Citation: 2005TCC463
Date: 20051209
Docket: 2003-500(IT)I

BETWEEN:

NICK POUSHINSKY,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(Delivered orally from the Bench at
Vancouver, British Columbia on May 14, 2003)

Margeson J.

[1] The questions before the Court are whether or not the Appellant should have been assessed a benefit in the taxation year 2000, allegedly a benefit conferred on him by the company and, secondly, if there was a benefit, was the Appellant liable for the penalties assessed to him. The benefit was assessed under subsection 15(1) of the *Income Tax Act* ("*Act*"), allegedly received from Mattanda. Further, in the year 2000 did the Appellant knowingly under circumstances amounting to gross negligence make or participate in, assent to or acquiesce in the making of false statements or omissions in failing to report the alleged benefit in his income for the 2000 taxation year.

[2] The Appellant, Nick Poushinsky, said that in the 2000 taxation year in issue, his company, Mattanda, was in business. He was the only shareholder. He was a director. There was some issue as to whether or not he was an employee. That is not relevant here. He said he was now.

[3] In essence, the company provided a management consulting service to a wide range of clientele, including in this particular case one of the ministries of the Government of British Columbia.

[4] What is significant is the Appellant's background. The Appellant said that he has a Ph.D. from York University. He taught at Dalhousie University. He also

taught at Rutger University and at the University of Victoria in British Columbia. He was also in the public service. He was a Deputy Minster for Mines in the Yukon and a Deputy Minister of Social Services there.

[5] Mattanda was incorporated in the Yukon. The stated purpose of this company was to provide consulting services to clientele such as the Ministry, in this particular case. What they were doing in this particular case was conducting a review of the mental health office, or at least that was one of the services that they were reviewing.

[6] Even though the Appellant signed the agreement himself personally, the contract work was on behalf of the company. The company was entitled to the benefit of the money that was paid, even though the cheques were made out into his own name as a result of some problem with Workers' Compensation. The Court is more than satisfied that it was the company that was doing the work and any monies that the Appellant received were obviously monies of the company.

[7] The Appellant said that the work was finally completed in 2001. He was very confused about the circumstances and the Court has some problem with why he should have been so confused. There were not a great many facts involved. Although he did not seem to remember it, the evidence satisfied the Court that there were two cheques issued and the Ministry was told that they were lost or stolen. Two other cheques were issued to replace them.

[8] It would seem only reasonable that the Appellant, before coming here today and being the major player in this case would have known what the factual situation was regarding these cheques. He looked at the back of the cheques that were put before him, but the Court is satisfied that he should have been much more aware and much more forthright in saying what the cheques represented and should have known what they represented. It would be unreasonable for the Court to conclude that he would not have known the circumstances under which the cheques were issued, when they were cashed, when they were deposited and when the money was taken out. It is unreasonable for him not to have been better aware of what the actual factual situation was.

[9] There is no doubt that there were two cheques issued and that they were for $13,000 each. The money belonged to the company and by the Appellant's own evidence, $13,000 of it went into the company account and $13,000 of it did not. By his own evidence the other $13,000 went into his own account and he used it for his own personal purposes.

[10] He did say that it was a distressful time for him and he was not exactly sure as to what happened after that and did not know when the cheques were issued. As a matter of fact he did not even seem to know that the cheques were actually recalled. He gave no evidence about that. That came out in the evidence of the witness who was presented on behalf of the Respondent.

[11] He did say that his wife had fallen and was having pains in her arms. In the panic that ensued he said, "I inadvertently deposited the money into my account". That was the statement out of his own mouth.

[12] He said that the Mattanda year was August 1, 2000 to July 31, 2001. He indicated who his accountants were. His financial statements were not prepared by him, they were prepared by accountants who were representing him here today. These returns were filed quite late. He was not a good manager according to him. He got his papers ready to present to his accountants who would at the end of the day make up the financial statements. He said that he prepared the documents at least a year after he deposited the money into his account. So that, again, was part of his explanation as to why he would have been confused about what had actually taken place.

[13] He did not inform the accountants about the money. "I had clearly forgotten about it. I am the sole director." He did admit that he reviewed the financial statements when they were prepared. He did not realize that the company's income was understated by $13,000. He did not know until about a year later when someone from Revenue Canada called him and told him about it. He had no problems with Revenue Canada before that date. That was his evidence in direct.

[14] In cross-examination he said that he had a Ph.D. in sociology. He operates a consulting business through Mattanda and has been operating it since 1992. In 2000 he was the sole shareholder and director of Mattanda. He did not report any salary or other income in 2000 from Mattanda. All of his income came from KPMG; he was employed there. From January 1, 2000 to December 31, 2000 his sole income was from KPMG. He may have been owed money by Mattanda by way of a shareholder loan and this may have been repaid but he was not quite sure about that. From time to time he did take money out of the company and he wrote cheques to himself. This would appear to have been by way of shareholder loan repayments.

[15] He said, "I don't know if I made draws to myself during 2000. If I did they were a loan payment." The contract with the British Columbia government was signed in 1999, the 7th of November. This is the service contract. Exhibit R-1 was admitted by consent. The reason why it was in his name was more than just because there was a problem with the company being registered in the Yukon and operating in British Columbia. It had to do with Workers' Compensation and some problem with Workers' Compensation. But he said, "I did the contract in Mattanda's name. I always did it through the company". There can be no doubt on the evidence that it was not his work he was doing, the remuneration was obviously not going to be his, it was going to belong to the company and he knew it.

[16] He said, "I understood it to be Mattanda's". He received the $13,000 in December of 1999. That is the $13,000 in dispute. He thought that he received it in 1999 and put it in the bank but the evidence later on would seem to indicate that the cheques were issued but then they were lost and they were reissued, and that did not get into the account until January of 2000.

[17] The Court did note at this time in the giving of the evidence that he seemed to be very uncertain about matters that he should have been more aware of and this has some effect certainly on the Court's view of his evidence. He did not really start getting ready for this case until a short time ago, according to his evidence. He may not have reviewed the necessary documentation and certainly that would have affected the way he gave his evidence.

[18] He recognized one of the cheques and not the other. He said "My honest recollection is that I recall one cheque in December of 1999". He said, "I think that that one was pulled back. I honestly don't know". That was the only indication that he had that there might have been a reissued cheque.

[19] He said, "I have not been able to track down the December 1999 cheque". He was not certain about whether the December cheque was cancelled and another one was reissued in January. A question arose that if both went in on the same date how did he get one registered to the company's name and the other not?" That was the question that was put to him but he said that the $13,000 did not get registered in Mattanda's account.

[20] He was asked if he was suggesting that the $13,000 was a repayment of a shareholder's loan and, after some consideration on it, he said, no, it was not. At the end of the day the Court concludes that it was not in his mind that he was

actually getting repayment of a shareholder's loan. He said that the $13,000 that went into his account went in there in "confusion". It was not believed to be a repayment of a shareholder's loan. The $13,000 was never put into Mattanda's account is what he said. Then he was asked what he did with the $13,000 and he said that he did not know although there can be no doubt that he used it for his own personal purposes.

[21] Exhibit R-2 was admitted by consent. Those were the financial statements. He reviewed the financial statements of the company for the period August 1999 to July 31, 2000, and these were identified. He referred to a copy of the revenue statement as well. He referred to the figure of $13,000, which was included in the statement and he said that that was one of the cheques or one of the amounts that was part of the $26,000, the other $13,000 being in issue. He said, "I never noticed that it was not recorded in Mattanda's books when I reviewed them".

[22] He said that he had 15 to 20 clients, some smaller and some larger. He never noticed that the $13,000 was unrecorded until Revenue Canada contacted him. He admitted that he was responsible for recording the income, reporting it and making the deposits. He did not compare the entries in the deposits to the contracts that the company had entered into, that is in the sense that he did not take a deposit and say, well, that is related to contract A, that is related to contract B and so on. He did not take any steps to verify the $13,000 entry on January 31, 2000. It was the B. C. Ministry's cheque. He said that he would not know how to do it.

[23] In redirect he said, "I do not know when I received the cheques. I don't recall keeping a journal," being a journal of cheques, or a synopsis of the cheques or a record of the cheques that he received.

[24] The Respondent called Kim Dow, who is an auditor with Canada Customs and Revenue Agency ("CCRA"), who had 18 years of education in a Catholic seminary before he came to Canada in 1965. He has been working with CCRA since 1991, or its predecessor. He has a degree in philosophy and then he studied French. He studied accounting in Canada. He has been an auditor since 1999. He was the auditor on this file.

[25] His purpose for doing the audit was to audit unreported income. He was trying to determine whether the contract was valid, how much was reported and how much was not reported. He found that of the $26,000, $13,000 was reported. The accountant could not provide the documents but he said that he did not report it.

[26] Exhibit R-1 was entered by consent. This was the contract that he audited and to which he earlier referred. Exhibit R-2 was a copy of the document provided by the accountant. He recognized that. He was asked what steps he took to determine what amount was paid and he explained that he contracted the accountant and he also contracted the Appellant himself. Apparently he spoke with him on two or three occasions, although the majority of his records were restricted to one of those interviews. He believed that he had interviewed the Appellant two to three times, or at least talked to him.

[27] When he spoke to the accountant he did not get the answers. He contacted the Ministry and he received copies of the cheques made out to the Appellant. The replacement cheques were issued to replace two cheques that were lost or stolen. They were deposited on January 31, made payable to Dr. Poushinsky both in the amounts of $13,000 dated January 27.

[28] Exhibit R-3 was introduced by consent. These referred to the replacement cheques. Two earlier cheques were replaced. They were referred to as having been lost or stolen.

[29] Exhibit R-4 was introduced by consent. This was a replacement cheque request, which was given to him by the Ministry. He was referred to Exhibit R-1 and identified the first cheque as being dated December 31, 1999. The payee was Dr. Poushinsky for $13,000. This was replaced as having been lost or stolen.

[30] The second cheque dated January 31 for $13,000 was reported lost or stolen. Payment was stopped on it on January 24. That was replaced on January 31. He also identified the summary, which was in reference to the two cheques which were reported lost or stolen. There was no information that he had that showed that any of this information was incorrect. He was not told that any adjustment was made to the shareholder's loan account and he did not go into it any further so he did not know whether it was or was not.

[31] In cross-examination he said that the Appellant did not explain why the $13,000 was not picked up. By that he meant why the Appellant did not know at some later time that the $13,000 had not been recorded in the company's income. The Appellant admitted that the funds were Mattanda's and that he did not record it anywhere. He did not record it in their income.

[32] At this point the Appellant said that he had reported the $26,000 in the income for Mattanda but this could not be verified. The Appellant satisfied him that he knew that he had not reported the income into the name of the company.

[33] In redirect he said that the Appellant's income was adjusted to include the $13,000 benefit to the company. After the Court's questions, he said that he had been told that the income had been reported and that he was not wrong on that. What he had said earlier was correct.

Argument on Behalf of the Appellant

[34] In argument the agent for the Appellant said that Mr. Poushinsky does not remember the dates. This was merely an error of bookkeeping. The reason that it was an error and that it happened was because there was a significant period of time between the money being received and when the year-end documents were prepared. Because of the amount of the money involved and the total amount of money which the company had as income in that year, even though the amount might have been significant with respect to other deposits, when you look at the total income of the company it was not a significant amount. Therefore, it would not have stood out. If it stood out they would have said, look, there is something wrong here. It was a bookkeeping error, and according to the case law it is his position that such errors do not always result in a benefit being applied to the taxpayer, to the shareholder.

[35] He referred to Tab 2 of his Authorities which was the case of *Chopp v. The Queen*, 95 DTC 527. He relied upon that. This was a decision of Mogan J. where at page 529 he said:

> It has been held on many occasions that a benefit will be taxable under subsection 15(1) of the *Income Tax Act* ... only if it is conferred on a shareholder in his capacity as a shareholder. ...The relationship between a corporation and its shareholders is based on invested capital. That relationship is not, by itself, incidental to or connected with any business carried on by the corporation. Indeed, a corporation may not carry on a business or, if it does, the shareholders may not be involved in the business.

He went on to indicate that in his belief:

> A shareholder benefit is more like a dividend and less like a business expense. Therefore, a benefit taxed under subsection 15(1) will usually result in some form of double taxation because the shareholder will be taxed on an amount

> which has not been deducted in computing the income of the corporation. In appropriate circumstances, this will be a harsh but necessary result.

Now, in this case argued by the agent for the Appellant he referred to a decision of Judge Rowe, being quoted by Mogan J. which went a bit further than Mogan was prepared to adopt. Mogan J. said:

> I would not go as far as Judge Rowe in stating that the words used in subsection 15(1) refer to some form of action with a strong component of intent. I think a benefit may be conferred within the meaning of subsection 15(1) without any intent or actual knowledge on the part of the shareholder or the corporation if the circumstances are such that the shareholder or corporation ought to have known ...

And I agree with that,

> ... that a benefit was conferred and did nothing to reverse the benefit if it was not intended.

And again, he says:

> Shareholders should not be encouraged to see how close they can sail to the wind under subsection 15(1) and then plead relief on the basis of no proven intent or knowledge.

[36] In that case he accepted the Appellant's argument based upon "the unqualified credibility of all four witnesses in the appeal as the most relevant factor". Then he went on to allow the appeal.

[37] The agent for the Appellant referred to Tab 7, which was the case of *Long v. Canada*, 98 DTC 1420, and he equated the present case to the type of errors that existed in that case, bookkeeping errors he referred to them as, and indicated that these do not amount to benefits according to the position that he took. At paragraph 11 of the decision the learned trial judge, Bowman J. said:

> I do not see how it can be said that a bookkeeping error of which the sole shareholder was not aware and which he did not sanction and that was not in accordance with the company's established practices constitutes "in reality a method, arrangement or device for conferring a benefit or advantage on the shareholder *qua* shareholder".

The agent says that that is basically what we have here.

[38] More importantly the Appellant referred to Tab 3 in his Book of Authorities, the case of *The Queen v. Chopp*, 98 DTC 6014. This was the Federal Court of Appeal decision, and the Court said:

> In our view, Judge Mogan properly assessed the facts when he concluded that it was through the taxpayer's "ignorance and innocence ...

Which is what the agent is arguing here,

> ... in not knowing that an error had been made when the amount of $28,490 was posted" as a corporate expense when it should have been debited to the shareholder's loan account.

[39] In that case there was the issue of the shareholder's loan account, and obviously the Court accepted at the Trial Division level that the taxpayer thought it was a shareholder's loan account that was debited. It was not debited, and, therefore, he did not have the intention to do anything wrong and it was not gross negligence. The Appeal Court would not overturn that finding of fact. The Court said that there was nothing in Judge Mogan's findings that was not reasonably supported by the evidence before him so they upheld what he had to say.

[40] At Tab 5 the agent referred to her *The Queen v. David Robinson*, 2000 DTC 6176. His argument was that there must be strong evidence of intent and not just an honest error. In that particular case, which dismissed the Crown's appeal, the Court held:

> There was no evidence that the taxpayer had the knowledge to appreciate the significance of the increased shareholder's loan account in the Company's financial statements when he signed its corporate tax return for 1986. ... the fact that the taxpayer had received no money from the Company resulting from the misclassification error. And finally, the taxpayer was unaware of the error, and his credibility was not in issue. In light of all of the foregoing, the $64,022.19 in issue was not required to be included in taxpayer's income. The Minister was ordered to reassess accordingly.

And the Court in the context of the decision said at page 3:

> At all material times the Defendant was in a credit balance in his shareholder loan account in the Company. ... The Defendant never drew on the Balance,

That is different, of course, from the present case because we have no evidence at all which is sufficient for the Court to decide what the balance of the shareholder's

loan account was. There can be no doubt anyway in the Court's mind that the Appellant was not putting forth as a reason for his actions the fact that he believed that he was receiving a repayment of his shareholder loan account.

[41] The Court in *David Robinson, supra*, referred to Judge Rowe's decision and said:

> In the Tax Court of Canada, Judge Rowe concluded that the accountant's error in misclassifying the payment ... on its books and records, as a credit to the defendant's shareholder loan account rather than as a sale, did not constitute an appropriation within the meaning of subsection 15(1) of the *Income Tax Act*.

[42] The Court would not overturn that finding. In essence, the Court decided on the evidence before it that the Defendant could not have known when he signed his return that that amount had been erroneously credited to his shareholder account. The Court further held that the Defendant received no money from his company as a result of the misclassification. That was acknowledged by the Defendant in any event. The credibility of the Defendant was not in issue. That case is considerably different from the case at bar on all of those points.

[43] On the issue of intent, the agent said that there was no intent. There was ignorance. It was an error based upon the same principle as is found in the cases earlier cited.

[44] On the issue of subsection 163(2) "knowingly or in circumstances amounting to gross negligence" the evidence of the Appellant was that he did not know. In *Sommers v. M.N.R.*, 91 DTC 656, the taxpayer was a reasonably successful businessman with a professional firm of accountants to assist him in preparing his returns. In his 1977 return he had specifically reported certain small amounts of income while ignoring a significant sum of $21,446.35, which comprised a substantial portion of his gross earnings for 1977. That is not the case here, according to the agent.

[45] Further, there was no history of any *Income Tax Act* violations by the Appellant. He had no history of doing this kind of thing so nothing can be drawn from that. He also referred to *Venne v. The Queen*, 84 DTC 6247, particularly at page 12 of that decision. He relied upon quotations such as the following regarding the definition of gross negligence:

> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with our not.

In that particular case, the Court said:

> In other words the errors in business income, small in some years but very substantial in others, would not necessarily have "sprung out" at a person with the taxpayer's background and abilities. While it may have been naive for him to trust his bookkeeper as knowing more about such measures than he did, I do not think it was gross negligence for him to fail to challenge the bookkeeper with respect to the business computations. However egregious the errors committed by the bookkeeper in this respect, it is quite conceivable that they were not in fact noticed by the plaintiff and his neglect in not noticing them fell short of constituting gross negligence.

[46] In so far as this Court is concerned that case is not like the case at bar. That situation did not take place here. If there were bookkeeping errors, which the Appellant could not be reasonably expected to have noticed, then, yes, that is the type of case we are talking about, but we do not have that case here. As a matter of fact any actions that took place were not the actions of the bookkeeper at all. Any egregious actions were the actions of the Appellant himself. The bookkeeper was not told about the money and it was not included in the returns. As a matter of fact when he was asked about it by the auditor he referred him back to the Appellant himself and he said he did not have any knowledge about that.

[47] The agent said that the Respondent has not proved the penalties and has not met the burden on him to prove that the penalties should be levied. That is a burden that is on the Respondent from the beginning to end. He has not established on the balance of probabilities that the Appellant has run afoul of subsection 163(2) and that penalties should not be assessed.

Argument on Behalf of the Respondent

[48] In argument on behalf of the Respondent counsel said there were two issues: one, was there a benefit conferred in the years in question and, if there was, were the penalties properly assessed? Counsel referred to subsection 15(1) at Tab 1, and, of course, that is the section we are dealing with, which says:

> Where at any time in a taxation year a benefit is conferred on a shareholder, or on a person in contemplation of the person becoming a shareholder, by a corporation otherwise than by ...

And the exceptions do not apply, so that is the section we are dealing with, whether or not there was a benefit. If he got the money, then there was a benefit and, if he converted it to his use, then certainly there was a benefit. There is no doubt that the exceptions set out in section 15 do not apply. Then subsection 163(2) says:

> 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 ...

And so on. So that is the question. That is the second issue.

[49] Counsel took the position that a shareholder in a corporation, particularly in a small closely held corporation as here, is in a very special position. They are in a position where they can draw funds out of the corporation without much difficulty. They can write cheques to themselves, and, indeed, the evidence here indicated that cheques were written to the Appellant. Consequently, the Court has to take into account that very close relationship that exists.

[50] He referred to *Chopp, supra,* in support of his position, particularly at pages 529 and 530, which requires that the benefits be conferred only on a shareholder in his capacity as a shareholder. There is no doubt in this particular case that if it was conferred; it was conferred on him in his capacity as a shareholder.

[51] And then he went on to quote the very underlying part that the Court already referred to in its earlier statements. Suffice it to say that he argues that in light of this close relationship the Court must pay particular attention to that relationship.

[52] He particularly relied upon the statements at page 532 in the *Chopp, supra,* decision, again, which I have already referred to where Mogan J. was talking about Judge Rowe's decision, and he would not go as far as Rowe J. in saying that there had to be a strong component of intent. Suffice it to say that he obviously decided that there need only be something less than that. I have already indicated that what he was thinking about were circumstances where the shareholder ought to have known that a benefit was conferred and did nothing about it.

[53] Counsel said that when you take those general principles into account and apply it to the facts of the situation here, then the answer is that there was a benefit conferred and the Appellant knew about it or should have known about it.

[54] With respect to penalties under subsection 163(2), counsel said that it is very significant that two cheques came in on the same date and that one was deposited and one was not deposited. This is evidence of intention to use the money and not to report it, but if it was not evidence of intention it was at least evidence that there was a gross error on behalf of the Appellant or that the actions of the Appellant amounted to gross negligence as contemplated by the subsection 163(2).

[55] He said that there is sufficient evidence before the Court to find that the Appellant intentionally did not record the money and did not include it in the books of the company but took it and used it, but he is relying more on the second part, in other words, that there was gross negligence, that his actions at least amounted to gross negligence or he made a grossly negligent omission.

[56] Counsel referred to *Findlay v The Queen*, 2000 DTC 6345. That is a case where this Court decided that the Appellant was grossly negligent and the Appeal Court overturned it. However the significant part of that case was the gross negligence definition where Isaac, J.A. said:

> *"Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.*

[57] According to Isaac J.A. this definition is consistent with the jurisprudence on the subject and they adopted it.

[58] Counsel for the Respondent said that that is what existed in the present case. The Appellant here was an educated person. He had long experience in acting in companies. The companies had acted in this type of endeavour providing services to governments and other clients over a period of six years. He knew that the money was the company's. He did not take proper care to ensure that the money was recorded in the books of the company. He used the money for his own purposes.

[59] It is significant, he says, that this was the second largest deposit in the company's books of accounts for the year in question and that should have sprung out at the Appellant. At least it should have been sufficient warning for him that

something was not being done that should have been done and that the money should have been reported.

[60] He reported one part of the income and did not report the other. There was no explanation for that. The appeal should be dismissed. There was not a reasonable explanation given and there was no corroboration for the testimony of the Appellant.

Analysis and Decision

[61] As this Court may have indicated in its comments during the trial, even though the Minister may have told the Appellant's agents what he considered to be the two most significant cases and factors to be considered in deciding whether or not there was a benefit and whether or not there was gross negligence, this Court is not bound by that. That is just what the Minister believed, but this Court has gone over all of the cases that have been referred to here and cited at length from them, and those are the cases that it must use in order to make its decision. It is not conclusive what the Minister thought were the most important reasons.

[62] The Court does agree that there are two issues: one, was there a benefit conferred on the corporation to the shareholder under subsection 15(1) and, if there was a benefit conferred, should the penalties have been assessed under subsection 163(2)?

[63] On the first issue there can be no doubt in the Court's mind that there was a benefit conferred. We have the evidence out of the mouth of the Appellant himself. He said himself that he received the money, that it was not his money, it belonged to the company, that he received it because he was a shareholder in the company, and, as *Chopp, supra*, indicates, he was very close to the corporation, was able to write cheques to himself. There is no doubt that he took the money out. That was his evidence.

[64] There can be no doubt that he used the money for his own purposes. There can be no doubt that the money was not his, it was the company's, and it was sent over to him because of his own actions and he used it. There can be no doubt in the Court's mind whatsoever that on his own evidence there was a benefit conferred upon him.

[65] There can be no doubt in the Court's mind that the Appellant was not really seriously contending that the money that he received was a repayment for a loan

that he had made to the company. There can be no doubt that he made loans to the company, but, first of all, the Court does not conclude that the Appellant was even arguing that it was a repayment of a loan at the time that he took the money and used it for his own purposes. Even if he were taking that position, there is nothing in the records to indicate that there was ever any adjustment made to the corporate loan documents to indicate in any way whatsoever what the loan balances were, that the loan balance was sufficient to use up this amount of money, or that the Appellant ever intended that this money be considered to be a repayment of a loan.

[66] Even if that argument were made, the Court does not accept it as a valid argument because there is nothing to support it. There was no corroboration of that position at all. The Appellant received the money all right, it was the company's money, he used it for his own purposes, so he definitely received a benefit.

[67] With respect to whether this was an error or not, or whether the Appellant knew that it was being done and it was a mere bookkeeping error, once he gets the benefit the Appellant has to explain why he got the benefit and, in this particular case, he was unable to do so. He merely said that it was an error. He did not say, "it was my money, I was entitled to it", but he said "I got it in error. It was just confusion on my part. I was in a bad state of affairs. My wife was injured. I was not a good bookkeeper. I did not keep a chequing journal. I did not keep an income journal. I did not realize that it was happening until I went to get my year-end financial statements done, which was some considerable time after the money had come out" consequently, it was merely an error that he should not be held responsible for.

[68] That argument does not hold water as far as the Court is concerned. The Court is satisfied on the evidence that the Appellant knew what he had done. He knew that the money was the company's. He knew when the money was received. There is no explanation as to why he had any confusion about the cheques when they came in, and the Court is surprised that he was not able to explain to the Court exactly what the process was, when the cheques came in and when the cheques were recalled and why he was issued two new cheques.

[69] There can be no doubt that when he received the money he must have known that it was the company's money. He must have known that the money should have been deposited to the company's account. He must have known that he was not putting it in the company's account, that he was putting it into his own account. He continued on until the end of the whole process, even today, and made no corresponding adjustment in the books of the company at any point in time to

show that this, indeed, was an error, a mere bookkeeping error. In other words, he did nothing which would show that he acted consistently with his avowed belief that this was an error and that he did not know this had taken place.

[70] The Court is satisfied beyond any doubt that he knew exactly what was going on and that when the money was put into his own account he knew what he was doing. He put part of the money into his own account and part into the company's account. He must have known at that point in time that this was not correct. The Court does not know what was in his mind when he was doing it. The Court is not attributing any other motive to him, whether he needed the money or whether there was some other reason why he did it, but the point remains clear that he did it. He must have known that he was doing it and when he did it he knew that he was taking money that belonged to the company and was using it for his own purposes. At that there can be no doubt.

[71] If there was any doubt about that, the fact that two cheques were deposited at the same time and one amount was put in the company's account and one was not, dispels that. That cannot be put down to mere carelessness, lack of knowledge, or lack of bookkeeping skills or advice given by accountants.

[72] The actions which gave rise to this case here were not the actions of the accountant as in *Findlay*, *supra*. In *Findlay*, it was the bookkeeper's fault as the facts disclose. It was not Mr. Findlay's fault. The Trial Court, at that particular time, found that the actions of the bookkeeper amounted to gross negligence, and the Court attributed those grossly negligent actions to the Appellant himself, the taxpayer, but the Appeal Court said that under the circumstances, that gross negligence of the accountant was not that of the taxpayer.

[73] In this particular case we do not have that at all. Nobody is arguing that the bookkeepers did anything wrong. As a matter of fact the Appellant himself when he was on the stand said that the bookkeepers did not do anything wrong, they did not know about it. He was not trying to cast blame on the accountant or saying that he was at fault for all of this. He was merely saying that it was due to his personal problems at the time and due to the fact that he was unsophisticated in bookkeeping matters, that he was a little slack in what he was doing and that he did not pay enough attention to what he was doing. That was his explanation.

[74] The Court agrees with counsel for the Respondent that each case must be decided on its own facts. In this particular case when you look back at *Chopp*, *supra* and cases of that nature, those were cases where the taxpayer did not

really have the necessary knowledge. In *Findlay, supra*, where the bookkeeper made the error the Court was not prepared to attribute the error of the bookkeeper to the taxpayer. Sometimes if the error is so glaring and the amount is so large in relation to the amount of money earned by the corporation, or the facts are of such a nature that it would be almost impossible for the Appellant not to know that the bookkeeper made a mistake, the gross negligence of the bookkeeper can become the gross negligence of the taxpayer. But that is not the case here. This case is entirely different.

[75] It is significant that in the present case only the Appellant himself, Dr. Poushinsky, handled the cheques. He was the one that deposited them. He was the one that saw them. He was the one who knew what they were about. He was the one that knew that one of the cheques was deposited in the company's accountant and one was not. He was the one that knew that he used the money for his own purposes. He was the one that did not tell the bookkeepers about it. He was the one that signed the financial statements at the appropriate period of time without advising the bookkeepers that these amounts were improperly not included in the company's income. He is the one that at the end of the day, and even up to today, took no corrective action whatsoever to set the record straight.

[76] The Court can only conclude that he knew exactly what he was doing and, if he did not know, then he should have known what he was doing. It is satisfied that he actually knew what he was doing at the time when he used that money and put the money in his own account.

[77] Both cheques were issued at the same date. Both cheques were deposited the same date. He knew that the money that was coming in was money which was owing on a contract, which was owned actually by the corporation even though he had signed it himself. He knew that was the company's work and he knew that was the company's money. His explanation is insufficient as far as the Court is concerned.

[78] With respect to the benefit, of course, the Court has said that there is no doubt that he had a benefit. He received the benefit himself. The Court is satisfied with that, that he knew that he received a benefit and he used the money for his own purposes so that the Court is satisfied that during the year in question the Minister was right to add the amount to the Appellant's income as a benefit conferred by the company.

[79] With respect to the question of gross negligence, the Court looks at the definition of gross negligence, which was set out in *Findlay, supra*, and applying that definition to the factual situation in the case at bar, the Court is satisfied that the Minister was right to apply the penalties, that the actions of the Appellant in this case did amount to gross negligence.

[80] The Court is satisfied that the actions of the Appellant in this case must be taken to have involved greater neglect than simply a failure to use reasonable care. It is satisfied that it involved a high degree of negligence tantamount to intentional acting or at least a wilful indifference as to whether or not the law was complied with. The Court can come to no other conclusion based upon the evidence than that the Appellant knew what he was doing when he did what he did and he was not even himself trying to pass the blame on to anybody else when he acted as he did. The Court is satisfied that his actions did amount to gross negligence under the circumstances and that the Minister was entitled to apply the penalties.

[81] Consequently, the Court will dismiss the appeal and confirm the Minister's assessments.

[82] The Court is satisfied that the Minister had the duty of establishing on the balance of probabilities that these penalties should be applied, and the Court is satisfied that the evidence taken in total, including the evidence of the Appellant himself and the other evidence, is more than sufficient for the Court to conclude that the Minister has met this burden. The appeal is dismissed and the Minister's assessment is confirmed.

Signed at New Glasgow, Nova Scotia this 9th day of December 2005.

"T. E. Margeson"

Margeson J.

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APPEARANCES:

Agents for the Appellant:	James McCallum and Gordon S. Caulder
Counsel for the Respondent:	Michael Taylor

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario