Docket: 2012-2383(IT)G

BETWEEN:

JONATHAN PECK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 26, 2018, at Hamilton, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Craig Burley
Counsel for the Respondent:	Dominique Gallant

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessment made under the *Income Tax Act* for the 2009 taxation year, by notice dated July 8, 2011, is dismissed with costs to the Respondent in accordance with the Tariff.

Signed at Ottawa, Canada, this 12th day of March 2018.

"J.R. Owen"

Owen J.

Citation: 2018 TCC 52
Date: 20180312
Docket: 2012-2383(IT)G

BETWEEN:

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Appellant,

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REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] This is an appeal by Jonathan Peck (the "Appellant") of the reassessment by the Minister of National Revenue (the "Minister") of his 2009 taxation year by a notice dated July 8, 2011 (the "Reassessment").

[2] By the Reassessment, the Minister denied a loss from a business of $342,682.13 (the "Loss") reported by the Appellant in his T1 income tax return for his 2009 taxation year (the "Return")[1] and assessed the Appellant a penalty in the amount of $52,852.98 (the "Penalty") under subsection 163(2) of the *Income Tax Act* (the "ITA").

[3] The Appellant also filed a "Request for Loss Carryback" (the "Request") requesting that $244,137 (the "Non-capital Loss"), being the amount of the Loss remaining after applying the Loss to reduce his 2009 income to nil, be carried back to his 2008, 2007 and 2006 taxation years, but the request was denied by the Minister.[2]

[1]Exhibit R-1 is a copy of the Return signed by the Appellant.

[2]A copy of the Request signed by the Appellant is included in Exhibit R-1.

[4] The Appellant was represented by counsel and testified on his own behalf. The Respondent did not call any witnesses. At the request of both counsel, I allowed the Appellant to be examined first in chief by his own counsel. The Respondent went first in argument.

II. The Facts

[5] The Appellant, who is 50 years old, graduated from high school and completed a five-month college course to obtain a certificate as a lab technician. The Appellant does not have any background in finance, accounting or tax matters.

[6] The Appellant has been employed in the assembly plant of an automotive manufacturer since 1997. At the relevant time he had been a team leader in the body repair area of the assembly plant since 1999. The Appellant addresses day-to-day work-related issues of the team that works under him, and he provides some training. The Appellant does not make management-level decisions regarding the members of his team.

[7] In late 2008, the Appellant and his spouse acquired a bungalow as a residential rental property. The Appellant's spouse found the property and they purchased it together through a realtor. On December 22, 2008, the Appellant and his spouse entered into a tenancy agreement (Exhibit A-1) with an arm's length thirdparty under which they rented the bungalow for $1,375 per month ($16,500 per year), commencing on the date of the agreement.

[8] The Appellant testified that in early 2010 the tenant started to pay only part of the rent that was due under the tenancy agreement and that by May 2010 the tenant had ceased paying rent altogether.

[9] On August 17, 2010, the Appellant took formal steps to evict the tenant, which included serving the tenant with a Notice To End a Tenancy Early For Non-payment of Rent and filing a Certificate of Service with the Landlord and Tenant Board.[3] The Notice states that the tenant owes total rent of $2,750, or $1,375 for each of the periods ending July 22, 2010 and August 22, 2010.

[10] The tenant was involved in illegal activity and was under investigation in 2010. At some point, the Appellant's spouse reported to the Appellant that she had

[3]The Notice and the Certificate are Exhibit A-3.

seen two individuals rifling through their garbage at their home. Later the two immigration officials visited their home and explained that they were investigating the tenant and others for illegal activities and had needed to determine whether the Appellant was involved. The Appellant could not recall the timeframe of these events.

[11] Around the time that the Appellant says he started to have issues with his tenant, he was approached at his place of employment by an individual known to the Appellant (SM) who worked in a different area of the plant. SM suggested to the Appellant that, given that he now owned a rental property, it might be a good idea to use a group called Fiscal Arbitrators (FA) to prepare his income tax return. SM followed up with the Appellant on several occasions. The Appellant did not know if FA paid SM a commission for new clients.

[12] The Appellant understood that SM gave guitar lessons and had used FA to prepare his tax return, with favourable results. SM mentioned the carry-back of losses to the Appellant, but the Appellant testified that he did not know what that was. SM showed the Appellant a refund cheque even though he had not asked to see the cheque.

