Docket: 2013-868(IT)G

BETWEEN:

ANGELINA BRATHWAITE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *Ian Thompson* (2014-1150(IT)G) on **December 8**, 2015, at Toronto, Ontario

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant:	Jeffrey Radnoff
Counsel for the Respondent:	Katie Beahen

AMENDED JUDGMENT

The appeals from the reassessments made pursuant to the *Income Tax Act* (the "*Act*") for the 2005, 2006 and 2007 taxation years are dismissed.

The appeal from the reassessment made pursuant to the *Act* for the 2008 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the penalty imposed pursuant to subsection 163(2) of the *Act* is deleted.

One set of costs is awarded to the respondent in accordance with Tariff B. That sum – as calculated - is to be multiplied by 60% and the resulting number, when divided by two, is the amount of costs each of the appellants, Angelina Brathwaite and Ian Thompson, must pay to the respondent by March 31, 2016.

This Amended Judgment is issued in substitution for the Judgment dated February 1, 2016. The Judgment is amended solely to correct the date of the hearing of the appeal.

Signed at **Toronto, Ontario**, this **18th** day of February 2016.

"D.W. Rowe"

Rowe D.J.

Docket: 2014-1150(IT)G

BETWEEN:

IAN THOMPSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
Angelina Brathwaite (2013-868(IT)G) on **December 8**, 2015,
at Toronto, Ontario

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant:	Jeffrey Radnoff
Counsel for the Respondent:	Katie Beahen

AMENDED JUDGMENT

The appeal from the reassessment made pursuant to the *Income Tax Act* (the "*Act*") for the 2007 taxation year is dismissed.

The appeal from the reassessment made pursuant to the *Act* for the 2008 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the penalty imposed pursuant to subsection 163(2) of the *Act* is deleted.

One set of costs is awarded to the respondent in accordance with Tariff B. That sum – as calculated - is to be multiplied by 60% and the resulting number, when divided by two, is the amount of costs each of the appellants, Angelina Brathwaite and Ian Thompson, must pay to the respondent by March 31, 2016.

This Amended Judgment is issued in substitution for the Judgment dated February 1, 2016. The Judgment is amended solely to correct the date of the hearing of the appeal.

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"D.W. Rowe"

Rowe D.J.

Citation: 2016 TCC 29
Date: 20160218
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BETWEEN:

ANGELINA BRATHWAITE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2014-1150(IT)G

AND BETWEEN:

IAN THOMPSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Rowe D.J.

[1] Upon consent of counsel for the respondent and counsel for both appellants, these appeals were heard on common evidence.

[2] The affidavit of Ahmadreza Fallahfini ("Fallahfini"), Litigation Officer employed by Canada Revenue Agency ("CRA"), filed in each of the above appeals, is directed to be filed pursuant to subsection 244(9) of the *Income Tax Act* (the "*Act*").

Appeal of Angelina Brathwaite

[3] The appellant, Angelina Brathwaite ("Brathwaite") appealed from assessments issued by the Minister of National Revenue (the "Minister") with respect to the 2005, 2006, 2007 and 2008 taxation years. In those years, Brathwaite deducted certain amounts as Claimed Agent Loss as detailed in a Statement of Business Activities. The Minister initially assessed Brathwaite's returns for 2005, 2006 and 2007, as filed. In issuing an assessment for the 2008 year, the Minister disallowed the professional loss and other deductions claimed and imposed a gross negligence penalty pursuant to subsection 163(2) of the *Act* in the sum of $53,509.34. The Minister reassessed Brathwaite for the 2005, 2006 and 2007 taxation years, disallowing the net business losses claimed and reduced other expenses claimed to nil for the 2005 taxation year. The Minister imposed gross negligence penalties under subsection 163(2) for the 2005, 2006 and 2007 taxation years in the amounts of $5,334.42, $15,025.92 and $5,849.20, respectively. On August 20, 2012, the Minister issued further reassessments for the 2005, 2006, 2007 and 2008 taxation years, allowing certain other expenses that were not part of the business losses or Claimed Agent Loss in those years.

[4] For convenience, counsel for the appellants, with the consent of counsel for the respondent, filed – as Exhibit R-1 – a binder entitled Respondent's Book of Documents, Tabs 1 to 25, inclusive. A binder entitled Appellant's Book of Documents, Tabs 1 to 6, inclusive, was filed as Exhibit A-1.

[5] Brathwaite testified she is 52 years old and graduated with a Diploma in Business from Seneca College where she studied insurance and investment. She joined Royal Bank of Canada ("RBC") and worked as a teller for 14 years and then managed a department dealing with staff banking in a Toronto branch. After her employment with RBC, she started working as a financial planning trainer at Investors Group. In 2000, she was hired as a recruiter by Shared Vision Management and in 2006 joined Brunel Canada Limited ("Brunel") in the recruitment department as a senior client partner. Brathwaite stated that during the course of her various employments she had not dealt with accounting or tax matters. She met Ian Thompson ("Thompson") in 2005 and they were married in 2008. Thompson was acquainted with a man who introduced them to Danasar Morlee ("Morlee"). At that point, Brathwaite had not filed income tax returns for several years as her mother had been ill and as she had been remunerated for years by commissions, she had not remitted sufficient payments on account of tax because she needed the money. After considerable discussion with Morlee, Brathwaite was advised that he could file her 2007 tax return and also

introduced her to an insurance agent from whom she and Thompson later purchased a term insurance policy. With respect to her tax return, Morlee advised that she could claim a variety of expenses pursuant to the Form 2200 provided by her employer. He did not mention the amount of any potential refund as a result of preparing a tax return on her behalf but charged a fee of $2,500 which she paid. As a consequence of filing her 2007 tax return, she received a refund in the sum of $7,283.11 and she and Thompson were "very happy." They spoke to Morlee who advised her to file returns for years prior to 2007 because the nature of her work would entitle her to deduct certain expenses which would reduce income and produce refunds of tax paid earlier. Morlee also discussed with her and Thompson the opportunity to participate in financial planning through policies and other investments offered by insurance companies. Brathwaite stated there was no discussion about business losses. Early in 2009, she began receiving letters from CRA concerning claimed business losses and she contacted Morlee who introduced her and Thompson to Christian Lachapelle ("Lachapelle") who was someone apparently experienced in tax matters derived in part from previous employment with CRA. Counsel referred Brathwaite to a four-page letter dated 2009-01-12 (January 12, 2009) - at Tab 3 in Exhibit A-1 – that she sent to J. Adam, an auditor at the CRA Audit Division and acknowledged that she had written at the bottom of each page the phrase, "Certified Conform to the Original" and signed her name below. She stated that she had read that document which had been e-mailed to her by Lachapelle for the purpose of responding to the inquiry by CRA. Although she did not understand the contents of the letter, she signed it and mailed it to the auditor with respect to her 2005, 2006 and 2007 tax returns. Brathwaite thought her 2008 return had been prepared by a different person but stated it was not done by Morlee. Brathwaite stated she and Thompson had attended a seminar for the purpose of meeting Lachapelle and listened to his explanation about how they could rectify their financial situation and he recommended a financial advisor – Paul Mahinder ("Mahinder") who would attend at their residence to provide relevant advice in that regard. Mahinder came to their residence at some point during the Christmas holiday season and began discussing various systems he had used to advise clients but he was inebriated and they became concerned about their relationship with Morlee and Lachapelle and instructed Mahinder to leave their home. They reported the incident to the Toronto Metropolitan Police that same evening. Later in the course of their attempts to obtain satisfaction in resolving their difficulties with CRA, they appeared before a Justice of the Peace and swore out an Information alleging that they had been the victims of fraud. They also spoke to CRA officials at various levels within that organization and pursuant to their advice, filed amended returns in an effort to demonstrate cooperation with the agency to resolve the matter. When asked to provide a statement to be recorded on

video concerning their dealings with Morlee and Lachapelle, Brathwaite stated she and Thompson were ready and willing to comply but had not been contacted subsequently for that purpose. Counsel referred Brathwaite to a document – Amended T1 General Return 2006 – at Exhibit R-1, Tab 11 – and she identified her signature on the last page and had inserted the date, August 15, 2011. At Tab 12, she also identified her signature on her amended tax return for the 2007 year and confirmed the above date had been inserted and that the same procedure was followed with respect to the amended return for 2008 at Tab 13. All amended returns – prepared by the same firm - were delivered to the Toronto West Tax Services Office and were stamped as received on August 30, 2011 and the information provided in the box for professional tax preparers in the 2006 and 2007 returns showed B T & Associates in Richmond Hill and Thornhill, Ontario were the preparers. Brathwaite reiterated there had never been any discussion with Morlee about claiming false business losses.

[6] In cross-examination by counsel for the respondent, Brathwaite stated that she and Thompson had retained the services of Morlee to file their returns. Later, although letters sent by CRA were addressed to them as individuals using their names, as filed, and each of them had responded separately, they dealt jointly with their financial situation as it pertained to the issue of income tax. Brathwaite stated her training at Seneca College had been focussed on marketing and that she had taken business writing courses at University of Toronto. In the 1980s, she took an investment course and additional training to sell insurance. During her 14 years at RBC, she worked as a teller and in the section dealing with term deposits, fixed-term investments and lending, and in each instance used the appropriate software. After leaving the bank, she worked with a small recruiting firm prior to joining Brunel in 2006 - Life and Health Sciences Division - where she was employed to sell contracting solutions to business entities that did not perform their own hiring and are shown the advantages of retaining the services of Brunel to institute outsourcing programs for specific purposes. Because she was remunerated on a commission basis, her income varied and although she had paid some payments in earlier years, she had not filed tax returns for the taxation years 2000 to 2005, inclusive. Morlee prepared her 2007 return and later the revised returns for the 2005 and 2006 years but did not file her 2008 return. Morlee had requested bank statements and advised that she was entitled to claim certain expenses against commission income. Brathwaite acknowledged that she had not verified the background of Morlee nor had she undertaken any inquiry in that regard. She stated that when she signed her return for the 2007 taxation year, she did not take note of the business loss claimed, even though it was contained within the tax return which she had not reviewed prior to signing. She stated she had not inquired

about the method of preparation of the return for which she paid Morlee the sum of $2,500 as his fee for preparation of the return and additional advice concerning financial matters. Counsel referred Brathwaite to the last sentence in paragraph 5 of her Notice of Appeal which stated that "On May 15, 2008, Angelina paid a total fee of $12,500 to Mr. Morlee." Brathwaite stated the amount was accurate but the money had been paid at various times and that the total fee included services provided to her husband, Thompson. She agreed with counsel's observation that it was "a lot of money to pay" when the only additional service Morlee performed was to introduce them to a life insurance agent. When she received a refund of over $7,000, she did not regard that sum as exceptional even though at that time she owed income tax for prior years. As a result of having obtained the refund, she retained Morlee to prepare her tax returns for 2005 and 2006 and agreed that in those years business losses were claimed. However, she did not review the returns prior to signing nor did she inquire about the method used to prepare those returns. Counsel referred Brathwaite to a four-page letter - dated November 27, 2008 - from CRA auditor J. Adam in which information was requested concerning business and income and expenses for the years 2005 to 2007, inclusive. There was a Business Questionnaire enclosed in the letter and various matters requiring a specific response were set forth in bullet form on the first page. On pages 2 and 3, there were paragraphs written in bold concerning the method of providing receipts for business expenses and also for employment expenses claimed in 2005. Brathwaite stated the letter caused her to worry and she contacted Morlee to seek advice and he referred her and Thompson to Lachapelle. In hindsight, she wished they had contacted the CRA auditor directly but believed Morlee had the expertise to deal with the matter and accepted his recommendation. Another letter - Exhibit R-1, Tab 3, dated January 13, 2009 - was sent to Brathwaite by the auditor advising that there had been no response to the earlier letter and that if no reply was received within 30 days, the 2005 return would be adjusted to delete the employment expenses and the business loss claimed for 2005 would be deleted and the 2006 and 2007 returns would be reassessed to reduce the business losses to nil. The last paragraph stated there was the opportunity for Brathwaite to request an adjournment of that deadline if required and it would be reviewed. Brathwaite stated she "probably" passed that letter on to Morlee. Counsel referred her to the January 12, 2009 letter to J. Adam – Exhibit R-1, Tab 15, page 165 (referred to earlier (Exhibit A-1, Tab 3) - in her direct examination and to paragraph 4 thereof which reads:

> Based on several communication with different CRA agents, we can give you this hint: in our letters, you will come into contact with the human being *Angelina Elizabeth : Brathwaite* and the *natural person* ANGELINA BRATHWAITE

> which is the corporation. In order to differentiate them, anytime you see the word *person*, we are referring to the legal construct, the corporation, the legal entity, the judicial personality, as defined and referred in the law. Furthermore, when you see a colon ":" in the name, it is precisely the sign that this name refers to a human being. The meaning of this colon is "*of the family*". Hope this help [*sic*] you in your understanding.

[7] Brathwaite stated that Lachapelle had explained to her and Thompson that "as a human being, you are a corporation and have certain write-offs." In her understanding of that concept, the proposed deductions were work-related expenses including items such as personal grooming. She was not requested by Morlee to provide receipts in support of any deductions nor did she ask if they were needed. In letters dated May 12, 2009 and June 4, 2009 - found at Tabs 6 and 7, respectively in Exhibit R-1 - Brathwaite was advised that the position of CRA was unchanged and that it would be applying the penalty pursuant to subsection 163(2) as explained in the letter dated January 21, 2009. Brathwaite stated she and Thompson "hoped" Lachapelle could rectify the situation as he had assumed conduct of their files shortly after they had received the first correspondence from the CRA auditor. She received an e-mail – Exhibit A-1, Tab 5 - from Lachapelle and read it but thought the wording and grammatical construction was due to the fact he was a Francophone and English was not his original language. She was instructed to sign the letter in "RED" using her normal signature. In the first line of the e-mail following the salutation, "Hi, Angelina", Lachapelle informed her that the kind of letter she had received from CRA "is meant to disorient you and to shatter fear." He went on to say that there was nothing to be nervous about and the CRA letters were a "smoke screen" so she could not see that the auditor was not responding properly to what had been referred to as a "Usage Notice". He also advised that the "alledged [*sic*] debt is not certain anymore since you have rescinded your signature from the original documents used to create this debt." Brathwaite recalled receiving another communication by e-mail – Tab 6 in same exhibit dated April 9, 2010 - from Lachapelle but at this point she and Thompson had reported to the Toronto Police the matters arising from their relationship with Morlee and Lachapelle and the problems arising from the manner in which their tax returns had been filed. Counsel referred Brathwaite to a document entitled ANSWERS ON WRITTEN EXAMINATION FOR DISCOVERY – Exhibit R-2 – and to the answer to Question 83 asking which of the facts in paragraphs 23(a)-(o), 24(a) and 25(a)-(i) of the Reply did she deny and why? The answer stated she did not agree with paragraph 23(e), (g) and (i) that the tax preparer had claimed losses. Brathwaite stated her 2008 tax return was not filed by Dan Rosenbault and that her answer to Question 12 was incorrect but he had prepared returns for her in the first few years after 2000. Brathwaite stated that the 2008 return – filed on June 30,

2009 - may have been prepared by Morlee and submitted to CRA but she had not instructed him to do that and had no knowledge of its contents or that a loss of $281,092 had been claimed.

[8] Counsel did not re-examine the appellant.

Appeal of Ian Thompson

[9] Thompson appealed from assessments issued by the Minister for the 2007 and 2008 taxation years. Initially, the Minister assessed the 2007 taxation year, as filed, and issued a refund in the sum of $19,136.76 on August 25, 2008. The Minister initially assessed Thompson for the 2008 taxation year pursuant to a Notice dated February 15, 2011. However, the Minister issued reassessments for the 2007 and 2008 taxation years denying the business losses claimed on the basis Thompson was not involved in any kind of income-earning business activity and assessed penalties pursuant to subsection 163(2) of the *Act*. The appellant filed Notices of Objection and the Minister subsequently did not vacate, confirm or reassess the 2007 or 2008 taxation years. A Notice of Appeal was filed on behalf of the appellant on April 7, 2014.

[10] On consent of counsel, the Respondent's Book of Documents was filed as Exhibit R-3, Tabs 1 to 31, inclusive.

[11] Thompson testified he lives in Toronto and has been employed as a welder for Chrysler Canada since 1992. He is 49 years old and has been involved for 35 years in amateur boxing including participation in national and international events. He was a three-time Canadian champion, first as a flyweight at age 15 and later as a junior welterweight (139 pounds). During his working life, he filed income tax returns and had never encountered a problem with CRA or its predecessor. He and Brathwaite met in 2005 and were married in 2008, an event he described as the most important in his life. Before their marriage, they began discussing means to accumulate wealth for the future. Thompson spoke with an acquaintance who recommended Morlee as a tax advisor as he had worked for CRA but was now operating his own business where he assisted clients to build wealth. Thompson and Brathwaite met with Morlee who informed them that his experience as an employee at CRA qualified him to utilize little-known techniques to obtain better tax treatment for his clients. Thompson had been accustomed over the years to paying about $200 as a fee to a tax preparer and had received refunds in amounts that sometimes represented up to 10% of tax paid in a particular taxation year. However, he and Brathwaite each paid Morlee a fee in the sum of

$1,250 for his services including income tax preparation and filing. Counsel for the appellant referred Thompson to his 2007 tax return – Exhibit R-3, Tabs 3 and 4 – which also contained a Statement of Business Activities. Thompson identified his signature on the return which showed a refund was claimed in the sum of $18,966.04. Above his signature, Thompson wrote "with rights reserved and without prejudice" as instructed by Morlee who had pointed to places where he and Brathwaite had to sign in each of their returns. Thompson stated he asked how Morlee was able to obtain more money for them and was told that it was due to knowledge gained during his employment at CRA. With respect to the Statement of Business Activities, Thompson stated he did not write any of the numbers nor the words contained therein. Morlee had explained that he was able to obtain additional refunds of tax paid in previous years by Thompson and Brathwaite and prepared the 2006 tax return - at Tab 2 in the same Exhibit – which he signed and may have also written the disclaimer referred to earlier or it may have been there prior to signing. Thompson stated it took only minutes to sign both returns. Morlee referred both of them to an insurance agent who sold certain products and also spoke about a trust being established in the future to manage accumulated wealth. Thompson stated that since he had received a refund of more than $19,000, that a payment of $2,000 to Morlee was reasonable as it was only about 10% of that amount. Thompson said he and Brathwaite developed a trust in Morlee and - later - with Lachapelle and that both were responsive to their inquiries, empathetic and willing to work towards resolving their difficulties with CRA. Counsel referred Thompson to a four-page document – Tab 11 – and to the last page thereof where he identified his signature. The four-page letter addressed to a CRA Senior Office Auditor at the Sudbury office had been sent to Thompson as an attachment to an e-mail. Thompson stated he read the document but did not understand it. Earlier, he had received an explanation that seemed feasible concerning the novel filing method which was based on an interpretation of his identity as disclosed on his birth certificate. The draft letter provided by Lachapelle to be sent to CRA referred to Thompson's existence as a corporation or legal construct through which he generated income and the relationship of that entity to himself as a natural person which permitted a different interpretation for tax purposes. Thompson stated he advised Brathwaite that they should retain the services of the tax preparer Thompson had used for 20 years when reporting income from his employment at Chrysler prior to obtaining the services of Morlee for the 2007 taxation year. However, he and Brathwaite had been warned by Morlee and Lachapelle that CRA would "bury them" and decided to continue relying on those individuals to resolve their problem and attended a seminar to seek further advice but – instead – ascertained it was a recruitment session organized by Morlee and Lachapelle to persuade people to hire them as income tax experts based on their experience and

talent. At that session, Thompson and Brathwaite were introduced by either Morlee or Lachapelle to a man named Mahinder who was willing to attend at their home to advise them with respect to financial matters. At their home, when Mahinder attended and began to talk about various investment instruments, Thompson stated he and Brathwaite noticed the man was drunk and they instructed him to leave following which they attended at a Toronto Metro Police station to report the incident and explained the nature of their recent dealings with the alleged tax experts, Morlee and Lachapelle. The police advised they were aware of the scheme promoted by certain persons in the Toronto region and advised them to contact the elected representative for their constituency. They met with that individual and explained their situation and were advised to contact the Office of the Ombudsman which they did and were informed that it did not have jurisdiction so they returned to the Toronto Police station to advise of their lack of progress in resolving their troubles. CRA issued a demand to Brunel requiring it to remit 50% of Brathwaite's remuneration and this prompted Thompson and Brathwaite to visit the relevant CRA office where they spoke to a senior official and explained the circumstances arising from their relationship with Morlee and Lachapelle. As a result, the garnishee was removed but that official advised them to retain the services of a reputable person to file amended tax returns for the years that were the subject of reassessments issued to both of them. One CRA official at the meeting had requested that Thompson and Brathwaite record their statements on video, which they were willing to do, but that did not take place. Counsel referred Thompson to a Memo For File – Telephone Contact – Tab 27, 2nd paragraph on page 2 – where the CRA auditor described the conversation he had with Thompson on June 29, 2010 in which he explained that he and Brathwaite had not considered the manner of filing their returns to have been a scam since the promoters of that method were approachable, provided further advice, responded to ongoing enquiries and were willing to provide assistance in dealing with CRA. During that conversation, the auditor's notes indicate that when they attended the seminar where the tax-filing program was offered to approximately 60 persons, Thompson and Brathwaite decided they "were not willing to go any further with this and at that point felt that something may be wrong."

[12] Thompson was cross-examined by counsel for the respondent. Counsel filed – as Exhibit R-4 – a binder entitled Respondent's Book of Documents, Tabs 1 to 31, inclusive. The binder is almost identical to the one filed as Exhibit R-3, except some documents are inserted in a different order and the pages are numbered. Thompson stated that he spoke with Brathwaite whenever he received any correspondence from CRA. He had a Diploma in Business Administration from Seneca College and also studied at Sheridan College where he studied various

subjects including torts and obtained a Diploma in Legal Administration. However, by 2007, he had not retained details of his earlier studies in business administration. He went to work at Chrysler and has been there for 23 years earning an annual salary of between $65,000 and $70,000. During most of that time, he hired a tax preparer to file his returns and often received a small refund and on a couple of occasions had owed a small amount. In 2008, he contacted Morlee and hired him to prepare the 2007 tax return. Morlee had been recommended by a man who was selling an investment which he and Brathwaite declined but they accepted his advice to retain Morlee, who was described as a tax expert. When speaking with Morlee, Thompson stated he did not know the amount of any refund to be received and when asked to pay a fee of $1,250, considered that amount was reasonable as it probably was about 10% of any future refund. Thompson agreed that the total sum paid by him and Brathwaite to Morlee was $12,500 as stated in her Notice of Appeal. Prior to signing his tax returns for 2007 and 2008, he saw the wording in the disclaimer above the signature line and if he had written it in one of the returns, did so on the instruction of Morlee even though he did not understand its significance. Thompson stated that he trusted an alleged professional to provide a service and accepted advice based on that individual's knowledge and experience. He added that everyone should know that a person cannot lie on their tax return and he had not attempted to deceive CRA. He stated he was proud of being a Canadian and had represented his country at various amateur boxing competitions and would never seek to defraud his government. As a young man, he had accumulated a substantial amount of debt due in part to pursuing an education and had received advice to file for bankruptcy but refused to do so and undertook to repay all of his creditors over an extended period of time. Thompson acknowledged he did not review the returns prior to signing. As for the box to be completed by the tax preparer not having been filled in by Morlee, Thompson said it had been his experience throughout the years that a preparer often used a rubber stamp to provide the requested information. Counsel referred him to Exhibit R-4, Tab 3, page 38 – where the entry on line 135 ($61,786.36) represented a net loss. Thompson stated he had not seen that amount nor was he aware that this number was also used to show a minus amount for a net income as disclosed on the Statement of Business Activities at page 52. When he received a refund in excess of $19,000, he was very happy and instructed Morlee to re-file returns for earlier years. At Tab 1, Thompson identified his signature on the last page of his T1 General 2005 return. He did not write the disclaimer but had read it before signing. He stated he had not noticed the business loss claimed in the sum of $73,652.14. At Tab 2, he identified his signature on his 2006 tax return and did not take note of the specific amount - $15,918.13 - of the refund claimed nor had he seen the number ($55,693.99) at line 135 representing the amount of a business

loss. He stated that he had hoped he would be entitled to a refund in an amount similar to the one received for his 2007 taxation year. Thompson acknowledged he had signed the document – at Tab 5, entitled Special Resolution – purporting to state the result of a meeting between the corporation Ian Thompson and Ian Floyd Fangio : Thompson, a human being whereby the corporation accepted to transfer the required assets to the human being – as identified – to manage the corporation and its "Subsidiaries and Divisions and businesses" to the amount of $119,067.81 for the year 2005. The document purported to conform with the requirements of the "Canada Company Act". Thompson stated he thought that resolution had something to do with what was printed on the reverse of his birth certificate as explained earlier by Morlee and Lachapelle. Thompson stated that he and Brathwaite both believed the Morlee methodology was correct and that each was entitled to a refund of tax paid which was confirmed when each of them received a refund. When he received a letter – Tab 9, dated October 27, 2008 - from an auditor at CRA enclosing a Business Questionnaire and asking for details of income, expenses and documentation in support of all business expenses, he read it before sending it to Morlee and was worried about the content of that letter because he knew he had no receipts for business expenses because he did not operate a business. Thompson received another letter – Tab 10, dated December 3, 2008 - informing him that if CRA did not hear from him within 30 days it would deny his claim for business losses in 2005 and 2006 and would adjust his 2007 tax return to reduce the previously-assessed net business loss from $61,786 to zero and he forwarded the letter to Morlee. Lachapelle sent - by e-mail – a four-page letter dated 2009-01-12 - for Thompson to sign and send to the CRA Senior Office Auditor and he complied by signing his name below the typed words, "For the natural person IAN THOMPSON" and that signature was described on the line below it as having been affixed by Ian Floyd Fanio : Thompson. Lachapelle had told him "not to worry about it". In the letter dated January 23, 2009 – Tab 18 – the Senior Auditor advised Thompson that CRA had determined that he may have participated in an arrangement that attempts to avoid paying income tax and that if a reply was not received within 30 days, the 2005, 2006 and 2007 tax returns could be reassessed to include the levying of penalties pursuant to subsection 163(2). Pursuant to the CRA letter to Thompson – Tab 19, dated June 4, 2009 - he was advised that the proposed reassessments would be forthcoming and enclosed a copy of Form T400A (Notice of Objection). Thompson acknowledged that he had signed the bottom of a letter – Tab 22 – which had been prepared for him by Lachapelle on the letterhead of "Ian Floyd Fangio : Thompson sui juris" for mailing to "Canada Revenue Agency c/o Mister **William V. Baker**, commissioner and first leader" at an address in Ottawa. Thompson's signature purported to conform to the name on the letterhead. Thompson received a reply - Tab 23, dated

October 7, 2009 - on behalf of William V. Baker informing him that the document and information he had provided did not absolve him or his obligations or cancel his rights as a taxpayer and provided therein a definition of "person" as defined by section 248 of the *Act*. Thompson stated he and Brathwaite had visited a website that provided details of a program that had been the subject of the seminar they had attended when they wanted to seek advice from Lachapelle as it pertained to their specific problems with CRA. When Brathwaite forwarded the letter - by way of e-mail to Lachapelle - that was sent to Thompson on behalf of the Commissioner of CRA, the response was an e-mail – Exhibit A-2, Tab 10 – which was referred to earlier in the testimony of Brathwaite. Thompson identified his signatures on the documents at Exhibit R-4, Tabs 24 and 25, respectively, which were addressed to the Assistant Director of CRA at Mississauga, Ontario and also to the Senior Auditor at the Sudbury office, which – first - purported to be a document in confirmation of an agreement reached between Thompson and Commissioner Baker whereby all Notices of Assessment would be considered as void and all procedures relating thereto would be stopped and – second – a document entitled Contract for Hire, Independent Animator Agreement between the Actors Ian Thompson, "a determined statutory corporation known by law as a Natural Person" and Ian Floyd Fangio : Thompson, a HUMAN BEING" who was fulfilling the role of Animator to said corporation. Thompson agreed with counsel that at this point he was in the "sign and send" mode but had not considered anything in those documents as illegal. Thompson stated he thought the 2008 tax returns for him and Brathwaite were filed sometime in October, 2009 by an accountant, Mr. Abecassis.

[13] Ahmadreza Fallahfini was called as a witness by counsel for the respondent and testified he is a Litigation Officer employed by CRA and has been in the Appeals Division for eight months. He drafts the Reply to a Notice of Appeal filed pursuant to the Informal Procedure and assists counsel assigned to conduct appeals to be heard under the General Procedure. A search of the records pertaining to the appeal of Brathwaite was conducted by him as set forth in the affidavit affirmed by him and filed as noted at the outset of these appeals. Fallahfini stated the records disclosed that a return for Brathwaite's 2008 taxation year had been filed on June 30, 2009 and that a business loss in the sum of $281,092 had been claimed therein. With respect to the appeal of Thompson, Fallahfini stated an examination of the relevant records as attached as Exhibit "A" to his filed affidavit at the part described as "screen 2" and at line 139, indicated business income in the sum of $222,518 had been reported and did not represent a loss in that amount.

[14] In cross-examination by counsel for the appellants, Fallahfini stated he did not see either appellant's tax returns for the years at issue. He does not know

whether they were filed electronically nor does he know who prepared those returns.

[15] Counsel for the appellants did not call any rebuttal evidence and closed the case on their behalf.

[16] Counsel for the respondent closed the case for the respondent.

[17] Counsel for the appellants submitted that no returns – except the amended returns – for the years at issue had been submitted into evidence on behalf of the respondent. There was a return filed by someone purporting to act on behalf of Thompson in respect of the 2008 taxation year but there was no return entered into evidence and the only information relevant to any statement of income was provided by Fallahfini which disclosed that no loss had been claimed on behalf of Thompson and that the reported business income in the sum of $222,518 when considered in the context of employment income and certain permissible deductions would not constitute the basis for any reduction in tax payable nor would it entitle Thompson to any refund of tax already deducted by his employer and remitted to the Receiver General.

[18] Counsel submitted there had been no evidence adduced that Brathwaite had submitted a tax return for 2008. There had been no evidence adduced in that regard and Fallahfini had not reviewed the actual return and there was no information available within the CRA records to reveal who had prepared it. With respect to the issue of gross negligence penalties imposed on Thompson for the 2007 taxation year and on Brathwaite for the 2005, 2006, 2007 and 2008 taxation years, counsel submitted the onus on the respondent is high and that there must be negligence tantamount to intentional acting, an indifference to whether the law is complied with or not, and that subsection 163(2) is a penal provision and must be construed accordingly in accordance with the decision of Strayer J. of the Federal Court – Trial Division – as it then was – in the case of *Venne v Canada (Minister of National Revenue – MNR)*, 84 DTC 6247 (FCTD). Counsel submitted there was jurisprudence to support the contention that where there is more than one way of construing the taxpayer's conduct, that individual should be granted the benefit of the doubt and should not be responsible for the false statements where there was honest reliance on a trusted financial advisor, tax preparer, friend or family member. Counsel described the appellants as victims of a scam which was well-organized and presented by unscrupulous persons who designed the scheme and promoted it to take advantage of the lack of expertise on the part of ordinary people who despite their ability to earn a respectable amount of income in the

course of employment had no real knowledge of tax or accounting matters. Counsel warned against using hindsight to make a finding of a taxpayer's intention at the outset in light of such lack of understanding and that the conduct of both appellants throughout was consistent in that they did not consider any of their conduct was other than legal and in conformity with advice received from persons whom they believed - reasonably – to be professionals in the field of income tax matters including preparation, filing and providing advice when dealing subsequently with inquiries from CRA.

[19] Counsel for the respondent conceded that the evidence had established that there had not been any understatement of income in the tax return of Thompson for the 2008 taxation year and there had been no loss claimed according to the only records available from CRA. Since the penalty imposed pursuant to subsection 163(2) is based on the understatement of income that is reasonably attributed to the false statement, there was no basis for the imposition of the penalty against Thompson for the 2008 taxation year.

[20] Counsel also acknowledged that there was no direct evidence adduced to support a finding that Brathwaite filed or had instructed any person on her behalf to file her 2008 tax return and there was no information in the records at CRA to reveal who had prepared and/or submitted said return.

[21] Counsel acknowledged that the evidence had not disclosed that either of the appellants had intended to defraud the government by filing the income tax returns during the years at issue.

[22] Counsel submitted the penalties levied against Brathwaite in respect of her 2005, 2006 and 2007 taxation years were justified as the evidence supported a finding that her conduct during those years, including her ongoing failure to make inquiry of the methodology used by Morlee, and the signing of returns without review or attempting to understand the contents thereof, constituted wilful blindness which was sufficient to meet the definition of gross negligence pursuant to subsection 163(2) of the *Act*.

[23] Counsel submitted the penalty levied against Thompson in respect of his 2007 taxation year was justified and that a review of the evidence was consistent with the conduct required to support a finding of gross negligence attributable to wilful blindness.

[24] Subsection 163(2) of the *Act* reads in part as follows:

> 163(2) 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 . . .

[25] Pursuant to subsection 163(3), the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[26] There are two elements that must be established to justify the imposition of those penalties:

1. a false statement in a return; and

2. knowledge or gross negligence in the making of, assenting to or acquiescing in the making of that false statement.

[27] In the case of *Guindon v Canada*, 2015 SCC 41, [2015] SCJ No. 41, the Supreme Court of Canada heard an appeal from a decision of the Federal Court of Appeal setting aside a decision of the Tax Court of Canada that had vacated the assessment of a penalty imposed pursuant to subsection 163.2 on the basis that the provision was penal in nature. The appellant was a lawyer with no expertise in income tax law who participated in a leveraged donation program. The case also considered whether that Court could hear and decide a constitutional issue when it had not been raised in the courts below by complying with the usual requirements of notice to the interested parties. For the purposes of the within appeal, the comments by Rothstein and Cromwell J.J. – who delivered judgment for the majority – beginning at paragraphs 60 to 62 inclusive are as follows:

> [60] The Minister states in her factum that "culpable conduct" in s. 163.2 of the *ITA* "was not intended to be different from the gross negligence standard in s. 163(2)": para. 79. The Federal Court in *Venne v. The Queen*, [1984] C.T.C. 223 (T.D.), in the context of a s. 163(2) penalty, explained that "an indifference as to whether the law is complied with" is more than simple carelessness or negligence; it involves "a high degree of negligence tantamount to intentional acting": p. 234. It is akin to burying one's head in the sand: *Sirois (L.C.) v. Canada*, 1995 CarswellNat 555 (WL Can.) (T.C.C.), at para. 13; *Keller v. Canada*, 1995 CarswellNat 569 (WL Can.) (T.C.C.). The Tax Court in *Sidhu v. R.*, 2004 TCC 174, [2004] 2 C.T.C. 3167, explaining the decision in *Venne*, elaborated on expressions "tantamount to intentional conduct" and "shows an indifference as to whether this Act is complied with":

> Actions "tantamount" to intentional actions are actions from which an imputed intention can be found such as actions demonstrating "an indifference as to whether the law is complied with or not"... . The burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes. The burden is to prove on a balance of probability such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense. [para. 23]

[61] Therefore, while there has been debate as to the scope of "culpable conduct" (as argued before the Tax Court in this matter), the standard must be at least as high as gross negligence under s. 163(2) of the *ITA*. The third party penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes on the part of a tax preparer or planner.

[62] We can conclude that the purpose of this proceeding is to promote honesty and deter gross negligence, or worse, on the part of preparers, qualities that are essential to the self-reporting system of income taxation assessment.

[28] The judgment continued at paragraphs 71 to 73, inclusive, to conclude as follows:

[71] Ms. Guindon also submits that the use of the term "culpable conduct" in s. 163.2(4) indicates a *mens rea* requirement, which is classically criminal in nature. This is irrelevant to the analysis because, as discussed, the criminal in nature analysis is concerned with the process, not the conduct. The simple fact that there is a mental element that must be present in order for the penalty to be imposed does not render the provision criminal. For example, intentional torts require proof of intention, commonly understood as a subjective desire to cause the consequence of one's action: see P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 251. In addition, some non-criminal statutory causes of action include mental elements such as recklessness or knowledge. For example, the statutory cause of action in s. 134(4) of Ontario's *Securities Act*, R.S.O. 1990, c. S.5, includes a knowledge requirement. Also, s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, creates a cause of action for those who have suffered loss or damage as a result of conduct contrary to Part VI, which contains the Act's criminal offences. Given that these are criminal offences, all contain a mens rea element, but that does not render s. 36 proceedings criminal.

[72] While some regulatory penalties are imposed without consideration of the person's state of mind, in other cases it is rational that the state would only wish to impose a penalty on those who engage in misconduct knowingly, recklessly, or with a particular intention. Providing a due diligence defence or including a mental element as a component of the penalty does not detract from the administrative nature of the penalty. (See the Federal Court of Appeal's reasons, at para. 48.)

> (c) *Conclusion on the "Criminal in Nature" Test*
>
> [73] We conclude that the s. 163.2 process is not criminal in nature.

[29] In *Torres v Canada*, 2013 TCC 380, 2014 DTC 1028, C. Miller J. heard the appeals of six taxpayers who were described in paragraph one of his judgment as being participants in a "sad and sorry tale ... who were led down a garden path, with the carrot at the end of the garden being significant tax refunds." The tax refunds were the result of the taxpayers having claimed fictitious business losses in accordance with the "unwavering faith" by which they accepted advice and instructions provided by representatives of Fiscal Arbitrators to prepare their tax returns in a manner capable of producing those refunds.

[30] C. Miller J. reviewed the relevant jurisprudence including recent decisions from the Federal Court of Appeal and referred to his earlier decision in *Bhatti v Canada*, 2013 TCC 143, 2013 DTC 1129, which also involved participation in a scheme promoted by Fiscal Arbitrators. In *Torres*, based on that jurisprudence and the evidence heard in the six appeals before him, at paragraphs 65 and 66, he stated as follows:

> [65] Based on this jurisprudence and the evidence that I have heard in the six Appeals before me, I draw the following principles:
>
> a) Knowledge of a false statement can be imputed by wilful blindness.
>
> b) The concept of wilful blindness can be applied to gross negligence penalties pursuant to subsection 163(2) of the *Act* and it is appropriate to do so in the cases before me.
>
> c) In determining wilful blindness, consideration must be given to the education and experience of the taxpayer.
>
> d) To find wilful blindness there must be a need or a suspicion for an inquiry.
>
> e) Circumstances that would indicate a need for an inquiry prior to filing, or flashing red lights as I called it in the *Bhatti* decision, include the following:
>
> i) the magnitude of the advantage or omission;
>
> ii) the blatantness of the false statement and how readily detectable it is;

iii) the lack of acknowledgment by the tax preparer who prepared the return in the return itself;

iv) unusual requests made by the tax preparer;

v) the tax preparer being previously unknown to the taxpayer;

vi) incomprehensible explanations by the tax preparer;

vii) whether others engaged the tax preparer or warned against doing so, or the taxpayer himself or herself expresses concern about telling others.

f) The final requirement for wilful blindness is that the taxpayer makes no inquiry of the tax preparer to understand the return, nor makes any inquiry of a third party, nor the CRA itself.

[66] Did the Appellants act with wilful blindness?

[31] C. Miller J. then applied the evidence to each of the individuals utilizing the criteria developed in his reasons as quoted above and, at paragraphs 70 to 72, inclusive, commented as follows:

> [70] I readily conclude there were sufficient warning signs to cause the Appellants to make further inquiries of the tax preparers themselves, independent advisers or even the CRA, prior to signing their returns. None of the Appellants made such inquiries before making the false statements. Mr. Barrett argues there were no warnings justifying an inquiry. As I have made clear, the evidence does not support that argument. He then seems to suggest the warnings were not so evident or strong as to demand an inquiry. Again, I have found otherwise - the evidence simply does not support that position. Then he suggests that even if there were warnings, the Appellants were so conned by Fiscal Arbitrators they may have been blind to those warnings, but they were not wilfully blind. There was no wilful or intentional wrongdoing punishable by such harsh penalties. Negligence perhaps, Mr. Barrett would argue, but not such cavalier disregard for the law as to attract gross negligence. They were simply duped.
>
> [71] The Appellants argument in this regard would be more persuasive where the circumstances do not suggest so strongly the need to inquire. It is difficult to counter wilful blindness with a defence of no wrongful intention when the concept of wilful blindness imputes knowledge regardless of intention (see Panini). Perhaps it might be better stated that such strong circumstances as I find exist here, that scream for an inquiry, impute the wilful element of wilful blindness. Blindness is evident. The strong circumstances effectively preclude a

defence that "I believed what I was doing was okay", even where that belief arises from being duped by others.

[72] As is clear from a review of the evidence, as well as a review of the factors that indicate an inquiry was warranted, there are significant similarities amongst the six Appeals. The circumstances surrounding the preparation, review, signing and filing of the returns are not so dissimilar to reach any different results. The difference in circumstances are minor. I will identify a few.

Mr. Hyatali may not have read the return to see the glaring large business loss staring him in the face. That was negligent: combined with the other warning signs, all ignored by Mr. Hyatali, there is more than enough to conclude he too was wilfully blind.

Ms. Mary Torres not only should have suspected something amiss when filing her 2007 return, she clearly knew something was wrong when she filed her 2008 return, given the CRA had been in touch with her regarding her 2007 return.

While Ms. Eva Torres indicated Mr. Watts worked at the same organization for 18 months, she did not suggest there was any close working relationship that might have alleviated any suspicion.

[32] At paragraphs 77 to 79, inclusive, he concluded:

Conclusion

[77] It is difficult to feel a great deal of sympathy for the Appellants notwithstanding some presented as most sympathetic characters, simply duped by the bad guys. Yet, underlying this purported duping is a motivation attributable to all of them to not have to pay taxes. Fiscal Arbitrators was not hired just to prepare their returns - it was hired to prepare their returns in such a way as to produce a significant refund; in fact, a refund that would result in no tax in the year in question, and with respect to some, prior years as well. I question how an individual, regardless of the level of education, who has worked in Canada, paid taxes and benefited from all the country has to offer, can without question enter an arrangement where he or she claims fictitious business losses and therefore simply does not have to pay his or her fair share, indeed, does not have to pay any share of what it takes to make the country function. I am not unsympathetic to spouses and family who may suffer from the significant negative financial consequences these penalties will heap upon them by the actions of the Appellants: the Appellants' penalties are indeed harsh. I however cannot pretend the specific 50% penalty called for by subsection 163(2) of the *Act* can be something less. That is only something the Government can consider.

[78] It was clear to me these Appellants have paid a huge price, not just economically, as a result of Fiscal Arbitrators' deceitful ways. I have concluded,

> however, that penalties are clearly justified, though I am concerned about the devastating effect the magnitude of the penalties will have on the Appellants. I recognize this consideration is not a factor cited in Rule 147 of *Tax Court of Canada Rules (General Procedure)*, but I do not view the list of factors as exhaustive. Add to this the fact that few General Procedure cases have been heard regarding Fiscal Arbitrators, that I view these matters akin to test cases, though acknowledging the Parties did not present them as such, and that a novel argument was presented by the Appellants' counsel, I exercise my discretion to not award costs. Having said that, I make no representation that not awarding costs is something I would consider in future Fiscal Arbitrators' cases.
>
> [79] The Appeals are dismissed.

[33] I will consider the factors identified by C. Miller J. in his analysis as they pertain to the appellant in the within appeal.

Angelina Brathwaite

Education and experience

[34] Brathwaite is 52 years old and studied at Seneca College where she received a Diploma in Business Studies. Later, she studied insurance and investments and worked 14 years for RBC where after working as a teller, undertook management responsibilities in a branch department dealing with investments and staff banking. After leaving her employment with RBC in 2000, she joined a small firm engaged in recruiting individuals for hiring or placement with businesses or organizations and worked in that capacity until joining Brunel where she was hired to sell contracting and outsourcing programs to various potential clients. Although she did not have any specific knowledge of income tax and had used the services of a preparer in the past, she must have had a significant understanding of the importance of numbers as used in various documents pertaining to financial matters. The concept of generating income from the operation of a business and the distinguishing characteristics between that and employment in the ordinary sense would have been apparent based on her extensive banking experience and her new career as a recruiter selling business solutions to a variety of clients. As an employee for most of her career, except for her early foray into the recruiting business where she worked for a small firm - apparently as an independent contractor required to remit instalment payments in respect of her earnings – she would have knowledge concerning the types of income to be reported and the permissible deductions pertaining to employment particularly where the employer required certain expenses to be paid personally by the worker. In her previous

experience retaining the services of tax preparers, she had not paid other than a modest amount for the preparation and filing of a return, yet was not concerned with the demand of Morlee to be paid the sum of $1,250 for the same services to be provided and an equal amount to prepare a return for her husband, Thompson. Apart from her early education and subsequent work experience in the banking, insurance and business solutions industries where proven facts and documentation and precision in information gathering would have been extremely important, her life experience at that point in 2008 had equipped her to comprehend certain complex matters concerning finance in a general sense. The testimony of Brathwaite and her demeanour readily permitted a conclusion to be drawn that she is a literate, articulate, highly-intelligent individual.

Suspicion or need to make an inquiry

[35] Brathwaite did not know Morlee and relied on the recommendation her husband had received from an acquaintance who sold a certain investment that this individual was an expert in matters of income tax. She accepted Morlee's statement that he had been an employee at CRA where he acquired special expertise in providing clients with the means to reduce their income tax burden by using what he described as "little-known techniques". She did not inquire as to the nature of those methods or stratagems to be applied to her tax return and the further financial services Morlee had agreed to perform in order to earn his fee paid to him in 2008 consisted of a referral to an insurance agent which was not required since Brathwaite had been an agent and was familiar with the process of acquiring insurance. When she received a refund in excess of $7,000 in respect of her 2007 taxation year, she and Thompson were very pleased and accepted Morlee's advice to file returns for her 2005 and 2006 taxation years because he was confident she was entitled to significant refunds in those years based on certain deductions that had been overlooked in the past. Due to her financial situation and family commitments earlier, she had not filed returns for the years 2000 to 2005, inclusive, and was aware that she owed income tax as a result because when she had made instalment payments on a sporadic basis, the amounts remitted were insufficient to meet her obligations based on her income during that period. Although Morlee requested bank statements for the relevant period which she provided, he did not ask for any receipts pertaining to business expenses which – supposedly - were the basis of legitimate deduction from income nor did she inquire about the need for such production for review by CRA. When Brathwaite signed her return for the 2007 taxation year, it was at the residence of her and Thompson and she signed it as instructed by Morlee. She admitted that she did not review the return and did not notice there was a business loss claimed and did not

inquire of Morlee about what method he was using or how particular sums were produced as a consequence of his calculations. She signed her returns for the 2005 and 2006 taxation years in which business losses were claimed and did not review those returns nor did she inquire about the method used in their preparation or why and how business losses could be claimed.

