Docket: 2012-2348(IT)G

BETWEEN:

ROSETTA WYNTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 2, 2016, at Toronto, Ontario

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

Appearances:

Counsel for the Appellant:	Duane R. Milot
Counsel for the Respondent:	Tony Cheung

JUDGMENT

The appeal from the reassessment made pursuant to the *Income Tax Act* for the 2009 taxation year is dismissed. Costs in the amount of $1,200, inclusive of disbursements, are awarded to the Respondent.

Signed at Sidney, British Columbia, this 22nd day of April 2016.

"D.W. Rowe"

Rowe D.J.

Citation: 2016 TCC 103
Date: 20160422
Docket: 2012-2348(IT)G

BETWEEN:

ROSETTA WYNTER,

Appellant,

and

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REASONS FOR JUDGMENT

Rowe D.J.

[1] Pursuant to the Fresh Notice of Appeal – dated November 4, 2015 - the within appeal is from the imposition of a gross negligence penalty pursuant to subsection 163(2) of the *Income Tax Act* (the "*Act*") in respect of the 2009 taxation year. The appellant, Rosetta Wynter ("Wynter"), in filing her return for the 2009 taxation year, claimed a loss in the sum of $447,148.31 as "Claimed Agent Loss" which was detailed in her Statement of Business or Professional Activities ("SBA") as follows:

Gross business or Professional Income Receipts as Agent	$204,999.65
Gross Profit	$204,999.65
Business Expenses – Amount to Principal from Agent	$652,147.96
Net Loss	$447,148.31

[2] The appellant used $114,201.31 of the Claimed Agent Loss against her income in the 2009 taxation year and requested the unused balance of $332,947 be carried back and applied to her 2006, 2007 and 2008 taxation years in the amounts

of $91,497, $101,779, and $139,671, respectively. The Minister of National Revenue (the "Minister") initially assessed the appellant for the 2009 taxation year – on June 3, 2010 - allowing the Claimed Agent Loss and denying the request to carryback a non-capital loss for previous years. The Minister reassessed the appellant – on July 8, 2011 – for the 2009 taxation year and applied a gross negligence penalty in the sum of $51,569.49.

[3] Pursuant to subsection 244(9), the affidavit of Sadruddin Suleman, Litigation Officer employed by the Canada Revenue Agency ("CRA"), was filed.

[4] Counsel for the parties agreed the following exhibits could be entered as follows:

> Exhibit A-1 – Appellant's Book of Documents, Tabs 1 to 12, inclusive.
> Exhibit R-1 – Respondent's Book of Documents, Tabs 1 to14, inclusive.

[5] Wynter testified she is a retired worker previously employed by Chrysler Canada Inc. ("Chrysler"). She was born in Jamaica and, in 2009, was 65 years old. She immigrated to Canada in 1967 from England where she had lived for four years. She became a Canadian citizen in 1977. In Jamaica, she attended school to Grade 6 but does not know the equivalent level in Canada. (Paragraph 4 of her Fresh Notice of Appeal stated this level was equivalent to Grade 10 in Canada.) Wynter stated she was an average student. She is married with four children. In 2012, she attended a college in Mississauga, Ontario, and in 2013, obtained a qualification as a Personal Support Worker, commonly known as a caregiver. She has no training in tax matters, business or accounting. In 1963, when living in England, she was a factory worker and after arriving in Canada, worked as a packer in a Planters Peanuts facility for about a year. She went to the United States of America for a short period but returned to Canada and obtained employment with Admiral, an appliance company, working on the assembly line to manufacture refrigerators. When that entity was taken over by Inglis, she worked again on the assembly line building washing machines. Her next job was with American Motors in Brampton, Ontario, where she worked steadily from 1986 to 1991 except for a brief layoff of three weeks. Chrysler purchased American Motors and the appellant worked for her new employer until her retirement in 2008. Her last duty was as an Inspector of dashboards, wipers and other instruments and her designation was a B Specialist. Wynter stated she often had worked double shifts and holidays. When her employer issued a T4 slip, she took it to a tax preparer to file her return and had not encountered any problems with CRA since her initial filing in 1967. She had not prepared any tax returns on her own and one preparer in Brampton had

provided his services for several years. Before that, a co-worker at Chrysler prepared her returns. Wynter stated she had never owned or operated a business. Her only income had been employment income but when she moved to Brampton from Mississauga in 1999, she purchased a house and rented out a basement suite and declared the net income from that source. Over the years, she had deductions for charitable donations, Registered Retirement Savings Plan ("RRSP") and other allowable amounts such as medical expenses, union dues and similar payments. In 2006, the appellant received a phone call from a man who introduced himself as Alrick Perkin ("Perkin"). She did not know him nor how he had obtained her home phone number. Perkin requested permission to visit the appellant at her home – which she granted – and he came to her residence and spoke about the advantages of donations to DSC Lifestyle Services ("DSC"). At this point, Wynter did not ask Perkin any questions but he invited her to attend a meeting and informed her that DSC also prepared income tax returns. Wynter attended the meeting where there was a video as part of a presentation which she understood to be about a charitable donation program and that it had some aspect of matching to increase the amount of the gift. Perkin worked with Janet Perry ("Perry") at the DSC office located on the third floor of a large building at 5000 Steeles Avenue in Brampton. Wynter recalled that the office had computers, projectors and several desks in the work area but understood the Head Office of DSC was at 800 Steeles Avenue and it was there she attended to obtain advice because CRA wanted her to repay a refund of about $1,000 she had received. Between 2006 and when DSC no longer was operating, Wynter attended a meeting every year at which 30 or more people of different nationalities and origins were present and the consensus was that the programs offered to them were "okay" in the sense that they were normal and legal. In 2006, the appellant paid a fee of $6,000 to join DSC but the method of payment was based on what she understood was a loan from DSC which would be repaid when she received her tax refund. Wynter stated she asked about the basis for the refund and was informed by DSC personnel that it was because of her donations. Wynter stated she had received the material – Exhibit A-1, Tab 2 – from DSC including a document entitled Code of Ethics and another with the heading: The Financial Facts of Life. Wynter stated that she was required to complete an application to join DSC. She borrowed the sum of $90,000 from the TD bank and – relying on advice provided by Perkin and Perry – invested the money in a land development project in Whitby, Ontario. In 2008, Chrysler instituted a severance package program for older workers and the appellant received a payment from Chrysler in the amount of approximately $60,000, after tax. Wynter stated she signed the back of that Chrysler cheque and gave it to DSC and also withdrew about $40,000 from her RRSP account with Chrysler Credit Union because Perry had promised a higher rate of interest than the one paid by the Credit Union.

Wynter stated she believed DSC operated a financial institution. In 2015, she received the sum of $60,000 which she deposited in an account with Chrysler Credit Union. Wynter stated she hired DSC to prepare her 2006 and 2007 tax returns but did not know the actual tax preparer. Wynter was referred to a document at Exhibit A-1, Tab 3, on the letterhead of Furry World Rescue Mission ("Furry World") located in Lynden, Ontario. That document purported to be an official receipt for income tax purposes - dated December 29, 2008 - in the sum of $80,891.25 and the property allegedly donated by the appellant was described therein as 39,220 shares of RCT Global Networks Inc. The document stated the shares had been appraised by the Frankfurt Stock Exchange in Germany. The receipt was signed: Peter Black, Executive Director, Authorized by the Charity. Wynter stated she did not know what the money was used for but was accustomed to making charitable donations to various organizations throughout her working life and had not encountered any tax problems as a result. She had asked her contacts at DSC if these donations were like her usual gifts to charity and was assured they were in the same category. Wynter stated the people she dealt with at DSC were dressed in business attire and conducted themselves in a professional and courteous demeanour and there were certificates on the wall, although she did not know what they stated or by whom they had been issued. At one meeting in Toronto, Larry Watts was one of the presenters and spoke about savings and investments. Wynter attended with her husband and about 30 to 40 people were present. She stated there was no discussion about a concept of "natural persons" or the use of any agent or entity. DSC was responsible for the preparation of the appellant's 2009 tax return and she subsequently received a refund in the sum of $30,311.62. At tab 5 of the same exhibit, the appellant identified her 2009 T1 General Return which had been prepared either by someone at DSC or a preparer hired by DSC (page numbers referred to hereafter pertaining to this tax return are located at the upper-right corner and have been numbered by counsel for ease of reference). Wynter stated she provided Perry – at the 5000 Steeles Avenue DSC office - with her T4 slips, information about her income from renting the suite in her house and receipts for charitable donations. A week later, Wynter received a call from Perry that her tax return was ready to pick up and she met Perry at the DSC reception desk who told her where to sign and she followed those instructions. Perry put the return in an envelope and told Wynter to mail it to CRA. Wynter stated that prior to signing the tax return, she looked at the first page but did not notice the entry at line 135 - on the second page – where it showed a negative amount of business income in the sum of $447,148.31 nor did she take notice of other numbers such as $204,999.65, purporting to be business income. Rental income from her suite was entered at line 126 in the sum of $10,800 and - at line 130- the sum of $110,000 was reported as other income. Wynter stated she had

not noticed her T4 slip - at page 19 – issued by Chrysler or the T4A slips in following pages as issued by DaimlerChrysler Opr. and had not been aware of the T5 slips and receipts for charitable donations. At page 51 of Tab 5, Wynter identified her signature but stated the word "per" was not present when she signed the return on 2010-04-23 (April 23). The box beside her signature to be completed by a professional tax preparer was blank. Wynter stated she had not noticed the amount of her claimed refund – in the sum of $30,311.62 – at line 484. Wynter stated she did not know the basis for the refund claim or why it would be payable. With respect to other taxation years, Wynter stated she paid DSC a fee of $100 to prepare her returns from 2006 to 2009, inclusive, and had received a refund in each taxation year and paid DSC the sum of $6,000 from the 2006 refund and $5,000 from a refund received in respect of the following year. She did not pay DSC any portion of her last refund. The appellant was referred to Tab 6 and to a document entitled Request for Loss Carryback. Wynter acknowledged she had signed that document but had not written the word "per" in front of her signature. Included in her 2009 tax return was the SBA which Wynter stated she did not see and had assumed – as before – that DSC were professionals and that this return was also correctly prepared. CRA sent the appellant a letter – dated Feb 7, 2011 – Tab 7 – advising that it required additional information concerning the business loss claimed in the sum of $447,148.31. Wynter stated she knew she had not operated a business and faxed that letter to Christine at Ed Gilmore's office. Wynter stated she did not recognize the documents at Tab 8 which were a letter addressed to L. Rudyk - CRA Auditor at the Sudbury office - and a T4A Summary. Wynter received another letter from CRA – dated May 6, 2011 – at Tab 9 – advising that the Agency was considering the imposition of a gross negligence penalty pursuant to subsection 163(2) of the *Act* in addition to disallowing the business loss claimed for the 2009 taxation year and denying the request for a loss carryback of the non-capital loss claimed for 2007 and 2008. Wynter stated that after she received a statement from CRA – dated June 1, 2011 – indicating she owed the sum of $150,173.17 - including a provincial penalty of $29,790.26 - she went to the DSC office at 800 Steeles Avenue. (The Notice of Reassessment showing this amount is found at Tab 11 of Exhibit R-1, the Respondent's Book of Documents.) Wynter stated she spoke with Esma Bowman ("Bowman") who told her not to be concerned because the next statement from CRA would show she owed "zero" because DSC had professional tax experts working on the problem and Wynter would end up not owing any money. Bowman did not request any additional fee. Wynter stated she did not send the letter dated June 1, 2011, Tab 10 of Exhibit A-1 – to L. Rudyk at CRA, Sudbury office but had signed the Notice of Objection ("Objection") – Tab 12 – dated 2011-10-05 (October 5, 2011) and mailed it to CRA. She had received the document from Perry or another person at DSC and did

not know what was happening because she thought the problem was related to a donation which she thought was legitimate and did not understand how she had been "caught up in this bad situation."

