Docket: 2012-4089(IT)G

BETWEEN:

ALEXANDER ROWE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 26, 2016, at Toronto, Ontario

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Christian Cheong

JUDGMENT

The Appeal from the reassessment made under the *Income Tax Act* with respect to the 2009 taxation year is dismissed, without costs.

Signed at Ottawa, Canada, this 23rd day of June, 2017.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2017 TCC 122
Date: 20170623
Docket: 2012-4089(IT)G

BETWEEN:

ALEXANDER ROWE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to an Appeal by Alexander Rowe against a reassessment (the "Reassessment") of his 2009 taxation year, as set out in a Notice of Reassessment dated March 28, 2011. Mr. Rowe's income tax return for 2009 was prepared by a representative of an organization known as Fiscal Arbitrators. That return reported a net business loss large enough to eliminate (so to speak) Mr. Rowe's taxable income for 2009, as well as for the three preceding taxation years. When the Minister of National Revenue (the "Minister"), as represented by the Canada Revenue Agency (the "CRA"), reassessed Mr. Rowe to deny the loss, the CRA also imposed a penalty under subsection 163(2) of the *Income Tax Act*[1] (the "*ITA*"). Mr. Rowe has not challenged the denial of the loss or the amount of income tax assessed by the Reassessment, but he has challenged the penalty.

II. ISSUE

[2] The issue for consideration in this Appeal is whether Mr. Rowe is liable to a penalty pursuant to subsection 163(2) of the *ITA*. More specifically, that requires a determination of whether Mr. Rowe knowingly, or under circumstances amounting

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

to gross negligence, made or participated in, assented to or acquiesced in the making of, a false statement in his 2009 income tax return.

III. BACKGROUND

[3] Mr. Rowe earned a diploma in business from Sheridan College and obtained a professional designation as a certified general accountant in 2004.[2] It should be noted that, although Mr. Rowe is an accountant, he is not a tax accountant. Mr. Rowe was employed in the accounting department of a meat trading company from approximately 1993 to 1997; from approximately 1997 to 2000 he was the controller of that company. He was employed as the financial controller of a printing company from 2000 to 2009. On or about January 31, 2009, the printing company ceased to operate, whereupon Mr. Rowe, having thus lost his employment, joined members of his family in purchasing and operating a farm in a country other than Canada.[3] Mr. Rowe moved to that country in September 2009 to help to establish the farm. Mr. Rowe's education and work experience, particularly as an accountant and controller, have presumably provided him with knowledge and understanding of business and financial matters.

[4] In 2004, Chester Lewis, who was a close friend of Mr. Rowe, a fellow church member and a tax preparer, invited Mr. Rowe to participate in a charitable donation program. Initially, Mr. Rowe declined to participate because he knew little about the program. However, he subsequently obtained more information in respect of the particular charity (the "Charity") and its donation program, reviewed the CRA's website to confirm that the Charity was registered as such, and spoke with a representative of the CRA, as a result of which he "got an understanding that this particular group was indeed a reputable charter [*sic*] organization."[4] Consequently, he made donations to the Charity in 2005, 2006 and 2008. As events unfolded, the Charity was not as reputable as Mr. Rowe initially understood and he was reassessed in respect of those three taxation years.

[5] Facing significant tax liabilities in respect of 2005, 2006 and 2008, by reason of the above reassessments, Mr. Rowe was anxious to find some way to

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2 Mr. Rowe explained that, with the recent unification of the accounting professions in Ontario, his professional designation is now "chartered professional accountant."

3 The name of the country in which the farm was located was not given in the evidence at the hearing of this Appeal.

4 *Transcript*, page 9, lines 11-13. The transcript uses the word "charter". Perhaps Mr. Rowe intended to say "charitable", or perhaps he did say "charitable" and the word was mistranscribed.

reduce or eliminate those liabilities. When it was time for Mr. Rowe to file his 2009 income tax return, Mr. Lewis said that he could prepare and file the return and that, because of what he knew of Fiscal Arbitrators, he would be able to "reverse" the tax liabilities that had arisen by reason of the reassessments that had disallowed Mr. Rowe's donations to the Charity. As Mr. Rowe was then spending a significant amount of time outside Canada, assisting with the farming venture, he authorized Mr. Lewis to look after the preparation and filing of the 2009 income tax return.[5]

[6] As Mr. Rowe had worked for only one month in 2009, his income that year was relatively modest. In particular, his tax return showed employment income in the amount of $3,273.60, other employment income in the amount of $3,031.94, employment insurance benefits in the amount of $14,751.00 and an RRSP withdrawal of $5,000.00. As well, the return showed gross business income of $30,746.72 and net business income of −$274,576.54. In other words, a net business loss in the amount of $274,576.54 was reported for 2009, resulting in an overall loss for the year in the amount of $248,520.00. The return was accompanied by a Request for Loss Carryback (Form T1A), which showed a carryback amount of $249,820.00,[6] which was carried back to the three preceding taxation years and applied as follows:

2006	$86,132.00
2007	88,329.00
2008	75,359.00
	$249,820.00

5 *Transcript*, page 21, lines 7-11 & 20-28; and page 22, line 1.

6 There was no explanation as to why the amount of the loss reported on the tax return was $248,520.00 and the amount of the loss reported on Form T1A was $249,820.00.

IV. ANALYSIS

A. Statutory Provisions

[7] There is no dispute as to the amount of the penalty. Therefore, for the purposes of this Appeal, the relevant portion of subsection 163(2) of the *ITA* is the following:

> (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 …. in a return … filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty….

[8] Although in many situations a taxpayer has the burden of proving that a challenged assessment is not valid or binding,[7] subsection 163(3) of the *ITA* places the burden of proof on the Minister in the case of this penalty:

> (3) Where, in an appeal under this Act, a penalty assessed by the Minister under this section … is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[9] This is a burden that is to be taken seriously and that is not lightly discharged, as explained by Bowman ACJ (as he then was) in *Farm Business Consultants*:

> A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2)…. [T]he routine imposition of penalties by the Minister is to be discouraged…. [S]ubsection 163(2) … involves the penalizing of conduct that requires a higher degree of reprehensibility. In such a case a court must, even in applying a civil standard of proof, scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established. Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted. I think that in this case the required degree of probability has been established by the respondent, and that no

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[7] See subsection 152(8) of the *ITA*; *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20, ¶25; and *Hickman Motors Ltd. v The Queen*, [1998] 1 CTC 213, 97 DTC 5363 (SCC).

> hypothesis that is inconsistent with that advanced by the respondent is sustainable on the basis of the evidence adduced.[8]

B. False Statements

[10] Mr. Rowe's 2009 income tax return contained a Statement of Business or Professional Activities (Form T2125), which described his gross business income as "RECEIPTS AS AGENT" in the amount of $30,746.72. That Statement showed no other business revenue or business expenses other than an expense described in the "other expenses" category as "AMT TO PRINCIPAL FR AGENT," which presumably meant "amount to principal from agent," in the amount of $305,323.26. The result was a reported loss from the business in the amount of $274,576.54 (i.e., $30,746.72 – $305,323.26).[9] As indicated above, the gross business income and the net business loss were reported on Mr. Rowe's 2009 income tax return.

[11] During cross-examination, Mr. Rowe acknowledged that he did not operate a business in 2009.[10] Thus, the statements in Mr. Rowe's 2009 income tax return, including the Statement of Business or Professional Activities, to the effect that he had business receipts as agent in the amount of $30,746.72 and expenses described, in essence, as an amount to principal from agent in the amount of $305,323.26, resulting in a net business loss of $274,576.54, were false statements.

C. "Knowingly" Criterion

[12] During his testimony, Mr. Rowe did not say that, when he signed his 2009 income tax return or arranged for it to be sent to the CRA, he knew that he was making false statements in that return. Rather, during his cross-examination, Mr. Rowe stated that:

a) when he signed his 2009 income tax return, he did not see that line 162 on page 2 of that return reported gross business income in the amount of $30,746.72;[11]

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8 *Farm Business Consultants Inc. v The Queen*, [1994] 2 CTC 2450, 95 DTC 200 (TCC), ¶27 in the Taxnet Pro report or ¶28 in the LexisNexis report; *aff'd* [1996] 2 CTC 200, 96 DTC 6085 (FCA). See also *Panini v The Queen*, 2006 FCA 224, ¶22 and 31.

9 Exhibit R-1, pages 25-26.

10 *Transcript*, page 29, lines 15-17; and page 36, lines 3-4.

11 *Transcript*, page 35, lines 8-12. Mr. Rowe was also asked about his understanding of the net loss in the amount of $274,576.54 (which was reported on line 135 on page 2 of his

b) when he filed his tax return, he was not aware that he was claiming a loss of approximately $248,000;[12] and

c) he did not know that Mr. Lewis had prepared a request for a loss carryback.[13]

[13] In some circumstances, knowledge may be imputed to a taxpayer, or a taxpayer may be deemed to have knowledge.[14] The Crown has not persuaded me that those circumstances existed in this Appeal.

D. "Gross Negligence" Criterion

[14] Subsection 163(2) of the *ITA* may apply where a taxpayer makes a false statement under circumstances amounting to gross negligence. The Federal Court of Appeal recently confirmed that the correct legal test for establishing gross negligence is to determine whether there was neglect beyond a failure to use reasonable care.[15]

[15] A number of cases have held that wilful blindness may support a finding of gross negligence. For instance, the Federal Court of Appeal stated the following in *Strachan*:

> Gross negligence may be established where a taxpayer is willfully blind to the relevant facts in circumstances where the taxpayer becomes aware of the need for

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2009 income tax return). His response, rather than addressing his knowledge or lack of knowledge when he signed the return, focused on the assumptions that he made in respect of that amount over the six months or so preceding the hearing of this Appeal; see *Transcript*, page 35, lines 13-19.

12 *Transcript*, page 36, lines 8-10.

13 *Transcript*, page 42, lines 5-7.

14 *Panini, supra* note 8, ¶43. See also *Lauzon v The Queen*, 2016 FCA 298, ¶9; *aff'g* 2016 TCC 71; *Attorney General of Canada v Villeneuve*, 2004 FCA 20, ¶6; *McLeod v The Queen*, 2013 TCC 228, ¶12; and *Torres et al. v The Queen*, 2013 TCC 380, ¶65(a); *aff'd subnom Strachan v The Queen*, 2015 FCA 60.

