Docket: 2015-3695(IT)G

BETWEEN:

SHERYL TAVERNIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 1, 2018, at Toronto, Ontario

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Charles Haworth
Counsel for the Respondent:	Aaron Tallon

JUDGMENT

The appeal from the two reassessments raised February 28, 2013 under the *Income Tax Act* (Canada) for the Appellant's 2008 and 2009 taxation years respectively is dismissed, with costs.

Signed at Halifax, Nova Scotia, this 28th day of August 2018.

"B. Russell"

Russell J.

Citation: 2018TCC173
Date: 20180828
Docket: 2015-3695(IT)G

BETWEEN:

SHERYL TAVERNIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Russell J.

Introduction:

[1] The appellant Ms. Sheryl Tavernier has appealed reassessments of her 2008 and 2009 taxation years, both raised February 28, 2013 under the *Income Tax Act* (Canada) (Act). She specifically appeals the gross negligence penalty assessed pursuant to subsection 163(2) of the Act in respect of a net business loss falsely claimed for each of those taxation years. The appellant does not oppose denial of these falsely claimed net business losses, in the amounts of $25,038 (2008) and $424,023 (2009).

[2] She says she had neither intentionally claimed these fictitious business losses nor been grossly negligent in claiming them. She says she wrongly had trusted her tax return preparer who, unbeknownst to her she said, had included these bogus claims in her 2008 and 2009 returns which she then had signed without, in either instance, review.

Evidence:

[3] Evidence adduced at the hearing established that in 1979 Ms. Tavernier had moved to Canada from Saint Kitts and Nevis at the age of 19 years. She trained to become a nurse, receiving a nursing diploma in or about 1989 and becoming a registered nurse. Then in 2000 she earned a B.Sc. in Nursing from Ryerson

University. She has worked as a nurse at Scarborough Hospital since 1990 and has been working both there and at the former Toronto East General Hospital in the orthopaedics and palliative care departments, sometimes as a charge nurse.

[4] Prior to 2005 her annual income tax returns were on occasion prepared by her common law partner but never prepared by herself. In 2004 she and her partner attended one or more advertised public seminars on financial planning presented by DSC Lifestyle Services (DSC). DSC persuaded the appellant and her common law partner that it could help them with debt restructuring, and did assist them in getting a lower interest rate for their mortgage. DSC also introduced them to the Global Learning Gift Initiative (GLGI) gifting program (since discredited) saying that for each dollar gifted they could claim a deduction of three to five dollars. DSC gave them an explanation as how this could occur. The appellant said her partner (who did not testify) thought it was "OK", so she went along with him in doing this. DSC began preparing the appellant's tax returns with her 2005 taxation year.

[5] For each of her 2005, 2006 and 2007 taxation years, which are not in issue, the appellant gifted money for the GLGI program, which DSC reported in her tax returns for those years but in exaggerated amounts, leading to improperly excessive tax refunds yearly.

[6] Also in her 2005 taxation year return prepared by DSC, the appellant claimed a fictitious business loss of $12,371, she says unknowingly, without identifying any business in her Statement of Business Activities enclosed with the return. She merely signed the prepared return without at all first reviewing it.

[7] As well, in her 2006 taxation year return that DSC prepared the appellant claimed a fictitious net business loss of $37,499, representing that she had engaged that year in management consulting, had made revenue of one dollar against alleged expenses of $37,500 including $33,000 for advertising, $1,500 for office expenses and $3,000 for professional fees. Again the appellant claims this was done without her knowledge and that she did not review or otherwise question her DSC-prepared return before signing it and handing it back to the DSC staff to be filed.

[8] Now turning to the 2008 and 2009 taxation years in issue, the appellant's 2008 taxation year return was filed November 5, 2009. As noted the return was prepared by DSC and included a claim for a fictitious business loss of $25,038. Shortly thereafter, on December 14, 2009, it was assessed as filed. The appellant's

2009 taxation year return was filed September 15, 2010. Again as noted DSC prepared it, and included in it a claim for a fictitious business loss in the massive amount of $424,023. That return also was assessed as filed. Both taxation years were reassessed February 28, 2013, by which reassessments these claimed fictitious business losses were denied and gross negligence penalties in respect thereof, which the appellant here challenges, were assessed.

[9] The appellant further testified in chief that she dropped off at DSC's office for her 2008 taxation year return preparation, as she had done for her 2005, 2006 and 2007 taxation year returns, documentation principally including T4s and RRSP and nurse licensing slips. Upon completion of these returns she did not review any of them. She therefore was unaware of the fictitious net business loss of $25,038 that DSC had claimed in her 2008 return.

[10] DSC had encouraged the appellant and her partner in December 2008 to get involved in DSC's purported "T.I.G.E.R" business ("Total. Implementation to. Generate. Excellent Business. Revenue" - Ex. A-1, tab 2 pamphlet). For $25,000 paid to DSC, the business would distribute CDs. DSC further explained to them that this T.I.G.E.R. participation would allow refunds to the appellant and her common law partner of taxes from prior taxation years. They agreed to participate and paid a $1,500 downpayment with $175 thereafter paid monthly from her partner's account, beginning in January 2009. DSC said it would advise them when this business or program would start. In fact DSC never spoke to them of this again, including as to when the business or program would start, and DSC could not be found when the appellant subsequently sought out DSC representatives respecting the false business deductions claimed in her name.

[11] The appellant testified that for preparation of her 2009 taxation year return she once again dropped off at the DSC office her relevant tax documents. This would have been in or about late August and early September 2010, given that the return was filed September 15, 2010, and enclosing a request for loss carryback form dated August 23, 2010 and signed by the appellant. There was, as before, no discussion as to how the return would be prepared. She says she completely trusted DSC. She was receiving refunds as initially claimed.

[12] But, also by this time she knew from Canada Revenue Agency (CRA) correspondence dated June 10, 2010 that her 2006 year had been reassessed to disallow the entire $37,499 business loss she had claimed for that year and also that she had been assessed a gross negligence penalty in respect of that now denied business loss.

[13] Also she knew from CRA correspondence dated November 3, 2008 that her 2005 and 2006 taxation years had been reassessed to disallow all (2005) and a portion of (2006) her claimed GLGI charitable donations for those years, and she knew from CRA correspondence dated December 7, 2009 that her 2006 taxation year had been again reassessed to deny the $15,049 remainder of her claimed GLGI charitable donations for that taxation year.

[14] Nevertheless, her 2009 taxation year return prepared by DSC was submitted, yet again without review or question prior to signature. As noted, included in that return was a request for loss carryback form signed by her dated August 23, 2010, together with a claim for business loss of the strikingly large amount of $424,023. For the 2009 taxation year her reported T4 income, from nursing, was a comparatively paltry $132,845.

[15] The appellant spoke of a letter to her ostensibly signed by two high level provincial and federal politicians thanking her for her charitable gift-giving, but she was unable to provide that letter or a copy thereof as evidence. She saw that the 2009 return called for a $32,900 refund but did not ask any questions about that or anything else. She said she did not see the claim for loss carryback form which she had signed. She says she signed what DSC personnel told her to sign - “sign this, sign this”.

[16] In cross-examination the appellant testified that regarding the purported T.I.G.E.R. program DSC never contacted her or her partner, nor did they initiate any contact with DSC or CRA about it. She agreed she did not do any work for that program. She never distributed any CDs and she never received any money from this. She said she was busy and thus did not follow up. She said she had lots of correspondence from CRA. But still, she says, she trusted the DSC people. They told her they were filing notices of objection, that lawyers would handle these several issues and that it would all be worked out. She confirmed that she had a nursing baccalaureate degree, that she asked no questions of DSC even after CRA correspondence disagreeing with her filings started coming in, and that she did not review any more than she had before. She said she sees it now but then CRA was still sending refunds, even while saying the filings were wrong. She also said she was unaware that business losses had been claimed in her 2005 and 2006 taxation year returns, in addition to her 2008 and 2009 taxation years.

[17] No one else was called as a witness for the appellant’s case. For the respondent’s case, Ms. L. Dupont, a CRA officer based in Sudbury, was called to testify. She had worked on CRA’s file regarding the appellant’s years herein at

issue. The appellant had not replied to CRA's information request for her 2008 taxation year. If the 2009 request for loss carryback had been permitted the appellant would have received back all taxes since 2006. She had prepared the penalty recommendation reports for 2008 and 2009. The predominant reason for this recommendation was absence of any actual business.

Issue:

[18] The issue is whether the appellant was properly assessed a gross negligence penalty for each of her 2008 and 2009 taxation years pursuant to subsection 163(2) of the Act. The respective penalty amounts are said by the respondent to be $3,275 and $55,495. The appellant asserts that a total of $194,491 is at issue - no doubt reflecting interest under the Act on the penalty amounts, running from each of the at issue taxation years to the present.

Legal Analysis and Conclusion:

[19] The relevant portion of the subsection 163(2) "gross negligence" penalty provision for purposes of this appeal provides:

> (2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement 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…

[20] It is settled law that gross negligence can include wilful blindness; see *Villeneuve v. Canada*, 2004 D.T.C. 6077 (F.C.A.).

[21] The recent Federal Court of Appeal (FCA) decision of *Rosetta Wynter v. Her Majesty*, 2017 FCA 195, is factually similar to and thus largely determinative of the herein appeal involving the same issue being applicability of subsection 163(2) penalties. *Wynter* concerned a taxpayer who challenged the subsection 163(2) penalty assessed due to a fictitious business loss in the amount of $447,148 claimed in her 2009 return. Allowance of the claim would have entitled the taxpayer to large tax refunds for the current and prior taxation years. This taxpayer had, like the appellant in the case at bar, used DSC to prepare her returns. She had received large refunds for her 2006, 2007, 2008 and 2009 taxation years. She asked DSC in 2006 why she qualified to receive a large refund compared to what she had previously received with her former accountant. DSC answered it was because of a

charitable donation she had made. The taxpayer did not otherwise at all query why she qualified for such large refunds. She did not and had not operated any business, but regardless signed a request for loss carryback for her 2009 taxation year. The Tax Court (2016 TCC 103, per Rowe, DJ) had denied the appeal on the basis the taxpayer was wilfully blind to the false statement in her 2009 return as to large business loss.

[22] The FCA in dismissing the appeal noted that subsection 163(2) speaks of the penalty applying where the taxpayer acts or omits to act, "knowingly or under circumstances amounting to gross negligence". And wilful blindness connotes "deliberate ignorance", per *R. v. Bristle*, 2010 SCC 13, paras. 23-4. Knowledge is imputed to the taxpayer. The FCA found that an intention to cheat is not a prerequisite for a finding of knowledge, including wilful blindness. At para. 16 the FCA per Rennie, JA summarized as follows:

> In sum, the law will impute knowledge to a taxpayer who, in circumstances that suggest inquiry should be made, chooses not to do so. The knowledge requirement is satisfied through the choice of the taxpayer not to inquire, not through a positive finding of an intention to cheat.

[23] The FCA at paras. 18 and 19 went on to note that gross negligence is distinct from wilful blindness. The former captures conduct that is "markedly below what would be expected of a reasonable taxpayer". Per the venerable *Venne v. R.* (1984), 84 DTC 6247 (FCTD) at 6256, gross negligence is "a high degree of negligence, one that is tantamount to intentional acting or an indifference as to whether the law is complied with or not." (Indeed this 1984 *Venne* phrase, "indifference as to whether the law is complied with or not", seems conceptually to encompass wilful blindness.)

[24] Now turning back to the appeal at bar - here the appellant is quite well educated, holding a baccalaureate degree and, as a nurse, having worked numerous years in a demanding profession that requires serious attention and precision. Apparently DSC endeared itself to the appellant in 2006 by helping her and her common law partner arrange a lower interest rate mortgage. Thereafter, the appellant had DSC prepare all her tax returns until 2010, particularly including for the taxation years at issue - 2008 and 2009.

[25] Also as noted, by the time for filing of the 2008 taxation year return on November 5, 2009, the appellant had a year earlier (November 3, 2008) been advised by CRA that her 2005 and 2006 taxation years both had been reassessed to

deny all (2008) and a portion of (2009) her GLGI charitable donations. She also had learned by a February 20, 2009 CRA letter that her 2007 taxation year had been reassessed to substantially adjust three claimed spousal transfer amounts. That should have been enough for her to become much more questioning of DSC filings on her behalf.

[26] In addition, for the 2009 taxation year filing on September 15, 2010 she had learned, by CRA letter dated December 7, 2009, that her 2006 year again had been reassessed to deny all of the claimed GLGI supposed charitable donations. Also she knew by letter dated June 10, 2010 that business losses claimed for 2006 in the amount of $37,499 had been denied, with also a subsection 163(2) penalty having been assessed thereon.

[27] In summary the appellant, a university-graduate and seasoned health professional, unquestioningly and without review filed her 2008 return while fixed with knowledge of CRA non-acceptance of certain prior DSC-prepared filings of hers, claiming in that 2008 return a substantial fictional business loss. And, for her 2009 DSC-prepared return she signed a loss carryback form on August 23, 2010 for enclosure with that return, which return claimed a fictional business loss of $424,023, again absent any questioning (whether of DSC, CRA or her former accountant) let alone review by the appellant, and with the appellant fixed with further knowledge of CRA rejection of prior DSC-prepared filings of hers.

[28] My view is that these actions and omissions to act of the appellant readily equate to wilful blindness and as well to a marked degree of negligence well sufficient to constitute gross negligence - both being elements, discussed above, of the subsection 163(2) penalty provision. As the FCA noted at para. 20 in *Wynter*,

> ...while conceptually different, gross negligence and wilful blindness may merge to some extent in their application. A taxpayer who turns a blind eye to the truth and accuracy of statements made in their income tax return is wilfully blind, and is also grossly negligent.

[29] The appellant points to an occasion in 2006 respecting her 2005 return when she contacted CRA to enquire as to the apparent lateness of the anticipated 2005 income tax refund, which ultimately did arrive. This instance was put forward as indicating the appellant was not hesitant about contacting CRA about this DSC-prepared filing, thus, it was submitted, demonstrating she was not wilfully blind or grossly negligent. I do not think that this action at all carries that kind of weight. At issue here are the 2008 and 2009 taxation years, not the 2005 taxation year. As

indicated above, by the times she was filing her 2008 and 2009 DSC-prepared returns, unreviewed, the appellant had received several if not numerous CRA communications informing that CRA had not accepted her 2005 and 2006 taxation year filing positions. This included, with respect to her 2009 taxation year filing of September 15, 2010, shortly prior receipt of the June 10, 2010 CRA letter informing her of rejection of the claimed fictitious business loss in her 2006 taxation year return. Any response from DSC to her not to be concerned about these CRA communications and that they were being objected to, does nothing to excuse or otherwise mitigate her continued signing and submission of income tax returns without even any review of same (so as to, for example, become aware of the large amounts of fictitious business losses being claimed in the 2008 and especially 2009 returns). Canada's self-assessing tax system requires that taxpayers take responsibility for their tax filings. An educated taxpayer particularly, cannot fob off this responsibility so as to not even be aware of what is being claimed on his/her behalf; while giving no credence to ample signs of CRA non-acceptance of previous filings.

[30] In concluding on the basis of the foregoing that the gross negligence penalties here at issue are well founded, I have as well considered the several authorities cited by the appellant, which, I note, include *Wynter*, and as well *Findlay v. R.*, [2000] CarswellNat 954 (FCA), *Julian v. R.*, [2004] CarswellNat 1368 (TCC), *Torres v. R.*, [2013] CarswellNat 4583 (TCC), *Boateng v. R.*, [2017] CarswellNat 7260 (TCC), *Kajtor v. R.*, [2018] TCC 6, *Anderson v. R.*, [2016] CarswellNat 1064 (TCC), *Morrison v. R.*, [2015] CarswellNat 8214 (TCC); *Sam v. R.*, [2015] CarswellNat 8213 (TCC) and *Bolduc v. The Queen* [2017] TCC 203. As stated, in my view this matter is largely governed by the recent *Wynter* decision of the FCA.

[31] The appeal is dismissed, with costs.

Signed at Halifax, Nova Scotia, this 28th day of August 2018.

"B. Russell"

Russell J.

CITATION:	2018TCC173
COURT FILE NO.:	2015-3695(IT)G
STYLE OF CAUSE:	SHERYL TAVERNIER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 1, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
DATE OF JUDGMENT:	August 28, 2018

APPEARANCES:

Counsel for the Appellant:	Charles Haworth
Counsel for the Respondent:	Aaron Tallon

COUNSEL OF RECORD:

For the Appellant:

Name:	Charles Haworth
Firm:	Dioguardi Tax Law LLP

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada