Federal Court of Appeal | Cour d'appel fédérale

Date: 20201221

Docket: A-363-19

Citation: 2020 FCA 222

CORAM: **WEBB J.A.**
NEAR J.A.
LASKIN J.A.

BETWEEN:

RALPH ABDEL DEYAB

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on October 8, 2020.

Judgment delivered at Ottawa, Ontario, on December 21, 2020.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Mr. Deyab was reassessed under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) in 2015 to include substantial sums in his income as shareholder benefits for the 2007 to 2011 taxation years. Gross negligence penalties were included in the reassessments. Other than in respect of certain amounts that were agreed upon by the parties, Mr. Deyab's appeal from these reassessments was dismissed by the Tax Court of Canada (Tax Court Docket: 2016-410(IT)G).

[2] For the reasons that follow, I would allow Mr. Deyab's appeal in relation to the assessment of gross negligence penalties and dismiss his appeal in relation to the amounts included in his income.

I. Background

[3] Mr. Deyab is an industrial engineer. For a number of years he worked for Maple Leaf Meats and its predecessor corporations. He eventually became the director of engineering for that company. In 2000, he left the employment of Maple Leaf Meats and he received a severance payment of $1,000,719.

[4] Prior to his leaving Maple Leaf Meats, Mr. Deyab and his spouse incorporated a numbered company for the purpose of carrying on certain engineering consulting work. After he left Maple Leaf Meats, Mr. Deyab, through the numbered company, provided engineering consulting work to Furlani's Food Corporation and Whyte's Food Corporation Inc. starting in 2001.

[5] On December 1, 2005, Mr. Deyab formed M.D. Consulting 2005 Inc. (M.D. Consulting), which is the relevant corporation in this appeal. This corporation continued to carry on consulting work for Furlani's Food Corporation and other clients. Mr. Deyab testified that his net worth in 2000 was approximately $3 million to $4 million. A letter from BMO Harris Private Banking dated November 21, 2014 confirmed that the numbered company, as of September 20,

2005, had a balance in its account of $4,222,542. Mr. Deyab testified that when he started M.D. Consulting, he transferred everything from the numbered company to this company.

[6] During the years 2007 to 2011, various amounts were withdrawn from the account of M.D. Consulting and transferred to Mr. Deyab's personal account or the accounts of his immediate family members, and M.D. Consulting paid certain personal expenses. Mr. Deyab was reassessed to include the following amounts in his income:

Taxation Year	Amount Included in Income
2007	$103,837
2008	$232,212
2009	$212,867
2010	$2,199,746
2011	$115,547

[7] Mr. Deyab was reassessed on the basis that these amounts were benefits that were conferred on him as a shareholder of M.D. Consulting and hence were included in his income under subsection 15(1) of the Act.

[8] For the years 2007 to 2010, the notices of reassessment were issued after the expiration of the normal reassessment period. As well, for each taxation year, gross negligence penalties were assessed under subsection 163(2) of the Act.

[9] At the Tax Court hearing, the parties agreed that certain adjustments should be made to the amounts included in the reassessments. The following table sets out the amounts included in

the reassessments that were issued, the adjustments agreed upon, and the revised amounts that would be reflected in revised reassessments to reflect these agreed upon amounts:

Taxation Year	Amount Reassessed	Adjustment	Revised Amount
2007	$103,837	($82,501)	$21,336
2008	$232,212	($113,200)	$119,012
2009	$212,867	($115,858)	$97,009
2010	$2,199,746	($167,035)	$2,032,711
2011	$115,547	($11,308)	$104,239
Total:			$2,374,307

[10] In addition, Mr. Deyab conceded that he was no longer disputing the inclusion of $24,528 in his income for 2011 related to personal expenses that were paid by M.D. Consulting. As a result, the following amounts that were included in Mr. Deyab's income remained in issue before the Tax Court and this Court:

Taxation Year	Amount in Dispute
2007	$21,336
2008	$119,012
2009	$97,009
2010	$2,032,711
2011	$79,711
Total:	$2,349,779

[11] All of the remaining amounts in dispute were amounts that were transferred from the account of M.D. Consulting to the personal accounts of Mr. Deyab and the members of his immediate family.

II. Decision of the Tax Court

[12] Mr. Deyab does not dispute that he and his family received the amounts indicated above from M.D. Consulting. However it was, and remains, his position that he was simply withdrawing money that he had previously transferred to M.D. Consulting.

[13] At pages 19 - 20 of the transcript of his oral reasons, the Tax Court Judge notes:

> […] It is clear, and admitted by Mr. Deyab, that he received the amounts remaining at issue in this Appeal from M. D. Consulting 2005 Inc. which total in aggregate $2,349,779. It is also clear, and accepted by the Respondent, that Mr. Deyab, and his family, transferred substantial amounts to M. D. Consulting 2005 Inc. before or during the years at issue in these Appeals. In my view, however, Mr. Deyab has not established, on a balance of probabilities, that the amounts he received were a repayment of shareholder loans. There is, in my view, insufficient credible evidence to support that assertion.
>
> Based on all of the foregoing, it is my view that Mr. Deyab received the shareholder benefits remaining at issue in these Appeals totalling $2,349,779 from M.D. Consulting 2005 Inc. in the years under appeal, and that he failed to report such amounts in his income in those years.
>
> Having concluded that Mr. Deyab received amounts totalling $2,349,779 in respect of shareholder benefits he received from M.D. Consulting 2005 Inc. and was required to include the amounts in his income during the taxation years under Appeal, I will next address the issue of subsection 163(2) gross negligence penalties and the reassessment of statute-barred years pursuant to subsection 152(4) in this case.

[14] The “statute-barred years” are those that were reassessed after the expiration of the normal reassessment period for such years.

[15] The evidence that was before the Tax Court Judge included a reconciliation of the shareholders' loan account for M.D. Consulting. It appears that this reconciliation was prepared after Mr. Deyab was reassessed. However, as noted by the Tax Court Judge, this reconciliation did not reflect the substantial withdrawals in excess of $2 million that are in issue in these appeals. Mr. Deyab does not dispute that this reconciliation does not reflect these amounts.

[16] In determining that the Minister of National Revenue (Minister) could reassess the statute-barred years and also assess gross negligence penalties, the Tax Court Judge relied mainly on the decision of this Court in *Lacroix v. Canada*, 2008 FCA 241:

> In my view, the test set out by the Federal Court of Appeal at paragraph 32 of *Lacroix* applies in this case. In this respect, the Minister has clearly established, and the Appellant has admitted, that Mr. Deyab received $2,349,779 from M. D. Consulting 2005 Inc., which he did not report in his income during the taxation years under appeal. In my view, as previously discussed, Mr. Deyab has not provided a credible explanation for the discrepancy between his reported income and those substantial amounts admittedly received by Mr. Deyab from M. D. Consulting 2005 Inc. As a result, it is my view that the Minister has satisfied her onus under both subsections 152(4) and 163(2) of the *Act*.
>
> [page 29 of the transcript of the Tax Court Judge's oral reasons]

III. Issues and Standard of Review

[17] Mr. Deyab raised three issues in his memorandum of fact and law. Mr. Deyab submitted that the Tax Court Judge erred in:

(a) shifting the burden of proof from the Minister to Mr. Deyab in relation to reassessing the statute barred years and assessing gross negligence penalties;

(b) relying on adverse inferences that he drew against Mr. Deyab before the Minister had established a *prima facie* case; and

(c) misapplying the evidence to the legal test in *Lacroix*.

[18] To the extent that this appeal raises any questions of law, the standard of review is correctness. To the extent that this appeal raises any questions of fact or questions of mixed fact and law (for which there is no extricable question of law), the standard of review is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33).

IV. Analysis

[19] At the hearing of this appeal, Mr. Deyab submitted that the critical point in his appeal is the failure of the Tax Court Judge to take into account all the evidence that was before him. This particular point will be considered in relation to the three issues identified by Mr. Deyab in his memorandum of fact and law.

[20] The first two issues will be addressed in relation to the reassessments of the statute-barred years and the third issue will be addressed in relation to the assessment of the gross negligence penalties.

A. *Burden of Proof*

[21] Mr. Deyab's argument that the Tax Court Judge inappropriately shifted the burden of proof to Mr. Deyab, in relation to the reassessments of the statute-barred years, arises from the

sequence in which the Tax Court Judge considered the issues that were before him. At page 4 of the transcript of his oral reasons the Tax Court Judge stated:

> The three issues which were raised in this appeal are as follows:
>
> (a) Whether the Appellant failed to report in his income the aforementioned shareholder benefit amounts the Minister alleges the Appellant received from M.D. Consulting 2005 Inc. in his 2007 through 2011 taxation years;
>
> (b) Whether the Appellant is liable to pay gross negligence penalties in respect of any such unreported income pursuant to subsection 163(2) of the *Act*; and
>
> (c) Whether the Minister was able to reassess the Appellant's 2007, 2008, 2009 and 2010 taxation years beyond the normal reassessment period pursuant to subsection 152(4) of the *Act*.

[22] In his reasons, the Tax Court Judge considered the first issue before he collectively addressed the other two issues. In particular, he noted at page 7 of the transcript of his oral reasons, "I will first address the issue of whether Mr. Deyab received any shareholder benefits from M.D. Consulting 2005 Inc. which he failed to report in the taxation years under appeal".

[23] In this appeal, there is no allegation of fraud. Therefore, in order to reassess the statute-barred years (2007 to 2010), the Minister must prove, on a balance of probabilities, that Mr. Deyab:

> (a) has made a misrepresentation; and
>
> (b) such misrepresentation is attributable to neglect, carelessness or wilful default.
>
> [*Estate of Stanley Vine v. The Queen*, 2015 FCA 125, at para. 24]

[24] In this particular appeal, however, not all of the taxation years that were before the Tax Court were statute-barred. Specifically, the reassessment for 2011 was issued within the normal reassessment period. Therefore, there would not have been an onus of proof on the Minister to establish a misrepresentation that would have permitted the reassessment of the 2011 taxation year.

[25] In listing the issues, the Tax Court Judge should have recognized that for four of the five taxation years that were before him, the Minister had the onus of proving that there was a misrepresentation and that such misrepresentation was attributable to neglect, carelessness or wilful default (there being no allegation of fraud in this case). However, in my view, this did not affect the outcome of the case in relation to the question of whether the statute-barred years could have been reassessed.

[26] It is clear from the evidence that was presented at the hearing that there is no dispute that Mr. Deyab withdrew the amounts in question from M.D. Consulting during the taxation years in issue. There is also no dispute that no shareholders' loan account ledger that accurately reflected the amounts withdrawn was presented to either the auditor for the Canada Revenue Agency (CRA) or the Tax Court.

[27] Subsection 15(1) of the Act provides the general rule that the amount or value of any benefit conferred by a corporation on a shareholder of that corporation is to be included in the income of that shareholder. If a corporation is repaying an amount payable to that shareholder

and records the payment as such, then no benefit would be conferred, and hence, there would be no misrepresentation in not including such amount in the income of the shareholder.

[28] The financial statements for M.D. Consulting included, in the liabilities of that company, amounts “Due to shareholders”. However, although the CRA auditor requested the shareholders’ loan account information for M.D. Consulting during her audit, no such information was provided to the CRA. Mr. Deyab, during his cross-examination, confirmed that M.D. Consulting did not maintain a shareholders’ loan account in its books and records. Since M.D. Consulting did not maintain a shareholders’ loan account during the taxation years in issue, this begs the question of how the amounts due to shareholders were determined. There is nothing in the record that addresses how M.D. Consulting determined the amounts “Due to shareholders” that were reported in its financial statements.

[29] Mr. Deyab did arrange to have a reconciliation of the shareholders’ loan account prepared for the purposes of his objection and appeal. This reconciliation, however, did not reflect the amounts that were withdrawn from M.D. Consulting that are in issue in this appeal.

[30] In this case, there is also a problem in identifying the source of the amounts that were transferred to Mr. Deyab and his family during the years in question. This is best illustrated by the summary prepared by the CRA auditor. The largest transfer in issue was during the 2010 taxation year. Approximately $2 million was transferred to Mr. Deyab and his family from a particular BMO Harris Private Banking Account of M.D. Consulting. In the summary prepared by the CRA auditor, she also noted that there was a contribution of $3 million to this particular

account on June 30, 2010 (which was prior to the transfers to Mr. Deyab and his family that are in dispute for 2010).

[31] The paper trail for the source of the $3 million that was transferred into the account of M.D. Consulting (and that appears to have been used to fund the transfers of approximately $2 million to Mr. Deyab and his family in 2010) does not lead back to Mr. Deyab. The trail simply does not disclose the source of these funds.

[32] The source of this money was identified by the CRA auditor as a particular bank account. This bank account was an account of the numbered company referred to above. The only banking statement for this particular account that is in the record is for the period ending April 30, 2007. The closing balance in this account as of April 30, 2007 was less than $2,000.

[33] As well, according to the BMO Harris Private Banking Statement for the account of M.D. Consulting from which the transfers in issue in this appeal were made to Mr. Deyab and his family in 2010, $3 million was transferred to this account on April 27, 2010 (approximately 2 months earlier than the date noted by the CRA auditor). The source for this $3 million was identified in this statement as a different account than the one identified by the CRA auditor. The only bank statement for the account identified in the BMO Harris Private Banking statement as the source for the $3 million is the statement for the period ending March 30, 2007. This account is also identified as an account of M.D. Consulting. According to this statement, there was less than $70,000 in this account as of March 30, 2007. Neither the trail identified by

the CRA auditor nor the trail disclosed by the BMO Harris Private Banking Statement disclose the source of the $3 million transferred to the account of M.D. Consulting.

[34] The other documents introduced by Mr. Deyab to support his personal contributions to M.D. Consulting also do not provide much assistance. The main documents that Mr. Deyab was relying on are letters from BMO Harris Private Banking. These letters indicate that there was in excess of $4 million in the account for the numbered company as of September 20, 2005, and that there was in excess of $1.5 million in the personal account of Mr. Deyab's family as of November 21, 2014. The snapshot views of amounts in these accounts as of particular dates do not assist in determining when or whether these amounts were transferred to M.D. Consulting. To that end, Mr. Deyab also included a letter from BMO Harris Private Banking dated November 30, 2010 that confirmed that the following amounts were transferred from the account for Mr. Deyab and his family to M.D. Consulting:

- during the fiscal year ending March 31, 2007: $1,150,662
- during the fiscal year ending March 31, 2008: $580,786
- during the fiscal year ending March 31, 2009: $60,000

[35] It would appear from the reconciliation of the shareholders' loan account (which did not include the amounts withdrawn by Mr. Deyab in issue in this appeal) that amounts totalling approximately $4.5 million were included as debits to the shareholders' loan account during the years in issue. The total amount transferred to M.D. Consulting, as set out in this letter, ($1,791,448 = $1,150,662 + $580,786 + $60,000) is less than the amount debited to the shareholders' loan account. Therefore, these transferred funds could not cover the amounts

debited to the shareholders' loan account, without even considering the amounts that were withdrawn by Mr. Deyab that are in issue in this appeal.

[36] In another letter dated September 4, 2014, BMO Harris Private Banking confirmed that the total sum of $3,154,531 "was transferred from personal investment accounts in the name of Ralph, Mona, Waleed, Tamer and Hany Deyab to various personal accounts in the same names and corporate accounts in the name of MD Consulting 2005 Inc. These transfers took place from the period beginning January 1, 2007 to March 31, 2011."

[37] This letter unfortunately is lacking in details concerning when the amounts were transferred and to whom the amounts were transferred. Since the letter indicates that the amounts were transferred to other accounts in the names of the individuals and to the corporate accounts for M.D. Consulting, it is not possible to determine what portion of the approximately $3 million was transferred to M.D. Consulting.

[38] During the hearing of this appeal, Mr. Deyab emphasized that there was no dispute that he transferred substantial sums to M.D. Consulting. He argued that this was evidence that was not considered by the Tax Court Judge. However, the details concerning the exact amounts transferred and the timing of the transfers are missing. The Act requires a specific amount in order to calculate a taxpayer's income, not a general and vague description of uncertain amounts. Simply stating that he transferred unspecified substantial amounts to M.D. Consulting is not sufficient to support a finding that Mr. Deyab was repaying amounts that were payable to him when he withdrew the amounts in issue.

[39] It is also clear that Mr. Deyab did not maintain a shareholder loan account for M.D. Consulting that accurately included the amounts in issue, and that even the reconciliation that was completed for the purposes of his objection and appeal did not include the substantial transfers from M.D. Consulting to Mr. Deyab and his family that are the subject of this appeal.

[40] As a result, while the Tax Court Judge should have first acknowledged that the onus was on the Minister to establish the facts that would justify the reassessments issued for the statute-barred years, there was sufficient evidence before the Tax Court Judge for him to conclude that the Minister had satisfied this onus. Mr. Deyab had made a misrepresentation in his tax returns for 2007 to 2010 by not reporting the amounts that were transferred to him and his family by M.D. Consulting, which, based on the evidence as presented, were not, on a balance of probabilities, repayments of amounts due to him. This misrepresentation was attributable to the neglect or carelessness of Mr. Deyab in not properly maintaining a shareholders' loan account that perhaps could have justified the payment of the amounts to him as repayment of his shareholder's loan.

[41] Maintaining a proper shareholders' loan account would ensure that there is an accurate accounting for all amounts lent by a shareholder to the corporation and repaid by that corporation. This would ensure that amounts that are properly repaid to a shareholder as amounts payable to that shareholder are not included in that shareholder's income as a taxable benefit. In this case, failing to do so has resulted in a considerable tax liability to Mr. Deyab that perhaps could have been avoided.

[42] As a result, Mr. Deyab cannot succeed on this ground of appeal in relation to the reassessments issued for the statute-barred years.

B. *Adverse Inference*

[43] In describing the adverse inferences made by the Tax Court Judge, Mr. Deyab, in paragraph 5 of his memorandum, states:

> […] The Judge concluded that the amounts he received from MD were taxable. In so concluding, the Judge drew adverse inferences against Mr. Deyab for not providing the Court with a properly reconciled shareholder loan account and for not calling any of his tax professionals to the hearing.

[44] With respect to the reconciliation that was prepared, the Tax Court Judge noted, at page 15 of the transcript of his oral reasons:

> While it purports to provide a detailed reconciliation of the corporation's shareholder loan account, I note that it critically does not reflect the substantial withdrawals in excess of $2 million that are at issue in these appeals. As a result, it is my view that this document is unreliable, and I have placed little weight on it. As discussed further below, it is my view that this document also critically undermines the credibility of Mr. Deyab's testimony and his assertions.

[45] The Tax Court Judge then noted that the various banking statements would be available to Mr. Deyab and his accountants but Mr. Deyab did not call his accountant or his bookkeeper as a witness. The Tax Court Judge also noted that during the period following the issuance of the letters from the CRA to Mr. Deyab proposing the adjustments to his income to the time of the hearing of the appeal before the Tax Court (almost 4.5 years) Mr. Deyab did not provide an

accurate shareholders' ledger account for M.D. Consulting. With respect to the adverse inference he stated, at page 16 of the transcript of his oral reasons:

> I have drawn an adverse inference from the absence of such available evidence which may have supported Mr. Deyab's testimony and assertions. The absence, in particular, of a credible shareholder's reconciliation, in the face of substantial available financial records, in my view, critically undermines the credibility of Mr. Deyab's testimony and assertions.

[46] In Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (LexisNexis Canada Inc., 2018) at §6.471 - §6.472, the situations in which an adverse inference can be drawn are set out:

> §6.471 In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.
>
> §6.472 An adverse inference should be drawn only after a *prima facie* case has been established by the party bearing the burden of proof.

[47] The only objection set out in Mr. Deyab's memorandum to the drawing of an adverse inference by the Tax Court Judge is the alleged failure of the Minister to first establish a *prima facie* case that Mr. Deyab had made a misrepresentation that was attributable to neglect or carelessness. In this case, substantial sums were transferred from M.D. Consulting to Mr. Deyab and his family which were not included in his income and were not reflected in the shareholders'

loan account. The Minister had, therefore, established a *prima facie* case that Mr. Deyab had made a misrepresentation in not including these amounts in his income for the years in question.

[48] As a result, there is no basis to interfere with the drawing of an adverse inference against Mr. Deyab for failing to call his accountant or bookkeeper, or presenting a properly completed shareholders' loan account reconciliation.

C. *The Application of Lacroix*

[49] I agree with Mr. Deyab that the Tax Court Judge erred in applying this Court's decision in *Lacroix* to the facts of this case. It is evident from reading the Tax Court Judge's reasons that he effectively addressed the issues of whether the Minister could reassess the statute-barred years and whether gross negligence penalties could be assessed collectively. He concluded, as noted in the excerpt from the oral reasons quoted at paragraph 16 above, that "the Minister has satisfied her onus under both subsections 152(4) and 163(2) of the *Act*".

(1) The Decisions of this Court and the Tax Court in *Lacroix*

[50] That the facts of a particular case may support both the reassessment of statute-barred years and the assessment of gross negligence penalties is based on the comments of this Court at paragraph 32 of *Lacroix*:

> [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) [*sic*].

[51] This Court in *Lacroix* was simply confirming that in the circumstances of that case, which was a reassessment based on a net worth analysis, the same facts may support both a finding that statute-barred years may be reassessed and that gross negligence penalties could be assessed. The Court was not stating that this would always be the case. The facts of each case must be examined to determine if the distinct statutory requirements for reassessing statute-barred years and assessing gross negligence penalties are satisfied.

[52] In *Lacroix*, this Court also noted:

> [30] The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts, and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanation he gave was found not to be credible. In those circumstances, the conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence, is inescapable. This justifies not only a penalty, but also a reassessment beyond the statutory period.
>
> [emphasis added]

[53] In *Lacroix*, the taxpayer was arguing that he had received a loan of $500,000 from another individual and therefore the net worth analysis was not accurate. In rejecting this argument, the Tax Court Judge in *Lacroix* (2007 TCC 376) noted:

> [20] My analysis of the evidence leads me to find that it is more likely than not that these loans never existed and that the notes (Exhibit A-4), the request for repayment (Exhibit A-8) and the cheques made out to Mr. Pronovost were merely a sham to hide the truth. Accordingly, it is difficult to arrive at any other conclusion than that the appellant deliberately failed to report $516,000 in income. In my opinion, the Minister has discharged the burden of proof on him and was therefore entitled to impose penalties under subsection 163(2) of the Act on the appellant's unreported income. Since the Minister's burden of proof is less under subsection 163(2) of the Act than under subsection 152(4), I am also of the opinion that the Minister was entitled to make reassessments.

[54] The reference to the Minister's burden of proof being "less under subsection 163(2) of the Act than under subsection 152(4)" would appear to be a typographical error. The Minister's burden of proof in relation to both the assessment of gross negligence penalties and the reassessment of statute-barred years is to establish, on a balance of probabilities, the relevant facts based on the statutory requirements for each provision. The logic of the sentence (i.e. that nothing further need be said to justify the reassessment of statute-barred years) confirms that the Tax Court Judge understood that once the finding was made that the documents were a sham and that the taxpayer, in that case, "deliberately failed to report $516,000 in income", this finding would also support the reassessment of the statute-barred year on the basis that there was a misrepresentation of his income that was attributable to wilful default.

[55] In *Lacroix*, the finding of the Tax Court was that the documents that purported to support a loan were a sham and that Mr. Lacroix "deliberately failed to report $516,000 in income".

In Mr. Deyab's case, there was evidence that significant amounts had been transferred to M.D. Consulting and there is no suggestion that any documents were a sham.

(2) Gross Negligence Penalties versus Reassessing a Statute-barred Year

[56] Subsection 163(3) of the Act provides that for any penalty assessed under subsection 163(2), "the burden of establishing the facts justifying the assessment of the penalty is on the Minister". With respect to how the Minister could satisfy his or her onus of proof, the Minister could introduce evidence by cross-examining the taxpayer or by calling the taxpayer as a witness (Rule 146 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a). The Minister could also call other witnesses, although generally the person with the most knowledge of the taxpayer's affairs is the taxpayer. In this case, Mr. Deyab testified and the Minister had an opportunity to cross-examine him.

[57] It is important to recognize that the statutory requirements for reassessing a statute-barred year are not the same as the statutory requirements for assessing gross negligence penalties. While there may well be cases where the same facts could justify both the reassessment of a statute-barred year and the assessment of gross negligence penalties, it will not necessarily always be the case.

[58] The right to reassess a statute-barred year is set out in paragraph 152(4)(a) of the Act. Unless a waiver has been filed by the taxpayer within the prescribed period of time, the Minister may only reassess a taxpayer in relation to a statute-barred year if "the taxpayer or person filing the return (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful

default or has committed any fraud in filing the return or in supplying any information under this Act […]".

[59] The requirements for reassessing a statute-barred year are met if the misrepresentation is attributable to neglect or carelessness, without the need to consider whether the misrepresentation was attributable to wilful default or whether the taxpayer committed fraud (which in and of themselves could also justify the reassessment of a statute-barred year).

[60] By contrast, penalties can only be assessed under subsection 163(2) if the conduct of the taxpayer amounts to gross negligence: "Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return […]" is liable to the penalty imposed under this subsection.

[61] Neglect or carelessness should not be confused with gross negligence.

[62] In *Guindon v. Canada*, 2015 SCC 41, the Supreme Court of Canada addressed the issue of whether particular conduct was culpable conduct for the purposes of the preparer penalty imposed under section 163.2 of the Act. The Supreme Court, in addressing that issue, endorsed the following descriptions of gross negligence for the purposes of subsection 163(2) of the Act:

> [59] The expressions "shows an indifference as to whether this Act is complied with" and "tantamount to intentional conduct" originated in the jurisprudence on the gross negligence penalty applicable directly to taxpayers in s. 163(2) of the *ITA*, which states:

> (2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of . . . . [Penalty calculations omitted.]

[60] The Minister states in her factum that "culpable conduct" in s. 163.2 of the *ITA* "was not intended to be different from the gross negligence standard in s. 163(2)": para. 79. The Federal Court in *Venne v. The Queen*, [1984] C.T.C. 223 (T.D.), in the context of a s. 163(2) penalty, explained that "an indifference as to whether the law is complied with" is more than simple carelessness or negligence; it involves "a high degree of negligence tantamount to intentional acting": p. 234. It is akin to burying one's head in the sand: *Sirois (L.C.) v. Canada*, 1995 CarswellNat 555 (WL Can.) (T.C.C.), at para. 13; *Keller v. Canada*, 1995 CarswellNat 569 (WL Can.) (T.C.C.). The Tax Court in *Sidhu v. R.*, 2004 TCC 174, [2004] 2 C.T.C. 3167, explaining the decision in *Venne*, elaborated on expressions "tantamount to intentional conduct" and "shows an indifference as to whether this Act is complied with":

> Actions "tantamount" to intentional actions are actions from which an imputed intention can be found such as actions demonstrating "an indifference as to whether the law is complied with or not". . . . The burden here is not to prove, beyond a reasonable doubt, mens rea to evade taxes. The burden is to prove on a balance of probability such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense. [para. 23]

[63] Conduct that would justify the assessment of a gross negligence penalty is conduct that is tantamount to intentional acting. Conduct that would be tantamount to intentional acting to avoid the payment of taxes on money that is withdrawn from a corporation is different from careless or neglectful conduct that results in a person being taxed for receiving a benefit from that corporation in statute-barred years.

(3) The Tax Court Judge's Errors

[64] In confirming the reassessment of the statute-barred years and the assessment of the penalties under subsection 163(2) of the Act in this case, the Tax Court Judge noted, in the paragraph immediately following the excerpt quoted in these reasons at paragraph 16 above:

> Based on *Lacroix*, once the Minister has established with reliable evidence a substantial discrepancy with reported income, which has not been credibly explained, the taxpayer must then identify the source of the income and show that is not taxable. In my view, the Appellant did not do so in this case for the reasons previously discussed.
>
> [emphasis added]

[65] However, if Mr. Deyab would have "[identified] the source of the income and [shown] that it was not taxable", then the amounts would not have been included in his income at all. Not only would there not be any penalties, there would be no tax payable. Simply finding that an unreported amount is taxable does not inevitably lead to a conclusion that a gross negligence penalty is justified. The Tax Court Judge effectively equated the test for determining whether a gross negligence penalty should be assessed with the test for determining whether the amounts were taxable. In my view, the Tax Court Judge erred in doing so.

[66] The right to reassess a statute-barred year and the right to assess a gross negligence penalty are both premised on a taxpayer having unreported income for a particular taxation year. Once it has been established that a taxpayer had unreported income, the circumstances related to the failure to report the income must be examined to determine if such failure was attributable to

neglect, carelessness, wilful default or fraud (to reassess a statute-barred year) or gross negligence (to justify the assessment of the gross negligence penalty).

[67] It appears that the Tax Court Judge was basing his reading of *Lacroix* on the following statement by this Court in paragraph 32 of *Lacroix*:

> […] 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) [*sic*].

[68] However, these comments must be read in light of the case that was before this Court in *Lacroix*. In paragraph 30, this Court noted:

> [30] The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts, and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanation he gave was found not to be credible. In those circumstances, the conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence, is inescapable. This justifies not only a penalty, but also a reassessment beyond the statutory period.

[69] In the circumstances of *Lacroix*, the failure to provide a credible explanation was sufficient to justify the assessment of the gross negligence penalty and the reassessment of the statute-barred years. The comments of this Court in *Lacroix* do not support the conclusion that, in order to set aside a gross negligence penalty, “the taxpayer must […] identify the source of the income and show that is not taxable”.

[70] The Tax Court Judge, at page 30 of his oral reasons, also stated:

> […] Mr. Deyab's failure to report the shareholder benefits at issue in this appeal were attributable to both neglect and carelessness. Given the amounts of shareholder benefits which Mr. Deyab admittedly knew he received, and knowingly did not report, it is also my view that he did not report the shareholder benefits at issue in these Appeals both knowingly and in circumstances amounting to gross negligence.
>
> [emphasis added]

[71] Since Mr. Deyab's position, which he maintained throughout the Tax Court hearing and in this appeal, was that he was simply repaying himself amounts that he had previously advanced to M.D. Consulting, there is no basis for the conclusion that Mr. Deyab "admittedly knew he received" shareholder benefits. Mr. Deyab knew he was withdrawing funds from M.D. Consulting but since, in his view, these were simply amounts that were payable to him, it does not lead to the conclusion that he admittedly knew he was receiving shareholder benefits. There is no basis for the conclusion that Mr. Deyab admittedly knew that he was receiving shareholder benefits. This conclusion formed the foundation for the Tax Court Judge's finding that the gross negligence penalties should be confirmed. Therefore, the Tax Court Judge made a palpable and overriding error in reaching this conclusion.

[72] As a result, the issue of whether the gross negligence penalties could be assessed will be considered based on the record.

(4) Should the Assessment of the Gross Negligence Penalties be Confirmed?

[73] In *Lacroix*, at paragraph 28, this Court quoted the following passage from the decision of Justice Bowman in *Farm Business Consultants Inc. v. Her Majesty the Queen*, [1994] 2 C.T.C. 2450, 95 D.T.C. 200:

> 27 A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). Conduct that warrants reopening a statute-barred year does not automatically justify a penalty and the routine imposition of penalties by the Minister is to be discouraged ... . Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted ...

[74] In the case that is before us, the Tax Court Judge acknowledged that substantial sums had been transferred by Mr. Deyab to M.D. Consulting. The concern in this case related to the record keeping, and, in particular, to the failure of M.D. Consulting to properly record all of the transactions between that company and Mr. Deyab (and his family). It is possible that the amounts that were transferred to M.D. Consulting exceeded the personal expenses paid by M.D. Consulting and the amounts withdrawn, and that the withdrawals, if properly recorded, were a repayment of the amounts payable to Mr. Deyab. The question is then whether, in the circumstances of this case, the assessment of gross negligence penalties should be confirmed.

[75] One critical piece of evidence that, in my view, was not considered by the Tax Court Judge in confirming the assessment of the gross negligence penalties was the evidence that M.D. Consulting had lost money in each and every taxation year. As part of its review of this matter, the CRA prepared a summary of the losses of M.D. Consulting for its taxation years ending

March 31, 2007 to March 31, 2011. For its first taxation year ending March 31, 2006, the summary discloses that no revenue or expenses were recorded for that year. The losses as shown on this summary are as follows:

Taxation Year Ending:	**(Loss)**
March 31, 2007	($74,952)
March 31, 2008	($126,923)
March 31, 2009	($517,986)
March 31, 2010	($249,859)
March 31, 2011	($158,158)
Total:	($1,127,878)

[76] With losses in excess of $1 million, the obvious question is: how could M.D. Consulting have sourced the funds transferred to Mr. Deyab and his family? Clearly, any amounts transferred to them were not from the profits realized by M.D. Consulting. The fact that M.D. Consulting incurred losses throughout its corporate history supports a viable and reasonable hypothesis that M.D. Consulting could have been simply repaying Mr. Deyab amounts that he had previously advanced to M.D. Consulting. There was no other identified source for these funds.

[77] Mr. Deyab's failure to maintain proper records that might have established that M.D. Consulting was repaying amounts payable to him (if such amounts had been properly recorded) does not establish that his failure to include the amounts withdrawn in his income demonstrated "a high degree of negligence tantamount to intentional acting" or that he was indifferent as to whether he complied with the Act. Mr. Deyab's failure to include the amounts reassessed in his income, in the circumstances of this case, did not amount to gross negligence.

[78] I would allow the appeal in relation to the assessment of the gross negligence penalties.

V. Conclusion

[79] Subsequent to the hearing, the parties notified the Court that if Mr. Deyab was partially successful then the parties agreed that no costs should be awarded in either this Court or the Tax Court.

[80] As a result, I would allow the appeal, without costs, with respect to the assessment of the gross negligence penalties but otherwise dismiss Mr. Deyab's appeal. I would, therefore, set aside the Judgment issued by the Tax Court and render the following judgment (which reflects the amounts as agreed upon by the parties at the Tax Court hearing and the deletion of the gross negligence penalties):

> The appeals from the reassessments made under the Act for Mr. Deyab's 2007, 2008, 2009, 2010 and 2011 taxation years are allowed, without costs, and the reassessments are referred back to the Minister for reconsideration and reassessment on the basis that:
>
> (a) Mr. Deyab's 2007 taxable income be reduced by $82,501;
>
> (b) Mr. Deyab's 2008 taxable income be reduced by $113,200;
>
> (c) Mr. Deyab's 2009 taxable income be reduced by the amount of $115,858;
>
> (d) Mr. Deyab's 2010 taxable income be reduced by $167,035;

(e) Mr. Deyab's 2011 taxable income be reduced by $11,308;

(f) the amount of applicable interest should be consequently reduced in respect to the foregoing paragraphs (a) to (e);

(g) all of the penalties assessed under subsection 163(2) of the Act be deleted; and

(h) Mr. Deyab's appeal is dismissed in all other respects.

"Wyman W. Webb"
J.A.

"I agree
D. G. Near J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED JUNE 27, 2019, DOCKET NO. 2016-410(IT)G

DOCKET:	A-363-19
STYLE OF CAUSE:	RALPH ABDEL DEYAB v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	OCTOBER 8, 2020
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. LASKIN J.A.
DATED:	DECEMBER 21, 2020

APPEARANCES:

Joseph G. LoPresti	FOR THE APPELLANT
Dominique Gallant	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LoPresti Law Toronto, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT