Docket: 2013-1288(IT)G

BETWEEN:

PETER MAYNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 1 and June 24, 2016 at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the Appellant:	Archie B. Palinka
Counsel for the Respondent:	H. Annette Evans

JUDGMENT

In accordance with the attached reasons for judgment, the appeal from the assessment made under the *Income Tax Act* for the 2009 taxation year is dismissed.

The Respondent is entitled to her costs if she wants them.

Signed at Kingston, Ontario, this 6th day of October 2016.

"R.G. Masse"

Masse D.J.

Citation: 2016 TCC 212
Date: 20161006
Docket: 2013-1288(IT)G

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PETER MAYNE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Masse D.J.

[1] The Appellant is appealing the penalty for gross negligence imposed on him pursuant to subsection 163(2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), (the "Act"), in relation to his 2009 taxation year.

Factual Context

[2] The Appellant is a 59 year old auto worker employed by General Motors ("GM"). He attended school up until grade 11. He never did finish high school but his education did not end at grade 11. He went back to school to upgrade his math and English. He also studied electronics at George Brown College and he took a certificate course in microcomputer technology.

[3] The Appellant has always worked hard starting at age 16 when he began to work part-time. He has spent his working life as a factory worker in a chemical factory, in a steel mill and since 1989 as a full-time auto-worker for GM. He has never owned or operated any kind of business, although his wife did operate a clothing business from 1993 until 1998 when she had to stop working due to illness.

[4] The Appellant has never prepared his own tax returns, relying on friends or professional tax preparers to do so. A colleague of his referred him to a tax

preparer named Chester Lewis. Mr. Lewis began preparing tax returns for the Appellant and his wife for the 2005 taxation year and continued to do so up to the 2014 tax year.

[5] Around 2006, Lewis offered the Appellant and his wife an opportunity to become involved in a donation programme known as the Universal Health Trust ("UHT"). Lewis explained that this programme provided medical supplies to third world countries. The Appellant understood that by participating in UHT, he would obtain a charitable donation receipt for tax purposes that would enable him to receive a tax refund larger than he would were he to make the same donation to some other charity such as his church. The Appellant stated that he and his wife participated in the UHT donation programme from 2006 to about 2009. They obtained significant tax refunds as a result of this donation programme. To say the least, the UHT donation programme was highly questionable. The CRA reassessed the Appellant and his wife so as to disallow their charitable donations to UHT and also assessed penalties amounting to about $20,000. The Appellant passed these matters on to Lewis to be resolved. Lewis told him that there was someone he was dealing with (who turned out to be scammers known as Fiscal Arbitrators), who could help to resolve the matter.

[6] In April or May of 2010, the Appellant provided Mr. Lewis with all of his documentation for the preparation of his 2009 tax return. The Appellant testified that Mr. Lewis accepted the documents and prepared the tax returns. Mr. Lewis, however, is adamant that he did not prepare the Appellant's 2009 tax return, Fiscal Arbitrators did. The Appellant did not hear from Mr. Lewis and so the Appellant contacted him to find out what was happening. Mr. Lewis told him that he was having issues regarding the filing of the return. The Appellant testified that it was around August 2010 that Mr. Lewis contacted him and wanted him to sign some papers. He does not tell us what these papers are. If these papers were his 2009 return, then the Appellant is mistaken that he signed his return in August since the weight of the evidence is that his 2009 return was filed with the CRA in May of 2010.

[7] A photocopy of the Appellant's 2009 tax return appears at Exhibit R-1, Tab 1. This return is undated but I accept that it was filed in May 2010. He agrees that it looks like his signature on the last page of the return and he states that he quite possibly signed this return. The Appellant says that the first time he saw this tax return was when he recently attended his counsel's office in preparation for this hearing. This is simply not true; he clearly saw it when he signed it in May 2010. The Appellant also signed a Request for Loss Carryback to the years 2006, 2007 and

2008 (see Exhibit R-1, Tab-4) although he claims not to remember signing this document which is dated May 12th 2010. He says that he may have signed these documents in the presence of Mr. Lewis but does not remember. He maintains that he has no knowledge of the contents of these documents. He did not review these documents before signing and in fact he probably never even looked at them. He simply signed whatever document Chester Lewis presented to him. He even goes so far as to say that he might have signed these documents in blank at the request of Mr. Lewis. Signing blank documents is something that he has done before.

