012 were put in evidence. However, the available documentary evidence for 2011 supports a finding that the amounts paid on account of the credit card exceed the business fuel expense.

[24] See the T2125 to 2011 and 2012 in Exhibits A6 and A5, respectively, which indicate gross fuel costs of $3,549 and $3,271, respectively, but only $2,909 and $2,297 of such amounts as related to business use in 2011 and 2012, respectively.

[25] It is presumably possible another credit card was used.

[26] The last Esso statement for 2012 states Year To Date fuel purchases were $2,660.12. See Exhibit R1.

purchased with cash, and that the Esso credit card invoices were paid with funds from the joint account.

[50] This evidence for 2012 is inconsistent with Mr. Tong's evidence suggesting all fuel was purchased using the Esso credit card which in turn was paid using funds from the joint account. However, the point was not raised in cross-examination and Mr. Tong's recollection seven years later may be somewhat inaccurate. However, that goes only to the amount established not to have been paid with cash.

(iii) Other Expenses:

[51] The restaurant cash sales reported by Mrs. Tong are not sufficient to pay the expenses that Mr. Tong concedes were paid in cash. The cost of food and the Tongs' salaries alone exceed $46,000 a year, while total reported revenues (cash and credit/debit) were less than $47,000 in 2011 and less than $57,000 in 2012. If non-cash sales represented 20% of all sales, the cash sales were insufficient to pay for food and salaries, not to mention the other restaurant-related expenses that the Tongs agree were paid using cash.

[52] So what is the source of that cash? The Respondent's position is that it was unreported sales. Mrs. Tong does not agree.

[53] Mr. Tong said additional money to fund cash expenses was withdrawn from the Tongs' joint bank accounts at HSBC and TD (*i.e.*, not by cheque). In particular, Mr. Tong claims that in 2011 more than $16,000, and in 2012 more than $17,000, was withdrawn in cash from the HSBC and TD joint bank accounts to fund the Tongs' salaries and other restaurant-related expenses. Because the deposits to these accounts were primarily Mrs. Tong's salaries,[27] the position is that she was paying these expenses from her funds.

[54] Mr. Tong admitted that he did not maintain a record of which expenses were paid with cash from the cash register and which were paid with cash withdrawn

[27] All of the HSBC bank statements for 2011 and 2012 are in evidence. With few exceptions (e.g., transfers from a RESP and proceeds from a maturing term deposit), deposits to the HSBC account were limited to Mrs. Tong's salary and government cheques. While significantly fewer TD bank account statements were in evidence, those that were also suggest Mrs. Tong's salary and transfers from another unidentified account represented the vast majority of deposits. See Exhibit A10.

from the bank account. He did not think that mattered. He thought what mattered was that he had records of the sales and records of the expenses, and was able to substantiate those through cash register tapes, deposits by Elavon and receipts for expenses.

[55] Bank statements for the HSBC and TD accounts show several cash withdrawals in multiples of $1,000 from the HSBC and TD account over the two year period.[28] There are also seven withdrawals of $400 or less from these accounts over the two years that Mr. Tong claims were used to pay expenses for the restaurant. While this evidence does not establish that all of these withdrawals were used to pay restaurant-related expenses, it is one explanation as to how the expenses might have been paid. In fact, if a substantial portion of these withdrawals were not for business-related expenses, why would the withdrawals be made? In other words, if the restaurant had as much unreported cash as the Minister assumes, why would these large withdrawals be necessary? Yet on cross-examination, Mr. Tong was only asked about the irregularity of these withdrawals, in terms of amounts and frequency. His explanation was that he withdrew the money when it was needed to pay his salary or expenses.

[56] In my view, Mr. Tong's statement that money withdrawn in cash from the joint accounts was used to pay restaurant related expenses is plausible. This is not to say that I accept that every dollar withdrawn in cash was spent on restaurant-related expenses. In particular, I am skeptical the small dollar amounts and every dollar of the larger amounts were used for that purpose. But, Mr. Tong has put forth a plausible explanation for the source of the funds to pay the expenses.

(iv) Conclusion on Expenses Paid with Cash:

[57] In my view, the Respondent bore the onus of establishing that the expenses identified in paragraph 24 j) were paid for with cash from unreported sales, but has failed to meet that onus. One might argue that, read in context, that paragraph should be interpreted as incorporating the statement in paragraph 24 i) that the cash was sourced from unreported sales. I do not agree with that view.