15 *Melman v The Queen*, 2017 FCA 83, ¶4. In *Melman* the Federal Court of Appeal was, in essence, affirming the definition of gross negligence set out in *Venne v The Queen*, [1984] CTC 223, 84 DTC 6247.

> some inquiry but declines to make the inquiry because the taxpayer does not want to know the truth.…[16]

In other words, for the purposes of the legal test confirmed in *Melman*, wilful blindness of the type described in *Strachan* constitutes neglect beyond a failure to use reasonable care.

[16] Some cases have held that an indifference concerning compliance with the law may constitute gross negligence. In *Venne*, Strayer J stated:

> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.[17]

[17] I will first consider whether Mr. Rowe was wilfully blind in signing and filing his 2009 income tax return, which reported a net business loss in the amount of $274,576.54. I will then determine whether Mr. Rowe demonstrated an indifference as to whether the *ITA* was complied with or not.[18]

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16 *Strachan*, *supra* note 14, ¶4. See also *Melman*, *supra* note 15, ¶7; *Lauzon*, *supra* note 14, (FCA) ¶8, (TCC) ¶28; *Panini*, *supra* note 8, ¶41; *Villeneuve*, *supra* note 14, ¶6; *Tomlinson v The Queen*, 2016 TCC 246, ¶23; *McLeod*, *supra* note 14, ¶12; *Torres*, *supra* note 14, ¶65(b); and *Bhatti v The Queen*, 2013 TCC 143, ¶23. Some cases indicate that a taxpayer's wilful blindness might constitute gross negligence, while others suggest that a taxpayer's wilful blindness may be an element in imputing knowledge to the taxpayer. For the purposes of these Reasons, I will consider wilful blindness as an element of establishing gross negligence.

17 *Venne*, *supra* note 15. See also *Melman*, *supra* note 15, ¶4, and *Findlay v The Queen*, [2000] 3 CTC 152, 2000 DTC 6345 (FCA), ¶21-22, both of which, in essence, adopted the *Venne* definition of "gross negligence." In addition, see *McLeod*, *supra* note 14, ¶11.

18 By taking this approach, I am not suggesting that there is a clear and distinct dichotomy between wilful blindness and indifference concerning compliance. I am mindful that in *Sidhu v The Queen*, 2004 TCC 174, endnote 7, Hershfield J said, "I am satisfied that the Federal Court of Appeal in [*Villeneuve*, *supra* note 14], found … that wilful blindness can be imputed from the conduct of the party which in my view would include, as held in *Venne*, an indifference as to whether the law was complied with."

E. Wilful Blindness

[18] In *Torres*, C. Miller J identified various principles to be applied in determining whether a taxpayer was wilfully blind:

> (a) Knowledge of a false statement can be imputed by wilful blindness.
>
> (b) The concept of wilful blindness can be applied to gross negligence penalties pursuant to subsection 163(2) of the [*ITA*]….
>
> (c) In determining wilful blindness, consideration must be given to the education and experience of the taxpayer.
>
> (d) To find wilful blindness there must be a need or a suspicion for an inquiry.
>
> (e) Circumstances that would indicate a need for an inquiry prior to filing, or flashing red lights …, include the following:
>
> (i) the magnitude of the advantage or omission;
>
> (ii) the blatantness of the false statement and how readily detectable it is;
>
> (iii) the lack of acknowledgement 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.[19]

I will now, in the context of this Appeal, turn to a consideration of the principles enunciated in *Torres*.

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[19] *Torres, supra* note 14, ¶65.

(1) Education and Experience

[19] As noted above, Mr. Rowe earned a college diploma in business and obtained a CGA (now CPA) professional designation. He worked as an accountant and later as a controller. Thus, Mr. Rowe cannot claim that a lack of education or experience contributed to his making of the false statements in his 2009 income tax return.[20]

(2) Suspicion or Need for an Inquiry

[20] When Mr. Lewis asked Mr. Rowe to participate in the charitable donation program in 2004, Mr. Rowe declined to do so until he had first investigated the program and made inquiries about the Charity. A year later he determined (perhaps incorrectly[21]) that the Charity was legitimate and that it would be appropriate for him to contribute. When Mr. Lewis approached Mr. Rowe about the Fiscal Arbitrators program in 2009 or early 2010, Mr. Rowe chose not to make the same level of inquiry, primarily because he was not then in Canada and because of the trust that he had placed in Mr. Lewis.[22] Mr. Rowe acknowledged that his trust in Mr. Lewis may have been misplaced:

> … I have to say that I probably had – well not probably, it is clear that I did not – I trusted this individual [Mr. Lewis] more that I should have … I did not do the work as I should have on my own.[23]

Ultimately, Mr. Rowe realized that, although he had trusted Mr. Lewis "with all [his] heart," he had been "misled."[24] During his oral testimony, Mr. Rowe did not

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20 A taxpayer's education and apparent intelligence are one of the factors to be considered in drawing the line between ordinary negligence and gross negligence; see *DeCosta v The Queen*, 2005 TCC 545, ¶11.

21 Mr. Rowe's objections in respect of the reassessments concerning his donations to the Charity are apparently still before the Appeals Division of the CRA; *Transcript*, page 23, lines 23-25; and page 24, lines 6-10.

22 *Transcript*, page 12, lines 10-21.

23 *Transcript*, page 13, lines 16-21. See also Exhibit A-1, being a letter dated March 17, 2012 from Mr. Rowe to the Appeals Division of the CRA. On page 2 of that letter, Mr. Rowe stated, "Quite frankly, I did not investigate this as much as I did the tax shelter program because the individual who introduced me to Fiscal Arbitration is someone I trusted immensely." Placing blind faith and trust in a tax adviser or tax preparer may lead to adverse consequences; see footnote 60 below.

24 *Transcript*, page 56, lines 7-8 & 27-28. These statements were made by Mr. Rowe during his oral argument.

give any indication of his having harbored doubts or suspicions about the preparation and filing of his 2009 income tax return. However, a need for an inquiry can be inferred if there are warning signs or "flashing red lights." I will now consider whether there were any such warning signs.

(3) Warning Signs

(a) Magnitude of the Advantage

[21] The amount of the net business loss claimed by Mr. Rowe in his 2009 income tax return was $274,576.54, large enough to result in a refund of all tax withheld at source for 2009 and to create potential refunds of all tax paid by Mr. Rowe in 2006, 2007 and 2008.

[22] In *Chénard*, Bédard J considered an appeal by a taxpayer who engaged Fiscal Arbitrators to file adjustment requests for eight previous taxation years, so as to report net business losses in amounts sufficient to give rise to tax refunds for each of those years. Bédard J made the following comment about the magnitude of the claimed losses:

> These losses would have allowed the appellant to receive a full refund of all the income taxes paid over the course of the years in question.… In this case, the magnitude of the reported business losses is an overwhelming factor because, even with little formal education and even without understanding our tax system, a reasonable person could have easily questioned the legitimacy of these losses.[25]

A similar comment could be made about Mr. Rowe and the magnitude of the losses claimed by him.

(b) Blatantness and Detectability of False Statement

[23] Page 2 of Mr. Rowe's 2009 income tax return contained seven entries; the rest of the lines were left blank. Those entries, with the applicable line numbers, are as follows:

Line	Description	Amount ($)

[25] *Chénard v The Queen*, 2012 TCC 211, ¶21. The magnitude of a taxpayer's misrepresentation in relation to the income declared is one of the factors to be considered in drawing the line between ordinary negligence and gross negligence; see *DeCosta, supra* note 20, ¶11.

101	Employment income	3,273.60
104	Other employment income	3,031.94
119	Employment insurance benefits	14,751.00
129	RRSP income	5,000.00
162	Gross business income	30,746.72
135	Net business income	−274,576.54
150	Total income	−248,520.00

The above seven entries are spread out on page 2 of the return, such that each amount is readily visible and discernable. Mr. Rowe knew that he did not carry on a business in 2009,[26] so the entries on page 2 of the return showing gross business income and a net business loss would have been glaring and patently obvious. Similarly, the two-page Statement of Business or Professional Activities (containing the entries "RECEIPTS AS AGENT" and "AMT TO PRINCIPAL FR AGENT"), which was filed with the return, would have been conspicuous and readily noticeable. Accordingly, the false statements in Mr. Rowe's 2009 income tax return were blatant and readily detectable.[27]

(c) Tax Preparer Acknowledgment

[24] Box 490 on the signature page of Mr. Rowe's 2009 income tax return contains spaces for the name, address and telephone number of the professional tax preparer who prepared the return. That information was not provided by Mr. Lewis or by Fiscal Arbitrators.[28] Box 490 appears immediately to the right of the line where Mr. Rowe signed the return. As indicated by Miller J in *Torres,* "It is difficult not to see it [Box 490]".[29] Thus, Mr. Rowe would likely have noticed that the tax preparer's name and contact information were not provided. Although this

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26 *Transcript*, page 29, lines 15-17; and page 36, lines 3-4.

27 In considering this warning sign, I consulted a dictionary to better understand the meaning of the word "blatant". *The Canadian Oxford Compact Dictionary* (Don Mills: Oxford University Press, 2002):
(a) at page 93, defines "blatant" as meaning (among other things) "flagrant";
(b) at page 364, defines "flagrant" as meaning (among other things) "glaring"; and
(c) at page 411, defines "glaring" as meaning (among other things) "obvious, conspicuous (*a glaring error*)."
A taxpayer's opportunity to detect an error in his or her income tax return is one of the factors to be considered in drawing the line between ordinary negligence and gross negligence; see *DeCosta*, *supra* note 20, ¶11.

28 Exhibit R-1, page 28. See also *Transcript*, page 34, line 22 to page 35, line 7.

29 *Torres*, *supra* note 14, ¶69(c).

may have been a minor point, combined with the other warning signs, it should have raised suspicion.[30]

(d) Unusual Requests by Tax Preparer

[25] Before Mr. Rowe was given his 2009 income tax return to sign, someone had written the word "Per" on the signature line immediately to the left of the space where Mr. Rowe was to sign.[31] This practice was described by Miller J as an "odd request."[32] Mr. Rowe explained, during his cross-examination, that he understood that the word "Per" indicated the place where he was to sign.[33] Thus, the use of the word "Per" did not seem to raise any questions or suspicion on the part of Mr. Rowe, or, from his perspective, create a need for an inquiry.

(e) Previously Unknown Tax Preparer

[26] Mr. Rowe engaged Mr. Lewis, a long-time and trusted friend, a "church brother" and a tax preparer, to prepare his 2009 income tax return.[34] However, notwithstanding that Mr. Lewis was well known to Mr. Rowe, 2009 was the first taxation year for which Mr. Lewis was engaged to prepare the return (as Mr. Rowe had previously prepared his own returns).[35] Furthermore, as it turned out (and at the time unbeknown to Mr. Rowe), the return was actually prepared by a representative of Fiscal Arbitrators and not by Mr. Lewis.[36] Before Mr. Lewis spoke to Mr. Rowe about Fiscal Arbitrators, Mr. Rowe was not aware of the organization, nor had he attended any of its meetings or met any of its representatives.[37] Given that Mr. Rowe had no knowledge of, and no prior involvement with, Fiscal Arbitrators, further investigation was warranted, as he has acknowledged.[38]

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30 *Ibid.*

31 Exhibit R-1, page 28; and *Transcript*, page 33, line 26 to page 34, line 21.

32 *Torres*, *supra* note 14, ¶69(d).

33 *Transcript*, page 34, lines 11-12 & 20-21. It seems that Mr. Rowe viewed the word "Per" as a "Sign Here" stickie.

34 *Transcript*, page 10, lines 24-25; page 11, line 11 to page 12, line 1; and page 21, line 7 to page 22, line 1.

35 *Transcript*, page 21, lines 12-17.

36 *Transcript*, page 12, lines 23-26; and page 42, line 25 to page 43, line1.

37 *Transcript*, page 12, lines 22-24; and page 27, lines 11-16.

38 Mr. Rowe's recognition of the need for further investigation is discussed in paragraph 39 below.

(f) Incomprehensible Explanation by Tax Preparer

[27] In certain other cases decided by this Court, some taxpayers whose income tax returns were prepared by Fiscal Arbitrators were provided with incomprehensible explanations for the large tax refunds that they claimed. For instance, some were told that their social insurance number was a separate entity that could somehow incur expenses that would be deductible by them (as fictional entities),[39] while others were told that they were the principal of their own agency and that they were engaged in the business of "agency."[40] It appears that Mr. Lewis explained Mr. Rowe's anticipated refunds in different terms, as seen from the following excerpt from Mr. Rowe's cross-examination:

> Q. So is your understanding that you would clear your past tax debt with only the 2009 tax filing?
>
> A. It's not just that. I understand also that there's a little bit of – there are – this is how it was placed to me that, you know, there are tax laws that the normal citizen is just not aware of. At certain – at certain income levels it is beneficial to you while it might not be beneficial to someone else.
>
> So Mr. Lewis mentioned to me that because of the taxes that I have paid in previous years, I will be able to refile my taxes. I should be able to see some refund, but yes, it will indeed clear the previous reassessments that are done on those donation programs.
>
> Q. And again, he didn't tell you the mechanism or the statute – ?
>
> A. No. I was not aware of how – what process would be used, how it will be done….[41]
>
> Q. Did you ask Mr. Lewis for an explanation?
>
> A. Of?
>
> Q. Of how you would be entitled to these monies?
>
> A. I mentioned to you that when Mr. Lewis spoke to me, he mentioned that I – because of the previous tax returns, the previous income tax level that I

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39 *Torres*, *supra* note 14, ¶69(f).

40 *Tomlinson*, *supra* note 16, ¶8.

41 *Transcript*, page 42, lines 8-25.

> paid, they can go and refile for – for those – portions of those taxes that I paid for previous years.[42]

While the explanation provided by Mr. Lewis did not contain the same "nonsense [and] gobbledygook"[43] that is sometimes seen in other Fiscal Arbitrators cases, it nevertheless did not clearly explain how a taxpayer, merely because of having earned income and having paid taxes at particular levels in previous years, could be entitled to a refund of those taxes.[44]

(g) Conduct of Others, Warnings or Concerns

[28] There was no evidence to suggest that Mr. Rowe was aware of anyone who declined to engage Fiscal Arbitrators, that he was warned against doing so himself, or that he was fearful of telling others about Fiscal Arbitrators. During his oral submissions, counsel for the Crown acknowledged that this particular warning sign is not applicable in this Appeal.[45]

(h) Previous Experience with Tax Adviser

[29] It was Mr. Lewis who suggested to Mr. Rowe in 2004 that the latter contribute to the Charity. Mr. Rowe waited a year, while he investigated the Charity, and then contributed to it in 2005, 2006 and 2008. Subsequently, the CRA reassessed Mr. Rowe and disallowed the tax credit that he had claimed in respect of those donations. As it was Mr. Lewis who suggested both the questionable donation program and the Fiscal Arbitrators program to Mr. Rowe, one would have expected Mr. Rowe to wonder whether the Fiscal Arbitrators program was similarly suspect. It appears that Mr. Rowe failed to see this warning sign, as he trusted Mr. Lewis to involve him in another program, even though it had been Mr. Lewis who had introduced to him to the donation program that was ultimately challenged by the CRA.[46]

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42 *Transcript*, page 43, lines 2-11.

43 *Sam v The Queen*, 2016 TCC 98, page 7.

44 There was no suggestion by Mr. Lewis that Mr. Rowe's income was so modest as to be at the bottom of the lowest income tax bracket, such that his personal credits would offset any income tax that might otherwise be payable; nor was this a situation where excess source deductions were withheld throughout a taxation year and then refunded upon filing an income tax return for the year.

45 *Transcript*, page 62, lines 24-26.

46 *Transcript*, page 38, lines 23-26; and page 81, lines 4-22.

[30] While this was not one of the warning signs identified by Miller J in *Torres*, it is, in the circumstances of this case, a relevant warning sign.

(4) Inquiry to Understand Tax Return

[31] During his cross-examination, Mr. Rowe acknowledged that he did not ask Mr. Lewis to explain any of the amounts set out on page 2 of the 2009 income tax return, nor did Mr. Rowe ask anyone else any questions in order to obtain a better understanding of that which he was claiming in the tax return.[47]

[32] It is my impression that in 2009 and early 2010 (when the 2009 income tax return was prepared), Mr. Rowe was particularly concerned about the reassessments that had been issued to him in respect of the donations that he had made to the Charity in 2005, 2006 and 2008. His recollection is that the aggregate amount of tax owed by him due to the disallowed donations was in the range of $40,000 to $50,000. When Mr. Lewis suggested that, if the Fiscal Arbitrators program were to be used for 2009, the liability from the reassessments for the previous years would be cleared, Mr. Rowe readily agreed to let Mr. Lewis proceed as proposed, without insisting on a full explanation of the contents of his 2009 income tax return.[48]

(5) Summary

[33] The application of the *Torres* principles to the circumstances of Mr. Rowe's Appeal may be summarized as follows:

a) *Education and Experience*: There was no lack of education, professional training or work experience that contributed to the making of the false statements by Mr. Rowe in his 2009 income tax return.

b) *Suspicion or Need for an Inquiry*: Mr. Rowe trusted Mr. Lewis and appeared to accept without question the latter's suggestion that the Fiscal Arbitrators program be used to prepare Mr. Rowe's 2009 income tax return. Mr. Rowe

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47 *Transcript*, page 36, lines 18-23.

48 *Transcript*, page 37, line 8 to page 38, line 26.

did not acknowledge having any specific suspicion, but he did concede that he should have investigated Mr. Lewis' proposal.[49]

c) <u>*Warning Signs*</u>: Some of the warning signs identified in the jurisprudence were not present or applicable in this Appeal. In particular:

i. the insertion of the word "Per" on the signature line of Mr. Rowe's 2009 income tax return appears to have been innocuous in this situation; and

ii. there was nothing in the conduct of, nor were there warnings from, Mr. Rowe's associates to put him on his guard, and he expressed no concern about Fiscal Arbitrators to any of his associates.

However, several warnings signs were present:

i. *Magnitude of the Advantage*: The amount of the net business loss claimed by Mr. Rowe was approximately nine times greater than the amount of the gross business income reported (incorrectly) by him and approximately ten times greater than the aggregate of the actual income (employment, EI benefits and RRSP income) reported by him in his 2009 income tax return. If the net business loss had been allowed, it would have eliminated any tax liability for 2009 and resulted in refunds of all of the tax paid by Mr. Rowe in 2006, 2007 and 2008.

ii. *Blatantness and Detectability of False Statement*: Page 2 of Mr. Rowe's 2009 income tax return contained only seven entries, such that even a cursory glance at that page would have disclosed the gross business income and net business loss that were falsely reported thereon. Merely by leafing through his return, Mr. Rowe would have seen the two-page Statement of Business or Professional Activities, which would have struck him as odd, given that he did not carry on a business in 2009.

iii. *Tax Preparer Acknowledgement*: The empty box for the name, address and telephone number of the person who prepared

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[49] Mr. Rowe's recognition of the need for further investigation is discussed in paragraph 39 below.

Mr. Rowe's 2009 income tax return would have been readily visible when Mr. Rowe signed the return immediately to the left of that box.

iv. *Previously Unknown Tax Preparer*: Mr. Rowe understood that Mr. Lewis, a long-time and trusted friend, would prepare the 2009 income tax return. However, Mr. Lewis advised Mr. Rowe that he would be filing the return in accordance with the "Fiscal Arbitration program" (as Mr. Rowe called it).[50] As this was a new program, with which Mr. Rowe was not familiar, an inquiry was warranted, as Mr. Rowe acknowledged but did not do.[51]

v. *Incomprehensible Explanation by Tax Preparer*: While the explanation provided by Mr. Lewis to Mr. Rowe of the basis for the anticipated tax refunds was not as incomprehensible as some explanations that have been given in other cases, it still made little, if any, sense. In essence, Mr. Lewis suggested that, for no other reason than Mr. Rowe's income level and tax level, he owed no tax for the current year and was entitled to a refund of all the taxes paid in the previous three years.

vi. *Previous Experience with Tax Adviser*: Mr. Lewis was the tax adviser who introduced Mr. Rowe to the charitable donation program to which the latter contributed in 2005, 2006 and 2008. Those donations had been disallowed by the CRA before Mr. Lewis spoke to Mr. Rowe about Fiscal Arbitrators. The fact that it was Mr. Lewis who introduced Mr. Rowe to the questionable donation program should have suggested that perhaps the Fiscal Arbitrators program was also questionable.

By reason of the above factors, there were enough warning signs that an inquiry by Mr. Rowe was warranted.

d) *Inquiry to Understand Tax Return*: **As** Mr. Rowe was outside Canada when his 2009 income tax return was prepared, and perhaps because he was overly anxious to obtain tax refunds for previous years to offset the disallowed charitable donations, he did not inquire about the entries in his 2009 income tax return and he made no inquiries about Fiscal Arbitrators.

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50 *Transcript*, page 12, line 21; see also page 11, line 23.

51 *Transcript*, page 12, lines 17-21; page 13, lines 20-21. See also paragraph 39 below.

Accordingly, after having considered the factors set out above, I am of the view that Mr. Rowe was wilfully blind when he signed his 2009 income tax return, in which he reported gross business income in the amount of $30,746.72 and a net business loss in the amount of $274,576.54.

[34] Three of the *Torres* factors discussed above (i.e., education/experience, magnitude and detectability) are also, according to *DeCosta*, factors to be considered in drawing the line between ordinary negligence and gross negligence.[52] Accordingly, in the context of this Appeal, those factors provide additional support for a finding of gross negligence.

F. Indifference Concerning Compliance

[35] As noted above, *Venne* indicated that gross negligence may arise where there is an indifference as to whether the law is complied with or not.[53] The interrelated concepts of gross negligence and indifference concerning compliance with the law were discussed by Hershfield J in *Sidhu*, a case dealing with the capital gains deduction, in which he made the following comments in the context of paragraph 110.6(6)(*a*) of the *ITA*, which precludes such a deduction where an individual "knowingly or under circumstances amounting to gross negligence" fails to file a tax return or fails to report a capital gain:

> The Appellant relies on the decision in *Venne* … and argues that the bar for finding gross negligence has been raised to require a finding of a high degree of negligence tantamount to intentional acting. While some support may be found to argue otherwise, the decision in *Venne* does not raise the bar to require the Minister to establish actual intent to deceive or willful misconduct. If that were the test, the subject provision of the [*ITA*] need only have referred to "knowingly" failing to report a gain. Actions "tantamount" to intentional actions are actions from which an imputed intention can be found such as actions demonstrating "an indifference as to whether the law is complied with or not"…. The burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes. The burden is to prove on a balance of probability such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense.[54]

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52 *DeCosta*, *supra* note 20, ¶11. For brief comments about those factors, see footnotes 20, 25 and 27 above.

53 *Venne*, *supra* note 15.

54 *Sidhu*, *supra* note 18, ¶23. See also *Guindon v The Queen*, 2015 SCC 41, ¶60, where the Supreme Court of Canada indicated "that 'an indifference as to whether the law is complied with' … is akin to burying one's head in the sand."

(1) Illustration of Indifference

[36] On March 17, 2012, Mr. Rowe sent a letter to the Appeals Division of the CRA, in which he provided certain background information and made various submissions.[55] After summarizing the donations that he had made to the Charity in 2005, 2006 and 2008, Mr. Rowe stated the following:

> As you may be aware, CRA reassessed all these tax shelter programs and as a result I was suddenly liable for large sums to Revenue Canada. In the midst of this, I lost my job in January 2009 and as a result I tried to find gainful employment and became unsuccessful for over a year as I was unable to find a permanent position. I then proceeded to ask a tax preparer to see how they could help with these three years of tax shelter program liabilities. I was then introduced to what is called "Fiscal Arbitrattion". It was explained to me quite genuinely that I am able to re-file my prior tax returns (up to eight years) and legally request most, if not all the income taxes that was paid in those years. Quite frankly, I did not investigate this as much as I did the tax shelter program because the individual who introduced me to Fiscal Arbitration is someone I trusted immensely. He is also quite an experienced tax preparer and is not known to me as individuals who would get involved in any questionable activities. Needless, to say I participated based on the advised. I felt also that I had nothing to lose since this was not an illegal activity (this was what I thought at the time).[56]

During Mr. Rowe's testimony, he indicated that it was Mr. Lewis who approached him about Fiscal Arbitrators. The above excerpt from Mr. Rowe's letter to the CRA indicates that, before Mr. Lewis said anything about Fiscal Arbitrators, Mr. Rowe approached Mr. Lewis to see if there was some way of dealing with the tax liabilities that had arisen by reason of the disallowed charitable donations.

[37] Mr. Rowe's statement in the above letter, to the effect that he had nothing to lose by participating in the Fiscal Arbitrators program, may suggest a nonchalant or cavalier attitude toward compliance with the *ITA*,[57] or at least a less-than-cautious regard as to whether the *ITA* was complied with or not.

[38] Mr. Rowe was asked, during his cross-examination, about his understanding of the gross business income in the amount of $30,746 that he had reported on line 162 of his 2009 income tax return. Mr. Rowe indicated that he had no understanding of that item, as he did not see it at the time of signing the return.[58]

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55 Exhibit A-1.

56 Exhibit A-1, page 2. See *Transcript*, page 80, line 26 to page 81, line 25.

57 See *DeCosta, supra* note 20, ¶12.

58 *Transcript*, page 35, lines 8-12.

Mr. Rowe also acknowledged that he did not review the first page of the two-page Request for Loss Carryback before signing at the bottom of the second page.[59] In my view, placing undue trust in a tax preparer or tax adviser, to the extent of signing a tax return or a tax form without reviewing it and being aware of its contents, demonstrates an indifference as to whether the *ITA* is complied with or not.[60]

(2) Acknowledgments by Mr. Rowe

[39] At the hearing Mr. Rowe was contrite, forthright and well aware that he should have conducted some due diligence in respect of Fiscal Arbitrators before authorizing Mr. Lewis to use the Fiscal Arbitrators program in preparing the 2009 income tax return. On several occasions during the hearing, Mr. Rowe acknowledged that he did not do all that he should have done in order to verify the contents of his 2009 income tax return. During his direct examination, he stated:

> … I did not do in-depth research of the text, of the procedure he [i.e., Mr. Lewis] had used for this, for the filing of my 2009 tax return. I trusted him and I felt that he had done the research necessary….
>
> … I felt that I could trust him to go ahead and do what needed to be done because I was not at the time here in Canada or able to do the research that I would have normally done on a tax program like – not a tax program, but on the Fiscal Arbitration program….[61]
>
> … I have to say that I probably had – well not probably, it is clear that I did not – I trusted this individual more than I should have, and I've allowed him to take care of a lot of my – the tax issues that related to these two issues, and I did not do the work as I should have on my own.[62]

During Mr. Rowe's cross-examination, the following exchanges occurred:

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59 *Transcript*, page 41, lines 20-25. See Exhibit R-2.

60 In *Lauzon*, *supra* note 14, (TCC) ¶34, Masse J stated that "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 returns. Quite apart from wilful blindness, taxpayers who take no steps whatsoever to verify the completeness and accuracy of the information contained in their returns may thereby face penalties for gross negligence." See also *Chartrand v The Queen*, 2015 TCC 298, ¶40-47.

61 *Transcript*, page 12, lines 10-13 & 17-21.

62 *Transcript*, page 13, lines 16-21.

Q. … what was the mechanism for you to get a portion of your taxes back each year?

A. Because there is an Income Tax Act law that allows that, that's what – that's what I was told. And I'm going to be frank with you. I probably should have checked to ensure, but I did not. I believed Mr. Lewis….[63]

Q. Did you ask Mr. Lewis for an explanation?...

A. … I probably should have gone into more detail [about my 2009 income tax return], but at the time I guess I did not. I trusted Mr. Lewis and I went with his suggestion. You could call me a fool for that (inaudible), but maybe I should have asked more questions.

I'm just – I'm just telling you the truth. I did not. I did not get into the details as I should have; and at this point I regret I didn't question it….[64]

Q. Is it your position that you took reasonable steps to ensure that your income taxes payable were accurately reported in your 2009 return?

A. I don't think I did it. Now I don't think I did.[65]

During his oral argument, Mr. Rowe stated the following:

… as an individual, I believe that I may have made some error by not doing a thorough assessment as I should have. I honestly did not understand the process to be what it has turned out to be. I do not believe the penalty that was levied for myself really is a true amount to – to place guilt on me, so to speak. I believe this is far beyond what it should be in my case.

I don't want to sit here and don't take any responsibility. I may be an unusual witness or an unusual appellant in this case, but I'm just – I'm a fair and honest individual. I've always been all my life, and now that I look back, I should have, I really should have done more to make sure that I am – that my tax return has been done according to the law….[66]

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63 *Transcript*, page 27, lines 18-24.

64 *Transcript*, page 43, lines 2-3 & 12-19.

65 *Transcript*, page 46, line 27 to page 47, line 3.

66 *Transcript*, page 54, line 20 to page 55, line 5. Notwithstanding Mr. Rowe's reference to guilt in the above excerpt from his oral argument, there was no suggestion that Mr. Rowe had made a false statement of the type or in the circumstances contemplated by subsection 239(1) of the *ITA*. To my knowledge, Mr. Rowe has not been charged with an offence; therefore, the question of guilt is irrelevant in the proceedings before me.

> I wish I had done what I was supposed to have done.[67]

By indicating that he "really should have done more to make sure" that his tax return was "done according to the law," Mr. Rowe was, in a sense, acknowledging that, when he signed and filed his 2009 income tax return, he was indifferent as to whether the law (i.e., the *ITA*) was complied with or not.

V. CONCLUSION

[40] While I accept that Mr. Rowe did not knowingly make false statements in his 2009 income tax return, I find that, in addition to turning a blind eye to the warning signs that were there to be seen, he was indifferent as to whether the *ITA* was complied with or not. Accordingly, I have concluded that Mr. Rowe, under circumstances amounting to gross negligence, made false statements in his 2009 income tax return. Therefore, this Appeal is dismissed.

[41] I anticipate that the penalty that is the subject of this Appeal will likely have a devastating effect on Mr. Rowe.[68] For that reason, as well as others (including Mr. Rowe's forthrightness, contrition, acceptance of responsibility and demeanor on the witness stand and in his oral submissions),[69] I am not awarding costs against him.[70]

Signed at Ottawa, Canada, this 23rd day of June, 2017.

"Don R. Sommerfeldt"

Sommerfeldt J.

Furthermore, this Court has no jurisdiction to deal with offences under section 239 of the *ITA*.

67 *Transcript*, page 56, lines 4-5.

68 See *Torres, supra* note 14, ¶78.

69 Mr. Rowe's conduct was conducive to the prompt and effective resolution of this Appeal. See paragraph 147(3)(*g*) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*").

70 Like Miller J in *Torres, supra* note 14, ¶78, I am not making any representation as to how I will exercise my discretion under subsection 147(1) of the *Rules* in future cases involving taxpayers who used the services of Fiscal Arbitrators.

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