

Docket: 2009-3521(IT)I

BETWEEN:

WIESLAW WEGLINSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Jan Weglinski, 2009-3523(IT)I and *Lech Bienasz, 2009-3524(IT)I*
on June 2, 2010, at Ottawa, Ontario

Before: The Honourable Justice T.E. Margeson

Appearances:

Agent for the Appellant: Michael E. Coghlan
Counsel for the Respondent: Jonathan Charron

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2004 and 2005 taxation years are dismissed, and the Minister of National Revenue's reassessments are confirmed.

Signed at New Glasgow, Nova Scotia, this 19th day of August 2010.

“T.E. Margeson”

Margeson J.

Docket: 2009-3523(IT)I

BETWEEN:

JAN WEGLINSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Wieslaw Weglinski, 2009-3521(IT)I and *Lech Bienasz, 2009-3524(IT)I*
on June 2, 2010, at Ottawa, Ontario

Before: The Honourable Justice T.E. Margeson

Appearances:

Agent for the Appellant: Michael E. Coghlan
Counsel for the Respondent: Jonathan Charron

JUDGMENT

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Signed at New Glasgow, Nova Scotia, this 19th day of August 2010.

“T.E. Margeson”

Margeson J.

Docket: 2009-3524(IT)I

BETWEEN:

LECH BIENASZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Wieslaw Weglinski, 2009-3521(IT)I and *Jan Weglinski, 2009-3523(IT)I*
on June 2, 2010, at Ottawa, Ontario

Before: The Honourable Justice T.E. Margeson

Appearances:

Agent for the Appellant: Michael E. Coghlan
Counsel for the Respondent: Jonathan Charron

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2004 and 2005 taxation years are dismissed, and the Minister of National Revenue's reassessments are confirmed.

Signed at New Glasgow, Nova Scotia, this 19th day of August 2010.

“T.E. Margeson”

Margeson J.

Citation: 2010 TCC 435
Date: 20100819
Docket: 2009-3521(IT)I

BETWEEN:

WIESLAW WEGLINSKI,
and
HER MAJESTY THE QUEEN,
Appellant,
Respondent.

Docket: 2009-3523(IT)I

AND BETWEEN:

JAN WEGLINSKI,
and
HER MAJESTY THE QUEEN,
Appellant,
Respondent.

Docket: 2009-3524(IT)I

AND BETWEEN:

LECH BIENASZ,
and
HER MAJESTY THE QUEEN,
Appellant,
Respondent.

REASONS FOR JUDGMENT

Margeson, J.

[1] It was agreed that all of these cases would proceed on common evidence.

[2] The Minister of National Revenue (the “Minister”) reassessed Jan Weglinski on April 7, 2008, for tax liability to include income in the amounts of \$38,901 and \$38,334 for the 2004 and 2005 taxation years, respectively.

[3] The Minister reassessed Wieslaw Weglinski on April 7, 2008, for tax liability to include in income the amounts of \$34,916 and \$37,523 for the 2004 and 2005 taxation years, respectively.

[4] The Minister reassessed Lech Bienasz on April 7, 2008, to include income in the amounts of \$34,100 and \$36,390 for the 2004 and 2005 taxation years, respectively.

[5] The Minister levied penalties pursuant to subsection 163(2) of the *Income Tax Act* (the “Act”) in the amounts of \$4,150 and \$1,181 against Lech Bienasz, \$4,523 and \$2,505 against Wieslaw Weglinski and \$3,962 and \$1,279 against Jan Weglinski for the same taxation years.

[6] All three taxpayers filed appeals to this Court against these reassessments.

Evidence

[7] Jan Weglinski testified that the Minister reassessed him for hydro expenses that he claimed for his garage and for his business for the years in issue.

[8] The Minister also reassessed him for expenses of \$570 that he claimed for gasoline and hotel expenses incurred in travelling to Nova Scotia while searching for work. No contract for work was ever concluded and the trip was not worthwhile. He said that he fixed his own toilet in his office and claimed \$299 for these expenses. He had to buy supplies.

[9] Exhibit A-1 was admitted by consent, subject to weight and argument. It was a recapitulation completed by the agent for the three Appellants of the disputed amounts.

[10] Jan Weglinski said that he reported everything. He received \$41,900 in 2004 and \$50,790 in 2005 as income from 4233247 Canada Inc. (the "Corporation").

[11] In cross-examination, he admitted that he was a shareholder in the Corporation. He was in charge of the books and the cheques, and the other partners were also involved. The furnace oil expense claimed was for the Corporation although it was delivered to his residence. He identified the receipt for \$444.63 as an expense for diesel fuel for the forklift. It was admitted as Exhibit R-1.

[12] He had no receipts for the hydro expenses. He claimed \$1,180 as the business portion of the expenses claimed for an office in his home.

[13] He had no receipts for the plumbing expenses. He could not remember the name of the person he went to see in Nova Scotia while seeking work. His accountant gave him his income tax return and he signed it.

[14] He did not prepare Exhibit A-1 and did not know what it really was. He gave the cheques to his accountant and he deposited them to his bank account.

[15] In re-direct, he said that he had only one business account.

[16] Lech Bienasz testified that Exhibit A-1 was correct. He agreed that he had under-reported his income in 2004 and 2005.

[17] In cross-examination, he said that he was a shareholder of the Corporation. He just gave his accountant his papers and signed his income tax return.

[18] Exhibit R-2, the Corporation's cheques, was admitted by consent.

[19] He said that the cheques were issued by the Corporation to the named persons. He deposited the cheques issued to him to his bank account. His accountant prepared his income tax returns for the 2004 and 2005 taxation years. He looked at them but did not review them.

[20] His return for 2005 was admitted as Exhibit R-3. He did not know if he under-reported his income. Then he said that he reported everything. He only received income from the Corporation.

[21] Jan Weglinski was recalled. Exhibit A-2, a revised schedule of the Appellants' disputed amounts, was admitted into evidence, subject to weight.

[22] Exhibit R-2 contained all the cheques issued by the Corporation. He was present when the accountant prepared Exhibit A-2.

[23] He said that \$3,500, the amount of the repayment on the shareholders' loans, was reasonable, and the adjustment of \$5,000 to the shareholders loan account was reasonable.

[24] In cross-examination, he said that Exhibit A-2 was correct. He identified his 2004 income tax return which was admitted as Exhibit R-4.

[25] The Respondent called Wieslaw Weglinski. He said that he was a shareholder of the Corporation in 2004 and 2005 and he received payments from that Corporation during those years. He identified his 2005 tax return which was admitted as Exhibit R-5. He only received income from the Corporation in 2004 and 2005.

[26] In cross-examination, he said that all of the shareholders had an office in their homes. Thirty-five hundred dollars (\$3,500) was a reasonable amount to claim for expenses of a home office.

[27] Michelle Goldstone has been employed by the Canada Revenue Agency ("CRA") since 2004. She was the auditor in these cases. This was a full-scope audit of the Corporation including income, expenses, salaries, wages and management fees. She met with the parties and made adjustments to the shareholders' accounts.

[28] She considered the expenses for the Bank of Montreal, hydro and plumbing to be personal expenses of Jan Weglinski. She was referred to her letter to Jan Weglinski dated March 28, 2008. It was admitted by consent as Exhibit R-6. The expenses claimed were allowed to the Corporation and not to him. She added \$6,500 as unreported income to him in 2005.

[29] Exhibit R-7 was the auditor's working papers and was admitted by consent. Each shareholder received \$27,600 in management fees and did not report them. She traced the management fees and they were claimed as an expense to the Corporation.

[30] The entries in the Corporation's general ledger were made by Jan Weglinski and they reconciled with all amounts claimed by the Corporation.

[31] Exhibit R-8 was admitted by consent. It was a letter to Wieslaw Weglinski from CRA dated March 28, 2008. It referred to claimed dental expenses which were

paid by the Corporation. These were a benefit to this taxpayer. It also referred to unreported salaries, wages and management fees.

[32] Similarly, Exhibit R-9, a letter to Lech Bienasz from CRA dated March 28, 2008, admitted by consent, referred to unreported salaries, wages, unreported management fees and a shareholder benefit in 2005.

[33] The Corporation claimed subcontract fees as an expense. None were shown as paid to shareholders and should have been reported as a shareholders' benefit but were not reported by the shareholder. There were no amounts owing to the shareholders. There was no shareholders' loan account maintained.

[34] The auditor applied penalties but not on the amounts owing to shareholders.

[35] In cross-examination, Ms. Goldstone said that the accountant told her that there were no loan accounts maintained.

Argument on Behalf of the Appellants

[36] The agent merely stated that the correct amounts that are in dispute should be those set out in the revised schedule, Exhibit A-2, and not those assessed by the Minister.

Argument on Behalf of the Respondent

[37] Counsel argued that the issues are with respect to shareholders benefits, unreported income, and the matter of gross negligence penalties.

[38] There was no evidence to support the expenses claimed. There was no business purpose shown for the expenses.

[39] There was no evidence of how the hydro expenses were allocated. There were no receipts or invoices for the plumbing expenses. The presumptions should stand.

[40] Wieslaw Weglinski admitted that the expenses were personal. This constitutes a benefit to the shareholder. He referred to the case of *Varcoe v. Canada*, 2005 TCC 620, 2005 DTC 1319, in the Tax Court of Canada, at page 10 as authority for that proposition. It was upheld by the Federal Court of Appeal in *Varcoe v. Canada*, 2007 FCA 159, 2007 DTC 5357 (F.C.A.), where the Court would not interfere with the

finding of fact made by the trial judge upon an assessment of the taxpayer's credibility.

[41] All of the taxpayers under-reported their salaries and wages by \$6,500. The auditor merely added up the total amounts in the cheques issued to the shareholders. The management fees were paid to each of the Appellants in both years in dispute as shown by the cheques. Subcontract fees were not claimed. The information about subcontract fees comes from the balance sheet and shows them as due to shareholders. However, there were no amounts owing to shareholders. Therefore, this amount should be added to their income.

[42] With respect to the gross negligence penalties, the Minister did not levy penalties on the due to shareholders amounts.

[43] However, with respect to the other unreported amounts, they were large and there were no special calculations that had to be made. The taxpayers all received cheques for their amounts, and all signed their returns.

[44] With respect to Wieslaw Weglinski, the unreported amounts were equal to 81% of his income in 2004 and 46% of his income in 2005.

[45] With respect to Jan Weglinski, they amounted to 81% in 2004 and 40% in 2005.

[46] In respect to Lech Bienasz, they amounted to 81% of his income in 2004 and 45% of his income in 2005.

[47] The payments were made on an almost weekly basis and there was no explanation given as to why they did not report the payments. It amounted to wilful blindness on their part. The Appellants said that they did not know, yet they received the cheques and they cashed them. They should have inquired as to what the cheques were for. They did not. The appeals should be dismissed.

[48] In reply, the agent said that the Appellants were not wilfully blind or grossly negligent.

Analysis and Decision

[49] The evidence of all Appellants was woefully weak in every respect. They said that they reported all of their income and then said that they did not.

[50] They all admitted to having signed their returns, to having received the cheques and to having cashed them, and obviously they used the funds. As indicated by counsel for the Respondent, the cheques were issued almost weekly and so it was not just a mere oversight of one cheque or the amount. The evidence of the auditor shows that she was able to trace the amounts through the Corporation's books and obviously the Corporation claimed the expenses. Further, it was not just failing to report one form of income but several, i.e., unclaimed salaries and wages; subcontract fees claimed by the Corporation; personal expenses paid by the Corporation; unreported management fees and shareholder benefits.

[51] The Corporation's books were adequate to enable the Corporation to claim its expenses, so there is no reason why they were not adequate to keep track of the amounts paid to its shareholders and to report those amounts to CRA.

[52] There was a real dilemma between the evidence of the taxpayers and the position taken by their agent. The taxpayers at times claimed that they had reported all of their income, which they obviously did not, and the agent's position throughout was that they had not, although he took the position that the amounts due to CRA were lower than those claimed.

[53] The Court attaches no weight to Exhibit A-2. There is no backup material to support those figures and they are obviously at odds with the evidence of the auditor and the corporate records.

[54] The Appellants have not dislodged any of the presumptions contained in the Replies and they must stand.

[55] The appeals are dismissed and the Minister's reassessments are confirmed.

[56] Regarding the penalties, the Court is satisfied that the Appellants were either grossly negligent or their actions were deliberate in not reporting the income and in making the claims for deductions that they did in spite of their knowledge of the Corporation, its workings and the advice that was available to them through their accountant.

[57] The Minister was entitled to levy the penalties as he did under subsection 163(2) of the *Act*.

Signed at New Glasgow, Nova Scotia, this 19th day of August 2010.

“T.E. Margeson”

Margeson J.

CITATION: 2010 TCC 435

COURT FILE NOS.: 2009-3521(IT)I, 2009-3523(IT)I
and 2009-3524(IT)I

STYLE OF CAUSE: WIESLAW WEGLINSKI and
HER MAJESTY THE QUEEN

JAN WEGLINSKI and
HER MAJESTY THE QUEEN

LECH BIENASZ and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 2, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice T.E. Margeson

DATE OF JUDGMENT: August 19, 2010

APPEARANCES:

Agent for the Appellant: Michael E. Coghlan
Counsel for the Respondent: Jonathan Charron

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

For the Respondent: Myles J. Kirvan
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