[58] However, regardless of who bore the onus, I am satisfied on a balance of probabilities that the expenses and salaries that the Minister assumed were paid from unreported cash sales, were paid (i) directly from bank accounts,[29] (ii) with

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[28] Typically $2,000, although there are also a few withdrawals of $3,000 and one for $5,000.

[29] A combination of the BMO account (maintenance) and the joint accounts (fuel).

cash withdrawn from the joint bank accounts, or (iii) from cash sales reported by Mrs. Tong but not deposited in the BMO bank account.

(c) Cash Sales Not Deposited in the BMO Bank Account:

[59] Neither Mr. nor Mrs. Tong dispute that cash from the cash register was not deposited in the BMO bank account. Mr. Tong explained that each day he took the money home from the cash register and used it to purchase food for the restaurant, to pay expenses associated with the restaurant,[30] and to pay salaries to himself and his children. However, neither he nor the Tong children were paid weekly, bi-weekly, semi-monthly or even monthly. His salary was $24,000 a year and his children were paid based on the hours they worked at the restaurant. Mr. Tong said that over the course of a year he would retain sufficient cash out of the cash register, combined with money from cash withdrawn from their joint accounts, to pay himself his salary and to pay his children.

[60] Mr. Tong admitted that he did not keep records of how much cash brought home on a particular day would be used to pay particular expenses. He kept receipts for all of the expenses. But, he had no record of how cash from a particular day was applied. For example, if Mr. Tong brought home $195 on Monday, $186 on Tuesday, $214 on Wednesday, $224 on Thursday, $197 on Friday and $170 on Saturday, he would not be able to identify which dollars went to which expenses, or even if there was enough cash in a particular week to pay the expenses for that week. Put simply, the money went home in his pocket, and he used it as needed to pay his salary, to pay his children, to purchase food for the restaurant and to pay other restaurant-related expenses. To the extent that cash was not sufficient, cash was withdrawn from their joint bank accounts. Again, he did not track which expenses he paid with cash withdrawn from the joint bank accounts. He thought it was enough that he had a record of the sales and a record of the expenses, with receipts to support those amounts.

[61] Mr. Tong explained that at the end of each day he printed a cash register tape which contained information about the sales for the day in a summary (total) form.[31] From that summary, Mr. Tong created a handwritten daily sales register,[32]

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[30] For example, office supplies and the daily newspaper he supplied for customers.

[31] See Exhibit A8. Some copies in Exhibit A8 are difficult to read. However, the original cash register daily summaries were provided to the Court and are included in Exhibit A8.

[32] See Exhibit A9.

breaking out gross sales, GST/HST and net sales.[33] In some months, he separately recorded credit/debit sales in the daily sales register. Mr. Tong explained he did so to test whether Elavon was depositing the correct amount into the BMO account, but found Elavon never made a mistake so he stopped. The totals on the handwritten daily sales register match the corresponding daily cash register summary tape. Mr. Tong also prepared quarterly summaries of sales for purposes of completing the HST returns.[34] The restaurant was a quarterly HST filer and thus a quarterly summary made sense.

[62] Mr. Tong also maintained a monthly record of the non-salary expenses paid by category[35] (and the corresponding receipts). He said he collected receipts for all expenses in a box that he emptied at the end of each month to prepare that month's summary. The monthly summary does not specify how the expense was paid (cash, cheque or direct withdrawal) or where the source of cash used to pay an expense came from. Ms. Datu confirmed that she was satisfied that all of the expenses were incurred.

[63] Mr. Tong made the original cash register summary tapes available to the Court and Mrs. Tong's counsel asked him several questions about them. While some showed the cash register opened but "No Sale" recorded, Mr. Tong explained that this sometimes happened because someone wanted change, for the bus, for example. Mr. Tong also explained why a Void transaction might appear on the daily cash register summary. While he could not remember the circumstances of the particular transaction Mrs. Tong's counsel identified, he said he sometimes made a mistake inputting a transaction and had to void it and then input the correct one. In those circumstances, the void would appear directly on the cash register print out. However, in some cases, he did not realize he had made a mistake until the end of the day when he compared the total of the cash in the cash register and the credit/debit sales slips to that day's printed cash register summary tape. Once the daily summary was printed, it was too late to void a transaction. In those circumstances, Mr. Tong said he would make a handwritten notation of the void on the summary. None of this evidence was tested in cross-examination.

[33] The summary did not separately identify cash and credit or debit card receipts, although Mr. Tong could separate them because he had copies of credit/debit card receipts from those sales and could see the deposits Elavon made.

[34] See Exhibit A9.

[35] For example, food, maintenance, office, utilities, and supplies. See Exhibit A12.

[64] So why was the cash from sales not deposited in the BMO bank account and the expenses paid from there? Mr. Tong said that he did not think it was necessary to deposit the cash in the BMO account as long as he maintained records of the daily sales and had receipts for his expenses. Mr. Tong said Ms. Datu had told him in the course of the audit that it was acceptable to pay expenses in cash. Ms. Datu agreed that it was not necessary to deposit cash sales into a bank account and there was nothing wrong with paying expenses with cash.[36]

[65] The Respondent's counsel spent some time asking Mr. Tong about this evidence. Counsel observed that the expenses paid from the BMO account seemed to be limited to those that could not be paid in cash, such as the rent and utilities. He asked why, if expenses are not paid daily, and some were only paid monthly, the cash from the restaurant was never deposited in the bank. Mr. Tong said that he needed the money for expenses. In particular, Mr. Tong said the restaurant was open about 300 days a year, and he worked ten hours a day, amounting to approximately $73 a day.[37] So keeping the cash from the restaurant was a way of paying himself.

[66] Mr. Tong explained that it did not make sense to him to deposit the funds in the BMO account and then withdraw funds to pay for food for the restaurant, or other restaurant-related expenses, and his salary. Daily cash receipts were not large compared to those expenses. He didn't have time to go to the bank every day to deposit relatively small amounts. To deposit the funds in the BMO account and then write cheques to pay the expenses (including cheques to himself) or then pay the expenses through the bank would result in higher bank charges.[38] Thus, he decided to keep the cash and use it, together with cash withdrawn from the joint account to the extent necessary, to pay himself and those expenses he could or had to pay in cash.

[67] Although Mr. Tong was asked, more than once in cross-examination, whether there were cash transactions that he did not record in the cash register, he

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[36] Transcript page 308.

[37] $24,000/300 =$80. Mr. Tong said $73. Although this was not explained, given the specificity of the number it may be a reference to his net daily pay. Source withholdings were paid from a personal bank account, not the BMO bank account.

[38] The BMO bank statements indicate that each excess item resulted in a bank charge of $1.00. Excess bank charges were levied in several months.

consistently said that was not the case. His position is every sale was recorded.[39] He denied offering "special deals" such as permitting customers to avoid HST by paying cash. He explained that during the time he had operated the SuperWok restaurant a liquor-licensing officer had come in on an undercover basis and ordered a beer. Following that experience, he was concerned that any customer could be a CRA agent or other government agency representative.

[68] Ms. Datu was asked whether she had reviewed the cash register summary receipts provided by Mr. Tong. But, said she had not:

> . . . because there was no source document to verify against . . . there's no sales journal. These were just sales receipts.[40]

[69] Ms. Datu seemed to be suggesting the amounts from original receipts needed to be recorded in a sales journal to be meaningful. She also suggested the summaries from the cash register were not relevant because she derived the sales numbers from the bank statements.[41] Yet, Mrs. Tong has established the auditor's assumption that the deposits were all sales is incorrect. As to the absence of a sales journal, when presented with Mr. Tong's handwritten daily summary by month, she conceded that it was a sales journal.

[70] Appellant's counsel asked Ms. Datu about the assumption in the Reply that there were no internal controls put in place regarding the restaurant's finances.[42] In particular, Mrs. Tong's counsel asked her what type of internal control Ms. Datu was looking for. Her answer suggested that it was inappropriate that everything was done by one person. She suggested internal control meant different people looked after different aspects of the business such as accounts payable, payroll, disbursements, and sales; she was looking for a segregation of duties. With respect, this does not make much sense in the context of a sole proprietorship, and certainly is not a requirement.

[71] There is no doubt it would have been prudent for Mr. Tong to maintain a cash journal, and the failure to do so has made this a more challenging case. But,

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[39] Mr. Tong said there was a short period of time when he had no cash register because the one he had been using broke and needed to be replaced, but this is the only exception.

[40] Transcript page 298.

[41] *Ibid.*

[42] This assumption was made in support of the assessment of penalties.

the failure to do so is not in my view sufficient to tip the balance given all the other evidence and the sharing of the burden of proof.

[72] Counsel for the Respondent suggested that, at least on initial assessment, Mrs. Tong was refunded virtually all the tax withheld from her employment income and that that suggests that the reported losses were somehow engineered to result in a full refund of her taxes. He made this argument primarily to attack Mr. Tong's credibility.

