

BETWEEN:

VICTOR GOREV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 5, 2016, at Toronto, Ontario

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant: David M. Piccolo

Counsel for the Respondent: Leonard Elias

JUDGMENT

The Appeals from the reassessments and assessments made under the *Income Tax Act* for the 2006, 2007 and 2008 taxation years are disposed of as follows:

- a) the Appeals in respect of the reassessments (the “Disputed Reassessments”) under Part I of the *Income Tax Act* (the “*ITA*”), as set out in the Notice of Reassessment issued on December 31, 2012 in respect of the 2007 taxation year and the Notices of Reassessment issued on June 12, 2014 in respect of the 2006 and 2008 taxation years, are allowed, and the Disputed Reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the penalties imposed under subsection 163(2) of the *ITA* are not justified;
- b) in all other respects the Disputed Reassessments are confirmed; and
- c) the Appeals in respect of the assessments under Part XIII of the *ITA*, as set out in the Notices of Assessment issued on December 5, 2012 in respect of

the 2007 and 2008 taxation years, are allowed, and those assessments are vacated.

Each Party shall bear his or her own costs.

Signed at Ottawa, Canada, this 19th day of May 2017.

“Don R. Sommerfeldt”

Sommerfeldt J.

Citation: 2017 TCC 85
Date: 20170519
Docket: 2014-2607(IT)G

BETWEEN:

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REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to Appeals instituted by Victor Gorev in respect of various reassessments and assessments under Parts I and XIII respectively of the *Income Tax Act*¹ (the “ITA”), which were issued by the Canada Revenue Agency (the “CRA”) on behalf of the Minister of National Revenue (the “Minister”).

II. BACKGROUND

A. Facts

[2] Before emigrating from Russia to Canada in 2001, Mr. Gorev had been a successful businessman in Novosibirsk, Russia. In anticipation of his emigration, he sold his business assets and realized an amount in excess of US\$4,500,000.² Mr. Gorev has been a resident of Canada since 2003. In Canada, Mr. Gorev established a rental business, which he carried on through a Canadian corporation, Vigor Investment Inc. (“Vigor”).

¹ *Income Tax Act*, RSC 1985, c. 1 (5th supplement), as amended.

² See Exhibit R-1, Tab 12, page 57 (Item 5) and page 71.

[3] In 2006, 2007 and 2008 Mr. Gorev received significant amounts of money, which he claimed were repayments of various loans that he had advanced to friends and business associates. As well, although the evidence was not entirely clear, it is my understanding that in those taxation years Mr. Gorev was also continuing to receive money representing instalments of the sale prices of various assets sold in Russia, or, as Mr. Gorev put it, “at that moment money was still arriving from Russia.”³ The CRA took the position that many of those cash receipts represented income earned by Mr. Gorev. Certain of the cash receipts, which are the subject of these Appeals, were allegedly repayments made to Mr. Gorev by one of his friends, Iouri Kardachov, to whom Mr. Gorev had allegedly loaned at least an aggregate amount of \$78,000⁴ (or possibly \$78,500), in various advances from time to time in 2006 and 2007.

[4] In July 2006, Mr. Gorev borrowed US\$650,000 from Kerswell Industrial Ltd. (“Kerswell”), which was a corporation apparently resident in Belize and which was a non-resident of Canada for the purposes of the *ITA*. Mr. Gorev stated that his cousin, Nikolai Gorev, paid US\$650,000 to Kerswell in 2008 to fully satisfy and discharge that loan. Mr. Gorev did not pay or credit any amount to Kerswell in respect of interest on the loan. The CRA took the position that the loan bore interest at the rate of 7% and that interest in the amounts of \$30,752 and \$60,283 were credited by Mr. Gorev to Kerswell in 2007 and 2008 respectively.

B. Audit and Assessment History

(1) Part I Tax

[5] The CRA, on behalf of the Minister, issued the initial Notices of Assessment under Part I of the *ITA* for Mr. Gorev’s 2006, 2007 and 2008 taxation years on May 10, 2007, August 25, 2008 and May 11, 2009 respectively.⁵ In May 2010, the CRA commenced an audit of those three taxation years. In the course of the audit, the CRA undertook a bank deposit analysis in respect of Mr. Gorev’s bank accounts and identified a number of bank deposits which, in the view of the CRA

³ *Transcript*, page 33, lines 17-18; and page 37, lines 19-20. See also Exhibit R-1, Tab 12, p. 59.

⁴ Unless otherwise stated, all monetary references in these Reasons are to Canadian currency.

⁵ Digital summaries of the initial Notices of Assessment are set out in Exhibit A-2.

(as set out in a proposal letter dated January 26, 2012),⁶ represented unreported income, as follows:

Table 1

<u>Year</u>	<u>Amount</u>
2006	\$355,482.00
2007	859,755.00
2008	<u>139,185.00</u>
Total	\$1,354,422.00

[6] After receiving the CRA's proposal letter, Mr. Gorev and his accountant provided documents and submissions to the CRA to show that many of the bank deposits identified by the CRA had a non-taxable source. After receiving those documents and submissions, the CRA issued a revised proposal letter on May 16, 2012,⁷ which showed the following reduced amounts as supposedly being unreported income:

Table 2

<u>Year</u>	<u>Amount</u>
2006	\$281,982.00
2007	119,800.00
2008	<u>139,185.00</u>
Total	\$540,967.00

[7] After receiving the revised proposal letter, Mr. Gorev, his accountant and his lawyer provided additional documents and submissions to the CRA, which led to further reductions in the amounts that the CRA viewed as unreported income. In a schedule attached to a letter dated November 23, 2012,⁸ the CRA advised Mr. Gorev that it considered the following amounts to be unreported income:

⁶ Exhibit R-1, Tab 10.

⁷ Exhibit R-1, Tab 13.

⁸ Exhibit R-1, Tab 17.

Table 3

<u>Year</u>	<u>Amount</u>
2006	\$35,711.30
2007	21,800.00
2008	<u>41,500.00</u>
Total	\$99,011.30

[8] On December 31, 2012, the CRA, on behalf of the Minister, issued Notices of Reassessment (the “Initial Notices of Reassessment”) for 2006, 2007 and 2008,⁹ which increased Mr. Gorev’s income for those taxation years by the amounts set out in Table 3. The Initial Notices of Reassessment also imposed penalties under subsection 163(2) of the *ITA* for making a false statement knowingly or in circumstances amounting to gross negligence and penalties under subsection 162(7) of the *ITA* for failure to file Form T1135, being a Foreign Income Verification Statement, for each of those taxation years.

[9] Mr. Gorev and his advisors objected to the Initial Notices of Reassessment and made further submissions to the CRA’s Appeals Division. In April or June 2014, the Minister confirmed the 2007 reassessment.¹⁰ The Appeals Division accepted some of the submissions made by Mr. Gorev and his advisors in respect of 2006 and 2008. Accordingly, on June 12, 2014, the CRA, on behalf of the Minister, issued new Notices of Reassessment (the “New Notices of Reassessment”) for 2006 and 2008.¹¹ Thus, the position ultimately taken by the CRA in respect of the amount of Mr. Gorev’s unreported income, as set out in the reassessments represented by the New Notices of Reassessment for 2006 and 2008

⁹ Exhibit R-1, Tabs 18, 19 and 20. The Initial Notices of Reassessment were issued after the applicable normal reassessment periods in respect of the 2006, 2007 and 2008 taxation years respectively.

¹⁰ The Notice of Confirmation was not entered into evidence. The Notice of Appeal indicates that the Notice of Confirmation was dated June 12, 2014, whereas the Reply indicates that the Notice of Confirmation was dated April 29, 2007, which was likely a clerical error and was presumably intended to read April 29, 2014.

¹¹ Copies of the New Notices of Reassessment were not entered into evidence; however, summaries of the additional amounts assessed in the New Notices of Reassessment for 2006 and 2008, as well as in the Initial Notice of Reassessment for 2007, were tabulated in a schedule that was prepared on April 22, 2014 by the Appeals Division and that is set out in Exhibit A-1, Tab 2, page 46. This schedule will be referred to as the “Appeals Division’s Schedule 1.”

and the Initial Notice of Reassessment for 2007 (collectively, the “Disputed Reassessments”), may be summarized as follows:

Table 4

<u>Year</u>	<u>Amount</u>
2006	\$11,903.80
2007	21,800.00
2008	<u>29,500.00</u>
Total	\$63,203.80

[10] As indicated in footnote 11 above, the CRA’s Appeals Division prepared a schedule showing the respective amounts that the Audit Division and the Appeals Division considered to be Mr. Gorev’s unreported income for 2006, 2007 and 2008. As well, the Appeals Division prepared three additional schedules,¹² which itemized, on a year-by-year basis, the various bank deposits that had been treated as unreported income in the Initial Notices of Reassessment, and which identified the bank deposits that the Appeals Division considered to have a taxable source or a non-taxable source, as the case may be. All of the bank deposits (the “Subject Deposits”) that are contemplated by Table 4, and that, in the view of the CRA, had a taxable source, pertained to amounts that Mr. Gorev claimed in his Notice of Appeal were loan repayments by Mr. Kardachov. However, at the hearing, Mr. Gorev suggested that some of the Subject Deposits may have been derived from loan repayments by other borrowers or from other non-taxable sources. Thus, two of the questions for resolution are whether Mr. Kardachov or other individuals borrowed and subsequently repaid the amounts represented by some or all of the Subject Deposits, and whether some of the Subject Deposits were derived from other non-taxable sources.

¹² Exhibit A-1, Tab 2, pages 47-49. These schedules will be referred to as the “Appeals Division’s Schedules 2, 3 and 4” respectively.

(2) Part XIII Tax

[11] On December 5, 2012, the CRA, on behalf of the Minister, issued Notices of Assessment under Part XIII of the *ITA* to Mr. Gorev, so as to assess tax under subsection 215(6) of the *ITA*, in the amounts of \$7,688 and \$15,071 for 2007 and 2008 respectively. As well, those Notices of Assessment imposed penalties pursuant to subsection 227(8) of the *ITA*.

[12] At the commencement of the hearing, counsel for the Crown advised the Court that the Crown had abandoned its position in respect of the Part XIII assessments.¹³ Accordingly, Mr. Gorev is entitled to succeed in the Appeals insofar as they pertain to the Part XIII assessments.

III. ISSUES

[13] The three issues for consideration in these Appeals are:

- a) whether the Subject Deposits, as summarized in Table 4, were derived from loan repayments or other non-taxable sources or were derived from unreported income;
- b) whether the Minister properly reassessed Mr. Gorev after his normal reassessment periods in respect of the 2006, 2007 and 2008 taxation years; and
- c) whether Mr. Gorev is liable to penalties pursuant to subsection 163(2) of the *ITA*.

IV. WITNESSES

[14] Mr. Gorev and Mr. Kardachov were the only witnesses at the hearing of these Appeals. The Crown did not call any witnesses.

¹³ *Transcript*, page 4, lines 16-21; and page 7, lines 14-17.

[15] Mr. Gorev and Mr. Kardachov testified in Russian, and their answers (as well as the questions put to them) were translated by an interpreter. It was my impression that, even though an interpreter was used, Mr. Gorev may not have fully understood all of the concepts that were discussed during the hearing. This possible lack of understanding is illustrated by the following exchange during Mr. Gorev's cross-examination:

Q. Do you agree that you initially filed your tax return reporting \$17,075 of total income, is that right?

A. Well, I would like to answer the following. As I had money and I had the money to leave home plus at that moment money was still arriving from Russia. I couldn't – I was able not to fill out the tax return, but since I had considered myself, at the time, a resident of Canada I considered it was necessary to pay taxes, at least, this one.

Q. Mr. Gorev, you're a permanent resident of Canada, is that right?

A. Unfortunately, because of my bad English I don't have passport.

Q. Oh, that's fine. I wasn't asking if you had a passport.

A. I have permanent resident.¹⁴

While Mr. Gorev seemed to catch the gist of the questions that were put to him about the amount of total income reported on his tax return and his permanent resident status, I am concerned that he may not have understood the full import of those questions.

[16] Another exchange that troubled me during Mr. Gorev's cross-examination is the following:

Q. Yes, and that's listed under 2008, do you see that?

A. What year are we talking about now?

Q. Now I'm talking about 2008.

A. And what is the amount?

Q. Seventy-five hundred dollars was assessed by [A]udit for two thousand and eight not two thousand and six.

¹⁴ *Ibid.*, page 33, lines 14-28.

- A. I didn't understand anything. So we are talking about 2006 or 2008?
- Q. We're actually talking about both.
- A. Okay, let's make clear with one year and then we'll transfer to the other one.
- Q. Sure. Let me put it to you directly.
- A. Maybe it will give me some kind of recollection.
- Q. Sure. Let me put it to you directly. I'm suggesting to you that [A]udit assessed you for \$7500 of unreported income in 2008 and yet the answer to that question is being provided for 2006. How do you respond to that?
- A. What do you mean assessed? Was it claimed against me?
- Q. Assessed by the minister.
- A. Does it mean that I deposited this amount by cash?¹⁵

Based on the above excerpt from Mr. Gorev's testimony, it seems that he did not understand the concept of an assessment. There may have been other technical elements of the subject matter of the hearing that he similarly did not understand.

[17] On one occasion, it was necessary for Mr. Gorev's counsel to use the interpreter to obtain instructions from Mr. Gorev.¹⁶

[18] In view of the above concerns, I have endeavoured to be liberal and generous in my reading of the transcript of the evidence given by Mr. Gorev at the hearing.

¹⁵ *Ibid.*, page 55, line 8 to page 56, line 3.

¹⁶ *Ibid.*, page 89, lines 2-5.