[6] The appellant was cross-examined by counsel for the respondent. Wynter stated she was able to subtract and multiply numbers but did not understand the concept of negative numbers generally but knew the significance of a minus amount in a bank statement. At Chrysler, she entered data into a computer after having made notes on a sheet of any faults in a vehicle interior that she had detected in the course of her inspection. Approximately 900 cars a day were constructed on the assembly line and she was one of the workers responsible for inspecting certain components. For a period prior to 2006, Sanjay Grouter ("Grouter") prepared her tax returns and did not charge more than $100, and sometimes only $60. On occasion, a refund of nearly $1,000 was received. In 2006, Perkin telephoned her at home and spoke about a certain program and invited her to attend a meeting. Wynter went to the meeting where the material at Exhibit A-1 -Tab 2 – was provided in the course of a presentation which included a video and advice concerning preparation of income tax returns. As she was leaving the meeting, Perkin told her that he was a tax preparer, which she accepted without question. He did not promise any specific amount of a refund but she knew DSC promoted a charity and decided to use the services of that entity instead of Grouter because she was interested in participating in a new charitable donation program. Wynter met Perry at the DSC office in the spring of 2007 and delivered her T4 slips and other relevant slips and documents. Perry phoned her when the return had been prepared and Wynter went to the office and paid a fee of $100 but understood from Perry that a further sum would be payable when she received a tax refund. At DSC, Perkin raised the subject of the Furry World project which she understood to be a charitable organization and wrote a cheque in the sum of $5,000 payable to Global Learning Gift Initiative and handed it to either Perry or Perkin. Wynter reiterated her belief that DSC had loaned her the sum of $6,000 to join its program and that this amount – together with an undisclosed amount of interest – would be repaid from the proceeds of her tax refund. When signing her 2006 tax return, Wynter stated she did not review "everything but glanced through it" and signed in various places as instructed by Perry. She did not know what documents were inserted or appended to the return. However, the procedure did not seem to be different from the one followed by Grouter when he had prepared several of her returns. According to the affidavit of Suleman – paragraph 10 - the appellant earned $108,571 from Chrysler and had rental income and other income for a total of $110,468. On October 29, 2009, the Minister reassessed the 2006 year to disallow a donation in the sum of $35,003 (see paragraph 8 of the affidavit).

Wynter acknowledged she had not made a donation in that amount but had written a cheque in the sum of $5,000 and was told by Perkin that DSC would in some way "match" that amount. Counsel referred the appellant to her signature on her 2009 tax return – last page of Tab 5 – Exhibit A-1 – and – as an example – directed her attention to the declaration immediately 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." Wynter stated she was confident that DSC either had prepared each of her returns correctly at their office or had hired a competent person to do so. She stated she had not noticed the amount of the refund claimed for her 2006 taxation year. Perry had placed the tax return in an envelope and handed it to the appellant who mailed it to CRA the next day. Wynter received a refund of $10,000 in respect of her 2006 taxation year. It was the largest refund she had ever received and did not know the reason why she would get that amount. She paid the sum of $6,000 to DSC in accordance with the agreement made earlier. She decided to use the services of DSC to prepare her 2007 tax return and went to the office where she provided the usual documents but was not required to pay a fee in advance. The same procedure was followed with respect to signing and mailing the return - personally - to CRA. For the 2008 taxation year, Wynter dealt with Perry and the same method was followed with respect to signing the return. Wynter issued a cheque payable to Furry World for what she understood was a "one-time" donation and received a receipt – included in her tax return - stating she had made a gift of shares with an appraised value of $80,891.25. In mid-2009, the appellant received a refund of approximately $15,000 but the Minister issued a reassessment for the 2008 taxation year on March 10, 2011 to disallow the sum of $2,728 in donation and a further reassessment on February 24, 2012 disallowed $90,891 in donation (see paragraph 14 of the affidavit of Suleman). After receiving her refund, Wynter paid DSC $6,000 from the proceeds. The appellant was referred to an unsigned letter – Exhibit A-1 – Tab 4 – dated March 11, 2009 - purporting to be from Siddiqi & Company Inc. in which two copies of her 2008 tax return were enclosed. The letter – at paragraph 2 – advised the appellant to "review the federal tax return carefully to ensure that it is accurate and complete." She was advised in the following paragraph that she was entitled to a refund of $27,290.71. The letter continued to state further relevant information pertaining to that return. Wynter stated she doubted that she had received this letter even though it had been provided in her List of Documents. Wynter stated that when she was reassessed for her 2006 taxation year – on October 29, 2009 – to disallow $35,003 in donation, she went to the DSC office at 5000 Steeles Avenue because the one at 800 Steeles Avenue had been closed for the winter months. She spoke to Bowman who told her the professionals retained by DSC would be able to reduce that outstanding balance to zero. Earlier, Wynter

