

Docket: 2010-2655(GST)I

BETWEEN:

NGHIEP MINH TRUONG and
HON NGUYEN

appellants,

and

HER MAJESTY THE QUEEN,

respondent.

Appeal heard on common evidence with the appeal of
Nghiep Minh Truong (2010-2689(IT)G) on November 5, 6 and 7, 2012,
at Regina, Saskatchewan.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the appellant Nghiep Minh Truong:	The appellant himself
For the appellant Hon Nguyen:	Nghiep Minh Truong
Counsel for the respondent:	John Krowina

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act* for the reporting periods from April 1, 2005 to December 31, 2006 is allowed, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment.

Each party shall bear their own costs.

Signed at Calgary, Alberta, this 28th day of February 2013.

"Robert J. Hogan"

Hogan J.

BETWEEN:

NGHIEP MINH TRUONG,

appellant,

and

HER MAJESTY THE QUEEN,

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Appeal heard on common evidence with the appeal of
Nghiep Minh Truong and Hon Nguyen (2010-2655(GST)I)
on November 5, 6 and 7, 2012, at Regina, Saskatchewan.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	John Krowina

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2004, 2005 and 2006 taxation years is allowed, the reassessment for the 2004 taxation year is vacated and the reassessments for the 2005 and 2006 taxation years are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment.

Each party shall bear their own costs.

Signed at Calgary, Alberta, this 28th day of February 2013.

"Robert J. Hogan"

Hogan J.

Citation: 2013 TCC 41
Date: 20130228
Dockets: 2010-2655(GST)I
2010-2689(IT)G

BETWEEN:

NGHIEP MINH TRUONG and HON NGUYEN,
NGHIEP MINH TRUONG,

appellants,

and

HER MAJESTY THE QUEEN,

respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] By notices of reassessment dated April 15, 2009 the Minister of National Revenue (the “Minister”) reassessed Nghiep Minh Truong’s tax liability for the 2004, 2005 and 2006 taxation years through the addition of undeclared income.

[2] The Minister used the net worth method to add \$8,185, \$124,709 and \$133,289 of alleged undeclared business income for Mr. Truong’s 2004, 2005 and 2006 taxation years. The Minister also assessed gross negligence penalties under subsection 163(2) of the *Income Tax Act* (the “ITA”) for the same taxation years.

[3] In addition, the Minister assessed Mr. Truong and his common law spouse, Hon Nguyen, for unpaid goods and services tax (“GST”), penalties and interest totalling \$41,405.47 for the reporting periods from April 1, 2005 to December 31, 2006 (the “relevant period”) on the grounds that the couple was in business together as partners (the “partnership”) and that the partnership failed to collect and remit the GST on its net income of \$16,371.68 for 2004, \$249,419.05 for 2005 and \$266,579.21 for 2006.

[4] These appeals were heard on common evidence.

Background

[5] At the outset of the hearing, the respondent produced a revised net worth schedule which contained changes based on submissions made by or on behalf of Mr. Truong and accepted by the respondent. On the basis of this schedule, the respondent agreed that the reassessment issued against Mr. Truong for the 2004 taxation year should be vacated and that the amount of Mr. Truong's alleged undeclared income should be revised to \$106,679.55 and \$133,740.02 for the 2005 and 2006 taxation years. The parties agree that corresponding adjustments should be made to the GST assessment referenced in paragraph 3 above.

[6] The evidence shows that the Canada Revenue Agency (the "CRA") undertook an audit of Mr. Truong and Ms. Nguyen after receiving a referral from the RCMP's integrated proceeds of crime ("IPOC") unit.

[7] The IPOC unit advised the CRA that Mr. Truong and Ms. Nguyen were charged with trafficking in marijuana and with money laundering and other related offences. The charges were laid following searches conducted at various marijuana grow houses, and personal residences and business locations of the parties. Ms. Nguyen and Mr. Truong were ultimately convicted on the charges laid against them and received prison sentences.

[8] The net worth method of assessment was used as Ms. Nguyen's and Mr. Truong's illicit activities involved the receipt of cash payments.

[9] The discrepancy determined through the net worth analysis was attributed to Mr. Truong and Ms. Nguyen on a fifty-fifty basis because both were involved together in the production of, and in trafficking in, marijuana, and their money laundering activities were conducted by them jointly. Mr. Truong and Ms. Nguyen had assets in their names which were purchased with the funds from their criminal activities.

[10] The CRA decided not to reassess Ms. Nguyen for income tax on her share of the undeclared income established under the net worth analysis because she had declared bankruptcy prior to the commencement of the audit. However, she and Mr. Truong were both reassessed for GST and penalties with respect to the relevant period on the undeclared income attributable to that period.

Analysis

[11] It is well established that a taxpayer is subject to tax on his income regardless of its source. A taxpayer must keep reliable books and records for all of his income, including income from illegal sources. If he does not, the Minister may issue a so-called arbitrary assessment using any method that is appropriate in the circumstances.

[12] Mr. Truong claims that the net worth analysis failed to take into account a gift of \$200,000 that he received in cash from his parents on or before October 5, 2005. According to Mr. Truong, those funds were used to make a down payment of \$100,000 on a house located at 12 Kennedy Road, White City, Saskatchewan.

[13] I do not accept Mr. Truong's testimony on this point. The evidence shows that Mr. Truong and Ms. Nguyen used fabricated gift and employment letters to help secure bank loans in order to acquire real estate. The proceeds from their illegal activities were used to make down payments on the properties equal to the amounts indicated in the false gift letters. This was done as part of an elaborate scheme to launder or hide the proceeds earned from the sale of the marijuana.

[14] The Crown argues that I should be bound by the factual findings of the trial judge in *R. v. Truong*, 2010 SKQB 127, a prior criminal proceeding pertaining to monies in the amount of \$71,440 found to belong to the appellants herein and to Nhut Minh Truong, Nghiep Ming Truong's brother.

[15] In that case, three of the four accused, namely Nghiep Minh Truong, Hon Thi Nguyen and Nhut Minh Truong, were charged with three offences, but only the offence based on subsection 354(1) of the *Criminal Code* is relevant to the matter at hand. That provision provides that every individual commits an offence who has in his possession any property or proceeds derived directly or indirectly as from trafficking in a controlled substance. At their criminal hearing, the trial judge found that \$71,440 was recovered from eight separate locations related to the offences but that there was no clear evidence as to the individual amounts found at each location. The trial judge found that the fact that the monies were not precisely linked to a specific location to be insignificant. Ultimately, the trial judge held that all three accused had knowledge of, and a measure of control over, the cash found (para. 102).

[16] The main element of the offence under subsection 354(1) is possession of the proceeds. Subsection 4(3) of the *Criminal Code* has been interpreted as creating three types of possession: personal possession (para. 4(3)(a)), constructive possession (subpara. 4(3)(a)(i) and (ii)); and joint possession (para. 4(3)(b)) (*R. v. Pham*, [2005] O.J. No. 5127 (QL) at para. 14 (Ont. C.A.). Specifically, paragraph

4(3)(b) states that where one of two or more persons, with knowledge and consent of the rest, has anything in his custody or or possession, it shall be deemed to be in the custody and possession of each and all of them. Knowledge and consent, are integral elements of joint possession, but they “cannot exist without the co-existence of some measure of control over the subject-matter” (*R. v. Terrence*, [1983] 1 S.C.R. 357 at 363, 1983 CarswellOnt 67 at para. 15, citing *R. v. Colvin and Gladue*, [1943] 1 D.L.R. 20 at 25).

[17] The meaning of “possession” under the *Criminal Code* is different than the concept of ownership in civil matters and tax matters. *Black’s Law Dictionary*, 9th, ed. defines “ownership” as a “bundle of rights allowing one to use, manage and enjoy property including the right to convey it to others . . . regardless of any actual or constructive control”. Professor Ziff describes the nature of ownership as including four key elements: (i) possession, management and control; (ii) income and capital; (iii) transfer *inter vivos* and on death; and (iv) protection under law (Bruce Ziff, *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010) at 3). As a matter of basic property law, ownership requires more than just mere possession and “some measure of control” over the property.

[18] At trial, Mr. Truong testified that the \$50,000 of the above-mentioned \$71,440 belonged to his brother-in-law, Mr. Van Hung Nguyen. This was corroborated by Mr. Nguyen, whose testimony was that the funds, belonged solely to him. According to Mr. Nguyen, the funds were placed in the appellant’s home for safekeeping. The \$50,000 in cash, albeit in the possession of the appellants, belonged to Mr. Nguyen. He had the right to use, manage and enjoy the \$50,000 regardless of the fact that the appellants had it in their possession. I take note that Mr. Nguyen’s admission is adverse to his own interest as it could prompt the CRA to reassess him on the grounds that he earned unreported income.

[19] The evidence shows that approximately \$71,440 in cash was found in Mr. Truong’s personal residence. Roughly \$50,000 of this amount was found in a tote bag which contained the passport of Mr. Van Hung Nguyen, who is, as stated earlier, Mr. Truong’s brother-in-law.

[20] While the evidence on this point is not perfect, I find that the appellants have established on a balance of probabilities that the \$50,000 found in the tote bag did not belong to them and as a result, it did not represent undeclared income of theirs. Therefore, this amount will be excluded from the net worth calculation for the period ending December 31, 2006.

[21] The evidence shows that Mr. Truong withdrew \$50,000 in cash on a line of credit on August 31, 2006. The CRA auditor who carried out the net worth analysis treated this amount as an additional asset of the appellants for the period ending December 31, 2006. Mr. Truong contends that the amount should be excluded from the net worth calculation because the funds were used by Ms. Nguyen to purchase a property identified as “5 Quappelle RM 157”. The net worth analysis reflects the fact that approximately \$33,576 was used to purchase that property. Because the couple’s personal expenditures and assets, including cash, have already been accounted for in the net worth analysis, the CRA’s treatment of this cash withdrawal leads to an inappropriate double counting of this amount.

[22] In light of the above, the income tax appeals are allowed as follows:

- (a) The reassessment for the 2004 taxation year is vacated.
- (b) The reassessment for the 2005 taxation year is referred back to the Minister for reconsideration and reassessment on the basis that Mr. Truong’s undeclared income for that year is \$106,679.59. A corresponding adjustment should be made to the gross negligence penalties.
- (c) The reassessment for the 2006 taxation year is referred back to the Minister for reconsideration and reassessment on the basis that Mr. Truong’s undeclared income for that year is \$83,740. This gives effect to the \$100,000 adjustment, in total noted above, half of which is allocable to Mr. Truong. A corresponding adjustment should be made to the gross negligence penalties.

[23] The appeal of the GST assessment is allowed, and the matter is referred to the Minister for reconsideration and reassessment in accordance with these reasons for judgment.

[24] As the result is split, each of the parties shall bear their own costs.

Signed at Calgary, Alberta, this 28th day of February 2013.

"Robert J. Hogan"

Hogan J.

CITATION: 2013 TCC 41

COURT FILE NOS.: 2010-2655(GST)I
2010-2689(IT)G

STYLE OF CAUSE: NGHIEP MINH ADAM TRUONG and
HON NGUYEN v. THE QUEEN,
NGHIEP MINH TRUONG v. THE QUEEN

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: November 5, 6 and 7, 2012

DATE OF JUDGMENT: February 28, 2013

APPEARANCES:

For the appellant Nghiep Minh Adam Truong:	The appellant himself
For the appellant Hon Nguyen: Counsel for the respondent:	Nghiep Minh Adam Truong John Krowina

COUNSEL OF RECORD:

For the appellants:

Name:

Firm:

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