Docket: 2011-555(IT)G

BETWEEN:

COLIN J. HINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 27, 2012 at Ottawa, Canada,
Reasons for Judgment as delivered by conference call on July 5, 2012
and Reasons for dismissing Appellant's Motion for enhanced costs.

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	Susan G. Tataryn
Counsel for the Respondent:	Hong Ky (Eric) Luu

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2006 taxation year is allowed, with costs, as set out in the applicable tariff, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment, in accordance with and for the reasons set out in the attached Reasons for Judgment.

The Appellant's Motion for enhanced costs is dismissed.

Signed at Winnipeg, Manitoba this 15th day of August 2012.

"J.E. Hershfield"

Hershfield J.

Citation: 2012 TCC 295
Date: 20120815
Docket: 2011-555(IT)G

BETWEEN:

COLIN J. HINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(Delivered on July 5, 2012 by conference call)
and REASONS FOR DISMISSING APPELLANT'S MOTION FOR ENHANCED COSTS

Hershfield J.

[1] The Appellant, Mr. Colin J. Hine, failed to report $157,965 in business income on his 2006 income tax return. He was assessed accordingly and, as well, the Minister of National Revenue (the "Minister") imposed the gross negligence penalty provided for in subsection 163(2) of the *Income Tax Act* (the "*Act*").[1] Only the gross negligence penalty is at issue in this appeal.

[2] Three witnesses testified at the hearing: the Appellant, his common-law partner (spouse), and a former employer of his spouse. Aside from having to assess the weight to be given to self-serving testimony in the case of the Appellant and his spouse, I found them all to be forthright and credible witnesses.

Background

[3] The Appellant worked as a general contractor since the late 1990s. In 2005, the Appellant embarked on a new business venture: purchasing a house, renovating it and selling it ("flipping houses"). The Appellant completed much of the renovations himself but did hire subcontractors as well.

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[1] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[4] The first property flipped by the Appellant was referred to at the hearing as the Tedwyn property which was purchased in February 2005 and sold for a profit in June of the same year. Subsequently, in August 2005, the Appellant purchased a second property referred to at the hearing as the Greyrock property. The Greyrock property was sold in April 2006. Also in April 2006, there was a third property purchased. It was referred to at the hearing as the Pinhey property. The underreported business income is attributed solely to the sale of the Greyrock property.

[5] I note, at this point, that the Appellant never received any funds from the sale of the Greyrock property. The proceeds went into his lawyer's trust account. The lawyer applied the proceeds received from the sale of the Greyrock property to the purchase of the Pinhey property. The lawyer's trust account ledger statement (Exhibit A-1, Tab 4) shows the closing receipt from the purchaser of the Greyrock property as $161,035.12, which is $157,965 less than the actual sale price of $319,000. Although the lawyer did not testify, I have no reason not to believe my understanding of the testimony at the hearing. Specifically, that testimony was that the difference between the sale price receipt shown in the lawyer's statement and the actual sale price was the amount of the mortgage encumbrance on the Greyrock property that would have been paid to the mortgagee. In this respect the statement was said to be in error.

[6] The Appellant's spouse, who prepared the Appellant's business records and tax returns, testified that she did not receive the lawyer's trust account statement until a few days before the April 30, 2007 filing deadline for the Appellant's 2006 taxation year. She relied on the statement as effectively showing the proper net reportable amount for the sale of the Greyrock property. This was consistent, she thought, with her understanding, based on a conversation with the Canada Revenue Agency (the "CRA"), that the mortgage payments reduced the taxable gain.

[7] The Appellant's spouse, who I should identify as Ms. Diane Prevost, has a background in financial accounting. In addition to her full time job with the federal government, she manages the Appellant's business records and prepares his tax returns for the Appellant. Ms. Prevost's previous manager (since retired), Mr. Bruce Shorkey, testified that Ms. Prevost was an organized, meticulous and diligent worker. He had no reservations about her skill set in accounting and financial management and her honesty and integrity. There is also evidence that Ms. Prevost received an award recognizing her effectiveness and efficiency in the performance of her duties.

