FEDERAL COURT OF APPEAL

BETWEEN

BOBBIE MANN

Appellant

- and –

HIS MAJESTY THE KING

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at (place where Federal Court of Appeal (or Federal Court) ordinarily sits).

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date)

Issued by:_____
(Registry Officer)

Address of local office:_____

TO: Registrar of the Federal Court of Appeal

AND TO: **Attorney General of Canada**
Department of Justice Canada
NCR-Tax Litigation Section
99 Bank Street, 11th Floor
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Counsel for the Respondent

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of B. Russell, J. of the Tax Court of Canada dated October 24, 2023, wherein His Honour allowed the appellant's appeal in part.

THE APPELLANT ASKS that the Court set aside the decision of the His Honor with respect to those matters said to be taxable, with cost of the appeal and that below.

GROUNDS OF THE APPEAL

Subject to the receipt of the transcripts, the grounds of the appeal are as follows:

(i) The Background Facts Prior to Commencement of the Appeal at the Tax Court of Canada

1. The appellant, an employee of some thirty (30) years of Canada Revenue Agency (CRA) was selected for audit of her 2008-2013 of her tax returns. The reason for the audit was that it was said that she was likely involved in criminal activity as it was believed that she was in cahoots with a known drug dealer.

2. The auditor purportedly claimed that he had done a thorough net worth audit which resulted in a re-assessment of $5,540,547 of additional income. The net worth method was used despite the fact that the auditor had all of the records which pertained to the various real estate transactions carried out by the appellant.

3. The appellant filed a notice of objection to the re-assessments. Her objection was allowed by the appeals officer who determined that there was a negative net worth of

$318,271. However, inexplicably, the appellant's counsel received a letter from another taxation office seeking additional information as he had been asked to do a re-audit of the appellant's file. This was said to have been done pursuant to a protocol which had not been met on the facts of the case.

4. That new auditor recommended that the changes be reduced from $5,540,547 to $121,140. The new auditor was of the view that two properties sold in 2012 were appropriately treated as the personal residence of the appellant's daughter and that the appellant could gift to an adult child money of the kind at issue in the case. He also applied a rule of thumb not to recommend a change of up to $10,000, within the context of the facts of this case.

5. The very same appeal officer who initially arrived at a negative amount of $318,271, and had communicated to the appellant this result, now increased the amount to $473,179, which was higher by $352,039 than the recommended amount by the second auditor of $121,140.

6. The appellant notes that a property described as 1225 Mineola Gardens, disposed in 2008 and treated by the appellant as a personal residence was never flagged as an issue, ***before the appellant filed her notice of objection.*** This was raised at the appeal stage in the second round after the objection had been returned to the appeals officer by the second auditor.

(ii) The Evidence Before The Tax Court

7. The appellant testified and as well, her two daughters and her spouse. Their testimonies related to the use of 1225 Mineola Gardens as the personal residence in 2007 and part of 2008 and the circumstances surrounding the residence of one of the daughters in the two properties at issue. The appellant also provided plausible explanations with respect to the unidentified deposits in her bank account said to be income for the years in question.

8. The Respondent presented as a witness the second auditor who confirmed that he was asked to do a re-audit and in his opinion, the appeals officer was wrong in arriving at the negative net worth results. He also testified that he treated the gains on the sale of the two properties said to have been occupied and owned by the appellant's daughter as non-taxable. It was his view that the appellant as a parent could gift to her adult child money as shown in this case. He also repeated the practice of only looking at unexplained amounts in a taxpayer's bank account greater than $10,000 in the year involving a Net Worth as this.

9. He also testified that he was of the view that a Net worth was unnecessary and this he shared with the Appeals Division but they insisted that he continue with the net worth assessment method anyway.

10. As for the issue regarding the use of 1225 Mineola Gardens, as a personal resident of the appellant, he indicated that he had no information regarding that matter.

11. Other helpful evidence was that it was confirmed by the appellant, the two children and the appellant's spouse that the two homes were in fact occupied by the appellant's daughter. In addition, there was documentary evidence to show that the appellant lived at 1225 Mineola Gardens with her children at least up to December 2017 and for some period preceding the sale of disposition of the property in April 2018.

12. The new auditor testified that he could not assist in providing any evidence as to why the year was reopened by the first auditor nor could he give testimony as to why there was a penalty under 163(2) of the *Income Tax Act.*

13. One other important fact is that the auditor indicated that he had not identified in the bank accounts of the appellant any amount which was taxable.

(iii) The Reviewable Errors Committed By The Trial Judge

14. The trial judge committed the following reviewable errors:

(i) The trial judge committed an overriding and palpable error in his misapprehension of a significant aspect of the case which brings into question the entire discourse concerning the appeal. At paragraph 13 of the Reasons, the trial judge stated ***"The appeals officer considered the recommendations of the second auditor, and accepted same, reflected in the subject of March 27, 2017 recommendations"*** . Indeed, the uncontroverted evidence was that the recommendation by the second auditor was that the total change to be re-assessed should be $121,140, but as noted in paragraph 4 above, the appeals officer ignored the recommendations of the second auditor and proceeded to put forward a change of $473,179, which was a difference of $352,039 compared to the said recommendation of the second auditor;

(ii) The trial judge's acceptance that the appellant should have known that not designating 1225 Mineola Gardens as a personal residence was vital and the evidence as revealed during the trial that there was limited activity at the

property in 2008 was sufficient to conclude that the Minister had met the burden of showing that subsection 152(4) of the *Income Tax Act* was met. This constitutes a reviewable error. Indeed, the test is not whether the Appellant should have had a higher level of awareness, but rather, whether she put her mind to the issue. Indeed, what was clear by the ink dedicated to this issue by the trial judge was that there was an arguable case which involved a legal analysis (Reasons, paras 41-64). At issue was a disagreement as between the appellant and CRA, as to whether the gains on the property were taxable. As such there was no basis to conclude that there was carelessness, neglect or willful default as the appellant need not show that she was correct in her belief that the home was her personal residence. The fact is that she resided at the residence and evidence was proffered to prove this. While the trial judge was entitled to not believe her evidence of keeping the home spic and span during the months in 2008 when it was being shown for sale, such was insufficient to conclude that there was no arguable case, which grounded her decision to not report the gain. In any event, as submitted to the trial judge, this was an issue that was raised after she filed a notice of objection;

(iii) The trial judge accepted that the use of the net worth method was appropriate as there was evidence that the taxpayer did not disclose her records and had not co-operated with the auditor or the appeal division. This is a material misapprehension of the evidence and constitutes an overriding and palpable error. Indeed, there was evidence that all the records were available to the auditor to perform an audit without reverting to a net worth method. Of note, the second auditor who testified, alerted the Appeals division that there was no need for a net worth but the was directed to redo the audit using the net worth method anyway. Furthermore, whether the appellant co-operated with the auditor, and more so, the appeals division, was irrelevant as to whether the net worth method was appropriate. This was not a merchandizing business but a rental business, for which all the records were available and in accordance with the testimony of the second auditor, there was sufficient evidence to determine whether there was any unreported income of the appellant's rental business, without reverting to the net worth method;

(iv) The trial judge excused the absence of any pleadings regarding the assumption that the purchase and sale of the two properties in which her daughter resided, was a case of a bare trustee. He did so by referring to case law not raised by neither the Respondent or the appellant. What followed in his Reasons (paras 100-115) is an in-depth legal analysis of resulting trust and the legal principle of rebuttable presumption, which referred to the need for evidence to rebut a resulting trust. Curiously, when dealing with the issue of whether a penalty ought to be imposed, the trial judge, indicated that no such penalty should be imposed given the "legal complexity" that would be involved in determining whether there was a bare trustee or resulting trust situation. In the result, the appellant ***was not placed on*** notice by way of

appropriate pleading that such a ground or assumption would be the basis of this portion of the reassessment;

(v) In addition, the trial judge completely ignored the appellant's arguments that in any event, she was allowed to plan her affairs as she saw fit, including transferring money to her adult children. The trial judge also ignored the appellant's testimony that as a family, they pooled their resources together and thus, the deposits in her personal or joint account were not determinative of whether there had been a gift made to her daughter. The above concerns regarding the bare trustee issue, constitutes reviewable legal errors, misapprehension of the evidence and ignoring critical evidence;

(vi) The trial judge's examination of what he viewed as unexplained or unidentified deposit (2012 &, 2013) was grounded in a much higher test than is required in the context of a net worth assessment. The requirement is that the appellant provides a "creditable" or "plausible explanation" for the unexplained deposits. This is demonstrated by the trial judge's use of words "need corroboration" (Reasons, para 90) of the receipt of $250 for strike pay over a period of time despite the fact that the appellant and her spouse testimonies confirm that strike pay of the $250 was received and deposited into their joint accounts over a time period. Further, the trial judge showed that there was a need for a higher burden of proof, when he refused to accept the appellant's explanation that for 2013, a $5000 deposit was a credit memo and that the amount of $500 was an amount for rent which had been reported on her tax return (Reasons, paras 133-135);

(vii) Furthermore, the trial judge ignored the Crown's witness testimony that form a review of the audit of the bank accounts of the appellant, there were no unidentified deposits which existed as unreported income, and also, the testimony that in a case as this, his rule is that any amount less than $10,000 in a year would ***not be included in income***. These errors constitute a misapprehension, or ignoring evidence and erring in principle by applying the wrong test to be met in the quality of proof of unidentified deposits in a net worth assessment;

(viii) The trial judge refusal to consider the substrata of what is clearly a significant departure from the legitimate expectations of this appellant to be treated in accordance with due process, was a reviewable legal error. The suggestion that procedural fairness or abuse of process has no place in tax law is irreconcilable to due process, and allows persons like this appellant to be crushed by the sheer force and power of the Minister. The facts in this case compel the consideration of how the appellate process was misused against the appellant which would necessitate that she engages another process to seek justice;

(ix) The trial judge completely ignored the thrust of the Appellant's argument that

a net worth assessment was not appropriate. Indeed, the trial judge ignored the submissions of the appellant that indeed, the second auditor indicated in his testimony that he advised the appeals division that a net worth assessment was unnecessary but it was directed that he must continue with it anyway. This is an overriding and palpable error; and

(x) The trial judge committed a reviewable legal error when it excused the Respondent's legal obligation to discharge the onus of proof regarding 152(4) and 163(2) of the ITA. In particular, there was no evidence whatsoever tendered before the trial judge by the Respondent regarding the appellant's culpability. The basic penalty report frequently relied upon to prove that a penalty should be imposed was not tendered. In fact, the witness called by the Respondent was not involved in imposing the penalty pursuant to subsection 163(2) of the ITA. In any event, the conclusion that this appellant was grossly negligent in not reporting unexplained amounts in her bank account or not reporting capital gains from a property she believed was her personal residence, in a closed year, constitutes an error in principle, which is an error of law.

15. Section 27(1) of the *Federal Courts Act;* Rules 337, & 337.1, *Federal Courts Rules.*

16. The Appellant requests that the appeal heard in Toronto, Ontario, Canada.

Date: November 23, 2023.

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FEDERAL COURT OF APPEAL

B E T W E EN:

BOBBIE MANN

Applicant

- and -

HIS MAJESTY THE KING

Respondent

NOTICE OF APPEAL

The address for service upon the Applicant is:

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