[8] Had the Appellant bothered to look at his return when he signed it, he would have seen some anomalies and some blatantly false information. The word "per" appears in front of his signature on these documents. He does not know who wrote "per" in front of his signature and he does not know what that means. He claims that the word "per" was not there when he signed these documents. If he contends that he really does not remember reviewing or signing these documents, it is not plausible that he would remember that the word "per" was not on the signature line. I find as a fact that the word "per" was on the signature line before he signed the documents. Box 490, which is reserved for the identification of the professional tax preparer who completed the return, was left empty. Mr. Lewis states that had he completed the return, which he did not, he would have completed this box as he always did in the past. In this return, the Appellant claimed huge net business losses in the amount of $294,195.29. This is false. He never owned or operated any business whatsoever during 2009 and could not have had any business losses whatsoever. The Appellant's only significant income during the 2009 taxation year was employment income in the amount of $65,029.73. Just above his signature, we see the usual certification stating, "***I certify that the information given in this return and in any documents attached is correct, complete, and fully discloses all my income***". The truth is that the Appellant made no effort at all to verify the accuracy and completeness of his return – he never even looked at it. Had he looked at his return, which he did not, he would surely have seen the ominous warning that appears just below his signature that "***It is a serious offence to make a false claim***". How could he not have seen this when he signed the return? By not looking at his return, he ignored both his duty to verify the completeness and accuracy of his return and he also ignored the dire warning that it is a serious offence to make a false claim. He agrees that the claimed refund of about $14,000 was large compared to what he usually received.

[9] He claims that he has never had any communications at all with Fiscal Arbitrators. However, he contradicts himself in cross-examination when he states that it is possible that he received copies of his tax returns directly from Fiscal

Arbitrators, in an envelope, and he then brought these documents to Mr. Lewis for him to review and go over.

[10] The CRA sent a letter to the Appellant dated September 16, 2009 (Exhibit R-1, Tab 5). This letter clearly indicates in the fourth line of the body of the letter that the Appellant had claimed business losses of more than $294,000. The letter asked the Appellant to provide documentation in support of the claimed business loss. The letter also requested that the Appellant complete a questionnaire that was included with the letter. The Appellant agreed that he received this letter. However, the Appellant equivocates on whether or not he reviewed this document. He indicates that he may have read the first two paragraphs. If he did, then he clearly would have become aware that he had claimed large fictitious business losses. However, he then says that he did not think that he reviewed the letter and it was quite possible that he sent it to Mr. Lewis without reading it at all.

[11] The Appellant testified that Mr. Lewis provided him with a response to the CRA's letter of inquiry (see letter dated September 29th 2010, Exhibit R-1, Tab-6). The Appellant admits that he wrote his name and return address on the envelope in which that letter was mailed. The Appellant claims that Mr. Lewis likely did up this letter, gave it to him and all the Appellant did was mail it to the CRA. He did not review it before sending it. He states that had he read it, he still would have sent it on to the CRA. This letter is confrontational and not at all responsive to the legitimate inquiries set out in the letter initially sent to him by the CRA. Mr. Lewis is adamant that he did not draft this letter.

[12] The CRA sent further letters to the Appellant seeking information to support the claimed business losses as well as indicating the possibility that a penalty could be imposed pursuant to s. 163(2) of the *Act* (see Exhibit R-1, Tab-7, letter dated January 10th 2010; and Tab-8, letter dated April 7th 2010).

[13] The CRA did not receive any response to these further letters. Consequently, the Minister of National Revenue disallowed the claimed business losses, denied the Request for Loss Carryback and imposed a penalty pursuant to subsection 163(2) of the *Act*. A Notice of Objection was filed on behalf of the Appellant but the Minister confirmed the assessment. Hence the appeal to this Court.

[14] The Appellant never did get a refund.

[15] The Appellant testified that he did not know that his return contained false information and in particular, he did not know that he had claimed a huge business

loss of over a quarter million dollars. He only realized that there was something really wrong once he got the last letter from the CRA stating that he owed about $80,000 in penalties and interest. At no time did he go back and look at his return to see what the problem was. Even when he received the Notice of Assessment he still did not bother to find out what the problem was with his 2009 return; he says that he simply assumed that Mr. Lewis was taking care of things.

[16] The Appellant claims that he did not start the present court action and he never instructed anybody to start any court action – this is a blatant falsehood since he is the Appellant and he is the one who is seeking to have the penalties and accrued interest set aside.

[17] Chester Lewis is a 55 year-old self-employed tax preparer. He has been doing this for a number of years. He has made it clear that he is neither a tax professional nor an accountant. Mr. Lewis testified that he first met the Appellant around 2006. He agrees that he prepared the Appellant's tax returns as well as those of his wife starting with the 2005 taxation year. Mr. Lewis prepared all of their returns for the 2005 through to the 2014 taxation years with the exception of 2009 which is the taxation year here under review. Mr. Lewis was involved in promoting UHT. As I understand it, UHT would provide charitable donation receipts to participants in the programme indicating that the amount eligible to be claimed as a charitable donation far exceeded the actual amount donated which would result in tax refunds that could exceed the actual amount of the donation.

[18] For the 2006 and 2007 taxation years, the Appellant sought to claim deductions for donations to UHT which donations were disallowed by the CRA. The CRA also assessed penalties pursuant to subsection 163(2) of the *Act*. Several of Mr. Lewis's other clients were also reassessed in relation to the UHT donation program. Mr. Lewis indicated that he was really not in a position to help his clients with these reassessments and he was looking for help in dealing with this problem. Somehow, a person named Carlton Branch from Fiscal Arbitrators found out about these difficulties and approached Mr. Lewis indicating that Fiscal Arbitrators could help his clients to deal with the problems they were having with the UHT donation program. Mr. Lewis therefore referred his clients, including the Appellant, to Fiscal Arbitrators.

[19] The Appellant provided Mr. Lewis with all of his documentation for the preparation of his 2009 tax return. However, Mr. Lewis testified that the Appellant and his wife did not mandate him to prepare their 2009 tax returns. Lewis made it clear to them that they would be referred to Fiscal Arbitrators who would prepare

their returns. According to Mr. Lewis, the Appellant was aware of this before providing Mr. Lewis with his documents and before his documents were forwarded to Fiscal Arbitrators. The Appellant disputes this. Mr. Lewis submitted the Appellant's documents to Fiscal Arbitrators. After that, according to Mr. Lewis, Fiscal Arbitrators dealt directly with the Appellant.

[20] Eventually, Fiscal Arbitrators sent the Appellant a package containing copies of his completed tax return. The Appellant brought this package to Mr. Lewis. Initially, Mr. Lewis indicated that he had no memory of meeting with the Appellant to review the return but clearly there was such a meeting since Mr. Lewis testified that he was present and saw the Appellant sign his return as well as a Request for Loss Carryback. Mr. Lewis testified that he remembered the Appellant had a package that had already been opened, containing the return. Mr. Lewis has no idea who wrote "per" in front of the Appellant's signature on the return. The word "per" was already there when the Appellant signed his documents. The Tax Completion Checklist (Exhibit A-8), that came with the package from Fiscal Arbitrators, indicated that "per" should appear in front of all signatures. The Appellant had possession of his return for quite some time and he had ample opportunity to review his return in its entirety if he chose to do so. The Appellant could have asked Mr. Lewis any questions that he wanted about his return but did not do so.

[21] Mr. Lewis testified that he did not review the tax return with the Appellant since he did not prepare it. He simply advised him to make sure that the information contained in the return was correct before signing. He also told him to make sure all required documentation was submitted with the return. He did not give the Appellant any advice other than to follow the instructions provided by Fiscal Arbitrators since they had prepared the return.

[22] In the fall of 2010, the CRA began questioning the information contained in the returns of some of Mr. Lewis' clients who had been referred to Fiscal Arbitrators. These clients contacted Mr. Lewis and it became obvious that something was just not right; Fiscal Arbitrators had done something terribly wrong. Lewis stated that he advised his clients not to have anything further to do with Fiscal Arbitrators and not to let Fiscal Arbitrators do anything else for them. Mr. Lewis wanted to assist his clients and he wanted to refile on behalf of several of his clients, including the Appellant, in order to undo what Fiscal Arbitrators had done. Mr. Lewis contacted the CRA requesting information on how to refile. He was told that because the returns were already in the system, he had to wait until the clients received an assessment before he could refile.

[23] The Appellant's Notice of Assessment was issued in May 2011 (Exhibit R-1, Tab-9). Mr. Lewis then started to reach out to other professionals for help and that is when one Mr. Rudolfo Terracina, supposedly a chartered accountant, became involved. Mr. Lewis paid a deposit for Mr. Terracina's services out of his own pocket. Mr. Terracina told Mr. Lewis that the donation programs were a scam and that Fiscal Arbitrators was running an even bigger scam. Mr. Terracina prepared and served a Notice of Objection dated July 11, 2011 on behalf of the Appellant (Exhibit R-1, Tab-10). This was unbeknownst to the Appellant, or so the Appellant claims. Even though Mr. Terracina was of the view that Fiscal Arbitrators was running a scam, a reading of the Notice of Objection appears to buy into and perpetuate the Fiscal Arbitrators scam.

[24] When the Appellant started to receive letters from the CRA Mr. Lewis did not give him any advice on how to respond, because the only people who could respond were Fiscal Arbitrators since they were the ones who completed the Appellant's tax return. The most Mr. Lewis would have told any of his clients, including the Appellant, was not to let Fiscal Arbitrators do anything further on their behalf. Mr. Lewis did not understand what Fiscal Arbitrators had done and he did not trust Fiscal Arbitrators. He states that he never told his clients that he would look after the problem but yet he appears to have expended some considerable effort and expense in trying to rectify the problem.

Position of the parties

[25] The Appellant concedes that he likely signed his 2009 tax return that was filed, even though he states that he does not have a specific recollection of the circumstances surrounding the signing. The Appellant further concedes that it is open to this Court to find that he was negligent in signing a document that neither he nor Mr. Lewis understood. It is argued however, that such action does not amount to gross negligence and ought not to attract the penalties provided for in subsection 163(2) of the *Act*. In addition, it is argued that the Appellant ought not to be liable for gross negligence penalties because he relied upon the information, advice and assistance of Chester Lewis, an experienced tax preparer, whom he trusted since 2005 when Lewis first began to prepare tax returns for the Appellant and his wife. It is submitted that the Appellant was completely unaware that his 2009 return contained any false information and it is suggested that Mr. Lewis intentionally kept him in the dark concerning the true state of his income tax situation. The Appellant claims to be an innocent victim. Chester Lewis and Fiscal Arbitrators, who were engaged by Chester Lewis, are the culprits here and it is unjust to punish the Appellant for their wrongdoings. The Appellant therefore

prays that his appeal be allowed and that this Court waive the penalties and interest that are the subject of the present appeal.

[26] The Respondent submits that the Appellant never owned or operated any kind of a business during the 2009 taxation year and so his claimed business losses as reported in his tax return are obviously false. These false statements are of such a magnitude that if allowed, would result in the refund of all taxes withheld or paid from 2006 through to 2009 – a significant amount. The Respondent submits that the Appellant was wilfully blind or otherwise grossly negligent regarding the falseness of the statements contained in his return. The penalties for gross negligence imposed pursuant to subsection 163(2) of the *Act* are therefore justified. The Respondent urges this Court to dismiss the appeal with costs.

Credibility and findings of fact

[27] I have a great deal of difficulty with the credibility of both Chester Lewis and the Appellant. Chester Lewis is not a disinterested party. He is being targeted by the Appellant as being the author of all of the Appellant's problems and indeed, in a sense, he is since he is the one who referred his clients to Fiscal Arbitrators. He assumes no responsibility whatsoever for the difficulties suffered by his clients. He stated that he did not review the Appellant's 2009 tax return with the Appellant since he did not prepare it. It is clear that the Appellant came to Mr. Lewis to review the return and it seems to me that Mr. Lewis should have taken a look at it to see if everything was in order; after all, he was the Appellant's trusted tax preparer. Had he done so, Mr. Lewis would have seen the claimed business losses and hopefully would have told the Appellant not to sign and not to file the return. I view his evidence with a great deal of suspicion.

[28] The Appellant's credibility and reliability are even more suspect. His evidence is vague, uncertain, inconsistent and contradictory. He is incapable of accurately relating time frames, events or circumstances. He is very equivocal in his evidence as to whether or not he reviewed any of the documents that are central to this appeal. If he reviewed them, then he merely glimpsed at them. It is highly likely, and I find as a fact, that he did not even look at his documents at all before signing. He goes so far as to suggest that he may even have signed his returns, including his 2009 return, in blank at the urging of Mr. Lewis. Throughout his testimony, he was unable to state with any certainty as to when he first became aware that he had claimed huge business losses on his return. He simply does not really know. He states that the first time he ever saw his return was in his counsel's office a short time before and in preparation for this hearing. That is simply not

believable. He states that he did not start these court proceedings and he did not instruct anybody to institute these proceedings on his behalf; yet he is the named Appellant and he clearly wants this Court to set aside the penalties and the accrued interest that were assessed against him. This assertion is also patently false. In summary, I find the Appellant's evidence to be unreliable.

[29] On weighing the entirety of the evidence, I am able to glean the following facts. I find as a fact that Fiscal Arbitrators prepared the Appellant's 2009 tax return, not Chester Lewis. However, this was done on the recommendation of Chester Lewis who referred the Appellant to Fiscal Arbitrators. I find that the Appellant signed his 2009 tax return and the Request for Loss Carryback without even looking at these very important documents. The return contained patently false information. He did not ask any questions at all about the information contained in his returns. He made no efforts at all to verify the completeness and accuracy of the information contained in his return. The Appellant was already under scrutiny by the CRA since he had been assessed penalties regarding his participation in the UHT donation programme, which programme had been recommended to him by Chester Lewis. In spite of this, he was still willing to sign any documents presented to him by Chester Lewis without looking at them and he was even willing to sign these documents in blank. I find that had the Appellant bothered to take a look at his return, he would have immediately known that his return contained some blatantly false and fraudulent information. This information was obvious on the face of these documents. Even an unsophisticated person would have immediately seen the false information and would have known that the information was false and did not reflect the reality of the Appellant's fiscal situation.

Legislative dispositions

[30] 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 …

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

Analysis

[32] In the case at hand, I will apply the same analysis that I did in many prior cases involving s. 163(2) of the *Act*. In fact, most of this analysis is a direct repetition of what I have previously stated in those past cases.

[33] It is trite law that our system of taxation is both self-reporting and self-assessing. It is based on the "honour system" and relies on the honesty and integrity of the individual taxpayer. The taxpayer has a positive duty to report his taxable income completely, correctly and accurately no matter who prepares the return. Therefore the taxpayer must be vigilant in ensuring the completeness and accuracy of the information contained in his return. Justice Martineau stated succinctly in *Northview Apartments Ltd. v. Canada (A.G.)*, 2009 FC 74 (CanLII), 2009 D.T.C. 5051, "[i]t is the essence of our tax collection system that taxpayers are sole responsible for self-assessment and self-reporting to the CRA" (para. 11).

[34] In *R. v. Jarvis*, [2002] 3 S.C.R. 757, 2002 SCC 73, the Supreme Court of Canada explained the responsibilities and duties of taxpayers as well as some of the measures contained in the *Act* that are designed to encourage compliance:

> 49 Every person resident in Canada during a given taxation year is obligated to pay tax on his or her taxable income, as computed under rules prescribed by the *Act* … The process of tax collection relies primarily upon taxpayer self-assessment and self-reporting: taxpayers are obliged to estimate their annual income tax payable (s. 151), and to disclose this estimate to the CCRA in the income return that they are required to file (s. 150(1)). …
>
> 50 While voluntary compliance and self-assessment comprise the essence of the *ITA*'s regulatory structure, the tax system is equipped with "persuasive inducements to encourage taxpayers to disclose their income" … For example, in promotion of the scheme's self-reporting aspect, s. 162 of the *ITA* creates monetary penalties for persons who fail to file their income returns. Likewise, to encourage care and accuracy in the self-assessment task, s. 163 of the *Act* sets up penalties of the same sort for persons who repeatedly fail to report required amounts, or who are complicit or grossly negligent in the making of false statements or omissions.
>
> 51 It follows from the tax scheme's basic self-assessment and self-reporting characteristics that the success of its administration depends primarily upon taxpayer forthrightness. As Cory J. stated in Knox Contracting, supra, at p. 350: "The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed." It is therefore not surprising that the Act exhibits a concern to limit the possibility that a taxpayer may attempt "to

> take advantage of the self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act" …

[35] The penalties provided for in section 163 of the *Act* have as their purpose to ensure the integrity of our self-assessing and self-reporting system and to encourage a taxpayer to exercise care and accuracy in the preparation of his return, no matter who prepares the return.