[8] In her testimony, she testified that she had been doing the Appellant's bookkeeping and tax returns for several years prior to 2005. When the Appellant first embarked on this new business in 2005, she had called the CRA multiple times to determine how to report the income generated. The Appellant and Ms. Prevost also met with an accountant or business advisor from the Business Bureau of City Hall, in addition to asking other professionals such as their real estate agent's accountant. However, most people were unable to help. This is understandable, in my view, as the questions would necessarily lead to ones directed at inventory versus capital property questions. Direct and categorical answers to such questions might be difficult to obtain without some recognition of grey areas depending on the facts presented on a case by case basis. Still, her persistence paid off and she finally was able to talk to a CRA agent, who she identified by first name. The CRA officer confirmed that the activity described was trading in inventory properties and that the gains were business income. The CRA agent reviewed the expenses related to this type of business and described the expenses that could be deducted in the calculation of profit. Ms. Prevost made notes of the conversation contemporaneous with its occurrence and referring to those notes gave evidence of what she was told.

[9] The Appellant relied completely on his spouse to keep proper records and prepare his returns. For each of the houses, the Appellant kept a separate envelope with all the receipts, and other documents relating to that project, in them. His spouse would enter everything onto an excel spreadsheet that she had programmed on their home computer. The excel spreadsheets detailed all the income and expenses and transactions meticulously. Using this data she prepared both GST and income tax returns. There were no problems with any of the prior years including 2005 when the gain on the Tedwyn property was properly reported.

[10] The $157,965 of unreported business income in 2006 stems from the fact that the Appellant's spouse had, according to her records, included in the cost of the Greyrock property the total purchase price which included the portion that was financed by way of a loan secured by a mortgage on the property. She also used the net proceeds on the sale, which did not include the amount applied to retire the mortgage, as shown on the lawyer's trust statement as the closing receipt on the sale. The net effect of this was that she deducted the mortgage amount twice in computing the income from this sale. This, in turn, created a loss in respect of the overall business operations of the Appellant for the year in the amount of $131, 653.

[11] Ms. Prevost testified that this was an innocent mistake exacerbated by the fact that she had to chase their lawyer for months to get the paperwork, receiving it only a

couple of days prior to her having to file the Appellant's income tax return. The rush to avoid any late filing penalties contributed to the error.

[12] She admitted, however, that she knew there was a sizable gain on the sale of the Greyrock property and could see that the large loss she was reporting did not reflect that gain. However, she would not acknowledge that it struck her as a discrepancy that should have alerted her to having made a misstatement. She knew the Appellant's business and earnings and had reported the profit on the Tedwyn property properly. However, she maintained still that she thought they were in a loss position for tax purposes. This impression arose from a combination of factors: not having seen any money from the sale of the Greyrock property; having rolled money from that sale into the Pinhey property; and, being confused about the mortgage deduction that she thought was dealt with in the lawyer's trust account statement which she received just days before having to file the return, leaving no time to consider the need to clarify the statement. She thought, at the time, since the mortgage is deductible, she simply would not deduct the mortgage as a separate expense and as such the numbers would still work out to the same result. That is to say, she did not appreciate until discussions with the CRA arising from an audit that she in effect deducted the mortgage amount twice by its inclusion in the cost of the property.

[13] It is noteworthy that Ms. Prevost testified that the audit of the Appellant's 2006 taxation year started in April 2008 and in spite of her total cooperation, a ready acknowledgment of her mistake and assurances by the CRA that there would be no penalties, there was a long delay in the processing of the reassessment which was issued, with penalties, in June 2009. The tax arising from the reassessment was less than $5,200 and the gross negligence penalty was $28,111.

Issue

[14] The issue here is whether the Minister is justified in applying the gross negligence penalty pursuant to subsection 163(2) under the circumstances.

Respondent's Argument

[15] The Respondent relies on the following cases: 1) *Lacroix v. The Queen*, 2008 FCA 241; 2) *Zhou v. The Queen*, 2006 FCA 211; 3) *Panini v. The Queen*, 2006 FCA 224; 4) *Venne v. The Queen*, [1984] C.T.C. 223 (F.C.T.D.); 5) *Labow v. The Queen*, 2010 TCC 408; 6) *Hougassian v. The Queen*, 2007 TCC 293; and 7) *Brygman v. Minister of National Revenue*, [1979] C.T.C. 3117 (Tax Review Board).

[16] I will consider these authorities as necessary in my analysis. They were discussed at the hearing as Respondent's counsel felt necessary. They are, needless to say, authorities whose facts and findings are said to support the Respondent's position that the Minister has discharged the burden placed on the Crown by the *Act* to warrant the penalty being imposed.

[17] Respondent's counsel argues that the loss in 2006 is substantial and stands in sharp contrast against the previous year and he submits that it is hard to accept the assertion of an innocent mistake in 2006 given that the Appellant's spouse was able to file his 2005 tax return correctly. They both knew they had a large gain in 2006 and reporting a large loss should have, must have, alerted Mr. Hine and/or Ms. Prevost that there was something wrong. They acknowledged in testimony that they knew they had a very profitable year in 2006 and that the very profitable sale of the Greyrock property was a transaction that you do not forget – it "stays with you".

[18] Also, when 2005 and 2006 are compared, what transpired in each of the two years is relatively the same. In 2005, two houses were purchased, but only one was sold. Similarly, in 2006, the Greyrock property was sold and another property was purchased but again was not sold in 2006. The 2006 sale was even more profitable than 2005. Yet, the 2005 profit was properly reported while in reporting a similar more profitable transaction the next year, they reported a significant loss. This could not be innocent – they either knew they were misrepresenting the income from the sale of the Greyrock property, ought to have known, or, wilfully turned a blind eye to circumstances that demanded further clarification, if not correction.

[19] It is argued that while Mr. Hine may have relied on Ms. Prevost, he needs to take responsibility. He knew his affairs and he knew he had a good year in 2006. Further, this is not complicated tax planning. The Canadian tax system is a self-assessing system; if one person does not pay their fair share, then someone else will be paying for it. That Mr. Hine's spouse was meticulous in her record keeping raises a red flag in this case. The import of Respondent's counsel's point is that Ms. Prevost's spreadsheet reporting for 2006, unlike that for 2005, does not reflect the proceeds of sale. How can such a meticulous person not see that the difference in the way almost identical events are recorded will lead to a false statement on a tax return? This adds grave doubt as to the incredulous assertions that this was an innocent mistake.

[20] In conclusion, the Respondent submits that Mr. Hine was privy to Ms. Prevost's gross negligence. In the alternative, it is submitted that there was, at least, wilful blindness in this case. That is Mr. Hine was wilfully blind for not further

inquiring into the loss. The big picture is that they made a profit in 2006, and it should have been common sense that they would not have generated a big loss. While the individuals may be sympathetic, they knew what they were doing. The gross negligence penalty is imposed to keep the taxation system together by making taxpayers pay for such misstatements of their income.

Appellant's Argument

[21] The Appellant argues that this was a new venture in 2005 and they tried to be very detailed and organized. They even started doing their research on how this income was to be reported by phoning the CRA and the Business Bureau at City Hall. Consequently, they were able to file the 2005 tax return correctly. How can they have gone from caring so much in one year to completely not caring in the next, such that it would warrant the gross negligence penalty?

[22] Also, while the Respondent submits that by looking at the return, the substantial loss should have jumped out at them, Appellant's counsel argued that when looking at the income tax return (Exhibit R-12), the net income line, line 236, did not show a net loss at all; it was blank suggesting nil income. Consequently, suspicions aside, no flags would have been raised. Even the correct tax that was ultimately assessed went from nil, as reported, to only $5,200. The suggestion is that if the Appellant was looking for red flags he might not have seen one. The amount in issue might not have jumped out as does the $131,000 loss shown elsewhere on the return.

[23] It was argued, as well, that the trust ledger statement from their lawyer caused a lot of the confusion. That statement showed sale receipts net of the mortgage as the total receipts on closing. Ms. Prevost honestly believed that reporting that amount gave the same result as showing the full proceeds and deducting the same amount separately.

[24] The import of the argument is that while hindsight makes matters look obvious, the sale proceeds from the Greyrock property went to pay the Pinhey property. It did not go through their bank account. The loss would seem to be attributed to the fact that the money went to the Pinhey property which was not sold yet. The comparison with the previous year's reporting did not jump out at them given the confusion arising from the last minute receipt of the trust ledger statement which seemed only to confirm that the mortgage was deductible. The Appellant's spouse testified that she honestly believed at the time of filing the subject return that the effect of reporting the sale proceeds as net of the mortgage as shown on the trust

ledger statement would be the same as reporting the gross sale price less the mortgage which she thought was deductible. At the time, she did not appreciate in the confusion that that would create a double deduction of the amount of mortgage financing on the subject property. As Mr. Shorkey testified, Ms. Prevost had always been honest and was not someone that would not do her best to pay proper attention to detail.

[25] It was said that the Court should also consider mitigating factors as done in *Venne*. Mr. Hine and Ms. Prevost did not conduct themselves as if they were deliberately trying to hide income. Their records were an open book and they cooperated fully with the CRA auditor. As Justice Strayer (then of the Federal Court Trial Division) said, for the gross negligence penalty to apply, there must be greater neglect than simply the failure to use reasonable care. And a reasonable man not noticing a mistake does not make for gross negligence.

[26] And as Justice Bowman (as he then was) pointed out in *Farm Business Consultants Inc. v. Canada*, 1994 CarswellNat 1107, one should be extremely cautious in imposing penalties. As well, he noted what appears to be true today: it is accepted by this Court in subsection 163(2) penalty cases, a higher standard of proof is required than a mere probability of misconduct. The taxpayer should get the benefit of any doubt. I note here, however, that the validity of employing a higher standard of proof might arguably be put in doubt given the Supreme Court of Canada's decision in *F.H. v. McDougall*, 2008 SCC 53. In that case the Supreme Court of Canada made it clear that in civil cases there is only one standard of proof – namely a balance of probability. That case was not raised by the Respondent. In fact, the Respondent expressly accepted the standard of proof expressed in *Farm Business Consultants*. Still, it might be worth mention that it strikes me that there are distinctions to be made with respect to the standard of proof applicable to subsection 163(2). It is arguably a quasi criminal provision that should be viewed differently and, in any event, requires that a distinction be made between negligence and gross negligence. As such, it may be less a question of changing the standard of proof than changing the focus. The focus is on determining the sufficiency of evidence to establish whether conduct of an appellant is "gross". It strikes me that the subsection 163(2) cases underline little more than the obvious which is that the Crown needs better evidence to come within the scope of this penalty provision than it would to establish mere negligence. In that context, I will not depart from the manner in which this Court has consistently viewed subsection 163(2) – namely that it requires a greater standard of proof.

[27] In any event, failure to report a large amount, does not in itself mean there has been gross negligence as demonstrated in *Hyndman v. R.*, 2004 TCC 641 and *Gallery v. R.*, 2008 TCC 583. In *Hyndman*, Justice Angers held that there was no intentional omission and that there was no wilful blindness even though the taxpayer failed to make inquiries. In contrast to that case, Mr. Hine and Ms. Prevost did make many inquiries in this case.

[28] In a case like this where an appellant relies on a tax preparer it must first be held that there was gross negligence on the part of the tax preparer. The Appellant submits there was no gross negligence on the part of Ms. Prevost and even if there was the Appellant submits that an agent's gross negligence cannot be attributed to the taxpayer. Reliance is placed on *Findlay v. R.*, 2000 DTC 6345 (FCA) and *Gallery*.

[29] The Appellant also cited *Down v. Minister of National Revenue*, [1993] 2 C.T.C. 2027 (T.C.C.), as being very similar to the current case in that it also dealt with the flipping of houses. In *Down*, the taxpayer had an accountant prepare his income tax return and merely signed it when it was done. The taxpayer's failure to study and understand his return is merely negligent conduct and not grossly negligent. Consequently, the penalty pursuant to subsection 163(2) did not apply.

[30] Cases such as *Hougassian* relied on by the Crown were distinguished. In that case, for example, the taxpayer was found not only to be careless (which would not have been sufficient to warrant imposition of the penalty) but was indifferent with respect to whether he complied with the *Act*. It was the indifference that condemned that taxpayer. No indifference was proven here.

[31] The Appellant seeks judgment in his favour and if the appeal is allowed asks for the opportunity to speak to costs.

Analysis

[32] For the reasons below, I would allow the appeal.

[33] Respondent's counsel successfully and competently painted a picture that raised logical suspicions about whether the Appellant's spouse and the Appellant himself, knew what they were doing when they misrepresented the income in the subject year. Based on such logical suspicions it was submitted that the misrepresentation was knowingly made or that obvious questions that needed to be asked were purposely not asked. However, I am not satisfied that those logical suspicions are sufficient to offset the evidence I have that leads me to believe that

Appellant's counsel's submissions are correct. I accept that neither Appellant's spouse nor the Appellant himself were indifferent with respect to reporting the Appellant's income in 2006. There is sufficient evidence that they meant to be diligent and accurate in the way they reported the income from the sale of their properties. No indifference was proven here. A mere probability is not sufficient. While the suspicions raised are logical and perhaps not even unreasonably drawn, that is not sufficient in this case. I accept that an honest confusion existed in this case and that a mistake was made in the wake of that confusion.

[34] That said, there are aspects of this case that beg for further comment.

[35] One of the main issues in this case is the fact that Mr. Hine relied completely on Ms. Prevost to keep the proper records and to correctly report his income on his tax return. The cases cited by counsel on both sides dealt with taxpayers and their agents who were professional tax preparers. The obvious distinctions are: 1) the existence of a spousal relationship; and 2) Ms. Prevost does not hold herself out as a professional tax preparer. Therefore, while the cases proffered are helpful, they do not take into account the unique circumstances of this case.

[36] Before delving into how the analysis should differ in this case, some brief mention of the cases dealing with taxpayers and their agents in the context of subsection 163(2) can be made. The relevant cases cited by the Respondent are: *Panini*, *Hougassian* and *Brygman*; and by the Appellant are: *Findlay*, *Gallery* and *Down*.

[37] In each of the Respondent's cases, while the taxpayer may have relied on his tax preparer, the taxpayer was still found to be grossly negligent such that the penalty applied. *Brygman* is a relatively older case (1979) and was especially critical of the taxpayer abdicating his responsibility to his accountant in filing an accurate tax return.

[38] In *Panini*, the Federal Court of Appeal upheld the trial judge's decision to dismiss the appeal. One of the key factors in finding for the Minister was described at paragraph 44 where the trial judge's finding that there could only be one explanation for the appellants' failure to discuss the matter with their accountants, was accepted. That explanation was that they did not want to know whether taxes were payable in respect of the receipt in question.

[39] I have already referenced the Respondent's reliance on *Hougassian* as well as the factual distinctions made by the Appellant in respect of that case.

[40] Turning to the cases cited by the Appellant, these all held that the taxpayers were not grossly negligent. *Findlay* was an appeal at the Federal Court of Appeal, which discussed whether 1) the taxpayer was grossly negligent on his own; and 2) could the taxpayer's agent's gross negligence be attributable to the taxpayer. The Court found the trial judge had misapplied, *inter alia*, the principles from *Udell v. Minister of National Revenue*, (1969), 70 DTC 6019 (Can. Ex. Ct.). The relevant passage from *Udell* which was quoted at paragraph 18 in *Findlay*, in short, says attributing the gross negligence of an agent to a taxpayer involves a deliberate and intentional consciousness on the part of the principal to the act done. On the facts of that case such consciousness was lacking in the appellant as he was not privy to the gross negligence of his accountant. Further, there should be no doubt that the statute is to be construed so as to give the party sought to be charged with the penalty, the benefit of the doubt.

[41] *Gallery* and *Down* have been previously noted in these Reasons under the heading "Appellant's Argument". Nothing more need be said.

[42] Clearly, all these cases are fact specific. Critical findings tend to concern whether the taxpayer had knowledge of the negligence of his tax preparer or whether it was reasonable to find that the taxpayer should have made further inquiries. Here, the property flipping business was effectively being carried on by both the Appellant and his spouse. At least one of the properties mentioned at the hearing showed both their names on an offer of purchase and sale. That said, and acknowledging that it is not in issue that it is his business, they each had distinct roles in the operation of the business. She had full knowledge of the business while he relied on her keeping proper books and records and properly preparing his tax returns. In such case, should there be more or less attribution of her negligence, if any and if gross, to the Appellant?

[43] My view is that the attribution question must be applied no differently in a case like this than it does when the taxpayer and the tax preparer are not so closely tied. I say "in a case like this" because I see no circumstances on the facts of this case that beg for a different answer and importantly, the Respondent did not argue otherwise.

[44] Applying the normal test as described by the authorities, I do not find that the conduct of the Appellant in not questioning the return prepared by his spouse constituted gross negligence. His confidence in her was justified. His belief she had reported his income properly was not unreasonable. The circumstances of this case

do not make even blind faith in his wife, unreasonable. Further, while this finding gives the Appellant the benefit of any doubt, my decision to allow the appeal is not dependent on it as I have not found his spouse's actions to have amounted to gross negligence or wilful blindness. As I said, I have accepted Ms. Prevost's testimony that this was a simple mistake.

[45] In making that finding, I have also accepted that the Appellant's counsel's arguments, as I have summarized or portrayed them in these Reasons, are sound and sufficient to support my allowing the appeal. Ms. Prevost made diligent inquiries and kept diligent records. The double counting of the mortgage deduction was not recognized by her and given her confusion and the rushed circumstances relating to the lawyer's trust ledger statement I do not find that not making further inquiries before filing the said return constitutes gross negligence. There was no wilful blindness. Further, there was full cooperation with the auditor and forthright acknowledgement and acceptance of the mistake. I have not assessed her as a person who would deliberately try to hide income or that she suddenly became so careless in reporting income so as knowingly distorting the true picture.

[46] In conclusion, I would hold that the Minister was not justified in imposing the gross negligence penalty pursuant to subsection 163(2) of the *Act*. I am satisfied that the Respondent has not met the burden of proof imposed by the *Act* to warrant a finding that the Appellant intended to make a false statement or in circumstance amounting to gross negligence made such a false statement.

[47] Before closing, I wish to note that there is no express requirement in the *Act* that the person who knowingly makes a false statement must intend or understand that the consequences of making that false statement will result in a tax savings. So, for example, if I overstate expenses on one line of a return and then effectively eliminate that line by subtracting it out on another line as, say, a personal expense, then strictly speaking there has been a misrepresentation in my return. However, there will be no penalty since there will be no difference between the tax that would have been payable had the misrepresentation not been made and the tax payable if the return had been accepted as filed.

[48] Still, if one does not intend a reduction in tax then it might be harder for the Crown to establish that the misrepresentation, if not intentional, was made under circumstances that amount to gross negligence. This aspect of the present case troubles me.

[49] The misrepresentation here, made by the Appellant's spouse in the preparation of the Appellant's return, did save some tax. However, it is a relatively

small amount compared to the amount of the imputed tax saved amount against which the penalty is assessed. The misrepresentation is, on the other hand, a very large amount, creating a large loss and thereby seemingly creating a "shelter" to protect large amounts of taxable income in *other* years by virtue of loss carry-backs and carry-forwards. However, there is no evidence the losses were ever used in this way. Although the assessment in question was done relatively quickly there is no evidence that the Appellant made any attempt to use that shelter. The Crown's burden of proof might, arguably, include bringing evidence, if it exists, that the shelter was more than a simple mistake as shown by other tax returns such as amended prior years' returns and/or subsequent years' returns, that demonstrate the avarice resulting from the so-called "mistake". However, it is possible in this case that any avarice intent, if it existed, would not have been acted upon given that the subject audit started in April 2008.

[50] That being the case, I do not draw any inference from the Crown's failure to bring evidence on this aspect of this case. However, I simply want to draw attention to the point that the provision in the *Act* (subsection 163(2.1)) that deems that reported income cannot be less than nil is there to ensure that the penalty is assessed *as if* the full loss had been available to save tax in the year the false statement was made. The policy and wisdom of that penalty is not questionable. Setting up losses that were not incurred by reporting false costs or false proceeds might well best be prevented by not giving any weight to whether there was any attempt to use the loss. But surely the absence of evidence that the taxpayer intended the reduction in tax afforded by the creation of a loss might properly inform the question of whether the circumstance of the case were such that the making of the false statements amounted to gross negligence or to turning a blind eye to the truth of the statement.

[51] Those comments aside, I have accepted the Appellant's testimony and that of his spouse that they did not knowingly make a false statement. The Appellant trusted that the proceeds of disposition from the sale of the Greyrock property were, for tax purposes, reported properly. He relied on his wife to prepare his return and I am satisfied that such reliance in the circumstances of this case did not amount to gross negligence or wilful blindness.

[52] Accordingly, the appeal is allowed.

[53] As to costs, a motion was made by Appellant's counsel after my delivering my Judgment and Reasons by conference call, that enhanced or substantial indemnity costs be awarded. Written submissions on the motion were received.

[54] The basis for the motion is that an offer to settle the appeal was made in writing on March 12, 2012, and reliance is placed on paragraph 147(3)(*d*) of the *Tax Court of Canada Rules (General Procedure)*. That provision allows the Court discretion in determining the amount of costs to be awarded to a party involved in the proceedings. One of a number of factors that the Court may consider in exercising that discretion is, pursuant to the paragraph relied on by the Appellant, "any offer of settlement made in writing".

[55] At issue at the outset is whether there was in fact an "offer of settlement". The correspondence purporting to be an offer of settlement, dated March 12, 2012, sets out factual submissions and arguments and states that the case for the assessments of penalties is unsupported by the evidence and should be waived. The correspondence then offers to settle the matter, without costs, if the Minister agrees to vary the assessment accordingly. Failing acceptance of the offer, the correspondence states that solicitor and client costs would be sought if the Appellant is successful at trial.

[56] The Minister declined the offer on March 19, 2012. On June 26, 2012 Appellant's counsel wrote urging a reconsideration of the Minister's position and reiterating an intention to seek solicitor and client costs if the Appellant won at trial.

[57] The Respondent argues that the essence of the "offer" was to abdicate the appeal. I agree. An "offer" that the other party to the litigation withdraw in order to avoid a threat of enhanced costs cannot, in these circumstances, be considered to be an "offer of settlement".

[58] Further, and more importantly, my caveat "in these circumstances", is meant to underline that even if the said correspondence might otherwise be considered to be an offer of settlement, which is dubious,[2] it was not open here to the Respondent to accept it as such.

[59] It was acknowledged that the only issue at trial was whether Mr. Hine was grossly negligent. That question fits into the "yes-no" category described by Justice Stratas in *CIBC World Markets Inc. v. R.*, 2012 FCA 3. There are no degrees of gross negligence. Objective considerations supported the Respondent's

[2] See *LeRiche v. R.*, 2012 TCC 19.

view that showing a loss as opposed to disclosing a substantial gain warranted a hearing to assess the weight and probability of self-serving evidence.

[60] The assessment at issue was not a routine imposition of penalties. Indeed, based on the case presented by Respondent's counsel, I am satisfied that the assessment was based on a thoughtful and not unreasonable belief that the Appellant must have known of the misrepresentation in question. To have "settled" the case as offered by the Appellant would have been to abdicate the responsibilities imposed on the Department of Justice. There was, in these circumstances, an impediment to settlement tantamount to a legal impediment. There is nothing in the authorities, including my decision in *Potash Corporation of Saskatchewan Inc. v. R.*, 2012 TCC 235, to suggest otherwise. Determining whether the Appellant's conduct in this case was wilful or wonton or grossly negligent could not be conceded in this case on the basis of what a court was likely to find on a balance of probability. The objective evidence pointed in a different direction.

[61] As well, I note that none of the other factors in subsection 147(3) warrant my awarding enhanced costs in this case. The amount at issue, the tariff versus the fees incurred and the circumstances of the case are not such to cause me any alarm that a grave injustice has been suffered by the Appellant in terms of a cost award governed by the applicable tariff. The law is well settled in this area. Further, its importance is singular to this appeal and there are no complexities that warrant special consideration. There was nothing in the time required by Appellant's counsel (some 30 hours) that would suggest that the volume of work was such to create an expectation that an enhanced cost award would be justified. As to the conduct of the parties, the Respondent did not require examinations for discovery and the Appellant did not request same. The Respondent did not oppose the Appellant filing an amended list of documents some 45 days prior to the hearing. There was nothing denied that ought to have been admitted. There was no conduct that could, in any way, be described as inappropriate and the Appellant has not demonstrated any exceptional circumstance that would justify an enhanced cost award.

[62] Accordingly, the Motion for enhanced costs is dismissed.

Signed at Winnipeg, Manitoba this 15th day of August 2012.

"J.E. Hershfield"

Hershfield J.

CITATION:	2012 TCC 295
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