Docket: 2008-2163(IT)G

BETWEEN:

JOHN MCEWEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeal of
John McEwen (2008-2180(GST)G)) on December 13, 2011 at
Prince George, British Columbia

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	Terrence P. Matte
Counsel for the Respondent:	Sara Fairbridge

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* (the "*ITA*") for the 2003 and 2004 taxation years are allowed in part, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

(a) for 2003

(i) the Appellant's unreported revenue from his sole proprietorship business that he was carrying on as John's Moving (the "Business") was $93,538.57 and not $113,102.16 as assessed (a reduction of $19,563.59);

(ii) the Appellant's expenses related to the Business totalled $50,365.61 and not $45,823.65 as assessed (an increase of $4,541.96);

(iii) additional non-capital losses of $61,897 (in addition to the non-capital losses of $29,166 that the Appellant had claimed when he filed his tax return for 2003) that had previously been incurred by the Appellant shall be deducted in determining the taxable income of the Appellant for 2003; and

(iv) the penalty imposed under subsection 163(2) of the *ITA* is reduced to reflect the revised tax that would be payable as a result of the above adjustments to the unreported revenue and expenses, but is otherwise confirmed;

(b) for 2004:

(i) the Appellant's unreported revenue from the Business was $28,896.71 and not $67,683.91 as assessed (a reduction of $38,787.20);

(ii) the Appellant's expenses related to the Business totalled $37,905.51 and not $36,137.95 as assessed (an increase of $1,767.56);

(iii) additional non-capital losses of $14,050 (in addition to the non-capital losses of $20,888 that the Appellant had claimed when he filed his tax return for 2004) that had previously been incurred by the Appellant shall be deducted in determining the taxable income of the Appellant for 2004; and

(iv) the penalty imposed under subsection 163(2) of the *ITA* is reduced to reflect the revised tax that would be payable as a result of the above adjustments to the unreported revenue and expenses, but is otherwise confirmed.

The Appellant shall pay costs to the Respondent which are fixed in the amount of $1,500.

Signed at Halifax, Nova Scotia, this 30th day of January 2012.

"Wyman W. Webb"

Webb J.

Docket: 2008-2180(GST)G

BETWEEN:

JOHN MCEWEN,

Appellant,

and

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Respondent.

Appeal heard on common evidence with the appeals of
John McEwen (2008-2163(IT)G)) on December 13, 2011 at
Prince George, British Columbia

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	Terrence P. Matte
Counsel for the Respondent:	Sara Fairbridge

JUDGMENT

The appeal from the reassessments made under the *Excise Tax Act* (the "*ETA*") for the reporting periods from January 1, 2003 and to December 31, 2004 (the "Period") is allowed in part, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

(a) for the reporting period of October 1, 2003 to December 31, 2003:

(i) the Appellant's unreported goods and services tax ("GST") collectible was $5,894.80 and not $7,264.23 as assessed (a reduction of $1,369.43);

(ii) the Appellant is entitled to additional input tax credits ("ITCs") totalling $61.84; and

(iii) the penalty imposed under subsection 285 of the *ETA* is reduced to reflect the revised net tax payable for this reporting period but is otherwise confirmed;

(b) for the reporting period of October 1, 2004 to December 31, 2004:

(i) the Appellant's unreported GST collectible was $1,611.19 and not $4,326.29 as assessed (a reduction of $2,715.10);

(ii) the Appellant is entitled to additional ITCs totalling $100.76; and

(iii) the penalty imposed under subsection 285 of the *ETA* is reduced to reflect the revised net tax payable for this reporting period but is otherwise confirmed.

Signed at Halifax, Nova Scotia, this 30th day of January 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC31
Date: 20120130
Dockets: 2008-2163(IT)G
2008-2180(GST)G

BETWEEN:

JOHN MCEWEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant, in addition to his job as a welder at a mill located approximately 50 to 60 miles north of Prince George, British Columbia, also carried on a moving business as a sole proprietorship in Prince George. For his 2003 and 2004 taxation years, the Appellant was reassessed under the *Income Tax Act* (the "*ITA*") to increase his revenue and decrease his expenses. The Appellant was also assessed for additional net tax payable under the *Excise Tax Act* (the "*ETA*") as a result of the changes to the Appellant's revenue and expenses (which changed the amount of GST collectible or collected by the Appellant and the amount of his input tax credits). The Appellant appealed these assessments under the *ITA* and *ETA*. Penalties were also assessed under subsection 163(2) of the *ITA* and section 285 of the *ETA*.

[2] Prior to the commencement of the hearing the parties settled the issues related to the unreported revenue and the expenses that the Appellant could claim in determining his income for the purposes of the *ITA* as well as the amount of net tax payable for the purposes of the *ETA*. The parties agreed that, in relation to the appeal under the *ITA*:

(a) for 2003

(i) the Appellant's unreported revenue from his sole proprietorship business that he was carrying on as John's Moving (the "Business") was $93,538.57 and not $113,102.16 as assessed (a reduction of $19,563.59);

(ii) the Appellant's expenses related to the Business totalled $50,365.61 and not $45,823.65 as assessed (an increase of $4,541.96); and

(iii) additional non-capital losses of $61,897 (in addition to the non-capital losses of $29,166 that the Appellant had claimed when he filed his tax return for 2003) that had previously been incurred by the Appellant shall be deducted in determining the taxable income of the Appellant for 2003;

(b) for 2004:

(i) the Appellant's unreported revenue from the Business was $28,896.71 and not $67,683.91 as assessed (a reduction of $38,787.20);

(ii) the Appellant's expenses related to the Business totalled $37,905.51 and not $36,137.95 as assessed (an increase of $1,767.56); and

(iii) additional non-capital losses of $14,050 (in addition to the non-capital losses of $20,888 that the Appellant had claimed when he filed his tax return for 2004) that had previously been incurred by the Appellant shall be deducted in determining the taxable income of the Appellant for 2004.

[3] The parties also agreed that, in relation to the appeal under the *ETA*:

(a) for the reporting period of October 1, 2003 to December 31, 2003:

(i) the Appellant's unreported goods and services tax ("GST") collectible was $5,894.80 and not $7,264.23 as assessed (a reduction of $1,369.43); and

(ii) the Appellant is entitled to additional input tax credits ("ITCs") totalling $61.84;

(b) for the reporting period of October 1, 2004 to December 31, 2004:

(i) the Appellant's unreported GST collectible was $1,611.19 and not $4,326.29 as assessed (a reduction of $2,715.10); and

(ii) the Appellant is entitled to additional ITCs totalling $100.76.

[4] As a result, the only issue remaining for the hearing was the imposition of penalties under subsection 163(2) of the *ITA* and section 285 of the *ETA*. Penalties will be applicable under these provisions if a person "knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return".

[5] The Appellant started his moving business in 1990 or 1991. He acquired a small cube van so that his sons could work moving furniture. After his sons moved on to other jobs he hired other people that he knew to continue to operate the business.

[6] The Appellant had been audited previously and he had been advised to maintain better records. However, it is obvious that the Appellant's record keeping was inadequate. The Appellant kept a box for his receipts and he would put receipts in the box regardless of whether the receipt was for a personal expenditure or a business expenditure. It also appears that invoices for significant amounts of revenue were not included in the invoices provided to the Appellant's accountant. The Appellant had retained an accountant and he assumed that his accountant would sort out his revenue and expenditures. However, it appears that the Appellant did not provide much (if any) assistance to his accountant in determining whether receipts were for personal expenditures or business expenditures. The accountant would also not be able to accurately determine the Appellant's revenue if all of the invoices for the services provided in carrying on the Appellant's business were not delivered to the accountant.

[7] The Appellant's income as reported and his income based on the amounts that the parties settled upon as his revenue and expenses are as follows:

	2003	**2004**

Revenue as reported:	$39,759	$27,306
Expenses as reported:	$58,482	$50,365[1]
Income (Loss) as reported:	($18,724)	($23,059)
Unreported Revenue:	$93,539	$28,897
Expenses Disallowed:	$8,116[2]	$12,459[3]
Revised Income:	$82,931	$18,297

[8] The Appellant had originally claimed a loss from his business in 2003 and 2004 but as a result of the adjustments made to his revenue and expenses he had a profit of $82,931 in 2003 and $18,297 in 2004. The increase in his income for 2003 was $101,655 and for 2004 was $41,356. The unreported revenue of $93,539 for 2003 was 70% of his total revenue for 2003 of $133,298 ($39,759 + $93,539) and 2.35 times the amount of revenue that he did report.

