Docket: 2011-86(IT)I

BETWEEN:

ALAIN CHÉNARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 30, 2012, at Ottawa, Ontario

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the appellant:	Richard Généreux
Counsel of the respondent:	Martin Beaudry Paul Klippenstein

JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the 1998, 1999, 2000, 2001, 2002, 2003 and 2004 taxation years are dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of June 2012.

"Paul Bédard"

Bédard J.

Translation certified true
on this 26th day of July 2012
Monica F. Chamberlain, Reviser

Citation: 2012TCC211
Date: 20120612
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Appellant,

and

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REASONS FOR JUDGMENT

Bédard J.

[1] When he first filed his tax returns, the appellant reported employment income only for the 1998, 1999, 2000, 2003 and 2004 taxation years, and employment income and withdrawals from a registered retirement savings plan (RRSP) for the 2001 and 2002 taxation years.

[2] On December 19, 2008, the appellant filed an adjustment request for the 1998, 1999, 2000, 2001, 2002, 2003 and 2004 taxation years, reporting net business losses of $49,237 for the 1998 taxation year, $53,776 for the 1999 taxation year, $49,555 for the 2000 taxation year, $48,421 for the 2001 taxation year, $51,222 for the 2002 taxation year, $62,875 for the 2003 taxation year and $52,321 for the 2004 taxation year.

[3] In a notice of reassessment dated July 27, 2009, the Minister of National Revenue (the Minister) rejected the adjustment requests of December 19, 2008 and assessed a penalty for gross negligence in accordance with subsection 163(2) of the *Income Tax Act* (the Act) in the amount of $5,339.67 for the 1998 taxation year, $6,026.85 for the 1999 taxation year, $6,031.14 for the 2000 taxation year, $5,390.51 for the 2001 taxation year, $5,358.61 for the 2002 taxation year, $6,416.83 for the 2003 taxation year and $5,134.48 for the 2004 taxation year.

[4] The appellant filed an appeal under the informal procedure solely in respect of the penalties assessed under subsection 163(2) of the Act in the notices of reassessment dated July 27, 2009.

[5] The facts on which the Minister relied to assess the penalties under subsection 163(2) of the Act are set out in paragraph 16 of the response to the Notice of Appeal, which reads as follows:

[TRANSLATION]

> (a) During the years at issue, the appellant did not operate any business whatsoever;
>
> (b) The expenses claimed were all personal expenses of the appellant;
>
> (c) The adjustment requests submitted by the appellant were signed by him;
>
> (d) The losses claimed by the appellant represent 88% of his total income for the 1998 taxation year, 87% for the 1999 taxation year, 81% for the 2000 and 2001 taxation years, 88% for the 2002 taxation year and 87% for the 2003 and 2004 taxation years;
>
> (e) The losses claimed by the appellant for the years at issue were part of a scheme devised by the group known as "Fiscal Arbitrators;"
>
> (f) Given the very nature and scope of the adjustment requests, the appellant knew or should have known that these applications were false;
>
> (g) The appellant never reported business income in previous years.

[6] In the case at bar, the witnesses were as follows: for the respondent, the appellant and Louise Girard (the appeals officer in the appellant's case) and, for the appellant, Yves Lauzon, a long-standing friend of the appellant.

[7] The appellant's testimony may be summarized as follows:

(a) The appellant worked for Bowater during the years at issue;

(b) The appellant did not finish high school and has been working since he was 16 years of age;

(c) His spouse usually prepared his tax returns. On several occasions, he engaged the services of a third party to prepare his tax returns;

(d) The appellant admitted never really understanding his tax returns and trusted the individuals who prepared them. He never reviewed these returns before signing them;

(e) The appellant's spouse works part time as a clerk in a church;

(f) The appellant's daughter works as an accounting clerk. She took adult education accounting courses. She was still studying when the appellant began doing business with Fiscal Arbitrators (F.A.) in 2008;

(g) The appellant handled the household bills: (electricity, heating, etc.);

(h) He recently sold a home and bought a new one without using the services of a real estate agent;

