Docket: 2013-492(IT)G

BETWEEN:

ROBERT DASZKIEWICZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 6, 2015, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the Appellant:	Jeffrey Radnoff Charles Hayworth (student-at-law)
Counsel for the Respondent:	Christian Cheong

JUDGMENT

For the attached reasons for judgment, the appeal from the assessment made under the *Income Tax Act* for the 2009 taxation year is dismissed.

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

Signed at Kingston, Ontario, this 12th day of February 2016.

"Rommel G. Masse"

Masse D.J.

Citation: 2016 TCC 44
Date: 20160212
Docket: 2013-492(IT)G

BETWEEN:

ROBERT DASZKIEWICZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

Overview

[1] The Appellant, Robert Daszkiewicz, 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 2009 taxation year and a related request for loss carryback to the 2006, 2007 and 2008 taxation years. The Appellant was introduced by a friend to an organization that prepared the Appellant's tax return in such a way as to claim very large fictitious business losses. These business losses, if allowed, would result in the refund to the Appellant of all the taxes paid or deducted at source for the 2006, 2007, 2008 and 2009 taxation years. The fact is that the Appellant never owned or operated any kind of business at all during the taxation period under consideration. 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] The Appellant is 53 years old. He was born and educated in Poland and came to Canada in 1987. In Poland he went to trade school and became an auto mechanic. He has always worked as a maintenance or industrial mechanic since coming to Canada. He has never taken any courses in financing, business,

accounting or taxation. He never prepared his own tax returns; he would normally have them done by a professional tax preparer close to where he lived and he paid a fee for this service usually in the range of $50. He has some limited experience as a businessman approximately 13 years ago when he ran a roadside assistance business. It lasted for only about one year. He agrees that he did the bookkeeping and the tax filings for that business. He agrees that he understood basic concepts of income and expenses.

[3] The Appellant met a fellow named Paul Berry about 20 years ago. Mr. Berry seemed to be a pleasant individual and the two of them became friends. The two of them are boat owners and they moor their boats at the same marina. The Appellant believed that Mr. Berry was in industrial sales. The Appellant believed that Mr. Berry was financially successful — he had an expensive boat, an expensive car and he lived in a house that the Appellant described as a mansion.

[4] In the fall of 2009, Mr. Berry invited the Appellant to a meeting. There were quite a few of Mr. Berry's friends there whom the Appellant did not know. Mr. Berry spoke to them of an organization called Fiscal Arbitrators ("FA"). The Appellant was told that the members of FA used to be with the CRA and were experts at the preparation of tax returns and dealing with the courts. The Appellant was amazed to see that Mr. Berry had obtained a tax refund of $30,000 using the services of FA and that convinced the Appellant to also use the services of FA.

[5] In the spring of 2010, just before filing time, Mr. Berry had the Appellant sign an agreement with FA (Exhibit A-1, Tab 2) whereby the Appellant agreed to employ the services of FA in consideration of an initial fee of $500 plus 20% of any refunds (less the initial fee of $500). This fee is certainly much higher than any fee paid by the Appellant in the past for the preparation of his tax returns. FA prepared the Appellant's tax return for 2009. It is to be noted that the Appellant never did meet the individual who prepared the return; he only dealt with Mr. Berry.

[6] The Appellant admits that he signed his 2009 tax return on April 12, 2010 (Exhibit R-1, Tab 2). Just above the Appellant's signature on the last page, there appears the usual certification that the taxpayer certifies that the information contained in the return and attached documents is complete and accurate and fully discloses all of his income. Just below his signature, there appears the warning that it is a serious offence to make a false return. The Appellant also signed a request for loss carryback on April 7, 2010 (Exhibit R-1, Tab 1), but he claims that he did not know that he did so. It is manifestly evident that the Appellant did not bother to

review or read over these documents or even look at any of them before he signed them. He took no steps at all to verify the accuracy of the information that was contained therein. In fact, he really has no knowledge at all of what was contained in his return. The Appellant never asked any questions to Mr. Berry or FA and they never offered any explanation as to what was contained in his return. It was solely on the trust that the Appellant reposed in Mr. Berry that the Appellant signed and filed his return. He believed that there was no risk at all to using the services of FA; there was only the promise to obtain larger than usual refunds.