V. ANALYSIS

[19] It is significant that, in the early stages of the CRA's audit, the auditor identified bank deposits totalling \$1,354,422 that appeared to the CRA to represent unreported income (as set out in Table 1). As a result of various documents and submissions presented by Mr. Gorev and his advisors to the CRA over the next two-and-a-half years, the aggregate amount that the CRA considered to be unreported income was significantly reduced to \$63,203.80 (as set out in Table 4). The fact that there was such a dramatic reduction in alleged unreported income causes me to wonder whether all \$1,354,422 of the questionable bank deposits initially identified by the CRA may have been derived from loan repayments or other non-taxable sources. Perhaps Mr. Gorev was unable to satisfy the CRA of the non-taxable character of the Subject Deposits (in the amount of \$63,203.80) merely because the requisite documents had been lost or misplaced. However, such conjecture is insufficient to satisfy Mr. Gorev's evidentiary obligation. As Mr. Gorev has the burden of proving that the Subject Deposits did not represent unreported income, I must analyze the Subject Deposits and the evidence pertaining to those deposits to determine whether that burden has been satisfied.

A. Loans to Mr. Kardachov

[20] Mr. Gorev testified that in December 2005 he began to loan money to Mr. Kardachov. There were no formal terms of the loans, which were interest free and were advanced and repaid in cash denominated in Canadian currency.¹⁷ Mr. Gorev stated that he had a safe in his home, in which he regularly kept significant amounts of cash (on one occasion \$40,000). Mr. Gorev testified that many of the loans he advanced to Mr. Kardachov came from the cash in the safe.¹⁸ Mr. Gorev and Mr. Kardachov did not prepare any formal documentation, such as receipts, promissory notes or written agreements, in respect of those loans.¹⁹ However, after each loan advance or repayment, once Mr. Kardachov had left Mr. Gorev's home, Mr. Gorev made entries in his day planner in order to keep track of the money that he was lending to Mr. Kardachov.²⁰ It is regrettable that Mr. Gorev did not produce

¹⁷ *Ibid.*, page 14, line 10 to page 17, line 2; page 40, line 20 to page 41, line 4, and page 72, line 1.

¹⁸ *Ibid.*, page 19, line 14 to page 21, line 7; and page 40, lines 17-19.

¹⁹ *Ibid.*, page 15, lines 15-17, and page 72, lines 2-3.

²⁰ *Ibid.*, page 15, lines 18-22.

his day planner at the hearing of these Appeals, as it may have corroborated his oral testimony.

B. Mr. Kardachov's Document

[21] During his cross-examination, Mr. Kardachov identified a document (the "Paid-Back Document") that begins with the phrase, "I (Iouri Kardachov) paid back to Victor Gorev," and that was dated and signed by him on November 28, 2013, more than five years after the last alleged repayment. Below the phrase quoted in the previous sentence, the Paid-Back Document sets out a table that was prepared by Mr. Gorev and Mr. Kardachov and that shows the amounts of the loan repayments (in Canadian currency) that Mr. Kardachov claims to have made to Mr. Gorev in 2006, 2007 and 2008.²¹ The dates and amounts of those alleged repayments, as set out in the Paid-Back Document, are as follows:

Table 5

<u>Date</u>	<u>Amount</u>
October 12, 2006	\$14,500.00
January 4, 2007	7,000.00
August 15, 2008 [<i>sic</i>]	5,000.00
August 19, 2008 [<i>sic</i>]	6,750.00
September 6, 2007	4,000.00
October 30, 2007	6,250.00
January 31, 2008	4,500.00
April 28, 2008	6,000.00
May 12, 2008	5,000.00
June 27, 2008	4,000.00
July 9, 2008	5,000.00
August 13, 2008	5,000.00
November 25, 2008	<u>5,500.00</u>
Total	\$78,000.00 [<i>sic</i>]

The actual total of the alleged repayments, as set out in Table 5, should be \$78,500 (and not \$78,000, as set out in the Paid-Back Document).

[22] Based on the layout of the table in the Paid-Back Document, it seems that perhaps the third and fourth repayments listed above in Table 5 should have been

²¹ Exhibit R-1, Tab 21, page 137.

dated August 15, 2007 and August 19, 2007 respectively (rather than August 15, 2008 and August 19, 2008). Unfortunately, notwithstanding the efforts of counsel for the Crown to clarify this point, Mr. Kardachov did not provide any clarification.

[23] During his cross-examination, when Mr. Kardachov was asked how he knew that he had made loan repayments on the dates set out in the Paid-Back Document, he stated that he probably repaid the amounts before those dates. He then acknowledged that he probably did not make the repayments on the precise dates stated in the Paid-Back Document.²²

[24] During Mr. Kardachov's direct examination, he testified that he kept track of the money that he owed to Mr. Gorev by making notes for himself.²³ During his cross-examination, Mr. Kardachov confirmed that he "put notes at [his] papers" when he repaid an amount to Mr. Gorev.²⁴ He stated that he probably had those notes in 2013, when Mr. Gorev and he prepared the Paid-Back Document, and he may even have had the notes in 2014. When asked if he had the notes on the date of the hearing (May 5, 2016), Mr. Kardachov said that he did not, and then in the two subsequent answers he indicated initially that maybe he destroyed them, and then that he probably destroyed them.²⁵ When further asked if he had kept the notes from 2006 all the way to 2013, but then got rid of them in 2014, he backtracked and said that he probably destroyed them before 2013.²⁶ If Mr. Kardachov's notes had not been destroyed, they might have corroborated the Paid-Back Document.

²² *Transcript*, page 79, lines 6-12.

²³ *Ibid.*, page 73, lines 22-24.

²⁴ *Ibid.*, page 79, lines 15-16.

²⁵ *Ibid.*, page 79, lines 17-25.

²⁶ *Ibid.*, page 79, line 26 to page 80, line 5.

[25] During the period that Mr. Gorev was loaning money to Mr. Kardachov, the latter was in difficult financial circumstances.²⁷ In particular, Mr. Kardachov was experiencing difficulty in his business, prompting him to borrow money from Mr. Gorev for the business.²⁸ Eventually, Mr. Kardachov filed for bankruptcy on October 1, 2008.²⁹ Table 5 above indicates that in the period from April 28, 2008 to the date of Mr. Kardachov's bankruptcy (a period of approximately five months), Mr. Kardachov made loan repayments totalling \$25,000.³⁰ The final payment set out in Table 5 was in the amount of \$5,500 and was made on November 25, 2008, almost two months after Mr. Kardachov became a bankrupt. He testified that he obtained the \$5,500 from his brother in Russia, and he acknowledged that he did not advise his trustee in bankruptcy about receiving the money from Russia or paying it to Mr. Gorev.³¹

[26] In view of the involvement of Mr. Gorev, as well as Mr. Kardachov, in the preparation of the Paid-Back Document, the uncertainty concerning the dates of the alleged repayments, the five-year delay between the last repayment and the preparation of that document, the destroyed notes and Mr. Kardachov's bankruptcy, I question the reliability of that document.

C. Borrowers

[27] In his Notice of Appeal, Mr. Gorev alleged that in 2006 and 2007 he lent an aggregate amount of \$78,000 to Mr. Kardachov. In the Notice of Appeal, Mr. Gorev also alleged that all of the Subject Deposits were derived from loan repayments made by Mr. Kardachov. At one point in Mr. Gorev's direct examination, he said, "I can swear that all the money came from his [Mr. Kardachaov's] return of the debts."³² Elsewhere in his testimony, Mr. Gorev expanded his explanation, by indicating that not only Mr. Kardachov, but also Evgeny Sluzkiy and other unnamed individuals, owed him money and made loan repayments in 2006, 2007 and 2008, such that the Subject Deposits may have been

²⁷ *Ibid.*, page 14, lines 1-4; page 42, lines 3-8; page 83, lines 18-24.

²⁸ *Ibid.*, page 70, lines 26-27.

²⁹ Exhibit A-3; *Transcript*, page 83, line 25 to page 84, line 10.

³⁰ The amounts allegedly repaid during this period were \$6,000 on April 28, 2008, \$5,000 on May 12, 2008, \$4,000 on June 27, 2008, \$5,000 on July 9, 2008 and \$5,000 on August 13, 2008, for a total of \$25,000.

³¹ *Transcript*, page 86, line 18 to page 88, line 9.

³² *Ibid.*, page 29, lines 1-2.

derived from repayments by any of those individuals.³³ Although the Notice of Appeal states that Mr. Gorev loaned \$78,000 to Mr. Kardachov, Mr. Gorev testified that the amount actually loaned was significantly greater than \$78,000, but he refused to advise the Court of the actual amount loaned. Since the loaned amount set out in the Notice of Appeal, i.e., \$78,000, was greater than the amounts of the Disputed Reassessments, Mr. Gorev decided to ask only Mr. Kardachov to appear as a witness at the hearing of these Appeals, rather than calling the other individuals as witnesses as well.³⁴ Given that Mr. Gorev testified that some of the Subject Deposits may have been made by individuals other than Mr. Kardachov, and given that those other individuals were not called as witnesses, there is a lack of corroboration.

D. Family Banking Arrangements

[28] During his testimony, Mr. Gorev provided an additional explanation for some of the Subject Deposits. Mr. Gorev's common-law spouse, Yulia Cherenkova, managed the family finances. From time to time, Mr. Gorev took cash from his safe or from a recent loan repayment and gave that money to Ms. Cherenkova to enable her to pay the household expenses, including the mortgage, utilities, educational costs and recreational expenses for their children.³⁵ Ms. Cherenkova typically deposited that cash into their joint bank account.³⁶

[29] Mr. Gorev testified that Ms. Cherenkova took care of the management of the plaza (as he called it), or rental property, that was owned and rented by Vigor. Her salary from Vigor was \$2,500 per month, which was paid to her by cheque.³⁷ According to Mr. Gorev, some of the Subject Deposits may have been made with money earned by Ms. Cherenkova.³⁸

³³ *Ibid.*, page 18, lines 9-10; page 27, line 18 to page 28, line 23; page 39, lines 11-25; and page 41, lines 11-18.

³⁴ *Ibid.*, page 39, lines 4-17; page 41, line 8 to page 42, line 8; and page 73, lines 8-21.

³⁵ *Ibid.*, page 17, lines 5-19; page 18, lines 18-21; page 23, lines 22-24; page 28, lines 1-9; page 45, lines 21 & 26-27; and page 46, lines 17-18.

³⁶ *Ibid.*, page 17, lines 6-10.

³⁷ *Ibid.*, page 17, line 19 to page 18, line 2.

³⁸ *Ibid.*, page 57, line 23.

E. Subject Deposits

[30] The Subject Deposits are summarized as follows:³⁹

Table 6

	<u>Bank</u>	<u>Date</u>	<u>Amount</u>
(1)	BMO	June 27, 2008	\$3,500.00
		November 25, 2008	\$4,000.00
(2)	Scotiabank	October 12, 2006	US\$7,000.00
(3)	Scotiabank	October 12, 2006	\$2,225.00
(4)	Scotiabank	October 18, 2006	\$1,678.00
(5)	Scotiabank	December 12, 2006	\$1,000.00
(6)	Scotiabank	April 2, 2007	\$1,000.00
	(2007 and 2008)	April 25, 2007	\$5,500.00
		August 15, 2007	\$4,000.00
		August 20, 2007	\$4,000.00
		September 6, 2007	\$2,300.00
		October 30, 2007	\$5,000.00
		January 31, 2008	\$1,000.00
		April 15, 2008	\$2,500.00
		April 29, 2008	\$4,000.00
		May 3, 2008	\$1,500.00
		May 12, 2008	\$5,000.00
		July 9, 2008	\$4,000.00
		August 13, 2008	\$4,000.00

(1) BMO Deposits

[31] The CRA identified two deposits, in the amounts of \$3,500 and \$4,000, that were deposited into Mr. Gorev's Canadian-dollar account at the Bank of Montreal ("BMO"). There was some confusion as to the dates of those deposits. The CRA's initial proposal letter, dated January 26, 2012, showed the amounts of \$3,500 and \$4,000 as being deposited on June 27, 2008 and November 25, 2008 respectively.⁴⁰ The monthly statements for that account similarly showed deposits of \$3,500 and

³⁹ The numbers in the left hand column in Table 6 correspond to the numbers of the subheadings in these Reasons in which the particular deposits are discussed.

⁴⁰ Exhibit R-1, Tab 10, page 47.

\$4,000 as having been made on June 27, 2008 and November 25, 2008 respectively.⁴¹

[32] On March 9, 2012, Mr. Gorev's accountant, Raymond Leydier, sent a letter to the CRA's audit division, in response to the CRA's proposal letter of January 26, 2012. On the fourth page of that letter,⁴² Mr. Leydier discussed the deposits to Mr. Gorev's BMO Canadian-dollar account. The heading for that discussion suggests that the deposits were made in 2008. As well, Mr. Leydier attached copies of various documents to his letter and referred to them as Exhibit #9. One of those documents is the customer copy of the transaction record for a deposit in the amount of \$3,500 on June 27, 2008 to Mr. Gorev's account.⁴³ Mr. Leydier did not provide a customer copy of the transaction record for the \$4,000 deposit.

[33] It appears that the confusion began when Yasha Bushuev, an accountant who was engaged by Mr. Gorev and who apparently replaced Mr. Leydier, faxed a number of schedules to Pierre Pageaut of the Appeals Division. One of those schedules showed the questionable deposits made to Mr. Gorev's BMO Canadian-dollar account in the amounts of \$3,500 and \$4,000.⁴⁴ The year set out near the top of that schedule was 2008; however, the dates listed in the schedule for the two deposits were shown as 08/31/2006 and 09/18/2006. When Mr. Pageaut prepared the Appeals Division's Schedule 2, he seems to have used the dates provided by Mr. Bushuev and showed the amounts of \$3,500 and \$4,000 as being deposited on August 31, 2006 and September 18, 2006 respectively. However, the composite table (showing all three years) in the Appeals Division's Schedule 1 showed those deposits as having been made in 2008.

[34] In paragraph 12 of his Notice of Appeal, Mr. Gorev stated that the amounts were deposited on August 31, 2006 and September 18, 2006. However, it appears that, in paragraph 21(e) of the Crown's Reply, the two amounts were assumed to be included in income in 2008, rather than in 2006.

[35] Not only is there confusion concerning the dates of the deposits of \$3,500 and \$4,000, but there is also confusion concerning the source of the funds that were deposited. That confusion is summarized below:

⁴¹ Exhibit R-1, Tab 26, pages 273 and 284.

⁴² Exhibit R-1, Tab 12, page 58.

⁴³ Exhibit R-1, Tab 12, page 84.

⁴⁴ Exhibit R-1, Tab 21, page 131.

- a) In Mr. Leydier's letter of March 9, 2012 to the CRA, he stated that the deposits to Mr. Gorev's BMO account were not income, but were "funds withdrawn from the client's accounts."⁴⁵ This statement is contrary to the submission made by Mr. Gorev in his Notice of Appeal that the \$3,500 deposit and the \$4,000 deposit represented loan repayments by Mr. Kardachov.
- b) During his direct examination, Mr. Gorev stated that the amounts were probably loan repayments from somebody, but he could not recall the source of the repayments. He asserted that it was not his income.⁴⁶ During his cross-examination, Mr. Gorev stated that the amounts of \$3,500 and \$4,000 came from his debtors, including Mr. Kardachov.⁴⁷
- c) Later in his cross-examination, Mr. Gorev stated that he was in Russia when the two BMO deposits were made, and that he knew that Mr. Kardachov would not have made any loan repayments while he (Mr. Gorev) was in Russia. Therefore, Mr. Gorev changed his previous explanation and suggested that the amounts of \$3,500 and \$4,000 were either taken by Ms. Cherenkova from his safe or were earned by her.⁴⁸ Similarly, in his letter of March 9, 2012, Mr. Leydier stated that the amounts were deposited by Ms. Cherenkova, as Mr. Gorev was in Russia from May 17, 2008 to July 14, 2008, and again from October 2, 2008 to December 1, 2008.⁴⁹
- d) During his direct examination, Mr. Gorev stated that the deposit of \$3,500 (which Mr. Gorev understood was made on August 31, 2006, but was actually made on June 27, 2008) was used for household expenses, such as the mortgage payment, utilities and maintenance.⁵⁰ However, the customer copy of the transaction record for that deposit shows that immediately after the deposit of \$3,500 in cash was made, a Canadian bank draft in the same amount was issued, using funds from the same account and leaving a balance in that account of \$226.84.⁵¹ Therefore, the \$3,500 was not left in

⁴⁵ Exhibit R-1, Tab 12, pages 58 and 83.

⁴⁶ *Transcript*, page 23, lines 24-27.

⁴⁷ *Ibid.*, page 52, lines 8-20.

⁴⁸ *Ibid.*, page 57, lines 12-23.

⁴⁹ Photocopies of Mr. Gorev's itineraries for those trips to Russia are set out in Exhibit R-1, Tab 12, pages 85-86.

⁵⁰ *Transcript*, page 23, lines 22-24.

⁵¹ Exhibit R-1, Tab 12, page 84.

the account to pay household expenses. However, perhaps the bank draft was used to pay those expenses.⁵²

[36] Based on the bank statements and the customer copy of the transaction record for the \$3,500 deposit, I find that the deposits of \$3,500 and \$4,000 were made on June 27, 2008 and November 25, 2008 respectively, and not on August 31, 2006 and September 18, 2006. Given the inconsistencies between Mr. Gorev's testimony and the documentary evidence, I do not accept Mr. Gorev's assertion that the amounts of \$3,500 and \$4,000 deposited to Mr. Gorev's BMO Canadian-dollar account were derived from non-taxable sources. Mr. Gorev has failed to prove, on a balance of probabilities, that those amounts did not represent income earned in 2008.

(2) Scotiabank US\$7,000 Deposit on October 12, 2006

[37] On October 12, 2006, Mr. Gorev, or someone acting on his behalf (such as Ms. Cherenkova), deposited US\$7,000 in cash into Mr. Gorev's Scotiabank US-dollar account.⁵³ In his letter of March 9, 2012 to the CRA, Mr. Leydier, stated that he had been told by Mr. Gorev that the US\$7,000 deposit on October 12, 2006 had been derived from a repayment by Igor Nikitenko of a debt that was outstanding from the sale of Mr. Gorev's assets before becoming a resident of Canada.⁵⁴ During his cross-examination, when Mr. Gorev was asked about Mr. Leydier's explanation that the US\$7,000 deposit on October 12, 2006 came from a debt repayment by Mr. Nikitenko, Mr. Gorev replied, "I cannot understand how Mr. Nikitenko is related to 7,000 cash."⁵⁵ Thus, Mr. Gorev's testimony was inconsistent with the explanation that he gave to Mr. Leydier.

[38] Mr. Gorev stated in his Notice of Appeal that the US\$7,000 deposited on October 12, 2006 was derived from a loan repayment made by Mr. Kardachov. He reiterated that position during his testimony, although (as noted above) he expanded that position to suggest that some of the unexplained deposits may have come from money repaid by borrowers other than Mr. Kardachov.⁵⁶ However, during his cross-examination, in offering another explanation, Mr. Gorev stated

⁵² In his testimony, Mr. Gorev stated that, on occasion, when Ms. Cherenkova deposited money into the bank account, she obtained a draft for the same amount from the bank; see *Transcript*, page 46, lines 14-17.

⁵³ Exhibit R-1, Tab 12, page 93.

⁵⁴ Exhibit R-1, Tab 12, page 59.

⁵⁵ *Transcript*, page 51, line 4 to page 52, line 7.

⁵⁶ *Ibid.*, page 24, lines 9-12; page 27, lines 20-24; and page 52, lines 3-20.

that the US\$7,000 deposited on October 12, 2006 was money left over at the conclusion of one his trips to various gun shows and antique shows.⁵⁷

[39] During his testimony, Mr. Gorev stated several times that all of the loan advances that he made to Mr. Kardachov and all of the loan repayments made by Mr. Kardachov were in Canadian currency.⁵⁸ Given that the cash deposited in the Scotiabank US-dollar account on October 12, 2006 was in US currency, it does not appear that this was a loan repayment by Mr. Kardachov.

(3) Scotiabank \$2,225 Deposit on October 12, 2006

[40] In his Notice of Appeal, Mr. Gorev indicated that the deposit of \$2,225 to his Scotiabank Canadian-dollar account on October 12, 2006 was derived from a loan repayment made to him by Mr. Kardachov. It appears that Mr. Gorev gave the same explanation to the Appeals Division, as the Appeals Division's Schedule 4 indicates that Mr. Kardachov was the source of the funds for this deposit. A copy of the customer receipt for the deposit, which was entered into evidence, shows that the currency and the amount of the cash received by the bank in respect of this deposit was US\$2,000 and that, applying the applicable exchange rate, the amount of the foreign exchange was \$225, with the result that the Canadian-currency equivalent of the deposit was \$2,225.⁵⁹ As the cash that was presented to Scotiabank was in US currency, and as Mr. Gorev testified that Mr. Kardachov always made his loan repayments in Canadian currency,⁶⁰ this deposit could not have derived from a loan repayment made by Mr. Kardachov.

⁵⁷ *Ibid.*, page 49, lines 3-20.

⁵⁸ *Ibid.*, page 15, lines 6-10; page 16, lines 5-8; page 40, line 20 to page 41, line 4, page 49, line 21 to page 50, line 19; page 74, lines 6-15; and page 77, lines 23-25.

⁵⁹ Exhibit R-1, Tab 12, page 97.

⁶⁰ *Transcript*, page 15, lines 6-10; page 16, lines 5-8; page 40, line 20 to page 41, line 4; page 49, line 21 to page 50, line 19; page 74, lines 6-15; and page 77, lines 23-25.

(4) Scotiabank \$1,678.80 Deposit on October 18, 2006

[41] In his Notice of Appeal, Mr. Gorev indicated that the deposit of \$1,678.80 to his Scotiabank Canadian-dollar account on October 18, 2006 was derived from a loan repayment made to him by Mr. Kardachov. A comment in the Appeals Division's Schedule 4 in respect of the \$1,678.80 deposit to Mr. Gorev's Scotiabank Canadian-dollar account on October 13, 2006 states the following:

Kardachov \$1,400 US - \$1,504.85 plus \$173.95 CRA⁶¹

I was unable to find any indication of the source of the information on which the above comment was based. If the deposit derived primarily from cash in the amount of US\$1,400, given that Mr. Gorev testified that Mr. Kardachov made loan repayments only in Canadian currency, it follows that the deposit of \$1,678.80 did not derive from a loan repayment made by Mr. Kardachov.

[42] This is confirmed by Mr. Gorev's testimony. During his direct examination, Mr. Gorev stated that the deposit of \$1,678.80 to his Scotiabank Canadian-dollar account on October 18, 2006 derived from a loan repayment made to him by Mr. Kardachov or another borrower.⁶² During his cross-examination, Mr. Gorev stated that, because the amount of the deposit was not an even round number, it probably was not a loan repayment by Mr. Kardachov.⁶³

(5) Scotiabank \$1,000 Deposit on December 12, 2006

[43] In his Notice of Appeal, Mr. Gorev indicated that the deposit of \$1,000 to his Scotiabank Canadian-dollar account on December 12, 2006 was derived from a loan repayment made to him by Mr. Kardachov. During both his direct examination and his cross-examination, Mr. Gorev testified that the deposit of \$1,000 to his Scotiabank Canadian-dollar account on December 12, 2006, derived from a loan repayment by Mr. Kardachov or one of the other borrowers.⁶⁴ In particular, in describing this deposit, Mr. Gorev stated during cross-examination:

⁶¹ Exhibit A-1, Tab 2, page 49. See also Exhibit R-1, Tab 21, page 129.

⁶² *Transcript*, page 27, line 9 to page 28, line 1.

⁶³ *Ibid.*, page 45, line 3 to page 46, line 19.

⁶⁴ *Ibid.*, page 27, line 9 to page 28, line 1; and page 46, line 25 to page 47, line 18.

... this money including all the money which we'll be talking about they were deposited from the money which were returned including by all others including Kardachov. There are other options.⁶⁵

Thus, Mr. Gorev was not certain that the \$1,000 deposit derived from a loan repayment by Mr. Kardachov.

(6) Scotiabank Deposits in 2007 and 2008

[44] The CRA identified 13 deposits that were made to Mr. Gorev's Scotiabank Canadian-dollar account in 2007 and 2008 and that were, in the view of the CRA, derived from unreported income, as follows:

Table 7

	<u>Date</u>	<u>Amount</u>
2007	April 2, 2007	\$1,000.00
	April 25, 2007	5,500.00
	August 15, 2007	4,000.00
	August 20, 2007	4,000.00
	September 6, 2007	2,300.00
	October 30, 2007	<u>5,000.00</u>
	2007 Total	\$21,800.00
	2008	January 31, 2008
April 15, 2008		2,500.00
April 29, 2008		4,000.00
May 3, 2008		1,500.00
May 12, 2008		5,000.00
July 9, 2008		4,000.00
August 13, 2008		<u>4,000.00</u>
2008 Total		\$22,000.00

[45] The deposits made in 2007 and 2008 were not the subject of specific questioning by either counsel of either witness. Therefore, the only information to which I was directed in respect of those deposits is:

- a) the pleading in the Notice of Appeal to the effect that all of the Subject Deposits were derived from loan repayments made by Mr. Kardachov;

⁶⁵ *Ibid.*, page 47, lines 15-18.

- b) the general statements made by Mr. Gorev that the Subject Deposits represented loan repayments made by Mr. Kardachov or other borrowers, money left over at the end of a trip abroad, or money deposited by Ms. Cherenkova from cash given to her by Mr. Gorev or from remuneration earned by her for managing Vigor's rental property; and
- c) Mr. Kardachov's statement that he made various repayments to Mr. Gorev, as itemized in the Paid-Back Document,⁶⁶ the substance of which is reproduced in Table 5 above.

[46] In order to determine the plausibility of Mr. Gorev using Mr. Kardachov's alleged repayments to make the Subject Deposits, I have combined Tables 5 and 7, so as to set out a chronological sequence showing the repayments and the deposits in 2007 and 2008, as follows:⁶⁷

Table 8

<u>Date</u>	<u>Alleged Repayment</u>	<u>Subject Deposit</u>
January 4, 2007	\$7,000	
April 2, 2007		\$1,000
April 25, 2007		5,500
August 15, 2007	5,000	4,000
August 19, 2007	6,750	
August 20, 2007		4,000
September 6, 2007	4,000	2,300
October 30, 2007	<u>6,250</u>	<u>5,000</u>
Total for 2007	\$29,000	\$21,800
January 31, 2008	\$4,500	\$1,000
April 15, 2008		2,500
April 28, 2008	6,000	
<u>Date</u>	<u>Alleged Repayment</u>	<u>Subject Deposit</u>
April 29, 2008		4,000
May 3, 2008		1,500

⁶⁶ Exhibit R-1, Tab 21, page 137.

⁶⁷ In compiling Table 8, I assumed that the payments described by Mr. Kardachov in the Paid-Back Document as having been made on August 15, 2008 and August 19, 2008 were actually made on August 15, 2007 and August 19, 2007. See paragraph 22 above.

May 12, 2008	5,000	5,000
June 27, 2008	4,000	
July 9, 2008	5,000	4,000
August 13, 2008	5,000	4,000
November 25, 2008	<u>5,500</u>	
Total for 2008	\$35,000	<u>\$22,000</u>

Mr. Gorev testified that, when receiving loan repayments, he sometimes spent part of the money on himself, gave part of the money to Ms. Cherenkova or kept part of the money in the safe at his home, and then, as needed, would deposit some of the money into a bank account.⁶⁸ The dates and amounts of the alleged repayments and the Subject Deposits, as set out in Table 8, are consistent with Mr. Gorev's explanation as to the source of those deposits.

[47] The information concerning the alleged repayments set out in Table 8 is taken from the Paid-Back Document. As explained in paragraphs 23 to 26 above, I question the reliability of that document. Accordingly, the mere fact that the dates and the amounts of the alleged repayments and the Subject Deposits set out in Table 8 are consistent with Mr. Gorev's explanation as to the source of those deposits is not sufficient to prove on a balance of probabilities that the Subject Deposits were not derived from taxable sources.

(7) Summary

[48] Given the concerns and observations noted above in respect of the deposits made in 2006 (particularly the inconsistencies and confusion in the evidence pertaining to some of those deposits) and the questionable reliability of the Paid-Back Document, I am of the view that the evidence provided by Mr. Gorev and Mr. Kardachov was not adequately corroborated and was not sufficient to satisfy Mr. Gorev's evidentiary burden. Mr. Gorev's and Mr. Kardachov's testimonies could possibly have been corroborated if:

- a) Mr. Gorev had produced the day planner in which he kept a record of the advances to, and the repayments by, Mr. Kardachov;
- b) Mr. Kardachov had not destroyed and had produced the notes that he compiled to keep track of the money borrowed by him from Mr. Gorev; and

⁶⁸ *Transcript*, page 17, lines 11-13; page 18, lines 4-7 & 18-21; page 21, lines 2-7; page 23, lines 22-25; page 28, lines 2-9; and page 64, lines 18-23.

- c) Mr. Gorev had called Ms. Cherenkova, Mr. Sluzkiy and the other borrowers to testify.

[49] I acknowledge that some or all of the Subject Deposits may possibly have been derived from the non-taxable sources described by Mr. Gorev. In other words, I am not convinced that the Subject Deposits were derived from taxable sources. However, Mr. Gorev has not produced reliable evidence sufficient to demolish the assumptions of fact made by the Minister as set out in paragraph 21 of the Reply, or to prove on a balance of probabilities that the Subject Deposits were not derived from taxable sources.

F. Reassessment after Normal Reassessment Period

[50] Subparagraph 152(4)(a)(i) of the *ITA* provides that the Minister may make a reassessment of tax, interest or penalties for a taxation year after a taxpayer's normal reassessment period in respect of the year if the taxpayer has made a misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the tax return for that year. The burden is on the Crown to prove that Mr. Gorev made a misrepresentation and that the misrepresentation was attributable to neglect, carelessness, wilful default or fraud.⁶⁹ In explaining this burden, the Federal Court of Appeal stated the following:

Although the Minister has the benefit of the assumptions of fact underlying the reassessment, he does not enjoy any similar advantage with regard to proving the facts justifying a reassessment beyond the statutory period, or those facts justifying the assessment of a penalty for the taxpayer's misconduct in filing his tax return. The Minister is undeniably required to adduce facts justifying these exceptional measures.⁷⁰

Accordingly, Mr. Gorev is not subject to an evidentiary burden requiring him to demolish the assumptions of fact made by the Minister as set out in paragraph 22 of the Reply.

[51] During his cross-examination of Mr. Gorev, counsel for the Crown established that Mr. Gorev did not include in his income the amounts that were

⁶⁹ *Yunus v The Queen*, 2015 TCC 272, ¶85; *Dao v The Queen*, 2010 TCC 84, ¶32; and *MNR v Taylor*, [1961] CTC 211 at 214, 61 DTC 1139 at 1141 (Ex Ct).

⁷⁰ *Lacroix v The Queen*, 2008 FCA 241, ¶26.

represented by the Subject Deposits.⁷¹ Accordingly, there is a discrepancy between the amounts of Mr. Gorev's income as reported in his tax returns for 2006, 2007 and 2008 and the amounts of his income computed by reference to the Subject Deposits (as well as the reported amounts). In *Yunus*, Lamarre ACJ stated:

... I consider that the discrepancy between the income determined according to the cash flows and the income reported is sufficient to conclude that there was misrepresentation.⁷²

Similarly, I am of the view that the discrepancy between the income reported on Mr. Gorev's tax returns and the income determined by reference to the Subject Deposits (as well as the tax returns) is sufficient for me to conclude that there was a misrepresentation for the purposes of subparagraph 152(4)(a)(i) of the *ITA*.

[52] Turning to the question of whether the misrepresentation was attributable to neglect or carelessness, the question to ask is whether the care exercised by Mr. Gorev, in filing his tax returns for 2006, 2007 and 2008, was that of a wise and prudent person.⁷³ There was relatively little evidence presented as to whether the misrepresentation was attributable to neglect or carelessness.⁷⁴ While the evidence was not precisely clear, it appears that Mr. Gorev used an accountant to prepare his tax returns and that Ms. Cherenkova instructed and provided documents to the accountant. Mr. Gorev stated in cross-examination that Ms. Cherenkova made several mistakes in respect of the tax returns. He also seemed to indicate that he signed the returns without first reviewing them.⁷⁵ A wise and prudent person would review his or her tax return before signing it. In other words, a failure to review a tax return before signing it may constitute neglect or carelessness for the purposes of subparagraph 152(4)(a)(i) of the *ITA*.⁷⁶

⁷¹ *Transcript*, page 44, line 4 to page 45, line 2; and page 47, line 19 to page 48, line 5.

⁷² *Yunus*, *supra* note 69, ¶87.

⁷³ *Angus v The Queen*, [1999] 1 CTC 60, 98 DTC 6661(FCA), ¶7. See also *Yunus*, *supra* note 69, ¶87.

⁷⁴ There was no suggestion that Mr. Gorev committed wilful default or fraud in filing his tax returns.

⁷⁵ *Transcript*, page 30, lines 25-28; and page 32, lines 4-27.

⁷⁶ *Yunus*, *supra* note 69, ¶88; *Demers v The Queen*, 2014 TCC 368, ¶66-67; *Vekkal v The Queen*, 2014 TCC 341, ¶37; *Vachon v The Queen*, 2013 TCC 330, ¶65; *Yazdani v The Queen*, 2012 TCC 371, ¶12; *Venne v The Queen*, [1984] CTC 223, 84 DTC 6247; *Udell v MNR*, [1970] Ex CR 176 (Ex Ct). See also *Spence v CRA*, 2011 FC 426, ¶1, 6 & 13; *aff'd*, 2012 FCA 58.

[53] Accordingly, I find that the Crown has satisfied the burden of proving that Mr. Gorev made a misrepresentation attributable to neglect or carelessness, with the result that the Disputed Reassessments were properly issued after Mr. Gorev's normal reassessment periods in respect of the taxation years in question.

G. Gross Negligence Penalties

[54] Although I have found that the Minister had the right to reassess Mr. Gorev for the 2006, 2007 and 2008 taxation years after his normal reassessment periods for those years, that finding is not determinative of whether the gross negligence penalties assessed against Mr. Gorev may be sustained. As stated by Lamarre ACJ:

Moreover, the law is well settled: the type of conduct by a taxpayer that justifies the Minister reopening statute-barred years, under subparagraph 152(4)(a)(i) of the ITA, does not necessarily justify the imposing of penalties under subsection 163(2) of the ITA. In fact, the provisions of subsection 163(2) are penal in nature and call for a higher degree of culpability.⁷⁷

The above statement is consistent with the observation by the Federal Court in *Venne*:

It will be noted that for the penalty [under subsection 163(2)] to be applicable there appears to be a higher degree of culpability required, involving either actual knowledge or gross negligence, than is the case under subsection 152(4) for reopening assessments more than four [now three] years old where mere negligence seems to be sufficient.⁷⁸

[55] The established jurisprudence makes it clear that the burden imposed on the Minister by subsection 163(3) of the *ITA* is meaningful. In *Boileau Proulx J* stated:

Indeed, the Appellant was unable to contradict the basic elements of the net worth assessments. However, in my view, this is not sufficient for discharging the burden of proof which lies on the Minister. To decide otherwise would be to remove any purpose to subsection 163(3) by reverting the Minister's burden of proof back onto the Appellant....

I am of the view that in the present case, the Respondent did not adequately discharge his burden of proof in that he relied almost exclusively on the fact that the Appellant was unable to reverse the net worth assessments. In effect, subsection 163(3) requires evidence of the intent or gross negligence of the

⁷⁷ *Yunus*, *supra* note 69, ¶93. See also *Dao*, *supra* note 69, ¶39.

⁷⁸ *Venne v The Queen*, [1984] CTC 223 at 226, 84 DTC 6247 at 6249 (FCTD).

contravenor. This, in my view, should be done in a structured, clear and convincing manner. I do not find that the evidence was adequate in this respect and therefore, the penalties cannot be maintained.⁷⁹

As indicated in the passage quoted from *Lacroix* in paragraph 50 above, the Minister does not have the benefit of the assumptions of fact with regard to proving the facts justifying the assessment of a penalty for misconduct in filing a tax return.⁸⁰ Therefore, Mr. Gorev is not subject to an evidentiary burden requiring him to demolish the assumptions of fact made by the Minister as set out in paragraph 23 of the Reply.

[56] The jurisprudence also indicates that caution should be exercised in approving the imposition of penalties under subsection 163(2):

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 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 deleted.⁸¹ [footnotes omitted]

Thus, it is necessary to determine whether there is a viable and reasonable hypothesis that could lead me to give Mr. Gorev the benefit of the doubt.⁸²

[57] The explanation put forward by Mr. Gorev is that the Subject Deposits were derived from a combination of the following:

⁷⁹ *Boileau v MNR*, [1989] 2 CTC 2001 at 2005-2006, 89 DTC 247 at 250 (TCC). The first of the two paragraphs quoted above was quoted by Pelletier JA in *Lacroix*, *supra* note 70, ¶27.

⁸⁰ *Lacroix*, *supra* note 70, ¶26.

⁸¹ *Farm Business Consultants Inc. v The Queen*, [1994] 2 CTC 2450 at 2457, 95 DTC 200 at 205-206 (TCC), ¶28; *aff'd*, [1996] 2 CTC 200, 96 DTC 6085 (FCA). The first two sentences and the last sentence of the above passage were quoted by Pelletier JA in *Lacroix*, *supra* note 70, ¶28.

⁸² *Lacroix*, *supra* note 70, ¶29. See also *Fourney v The Queen*, 2011 TCC 520, ¶77.

- a) loan repayments made by Mr. Kardachov;
- b) loan or debt repayments made by Mr. Sluzkiy and other individuals, including some of the purchasers of some of the assets sold by Mr. Gorev while he was still living in Russia;
- c) cash (particularly US currency) left over when Mr. Gorev returned from trips abroad;
- d) remuneration earned by Ms. Cherenkova; and
- e) cash kept by Mr. Gorev in the safe in his home (some or all of this cash may have been derived from the first three sources listed above).

As indicated above, Mr. Gorev did not provide sufficient evidence to prove on a balance of probabilities that the Subject Deposits were not derived from taxable sources. However, while Mr. Gorev failed to meet his burden of proof, I am not satisfied that he earned unreported income.⁸³ The evidence was sufficient to persuade me that the explanation summarized in subparagraphs a) through e) above is a viable and reasonable hypothesis concerning the source of the Subject Deposits, which leads me, for the purposes of subsection 163(2) of the *ITA*, to give Mr. Gorev the benefit of the doubt.

[58] The neglect or carelessness discussed in paragraph 52 above for the purposes of subparagraph 152(4)(a)(i) of the *ITA* does not rise to the level of gross negligence for the purposes of subsection 163(2) of the *ITA*. Accordingly, the Crown has failed to meet its burden of proof, and the penalties assessed against Mr. Gorev under subsection 163(2) of the *ITA* are not justified.

VI. CONCLUSION

[59] These Appeals are disposed of as follows:

- a) the Appeals in respect of the Disputed Reassessments (as set out in the Notice of Reassessment issued on December 31, 2012 in respect of the 2007

⁸³ See *Lacroix*, *supra* note 70, ¶32. In the first clause of the last sentence of that paragraph, Pelletier JA indicates that, in order for his comments about the Minister's burden of proof to be applicable, the Tax Court judge must be satisfied that the taxpayer has earned unreported income.

taxation year and the Notices of Reassessment issued on June 12, 2014 in respect of the 2006 and 2008 taxation years) are allowed, and the Disputed Reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the penalties imposed under subsection 163(2) of the *ITA* are not justified;

- b) in all other respects the Disputed Reassessments are confirmed; and
- c) the Appeals in respect of the assessments under Part XIII of the *ITA* (as set out in the Notices of Assessment issued on December 5, 2012), in respect of the 2007 and 2008 taxation years, are allowed, and those assessments are vacated.

[60] As success has been divided, I am not making any award as to costs.

Signed at Ottawa, Canada, this 19th day of May 2017.

“Don R. Sommerfeldt”

Sommerfeldt J.

CITATION: 2017 TCC 85

COURT FILE NO.: 2014-2607(IT)G

STYLE OF CAUSE: VICTOR GOREV AND HER MAJESTY
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 5, 2016

REASONS FOR JUDGMENT BY: The Honourable Justice Don R.
Sommerfeldt

DATE OF JUDGMENT: May 19, 2017

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