The fee structure

[36] Brathwaite and Thompson paid Morlee a total of $12,500 for his services. Apart from paying an advance fee of $1,250 for the preparation of her return and the same amount for her husband, Morlee was rewarded for his services that had produced the refunds for both of them of more than $26,000 ($26,419.87). I do not understand why Brathwaite personally and on behalf of her husband would have paid Morlee a total fee that was equal to approximately 47% of the total refunds they received. In comparison to earlier experience with tax preparers and in the context of her knowledge of banking and other professional services rendered by various individuals in the business world, this payment was excessive and out of proportion to the relatively mundane nature of the services provided.

Anonymity of the tax preparer and lack of acknowledgment in preparing returns

[37] The original returns were not in evidence but it soon became apparent that Morlee was not about to intervene directly with CRA as agent for Brathwaite and Thompson. When handed off to Lachapelle, who had been described by Morlee as another expert with superior talent acquired while working at CRA, thereafter neither of these alleged experts ever contacted any official at CRA on their behalf. Instead, they produced nonsensical material with instructions for Brathwaite to sign and send to the relevant person at CRA and she complied without questioning the rationale of that material. Again, there was nothing to indicate that Lachapelle was making the snowballs Brathwaite was directed to lob at the CRA auditors.

[38] The amount of the refund - $7,283.11 - received for Brathwaite's 2007 taxation year was not inordinate but she was surprised in the sense that she knew she owed a balance on unpaid taxes from earlier years. However, the amount was sufficient to inspire her to accept Morlee's advice that significant refunds could be obtained by filing returns for 2005 and 2006 and claiming certain expenses which were categorized in those returns as business expenses which resulted in significant losses of $34,768.27 in 2005, $129,782.81 in 2006, and $63,954.22 in 2007. Had these false losses been accepted by CRA, it is likely the entire amount of income

tax paid in those years by Brathwaite by deduction from Brunel would have been refunded and a credit applied to any outstanding balance on unpaid taxes that had accrued in the period prior to starting work for Brunel in 2006.

Blatantly false statement – readily detectable

[39] It is not reasonable to accept that Brathwaite could not have detected the large amount of the refund claimed in each of the tax returns for the years 2005 to 2007, inclusive, and that she could fail to appreciate that any such refund must be inextricably linked to a huge loss arising from a business which she had not operated. Her income was from employment with Brunel or from working as a self-employed individual with the small recruiting firm prior to joining Brunel.

Tax preparer makes unusual requests

[40] Morlee instructed Brathwaite to sign her returns where he indicated and to retain the services of Lachapelle for the purpose of dealing with the auditors and other officials at CRA and not to question the strategy employed. However, a perusal of the material sent to her for forwarding to CRA should have revealed that it made no sense including the instruction to sign that correspondence in the colour red while using her original signature.

Tax preparer previously unknown to taxpayer

[41] Morlee had been recommended as a tax expert by an acquaintance of Thompson. For many years prior to 2008, each of them had their tax returns prepared by a person practicing that occupation either alone or in a firm and the process had been relatively routine for which each had paid a modest fee of $200 or less per year. Brathwaite and Thompson knew nothing of the background and qualifications of Morlee except as described in the bald assertions of Thompson's acquaintance.

Lack of inquiries of professionals or officials at CRA

[42] Unlike other cases of this nature, Brathwaite was not aware of any organized scheme such as the one peddled by Fiscal Arbitrators or scam artists of their ilk but she accepted without question the explanation of Morlee that the technique he was utilizing to generate refunds for her and Thompson was legitimate without attempting any verification whether personally by using search engines to find information available on the Internet or from colleagues at Brunel or other

associates who were employed in the banking or insurance industry or by obtaining information from CRA either via telephone or from the agency website. It was not until Brathwaite and Thompson had attended a seminar where Lachapelle was pitching his tax-dodging magical program to a roomful of potential victims, that they became suspicious and their serious doubts were confirmed when the alleged expert – Mahinder – who had been dispatched to their residence by Lachapelle and/or Morlee turned out to be a babbling drunk who spouted nonsense about the brilliance of his programs and the success realized on behalf of those clients who had followed his bizarre advice.

Appellant's trust in the tax preparer and his cohort

[43] Even in the face of clear and repeated demands from an auditor at CRA for information pertaining to the operation of the alleged business which had produced losses in 2005, 2006 and 2007, Brathwaite did not contact CRA but chose to forward the correspondence to Morlee and Lachapelle and relied on their subsequent instructions on how to reply to the demands of the auditor. When it was obvious as of May 12, 2009 that severe penalties under subsection 163(2) of the *Act* would be imposed, Brathwaite testified that she "hoped" Lachapelle could rectify the situation. Although the e-mail received from him with a draft letter attached did not seem clear, she attributed that absence of clarity to a language problem and proceeded to forward it to the CRA auditor after reading it but without understanding the content or the points being made therein. She relied on an earlier explanation by Morlee that the manner of her tax filings was based on a concept that as a human being she was a corporation and in the course of earning a living in the name of Angelina Brathwaite, as defined by certain government-issued identification, she was entitled to some write-offs against income.

Ian Thompson

Education and experience

[44] Thompson has a Diploma in Legal Administration from Seneca College. He is 49 years old and has worked for Chrysler Canada for 23 years earning a substantial salary. He has been involved in amateur boxing in Canada and won his first national title at age 15 and won two others before he left the ring to spend time coaching, mentoring and participating in boxing tournaments and other events. He did not have any specific knowledge of income tax or accounting and had relied on the services of a tax preparer in the course of his working career. He had an understanding of the burden of debt because as a young man he was a candidate to

file for bankruptcy but refused to do so and soldiered on with the discipline of a person dedicated to training, hard work and attention to detail in the pursuit of specific goals in his chosen sport. He worked at an occupation requiring precision and consistency in conformity with established procedures. Thompson is literate, articulate, intelligent, and has had exposure to various situations, travelled to different locations within Canada and dealt with many different individuals in the course of his participation in the sport of boxing over decades.

Suspicion or need to make an inquiry

[45] Thompson testified that shortly after meeting Brathwaite, they became concerned about the need to discover ways to create and retain wealth for their future and met with a man who had attempted to sell them an investment. Although they decided not to participate in that program or fund, Thompson accepted the man's advice to hire Morlee as an expert in tax and other matters. He and Brathwaite met with Morlee and Thompson acknowledged that they had been impressed with him and with his background as a former employee of CRA who had decided to operate his own business as a financial advisor. Until the issues arose which are the subject of his appeal, Thompson had not encountered any problem arising from the manner in which his tax returns had been filed. Sometimes, he received a refund and now and then had owed a small balance but the fee paid to his preparer was not more than $200. His employment income in 2007 was in excess of $70,000 and there was an RRSP withdrawal of $20,000 as shown on his T1 General return for that year – Exhibit R-3, Tab 3. He received a refund in excess of $19,000 and when he asked Morlee how he was able to obtain refunds for him, Thompson was told it was based on Morlee's knowledge and experience gained from working at CRA. Thompson was so pleased with the refund that he hired Morlee to file returns for previous years based on advice that it was quite likely similar refunds would be paid. He did not notice the Statement of Business Activities as part of his 2007 tax return and did not review the return prior to signing. He was aware of the disclaimer above his signature but is not sure whether he wrote it on instructions of Morlee or if it had been written before the return was presented for signing. He also read the same disclaimer – as referred to earlier in the evidence – in his 2005 and 2006 returns and signed each return without noticing that there had been net business losses claimed of $73,652.14 and $55,693.99, respectively. Thompson testified he had not noted the specific amount of the refunds claimed in those returns and assumed Morlee had done the calculations correctly. When signing any returns, he did so at places Morlee pointed out and accepted the need for the disclaimers.

The fee structure

[46] In Exhibit A-2, at Tab 1, there are copies of four cheques – each dated 2008-05-15 – issued by Thompson in the following amounts to these payees:

Multi Marketing Strategies – $2,800.00

Sovereign Trusts - $2,700.00

Multi Marketing Strategies - $4,300.00

Sovereign Trusts - $2,700.00

[47] The total amount paid is $12,500 which was acknowledged in Brathwaite's Notice of Appeal. Brathwaite's recollection was that this sum had been the subject of payments over a period of time but it is apparent Thompson paid that amount on May 15, 2008 but the refund in the sum of $19,136.76 issued to Thompson for his 2007 taxation year was not issued until August 28, 2008. Brathwaite's refund in the sum of $7,283.11 for her 2007 taxation year was received in September, 2008. Brathwaite testified that she had paid the sum of $12,500 to Morlee as set forth in her Notice of Appeal but that assertion was not correct as the money was paid by Thompson. The question then arises as to why Thompson would issue those cheques to the two different entities in that large total amount compared with what he and Brathwaite had been accustomed to throughout their working life when paying tax preparers to file returns. The only logical inference to be drawn is that he was aware – at that time – of the probable amount of refunds that would be paid to each of them as a consequence of hiring Morlee and following his advice. The total sum paid was out of proportion to the services rendered by Morlee and his other purported financial advice was to refer Thompson and Brathwaite to an insurance agent so certain policies and investments could be explained.

Anonymity of the tax preparer and lack of acknowledgment in preparing returns

[48] Thompson's previous experience with tax preparers had been without incident but as for identification of the preparer at the appropriate place in the return, it had been his experience that this was filled in later by the preparer using a stamp which provided the requested information. However, there was not any identification by Morlee at any point subsequently that he had been the author of the returns for either Thompson or Brathwaite and when CRA began inquiring about the alleged business losses claimed for each of them, Morlee recommended that they contact Lachapelle and follow his advice which they did without question even though he did not have any direct contact with the auditor or other officials at CRA and provided advice via e-mail with attached drafts of letters or other documents that Brathwaite and Thompson were to submit in response to repeated inquiries from CRA about those business losses.