[9] There were missing invoices in relation to the services provided in carrying on the Appellant's business. The Appellant did not report any revenue in relation to any local moves although it would appear that local moves were part of the business in 2003 and 2004. The Appellant had no explanation for the missing invoices or the failure to include any revenue in relation to local moves. He did not prepare any reconciliation of the amount he was reporting as revenue to the amount he was depositing in the bank. He simply told his employees to put everything in the box and it appears that the Appellant did not check to see what was being put in the box.

[10] With respect to the expenses claimed there were a number of problems that were identified. Included among the expenses claimed was an amount paid to The Coast Inn of the North in Prince George for a "Jacuzzi package". The Appellant did not provide any explanation for this claim or how this was related to his business.

[11] The Appellant also included claims for amounts paid to Ticketmaster (for an unspecified event), Batnuni Lake Resort (for two nights camping) and Days Inn

[1] This includes $9,022 claimed as Cost of Goods Sold – Subcontracts.

[2] Expenses originally claimed ($58,482) – Revised Expenses Allowed ($50,366) = Expenses Disallowed ($8,116).

[3] Expenses originally claimed ($56,365) – Revised Expenses Allowed ($37,906) = Expenses Disallowed ($12,459).

Medicine Hat (for one night's stay). There was no evidence provided by the Appellant to explain how any of these related to his business.

[12] The Appellant claimed an amount of $9,777.90 (which included GST of $639.68) in relation to a significant amount of work performed on the truck. The date on the invoice is September 8, 2003 and the Appellant stated that he paid for the work with a cheque drawn on his visa account. A copy of the cheque was introduced into evidence. A photocopy of the visa statement for the Appellant dated September 19, 2003 with the same account number as appeared on the cheque was also introduced into evidence. The original statement was not introduced and the Appellant indicated that he did not know where the original statement was located. Both parties agreed that this visa statement had been altered. It seems clear that the following entry was added:

DATE OF TRANS.	REF. NO.	DEBITS/ CREDITS (-)	TRANSACTIONS SINCE LAST STATEMENT	
09/08	3	9,977.90	ROCKYAUTO ELECTRIC	RED DEER,AB

[13] The font used for this entry is different from the font used for the other entries. The above items do not line up with the items above and below this line in the statement. The first digit in the amount ("9") was written by hand. The amount of the visa cheque was $9,777.90 and not $9,977.90 as added to the visa statement. The province (AB) immediately follows the place (RED DEER), separated only by a comma. For the places that are referenced in the other lines of the statement there is no comma between the place and the province and there is a gap between the place and the province.

[14] Whoever altered the document also simply changed the total new balance as shown on the statement. As a result, the following is the financial summary as now stated on this altered visa statement:

DATE OF LAST STATEMENT	PREVIOUS BALANCE	+ INTEREST	+ DEBITS	- CREDITS	= NEW BALANCE
AUG 20/03	2,987.24	25.27	259.56	280.00	12,765.14

[15] Obviously the arithmetic sum of the above amounts is not $12,765.14. It is not even clear how this amount was calculated. In any event it is obvious (as agreed by the parties) that the statement was altered. The Appellant did not have any explanation for these alterations and did not know who altered this document. However, there is another question (which also was not answered). It is clear that this visa statement (in its original form) did not include the visa cheque that the

Appellant claims was used to pay for the work completed in relation to the truck. Since the Appellant stated that he paid the invoice dated September 8, 2003 with the visa cheque on September 9, 2003 (which he stated he had to do to get his truck back) this visa cheque should have appeared on the visa statement dated September 19, 2003. If the Appellant had paid for this invoice on September 9, 2003 with the visa cheque, why was this cheque not included in the visa statement for the same visa account dated September 19, 2003? It appears that the Respondent is not disputing that a significant amount of work was done on the truck and that the total invoice for this work was the amount as stated ($9,777.90 including GST). However the Respondent was questioning the year in which the work was done and the altered visa statement does not assist the Appellant in establishing that this work was done in 2003.

[16] During the hearing two copies of cheque number 1067 were also introduced. This cheque was written by the Appellant to Rene Lozier. On one cheque there is a notation that reads “For canopy on house” and on the other copy there is no such notation. Counsel for the Appellant had suggested that perhaps different photocopiers had been used. However, there were three cheques that had been written to Rene Lozier that had been copied twice. Each sheet of paper had copies of three cheques on it. Therefore cheque number 1067 would have been copied on the same photocopier that would have been used to copy cheques numbered 1063 and 1120. For each of the other two cheques the notation appears on both copies. I do not accept that the absence of the notation on the second copy can be attributed to a different photocopier. It appears that someone removed the notation “For canopy on house” before cheque number 1067 was copied for the second time. In any event the Appellant did not deny that cheque number 1067 was for the canopy on his house nor did he provide any explanation for why he was claiming an amount in relation to the canopy on his house in determining the net income from his business.

[17] The Appellant also claimed amounts based on quotations that he had received for new tires. This illustrates that the Appellant was indifferent with respect to what documents were put in the box and what amounts were claimed as expenses for the purposes of determining his income for the purposes of the *ITA* and what amounts were claimed as input tax credits for the purposes of the *ETA*.

[18] Justice Strayer of the Federal Court Trial Division, in *Venne* v. *The Queen*, [1984] C.T.C. 223, 84 DTC 6247, made the following comments on the meaning of gross negligence for the purposes of penalties imposed under subsection 163(2) of the *ITA:*

> "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] In *Maltais* v. *The Queen*, [1991] 2 C.T.C. 2651, 91 DTC 1385, Justice Bowman (as he then was) in dealing with a penalty imposed pursuant to subsection 163(1) of the *ITA* stated as follows:

> 7. … Mr. Ghan on behalf of the respondent contended that subsection 163(1) in the form which is applied to 1989 did not require that there be a wilful intention to evade tax. In support of this position he pointed to the wording of the former 163(1) which referred to "Every person who wilfully attempts to evade the payment of tax payable by him" ***and to the wording of subsection 163(2) which uses the expression "knowingly or under circumstances amounting to gross negligence". These provisions require a mens rea of intent or of recklessness.***
>
> (emphasis added)

[20] While the comments of Justice Bowman (as he then was) in relation to subsection 163(2) of the *ITA* were *obiter* in that case, these comments were adopted by Justice Hamlyn in *Dunleavy* v. *The Queen*, [1993] 1 C.T.C. 2648, 93 DTC 417.

[21] In *Boileau* v. *The Minister of National Revenue*, [1989] 2 C.T.C. 2001, 89 DTC 247, Justice Lamarre Proulx stated that

> 20. … It is true that by virtue of subsection 163(2), there is no accused nor is there a criminal charge. It would thus appear that it is not, as such, a criminal proceeding and that it remains a civil proceeding. However, ***the application of that subsection requires the evidence of mens rea or culpable conduct***…
>
> (emphasis added)

[22] It seems clear to me that the Appellant was indifferent with respect to whether he complied with the *ITA* and the *ETA* and that the *mens rea* of recklessness has been established in this case. The Appellant was indifferent with respect to what documents were placed in the box and whether all of the invoices for services rendered as part of the Appellant's business were included. The Appellant did not check to ensure that all of the revenue was included nor did he reconcile the amount he was reporting as revenue to what he had collected in carrying on his business. The unreported revenue, as noted above, for 2003 was 70% of his total revenue for 2003 of $133,298 and 2.35 times the amount of revenue that he did report. For 2004, his unreported revenue was $28,897 which

was 51% of his total revenue of $56,203 for 2004 ($27,306 + $28,897) and slightly more than the revenue that he did report for 2004. These amounts are significant and establish that the Appellant had "an indifference as to whether the law is complied with or not".

[23] The amounts claimed as expenses and which were denied also confirm the indifference that the Appellant had with respect to whether he complied with the *ITA* and the *ETA*. The Appellant claimed expenses related to a Jacuzzi package at The Coast Inn of the North, tickets to an unspecified event, camping, accommodation in Medicine Hat (to which no connection to the business was provided), amounts based on quotations for new tires and an amount for the canopy on his house. That he claimed these amounts also indicates an indifference or recklessness.

[24] The claim in relation to the work done on the truck and the altered visa statement indicate that the Appellant (or someone acting for him) was attempting to provide misleading information with respect to when the work on the truck was completed. It appears that it was the position of the Respondent that the work was done in a year after 2003. If the work was done in a later year, the Appellant could not claim any amount in 2003 under the *ITA* in relation to such work nor could he claim any input tax credits for the reporting period that included September 2003 in relation to such work for the purposes of the *ETA*.

[25] As a result the penalties imposed under subsection 163(2) of the *ITA* and section 285 of the *ETA* are upheld. As noted by the Federal Court of Appeal in *Boucher* v. *The Queen*, 2004 FCA 46, 2004 DTC 6084, [2004] 2 C.T.C. 179:

> 7 At the hearing of the appeal, a number of questions relating to the computation of the penalty, that had not been raised by the appellant, were raised by the Court. In particular, the Court wished to be satisfied that a penalty may be assessed under subsection 163(2) in respect of unreported income for a particular year even if the unreported income is offset by preexisting losses arising in the same year. Counsel for the Crown explained the relevant provisions in some detail. Her explanation was challenged by the appellant. Having heard the submissions of both parties, I agree with counsel for the Crown that, by the combined operation of subparagraph 163(2)(a)(i) and paragraph 163(2.1)(a), a penalty may arise even in a loss year because, in effect, the previously recognized loss is ignored for purposes of the penalty calculation.

[26] As a result, even though the Appellant has non-capital losses from other years that he can use to reduce his taxable income for 2003 and 2004, the penalty imposed under subsection 163(2) of the *ITA* for 2003 and 2004 is determined based

on what his tax liability for these years would be if such losses are not used to reduce his taxable income for these years.

[27] The appeals from the reassessments made under the *ITA* for the 2003 and 2004 taxation years are allowed in part, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

(a) for 2003

(i) the Appellant's unreported revenue from his sole proprietorship business being carried on as John's Moving (the "Business") was $93,538.57 and not $113,102.16 as assessed (a reduction of $19,563.59);

(ii) the Appellant's expenses related to the Business totalled $50,365.61 and not $45,823.65 as assessed (an increase of $4,541.96);

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(iv) the penalty imposed under subsection 163(2) of the *ITA* is reduced to reflect the revised tax that would be payable as a result of the above adjustments to the unreported revenue and expenses, but is otherwise confirmed;

(b) for 2004:

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(iv) the penalty imposed under subsection 163(2) of the *ITA* is reduced to reflect the revised tax that would be payable as a result of the above adjustments to the unreported revenue and expenses, but is otherwise confirmed; and

(c) The Appellant shall pay costs to the Respondent which are fixed in the amount of $1,500.

[28] The appeal from the reassessments made under the *ETA* for the reporting periods from January 1, 2003 and to December 31, 2004 (the "Period") is allowed in part, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

(a) for the reporting period of October 1, 2003 to December 31, 2003:

(i) the Appellant's unreported goods and services tax ("GST") collectible was $5,894.80 and not $7,264.23 as assessed (a reduction of $1,369.43);

(ii) the Appellant is entitled to additional input tax credits ("ITCs") totalling $61.84; and

(iii) the penalty imposed under subsection 285 of the *ETA* is reduced to reflect the revised net tax payable for this reporting period but is otherwise confirmed;

(b) for the reporting period of October 1, 2004 to December 31, 2004:

(i) the Appellant's unreported GST collectible was $1,611.19 and not $4,326.29 as assessed (a reduction of $2,715.10);

(ii) the Appellant is entitled to additional ITCs totalling $100.76; and

(iii) the penalty imposed under subsection 285 of the *ETA* is reduced to reflect the revised net tax payable for this reporting period but is otherwise confirmed.

Signed at Halifax, Nova Scotia, this 30th day of January 2012.

"Wyman W. Webb"

Webb J.

CITATION:	2012TCC31
COURT FILE NOS.:	2008-2163(IT)G; 2008-2180(GST)G
STYLE OF CAUSE:	JOHN MCEWEN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Prince George, British Columbia
DATE OF HEARING:	December 13, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	January 30, 2012

APPEARANCES:

Counsel for the Appellant:	Terrence P. Matte
Counsel for the Respondent:	Sara Fairbridge

COUNSEL OF RECORD:

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