(i) In addition, the appellant owns two lots he also purchased without the help of a real estate agent. He also dealt with the bank to remortgage his home;

(j) The appellant completed all these transactions on his own, without the help of an agent. When necessary, he obtained information from the other party's real estate agent;

(k) During the period at issue from 1998 to 2004, the appellant did not earn any business income. In fact, he confirmed never having owned a business;

(l) Mr. Joannis introduced the appellant to F.A.;

(m) It was his long-standing friend Yves Lauzon who had introduced the appellant to Mr. Joannis;

(n) Mr. Lauzon had recruited the appellant to encourage him to invest in one of Mr. Joannis' projects involving home buying kits. The appellant had invested about $2,000 in the doomed adventure. He lost all the money that he invested;

(o) On the advice of Mr. Joannis, the appellant then invested about $12,000 in ICF, a company that invested in gold products;

(p) The appellant and Mr. Lauzon developed a friendship with Mr. Joannis. They went fishing and hunting together;

(q) Mr. Joannis then offered to introduce the appellant to F.A. representatives. Mr. Joannis had used the services of the F.A. tax experts for some of his business projects. He offered the appellant the opportunity to meet with them with a view to saving taxes;

(r) Mr. Joannis intimated that because the appellant was a special client who had invested in his companies, he was giving him the opportunity to meet with the tax experts at F.A.;

(s) The appellant therefore attended a meeting with the F.A. tax experts. The meeting had been called for the appellant, Mr. Lauzon and a few other people. The appellant's spouse also attended the meeting;

(t) The meeting was held in English. Since the appellant is not fluent in English, he relied on his friends Messrs. Lauzon and Joannis to tell him about what was discussed at the meeting;

(u) It was during this meeting that the F.A. representatives presented a plan that would allow the appellant to obtain tax refunds by claiming business losses. The refunds would allow the appellant to recoup all the income taxes he had paid during the seven years at issue;

(v) The appellant thought he was part of a "corporation." He thought that it was through this "corporation" that he had invested in the projects of Mr. Joannis, Fine Add and ICF;

(w) In his mind, this status as a corporation legitimized the claimed business losses.

(x) However, the appellant confirmed that he never understood the plan used by F.A. to claim expenses. He did not try to obtain information from others to gain a better understanding of the plan proposed by F.A.;

(y) One of the F.A. representatives said he had worked for the CRA for many years;

(z) The F.A. representatives stated their plan was legal. Mr. Lauzon also showed the appellant the Fine Add Web site, which stated that their company was "CRA approved;"

(aa) The appellant therefore trusted the F.A. representatives because they were tax experts;

(bb) The appellant consulted his spouse, who ultimately left the decision to participate in the project up to him. He did not consult his daughter;

(cc) F.A. charged a base fee of $500 as well as 10% of the tax refunds obtained;

(dd) The appellant was required to sign an agreement in which he undertook to stop communicating with the CRA. All correspondence with the CRA would be in English and sent to F.A.;

(ee) The appellant therefore signed all the adjustment requests prepared by F.A.;

(ff) The appellant never received any refunds;

(gg) A CRA agent contacted the appellant to discuss his file. Whenever he received a call, the appellant requested that all correspondence be sent to him in writing, in English. He then forwarded the correspondence to F.A.

[8] During his testimony, Mr. Lauzon essentially corroborated the appellant's testimony in respect of the elements mentioned in paragraphs 6(l), 6(m), 6(n), 6(o), 6(p), 6(s), 6(t), 6(u), 6(y) and 6(z). Mr. Lauzon added that:

(i) like the appellant, he had invested in Fine Add and ICF;

(ii) his investments in Fine Add and ICF proved to be failures;

(iii) like the appellant, he had claimed business losses and had believed that the plan proposed by F.A. was "CRA approved;"

(iv) he only recently discovered that he had been cheated by Joannis and the F.A. representatives. Mr. Lauzon explained that Mr. Joannis and the F.A. representatives had taken advantage of his good faith, naïveté and lack of

> business experience. In other words, Mr. Lauzon was a victim in this carefully crafted scam of the F.A. representatives.

