Date: 20111214

Dockets: A-351-10
A-352-10
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A-354-10
A-360-10

Citation: 2011 FCA 344

CORAM: DAWSON J.A.
TRUDEL J.A.
MAINVILLE J.A.

Docket: A-351-10

BETWEEN:

MICHEL GUIBORD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-352-10

BETWEEN:

MEI GUIBORD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-353-10

BETWEEN:

GEORGE S. SZETO INVESTMENTS LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-354-10

BETWEEN:

GEORGE SZETO

Appellant

and

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Docket: A-360-10

BETWEEN:

GEORGE S. SZETO INVESTMENTS LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on December 7, 2011.

Judgment delivered at Ottawa, Ontario, on December 14, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This concerns five appeals from five judgments of V. Miller J. of the Tax Court of Canada (the "Judge"):

a. The individual appellants Michel Guibord (appeal file A-351-10), Mei Guibord (appeal file A-352-10) and George Szeto (appeal file A-354-10) seek to overturn the judgments of the Tax Court of Canada which partially allowed their appeals from reassessments issued by the Minister of National Revenue (the "Minister") under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) for the 1995, 1996 and 1997 taxation years.

b. The corporate appellant, George S. Szeto Investments Ltd., seeks to overturn a judgment of the Tax Court of Canada which allowed in part its appeal from reassessments issued by the Minister under the *Income Tax Act* for its taxation years ending October 31, 1995, October 31, 1996 and October 31, 1997 (appeal file A-353-10)

c. Finally, the corporate appellant George S. Szeto Investments Ltd. also seeks to overturn a decision of the Tax Court of Canada which allowed in part its appeal from reassessments issued under the *Excise Tax Act*, R.S.C. 1985, c. E-15 in respect to GST for the period of November 1, 1994 to October 31, 1997 (appeal file A-360-10).

All these appeals were consolidated by order of this Court dated December 17, 2010.

[2] Siblings Mei Guibord and George Szeto are the sole shareholders of George S. Szeto Investments Ltd. which itself owns and operates the Ruby King Restaurant. The corporate appellant shall be referred to in these reasons as "Ruby King". Mei Guibord is also the spouse of Michel Guibord. During the years reassessed, Mei Guibord and George Szeto were salaried employees of Ruby King. Michel Guibord was not directly employed by Ruby King. Rather, he worked for the Department of National Defence as a computer specialist. However, until February 1997, he was the bookkeeper for Ruby King. In that capacity, he received the daily sales receipts for Ruby King and he periodically made deposits to Ruby King's bank account.

[3] In 1995, 1996 and 1997, Michel Guibord reported employment income of $43,933, $49,111 and $48,779 respectively; Mei Guibord reported employment income of $10,600, $10,400 and $10, 400 respectively; and George Szeto reported income of $10,600, $10,400 and $10,400 respectively. Ruby King reported losses for all relevant periods; however, in each of the relevant years, the financial statements prepared for Ruby King indicated large amounts as "Due to Shareholders".

[4] The Minister audited Ruby King and found its records to be unreliable and incomplete. This resulted in additional investigations by the Minister into the income reported by the individual appellants. A net worth method was finally used by the Minister to reassess Ruby King and the three individual appellants. The Minister further relied on subsection 152(4) of the *Income Tax Act* to reassess the appellants beyond the three-year limitation period. In addition, he assessed all of the appellants with penalties under subsection 163(2) of the *Income Tax Act* and Ruby King with additional penalties under subsection 298(4) of the *Excise Tax Act*.

[5] The appellants appealed to the Tax Court of Canada. Their appeals were decided on common evidence following thirteen days of hearings. The Judge was satisfied that the Minister was justified in opening the three statute barred taxation years for all the appellants because she found that they had made misrepresentations relating to their income which, at minimum, were attributable to neglect and carelessness. The Judge went on to make various corrections to the appellants' net worth statements. She then set aside the penalties imposed upon the individual appellants while confirming the penalties assessed on Ruby King. The issue of costs was reserved. After receiving written submissions on costs, the Judge issued reasons and an order with respect to costs. That order is the subject of separate appeals, and is not dealt with in these reasons.

[6] The appellants appeal to this Court on various grounds. The principal grounds of appeal may be restated as follows:

a. The Judge erred when failing to put her mind as to whether or not, in the circumstances, the net worth reassessments should be vacated because they were not completed in a principled and rational manner and because they were done in an arbitrary fashion.

b. The Judge erred by (i) failing to identify the legal test which the appellants had to meet in order to demolish the Minister's assumptions, (ii) failing to determine whether the facts satisfied the legal test for each of the appellants, and (iii) failing to consider all the relevant evidence when considering the test for each of the appellants.

c. The Judge erred in apportioning a part of the income of Michel Guibord to his spouse Mei Guibord.

d. The Judge erred when she failed to vacate George Szeto's reassessment on the principle of *de minimus*.

[7] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 sets out the standard of review in an appeal from a judgment of the Tax Court of Canada. The standard of review on a question of law is correctness, while findings of fact are not to be disturbed unless it can be established that the trial judge made a palpable and overriding error. The application of a legal standard to a set of facts is a question of mixed fact and law which is also subject to deference unless an extricable question of law can be identified. The appellants' grounds of appeal challenge the Judge's findings of fact or the application by the Judge of a legal standard to a set of facts. Consequently, unless an extricable question of law can be identified, the standard of review which applies in these appeals is that of a palpable and overriding error.

Did the Judge err by failing to put her mind as to whether or not, in the circumstances, the net worth reassessments should be vacated because they were not completed in a principled and rational manner and because they were done in an arbitrary fashion?

[8] In certain appropriate circumstances, the Minister may use the net worth methodology to assess a taxpayer. This methodology has been described as follows by Bowman J. in *Bigayan v. R.* (1999), 2000 D.T.C. 1619:

> The net worth method, as observed in *Ramey v. The Queen*, 93 D.T.C. 791, is a last resort to be used when all else fails. Frequently it is used when a taxpayer has failed to file income tax returns or has kept no records. It is a blunt instrument, accurate within a range of indeterminate magnitude. It is based on an assumption that if one

> subtracts a taxpayer's net worth at the beginning of a year from that at the end, adds the taxpayer's expenditures in the year, deletes non-taxable receipts and accretions to value of existing assets, the net result, less any amount declared by the taxpayer, must be attributable to unreported income earned in the year, unless the taxpayer can demonstrate otherwise. It is at best an unsatisfactory method, arbitrary and inaccurate but sometimes it is the only means of approximating the income of a taxpayer.

[9] Though it is an arbitrary and imprecise approximation of a taxpayer's income, the perceived unfairness of a net worth assessment is somewhat resolved by the fact the taxpayer is in the best position to know his or her own taxable income. Where a 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: *Hsu v. The Queen*, 2001 FCA 240; [2001] 4 C.T.C. 1; 2001 D.T.C. 5459, at paragraph 30.

[10] The appellants assert that the use of the net worth method was arbitrary in that the Minister could have used another audit method. They add that the Minister's net worth reassessments were unprincipled since the CRA auditor responsible for the audits attributed the "Due to shareholders" in Ruby King to the individual appellants - rather than as unreported earnings of Ruby King - when he knew (and later acknowledged) that this assumption was questionable. The appellants thus conclude that their reassessments should be vacated on this basis.

[11] In my view, this ground of appeal should fail.

[12] The Judge found that the systems used by the appellants for sales and daily cash reconciliations in Ruby King were haphazard and questionable: Reasons at paragraphs 31 and 64. She further found that large amounts attributable to sales at Ruby King's were not rung into the cash register, and that Michel Guibord treated his duties as bookkeeper and the Ruby King's monies "in a cavalier and frivolous manner": Reasons at paragraph 64. She further did not believe Michel Guibord's explanation that any discrepancies between declared revenues and his and his spouse's net worth assessments were attributable to his alleged large casino gambling gains: Reasons at paragraphs 55 to 58. All these findings support the position of the Minister that a net worth method was justified in these circumstances.

[13] Moreover, the financial statements of Ruby King set out large amounts as "Due to shareholders". Though these amounts were subsequently found by the Judge to relate to unreported sales in Ruby King, the appellants cannot take issue with the fact that the Minister used an assumption which they themselves set out in the financial statements they submitted to the Minister.

Did the Judge err by (i) failing to identify the legal test which the appellants had to meet in order to demolish the Minister's assumptions, (ii) failing to determine whether the facts satisfied the legal test for each of the appellants, and (iii) failing to consider all the relevant evidence when considering the test for each of the appellants?

[14] Under subsection 152(7) of the *Income Tax Act*, the Minister is not bound by a return or information supplied by a taxpayer and may assess the taxpayer using any method that is appropriate in the circumstances. Subsection 152(8) of the *Income Tax Act* sets out that these assessments are deemed to be valid. The onus is therefore upon the taxpayer to disprove the assumptions of the Minister by making out a *prima facie* case. Once the Minister's assumptions

have been "demolished", the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and to prove the assumptions.

Ruby King

[15] Ruby King asserts that since the Judge found that there was no evidence that its sales exceeded the deposits in its bank accounts (Reasons at paragraph 64 *in fine*), this finding "demolished" the Minister's net worth assumptions, and its appeals should thus be granted. It further argued that it was improper for the Judge to refer the matter back to the Minister for reassessment on a net worth basis.

[16] I find this argument somewhat disingenuous in light of the findings of the Judge that Ruby King maintained a deficient and frivolous accounting system resulting in hundreds of thousands of dollars in unreported sales during the three years in question. There is consequently no merit to this argument.

Mei and Michel Guibord

[17] Mei and Michel Guibord assert that the Judge failed to consider that they had "demolished" the Minister's assumption that the increase in their net worth came from undeclared cash revenues in Ruby King. They say that this assumption was "demolished" when the Judge found that the amounts "Due to shareholders" reported in the financial statements were in fact unreported sales in Ruby King, and that only these amounts had been unreported as revenues in Ruby King. In their view, had the Judge considered the evidence, she would have been compelled to conclude that the

onus had shifted to the Minister to prove the source of their income which explained their net worth. Since the Minister did not present any such evidence, they claim that their appeals against the reassessments should have been allowed.

[18] They add that in any event, their testimony and the other evidence they tendered demonstrated at least on a *prima facie* basis that Michel Guibord was a very lucky "slot machine" gambler. Consequently, his gains from "slot machine" gambling explained *prima facie* the discrepancies between their net worth and their declared taxable incomes.

[19] This ground of appeal fails to consider that the Minister's assumptions were not necessarily tied to revenues obtained by Mei and Michel Guibord in Ruby King. The proceedings in the Tax Court show that the Minister's assumptions were that Mei and Michel Guibord had undeclared taxable revenues from a source other than their declared income. Moreover, this ground of appeal is largely predicated on the assumption that the evidence submitted in support of the gambling revenue source was uncontroversial and credible. It was not.

[20] The Judge found Michel Guibord's testimony on this issue not to be reliable, his recollection to be incorrect and self serving, and the evidence submitted to be unpersuasive. She further found that much of the evidence simply did not support his version of events: Reasons at paragraphs 55 to 58.

[21] I have not been persuaded that the Judge made a palpable and overriding error in reaching these findings. The record before us shows that there was ample evidence before the Judge to allow her to conclude as she did. There was clear evidence of substantial withdrawals from bank accounts and credit cards which contradicted the assertion that all large US dollar deposits by the couple were from gambling wins. Moreover, no record or tracking of the gambling wins or losses was supplied. Nor was any evidence tendered as to the amounts spent to make the alleged gambling wins.

[22] The issue here is simply one of credibility. The Judge did not find the testimony as to the extent of the claimed gambling wins either reliable or credible. Consequently, neither Mei nor Michel Guibord made out a *prima facie* case disputing the Minister's assumptions. Barring a palpable and overriding error, this Court should not intervene.

Did the Judge err in apportioning a part of the income of Michel Guibord to his spouse Mei Guibord?

[23] The Minister applied the net worth assessment analysis to the family unit comprised of both Mei and Michel Guibord, and apportioned as taxable income the unexplained increases in the net worth equally between Mei and Michel Guibord. Mei Guibord asserts as an additional ground of appeal that the Judge erred in confirming this apportionment when the evidence showed that the additional income was essentially attributable to Michel Guibord.

[24] The parties confirmed at the oral hearing before this Court that this ground of appeal had not been raised in the Tax Court of Canada. Consequently, the Judge did not address it in her Reasons.

Since the issue was not pleaded and put in issue before the Tax Court, it is now too late to raise the issue.

Did the Judge err when she failed to vacate George Szeto's reassessment on the principle of *de minimus*?

[25] Under the doctrine of *de minimus,* a fact or thing may be so insignificant that a court may overlook it in deciding an issue or case: *Black's Law Dictionary*, Eight Edition.

[26] George Szeto asserts that since the results of the Minister's net worth analysis were substantially reduced by the Judge, she should have accordingly found - on the *de minimus* doctrine - that the Minister had not established that he had made misrepresentations that were attributable to neglect, carelessness or wilful default. Accordingly, the Judge erred when she found that the Minister was justified in reassessing Mr. Szeto for the statute barred years.

[27] The Crown contends that the *de minimus* doctrine does not apply in the Tax Court of Canada in light of the limited statutory jurisdiction of that Court. We need not decide this issue.

[28] Indeed, whether the doctrine applies or not, there was ample evidence before the Judge demonstrating that George Szeto was grossly negligent in regard to his and Ruby King's tax returns. I note in particular the findings of the Judge at paragraph 26 of her reasons that Mr. Szeto "signed both his and Ruby King's income tax returns without asking any questions" and that he did not review the financial statements. In addition, the Judge further found at paragraph 39 of her reasons that the "evidence submitted at the hearing does not totally support George's testimony with respect

to the bank accounts". The Judge also noted discrepancies in his testimony concerning the net worth statement items relating to a Honda Civic and certain household goods. There were consequently ample reasons and evidence for the Judge to conclude that the Minister was justified in reassessing George Szeto for the concerned years.

Other grounds of appeal

[29] Though not emphasizing these issues in their oral arguments, the appellants have also raised numerous other grounds of appeal concerning notably the cash on hand which the Guibord couple held, certain personal assets and personal expenditures of Mr. Szeto, the ownership of certain bank accounts, etc. All these grounds seek to challenge the assessment of the evidence by the Judge. The appellants have not convinced me that the Judge committed a palpable and overriding error on any of the challenged findings.

Conclusions

[30] I would consequently dismiss these appeals. I would also award the costs of these appeals to the respondent. However, there should be only one set of costs for the appeal files A-351-10, A-352-10, A-353-10, A-354-10 and A-360-10.

"Robert M. Mainville"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-351-10
APPEAL FROM THE JUDGMENT OF THE HONOURABLE JUSTICE VALERIE MILLER DATED AUGUST 19, 2010.	
STYLE OF CAUSE:	Michel Guibord v. Her Majesty The Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 7, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	DAWSON J.A. TRUDEL J.A.
DATED:	December 14, 2011

APPEARANCES:

Charles Gibson Ian Houle	FOR THE APPELLANT
Josée Tremblay Natasha Wallace	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Vincent Dagenais Gibson Ottawa, Ontario	FOR THE APPELLANT
Myles J. Kirvan Ottawa, Ontario	FOR THE RESPONDENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-352-10
APPEAL FROM THE JUDGMENT OF THE HONOURABLE JUSTICE VALERIE MILLER DATED AUGUST 19, 2010.	
STYLE OF CAUSE:	Mei Guibord v. Her Majesty The Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 7, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	DAWSON J.A. TRUDEL J.A.
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STYLE OF CAUSE:	George S. Szeto Investments Ltd. v. Her Majesty The Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 7, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	DAWSON J.A. TRUDEL J.A.
DATED:	December 14, 2011

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Myles J. Kirvan Ottawa, Ontario	FOR THE RESPONDENT