[36] I have often stated that I am of the view that the decision whether or not a taxpayer should be subjected to the penalties under subsection 163(2) of the *Act* should be determined in light of the positive responsibilities and duties of the taxpayer to accurately and completely report his income in a self-reporting and self-assessing system.

[37] There are two necessary elements that must be established in order to find liability for subsection 163(2) penalties:

a) a false statement in a return, and

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

[38] There can be no question that the Appellant's 2009 tax return contained false statements. The Appellant never owned or operated any kind of a business during that year and therefore could not have had any net business losses amounting to more than $294,000. His claim for business losses has no foundation in fact and is patently false.

[39] If the Appellant is to be believed, then it is evident that he had no knowledge that his return contained any false information since he simply never bothered to look at his return before signing it; indeed, he goes so far as to suggest that he may have signed his return in blank.

[40] I come to the conclusion that the Crown has clearly established on the balance of probabilities that the Appellant made, assented to, participated in or acquiesced in the making of the false statements in his 2009 return in circumstances amounting to gross negligence. I come to this conclusion for the reasons that follow.

[41] There is a difference between ordinary negligence and gross negligence. Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. Gross negligence involves greater neglect than simply a failure to use reasonable care. It involves a high degree of negligence tantamount to intentional acting or indifference as to whether the law is complied with or not: see *Venne v. Canada*, [1984] F.C.J. No. 314 (QL), at paragraph 37.

[42] It is also well settled law that gross negligence can include "wilful blindness". The concept of "wilful blindness", well known to the criminal law, was explained by Mr. justice Cory of the Supreme Court of Canada in *R. v. Hinchey*, [1996] 3 S.C.R. 1128. The rule is that if a party has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.

[43] It has been long recognized that the concept of "wilful blindness" is applicable to tax cases and is included in the term "gross negligence" as that term is used in subsection 163(2) of the *Act*: *Villeneuve v. Canada* , 2004 FCA 20); *Panini v The Queen*, 2006 FCA 224 at paragraph 43.

[44] In drawing the line between "ordinary" negligence or neglect and "gross" negligence a number of factors have to be considered:

a. the magnitude of the omission in relation to the income declared,

b. the opportunity the taxpayer had to detect the error,

c. the taxpayer's education and apparent intelligence, and

d. genuine effort to comply.

No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence (see: *DeCosta v. The Queen*, 2005 TCC 545, at paragraph 11; *Bhatti v. The Queen*, 2013 TCC 143, at paragraph 24; and *McLeod v. HMQ*, 2013 TCC 228, at paragraph 14).

[45] Justice Campbell Miller in the matter of *Torres et al. v. Canada*, 2013 TCC 380, affd 2015 FCA 60, conducted a thorough review of the jurisprudence regarding gross negligence penalties under subsection 163(2) of the *Act*. He

summarized the governing principles to be applied at paragraph 65 of his decision, and I paraphrase:

> a. Knowledge of a false statement can be imputed by wilful blindness.
>
> b. Wilful blindness can be applied to gross negligence penalties pursuant to subsection 163(2) of the *Act*.
>
> 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.
>
> Circumstances that indicate a need for an inquiry prior to filing, include:
>
> 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.

This is certainly not an exhaustive list.

[46] An application of the *Torres* factors leads inescapably to the conclusion that the Appellant was wilfully blind when he signed his return and therefore he exercised gross negligence. The *Torres* analysis yields the following:

> The Appellant is a man of average intelligence who chose not to complete his secondary education but preferred to enter the work force when he was in grade 11. However, he has taken courses at George Brown to upgrade his education and also to acquire knowledge in electronics and microcomputer technology. He

understands financial transactions having negotiated mortgages for his homes and motor vehicle leases. He was able to take the steps necessary to obtain the Disability Tax Credit for his wife when she became ill. He has a rudimentary knowledge of business matters since his wife had her own clothing business for a while. The Appellant has sufficient intelligence, education and life experience to be able to ensure that his tax returns are accurate and complete and it is clear that he would have been able to recognize that a false business loss had been claimed in his 2009 tax return had he simply looked at his return.

The business loss claimed is huge compared to the Appellant's actual income. The refund claimed is also very large. He would have known this had he looked at his return.

The false statement was blatant and was easily detectable. He ignored this by not even looking at the return.

The tax preparer, Fiscal Arbitrator, did not acknowledge having prepared the return.

The Tax Completion Checklist instructed the Appellant to write "per" next to his signature and the Appellant was instructed not to respond directly to the CRA if contacted. These are unusual requests.

Fiscal Arbitrators was previously unknown to the Appellant and he never did have any personal contact with any representative of Fiscal Arbitrators.

The Appellant never sought nor was he provided with any explanations at all about how his tax return was completed or about the information contained therein.

The Appellant's previous returns were being scrutinized by the CRA as a result of the UHT donation programme. This should have alerted the Appellant to exercise greater caution in the preparation of his 2009 tax return.

Chester Lewis told the Appellant that he did not understand what Fiscal Arbitrator was doing. This should have been a warning to the Appellant to exercise caution and to inform himself about what was going on. He did not seek input from anyone else.

The Appellant made no efforts whatsoever to comply with the law. His subsequent behaviour and lack of cooperation when the CRA was simply seeking clarification about his claimed business losses is indicative of the complete absence of due diligence throughout.

[47] On considering all of the foregoing, I come to the conclusion that the Appellant was wilfully blind as to the falsity of the contents of his 2009 tax return.

By not even looking at his return, he chose to ignore what should have been obvious red flags.

[48] However, quite apart from wilful blindness, I find that the Appellant was otherwise grossly negligent in the preparation and filing of his tax return. The Appellant certified by his signature that the information contained in his return was complete and accurate. Yet he made no effort at all to verify the accuracy of the contents of his tax return, as it was his duty to do. All he did was sign his return without even looking at it. Had the Appellant bothered to take even a cursory look at his return, he would have immediately discovered the blatantly false information contained therein. He did not care what was contained in his return and he was content to let Mr. Lewis or whomever prepare his return. He was even willing to sign his return in blank thus showing a highly cavalier attitude in regards to the accuracy and completeness of his returns. Such conduct in refusing to inform himself, even in general terms of what was contained in his return, is not only evidence of wilful blindness but is also conduct otherwise amounting to gross negligence in my opinion. He showed wanton and reckless disregard as to whether or not his return was completed in compliance with the law.

[49] The Appellant takes the position that he placed his complete trust and confidence in Chester Lewis. He argues that he is an innocent victim who was somehow betrayed by Lewis and Fiscal Arbitrators. 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: *Jean-Yves Coté et Lise Lavoie c. Sa Majesté La Reine*, 2015 CCI 228, a case where the taxpayers relied on their lawyer whom they had known and trusted for more than 30 years and who was a friend.

[50] However, there is a significant body of jurisprudence to the effect that taxpayers cannot 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. Quite apart from wilful blindness, taxpayers who take no steps whatsoever to verify the completeness and accuracy of the information contained in their return may thereby face penalties for gross negligence.

[51] In *Gingras v. The Queen*, [2000] T.C.J. No. 541 (QL), the appellants contended that they had always acted in good faith and that they believed that their tax preparer was conducting a responsible and reliable business, adding that they had little or no knowledge of tax matters. Justice Tardiff 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.
>
> [20] The appellants signed returns of income containing false and untruthful information and cannot claim that this was done without their knowledge. They had an obligation to ensure that all the information contained in their returns was truthful. …

[52] Further, at paragraph 30 and 31, Justice Tardiff continues:

> [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.
>
> [31] With respect to penalties, the burden of proof is on the respondent. It was clearly shown on a preponderance of the evidence adduced that the appellants submitted in their respective returns major false statements which had significant impact on their tax burden. They could not have been unaware that these statements were false. The Court can understand that the taxpayers might have been incapable, inexperienced and incompetent when it came to preparing their income tax returns. However, it is utterly reprehensible to certify by one's signature that the information provided is correct when one knows or ought to know that it contains false statements. Such conduct is a sufficient basis for a finding of gross negligence justifying the assessment of the applicable penalties.

[53] In *DeCosta v. The Queen*, 2005 DTC 1436, Bowman C.J. stated at para. 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.

[54] In *Ghislain Laplante v. The Queen*, 2008 TCC 335, the Appellant, just as in the case at bar, did not look at his tax return at all before signing. This was held to be gross negligence. Justice Bédard of this Court wrote as follows:

> [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 added]

[55] Justice Bowie of this Court stated in *Brown v. The Queen*, 2009 TCC 28 (CanLII); [2009] 4 CTC 2162:

> 20. Quite apart from all of that, in respect of the gross negligence penalties under the Income Tax Act, **the Appellant in his own evidence early on made it clear that he signed his returns for each of the four years under appeal without having paid the least attention to what income was included in them and what expenses were claimed in them.** He said that he kept the records that he kept, prepared spreadsheets from them and gave them to a tax preparer who, in each year, prepared the returns for him based on the material that he gave her. We did not hear from her on that, but taking that statement at its face value, it still leaves the Appellant with an onus to look at the completed return before signing it and filing it with the Minister. The declaration that the taxpayer makes when he signs that form is,
>
> I certify that the information given on this return and in any documents attached is correct, complete and fully discloses all my income.
>
> **To sign an income tax return and make that certification without having even glanced at the contents of the return, because that is what I understood his evidence to be is of itself, in my view, gross negligence that justifies the penalties**.
>
> [Emphasis added]

[56] Of particular relevance is the decision of Justice Bédard of this Court in Gélinas v. Canada, 2009 TCC 136, where he stated:

> [11] In my opinion, the Appellant also committed gross negligence in 2004. **I am of the opinion that the Appellant's negligence (based on the fact that he did not check his entire return before his accountant sent it to the Canada Customs and Revenue Agency) was serious enough to justify using the somewhat pejorative epithet "gross". The Appellant's attitude was so cavalier that it translates to a complete indifference in terms of respecting the Act.** If the Appellant had examined his income tax return for the 2004 taxation

> year, he would likely have discovered the false statement contained within (a statement which apparently was made by his accountant) in terms of the size of the amounts of unreported income and other factors analyzed above. The Appellant cannot absolve himself of his responsibility by pointing the finger at his accountant. **By attempting to absolve himself of all responsibility with respect to his income tax returns, the Appellant is being negligent by ignoring the responsibilities, duties and obligations imposed by the Act. Also, the Act imposes a minimum obligation to the Appellant to check his income tax return for the 2004 taxation year before his accountant sends it in; in addition, a more than cursory glance would have permitted him, in my opinion to find the false statement that his accountant had made**.
>
> [Emphasis added]

[57] In *Brochu v. HMQ*, 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 or 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 inform herself was carelessness amounting to gross negligence.

[58] In *Bhatti v. R.*, 2013 TCC 143, Mr. Justice Campbell Miller pointed out at paragraph 30:

> [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. …

This dicta of Justice Miller is most apt to the case at bar.

[59] Another recent example can be found in the matter of *Atutornu v. H.M.Q.*, 2014 TCC 174, where the taxpayers simply signed their returns where they were told to sign and 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. Justice Jorré of this Court held that the complete failure of the taxpayers to ask any questions or review their returns, when only a little effort would have raised red flags, clearly showed wilful blindness which justified the imposition of subsection 163(2) gross negligence penalties.

Conclusion

[60] It cannot be disputed that the Appellant's 2009 tax return contained false statements – the Appellant did not carry on a business and he did not incur any business losses whatsoever, let alone losses amounting to more than $294,000. On considering the entirety of the evidence and recent jurisprudence, I come to the conclusion that the Appellant made, participated in, assented to or acquiesced in the making of false statements in his return in circumstances amounting to gross negligence. If he is to be believed, then regardless of who prepared his return, whether it be Chester Lewis or Fiscal Arbitrators, he did nothing to verify the accuracy of the information contained in his tax return. He simply signed his return without reviewing it or without even looking at it. In so doing, he certified that the return was complete and accurate – it was not and in fact it was patently false. He had a duty to exercise care and accuracy in the completion of his return and he failed miserably in this duty, making no effort at all to verify the accuracy and completeness of his return. Had he made even the most minimal effort, he would have quickly and easily discovered the blatantly false information contained in the return. His actions in signing his return without even looking at it are not only negligent but are grossly negligent. In addition, if he signed his return in blank, as he suggests he may have done, then this is even greater recklessness that would also attract the characterisation of "gross negligence". As such, the Appellant is properly subject to the penalties imposed on him pursuant to subsection 163(2) of the *Act*.

[61] For all of the foregoing reasons, this appeal is dismissed. The Respondent is entitled to her costs if she wants them.

Signed at Kingston, Ontario, this 6th day of October 2016.

"R.G. Masse"

Masse D.J.

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PLACE OF HEARING:	Toronto, Ontario
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