Docket: 2013-3908(IT)G

BETWEEN:

MYRTLE ROBICHAUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 24, 2015, at Toronto, Ontario

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

Appearances:

Counsel for the Appellant:	Jeffrey Radnoff
Counsel for the Respondent:	Tony Cheung

JUDGMENT

The appeal from the reassessment made pursuant to the *Income Tax Act* for the 2008 taxation year is dismissed. Costs are awarded to the Respondent.

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

"D.W. Rowe"

Rowe D.J.

Citation: 2016 TCC 19
Date: 20160122
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Appellant,

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REASONS FOR JUDGMENT

Rowe D.J.

[1] The appellant's appeal now is only from the imposition of gross negligence penalties pursuant to subsection 163(2) of the *Income Tax Act* (the "*Act*") in relation to her 2008 taxation year. In filing her return of income for that year, Myrtle Robichaud claimed a business loss in the amount of $354,351.72 (the "Claimed Business Loss") which was detailed in a document entitled Statement of Business Activities based on the following:

> - Money - $114,643.68 - collected as Agent for Principal and reported by third parties
>
> - Money - $7,451.84 - collected as Agent for Principal and not reported by third parties for a total of $122,095.52.

[2] The above amount was offset by a deduction of $361,803.56 under the heading of Amount to Principal in exchange for Labour resulting in a Gross Profit of $239,708.04, which when the sum of $114,643.68 (money collected as Agent

for Principal) was included in the calculations resulted in a net loss in the sum of $354,351.72.

[3] The appellant's income in 2008 was $114,469.99 consisting of employment income in the sum of $100,944.33 and RRSP income of $13,525.66.

[4] The appellant used $95,849.72 of the Claimed Business Loss against her income in the 2008 taxation year and requested the unused balance be carried back and applied to her 2005, 2006 and 2007 taxation years in the amounts of $80,486, $80,273 and $97,743, respectively. On December 6, 2010, the Minister of National Revenue (the "Minister") reassessed the appellant for the 2008 taxation year to disallow the Claimed Business Loss and imposed a gross negligence penalty in the sum of $46,698.91. On the same date, the Minister also reassessed the appellant for the 2005, 2006 and 2007 taxation years to disallow the loss carryback.

[5] The issue is whether is the appellant knowingly or in circumstances amounting to gross negligence, made or acquiesced in the making of false statements in her return that would justify the imposition of penalties pursuant to subsection 163(2).

[6] The appellant, Myrtle Robichaud ("Robichaud"), testified she lives in Toronto and is employed as an Administrator at Parkdale Community Health Centre ("Parkdale") which provides a variety of services to individuals and non-profit organizations. She is 57 years old and came to Canada from Trinidad and Tobago in 1988. She took various courses at Toronto School of Business but not any concerning taxation or accounting. In 1990, her ex-husband who was also from Trinidad and Tobago had introduced her to Muntaz Rasool ("Rasool") who had moved to Toronto from Guyana. Robichaud stated Rasool was married with children and she was told that he was a former employee of Canada Revenue Agency ("CRA") known then as Revenue Canada. About that time, Rasool began preparing her income tax returns and in April, 2009, she met with him and delivered the usual documents and receipts required. Rasool informed her that she had been overpaying her income tax and there was a method by which she could go back three years and claim refunds. He showed her cheques (perhaps copies) from the Government of Canada that had been issued to his clients and one of them was in the sum of about $5,000. Rasool advised her that his fee could be as much as 50% of the amount of the refund issued to her by the Government. Robichaud stated she asked Rasool about that method of filing and he assured her it was legitimate. Rasool knew Robichaud was divorced, a single mother, had filed for bankruptcy and was currently living paycheque-to-paycheque and could use the

money she would receive from refunds of income tax paid previously. Earlier, she had invested the sum of $17,000 USD in an investment fund promoted by Rasool. With respect to her 2008 tax return, in due course she received a refund cheque in the sum of $25,000 which was deposited electronically into her account. The amount seemed reasonable because Rasool had advised that she would be entitled to a refund based on approximately $8,000 a year for three years. When she began receiving letters from CRA, she attempted to contact Rasool by telephone at his home and on his cell phone because she stated she did not understand the content of those communications. She left voicemail messages on both phones but did not receive any response. In 2010, she spoke to a friend – Sonia Dolar – who went to Rasool's house, rang the doorbell and when no one responded, looked in a window and saw piles of paper on the floor. Robichaud stated she contacted CRA - by telephone - on several occasions and was informed there was a "Code 6" noted on her file and when she inquired what that meant, was told CRA would be advising her in the future.

[7] The appellant was cross-examined by counsel for the Respondent.

[8] With the consent of counsel for the appellant, counsel for the respondent filed as Exhibit R-1, the Respondent's Book of Documents, Tabs 1 to 9, inclusive.

[9] Robichaud confirmed that she had lived and worked in Canada since 1988 and had filed income tax returns since then but did not understand matters such as data entry. Counsel referred her to a certificate – Level 1 – indicating she had taken a course in Data Entry in 2003. Robichaud stated she does not perform any data entry in the course of her employment and does not use any software such as Excel or similar programs. Although her title at Parkdale is Director of Health, she is not involved with data as her job is to oversee staff who delivered services to people who are poor, homeless, newcomers, affected by mental health problems, suffering from addictions or other persons within marginalized sectors of the community. She does not deal with matters such as preparation of financial reports and stated her title of Director does not relate to the exercise of executive functions in the usual sense. At Tab 1, Robichaud identified her signature on the last page of her return for the 2008 taxation year and acknowledged the space intended to be completed by a professional tax preparer was blank. She signed her return after the word "per" which had not been written by her. In 2008, she earned $100,944.33 in employment income and a net refund in the amount of $25,478.09 was claimed therein. When asked by counsel about that amount, Robichaud stated she "did not pay attention to that." At page 4 of Tab 1, a T4 indicated the sum of $22,147.59 had been deducted in income tax together with $711.03 in Employment Insurance

Premiums and $2,049.30 in Canada Pension Plan contributions. The total amount of said deductions was $24,907.92, almost the same as the refund of $25,000 she received. Robichaud was referred to line 162 of her return where business income in the sum of $122,095.52 was reported and to line 135 where a net amount was reported in brackets - ($354,351.72) - to indicate a negative sum. Robichaud stated she had not operated a business in 2008 or at any time earlier. She stated she had not read that part of the tax return and did not notice this amount inserted at line 150 which indicated she had negative income in the sum of $239,881.73. Robichaud was referred to a document – page 28 in Tab 1 – entitled Statement of Agent Activities which had been handed to her by Rasool with instructions to write in her name and to sign the form at the bottom which she did. She stated she did not read that document, nor was she aware that it showed a negative sum of $239,708.04 as the amount of her income in 2008. Robichaud stated she did not know what Rasool had done and had accepted his advice that she had to sign – at page 25 – the form entitled Request for Loss Carryback. Even though she did not understand the purpose of that document, it seemed to fit with Rasool's advice given to her in April, 2009 that the Government owed her money because she had overpaid tax in previous years. Robichaud stated she was not concerned about the specific amount of any refund because that would be determined by CRA. Rasool was not paid any amount of the refund Robichaud received for her 2008 taxation year because he owed her money from her earlier investment in the fund he had been promoting. Robichaud stated she was aware that refunds in earlier years were in amounts much less than $8,000 per year and had not been expecting a refund in the amount of $25,000 but due to her precarious financial situation needed those funds and spent them shortly after receipt. Robichaud acknowledged that she had received a letter – Tab 2 – from CRA dated March 5, 2010 – requesting information about her business activity sufficient to enable CRA to review the accuracy of her 2008 return as it purported to report Gross Business Income and Net Business Loss. She attempted – without success – to contact Rasool and recalled that at some point she telephoned CRA several times but did not respond in writing to the letters from the auditor. However, probably late in 2010, she spoke to L. DuPont, Senior Office Auditor at the Sudbury Tax Services Office and advised that she did not have a business. She had received a letter – Tab 3 - from CRA dated June 7, 2010 stating that no response had been received to its earlier letter and that without any communication from her to provide the information requested within 30 days, CRA would disallow the business loss claimed in her 2008 tax return and disallow the non-capital loss carryback that was to be applied to her 2005, 2006 and 2007 returns. Another letter – Tab 5 - dated November 24, 2010 was sent by CRA to Robichaud advising that she had not replied to two previous letters. Counsel referred her to a letter from CRA – Tab 6 – dated July 31,

2012, advising that her Notice of Objection for the years at issue had been reviewed and that a gross negligence penalty pursuant to subsection 163(2) of the *Act* had been imposed. Robichaud stated that even at this point she did not understand the significance of the position taken by CRA as she had not objected to the disallowance of the claimed business loss in 2008. A Notice of Confirmation was issued with respect to said penalty. Robichaud acknowledged that she had not contacted CRA or anyone else to confirm the accuracy of the advice she had received from Rasool in 2009 about her ability to claim refunds - attributable to alleged overpayment of tax in previous years - either at the outset or prior to signing the return for the 2008 tax year.

[10] Sonia Dolar ("Dolar") testified she is a qualified Financial Advisor working in Toronto and has known the appellant since 2003, as her children and Robichaud's had attended the same school. Dolar met with the appellant in March, 2010 to discuss her RRSP contribution for the year. At that time, Robichaud mentioned she did not understand the content of letters she had been receiving from CRA and disclosed the subject matter of the information requested. Dolar stated she knew Robichaud did not operate a business and asked her to bring in the 2008 tax return but was told she had moved and had to locate that document in her new residence. Dolar stated she had known of Rasool for many years and attempted to contact him by attending at his residence but he was not there or did not respond when she rang the doorbell. Dolar stated she informed Robichaud that it was important to contact CRA "right away" to deal with this serious matter.

[11] In cross-examination, Dolar stated she went to Robichaud's residence to discuss the RRSP contribution and the subject of problems with her tax returns and correspondence from CRA arose in the course of their discussion and that prompted her to advise Robichaud to contact the agency immediately, although she did not discuss any particular method. Dolar stated she did not know the contents of the appellant's 2008 tax return.

[12] Counsel for the appellant closed her case. Counsel for the respondent did not call evidence.

[13] Counsel for the appellant submitted that Rasool had been her tax preparer for many years without any complications having arisen in terms of review by CRA. As a result, she had an honestly-held belief that the advice provided by him was legitimate and had sought – and obtained – confirmation from him. Counsel pointed out that despite recent jurisprudence, there was still the need for the Crown to discharge the onus that would justify the imposition of the gross negligence

penalty and that it required more than a naive or foolish belief on the part of a taxpayer who was the victim of a scam perpetrated by someone whom she had known for years and trusted. She was an individual who did not have a working knowledge of taxation or accounting and was not required to deal with numbers or data entry or accounting software in the course of her employment. As such, she relied on the fact Rasool had provided her with reliable advice and trouble-free professional services for many years.

[14] Counsel for the respondent submitted the evidence was clear and conformed with recent jurisprudence in terms of examining conduct on the part of the appellant that was consistent with wilful blindness which can be applied to justify the imposition of gross negligence penalties pursuant to subsection 163(2). Counsel referred to the anomalies that should have put the appellant on her guard. In the 18 years prior to 2008 that Rasool had prepared her tax return, he had not sought any percentage of a refund as his fee for professional services. The amount of the refund was substantial in relation to her income that year and was inconsistent with any refunds received in the past which were attributable to the purchase of an RRSP or other deduction for matters such as professional fees. Counsel submitted the evidence of the appellant was not credible when she denied having looked at the amount of the refund stated in her return and that if – as she testified – she had focussed only on the signature line, then that omission constituted wilful blindness. With respect to the claim for the loss carryback, that is not a complicated concept particularly when the appellant knew she had never operated a business and could not have incurred a loss in relation thereto. The fact that other clients of Rasool had received a refund would not indicate to a prudent person that he or she was automatically entitled to receive the same treatment from CRA.

[15] 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 …

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

[17] In the case of *Farm Business Consultants Inc. v Canada*, [1994] 2 CTC 2450, Bowman J. (as he then was) heard an appeal from imposition of penalties pursuant to subsection 163(2) of the *Act*. At paragraph 26, he stated:

> [26] The type of conduct envisaged by subsection 163(2) may overlap portions of subparagraph 152(4)(*a*)(i) and I think that it does so in this case. I have made a great effort to put the appellant's conduct in as benign a light as possible, and to attribute it to a naïve and foolish belief that schemes of the type involved here actually work rather than to a wilful misrepresentation of the true state of affairs. I have been unable to do so. The appellant either knew what it was doing or was reckless as to the legal efficacy of the arrangement. I am cognizant of the fact that subparagraph 152(4)(*a*)(i) has as its purpose the opening up of returns for statute-barred years where items of income, for a wide variety of reasons, are omitted or misstated, whereas subsection 163(2) is a penal provision and that in applying it if there is doubt as to the type of conduct to which the misrepresentation is attributable the benefit of that doubt should be given to the taxpayer. In Udell v. M.N.R., 70 D.T.C. 6019 Cattanach J. said at page 6025:
>
> > There is no doubt that section 56(2) is a penal section. In construing a penal section there is the unimpeachable authority of Lord Esher in Tuck & Sons v. Priester, (1887) 19 Q.B.D. 629, to the effect that if the words of a penal section are capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail. He said at page 638:
> >
> > > We must be very careful in construing that section because if imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction.
>
> and at page 6026:
>
> > I take it to be a clear rule of construction that in the imposition of a tax or a duty, and still more of a penalty if there be any fair and reasonable doubt the statute is to be construed so as to give the party sought to be charged the benefit of the doubt.

[18] At paragraphs 28 and 29, Bowman J. continued as follows:

> [28] A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). Conduct that warrants reopening a statute-barred year does not automatically justify a penalty and the routine imposition of penalties by the Minister is to be discouraged. Conduct of the type contemplated in paragraph 152(4)(*a*)(i) may in some circumstances also be used as the basis of a penalty under subsection 163(2), which involves the penalizing of

> conduct that requires a higher degree of reprehensibility. In such a case a court must, even in applying a civil standard of proof, scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established. Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted4. I think that in this case the required degree of probability has been established by the respondent, and that no hypothesis that is inconsistent with that advanced by the respondent is sustainable on the basis of the evidence adduced.
>
> [29] Had I been able to construe the statute, or to view the evidence, in a manner that permitted me to give the appellant the benefit of the doubt I would have done so. That course of action is not open to me. The appellant's depiction of the legal relationship between it and Agricultural as that of a consulting arrangement went beyond simple negligence.

[19] In the case of *Brisson v Canada*, 2013 TCC 235, 2013 DTC 1197, V.A. Miller J. heard an appeal involving the entity known as Fiscal Arbitrators whose employees or associates had persuaded the taxpayer and his spouse to utilize a particular stratagem designed to generate large refunds of tax for a current filing year and earlier years by claiming large business losses even though they had only employment income. At paragraphs 24 to 29, inclusive, V.A. Miller J. stated:

> [24] Pursuant to subsection 163(3) of the *ITA*, "the burden of establishing the facts justifying the assessment of the penalty is on the Minister". The Crown must therefore prove (1) that the Appellants made a false statement or omission in their 2008 income tax returns, and (2) that the statement or omission was either made knowingly, or under circumstances amounting to gross negligence.
>
> [25] An abundant case law has developed with respect to the application of subsection 163(2). Although each decision is deeply rooted in the specific facts of the case, some broad principles have been enunciated by the courts.
>
> [26] The following passage from *Venne v The Queen*, 84 DTC 6247 (FCTD), at page 6256, has been quoted and referred to in numerous decisions of the Tax Court of Canada and the Federal Court of Appeal and remains the seminal definition of gross negligence.
>
> > "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[27] In *Villeneuve v Canada*, 2004 FCA 20 the Federal Court of Appeal found that gross negligence could include wilful blindness in addition to intentional action and wrongful intent. In this regard, Justice Létourneau stated the following at paragraph 6 of that decision:

> With respect, I think the judge failed to consider the concept of gross negligence that may result from the wrongdoer's willful blindness. Even a wrongful intent, which often takes the form of knowledge of one or more of the ingredients of the alleged act, may be established through proof of willful blindness. In such cases the wrongdoer, while he may not have actual knowledge of the alleged ingredient, will be deemed to have that knowledge.

[28] Since *Villeneuve*, it is well established that actual knowledge by a taxpayer of the accountant's negligence is not required to a finding of gross negligence: *Brochu v Canada* 2011 TCC 75 at paragraph 20. Indeed, gross negligence also includes situations where a taxpayer blindly trusts the person who prepared his income tax return, as was recently held by Justice Bédard in *Laplante v The Queen*, 2008 TCC 335:

> 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 [his accountant]? 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.

[29] Former Chief Justice Bowman discussed some of the factors to consider when deciding whether gross negligence penalties were properly imposed. In DeCosta v The Queen, 2005 TCC 545 he stated:

> 11. In drawing the line between "ordinary" negligence or neglect and "gross" negligence a number of factors have to be considered. One of course is the magnitude of the omission in relation to the income declared. Another is the opportunity the taxpayer had to

> detect the error. Another is the taxpayer's education and apparent intelligence. No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence.

[20] 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 paragraph 55 and continuing to paragraph 62 are as follows:

> [55] This appeal focuses on s. 163.2 of the *ITA*. Enacted in 2000, it contains two administrative penalties: the "planner penalty" in subsection (2) and the "preparer penalty" in subsection (4). The planner penalty is not at issue in this appeal. The preparer penalty reads:
>
> > (4) Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person (in this subsection, subsections (5) and (6), paragraph (12)(*c*) and subsection (15) referred to as the "other person") that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of this Act is liable to a penalty in respect of the false statement.
>
> [56] The CRA explains that the preparer penalty is intended to apply when an individual has made, participated in, assented to, or acquiesced in the making of a false statement. A specific person who could use the false statement must be identified (the provision uses the term "the other person"). According to the CRA, the penalty could apply, for example, to an individual preparing a fraudulent tax return for or providing deceptive tax advice to a specific taxpayer. (See CRA's information circular IC 01-1, "Third-Party Civil Penalties" (September 18, 2001 (online)), at paras. 6, 7 and 9.)

[57] The preparer penalty is narrow: the false statement must be made knowingly or in circumstances amounting to culpable conduct. Culpable conduct is defined in s. 163.2(1) as

> conduct, whether an act or a failure to act, that
>
> (a) is tantamount to intentional conduct;
>
> (b) shows an indifference as to whether this Act is complied with; or
>
> (c) shows a wilful, reckless or wanton disregard of the law.

[58] This is clearly a high standard. "[W]ilful, reckless or wanton disregard of the law" refers to concepts well-known to the law, commonly encountered as degrees of *mens rea* in criminal law: see, e.g., K. Roach, *Criminal Law* (5th ed. 2012), at pp. 180-84 and 191-92. The use of such terms evinces a clear intention that "culpable conduct" be a more exacting standard than simple negligence.

[59] The expressions "shows an indifference as to whether this Act is complied with" and "tantamount to intentional conduct" originated in the jurisprudence on the gross negligence penalty applicable directly to taxpayers in s. 163(2) of the *ITA*, which states:

> (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 of ... . [Penalty calculations omitted.]

[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.

[21] Prior to this decision, persons dealing with this issue can be forgiven for equating this provision with one that is penal – or nearly so - in nature. The severity of the consequences flowing from the penalty may well have had the effect of elevating – even at a subconscious level - the degree of proof required to justify its imposition and to nudge – gently – that bundle of burden somewhere beyond the boundary of balance of probability. That concept tended to inspire hope in many taxpayers who were content to concede they had been careless, naive, foolish or victims of an incompetent or fraudulent individual whom they had trusted implicitly. These individuals believed if they had not intended to make a false statement in their tax returns and other related documents and that if false information was provided, it was not attributable to a guilty mind or deceitful motive on their part, then all inadvertent untruths should be commonly understood as not constituting conduct worthy of a quasi-penal sanction and any doubt in that respect should be resolved in their favour.

[22] This judgment makes it clear that the penalty under that particular subsection at issue and also as imposed under subsection 163(2) is administrative and not penal in nature.

[23] 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.

[24] 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?

[25] 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.

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

[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.

[27] 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 of the taxpayer

[28] Robichaud came to Canada in 1988 and attended the Toronto School of Business where she studied various subjects not including taxation or accounting. She is employed as a Director of Health Services of Parkdale which delivers a variety of services to individuals in that community. It is publicly funded and also receives charitable donations. Robichaud earned over $100,000 in 2008 from her employment and even though she testified she was not a CEO in the usual sense, she would have been required to have a working knowledge of funding requirements, cash flow, expenses and the need to raise private funds to ensure delivery of services to individuals and groups requiring assistance to confront various serious health and other issues. I accept that she did not use accounting software in the course of her employment to input specific data or numbers but her responsibility would have included the need to direct and supervise staff and to maintain oversight over operations designed to fulfil the mandate of Parkdale. She had filed income tax returns on an annual basis since 1988 and was aware of deductions available for contributions to RRSPs and other expenditures recognized as legitimate by CRA.

Suspicion or need to make an inquiry

[29] Rasool began preparing tax returns for the appellant about 1990. There is no reason to believe there was anything out of the ordinary until April, 2009 when she met with him for the purpose of having him prepare her 2008 tax return and she delivered the usual documents and receipts to him. Rasool told her that CRA owed her money and since she understood that he had been a former employee of Revenue Canada, accepted his word that she had overpaid her income tax for several years and that she could request a review of her returns for the previous three years which would produce significant refunds, as well as reduce significantly her tax payable for 2008 and the amount deducted by her employer would be part of the total refund. To demonstrate the validity of his proposal, Rasool showed her some Government of Canada cheques in various amounts that had been issued to his clients as refunds. One cheque was in the approximate sum of $5,000. Rasool informed her that she would be paying him up to 50% of whatever amount was received by way of refunds for her 2008 taxation year and earlier years for prior overpayments. Robichaud's due diligence consisted of asking Rasool whether the procedure proposed was legitimate and accepting

without question his assurance that it was, even though this was a complete departure from the manner of filing for the past 18 years. Robichaud testified that Rasool knew she was divorced and a single mother who had filed for bankruptcy at some point earlier. He was aware that she was having trouble getting by each month and told her she could use money from tax refunds to help resolve her financial problems. At some point before 2009, Robichaud had invested the sum of $17,000 USD in what she described as "some investment sold by Rasool." It was difficult for her to assemble that sum from various sources including a line of credit. When the refund in the sum of $25,000 was deposited electronically to her account, she did not consider that sum to be unusual because Rasool had estimated she should be entitled to a refund of about $8,000 for each of the three years prior to 2008. In any event, she was not concerned with the amount and proceeded to spend the money. She did not pay Rasool any portion of that refund as a fee for his services because she had not received any dividend or other payment from the $17,000 USD she had invested with him earlier and did not know the status or even the identity of that alleged fund. Why would Robichaud have reason to believe that after 18 years, Rasool would have discovered some astounding new method of filing tax returns capable of generating not only a refund of tax already deducted for the current year but also of retrieving money overpaid for a previous three year period? His supposed expertise – not verified by her – was allegedly acquired during employment with what was then known as Revenue Canada and even if true would have been long before CRA was established as an agency of the Federal Government. Rasool had not disclosed the nature of the proposed scheme and there was no evidence that Robichaud was aware of the existence and participation of Fiscal Arbitrators or one of its copycats and had dealt only with Rasool.

[30] Prior to signing her return for 2008 and the form entitled Request for Loss Carryback, the appellant was aware of the magnitude of the advantage to be gained by accepting – without question – the advice of Rasool. It was apparent that for the 2008 taxation year she was seeking a complete refund of taxes deducted at source and anticipated a refund of as much as $8,000 per year for those previous years identified by Rasool. This amount was out of proportion in relation to refunds received over the course of nearly 20 years of filing returns because any refunds produced were related to an RRSP contribution or other deduction and were substantially less than that sum.

The fee structure and anonymity of the tax preparer

[31] As mentioned earlier, April, 2009 was the only time since 1990 Rasool had mentioned that his fee would be based on a percentage ranging up to 50% of whatever refund she received. This should have indicated to Robichaud there was something at play that was not correct and while it is sometimes a factor to consider when the tax preparer was previously unknown to the taxpayer, the relationship with a preparer can be a double-edged sword. In my view, it is equally as significant or perhaps more so when there is a radical departure from an established methodology that had not caused any problems with tax officials in the past and which was now - without adequate explanation or any attempt at independent verification - capable of producing significant amounts of money from refunds. There is no evidence on this point but it is difficult to believe that in the 18 years Rasool had been filing the appellant's tax returns that he had not at some point identified himself as a tax preparer which was not done in the 2008 return.

Blatantness of the false statement – is it readily detectable

[32] The appellant claimed huge business losses when she knew she was not engaged in any business at any time since her arrival in Canada in 1988. The income tax return she signed for the 2008 year showed business income and expenses leading to a negative income of $239,881.73 calculated on gross business income of $122,095.52, resulting in net business income of $354,351.72. On the last page of the return below the certification which requires that "… the information given on this return and in any documents attached is correct, complete, and fully discloses all my income", the appellant signed her name – after the word "per" which was not written by her – immediately above the printed warning that "It is a serious offence to make a false return." Attached to her return was the Request for Loss Carryback which she signed on the advice of Rasool. Again, her signature followed the word "per" which had been written by someone else. The balance of capital loss claimed was $258,502. This claim purporting to be true and accurate was made by Robichaud who was an employee earning over $100,000 in 2008 and who had never operated any business. Also included in the return was a document entitled Statement of Agent Activities which she signed as "principal for the agent, Myrtle Robichaud" and declared that all information was complete and accurate as of 2008-12-31. A cursory glance at this document beginning at the top would have revealed that it was a statement regarding the activities of an agent. But for whom was she an agent? At the bottom of that page where she signed her name, she would have read that she was doing so as "principal for the agent". How did that make any sense when she was an employee of Parkdale?

[33] In the within appeal, unlike the situation in many other similar cases, Rasool had disappeared and was not available to direct Robichaud to make the usual ludicrous responses to the repeated demands in letters sent by CRA requesting details concerning the alleged business losses and the subsequent reminders of her lack of response. Instead, she did nothing even in the face of additional letters advising that a gross negligence penalty would be imposed in respect of her 2008 taxation year in addition to disallowance of the claimed business loss in that year and previous years.

Lack of inquiries of other professionals or the CRA

[34] Robichaud stated she had tried calling the auditor at CRA several times but had not responded in writing at any point. It was not until March, 2010 when she met with Dolar - her financial consultant - that the subject of her troubles with CRA arose and even then it was during the course of the usual annual discussion about an RRSP contribution. When the name Rasool was mentioned, Dolar indicated she had heard of him and was "disgusted" that he had claimed business losses on behalf of Robichaud. She tried to track him down without success and urged Robichaud to contact CRA officials immediately and to cooperate with their inquiries. Until that point, Robichaud maintained her silence knowing she had spent the $25,000 refund and that it had been based on claiming business losses which were denied. This persistence is capable of bolstering an inference that her intent at the outset was to do whatever Rasool told her was necessary to produce a substantial refund. Thereafter, she did not seek advice and ignored letters sent by CRA because she knew she would have to return the amount of the refund – already spent – to the Government. Fortunately, she had not paid Rasool any portion thereof for his services because by that point she realized the money she had invested with him earlier in some sort of fund was probably gone. Robichaud could have consulted with Dolar in April, 2009 when the refund scheme was proposed by Rasool but failed to do so. Nor, did she make inquiries of qualified individuals at her workplace or of any tax or financial professionals in the community or at her financial institution.

[35] There is no indication that Robichaud was aware a Notice of Objection had been filed on her behalf, possibly by Rasool or someone working with him. A Notice of Confirmation was issued by the Minister on January 18, 2013 for the taxation years 2005 to 2008, inclusive. In many of these cases, the Notice of Objection drafted by the tax preparer or his or her cohorts involved in the scam is nonsensical, incomprehensible and plain silly but people by this time are so far down the rabbit hole they persist to the bitter end.

[36] The majority of the cases relied on by the appellant pre-date *Torres* which was upheld by the Federal Court of Appeal in *Torres v Canada [appeal by Strachan]*, 2015 FCA 60. The judgment of the Court was delivered orally by Dawson J.A. who stated at paragraph 4:

> [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).

[37] I had the benefit of reading recent decisions by the Honourable Rommel Masse, Deputy Judge, in the cases of *Chartrand v Canada*, 2015 TCC 298, [2015] TCJ No. 231 (QL) and *Spurvey v Canada*, 2015 TCC 300, [2015] TCJ No. 232 (QL), wherein he conducted a thorough review of the relevant jurisprudence and the various factors to be considered when deciding whether the penalty imposed pursuant to the relevant subsection is justified. In *Spurvey*, at paragraphs 53 to 55, he referred to the following decisions:

> [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.

[38] At paragraph 56, he stated:

> [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.

[39] The facts in the within appeal are not like those where material has been inserted in a return without the taxpayer's knowledge or consent. There is no suggestion that the lack of education or intelligence or language skills played any role in the willingness of Robichaud to accept the radical new approach to tax filing promoted by Rasool. This is not the case where there was an omission by a tax preparer that was not noticed by the taxpayer prior to signing the return. It is apparent that Robichaud made a statement that was false, namely that she was engaged in business in 2008 and in those earlier years that were subject of her request for a carryback. Documents in support of those claimed business losses were false as she had not carried on any activity as an agent nor had she engaged one as a principal. Her income was from employment. Did she know that the statement of income was false or was she wilfully blind in the making of, assenting to or acquiescing in the making of those false statements? The evidence leads me to conclude that she knew the statements were false and did not take any steps to refrain from asserting that she had been engaged in business and as a consequence was grossly negligent as defined by subsection 163(2) and the jurisprudence pertaining thereto.

[40] Robichaud needed money and was motivated by promises of a large tax refund that was rarely – if ever – received in the past when filing returns either

personally or through her tax preparer, yet she accepted without question the advice provided by Rasool to use a new and unusual method of filing without understanding or attempting to understand the basis thereof and – most importantly – did not care because of an all-absorbing desire to obtain that refund. This intentional and egregious suspension of rational thinking constitutes wilful blindness as to the falsity of the statements in her return.

[41] The respondent has discharged the requisite onus and the penalty imposed by the Minister is justified in respect of the claimed business loss for the 2008 taxation year.

[42] The appeal is dismissed and the respondent is entitled to costs.

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

"D.W. Rowe"

Rowe D.J.

CITATION:	2016 TCC 19
COURT FILE NO.:	2013-3908(IT)G
STYLE OF CAUSE:	MYRTLE ROBICHAUD and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 24, 2015
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	January 22, 2016

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