[13] The Appellant testified that other co-workers said that they had used FA, that it was a topic of conversation around the workplace and that no one he spoke to at work said he/she would not use FA.

[14] The Appellant believed that FA were legitimate tax preparers like any other and that FA could obtain a better tax result for him if they prepared his income tax return. The Appellant relied on FA to prepare his income tax return correctly.

[15] The Appellant communicated with FA by e-mail or mail, did not attend at an office of FA and did not attend any seminar held by FA. The Appellant testified that he did not see FA's nonsensical explanation for the extraordinary tax result claimed in the Return until he was provided with materials to submit to the Canada Revenue Agency ("CRA") following a request for information by the CRA. The Appellant submitted these materials without questioning them.

[16] The Appellant mailed to FA all his tax information for 2009, including the tenancy agreement and the bills relating to the rental property.

[17] The Appellant subsequently received a tax return package from FA (the "package").[4] The package included a cover letter, a page showing the expected tax refunds and the amount of the fee charged by FA, a page showing the diagnostic messages produced by the tax preparation software, and the Return, which included (i) a Statement of Real Estate Rentals (T776), (ii) a Statement of Business or Professional Activities (T2125), (iii) a Statement of Agent Activities and (iv) a request to carry back the Non-capital Loss to the Appellant's 2006, 2007 and 2008 taxation years (the aforementioned "Request").

[18] The following is an image of the cover letter included with the package:

April 12, 2010

JONATHAN PECK
118 RYMAL RD WEST
HAMILTON ON L9B 1B8

Dear JONATHAN PECK,

Please find enclosed two copies of your 2009 income tax return, as well as all supporting documentation and schedules. The original should be submitted to the Canada Revenue Agency and the second copy is for your records.

The following form(s) should be signed and sent to the CRA:

- T1 Jacket - Income Tax and Benefit Return
- T1A - Request for Loss Carryback

You are entitled to a refund of $19,271.52.

Your return has been prepared based on the information you provided. Please review it carefully to ensure that it is both accurate and complete.

It has been a pleasure to welcome you to the tax services offered by and to assist you in filing your 2009 income tax return. If you have any questions or concerns relating to your return, the firm, or any other service that we may be able to provide, kindly contact the undersigned at

Yours truly,

[19] The cover letter was unsigned, had words missing in the last paragraph, did not mention FA and did not indicate who prepared the package or who was sending the package to the Appellant. The Appellant recalled reading that he would

[4]The package is Exhibit A-4.

receive a refund of $19,271.52 but he said he did not notice any issues with the cover letter.

[20] The following is an image of the second page of the package:

JONATHAN PECK
Tax Summary
Estimated Tax Refund or Saving

Year	Amount
2009	$ 19,271.52
2008	$ 23,816.26
2007	$ 19,481.66
2006	$ 21,995.73
Total	$84,565.17
Fee Due	**$16,913.03** *
Net Amount	$67,652.14

$16,413.03 Due when ANY refunds/Assessments Received AND AS RECEIVED
Please note that the payments may come in 2 or more installments and the fee for each installment is due immediately upon ANY refund or assessment.

[21] The amount of the fee charged by FA was 20% of the total tax refund of $84,565.17. The tax refunds indicated for 2009, 2008, 2007 and 2006 were equal to all the income tax paid by the Appellant for those taxation years.

[22] The Appellant did not recall the details of the fee arrangement with FA, but he believed he had to pay $500 up front and a percentage of the tax refund he received. The Appellant had used other tax preparers and those tax preparers charged a flat fee unless they were also providing an advance of his tax refund.

[23] The third page of the package was a printout of the diagnostic messages provided by the tax return preparation software. The messages included alerts and errors in plain English. The following is an image of the alerts and errors with the Appellant's social insurance number redacted:

Name: PECK,JONATHAN SIN: [Redacted]

Diagnostic Messages:

Alert:
127 - Taxpayer is not claiming the GST/HST Tax Credit.
154 - If the taxpayer is a Canadian citizen, answer the questions regarding the Canadian citizenship and the permission to give information to Elections Canada on the T1-1 screen.
262 - Standard Industry Code missing.

Error Finder:
445 - Taxpayer's phone number missing. Please verify.
1022 - T2125 - Postal code is missing.
1023 - T2125 - Address missing.
1024 - T2125 - City, province, or territory missing.
1025 - T2125 - Name of business missing.

[24] The fourth page of the package is titled "2009 Tax Return Summary" (the "Summary"). The following is an image of the portion of the Summary that follows the box at the top of the page which contains the Appellant's personal information:

Total income

Employment income					101	76,945 | 13	
Rental income	Gross	160	21,600 | 00	Net	126	21,600 | 00	
Business income	Gross	162	116,283 | 25	Net	135	-342,682 | 13	
						Total income 150	-244,137 | 00

Net income

Pension adjustment	206	7,993 | 00	
		Net income 236	<NIL>

Taxable income

	Taxable income 260	<NIL>

Federal non-refundable tax credits

Basic personal amount	300	10,320 | 00	
CPP or QPP contributions through employment	308	2,118 | 60	
Employment Insurance premiums	312	731 | 79	
Canada employment amount	363	1,044 | 00	
Total federal non-refundable credits	335	14,214 | 39	
Multiply the amount on line 335 by 15% =	338		2,132 | 16
Total federal non-refundable tax credits	350		2,132 | 16

Refund or Balance owing

Federal tax	406	<NIL>
Net federal tax	420	<NIL>
Total payable	435	<NIL>

Total income tax deducted	437	18,346 | 52	
Working Income Tax Benefit (WITB)	453	925 | 00	
Total credits	482	19,271 | 52	19,271 | 52
Line 435 minus line 482			-19,271 | 52
Refund	484		19,271 | 52

[25] The Summary showed gross and net rental income of $21,600 and gross and net business income of $116,283.25 and ($342,682.13). The gross rental income exceeded the annual rent charged under the tenancy agreement by $5,100.

[26] The Return followed the Summary. The Return included the T2125, the T776, the Request and the Statement of Agent Activities. The box on the signature page

of the Return for the name, address and telephone number of the tax preparer was blank.

[27] The Appellant testified that the package had yellow tabs showing where he had to sign. The Appellant flipped through the pages to get to the tabs and signed where indicated, but he did not otherwise review the documents.

[28] The Appellant did not notice the deficiencies in the cover letter, the incorrect amount of rental income shown on the Summary and the T776, the absence of expenses for the rental property on the Summary and the T776, the income and loss from a business shown on the Summary and the T2125 or the failure to identify a tax preparer in the box next to the signature line of the Return.

[29] The Appellant could not recall whether he had noticed the total fee payable to FA or the percentage of the total tax refund that the fee represented. The Appellant testified that he recalled the $19,271.52 tax refund for 2009 but he did not recall the refunds for the 2008, 2007 and 2006 taxation years stated on the second page of the package.

[30] The Statement of Agent Activities was included in the Return immediately before the T2125. The following is an image of the Statement of Agent Activities with the Appellant’s social insurance number redacted:

STATEMENT OF AGENT ACTIVITIES

For: JONATHAN PECK

Social Insurance Number: [REDACTED]

From To

Period: 2009-01-01 2009-12-31

Business Name: **JONATHAN PECK**

Business (Social Insurance) Number: [REDACTED]

Business Service: **Agent**

Gross Receipts:

**Money Collected as Agent for Principal and reported by third parties*

A.	ıd/or Already Posted on lines 101-130 via **T4's, T5's, T3's, Other slips, etc.**	$	98,545.13
	*T4a's and other money reported by 3rd parties and collected as agent	$	-
	***TOTAL Money Collected as Agent for Principal and reported by third parties:**	**$**	**98,545.13**
***Additional**	***Money Collected as Agent for Principal and NOT reported by third parties:***	$	17,738.12
B.	Line 162 ***RECEIPTS AS AGENT***	**$**	**116,283.25**
	Minus:		
	Sub contracts and labour		
	AMT TO PRINCIPAL FR AGENT	**$**	**458,965.38**
	Gross Profit		($342,682.13)
	Subtract: (from ' A.' above)		
		$	-
C.	Line 135 Net Amount (- Loss)		**($342,682.13)**

[31] The Appellant testified that he signed and filed the Return and the Request. The copy of the signed Return entered into evidence by the Respondent does not include the Statement of Agent Activities.

[32] The T2125 included with the signed Return and with the package states that the main product or service is “agent”. Lines 8230 and 9270 of the T2125 show other income of $116,283.25 and other expenses of $458,965.38 respectively. The description of the other income is “RECEIPTS AS AGENT” and the description of the other expenses is “AMT TO PRINCIPAL FR AGENT”.

[33] The signed copies of the Return and the Request have the word *per* handwritten before the Appellant’s signature. The Appellant testified that he did

not write *per* when he signed the Return and the Request. The Appellant says he does not know who added the word *per* to the signature lines.

[34] The Appellant testified that he understood that the purchase of the rental property was his business, but he did not notice that the Summary, the T2125 and the T776 reported both rental income and business income from an activity described as "agent". The Appellant testified that he did not know what the reference to agent on the T2125 meant. The Appellant says that he now knows that he did not have a business in 2009.

[35] The Appellant testified that he may have read the certification above the signature line of the Return before signing the Return. In any event, he signed the Return because he believed FA was a professional firm.

[36] By a letter dated May 17, 2011, the Appellant forwarded a 2009 T4A and a T4A Summary to the CRA.[5] The T4A showed in box 28 "Other income" in the amount of $458,965.38 and included the comment "Amounts exchanged for labour". The Appellant testified that he did not review the T4A or the T4A Summary before sending them to the CRA, that he did not remember whether he saw the amount in box 28, that he did not see the comment on the T4A and that he did not question the forms.

[37] The Appellant testified to the effect that he is unsophisticated in tax matters, did not intend to deceive the CRA and placed his complete faith in FA.

III. Analysis

A. The Statutory Regime

[38] Under subsection 163(3) of the ITA, the Respondent has the burden of proving on a balance of probabilities the facts that justify the assessment of a penalty against the Appellant under subsection 163(2) of the ITA.

[39] The introductory words of subsection 163(2) of the ITA state:

> Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the

[5] Exhibit R-5.

> making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of . . .

[40] Subsection 163(2) of the ITA requires the determination of two questions.

[41] First, has the Appellant made, or participated in, assented to or acquiesced in the making of, a false statement or omission in a return (a "prohibited act")? A false statement is a statement in a return that is not true, and an omission is something that should be included in a return that is not included in the return.

[42] Second, if the Appellant has done a prohibited act, did the Appellant do the prohibited act knowingly or under circumstances amounting to gross negligence?

B. The "Knowingly" and "Under Circumstances Amounting to Gross Negligence" Standards

[43] In *Wynter v. The Queen*, 2017 FCA 195, the Federal Court of Appeal stated the following about the two standards in subsection 163(2):

> [11] When Parliament uses alternative terms, it is assumed that it intended them to have different meanings. Put otherwise, Parliament does not repeat itself: see Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016) at 43. Section 163 allows the imposition of penalties **where the taxpayer has knowledge *or* in circumstances amounting to gross negligence**. The section is not conjunctive, and presumptively, these two terms differ in their meaning and content.
>
> [12] The distinction between gross negligence — determined by an objective assessment of the comportment of the taxpayer — and wilful blindness — determined by reference to the taxpayer's subjective state of mind — has a long history. Admittedly, it is, on occasion, a fine distinction and one that is not always clearly drawn. Nonetheless, Parliament is taken to have been cognizant of the distinction.

[44] As suggested in *Wynter*, the word "knowingly" requires a determination of whether the Appellant had subjective knowledge that he was making a false statement in the Return or the Request when he signed those documents. The burden is on the Respondent to present evidence that establishes on a balance of probabilities that the Appellant knew he was making a false statement when he signed the Return and the Request.

[45] As also suggested in *Wynter*, the subjective knowledge of the Appellant may be proven by evidence establishing on a balance of probabilities that the Appellant was wilfully blind as to whether the statements in the Return and the Request were false. This is a helpful clarification of the point that wilful blindness is used to attribute subjective knowledge to the Appellant and that wilful blindness and gross negligence are different legal concepts.

[46] To establish wilful blindness, the evidence must prove on a balance of probabilities that the Appellant subjectively knew that the false statements in the Return and the Request were probably false but deliberately chose not to make further inquiries because he subjectively knew or strongly suspected that the inquiries would provide him with the knowledge that the statements were indeed false (see *Sansregret v. The Queen*, [1985] 1 S.C.R. 570 at 584, *R. v. Jorgensen*, [1995] 4 S.C.R. 55 at paragraphs 102 and 103 and *Briscoe v. The Queen*, 2010 SCC 13, [2010] 1 S.C.R. 411 at paragraphs 21 to 23). The wilful blindness test is summarized in *Wynter* as follows:

> [13] A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: *R. v. Briscoe*, 2010 SCC 13 at paras. 23-24, [2010] 1 S.C.R. 411 (*Briscoe*); *Sansregret* at para. 24. In these circumstances, the doctrine of wilful blindness imputes knowledge to a taxpayer: *Briscoe* at para. 21. . . .

[47] The subjective knowledge required for a finding of actual knowledge or wilful blindness refers to the actual or subjective knowledge of the person committing the prohibited act and not the objective or constructive knowledge of a reasonable person in the same circumstances (see, generally, *Shand v. The Queen*, 2011 ONCA 5 at paragraph 188 and *Roks v. The Queen*, 2011 ONCA 526 at paragraph 132).

[48] Actual subjective knowledge and wilful blindness may be proven by direct evidence, by circumstantial evidence or by a combination of the two. The determination of whether there is actual subjective knowledge or wilful blindness must be made in light of all the circumstances.

[49] The subjective nature of the wilful blindness standard versus the objective nature of the gross negligence standard means that conduct that contributes to a finding of wilful blindness may support a finding of gross negligence, but the converse is not necessarily true. For example, the fact that a reasonable person in the same circumstances would have made inquiries does not support a finding of

wilful blindness but can support a finding of gross negligence. In *Briscoe*, the Supreme Court of Canada explains this distinction as follows:

> [24] Professor Don Stuart makes the useful observation that the expression "deliberate ignorance" seems more descriptive than "wilful blindness", as it connotes "an actual process of suppressing a suspicion". Properly understood in this way, "the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind" (*Canadian Criminal Law: A Treatise* (5th ed. 2007), at p. 241). While a failure to inquire may be evidence of recklessness or criminal negligence, as for example, where a failure to inquire is a marked departure from the conduct expected of a reasonable person, wilful blindness is not simply a failure to inquire but, to repeat Professor Stuart's words, "deliberate ignorance".

[50] The subjective nature of the wilful blindness standard also means that the personal attributes of the individual may be considered in determining whether the individual is wilfully blind.

[51] In contrast, the objective nature of the gross negligence standard means that the personal attributes of the individual are not relevant unless the individual establishes that he or she is incapable of understanding the risk the individual has failed to avoid (see *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49 at paragraph 40). In *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60 at paragraph 38 the Court refers to this as the modified objective standard:

> . . . The modified objective standard means that, while the reasonable person is placed in the accused's circumstances, evidence of the accused's personal attributes (such as age, experience and education) is irrelevant unless it goes to the accused's incapacity to appreciate or to avoid the risk . . . .

[52] Although *Roy* addresses the criminal law standard of negligence, I see no reason to approach "gross negligence" under subsection 163(2) differently since the test under any negligence standard is whether the conduct in question departs from the objective standard of the reasonable person. *Roy* simply emphasizes that the relevant objective standard is that of the reasonable person in the same circumstances as the person whose conduct is in issue.

[53] The risk that the Appellant must be capable of understanding in order for gross negligence to be established is the risk of failing to meet the obligation imposed on all taxpayers under Canada's self-assessment system to prepare their income tax returns with honesty and integrity; in short, the risk of failing to meet

the obligation not to commit a prohibited act. In *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C. R. 757 the Supreme Court of Canada stated at paragraph 49:

> Every person resident in Canada during a given taxation year is obligated to pay tax on his or her taxable income, as computed under rules prescribed by the Act . . . . The process of tax collection relies primarily upon taxpayer self-assessment and self-reporting: taxpayers are obliged to estimate their annual income tax payable . . . and to disclose this estimate to the CCRA in the income return that they are required to file . . . .

[See also: *(Canada) National Revenue v. Thompson*, 2016 SCC 21 at paragraph 31, [2016] 1 S.C.R. 381]

[54] Accordingly, short of evidence establishing that the Appellant could not understand the obligation placed on him by Canada's self-assessment income tax system not to commit a prohibited act, the words "under circumstances amounting to gross negligence" require a determination of whether the conduct of the Appellant represented a marked and substantial departure from the expected conduct of a reasonable person in the same circumstances as the Appellant. For there to be a finding of gross negligence, the conduct of the Appellant must reflect a high degree of negligence (*Venne v. The Queen*, 84 DTC 6247).

[55] Importantly, the objective standard against which the conduct of the Appellant is measured does not vary according to the personal attributes of the Appellant or the actual knowledge of the Appellant. In all cases, the standard is the expected conduct of a reasonable person in the same circumstances as the Appellant. The question that must be addressed is this: To what degree, if any, has the conduct of the Appellant deviated from that objective standard?

[56] A helpful albeit brief summary of the necessary departure from the objective standard of the reasonable person required for a finding of gross negligence is found in the recent judgment of the Supreme Court of Canada in *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 where, at paragraph 60, the Court, in discussing the gross negligence standard described in *Venne*, adopts the following statement of the Tax Court of Canada from paragraph 23 of *Sidhu v. The Queen*, 2004 TCC 174:

> 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.

C. Application of the Law to the Facts

[57] The evidence of the Respondent establishes that the Appellant signed and filed the Return and that in the Return he claimed a fictitious business expense of $458,965.38 described as "AMT TO PRINCIPAL FR AGENT" which resulted in the reporting of a business loss of $342,682.13 for his 2009 taxation year. In fact, the Appellant did not incur an expense of $458,965.38 in 2009.

[58] The evidence of the Respondent also establishes that the Appellant signed, and filed with the CRA, the Request, in which he requested the carry-back of a fictitious non-capital loss of $244,137 to his 2008, 2007 and 2006 taxation years.

[59] On the basis of this evidence, I find that the Appellant did make a false statement in the Return and in the Request. Counsel for the Appellant did not suggest otherwise.

[60] Counsel for the Appellant submits, however, that the false statements in the Return and the Request were not made knowingly or under circumstances amounting to gross negligence. Counsel submits that the Appellant is unsophisticated in tax matters, relied entirely on FA to prepare the Return and the Request correctly and did not intend to deceive the CRA.

[61] Counsel for the Appellant submits that, since the Appellant did not review the Return before he signed and filed it but rather relied on FA to ensure the Return was correct, he did not knowingly make a false statement in the Return.

[62] Counsel for the Respondent submits that, even if the false statements made by the Appellant in the Return and the Request were not made knowingly, they were made under circumstances amounting to gross negligence.

[63] The cover letter accompanying the package advised that the return was prepared on the basis of the information provided by the Appellant and that the Appellant should carefully review the Return to ensure that it was both accurate and complete. Even in the absence of such a statement, a reasonable person in the Appellant's circumstances would carefully review the package before signing the Return or the Request.

[64] The cover letter accompanying the package was not signed, had no return address and did not identify the person who prepared the package or the person who sent it. A reasonable person in the Appellant's circumstances would question

why a legitimate professional tax preparer would not have signed the letter or included such basic information in the letter.

[65] The second page of the package stated that the Appellant's estimated tax refund over four taxation years was $84,565.17 and that the fee payable to FA was $16,913.03, or 20% of that total. The total tax refund equalled the total taxes paid in those years. A reasonable person in the Appellant's circumstances would be suspicious of such an extraordinary tax result, particularly when the tax preparer charges an exorbitant fee based on the tax refund obtained.

[66] The third page of the package is a printout of diagnostic messages, which includes plain English alerts and errors. Although the errors are minor, a reasonable person in the Appellant's circumstances would question the expertise of a tax preparer that completes a tax return with any alerts or errors.

[67] The fourth page of the package is a one-page summary of the Return. The Summary discloses employment income, a loss from a business of $342,682.13 and gross and net rental income of $21,600. A reasonable person in the Appellant's circumstances would question why there is rental income and an extraordinarily large business loss when the only activity being carried on is the rental of a bungalow.

[68] The T2125 filed with the Return describes the activity giving rise to the $342,682.13 business loss as "agent". The business expense of $458,965.38 claimed by the Appellant is described on line 9270 of the T2125 as an "AMT TO PRINCIPAL FR AGENT" and the $116,283 of income from the "agent" activity is described on line 8230 of the T2125 as "RECEIPTS AS AGENT".

[69] The T776 Statement of Real Estate Rentals filed with the Return shows rental income of $21,600.

[70] A reasonable person in the Appellant's circumstances would question why, in addition to the reporting of income from real estate, there is reporting of income and expenses from a business described as "agent". A reasonable person in the Appellant's circumstances would also question the descriptions of the income and expense on the T2125 since they do not reflect any actual activity carried on by the Appellant or any actual amount of income earned or expense incurred by the Appellant.

[71] The expense of $458,965.38 reported on the T2125 is almost five times the total income reported by the Appellant and over twenty-one times the inflated rental income reported by the Appellant, and the description of the expense is on its face nonsensical. A reasonable person in the Appellant's circumstances would be highly suspicious of, and would question the basis for claiming, such an expense.

[72] The package included the Statement of Agent Activities. This statement does not disclose any activity undertaken by the Appellant or any expense incurred by the Appellant and is on its face nonsensical. A reasonable person in the Appellant's circumstances would be highly suspicious of a $342,682.13 business loss based on the description contained in that statement.

[73] The package included other warning signs that a reasonable person might well see as raising questions. The Summary showed a fictitious amount of business income in addition to an erroneous amount of rental income. The T776 included in the package and with the filed Return showed no expenses at all even though the Appellant had provided FA with evidence of expenses. The T776 also overstated the Appellant's rental income by $5,100 even though the Appellant had provided FA with a copy of the tenancy agreement. The T2125 included in the package and with the filed Return showed other income of $116,283.25 identified as "RECEIPTS AS AGENT" even though no such income was earned by the Appellant and the rental income from the bungalow was reported separately.

[74] FA provided no explanation to the Appellant for the extraordinary tax savings described on the second page of the package and FA provided no independent verification of the validity of the filing position taken in the Return. The Appellant did not request a legal or accounting opinion or analysis supporting the filing position taken in the Return and did not contact the CRA to confirm the legitimacy of the filing position.

[75] Given the manifestly extraordinary tax result involved, a reasonable person in the Appellant's circumstances would ask for some form of independent verification that the filing position being taken was legitimate. In my view, given the extraordinary tax result and the absence of any rational explanation for that result in the package, being told by co-workers that they have used the same tax preparer and seeing a refund cheque issued to another taxpayer are not the sorts of independent verification that a reasonable person in the Appellant's circumstances would rely upon.

[76] The Appellant suggested that he was dealing with his tenant issue around the time he filed the Return and that that distracted him, although he had no clear memory of the time frames involved. The Notice To End a Tenancy Early For Non-payment of Rent[6] states that the tenant owed rent for the periods ending July 22, 2010 and August 22, 2010, while the Return was signed by the Appellant on April 27, 2010. As well, the Appellant testified that he and his spouse were advised of the investigation of the tenant only after the investigation was completed.

[77] In light of these facts, the tenant issue does not explain why the Appellant failed to conduct even the most cursory review of the package. Nor does the tenant issue lead to the conclusion that the conduct of the Appellant was that of a reasonable person in the Appellant's circumstances. Moreover, the Appellant did not present any evidence to suggest that he was incapable of understanding the obligation imposed upon him by Canada's self-assessment system not to do a prohibited act.

[78] The Appellant signed and filed the Return and the Request notwithstanding the clear deficiencies in the cover letter, the request in the cover letter to carefully review the Return, the expected refund of all income taxes paid for 2009, 2008, 2007 and 2006 described on the second page of the package, the large fee payable to FA that was based on the amount of the tax refunded to the Appellant, the fictitious business income and very significant business loss shown on the Summary in addition to the gross and net rental income, the error in the amount of gross and net rental income reported on the Summary, the nonsensical Statement of Agent Activities included in the package, the fictitious service described on the T2125 that purportedly generated the business loss, the fictitious business income and expense reported on the T2125 and the nonsensical descriptions of those amounts, the erroneous rent and absence of expenses reported for the rental property on the T776, the *per* added to the signature lines of the Return and the Request, and the failure of FA to identify the tax preparer on the signature page of the Return.

[79] In my view, the conduct of the Appellant in signing and filing the Return and the Request in these circumstances represented a marked and substantial departure from the conduct one would expect of a reasonable person in the same circumstances. The Appellant cannot simply throw up his hands and say "I blindly

[6]Exhibit A-3.

relied on my tax preparer" when the materials provided by that tax preparer are so obviously wrong, deficient and nonsensical, and when the tax result purportedly obtained is so extraordinary and suspicious.

[80] To use the words quoted by the Supreme Court in *Guindon*, the conduct of the Appellant in the circumstances in issue demonstrated "such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense". Such conduct amounts to gross negligence.

[81] For the foregoing reasons, I find that the Appellant made false statements in the Return and the Request under circumstances amounting to gross negligence. Consequently, the appeal of the Appellant is dismissed with costs to the Respondent in accordance with the Tariff.

Signed at Ottawa, Canada, this 12th day of March 2018.

"J.R. Owen"

Owen J.

CITATION:	2018 TCC 52
COURT FILE NO.:	2012-2383(IT)G
STYLE OF CAUSE:	JONATHAN PECK v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	January 26, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
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