Docket: 2008-3305(IT)I

BETWEEN:

SHIU KEUNG FRANKLIN WONG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeal of *Shiu Keung Franklin Wong* (2008-3311(GST)I) on June 9, 2010 at Hamilton, Ontario and on October 20, 2010 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Agent for the Appellant:	Alex Wai
Counsel for the Respondent:	Sandra K.S. Tsui

JUDGMENT

The appeals from assessments made under the *Income Tax Act* with respect to the 1999, 2000, 2001 and 2002 taxation years are allowed, without costs, and are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the unreported income amounts in the 1999 and 2000 taxation years should be $9,500 and $17,700, respectively, in accordance with the attached Reasons for Judgment.

It is further ordered that the filing fee of $100.00 be refunded to the Appellant.

Signed at Vancouver, British Columbia, this 25th day of January 2011.

"Diane Campbell"

Campbell J.

Docket: 2008-3311(GST)I

BETWEEN:

SHIU KEUNG FRANKLIN WONG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeal of *Shiu Keung Franklin Wong* (2008-3305(IT)I) on June 9, 2010 at Hamilton, Ontario and on October 20, 2010 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Agent for the Appellant:	Alex Wai
Counsel for the Respondent:	Sandra K.S. Tsui

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, ("*ET Act*") Notice of Assessment No. 05CP0119080, dated March 24, 2006, is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that recalculations of total interest and penalties owing pursuant to section 280 of the *ET Act* may be required on the outstanding GST amounts in respect to the taxation years 2001 and 2002 only, in accordance with the attached Reasons for Judgment.

It is further ordered that the filing fee of $100.00 be refunded to the Appellant.

Signed at Vancouver, British Columbia, this 25th day of January 2011.

"Diane Campbell"

Campbell J.

Citation: 2011 TCC 30
Date: January 25, 2011
Docket: 2008-3305(IT)I
2008-3311(GST)I

BETWEEN:

SHIU KEUNG FRANKLIN WONG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] These appeals relate to income tax issues in respect to the Appellant's 1999, 2000, 2001 and 2002 taxation years and Goods and Services Tax ("GST") issues in respect to the periods January 1, 2001 to December 31, 2002. Initially, the Appellant was also assessed pursuant to the *Excise Tax Act* (the "*ET Act*) for the periods February 1, 1999 to December 31, 2000 but those periods have since been vacated. In addition, the Minister of National Revenue (the "Minister") has reduced the unreported income amounts for 1999 and 2000 to $9,500 and $17,700 respectively.

[2] There are four issues that arise in respect to these appeals:

1. Whether payments, received by the Appellant from Canadian Information Technology Inc. ("CITC") in the taxation years 1999, 2000, 2001 and 2002, should be characterized as income from business or as repayments of a shareholder's loan that should not be included in the Appellant's income?

2. If the payments are properly characterized as income from business, were gross negligence penalties properly levied pursuant to

subsection 163(2) of the *Income Tax Act* (the "*IT Act*") in respect to the Appellant's failure to include those payments in the taxation years 2000, 2001 and 2002?

3. Whether the Minister properly assessed unremitted GST amounts in respect to the taxation years 2001 and 2002?

4. If the outstanding GST remittances have been properly assessed, is the Appellant liable for interest and penalties pursuant to section 280 of the *ET Act* for the years 2001 and 2002?

[3] The Appellant is a former customer service engineer, who worked for IBM from 1970 to 1994. He has a Bachelor of Arts degree from York University. After he retired from IBM, he worked with various companies and taught computer-related courses at Seneca College and Ryerson University. In addition, he launched a number of businesses which focussed on providing educational services primarily to new Canadian immigrants. Between 1998 and 2002, the Appellant developed fourteen different educational programs that gained approval as private diploma programs from the Ontario Ministry of Education.

[4] One of the businesses which he initiated, Workplace Technology Inc. ("WTI"), was renamed to Canadian Information Technology College Inc. in 1997. The Appellant and his business partner, Brij Bali, started CITC to provide professional computer training in Toronto to new immigrants. In addition to approval from the Ontario Ministry of Education, the Appellant also obtained accreditation from the Ontario Student Assistance Program ("OSAP") in respect to student funding. While operating CITC, the Appellant developed an information technology internship, in which the students could gain work experience at various companies. According to the Appellant, it was a "first of its kind" program in the Toronto area (Transcript, pages 321-322).

[5] The Appellant provided various services to CITC. To obtain payment from the company, the Appellant invoiced CITC for "Technology Management and Support Service" (Exhibit R-1, Tab 14, page 190) through his sole proprietorship, Alliance Computer Services ("ACS"), and charged the applicable GST rate on the invoiced amounts. The Appellant testified that the invoicing system was established by his business partner, Brij Bali, and that CITC's accountants relied on it to prepare the corporate books.

[6] Although CITC was operated by both the Appellant and Mr. Bali, only the Appellant extended a shareholder loan to CITC. At the end of 1998, his loan totalled $73,000 and remained at this amount on the corporate books until the end of 1999. An explanatory note in CITC's 1999 Notes to Financial Statements dated June 14, 2000 (Exhibit R-1, Tab 1, page 31) indicates that the shareholder's loan was non-interest bearing, unsecured and without specific terms of repayment. The note also stated that this loan was not to be repaid in 2000.

[7] In early 2000, CITC was experiencing financial difficulties which led to Mr. Bali's departure from the company. In late 2000, the Appellant sold the majority of the shares of CITC to Paxtan Educational Inc. ("Paxtan"), which was controlled by Dr. Beck Yu Tan. Although there was an apparent difference of opinion between the Appellant and Dr. Tan as to whether the Appellant remained a 6.25 per cent shareholder/owner of CITC or whether he satisfied a share option clause, contained in the Supplementary Agreement respecting the purchase and sale (the "Supplementary Agreement"), and acquired a 30 per cent shareholding after the sale, this matter has no effect on the issues in these appeals.

[8] According to the Supplementary Agreement, the Appellant was to be paid $3,000 monthly as salary, which was to be reviewed after a period of time. Dr. Tan testified that, after Paxtan purchased shares of CITC, the Appellant continued to invoice CITC for his services personally or through his business, ACS. Although after the sale, CITC's accounting department initiated a process to keep the now multiple shareholder loan accounts separate for accurate tracking, the invoicing procedure for the Appellant's services, commenced by CITC prior to the sale, continued in the same manner subsequent to Paxtan's purchase. CITC's 2001 and 2002 "Transactions by Account" spreadsheets generally reference payment of these invoices as "fees" or "consulting fees" in these years.

[9] Jacqueline Lam, the internal accounting manager for CITC from 2000 to 2006, confirmed that she issued cheques to the Appellant personally, or to his business, ACS, for the Appellant's services and also to reimburse him for expenses he incurred on behalf of CITC. Ms. Lam stated that she issued cheques according to the requisition purpose specified on the invoices and that the amounts payable were posted to specific CITC accounts. She also confirmed that a cheque issued with the notation "fees" attached to it would not have been issued as a repayment of a shareholder's loan account.

[10] Tammy Lam, CITC's external accountant, who had commenced working with CITC prior to the sale to Paxtan, confirmed that, in its corporate returns for 2000,

2001 and 2002, CITC deducted the management consulting fees, invoiced by the Appellant, from its corporate income as a business operating expense.

[11] CITC's 2000 Balance Sheet, prepared by CITC's external accountant, Tammy Lam, on June 21, 2001 and signed by the Appellant "on behalf of the Board", indicates that his shareholder's loan account had increased from $73,000 in 1999 to $88,718 by December 31, 2000. In 2001, the Appellant made further shareholder loan advances, which appear to have been for the purpose of satisfying a share option purchase provided to him pursuant to the Supplementary Agreement. In 2001, he issued a number of cheques to CITC in amounts between $3,000 and $10,000, containing notations such as "Share Options" or "Share Options – Loan". A detailed accounting of the Appellant's 2001 shareholder's loan advances (Exhibit R-1, Tab 8) indicates that the Appellant advanced a total of $50,607.19 in 2001. This advance was in addition to the Appellant's pre-existing original shareholder's loan amount of $88,718. According to CITC's corporate records, on December 31, 2002, these balances remained unchanged.

[12] By the end of 2002, the Appellant was no longer in receipt of payments from CITC and, according to his evidence, he was terminated by CITC in February, 2003. Subsequent to his departure from CITC, the Appellant successfully sued CITC in Small Claims Court for outstanding payments owed to him in the amount of $10,408.24.

[13] Ranjani Roberts, the auditor for Canada Revenue Agency ("CRA"), testified that she concluded that the payments that CITC made to the Appellant were management fees rather than a repayment of his shareholder's loan for several reasons: she was able to trace these payments through the corporate journal entries; the Appellant's invoices, which he submitted to CITC, were in respect to "Agreed Services for Technology Management & Support Services"; cheques were issued to the Appellant or his business, ACS, in respect to those invoices and contained notations indicative of compensation for services; the Appellant cashed these cheques; and, as well, all of these matters were encompassed and reflected in CITC's financial statements and tax returns. In addition, an agreement existed in which the Appellant would be paid a salary commencing November 1, 2000 and, in verifying the shareholder's loan account, the corporate books disclosed no reduction in the Appellant's loan balances and there were no unusual entries that had not been corrected by CITC's external accountant.

[14] Ms. Roberts stated that, because management services are a taxable supply and because the Appellant's invoices to CITC contained charges for GST, although he

was not a GST registrant, she also completed a GST assessment in respect to the Appellant's service fees. Ms. Roberts also recommended that penalties be levied.

The Appellant's Position:

[15] The Appellant characterized the payments he received from CITC as a repayment of his shareholder loans and, on that basis, he argued that he would owe no income tax, interest or penalties on those payments. He also argued that he did not owe GST, or the related interest and penalties, because he really did not collect GST. He did not believe that he was charging GST, although it was listed on the invoices he prepared, because he believed that he was receiving money in respect to his shareholder loans. He simply continued to use the same invoice templates, which contained the GST notation, that his former business partner, Mr. Bali, instituted prior to the sale to Paxtan. Further, the Appellant stated that he thought that the GST notation on the invoice had been inadvertently included on his invoices by the CITC accounting department, both prior to, and subsequent to, the sale to Paxtan.

[16] The Appellant relied on three main arguments to support his position:

(1) he did not make any money from CITC in these years;

(2) he always intended to treat the payments as shareholder loan repayments; and

(3) he had no knowledge of accounting and taxation procedures.

The Respondent's Position:

[17] The Respondent argued that the payments to the Appellant were management/consulting fees for services he rendered to CITC and were not a repayment of his shareholder's loan. The Respondent's position is that it is insufficient for the Appellant to state that he always considered that these payments were a repayment of his loan, because it is not simply what the Appellant intended to do but, rather, what he actually did that is relevant to the payment characterization.

[18] The Respondent also pointed out that the Appellant became aware that he could have treated the payments as a shareholder's loan repayment, instead of income, only after the audit was in progress. While the Appellant could have arranged for these payments to constitute a repayment of his shareholder's loan, he

did not do so and it is not up to this Court to now determine the most favourable accounting treatment.

Analysis:

Issue #1: Characterization of the Payments from CITC to the Appellant

[19] A determination of the nature of these payments is a question of fact. In the 1949 Tax Appeal Board decision in the *Reference Re Income War Tax Act and Walter Crassweller* (1949), 1 Tax A.B.C. 1, 1949 CarswellNat 20, the principle was advanced that the true character and taxability of a payment is determined not by the payor's own description of that character but, rather, by reference to the substance of the facts and the provisions in the *IT Act*. In the 1967 Tax Appeal Board decision in *Rossman et al v. M.N.R.*, 67 D.T.C. 273, the same principle was applied and, at page 274, the following was stated:

> …no process of accounting subsequently employed by the company's auditors could change the quality of income that had attached to the money that came into the appellants' hands.

[20] In *Farm Business Consultants Inc. v. The Queen*, 95 D.T.C. 200, Bowman J., as he was then, reiterated that the true nature of a payment is determined not by an assigned description but, rather, by the totality of the facts and by the underlying legal relationships of the parties. At page 203, he stated:

> … The essential nature of a transaction cannot be altered for income tax purposes by calling it by a different name. It is the true legal relationship, not its nomenclature, that governs. The idea of dressing up the payments for the customer list in the garb of consulting fees was the idea of Mr. Ibbotson, the president of the appellant, because he wanted to turn the payments for goodwill into currently deductible expenses. Evidently the Whalls were prepared to go along with this suggestion but their acquiescence, and the fact that they were prepared to include the payments in income, does not assist the appellant, nor indeed does the fact that the Minister did not question the Whall's inclusion of the payments in income. …

[21] These decisions suggest that neither CITC's entries in its books, which indicated the payments to the Appellant were management/consulting fees, nor the Appellant's statement that they were shareholder loan repayments, are sufficient, on their own, to determine the true character of those payments. Instead, the character of the payments must be addressed by the substance of all the facts and evidence in

these appeals as well as the underlying legal relationships between the Appellant and CITC.

[22] The only evidence I have to support the Appellant's position, that the payments were shareholder loan repayments, is the oral testimony of the Appellant. However, all of the documentary evidence suggests quite the opposite. In addition, all of the Respondent's witnesses contradicted the Appellant's claim respecting these payments. The Respondent presented the corporate records of CITC, the corporate T2 returns and audit reports, as well as the cancelled cheques cashed by the Appellant – all of which support the Respondent's position that these payments were management/consulting fees that CITC paid to the Appellant for his services. For example, CITC's T2s and Financial Statements for the years 1999, 2000 and 2001 indicate that CITC incurred management fees and, in 2002, consulting fee expenses. Even the Appellant's own invoices, both prior to the sale of CITC to Paxtan and after the sale, record that the fees charged were for "services" rendered or, more specifically, as he referenced in 1999 to 2001, "technology management and support services" and then, in 2002, as "management/consulting services". The Appellant signed or co-signed some of the cheques for these invoices. In 2002, the cheque memos indicate the payment purpose as "consulting fees". After the Appellant was terminated, he brought an action in the Small Claims Court against CITC and successfully claimed outstanding amounts for the services he had rendered to the company. The Supplementary Agreement clearly states that payments were to be made to the Appellant in exchange for him providing his services for a monthly "salary" of $3,000 for a six month period, after which it was to be reviewed. In addition, the Supplementary Agreement references the Appellant's existing shareholder loans in a separate paragraph and states that the loans were either to be forgiven or assigned to Paxtan and the Appellant on a 70/30 basis, respectively, if the Appellant purchased a total of 30 per cent of the shares pursuant to an option clause. The Appellant himself confirmed in his evidence that he provided the agreed services to CITC and referred to these payments which he received for those services as "salary". At page 136 of the transcript, he confirmed that his monthly salary was increased from $3,000 monthly because it was too low:

> Yeah. I can't live on that forever. That is a very low <u>salary</u> for a person …
> (Emphasis added)
>
> (Transcript, page 136, lines 1 – 2)

All of this suggests that the Appellant understood that he was dealing with fees for services rendered to CITC and not repayments of his loans.

[23] The Appellant argued that, because he had a large outstanding shareholder's loan during the period when he received the payments from CITC, these payments could automatically be treated by him as loan repayments. However, there is no basis in any legal authority to support an automatic shareholder loan setoff. Caselaw has confirmed that a payment, made by a corporation to its shareholder/lender, will not be considered an automatic setoff but, rather, its true nature will be determined by the parties' intentions respecting the payments together with the entirety of the evidence adduced at the hearing.

[24] The Respondent relied on the case of *Docherty v. M.N.R.*, 91 D.T.C. 537, in which Brulé J. confirmed that a right of setoff is not automatic. At page 539, quoting *Massey-Ferguson Limited v. The Queen*, Brulé J. stated:

> … Frequently no difficulties ensue, but if they do, in the absence of contracts or other documents, Courts must determine the intention of the parties and the nature of the obligations imposed on them by reference to credible evidence of another kind.

Brulé J. then went on to state:

> However, more formality may be required when a third person is involved, such as the Department of National Revenue. This point was stated in *The Queen v. Peter Neudorf*, 75 DTC 5213, when Mr. Justice Heald stated at 5215:
>
> > It is my further view that since one of the parties to the arrangement was a corporation, there is more formality required (such as corporate resolutions, for example) than in the case of individuals and particularly where the details of a relationship are important as against third persons such as the Revenue.

[25] In giving her evidence, Dr. Tan stated that her understanding was that the payments to the Appellant constituted compensation for his technological services to CITC and not shareholder loan repayments as the Appellant contended. In fact, Dr. Tan testified that no cheques were ever issued to the Appellant for drawings from his shareholder's loan account. Jacqueline Lam, CITC's internal accountant, confirmed that the procedure for making such a payment to the Appellant, in respect to his shareholder loans, would have required a cheque requisition, or a specific request by Dr. Tan, reflecting this specific payment purpose and that the resulting cheque memo would have also reflected that purpose. She went on to state that, if there had been a repayment of a shareholder's loan, it would have been documented in the corporate books. Tammy Lam, CITC's external accountant, also confirmed her

understanding that the payments to the Appellant by CITC were for services he was providing to the company. She testified that, when she reviewed these payments with the Appellant, he did not disagree with the way the payments were being posted in CITC's books, nor did he question her about how the payments that he was receiving should be treated. When she reviewed the year-end balance of his 2000 shareholder's loan account with him, he did not disagree with the balance amount. In addition, as late as February 10, 2005, the Appellant, during a meeting with the CRA auditor, stated that CITC still owed him for "unpaid wages".

[26] The Appellant's evidence, with respect to the intention of the parties for a shareholder loan setoff, was, at times, inconsistent. He testified that, had he requested Dr. Tan to treat the payments as a repayment of his loans, she would not have consented. Their agreement respecting the sale of CITC shares to Paxtan specified that the Appellant would make additional shareholder loan advances, but did not incorporate specific loan repayment plans for those loans. Finally, the Appellant's statement, that he only learned that he might have been able to treat these payments as repayments of his shareholder loans after his audit was commenced, again counters his setoff argument.

[27] Where the evidence clearly supports that the Appellant was providing technological services to CITC, then payments made to the Appellant would seem to me to constitute strong evidence that they were intended to be compensation for those services, unless sufficient evidence is adduced to support a different classification of those payments. All of the documentary evidence, including the Supplementary Agreement, the consistent corporate treatment of the payments and the Appellant's invoicing, together with the evidence of Dr. Tan, Jacqueline Lam and Tammy Lam, not to mention the Appellant's own reference to the payments as salary, support the conclusion that when the payments were made, the intent respecting these payments was that they be treated as compensation for the services which the Appellant testified he provided to CITC. All of this supports the conclusion that there was no common intention between the Appellant and CITC, its majority owner or its internal and external accountants, to treat the payments as a reduction to the Appellant's shareholder loan account.

[28] The Federal Court of Appeal decision in *Friedberg v. The Queen* (1991), 92 D.T.C. 6031, upon which the Respondent relied, supports the proposition that, for tax purposes, the form a transaction is given will be of paramount importance and that the tax treatment of such transactions may not be retroactively recharacterized unless a *bona fide* accounting error has occurred with respect to their initial characterization. I have no evidence before me to suggest that these payments were

mischaracterized due to some mistake or error. CITC relied on its classification of the payments as management/consulting fees throughout and deducted them as operating expenses from its income for income tax purposes. The corporate books and the Appellant's own invoices gave consistent treatment with respect to the classification of these payments. Although CITC's accounting was overseen by the Appellant's partner, Mr. Bali, prior to the sale of CITC to Paxtan and, subsequent to the sale, by CITC's own accounting department, it was the Appellant who was in charge of the invoices he supplied to receive his payments and these invoices were identical in format between 1999 and 2002. The Appellant completed them himself and represented that he was requesting payment for his services to CITC. He never indicated that he was requisitioning payment in respect to his shareholder's loan account.

Issue #2: Were penalties properly levied pursuant to 163(2) of the *IT Act*?

[29] Subsection 163(2) states:

> **163[…](2) False statements or omissions.** 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 …

[30] Caselaw has clearly established that subsection 163(2) is intended to be a penal provision. An early decision often quoted in support of this characterization is the 1969 Exchequer Court of Canada decision in *Udell v. M.N.R.*, [1970] Ex C.R. 176, where, at page 190, Cattanach J. stated:

> There is no doubt that section 56(2) is a penal section. In construing a penal section there is the unimpeachable authority of Lord Esher in *Tuck & Sons v. Priester*, [(1887) 19 Q.B.D. 629], to the effect that if the words of a penal section are capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail. He said at page 638:
>
> > We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction.

[31] In *Venne v. The Queen*, 84 D.T.C. 6247, Strayer J., at page 6256, discussed the term "gross negligence" in the following terms:

> … "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. …

[32] At paragraph 39 of *Dao v. The Queen*, 2010 D.T.C. 1086, I stated the following:

> [39] … Subsection 163(2) implies a requirement of intent to conceal a taxation transaction. … Because subsection 163(2) is penal in nature, the provision merits a higher degree of culpability and must be imposed only where the evidence clearly justifies it. …

[33] The onus is upon the Respondent to establish that the Minister was justified in imposing this penalty in the circumstances of these appeals. Courts have been hesitant to apply gross negligence penalties unless the evidence establishes a high degree of blameworthiness involving reckless conduct.

[34] In reviewing whether these penalties are justified, caselaw has established a number of factors that, although not exhaustive, act as a guideline. *DeCosta v. The Queen*, 2005 D.T.C. 1436, is particularly helpful. Bowman C.J. (as he was then) stated at paragraph 11 of that decision:

> [11] In drawing the line between "ordinary" negligence or neglect and "gross" negligence a number of factors have to be considered. One of course is the magnitude of the omission in relation to the income declared. Another is the opportunity the taxpayer had to detect the error. Another is the taxpayer's education and apparent intelligence. …

[35] In these appeals, the magnitude of the omission in relation to the income declared in 2000, 2001 and 2002 was significant. The Appellant reported $4,032 in employment income in 2000, $8,990 in 2001 and $0 in 2002, compared to the unreported income that was assessed for each of these taxation years ($17,700 in 2000, $45,784 in 2001 and $41,280 in 2002). The Appellant is an educated man with a university degree and an extensive background and involvement in business endeavours. He launched a number of businesses after he retired from IBM and successfully developed a large number of educational programs requiring approvals from the Ontario Ministry of Education for accreditation and for OSAP. He had knowledge of the requirement for GST registration, as the evidence supports that he obtained and used at least one GST registration number for one of his businesses in prior years.

[36] The evidence suggests that the Appellant is a capable professional and, with his level of education, intelligence and work-related experience, he could have sought assistance in determining whether he had to declare as taxable income those payments from CITC. The evidence supports that the Appellant had access to not only one corporate accountant who worked within the CITC accounting department, but also CITC's external accountant. They both confirmed that the Appellant never questioned the title of management/consulting fees given to the payments, even though he reviewed them with at least one of those accountants. He was a shareholder of CITC and Dr. Tan testified that he had control of the day-to-day operations of CITC after she purchased the majority of the shares through her company, Paxtan. He signed financial statements and T2 returns for some years, signed and co-signed some of the cheques to himself and he cashed these cheques. He prepared every invoice that he issued to CITC in respect to these fees. All of this occurred over a number of years. They were not isolated instances. The very label that the Appellant himself attached to these payments in giving his evidence was "salary".

[37] In *DeCosta*, Bowman C.J. (as he was then), at paragraph 11, stated:

> … No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence.

In reviewing the "overall picture" in these appeals, I must conclude that the Appellant was more than simply negligent in his responsibility to accurately report his income and, therefore, penalties are warranted.

Issue #3: Are unremitted GST payments correctly assessed for 2001 and 2002?

[38] Caselaw clearly establishes that, where a taxpayer (supplier) charges GST, whether it was collectible or not, the tax must be remitted to the Receiver General for Canada. If the amounts are not remitted, a taxpayer is liable to be assessed for those payments (*ITA Travel Agency Ltd. v. The Queen*, [2001] G.S.T.C. 5, affirmed by the Federal Court of Appeal at [2002] G.S.T.C. 58; *800537 Ontario Inc. [Acura West] v. The Queen*, [2005] F.C.J. No. 1732 (FCA); and *Gastown Actors' Studio v. The Queen*, [2000] F.C.J. No. 2047 (FCA)). This principle is in accordance with the intention of the scheme of the legislation generally and, more specifically, sections 222 and 225 of the *ET Act*. If there is an error and the services are either not taxable and are an exempt supply, the purchaser may apply for a rebate. Even where a taxpayer/supplier does not perceive the significance of including GST on an invoice,

he will be required to remit it unless it was included by mistake and there is an intention contrary to that of charging GST that can be sufficiently substantiated by the evidence.

[39] The Appellant did not adduce any evidence that he had an affirmative intention not to charge GST that was included on his invoices to CITC. He completed his own invoices over a number of years, always included a GST component, collected it from CITC, cashed the cheques and used all of the proceeds of the cheques. The Appellant clearly had a duty to remit these GST amounts. All of those amounts that were collected, by the Appellant, were "collected as or on account of tax" and were to be held in trust for the Crown pursuant to subsection 222(1) of the *ET Act*. The amounts were then to be included in a net tax calculation pursuant to subsection 225(1) and remitted pursuant to subsection 228(2). Simply put, whether the GST amounts were payable or not, the Appellant charged GST, CITC paid it and the Appellant was required to remit it because the evidence supports that he collected it.

[40] With respect to the Appellant's arguments that he really did not charge GST because he was collecting his shareholder's loan and that the GST notation had been inadvertently included on the invoices by CITC's accounting department, I must reject both of these submissions. These invoice formats were used by the Appellant prior to the sale of CITC; he obviously knew enough about GST to complete the proper calculation and include it on his invoices; he had previously obtained a GST registration number for another of his businesses; he completed the GST calculations and invoiced CITC for at least four years, on a monthly and later on a bi-weekly basis, and, on his expense reports to CITC, he calculated and indicated separately the GST component. Based on all the evidence, the Appellant is not entitled to rely on a purported lack of understanding of accounting procedures. He is clearly the author of his own misfortune.

[41] Although the Respondent did not examine her witnesses with respect to whether CITC claimed input tax credits for the GST amounts it paid to the Appellant, and the documents provided to the Court do not clearly indicate such a claim, based on all of the evidence and the caselaw, the Appellant collected the GST amounts and must remit them. Such an examination by Respondent counsel may simply have strengthened the Respondent's argument on this issue.

Issue #4: Were interest and penalties properly levied pursuant to 280(1) of the *ET Act*?

[42] I must conclude that, since the Minister correctly assessed outstanding GST remittances that should have been remitted in 2001 and 2002, the interest and penalties have been properly imposed. Although the Appellant relied on his stated lack of awareness and understanding of accounting and taxation matters to explain his failure to report and remit the collected GST amounts, I have concluded that the evidence suggests the contrary. Even if the Appellant had shown such a lack of understanding and knowledge, I would still have concluded that, after he charged these amounts and collected them, he did not do everything that could reasonably be expected to ensure that GST was properly reported and remitted. Since the Appellant has not adduced evidence that would establish that he exercised all reasonable care in the circumstances, interest and penalties were properly levied pursuant to subsection 280(1) of the *ET Act*.

Conclusion:

[43] The payments received by the Appellant from CITC are properly characterized as management/consulting fees and, consequently, constitute taxable business income in the taxation years 1999, 2000, 2001 and 2002. Gross negligence penalties pursuant to subsection 163(2) of the *IT Act* were properly levied in respect to the taxation years 2000, 2001 and 2002. The Appellant is liable for the GST amounts assessed, as he failed to report and remit GST that was collected. The Minister originally assessed the Appellant on the basis that there were outstanding GST amounts respecting the years 1999 to 2002 but, at the hearing, conceded that there were no outstanding GST amounts in 1999 and 2000. Consequently, interest and penalties, although properly assessed pursuant to subsection 280(1) of the *ET Act*, should be calculated on the outstanding GST amounts for the taxation years 2001 and 2002 only.

[44] The appeals are allowed, without costs, to reflect the Minister's concession that the unreported income amounts in the 1999 and 2000 taxation years should be $9,500 and $17,700, respectively, and to permit recalculations of interest and penalties pursuant to section 280 of the *ET Act* on the outstanding GST amounts in respect to the 2001 and 2002 taxation years.

Signed at Vancouver, British Columbia, this 25th day of January 2011.

"Diane Campbell"

Campbell J.

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COURT FILE NOS.:	2008-3305(IT)I and 2008-3311(GST)I
STYLE OF CAUSE:	SHIU KEUNG FRANKLIN WONG AND HER MAJESTY THE QUEEN
PLACES OF HEARING:	Hamilton, Ontario and Toronto, Ontario
DATES OF HEARING:	June 9, 2010 and October 20, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	January 25, 2011

APPEARANCES:

Agent for the Appellant:	Alex Wai
Counsel for the Respondent:	Sandra K.S. Tsui

COUNSEL OF RECORD:

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Name:

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