Docket: 2012-1409(IT)G

BETWEEN:

ANDRÉ MALLETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 2, 2015, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the Appellant:	Jeff Kirshen Jason C. Rosen
Counsel for the Respondent:	Craig Maw

JUDGMENT

For the attached reasons for judgment, the appeal from the assessment made under the *Income Tax Act* for the 2008 taxation year is dismissed.

The Respondent is entitled to her costs if she wants them.

Signed at Kingston, Ontario, this 27th day of January 2016.

"Rommel G. Masse"

Masse D.J.

Citation: 2016 TCC 27
Date: 20160127
Docket: 2012-1409(IT)G

BETWEEN:

ANDRÉ MALLETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

Overview

[1] André Mallette is appealing the penalty for gross negligence that was imposed on him pursuant to subsection 163(2) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the "Act") in relation to his 2008 taxation year and a related request for loss carryback to the 2005, 2006 and 2007 taxation years. Tax preparers known as Fiscal Arbitrators ("FA") prepared his tax return in such a way as to claim very large fictitious business losses amounting to more than $520,000. These business losses, if allowed, would result in the refund to the Appellant of all or practically all the taxes paid by him or deducted at source for the 2005, 2006, 2007 and 2008 taxation years. The fact is that these claimed business losses never existed. The Canada Revenue Agency (the "CRA") disallowed the losses and penalized the Appellant pursuant to subsection 163(2) of the Act. This case pertains only to the penalties that were imposed.

Factual Context

[2] André Mallette resides in Gatineau, Quebec. He attended the CEGEP program in Quebec and then attended the University of Toronto obtaining a bachelor of science degree in forestry in 1980. This is ordinarily a four-year program, but he obtained credits for his CEGEP studies thus permitting him to

complete his university degree in three years. After graduation, he began working in the pulp, paper and forestry industry. He was known to be a self-starter and could work independently. He held several important positions starting as a logging foreman, progressing through to procurement of fibre materials and project manager in charge of wood scaling operations for five different mills. This was a middle management position that involved working with budgets, resource allocation and cost follow-up. He was responsible for many employees, perhaps as many as 95 at a time. He was resilient enough to survive several corporate reorganizations while others around him fell by the wayside. He continued working in this industry for 28 years up until the end of May 2008 when he was terminated by his then employer, AbitibiBowater, as a result of restructuring. He was 51 years old at the time. Before he was terminated, he was resourceful enough to establish himself in a forestry consulting business and he incorporated himself under the name of Casoma Forest Management Inc. This enterprise continued on after his termination. The Appellant testified that he has taken no courses in taxation or accounting, but he has taken courses in economics. He is no stranger to tax return preparation since he was the one who completed and filed his own tax returns between 1980 and 2006.

[3] The Appellant testified that he was introduced to Philippe Joanisse some time in 2007 through his personal trainer. Mr. Joanisse is the national sales director for an organization called Frieslander Financials ("FF"). FF are purportedly experts at financial opportunities and tax deferrals. Mr. Joanisse was doing a lot of multi-marketing opportunities at that time as a sideline. The Appellant became friends with Mr. Joanisse and they socialized on frequent occasions.

[4] Mr. Joanisse convinced the Appellant to invest in certain opportunities. Some of these opportunities involved investments in gold and oil which could produce a return on investments of up to 30%. These investment opportunities were somehow linked up with using the services of FA, who were described as tax specialists from Toronto who used to work for the CRA. In order to take advantage of these investment opportunities promoted by Mr. Joanisse, the Appellant had to use the services of FA. The money to be saved through using the services of FA would be used to finance the investments promoted by Mr. Joanisse.

[5] The Appellant attended presentations given by Mr. Joanisse regarding FA. These presentations were meant to explain a tax savings scheme that would result in maximized refunds. The Appellant understood that he could claim all his personal expenses so as to offset revenues based on some theory of principal and agent. He understood that an individual could be split into two entities for tax

purposes — André Mallette, the natural person who is the agent, and André Mallette, a fictional entity created by his social insurance number who is the principal. The agent generates revenues for the principal and the agent can deduct the expenses that were used to generate these revenues. Apparently, these expenses are all in the nature of the Appellant's personal expenses that are spent to allow André Mallette, the principal, to earn revenues. The Appellant agrees that he was both the principal and the agent. The Appellant agrees that this was not any kind of a business relationship. FA charged an initial fee of $500 and the Appellant was also to pay to FA 20% (less the initial $500) of any tax refunds received by him. The Appellant recognized that FA were proposing a scheme that would result in not paying any income taxes over four years and there was even a possibility of being able to extend this tax holiday for 10 years back. He stated that at the time it all made sense to him to claim a large business loss on his tax return that he never even incurred. Describing this deduction as a business loss was the only way the CRA would accept it since the tax return forms did not permit of any other kind of description. The Appellant did not know who FA were and he had never heard of them before. He did some Internet searches on both FA and FF and he did not find anything negative so he assumed that they were on the level. However, he never did seek the advice of a tax accountant, a tax lawyer or the CRA regarding the legitimacy of this tax savings scheme.

[6] His 2008 tax return was prepared by FA and sent to Mr. Joanisse at FF to be presented and reviewed with the Appellant. Exhibit R-1, Tab 2, is the Appellant's 2008 tax return dated May 27, 2009. The Appellant agrees that when he got the completed tax return, he was supposed to look at it and he did look at it. Therefore, I find that he has knowledge of its contents. In this return, he reported employment income of $109,120.02, other income of $62,483.75 (which he describes as severance pay), additional money collected as "agent for principal not reported by third parties" in the amount of $30,865.75. The Appellant admits that this was money that he never even earned and never received. This resulted in business income described as "total money collected as agent for principal" in the amount of $202,342.13 (statement of agent activities, Exhibit R-1, Tab 1). He claimed business expenses amounting to $551,729.13 described as "amount to principal in exchange for labour". This resulted in net business losses in the amount of $520,863.38 reported at line 135 of his return. The Appellant stated that this was the amount that FA told him he could claim back as expenses. He does not explain nor does he even know how this amount was calculated. He never provided FA with any kind of an itemized list of expenses so it is incomprehensible to me how FA could have come up with expenses of more than half a million dollars. The Appellant used $163,325.38 of these business losses against his 2008 tax return.

He also signed a request for loss carryback (Exhibit R-1, Tab 3) wherein he requested that the unused balance of these business losses be carried back to 2005, 2006 and 2007 as non-capital losses and be applied against his income of those years. It is clear to me that this fiscal "sleight of hand" would result in the Appellant having to pay no taxes from 2005 through to 2008 — a most astounding result.

[7] It is obvious that this tax return contains some blatantly false information. The Appellant never earned income of $30,865.75 as "agent for principal", yet he reported this as earned income. The Appellant never incurred expenses, described as "amount to principal in exchange for labour", or any expenses of any nature at all during that year amounting to more than half a million dollars. This is a huge falsehood. There was no business enterprise at all between the agent and the principal. There was no exchange of money at all between the agent and the principal, nor could there be since the agent and the principal were one and the same person. On the first page of the return, the Appellant is described as single; in fact he was married. All the foregoing information is patently false, yet the Appellant admits that he signed the return on the last page thus certifying that the information contained in the return was correct, complete and fully disclosed all his income.

[8] FA made some unusual requests of the Appellant in relation to his tax return. The word "per" had to appear before the Appellant's signature anywhere he signed. The Appellant knows that this means he was not signing on his own behalf but on behalf of someone else — yet this was his own personal tax return, not anyone else's. He did not receive any explanation as to why he had to do this. He had to write his name in block letters on the statement of agent activities and it had to be in blue ink. He did not receive any explanation as to why he had to do this. The Appellant was simply told that FA had prepared the return that way and that is the way it had to be in order for the tax savings scheme to work. In addition, FA suggested that the Appellant not provide the CRA with his phone number, that he not speak directly with the CRA, that he refer all correspondence received from the CRA to FA, that he not file electronically and that he not take advantage of direct deposit of refunds. One has to wonder why?

[9] The Appellant knew that he was going to get a refund of about $21,400 for 2008, and that he could expect a total refund of $178,235.26 over the four years from 2005 through to 2008 (Exhibit A-1, Tab 67) — a considerable sum of money. He actually did receive a refund cheque for 2008 in the amount of about $25,500. The Appellant wrote a cheque to FA for 20% of this refund (less $500) and he

gave FF the remainder to be invested. These investments were not fruitful. FF has since gone out of business and the Appellant has since lost everything.

