

Docket: 2011-249(IT)G

BETWEEN:

GLEN HARVEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 9 and 10, 2013, at Winnipeg, Manitoba.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant: Richard Beamish
Counsel for the Respondent: Rachelle Nadeau

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the Appellant's 2003 and 2004 taxation years is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Harvey is entitled to the following additional deductions:

- \$2,000 in home office expenses in each of his 2003 and 2004 taxation years;
- \$1,200 in meals and entertainment in each of his 2003 and 2004 taxation years;
- \$600 in taxi expenses in 2003;
- \$1,200 in parking expenses in 2003;

- \$13,623.70 in vehicle repair expenses in 2004; and
- \$2,575.36 in vehicle lease expenses in 2004.

Signed at Ottawa, Canada, this 26th day of September 2013.

“David E. Graham”

Graham J.

Citation: 2013 TCC 298

Date: 20130926

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GLEN HARVEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] Glen Harvey is a prominent Winnipeg real estate agent. Mr. Harvey works with Re/Max Real Estate Inc. (“Re/Max”) and has done so for approximately 30 years. When he filed his income tax returns for his 2003 and 2004 taxation years he reported commission revenue and expenses related to his activities as a real estate agent. Mr. Harvey understated his commission revenue by \$44,596 in 2003 and \$26,641 in 2004. The Minister of National Revenue reassessed those taxation years to include these amounts in Mr. Harvey’s income. The Minister also imposed gross negligence penalties under subsection 163(2) of the *Income Tax Act* (the “Act”) on the unreported revenue. Finally, the Minister denied a number of expenses that Mr. Harvey had claimed in respect of his commission income. Mr. Harvey has appealed the gross negligence penalties and the denial of the expenses to this Court. Mr. Harvey has not appealed the addition of the unreported revenue.

Issues:

[2] The appeal can be reduced to two overriding issues. The first issue is whether the Respondent has met her onus of proving that Mr. Harvey knowingly or in circumstances amounting to gross negligence failed to fully report his revenue. The

second issue is whether Mr. Harvey has met his onus of demolishing the Minister's assumption that he did not incur various expenses for the purpose of earning income.

Concessions:

[3] On the first day of trial, Mr. Harvey conceded that \$2,651.51 in vehicle lease payments, \$910.36 in traffic fines and \$196.90 in vehicle insurance were not properly deductible in his 2003 taxation year.

Witnesses:

[4] Mr. Harvey testified on his own behalf. For the reasons set out in more detail below, I did not find him to be credible and have not accepted his evidence on many points.

[5] Pat Button testified for the Respondent. Ms. Button is the Chief Financial Officer and Manager of Accounting at Re/Max in Winnipeg. I found Ms. Button to be a credible witness.

[6] Brenda Davis also testified for the Respondent. Ms. Davis is currently an audit team leader at the Canada Revenue Agency but, in the relevant period, was an investigator in CRA's Enforcement Division. I found Ms. Davis to be a credible witness.

The Business:

[7] Mr. Harvey testified at length about the nature of his business. He explained that he had been a realtor for 38 years. He described himself as one of the top 3 agents in Winnipeg and the number one Re/Max agent in Manitoba. Approximately 5% of Mr. Harvey's business involves acting for individual purchasers and vendors of residential homes. The balance of Mr. Harvey's business relates to the condo market. Over a period of approximately 20 years Mr. Harvey has focused on arranging the purchase of apartment buildings for his clients, working with those clients to convert the buildings into condos and then marketing and selling those condos to individuals on behalf of those clients. He estimates that he handles approximately 75% of all apartment-to-condo conversion work in Winnipeg. In a

typical year, Mr. Harvey is involved in approximately 200 transactions. He has several agents who work for him.

[8] Mr. Harvey testified that very few realtors survive in the business as long as he has. He emphasized that it was essential for him to constantly be in contact with his clients. He believed that each current client would lead to a referral to one or more future clients. He also knew that his biggest clients were constantly being wooed by his competitors and that he therefore had to fight to keep their business.

[9] Mr. Harvey explained that Re/Max is a “100% house” which means that he pays Re/Max various fees (e.g. a desk fee, a promotional fee, a head office fee, an institutional advertising fee) and, in return, he gets to keep 100% of the commissions on his sales. He explained that, among other things, the fees he pays entitle him to a desk and computer in a shared office at Re/Max’s office. However, he stated that he makes very little use of the office space as both he and his clients dislike the lack of privacy. Mr. Harvey clarified that he is not reimbursed by Re/Max for any expenses that he incurs personally in the course of his business.

[10] I accept Mr. Harvey’s testimony on all of the above points.

[11] Mr. Harvey described his typical week as follows. On weekdays, he works from 7:00 a.m. to 11:00 p.m. He has an office in his house where he starts work every morning. There he checks his emails and reviews the new listings for the day. He then meets with the agents that work with him and makes his to-do lists for the day. Then he meets with his larger clients to review strategies, marketing plans and other issues. All of the foregoing occurs in his home office. Between 3:00 p.m. and 7:00 or 8:00 p.m. he works on-site at his clients’ condo sales sites. If he is successful in making a sale, he works later than that to complete the paperwork. When he is finished at the sales sites, he generally takes clients out for dinner or drinks. On weekends, Mr. Harvey typically sees clients in the morning and then does condo sales from 1:00 to 5:00 p.m. Again, he takes clients out for dinner or drinks in the evening. In addition to the above, Mr. Harvey takes clients to football games and golfing.

[12] I am prepared to accept much of Mr. Harvey’s testimony regarding his typical week. However, I feel that the frequency of some of the activities that he describes has been exaggerated. Where that is the case, I have stated so explicitly under my analysis of the individual expenses. That said, I accept the basic premise that Mr. Harvey works very long days, that the vast majority of each weekday is devoted to his business, that his business is based out of his home office, that he regularly meets

with clients in that home office and that he regularly takes clients to football games, golfing or out for meals or drinks.

Accounting and Preparation of Tax Returns:

[13] In the years in question, Mr. Harvey reported his business income using a fiscal year end of August 31. Thus, his 2003 income should have included his revenues and expenses from September 1, 2002 to August 31, 2003 and his 2004 income should have included his revenues and expenses from September 1, 2003 to August 31, 2004. The parties advised me that this was an acceptable method for an individual to report business income in those years and that the method was not in issue.

[14] Mr. Harvey used an accountant named Mr. Osato to prepare his tax returns. Mr. Harvey described Mr. Osato as being a certified accountant who had previously worked for CRA. He explained that he gave Mr. Osato all of the documents that Mr. Osato needed to prepare his tax returns each year and that Mr. Osato would then put the returns together for Mr. Harvey's signature.

Criminal Charges and Conviction:

[15] As set out above, Mr. Harvey is not disputing the fact that he underreported his revenue by \$44,596 in 2003 and \$26,641 in 2004. The auditor reviewing Mr. Harvey's 2003 and 2004 taxation years was sufficiently concerned about this underreported revenue that he referred the matter to CRA's Enforcement Division. The Enforcement Division ultimately recommended to the Crown that criminal charges be laid against Mr. Harvey under subsection 239(1) of the *Act*. The charges were based on Mr. Harvey's unreported revenue from his 2003 and 2004 taxation years as well as some other alleged unreported income from his 2000 taxation year that is not in issue in this Appeal.

[16] Mr. Harvey ultimately entered into a plea agreement with the Crown whereby he pled guilty to Count 3 of the Information (Exhibit R-13) and the remaining counts were stayed. The relevant portions of Count 3 read as follows:

Glen Harvey ... did unlawfully make, or participate in, assent to or acquiesce in the making of false or deceptive statements in his T-1 Return of Income for the taxation year 2003 ... by understating his taxable income in the amount of \$44,596.87 in the

said T-1 Return of Income, and did thereby commit an offence under Paragraph 239(1)(a) of the said Act.

[17] As a result of his guilty plea, Mr. Harvey was sentenced to a fine of \$6,700. Mr. Harvey's counsel advised me that an Agreed Statement of Facts was not filed with the Court as part of the plea.

Unreported Revenue and Gross Negligence Penalties:

[18] Mr. Harvey submits that he should not be subject to gross negligence penalties under subsection 163(2) for underreporting his revenues. The classic test for the application of gross negligence penalties is set out in *Venne v. The Queen*, 84 DTC 6247, a Federal Court Trial Division decision that was affirmed by the Federal Court of Appeal in *Findlay v. The Queen*, 2000 DTC 6345.

... 'Gross negligence' must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[19] Mr. Harvey pled guilty to an offence in respect of his 2003 unreported revenue. Mr. Harvey does not dispute that the unreported revenue in respect of which he pled guilty is the same unreported revenue in respect of which the penalties have been applied.

[20] Throughout his testimony Mr. Harvey frequently referred to having "acquiesced" to pleading guilty to filing a false tax return. It was clear that Mr. Harvey believed that it was important to his case that he had "acquiesced" to something as he used that word frequently in his testimony. It was also clear that he wanted me to believe that the unreported revenue was all his accountant's fault, that that fact had been accepted by the Court when he pled guilty, that he had pled guilty simply because he recognized that he had signed the return and was therefore responsible for it and that his understanding was that he was not admitting to have knowingly done anything wrong. In submissions, Mr. Harvey's counsel shed some light on this issue. Counsel submitted that paragraph 239(1)(a) is a strict liability offence and that in pleading guilty all that Mr. Harvey did was to agree that he had negligently acquiesced in the making of a false statement in his return. Counsel therefore argued that, since Mr. Harvey had merely admitted to negligence, he had not met what counsel described as the much higher standard of gross negligence that is required to impose penalties under subsection 163(2). Counsel was unable to direct me to any supporting case law.

[21] I do not accept this position. To do so would be to accept that Parliament drafted the *Act* in such a way that mere negligence would give rise to criminal fines or imprisonment while gross negligence would be required to impose a civil penalty. This is simply not logical.

[22] Paragraph 239(1)(a) is not a strict liability offence. It is a specific intent offence. The accused must have knowingly committed the act in question or must have been wilfully blind to its commission. Mere negligence is not enough. The Alberta Court of Appeal provided a clear summary of the law on this point in *R. v. Breakell*, 2009 ABCA 173 at paragraphs 17 and 18:

The trial judge understood that offences under ss. 239(1)(a) and (d) are true criminal offences: *Knox Contracting Ltd. v. R.*, [1990] 2 S.C.R. 338 (S.C.C.), at 346-50, (1990), 73 D.L.R. (4th) 110 (S.C.C.). He recognized that to satisfy the *mens rea* requirement under s. 239(1)(a), the false statement must be made knowingly and intentionally: *R. v. Derosé*, 2001 ABPC 146, 297 A.R. 51 (Alta. Prov. Ct.) at para. 157. ... As the trial judge correctly concluded ... “[A]ll six charges before me are specific intent offences for which negligence, in any of its forms, is not the standard to support a conviction.”

The trial judge also noted that for charges under both ss. 239(1)(a) and (d), specific intent may be inferred from an accused’s wilful blindness. His conclusion on this point too is correct in law ...

[23] Assuming for the sake of argument that Mr. Harvey acquiesced in making of the false statement in his 2003 return rather than actually making the false statement, he has pled guilty, not to negligently acquiescing in making the false statement, but rather to knowingly acquiescing in making the false statement or being wilfully blind to having done so. Doing something with knowledge or wilful blindness involves a greater level of *mens rea* than gross negligence.

[24] Justice Paris recently had the occasion to consider the effect of a guilty plea to a criminal offence on gross negligence penalties. At paragraphs 14 and 15 of *Raposo v. The Queen*, 2013 TCC 265 he stated:

A criminal conviction is admissible as *prima facie* evidence of the material facts underlying the conviction: *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (Ont. C.A.). Even greater weight may be accorded to a prior criminal conviction where there has been a full trial leading to the conviction: *Ali et 124558 Canada inc v Cie d’assurance Guardian du Canada et Cie d’assurance Royale du Canada*, 1999 CanLII 13177 (QCCA).

In this case, given that the conviction was recorded as a result of the appellant's guilty pleas, rather than after a trial, it is more appropriate to treat the conviction as *prima facie* proof of the fraud by the appellant against [his employer].

[25] Based on the foregoing, I therefore find that there is *prima facie* proof that Mr. Harvey was grossly negligent in not reporting all of his revenues in his 2003 taxation year. If Mr. Harvey wishes to avoid the penalties, he will have to introduce sufficient evidence to overcome that *prima facie* proof.

[26] My understanding is that Mr. Harvey's counsel at trial was the same as his counsel in the criminal proceeding. It is therefore possible that Mr. Harvey's understanding of what he was pleading guilty to was informed by the view of the law put forward by his counsel at trial. If that is the case, then Mr. Harvey may have honestly believed that he was pleading guilty to negligently acquiescing in making a false statement. However, I do not need to decide whether an honestly held but mistaken belief of one's guilt is sufficient to overcome the *prima facie* proof of gross negligence arising from a guilty plea. This is because for the reasons set out below, I find there is more than enough other evidence to satisfy me that the Respondent has proven that Mr. Harvey was grossly negligent.

[27] Mr. Harvey did not plead guilty in respect of his 2004 taxation year. Accordingly, the Respondent must prove that gross negligence penalties should apply to that year. For the reasons set out below, I find that the Respondent has succeeded in doing so.

[28] Mr. Harvey testified that he received a T4A and a statement of commission income (also referred to as a "payroll summary") from Re/Max each year. The T4A and statement of commission income were prepared by Re/Max on a calendar year basis. Ms. Button confirmed Mr. Harvey's testimony on these points.

[29] Mr. Harvey testified that he would give his T4A and statement of commission income to Mr. Osato each year when it was time to prepare his tax return. Since the T4A and statement of commission income were based on a calendar year end, Mr. Harvey explained that Mr. Osato would have to refer both to the current set of documents and those for the previous calendar year when preparing Mr. Harvey's tax return.

[30] Ms. Button testified that Re/Max would sometimes print custom statements of commission income for realtors who did not have calendar year ends. Those custom

statements of commission income would show the commission income earned in that particular realtor's fiscal year. While Ms. Button recalled printing such custom statements for a number of different realtors, she could not recall whether Mr. Harvey was one of them. Mr. Harvey both denies receiving such a statement from Re/Max or giving such a statement to Mr. Osato.

[31] There are 5 key documents relating to the unreported revenue:

Exhibit R-9: This is a custom statement of commission income for Mr. Harvey's fiscal period from September 1, 2002 to August 31, 2003. Ms. Button testified that it was generated by Re/Max in 2007 at the request of CRA after the audit began and was given to the auditor and that it shows all of Mr. Harvey's revenues for the period. At the top of the document is a summary of those revenues. Mr. Harvey denies ever receiving a statement like this from Re/Max.

Exhibit R-11: This custom statement of commission income is identical to the statement in Exhibit R-9 except that it does not show the date on which it was created and it has been altered to remove both the revenue summary at the top of the document and all commission revenue earned from June 26 to August 31, 2003. The commission revenue shown on this altered document matches the revenue reported by Mr. Harvey on his 2003 tax return. The revenue that has been removed by the alterations matches the unreported revenue in respect of which Mr. Harvey pled guilty. Ms. Button testified that Re/Max could not have produced a statement in this format. Mr. Harvey admits that the handwritten figure showing total revenue might be in his handwriting but denies altering this statement or giving this statement to Mr. Osato. Ms. Davis testified that she received this document from the auditor.

Exhibit R-10: This is a custom statement of commission income for Mr. Harvey's fiscal period from September 1, 2003 to August 31, 2004. Ms. Button testified that it was generated by Re/Max in 2007 at the request of CRA after the audit began and was given to the auditor and that it shows all of Mr. Harvey's revenues for the period. At the top of the document is a summary of those revenues. Mr. Harvey denies ever receiving a statement like this from Re/Max.

Exhibit R-12: This custom statement of commission income is identical to the statement in Exhibit R-10 except that it does not show the date on

which it was created and it has been altered to remove both the revenue summary at the top of the document and all commission revenue earned from August 5 to 31, 2004. The commission revenue shown on this altered document matches the revenue reported by Mr. Harvey on his 2004 tax return. The revenue that has been removed by the alterations matches the unreported revenue in respect of which Mr. Harvey was charged for 2004 prior to those charges being stayed as part of the plea agreement. Ms. Button testified that Re/Max could not have produced a statement in this format. Mr. Harvey admits that the handwritten figure showing total revenue is in his handwriting but denies altering this statement or giving this statement to Mr. Osato. Ms. Davis testified that she received this document from the auditor.

Exhibit R-2: This is a handwritten document prepared by Mr. Harvey. It lists various revenues, expenses and other amounts related to the preparation of his 2003, 2004 and 2006 tax returns. The amount of revenue shown on the 2003 and 2004 sheets is identical to the revenue ultimately reported in Mr. Harvey's 2003 and 2004 tax returns respectively. Mr. Harvey denies giving this document to Mr. Osato but Ms. Davis testified that Mr. Osato gave this document to her.

[32] The parties have very different views of the above documents and of how Mr. Harvey's unreported revenue came to be unreported.

[33] The Respondent's theory is that Mr. Harvey obtained commission statements similar to those shown in Exhibits R-9 and R-11 from Re/Max, altered those documents to remove some of the revenue (thus becoming Exhibits R-10 and R-12) and gave those altered documents to Mr. Osato for the purpose of preparing Mr. Harvey's 2003 and 2004 tax returns. The Respondent believes that Mr. Harvey did not give Mr. Osato either the T4As or the calendar year statements of commission income that Mr. Harvey received from Re/Max. The Respondent also believes that Mr. Harvey gave Mr. Osato the handwritten summaries of revenue, expenses and other items for 2003 and 2004 contained in Exhibit R-2 as part of the preparation of his 2003 and 2004 tax returns.

[34] The Respondent's theory is supported by the following:

- Ms. Button testified that the altered commission statements could not have been produced in their altered state by Re/Max's computer system.

- Ms. Davis testified that Mr. Osato gave the handwritten list of revenues and expenses to her. Therefore, Mr. Osato must have had that document in his possession.
- Ms. Davis testified that she received the altered commission statements from the auditor. Therefore, the auditor must have had those statements in his possession. The auditor no longer works at CRA and was not called to testify. This left a gap in the evidence as to how the altered commission statements came into his possession. However, I think it is reasonable to infer in the circumstances that since he did not receive them from Re/Max, he must have received them from either Mr. Osato or Mr. Harvey.

[35] Mr. Harvey places all of the blame for the unreported revenue on Mr. Osato. He claims that he gave Mr. Osato the documents that Mr. Osato needed to correctly report his income and that Mr. Osato failed to do so. I do not find Mr. Harvey's evidence credible for the simple reason that it defies logic. Mr. Harvey would have me believe:

- that he gave Mr. Osato his T4As and calendar year statements of commission income and asked him to correctly calculate his income;
- that the calendar year statements of commission income that Mr. Harvey gave to Mr. Osato have since been lost by either Mr. Osato or the CRA;
- that, using those statements, Mr. Osato somehow incorrectly calculated Mr. Harvey's revenues;
- that Mr. Harvey did not obtain custom commission income statements from Re/Max for his fiscal year;
- that presumably Re/Max therefore issued custom commission income statements showing Mr. Harvey's income to someone other than Mr. Harvey;
- that someone other than Mr. Harvey altered those statements to hide the true amount of revenue that Mr. Harvey had received and then gave those altered statements to the auditor;
- that the amount of income shown on the altered statements coincidentally equals the amount of income incorrectly calculated by Mr. Osato;
- that the handwritten revenue totals that appear on the top of the altered commission income statements (that Mr. Harvey has admitted in one case is his handwriting and in the other case might be his handwriting)

were added after those altered statements came into his possession during the audit process;

- that the handwritten list of revenues and expenses in Exhibit R-2 was prepared by Mr. Harvey as his own working papers not as instructions to Mr. Osato and that the revenue figures thereon (that are the same as those on the altered commission income statements) were not placed there by him as an instruction to Mr. Osato but rather were added by him after Mr. Osato told him what the proper revenue figures were;
- that he does not think he gave those handwritten records to Mr. Osato but that somehow Mr. Osato had them in his possession to give to Ms. Davis;
- that the failure to properly report his revenue was entirely Mr. Osato's fault; and
- that despite everything that has occurred, Mr. Osato never told Mr. Harvey how he arrived at the incorrect revenue totals and Mr. Harvey still does not know what error Mr. Osato made.

[36] The Respondent's theory is clean, logical and supported both by the testimony of Ms. Button and Ms. Davis and by the documents. By contrast, Mr. Harvey's explanation defies belief.

[37] The simple fact is that someone altered the custom commission income statements. Re/Max did not do it. I have no reason to think, nor evidence to suggest, that the CRA did it. Therefore there are only two people left who could have made the alterations: Mr. Harvey and Mr. Osato. There is no evidence to suggest that Mr. Osato made the alterations. Of the two of them, only Mr. Harvey would stand to gain from making the alterations.

[38] Mr. Osato was not called as a witness. Given the strength of the Respondent's case, I see no reason for the Respondent to call Mr. Osato as a witness. On the other hand, if Mr. Harvey's story were true, Mr. Osato would have provided invaluable testimony in support of Mr. Harvey's position. I draw an adverse inference from Mr. Harvey's failure to call Mr. Osato.

[39] Mr. Harvey pled guilty in respect of his 2003 taxation year. The altered document which gave rise to the charges for that year is the same type of altered document that gives rise to the unreported income in the 2004 taxation year. Mr. Harvey did not provide any explanation of how what happened in 2004 was any different for tax purposes than what happened in 2003.

[40] My views of Mr. Harvey's credibility in respect of the unreported revenue are not enhanced by his inconsistent explanations of what happened. On cross-examination, he testified that he did not know what error Mr. Osato made. However, in a handwritten statement that Mr. Harvey previously made to CRA Appeals (Exhibit R-5), Mr. Harvey stated that Mr. Osato had mistakenly treated Mr. Harvey as having an August 1 fiscal year end rather than an August 31 fiscal year end in both 2003 and 2004. This explanation is not only inconsistent with Mr. Harvey's statement at trial, it also makes no sense as it would not explain how the revenues for July 2003 were missed and the revenues for August 4, 2004 were included nor would it explain how, having mistakenly identified the fiscal year end in 2003, Mr. Osato would not have picked up the missing August 2003 income when he prepared the 2004 tax return. On cross-examination, counsel for the Respondent presented another handwritten document to Mr. Harvey (Exhibit R-8). Mr. Harvey acknowledged that it was his handwriting. The document reads:

Annual Income

Sept 1/02 – Aug 31/03

I took the summer off in 03 to go to the lake with my kids for July 1 – Aug 31/03

There is what appears to be part of Mr. Harvey's signature at the bottom of the document. Counsel for the Respondent suggested to Mr. Harvey that Mr. Harvey had given this document to the auditor for the purpose of explaining why the altered statement of commission income did not show any commissions being paid in the summer of 2003. Mr. Harvey denied this. I do not find his denial to be credible. I cannot imagine any other reason that he would have prepared this document. In addition, Mr. Harvey's explanation in this document that he did not work in the summer of 2003 is further contradicted by his subsequent submission to CRA Appeals where, in discussing his use of a vehicle in the summer of 2003, he stated:

I only go to the lake some times [sic] in the summer for weekends etc. ... My work does not just stop because I go to the lake for a few days here & there thats [sic] unreasonable.

The impression that I am left with is that Mr. Harvey tried one explanation on for size with the auditor, then a different one with CRA Appeals and, having failed on both prior attempts, finally decided to feign ignorance at trial.

[41] For all of the reasons set out above, I find that the Respondent has successfully introduced sufficient evidence to prove that Mr. Harvey was grossly negligent in underreporting his 2003 and 2004 revenues.

Expenses in General:

[42] I will now turn to the various expenses in dispute. Many of Mr. Harvey's expenses are not backed by receipts. They either have no documentary support or the only support that they have is in the form of bank or credit card statements instead of actual receipts.

[43] Mr. Harvey testified that each year he would sort his business receipts by type of expense, prepare an adding tape totalling each type of expense and then put those documents in folders and give them to Mr. Osato. He stated that Mr. Osato would review the receipts and advise Mr. Harvey which items he could and could not deduct.

[44] Mr. Harvey filed 6 books of receipts, bank statements and credit card statements (Exhibits A-1 to A-6). He explained that he did not have receipts for some categories of expenses or did not have all of the receipts for a given category of expenses because those documents had been lost either by Mr. Osato or the CRA. He stated that he had given all of the documents to Mr. Osato when Mr. Osato prepared his returns, retrieved the documents from Mr. Osato and given them to CRA when the audit commenced and ultimately received the documents back from the CRA when the investigation was completed. He stated that the documents were in a different order when he received them back and that there were many documents missing.

[45] I am not able to accept Mr. Harvey's explanation for the missing documents for a number of reasons. If he had truly provided all of the documents in question to Mr. Osato, then why did Mr. Harvey not call Mr. Osato as a witness to verify that. In addition, while I could accept that the CRA or Mr. Osato might have lost an entire category of receipts, I find it difficult to accept that they lost only some receipts within a given category. Finally, Mr. Harvey has a history of not keeping adequate books and records. He has previously been audited on at least two occasions and has been warned by the CRA in writing in detail that his records were inadequate and the types of records that he needed to maintain in the future (Exhibit R-1). I find it far more likely that Mr. Harvey continued to keep poor records than that he began keeping excellent records and someone else lost them.

[46] Counsel for Mr. Harvey submitted that the fact that Mr. Harvey specifically admitted that two categories of expenses were estimates should enhance his credibility and the fact that all of the expenses had been calculated down to the penny was an indication that Mr. Harvey had not just made the figures up. I agree that Mr. Harvey's admission that his parking and taxi expenses were estimates was forthright of him. That is reflected in my decision in respect of those amounts below. I do not consider the fact that the expenses were not round numbers to be of any significance. I have already concluded that Mr. Harvey provided altered commission income statements to Mr. Osato in order to hide his income. If he is capable of that level of deceit, I can hardly be expected to find that the fact that expenses are stated in non-round figures enhances his credibility.

[47] While it is not always necessary for a taxpayer to have receipts to support his or her expenses, a taxpayer like Mr. Harvey who has otherwise been found to lack credibility and whose expenses involve things such as automobiles, cell phones, home offices and meals and entertainment that could also be personal in nature, is going to have difficulty overcoming the Minister's assumptions without such receipts.

[48] I will now turn to the individual categories of expenses that are in dispute.

Home Office Expenses:

[49] Mr. Harvey claimed \$4,546.87 in home office expenses in each of 2003 and 2004. He testified that he had calculated the square footage of his home office to be 12.5% of the home and had multiplied that percentage by this house costs to arrive at the cost of his home office. He provided very few receipts to support these house costs. The receipts were among the ones he claimed had been lost.

[50] The claim for house costs included such items as interest, property taxes, gas, hydro, water and insurance which vary each year yet the figure claimed by Mr. Harvey was identical in both 2003 and 2004 and was used again by him on his handwritten sheet for 2006. This indicates that Mr. Harvey did not actually calculate a figure each year.

[51] Counsel for Mr. Harvey drew my attention to a listing of the house costs that Mr. Harvey had given to CRA Appeals. That list included \$742 for cable television and \$3,600 for office equipment. Mr. Harvey had previously testified that no office

equipment was included in his claim for home office expenses. I also cannot see why cable television would be a home office expense when Mr. Harvey has separately made a claim for an internet connection.

[52] While I do not accept the figure put forward for home office use by Mr. Harvey, I do accept that he had a home office that would qualify as a deduction. Accordingly, I will allow Mr. Harvey a deduction of \$2,000 per year for his home office. I suspect that this figure is a low estimate of Mr. Harvey's actual costs but, in the absence of any supporting documents, I am not prepared to reward Mr. Harvey's poor record keeping by using a middle or high estimate.

Travel Expenses:

[53] Mr. Harvey claimed \$2,160.82 in travel expenses in 2003 and \$2,818.62 in travel expenses in 2004. He did not provide any receipts to support these travel costs. Those receipts were among the ones he claimed had been lost.

[54] Mr. Harvey testified that in 2003 he travelled to Victoria for a Re/Max awards conference and in 2004 he travelled to Victoria for a Re/Max marketing seminar and to Toronto to meet with some realtors for one day. He explained that his trip to Toronto was a stopover on a family vacation to the Dominican Republic and that he only expensed the Toronto portion of the trip.

[55] Mr. Harvey testified that he had a very detailed calendar which tracked all of his activities each day. Such a document would have been very useful to confirm his travel expenses. He claims, however, that he gave his calendar to the auditor and never received it back.

[56] On cross-examination, Mr. Harvey was asked about his debit and credit cards. He testified that his wife (from whom he was separated in the periods in question), his teenage daughters and his assistant would all have had access to his debit and credit cards. However, he was very careful to specify that there were strict rules about how the cards were to be used. He stated that the cards could not be used without his explicit permission each time and then that they were only to be used for business expenses. He explained that whoever needed to use his cards would have had to phone him first to get that permission. He stated that this only occurred on rare occasions and that the total charges incurred by all of these individuals in any given year would have been less than \$300.

[57] Later in cross-examination, counsel for the Respondent drew Mr. Harvey's attention to the fact that during the period that he claimed to have been in Victoria in 2003 numerous charges were incurred on his bank account that would indicate that he was, in fact, in Winnipeg. Mr. Harvey explained that the charges must have been incurred by his assistant. The charges in question include the purchase of a \$307 printer, two purchases of gas, a \$38.60 purchase at McDiarmid Lumber, a car wash and a number of meals. This level of use of Mr. Harvey's debit card and the types of expenses it is being used for do not match Mr. Harvey's evidence of the rare circumstances in which his assistant would be permitted to use his card. In addition, the charges incurred over this 5 day period exceed the \$300 amount that Mr. Harvey stated would have been spent on both his debit and credit cards in the entire year. Based on the foregoing, I do not accept Mr. Harvey's evidence that he was in Victoria in 2003.

[58] Given my overall view of Mr. Harvey's credibility, my specific view of his credibility in respect of the alleged 2003 trip to Victoria, the lack of any documentation supporting the 2003 and 2004 travel expenses, the lack of any documentary evidence of the existence of the conferences or seminars and the connection between the Toronto stopover and a family vacation, I am not prepared to allow Mr. Harvey any travel expenses.

Meals & Entertainment Expenses:

[59] Mr. Harvey claimed \$4,575.70 in meals and entertainment expenses in 2003 and \$6,390.80 in meals and entertainment expenses in 2004. Both of these figures are the amounts calculated after the 50% reduction in subsection 67.1(1).

[60] Mr. Harvey provided copies of receipts for some of these expenses and bank and credit card statements in support of others. Some of the receipts that were provided had the names of the individuals that Mr. Harvey said he entertained. He testified that some of these names were written on the receipts contemporaneously while others were written on the receipts prior to giving them to the auditor. He claimed that the names that were written prior to the receipts being given to the auditor were gathered from his now missing calendar.

[61] As stated above, I accept that Mr. Harvey regularly takes clients out to football games, for a game of golf or for meals or drinks. Mr. Harvey testified that he virtually always pays for the clients when he does so and that this is an essential part of his business. I accept that testimony. I do not, however, accept that Mr. Harvey takes clients out as frequently as he claims to have nor do I accept that all of the

amounts that Mr. Harvey claims to have spent entertaining clients were in fact spent entertaining clients.

[62] The very first receipt in the Book of Documents is for \$8.28 in take-out food from McDonalds and includes the purchase of what appears to be a Happy Meal. The third receipt in the book is also for take-out food from McDonalds although it is only for \$7.50 and no child appears to have been present for this meal. Throughout the documents there are numerous receipts for amounts under \$8 at Subway. Mr. Harvey went to great lengths to explain how important it was to maintain his image as a successful realtor and to entertain his clients in style. With no disrespect to McDonalds and Subway, I have a hard time accepting that Mr. Harvey was enhancing his image by treating his clients to take-out fast food. The foregoing harms Mr. Harvey's already weak credibility further. It suggests that Mr. Harvey has no qualms about including personal meals in his claims for business expenses. This casts significant doubt on whether the many expensive drinks and meals that he has claimed were also personal.

[63] Golf expenses made up a significant portion of Mr. Harvey's meals and entertainment claim in both years. To the extent that they were incurred for business purposes, paragraph 18(1)(l) would deny Mr. Harvey's golf expenses in any event.

[64] While I do not accept the figures put forward for meals and entertainment by Mr. Harvey, I do accept that he spent a great deal of time entertaining his clients. Accordingly, I will allow Mr. Harvey a deduction of \$1,200 per year for meals and entertainment. In reaching this figure I have already applied the 50% deduction in subsection 67.1(1). I suspect that this figure is a low estimate of Mr. Harvey's actual costs but, given his lack of credibility both in terms of the documents provided and in general, I am not prepared to reward Mr. Harvey's poor record keeping by using a middle or high estimate.

Motor Vehicle Expenses:

[65] Mr. Harvey claimed \$22,357 in motor vehicle costs in 2003. The Minister allowed the deduction of \$11,699. Mr. Harvey claimed \$32,529 in motor vehicle costs in 2004. The Minister allowed the deduction of \$8,527. The vehicle costs consisted of gas, car washes, a licence fee, parking, repairs and leasing costs. There was also a claim for taxi costs and a category described as "unallocated" costs. Mr. Harvey provided some receipts and supported other amounts with bank or credit card statements.

[66] Mr. Harvey admitted that the taxi expense in 2003 was simply an estimate of \$100 per month. He explained that he did not drink and drive and, since he regularly had drinks with clients, he would take a taxi home. He stated that he paid cash and did not receive receipts. The Minister did not allow Mr. Harvey any deduction in respect of these taxi costs. Having looked at Mr. Harvey's meals and entertainment receipts, I acknowledge that a significant number of them involved the purchase of alcohol. I accept Mr. Harvey's evidence that he drank with clients, took taxis home, paid cash and did not receive receipts. However, given Mr. Harvey's general lack of credibility, I am not prepared to simply accept his word that he spent \$100 a month on taxis. I will accordingly allow a deduction of \$600 in 2003.

[67] Mr. Harvey also admitted that the parking expense in 2003 was simply an estimate of \$100 per month. The Minister did not allow Mr. Harvey any deduction in respect of these parking costs. Mr. Harvey explained that he frequently parked in downtown Winnipeg at metered parking spots where he would not receive receipts. I accept Mr. Harvey's testimony on this point. If he parked 5 days a week, 4 weeks a month that would only amount to \$5.00 in parking per day. This amount seems reasonable to me and I can hardly fault Mr. Harvey for not providing receipts from parking meters that, at the time, did not produce receipts. I will accordingly allow the full \$1,200 deduction claimed by Mr. Harvey.

[68] Mr. Harvey drove a Jeep. He claimed 90% of its use was for business purposes. The Minister reviewed Mr. Harvey's expenses and allowed various amounts for gas, car washes, licence fees and unallocated expenses based on the Minister's assessment of the documents and Mr. Harvey's use of the vehicle. I have not seen or heard any evidence that would convince me that the Minister's conclusions were incorrect.

[69] The only vehicle issue that remains is the repair (\$15,326.66) and lease (\$2,897.28) expenses from 2004. Mr. Harvey testified that one night in 2004, Mr. Harvey's daughter and a group of her friends took Mr. Harvey's Jeep from his garage without his knowledge or permission. None of the girls had a driver's license. Mr. Harvey does not know which girl was driving. The Jeep was in an accident and suffered very significant damage. Mr. Harvey's insurer refused to cover the cost of repairing the Jeep on the basis that it was being operated by an unlicensed driver at the time of the accident. The Jeep took months to repair. It was a leased vehicle, pursuant to the terms of the lease, Mr. Harvey both had to repair the vehicle and continue paying the lease while the vehicle was being repaired. Mr. Harvey bought a Jaguar to use while the Jeep was being repaired. He never used the Jeep for business

purposes again. I accept Mr. Harvey's evidence on these points. I cannot imagine that he would have allowed his unlicensed daughter and her unlicensed friends to drive his Jeep. Mr. Harvey deducted 90% of the costs of repairing the Jeep and the lease payments. The Minister denied the deduction of both amounts on the basis that they were not incurred for the purpose of gaining or producing business income. There is no dispute that the expenses were incurred.

[70] This issue raises a number of interesting questions. I was not directed to any case law specifically on point. I will deal with the repair expenses first. Had the repair expenses arisen as a result of an accident that Mr. Harvey had had while driving for business purposes, those expenses would have been fully deductible. On the other hand, had the repair expenses arisen as a result of an accident that Mr. Harvey had had while driving for personal purposes, none of those expenses would have been deductible. However, since Mr. Harvey was not operating the vehicle at the time of the accident, it is not as simple to determine whether the vehicle was being used for business or personal purposes.

[71] Counsel for the Respondent submitted that the fact that the vehicle was taken by Mr. Harvey's daughter makes the use of the vehicle at the time of the accident personal. Had Mr. Harvey allowed his daughter to use the vehicle, then I would have considered the vehicle to have been being used for personal purposes at the time of the accident and not allowed the repair expenses to be claimed. However, Mr. Harvey did not allow his daughter to use the vehicle. The vehicle was taken without his permission or knowledge. In those circumstances, I do not consider the fact that his daughter was among those who stole his car to be relevant.

[72] What I must do is to determine what use was being made of the vehicle when it was stolen, not when it was actually in the accident. Mr. Harvey uses the vehicle for both business and personal purposes. He also uses his house for both business and personal purposes. Therefore it is not possible to state with any certainty that the vehicle, while parked at his house, was being used for either business or personal purposes. The better argument is that it was simply sitting idle, being used for neither purpose. In the circumstances, I feel that the method chosen by Mr. Harvey of allocating the expense based on his percentage business use of the vehicle was appropriate.

[73] Mr. Harvey claimed that he used his vehicle 90% for business purposes. Given his description of the general nature of his business, I am prepared to accept that he had a very high business use of the vehicle. However, he has not satisfied me that he used his vehicle 90% of the time for business purposes. Given Mr. Harvey's

testimony that he would drive the vehicle to his cottage in the summer, the fact that he lived alone during the period so there was presumably no other person in his household who was able to travel to make domestic purchases, the fact that he had a social life outside of work during the period which would presumably have caused him to drive from time to time and the fact that he had two teenage daughters during the period who he would presumably travel with from time to time and given my general findings as to his credibility, I am going to reduce his business use to 80%. Accordingly, I will allow \$13,623.70 in additional repair expenses in 2004 (i.e. $\$15,326.66 / 90\% \times 80\%$).

[74] Mr. Harvey entered into the lease for a mix of business and personal purposes. Although he was unable to use the vehicle during the relevant period due to the accident, since I have concluded that the vehicle was being used for mixed business and personal purposes at the time that it became unavailable, I therefore conclude that the lease payments following that time were for mixed business and personal purposes and are deductible based on 80% business use. Accordingly, I will allow \$2,575.36 in additional lease expenses in 2004 (i.e. $\$2,897.28 / 90\% \times 80\%$).

Insurance:

[75] Mr. Harvey claimed \$3,178.58 in insurance costs in 2003 and \$3,608.28 in insurance costs in 2004. He did not provide any documentary support for these amounts. He stated that he believes these amounts were for errors and omissions insurance that was arranged through Re/Max but that he is not sure. It should have been relatively easy for Mr. Harvey to obtain documentary evidence of these amounts from Re/Max or at least evidence of the annual amount that is currently payable. In his submissions to CRA Appeals (Exhibit R-5), Mr. Harvey characterized these amounts as “long term and short term disability insurance”. Given Mr. Harvey’s contradictory statements, in the absence of documentary evidence, I am not prepared to allow this expense.

Telephone:

[76] Mr. Harvey claimed \$5,594 in telephone and internet expenses in 2003. The Minister allowed the deduction of \$1,912. Mr. Harvey claimed \$6,004 in telephone and internet expenses in 2004. The Minister allowed the deduction of \$3,078. Mr. Harvey provided copies of bills in support of his expenses. It was not entirely

clear to me which amounts the Minister had allowed and which amounts had been denied.

[77] Mr. Harvey claimed that he required a business phone / fax line in his home, a pager and 2 cell phones. The pager bills appeared to have a significant balance carried forward from a prior period and to consist mostly of interest charges on that balance. He explained that he needed two cell phones because the messages on one would sometimes fill up. I do not accept his explanation for needing two cell phones. A third party's name was on one of the cell phone accounts. Mr. Harvey gave a very convoluted explanation about the individual being someone that he had previously worked with who had a great unlimited calling plan that lasted for life. Apparently the individual agreed to transfer his phone to Mr. Harvey so that Mr. Harvey could take advantage of the plan and the phone company allowed such a transfer once but would not allow the name on the plan to be changed. Apparently the individual dying in 2009 and the phone company then allowed Mr. Harvey to put the phone in his own name despite the plan being for life. Mr. Harvey's daughter had a cell phone on one of the accounts for part of the period. She was a teenager at the time. Mr. Harvey provided a very weak explanation for this stating that his daughter had her own personal cell phone but that she sometimes delivered flyers for him door to door in his neighbourhood and needed a phone from him so that she could call him for a ride when she was done and to tell him how many hours she had worked. This explanation is not only ridiculous, it also contradicts a statement that Mr. Harvey previously made to CRA Appeals where he stated "I agree the portion for my daughter (sorry I did not notice) should be disallowed" (Exhibit R-5).

[78] Based on Mr. Harvey's specific lack of credibility on this issue, his general lack of credibility and the uncertainty about which expenses have already been allowed, I am not prepared to make any changes to the amount of phone expenses already allowed by the Minister.

Decision:

[79] The appeal is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that Mr. Harvey is entitled to the following additional deductions:

- \$2,000 in home office expenses in each of his 2003 and 2004 taxation years;

- \$1,200 in meals and entertainment in each of his 2003 and 2004 taxation years;
- \$600 in taxi expenses in 2003;
- \$1,200 in parking expenses in 2003;
- \$13,623.70 in vehicle repair expenses in 2004; and
- \$2,575.36 in vehicle lease expenses in 2004.

Costs:

[80] At the end of the hearing counsel for the Respondent requested an opportunity to make submissions on costs. I will therefore hold off ruling on costs pending submissions from the parties.

Signed at Ottawa, Canada, this 26th day of September 2013.

“David E. Graham”

Graham J.

CITATION: 2013 TCC 298
COURT FILE NO.: 2011-249(IT)G
STYLE OF CAUSE: GLEN HARVEY AND HER MAJESTY
THE QUEEN
PLACE OF HEARING: Winnipeg, Manitoba
DATE OF HEARING: September 9 and 10, 2013
REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham
DATE OF JUDGMENT: September 26, 2013
APPEARANCES:

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