

[OFFICIAL ENGLISH TRANSLATION]

Docket: 2001-565(IT)I

BETWEEN:

GÉRALD GAUTHIER

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on August 29, 2002, at Chicoutimi, Quebec

Before: The Honourable Judge Louise Lamarre Proulx

Appearances

For the Appellant: The Appellant himself

Counsel for the Respondent: Martin Gentile

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* (the "Act") for the 1989, 1990, 1991, 1992, 1993 and 1994 taxation years are allowed in order to delete the penalties and related interest 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.

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REASONS FOR JUDGMENT

Lamarre Proulx, J.T.C.C.

[1] This is an appeal under the informal procedure concerning the 1989 to 1994 taxation years. The issue is whether the appellant must pay interest on the amounts of tax owed and the penalties and related interest.

[2] On September 25, 1995, the appellant received a tax refund amounting to \$15,387.71. This is a refund to which he was not entitled that was fraudulently obtained for him by two employees at the Department of National Revenue.

[3] The facts on which the Minister of National Revenue (the “Minister”) relied in making his reassessments are described in paragraph 6 of the Reply to the Notice of Appeal (the “Reply”) as follows:

[TRANSLATION]

- (a) the case arises from an internal investigation of certain employees of the Jonquière Taxation Centre who had set up a scheme to enable certain persons to receive fraudulent tax refunds in exchange for a commission based on a percentage of the said refunds;
- (b) on September 25, 1995, the appellant received a total tax refund of \$15,387.71 for the 1989, 1990, 1991, 1992, 1993 and 1994 taxation years as a result of reassessments dated September 25, 1995;
- (c) the notices of reassessment, dated September 25, 1995, for the 1989, 1990, 1991, 1992, 1993 and 1994 taxation years, allowed in the computation of the appellant's income the deduction of an annual amount of \$8,500 in respect of alimony or other allowance payable on a periodic basis;
- (d) the appellant claimed to the Minister's investigators in a solemn declaration that he had known Mario Boucher in 1991 and 1992 and that in the course of some desultory conversation he had told him about the weekly payments of approximately \$70 that he made to his former spouse, without however having any receipts;
- (e) the appellant admitted to the Minister's investigators in a solemn declaration that Mario Boucher had offered to review his tax returns, that he had given his agreement, but had not signed any document in relation thereto;
- (f) regarding the total refund arising out of the reassessments dated September 25, 1995, for the 1989, 1990, 1991, 1992, 1993 and 1994 taxation years, the appellant admitted to the Minister's investigators in a solemn declaration that he had given a total amount of \$11,000 to Mario Boucher in accordance with Mr. Boucher's instructions through an initial payment of \$8,000 and a second payment of \$3,000;
- (g) in the Minister's opinion, the negligence shown by the appellant in this matter amounted to complicity;
- (h) concerning the 1989, 1990, 1991, 1992, 1993 and 1994 taxation years, the appellant made a misrepresentation that was attributable to neglect, carelessness or wilful default or committed fraud in supplying information under the "Act";

- (i) the claim for alimony, with regard to the 1989, 1990, 1991, 1992, 1993 and 1994 taxation years, leads the Minister to believe that the appellant knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of a false statement or omission in the income tax returns filed for the 1989, 1990, 1991, 1992, 1993 and 1994 taxation years, as a result of which the tax that he would have been required to pay based on the information provided in the income tax returns filed for those years was less than the amount of tax actually payable for those years.

[4] The Notice of Appeal reads as follows:

[TRANSLATION]

...

This is to inform you that I disagree with paying the penalties and interest and with the notice, a copy of which you will find attached hereto, for the following reasons:

Mario Boucher took advantage of my vulnerability and my lack of judgment since at the time of the events I was under the influence of alcohol.

Since I never signed any documents or gave any follow-up or information to Mario Boucher, I forgot about this until I received the cheque. Mario Boucher asked me to give him \$10,000, which I did, because he seemed disreputable to me and I was afraid of the reprisals there might be since Mario had told me that there were two other people who worked with him and I do not know who they are.

[5] The appellant testified for the appellant party. Rolland Pelletier and André Tremblay testified at the request of counsel for the respondent.

[6] The appellant is a civil engineering technician. He admitted subparagraphs 6(b) and 6(d) to 6(f) of the Reply.

[7] Concerning subparagraph 6(e) of the Reply, the appellant made the following qualification, as described at page 6 of the transcript:

[TRANSLATION]

- A. It was not... he had not said that he was going to audit my tax returns, they just said... I was paying alimony, but I did not have any receipts. Then, he said to me, "This is not normal; there might be something to do for this," and... He said, "I could perhaps check into it to see if something could be done." He worked in taxation. I said: "See what you can do."

[8] With reference to subparagraph 6(f) of the Reply, he confirmed that he had in fact given Mr. Boucher \$11,000 from an amount of \$15,387.

[9] With reference to subparagraph 6(g) of the Reply, the appellant said he completely disagreed with this statement. According to him, there was no question of complicity, because he was not aware that the operation was fraudulent. He said the following at page 8 of the transcript:

[TRANSLATION]

...

- A. I had absolutely no idea that there was something underhanded about these dealings. In my view, he was someone who had been introduced to me, and besides, it was someone who said In any event, since I was paying alimony and did not have a receipt, he said: "Well! Maybe we'll have a look and do something about it for you." Fine, but I did not know about this, Ma'am, not at all.

...

[10] The appellant explained the statement in his Notice of Appeal, at pages 9 and 10 of the transcript, as follows:

[TRANSLATION]

A. It is because, Ma'am, when I had the amount there, I found... first, I found it was a lot, but I had slips for the years that they had reviewed, and besides, it was marked that they had reviewed my situation and I was entitled to it. In any case, I called him to thank him and also to ask him if I could give him something, something or other to thank him, like a bottle of wine or I don't know, something like that, but then, when he told me that stuff, well, then I kind of jumped; I said, "*Tabarnik*, what's this about?" So he said: "There were three of us working on it, and then, we worked hard, and besides, bla, bla, bla, I have to pay my people, and..." Then, it was... That's when I saw, Ma'am, that it did not make any sense. He tells you you're entitled to a refund of \$15,000, but then he asks you to give back \$11,000 to pay his people. I could really see that this made no sense. But I don't know who these others who worked with him were.

...

[11] This is what the appellant would like to see, at page 10:

[TRANSLATION]

...

A. I agree about paying back the payment that I got; I know that I was not entitled to it and besides I got part of it; I agree about paying it back.

...

A. Maybe to pay a penalty, how can I say this... symbolic, I don't know...

...

A. ... a few thousand dollars.

...

A. But not that you should put interest on it and make me penniless for the rest of my life to pay all that.

...

[12] On cross-examination, a photocopy of the cheque dated September 25, 1995, in the amount of \$15,387.71 was filed as Exhibit I-1. The appellant explained that since the 1990s he had paid alimony to the mother of his child and former spouse. He was supposed to give her about \$125 a week, but since his former spouse could not or would not give him a receipt, he gave her \$70 a week.

[13] In answer to the question asked by counsel for the respondent as to why he had agreed to pay \$11,000 to those responsible for the refund, he replied:

[TRANSLATION]

Well, when I saw... when I saw Mario arriving at our house, also, this is going to sound strange, on motorbikes, Harleys, and all that, I am going to tell you that this made me... it isn't that he was physically big, but you never know who you're dealing with—it made me kind of afraid, and then when he told me that three of them were involved, I didn't know what was going on...

...

... I felt like I was cornered, like I didn't have a choice.

[14] Counsel for the respondent asked him if he had been threatened, and he answered: [TRANSLATION] “*No, because I gave him what he wanted. I didn't know who I was dealing with; I didn't know him very well.*”

Q. And according to you, at that time, were you entitled to the \$15,387 before he suggested that you give him \$11,000?

A. Well, in my mind... he had told me that he was going to check all that, and besides he told me what I had... yes.

[15] He claimed that he did not call Revenue Canada because he was afraid of reprisals.

[16] Rolland Pelletier, a senior investigator, testified at the respondent's request. He has worked in Special Investigations since 1977. He said that someone from Client Services in the Jonquière Taxation Centre realized in May 1998 or thereabouts that the federal government had made a refund of \$22,000 but the province had not made such a refund. That is how the investigation began. The facts of the investigation were fully narrated earlier in *Jean-Marc Simard v. Canada*, [2002] T.C.J No. 265 (Q.L.). For the purposes of these Reasons, it is not necessary to go over them again.

[17] A recent event is that Mario Boucher, the chief instigator behind the fraud system pleaded guilty and was sentenced in June 2002 to two years less a day in prison and a fine of \$306,000. The fine corresponds to 100 per cent of the amount of the kickbacks he received.

[18] Mr. Pelletier also said that, of the taxpayers who received refunds to which they were not entitled, two-thirds confessed that they had given back 66 per cent of the amount to Mr. Boucher or Mr. Simard. The other third of the taxpayers did not admit to returning such payments, but in every case the financial statements show immediate withdrawals equivalent to two-thirds of the amount deposited.

[19] The witness also testified that some forty-five people received fraudulent refunds for an approximate total of \$500,000.

[20] Counsel for the respondent referred to my decision in *Lévesque Estate v. Canada*, [1995] T.C.J. No. 469 (Q.L.) and, specifically, to paragraph 13:

13. 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.

[21] He said that, in returning 66 per cent of the amount received to those responsible for the refund, the appellant participated in the fraud and, even if it

could be argued that there was blindness, it was wilful blindness that gives rise to the assessment of a penalty under subsection 163(2) of the *Act*.

Conclusion

[22] The assessments appealed from were not filed in evidence. I had asked counsel for the respondent to send me a chart showing the calculations for the tax owed, the interest owed on the taxes, the amount of the penalties and the interest owed on the penalties. I received approximately 30 pages of computer printouts establishing the amounts at issue. Unfortunately, the information was too detailed to be of use to me. I will merely indicate that the balance on September 12, 2002, was in the amount of \$43,130.77.

[23] Nonetheless, I believe it is worth reproducing a paragraph from the letter that accompanied the computerized statements:

[TRANSLATION]

We wish to explain that, in issuing reassessments cancelling the fraudulent refunds and assessing the penalties provided for in subsection 163(2) of the *Income Tax Act*, the Minister calculated the interest on the penalty from the date due for each of the taxation years at issue, but the interest on the amount of the fraudulent refund does not start to accrue until the date on which the refund was made.

[24] Concerning the penalty assessed under subsection 163(2) of the *Act*, in *Jean-Marc Simard (supra)*, I had determined that the Court had the discretion to adjust the amount taxed according to the taxpayer's ability to pay, the degree of his wrongful intent and his previous behaviour. This decision was appealed by the respondent.

[25] While awaiting the decision of the Federal Court of Appeal, I believe that for the time being it is more prudent to follow the approach taken by the Court of Appeal in a recent decision in the case of *Chabot v. Canada*, [2001] F.C.J. No. 1829 (Q.L.). In that decision, the Court did not assess the taxpayer's degree of wrongful intent but completely relieved him from any application of

subsection 163(2) of the *Act* on the grounds that the taxpayer had been ambushed. The case involved a taxpayer who had claimed tax credits for charitable donations. In 1992, he reported a charitable donation in the amount of \$10,000 for which he had in fact paid \$2,800, and in 1993 and 1994, charitable gifts of \$15,000 and \$8,000 whereas he had paid \$2,500 in all.

[26] I quote paragraphs 40 and 41 of that decision:

[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] ... they had been caught in an ambush. It had grown completely out of proportion [*sic*] for them. They were genuinely ... they are not specialists when it comes to artwork. They found the offer very appealing. It required a lot of work and profits were virtually nil.

...

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.]

[27] I believe that the appellant also got caught in an ambush. He is not the one who developed the scheme. The suggestion came to him from a Revenue Canada employee who did not talk to him about fraudulent acts. The employee, Mario Boucher, told the appellant that he might not have claimed all the tax refunds to

which he was entitled. This is a premise that many people of good faith are tempted to believe. The appellant received a substantial amount of money that surprised him. Mr. Boucher then told him that he had to return two-thirds to those responsible for the refund. The appellant hesitated but agreed without taking the time to carefully think it over. He was afraid. He had the misgivings of a person preyed upon—caught in an ambush. The appellant did not know what to do and let himself be carried away by the events.

[28] The respondent contended that a person could choose and that even after the appellant had made a choice, he could still seek to have his situation rectified by the tax authorities. It is true that the appellant chose the path of obscurity and doubt and that he did not go and disclose his situation to the tax authorities. One might think, however, that it would be hard for the appellant to consult the tax authorities. Immediately after he had received the payment, he had given back too much money to those responsible for the refund. He must have felt deep down that he could not recover that amount and that he should return it to the tax authorities along with his own share. He anxiously awaited the train of events.

[29] There is always a measure of responsibility in the acts that are committed unless a purely accidental act is involved. It is a serious act to give money back to government employees when they are performing their duties.

[30] Subsection 163(2) of the *Act* requires, however, that the false statement or omission be made knowingly, or under circumstances amounting to gross negligence. In other words, this subsection requires wrongful intent. I am of the opinion that the Court must be even more certain of a wrongful intent when the resulting penalty is an extremely large amount and would have a particularly onerous effect on the taxpayer, as is the case here.

[31] The appellant has a good occupation, but he is not an accountant or a legal expert. According to what he said in his testimony, he always filed his tax returns every year and always wanted to comply with the *Act*. This statement was not contradicted by the respondent.

[32] In my opinion, the circumstances described by the appellant are much more attributable to an ambush than to a deliberate decision on the appellant's part to contravene the *Act*. The appellant's act derived from a lack of reflexion and an error of judgment and not from wrongful intent. After that, he was trapped in an ambush.

[33] The more educated a person is, the harder it will be for the person to avoid the application of subsection 163(2) of the *Act* on the grounds of an error in judgment in circumstances like those in the case at bar. But here I am of the opinion that the appellant did not form the wrongful intent required by subsection 163(2) of the *Act*.

[34] Consequently, the appeals are allowed in order to delete the penalties and related interest.

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

"Louise Lamarre Proulx"

J.T.C.C.