

BETWEEN:

TERRY BURKE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

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Appeal heard on November 15, 2022, at Kelowna, British Columbia

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Katherine Matthews

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**JUDGMENT**

WHEREAS the Court has published its reasons for judgment in this appeal on this date;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The appeal with respect to the 2014, 2015 and 2016 taxation years is allowed on the following basis:
  - a) As conceded by Respondent's counsel at the outset of final submissions, the subsection 163(2) penalties are cancelled;
  - b) The 2014 and 2015 taxation years are statute barred and the Minister has not established more likely than not that a misrepresentation attributable to neglect, carelessness or wilful default was made on the returns filed by the Appellant for those years;
  - c) For clarity The Appellant's unreported income for the 2016 taxation year is \$ 38,713.

2. The matter is referred back to the Minister of National Revenue for reconsideration and reassessment.
3. The Appellant shall be entitled to his costs fixed at \$500.

Signed at Ottawa, Canada, this 9th day of December, 2022.

“R. S. Boccock”

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Boccock J.

Citation: 2022TCC158  
Date: 20221209  
Docket: 2021-1143(IT)I

BETWEEN:

TERRY BURKE,

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and

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Respondent.

### **REASONS FOR JUDGMENT**

Bocock J.

#### I. INTRODUCTION

[1] The Minister reassessed the Appellant, Mr. Burke, for three taxation years: 2014, 2015 and 2016 (the “appeal years”). The Minister’s agents, the CRA, did not believe the amount of Mr. Burke’s reported income in his returns or that his books and records were reliable. Therefore, subsection 152(7) of the *Income Tax Act*, RSC 1985, c.1, as amended (the “Act”) was deployed. Under that subsection, the Minister alternatively reassessed the appeal years using a net worth assessment (“NWA”) method. To reach back to the first two statute barred years of 2014 and 2015, the Minister asserts misrepresentation attributable to neglect, carelessness or wilful default (the “misrepresentation issue”), which years were otherwise statute barred. Penalties under subsection 163(2) were imposed for all three years, on the basis Mr. Burke was grossly negligent or made false statements. As a preliminary matter, Respondent’s counsel rose at the outset of final submissions, after a full day of evidence, to concede the Minister had not satisfied her burden regarding the section 163(2) penalties. The Court confirms such penalties are cancelled. Counsel maintains the Minister has satisfied her burden regarding the subsection 152(4) misrepresentation issue for 2014 and 2015.

*Post-Hearing Submissions*

[2] Mr. Burke struggled at the hearing, itself a misnomer given his injuries. He utilized the court-provided services of a “CART” reporter who transcribed real time the oral statements of everyone else, none of whom Mr. Burke could otherwise hear. As a result, the production of exhibits was a bit hodge podge. Mr. Burke’s main Exhibit A-1 originally was missing certain schedules. These schedules were submitted to the CRA after audit. Ultimately, with the assistance of the CART transcriber at the hearing, one copy of the schedules was produced towards the end of the hearing. Because of the remote, non-court venue and limited Courts Administration Services technology available at that hotel site for the Tax Court, copies were not reproduced during the hearing. Mr. Burke referenced these schedules in submissions. The Court undertook to review the schedules in due course. To address Respondent counsel’s ability to do the same, copies were provided by the Court to counsel later that week. An order issued explaining how this arose and requesting brief submissions. Those submissions were received from counsel and considered by the Court.

II. FACTS

*Mr. Burke’s struggles during the appeal years*

[3] Quite apart from the NWA process, Mr. Burke’s life was difficult during and after the appeal years. He has operated a painting/decorating business for some 25 years, Abstract Design and Painting (“Abstract Painting”). In November 2014, he was involved in a serious motor vehicle accident which left him severely hearing impaired. There is no question of this or the imputed violence necessary in a car crash for such a consequential injury. The Minister allowed a disability tax credit for all years from 2014 forward and that issue is not before the Court. Mr. Burke’s profound hearing loss complicated representations, discussions and communications, both during and after audit with the CRA, concerning the appeal years. The Court, first hand, witnessed a man who in his later life can no longer hear and follow ordinary events without considerable technological and third-party assistance. As noted, these same difficulties occurred during his dealings with the CRA.

*The audit and appeal review history*

[4] The audit history requires some explanation. In late 2018, the Minister’s agents commenced an audit of Abstract Painting and Mr. Burke. The reason for this

is not clear. He was a timely filer for income tax and GST. A previous audit has been uneventful. His business, while longstanding, was a labour intensive, mostly one-man show. At the outset, CRA requested his books and records. These were old-style handwritten books. Produced for 2015 as part of the referenced schedules at trial, the records consisted of standard, duplex purchase/sales order books and copies of a columnar receipts and expense journal. In the sales order book, each completed paint job entry itemized supplies, labour and sales taxes (GST and PST separately in B.C.). The jobs were not huge, but they reflect a job or two each month undertaken by a sole proprietor, whose only other occasional helper was his son.

*Mr. Burke's record system*

[5] The order/sales book tracks each invoice sequentially and a "Thanks" when paid. These are totalized on an old-style handwritten columnar ledger across 20 columns for Abstract Painting's jobs. On one page are the receipts and on another are the expenses. Mr. Burke testified that the totalized amounts were then provided to an accountant who compiled the year-end statements, made year-end adjustments and filed the statement of self-employed of income within the tax returns. The reasonable conclusions drawn from these ledgers are the Court's analysis. The ledgers were before the Court as part of the schedules to Exhibit A-1.

*The Auditor's response to the records and audit review corrections*

[6] These rudimentary records did not impress the Minister's agents, although it is not clear when they were actually reviewed by the CRA. A preliminary deposit analysis audit for 2016 prompted a full NWA for each of 2014, 2015 and 2016. Representations by Mr. Burke's then lawyer reduced the NWA unreported income for the two statute barred years of 2014 and 2015 by some 20% and 45%, respectively, after review by the litigation officer ("appeals review"). After representations and before the appeal, Mr. Burke discontinued the lawyer's retainer because of cost. He represented himself at the hearing. In the original NWA, the CRA auditor missed RSP and RESP withdrawals, ignored recorded but unclaimed capital cost allowance and conflated investment renewals as initial deposits. Although Mr. Burke believed these errors were unaddressed, the Court confirmed at trial that the appeals officer did reduce the unreported income accordingly.

*The corrections at appeals review of the audit does not weigh on penalties*

[7] The post audit corrections on account of representations at appeals review only went so far. Although the reassessments for unreported income were reduced

for 2014 and 2015, there was no real consideration of certain related facts. The reduced magnitude concerning the penalties, Mr. Burke's falling income from the considerable physical injury suffered in 2014 and certain 2015 bad debts claimed on the returns did not cause an appeals review reconsideration of penalties. The precise details of the bad debts written off were not verifiable, one way or the other, at trial because the returns for 2015 were not before the Court.

#### *Non-Taxable Sources of Funds*

[8] Mr. Burke indicated he received a non-taxable source of income years ago. Mr. Burke divorced from his wife in 2005. Credible evidence before the Court shows he received some \$82,000.00 as his portion of the sold matrimonial home. He purchased a mobile home for approximately \$45,000 to live in and retained a balance of \$37,000. He asserts he expended these moneys in 2014 through 2016, after partial loss of his working ability because of his accident, and the coming to terms, physical and emotionally, with a severe medical impairment: his ability to hear. He maintained a safety deposit box and retained certain of the residual cash in the box to be expended when necessary. He reproduced a receipt for the safety deposit box rental, a copy of which his lawyer had also delivered to the CRA in 2019. The receipt covered the precise period, from 2005 when the cash was received until 2019. Neither the auditor nor appeals officer gave credence to this evidence.

#### *The CRA auditor's lack of prior NWA experience*

[9] The auditor's first completed NWA was likely that conducted on Mr. Burke and Abstract Painting. However, even this revelation was learned by prodding at the hearing. During his evidence-in-chief, the auditor was certain he had "completed 4 or 5 NWAs". In questioning by the Court, the auditor revised this vague reference to that of 4 or 5 NWAs at the date of trial. The majority, and quite possibly all, of those NWAs arose after the auditor finished the NWA of Mr. Burke. In this informal appeal, the Court queried the auditor's failure to observe the investment roll-overs or RESP and RSP withdrawals within the requests for information (RFIs) from a certain Bank. The auditor stated he believed the information from the Bank responsive to the RFIs was deficient. Similarly, he did not complete in the working papers any comparative description or disparity between Mr. Burke's books and records for 2014 and 2015 and his preliminary bank deposit analysis, which analysis occurred only for 2016. The 2016 preliminary bank deposit analysis was not before the Court. Despite this, the 2016 unreferenced and unproduced comparison, according to the auditor, justified the full 3-year NWA and reopening the statute barred 2014 and 2015 taxation years.

### III. THE LAW

#### *Statute Barred Years; subsection 152(4)*

[10] The *Act* prevents the Minister from reaching back in time to reassess for a period greater than 3 taxation years. There is an exception. The Minister may assess these statute barred years where the Minister is satisfied, and ultimately satisfies the Court under subsection 152(4) of the *Act*, that:

- (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,

[11] For the 2014 and 2015 appeal years, the Minister asserts she satisfied this burden to reassess. The test is conjunctive: there must be a misrepresentation in the return filed and it must arise from neglect, careless or wilful default, or from fraud.<sup>1</sup> Although fraud was contained as a basis for reassessment in the reply, wisely, it was not pursued at trial by the Respondent.<sup>2</sup>

#### *The alternative assessment: subsection 152(7)*

[12] How the Minister assessed Mr. Burke is also before the Court. For all appeal years, the Minister employed an alternative assessment. This alternative assessment engages the authority of subsection 152(7) of the *Act* which provides that:

- (7) [...] The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

[13] The Minister's alternative reassessment across all appeal years, whether statute barred or not, is dependant upon this section, uniformly. The misrepresentation issue is relevant to only the 2014 and 2015 appeal years. However, the Minister bears the onus for the misrepresentation issue, but gets the benefit of her assumptions for the alternative assessment in 2016 alone.

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<sup>1</sup> *Deyab v. HMQ* 2022 FCA 222 at paragraph 23.

<sup>2</sup> *Lacroix v. HMQ* 2008 FCA 241 at paragraph 26.

*The issues*

[14] On that basis the issues to be resolved are:

1. For 2014 and 2015, has the Minister satisfied the onus of establishing:
  - a) A misrepresentation in the return;
  - b) Attributable to neglect, carelessness or wilful default;in order to reopen the statute barred year?
2. If so, has the alternative assessment, in the form of the NWA, been demolished or reduced by the Appellant for any of the appeal years.

IV. ANALYSIS

a) Intersection of the Misrepresentation Issue and the NWA

[15] Even in a case of a NWA, the Minister bears the onus of establishing the elements of misrepresentation and the attributing factors where statute barred years are assessed.<sup>3</sup> In the appeal, the Respondent relies on the NWA as evidence of the misrepresentation for 2014 and 2015. Therefore, the Minister must prove and the Court must be satisfied that the taxpayer earned unreported income and failed to provide a credible explanation before the Minister has discharged that burden.<sup>4</sup>

*The auditor's errors revisited*

[16] Tangential to this analysis, the Court notes that Respondent's counsel conceded the subsection 163(2) penalties because the Minister did not discharge her burden. The misrepresentation burden remains different; subsection 163(2) penalties by comparison is beyond the use of reasonable care through to the extent of a high degree of negligence reaching an intent to act elevated to indifference with legal compliance.<sup>5</sup> In assessing the misrepresentation issue, the Court identifies the

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<sup>3</sup> *Boroumand v. HMQ*, 2015 TCC 239 at paragraph 65.

<sup>4</sup> *Lacroix*, 2018 FCA 241 at paragraph 32.

<sup>5</sup> *Venne v. HMQ* (1984), 84 DTC 6247 at page 6256.

following specifically related to the 2014 and 2015 appeal years. These appeal years were originally assessed amounts considerably reduced after appeals review. These erroneous amounts related to the auditor's novice mistakes: unobserved GST remittances, RESP and RESP withdrawals, investment rollovers, and recorded but undeducted CCA. These errors were not misrepresentations of the Appellant; they were misapplications or miscalculations of the Respondent's auditor. When queried by the Court, the auditor seemed to suggest the oversights or "over-inclusions" were the result of insufficient information from the taxpayer, financial institutions' partial responses to RFIs or even the CRA's faulty internal recording of GST remittances. Meaningfully, these misapplications and miscalculations were not in the return or underlying information of the taxpayer; they were in the NWA and committed or "omitted" by the auditor.

*The alternative non-taxable source of funds assertion*

[17] Certain representations, particularly relevant to 2014 and 2015, concerned the latent proceeds from Mr. Burke's house sale upon marriage breakdown in 2005. He said this amount, some \$37,000 by the court's arithmetic, was retained and used when needed. Such amounts are capital, not income. He testified his loss of hearing in 2014 represented such a need. The use of a safety deposit box evidenced by payment of annual fees, payment of certain debts by cash in a measured and methodical way, revealed within the Minister's own working sheets and Mr. Burke's credible testimony, all bear on the Court's assessment. The reduced income and living difficulties of 2014 and 2015, until a level of stabilization was achieved in 2016, are probable and logical times for the deployment of such saved sums, including the separate RSP withdrawals, themselves originally missed by the auditor. While the Minister simply rejected the assertion regarding use of saved cash, the Court believes such sums were more likely than not used as a non-taxable source of income in 2014 and 2015. This would further materially overstate unreported income.

*The impetus to reassess 2014 and 2015 rooted in 2016*

[18] The auditor's initial deposit analysis giving rise to the NWA never touched upon 2014 and 2015, only the 2016 appeal year. While not dispositive to the issue, there is some incongruity of its use in these informal appeals. The considerable force of a full NWA bore down on 3 appeal years where only the 2016 appeal year, coincidentally the only appeal year not statute barred, was tested initially by way of bank deposit analysis. As the auditor stated, that deposit analysis (not present in any evidence placed before the Court) in 2016 revealed a disparity of reported income

deemed sufficient enough to conduct a NWA for all years, sweeping up two statute barred years without any distinct deposit analysis.

*Where is the misrepresentation?*

[19] This Court has said that the prerequisite of misrepresentation must occur within the return or reference information.<sup>6</sup> The Minister bears the onus to show that. The only assertion of misrepresentation on the returns in 2014 and 2015 is the disparity between reported income and the NWA derived unreported income. The Minister did not place any tax returns before the Court despite the onus to prove misrepresentation within that very document when compared to the NWA. The auditor's testimony was not grounded in the returns. The only evidence of the disparity is in the reply. The Minister cannot rely on those assumptions for 2014 and 2015. Further, Mr. Burke's imperfect records exist. By way of example, the Court reviewed Mr. Burke's general ledger for 2015 and corresponding sales/purchase order book. While rudimentary, on balance they more accurately reflect reported income than the Minister's NWA, even after the corrections at appeals review. When the expended saved capital is included, the disparity narrows much. Moreover, the heart and soul of the NWA for these two years has been whittled to the extent of approaching *de minimus* amounts. The Minister's misrepresentation burden, in order to count for something, must reach beyond back feeding *de minimus* amounts of the ultimate NWA reassessment into statute barred taxation years. Otherwise, the Minister simply says, even where such small discrepancy of income arises from an imprecise NWA, "ZAP! ..., the years are open for assessment". Such minor disparities will occur in informal appeals, involving small businesses using less than modern bookkeeping. In conclusion, Mr. Burke's records and proffered alternate sources of non-taxable income are, on balance, more reliable than the Minister's NWA.<sup>7</sup>

*Mr. Burke has established an un rebutted prima facie case*

[20] On balance, the NWA for 2014 and 2015, a "blunt instrument" to begin with, is the sole misrepresentation evidence used to re-open these statute barred years. Where so used, the NWA needs to be well executed and the taxpayer fairly believed where exceptional circumstances were experienced, explained and obvious. The NWA for 2014 and 2015 was not well executed or reliable; Mr. Burke's books were not appropriately referenced as deficient and his credible alternative non-taxable

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<sup>6</sup> *Ross v. HMQ*, 2013 TCC 333 at paragraph 57.

<sup>7</sup> *Mensah*, 2008 TCC 378, at paragraphs 23 and 27.

source of funds evidence was not believed or particularly explored. Further, the bad debts claimed in the 2015 return, raised by Mr. Burke, were not reviewable because the all important returns were not before the Court. The *prima facie* case asserted has not been satisfactorily “refuted”.<sup>8</sup> The appeal years of 2014 and 2015 are beyond the Minister’s reach because the Minister, in these circumstances, on these facts and in the absence of the returns before the Court has not discharged her burden concerning misrepresentation owing to neglect, carelessness or wilful default in the first instance.

b) The Net Worth Assessment for taxation years properly before the Court

*No misrepresentation required to reassess 2016*

[21] The remaining appeal year is 2016. It is a different legal framework. The Minister has an onus regarding misrepresentation for 2014 and 2015 only. Her reply facts are assumed correct for 2016. As well, the pre-tested deposit analysis specifically related to this taxation year to justify the NWA.

[22] There are further relevant evidentiary conclusions. The 2016 appeal year was not varied through representations in any way at appeals review. Mr. Burke, unlike in 2014 and 2015, offered no challenges to the calculations, omissions or duplication in 2016. His non-taxable source of capital, by his own testimony, was depleted in 2014 and 2015 appeal years. He made no mention of bad debts in 2016.

[23] Similarly, any NWA *per se* would be most reliable in 2016 because of the methodology employed by the auditor and the somewhat “normalized” revenue from the painting business identified by Mr. Burke during that year.

[24] Other alternative assessment methods such as a continued deposit analysis, purchased supply costs vs. revenue ratios and/or supplier RFIs may have been more appropriate in this situation: a physically impaired sole proprietor, and small, single service business. However, the Court’s role is not to question the need for an alternative assessment, the choice of a NWA method or the unassailed calculations in 2016. That was Mr. Burke’s onus to bear in 2016. The initial deposit analysis justified an alternative assessment in that year. The Minister’s auditor chose to do the NWA. No representations by Mr. Burke’s lawyer or any challenge by Mr. Burke at trial addressed the NWA in the 2016 appeal year. Not only was it not varied at appeals, undeclared income was slightly increased. The calculations appear correct

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<sup>8</sup> *Saraf v. HMQ* [1994] 1 CTC 2519 at paragraph 12.

enough or at least are not challenged by Mr. Burke, as is needed. Accordingly, the 2016 NWA remains factually untouched and a legally valid reassessment.

V. CONCLUSION AND COSTS

[25] The appeal is allowed in all aspects, but for the 2016 NWA, which reassessed Mr. Burke for \$38,713 in additional unreported income.

[26] Given the considerable and comparable success of Mr. Burke, particularly on the issue of the totally cancelled penalties and the vacated NWA for the 2014 and 2015 appeal years, cost are awarded to him and fixed at \$500.

Signed at Ottawa, Canada, this 9th day of December, 2022.

“R. S. Boccock”

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Boccock J.

CITATION: 2022TCC158

COURT FILE NO.: 2021-1143(IT)I

STYLE OF CAUSE: TERRY BURKE AND HIS MAJESTY  
THE KING

PLACE OF HEARING: Kelowna, British Columbia

DATE OF HEARING: November 15, 2022

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.  
Bocock

DATE OF JUDGMENT: December 9, 2022

APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Katherine Matthews

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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