The issue

[9] The only issue is to determine whether the penalty assessed under subsection 163(2) of the Act for the 1998 to 2004 taxation years was justified.

[10] Subsection 163(2) of the Act reads as follows:

> **False statements or omissions** – Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of:
> …

[11] This provision can only apply if it can be shown that the taxpayer "knowingly or under circumstances amounting to gross negligence" made a "false statement" in a return or participated in this statement. Under subsection 163(3) of the Act, "the burden of establishing the facts justifying the assessment of the penalty is on the Minister ".

The appellant's arguments

[12] The appellant's arguments may be summarized as follows:

(i) The respondent has not met its burden of proof;

(ii) The appellant did not knowingly or under circumstances amounting to gross negligence make a false statement as required by subsection 163(2) of the Act;

(iii) The appellant alleges he was a victim of a well orchestrated scam of the F.A. representatives who took advantage of his good faith, naiveté, lack of business experience, lack of formal education and lastly, his ignorance in the area of taxation;

(iv) The appellant did not derive any tax advantages from the adjustment requests prepared by F.A.

[13] In light of the evidence submitted by the parties, it is clear that the appellant was guilty of negligence in signing a tax return that contained false statements. As such, our analysis should instead focus on the following question: Was the negligence exhibited by the appellant so great as to merit the epithet "gross?"

The concept of gross negligence

[14] In *Venne v. The Queen*, [1984] C.T.C. 223, 84 DTC 6247 (FCTD), Strayer J. made the following comment concerning the meaning of the term "gross negligence" for the purpose of assessing penalties under subsection 163(2) of the Act:

> … "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. …

[15] In *DeCosta v. The Queen*, 2005 DTC 1436 (T.C.C., informal procedure), Bowman C.J. referred to the decision in *Udell v. M.N.R.*, [1969] C.T.C. 704, 70 DTC 6019 (Ex. Ct.), and two decisions by Rip J. (now chief justice) and made the following comments:

> [9] I have no difficulty in reconciling the decision of Cattanach, J. with those of Rip, J. They each depend on a finding of fact by the court with respect to the degree of involvement of the taxpayers. The question in every case is, leaving aside the question of wilfulness, which is not suggested here:
>
> (a) "Was the taxpayer negligent in making a misstatement or omission in the return?"
>
> (b) "Was the negligence so great as to justify the use of the somewhat pejorative epithet 'gross'?"
>
> This is, I believe, consistent with the principle enunciated by Strayer, J. in *Venne v. The Queen* , 84 DTC 6247.
>
> ...
>
> [11] In drawing the line between "ordinary" negligence or neglect and "gross" negligence, a number of factors have to be considered. One of course is the magnitude of the omission in relation to the income declared. Another is the opportunity the taxpayer had to detect the error. Another is the taxpayer's education and apparent intelligence. No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence.

> [12] What do we have here? A highly intelligent man who declares $30,000 in employment income and fails to declare gross sales of about $134,000 and net profits of $54,000. While of course his accountant must bear some responsibility I do not think it can be said that the appellant can nonchalantly sign his return and turn a blind eye to the omission of an amount that is almost twice as much as that which he declared. So cavalier an attitude goes beyond simple carelessness.
>
> [Emphasis added.]

Analysis and conclusion

[16] The appellant testified that he had little formal education and never really understood the content of his tax returns. This is why he always asked his spouse or a third party to prepare his returns. The appellant trusted the people who prepared his returns and he always signed them without reviewing their contents.

[17] In addition, the appellant was not fluent in English. Still, the meeting organized by "Fiscal Arbitrators" which the appellant attended took place in English only. It was during this meeting that "Fiscal Arbitrators" proposed the scheme that would allow the participants to realize substantial tax savings.

[18] The appellant chose to trust the representatives of "Fiscal Arbitrators" because they had been referred to him by his friends, Messrs. Lauzon and Joannis, because these representatives said they were experts in their field and lastly, because this strategy had been proposed as being legally compliant with tax laws. The appellant alleges that he was a victim of a scam and that for all these reasons, he should not be charged with “gross negligence.”

[19] When a taxpayer places his trust in a third party and when the latter makes a false statement or omission on the taxpayer’s tax return, it must be determined whether the false statement or omission can be attributed to the taxpayer. As in the case at bar, it must be determined whether, under the circumstances, the appellant demonstrated a high degree of negligence or wilful blindness tantamount to gross negligence in choosing to trust the representatives of "Fiscal Arbitrators."

[20] I submit that the facts show that the appellant should have been more prudent and that his behaviour demonstrates such a high degree of negligence or wilful blindness that it can be qualified as gross negligence.

[21] First, the business losses retroactively reported by the appellant are among the predominant factors in this case. As the respondent submitted, these amounts represent more than 80% of the appellant's total income for each of the seven years in question. 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 (testimony of Ms. Girard, appeals officer at the Canada Revenue Agency). 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.

[22] The appellant also admitted never having run a business. However, even if he thought he was part of a "corporation" through which he had invested in Mr. Joannis' business projects, the amounts of the reported losses were not at all consistent with reality. The concepts of business and loss are not so obscure that a reasonable person could think it was legal to report unrealistic business losses.

[23] Lastly, the appellant is relying on the decision of Tardif J. of the Tax Court of Canada *Therrien v. R.* (2002 CarswellNat 87, [2002] 3 C.T.C. 2141 (T.C.C. [informal procedure]). In this case, the taxpayer had become embroiled in a scheme orchestrated by a company called Highway. The Court had ruled in favour of the appellant by refusing to apply the penalty.

[24] According to Tardif J., while the taxpayer had been negligent, imprudent and even somewhat naïve, the evidence did not show any recklessness, carelessness, indifference or lack of concern tantamount to gross negligence. The Court had even found that the opposite was true. It was shown on a balance of probabilities that the appellant had been cautious and had had a concern for the honesty of the procedure. In this case, the evidence submitted by the respondent shows that the appellant had little concern for the honesty of the procedure.

[25] The respondent showed that, despite his lack of formal education, the appellant was responsible for paying the household bills. He had sold his home and purchased a new one as well as land, all without the help of a real estate agent. The appellant had remortgaged his home with the bank and had invested close to $20,000 in Mr. Joannis' business projects, albeit at a loss. The appellant was therefore able to understand the concepts of profit and loss. He was comfortable enough with numbers to take on these transactions.

[26] The appellant could not speak English, yet the meeting organized by "Fiscal Arbitrators" took place in English only. Since he had trouble understanding the

information that had been relayed during the meeting, the appellant relied on his friends Messrs. Lauzon and Joannis, who reassured him that the plan was legally compliant with tax laws. Beyond this assurance, the appellant did not understand the proposed plan, but this did not prevent him from participating.

[27] The evidence presented by the respondent shows that the appellant had been careless and even indifferent and that his behaviour was tantamount to gross negligence. The appellant had never run a business and while he thought he was part of a company, he had never sustained substantial losses. He could not speak English, the language in which this proposal was offered. He did not understand how he could be entitled to such tax refunds, but chose to believe the people making the proposal because they were experts.

[28] The appellant should have made an effort to consult other people besides those proposing the plan. In *Therrien, supra*, some of the participants in the plan proposed by Highway had contacted Revenue Canada, Revenu Québec and the consumer protection office to check whether the plan was legal, whether it was a concept that was under investigation or whether it was known as likely to cause problems. All the steps initiated revealed no irregularities that put the plan's legitimacy into question. This is not the case here. The appellant did not take any similar steps to verify the legitimacy of the process.

[29] The appellant's behaviour demonstrated such indifference and carelessness that his negligence must be qualified as gross. For this reason, the appeal must be dismissed.

Signed at Ottawa, Canada, this 12th day of June 2012.

"Paul Bédard"

Bédard J.

Translation certified true
on this 26th day of July 2012
Monica F. Chamberlain, Reviser

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COURT FILE NO.:	2011-86(IT)I
STYLE OF CAUSE:	ALAIN CHÉNARD AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa , Ontario
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APPEARANCES:

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