Magnitude of the advantage

[49] The refund received by Thompson was substantial and probably represented most – if not all – of the income tax payable for the 2007 year that had been remitted on his behalf by his employer and the financial institution from which he took out $20,000 from an RRSP account. He was impressed by that large refund and the one in excess of $7,000 received by Brathwaite the following month and it prompted him to instruct Morlee to file amended or adjusted returns for previous years with the expectation similar refunds would be forthcoming for 2005 and 2006.

Blatantly false statement – readily detectable

[50] Thompson knew he did not operate a business and that his principal income was derived from employment. The Statement of Business Activities and the amount of business loss entered in the relevant line of the 2007 tax return would have alerted him immediately that the claim for a business loss was false. However, his evidence was that he did not review the return or take notice of the statement but merely signed the return where Morlee indicated. It seems reasonable to expect that he would have inquired of Morlee why the tax return included a disclaimer that it was being filed "with rights reserved and without prejudice." Thompson had a Diploma in Legal Administration from Seneca College and had been exposed in the course of his studies to various legal terms and concepts and while he may not have retained much of that knowledge after 25

years or so, would have reason to question the purpose of a disclaimer written immediately above a certification above the signature line which states "I certify that the information given on this return and in any documents attached is correct, complete and fully discloses all my income." From many years of filing income tax returns, Thompson should have been aware that documents are often enclosed such as T4s, T5s, various receipts for union or professional dues and other similar disbursements and the presence of a statement purporting to pertain to business activities should have been one of proverbial "red flags or flashing lights" that would alert him to the potential danger in filing that return.

Tax preparer makes unusual requests

[51] Morlee instructed Thompson to sign his returns where indicated and thereafter to comply with instructions from Lachapelle and to accept without question their advice as to the validity of the methodology employed in filing the returns for him and Brathwaite. When CRA began inquiring about the claimed business losses, Lachapelle forwarded draft letters and documents with instructions to send them to the CRA auditor and even to the Commissioner in Ottawa. The letter is found at Tab 24 of Exhibit R-4 and the document entitled Contract for Hire Independent ANIMATOR Agreement is at Tab 25. Thompson did not inquire why these were to be sent or what they meant. He did not understand them but was willing to accept they were somehow valid despite being riddled with nonsensical and illogical strands of babble that should have been obvious to almost anyone, let alone someone as intelligent, literate and possessing an equivalent amount of life experience. The letterhead Lachapelle had created was in the name of Ian Floyd Fangio: Thompson and Thompson was instructed to sign the letter "per Ian Floyd Fangio: Thompson" on behalf of the legal person Ian Thompson. If that is not sufficiently bizarre, Thompson sent that agreement and also a purported special Corporate Resolution – Tab 12 of Exhibit R-4 – to CRA. The wording therein is an incomprehensible string of meaningless words and numbers that purport to derive authority pursuant to an Act of Parliament.

Tax preparer previously unknown to taxpayer

[52] Morlee had been recommended as a tax expert by an acquaintance of Thompson who had been trying to sell him and Brathwaite an investment. For many years prior to 2008, each of them had their tax returns prepared by a person practicing that occupation either alone or in a firm and the process had been relatively routine for which each had paid a modest fee of $200 or less per year. Thompson knew nothing of the background and qualifications of Morlee except as

described in the bald assertions of the individual who had named him as a tax expert.

Lack of inquiries of professionals or officials at CRA

[53] There was no inquiry by Thompson of his former tax preparers or advisors nor of the bankers with whom he and Brathwaite dealt or of CRA about the legitimacy of a tax-filing method that would produce large refunds even though they were employees who had tax deducted and remitted on their accounts. There is no evidence that Thompson did anything other than rely on the recommendation of the person who tried to sell an investment to him and Brathwaite and inquiries from CRA were ignored or responded to by means of the correspondence and provision of documents referred to above.

Appellant's trust in the tax preparer and his cohort

[54] The faith Thompson placed in Morlee and then in Lachapelle seemed to be without limit until he and Brathwaite attended a seminar hoping to ask them specific questions about their troubles with CRA and realized they were in the presence of some hucksters. Until then, each had followed the advice provided even though it was patently absurd and Thompson should have realized that in light of his education, intelligence and life experience. The extent to which that misplaced trust was present is demonstrated by the willingness of Thompson to send that absurd letter and those phoney documents referred to earlier in this analysis. Conduct subsequent to the original false statement does not prove - without more - that wilful blindness was present at the precise moment the tax return was signed but an examination of his consistent conduct in obeying the directions of Morlee and Lachapelle is indicative of the blind trust placed in those individuals. He chose to maintain faith in their methods by following directions explicitly in an effort to retain the refunds already received by him and Brathwaite.

[55] In *Torres v Canada [appeal by Strachan]*, 2015 FCA 60, 2015 DTC 5044 - a decision of the Federal Court of Appeal – Dawson J.A. delivered orally the judgment of the Court and the entire judgment reads:

The judgment of the Court was delivered by

1. DAWSON J.A. (orally):-- Subsection 163(2) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) renders a taxpayer liable to payment of a penalty when the taxpayer knowingly, or under circumstances amounting to gross negligence, makes a false statement in a return.

2. For reasons cited as 2013 TCC 380, a judge of the Tax Court of Canada dismissed an appeal brought by the appellant from the assessment of a gross negligence penalty in respect of the 2007 taxation year. The facts giving rise to the imposition of the penalty were that the appellant, at the behest of an unscrupulous tax preparer, claimed a fictitious business loss in an amount sufficient to generate a complete refund of all taxes paid by the appellant in respect of her employment income.

3. While counsel for the appellant asserts various errors on the part of the Judge, the appellant has failed to establish any basis for interfering with the judgment of the Tax Court. We reach this conclusion on the following basis.

4. First, as conceded in oral argument by counsel for the appellant, the Judge made no error in articulating the applicable legal test. Gross negligence may be established where a taxpayer is willfully blind to the relevant facts in circumstances where the taxpayer becomes aware of the need for some inquiry but declines to make the inquiry because the taxpayer does not want to know the truth *(Canada (Attorney General) v. Villeneuve*, 2004 FCA 20, 327 N.R. 186, at paragraph 6; *Panini v. Canada*, 2006 FCA 224, [2006] F.C.J. No. 955, at paragraphs 41-43).

5. Contrary to counsel for the appellant's submissions, the Judge's reasons demonstrate that he properly considered the appellant's background and circumstances.

6. Second, the appellant has failed to establish that the Judge misapplied the correct legal test. No palpable and overriding error has been shown in the Judge's finding of mixed fact and law that given the numerous "warning" signs, the appellant was required to make further inquiries of her tax preparer, an independent advisor or the Canada Revenue Agency itself before signing her tax return. Nor has any palpable and overriding error been shown in the Judge's conclusion that the circumstances precluded a defence that, based upon the wrongful representations of her tax preparer, the appellant believed that what she was doing was permissible.

7. In the result, the appeal will be dismissed with costs.

DAWSON J.A.

[56] Over the last few months, I have heard more than a dozen cases involving Fiscal Arbitrators or similar entities as well as appeals by taxpayers who utilized stratagems and techniques recommended to them by friends, family, complete strangers or alleged experts advertising tax-avoidance methods on the Internet. In some instances, appellants were not merely disputing the imposition of the gross negligence penalties but were convinced they were entitled to the business losses claimed pursuant to various ludicrous theories either peddled by fraudsters or acquired on their own by perusing certain sites on the Internet devoted to avoiding income tax based on ludicrous interpretations of law applicable only to natural persons, freemen, citizens of some sort of sovereign commonwealth or devotees of Moorish law. I am familiar with the relevant jurisprudence including recent decisions by the Honourable R.G. Masse, Deputy Judge in *Chartrand v Canada*, 2015 TCC 298, [2015] TCJ No. 231 (QL) and *Spurvey v Canada*, 2015 TCC 300, [2015] TCJ No. 232 (QL). In those decisions, Masse D.J. reviewed the jurisprudence pertaining to the responsibility of a taxpayer and the constituent elements required to be proven to justify the imposition of a penalty pursuant to subsection 163(2), and paragraphs 47 to 57 of the *Spurvey* decision, inclusive, read as follows:

> *Appellants' Blind Trust in Tax Preparer*
>
> [47] The Appellants simply indicated that they trusted Alex.
>
> [48] In some cases, a taxpayer can shed blame by pointing to negligent or dishonest professionals in whom the taxpayer reposed his trust and confidence; for example, see *Lavoie c. La Reine*, 2015 CCI 228, a case where the taxpayers relied on a lawyer whom they had known and trusted for more than 30 years and who was a trusted friend. However, cases abound where the taxpayers could not avoid penalties for gross negligence by placing blind faith and trust in their tax preparers without at least taking some steps to verify the correctness of the information supplied in their tax return.
>
> [49] In *Gingras v. Canada*, [2000] T.C.J. No. 541 (QL), Justice Tardif wrote:
>
> > 19 Relying on an expert or on someone who presents himself as such in no way absolves from responsibility those who certify by their signature that their returns are truthful.
> >
> > . . .
> >
> > 30 It is the person signing a return of income who is accountable for false information provided in that return, not the agent who completed it, regardless of the agent's skills or qualifications.

[50] In *DeCosta*, above, Chief Justice Bowman stated:

> 12 ... While of course his accountant must bear some responsibility I do not think it can be said that the appellant can nonchalantly sign his return and turn a blind eye to the omission of an amount that is almost twice as much as that which he declared. So cavalier an attitude goes beyond simple carelessness.

[51] In *Laplante v. The Queen*, 2008 TCC 335, Justice Bédard wrote:

> 15 In any event, the Court finds that the Appellant's negligence (in not looking at his income tax returns at all prior to signing them) was serious enough to justify the use of the somewhat pejorative epithet "gross". The Appellant's attitude was cavalier enough in this case to be tantamount to total indifference as to whether the law was complied with or not. Did the Appellant not admit that, had he looked at his income tax returns prior to signing them, he would have been bound to notice the many false statements they contained, statements allegedly made by Mr. Cloutier? The Appellant cannot avoid liability in this case by pointing the finger at his accountant. By attempting to shield himself in this way from any liability for his income tax returns, the Appellant is recklessly abandoning his responsibilities, duties and obligations under the Act. In this case, the Appellant had an obligation under the Act to at least quickly look at his income tax returns before signing them, especially since he himself admitted that, had he done so, he would have seen the false statements made by his accountant.
>
> [Emphasis in original.]

[52] In *Brochu v. The Queen*, 2011 TCC 75, gross negligence penalties were upheld in a case where the taxpayer simply trusted her accountant's statements that everything was fine. She had quickly leafed through the return and claimed that she did not understand the words "business income" and "credit", but yet had not asked her accountant nor anyone else any questions in order to ensure that her income and expenses were properly accounted for. Justice Favreau of this Court was of the view that the fact that the taxpayer did not think it necessary to become informed amounted to carelessness which constituted gross negligence.

[53] In *Bhatti*, above, Justice C. Miller pointed out:

> 30 ... It is simply insufficient to say I did not review my returns. Blindly entrusting your affairs to another without even a minimal amount of verifying the correctness of the return goes beyond carelessness. So, even if she did not knowingly make a false omission, she certainly displayed the cavalier attitude of not caring one way or the other . . . .

[54] In *Janovsky*, above, Justice V.A. Miller stated:

> 22 The Appellant said he reviewed his return before he signed it and he did not ask any questions. He stated that he placed his trust in FA as they were tax experts. I find this statement to be implausible. He attended one meeting with the FA in 2009. He had never heard of them before and yet between his meeting with them and his filing his return in June 2010, he made no enquiries about the FA. He did not question their credentials or their claims. In his desire to receive a large refund, the Appellant did not try to educate himself about the FA.
>
> 23 Considering the Appellant's education and the magnitude of the false statement he reported in his 2009 return, it is my view that the Appellant knew that the amounts reported in his return were fake.

[55] Another recent example can be found in the matter of *Atutornu v. The Queen*, 2014 TCC 174, where the taxpayers simply blindly relied on the advice of their tax preparer without reading or reviewing their returns and without making any effort whatsoever to verify the accuracy of their returns.

Conclusion

[56] There is no doubt that the Appellants' 2008 T1 adjustment requests, their 2009 tax returns and the related requests for loss carryback contained false statements -- the Appellants did not carry on a business and they did not incur any business losses whatsoever. I can come to no other conclusion than that the Appellants were wilfully blind as to the speciousness of these statements. There were many red flags or warning signs and they simply ignored them all. I am satisfied that the Crown has discharged its burden of proof and I am satisfied that the Appellants made the false statements in their returns in circumstances amounting to gross negligence. As such, they are properly subject to the penalties imposed pursuant to subsection 163(2) of the Act.

[57] The Appellants are people of modest means and the penalties are very harsh. The Appellants will certainly suffer hardship as a result of these penalties.

> However, I can offer no relief against the harshness of the penalties. The only question I can decide is whether the penalties are well founded or not.

[57] In the within appeals, both Brathwaite and Thompson were motivated by assurances provided by Morlee – the self-styled expert - that substantial tax refunds were available if they accepted without question his advice. Both appellants trusted Morlee that this novel method – which they did not understand or attempt to verify - was legitimate and made possible by applying special expertise he had acquired in the course of prior employment with CRA. Neither appellant comprehended the material provided by Lachapelle to be submitted in response to inquiries from auditors and other officials at CRA but that did not prevent them from sending letters and documents that abounded in nonsense, twaddle, jargon, drivel and babble sprinkled with random Latin words or phrases. Brathwaite and Thompson were intrigued initially by the lure of receiving tax refunds and when each received a substantial cheque in relation to the 2007 taxation year, they promptly accepted Morlee's advice to file or re-file tax returns for previous years with the expectation this would entitle them to similar refunds. The profound trust the appellants placed in Morlee and Lachapelle went beyond reason and their conduct throughout the period relevant to their appeals was fuelled by their desire to obtain tax refunds as part of an overall plan to amass wealth for their future. This consistent and egregious suspension of rational thinking constituted wilful blindness.

[58] Both appellants are decent, hard-working, citizens and a loving couple who were duped by unscrupulous individuals who were part of a widespread fraud perpetrated by various persons acting alone or with one or more associates or as part of a larger well-organized entity that targeted professionals and other higher-income taxpayers who were interested in recouping most – or perhaps all – of income tax already paid or in reducing the amount payable for the current year.

[59] A week or so after hearing the evidence in the within appeals, I saw an item posted on the Internet at ca.finance.yahoo.com/news which read as follows:

> **Tax protester Christian Lachapelle sentenced to four years in prison**
>
> Fri, 27 Nov. 2015 5:11 PM EST
>
> MONTRÉAL, Nov. 27, 2015/CNW Telbec/ - Nicolet resident and tax protester Christian Lachapelle was sentenced to four years in prison today by a Court of Quebec judge in Sherbrooke. He pleaded guilty last October 22nd to tax fraud charges.

> A Canada Revenue Agency (CRA) investigation revealed that, between June 2007 and November 2010, Mr. Lachapelle advised and enabled 93 individuals to avoid, or try to avoid, paying nearly $2 million in income tax for the 2003 to 2010 tax years.
>
> The scheme used by Mr. Lachapelle consisted of helping or advising individuals to file income tax returns or request a reassessment using the distinction between a "natural" person and a "legal"person. According to this false argument made by tax protesters, there are two distinct persons for tax purposes. Canadian courts have repeatedly and consistently rejected such arguments.
>
> This is not the first time that Mr. Lachapelle has had issues with the CRA and the law. He was sentenced to 30 days in jail in 2012 for failing to file his income tax returns despite a court order, as well as fines of $7,000 in 2005 and $14,000 in 2011 for the same reasons.
>
> All case-specific information above was obtained from the court records. …

Conclusion

Brathwaite

[60] With respect to the appeal of Brathwaite for the 2008 taxation year, the Crown has failed to discharge the requisite onus as there is no proof she made or participated in, assented to or acquiesced in the making of any false statement or omission in the tax return she did not sign and did not know that it had been submitted by someone without any instructions or authorization issued by her or by anyone on her behalf.

[61] The appeal for the 2008 taxation year is allowed and the Minister is directed to issue a reassessment in which the penalty previously imposed pursuant to subsection 163(2) of the *Act* is deleted.

[62] With respect to the appellant's appeal for the 2005, 2006 and 2007 taxation years, the evidence supports a finding that the imposition of penalties pursuant to subsection 163(2) in each of those years is justified and each assessment for each year is confirmed and the appeal with respect to those years is dismissed.

Thompson

[63] As conceded by counsel for the respondent at the outset of her submissions, the penalty imposed under subsection 163(2) for the 2008 taxation year is not justified as the evidence established that no loss had been claimed that would have the effect of reducing the amount of tax payable and therefore could not trigger the process to levy a penalty. The appellant's appeal is allowed and the Minister is directed to issue a reassessment for that year and to delete the penalty previously imposed.

[64] With respect to the appellant's 2007 taxation year, the evidence supports a conclusion that the assessment of the Minister is correct and it is confirmed and the appeal is dismissed.

Costs

[65] Brathwaite was successful in having the penalty imposed in the 2008 taxation year deleted. It was in the sum of $53,509.34 compared with penalties for 2005, 2006 and 2007 in the amounts of $5,334.42, $15,025.92 and $5,849.20, respectively.

[66] Thompson's appeal in respect of the 2008 taxation year was allowed.

[67] Although the two appeals were heard on common evidence, each appeal is separate and the matter of costs has to be addressed with that in mind.

[68] I have taken into consideration the provisions in section 147 of the *Tax Court of Canada Rules (General Procedure)* and particularly paragraph 147(5)(*b*) in arriving at the decision to award one set of costs to the respondent in accordance with Tariff B. However, that sum – as calculated - then is to be multiplied by 60% and that resulting number, when divided by two, is the amount of costs each appellant must pay to the respondent by March 31, 2016.

These Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment dated February 1, 2016. The Reasons for Judgment are amended solely to correct the date of the hearing of the appeal.

Signed at **Toronto, Ontario**, this **18th** day of February 2016.

"D.W. Rowe"

Rowe D.J.

CITATION:	2016 TCC 29
COURT FILE NO.:	2013-868(IT)G and 2014-1150(IT)G
STYLE OF CAUSE:	ANGELINA BRATHWAITE and HER MAJESTY THE QUEEN IAN THOMPSON and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	**December 8**, 2015
AMENDED REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF **AMENDED** JUDGMENT:	February **18**, 2016

APPEARANCES:

Counsel for the Appellants:	Jeffrey Radnoff
Counsel for the Respondent:	Katie Beahen

COUNSEL OF RECORD:

For the Appellants:

Name:	Jeffrey Radnoff
Firm:	DioGuardi Tax Law Mississauga, Ontario

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada