Citation: 2013TCC140
Date: 20130502
Docket: 2012-4340(IT)I

BETWEEN:

JAN JANOVSKY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on April 24, 2013, in Edmonton, Alberta.)

V.A. Miller J.

[1] This appeal relates to Jan Janovsky's 2009 taxation year. The only issue raised by the Appellant was whether he was liable for gross negligence penalties under subsection 163(2) of the *Income Tax Act* (the "*Act*").

[2] When he filed his income tax return for 2009, the Appellant reported gross business income of $21,583.30; he claimed losses of $29,157 for an "agent activities" business; and he requested that $29,157 be carried back to his 2006 and 2007 taxation years. In reassessing the Appellant, the Minister made various adjustments but the major adjustment was that he disallowed the "agent activities" business loss and he assessed a penalty pursuant to subsection 163(2). In determining the Appellant's tax liability, the Minster made various assumptions which were not disputed by the Appellant. Those assumptions are:

a) in 2009, the Appellant was a court-reporting student finishing his studies at the Northern Alberta Institute of Technology;

b) in 2009, the Appellant received a student loan of $2,030;

c) the Appellant did not pay any source deductions in 2009;

d) in 2009, the Appellant was also a self-employed musician, performing shows called "Janovsky" on cruise ships (the previously defined Musician Business);

e) the Appellant earned gross business income of $18,290.93 from his Musician Business;

f) the Appellant incurred business expenses for the Musician Business of no more that $9,452.40 for the 2009 taxation year as detailed in the attached schedule;

g) the Appellant earned net business income from the Musician Business of $8,838.53;

h) the Appellant paid interest of $850 on his student loan;

i) the Appellant incurred medical expenses of $922;

j) the Appellant paid tuition fees of $1,977;

k) the Appellant was entitled to the education and textbook amount of $2,325;

l) the Appellant reported gross business income of $21,583.30 for 2009;

m) the Appellant reported business expenses of $50,740.30 for 2009;

n) the Appellant claimed business losses of $29,157.00 (the previously defined Claimed Agent Losses);

o) the Appellant claimed in his income tax return for the 2009 taxation year that the business was as an "Agent";

p) the Appellant did not operate a business in the 2009 taxation year as an "Agent";

q) the Appellant claimed that his income of $21,583.30 from this business was "Receipts as Agent";

r) the Appellant did not receive any income as agent;

s) the Appellant claimed that expenses of $50,740.30 from his business were "amt to principal fr agent";

t) the Appellant did not pay any amount to "principal fr agent";

u) the Appellant did not incur any business expenses relating to "amt to principal fr agent" in 2009;

v) the Appellant did not incur a business loss in 2009;

w) the Appellant did not collect his income as agent for a principal;

x) the Appellant signed his income tax return for the 2009 taxation year "per" himself;

y) the Appellant's position is based on a script;

z) the Appellant knowingly participated in a type of detax scheme in order to avoid paying tax; and

aa) the Appellant was not involved in any agent activities or business.

[3] The Respondent had the onus to establish the facts which justified the assessment of the gross negligence penalties. In support of its position the Respondent relied on the affidavit of Connie Yeung, a Litigation Officer with the Vancouver Tax Services Office and the evidence of the Appellant.

[4] The Appellant is 33 years old. He is a self-employed musician and a teacher of music at Sherwood Park School of Music in Alberta. He has two degrees in music – one as an artist jazz performer and another as a classical pianist.

[5] At some point in time, he was in the military and was trained as a linesman. He has been enrolled in a court reporter program at the Northern Alberta Institute of Technology since September 2009 where he has completed all of the academic courses and is now attempting to attain the desired speed which is required to receive his certificate as a court reporter.

[6] In 2009, he learned about an organization called the Fiscal Arbitrators ("FA") from his girlfriend's father, Martin Whitaker. He and Mr. Whitaker attended a meeting in Edmonton sponsored by the FA where he was told that the FA would get

him the highest refund possible. There he learned that a natural person did not have to pay taxes and that the fictional person could claim expenses on behalf of the natural person. The "agent" is the natural and the fictional person. According to the Appellant, he was told by a Mr. Larry Watts that what the FA did was legal and was based on their understanding and interpretation of the law.

[7] The Appellant understood that Mr. Watts is an accountant and had worked for the Canada revenue Agency ("CRA"). He described Mr. Watts as a legal expert.

[8] The Appellant paid FA $500 to prepare his 2009 income tax return and promised them 20% of any amount he received from CRA. The FA prepared the Appellant's return and gave it to him to review, sign and file with the CRA.

[9] The Appellant testified that he didn't understand that he had claimed a loss of $29,157 or that he had applied for a loss carryback to the 2006 and 2007 taxation years.

[10] He stated that after he was reassessed he tried to contact Mr. Watts but he did not respond. Instead, Alexander Di Mauro, who I gather is also associated with the FA, agreed to help the Appellant with this appeal for a fee of $1,000. Because he did not pay the fee, no help was forthcoming.

[11] In response to a question from me concerning the calculation of expenses which he claimed in his income tax return, the Appellant stated that he did not know how the expenses were calculated and he didn't ask. He also did not understand what the notation "amt to principal fr agent" meant. He later testified that the amount of expenses consisted of all amounts he had spent for his music business and all of the expenses which he incurred as a student. He did not submit any documents to support his evidence.

[12] It was the Appellant's position that he trusted the FA and they owed him a duty of care. He has always paid his taxes and he gave the FA all of his documents as he did with H & R Block in prior years. He believed that the representatives of FA were legal tax experts. He was referred to the FA by his girlfriend's father who is both wealthy and knowledgeable.

[13] It is my view that the Respondent has established that the Minister was entitled to assess gross negligence penalties.

[14] Subsection 163(2) of the *Act* reads:

> 163(2) 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 …

[15] There are two elements contained in subsection 163(2). In the circumstances of this appeal, the Respondent had to show that the Appellant made a false statement in his 2009 income tax return and that the false statement was made knowingly or under circumstances amounting to gross negligence.

[16] In his 2009 return, the Appellant claimed that he, as agent, paid an expense of $50,740.30 to himself as principal. He may not have understood what this meant but he knew that he had not incurred an expense of $50,740.30 in 2009. I concluded that the Appellant did make a false statement in his return. In fact, he admitted the making of the false statement. He accepted that the Minister's reassessment was correct except for the imposition of gross negligence penalties. In doing so, the Appellant also accepted the assumptions made by the Minister in assessing his tax liability.

[17] Counsel for the Respondent stated that she did not think that the Appellant knowingly made a false statement in his tax return but that he was wilfully blind. It was the Respondent's position that gross negligence includes the concept of wilful blindness: *Villeneuve v Canada*, 2004 FCA 20 at paragraph 6.

[18] I agree with counsel that gross negligence includes the concept of wilful blindness. However, it is my view that the evidence in this appeal demonstrates that the Appellant knowingly made the false statement.

[19] The Appellant is well educated. He has two university degrees and is now in school studying to become a court reporter.

[20] The magnitude of his false statement was huge. In 2009, the Appellant only earned income from his business as a musician. His gross income was $18,290.93 and his expenses were $9,452.40. When he considered these expenses and those which he incurred from being a student, he ought to have known that the business expense of $50,740.30 which he reported on his income tax return was incorrect. His actual net income was $10,868 and yet he reported a business loss of $29,157. This is a false statement of $40,025.

[21] In his 2009 return, the Appellant also claimed a loss carryback for 2006 and 2007 in the amount of $8,787 and $20,370 respectively. If those losses had been allowed, the Appellant would have received a refund of all the income taxes he paid in those years. In 2006 and 2007, the total taxes payable by the Appellant were $1,021.10 and $4,379.90.

[22] The Appellant said he reviewed his return before he signed it and he did not ask any questions. He stated that he placed his trust in FA as they were tax experts. I find this statement to be implausible. He attended one meeting with the FA in 2009. He had never heard of them before and yet between his meeting with them and his filing his return in June 2010, he made no enquiries about the FA. He did not question their credentials or their claims. In his desire to receive a large refund, the Appellant did not try to educate himself about the FA.

[23] Considering the Appellant's education and the magnitude of the false statement he reported in his 2009 return, it is my view that the Appellant knew that the amounts reported in his return were fake.

[24] If I am incorrect and the Appellant did not knowingly make the false statement, then I find that he was wilfully blind. If he indeed did not understand the terminology used by FA in his return and if he did not understand how FA calculated his expnses, then he had a duty to ask others aside from FA. In a self-assessing system such as ours, the Appellant had a duty to ensure that his income and expenses were correctly reported. Our system of taxation is both self-reporting and self-assessing and it depends on the honesty and integrity of the taxpayers for its success: *R v McKinlay Transport Ltd.*, [1990] 1 SCR 627. The Appellant's cavalier attitude demonstrated such a high degree of negligence of wilful blindness that it qualified as gross negligence: *Chenard v The Queen*, 2012 TCC 211.

[25] The Appellant relied on the fact that FA had a duty of care to him. I explained to him that this court does not have jurisdiction with respect to this issue.

[26] In conclusion, the appeal is dismissed.

Signed at Ottawa, Canada, this 2nd day of May 2013.

"V.A. Miller"

V.A. Miller J.

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STYLE OF CAUSE:	JAN JANOVSKY AND THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
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REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Wendy Bridges Robert Neilson

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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