[73] However, on closer examination of the evidence, it is clear this is not correct.[43] In each of 2003, 2005, 2006, 2007, and 2008, Mrs. Tong remained liable for tax, despite the significant losses. Although in some years her tax returns were reassessed, resulting in Mrs. Tong being liable for more tax than on initial assessment (*i.e.*, reducing the claimed refund), the reassessments alone were not responsible for a tax liability. That is, she was liable for tax before taking into account the reassessments, some of which were unrelated to business losses. While Mrs. Tong's 2006 and 2007 taxation years were reassessed to reduce the business loss initially claimed, following objection, much of the denied losses were restored. The reassessments reduced her refunds, but Mrs. Tong was liable for some tax before the reassessments. While there is no doubt Mrs. Tong received tax refunds as a result of the claimed losses, that fact alone does not suggest losses were inflated through unreported sales and in light of all the other evidence does not undermine Mr. Tong's credibility.

[74] The Reply contains no assumptions regarding the Tongs' lifestyle or any suggestion that the family could not live on the money available to them after funding the restaurant losses. In the years under audit, the Tongs lived in rental accommodation, which cost about $19,000 per year. Mrs. Tong testified that she was not a big spender and most of their income was spent on food, shelter, education and her husband's salary. With the exception of some questions about the rent, and the source of funds for term deposits and their son's university tuition, the Tongs were not pressed about any of their personal expenditures or lifestyle.

[75] Mr. Tong explained that the funds for the term deposits came from the sale of the family home. Mrs. Tong also referred to term deposits purchased with the house proceeds. The university tuition and other university related expenses were paid with a student loan and withdrawals from a registered education savings plan

[43] See Exhibit R10.

established after the Tong children were born.[44] Ms. Datu said she had not seen evidence of extravagant spending or of assets beyond those identified to her by Mr. Tong. In fact, the CRA penalty report states the audit adjustments were greater using an expense analysis than a net worth analysis.[45]

[76] Mrs. Tong has been deducting losses from the operation of a restaurant every year since 2003. With the exception of 2003 and 2008,[46] those losses have never been less than $55,000, and in the two years under appeal they exceeded $65,000. While these are significant losses to bear year after year on employment income that approximates $100,000, in the years under appeal[47] approximately $30,000 of the loss was attributable to salaries paid to family members. In other words, that money stayed within the family[48] and was available to fund personal expenses. Moreover, because of the losses, Mrs. Tong received significant tax refunds every year. The tax paid by Mr. Tong and the Tong children was significantly lower than the tax refunds Mrs. Tong received because of her losses.[49] The tax refunds and intra-family salary payments together provided the family approximately $50,000 in each of the years under appeal and so reduced the "impact" of the loss.[50]

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[44] The bank statements corroborate a transfer of funds into the personal joint bank account from another HSBC account and payments out to a university. Mr. Tong identified the transfer as being from an RESP and that was not challenged.

[45] See Exhibit R9.

[46] In 2003, the first year she was the owner of a restaurant, the loss was $22,921 (on revenues of $4,688) and in 2008 the loss was $28,774 (on revenues of $395). 2003 was the year she first became the owner of a restaurant and it may have only operated for part of the year. 2008 was the year the first restaurant was abandoned so it too may have only operated for a short period.

[47] While Mr. Tong was paid a salary in other years, it is unclear whether the Tong children were but that is not relevant to this appeal.

[48] Mr. Tong's salary and the salary paid to the Tong children.

[49] Ms. Tong's tax refund approximated $20,000 in each of 2011 and 2012 which is obviously significantly more than the taxes Mr. Tong would be liable for on employment income of $24,000. It is unlikely the Tong children would be liable for any tax on their salaries.

[50] Mrs. Tong's counsel also pointed to a reduction in personal savings in 2011, observing that the bank balance in the HSBC account declined by $10,000 between January 1, 2011 and December 31, 2011. The evidence was insufficient to conclude on the actual reduction in savings. For example, not all bank statements for the TD bank account were provided, and the balance in that account may have increased over the same period. However, I accept that other sources of money may have been available to the Tongs, including some investment income from their investment accounts.

[77] I say this only to explain why it might be possible for Mrs. Tong to fund recurring losses on employment income of $100,000. As to why the family would choose to do so, that is a more difficult question to answer. My sense is that the restaurant operation may have been motivated as much by a desire to give Mr. Tong something to do, as anything else.

[78] Mr. Tong said that after the restaurant in Hamilton closed, they looked for another restaurant because he needed a job, he had been a restaurant owner for more than 20 years and he was not used to working for someone else or being told what to do. He also claimed a desire to eventually sell the restaurant, although in the case of the Wayside Restaurant circumstances precluded that, and All in One was not successful either.

[79] Mr. Tong had been in the restaurant business for the entire time Mrs. Tong had known him, and for approximately 18 years before circumstances had forced the closure of the second SuperWok restaurant. Mrs. Tong said she wanted to support him with the restaurants as he had supported her, in obtaining her Canadian nursing qualifications and improving her English skills, after she had immigrated to Canada. But, she also testified that the restaurant losses were a source of friction between them, and that she had tried to persuade him to make improvements to promote the restaurant – daily specials and better quality food being two examples.

[80] I confess my impression of the evidence is that a reassessment of Mrs. Tong's income might have succeeded were it advanced on some other basis,[51] although I am far from convinced that unreported sales play a significant role. For example, it is possible that a portion of the deducted Tong family salaries were not in fact paid, that some portion of the expenses deducted in computing income were personal rather than business-related, or that Mr. Tong's salary funded in part other restaurant expenses such that Mrs. Tong was not paying them.[52] I also wonder whether some of the government cheques deposited in the HSBC account might have been HST cheques related to the restaurant that more properly should have been deposited in the BMO account, or at least should reduce the amount Mrs. Tong claimed to have spent using personal funds. However, I have no evidence to make a determination on that basis, even if it were open to me to do

[51] But, perhaps for a much lower amount than the reassessments under appeal.

[52] In a sense, this is the same as saying Mr. Tong was not paid the salary they claimed he was.

so.[53] Respondent's counsel did not submit that the evidence demonstrated an alternative basis of supporting the reassessment. Importantly, the Respondent did not suggest that any of the expenses were unsubstantiated or invalid. Ms. Datu was clear that she was satisfied the expenses were valid.

VI. CONCLUSION ON UNREPORTED INCOME:

[81] The entire premise of the Respondent's case is that significant cash sales at the restaurant were not recorded in the books and records and that the resulting cash was used to pay the expenses described in the Reply. Yet, the evidence has established that some expenses the Minister assumed were paid in cash from sales were paid from the BMO bank account. The evidence has also established that significant deposits to the BMO bank account were not from sales, but were from the joint bank account. The original cash register summaries for each day match the numbers in Mr. Tong's sales journal and the amounts reported by Mrs. Tong as gross revenues from the business. Mr. Tong's evidence was consistent with the documents and he maintained his position under cross-examination. While the evidence regarding cash withdrawals was less convincing, the Respondent bore some of the onus of establishing there were unreported sales. The Respondent accepts all expenses as valid.

[82] Based on the evidence, I am satisfied on a balance of probabilities that Mrs. Tong did not have unrecorded sales or unreported income, and her appeal should be allowed.

VII. PENALTIES

[83] The reassessments impose penalties on Mrs. Tong under subsection 163(2) of the Act. The Respondent bore the onus of establishing the facts that might support a penalty under subsection 163(2). Given my decision on the unreported income, it's clear the Respondent did not meet that burden.

VIII. CONCLUSION

[84] For the above reasons, the Appellant's appeal of the reassessments made under the Act for her 2011 and 2012 taxation years is allowed and the

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[53] See *Pedwell* v. *R* 2000 3 CTC 246 (FCA) and *Rezek* v. *Canada* 2005 FCA 2007.

reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The Appellant did not have unreported income; and

2. The Appellant is not liable for penalties under subsection 163(2) of the Act.

[85] The parties shall have 30 days from the date of this Judgment to make written submissions on costs, which submissions shall not exceed 10 pages.

Signed at Ottawa, Canada, this 24th day of July 2020.

"K.A. Siobhan Monaghan"

Monaghan J.

CITATION:	2020 TCC 70
COURT FILE NO.:	2016-1057(IT)G
STYLE OF CAUSE:	JUDY TONG v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	December 10 and 11, 2019; January 28, 2020
REASONS FOR JUDGMENT BY:	The Honourable Justice K.A. Siobhan Monaghan
DATE OF JUDGMENT:	July 24, 2020

APPEARANCES:

Counsel for the Appellant:	Joseph G. LoPresti
Counsel for the Respondent:	Tony Cheung

COUNSEL OF RECORD:

For the Appellant:

Name:	Joseph G. LoPresti
Firm:	LoPresti Law Toronto, Ontario
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada