

Docket: 2010-1910(IT)G

BETWEEN:

BERNARD VICARS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Janice Vicars* 2010-1911(IT)G; *Bernie's Service Bay Limited* 2010-1912(IT)G; and *Bernie's Service Bay Limited* 2010-1913(GST)I on July 4-5-6, 2012 and May 15-16, 2013, at St. John's, Newfoundland and Labrador

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: Gerard Tompkins, Q.C.

Counsel for the Respondent: Marcel Prevost

---

**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2002, 2003, 2004, 2005 and 2006 taxation years is allowed and is referred back to the Minister of National Revenue for reassessment and reconsideration on the basis that the value of the Chevrolet Cavalier is to be deleted from the Personal Assets and Personal Liabilities in the net worth calculation.

The parties have sixty days from the date of this Judgment to file their written representations with the Court with regard to costs.

Signed at Ottawa, Canada, this 24<sup>th</sup> day of October 2013.

“V.A. Miller”

---

V.A. Miller J.

Docket: 2010-1911(IT)G

BETWEEN:

JANICE VICARS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Bernard Vicars* 2010-1910(IT)G; *Bernie's Service Bay Limited* 2010-1912(IT)G; and *Bernie's Service Bay Limited* 2010-1913(GST)I on July 4-5-6, 2012 and May 15-16, 2013, at St. John's, Newfoundland and Labrador

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: Gerard Tompkins, Q.C.

Counsel for the Respondent: Marcel Prevost

---

**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2002, 2003, 2004, 2005 and 2006 taxation years is allowed and is referred back to the Minister of National Revenue for reassessment and reconsideration on the basis that the value of the Chevrolet Cavalier is to be deleted from the Personal Assets and Personal Liabilities in the net worth calculation.

The parties have sixty days from the date of this Judgment to file their written representations with the Court with regard to costs.

Signed at Ottawa, Canada, this 24<sup>th</sup> day of October 2013.

“V.A. Miller”

---

V.A. Miller J.

Docket: 2010-1912(IT)G

BETWEEN:

BERNIE'S SERVICE BAY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Bernard Vicars* 2010-1910(IT)G; *Janice Vicars* 2010-1911(IT)G; and *Bernie's Service Bay Limited* 2010-1913(GST)I on July 4-5-6, 2012 and May 15-16, 2013, at St. John's, Newfoundland and Labrador

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: Gerard Tompkins, Q.C.  
Counsel for the Respondent: Marcel Prevost

---

### **JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2002, 2003, 2004, 2005 and 2006 taxation years is allowed and is referred back to the Minister of National Revenue for reassessment and reconsideration on the basis that:

- (i) the unreported investments included in the Company's income in 2002 is to be reduced by \$56,227;
- (ii) the unreported revenue per net worth analysis is to be reduced to reflect the changes in income allowed for Bernard Vicars and Janice Vicars.

The parties have sixty days from the date of this Judgment to file their written representations with the Court with regard to costs.

Signed at Ottawa, Canada, this 24<sup>th</sup> day of October 2013.

“V.A. Miller”

---

V.A. Miller J.

BETWEEN:

BERNIE'S SERVICE BAY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Bernard Vicars* 2010-1910(IT)G; *Janice Vicars* 2010-1911(IT)G; and *Bernie's Service Bay Limited* 2010-1912(IT)G on July 4-5-6, 2012 and May 15-16, 2013, at St. John's, Newfoundland and Labrador

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: Gerard Tompkins, Q.C.

Counsel for the Respondent: Marcel Prevost

---

**JUDGMENT**

The appeal from the assessment made under the *Excise Tax Act* for the periods ending July 31, 2002, March 31, 2003, July 31, 2003, July 31, 2004 and July 31, 2005 is allowed and the assessment is referred back to the Minister of National Revenue for reassessment and reconsideration on the basis that the amount of net tax is to be reduced to reflect the amounts to be deleted from the net worth analysis.

The parties have sixty days from the date of this Judgment to file their written representations with the Court with regard to costs.

Signed at Ottawa, Canada, this 24<sup>th</sup> day of October 2013.

“V.A. Miller”

---

V.A. Miller J.

Citation: 2013TCC329  
Date: 20131024  
Docket: 2010-1910(IT)G

BETWEEN:

BERNARD VICARS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1911(IT)G

AND BETWEEN:

JANICE VICARS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1912(IT)G

AND BETWEEN:

BERNIE'S SERVICE BAY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1913(GST)I

AND BETWEEN:

BERNIE'S SERVICE BAY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**REASONS FOR JUDGMENT**

V.A. Miller J.

[1] These appeals were heard on common evidence. Bernard and Janice Vicars are husband and wife and they each owned 50% of the shares of Bernie's Service Bay Limited (the "Company"). The appeals for each of the Appellants relate to the 2002 to 2006 taxation years inclusive.

[2] During an audit of the Company, its records were found to be unreliable and in disarray. The auditor, Amanda Langdon, performed a net worth analysis of Bernard and Janice Vicars and concluded that they had appropriated income from the Company. The result of the audit was that the appropriations were included in their income and the Company was reassessed to include the total appropriations in its income. The Minister of National Revenue (the "Minister") made other adjustments to the Appellants' income and those adjustments are summarized in the charts which follow.

[3] The following amounts were added to the income of Bernard Vicars and the income of Janice Vicars:

	2002	2003	2004	2005	2006
Shareholder Appropriations Per Net Worth Analysis	\$38,896	\$16,584	\$18,384		
Income Inclusion 15(2)			\$16,117	\$18,488	\$15,214
Total	\$38,896	\$16,584	\$34,501	\$18,488	\$15,214

[4] The Minister also determined that Janice Vicars had received a benefit from her use and operation of an automobile owned by the Company and he included a stand by charge in the amount of \$7,053 in her income in the 2003, 2004 and 2005 taxation years pursuant to subsection 15(5) of the *Income Tax Act* (“*ITA*”).

[5] The Company has a July 31 year end. For income tax purposes, the Minister reassessed the Company to include the following amounts in its income and to disallow capital cost allowance which it had claimed on a Chevrolet Cavalier:

	2002	2003	2004	2005
Unreported Revenue Per Net Worth Analysis	\$39,460	\$45,010	\$30,631	\$13,296
Unreported Investment Income	\$75,560			
Capital Cost Allowance Disallowed		\$2,783	\$4,732	\$3,312
Unreported Revenue Per Shareholder Loan	\$32,063	\$8,696		
Total	\$147,083	\$56,489	\$35,363	\$16,608

[6] With respect to the Excise Tax appeal, the Minister increased the Company’s HST collectible by \$10,728.54, \$8,922.07, \$5,460.89 and \$2,860.52 for the periods ending July 31, 2002, July 31, 2003, July 31, 2004 and July 31, 2005 respectively. The Minister also disallowed the input tax credit claimed by the Company for the period ending March 31, 2003 on the purchase of a Chevrolet Cavalier.

[7] The Minister assessed gross negligence penalties pursuant to the *ITA* against each of the Appellants and gross negligence penalties against the Company pursuant to the *Excise Tax Act* (the “*ETA*”). Each Appellant was reassessed beyond the limitation period for the 2002, 2003 and 2004 taxation years.

[8] The witnesses at the hearing were Bernard and Janice Vicars and their daughter Tara Vicars. The Appellants also relied on the testimony of Bruce Jones, a Certified Management Accountant, Sherry Sceviour, an accounting clerk, and Peter Collens, a Certified Accountant. Amanda Langdon, an auditor with the Canada Revenue Agency (“*CRA*”), gave evidence on behalf of the Respondent.



[9] Mr. Jones had been the Appellants' accountant during the relevant period. He prepared monthly summaries, the monthly HST returns, the financial statements and income tax returns for the Company. He also prepared the income tax returns for Bernard and Janice Vicars. Sherry Sceviour worked for Mr. Jones. Mr. Collens represented the Appellants at the audit and objections stage of this case.

## **Facts**

[10] Bernard Vicars operated a vehicle repair business and a gasoline station as a sole proprietor from 1991 until 1996. The Company was incorporated in 1996 and it stopped selling gasoline in 1997. Bernard and Janice Vicars testified that the Company only carried on the business of repairing and maintaining vehicles; providing snow removal services; and, towing services. Although they both denied that the Company sold used vehicles as part of its business, I have concluded that it did. My conclusion is based on prior statements made by both Bernard Vicars and his accountant, Mr. Jones, to Amanda Langdon. Bernard Vicars told Amanda Langdon on April 24, 2006 that the Company sold used vehicles and his statement was confirmed by Bruce Jones in a letter to the auditor on October 20, 2006.

[11] The roles of Bernard and Janice Vicars in the Company's business were described as follows:

- (a) Bernard Vicars is a trained mechanic and he is employed by the Company. During the period 2002 to 2006, the Company also employed two other mechanics in its business.
- (b) Bernard Vicars was the only employee who handled sales for the Company.
- (c) Each evening, Bernard Vicars placed the credit card receipts, cheques, cash and cash register tapes in a bag and took it home to Janice Vicars.
- (d) Only Janice and Bernard Vicars handled the cash from the Company.
- (e) Weekly or twice a week, Janice Vicars deposited the cash into the Company's bank account and she prepared the weekly sales summaries on a sheet which had been provided to her by the accountant, Bruce Jones. She prepared the payroll for the Company. Each month she compiled the weekly sales summaries, the light, phone and cell phone bills for the Company, the receipts for materials purchased for the Company, the Visa and Mastercard statements and the Company's bank statements and she took these documents to the accountant so that he could prepare the HST return.

[12] During the period, Janice Vicars was employed by Wal-Mart and had been so employed since 1994.

[13] The Company had its own bank account but it did not have a credit card in its name. Bernard Vicars had two credit cards in his name and he used them to purchase supplies for the Company. Janice Vicars also had a credit card in her name which she used for both business and personal expenditures. She stated that she purchased items for the Company from Wal-Mart on her credit card. Each month she analyzed her credit card statement and paid personal purchases out of her bank account and business purchases out of the Company account.

### **Analysis**

[14] In *Hsu v R*, 2001 FCA 240, the Court described net worth assessments and the onus on a taxpayer. It stated:

30 Net worth assessments are a method of last resort, commonly utilized in cases where the taxpayer refuses to file a tax return, has filed a return which is grossly inaccurate or refuses to furnish documentation which would enable Revenue Canada to verify the return (V. Krishna, *The Fundamentals of Canadian Income Tax Law*, 5<sup>th</sup> ed. (Toronto: Carswell, 1995) at 1089). The net worth method is premised on the assumption that an appreciation of a taxpayer's wealth over a period of time can be imputed as income for that period unless the taxpayer demonstrates otherwise ( *Bigayan*, *supra* , at 1619). Its purpose is to relieve the Minister of his ordinary burden of proving a taxable source of income. The Minister is only required to show that the taxpayer's net worth has increased between two points in time. In other words, a net worth assessment is not concerned with identifying the source or nature of the taxpayer's appreciation in wealth. Once an increase is demonstrated, the onus lay entirely with the taxpayer to separate his or her taxable income from gains resulting from non-taxable sources ( *Gentile v. R.*, [1988] 1 C.T.C. 253 (Fed. T.D.), at 256).

31 By its very nature, a net worth assessment is an arbitrary and imprecise approximation of a taxpayer's income. Any perceived unfairness relating to this type of assessment is resolved by recognizing that the taxpayer is in the best position to know his or her own taxable income. Where the factual basis of the Minister's estimation is inaccurate, it should be a simple matter for the taxpayer to correct the Minister's error to the satisfaction of the Court.

[15] In these appeals the Appellants presented none of the source documents for the Company. They chose to challenge the assessments on the following bases which I will discuss below.

(a) *It was not necessary to perform a net worth analysis*

[16] It was the Appellant's position that the Company's records were complete, organized and adequate for the CRA to perform an audit and it was not necessary in the circumstances of these appeals for Amanda Langdon to perform a net worth analysis of Bernard and Janice Vicars.

[17] I disagree. There was evidence that the weekly sales summaries prepared by Janice Vicars were inaccurate as they did not include all revenue. The accountant had to adjust the summaries and estimate sales. He had to make year end adjustments because of the lack of records. The records which Amanda Langdon received from Bruce Jones were totally unreliable.

[18] When she asked Bernard Vicars for the Company records, Amanda Langdon was given a garbage bag and a box of documents. The documents in the garbage bag were not organized and the documents in the box were contaminated with mice droppings. Some of the documents in the box had been shredded by the mice. Even if the documents had been in good condition, there were no source documents given so that the revenue reported could not have been reconciled.

[19] Given the state of the Company's records, Amanda Langdon was correct to conduct a net worth analysis of Bernard and Janice Vicars. It is my view that, even if the records had been complete but were contaminated with mice droppings, Amanda Langdon was not obligated to handle the records and risk her health.

[20] Although the Appellants spoke to the completeness of the Company records, none were submitted as evidence until I asked if any of the records would be made exhibits. Ten monthly summaries were made exhibits. These summaries showed that there was a discrepancy between the recorded sales and the revenue for every day shown on each of the summaries.

*(b) The Company had insufficient cash sales to support the unreported income*

[21] It was also the Appellants' position that the Company's sales were mostly credit card sales and it earned insufficient cash sales to have the amount of unreported income which the auditor had included in the Appellants' income. It is my view that this position is not supported by the evidence.

[22] None of the amounts used in the net worth analysis were estimates or based on Statistics Canada data. All amounts for assets, liabilities and expenditures in the net worth analysis were taken from documents and the personal expenditure worksheet provided by the Appellants.

[23] According to the monthly summaries which were tendered, the Company had cash sales of \$9,632.23, \$8,119.60, \$7,175.68, \$10,828.41, \$5,903.39, \$6,472.03, and \$10,744.41 in January 2002, July 2002, March 2003, June 2003, December 2003, May 2004, and November 2004. These summaries represented only six months of the thirty-six covered by the net worth analysis. There was also evidence that there was more cash deposited into the Company's bank account than was reported on the monthly summaries.

[24] Bernard and Janice Vicars had \$62,225.30 in cash to pay off their mortgage in 2002. In 2001, Bernard and Janice Vicars had a mortgage payable of \$60,751 on their principal residence. They made cash payments of \$43,866.65 and \$18,358.65 in 2002 so that the mortgage principal and interest were paid in full. Janice Vicars earned T4 income and she reported insufficient income to have made those payments in 2002. The only other declared source of revenue was the Company.

[25] At the audit stage of this case, there was no explanation given with respect to the source of the funds to pay off the mortgage. Neither Bernard Vicars nor Janice Vicars told the auditor that they had cash on hand either prior to or at the start of the net worth period. In cross examination, Janice Vicars could not explain the source of the funds used to pay off the mortgage. However, Bernard Vicars stated that he had received \$20,000 from the sale of gasoline in 1997 and \$7,000 from the sale of an automobile in 1996 or 1997 and he kept this money in a safe in the floor of the garage. It was this money which he said he used to pay off the mortgage. However, even this explanation does not account for the total amounts used to pay out the mortgage and I find Bernard Vicars' explanation unconvincing.

[26] Finally, Peter Collens, Bernard Vicars and Janice Vicars agree that the Shareholder Loan Account contained unreported revenue for the Company.

[27] According to the income tax returns filed by the Company, the credit in the Shareholder Loan Account was as follows:

2001	2002	2003	2004
\$107,164	\$186,255	\$204,378	\$176,372

[28] Both Bernard and Janice Vicars testified that they did not invest funds in the Company during the audit period. Peter Collens stated that Bruce Jones had incorrectly recorded unknown deposits in the Company's bank account as a credit to the shareholder loan account when these amounts actually represented unreported revenue for the Company. Mr. Collens opined that instead of performing a net worth analysis in this case, the auditor should have reduced the credits to the Shareholder

Loan Account and included these amounts in income for the Company. However, he did not know the amount of credits to the Shareholder Loan Account which represented unreported income for the Company as he had never seen any of the source documents.

(c) *Shareholder Benefit*

[29] As a result of the Appellants' and Mr. Collens' representations, the auditor removed the Shareholder Loan Account from the assets in the net worth calculation. She made adjustments relating to the Shareholder Loan Account for 2002 to 2006 on a factual basis. She reduced the opening balance for this account to zero and requested shareholder loan information for 2005 and 2006. The Appellants did not submit any information and the auditor calculated a subsection 15(2) benefit which was included in their income.

[30] At the hearing, counsel for the Appellants questioned whether the Shareholder Loan Account was entirely incorrect and whether its opening balance should have been reduced to zero. However, the onus was on the Appellants to produce documents or testimony to show the correct balance for the Shareholder Loan Account. This they failed to do. They gave no documents with respect to the Shareholder Loan Account.

[31] Mr. Collens opined that a shareholder benefit should not have been included in Bernard and Janice Vicars' income; that a stand by charge should not have been included in Janice Vicars' income; and, that the expenses from one of the Vicars' rental properties were included in the calculation of their personal expenditures in the net worth statements. I have given no weight to these opinions expressed by Mr. Collens. He was not called as an expert witness but as a factual witness. He saw no source documents. His knowledge of the file consisted of things he had been told by Bruce Jones and his review of the net worth documents produced by the CRA.

(d) *Chevrolet Cavalier*

[32] The Company had included a 2003 Chevrolet Cavalier ("Cavalier") in its capital cost allowance schedule. The auditor disallowed the claim for capital cost allowance on the basis that the Cavalier was used 100% by Tara Vicars. The cost and loan balance for the Cavalier was included in the net worth calculation for Bernard and Janice Vicars. Although they told the auditor that Tara Vicars made the payments

on the Cavalier, the Appellants did not give her any documents to support their position. It was only at the hearing of these appeals that Tara Vicars' bank statements were submitted which showed that an automatic monthly payment of \$435.08 was taken from her account to pay for the Cavalier.

[33] As a result of these bank account statements and Tara Vicars' evidence, I have concluded that the Cavalier should be deleted from the Personal Assets and Personal Liabilities in the net worth calculation.

*(e) Unreported Investment Income*

[34] The unreported investments included in the Company's income in 2002 must be reduced by \$56,227 as this amount represented investments for 2001.

*(f) Statute Barred Years and Gross Negligence Penalties*

[35] The reassessments for the 2002, 2003 and 2004 taxation years were made beyond the normal reassessment period in each of the appeals before the Court and the onus is on the Respondent to show that the Appellants made a misrepresentation that is attributable to neglect, carelessness, wilful default or fraud in filing their returns.

[36] The Appellants reported the following income when they filed their tax returns:

	2002	2003	2004
Janice Vicars	\$24,919	\$27,221	\$29,517
Bernard Vicars	\$36,811	\$23,575	\$21,302
The Company Net income	(\$4,458)	(\$1,187)	\$4,307

[37] It is my view that the Minister was justified in opening the three statute-barred years for each of the Appellants. I have found that Bernard and Janice Vicars appropriated funds from the Company. Bernie Vicars was the only person who handled the sales for the Company and only he and Janice Vicars handled the cash from the Company. I have concluded that many of their answers were implausible and it is my view that they were not credible. They have not provided any convincing explanation for the major portion of the discrepancy between the income reported on

the Company's and their 2002, 2003 and 2004 income tax returns and the income as shown by the net worth analysis and that discrepancy was substantial. It is my view that the misrepresentations made by the Appellants in filing their income tax returns were attributable to wilful default. In 2002, they had \$62,225.30 in cash to pay off the mortgage on their principal residence and they were not able to give a credible explanation for their receipt of this cash. They knew that their credit in the Shareholders Loan Account was increasing each year; they knew that they did not invest any money in the Company; they said that they did not understand the credit in the Shareholder Loan Account and yet they did not ask Mr. Jones any questions.

[38] In each of the appeals, the Minister assessed gross negligence penalties against the Appellants. Gross negligence penalties are defined in *Venne v The Queen*, 84 DTC 6247 (FCTD) as:

“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.

[39] In deciding whether the Minister has established that gross negligence penalties should be applied, a number of factors have to be considered. They include: the magnitude of the omission in relation to the income declared; the opportunity the taxpayer had to detect the error; the taxpayer's education and apparent intelligence: *DeCosta v The Queen*, 2005 TCC 545 at paragraph 11.

[40] I have concluded that the Company earned unreported income which the individual Appellants appropriated for their own use. The unreported income for each Appellant is significant when compared to the income reported by the Appellants. Only the individual Appellants controlled the cash earned by the Company. Although they prepared monthly sales summaries for the Company which they gave to their accountant, these summaries were inaccurate and they did not include all of the cash earned by the Company. They had their accountant prepare their returns but they controlled the information they gave him. In these circumstances, I am satisfied that the Minister was correct to impose gross negligence penalties.

[41] The appeals are allowed.

[42] The parties asked for an opportunity to address costs and they have sixty days from the date of the Judgments to file their written representations with the Court.

Signed at Ottawa, Canada, this 24<sup>th</sup> day of October 2013.

“V.A. Miller”

---

V.A. Miller J.



CITATION: 2013TCC329

COURT FILE NO.: 2010-1910(IT)G  
2010-1911(IT)G  
2010-1912(IT)G  
2010-1913(GST)I

STYLE OF CAUSE: BERNARD VICARS  
JANICE VICARS  
BERNIE'S SERVICE BAY LIMITED  
BERNIE'S SERVICE BAY LIMITED  
AND HER MAJESTY THE QUEEN

PLACE OF HEARING: St. John's, Newfoundland and Labrador

DATE OF HEARING: July 4-5-6, 2012 and May 15-16, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: October 24, 2013

APPEARANCES:

Counsel for the Appellant: Gerard Tompkins, Q.C.  
Counsel for the Respondent: Marcel Prevost

COUNSEL OF RECORD:

For the Appellant:  
Name: Gerard Tompkins, Q.C.  
Firm: Patterson Law

For the Respondent: William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Canada