## [OFFICIAL ENGLISH TRANSLATION]

2001-824(IT)I

BETWEEN:

DANY HOUDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on August 30, 2002, at Chicoutimi, Quebec, by

the Honourable Judge Louise Lamarre Proulx

**Appearances** 

For the Appellant: The Appellant himself

Counsel for the Respondent: Annick Provencher

# **JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* for the 1991, 1992, 1993, 1994 and 1995 taxation years are allowed in order to eliminate the penalties and the interest thereon, the whole in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of December 2002.

"Louise Lamarre Proulx"
J.T.C.C.

## [OFFICIAL ENGLISH TRANSLATION]

Date: 20021210

Docket: 2001-824(IT)I

BETWEEN:

DANY HOUDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

# **REASONS FOR JUDGMENT**

# **Lamarre Proulx, J.T.C.C.**

- [1] This is an appeal, instituted under the informal procedure, dealing with the 1991 to 1995 taxation years.
- [2] At issue are the following: a refund of income tax credits claimed on the basis of a misrepresentation; related interest; and penalties assessed under subsection 163(2) of the *Income Tax Act* ("the *Act*").
- [3] In making the reassessments, the Minister of National Revenue ("the Minister") relied on the following assumptions of fact set out in paragraphs 2, 3 and 6 of the Reply to the Notice of Appeal ("the Reply"):

# [TRANSLATION]

2. In a reassessment dated July 14, 2000, the Minister disallowed the deduction of amounts of \$9,900, \$14,700, \$15,800, \$14,950 and \$11,800, that were claimed at line 256 of the income tax returns and previously allowed in the computation of the appellant's taxable income for the 1991, 1992, 1993, 1994 and 1995 taxation years respectively.

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3. With respect to the 1991, 1992, 1993, 1994 and 1995 taxation years, the Minister assessed the following penalties under subsection 163(2) of the *Act*:

(a) 1991	\$ 433.00
(b) 1992	\$1,099.11
(c) 1993	\$1,100.78
(d) 1994	\$1,098.91
(e) 1995	\$ 858.77

...

- 6. In making and maintaining the reassessments dated July 14, 2000, the Minister relied in particular on the following assumptions of fact:
  - (a) the case originates from an internal investigation involving certain Jonquière Tax Centre employees who had set up a scheme under which certain persons would benefit from fraudulent income tax refunds in exchange for a commission based on a percentage of those refunds;
  - (b) as a result of reassessments made on March 24, 1997, on the same date the appellant received a total income tax refund of \$11,419.37 for the 1991, 1992, 1993, 1994 and 1995 taxation years;
  - under the Notices of Reassessment dated March 24, 1997, the appellant was allowed a deduction at line 256 of his income tax return in the computation of his taxable income for each of the 1991, 1992, 1993, 1994 and 1995 taxation years;
  - (d) in a solemn declaration, the appellant admitted to the Minister's investigators that he had accepted a proposal from Réjean Simard, a Revenue Canada employee, offering him

the possibility of obtaining income tax refunds in exchange for a commission of 66.6666 per cent and that he had given Mr. Simard his Social Insurance Number for that purpose;

- (e) the appellant knew neither the nature of the deduction that would be claimed on his income tax returns nor the total amount of the refund that would result therefrom;
- (f) in a solemn declaration, the appellant admitted to the Minister's investigators that he had personally given Mr. Simard, on Mr. Simard's instructions, an amount of \$7,612.92 with regard to the refunds resulting from the Notices of Reassessment dated March 24, 1997, concerning the 1991, 1992, 1993, 1994 and 1995 taxation years;
- (g) the Minister considers that the neglect shown by the appellant in this case is similar to complicity;
- (h) concerning the 1991, 1992, 1993, 1994 and 1995 taxation years, the appellant made a misrepresentation attributable to neglect, carelessness or wilful default, or committed fraud in filing the income tax returns for those years or supplying information under the *Act*;
- (i) deduction of the amounts claimed at line 256 of the appellant's income tax returns for each of the 1991, 1992, 1993, 1994 and 1995 taxation years leads the Minister to believe that the appellant knowingly or under circumstances amounting to gross negligence made a false statement or omission in filing the income tax returns for those years, or participated in, assented to or acquiesced in that false statement or omission, with the result that the income tax the appellant would have been required to pay according to the information supplied on the income tax returns filed for those years was less than the amount of income tax actually payable for those years.

# [4] In the Notice of Appeal, the following request was made:

#### [TRANSLATION]

... When I received that cheque, I believed it was completely legal because it was a Revenue Canada "employee" who called me and asked me to check whether my previous income tax returns had been

properly completed and whether all the credits for which I was eligible had been claimed.

Since he was an acquaintance and, moreover, a Revenue Canada employee, I trusted him and provided my Social Insurance Number ("SIN") so that he could perform the check. Some time afterward, he told me that I would receive a refund because, in his opinion, my income tax returns had been improperly completed at the time. Sure enough, a few weeks later, I received a refund, which I cashed because I believed it was completely legal.

Some years later I received a visit from Revenue Canada, and I was told that I was not entitled to the cheque I had received and that the employee who had contacted me had been dismissed for defrauding the employer. I want to tell the Court that it is not the fault of ordinary taxpayers if Revenue Canada hires fraud artists or if I was taken for a ride in this matter.

You can check my previous file: I have always played a straight game and never had any problems with the law or Revenue Canada. I therefore ask the Court to cancel this account in full: the penalty, the interest and the principal. As well, I am a seasonal construction worker; I make support payments for three children and I am presently living with another partner with whom I have had two more children. My situation would therefore make it impossible for me to pay this exorbitant account, and I ask you to show proper appreciation and to penalize your employees.

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- [5] The appellant testified. He is a carpenter and works for various construction contractors in his region. He explained that he knew Réjean Simard, a Revenue Canada employee, because Mr. Simard was the uncle of a female friend. At the time the events occurred, the appellant had known Mr. Simard for two years.
- [6] It was Mr. Simard who called the appellant to tell him that he might be entitled to income tax refunds. It was apparently after the cheque had been deposited that Mr. Simard told the appellant he had to repay two-thirds of the amount to Mr. Simard. The appellant asked Mr. Simard why. Mr. Simard explained to the appellant that three persons were involved. The appellant felt worried. Mr. Simard apparently told the appellant not to worry: if anything came up, Mr. Simard would be the one taking care of it.

- [7] The appellant reiterated the statement he made in the Notice of Appeal that he had always paid his income tax and had always filed his income tax returns.
- [8] Concerning the wording of subparagraph 6(g) of the Reply, which reads, [TRANSLATION] "the Minister considers that the neglect shown by the appellant in this case is similar to complicity", the appellant made the following statement, as recorded at page 10 of the transcript:

[TRANSLATION]

•••

A. Well, I didn't know. At the start, I didn't know, you know. It was afterward, when ... It was afterward, when he told me that, and I said:

"I'm afraid of that." "Oh," he said, "There's no problem. I work for the government. If anything comes up, call me and I'll fix it up for you." It's true, everything was set up, everything was started, everything was done, so I trusted him ... But he was working for the government, you know. Usually, I don't know, but ... I didn't know him really well; I'd seen him two or three times. Usually ...

•••

A. Like I said to the investigator when he came to my place, I'm prepared to pay my share. My share, I got it, I had it, I was the one who spent it, I know that. But them, they're asking me for \$24,000 and \$23,000 and some.

...

[9] An excerpt from the appellant's bank account was adduced as Exhibit I-2. This excerpt shows a direct deposit of \$11,419.37 on March 24 and a withdrawal of \$7,600 on March 27. The appellant stated that Mr. Simard called him on the evening the day the deposit was made; the appellant himself did not know the deposit had been made. The appellant provided the following explanation of the circumstances of the deposit, as recorded at pages 12 to 14 of the transcript:

## [TRANSLATION]

- Q. On the evening the day the deposit was made.
- A. Yes. I didn't know, myself, that the deposit had been made. I didn't know; I was working. He said, "Dany, your deposit's been made." I said, "Oh, well, I don't know about that; I haven't been to the credit union." "Oh yes," he said, "It's done. I checked; it's been deposited, and you owe me two-thirds of the amount."
- Q. Did you not think that two-thirds of the amount was quite a lot?
- A. Well, right, I asked some questions. I asked him, "Two-thirds? You told me I was entitled to a refund, and now you're asking me to give you the whole thing? What is this?" "Well, no," he said, "I'm not the only one involved in this business." "What's the story?" "Well," he said, "there's three of us: myself, somebody else (he didn't name any names) and you." That's when I saw it was some kind of underhanded business and, you know.
- Q. When you saw it was an underhanded business, did you call to blow the whistle on it? After all, these people were Revenue Canada employees.
- A. No. That was it. That was it, right.
- Q. Did you not want to blow the whistle on that underhanded business?
- A. No. Well, I thought about it, but then, you know, it was sort of in the family; I was going out with his niece, a while earlier I was going out with his niece, and ...
- Q. But you were no longer going out with his niece at that time, when you received the refund.
- A. No, that's right.
- Q. You were not really part of the family at that time.
- A. No.
- Q. Why? What stopped you from blowing the whistle on Mr. Simard?

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- A. Well, like I'm saying, it was the amount, you know. There's no doubt it's always appealing, eh? But when he asked me for two-thirds, that was when I ... Then I wasn't sure.
- Q. Do you know ... did you yourself know, at that time, that this business might have been tried on someone else?
- A. No, I hadn't heard anything about that. Well, I was working, I was minding my own business. Personnally, I don't know what he was doing.

...

[10] The appellant's solemn declaration was adduced as Exhibit I-1. I quote the following two paragraphs from it:

[TRANSLATION]

...

I went to the Rivière Éternité credit union to withdraw \$7,612.92 in cash, which I personally paid to Réjean Simard at my home.

I also paid Réjean Simard 2/3 of the refund received by Pierre Simard, a co-worker of mine.

...

- [11] The appellant had told Pierre Simard, a co-worker, about the possibility of obtaining income tax refunds through Réjean Simard, a Revenue Canada employee. The two payments by the appellant to Réjean Simard were made in cash on separate occasions. The payment in the case of Pierre Simard was made some months later.
- [12] Rolland Pelletier testified at the request of counsel for the respondent. Mr. Pelletier's testimony was adduced in the two other cases heard today, the appeals of Justin Savard (2001-4109(IT)I) and of Robin Villeneuve (2001-170(IT)I). Mr. Pelletier remained in the room to be available to the Court and the two other appellants, in case they wished to cross-examine him.

[13] In his testimony, Mr. Pelletier explained the scheme referred to in the Reply. Since the appellant did not challenge the facts stated by Mr. Pelletier, and since this scheme has already been described in the Reply and in my decision in *Jean-Marc Simard v. Canada*, [2002] T.C.J. No. 265 (Q.L.), I do not consider it necessary to explain the scheme once again.

# Argument

- [14] The appellant stated that he was prepared to repay the amount from which he benefited, that is, \$3,700, but did not consider that he was required to repay an amount from which he personally did not benefit.
- [15] Counsel for the respondent argued that the appellant not only acquiesced in the fraud by accepting the payment and making a kickback of two-thirds of that amount but also went so far as to collaborate in the fraud by causing a co-worker to participate in it.
- [16] Counsel for the respondent referred to a decision I rendered in *Lévesque Estate v. Canada*, [1995] T.C.J. No. 469 (Q.L.), and in particular to paragraph 13 of the English version:

Ignorance or failure to obtain adequate information could in certain circumstances be a sufficient element to constitute gross negligence, particularly in cases where there is an economic interest in remaining ignorant. Here, the element that tilts the scales in favour of accepting the taxpayer's position is that there was no economic interest in this omission or in this failure to obtain adequate information.

[17] Counsel for the respondent also referred to a decision by Hamlyn J., formerly of this Court, in *Carlson v. Canada*, [1997] T.C.J. No. 1351 (Q.L.), and in particular to paragraph 19:

Further, wilful blindness or a lack of care by someone capable of acting in a responsible manner has been found in circumstances to be gross negligence. Deliberate failure to make enquiries as to fiscal responsibilities has been found in one case to constitute gross negligence, and that case is Holley v. M.N.R., 89 D.T.C. 366. That was Judge Kempo of this Court.

[18] Counsel for the respondent argued that wilful blindness constitutes gross negligence when a person does not make enquiries if that person could have done so and obtains an economic benefit from not doing so. This describes the appellant's behaviour. The appellant did not make enquiries of the tax authorities about the legitimacy of the refund or the repayment to the persons who engineered it.

# Analysis and conclusion

[19] The assessments being appealed from were not adduced in evidence. I had asked counsel for the respondent to send me a chart illustrating the computation of the income tax payable, the interest owing on that tax, the amount of the penalties, and the interest on those penalties. I received approximately 30 pages of computerized statements establishing the amounts at issue. Unfortunately, these data are too detailed to be helpful to me. I shall indicate only the total amount as at September 12, 2002: \$27,934.06.

[20] However, I consider it worth reproducing a paragraph from the letter accompanying these computerized statements:

# [TRANSLATION]

We point out that, in issuing the reassessments cancelling the fraudulent refunds and assessing the penalties under subsection 163(2) of the *Income Tax Act*, the Minister computed the interest on the penalties from the due date for each taxation year at issue but computed the interest on the amount of the fraudulent refund only from the date the refund was issued.

[21] When I first read these appeals, it appeared to me that the taxation year was incorrect and should have been the taxation year in which the fraudulent refund was issued, in this case, the 1997 taxation year. According to the theory of mandates, however, a mandator accepts an act by a mandatary if the mandator ratifies the act. By accepting the income tax refund overpayment and by repaying most of the refund to the persons who engineered it, the appellant ratified the act by those persons, his mandataries. Since the mandataries used previous taxation

years for the purpose of the fraudulent reassessments, it is therefore correct to use the same taxation years for the purposes of the reassessments that are being appealed from.

- [22] The appellant would like to repay only the part of the amount from which he benefited. That option is not possible. He became the owner of the full amount of money paid into his bank account. That amount of money belonged to him. He disposed of it as he did by repaying two-thirds of it to the persons who engineered the refund. He must therefore repay the amount of the income tax refund overpayment in full, with interest.
- [23] Concerning the penalty assessed under subsection 163(2) of the *Act*, in *Jean-Marc Simard* (*supra*) I concluded that the Court had discretion to assess the amount of the penalty depending on the taxpayer's ability to pay, extent of criminal intent, and previous behaviour. The respondent has appealed from that decision.
- [24] For the moment, while awaiting a decision by the Federal Court of Appeal, I consider it more prudent to follow the recent example provided by that Court in *Chabot v. Canada*, [2001] F.C.J. No. 1829 (Q.L.). In that decision, that Court did not assess the taxpayer's extent of criminal intent but completely exonerated the taxpayer from any application of subsection 163(2) of the *Act* on the ground that the taxpayer had been caught in an ambush. That decision dealt with a taxpayer who had claimed income tax credits for charitable donations. In 1992, he claimed a charitable donation of \$10,000 for a gift for which he had actually paid \$2,800; in 1993 and 1994 he claimed charitable donations of \$15,000 and \$8,000 for gifts for which he had paid a total of \$2,500.
- [25] I quote paragraphs 40 and 41 of the decision in *Chabot*:
  - 40. I also note that Denis Lemieux, an investigator with Revenue Canada, explained to the Court that no action had been taken against the foundations involved themselves because, in the Department's view:

[TRANSLATION]

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... they had been caught in an ambush. It had grown completely out of proportion for them. They were genuinely ... they are not specialists when it comes to artwork. They found the offer very appealing ...

These are foundations; there was no criminal intent on the part of these people. They realized themselves that they were in the wrong.

(Appendix 6, pages 25 and 26)

In his own way, Mr. Chabot too "got caught in an ambush" and, in his own way, he too "found the offer appealing".

41. In these circumstances, I find it difficult to understand why Revenue Canada would assess penalties against such small taxpayers who, in good faith, tried to benefit from a tax credit that Revenue Canada itself dangled in front of their eyes and which, according to the guide, seemed so easy to obtain.

(Emphasis added.)

[26] I believe that the appellant, too, was caught in an ambush. He was not the one who concocted the scheme. The proposition came to him through employees of a federal institution, which he respects. He was not told about fraudulent acts. He was told that it was possible that he had not claimed all the income tax refunds to which he was entitled. That is an assumption that many persons of good faith are tempted to believe. The appellant received a substantial amount of money, which surprised him. He was told that he had to pay back two-thirds of that amount to the persons who had engineered the refund. He agreed without taking the time to think it over. Afterwards, he was caught in a situation he could not easily escape from.

[27] The appellant has stated that he was not open with the tax authorities. That is true, and there was no real response from the appellant when he was questioned on this point. That said, it was conceivably difficult for him to consult these authorities. He paid back too much money to the persons who engineered the income tax refund. He vaguely felt that he could not recover that share of the money and would have to repay that share, along with his own share, to the tax authorities. He became a victim, and he behaved like a victim. He waited anxiously. He may conceivably have mentioned the possibility of income tax

refunds to a co-worker in order to assuage his anxiety as a victim and to convince himself that everything would be all right, or he may conceivably have still trusted that the operation was legitimate since he advised a co-worker to take part in it. The situation was confused and feelings were unclear, but the situation appears to result from an ambush much more than from a deliberate decision by the appellant to contravene the *Act*.

- [28] Unless an occurrence is purely accidental, to some degree individuals are always responsible for their acts. Paying money back to government employees who are performing their duties is a serious act.
- [29] Noretheless, under subsection 163(2) of the *Act*, the false statement or omission must have been made knowingly or under circumstances amounting to gross negligence. In other words, according to this subsection, there must have been criminal intent. In my view, the Court must be all the more certain of criminal intent when the amount of the resulting penalty is extremely high and particularly burdensome for the taxpayer, as is the case here.
- [30] Although the appellant has a good trade, he is neither an accountant nor a lawyer. According to his testimony and the Notice of Appeal, he always filed his annual income tax returns and always wanted to comply with the *Act*. The respondent has not contradicted this statement.
- [31] I consider that initially the appellant's act was the result of lack of consideration, lack of awareness or an error of judgment, not the result of criminal intent, and that he then became caught in an ambush. In circumstances like those of the present case, the greater a person's education, the more difficult it will be for that person to avoid the application of subsection 163(2) of the *Act* on the ground of an error of judgment. Here, however, I consider that the appellant did not form the criminal intent required for subsection 163(2) of the *Act* to be applied.
- [32] The appeal is therefore allowed in order to eliminate the penalties and the interest thereon.

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Signed at Ottawa, Canada, this 10th day of December 2002.

"Louise Lamarre Proulx"
J.T.C.C.