[7] Had the Appellant bothered to take even a cursory look at his tax return and his request for loss carryback, he would have discovered some blatantly false information. In his return, the Appellant claimed gross business income in the amount of $78,813.80. He also claimed total business expenses of $321,911.16 resulting in business losses of $243,097.36. All this is completely and utterly false. The Appellant's only significant income during the 2009 taxation year was employment income in the amount of $66,791.36. The Appellant never owned or operated any business whatsoever during 2009 and he never incurred the business expenses that were claimed. The word "per" appears in front of his signature in both the return and the request for loss carryback. He does not know who wrote "per" in front of his signature and he does not know what that means. He did ask Mr. Berry why it was there and Mr. Berry simply replied that it was the proper way to sign. He simply does not know how any of the figures in his return were calculated. He did not notice that box 490, which is reserved for the identification of professional tax preparers, was left blank. The Appellant claims that he did not really know how much of a refund he would get but he thought it might be about $10,000. In fact his refund for 2009 was about $15,500 — a significant amount. He agrees that this was the largest refund that he ever got. He did not question why this was so. The Appellant claimed the amount of $66,791.36 of his business losses against his 2009 income and he requested that the balance be carried back and applied to his 2006, 2007 and 2008 taxation years. If these business losses were allowed, this would result in the Appellant having all his taxes paid or deducted at source refunded to him for 2006 through to 2009. He would have paid no taxes at all for four years — an astounding result. The Appellant would have received a refund of about $51,700 over those four years (Exhibit A-1, Tab 3, page 2). The Appellant claims that he was unaware of this or of the fact that he was making a request for loss carryback.

[8] The CRA sent a letter to the Appellant on July 16, 2010, questioning his business losses and seeking documentary proof of the claimed business losses (Exhibit R-1, Tab 3). This was the first time he became aware that he had claimed

business losses in his 2009 tax return. When the Appellant saw this letter, he was alarmed and he believed that something was not right. He did not understand how he could be claiming a business loss (and one of such a magnitude). The Appellant had not provided FA with any information at all that would permit the calculation of business income or business losses since he did not have any business. He does not know how FA arrived at these numbers. He says he was not aware of those numbers when he signed his return. He asked Mr. Berry for an explanation, but he did not get one. The Appellant simply handed this letter over to Mr. Berry who assured him that FA would take care of everything and that it was not a big deal. There then followed an exchange of correspondence and each time the Appellant received a letter from the CRA, he would hand it over to Mr. Berry who supposedly gave it over to FA for response. These responses which were apparently drafted by FA on behalf of the Appellant, made no sense at all and were not in the slightest responsive to the concerns raised by the CRA (letter dated August 4, 2010 at Exhibit R-1, Tab 4; letter dated December 9, 2010 at Exhibit R-1, Tab 6; notice of objection dated April 26, 2011 at Exhibit R-1, Tab 10). These responses did not advance the resolution of the dispute. The Appellant testified that he began to have concerns but, even though these responses that were drafted on his behalf by FA made no sense at all to the Appellant, he still trusted FA.

[9] The Appellant testified that he had initially signed a waiver to the effect that he was not going to have any communication directly with the CRA and that FA was going to take care of everything. He did everything under the direction of FA without bothering to check any of it out. He put blind faith in Mr. Berry and FA.

[10] Some time in 2012, Mr. Berry convened a meeting. Present at that meeting were about eight other people and Larry Watts, a representative of FA. The Appellant testified that this meeting basically opened his eyes to the fraudulent nature of what FA had done. Mr. Watts spoke only of how to declare bankruptcy, how to hide one's money out of the country and used "some ridiculous words which didn't make any sense", to quote the Appellant. It was then that the Appellant realized that he had made a terrible mistake in retaining the services of FA.

[11] The Appellant admits that the only reason he changed tax preparers on the recommendation of Mr. Berry to FA was so that he could get larger refunds. He believes that Mr. Berry was working with or for FA since his name appeared on papers that were presented to him by Mr. Berry. He does not know the credentials of Mr. Berry other than he was in sales and he does not know the credentials of the staff at FA or the person who prepared his tax return. In fact, he never met the

individual who had prepared his tax return. Prior to Mr. Berry referring him to FA, the Appellant had not known or heard of FA. He did not do any research into FA and he did not look into the claim that the members of FA were former CRA employees. He did not contact or seek the advice of any other independent professionals such as another known tax preparer, a tax accountant, a tax lawyer or anyone from the CRA.

[12] The Minister of National Revenue (the "Minister") disallowed the claimed business losses, denied the request for loss carryback and applied a penalty pursuant to subsection 163(2) of the Act. The Appellant objected to this assessment but the Minister confirmed the assessment, hence the appeal to this Court.

[13] The Appellant takes the position that he was unaware that his 2009 tax return contained false information. He honestly believed, based on the recommendation of Mr. Berry, a trusted friend of 20 years, that what FA had done was completely above board. He honestly believed that he was entitled to a tax refund based on the advice of Mr. Berry and that Mr. Berry had received a large refund himself. He reposed his complete trust and confidence in Mr. Berry and FA and he had no reason to question them. He ought not to be held liable for gross negligence penalties because he relied on the advice of a trusted friend. It is submitted that reliance on the advice of a trusted friend negates the finding of intentional conduct required for the assessment of gross negligence penalties. It was not wilful blindness or gross negligence to rely on the advice of someone he trusted. It is unjust to punish the Appellant for the wrongdoing of FA since he is an innocent victim of FA's fraudulent conduct. The Appellant therefore prays that his appeal be allowed with costs and that this Court waive the penalties and interest that are the subject of the present appeal.

[14] The Respondent is of the view that the Appellant never owned or operated any kind of business during the 2009 taxation year and that his claimed business losses as reported in his 2009 tax return and related request for loss carryback are obviously false. These false statements are of such a magnitude that, if allowed, would result in the refund of all taxes withheld or paid from 2005 through to 2009. The Respondent submits that the Appellant knowingly made these false statements. In the alternative, the Appellant made, participated in, 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 or otherwise grossly negligent 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

[15] 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 . . .

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

Analysis

[17] Counsel for the Appellant has done a great deal of research and has supplied a book of authorities for my guidance. These authorities are: *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *Udell v. M.N.R.*, [1969] C.T.C. 704 (Ex. Ct.); *Venne v. Canada*, [1984] F.C.J. No. 314 (QL); *Dunleavy v. The Queen*, [1993] 1 C.T.C. 2648 (TCC); *Farm Business Consultants Inc. v. Canada*, [1994] T.C.J. No. 760 (QL), affirmed by the Federal Court of Appeal, [1996] F.C.J. No. 82 (QL); *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *Carlson v. The Queen*, [1998] 2 C.T.C. 2476 (TCC); *897366 Ontario Ltd. v. Canada*, [2000] T.C.J. No. 117 (QL); *Findlay v. Canada*, [2000] F.C.J. No. 731 (QL); *Turcotte v. The Queen*, [2002] 2 C.T.C. 2806 (TCC); *Isaza v. The Queen*, [2002] 3 C.T.C. 2107 (TCC); *Therrien v. The Queen*, [2002] 3 C.T.C. 2141 (TCC); *410812 Ontario Ltd. v. Canada*, [2002] T.C.J. No. 176 (QL); *McGhee v. The Queen*, 2003 TCC 265; *Bernick v. The Queen*, 2003 TCC 433, affirmed by the Federal Court of Appeal, 2004 FCA 191; *Klotz v. The Queen*, 2004 TCC 147; *St-Pierre v. Canada*, [2002] T.C.J. No. 613 (QL); *Julian v. The Queen*, 2004 TCC 330; *Caron v. Canada*, [2002] T.C.J. No. 696 (QL); *Larouche v. The Queen*, 2004 TCC 629; *Mark v. The Queen*, 2006 TCC 35; *Hine v. The Queen*, 2012 TCC 295; and *Murugesu v. The Queen*, 2013 TCC 21.

[18] Counsel for the Respondent has also provided a book of authorities. These authorities are: *Venne v. Canada*, [1984] F.C.J. No. 314 (QL); *Canada v. Villeneuve*, 2004 FCA 20; *DeCosta v. The Queen*, 2005 TCC 545; *Panini v. Canada*, 2006 FCA 224; *Laplante v. The Queen*, 2008 TCC 335; *Gélinas v. The Queen*, 2009 TCC 136; *Chénard v. The Queen*, 2012 TCC 211; *Bhatti v. The Queen*, 2013 TCC 143; *Mullen v. Canada*, 2013 FCA 101; *Janovsky v. The Queen*, 2013 TCC 140; *McLeod v. The Queen*, 2013 TCC 228; *Brisson v. The Queen*, 2013 TCC 235; *Torres v. The Queen*, 2013 TCC 380, affirmed by the Federal Court of

Appeal, 2015 FCA 60; *Allison v. The Queen* (February 4, 2014), TCC, 2013-2144(IT)I; *Guindon v. Canada*, 2015 SCC 41; *Lavoie c. La Reine*, 2015 CCI 228; and *Atutornu v. The Queen*, 2014 TCC 174.

[19] I am thankful to both counsel for the Appellant and counsel for the Respondent for this helpful review of the authorities. Although I may not specifically refer to some of these authorities in my reasons for judgment, I can indicate that I have read and considered all of them in arriving at my decision.

[20] I begin by observing that our system of taxation is both self-reporting and self-assessing. It relies on the honesty and integrity of the individual taxpayer. It is based on the "honour system". The taxpayer has a 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."

[21] 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.]

[22] 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.

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

[24] 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.

[25] There can be no question that the Appellant's 2009 tax return and his request for loss carryback contained false statements. The Appellant never owned or

operated any kind of business during that year and therefore could not have had any business income or business expenses. His claim for business losses has no foundation in fact and is patently false.

[26] I am satisfied that the Appellant did not knowingly make any false statements since he was not aware of what was contained in his return. He admits that he never reviewed his return before signing it. I am satisfied, however, that the Crown has demonstrated to the requisite degree of proof that the Appellant made, participated in, assented to or acquiesced in the making of, false statements in his return in circumstances amounting to gross negligence.

[27] There is a difference between ordinary negligence and gross negligence. Negligence is 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*, above, at paragraph 37. In *Venne*, Justice Strayer of the Federal Court (Trial Division) stated that subsection 163(2) is a penal provision and must be construed strictly (but see *Guindon*, above, where the Supreme Court of Canada held that gross negligence penalties applicable against third parties pursuant to subsection 163(2) of the Act are not criminal in nature, being primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity — the purpose being to promote honesty and deter gross negligence). These penalties ought to be imposed only where there is a high degree of blameworthiness involving knowing or reckless misconduct. This subsection must be applied subjectively to the taxpayer, taking into consideration the intelligence, education, experience, etc. of the taxpayer. Justice Strayer believed that ignorance of the law, which is not unreasonable for the particular taxpayer in question and the particular circumstances of the case, may be acceptable as a defence to the application of penalties.

[28] In *Farm Business Consultants*, above, 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). The routine imposition of penalties is to be discouraged; see *897366 Ontario*, above, at paragraph 20.

[29] 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 *Hinchey*, above. 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". According to Justice Sopinka of the Supreme Court of Canada, "[d]eliberately choosing not to know something when there are reasons to believe further inquiry is necessary can satisfy the mental element of the offence" (*Jorgensen*, above).

[30] The concept of "wilful blindness" is applicable to tax cases; see *Villeneuve*, above, and *Panini*, above. 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.

[31] 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*, above, at paragraph 11; *Bhatti*, above, at paragraph 24; and *McLeod*, above, at paragraph 14).

[32] In *Torres*, above, Justice C. Miller of this Court 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.

[33] This is a not an exhaustive list. There may be other factors that need to be considered depending on the circumstances of any particular case.

[34] Therefore, in my view, liability for the gross negligence penalties provided for by subsection 163(2) of the Act can be found when the individual taxpayer has actual knowledge of the false statement contained in his return, is wilfully blind as to the existence of the false statement or has demonstrated recklessness or was otherwise grossly negligent in the making of, participating in, assenting to or acquiescing in the making of, the false statement.

[35] In the case at bar, I am satisfied that the Appellant did not knowingly make a false statement. He had no knowledge of what was in his 2009 tax return since he

never bothered to look at it. However, I am satisfied that he made, assented to, participated in or acquiesced in the making of, the false statements in circumstances amounting to gross negligence. I come to this conclusion for the reasons that follow.

[36] The Appellant has been in Canada for almost 30 years. He has a trade school education and is a skilled mechanic. He is a very pleasant and mild mannered individual who has always been steadily employed and works very hard for a living. He has a basic understanding of business organization and concepts of profit and loss. He did have his own business for a short period of time and he did the bookkeeping and the tax filings for that business. Although he may not be the most sophisticated of individuals, he is not so lacking in education, intelligence or life experience 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.

[37] There were ample warning signs that should have aroused the Appellant's suspicions and motivated in him the need to make further inquiries:

(a) **Tax Preparer Previously Unknown to Taxpayer** — Although the Appellant and Mr. Berry have known each other for 20 years, the Appellant did not tell me much about Mr. Berry other than he was very successful in industrial sales. Mr. Berry was not an accountant or a financial advisor or a tax preparer. Yet, the Appellant trusted him to give tax advice without reservation. FA were previously unknown to the Appellant. The Appellant did not know anything about FA other than FA were recommended by Mr. Berry. FA were not well-known tax preparers or financial advisors. The only reason the Appellant retained the services of FA was on the recommendation of Mr. Berry and Mr. Berry's assertion that FA would get him large tax refunds. Other than this one recommendation from Mr. Berry, who appears to have been recruiting clients for FA, the Appellant did not ask for or check out any other references. The Appellant never met the person who prepared his tax return; all communication with FA was done through Mr. Berry. One has to wonder why a professional tax preparer would not meet their taxpayer clients and would instead make use of a go-between, which is what Mr. Berry in fact was. This is perhaps a small factor, but when taken together with all the other factors, it should have alerted the Appellant to undertake a bit more due diligence with regard to the legitimacy of FA.

(b) **The Fee Structure** — FA charged a fee of 20% of the amount of the tax refund less the $500 fee paid for the initial review. The Appellant himself testified that he was expecting a refund of around $10,000 and thus the fee to be paid to FA would have been $2,000, far in excess of the usual fee of $50 that he had paid in the past to his neighbourhood tax preparer. As it turns out, the refund for 2009 was in the range of $15,000 and the total refund expected as a result of the loss carryback was in the range of $52,000, resulting in a fee of more than $10,000 (Exhibit A-1, Tab 3, page 2). This fee was exorbitant considering that FA only filled out some forms based on the limited information that the Appellant would have supplied to FA. This should have been a bright red flag for the Appellant.

(c) **Lack of Explanations by Tax Preparer** — Neither Mr. Berry nor FA offered any explanations whatsoever to the Appellant concerning

the preparation of his tax return. A true professional would want to make sure that clients understood the scope of what was being done and why. No one took the time to explain to the Appellant what was done. The Appellant was simply told to sign where directed. In addition, the Appellant never sought to know what was contained in his return; clearly he did not care to know and simply relied on the assertion of Mr. Berry and FA that all was right. A reasonable and diligent taxpayer would at the very least be curious and would want to know and understand what his tax preparer had done. Instead, the Appellant chose to remain in blissful ignorance and he was not interested in knowing anything. He was only interested in obtaining a large refund.

(d) **Magnitude of the Advantage** — The Appellant believed that he would obtain a refund of $10,000 for the 2009 taxation year. He claims that he did not know the actual amount of the refund. I find this assertion a difficult one to accept since the amount of the refund was very close to where he signed his return and would have been obvious to anyone who even glanced at the signature page of the return. In truth, his refund was to be about $15,000 for that year, more than all the taxes deducted at source. His total refund was to be about $52,000 if his request for loss carryback were to be allowed. He would have paid no taxes at all from 2006 to 2009. The Appellant acknowledges that the refund of $10,000 that he expected was larger than any he had received in the past. Yet, the Appellant never inquired why his refund should be that high. He never asked how it was that FA were able to obtain such a generous refund when his prior professional tax preparer could not. Nothing had changed in his fiscal situation. He continued to earn income only from employment and a small amount from the Workplace Safety and Insurance Board. What was it that his past professional tax preparers had missed that FA had discovered? The magnitude of the advantage was a glaringly bright red flag that should have motivated the Appellant to question what it was that his tax preparer was doing.

(e) **Blatantly and Readily Detectable False Statements** — The business losses indicated in the return were huge, amounting to about $243,000. This was blatantly false information. The Appellant claims that he did not know this because he did not see the information. However, it is obvious that the false information was readily and easily detectable and would have been seen by the Appellant had he bothered to simply take a perfunctory look at his return. He chose not to look at his return and he chose not to know what was in it. This is another glaring factor that points towards gross negligence through wilful blindness.

(f) **Tax Preparer does not Acknowledge Preparing the Return** — Box 490 of the return is reserved for the identification of the professional tax preparer who prepared the return. It is empty. The Appellant's assertion that he did not see box 490 is difficult to accept since this box appears right beside the Appellant's signature on the last page of the return. He must have seen it and he should have asked himself why FA did not want to identify themselves to the CRA. If the Appellant indeed did not see this box, then this demonstrated carelessness on his part in that he could not be bothered to take a look at his return.

(g) **Lack of Inquiries of Other Professionals or the CRA** — The Appellant did not receive any explanations from Mr. Berry or from FA. The Appellant made no inquiry of Mr. Berry or FA in an effort to understand his return, nor did he seek any advice from a tax accountant, a tax lawyer, his past tax preparers or any other known tax preparer or even the CRA. He simply chose not to inform himself and he chose to remain in blissful ignorance of not only the contents of his return but also of his duties and responsibilities under the Act.

(h) **Genuine Effort to Comply with the Law** — 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. Berry who gave it to FA. FA drafted a response that made no sense to the Appellant or to anyone else. Yet, he still sent it on to the CRA. The Appellant explains that he signed a waiver and that he was obliged to hand over all correspondence with the CRA to FA and that

> he was not to personally communicate with the CRA. I cannot accept that. He must have known when he got the first letter from the CRA that FA had done something dreadfully wrong and he no longer had any reason to trust them. Still, he continued with the obstructionist conduct advocated by FA. This after-the-fact conduct gives an indication as to his mindset throughout; see *Mullen*, above, at paragraph 7 regarding after-the-fact conduct.

All the foregoing factors should have aroused the Appellant's suspicions concerning FA and should have incited the Appellant to question what was going on. However, he did not. In fact, he did nothing. He chose to remain blissfully ignorant, preferring instead to place his complete and unquestioning trust and confidence in Mr. Berry and FA. Such conduct in refusing to inform himself, even in general terms of what was contained in his return, is not only evidence of wilful blindness, but is conduct amounting to gross negligence in my opinion.

[38] The Appellant argues that he is the innocent victim of people whom he trusted. He had known Mr. Berry for 20 years. He regarded Mr. Berry as a very successful man and he trusted his advice even though Mr. Berry was not a tax accountant, a tax lawyer, a financial advisor or a professional tax preparer. The Appellant takes the position that he honestly believed that what Mr. Berry and FA were doing was perfectly legal. 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*, above, 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. As well, *Hine*, above, is a case where 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. In addition, the mistake in under-reporting the income was the result of honest confusion on the part of the wife, not her gross negligence. Counsel for the Appellant has also provided other examples of cases where it has been held that a taxpayer ought not to be responsible for gross negligence penalties where the taxpayer honestly relies on a trusted financial advisor, tax preparer, friend or family member (see *Mark*, above, at paragraphs 18 and 19; *Findlay*, above, at paragraph 27; and *Hine*, above, at paragraphs 9, 35, 42 and 51 — reliance on spouse). Counsel for the Appellant

also points to cases holding that a taxpayer ought not to be personally responsible for infractions of a penal nature committed by another person in the position of an agent (see *Udell*, above, at paragraph 44 — reliance on accountant; *Murugesu*, above, at paragraphs 54 and 55 — recent immigrant chose an accountant recommended by members of his community; and *Klotz*, above, at paragraphs 70 and 72 — reliance on financial advisor). Counsel for the Appellant also forcefully argues that, when a taxpayer honestly but wrongly believes that what he has done is right, he cannot be liable for gross negligence penalties. Counsel for the Appellant submits that reliance on a trusted advisor will negate a finding of wilful blindness because a taxpayer does not question something that he believes and would not bother to verify something about which he has no doubt (see *Larouche*, above, at paragraphs 25 and 26; *McGhee*, above, at paragraph 27; *Dunleavy*, above, at paragraph 50; and *Carlson*, above, at paragraphs 33 and 36).

[39] However, there is a significant body of jurisprudence to the effect that taxpayers cannot 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. Quite apart from wilful blindness, taxpayers who take no steps whatsoever to verify the completeness and accuracy of the information contained in their returns may thereby face penalties for gross negligence.

[40] In *Gingras v. Canada*, [2000] T.C.J. No. 541 (QL), the appellants contended that they had always acted in good faith and that they believed that their tax preparer was conducting a responsible and reliable business, adding that they had little or no knowledge of tax matters. 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.
>
> 20 The appellants signed returns of income containing false and untruthful information and cannot claim that this was done without their knowledge. They had an obligation to ensure that all the information contained in their returns was truthful. If, as the theory put forward by Ratelle [the tax preparer] goes, every taxpayer is entitled to a total exemption from tax once in his life, which is not the case, this did not allow the appellants to submit false statements in order to exercise the alleged privilege, or justify them in so doing.

Justice Tardif further wrote:

> 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.
>
> 31 With respect to penalties, the burden of proof is on the respondent. It was clearly shown on a preponderance of the evidence adduced that the appellants submitted in their respective returns major false statements which had significant impact on their tax burden. They could not have been unaware that these statements were false. The Court can understand that the taxpayers might have been incapable, inexperienced and incompetent when it came to preparing their income tax returns. However, 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.
>
> [Emphasis added.]

[41] 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.

[42] In *Laplante*, above, the appellant, just as in the case at bar, did not look at his tax return at all before signing. This was held to be gross negligence. Justice Bédard wrote:

> 15 In any event, the Court finds that the Appellant's negligence (in not looking at his income tax returns at all prior to signing them) was serious enough to justify the use of the somewhat pejorative epithet "gross". The Appellant's attitude was cavalier enough in this case to be tantamount to total indifference as to whether the law was complied with or not. Did the Appellant not admit that, had he looked at his income tax returns prior to signing them, he would have been bound to notice the many false statements they contained, statements allegedly made by Mr. Cloutier? 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. In this case, the Appellant had an obligation under the Act to at least quickly look at his income tax returns before signing them, especially since he himself admitted that, had he done so, he would have seen the false statements made by his accountant.
>
> [Emphasis added.]

[43] In *Brown v. The Queen*, 2009 TCC 28, Justice Bowie stated:

> 20 Quite apart from all of that, in respect of the gross negligence penalties under the *Income Tax Act*, the Appellant in his own evidence early on made it clear that he signed his returns for each of the four years under appeal without having paid the least attention to what income was included in them and what expenses were claimed in them. He said that he kept the records that he kept, prepared spreadsheets from them and gave them to a tax preparer who, in each year, prepared the returns for him based on the material that he gave her. We did not hear from her on that, but taking that statement at its face value, it still leaves the Appellant with an onus to look at the completed return before signing it and filing it with the Minister. The declaration that the taxpayer makes when he signs that form is,
>
> > I certify that the information given on this return and in any documents attached is correct, complete and fully discloses all my income.
>
> To sign an income tax return and make that certification without having even glanced at the contents of the return, because that is what I understood his evidence to be is of itself, in my view, gross negligence that justifies the penalties.
>
> [Emphasis added.]

[44] In *Gélinas*, above, Justice Bédard stated:

> 11 In my opinion, the Appellant also committed gross negligence in 2004. I am of the opinion that the Appellant's negligence (based on the fact that he did not check his entire return before his accountant sent it to the Canada Customs and Revenue Agency) was serious enough to justify using the somewhat pejorative epithet "gross". The Appellant's attitude was so cavalier that it translates to a complete indifference in terms of respecting the Act. If the Appellant had examined his income tax return for the 2004 taxation year, he would likely have discovered the false statement contained within (a statement which apparently was made by his accountant) in terms of the size of the amounts of unreported income and other factors analyzed above. The Appellant cannot absolve himself of his responsibility by pointing the finger at his accountant. By attempting to absolve himself of all responsibility with respect to his income tax returns, the Appellant is being negligent by ignoring the responsibilities, duties and obligations imposed by the Act. Also, the Act imposes a minimum obligation to the Appellant to check his income tax return for the 2004 taxation year before his accountant sends it in; in addition, a more than cursory glance would have permitted him, in my opinion to find the false statement that his accountant had made.
>
> [Emphasis added.]

[45] In *Brochu v. The Queen*, 2011 TCC 75, gross negligence penalties were upheld in a case where the taxpayer simply trusted her accountant's statements that everything was fine. She had quickly leafed through the return and claimed that she did not understand the words "business income" and "credit", but yet had not asked her accountant or anyone else any questions in order to ensure that her income and expenses were properly accounted for. Justice Favreau of this Court was of the view that the fact that the taxpayer did not think it necessary to get informed amounted to carelessness, which constituted gross negligence.

[46] In *Janovsky*, above, Justice V.A. Miller stated:

> 22 The Appellant said he reviewed his return before he signed it and he did not ask any questions. He stated that he placed his trust in FA as they were tax experts. I find this statement to be implausible. He attended one meeting with the FA in 2009. He had never heard of them before and yet between his meeting with them and his filing his return in June 2010, he made no enquiries about the FA. He did not question their credentials or their claims. In his desire to receive a large refund, the Appellant did not try to educate himself about the FA.
>
> 23 Considering the Appellant's education and the magnitude of the false statement he reported in his 2009 return, it is my view that the Appellant knew that the amounts reported in his return were fake.
>
> 24 If I am incorrect and the Appellant did not knowingly make the false statement, then I find that he was wilfully blind. If he indeed did not understand the terminology used by FA in his return and if he did not understand how FA calculated his expenses, then he had a duty to ask others aside from FA. In a self-assessing system such as ours, the Appellant had a duty to ensure that his income and expenses were correctly reported. Our system of taxation is both self-reporting and self-assessing and it depends on the honesty and integrity of the taxpayers for its success: *R. v. McKinlay Transport Ltd.*, [1990] 1 SCR 627. The Appellant's cavalier attitude demonstrated such a high degree of negligence of wilful blindness that it qualified as gross negligence: *Chénard v. The Queen*, 2012 TCC 211.
>
> [Emphasis added.]

[47] In *Bhatti*, above, Justice C. Miller pointed out:

> 30 . . . It is simply insufficient to say I did not review my returns. Blindly entrusting your affairs to another without even a minimal amount of verifying the correctness of the return goes beyond carelessness. So, even if she did not knowingly make a false omission, she certainly displayed the cavalier attitude of not caring one way or the other. . . .

[48] Another recent example can be found in the matter of *Atutornu*, above, where the taxpayers simply blindly relied on the advice of their tax preparer without reading or reviewing their returns and without making any effort whatsoever to verify the accuracy of their returns. Justice Jorré held that gross negligence penalties under subsection 163(2) were appropriate in the circumstances.

[49] In the leading case of *Torres*, above, a case very familiar to counsel for the Appellant, the taxpayers were satisfied that FA were professional people, former CRA officials who knew what they were doing. The taxpayers believed FA to be legitimate and they all trusted FA to properly prepare their tax returns. FA convinced the taxpayers to become involved in a scam identical to the one here under consideration. All the taxpayers were confident that they were entitled to the refunds they were claiming. They had been completely and utterly convinced so by superb conmen. The CRA disallowed the claimed business losses and imposed gross negligence penalties. Justice C. Miller dismissed their appeals even though the taxpayers put "unwavering faith in representatives of Fiscal Arbitrators to prepare their returns in a manner that would produce the sought after refunds". Even though the taxpayers were credible and believed that what FA had done was legitimate, and even though they all trusted FA, Justice C. Miller found that they were all wilfully blind and dismissed their appeals against the assessment of penalties for gross negligence. A further appeal to the Federal Court of Appeal was dismissed.

[50] It is difficult for me to see how the case of the Appellant can be distinguished from that of any of the taxpayers in *Torres*.

Conclusion

[51] There is no doubt that the Appellant's 2009 tax return and his request for loss carryback contained false statements — the Appellant did not carry on a business and he did not incur any business losses whatsoever. I am of the view that in the circumstances of the present case, the Appellant has been wilfully blind or was otherwise grossly negligent in the making of, participating in, assenting to or acquiescing in the making of, a false statement in his return. He was content to let FA take care of everything and he did not care to know what FA did in completing his tax return. He could not be bothered to inform himself. He simply signed his return where he was instructed to sign without looking at it. In so doing, he certified that the return was complete and accurate — it was not. He had a duty to exercise care and accuracy in the completion of his return and he failed in this

duty, making no effort at all to verify the accuracy and completeness of his return. Had he made even the most minimal effort, he would have quickly and easily discovered the blatantly false information contained in the return. His actions are not only negligent, but are grossly negligent. As such, he is properly subject to the penalties imposed on him pursuant to subsection 163(2) of the Act.

[52] 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 12th day of February 2016.

"Rommel G. Masse"

Masse D.J.

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