

Docket: 2006-2629(GST)I

BETWEEN:

JULIE SCOTT-TRASK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on October 3, 2008, at Toronto, Ontario

By: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant: James Rhodes

Counsel for the Respondent: Sharon Lee

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**JUDGMENT**

The appeals from assessments made under the *Excise Tax Act*, notices of which are dated January 25, 2006 and February 20, 2006, for the periods October 1, 2002 to December 31, 2002 and October 1, 2001 to December 31, 2001, respectively, are allowed and the assessments are vacated.

Signed at Ottawa, Canada, this 24th day of November, 2008.

“C.H. McArthur”

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McArthur J.

Citation: 2008 TCC 638  
Date: 20081124  
Docket: 2006-2629(GST)I

BETWEEN:

JULIE SCOTT-TRASK,

Appellant,

and

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Respondent.

### **REASONS FOR JUDGMENT**

McArthur J.

[1] These appeals are from assessments issued by the Minister of National Revenue under the *Excise Tax Act*<sup>1</sup> for the periods October 1, 2001 to December 31, 2001 and October 1, 2002 to December 31, 2002, as a result of the Appellant's failure as a partner in Sunrise Gardens to remit goods and services tax to the Receiver General in the amount of approximately \$25,800, including interest and penalties. The issue boils down to whether the Appellant was a partner in Sunrise Gardens during the relevant periods.

[2] Counsel for the Respondent narrows the question to whether the business of Sunrise was carried on in common by the Appellant and her then husband, Norman Scott-Trask. The Appellant, Norman, and David Foster testified on the Appellant's behalf. I have no reason to disbelieve any of them.

[3] The question can be answered, primarily, upon applying the law to the facts which include the following. The Appellant was teaching school to handicapped children in 1997 and 1998, her husband was unemployed and their marriage was

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<sup>1</sup> R.S.C. 1985, c. E-15, as amended.

strained.<sup>2</sup> She was disappointed to find out, through a third party, that Norman was taking steps to commence a landscaping business but, to offer him moral support and solidify their relationship, she completed and registered the business name as a partnership in their joint names in March 1998.<sup>3</sup> She had no knowledge of the legal consequences and knew nothing of his new landscaping business, having full teaching employment and caring for their own two children at home. She did not work or participate in any way in her husband's new business and she remained the primary financial source for the family particularly in Sunrise's early years.

[4] Previous to 1998, Norman had declared bankruptcy and they financed the purchase of a home on the Appellant's salary alone. She was anxious to save their failing marriage, and therefore, to assist her husband, she co-signed a power line loan with the bank for Sunrise and co-signed as a signatory for Sunrise's bank account, opening documents along with GST returns and related documents.<sup>4</sup> She never wrote a cheque on the bank account nor did she do any of the banking or books and records.

[5] In the Appellant's personal income tax returns for the taxation years 2001 and 2002, she reported her \$60,000 plus teacher's salary, but made no mention of Sunrise (profit or loss). Norman never discussed the Sunrise business with her making all of the decisions, including the purchase of heavy equipment such as a truck. She had no idea that Sunrise was not remitting GST and other taxes to the Receiver General and was "hurt and shocked" when her salary was garnished.

[6] Norman corroborated the Appellant's testimony. He testified that he could not open a bank account for Sunrise without a business registration and he had no money, so she agreed to help him. He added "we never intended it to be a partnership, it was intended to be my business". He operated Sunrise as a sole proprietorship and stated that the Appellant took no part in the operation whatsoever. It was his business alone and absolutely. He needed her guarantee for the power line loan because he had no income having been unemployed for some time prior to 1998. Sunrise lost more money than it made and went out of business in 2003. Norman added that the only way he could keep it afloat in 2001 and 2002 was by not remitting to the Receiver General. He declared bankruptcy after Canada Revenue Agency garnished his wife's salary.

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<sup>2</sup> They are now separated or divorced.

<sup>3</sup> Exhibit R-1, Tab 1.

<sup>4</sup> Exhibit R-1, Tabs 4 and 5.

[7] The final witness for the Appellant was David Foster. He worked for Sunrise for over a year commencing in June 2000 as a landscape designer and labourer and never saw the Appellant or any evidence to the effect that she was connected to Sunrise during that period.

[8] An appeals officer, Maria Wormsbecker, testified for the Respondent. She stated that the Appellant did not report any income (or losses) from Sunrise during the relevant periods. She further stated that her file documents reflected that the Appellant was a partner of Sunrise.

[9] The Appellant's position through her counsel, was:

- (a) She signed the various documents to assist her husband only as a wife giving encouragement to her unemployed husband.
- (b) The documents she signed did not create a legal relationship as partners.
- (c) The Appellant's and Norman's intentions and actions with respect to Sunrise Gardens determine the legal relationship. These intentions and actions evidence that the Appellant did not carry on the business of Sunrise Gardens in common with Norman.
- (d) At all times, Sunrise Gardens was operated as a sole proprietorship, owned and operated exclusively by Norman.

[10] The Respondent's position is that:

- (a) In 1998, the Appellant and her spouse, John Norman Scott-Trask, formed a partnership and registered its name as Sunrise Gardens.
- (b) The partnership was a GST registrant with GST registration no. 89354 1623 RT0001.
- (c) The Appellant had signing authority and was named as a business partner on the partnership's bank accounts.
- (d) Pursuant to subsection 272.1(5) of the *Act*, the Appellant is jointly and severally liable for all amounts that are payable or remittable by the partnership.

- (e) The Minister properly assessed the Appellant pursuant to subsections 272.1(5) and 296(1) of the *Act* for the unpaid amounts due by the partnership.

### Analysis

[11] Both parties referred to *Continental Bank Leasing Corp. v. Canada*,<sup>5</sup> where Bastarache J. stated:

22. ... This wording, which is common to the majority of partnership statutes in the common law world, discloses three essential ingredients: (1) a business, (2) carried on in common, (3) with a view to profit. ...

23. The existence of a partnership is dependent on the facts and circumstances of each particular case. It is also determined by what the parties actually intended. As stated in *Lindley & Banks on Partnership* (17th ed. 1995), at p. 73: “in determining the existence of a partnership ... regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case”.

In these appeals, the parties agree that criteria (1) and (3) are met, and it is accepted that Sunrise was a business with a view to profit. The only issue is whether it was carried on in common by the Appellant and her husband Norman.

[12] Briefly reviewing the Respondent’s position, there was a formal partnership business registration, indicating that the Appellant and her husband Norman were carrying on Sunrise in partnership. She signed a loan and banking documents and was named as a partner on GST returns. There was no partnership agreement setting out terms of the partnership. In her concluding remarks, counsel for the Respondent stated:

... It’s clear that all levels of court have determined that a partnership does not require that both partners have management of the business. It does not require that both partners share in its profits, and it does not require that both partners contribute labour to the business.

What that leaves us with is evidence of their subjective intention which was only supported by their declaration, and, therefore, for that reason, the respondent submits

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<sup>5</sup> [1998] 2 S.C.R. 298.

that this should be held to be a partnership because it was held out to third parties as a partnership through their income tax filings, the banking documents, the opening of the bank account, the loan documents, the fact that Mrs. Scott-Trask has signing authority for the business bank account and the authority to bind the business with her signature.

The Minister's decision in this case is that there was a partnership. There's no evidence to suggest other than their declaration that it wasn't. ...

(Transcript, pages 35-36)

[13] Paragraph 2 The *Partnerships Act*<sup>6</sup> states:

2 Partnership is the relation that subsists between persons carrying on a business in common with a view to profit ... (Emphasis added)

For our purposes, the important words are "in common". In *Backman v. R.*,<sup>7</sup> Iacobucci and Bastarache JJ. stated:

21 In determining whether a business is carried on "in common", it should be kept in mind that partnerships arise out of contract. The common purpose required for establishing a partnership will usually exist where the parties entered into a valid partnership agreement setting out their respective rights and obligations as partners.

...

[14] The single fact relied on by the Respondent is the fact that the Appellant signed a Province of Ontario business registration form to the effect that she was a partner carrying on Sunrise together with Norman. This document cannot be isolated, and it has to be taken in context. As the Supreme Court of Canada stated in *Continental Bank*:

... A partnership is dependent on the whole facts, the true contract and the intention of the parties.

[15] The relevant facts include that the Appellant signed the business registration form ticking off the box for partnership not realizing its legal significance, but doing so in her attempts to encourage her husband's efforts towards employment. She knew nothing about landscaping and had no time or interest to get involved. Norman treated Sunrise as his business alone as did she. Registration alone does not form a partnership. The evidence before me as a whole supports the reality that the

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<sup>6</sup> R.S.O. 1990, c. P.5 as amended.

<sup>7</sup> 2001 SCC 10.

Appellant and Norman had no intention of carrying on Sunrise as a partnership. I have no doubt it was a sole proprietorship. The Appellant co-signed for a power line loan in the amount of \$5,000. She did this as a supportive wife, as with the other documents, and not because she was a partner. The GST returns included her name because of the partnership registration and not because she was a partner. Her personal income tax returns make no reference to the business or its profits or, more likely, its losses. She surely could have used the losses to reduce her tax payable. The uncontradicted evidence of the parties is clear that they had no intention of creating a partnership. In *Backman*, the Court added:

26 Courts must be pragmatic in their approach to the three essential ingredients of partnership. Whether a partnership has been established in a particular case will depend on an analysis and weighing of the relevant factors in the context of all the surrounding circumstances. That the alleged partnership must be considered in the totality of the circumstances prevents the mechanical application of a checklist or a test with more precisely defined parameters.

[16] The following comment of Christie J. in *Sedelnick Estate v. Minister of National Revenue*<sup>8</sup> applies to the present appeals:

2 ... Where there is no evidence of the existence of an express partnership agreement between husband and wife then in the absence of some special reason, which I cannot at the moment foresee, the existence of such a partnership should not be inferred from the conduct of the parties if that conduct is equally consistent with conduct arising out of the community of interests created by the marriage. This can embrace many activities which are purely commercial in nature. ...

He continues by citing *Lindley on Partnership*:<sup>9</sup>

... the court will be less ready to infer a partnership where the parties are husband and wife.

[17] When a husband and wife are involved, a higher standard must exist to find a business partnership between them. Clearly, it was Norman's business, the Appellant supported it as a partner in marriage and not as a business partner. Norman was a landscaper. The Appellant was a school teacher and mother. Had she been claiming 50% of Sunrise's losses, it is likely the Minister would have taken the

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<sup>8</sup> [1986] 2 C.T.C. 2102.

<sup>9</sup> 14<sup>th</sup> Ed. (*Scamell and Banks*)

position that she was not a partner. There was no synergy between the parties with respect to Sunrise.

[18] For these reasons, the appeals are allowed and the assessments are vacated.

Signed at Ottawa, Canada, this 24th day of November, 2008.

“C.H. McArthur”

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McArthur J.



CITATION: 2008 TCC 638

COURT FILE NO.: 2006-2629(GST)I

STYLE OF CAUSE: JULIE SCOTT-TRASK and  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 3, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: November 24, 2008

APPEARANCES:

Counsel for the Appellant:	James Rhodes
Counsel for the Respondent:	Sharon Lee

COUNSEL OF RECORD:

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