[10] The CRA sent a letter dated April 7, 2010 (Exhibit R-1, Tab 4) to the Appellant seeking further information from him in relation to his claimed business losses of $520,863.38 for 2008. The CRA required the completion of a business questionnaire and also the production of source documents that would establish the claimed business expenses. On September 8, 2010, the CRA sent another letter (Exhibit R-1, Tab 5) to the Appellant advising of its intention to disallow the claimed business losses and also advising of the likely imposition of penalties pursuant to subsection 163(2) of the Act. This letter was forwarded to Mr. Joanisse. Either Mr. Joanisse or FA drafted a response for him. This response (Exhibit R-1, Tab 6, and Exhibit A-1, Tab 19) made no sense at all, not even to the Appellant. He testified that he read it over three times when he got it and he still does not know what it meant, yet, it was sent in to the CRA unsigned. It was completely non-responsive to the concerns raised by the CRA.

[11] The CRA never did receive the information requested. The CRA subsequently disallowed the business losses and assessed the Appellant accordingly. The CRA also assessed penalties under subsection 163(2) of the Act. The Appellant objected to this assessment, but the assessment was confirmed, hence the appeal to this Court.

[12] The Appellant takes the position that he is the innocent victim of a fraudulent tax scheme concocted by Mr. Joanisse and FA that has cost him dearly. He, at all times, put his trust and confidence in Mr. Joanisse whom he had known and trusted for 18 months. He did not knowingly, or in circumstances amounting to gross negligence, sign a tax return that was incorrect or contained false information. The Appellant therefore prays that the appeal be allowed and that the matter be referred back to the Minister of National Revenue (the "Minister") for reassessment on the basis that the penalties imposed pursuant to subsection 163(2) are not appropriate in the circumstances.

[13] The Respondent submits that the Appellant's 2008 tax return contained false information of such a magnitude that, if allowed, would result in the refund of all taxes withheld or paid from 2005 through to 2008. The Respondent submits that the Appellant knew these statements to be false. In the alternative, the Appellant made, assented to or acquiesced in the making of, these false statements in circumstances amounting to gross negligence. At the very least, the Appellant was wilfully blind regarding the falseness of the statements contained in his tax return

and related request for loss carryback. The Respondent urges this Court to dismiss the appeal with costs.

Legislative Dispositions

[14] Subsection 163(2) of the Act reads in part as follows:

> 163(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 . . .

[15] According to subsection 163(3), the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

Analysis

[16] Our system of taxation is both self-reporting and self-assessing. It relies on the honesty and integrity of the individual taxpayer. It is the taxpayer's duty to report his taxable income completely, correctly and accurately no matter who prepares the return. Therefore, the taxpayer must be vigilant in ensuring the completeness and accuracy of the information contained in his return. Justice Martineau stated in *Northview Apartments Ltd. v. Canada (Attorney General)*, 2009 FC 74, at paragraph 11: "It is the essence of our tax collection system that taxpayers are sole responsible for self-assessment and self-reporting to the CRA."

[17] In the matter of *R. v. Jarvis*, 2002 SCC 73, Justices Iacobucci and Major of the Supreme Court of Canada explained the responsibilities and duties of taxpayers as well as some of the measures in the Act designed to encourage compliance:

> 49 Every person resident in Canada during a given taxation year is obligated to pay tax on his or her taxable income, as computed under rules prescribed by the Act (ITA, s. 2 . . .). The process of tax collection relies primarily upon taxpayer self-assessment and self-reporting: taxpayers are obliged to estimate their annual income tax payable (s. 151), and to disclose this estimate to the CCRA in the income return that they are required to file (s. 150(1)). . . . Upon receipt of a taxpayer's return, the Minister is directed, "with all due dispatch", to conduct an examination and original assessment of the amount of tax to be paid or refunded, and to remit a notice of assessment to this effect (ss. 152(1) and 152(2)). Subject to certain time limitations, the Minister may subsequently reassess or make an additional assessment of a taxpayer's yearly tax liability (s. 152(4)).

> 50 While voluntary compliance and self-assessment comprise the essence of the ITA's regulatory structure, the tax system is equipped with "persuasive inducements to encourage taxpayers to disclose their income" . . . . For example, in promotion of the scheme's self-reporting aspect, s. 162 of the ITA creates monetary penalties for persons who fail to file their income returns. Likewise, to encourage care and accuracy in the self-assessment task, s. 163 of the Act sets up penalties of the same sort for persons who repeatedly fail to report required amounts, or who are complicit or grossly negligent in the making of false statements or omissions.
>
> 51 It follows from the tax scheme's basic self-assessment and self-reporting characteristics that the success of its administration depends primarily upon taxpayer forthrightness. As Cory J. stated in *Knox Contracting*, *supra*, at p. 350: "The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed." It is therefore not surprising that the Act exhibits a concern to limit the possibility that a taxpayer may attempt "to take advantage of the self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act" . . . .
>
> [Emphasis added. Citations omitted.]

[18] The penalties provided for in section 163 of the Act have been conceived in order to ensure the integrity of our self-assessing and self-reporting system and to encourage a taxpayer to exercise care and accuracy in the preparation of his return, no matter who prepares the return. In *Sbrollini v. The Queen*, 2015 TCC 178, Justice Boyle of this Court was of the view that the penalty provisions set out in subsection 163(2) of the Act reflect:

> 15 . . . the significance and importance of the requirements of honesty and accuracy in the Canadian self-reporting income tax system. . . .
>
> 16 Such penalties are properly payable . . . if [a taxpayer] knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in, the making of false statements or omissions in his returns.

[19] Therefore, the decision of whether or not a taxpayer should be subjected to the penalties under subsection 163(2) of the Act should be considered in light of the responsibilities and duties of the taxpayer to accurately and completely report his income in a self-reporting and self-assessing system.

[20] There are two necessary elements that must be established in order to find liability for subsection 163(2) penalties:

(a) a false statement in a return, and
(b) knowledge or gross negligence in the making of, participating in, assenting to or acquiescing in the making of, that false statement.

[21] There can be no question that the Appellant's 2008 tax return and his request for loss carryback contained false statements — he did not have business expenditures exceeding half a million dollars! This is the most blatant of the falsehoods contained in his return. His claim for business losses has no foundation in fact and is patently false.

[22] It is clear from the evidence that the Appellant did review his return and therefore he is aware of its contents. He knew that he did not have any business expenditures of such a huge magnitude and he knew that this information was simply not true. This in and of itself justifies the imposition of penalties pursuant to subsection 163(2) of the Act for knowingly making, participating in, assenting to or acquiescing in the making of, a false statement. Even if he honestly believed that the tax savings scheme conceived by FA was legitimate, which obviously it is not, then he still knew that he did not incur anywhere near half a million dollars in any kind of expenses that year. He never supplied FA with any information that would allow the calculation of such an amount of expenditures. He knew therefore that this was just a made up number. This appeal must be dismissed on this basis alone.

[23] However, if I am wrong in my conclusion that he knowingly made, participated in, assented to or acquiesced in the making of, such a false statement, I would have to go on to consider whether he made, participated in, assented to or acquiesced in the making of, that false statement in circumstances amounting to gross negligence. As already indicated, the burden of proving gross negligence lies on the Crown. It is not sufficient for the Crown to prove mere negligence; it must go beyond simple negligence and prove that the Appellant was grossly negligent.

[24] Negligence is defined as the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. Gross negligence involves greater neglect than simply a failure to use reasonable care. It involves a high degree of negligence tantamount to intentional acting or indifference as to whether the law is complied with or not; see *Venne v. Canada*, [1984] F.C.J. No. 314 (QL). In *Farm Business Consultants Inc. v. Canada*, [1994] T.C.J. No. 760 (QL), Justice Bowman (as he then was) of the Tax Court of Canada stated at paragraph 23 that the words "gross negligence" in subsection 163(2) imply conduct characterized by so high a degree of negligence that it borders on recklessness. In

such a case a court must, even in applying a civil standard of proof, scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established (paragraph 28).

[25] It is also well-settled law that gross negligence can include "wilful blindness". The concept of "wilful blindness", well known to the criminal law, was explained by Justice Cory of the Supreme Court of Canada in the decision in *R. v. Hinchey*, [1996] 3 S.C.R. 1128. The rule is that if a party has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. "Wilful blindness" occurs where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth, preferring instead to remain ignorant. There is a suspicion which the defendant deliberately omits to turn into certain knowledge. The defendant "shut his eyes" or was "wilfully blind".

[26] The concept of "wilful blindness" is applicable to tax cases; see *Canada v. Villeneuve*, 2004 FCA 20, and *Panini v. Canada*, 2006 FCA 224. In *Panini*, Justice Nadon made it clear that the concept of "wilful blindness" is included in "gross negligence" as that term is used in subsection 163(2) of the Act. He stated:

> 43 . . . the law will impute knowledge to a taxpayer who, in circumstances that dictate or strongly suggest that an inquiry should be made with respect to his or her tax situation, refuses or fails to commence such an inquiry without proper justification.

[27] It has been held that in drawing the line between "ordinary" negligence or neglect and "gross" negligence, a number of factors have to be considered:

(a) the magnitude of the omission in relation to the income declared,
(b) the opportunity the taxpayer had to detect the error,
(c) the taxpayer's education and apparent intelligence,
(d) genuine effort to comply.

No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence (see *DeCosta v. The Queen*, 2005 TCC 545, at paragraph 11; *Bhatti v. The Queen*, 2013 TCC 143, at paragraph 24; and *McLeod v. The Queen*, 2013 TCC 228, at paragraph 14).

[28] In *Torres v. The Queen*, 2013 TCC 380, Justice C. Miller conducted a very thorough review of the jurisprudence regarding gross negligence penalties under

subsection 163(2) of the Act. He summarized the governing principles to be applied at paragraph 65:

> a) Knowledge of a false statement can be imputed by wilful blindness.
>
> b) The concept of wilful blindness can be applied to gross negligence penalties pursuant to subsection 163(2) of the Act . . . .
>
> c) In determining wilful blindness, consideration must be given to the education and experience of the taxpayer.
>
> d) To find wilful blindness there must be a need or a suspicion for an inquiry.
>
> e) Circumstances that would indicate a need for an inquiry prior to filing . . . include the following:
>
> i) the magnitude of the advantage or omission;
>
> ii) the blatantness of the false statement and how readily detectable it is;
>
> iii) the lack of acknowledgment by the tax preparer who prepared the return in the return itself;
>
> iv) unusual requests made by the tax preparer;
>
> v) the tax preparer being previously unknown to the taxpayer;
>
> vi) incomprehensible explanations by the tax preparer;
>
> vii) whether others engaged the tax preparer or warned against doing so, or the taxpayer himself or herself expresses concern about telling others.
>
> f) The final requirement for wilful blindness is that the taxpayer makes no inquiry of the tax preparer to understand the return, nor makes any inquiry of a third party, nor the CRA itself.

[29] This is certainly not an exhaustive list and there may be other factors that may need to be considered depending on the circumstances of any particular case.

[30] The Appellant is university educated, fluently bilingual and has enjoyed success in industry having ascended to an important middle management position before his position became redundant. He presented as an intelligent, charming, articulate and sophisticated individual. He is a go-getter and a self-starter who is clearly very self-motivated. He is familiar with the preparation of tax returns since he had prepared his own returns from 1980 through to and including 2006. He is a savvy businessman and so he understands basic business concepts such as profit and loss. The Appellant is not so lacking in education or basic understanding of concepts such as business or taxes as to claim ignorance. Education, experience

and intelligence are not factors that could relieve the Appellant of a finding that he made false statements under circumstances amounting to gross negligence. In fact, given his education, intelligence and life experience, it is simply astounding to me that he would fall for such a transparently fraudulent tax savings scheme.

[31] There were ample warning signs or "red flags" that should have aroused the Appellant's suspicions and awakened in him the need to make further inquiries.

(a) **The Fee Structure** — FA were seeking a fee of 20% of the refunds. Had the scheme succeeded, this would have amounted to a fee of $35,647.05 based on total expected refunds of $178,235.26. This was an exorbitant fee for simply filling out a few forms. This should have led the Appellant to question the legitimacy of this tax savings scheme.

(b) **Tax Preparer Previously Unknown to Taxpayer** — The Appellant did not know who FA were. FA were not a mainstream tax accounting professional firm and yet came up with this amazing tax savings scheme. Remarkably, the Appellant could not deal with FA directly but had to go through Mr. Joanisse. One has to ask why? Although the Appellant did perform an Internet search regarding both FF and FA, the fact that he did not get any negative information did not lend any legitimacy to FA's tax savings scheme. This is perhaps a small factor, but when taken together with all the other factors, it should have alerted the Appellant to exercise more care.

(c) **Linking of FF Investments with FA Services** — As I understood the evidence of the Appellant, he could only participate in FF's investment opportunities if he used the services of FA. It was the savings that he would realize through FA that would finance the investments. This is certainly a strange symbiotic relationship that should have alerted the Appellant to question the entire tax savings-investment scheme.

(d) **Speciousness of the Tax Savings Scheme** — The scheme proposed by FA was utterly preposterous and this should have been immediately obvious to the Appellant. The theory that there was a way that an individual could be separated from his social insurance number and thus create two separate entities for tax purposes is ludicrous. No one, except the most unsophisticated, ignorant, naive

and gullible individual, could reasonably believe that he could charge personal expenses amounting to more than half a million dollars against his personal income. The Appellant is not such a naive man. As I have already indicated, even if he believed this scheme to be legitimate, he should have asked himself how FA came up with the numbers that they did. The business income, business expenses and business losses reported in the Appellant's 2008 tax return made no sense at all and the Appellant knew this. This is a factor that strongly suggests gross negligence through wilful blindness.

(e) **Magnitude of the Advantage** — The Appellant stood to have all of his taxes paid over the last four years returned to him. This amounted to over $178,000. He indicated that he was told that perhaps he could get all taxes back that he had paid over the last nine or 10 years. This was not tax deferral but was tax avoidance at the very least. The magnitude of the advantage that the Appellant was to receive as a result of the false information contained in his return was a bright red flag that must have aroused his suspicions and should have induced him to critically question what FA were doing. This is another strong factor pointing to gross negligence through wilful blindness.

(f) **Blatantly and Readily Detectable False Statements** — the "money collected as agent for principal not reported by third parties" amounting to $30,865.75, the "amount to principal in exchange for labour" amounting to $551,729.13, the business losses amounting to $520,863.38 and the marital status of the Appellant are blatantly false statements. They are readily and easily detectable and were in fact detected by the Appellant. If he in fact did not detect these blatantly false statements, then he should have. This is another glaring factor that points towards gross negligence through wilful blindness.

(g) **Tax Preparer Makes Unusual Requests** — FA made some unusual requests of the Appellant in relation to his tax return. The word "per" had to appear before the Appellant's signature anywhere he signed. The Appellant knows that this means he was not signing on his own behalf but on behalf of someone else — yet this was his tax return, not anyone else's. Why would FA want him to do that? He did not receive any explanation as to why he had to do this. He had to write his name in block letters on the statement of agent activities and it had to be in blue ink. He did not receive any explanation as to why he had to do

this. FA suggested that the Appellant not provide the CRA with his phone number, that he not speak directly with the CRA, that he refer all correspondence received from the CRA to FA, that he not file electronically and that he not take advantage of the direct deposit of refunds. One has to wonder why? All these unusual requests should have alerted the Appellant to be wary of what FA were doing.

(h) **Tax Preparer does not Acknowledge Preparing Return** — Box 490 of the return is reserved for the identification of the professional tax preparer who prepared the return. Fiscal Arbitrators described themselves simply as FA in box 490. It gave as an address FA, 555 YT, 2C3 AB A1B 2C3, and then gave a phone number. This address format appears to be bizarre and frankly I have no idea where this is. This should give reason to question why FA would use such a strange address format.

(i) **Lack of Inquiries of Other Professionals or of the CRA** — The Appellant did not seek any advice about FA's tax savings scheme from a recognized tax preparer, tax accountant, tax lawyer or from the CRA itself. He was concerned enough about FA to make inquiries on the Internet about FA, but not enough to run the proposed scheme by the CRA to get an opinion if it was legal.

All the foregoing factors are indicators that the Appellant was wilfully blind and that he ignored some very obvious warning signs that should have led him not only to question what FA were doing, but should have convinced him to walk away from FA's questionable scheme. I conclude that the Appellant was grossly negligent through wilful blindness.

[32] The Appellant submits that he is the innocent victim of people whom he trusted. He had known Mr. Joanisse for 18 months and was friends with him. He trusted Mr. Joanisse, who introduced him to FA, and he had no reason not to trust FA. In some cases, a taxpayer can shed blame by pointing to negligent or dishonest professionals in whom the taxpayer reposed his trust and confidence; for example, see *Lavoie c. La Reine*, 2015 CCI 228, a case where the taxpayers relied on a lawyer whom they had known and trusted for more than 30 years and who was a trusted friend. Counsel for the Appellant has also brought to my attention the case of *Hine v. The Queen*, 2012 TCC 295. In *Hine*, the taxpayer's wife prepared his return. He was in the business of "flipping properties". Unfortunately, his wife had failed to report significant income as a result of double counting mortgage

deductions resulting from late receipt of their lawyer's trust account statement. The CRA disallowed the deduction and assessed gross negligence penalties pursuant to subsection 163(2) of the Act. Justice Hershfield of this Court held that in the peculiar circumstances of the case, the taxpayer was not grossly negligent or wilfully blind in relying on his wife to prepare his return. The mistake in underreporting the income was the result of honest confusion on the part of the wife.

[33] However, cases abound where taxpayers could not avoid penalties for gross negligence by placing blind faith and trust in their tax preparers without at least taking some steps to verify the correctness of the information supplied in their tax returns.

[34] In *Gingras v. Canada*, [2000] T.C.J. No. 541 (QL), Justice Tardif wrote:

> 19 Relying on an expert or on someone who presents himself as such in no way absolves from responsibility those who certify by their signature that their returns are truthful.
>
> . . .
>
> 30 It is the person signing a return of income who is accountable for false information provided in that return, not the agent who completed it, regardless of the agent's skills or qualifications.

[35] In *DeCosta*, above, Chief Justice Bowman stated:

> 12 . . . While of course his accountant must bear some responsibility I do not think it can be said that the appellant can nonchalantly sign his return and turn a blind eye to the omission of an amount that is almost twice as much as that which he declared. So cavalier an attitude goes beyond simple carelessness.

[36] In *Laplante v. The Queen*, 2008 TCC 335, Justice Bédard wrote:

> 15 . . . The Appellant cannot avoid liability in this case by pointing the finger at his accountant. By attempting to shield himself in this way from any liability for his income tax returns, the Appellant is recklessly abandoning his responsibilities, duties and obligations under the Act. . . .

[37] As stated by Justice Tardif in *Gingras*, above:

> 31 . . . it is utterly reprehensible to certify by one's signature that the information provided is correct when one knows or ought to know that it contains false

> statements. Such conduct is a sufficient basis for a finding of gross negligence justifying the assessment of the applicable penalties.

[38] I am of the view that the Appellant made no effort to comply with the law. This is certainly borne out by his after-the-fact conduct. When he got a letter from the CRA questioning his business losses, rather than respond directly to the CRA and take his tax preparer to task, he gave the CRA letter to Mr. Joanisse who gave it to FA. FA drafted a response that made no sense to the Appellant or to anyone else. Even realizing that the response was complete and utter nonsense, he still sent it on to the CRA. This gives a clear indication as to his mindset throughout.

Conclusion

[39] There is no doubt that the Appellant's 2008 tax return and his request for loss carryback contained false statements — the Appellant did not incur any business losses exceeding $520,000. This was a made up number. The Appellant is a sophisticated, intelligent and well-educated man who is quite savvy in business matters. I can come to no other conclusion than that the Appellant acted either knowingly or with wilful blindness in signing a return with made up numbers. The magnitude of his claim was huge and should have raised significant suspicions and concerns. As such, he is properly subject to the penalties imposed on him pursuant to subsection 163(2) of the Act.

[40] For all the foregoing reasons, this appeal is dismissed. The Respondent is entitled to her costs if she wants them.

Signed at Kingston, Ontario, this 27th day of January 2016.

"Rommel G. Masse"

Masse D.J.

CITATION:	2016 TCC 27
COURT FILE NO.:	2012-1409(IT)G
STYLE OF CAUSE:	ANDRÉ MALLETTE v. THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 2, 2015
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	January 27, 2016

APPEARANCES:

Counsel for the Appellant:	Jeff Kirshen Jason C. Rosen
Counsel for the Respondent:	Craig Maw

COUNSEL OF RECORD:

For the Appellant:	Dale A. Barrett Jeff Kirshen Jason C. Rosen
Firm:	Barrett Tax Law Vaughan, Ontario
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada