Docket: 2006-3317(IT)G

BETWEEN:

CLAUDE DALPHOND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 1, 2008, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Serge Fournier
Counsel for the Respondent:	Mounes Ayadi

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2000 taxation year is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Montreal, Quebec, this 8th day of September 2008.

"François Angers"

Angers J.

Translation certified true
on this 30th day of June 2009.

Erich Klein, Revisor

Citation: 2008 TCC 427
Date: 20080908
Docket: 2006-3317(IT)G

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REASONS FOR JUDGMENT

Angers J.

[1] When the appellant filed his income tax return for the 2000 taxation year, he reported, *inter alia*, the $277,875 taxable capital gain arising from the disposition of 50,000 shares in the company Tigertel, and in computing his taxable income he claimed a capital gains deduction for qualified small business corporation shares under subsection 110.6(2.1) of the *Income Tax Act* ("the Act") in the amount of $277,875.

[2] On June 28, 2001, the Minister of National Revenue ("the Minister") made an initial assessment with regard to the appellant, which allowed, *inter alia*, the deduction, in the computation of his taxable income, of $223,088 as capital gains from the disposition of qualified small business corporation shares.

[3] Following an audit by the Ministère du Revenu du Québec, the Minister was informed that during the 1999 taxation year the appellant held shares in Contour Telecom, and that during that same year, Contour Telecom merged with Tigertel. After the merger, the new Tigertel company became a wholly-owned subsidiary of the American public company Applied Digital. As a result, Tigertel shares could not be considered to be shares in a Canadian-controlled private corporation, and consequently the disposition of the Tigertel shares by the appellant in January 2000

did not qualify for the capital gains deduction claimed under subsection 110.6(2.1) of the Act.

[4] The Minister therefore made adjustments for the 1999 and 2000 taxation years to take into account Tigertel's merger with Contour Telecom in 1999. The following adjustments were made.

For the 1999 taxation year:

(i) As a result of the merger of the companies in 1999, the Minister determined a taxable capital gain of $163,500 arising from the disposition by the appellant of the shares he held in Contour Telecom, and allowed a $163,500 capital gains deduction for qualified small business corporation shares;

For the 2000 taxation year:

(ii) The Minister, using a higher adjusted cost base, computed a taxable capital gain arising from the appellant's disposition of his Tigertel shares on January 10, 2000;

(iii) The appellant was allowed no capital gains deduction for the 2000 taxation year because the shares that were disposed of were not qualified small business corporation shares.

[5] Accordingly, on February 25, 2005, the Minister reassessed the appellant for the 2000 taxation year outside the normal reassessment period, determining a $90,639 taxable capital gain and disallowing the $223,088 capital gains deduction for qualified small business corporation shares.

[6] The appellant served a notice of objection to the reassessment for the 2000 taxation year on the Minister on April 20, 2005. On August 25, 2006, the Minister confirmed the reassessment, hence this appeal.

[7] The only issue in this appeal is whether the Minister was justified in reassessing the appellant for the 2000 taxation year outside the normal reassessment period in order to determine a $90,639 taxable capital gain and disallow the $223,088 capital gains deduction for qualified small business corporation shares on the ground that the Tigertel shares were not shares in a Canadian-controlled private corporation and were not deductible under subsection 110.6(2.1) of the Act.

[8] The provision of the Act under which the Minister may reassess a taxpayer outside the normal reassessment period is subsection 152(4), which reads as follows:

> 152(4) Assessment and reassessment
>
> The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (*a*) the taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act . . . .

[9] The appellant retired in 2000 after a career of some 30 years as pension plan manager at the STM. He held a bachelor's degree in business from the École des Hautes Études Commerciales de Montréal and was awarded a prize in economics during his career.

[10] As manager of the pension plan, he was responsible for managing investment income for nearly 3,500 retirees. He worked with a team of managers, hired actuaries and made sure that investments were diversified. It seems that his involvement was profitable, since the retirement fund's assets grew from $30 million to $2.5 billion under his management.

[11] On a personal level, the appellant began managing his own portfolio in 1995. The appellant has always had a personal portfolio. In fact, he said that he was familiar with all that because that was his job. Through brokers, he began to purchase shares in various companies. This was the era of what he called "media technologies", which he characterized as call centre types of thing. Contour Telecom Management Inc. was one that seemed promising, and so in 1997 and 1998 he purchased over 200,000 shares in Contour Telecom. In total, he purchased 233,000 shares between May 28, 1997, and October 26, 1998. The details are as follows:

May 28, 1997	10,000 shares purchased
May 29, 1997	10,000 shares purchased
June 9, 1997	7,000 shares purchased
July 23, 1997	11,000 shares purchased

July 29, 1997	10,000 shares purchased
October 15, 1997	10,000 shares purchased
March 4, 1998	50,000 shares purchased
March 30, 1998	100,000 shares purchased
October 26, 1998	25,000 shares purchased
January 13, 1997	25,000 shares sold
In 1997	8,000 shares sold

On January 13, 1999, he sold 33,000 shares, and so at that point he held a total of 200,000 shares.

[12] The Contour Telecom shares were all purchased through brokers at the Royal Bank of Canada Financial Group or Canadian Investors Protection Fund. Apparently a Mr. Leblanc had spoken to the appellant about Contour Telecom. Mr. Leblanc is a manager and specializes in building portfolios of small and medium-sized businesses. The shares of Contour Telecom were traded on the Canadian Dealing Network (CDN) and the CDN is not listed on the stock exchange. The companies whose shares are traded by the CDN are thus not considered to be public corporations for the purposes of the Act. Contour Telecom was therefore a Canadian corporation.

[13] In September 1999, Contour Telecom and Tigertel merged. The appellant apparently heard the news from Mr. Leblanc. According to the appellant, that event did not make the headlines. The outcome was that the 200,000 Contour Telecom shares became 50,000 Tigertel shares, but the appellant said he did not ask himself any questions about this. He added that if there were Americans involved, he was not made aware of it. However, the appellant acknowledged that he received some 30 documents from various companies and that he may have received documentation concerning the merger, but he did not read everything. According to the appellant, the period in question was around New Year 2000, and in that context, events unfolded in rapid succession.

[14] In November 1999, the appellant received an offer to purchase his 50,000 Tigertel shares, and on January 10, 2000, he sold his shares, realizing a rather substantial gain.

[15] The appellant filled out his own income tax returns. He testified that he followed the form line by line and consulted the guide. He said he could teach those whose job it is to prepare tax returns a thing or two and did not see why he would pay specialists to prepare his.

[16] The appellant testified that he relied on an article published in the *Globe and Mail* in September 1999 in choosing the tax treatment for his sale of Tigertel shares. The article said that Contour Telecom was a Canadian corporation, which made the sale eligible for a capital gains exemption of up to $500,000. He had kept the article in his files ever since it was published, and on consulting the guide when preparing his 2000 income tax return he believed he was entitled to that exemption. He also testified that until the sale of his Tigertel shares he knew nothing about that company, because he had never received anything from Tigertel. However, he received quarterly reports on his investments from Mr. Leblanc.

[17] The appellant's tax return was filed in evidence. On line 127 of the return, where taxable capital gains are entered, it is indicated that Schedule 3 is to be completed and attached. The appellant did not complete Schedule 3, and instead submitted a sheet attached to his return on which he showed the sale of the Tigertel shares and the gain from the sale. He said that most of the time he never completed Schedule 3 because it did not have enough space and he had been doing it his way for a number of years. The appellant said that he consulted the guide, which informs the reader about the capital gains deduction that may be claimed at line 254. Line 254 of the guide refers to the capital gains deduction for gains realized on the disposition of qualified small business corporation shares.

[18] The respondent filed in evidence form T657, used for calculating the capital gains deduction for the 2000 taxation year. The Canada Revenue Agency recommends using the form if a taxpayer has disposed of qualified farm property or qualified small business corporation shares. The form also contains important information for the taxpayer, such as the information that if a taxpayer has investment income, he or she should complete another form, form T936, Calculation of Cumulative Net Investment Loss (CNIL) to December 31, 2000. The appellant could not say whether he had read form T657. He did not use it because, in his opinion, everything was transparent. He also admitted that he did not use the other form, form T936. He said he had prepared his return methodically.

[19] When questioned about his return, he acknowledged that he had not calculated his taxable income on line 260, preferring to leave it to the Department of Revenue to finalize the calculations and determine it to be $227,075.

[20] When Revenu Québec did its audit, the appellant was informed, on April 1, 2004, that he was not entitled to that deduction on the ground that the Tigertel shares were not shares in a Canadian-controlled private corporation. In his reply, the

appellant requested time to do his own research and consult a specialist, who he said then confirmed this to be the case.

[21] The respondent called the Revenu Québec auditor, who explained his work, and in particular the result of the audit. It was after a discussion with the appellant's representative that adjustments were made for 1999 and 2000; the first adjustment concerned the tax consequences of the merger and the second concerned the exemption. Revenu Québec also obtained a waiver from the appellant so that it could assess him after the normal assessment period. The auditor pointed out that the appellant's case was complex but said that the deduction of a substantial loss reported by the appellant with respect to one of his investments was rather unusual in view of the application of the criteria for allowing the capital gains exemption for the Tigertel shares. The auditor also considered the question of whether the taxpayer had reported all of his income. The case was then forwarded to Revenue Canada.

[22] The appellant's file was given to Maryse Lévesque, a reviewing officer at the Canada Revenue Agency office. She reviewed the appellant's return, his capital gains and losses and the exemptions claimed. She checked the schedules and saw that Schedule 3 had not been completed. She testified that if Schedule 3 had been completed, it would have been easy for her to see errors in the figures and to see calculations that were different. She also realized that the deduction claimed was a large amount and that the fact that it was not applicable was going to increase the taxpayer's capital gain substantially.

[23] She therefore prepared a draft assessment and sent the appellant and his representative a letter, but received no response from them. She therefore assessed the appellant accordingly.

[24] The issue is therefore whether the appellant made a misrepresentation that was attributable to neglect, carelessness or wilful default in filing his return for the 2000 taxation year. If so, the Minister would be authorized to assess after the normal assessment period. The burden is on the Minister to prove this, on a balance of probabilities.

[25] The objective of subsection 152(4) was summarized very well by Strayer J.A. of the Federal Court of Appeal in *Nesbitt v. Canada*, [1996] F.C.J. No. 1470, in which he wrote, at paragraph 8:

> . . . It appears to me that one purpose of subsection 152(4) is to promote careful and accurate completion of income tax returns. Whether or not there is misrepresentation

> through neglect or carelessness in the completion of a return is determinable at the time the return is filed. A misrepresentation has occurred if there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment. It remains a misrepresentation even if the Minister could or does, by a careful analysis of the supporting material, perceive the error on the return form. It would undermine the self-reporting nature of the tax system if taxpayers could be careless in the completion of returns while providing accurate basic data in working papers, on the chance that the Minister would not find the error but, if he did within four years, the worst consequence would be a correct reassessment at that time.

[26] There is no doubt that in this case there was a misrepresentation by the appellant when he filed his tax return for the 2000 taxation year. Not only were there incomplete calculations and a schedule that was not completed, but, first and foremost, there was an ineligible deduction of capital gains arising from the disposition of shares. Was that an error made in good faith in this case?

[27] Counsel for the appellant argued that his client had acted with care and diligence in filing his tax return for the year in question. His was an honest mistake relating to the characterization of proceeds, that is, his Tigertel shares were not eligible for the exemption. Counsel went on to say that the appellant is an educated taxpayer who believed he was entitled to the exemption in light of the advice he was given by Mr. Leblanc and the article published in the *Globe and Mail*. He added that the Act does not require that a taxpayer consult an accountant to prepare his or her tax return, nor does it require a taxpayer to do research on the Internet and seek information about the control of the corporation in which he or she holds shares. In the case at bar, the appellant had no reason to believe that Tigertel was controlled by American interests because the merger of Contour Telecom and Tigertel had been carried out by third parties and was beyond the appellant's control.

[28] Counsel for the respondent, for his part, argued that the appellant's training and work experience in investment management supported the argument that he was negligent. His training in economics and his career experience put the appellant in a position to be able to keep up with events and made him an informed taxpayer. In this case there was a substantial capital gain, and so the issue, that is, whether the taxpayer is eligible for the exemption, is an important one. Counsel for the Respondent also argued that the appellant failed to follow the guide or complete Schedule 3, which the Agency uses to enter data in its system, and that what we have in this case is not a mere error. In conclusion, he submitted that the appellant had not been diligent in his handling of his tax affairs.

[29] The judgment cited in nearly all decisions on this issue is *Venne v. Canada*, [1984] F.C.J. No. 314, in which Strayer J., then of the Federal Court, summarized the powers of the Minister under subsection 152(4) of the Act as follows:

> I am satisfied that it is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(a)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the words "misrepresentation that is attributable to neglect" must mean, particularly when combined with other grounds such as "carelessness" or "wilful default" which refer to a higher degree of negligence or to intentional misconduct. Unless these words are superfluous in the section, which I am not able to assume, the term "neglect" involves a lesser standard of deficiency akin to that used in other fields of law such as the law of tort. See Jet Metal Products Limited v. The Minister of National Revenue (1979), 79 DTC 624, at 636-37 (T.R.B.).

[30] Thus, all Canadian taxpayers have a duty to exercise reasonable care and to ensure that when they file their tax returns, the information given in those returns and in the documents is accurate and complete and discloses all of their income. Indeed, taxpayers attest to this by signing their declarations. It is therefore the breach of that duty that constitutes the neglect or carelessness referred to in subsection 152(4) and allows the Minister to assess outside the normal assessment period. The misrepresentation must relate to a fact that is material to the purposes of the return and to any future reassessment, as Strayer J.A. said in *Nesbitt*, *supra*.

[31] In this case, the appellant signed his tax return on April 27, 2001, nearly 14 months after the sale of his Tigertel shares. He said that in claiming the deduction he had relied on what Mr. Leblanc had said and on an article published in the *Globe and Mail* in September 1999 that he had kept until he prepared his return. He stated, moreover, that he was unaware that Tigertel was a wholly-owned subsidiary of an American public corporation, Applied Digital Solutions Inc.

[32] I had before me a taxpayer who had spent his entire professional career managing pension funds and making various investments in the performance of his duties, and who had for a number of years been managing his own investment portfolio. It is hard to believe that a person working in this field would not know the ins and outs of certain investments, and particularly the tax benefits or tax consequences of those investments. There can be no doubt that purchasing qualified small business shares sometimes involves a high risk, but let us not forget that the incentive provided by the deduction in subsection 110.6(2.1) of the Act makes them very attractive all the same.

[33] In my opinion, when the appellant acquired all his shares in Contour Telecom, he was not unaware of the deduction available in the event that he realized a gain on the disposition thereof. It is hard to believe that having realized such a substantial gain on the disposition of his Tigertel shares, the appellant did not wonder at all, between the time of that disposition, January 10, 1999, and his signing his tax return on April 27, 2001, whether it was eligible for that deduction. The appellant is by no means a neophyte in this field.

[34] The appellant chose to prepare his tax return for the 2000 taxation year himself, and that was his choice. He testified that he was as competent as a tax preparer and did not see why he would pay specialists, and that was also his choice. However, the appellant must provide all of the information required and complete the tax return form and accompanying schedules and do the calculations. Even though the appellant maintains that he prepared his return line by line following the guide, it is obvious in this case that he did not do so. It is not sufficient, in preparing a tax return, simply to give the CRA the information and leave it to the CRA to do the calculations, or to claim deductions without worrying about whether one is actually entitled to them.

[35] In my opinion, the appellant was not unaware that, in order for him to be entitled to the deduction, his shares had to be qualified shares, and if he was in possession of the *Globe and Mail* article when he prepared his tax return, he would certainly have seen that he had to have held the shares for two years before he could claim the deduction under subsection 110.6(2.1). Yet the majority of his shares, 175,000 in total, were purchased on or after March 4, 1998.

[36] It is the duty of all taxpayers to prepare their tax returns with care, providing accurate and complete information, and they must moreover attest to having done this by signing their returns. When taxpayers claim a deduction, they must do more than simply think they are entitled to it, particularly when the benefit obtained through the deduction is substantial. In this case, a simple check would have enabled the appellant to see that the consequence of the merger was that his new shares did not qualify under subsection 110.6(2.1) of the Act.

[37] I reiterate Strayer J.A.'s comments in *Nesbitt*, *supra*, which I have reproduced in paragraph 25 of these Reasons, and I find that in the present case there was misrepresentation by the appellant when he filed his tax return for the taxation year in question in that he claimed a deduction to which he was not entitled, and that this misrepresentation was attributable to neglect on his part. In my opinion, if taxpayers

are required to make a reasonable effort to report all of their income, the same is true when it comes to claiming deductions.

[38] The appeal is dismissed with costs.

Signed at Montreal, Quebec, this 8th day of September 2008.

"François Angers"

Angers J.

Translation certified true
on this 30th day of June 2009.

Erich Klein, Revisor

CITATION:	2008 TCC 427
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APPEARANCES:

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