BETWEEN:

LISUNIA CHERNENKOFF .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

1949
Oct. 3
Nov. 15

Revenue—Income tax—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 47—Onus on appellant—Evidence of appellant unsatisfactory—Failure to file proper returns—Appellant assessed on basis of net worth over a period of years—Appeal dismissed.

Appellant filed income tax returns for the years 1942 to 1945 inclusive. The returns as filed were not accepted by the respondent and appellant was assessed on the basis of the total taxable increase in worth of the appellant during those years. On appeal to this Court appellant contended that certain items included in the calculation are wrong.

Held: That the onus is on appellant to establish affirmatively that her taxable income was not that for each of the years for which she was assessed and this she failed to do.

2. That the conduct of the appellant and her agent in failing to produce proper records or accounts to the income tax inspector and in withholding information from him caused the inspector to adopt the "net worth" increase method as a basis for assessments and the appellant having failed to establish that her taxable income for each of the years in question is not that on which she has been assessed the appeal must be dismissed.

3. That the appellant at trial failed to establish her income with proper deductions and allowances by the production of records available to her and in the absence of such records the appellant failed to prove that on a proper and complete "net worth" basis the assessments were wrong.

1949

CHERNENKOFF v. MINISTER OF NATIONAL REVENUE

Cameron J.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Saskatoon.

E. W. Gerrand, K.C. for appellant.

W. Walker and *T. Z. Boles* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (November 15, 1949) delivered the following judgment:

In this matter the appellant appeals from assessment to income tax for the taxation years 1942 to 1945, inclusive. During these years the appellant was the owner of three quarter-sections of farm lands near Arran, Saskatchewan, comprising in all 480 acres of which 354 acres were under cultivation. She operated the farm with the help of a son, John Chernenkoff, her husband having died in 1937. She made no income tax return for the years 1942 to 1944 until August, 1945, when, following a demand, her son John on her behalf completed the returns for those years. He also later filed the return for 1945. As so filed these returns showed a net income as follows:

(*a*)	1942	$ 462 12
(*b*)	1943	773 08
(*c*)	1944	1,229 27
(*d*)	1945	a loss

The respondent did not accept these returns as satisfactory. Two inspectors of the Income Tax Division at Saskatoon interviewed the appellant in 1947 under circumstances to be mentioned later; and, upon being advised that the appellant had no records or vouchers for the years in question, determined to check the returns so made by ascertaining (from information supplied by the appellant) her net worth at December 31, 1941, and at December 31, 1946, and particulars of her expenditures and capital gains. The respondent apparently accepted the report of these two officers which indicated that the total taxable increase in worth of the appellant between those dates was

$10,693.02; and on February 28, 1948, the appellant's taxable income was determined and the appellant was assessed as follows:

1942	$ 1,800 00
1943	2,100 00
1944	2,300 00
1945	2,300 00
1946	2,293 02
	10,693 02

In so assessing the appellant the respondent proceeded under the provisions of section 47 of The Income War Tax Act, which is as follows:

Sec. 47. The Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer, and notwithstanding such return or information, or if no return has been made, the Minister may determine the amount of the tax to be paid by any person.

From these assessments appeals were taken and by his decision the respondent affirmed the assessments, his reasons being given as follows:

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal and matters thereto relating, hereby affirms the said Assessments on the ground that Section 47 of the Act provides that the Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer and notwithstanding such return or information the Minister may determine the amount of tax to be paid by any person; that in the absence of proper proof and accounting records and upon investigation and in view of all the facts the Minister has under the said Section 47 determined the amount of tax to be paid by the taxpayer for the years 1942, 1943, 1944 and 1945. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessments are affirmed.

Notice of dissatisfaction followed and by his reply the respondent affirmed the assessments as levied.

As I have said two officials of the Income Tax Division in Saskatoon, John Lesiuk and Walter Fawcett, interviewed the appellant in September 1947. They first called at her farm but were advised by her son John that she had given up farming and was living with her married daughter, Mrs. Picton. Lesiuk advised the son that they represented the Income Tax Department and that certain information was required in regard to the appellant's income before she could be assessed. The son stated that he represented his mother, that he had no records of the farm operations

1949

CHERNENKOFF v. MINISTER OF NATIONAL REVENUE

Cameron J.

and that when he had made out the returns for his mother they were not made out from any records but were estimates only. That he made these statements was not denied by the son, although in his own evidence he stated that when the returns were made out he had used farm records for that purpose. He was then advised by Lesiuk that in the absence of any records the returns could not be accepted but that a financial statement would be required. He replied that he could not give that information before seeing his mother. He was informed as to what would be required and it was arranged that he would attend at the bank, secure information as to bank balance there and take the officials that afternoon to see his mother. On the same day the officials interviewed the mother at the residence of her son-in-law. Those present were Lesiuk, Fawcett, the appellant, her son John, her son-in-law John Picton, and her daughter Mrs. Picton. All gave evidence at the trial except Mrs. Picton.

The appellant is a member of the Doukhobor community and speaks the Russian language only. Her son John is Canadian-born and speaks both Russian and English fluently, as does her son-in-law Mr. Picton. Mr. Lesiuk is Canadian-born but speaks and understands the Russian language thoroughly, although this fact was not disclosed to the appellant's family. Lesiuk conducted the investigation by putting questions in English to the appellant, which questions were then interpreted into Russian by the appellant's son. On occasions she gave the answers in Russian immediately, but on many occasions would discuss the matter in Russian with her family before reaching a conclusion. Her replies were given in Russian and again interpreted into English by her son. Lesiuk then in English would repeat the answer given by the son and the information so obtained was written down by Mr. Fawcett who took little, if any, part in the discussion. By reason of his knowledge of Russian, Lesiuk understood all the conversation between the members of the appellant's family and he states that in every instance the information which he gave to Fawcett to record came from the appellant, was correctly interpreted by her son John into the English language and was correctly taken down by Fawcett. Mr. Picton, while having no knowledge of what Fawcett

wrote down, does agree that the appellant's family explained to her very clearly what was said, that she gave the answer to John, that John correctly translated it to Lesiuk in English, that Lesiuk would then turn to Fawcett and tell him what to put down and that what Lesiuk so told Fawcett to record was the information that came directly from John Chernenkoff on behalf of the appellant.

The interview lasted approximately three hours and I have no doubt whatever that the appellant and her family fully understood the nature of the enquiry and were afforded every opportunity of thoroughly considering all questions put by Lesiuk before giving the information required. I find no reason whatever to question the credibility of Fawcett who stated that he took down the information exactly as given by John Chernenkoff on behalf of his mother and as repeated to him by Lesiuk. Before leaving, Fawcett and Lesiuk, on the basis of the information taken down, computed the total taxable increase from December 31, 1941, to December 31, 1946, at $10,693.02. They realized that crops in some years had been substantially better than for other years and therefore, instead of allocating a large part of that increase to a good year (and thereby raising the rate of taxation to a higher bracket), decided to apportion the whole in more relatively even proportions over the whole five years, and that was done. No objection is taken to that procedure. They left with the appellant a statement of the tax which would be payable for each year, including interest.

It should be noted that in the Notice of Appeal the appellant took the position that the assessments were invalid and should be set aside; that the returns as filed by her were complete and accurate except for one item in the return for 1942, amounting to $410, which it was admitted should not have been claimed as a deduction. Pleadings were delivered and in her Statement of Claim the appellant again alleged that the assessments were invalid and should be set aside and that the returns as filed were correct, save as to the one item for 1942. At the trial, however, counsel for the appellant was content to attack items in the computation based on the total taxable increase in the appellant's worth between

1949

CHERNENKOFF v. MINISTER OF NATIONAL REVENUE

Cameron J.

December 31, 1941, and December 31, 1946, and made no attempt to establish in any way that the appellant for the year in question did not have the taxable income for which she had been assessed.

Exhibit 2 is a copy of the computation made by Lesiuk and Fawcett. Page 2 is a computation of depreciation claimed by the appellant on the machinery and buildings. Page 3 is a statement of capital gains made on machinery sold. The information on which these two items is based was secured entirely from the appellant and her son and no dispute arises in connection therewith, the full amounts claimed having been allowed.

Page 1 of Exhibit 2 is a computation of the appellant's net worth on December 31, 1941, and December 31, 1946, the difference amounting to $4,165.02. To that have been added annual gifts to the son of $700 for each of the five years; a deduction of $3,472 was allowed for capital gains and then there was added "drawings" by the appellant for each of the five years at $1,300.

Objection is taken to the inclusion of the cost of two trips taken by the appellant, one to Vancouver and one to Winnipeg, at a cost of $250 and $100 respectively. It is admitted that the trips were taken by the appellant although it is rather vaguely suggested that the one to Winnipeg was in 1947. No attempt was made, however, to indicate just when the trips were made or what amount the appellant actually disbursed in connection therewith. I have no hesitation in reaching the conclusion that these figures were given to the officials by or on behalf of the appellant, and the evidence given at the trial falls short of establishing that they are incorrect in any way.

Objection is also taken to the inclusion of $3,500 as representing gifts to the son John in the years 1941 to 1946, over and above his wages. Both the appellant and her son insist that no such gifts were made and that throughout the entire period the son was paid only wages of approximately $600 per year, of which amount $400 was paid in cash and the balance charged as board. The son states that this item of $3,500 was put down by Fawcett and Lesiuk without any authority whatever.

Objection is also made to the inclusion of the sum of $6,500 for "drawings", being an average of $1,300 for each

of the five years. Lesiuk's evidence is that in order to ascertain the appellant's earnings over these years it was necessary to find out what she had spent for fuel, clothing, household living expenses, medical account, pleasure, fuel, operations of motor car, etc. He was told that in all these items would total over $2,000 a year, including $700 a year paid to the son John as gifts. Rough estimates for each category were given to him and he accepted them as correct. He says that the appellant approved of this item of $1,300 as annual "drawings". Again, the appellant and her son deny having given any such approval, stating that Lesiuk established the figures personally and without any consent on their part. They now attack this item as grossly excessive. They say that the medical expenses put in at $200 a year were never incurred, that fuel itemized at $80 a year should be deleted entirely as they bought none; that the item of $150 per year for clothing is excessive and, as well, the estimate of $30 per month for groceries purchased. No part of their evidence is supported by books of account, vouchers or cheques. The appellant's son-in-law Picton says that some of these items, comprising an annual total of $1,300 were not mentioned by anyone at the enquiry.

I find it difficult, on the evidence before me, to determine what amount the appellant paid out for these various items. Were it not for the evidence of Lesiuk and Fawcett that the appellant and her son actually agreed on these amounts, I would be inclined to find that the estimate of $1,300 was somewhat in excess of that actually disbursed annually, but in the view that I have taken of the matter it is not necessary to reach any concluded opinion as to which of the parties I am to believe as to the amount of "drawings" or gifts.

In effect, the appellant agrees that the "net worth" computation of her income is a satisfactory basis for arriving at her taxable income, but that some of the items—those which I have indicated—are wrong. When these are corrected in accordance with the evidence adduced—so she states—the result is that there is no taxable income for any of the years in question.

My opinion is that the appellant must do far more than she has attempted to do here if her appeal is to be

1949

CHERNENKOFF v. MINISTER OF NATIONAL REVENUE

Cameron J.

successful. There can be no question that the onus lies on the appellant and that, in my view, means that she must establish affirmatively that her taxable income was not that for each of the years for which she was assessed. Two courses were open to her, the first being to establish her income with proper deductions and allowances, and that course could quite readily have been followed. A perusal of Exhibit 1—her own returns for these years—indicates that with the exception of a few hundred dollars her entire income came from the sale of grain. All the necessary records of income from that source were available to her but were not produced in court, the son merely stating that he was not asked to bring them, or did not think it necessary to do so. The disbursement also could have been ascertained without any great difficulty, all or most of them having been made to people in the district, many of whom would have had books of record which could have been produced had the appellant herself possessed none. It is in evidence, also, that the appellant's son had a bank account from which farm expenses were paid and cancelled cheques could quite easily have been secured, but the appellant did not avail herself of the very obvious and simple method of establishing her income in this way.

In the absence of records, the alternative course open to the appellant was to prove that even on a proper and complete "net worth" basis the assessments were wrong. But that also she has failed to do. She submits that all she needs to do is to establish certain inaccuracies in the amounts and that these items must be adjusted accordingly. But it will be kept in mind that the "net worth" increase was established on her own statements and it was amply proven at the trial that these statements were most inaccurate and incomplete. I accept the evidence of Mr. Lesiuk that the appellant was asked if she had any assets other than those included in the statement, Exhibit 1, or cash on hand, and that she said she had not. The evidence establishes clearly that she had very large sums in cash at her home, so large that in one year alone she was able to expend $3,500 on account of the purchase price of new machinery, the balance of $3,500 being paid by cheque on the bank account. No attempt was made to

indicate what cash she had on hand at the beginning or end of the five-year period or to explain the sources of these funds on hand. In addition, in 1941 she opened a bank account in the name of her son and out of this account farm operating expenses were met in part. On December 31, 1946, there was a balance in this account of about $2,000, all of which was the property of the appellant, but this was not disclosed to the assessors. On December 31, 1941, the balance was $450 so that it would appear that the difference of $1,500 at least should have been added to the increased net worth of the appellant.

Both the appellant and her son had knowledge of this bank account and the money on hand, but withheld the information from the officials, the son stating at the trial that he was not asked about them and adding that he did not want anyone to know about the money his mother had at home. The appellant merely states that she was not asked about them. They withheld the information from the inspectors and did not choose to inform the Court as to what part of these very substantial items was earned in the period 1941 to 1946.

In the course of the trial I formed an unfavourable opinion as to the credibility of the appellant and her son. No attempt was made to file income tax returns until, after a lapse of some years, she was compelled to do so. It seems reasonably clear, too, that the returns as filed were incorrect in that substantial amounts derived from grain participation certificates seem to have been omitted. At the interview in 1947, the appellant was given an opportunity to ascertain her income with complete accuracy by production of available records, but her son stated that these records were not available when, as a fact, he had them at his home. She had a further opportunity to do so at the trial but again they were not forthcoming. It was the failure to produce these records and the denial of their existence that compelled the inspector to adopt the "net worth" increase method as a basis for assessments and it is now admitted that very large items of cash in bank and on hand were not disclosed. The conduct of the appellant and of her son in all these instances suggests very strongly that the production of all

1949

CHERNENKOFF v. MINISTER OF NATIONAL REVENUE

Cameron J.

the records in their possession would not have been to the appellant's financial interest and that they were deliberately withheld.

The appellant has failed to establish that her taxable income for each of the years in question is not that on which she has been assessed, and her appeal must therefore be dismissed, with costs to be taxed.

Judgment accordingly.