

Docket: 2010-3469(IT)G

BETWEEN:

NIMER ELMANSOUR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Basmah Elmansour (2010-3471(IT)G) on March 26 and 27, 2013,
at Montreal, Quebec.

Before: The Honourable Justice Johanne D' Auray

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Simon Petit

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2002, 2003, 2004 and 2005 taxation years are allowed to the extent that the cash on hand is to be adjusted for the years under appeal.

Costs are awarded to the respondent.

Signed at Ottawa, Canada, this 25th day of April 2014.

“Johanne D' Auray”

D' Auray J.

Docket: 2010-3471(IT)G

BETWEEN:

BASMAH ELMANSOUR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Nimer Elmansour (2010-3469(IT)G) on March 26 and 27, 2013,
at Montreal, Quebec.

Before: The Honourable Justice Johanne D' Auray

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Simon Petit

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2002 and 2003 taxation years are allowed and those for the 2004, 2005, 2006 and 2007 taxation years are dismissed.

Costs are awarded to the respondent.

Signed at Ottawa, Canada, this 25th day of April 2014.

“Johanne D' Auray”

D' Auray J.

Citation: 2014 TCC 123
Date: 20140425
Docket: 2010-3469(IT)G

BETWEEN:

NIMER ELMANSOUR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Docket: 2010-3471(IT)G

BETWEEN:

BASMAH ELMANSOUR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D' Auray J.

Overview

[1] The appeals of Mr. Nimer Elmansour (“Mr. Elmansour”) and Ms. Basmah Elmansour (“Ms. Elmansour”) were heard on common evidence. The appellants are husband and wife.

[2] For his taxation years under appeal, namely 2002, 2003, 2004 and 2005, Mr. Elmansour reported the following amounts as income:

2002	\$1 ¹
2003	(\$403)
2004	\$1
2005	\$1

[3] By reassessments dated April 2, 2009, the Minister of National Revenue (the “Minister”), using the net worth method, added the following amounts to the income of Mr. Elmansour:

2002	\$81,379
2003	\$394,596
2004	\$58,388
2005	\$4,240 ²

[4] For her taxation years under appeal, namely 2002, 2003, 2004, 2005, 2006 and 2007, Ms. Elmansour reported the following amounts as income:

2002	\$1 ³
2003	\$1
2004	\$1
2005	\$1
2006	\$1
2007	\$1

[5] By reassessments dated April 2, 2009, for the 2002, 2003, 2004 and 2005 taxation years, and by assessments dated April 8, 2009 for the 2006 and 2007 taxation years, the Minister, using the net worth method, added the following amounts to the income of Ms. Elmansour:

¹ No income was reported. The one dollar shown is for the CRA's records and is an acknowledgement that an income tax return was filed.

² Mr. Elmansour did not appeal the 2006 and 2007 taxation years.

³ No income was reported for the years under appeal. The one dollar shown is for the CRA's records and is an acknowledgement that an income tax return was filed.

2002	\$14,831
2003	\$1,534
2004	\$34,451
2005	\$48,196
2006	\$52,905
2007	\$51,501

[6] The reassessments for the 2002, 2003 and 2004 taxation years of both Mr. Elmansour and Ms. Elmansour were made by the Minister after the normal three-year reassessment period pursuant to subsection 152(4) of the *Income Tax Act* (the “Act”).

[7] The Minister assessed gross negligence penalties under subsection 163(2) of the Act for the taxation years in issue of both Mr. Elmansour and Ms. Elmansour.

[8] The Minister also assessed a penalty pursuant to subsection 162(1) of the Act for Ms. Elmansour’s failure to file her income tax return by April 30, 2007 for her 2006 taxation year and by April 30, 2008 for her 2007 taxation year.

Questions to be decided

1. Was the Minister entitled to reassess Mr. Elmansour and Ms. Elmansour after the normal reassessment period for the 2002, 2003 and 2004 taxation years? If the Minister was not entitled to reassess, I do not have to respond to the other questions with respect to the 2002, 2003 and 2004 taxation years.
2. Did the Minister correctly reassess Mr. Elmansour by adding the following amounts to his income?

2002	\$81,379
2003	\$394,596
2004	\$58,388
2005	\$4,240

3. Did the Minister correctly reassess Ms. Elmansour by adding the following amounts to her income?

2002	\$14,831
2003	\$1,534

2004	\$34,451
2005	\$48,196
2006	\$52,905
2007	\$51,501

4. Did the Minister correctly assess penalties under subsection 163(2) of the Act for all the years under appeal of both Mr. Elmansour and Ms. Elmansour?

5. Did the Minister correctly assess late filing penalties under subsection 162(1) of the Act for the failure by Ms. Elmansour to file her 2006 and 2007 income tax returns within the time prescribed by paragraph 150(1)(d) of the Act?

Burden of proof

[9] With respect to the first question, in order for the reassessments to be upheld for the 2002 to 2004 taxation years, the Minister has to prove that, in filing their income tax returns, the Elmansours made a misrepresentation that is attributable to neglect, carelessness or wilful default or that they committed fraud in filing their returns or in supplying information under the Act.

[10] With respect to the second and third questions, the burden of proof is on Mr. Elmansour and Ms. Elmansour. In order to succeed, they have to prove that the Minister incorrectly increased their income for the years under appeal.

[11] With respect to the fourth question, the penalties assessed under subsection 163(2) of the Act will be upheld if the Minister proves that, in filing their income tax returns, the Elmansours knowingly, or under circumstances amounting to gross negligence, made a false statement or an omission in those returns.

[12] With respect to the fifth question, the Minister has to prove that Ms. Elmansour filed her 2006 and 2007 income tax return after April 30, 2007 for her 2006 taxation year and after April 30, 2008 for her 2007 taxation year.

Evidence

[13] The Elmansours immigrated to Canada in 1994 as immigrant investors. Before coming to Canada, they lived in the United Arab Emirates, where Mr. Elmansour worked as an engineer in the petroleum industry.

[14] They came to Canada with their five children, Ayman, Anas, Essam, Rawan and Bashar.

[15] Ayman was born in 1979, Anas in 1980, Essam in 1982, Rawan in 1984 and Bashar in 1987. Accordingly, in 2002, which is the first year under appeal, Ayman was 23 years old, Anas was 22, Essam was 20, Rawan 18 and Bashar was 15.

[16] Mr. Elmansour stated that his children were living with him and his spouse. He supported his children, although he did not pay their university tuition fees. He explained that around 2001-2002, his older sons, Ayman, Anas and Essam, moved to Toronto for their studies. In 2003, those three sons lived in a house that Mr. Elmansour purchased in Ajax near Toronto. In 2005, Anas came back from Toronto to complete his studies in Montreal, and he lived in the family house. Rawan and Bashar were also living in the family house during the years under appeal.

[17] Mr. Elmansour stated that, under his visa conditions as an immigrant investor, he was obliged to invest in Canada. To that end, he incorporated on December 3, 1998, 9071-1607 Québec Inc. ("9071"). 9071 operated under the name of El-Mansour Import & Export. Mr. Elmansour was the sole shareholder and director of 9071.

[18] 9071 was importing and exporting clothes from and to the Middle East, mostly Qatar. Mr. Elmansour stated that he invested \$20,000 of his own money in that business. He worked full time and he hired two persons who worked on a part-time basis.

[19] The financial statements of 9071 for the 1999 taxation year showed gross income of \$71,396 and a loss of \$4,359. Mr. Elmansour as the sole shareholder and director did not file any income tax returns on behalf of 9071. The import-export business lasted approximately two years.

[20] According to Mr. Elmansour, Citizenship and Immigration Canada was not satisfied with the investment he had made in Canada. On July 16, 1999, a departure

order was issued for Mr. Elmansour, his spouse and their five children. In order to avoid deportation, Mr. Elmansour decided to invest more money.

[21] At the end of December 2001, Mr. Elmansour purchased a convenience store in Scarborough, Ontario, for \$26,500.

[22] At the beginning, the convenience store was operated by 9071. However, Mr. Elmansour was advised by his accountant that it would be less complicated if the convenience store were to be operated as a sole proprietorship. Consequently, Mr. Elmansour did operate the convenience store as a sole proprietorship.

[23] The convenience store first operated under the name of Friendly Mart; its name was later changed to Smokey-Way Discount. Mr. Elmansour stated that he hired a person to work on a full-time basis at Smokey-Way Discount and that he and one of his sons worked there part time.

[24] The financial statements of Smokey-Way Discount for the 2002 taxation year showed gross income of \$71,994 and net income of \$7,480.07. The amount of \$7,480.07 was not included as income in the income tax return filed by Mr. Elmansour for his 2002 taxation year.

[25] The gross income of \$71,396 arising from the sales made by 9071 from the import-export business during the 1999 taxation year is not reflected in the bank account of 9071. Almost no deposits were made in the bank account. The same is true for Smokey-Way Discount. As the business was a sole proprietorship, one would have expected to see in Mr. Elmansour's personal account deposits reflecting the gross income earned by Smokey-Way Discount during the 2002 taxation year, namely \$71,994. The deposits made in the bank accounts of both businesses were just enough to cover the expenses.

[26] On March 3, 2003, Mr. Elmansour purchased a house in Ajax for \$385,000. Mr. Elmansour stated that he paid for the house without any financing, using investments of his that he transferred into Canada in 2003 from the National Bank of Abu Dhabi.

[27] Mr. Elmansour stated that he bought the house in Ajax in order to show Citizenship and Immigration Canada that he was serious about investing money in Canada. At the same time, his children would have a place to stay while in Toronto. He also stayed at the house when he worked at Smokey-Way Discount.

[28] Smokey-Way Discount was sold in September 2003; Mr. Elmansour realized a capital gain of \$30,000 on the sale. The capital gain was not reported in Mr. Elmansour's income tax return for his 2003 taxation year.

[29] Around November 2003, Mr. Elmansour opened another business, Mioceen Carpet Cleaning ("Mioceen"). The carpet and upholstery cleaning business was operated by 9071. It was located in rented premises at 6830, Avenue du Parc in Montreal. Mr. Elmansour signed a one-year lease on behalf of 9071. After its expiration, the lease was not renewed. Mr. Elmansour moved his office to his house in Dollard-des-Ormeaux.

[30] Mr. Elmansour obtained his Canadian citizenship in August 2004.

[31] Mr. Elmansour stated that, after obtaining his citizenship, he closed Mioceen since it was not profitable.

[32] Ms. Elmansour said that she had never worked outside of the home since her arrival in Canada.

[33] Ms. Elmansour stated that ever since she immigrated to Canada, she and her family had been living off the money that her husband had accumulated while he was working in the United Arab Emirates. She also stated that she received money from her brother and from an inheritance.

[34] Ms. Elmansour received from 1115411 Ontario Ltd. ("Ontario Ltd.") cheques to her order. One such cheque was dated November 16, 2004 and was for an amount of \$5,470, and two other cheques, dated November 19, 2005, were for amounts of \$5,677 and \$6,300. The cheques were deposited in her bank account. She stated that the money came from work that her husband had done while he was in Ontario.

[35] In 2005, Ms. Elmansour applied for an American Express Costco credit card. On the application she stated that she was a manager for "Cleaning Inc." and that her income was \$54,000 per year.

[36] In 2006, Ms. Elmansour applied for a Canadian Tire credit card. On the application she stated that she had been working for Nimer Elmansour as a vice-president for two years and that her income was \$30,000 per year.

[37] In 2008, Ms. Elmansour applied for a CIBC Visa card. On the application she stated that she had been an employee of Mioceen Carpet for three years. With regard to income, she indicated that her monthly income from employment was \$1,100 and that her monthly income from other sources was \$2,000.

[38] Although Ms. Elmansour signed the credit card applications, she stated that it was her children who filled out the forms and that she did not pay attention to what they had written on the application forms.

Analysis

Question 1 - Statute-barred years - Was the Minister entitled to reassess Mr. Elmansour and Ms. Elmansour after the normal reassessment period for the 2002, 2003 and 2004 taxation years?

[39] I am of the opinion that the Minister was entitled to reassess Mr. Elmansour for the 2002, 2003 and 2004 taxation years since the Minister proved that, in filing his income tax returns, Mr. Elmansour made misrepresentations that are attributable to neglect, carelessness or wilful default.

[40] With respect to Ms. Elmansour, I am of the view that the Minister was entitled to reassess her for the 2004 taxation year since the Minister proved that, in filing her income tax return for 2004, she made misrepresentations that are attributable to neglect, carelessness or wilful default, but such is not the case for the 2002 and 2003 taxation years.

Mr. Elmansour

[41] In filing his income tax returns for the years 2002, 2003 and 2004, Mr. Elmansour made misrepresentations that are attributable to neglect carelessness and wilful default. For example:

- on page 2 of his income tax returns, he did not indicate that during the years under appeal he had more than \$100,000 in foreign investments, although it was clear from the evidence that he knew that he had more than \$100,000 of investments in the United Arab Emirates;
- he did not report the interest he earned on his foreign investments in any of his income tax returns;

- he did not report any of the income he earned from the convenience store, Smokey-Way Discount, nor did he report the capital gain he realized on the sale of Smokey-Way Discount in 2003;
- he never, as the sole shareholder and president of 9071, filed income tax returns for 9071;
- in applying for an RBC Visa Platinum Card, Mr. Elmansour indicated that he earned \$24,000 in 2005 while working for Mioceen. According to Mr. Elmansour's testimony, Mioceen was no longer operating in 2005. If Mioceen was in fact still operating in 2005, Mr. Elmansour did not report the \$24,000 as employment income;
- Mr. Elmansour did not mention in his testimony that he operated a business under the corporate name 1115411 Ontario Ltd. Was the income earned by Ontario Ltd. income that was not reported? Ms. Elmansour received a series of cheques in 2004 and in 2005 from Ontario Ltd. She testified that it was money earned by Mr. Elmansour while he was working in Ontario.

[42] In addition, Mr. Elmansour did not give any credible explanation as to how he was able to support himself and his family without earning any income. It is self-evident that he could not support a family of five children without any income.

Ms. Elmansour

[43] With respect to Ms. Elmansour, I am of the view the Minister did not prove that she misrepresented her income in filing her income tax returns for the 2002 and 2003 taxation years. Most of the documentary evidence referred to by counsel for the respondent related to the 2004, 2005, 2006 and 2007 taxation years. The 2005, 2006 and 2007 taxation years were reassessed within the time limit prescribed by subsection 152(4) of the Act.

[44] During the 2004 taxation year, Ms. Elmansour received cheques from Ontario Ltd. When asked by the respondent why she was receiving cheques from Ontario Ltd., she evaded the question by answering that it was money that her husband would have earned while working in Ontario. The cheques were made to her order by Ontario Ltd. and not by her husband. They were deposited by her in her bank account. Ms. Elmansour did not report the amounts that she received from Ontario Ltd. in her 2004 income tax return. Furthermore, she was unable to explain

why the balance in her bank accounts went from \$4,522 in 2003 to \$37,951 in 2004. The discrepancy between the zero income she reported and the income she should have reported, namely \$34,451 in 2004, is substantial. Accordingly, the Minister was entitled to reassess Ms. Elmansour's 2004 taxation year after the normal reassessment period.

Questions 2 and 3 - Net worth

[45] Did the Minister correctly reassess the Elmansours by adding the following amounts to their income?

Years	Mr. Elmansour	Ms. Elmansour
2002	\$81,379	\$14,831
2003	\$394,596	\$1,534
2004	\$58,388	\$34,451
2005	\$4,240	\$48,196
2006		\$52,905
2007		\$51,501

[46] Pursuant to subsection 152(7) of the Act, the Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied, assess the tax payable.

[47] In *Ramey v The Queen*, 93 DTC 791, [1993] TCJ No 142 (QL), Justice Bowman explains the concept of a net worth assessment and the circumstances in which the Minister will use this method of assessing. In his reasons for judgment, he states (at page 793 DTC):

. . . The net worth method of estimating income is an unsatisfactory and imprecise way of determining a taxpayer's income for the year. It is a blunt instrument of which the Minister must avail himself as a last resort. A net worth assessment involves a comparison of a taxpayer's net worth, i.e., the cost of his assets less his liabilities, at the beginning of a year, with his net worth at the end of the year. To the difference so determined there are added his expenditures in the year. The resulting figure is assumed to be his income unless the taxpayer establishes the contrary. Such assessments may be inaccurate within a range of indeterminate magnitude but unless they are shown to be wrong they stand. It is almost impossible to challenge such assessments piecemeal. The only truly effective way of disputing them is by means of a complete reconstruction of a taxpayer's income for a year. A taxpayer whose business records and method of reporting income are

in such a state of disarray that a net worth assessment is required is frequently the author of his or her own misfortunes. . . .

[48] Justice Bowman in *Bigayan v The Queen*, 2000 DTC 1619, [1999] TCJ No 778 (QL), at paragraph 3 added:

The best method of challenging a net worth assessment is to put forth evidence of what the taxpayer's income actually is. . . .

[49] For both Mr. Elmansour and Ms. Elmansour, the net worth assessment was done on the basis of actual data and not estimates. Many documents were obtained by the Canada Revenue Agency ("CRA") auditor. In addition to the documents provided by the Elmansours, the CRA auditor obtained further information by issuing requirements for information. I will not mention all the documents that were obtained by the CRA auditor as they are too numerous. However, some of the documents obtained for the taxation years under appeal were instrumental in determining the income of the Elmansours and they are bank account statements, credit card statements, applications for credit cards, car registrations from the Société de l'assurance automobile du Québec, contracts for the purchase of vehicles from dealerships, insurance contracts, documents of incorporation, corporate documents from CIDREQ, invoices relating to Mr. Elmansour's businesses, financial statements, documents relating to the house in Ajax, and Equifax reports. Although a net worth assessment is never perfect, the net worth assessments in these cases were well documented.

Mr. Elmansour

[50] Except for the amount of cash on hand for the 2001 reference year, Mr. Elmansour did not contest the amounts relating to assets in the net worth statement. As to liabilities, Mr. Elmansour did not have any.

[51] As regards expenditures, the Minister increased Mr. Elmansour's net worth by adding personal expenditures in the amounts of \$34,801 for 2002, \$19,900 for 2003, \$3,129 for 2004 and \$19,269 for 2005. These amounts were based on expenses incurred by Mr. Elmansour. The CRA auditor analyzed each bank account statement to determine Mr. Elmansour's expenditures.

[52] Mr. Elmansour's testimony was that his personal expenditures amounted to approximately \$1,839 per month or \$22,068 per year. Except for 2002, for which year the amount of the personal expenditures was established to \$34,801, the expenditures shown in the net worth statement are lower than the estimation given

by Mr. Elmansour. Therefore, the expenditures shown in the net worth statement should not be adjusted.

[53] Mr. Elmansour argued that the cash on hand shown in the net worth statement should be adjusted to reflect his investments in the United Arab Emirates.

[54] I agree, and the respondent also agreed, that the net worth must be modified to reflect the investments that Mr. Elmansour had in the United Arab Emirates. These investments were not taken into account in the determination of net worth. Counsel for the respondent stated that the documents relating to these investments were not provided to him before the hearing.

[55] Accordingly, the question to be determined is what amounts Mr. Elmansour had as cash on hand during the years under appeal.

[56] Mr. Elmansour argued that he had \$527,000 in cash on hand. He did not explain clearly what that amount was composed of. The respondent argued that the cash on hand should be 466,796 dirhams (CAN \$200,255).⁴

[57] From what I understood from Mr. Elmansour's testimony, the amount of \$527,000 would have been composed of the approximately \$250,000 that he brought with him from the United Arab Emirates when he immigrated to Canada in 1994 as well as the 597,281 dirhams (approximately CAN \$256,233) that he had on February 5, 2003 in his bank accounts at the National Bank of Abu Dhabi.

[58] In my view, the amount of \$250,000 should not be included in the net worth as cash on hand. During his testimony, Mr. Elmansour stated that he used the \$250,000 to support his family. He had to support his spouse and five children. In 1994, his children were young and were living with him. It was only in 2001 that the three oldest left to study in Toronto, and he paid for their accommodation. In addition, out of the \$250,000 he also took \$20,000 to invest in the clothing import-export business in 1998. By 2002, the \$250,000 had to be depleted.

[59] The amount of 597,281 dirhams (CAN \$256,233) was in different accounts that Mr. Elmansour had at the National Bank of Abu Dhabi. One account was in US dollars, another account was in sterling and still another was in dirhams. In

⁴ The conversion is based on a rate of 0.429. This rate will have to be confirmed by the parties.

2003, he transferred the funds in those three accounts to another account that he already had at the National Bank of Abu Dhabi. He withdrew from the latter account 597,281 dirhams (CAN \$256,233) and had that amount transferred to Canada. He used the money as a down payment on the house that he bought in Ajax.

[60] Counsel for the respondent brought to my attention evidence that showed that on October 6, 2002, Mr. Elmansour had in his dirhams account 237,235 dirhams. By October 14, 2002, he had 367,784 dirhams in the account, an increase of 130,548 dirhams (CAN \$55,900). Counsel for the respondent wondered about the source of the 130,548 dirhams. In other words, where did the 130,540 dirhams come from?

[61] Mr. Elmansour stated that the 130,548 dirhams was a loan that he obtained from the National Bank of Abu Dhabi. He did not file any documents proving that it was a loan.

[62] Counsel for the respondent's position was that the 130,548 dirhams formed part of his undeclared Canadian income. The undeclared amounts would have been transferred from Canada and deposited in Abu Dhabi. When it was suggested to him by counsel for the respondent that undeclared revenues were deposited abroad, Mr. Elmansour was evasive, answering: "No, no I mean. I give you all the documents".

[63] The position of counsel for the respondent is not without merit; the money had to come from somewhere. However, there is no evidence tracing amounts transferred from Canada to the United Arab Emirates.

[64] Mr. Elmansour had the burden of proof; he had to demolish the Minister's assumption of fact with respect to undeclared income. He had to give a credible explanation as to the source of the 130,548 dirhams. In this appeal, doubt has been cast upon Mr. Elmansour's credibility. Given the absence of any documents corroborating the existence of a loan; I do not accept Mr. Elmansour's testimony that it was a loan. It would have been easy for Mr. Elmansour to prove that he borrowed that amount from the National Bank of Abu Dhabi. Mr. Elmansour did not demolish the assumption of fact made by the Minister that it was undeclared income. Therefore, the amount of 130,548 dirhams should not be included as cash on hand in the determination of net worth.

[65] Accordingly, the amount that should be included as cash on hand in the determination of net worth is 466,796 dirhams, (CAN \$200,255).

Ms. Elmansour

[66] In light of my decision that the Minister was not entitled to reassess Ms. Elmansour for her 2002 and 2003 taxation years, I do not have to consider those taxation years. However, I must look at her net worth for her 2004, 2005, 2006 and 2007 taxation years.

[67] Ms. Elmansour maintained that the net worth calculation did not take into account an \$80,000 inheritance that she received from her mother.

[68] She also claimed that in 2005, 2006 and 2007 she received gifts from her brother who lived in the United Arab Emirates. The documents submitted in evidence with respect to these gifts were copies of documents of the Habib Exchange Company in Abu Dhabi. The Habib Exchange Company's documents are for amounts of \$1,645 in 2005, \$7,300 in 2006, and \$2,000 in 2007.

[69] Consequently, Ms. Elmansour argued that the cash on hand for the purpose of the determination of net worth should be adjusted accordingly.

[70] As to her personal expenditures, Ms. Elmansour stated that they were approximately \$3,000 per month and that the expenditures in her net worth statement should be changed accordingly. She did not explain how she arrived at \$3,000 per month.

[71] With respect to the \$80,000 inheritance that Ms. Elmansour said she received from her mother, she stated that her brother sent it to her in instalments. She could not remember the year in which she received the inheritance instalments or what amounts her brother sent to her. In addition, she did not submit any documents proving that she received an inheritance from her mother. Nor did she submit documents proving that she received instalments from her brother in respect of her inheritance. Since she could not remember how much money she received from her brother or when she received the instalments, and as she did not submit any documents corroborating the fact that she received such an inheritance, no adjustments will be made to Ms. Elmansour's net worth with respect to the inheritance.

[72] With respect to the gifts, the only documents submitted were from the Habib Exchange Company.

[73] Counsel for the respondent argued that these documents do not prove that the money Ms. Elmansour received from Abu Dhabi represented gifts from his brother. He referred the Court to the decision of *Sturzer v The Queen*, 2009 TCC 1, 2009 DTC 1131. The appellant, Mr. Sturzer, stated in that case, that the Minister's computation of his net worth should have taken into account gifts received from his father. Justice Bédard was of the view that the documents filed in evidence were not sufficient to prove that the father had made gifts to his son. He stated at paragraphs 14 and 15 of his reasons for judgment:

[14] I refer again to the Appellant's submission that the Minister's computation of his net worth should have taken into account gifts received from his father (who is apparently 80 years of age and lives in Austria) during the years in issue. The Appellant's evidence in this regard consisted of his own testimony and two documents filed as Exhibits A-9 and A-20, which, in my view, assuming that they are even admissible in evidence, do not in any way establish that Mr. Dominkovits, who is supposedly the Appellant's father, deposited a total of \$750,000 into the joint bank account during the years in issue. The Appellant's testimony concerning the alleged gifts can be summarized as follows: His father, who has been retired for about 20 years, made his fortune in construction. During the years in issue, he made deposits of amounts totalling approximately \$750,000, some of which the Appellant used during those years to defray the costs of building his residence in the municipality of Morin Heights, Quebec. The Appellant explained that, given his father's age and state of health, he could not ask him to come and testify. Lastly, the Appellant testified that he could not adduce banking documents showing that his father had deposited the amounts in question into the joint bank account because the documents issued by Austrian banks do not contain such information. The Appellant went so far as to add that Austrian banks do not even provide their customers with monthly statements that set out all the transactions done by those customers on their bank accounts during a given month.

[15] I immediately note that I find it implausible that Austrian banks do not provide their customers with periodic statements showing the transactions (deposits and withdrawals) that they make on their accounts. If the father's bank statements and the joint bank account statements had been tendered in evidence and corroborated by representatives of the banks concerned, the plausibility of deposits by the father into the joint bank account could have been established. The Appellant could also have provided adequate proof of his father's personal assets (assuming that Mr. Dominkovits — whose surname is, I stress, very different from the Appellant's — is even his father) and thereby established the likelihood that his father was financially able to make such astronomical gifts. The Appellant

had the ability to provide such evidence, but he did not do so. From this I infer that such evidence would have been unfavourable to him. Since I have already decided that I will accord no weight to the Appellant's testimony in the absence of corroborative or probative evidence in the form of reliable documentation or credible testimony, I am compelled to find here that Mr. Dominkovits did not make gifts totalling roughly \$750,000 to the Appellant during the years in issue.

[74] As in the *Sturzer* case, the documents submitted by Ms. Elmansour do not prove that her brother made cash gifts to her. The name of her brother is not on the Habib Exchange Company's documents. The only thing that the documents prove is that amounts were transferred to Ms. Elmansour from Abu Dhabi on a specific date.

[75] During the hearing, Ms. Elmansour's testimony was vague and self-serving. I cannot, in the absence of corroborative or probative evidence in the form of reliable documentation or credible testimony, accept her testimony that her brother gave her cash gifts.

[76] With respect to expenditures, the CRA auditor analyzed the statements for each of Ms. Elmansour's bank accounts in order to determine what her expenditures were. The CRA auditor listed all the expenditures that he included in determining her net worth. She did not challenge any of these expenditures. The burden of proof was on her; she had to prove that the expenditure figures used were incorrect.

[77] Therefore, with respect to expenditures, no adjustments should be made to Ms. Elmansour's net worth for the 2004, 2005, 2006 and 2007 taxation years.

Question 4 – Gross negligence penalties - Did the Minister correctly assess penalties under subsection 163(2) of the Act for all the years under appeal of both Mr. Elmansour and Ms. Elmansour?

[78] In *Lacroix v The Queen*, 2008 FCA 241, 2009 DTC 5029, Justice Pelletier, in a unanimous decision of the Federal Court of Appeal, explained how the Minister can discharge his burden under subsection 163(2) of the Act. At paragraph 32 of his reasons, he stated the following:

[32] What, then, of the burden of proof on the Minister? How does he discharge this burden? There may be circumstances where the Minister would be able to show direct evidence of the taxpayer's state of mind at the time the tax return was filed. However, in the vast majority of cases, the Minister will be limited to undermining the taxpayer's credibility by either adducing evidence or cross-

examining the taxpayer. Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of subparagraph 152(4)(a)(i) and subsection 162(3).

Mr. Elmansour

[79] With respect to Mr. Elmansour, during the taxation years under appeal he did not report any income. Direct evidence was adduced to prove that Mr. Elmansour chose not to do so. Without repeating what I have said in paragraph 41 of these reasons, Mr. Elmansour knew that he did not report his income from Smokey-Way Discount. Neither did he report the capital gain he realized when he sold Smokey-Way Discount. He never reported employment income during the time when he worked for the clothing import-export business; nor did he report his employment income earned while working for Mioceen.

[80] In addition, he could not explain why his bank accounts did not reflect amounts of income earned by his businesses. He also never filed an income tax return on behalf of 9071.

[81] Furthermore, he did not report on any of his income tax returns that he had foreign investments of more than \$100,000. He also failed to report the interest income earned on these investments in the United Arab Emirates.

[82] During the hearing, Mr. Elmansour's testimony was vague and self-serving. He evaded some of the questions by always responding in the same manner. When asked if he had included his income from Smokey-Way Discount in the amount of \$7,400, he responded:

I don't recall it, but it was the same answer. The accountant, he was . . . doing all this.

[83] When asked what steps he had taken to ensure that his company filed its income tax return for 1999, his answer was:

Actually, I put all these things on the shoulder of the accountant. That's what I was - - part of the business I have to go for accountant to do all the accounting services.

[84] In addition, Mr. Elmansour had to support a family of five children. Even if some adjustments were made to Mr. Elmansour's net worth, the discrepancy

between what he reported, namely zero income, and what he should have reported is substantial.

[85] Justice Strayer in *Venne v The Queen*, 84 DTC 6247, [1984] FCJ No 314 (QL), stated the following with respect to the gross negligence penalties provided for in subsection 163(2) of the Act (at page 6265 DTC):

With respect to the possibility of gross negligence, I have with some difficulty come to the conclusion that this has not been established either. “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. .

..

[Emphasis added.]

[86] Mr. Elmansour is an educated person. In my view, his behaviour showed a high degree of negligence; he also showed an indifference as to whether or not he was complying with the law. Therefore, the penalties were properly applied by the Minister for the years under appeal.

Ms. Elmansour

[87] The penalties were properly applied to Ms. Elmansour with respect to her 2004, 2005, 2006 and 2007 taxation years. When Ms. Elmansour answered that the cheques that she received from Ontario Ltd. represented money that her husband earned while in Ontario, she evaded the question. She did not explain why she was receiving such amounts from Ontario Ltd. and why these amounts were not included in her income.

[88] Although she stated in her testimony that she never worked outside the home, in applying for a credit card in 2005, she stated that she was employed by “Cleaning Inc.” and that her income was \$54,000 per year. In 2006, in applying for another credit card, she stated that she was employed by Nimer Elmansour and that her income was \$30,000 per year. These amounts of income were not included in her income tax returns for 2005 and 2006. Moreover, she could not explain why there was a substantial increase in her bank account balances from 2003 to 2004.

[89] Her personal expenditures amounted to \$62,361 in 2005, \$50,443 in 2006 and \$42,538 in 2007. She did not explain in a credible manner how she could have spent such amounts without any source of income. The discrepancy between what

she reported as income, namely zero, and what she should have reported was substantial in all of the years in question.

[90] Therefore, the Minister properly applied the gross negligence penalties for the 2004, 2005, 2006 and 2007 taxation years.

Question 5 - Late filing penalties - Did the Minister correctly assess late filing penalties under subsection 162(1) of the Act for the failure by Ms. Elmansour to file her 2006 and 2007 income tax returns within the time prescribed by paragraph 150(1)(d) of the Act?

[91] Counsel for the respondent proved that Ms. Elmansour filed her income tax returns for the 2006 and 2007 taxation years on February 27, 2009. Her income tax return for 2006 should have been filed by April 30, 2007 and her 2007 return should have been filed by April 30, 2008. Since Ms. Elmansour was late in filing both returns, the Minister correctly applied the penalty pursuant to 162(1) of the Act.

Disposition

Mr. Elmansour

[92] The appeal of Mr. Elmansour is allowed to the extent that the cash on hand is to be adjusted for the years under appeal. Costs are awarded to the respondent.

Ms. Elmansour

[93] The appeal of Ms. Elmansour is allowed for the 2002 and 2003 taxation years and dismissed for the 2004, 2005, 2006 and 2007 taxation years, with costs to the respondent.

Signed at Ottawa, Canada, this 25th day of April 2014.

“Johanne D’ Auray”

D’ Auray J.

CITATION: 2014 TCC 123

COURT FILE NO.: 2010-3469(IT)G
2010-3471(IT)G

STYLE OF CAUSE: NIMER ELMANSOUR v HER MAJESTY
THE QUEEN

BASMAH ELMANSOUR v HER
MAJESTY THE QUEEN

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: March 26 and 27, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Johanne D' Auray

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