had faxed correspondence from CRA pertaining to her 2006 taxation year to the DSC office. Wynter conceded that she should have consulted Grouter – her former tax preparer – but at that time "was not thinking". Wynter hired DSC to prepare her 2009 tax return and attended at the office early in April and spoke to Perry but did not inquire whether DSC had been able to resolve problems with CRA arising from her 2006 taxation year as evidenced by a reassessment dated months earlier in October, 2009. With respect to her 2009 return, the appellant stated she received a phone call from Perry to advise the return was ready to be signed. Wynter went to the office and the same procedure was followed and she did not review the return in detail but verified that the personal information on Exhibit A-1, Tab 5 - page 1 was correct. She did not look at the information contained on page 2 nor did she review pages 19 to 31, inclusive which were composed of various slips and receipts relevant to her income for that year. At page 28, there is a receipt from Olympia Trust Company pertaining to the appellant's self-directed RRSP in the sum of $59,447. Fortunately, this money had been placed there by DSC from the proceeds of the Chrysler severance payment that Wynter assigned to it by endorsing the cheque. Wynter stated DSC never repaid her investment from what had been referred to as the Whitby Land Project but she received an amount in 2015 from some source that was to a large extent related to the amount of her initial capital contribution. Wynter stated she had not seen the SBA in her return - at page 46 - and does not know why it would be included. When signing her 2009 return, Wynter stated she did not look at pages 47 or 48 but had signed at the bottom of page 49 to certify that the information contained about her business income and losses were correct. She stated she did not see page 50 and the number at the top – line 150 – showing the negative sum of $273,419.79 as representing her income. Wynter did take note of the amount of the claimed refund of $30,311.62 but did not ask Perry why or how she was entitled to that amount. She did not have any reaction to the absence of identification of DSC or someone hired by it as the tax preparer. Wynter stated she never told DSC that she had operated any business. She did not pay DSC any portion of the refund initially received for the 2009 year. When she received the February 7, 2011 letter from CRA – Tab 7 – she contacted Ed Gilmore as she did not feel sufficiently confident to contact the CRA auditor directly. She did not have any further dealings with DSC as the offices had been closed at some point, probably in late 2010. As stated earlier, Wynter did not send nor did she authorize anyone to send the letter – dated March 29, 2011 – to L. Rudyk, CRA auditor. When she received a further letter from CRA – dated May 6, 2011 – Tab 9 – she sent it to Gilmore. Wynter stated she had not seen the letter to CRA – dated June 1, 2011 – Tab 10 – purporting to be sent on her behalf and did not authorize or instruct anyone to do so. The appellant acknowledged her signature on the Objection – Tab 12 – dated 2011-10-05 which

had been sent to her computer as an attachment. She read some of that document, signed it and mailed it to the Chief of Appeals at Sudbury. Wynter stated she had never known or suspected that DSC was operating a tax avoidance scheme and had believed her refunds were due to having contributed to a charitable donation program that was legally able to increase the amount of the actual donation.

[7] Counsel did not re-examine and closed the appellant's case.

[8] Counsel for the respondent did not call any evidence.

[9] Counsel for the appellant submitted the appellant had a limited education and did not have a good grasp of numbers as reflected in certain parts of her testimony when describing the number of cars - 900 - she had inspected in one day when that number was attributable to the entire production of the assembly line. The appellant was a hard-working woman, aged 65 in 2010 when her 2009 tax return was filed. It is likely she had been the victim of some DSC scam pertaining to the land development project in Whitby and the money later received in 2015 was not readily identifiable by her as to the source. Counsel submitted it was obvious that Wynter had never represented to DSC that she had a business and trusted DSC on the basis it appeared to be a legitimate business - with two offices in Brampton – that was operated by professionals with income tax expertise in addition to offering other financial programs to clients. Counsel referred to the uncontradicted evidence of Wynter that she had not seen or been made aware of the SBA or the Request for Loss Carryback so there were no warning signs or "flashing lights" to arouse her suspicion that a business loss had been claimed. Her belief that she was participating in a legitimate donation program was bolstered by the fact she made a $5,100 donation on January 10, 2010 to a church in Kitchener which was recognized by the Minister as a legitimate registered charity that had issued a proper receipt. Counsel submitted the Crown had not discharged its onus and that the appeal should be allowed with costs. Counsel made further submissions concerning the current state of the law as it pertained to the concept of wilful blindness and I will deal with those later in these Reasons.

[10] Counsel for the respondent conceded there was no intentional acting on the part of the appellant and that she had not sent nor had she authorized the letters - at Tab 8 and Tab 10 – Exhibit A-1 to be sent to CRA but she had signed the Objection - dated October 5, 2011 –which she had received as an attachment to an e-mail sent to her by DSC and had mailed it to the Chief of Appeals in Sudbury. Counsel submitted the facts disclosed that the appellant had been wilfully blind and that an analysis of the evidence as required by the relevant modern

jurisprudence with respect to the imposition of a penalty pursuant to subsection 163(2) of the *Act* supported a finding that the imposition of the penalty for her 2009 taxation year was justified. Counsel submitted the appeal should be dismissed with costs.

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

[12] 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.

[13] In the case of *Guindon v Canada*, 2015 SCC 41, [2015] SCJ No. 41 [*Guindon*], 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.

[14] In the case of *Torres v Canada*, 2013 TCC 380, 2014 DTC 1028 [*Torres*], 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 which also involved Fiscal Arbitrators. In *Torres*, based on that jurisprudence and the evidence heard in the 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?

[15] 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.

[16] 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.

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

Education and experience

[18] Wynter received a Grade 6 education in Jamaica – as noted earlier, equivalent to Grade 10 in Canada - and has worked as a factory/plant assembly line worker most of her working life until her retirement with Chrysler in 2008. Her last position was as an Inspector of the interior of vehicles proceeding down the line and she was required to note any defaults and – later – to input that data into a computer. She participated in RRSP programs, made charitable donations, obtained a mortgage, created a rental suite in the lower level of the home she purchased in Brampton and understood the requirement to report net rental income. She was knowledgeable in terms of her earning capacity and worked overtime and holidays to augment her income. She did not have any training in income tax matters and retained the services of a tax preparer or had her return prepared by a co-worker at Chrysler.

Suspicion or need to make an inquiry

[19] In 2006, the appellant received an unsolicited telephone call from Perkin whom she did not know. He persuaded her to attend a meeting, the purpose of which was to promote a program referred to herein as DSC. She was provided with certain material and viewed a video and listened to speakers explain the donation mechanism used by DSC and details of other services offered to clients. As she was leaving the meeting, Perkin spoke to Wynter about preparing her tax returns, which for several years earlier had been done by Grouter. Wynter paid DSC a fee

of $6,000 for a membership but understood that was paid by means of a loan to her from DSC which would be repaid – together with unspecified interest – from a tax refund. Wynter did not know the details of the alleged charitable donation program promoted by DSC and did not inquire beyond having received a vague explanation from Perkin or one of his associates that it involved some sort of matching, the effect of which was to increase the amount of the initial donation for purposes of claiming a charitable donation deduction on a return for the applicable taxation year. Wynter had invested the sum of $90,000 – on the advice of Perkin and Perry – into what she understood was a land development project in Whitby. To obtain those funds, Wynter took out a loan from her bank. Perkin and Perry advised her to remove her RRSPs from the Chrysler credit union because DSC could obtain a higher rate of interest and she complied without question. Initially, Wynter received a refund for her 2006 taxation year and that was not disallowed until a reassessment dated October 29, 2009. She did not understand the reason for the large refund, which was many times larger than she had received since filing tax returns for more 30 years. She thought it was due to the charitable donation made through DSC and she was accustomed to making donations and had not encountered any problems with CRA as a consequence. Wynter had inquired of DSC whether their program was in the same category or type as other gifts she had made over the years and received assurances that it was equally valid. A receipt from Furry World – dated December 29, 2008 – stated the eligible amount of her gift was $80,891.25, which was the purported value of certain shares in RCT Global Networks Inc. which had been assessed by the Frankfurt Stock Exchange. Wynter knew she had written a cheque for only $5,000 to be donated to Furry World. She did not know what the money would be used for and could not confirm nor deny whether that receipt was in the return for her 2008 taxation year at the time of signing. Wynter went back to DSC in April 2010, for the purpose of having her 2009 return prepared. At this point, she had already been reassessed – since October 29, 2009 – for her 2006 taxation year wherein the Minister disallowed a donation in the sum of $35,003. Wynter's explanation of the method followed in reviewing and signing her tax returns for the years 2006 to 2009, inclusive, was consistent. She signed where Perry told her to and did not pay attention to numbers indicating large amounts of business income and losses resulting in minus business income which was claimed against her employment and other income. She stated that with respect to her 2009 return, she did not notice that the amount of the refund claimed was $30,311.62, which was at least double what she had received for two earlier years. Wynter testified she had not noticed the SBA, which supposedly provided details of her business activity, but signed the document where indicated by Perry together with the Request for Loss Carryback, dated April 23, 2010. After signing her 2009 return, it was placed in an envelope and

handed to her by Perry who instructed her to mail it to CRA and Wynter did so the following day. Wynter stated that she had not reviewed the return but recalled later in her testimony that she had noticed the amount of the refund – in excess of $30,000 – but had not asked Perry why it was that large.

[20] I will review the evidence including those factors referred to by C. Miller J. at paragraph 69 of his judgment in *Torres*.

The fee structure

[21] For years, Wynter had her return completed by tax preparers or by a co-worker. Between 1999 and 2005, she had not paid Grouter more than $100 as a fee and had not paid him or any previous preparer a percentage of a refund. However, she paid DSC the sum of $6,000 from proceeds of a refund for her 2006 taxation year which – ostensibly – was for a membership in DSC. She also paid DSC $5,000 from another tax refund. For preparing returns for the taxation years 2006 to 2009, inclusive, Wynter also paid DSC an annual fee of $100. The two payments to DSC amounted to at least $11,000 from a total of approximately $45,000 comprising the refunds for 2006 and 2008. She did not pay any amount to DSC from proceeds of her 2009 refund which was probably due to the lack of success on the part of DSC in resolving her issues with CRA arising from her 2006 taxation year.

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

[22] Wynter went to the DSC offices at both locations on Steeles Avenue and was impressed with the business-like appearance of the premises and the demeanour of the personnel and noticed certain certificates hanging on the wall but did not know what they stated or their origin. The space for the professional tax preparer adjacent to her signature on the 2009 return was empty at the time of signing. Wynter apparently received a letter from Siddiqi and Company – dated March 11, 2009 – enclosing two copies of her 2008 tax return and returned the information provided by her for the preparation. It specifically stated the return claimed was in the sum of $27,290.71. The letter instructed her to sign the return and to mail it to CRA at Sudbury. Wynter doubted she had ever seen that letter but that return arrived at the Sudbury office – as disclosed in the affidavit of Suleman – and was included in the requisite exchange of documents. However, there was no indication in the appellant's 2009 return that it had been prepared by DSC or any person retained by them.

Blatantly false statement – readily detectable

[23] Any reasonable review of her returns for 2006 and 2008 – even a cursory examination - would have revealed that the amount of a charitable donation claimed as a deduction was many times more than her actual contribution. A review of her 2009 return would have allowed her to see that she was reporting business income in the sum of $204,999.65 and business expenses in the sum of $447,148.31 resulting in minus income of $273,419.79. Wynter conceded she had not looked at most of the pages in her return after verifying her personal information on page 1. She stated she did not see the SBA or the Request for Loss Carryback but signed page 2 of each of those forms. She noted the large amount of the refund but did not ask Perry how that was possible based on her employment, rental and other income. Wynter knew she had never operated a business and had not told DSC to claim any business loss on her behalf. The amount of the refund claimed would have resulted in a return of all tax withheld from source that year. The point is that this was a huge advantage to be gained that was not only extraordinary but unique in Wynter's experience, having filed returns since 1967 or 1968. It is not as though Perry had offered some sort of explanation about the refund having been based on any special or particular DSC program – charitable or otherwise – applicable to that taxation year. Instead, Wynter made no inquiry whatsoever and there was no reason for her to believe the refund for that year was linked to any charitable donation by her as the only donations were evidenced by the receipts included in her return and had been issued by legitimate charities and were accepted by CRA.

Tax preparer makes unusual requests

[24] Perry instructed the appellant to sign the returns where indicated and did not disclose who had prepared the 2006, 2007 and 2009 returns. Later, Wynter forwarded to the CRA auditor an Objection – dated 2011-10-05 – (October 5, 2011) that she had received by way of attachment to an e-mail sent by DSC. She looked at it briefly and did not understand the contents but knew it pertained to her 2009 taxation year and the problems identified by CRA, which were the subject of letters requesting further information and clarification to support the claim for a business loss.

Tax preparer previously unknown to taxpayer

[25] For several years, Grouter had prepared the returns for the appellant. In 2006, she received a telephone call from Perkin who invited her to a meeting

which she attended and she was persuaded to participate in the DSC program. She accepted without question his statement that he was qualified to prepare her tax returns yet had no direct contact with him at DSC subsequently with respect to her returns and Perry conducted all interviews and provided instructions where to sign in each return. Wynter did not ask who had prepared the 2009 return and the only time there was a potential identifiable preparer of a return – Siddiqi & Company Inc. in 2008 - she claimed to have no recollection of having received that letter with two copies of her return. She did not know – in any event – the identity or nature of that entity nor where it was located or how it may have been connected to DSC, Perry or Perkin.

Lack of inquiries of professionals or official at CRA

[26] After being contacted by CRA about disallowing her charitable donation deduction for the 2006 year, Wynter received a reassessment notice - dated October 29, 2009 - but did not contact the auditor at CRA from whom she had received earlier correspondence and had faxed it to DSC. She went to the DSC office at 5000 Steeles Avenue in Brampton and spoke to Bowman who assured her there was no need for concern as the professional experts retained by DSC would ensure that the next notice from CRA would show a balance of zero. Wynter did not question how this could be possible in light of the persistence of CRA in denying the legitimacy of the charitable donation claimed. No further explanation was offered by Bowman other than to state that the problem would disappear through the efforts of DSC and its resources. Wynter did not contact anyone at CRA nor did she consult Grouter with whom she had a previous relationship without any problems with CRA having arisen.

Appellant's trust in the tax preparer and his or her cohort

[27] There is no evidence as to who prepared the tax returns for the 2006, 2007 and 2009 taxation years except it was done through the auspices of DSC and Perry was the one responsible for dealing with Wynter and instructing her how and where to sign. There is no evidence to permit a finding that Siddiqi & Company Inc. existed, as no address was provided on the letter sent to Wynter and there is no other name or signature thereon. Wynter accepted the advice of Perkin and Perry and Bowman without question and did not try to glean even a marginal understanding of what was being declared to CRA on her behalf. She maintained that she assumed DSC were professionals and experts in the field of tax preparation. She did not request any clarification or proof of this purported expertise and continued to trust the advice provided by sending in that nonsensical

Objection in October, 2011 which she did not read thoroughly and did not understand the content. The purported explanation in that Objection is incomprehensible and Wynter should have read the portion that claimed she was a "fictional entity". I can only assume that would have come as a surprise as she was a dedicated and faithful employee of several employers over the course of 40 years and was a hard-working citizen of Canada. However, the absence of any rational content did not prevent her from mailing the Objection to the Chief of Appeals. Again, her trust in DSC persisted even though at this point their offices had been closed in Brampton and the unsolicited Objection had been received by her as an attachment to an e-mail which she presumed was sent by DSC or someone instructed by it. It is apparent Wynter was not interested in ensuring that she had complied with the law in declaring her income for the 2009 taxation year. Earlier, she had ignored letters from CRA pertaining to her 2006 taxation year, except to seek advice from DSC, and should have been shocked at the fact that whomever DSC had hired had not prepared her return correctly and she had been reassessed and a large amount was due to the government of Canada. After-the-fact conduct does not require the inference to be drawn that this attitude was present at the time of signing the return at issue but it is a reasonable factor to be considered in the context of the requisite analysis of the entire evidence. In the within case, that inference can be drawn and I do so, in that Wynter was determined not to undertake any significant inquiry that would detract from her ability to receive a refund as promised by Perkin and others at DSC.

[28] In *Torres v Canada [appeal by Strachan]*, 2015 FCA 60, 2015 DTC 5044 [*Torres [Strachan]*]- 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.

[29] At this point, as one of my ancestors used to say when sprinkling grass seed on bare spots on the lawn, “the plot thickens.” Counsel for the appellant’s position is that the decision of C. Miller J. was approved by the Federal Court of Appeal including the references contained in his comments at paragraph 63 of *Torres* as follows:

> 63. The Federal Court of Appeal addressed the concept of wilful blindness in more detail in the case of *Panini v Canada* [351 NR 55 (FCA)], also citing Justice Létourneau in the *Villeneuve v Canada* case [2004 DTC 6077 (FCA)], but going on to draw on the criminal case of *R. v Hinchey*:
>
> > 42. In *R. v. Hinchey*, [1996] 3 S.C.R. 1128 [*Hinchey*], Cory J. discussed the concept of "wilful blindness" in the context of

criminal law. At paragraphs 112 to 115 of that decision, he wrote the following:

> ...
>
> In other words, there is a suspicion which the defendant deliberately omits to turn into certain knowledge. This is frequently expressed by saying that he "shut his eyes" to the fact, or that he was "wilfully blind."
>
> ...
>
> 114. In *Sansregret, supra,* [1985] 1 S.C.R. 570, this Court held that the circumstances were not restricted to those immediately surrounding a particular offence but could be more broadly defined to include past events. McIntyre J. distinguished wilful blindness from recklessness and quoted with approval a passage from Glanville Williams with regard to its application (at pp. 584 and 586):
>
> > Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant.
>
> ...
>
> 43. Although Cory J.'s comments were made in the context of a criminal law case, they are nonetheless, in my view, entirely apposite to the facts of the present case. Consequently, the law will impute knowledge to a taxpayer who, in circumstances that dictate or strongly suggest that an inquiry should be made with respect to his or her tax situation, refuses or fails to commence such an inquiry without proper justification.

[30] Counsel referred to the remaining portion of that quote and to the following paragraph, which reads as follows:

> 114. …

> … The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.
>
> ...
>
> The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

115. Although this would seem to be a rather narrow approach to wilful blindness it certainly can and should be applied in appropriate cases. As Professor Don Stuart points out in *Canadian Criminal Law*, *supra*, there is no reason to absolve those who are deliberately ignorant since a person who is deliberately ignorant of a likely risk is sufficiently culpable. At p. 212 he writes:

> The saga of Sansregret does not make one sanguine about the doctrine of wilful blindness. However, if we are careful to maintain the subjective test, the extension to wilful blindness seems to be a sensible widening of the net. **We should not absolve those who are deliberately ignorant. This could be applied as well to the concept of foresight or knowledge of consequences. One who is deliberately ignorant about a likely risk is sufficiently culpable.**

I agree with these comments. The requisite *mens rea* for the crime can thus be established by demonstrating that the accused had the requisite intent or was reckless or wilfully blind.

[Emphasis added]

[31] Counsel submitted that the jurisprudence emanating from the Supreme Court of Canada in *Sansregret v R*, [1985] 1 SCR 570 [*Sansregret*], requires that the evidence needed to permit the court to find wilful blindness must be such that "it can almost be said that the defendant actually knew" and that the court must be satisfied that "the defendant intended to cheat the administration of justice." In his

view, the unequivocal caveat to the application of that principle was stated in the last sentence of that paragraph where McIntyre J. stated:

> 22. …
>
> … Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

[32] Counsel submitted the effect of *Torres* and its subsequent approval by the Federal Court of Appeal had the effect of diluting the standard of proof required to justify the imposition of a penalty levied pursuant to subsection 163(2) of the *Act*. Although *Sansregret* and *Hinchey* were decisions in criminal law and taking into account the finding of the Supreme Court of Canada in *Guindon*, that clear test concerning wilful blindness has not been otherwise repudiated or modified and is still the law. In the within appeal, counsel's assessment of the evidence - and as conceded by counsel for the respondent – is that it did not establish that Wynter set out to cheat the administration of justice or knowingly participated in a scheme to evade tax. The unfortunate consequence, in his view, is that adherence to the *Torres* decisions at trial and on appeal without reference to the standard set by the Supreme Court of Canada is to water down the test so that it tends to equate carelessness, foolishness and extreme naivety with wilful blindness.

[33] It is likely this argument will be made in the near future in the Federal Court of Appeal and the Supreme Court of Canada. However, I am bound by the decision of the Federal Court of Appeal in *Torres* and the substantial body of jurisprudence issued by the Tax Court both before and after that decision.

[34] In my decision in *Brathwaite v Canada*, 2016 TCC 29, [2016] TCJ No. 22 (QL), at paragraph 56, I commented as set out below:

> [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.

[35] I adopt those references and comments for the purposes of the within appeal. I would add, however, that at this point I have heard more than 20 of these cases involving not only Fiscal Arbitrators but also DSC and other imitators.

[36] I have reviewed the evidence and undertaken the analysis required by the decisions of C. Miller J. and the Federal Court of Appeal in *Torres [Strachan]*. The appellant is a fine person, hard-working, generous, intelligent, devoted to helping people but – unfortunately - is naive and overly-trusting. Prior to signing her 2009 tax return, she knew that she knew better than to proceed with DSC and that something serious was wrong with the way it did business, including the preparation of her tax returns. The near-total absence of review and meaningful scrutiny of that return was such that standing alone it was capable of constituting wilful blindness. A review of her conduct during her earlier relationship with DSC and her persistent belief in that entity, even in the face of the reassessment of her 2006 charitable donation claim, is further evidence of her illogical behaviour and the suspension of rational thinking which she – at one point – conceded in the course of her testimony. Unlike other cases heard by me and other judges of the Tax Court, the tax preparer – after the return had been signed - did not mail it to CRA or insert documents containing false statements of which the taxpayer had no knowledge. Wynter took the 2009 return with her and could have consulted her former tax preparer or another person who had some rudimentary knowledge of tax preparation or could have taken a few moments to examine the contents of her return at home. A few minutes spent looking at the numbers on page 2 would have permitted her to notice that a huge loss had been claimed which was attributable to a business she never operated. That could have prompted further examination of the remainder of her return, including documents such as the SBA and the carryback request. Unfortunately, Wynter chose not to undertake these reasonable steps to verify the accuracy of the information she was submitting to CRA and was wilfully blind and – therefore – in the context of all the evidence adduced was grossly negligent as defined by the relevant provision.

[37] The Crown has discharged its onus. I find the imposition of the penalty pursuant to subsection 163(3) is justified.

[38] In the course of hearing these cases, I am astounded at the ongoing inability of CRA to detect these obvious frauds. The appellant's income in 2008 was $147,764 including T4 earnings of $107,920. She claimed a donation in the sum of $80,891 to Furry World which was allegedly the value of 39,220 shares of RCT Global Networks Inc., appraised by the Frankfurt Stock Exchange, which does exist but apparently not at the address shown on the receipt. Does not the

juxtaposition of that declared income and the gift of shares allegedly worth over $90,000 seem somewhat curious and worthy of additional examination? The Minister did not reassess the appellant with respect to her 2008 taxation year until February 24, 2012 when that donation was disallowed.

[39] With respect to the appellant's 2009 tax return, she had been an employee for 40 years and filed returns on that basis with some additional small amounts of income from rental or other sources. In 2009, her return contained information which indicated she had been transformed into an entrepreneur of some sort capable of generating business income in the sum of $204,999.65 and that when expenses of $652,147.96 were taken into account, it resulted in a loss of $447,148.31 of which the sum of $114,201.31 was claimed against her income in 2009. The subsequent request for loss carryback and the numbers and other information contained in the SBA would reveal something was not right. The appellant's 2009 return was filed before the end of April, 2010, yet it took CRA until February 7, 2011 before it sent her the standard boilerplate letter enclosing a business questionnaire and requesting that she provide other documentation, including receipts, to substantiate her claimed loss. A letter – dated March 29, 2011 – headed near the top "Without Prejudice" was sent on her behalf but without her knowledge and it enclosed a T4A summary showing other income of $652,147. CRA sent the appellant another letter - dated May 6, 2011 – in which it warned that it was about to deny the request to carryback non-capital loss to 2007 and 2008 and that a penalty pursuant to subsection 163(2) was being considered if a response was not received within 30 days. On June 1, 2011, a nonsensical purported response was sent by someone – again, not authorized by the appellant – and on July 7, 2011, CRA after having reviewed her "reply" to their May 6 letter, advised her that "we have maintained our position on the disallowance of … the net business loss of $447,148.31 on the 2009 income tax return." A reassessment for that year was issued the next day. An Objection – dated October 10, 2011 – was signed by Wynter and submitted to the Chief of Appeals in Sudbury. It was composed of pure nonsense, gibberish and drivel. This type of trash document – no doubt seen several hundred times by CRA auditors - was created by some fraudster operating a de-tax scheme and has been used by other con artists perpetrating the same or similar scam. These individuals who engage in such deceit are sly, deceitful men, mean fellows, rascals who, in Newfoundland and Labrador, are assigned the label sleveen.

[40] The problem arising from these long delays in contacting taxpayers and the lack of a meaningful early-warning system at CRA is that it provides fodder to the scam artists who have assured their clients that they are on top of the problem and

that their experts will battle CRA so effectively there will be nothing to worry about. The absence of prompt follow-up and the issuance of form-letter reminders months later is in effect a golden opportunity for the fraudsters to say, "I told you we would fix your problem with CRA." Then, by the time CRA issues an assessment and the collection department takes over, the con artists are long gone or – in some cases – have been arrested or convicted and – rarely, I suspect – sent to prison for any significant period.

[41] I am convinced that there are hundreds – if not thousands – of computer-savvy 9-to-19 year-olds in Canada who could develop software capable of recognizing the "red flags" and "flashing lights" that are referred to extensively in the relevant jurisprudence, albeit in another context. One phone call from a human being at CRA to Wynter – after having been alerted by an efficient computer program which spotted an egregious anomaly in her return - perhaps even triggering a flashing light on a desk or wall somewhere in the auditors' compound – could have proceeded like this: "Mrs. Wynter, I am Mr. or Ms. Doe from CRA. We are wondering why you claimed a business loss of $447,148.31 in your 2009 return. Are you no longer working at Chrysler? What business were you operating and how did you lose so much money?" I am confident that the response by Wynter – after recovering her composure – could at that point have resolved the matter quickly and she would have identified who her advisors were at DSC and explained the nature of her relationship with that entity since 2006. Also, it would have prevented the payment of a large refund based on false information. Thousands and probably tens of thousands of refunds have been mailed or sent by direct deposit to taxpayers based on no examination of their return. A self-assessing system does not require the automatic initial acceptance by CRA of every nonsensical and false declaration of income and expense. Auditing a random percentage of returns months or years later expends a substantial amount of time, energy and money – including costs of counsel provided to CRA by the federal government – to recoup those payments and to issue reassessments, most of which impose penalties, and then to conduct the inevitable litigation which follows those reassessments when appeals are filed. It is one thing to lock the barn door after the horse has been stolen. To leave the door open not only for other horses to be taken by the same thieves or others of their ilk is another, but to facilitate delivery of quadrupeds of the genus Equus to the doors of putative claimants based solely on the presence of a counterfeit brand not detected due to the lack of even a superficial examination constitutes, in my opinion, irrational corporate behaviour.

[42] It has been announced that the federal government will increase CRA budgets by hundreds of millions to institute new policies and to hire perhaps

hundreds of additional staff to administer programs designed to scrutinize overseas transactions carried out by the rich and super-rich who have the means to retain expertise to explore the benefits of tax havens located in countries, principalities, islands, archipelagos, spits or other domains that – even on a decent-sized globe - often are no larger than flyspecks. However, the ubiquitous domestic fraudsters require more attention from CRA because they are like the plastic mole in the *Whac-a-Mole* game where there is a large cabinet with five holes in its top and the player wields a large mallet. Once the game begins, the moles begin to pop out of their holes at random and the object is to force them back into their hiding place by hitting them directly on the head with the mallet. More hits on the head earn more points and the quicker all moles are dispatched, the higher the final score and the game is finished (Source is Wikipedia).

[43] The proliferation in scams and frauds of various types has increased substantially in recent years and to generate a profit for the con artists, people with higher incomes who have had substantial income tax withheld at source are the targeted group. It is difficult to believe that otherwise intelligent people in responsible positions in work - and in life generally - can be taken in by these crooks but there is a mob mentality that pervades the recruitment meetings and the resultant group non-think develops into a consensus and these outrageous concepts are accepted without question. Once along the path, there seems to be little or no thought of withdrawing from a program pitched to them earlier by the crooks or of asking for help from an independent source or of searching on their own for an escape route. Instead, they follow their dishonest gurus to the bitter end until they disappear, at which point the hurting truly begins. The financial hardship and stress on victims of these fraudulent schemes is cruel and can cause extreme damage and even destroy careers, lives, marriages and families. Human nature being what it is, there will always be con artists and no shortage of potential victims ready and eager to obtain the golden ticket to wealth but there has to be better detection techniques put into place by CRA as soon as possible to reduce the incidence of these tragedies. Perhaps, it is already underway. I hope so.

[44] With respect to the appeal of Wynter for her 2009 taxation year, I have no alternative, based on the evidence and the relevant jurisprudence, but to dismiss her appeal and it is hereby dismissed.

[45] The respondent is entitled to costs. However, after taking into account all the circumstances relevant to a consideration of the provisions in section 147 of the *Tax Court of Canada Rules (General Procedure)* and particularly paragraph

147(5)(*b*), I hereby fix those costs in the sum of $1,200, inclusive of disbursements.

Signed at Sidney, British Columbia, this 22nd day of April 2016.

"D.W. Rowe"

Rowe D.J.

CITATION:	2016 TCC 103
COURT FILE NO.:	2012-2348(IT)G
STYLE OF CAUSE:	ROSETTA WYNTER and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 2, 2016
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	April 22, 2016

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