

Docket: 2013-3996(GST)G
2013-3997(GST)G
2014-4354(IT)G

BETWEEN:

JOHN WALL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 24, 25 & 26, 2016 and April 26 & 27, 2017 at
Vancouver, British Columbia

By: The Honourable Justice Henry A. Visser

Appearances:

Counsel for the Appellant: George Douvelos
Counsel for the Respondent: Selena Sit
Johanna Russell

JUDGMENT

The Appeals from the assessments and reassessments made under Part IX of the *Excise Tax Act* and the *Income Tax Act* are allowed, and the assessments and reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

- (a) the Appellant's net business income for his 2006 taxation year should be reduced by \$126,000 in respect of his sale of the Vacant Lot at 2761 Patricia Crescent, Savary Island;
- (b) the Appellant's income for his 2006 taxation year should be increased by \$63,000 in respect of the taxable capital gain he earned in respect of his sale of the Vacant Lot at 2761 Patricia Crescent, Savary Island;

- (c) the Appellant was not required to collect or remit GST in respect of his sale in 2006 of the Vacant Lot at 2761 Patricia Crescent, Savary Island, and as a result the amount of net GST which he was required to remit in respect of his reporting period July 1, 2006 to September 30, 2006 should be reduced by \$9,000;
- (d) the Appellant's net business income for his 2006 taxation year should be reduced by \$159,370 (being the difference between \$810,693 and \$651,323), to reflect an error conceded by the Respondent and described in paragraphs 14 and 23 of her Reply in matter 2014-4354(IT)G;
- (e) the amount of applicable interest and penalties which was assessed should be consequentially reduced in respect of the foregoing paragraphs (a) to (d); and
- (f) the Appellant's Appeals are dismissed in all other respects.

Costs are awarded to the Respondent. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Respondent shall have a further 30 days to file written submissions on costs and the Appellant shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Halifax, Nova Scotia this 14th day of August 2019.

“Henry A. Visser”

Visser J

Citation: 2019 TCC 168
Date: 20190814
Docket: 2013-3996(GST)G
2013-3997(GST)G
2014-4354(IT)G

BETWEEN:

JOHN WALL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Visser J.

I. OVERVIEW

[1] The Appellant, John Wall, has been a licensed real estate agent in Vancouver since approximately 1977. He also has significant experience developing real estate. He has, however, reported very little income for income tax purposes from either activity. In 2006, 2008 and 2010, Mr. Wall sold four properties in British Columbia for aggregate sale proceeds of \$5,784,000.00 (and estimated profit of \$2,234,419), and in particular sold three homes which he developed in Vancouver's West Side (the "Three Homes") and one vacant lot on Savary Island (the "Vacant Lot") (collectively, the Three Homes and the Vacant Lot are referred to herein as the "Four Properties"). Mr. Wall did not report any income or gains from these sales in his 2006, 2008 and 2010 taxation years, and did not collect, remit or report any GST or HST on the sale of the Four Properties. He also reported very little income from other sources during those taxation years. In respect of the sale of the Three Homes, he did so on the basis that he had built and occupied each of the Three Homes as his principal residence. Notwithstanding his significant business and real estate experience, he testified that he overlooked reporting the significant gain on the sale of the Vacant Lot.

[2] Pursuant to Notices of Reassessment (the "ITA Reassessments") issued by the Minister of National Revenue (the "Minister") under the *Income Tax Act* (the

“*Act*”¹ on October 7, 2013, the Minister reassessed Mr. Wall’s 2006, 2008 and 2010 taxation years to include \$810,693, \$772,403 and \$651,323, respectively, of unreported net business income in respect of his sale of the Four Properties (totaling \$2,234,419 in aggregate). The Minister also assessed gross negligence penalties against Mr. Wall pursuant to subsection 163(2) of the *Act* in respect of this unreported income.

[3] Due to an acknowledged error by the Minister,² the Minister’s reassessments of Mr. Wall’s unreported net business income for 2006 and 2010 were accidentally switched, and the Minister accordingly issued a further Notice of Reassessment on May 4, 2015 pursuant to which the Minister reassessed Mr. Wall’s 2010 taxation year to include an additional \$159,370³ of unreported net business income. The Minister also assessed additional gross negligence penalties pursuant to subsection 163(2) of the *Act* in respect of this unreported income. The Minister did not, however, issue a further Notice of Reassessment to correct the \$159,370 overstatement error in the Minister’s October 7, 2013 Notice of Reassessment in respect of Mr. Wall’s 2006 taxation year or reduce the amount of gross negligence penalties assessed pursuant to subsection 163(2) of the *Act* in respect of Mr. Wall’s 2006 taxation year. In this respect, the Respondent has conceded that Mr. Wall’s net business income for his 2006 taxation year should be reduced by \$159,370, and that consequential reductions should be made with respect to the amount of interest and penalties applicable to Mr. Wall’s 2006 taxation year.⁴

[4] Pursuant to a Notice of Assessment (the “4668 ETA Assessment”) issued by the Minister under the *Excise Tax Act* (the “*ETA*”)⁵ on November 30, 2011, the Minister assessed the Appellant’s reporting periods from August 14, 2009 to December 31, 2010 in respect of \$271,800 of unreported net GST, \$8,833.50 of failure to file penalties and \$11,892.50 of interest, for a total of \$292,526. The 4668 ETA Assessment relates to the property sold by Mr. Wall in 2010.⁶

[5] Pursuant to three Notices of Assessment issued by the Minister under the *ETA* on January 24, 2012, the Minister assessed the Appellant’s reporting periods

¹ R.S.C., 1985, c.1 (5th Supp.), as amended. All statutory references herein are to the *Act*, unless specified otherwise.

² See paragraphs 14, 16, 19 and 23 of the Respondent’s Reply for matter 2014-4354(IT)G.

³ Being the difference between the switched numbers, namely \$810,693 – \$651,323.

⁴ *Supra*, note 2.

⁵ R.S.C., 1985, c. E-15, as amended. References herein to GST include any HST exigible pursuant to the *ETA*.

⁶ See pleadings in matter 2013-3996(GST)G.

from April 1, 2006 to June 30, 2006, July 1, 2006 to September 30, 2006, and January 1, 2008 to March 31, 2008 in respect of \$205,810 of unreported net GST, \$8,232.40 of failure to file penalties, \$4,321.20 of late remitting penalties and \$67,150.89 of interest, for a total of \$285,514.49.⁷ Combined, the four GST assessments at issue in these Appeals totalled \$578,040.49 at the time of assessment.

[6] At the hearing of these Appeals, the Respondent also conceded that Mr. Wall sold the Vacant Lot on Savary Island on account of capital, and that therefore the sale was not subject to GST and the gain thereon should be included in Mr. Wall's 2006 income as a capital gain.

[7] Mr. Wall has appealed the foregoing assessments and reassessments of income tax and GST (and related interest and penalties) to this Court. These Appeals were heard on common evidence.

II. ISSUES

[8] Further to the concessions made by the Respondent in her Reply in respect of the ITA Reassessments and those made at the hearing of these Appeals in respect of the Vacant Lot, the issues remaining in these Appeals are as follows:

- (a) Did Mr. Wall sell the Three Homes on account of income or on account of capital for the purposes of the *Act*;
- (b) If Mr. Wall sold the Three Homes on account of capital, could he claim the principal residence exemption in respect of any of the Three Homes pursuant to paragraph 40(2)(b) of the *Act*;
- (c) Did the Minister properly assess penalties pursuant to subsection 163(2) of the *Act* in respect of Mr. Wall's 2006, 2008 and 2010 taxation years;
- (d) Was the Minister able to reassess Mr. Wall beyond the normal reassessment period in respect of his 2006, 2008 and 2010 taxation years pursuant to subsection 152(4) of the *Act*;
- (e) Was the sale of each of the Three Homes subject to GST;

⁷ See pleadings in matter 2013-3997(GST)G.

- (f) Did the Minister properly assess failure to file penalties pursuant to section 280.1 of the *ETA*; and
- (g) Did the Minister properly assess late remitting penalties pursuant to paragraph 280(1)(a) of the *ETA*.

[9] Of the foregoing issues, the primary issue is whether Mr. Wall sold the Three Homes on account of income (in the course of a development business) or on account of capital. A secondary issue is whether (and if so, to what extent) Mr. Wall resided in any of the Three Homes prior to selling them. The other issues are subsidiary to the determination of those two issues.

[10] For the reasons that follow, it is my view that Mr. Wall sold the Three Homes on account of income in the course of a development business he was carrying on during the years under appeal, and that therefore Mr. Wall's Appeals should be dismissed, except to the extent of the concessions made by the Minister relating to:

- (a) the uncorrected overstatement error totaling \$159,370 in respect of Mr. Wall's 2006 taxation year;
- (b) the sale of the Vacant Lot on Savary Island by Mr. Wall in his 2006 taxation year being on account of capital, and not income;
- (c) the sale of the Vacant Lot on Savary Island by Mr. Wall in 2006 not being subject to GST in the amount of \$9,000; and
- (d) consequential reductions in the amount of penalties and interest applicable to the foregoing three concessions.

III. BACKGROUND FACTS

[11] As previously noted, these Appeals relate to the sale by Mr. Wall of the Four Properties during the taxation years under appeal. In particular, Mr. Wall sold the following properties during those taxation years:⁸

	<u>Purchase Date</u>	<u>Sale Date</u>	<u># Months Owned⁹</u>
2761 Patricia Crescent, Savary Island¹⁰	February 1992	August 15, 2006	177
4007 West 21st Ave	November 29, 2004	April 6, 2006	16
4324 West 14th Ave	July 13, 2006	March 27, 2008	21
4668 West 14th Ave¹¹	August 14, 2009	November 29, 2010	16

⁸ See the audit report and land title transfer documents in Exhibit R-1, tabs 2, 20, 35, 41, 45, 47, 53, 60 and 65. The purchase and sale dates are based on the dates set out in the respective land title transfer documents.

⁹ The total number of months owned is based on the relevant land title transfer documents and has been rounded off to the nearest whole month, and, in respect of the Three Homes, includes the time required to demolish the existing house and to build a new house, as well as the time that the house was listed for sale.

¹⁰ 2761 Patricia Crescent, Savary Island is herein referred to as the “Vacant Lot”. This property was also referred to as the “Courtenay Lot”.

¹¹ 4007 West 21st Ave, 4324 West 14th Ave and 4668 West 14th Ave are collectively referred to herein as the “Three Homes”.

[12] Mr. Wall had very little documentation with respect to these properties. Nevertheless, the Minister allowed certain documented expenses and estimated development costs, and as a result computed Mr. Wall's profit or gain from the sale of the Four Properties as follows:¹²

	<u>Purchase Price</u>	<u>Development Costs Allowed</u>	<u>Expenses Allowed</u>	<u>Sale Price</u>	<u>Profit/Gain</u>
2761 Patricia Crescent, Savary Island	\$ 24,000.00	\$ -	\$ -	\$ 150,000.00	\$ 126,000.00
4007 West 21st Ave	\$ 580,000.00	\$ 311,676.00	\$ 1,001.31	\$ 1,418,000.00	\$ 525,322.69
4324 West 14th Ave	\$ 890,000.00	\$ 287,054.00	\$ 1,543.34	\$ 1,951,000.00	\$ 772,402.66
4668 West 14th Ave	<u>\$ 1,127,500.00</u>	<u>\$ 325,205.00</u>	<u>\$ 1,601.69</u>	<u>\$ 2,265,000.00</u>	<u>\$ 810,693.31</u>
Total	<u>\$ 2,621,500.00</u>	<u>\$ 923,935.00</u>	<u>\$ 4,146.34</u>	<u>\$ 5,784,000.00</u>	<u>\$ 2,234,418.66</u>

[13] Mr. Wall testified at the hearing of these Appeals. He also submitted documentary evidence in support of his Appeals. As discussed further below, I did not find Mr. Wall to be a credible witness. Mr. Wall also called three additional witnesses, namely Mr. Bryan Velve (who was the real estate listing agent for the sale of the Three Homes), Mr. Alexander Wall (the Appellant's son), and Mr. Alfonso Daudet (who was Mr. Wall's investment advisor). The following are summaries of each of their testimonies.

A. Mr. John Wall

(1) Overview

[14] As previously noted, Mr. Wall has been a real estate agent for many years, and also has significant experience developing real estate, both on his own and in conjunction with others. He has, however, reported very little income for tax purposes from either business activity, including in the taxation years under appeal. He nevertheless claimed that he built each of the Three Homes with the intention to live in each as his principal residence, notwithstanding that his reported income

¹² *Supra*, Note 8. See also in particular the audit report in Exhibit R-1, tab 2.

could not plausibly support the significant mortgages he had on each of the Three Homes. In that respect, Mr. Wall testified that he built each of the Three Homes so that he and his son could live close to his ex-spouse (Ms. Karen Wall), but, through a series of unfortunate events, was forced to sell each of the Three Homes that he had built and lived in with his son, so that he could pay down his accumulated debt. In my view, however, the evidence shows that Mr. Wall engaged in a pattern of purchasing a property, demolishing the existing structure, building a new house, selling the property and using the proceeds (i) to repay his accumulated debt, (ii) as income to support his lifestyle and (iii) to finance his next real estate development. In this respect, based on all of the evidence, on a balance of probabilities, it is my view that Mr. Wall purchased and developed each of the Three Homes with the intention to sell them in the course of a development business he carried on as a sole proprietor. There is, in my view, no other plausible conclusion that can be drawn from all of the evidence presented at the hearing of these Appeals.

[15] In my view, Mr. Wall's testimony was largely unreliable, self-serving, and evasive. He also could not (or chose not to) provide documentary evidence to support much of his position. When faced with evidence that contradicted his position, he was incredulous, offering explanations that were implausible or illogical. In addition, when faced with his own prior inconsistent statements, he dismissed the inconsistencies as trivial. He was also selective in remembering details about the Three Homes and other properties he developed or transacted with.

[16] For example, Mr. Wall took out financing for his construction activities from his bank on the basis of being a real estate developer with a six figure income. In Court, however, he denied building the Three Homes as a developer and blamed the bank for manipulating his mortgage applications to get them approved.

[17] Mr. Wall testified that he was aware of the principal residence exemption and tried to inform himself generally about how it works but he did not seek advice as to whether it would apply to his specific circumstances. His evidence suggests that he operated on the assumption that if a person lived in a house for approximately one year, then the principal residence exemption would apply to exempt any gains arising on the sale of the house.

[18] During the relevant period, Mr. Wall's expenses far exceeded his reported annual income. In my view, the long-term ownership of each of the Three Homes was not plausible based on Mr. Wall's reported income, absent some other source of capital, such as savings or gifts. In this respect, Mr. Wall said that he used his

savings and loans from family to finance each of the Three Homes, but there was, in my view, no evidence proffered to support his claim. Mr. Wall reported income of approximately \$15,000 to \$20,000 per year as a realtor and he brought no evidence of the income he made from his prior developments or any other source of funding. Furthermore, the majority of the income he made from being a realtor during the relevant period involved transactions relating to properties he owned or properties transacted by his father (Mr. Henry Wall) and his “friend”, Ms. Pillon (who was also referred to in the evidence as his girlfriend or spouse).

[19] It is unclear whether Mr. Wall lived in any of the Three Homes. Considering all of the evidence, it is my view, on a balance of probabilities, that he did not. In my view, neither he nor the witnesses he called could reliably verify his claims. Throughout the entire period under appeal there is evidence that Mr. Wall lived in and used his apartment and Ms. Pillon’s homes as his mailing address. While there is some evidence showing that Mr. Wall used each of the Three Homes as his mailing address for some limited purposes (such as receiving gas bills), that evidence is insufficient to establish that he lived in any of the Three Homes. Overall, it is my view that Mr. Wall’s testimony about living in each of the Three Homes (and how long he lived in each) was self-serving and inconsistent with the documentary evidence presented at trial.

(2) Properties connected to John Wall

[20] As previously noted, Mr. Wall has extensive experience buying, developing and selling real estate. In that respect, following is a summary of various properties connected to Mr. Wall which were referenced in the evidence presented at the hearing of these Appeals.

(a) The Vacant Lot - 2761 Patricia Crescent, Savary Island

[21] In February 1992 Mr. Wall and his then spouse (Karen Wall) purchased the Vacant Lot (located at 2761 Patricia Crescent, Savary Island) for \$24,000. Mr. Wall and Karen Wall separated around 1996. On July 24, 1998, Mr. Wall became the sole owner of the Vacant Lot when Karen Wall transferred her interest to him.¹³ He subsequently sold the Vacant Lot for \$150,000 on August 10, 2006, and used the proceeds to finance the purchase of 2612 Patricia Crescent, Savary Island. During 2006, Mr. Wall was also involved with the sale of 4007 West 21st Ave and 4067 West 19th Avenue, as well as the purchase of 4324 West 14th Avenue (in

¹³ Exhibit R-1, volume 1, tab 24, page 17.

each case as discussed further below). Mr. Wall testified that he did not report the sale of the Vacant Lot in his 2006 income tax return because he overlooked reporting it, despite having knowledge of how such transactions are reported from his previous development activities and his experience as a real estate agent. He thus did not dispute the amount of the gain he earned in respect of his sale of the Vacant Lot, but rather argued that the Minister was statute barred from reassessing his 2006 taxation year on October 7, 2013 in respect thereof.

(b) Pocido Holdings Limited – Mr. Wall’s Real Estate Development Company

[22] Mr. Wall testified that he owned a real estate development company called Pocido Holdings Limited (“Pocido”). Sometime between 1993 and 1995, Pocido and another builder developed approximately 20 townhouses in Squamish, British Columbia. Mr. Wall also testified that Pocido conducted the townhouse development as a business and claimed input tax credits for the GST paid during the construction.

[23] Mr. Wall testified that Pocido also worked with different builders to develop a house and a duplex. Mr. Wall was unable to remember exactly when these properties were developed. When he was shown mortgage applications, he could not recall which properties they referred to. The house was likely built in the Arbutus area of Vancouver in the mid to late 1990s. The duplex was likely built in the Kitsilano area of Vancouver in the early 2000s. Both developments involved the demolition of an existing structure and the construction of a new house or duplex which was subsequently sold.

(c) 4434 West 8th Avenue

[24] Mr. Wall lived in 4434 West 8th Avenue with his spouse (Karen Wall) and son (Alexander Wall). Karen Wall and Alexander Wall continued to live in that house after Mr. Wall and Karen Wall separated in approximately 1996. After their separation, Karen Wall’s health deteriorated due to multiple sclerosis (MS). Mr. Wall testified that she was unable to work and that she used a wheelchair. Mr. Wall said that he had an agreement with Ms. Wall to care for Alexander Wall when she was unable to do so because of her illness. He said that Alexander Wall initially spent half of his time with his mother at 4434 West 8th Avenue but as her illness progressed he only spent weekends with her.

[25] On July 19, 2004, Mr. Wall transferred his share of 4434 West 8th Avenue to Karen Wall in lieu of future support payments. This was arranged through a transaction involving a notional mortgage. However, Mr. Wall testified that he continued to pay for expenses relating to Ms. Wall's illness such as the installation of a \$30,000 lift at 4434 West 8th Avenue. Mr. Wall also said he continued to pay expenses related to Alexander Wall's ADHD and other learning disabilities. However, Mr. Wall did not provide any documentary evidence to support these expenses or his separation or divorce arrangement with Ms. Wall (including in respect of child support).

(d) Mr. Wall's Apartment - #908 2370 West 2nd Avenue

[26] Mr. Wall testified that he moved into an apartment at #908 2370 West 2nd Avenue (the "Apartment") around 1996 after he separated from Ms. Wall. He further testified that it was a small unit and that he decided to purchase and develop the house at 4007 West 21st Avenue because he wanted to provide a house for his son Alexander Wall to live in. However, Mr. Wall testified that he decided to keep the Apartment lease even after he allegedly moved into 4007 West 21st Avenue. While Mr. Wall testified that he sublet the Apartment in order to cover the cost of the lease, he did not call any of his purported tenant(s) or provide documentary evidence of any sublease agreement(s).

[27] Mr. Wall testified that he moved back into the Apartment after selling 4007 West 21st Avenue and continued to live there while 4324 West 14th Avenue was under construction. It is unclear from the evidence presented at trial when Mr. Wall ended the lease on the Apartment, but he testified that he lived there for a short period while he was building 4668 West 14th Avenue. Mr. Wall's evidence indicates that the Apartment was available to him as a residence for most of the relevant period that is the subject of these Appeals.

[28] Mr. Wall used the Apartment as his mailing address on his 2006 and 2008 income tax returns, various mortgage and loan documents,¹⁴ and his HPO application for 4324 West 14th Avenue.

(e) 4007 West 21st Avenue

[29] 4007 West 21st Avenue was the first of the Three Homes which Mr. Wall Purchased. Mr. Wall testified that he had the same intention for purchasing and

¹⁴ See Exhibit A-1, tabs 24 and 25, and Exhibit R-1, volume 2, tabs 33, 38, 50, 51, and 55.

developing each of the Three Homes: he wanted to provide a home for his son, Alexander Wall, in the same neighbourhood as his school and his mother's home.

[30] Mr. Wall purchased 4007 West 21st Avenue on November 29, 2004 for \$580,000. He subsequently obtained a demolition permit, following which he demolished the existing house on that property. He also obtained a building permit which was issued on March 10, 2005, following which he constructed a new house. It was listed for sale on January 13, 2006 and again on February 13, 2006. He obtained an occupancy permit which was issued on April 4, 2006, and the property was sold on April 6, 2006 for \$1,418,000.

[31] Mr. Wall financed the development of 4007 West 21st Avenue using an \$812,500 mortgage from HSBC. On cross examination, the Respondent asked Mr. Wall how he could afford the down payment and the long-term mortgage payments. In this respect, I note that Mr. Wall's annual reported income for tax purposes for most of the years from 1987-2005 was approximately \$15,000 to \$20,000. Mr. Wall testified that he had savings and personal loans from friends and family, but he did not provide any evidence to corroborate his claims.

[32] Mr. Wall testified that he purchased a rundown house at 4007 West 21st Avenue, demolished it and built a three-level, five-bedroom house with a suite in the basement. He testified that his original plan was to renovate the existing house but, shortly after purchasing the property, it became apparent to him that a new build would be more cost effective. However, during examinations for discovery Mr. Wall made no mention of renovations. In contrast, he said, "when I bought [4007 West 21st Avenue] the house was not livable that was on there. It was just a rundown really old house that you couldn't even live in. So as soon as possible I got the permits necessary to tear it down."¹⁵

[33] Mr. Wall testified that it takes approximately six months of construction before a house can be lived in. In this respect, he testified that, despite ongoing construction, he moved into 4007 West 21st Avenue as soon as it was livable. Mr. Wall initially testified that that he moved into 4007 West 21st Avenue by approximately May 2005. However, upon the Respondent pointing out in cross examination that the building permit for 4007 West 21st Avenue was not issued until March 10, 2005, Mr. Wall suggested that he completed preliminary work prior to getting the building permit which accounts for the short period between getting the permit and moving in. Upon the Respondent further suggesting that Mr.

¹⁵ Transcript, volume 2, page 250, lines 20-25.

Wall did not begin construction until after the building permit for 4007 West 21st Avenue was issued and that therefore it would have been impossible for him to start living there in May 2005, Mr. Wall admitted that 4007 West 21st Avenue was not demolished until after March 10, 2005 and that it was more likely that he began living in 4007 West 21st Avenue by July or August, 2005.

[34] Mr. Wall's testimony and the documentary evidence are in conflict about whether there were appliances in 4007 West 21st Avenue before it was sold. Mr. Wall said that when he moved in, there may not have been appliances. When he sold 4007 West 21st Avenue, the listing indicated that there was a budget for appliances. Mr. Wall testified that he could not remember if there already were appliances in the house. He suggested that the budget for appliances was because some buyers prefer different appliances. When confronted with the contradiction he firmly asserted that he had installed cheap appliances in 4007 West 21st Avenue.

[35] Upon selling 4007 West 21st Avenue, the contract of purchase and sale dated February 24, 2006 listed as a fundamental term that all construction had to be completed before closing. Mr. Wall testified that construction was substantially finished by that time. The final construction inspection by the City of Vancouver was completed on March 29, 2006 and an occupancy permit was issued on April 4, 2006. Mr. Wall did not keep any documents evidencing the construction process or when it was complete. He was insistent that there was nothing stopping him from living in each of the Three Homes before construction was complete.

[36] Mr. Wall did not keep any records of the construction expenses for 4007 West 21st Avenue. The only documentary evidence he provided showing expenses were Terasen gas bills. Mr. Wall estimated that each of the Three Houses cost \$250 per square foot to construct. He said that each house was 3000 square feet so the construction cost would have totaled approximately \$750,000 for each of the Three Houses.

[37] Mr. Wall sold 4007 West 21st Avenue on April 6, 2006 for \$1,418,000. He did not report the sale in his 2006 income tax return. Mr. Wall testified that he has used the same accountant since the 1990s. Marsh and Marsh Co. prepared Mr. Wall's 2006 tax return. Mr. Wall testified that he did not inform his accountant that he had sold 4007 West 21st Avenue.

[38] Mr. Wall testified that he sold 4007 West 21st Avenue to pay his debts. I note, however that he had other personal assets that he could have sold. Mr. Wall

testified that the reason he sold 4007 West 21st Avenue was because his debts were unmanageable and there was sufficient equity in 4007 West 21st Avenue to pay the debts and construct a new house. Mr. Wall did not have any documents to show the amount of his debts at that time. He testified that he did not want to take another loan from the bank because he did not want to go further into debt. However, within three months of selling 4007 West 21st Avenue, Mr. Wall financed 4324 West 14th Avenue with a mortgage of \$1,125,000. Mr. Wall insisted that it was a logical financial move to use his equity in 4007 West 21st Avenue to pay his debts and reinvest into a new property. Despite having purported insurmountable debts, Mr. Wall contributed \$13,000 to his RRSPs during the same tax year. I note that Mr. Wall still owned the Vacant Lot (2761 Patricia Crescent, Savary Island) and an aircraft (which was valued at \$200,000 on his mortgage application dated April 9, 2005).¹⁶ Mr. Wall could not explain how he amassed the savings to finance 4007 West 21st Avenue and why he couldn't use his other assets to pay his accumulated debts.

(f) 4067 West 19th Avenue

[39] On March 10, 2005, Mr. Wall purchased 4067 West 19th Avenue for \$585,000.¹⁷ This was the same day that he received the building permit for 4007 West 21st Avenue. He claimed that his name was on the contract of purchase and sale but that his father was actually the buyer. Mr. Wall testified that he may have co-signed with his father for the mortgage on 4067 West 19th Avenue, but denied that 4067 West 19th Avenue was part of his real estate development business. Mr. Wall testified that he assigned the contract for the purchase of 4067 West 19th Avenue to his father on closing. I note that 4067 West 19th Avenue is in the same neighborhood as the Three Homes at issue in these Appeals (4007 West 21st Avenue, 4324 West 14th Avenue, and 4668 West 14th Avenue).

[40] Mr. Wall testified that he demolished the existing house on 4067 West 19th Avenue and built a new four-bedroom house for his father (who was 82 years old at the time). Mr. Wall was the general contractor for the construction. He could not recall if the layout was similar to the Three Homes.

[41] Mr. Wall's father agreed to sell 4067 West 19th Avenue on May 18, 2006 for \$1,480,000. Mr. Wall received a referral fee from Mr. Velve on this sale.¹⁸ Mr. Wall said that his father sold the house because his parents' health was

¹⁶ Exhibit R-1, volume 2, tab 38.

¹⁷ Exhibit R-1, volume 1, tab 13.

¹⁸ Exhibit R-1, volume 1, tab 15.

deteriorating and they moved in with his sister. When the house was sold, the contract of purchase and sale indicated that the seller occupied the residence and therefore GST was not applicable. The contract also required the seller to provide an occupancy permit by the closing date.

(g) 2612 Patricia Crescent, Savary Island

[42] On September 18, 2005, Mr. Wall was listed as the purchaser on a contract of purchase and sale for 2612 Patricia Crescent, Savary Island.¹⁹ He claimed that the contract was assigned to his father (Mr. Henry Wall) when the sale closed in July 2006. There was no evidence that Mr. Henry Wall made any payments for 2612 Patricia Crescent. Mr. Wall denied that he was the actual owner of 2612 Patricia Crescent at that time.

[43] As noted above, Mr. Wall sold the Vacant Lot (located at 2761 Patricia Crescent, Savary Island) on August 10, 2006 for \$150,000 and contributed the proceeds to pay for 2612 Patricia Crescent. Mr. Wall said that his father financed 2612 Patricia Crescent with a \$300,000 mortgage but there was conflicting documentary evidence showing that it was a \$485,000 mortgage. Mr. Wall was the covenantor on this mortgage.

[44] Mr. Wall said that the monthly mortgage payments of \$821 were coming out of his bank account but that his father would pay him back or they would rent the property to cover the mortgage. However, in discoveries, Mr. Wall said that he made most of the payments for 2612 Patricia Crescent because he was going to be using it the most.

[45] As noted, when Mr. Wall sold the Vacant Lot (located at 2761 Patricia Crescent, Savary Island) in 2006 for \$150,000, he contributed the proceeds to the purchase of 2612 Patricia Crescent. Yet when Mr. Wall was purportedly experiencing financial difficulties that he testified led to the sale of 4007 West 21st Avenue in 2006, he did not sell the Vacant Lot or apply its proceeds to his accumulated debt. Rather he chose to sell 4007 West 21st Avenue in 2006 first and subsequently used the proceeds of the sale of the Vacant Lot to finance the purchase of 2612 Patricia Crescent.

[46] In my view, Mr. Wall's evidence shows that there was a pattern of purchasing and selling properties which is inconsistent with his story. Mr. Wall

¹⁹ Exhibit R-1, volume 1, tab 16, page 4.

purchased 2612 Patricia Crescent just after he sold 4007 West 21st Avenue due to purported insurmountable debts. He sold the Vacant Lot to finance this purchase. He also purchased 4324 West 14th Avenue just before the purchase of 2612 Patricia Crescent closed. Mr. Henry Wall sold 4067 West 19th Avenue the month before 2612 Patricia Crescent was purchased. Therefore, notwithstanding his purported insurmountable debts in 2006, Mr. Wall sold two properties (the Vacant Lot and 4007 West 21st Avenue) and purchased two other ones (2612 Patricia Crescent and 4324 West 14th Avenue) which required an even larger investment than the two he had sold. During the same time frame, he also purchased, developed and sold 4067 West 19th Avenue, although it was partly “papered” in his father’s name (Mr. Henry Wall), although there is no evidence to suggest his father acted other than as agent in doing so.

[47] Mr. Henry Wall transferred 2612 Patricia Crescent to Mr. Wall for \$1.00 on March 28, 2011.²⁰ Mr. Wall’s acquisition of 2612 Patricia Crescent is discussed in further detail below because it is relevant to his reasons for selling 4668 West 14th Avenue.

(h) 4324 West 14th Avenue

[48] 4324 West 14th Avenue was the second of the Three Homes which Mr. Wall purchased. Mr. Wall purchased 4324 West 14th Avenue for \$890,000 on June 12, 2006, three months after selling 4007 West 21st Avenue. Mr. Wall listed 4324 West 14th Avenue for sale on January 19, 2008. The final construction inspection from the city was completed on April 22, 2008. Mr. Wall sold 4324 West 14th Avenue on March 25, 2008 for \$1,951,000.

[49] Mr. Wall applied for and received an HSBC mortgage of \$1,150,000 to finance the development. He did not provide the Court with any documents showing his savings, debts, down payment or expenses at the time.

[50] Mr. Wall testified that he bought 4324 West 14th Avenue with the intention of renovating it but he decided that it made more sense for him to build a new house. He said that it would cost less for him to rebuild than to renovate or hire a professional builder. During examinations for discovery he said 4324 West 14th Avenue was not livable and that it was only worth the land value. He did not mention any plans for renovation.

²⁰ Exhibit R-1, volume 1, tab 24, page 9.

[51] Mr. Wall received the building permit for 4324 West 14th Avenue on August 14, 2006. He agreed on cross-examination that construction would have begun on or after he got the building permit but insisted that construction began as soon as possible. Mr. Wall had no evidence showing when the construction began or when it was completed. However, he maintained that he was living in 4324 West 14th Avenue by early 2007.

[52] Mr. Wall testified that he designed the layout of 4324 West 14th Avenue specifically with his “friend”, Ms. Pillon, and her children in mind. He said that he built a special room at the back of the house to isolate his cat from Ms. Pillon’s children because one of them has allergies. Mr. Wall claimed that he was advised against designing the house to include the cat room because it would reduce interest in the property on resale. In other respects, 4324 West 14th Avenue was similar to 4007 West 21st Avenue– it was a three-level five-bedroom house with a suite in the basement which could be rented to generate income. Although the special room was described as a “cat room”, there was nothing to suggest that it couldn’t be used for other purposes. Furthermore, 4324 West 14th Avenue was sold only two months after it was listed.

[53] Mr. Wall applied to the Homeowner’s Protection Office (HPO) when building 4324 West 14th Avenue because the HPO allegedly allows a person who builds their own home to obtain certain savings by removing the requirement for home warranty insurance. Mr. Wall provided his applications for this program but was unable to show any documentation that demonstrated his applications were successful or that he met the criteria for acceptance. According to Mr. Wall, these criteria allegedly included proof that the property was owner occupied for a period of at least one year. There was no evidence to corroborate the way the program functions. Mr. Wall specifically mentioned the HPO in relation to 4324 West 14th Avenue and generally indicated that this was evidence which supported his residence at each property, but there was no specific testimony regarding the HPO program for the other properties.

[54] Mr. Wall stated that it took about six months to make 4324 West 14th Avenue livable and he moved in as soon as he could. He testified that he hired contractors to finish the house during the day while his son Alexander Wall was in school.

[55] Mr. Wall claimed that 4324 West 14th Avenue was furnished in the same way as the other properties. He testified that his son stayed there throughout the

week and spent weekends at his mother's house. Mr. Wall said that his son kept his clothing and sports equipment at 4324 West 14th Avenue.

[56] Mr. Wall said that he did not keep documents showing his construction expenses for 4324 West 14th Avenue, but he was able to produce several gas bills. He testified that on occasion he would keep the heat low or off to save money depending on the season. As with the other homes, he estimated the construction costs were \$250 per square foot.

[57] Mr. Wall sold 4324 West 14th Avenue on March 25, 2008 for \$1,951,000. He did not report the sale on his 2008 income tax return. Mr. Wall testified that he could not remember whether he told his accountant about the sale of 4324 West 14th Avenue. However, he made vague statements that suggested he kept this information to himself because he thought the principal residence exemption applied and there was no need to discuss the matter with his accountant.²¹

[58] Mr. Wall testified that he sold 4324 West 14th Avenue because his debts had become insurmountable again and he was not making a lot of money as a realtor. He said that he was expecting Ms. Pillon to live with him and to contribute to the mortgage payments but this did not work out. He also claimed that he was unable to get extra money from renting out the basement. There was growing equity in the property so he decided to pay off his debts and build another house.

[59] During this period, Mr. Wall continued making monthly mortgage payments of \$821 for 2612 Patricia Crescent and kept the lease for his Apartment. In a mortgage document dated March 28, 2007, Mr. Wall reported numerous assets including RRSPs, stocks, bonds, investments, an aircraft, and a Mercedes automobile.²² He also had access to a line of credit in the amount of \$150,000. Mr. Wall did not explain why he chose to sell his home (4324 West 14th Avenue) instead of using these other assets to manage his alleged debts.

(i) 4684 West 9th Avenue

[60] On February 28, 2007 Mr. Wall purchased 4684 West 9th Avenue. He testified that he assigned the purchase contract to Ms. Maria Pillon who made the purchase for \$1,200,000. Mr. Wall was a guarantor for Ms. Pillon's financing. Mr. Wall testified that he did not undertake any construction on this property. He described it as an older house that had been renovated. Much like the Three

²¹ Transcript, volume 3, pages 505-511.

²² Exhibit R-1, volume 2, tab 51.

Homes, it was a three-level five-bedroom house with a basement suite. Mr. Wall further testified that Ms. Pillon lived there with her children. In addition, Mr. Wall testified that he lived in 4684 West 9th Avenue with his son Alexander Wall while he was constructing the new house at 4668 West 14th Avenue.

[61] Mr. Wall testified that Ms. Pillon sold 4684 West 9th Avenue for financial reasons related to failed investments in the stock market. The property at 4684 West 9th Avenue was listed for sale on January 19, 2008 for \$1,988,000. Mr. Wall could not recall the actual sale price but he said that Ms. Pillon did not make money on the sale. He agreed with the Respondent that the final sale price would have been somewhere around \$1,215,000.

(j) 4668 West 14th Avenue

[62] 4668 West 14th Avenue was the third of the Three Homes which Mr. Wall purchased. Mr. Wall purchased 4668 West 14th Avenue on August 12, 2009 for \$1,127,500. Mr. Wall listed 4668 West 14th Avenue on October 7, 2010. The City of Vancouver granted final approval on October 21, 2010 and the occupancy permit was granted on November 23, 2010. Mr. Wall sold 4668 West 14th Avenue for \$2,265,000 on November 26, 2010.

[63] Mr. Wall financed 4668 West 14th Avenue with an HSBC mortgage for \$2,100,000. Mr. Wall did not provide the Court with any documentary evidence of his savings, down payment, debts or expenses at the time of the purchase. Mr. Wall argued that he could afford the mortgages for the Three Homes because he was planning to make more sales as a realtor, he was planning on getting financial help from Ms. Pillon, and he was planning to rent the basement suite. These plans did not succeed for any of the Three Homes. Mr. Wall did not bring any evidence to show that he tried to implement these plans. It is implausible that he actually believed he could make enough money to cover the mortgage let alone his other living expenses, particularly given his lack of income from other sources (as discussed further below).

[64] Mr. Wall testified that he was thinking of renovating 4668 West 14th Avenue but decided to build a new house. During examinations for discovery Mr. Wall gave a slightly different impression, he said, "Again, when I bought these homes they were not homes that had any value. They were so run down that the whole idea was to buy land value."

[65] Mr. Wall received the building permit for 4668 West 14th Avenue on September 16, 2009. He said that construction would have begun on that date and he would have moved in five to six months later. However, he also said that he moved in around December 2009. Mr. Wall testified that construction was ongoing while he was living in 4668 West 14th Avenue. Mr. Wall did not have any evidence showing when he actually moved into 4668 West 14th Avenue. He testified that he only obtained occupancy permits for the Three Homes because they were a requirement of the contract of purchase and sale.

[66] Mr. Wall did not keep any documents showing his construction expenses for 4668 West 14th Avenue. He explained that he didn't keep receipts because he was not running a business and he was not planning on claiming input tax credits. He intended to live in each of the Three Homes and therefore he did not manage their construction in the same way that he managed his real estate developments with Pocido. Mr. Wall suggested that at least one of his contractors did not document the transactions so in any event he could not have gotten documentary evidence from those contractors. The expenses for 4668 West 14th Avenue that Mr. Wall submitted were Terasen gas bills and a renewal notice for insurance from Wawanesa. As with the other homes, he estimated the construction costs were \$250 per square foot.

[67] Mr. Wall did not customize 4668 West 14th Avenue in the same way as 4324 West 14th Avenue. Rather than building a cat room, Mr. Wall said that he sent his cat to live with his parents. The layout was otherwise the same as the other homes: 4668 West 14th Avenue was a three-level five-bedroom house with a basement suite.

[68] Mr. Wall sold 4668 West 14th Avenue on November 26, 2010 for \$2,265,000. He did not report the sale in his 2010 income tax return. Mr. Wall testified that he could not remember whether he told his accountant about the sale. However, he made vague statements that suggested he kept this information to himself because he thought the principal residence exemption applied and there was no need to discuss the matter with his accountant.²³

[69] Mr. Wall gave several reasons for selling 4668 West 14th Avenue. First, he said that his father told him that he was going to give him 2612 Patricia Crescent. Second, his son (Alexander Wall) no longer needed him to be around once he had

²³ Transcript, volume 3, pages 505-511.

completed high school. Third, Mr. Wall allegedly had accumulated debts that he wanted to settle.

[70] Regarding his first reason for selling 4668 West 14th Avenue, Mr. Wall said he wanted to move to Savary Island (2612 Patricia Crescent) to “live a totally different lifestyle”. Mr. Wall’s father gave him 2612 Patricia Crescent for \$1 in a land transfer executed on March 28, 2011. Mr. Wall said that he sold 4668 West 14th Avenue in November 2010 in anticipation of being given 2612 Patricia Crescent. It is odd that he would give up his home in anticipation of a future event, even if the eventual transfer of 2612 Patricia Crescent was between related parties. Furthermore, Mr. Wall’s father owned 2612 Patricia Crescent in name only – Mr. Wall was involved in every step of the purchase and appears to have made all of the related mortgage and other payments.²⁴

[71] Mr. Wall said that his father (Mr. Henry Wall) and mother were living in 2612 Patricia Crescent and they moved to live with his sister in Delta. Mr. Wall told the Court that he moved to 2612 Patricia Crescent after selling 4668 West 14th Avenue. However, Mr. Wall sent a fax dated January 12, 2010, to the Canada Revenue Agency stating the following regarding his parents’ care in 2010:

I was commuting on a continual basis to Delta to care for my elderly parents. As the year progressed it became obvious that they would require a caregiver on a full-time basis to assist them with their day-to-day living. I decided to sell the property [4668 West 14th Avenue] and move in with my parents to provide them with this assistance. I listed the property and it sold November 29th, 2010 (not September as noted in your letter) after which I moved in with my parents.²⁵

[72] Mr. Wall could not explain why he told the Court that he moved to Savary Island after telling the CRA that he moved to Delta.

[73] Mr. Wall’s second reason for selling 4668 West 14th Avenue was that his son no longer needed him to be around. However, Mr. Wall testified that he built 4668 West 14th Avenue to provide a home for Alexander while he attended school. It seems odd that Mr. Wall would sell 4668 West 14th Avenue before his son completed high school. The evidence was that Mr. Wall’s ex-wife had poor health at this time. Mr. Wall said that after his son completed high school he moved in with his mother. It is unclear where his son lived between the sale of

²⁴ Transcript, volume 2, pages 319-320, 427, and 430-435; volume 3, pages 560, 611, and 622-627.

²⁵ Transcript, volume 3, page 629, lines 10-20.

4668 West 14th Avenue and his graduation. This reasoning conflicts with Mr. Wall's stated long term plans for living in 4668 West 14th Avenue.

[74] Mr. Wall's third reason for selling 4668 West 14th Avenue was because of accumulated debts. However, he did not bring any evidence of this debt. In various documents leading up to these Appeals, Mr. Wall mentioned his other reasons for selling 4668 West 14th Avenue but he did not mention debt. For instance, Mr. Wall did not mention that debt was a reason to sell 4668 West 14th Avenue in his GST Notice of Appeal. Furthermore, in a letter dated October 3, 2012, from Mr. Wall's representatives to the Canada Revenue Agency auditor, Mr. Wall indicated that he sold 4668 West 14th Avenue because 2612 Patricia Crescent was available to be his residence and he no longer needed to care for his ex-wife and son.²⁶

(3) Mr. Wall's Income

[75] In my view, Mr. Wall is a sophisticated business person who is aware of how taxation works in the real estate business. Mr. Wall used his development company, Pocido, to build approximately 20 townhouses, a house and a duplex. As a result of these development activities, Mr. Wall testified that he knew profits from real estate transactions must be reported as income for the purposes of the *Act*. He also testified that he was aware Pocido was responsible for reporting GST on its sales and he testified that he filed Pocido's GST returns properly.

[76] Mr. Wall testified that he could not remember the details of his real estate sales or the commissions he earned. In particular, he testified that he could not recall what real estate deals contributed to his income from 2006-2010. Despite documentary evidence to the contrary, Mr. Wall specifically denied that all or substantially all of his commission income from real estate sales during this time period was earned from properties he owned, or from real estate transactions involving his father (Mr. Henry Wall) or his "friend", Ms. Pillon.²⁷

[77] Mr. Wall repeatedly said that he was only working as a realtor during the relevant period and that he had no other income. However, Mr. Wall could not think of any listings that he made from 2006 to the date of the hearing. The only evidence that Mr. Wall was selling real estate was documents from Park Georgia Realty (his employer) showing referral commissions from transactions he facilitated for himself, his father, and Ms. Pillon. In addition, I note that there were

²⁶ Exhibit R-1, volume 2, tab 86.

²⁷ Transcript, volume 2, page 272.

no expenses claimed for advertising or other expenses related to his business as a realtor in Mr. Wall's income tax returns for the 2006, 2008, and 2010 tax years.

[78] Mr. Wall said that he rented or attempted to rent his Apartment, 2612 Patricia Crescent, and the basement suites in the Three Homes, but he did not provide any evidence or call any witnesses to show income from these purported transactions. There was also no evidence that he included any rent from these properties in his income.

[79] Mr. Wall reported income as follows for the purposes of the *Act* between 1987 and 2010:²⁸

Year	Amount
1987	\$11,266
1988	\$27,552
1989	\$8,076
1990	\$21,879
1991	\$10,412
1992	\$107,678
1993	\$15,303
1994	\$600
1995	\$43,419
1996	\$50,887
1997	\$35,248
1998	\$23,000
1999	\$15,000
2000	\$7,000
2001	\$13,472
2002	\$29,000
2003	\$15,000

²⁸ Mr. Wall's income from 1987 to 2011 is set out in Exhibit R-3, Tab 23.

2004	\$15,806
2005	\$18,000
2006	\$26,036
2007	\$15,919
2008	\$15,547
2009	\$16,646
2010	\$15,684

[80] In 2005, Mr. Wall reported gross and net business income of \$18,000. Mr. Wall could not remember how he made this income. In 2005, Mr. Wall referred Mr. Velve as the realtor for purchasing 4067 West 19th Avenue. Mr. Wall allegedly waived his referral commission because the purchaser was his father.

[81] In 2006, Mr. Wall reported gross business income of \$29,621 and net business income of \$26,036. Mr. Wall testified that all of his income came from real estate transactions. On April 13, 2006, Mr. Wall received a \$7,669.16 referral fee from Mr. Velve on the sale of 4007 West 21st Avenue. On June 14, 2006, Mr. Wall received a \$10,450 referral fee from Mr. Velve on the sale of 4067 West 19th Avenue. On June 22, 2006, Mr. Wall received a \$1.15 referral fee from Mr. Velve on the purchase of 2612 Patricia Crescent. Mr. Wall said that the referral fee was waived (listed as \$1.15) because his father purchased 2612 Patricia Crescent. On July 17, 2006, Mr. Wall received an \$11,502.26 referral fee from Mr. Velve on the purchase of 4324 West 14th Avenue. I note that these 2006 commissions total \$29,621.42, which equals his aforementioned reported gross business income for 2006.

[82] On August 10, 2006, Mr. Wall sold the Vacant Lot (located at 2761 Patricia Crescent, Savary Island) for \$150,000. He did not report this sale on his income tax return. He said that this sale had slipped his mind when he filed his taxes.

[83] Mr. Wall did not report the sale of 4007 West 21st Avenue in his 2006 income tax return because he thought he was eligible for the principal residence exemption. Mr. Wall said that he could not remember whether he told his accountant about 4007 West 21st Avenue. He did, however, remember asking his accountant, the Canada Revenue Agency and other persons about how the principal residence exemption works. During discoveries, Mr. Wall gave conflicting statements about whether his accountant was specifically consulted about the sales of the Three Homes. He eventually stated that he did not mention the sale of 4007 West 21st Avenue at all to his accountant. However, Mr. Wall said

that he asked the accountant how long he needed to live in a property before he could sell it and claim the principal residence exemption. The accountant allegedly told him that he could sell if he had a good reason.

[84] In 2007, Mr. Wall reported gross business income of \$19,173 and net business income of \$15,919. On January 2, 2007 Mr. Wall received commission income of \$15,082.20 from the sale of 4684 West 9th Avenue (Ms. Pillon's home). Mr. Wall did not provide any evidence to show how he earned his income in 2007.

[85] In 2008, Mr. Wall reported gross business income of \$18,000 and net business income of \$15,547. Mr. Wall testified that he was not involved in any other business and that he made his income from selling real estate for friends. The documentary evidence shows that Mr. Wall received a \$13,730.81 referral fee from Mr. Velve on the sale of 4324 West 14th Avenue. Mr. Wall could not account for the remainder of his business income for 2008.

[86] Mr. Wall did not report the sale of 4324 West 14th Avenue on his 2008 income tax return and, as described above, the evidence suggests that he did not consult his accountant as to whether the proceeds should have been included in his income.

[87] In 2009, Mr. Wall reported gross business income of \$18,375 and net business income of \$16,646. Mr. Wall bought 4668 West 14th Avenue in 2009 but he could not confirm whether there was commission income from this sale reported in his 2009 tax return. Mr. Wall was unable to point to any other transactions that could have accounted for his 2009 business income. He did not provide any evidence to show how he earned his income in 2009.

[88] In 2010, Mr. Wall reported gross business income of \$18,000 and net business income of \$15,684. Mr. Wall sold 4668 West 14th Avenue in 2010 and he said he would have received a referral fee from Mr. Velve on the sale. However, Mr. Wall could not remember the amount of the referral fee or if there were other commissions included in his income. He did not call any evidence to show how he earned his income in 2010.

[89] Mr. Wall did not report the sale of 4668 West 14th Avenue on his 2010 income tax return and, as described above, the evidence suggests that he did not consult his accountant as to whether the proceeds should have been included in his income.

(4) Mr. Wall's Mortgages

[90] Mr. Wall's annual reported income was on average between \$15,000 and \$20,000. Despite this relatively low reported income, he made mortgage applications to finance his real estate developments in which his occupation was listed as a real estate developer with a six figure income. Given Mr. Wall's low reported income and the size of the mortgages he held, it is implausible that he had a long term intention to keep any of the Three Homes. The mortgage payments Mr. Wall was making exceeded his annual income and he was unable to show how he could afford this pattern of borrowing without selling each of the Three Homes at a profit.

[91] On October 17, 2003, Mr. Wall made a mortgage loan application to finance a real estate development.²⁹ He could not remember which development this mortgage was used to finance, but he thought it may have been the duplex built by Pocado in Kitsilano. The application listed his annual income from being a realtor as \$40,000 and his annual income from being a real estate developer as \$100,000.

[92] On September 30, 2004, Mr. Wall made a mortgage loan application to finance the development of 4007 West 21st Avenue.³⁰ Again he listed his annual income from being a realtor as \$40,000. The application also shows that Mr. Wall was making \$100,000 annually from being a real estate developer.

[93] Mr. Wall obtained financing totaling \$812,500 for the development of 4007 West 21st Avenue. He did not have documents to show how much of this mortgage was actually drawn down for use in the development. Mr. Wall said that he funded the down payment using money he made from previous developments and loans from friends and family. He did not call any evidence or provide documents to show these savings or loans.

[94] The entire time Mr. Wall had the mortgage for 4007 West 21st Avenue his payments only covered the interest. These interest payments ranged from approximately \$1,500 to \$2,600, with a 2005 total of \$21,570.21. Mr. Wall's reported income in 2005 was \$18,000. In 2006, the interest payments totaled \$10,183.26 on this mortgage. During this time Mr. Wall also made a \$13,000 contribution to his RRSP. Mr. Wall insisted he was using his savings and some of the money from the mortgage itself to make the mortgage payments. He did not provide any evidence to support these claims.

²⁹ Exhibit R-1, volume 2, tab 30.

³⁰ Exhibit R-1, volume 2, tab 33.

[95] On April 9, 2005 Mr. Wall made another mortgage loan application to HSBC.³¹ There is no indication which development this mortgage related to but the timing is close to the date 4067 West 19th Avenue was purchased. Mr. Wall's income was listed as \$30,000 from being a realtor and \$200,000 from being a real estate developer. This application listed an aircraft that was valued at \$200,000. Mr. Wall said that this amount was exaggerated by the bank to get approval. This aircraft was also listed on a March 28, 2007 mortgage loan application with a value of \$130,000.³² Mr. Wall said that the aircraft was a piece of junk that was only listed on his loan applications to make his assets look good. Mr. Wall did not list any of his alleged debts to his family or friends in the liabilities section on his application.

[96] Mr. Wall's financing for 4324 West 14th Avenue was evidenced by a land title document dated July 13, 2006, which said he had a \$1,125,000 mortgage.³³ Mr. Wall's loan repayment history shows that he drew down the mortgage by \$578,500 on July 13, 2006.³⁴ In 2006 Mr. Wall made principal payments of \$1787.83 and interest payments of \$14,794.47 on this mortgage. Mr. Wall's reported income in 2006 was \$26,036. The total cost of Mr. Wall's 2006 mortgage payments for 4007 West 21st Avenue and 4324 West 14th Avenue exceed his reported income. In 2007, Mr. Wall made principal payments of \$10,610.48 and interest payments of \$32,019.52. Mr. Wall reported \$15,919 of income for 2007. Mr. Wall did not call evidence to show how he was able to afford the down payment and mortgage payments. He said that he used his savings and loans from friends and family.

[97] Beginning in the summer of 2006, Mr. Wall made monthly payments of \$821 on a \$300,000 loan he used to finance 2612 Patricia Crescent.

[98] HSBC provided the Minister with Mr. Wall's "Personal Financial Statement" dated March 28, 2007.³⁵ It shows that Mr. Wall had an annual income of \$200,000. Mr. Wall testified he did not tell the bank he made \$200,000 annually and the bank knew he did not make that much money. He said the bank manager wrote this on his financial statement because she knew he had money left over from previous developments which he kept in his bank account. Mr. Wall said

³¹ Exhibit R-1, volume 2, tab 38.

³² Exhibit R-1, volume 2, tab 51.

³³ Exhibit R-1, volume 2, tab 46.

³⁴ Exhibit R-1, volume 2, tab 55.

³⁵ Exhibit R-1, volume 2, tab 51.

that the bank manager always adjusted his mortgage applications to ensure that they were successful. He did not call any witnesses to support his claim.

[99] When asked about whether it was important to be truthful in his mortgage applications Mr. Wall testified:

“It's got nothing to do with being truthful. All [the bank manager] cared about was that there was enough security for the bank with the property, and she just wanted to get it passed by head office as quickly as possible. She knew that I had a very good repayment history, that she never had to worry about me or anything, so she said, "Look, just put in here whatever we need to make head office happy," and she would fill in the blanks.”³⁶

[100] He clarified this by testifying:

“Okay. You're asking me a kind of very ambiguous question. Being truthful. It's not a matter that I was in the bank lying to them. I would sit down with the bank manager and she would literally put in what -- like she rounded everything up to the point where we'd make head office happy. And it wasn't like I would say, I would give her misleading information or anything like that, because if I lied to the bank about things that were important to the bank, they would never do business to [sic] me...”³⁷

[101] On May 24, 2007, HSBC approved Mr. Wall for lending facilities of \$1,230,000 related to a bank guarantee that he made in favour of another borrower.³⁸ This occurred around the time that Ms. Pillon purchased 4684 West 9th Avenue. In this document, Mr. Wall's business was listed as a residential home builder.

[102] The letter further read:

Relationship background

John Wall is a valued premier customer who has maintained a banking relationship with HSBC since 1997. We have extended significant builder and mortgage facilities to John to assist him in financing building projects with a maximum two houses at one time.

...

³⁶ Transcript, volume 2, page 410.

³⁷ Transcript, volume 2, page 411.

³⁸ Exhibit R-1, volume 1, tab 5.

Summary & Recommendations

John Wall is a residential home builder who has been in the home construction business for over 10 years. Presently, a total of CAD\$1.2m in credit facilities has been extended to John and the relationship is entirely satisfactory and profitable in view of the construction loan draw fees being collected from the home building loans.³⁹ [emphasis added]

[103] In my view, it is clear that HSBC believed Mr. Wall was an active home builder and a valuable business client. However, Mr. Wall would have this Court believe that HSBC repeatedly embellished his financing approval documents so that he could get financing approval. In this respect, Mr. Wall testified that he told HSBC that he was a residential home builder so that he would be approved for the May 24, 2007 credit facility.⁴⁰ I have drawn a negative inference from Mr. Wall's failure to call any witnesses from HSBC to corroborate his testimony.

[104] On July 27, 2009, Mr. Wall made a mortgage loan application to finance the development of 4668 West 14th Avenue.⁴¹ The application lists his annual income from being a realtor as \$30,000 and his annual income from being a real estate developer as \$100,000. A land title document dated August 14, 2009 indicates that Mr. Wall had a \$2,100,000 mortgage on 4668 West 14th Avenue.⁴² Mr. Wall's loan payment history shows that he drew this mortgage down by \$845,250.⁴³ Mr. Wall only made interest payments on this mortgage. Mr. Wall made four interest payments in 2009 totalling \$12,012.87. In 2010 his interest payments totalled \$42,727.64. Mr. Wall's reported income for 2009 was \$16,646 and 2010 was \$15,684. Mr. Wall did not call any evidence to show how he was able to afford the down payment and mortgage payments. He said that he used his savings and loans from friends and family.

(5) Mr. Wall's Relationship with Ms. Wall

[105] Mr. Wall's relationship with his ex-wife affected the way he interacted with his properties historically and during the relevant period. Mr. Wall took steps to ensure that he owed no obligations to Ms. Wall; however, he also claimed that he voluntarily incurred significant expenses on her behalf. Mr. Wall's testimony

³⁹ Exhibit R-1, volume 1, tab 5, page 4.

⁴⁰ Transcript, volume 2, page 400.

⁴¹ Exhibit R-1, volume 2, tab 58.

⁴² Exhibit R-1, volume 2, tab 59.

⁴³ Exhibit R-1, volume 2, tab 69.

regarding Ms. Wall was inconsistent with the answers he gave at discovery and he did not bring any evidence or call any witnesses to account for this inconsistency.

[106] Mr. Wall testified that he separated from his wife around 1996 and was divorced around 2003. Ms. Wall passed away prior to the hearing of these Appeals.

[107] On July 19, 2004, Mr. Wall gave Ms. Wall his half interest in their property at 4434 West 8th Avenue in lieu of future support payments. On August 9, 2004, Ms. Wall entered into a loan agreement with Mr. Wall to borrow \$300,000 from him in a “notional mortgage” related to the transfer of 4434 West 8th Avenue.⁴⁴ Mr. Wall explained that notionally \$1,500 per month would be applied against the mortgage. He said that he entered into this arrangement to protect himself against any claims for support payments from Ms. Wall.

[108] Mr. Wall testified that he incurred large debts related to his ex-wife which contributed to his reasons for selling 4007 West 21st Avenue and 4324 West 14th Avenue. One expense in particular was a \$30,000 wheelchair lift he installed at 4434 West 8th Avenue. There was no documentary evidence to show the expenses Mr. Wall allegedly incurred on behalf of Ms. Wall.

[109] Mr. Wall gave contradictory evidence during discoveries when he said that his obligations to Ms. Wall were resolved when he gave her his half interest in their home (4434 West 8th Avenue). He also said that his debts were not related to Ms. Wall and it was other debts that caused him to sell 4007 West 21st Avenue. Mr. Wall tried to explain this inconsistency by saying that his continued support of Ms. Wall was a personal choice rather than a legal obligation.

(6) Mr. Wall’s Relationship with Ms. Pillon

[110] The evidence is unclear about the relationship between Mr. Wall and Ms. Pillon. She is variously referred to as Mr. Wall’s friend, girlfriend and spouse. Mr. Wall testified that he tried to make a romantic relationship work with Ms. Pillon but they decided to be friends. He said that the romantic parts of their relationship occurred in the early 2000s and later in 2006 or 2007.

[111] On the second day of trial, the Appellant said that he would not be calling Ms. Pillon as a witness.⁴⁵ However, on the fourth day of trial, after a six month adjournment, the Appellant brought Ms. Pillon to Court without notice and advised

⁴⁴ Exhibit R-1, tab 24, pages 5-7.

⁴⁵ Transcript, volume 2, page 347.

that he wished to call her as a witness. The Respondent asked for an adjournment to prepare to cross examine Ms. Pillon, but Mr. Wall decided that he would rather continue the trial and therefore he withdrew his request to call Ms. Pillon. The evidence suggests that Ms. Pillon had knowledge of the circumstances surrounding the Three Homes because of her relationship with Mr. Wall. I have drawn an adverse inference from Mr. Wall's failure to call Ms. Pillon as a witness.

[112] Mr. Wall testified that he lived with Ms. Pillon at 4324 West 14th Avenue for a month in 2006 or 2007. He said that Ms. Pillon's kids also lived at 4324 West 14th Avenue. Mr. Wall said that he and Ms. Pillon tried to have a romantic relationship at that time.

[113] Mr. Wall was listed as a guarantor for his "spouse", Maria Pillon, on his March 28, 2007 HSBC "Personal Financial Statement".

[114] Mr. Wall said that he lived with Ms. Pillon at 4684 West 9th Avenue while he was building 4668 West 14th Avenue. This may have been for a period of five to six months in 2009-2010.

(7) Mr. Wall's Addresses

[115] Mr. Wall used various addresses throughout the relevant period under appeal. Mr. Wall testified that he kept the lease for his Apartment at 2370 West 2nd Street until sometime during the development of 4668 West 14th Avenue. He testified that he lived with Ms. Pillon in her house and her apartment. He also claimed to have lived in the Three Homes for at least one year each. In my view, Mr. Wall's testimony about where he was living and when he was living there is not consistent with other evidence.

[116] Mr. Wall moved into the Apartment at 2370 West 2nd Street around 1996 when he separated from his former spouse, Ms. Wall. He made mortgage applications listing his address as the Apartment.⁴⁶ He also used the Apartment as his mailing address while he owned 4007 West 21st Avenue and 4324 West 14th Avenue. Mr. Wall allegedly moved back into the Apartment after selling 4007 West 21st Avenue in 2006 and continued to live there during the construction of 4324 West 14th Avenue. On the owner/builder declaration and disclosure notice for 4324 West 14th Avenue, Mr. Wall listed the Apartment as his address.⁴⁷ Mr. Wall's 2006 and 2008 income tax returns list the Apartment as his mailing

⁴⁶ Exhibit R-1, volume 2, tabs 33, 38, 50, 51, and 55.

⁴⁷ Exhibit A-1, tab 11.

address.⁴⁸ Mr. Wall allegedly lived at the Apartment again for a short time before building 4668 West 14th Avenue. It is unclear when Mr. Wall ended the lease of the Apartment.

[117] Mr. Wall testified that he also spent time living with Ms. Pillon at her properties. Mr. Wall said that he lived with Ms. Pillon in 4684 West 9th Avenue while he was building 4668 West 14th Avenue. On August 12, 2010, Mr. Wall signed a mortgage renewal application for 4668 West 14th Avenue in which his mailing address was listed as #702 2233 Allison Road (which was Ms. Pillon's address after she moved from 4684 West 9th Avenue).⁴⁹ However, Mr. Wall said that he was living in 4668 West 14th Avenue after he moved out of 4684 West 9th Avenue and he did not mention #702 2233 Allison Road during his testimony. The apartment at #702 2233 Allison Road is also listed as Mr. Wall's address in 2010 on his loan history reports from his bank.⁵⁰

[118] Mr. Wall also used the Park Georgia Realty Office at 5701 Granville Street, Vancouver, as his mailing address starting as early as 2009 and continuing through 2011. This is evidenced in CRA⁵¹ and land title documents.⁵²

[119] Mr. Wall used the Park Georgia Realty Office at 5701 Granville Street as his mailing address on his 2010 tax return. As previously noted, Mr. Wall's 2006 and 2008 income tax returns list the Apartment as his mailing address. There is no evidence that he ever used any of the Three Homes as his mailing address on any of his tax returns between 2005 and 2011.

[120] However, there is evidence that Mr. Wall used the Three Homes as his mailing address for limited purposes. Some of Mr. Wall's Terasen gas bills were mailed to the Three Homes⁵³ and a Wawanesa insurance renewal document was mailed to 4668 West 14th Avenue.⁵⁴ When Mr. Wall sold the Three Homes, he

⁴⁸ Exhibit R-1, volume 1, tabs 21 and 22.

⁴⁹ Exhibit R-1, volume 2, tab 63.

⁵⁰ Exhibit R-1, volume 2, tabs 67 and 69.

⁵¹ Exhibit R-1, volume 1 tab 11; Exhibit R-2, tab 3; Exhibit R-3, tab 2. I note, however, that most of the Terasen gas bills entered into evidence only show the service address, and not the mailing address. As a result, only a few of the Terasen gas bills showed one of the Three Homes as the mailing address.

⁵² Exhibit R-1, volume 1, tab 24.

⁵³ Exhibit R-1, volume 2, tabs 42, 54, and 66.

⁵⁴ Exhibit R-1, volume 2, tab 64.

listed them as his addresses on some of the documents involved in the sales including certain land title documents and loan history documents.⁵⁵

B. Mr. Bryan Velve

[121] The Appellant called Mr. Bryan Velve to testify. At the time of trial, Mr. Velve had been a real estate agent for almost 29 years and was then working as a real estate agent with RE/MAX. Mr. Velve testified that he had known Mr. Wall for approximately 15 to 20 years as both a fellow realtor and as a client. Mr. Velve was the listing agent for each of the Three Homes. As the listing agent, he testified that he would have received 53.5% of the sales commission on each of the Three Homes, but that he paid a referral fee out of his share back to Mr. Wall.

[122] Mr. Velve testified as follows regarding why he believed Mr. Wall retained him as the listing agent on the sale of the Three Homes:

Well, for one, in real estate if we sell our own properties we are not covered by Errors and Omissions Insurance. So that's why we don't sell our own properties. And two is, I think he believed, maybe he wasn't as active as I was in the area and he probably believed I would do a better job.⁵⁶

[123] Mr. Velve testified that Mr. Wall purchased each of the Three Homes, knocked down the existing house on each, and then built a new house on each. He also confirmed that Mr. Wall managed the construction for each of the Three Homes. He also testified that each of the Three Homes had three levels and four to five bedrooms. Mr. Velve testified that he advised Mr. Wall against building a "cat room" in 4324 West 14th Avenue because it was not an ideal layout for resale.

[124] Mr. Velve claimed that he could remember each house that he ever sold as a real estate agent. However, he was unable to remember selling Mr. Henry Wall's property at 4067 West 19th Avenue, which had been constructed in the same manner and at the same time as the first of the Three Homes. On cross examination he was reminded of this, and only then did he comment on his involvement with the sale of that property. Mr. Velve also paid Mr. Wall a referral fee out of his share of the commission which he earned on the sale of that property.

[125] Mr. Velve testified that Mr. Wall and Mr. Alexander Wall had lived in each of the Three Homes but that he was unsure when they started living in each home

⁵⁵ Exhibit R-1, volume 1, tab 24; volume 2, tabs 45, 46, 55, 59, 60, and 68.

⁵⁶ Transcript, volume 1, at page 30 line 25 to page 31 line 2.

or the specifics of their stay. He testified that Mr. Wall had some furniture in each of the Three Homes, but that each of the Three Homes was not fully furnished and that Mr. Wall's furniture was not very nice. In this respect, Mr. Velve testified that the furniture was the same at each of the Three Houses, and that he remembered telling Mr. Wall to replace the dining room table because newer furniture would assist with staging. Mr. Velve also testified that he had found Mr. Wall sleeping at one of the Three Homes on a few occasions when he was not supposed to be there because of a scheduled showing. Mr. Velve also testified that he would not have visited any of the Three Homes prior to Mr. Wall engaging him to list them for sale.

[126] On January 13, 2006, Mr. Velve listed 4007 West 21st Avenue as an owner occupied house that had been built in 2006. On February 13, 2006, Mr. Velve relisted 4007 West 21st Avenue as a house that was one year old and was built in 2005. When asked about why the property was relisted, Mr. Velve could not remember whether it was because of buyers who felt misled or another reason. Of particular note, both listings described the property as new and stated that there was no GST on the sale. Mr. Velve said that he listed 4007 West 21st Avenue as new to attract foreign buyers – despite his claim that Mr. Wall had been living there and despite listing the home as not being subject to GST because it was owner occupied. I note that these positions are inconsistent.

[127] Mr. Velve profited from Mr. Wall's real estate development activities. In this respect, I note that he participated in real estate transactions involving properties belonging to Mr. Wall, Mr. Henry Wall, and Ms. Pillon. Overall, I found Mr. Velve's testimony to be selective, vague, and incomplete. I also note that he was willing to list the Three Homes as being new, while at the same time listing them as not being subject to GST because they were owner occupied. In my view, it would appear that Mr. Wall was willing to take whatever positions best suited his business purposes, even if the positions were inconsistent within the same MLS listing, and that Mr. Velve acquiesced with those positions. As such, I did not find Mr. Velve's testimony to be reliable and I have therefore not given it much weight. It is also my view that Mr. Velve's testimony is insufficient to verify whether Mr. Wall ordinarily inhabited any of the Three Homes.

C. Mr. Alexander Wall

[128] The Appellant called his son, Alexander Wall, to testify. Alexander Wall was born in 1992 and was a teenager during the period under Appeal. He graduated from high school in mid-2011 and at the time of the hearing of this Appeal was

attending college studying business. Alexander Wall denied that his father built the Three Homes with the intention of selling them as soon as they were finished. He also denied that his father was making money from property development.

[129] After Alexander Wall's parents separated around 1996, he lived with both his mother (in her house at 4434 West 8th Avenue) and father but spent more time with his father because of his mother's illness. Alexander Wall testified that he stayed with Mr. Wall at the Apartment, which was a one bedroom apartment, when his parents first separated, but that later they lived in a series of homes. Alexander Wall could not remember when he moved into or out of each home or the specific address of any of the homes.

[130] Alexander Wall testified that after he completed high school he stayed with his mother at her 4434 West 8th Avenue home because he didn't need as much support from his father anymore. Alexander Wall inherited that home upon Ms. Wall's unfortunate death in 2015. Mr. Wall's testimony was that Alexander Wall went to live with his mother after 4668 West 14th Avenue was sold at the end of 2010, which would have been several months before Alexander Wall completed high school. It is unclear from Alexander Wall's testimony where he lived in the last months of high school.

[131] Alexander Wall testified that he did not remember ongoing construction in the homes where he lived. However, his testimony conflicts with the documentary evidence, which shows that there were lists of construction related deficiencies at 4007 West 21st Avenue and 4668 West 14th Avenue. For example, the agreement of purchase and sale for 4007 West 21st Avenue required the seller to supply and install a garage door. Alexander Wall could not remember whether a garage door was missing even though he testified that he regularly parked his bike in the garage. The listing for 4007 West 21st Avenue also indicated that there was a budget for appliances but Alexander Wall did not remember any missing appliances.

[132] Overall, Alexander Wall's testimony was vague about the homes he lived at with his father during the period under appeal. He could not remember the addresses of the homes where he purportedly lived as a child or how long he lived in each of those places. His testimony that there was no ongoing construction while he lived in the Three Homes also conflicts with the documentary evidence which lists substantial closing deficiencies prior to the sale of each of the Three Homes. In my view, it is unclear from Alexander Wall's testimony whether he lived in any of the Three Homes or some other properties. While his testimony shows that he

lived with his father at some points during the relevant period, it is not conclusive of where they lived at any point during the period under appeal. This is not surprising given his young age at the relevant times and the difficulties he was no doubt enduring because of his parent's separation and his mother's ill health. As a result, I have given little weight to Alexander Wall's testimony.

D. Mr. Alfonso Daudet

[133] The Appellant called Mr. Alfonso Daudet to testify. Mr. Daudet was an investment advisor who sold insurance and investments to Mr. Wall before and during the relevant period under appeal. Mr. Daudet testified that he began visiting Mr. Wall at his properties for business purposes in 2005 and his last business dealings with Mr. Wall were around 2010. He did not visit Mr. Wall for personal reasons. Mr. Daudet testified that he visited Mr. Wall once at each of the Three Homes but did not remember the addresses. He also visited Mr. Wall at his apartment but he could not remember when. Each of these visits was approximately 45 minutes to one hour. Mr. Daudet was aware that Mr. Wall had owned three different homes between 2006 and 2010 but was unaware of whether Mr. Wall had constructed these homes as a real estate developer.

[134] Mr. Daudet testified that he could not say whether Mr. Wall was living at the properties but suggested that it looked like he lived in them. He testified that Mr. Wall had furniture, clothing and a cat. He said the furniture was the same at all of the properties and at the apartment. Mr. Daudet also testified seeing Alexander Wall at one of the properties. Mr. Daudet spent his visits in the living room and did not see the other rooms. He was not aware of any construction occurring at the properties during any of his visits.

[135] Mr. Daudet sold Mr. Wall disability insurance and a trust account worth \$10,000 for Mr. Alexander Wall. There were no other investments. He testified that he was obliged to meet all of his clients annually regardless of the value of their investments. He was unable to remember specific details about the products he sold Mr. Wall. Mr. Daudet claimed that he was unaware of Mr. Wall's profession, income and finances. His reason for not knowing was because he sold products on behalf of companies who would have collected Mr. Wall's information themselves to determine whether he qualified for the products.

[136] Overall, I found Mr. Daudet's testimony to be vague and incomplete. Therefore, I have not given it much weight. It is also my view that his testimony

was insufficient to establish that Mr. Wall ordinarily inhabited or otherwise resided in any of the Three Homes during the period under appeal.

E. The Respondent's Witnesses

[137] The Respondent called two witnesses, namely Ms. Danielle Thomson and Mr. John Virtusio. I found both to be credible witnesses. The Respondent also submitted extensive documentary evidence in support of her position in these Appeals. Following is a summary of each of their testimony.

(1) Ms. Danielle Thomson

[138] Ms. Thomson was the CRA income tax auditor who audited Mr. Wall for the taxation years under review. She determined that the sale of the Three Homes was on income account. Her evidence was clear and the conclusions she reached were supported by the evidence she provided. Her audit involved many of the documents that shed light on Mr. Wall's real estate transactions.

[139] Ms. Thomson testified that Mr. Wall wrote to the Minister explaining the reasons why he bought and sold the properties but he did not provide documents to support his reasons. Ms. Thomson asked Mr. Wall to provide documents showing his expenses related to the purchase, construction, and sale of the properties. She testified that Mr. Wall provided only a few documents, which included Terasen gas bills, a Wawanesa insurance bill covering 17 days, and a Homeowner's Protection Office application for authorization to be an owner builder. The documents and letters Mr. Wall provided did not satisfy the Minister that Mr. Wall held the homes on capital account.

[140] Ms. Thomson made third party information requests to Park Georgia Realty and HSBC. The Park Georgia Realty documents showed Mr. Wall's real estate commissions during the relevant period. HSBC provided mortgage related documents, bank statements, income statements, and net worth statements for Mr. Wall. Ms. Thomson also accessed land title documents and various permits from the City of Vancouver.

[141] After reviewing all of the information, Ms. Thomson reassessed Mr. Wall to include the revenue from the sales of the Vacant Lot and the Three Homes in his income for the corresponding tax years. The increase in Mr. Wall's income was based on the sale price of each of the Four Properties less the original purchase price, project value, and expenses allowed. The project values were determined

using the project values listed on the City of Vancouver building permits, which was based on information supplied by Mr. Wall.⁵⁷ Ms. Thomson rejected Mr. Wall's unsupported project value estimate of \$750,000 per house which was based on his claim that the building cost was \$250 per square foot. The expenses allowed included all of the Terasen gas bills and a pro-rated portion of the Wawanesa insurance bill.

[142] There were a number of factors which the Minister considered when she determined that Mr. Wall was holding the Three Homes on account of income, including the following:

- (a) Mr. Wall's mortgage statements showed that he was primarily making interest payments which exceeded his reported income.
- (b) Despite being a realtor, Mr. Wall only received referral fees from transactions related to his properties and properties owned by Ms. Pillon and Mr. Henry Wall.
- (c) Mr. Wall consistently represented himself to the bank as a residential home builder with a six figure income.
- (d) The Three Homes were all owned for a relatively short period of time.
- (e) The audit did not reveal evidence showing that Mr. Wall used any of the Three Homes as his mailing address.⁵⁸
- (f) There was evidence that Mr. Wall used his Apartment (#908 2370 West 2nd Avenue) and 4684 9th Avenue (the home which he purchased and assigned to Ms. Pillon) as his mailing address.
- (g) The deficiencies listed in some of the agreements of purchase and sale indicated that those properties were under construction until they were sold.

[143] Ms. Thomson testified that the Minister assessed gross negligence penalties because Mr. Wall was an experienced realtor who built and sold three properties in a short period of time with financing that was not sustainable in the long term. Ms. Thomson also considered the fact that Mr. Wall represented himself to the bank as

⁵⁷ Exhibit R-1, volume 2, tabs 36, 48, and 61.

⁵⁸ Transcript, volume 4, pages 797-800.

a real estate developer. Finally, the amounts reassessed were 98% of Mr. Wall's revised taxable income.

(2) Mr. John Virtusio

[144] Mr. Virtusio was the CRA GST auditor who reviewed Mr. Wall's reporting periods from January 1, 2006 to December 31, 2008. He determined Mr. Wall's GST liabilities with respect to the purchase and sale of the Vacant Lot, 4007 West 21st Avenue, and 4324 West 14th Avenue. Mr. Virtusio also provided limited testimony regarding his knowledge of the GST audit conducted by Mr. Gerald Ng for the reporting periods from August 14, 2009 to December 31, 2010, which resulted in the reassessment of GST on the sale of 4668 West 14th Avenue. The audits were conducted independently but both auditors used similar methods and came to similar conclusions. I am of the view that Mr. Virtusio was a credible witness who made reasonable inferences from the available information.

[145] Mr. Virtusio found that Mr. Wall did not reside at 4007 West 21st Avenue or 4324 West 14th Avenue. He testified that Mr. Wall exhibited a pattern of purchasing a property, demolishing the existing structure, building a new house, and then selling the property within weeks of completing construction. Mr. Ng made similar findings regarding 4668 West 14th Avenue. Both auditors based their reassessments on permits from the City of Vancouver showing when construction was started and finished. Mr. Wall sent a fax to the Minister on January 11, 2012 outlining his position regarding the properties. Despite requests for further information, neither auditor received documentation supporting Mr. Wall's claim.

[146] Both GST auditors calculated Mr. Wall's GST liabilities based on the proceeds of disposition from the sale of the Four Properties. Neither GST auditor allowed input tax credits. Mr. Virtusio testified that Mr. Wall did not apply for input tax credits or provide any of the documentation necessary to claim them. Mr. Virtusio also testified that the Minister assessed automatic late filing and failure to file penalties according to the relevant provisions in force.

IV. LAW AND ANALYSIS

A. Did Mr. Wall sell the Three Homes on account of income or on account of capital for the purposes of the *Act*?

[147] As noted above, the primary issue in this Appeal is whether Mr. Wall sold the Three Homes on account of income (in the course of a development business) or on account of capital.

[148] In summary, Mr. Wall argued that he purchased and developed each of the Three Homes with the intention of living in each one as his principal residence, which he argued he did, but that changes in his circumstances forced him to sell each of the Three Homes after he had lived in each of them for a period of time. He therefore argued that he purchased each of the Three Homes on account of capital and that he qualified for the principal residence exemption, so that the substantial gains he realized from his sale of each of the Three Homes should be exempted from income taxation.

[149] The Respondent, in contrast, argued that “[the] evidence is abundantly clear that the appellant’s intention all along was to purchase the properties, tear down the houses, rebuild the houses, and then sell the properties for profit. The appellant then claimed all of them as his principal residence in order to take undue advantage of the principal residence exemption and to avoid paying any taxes.”⁵⁹

[150] I agree with the Respondent. As discussed below, it is my view that Mr. Wall sold each of the Three Homes on account of income in the course of a development business which he carried on as a sole proprietor during the taxation years under appeal.

[151] Pursuant to sections 3 and 9 of the *Act*, the Appellant is required to include in his income for the purpose of the *Act* all income from a source inside or outside Canada, including income from a business which he carried on in a taxation year. Pursuant to subsection 248(1) of the *Act*, “business” is broadly defined as including “a profession, calling, trade, manufacture or undertaking of any kind whatever and ... an adventure or concern in the nature of trade ...”.

[152] As a general proposition, a person who undertakes the development of residential real estate for the purpose of selling it at a profit is engaged in a business for the purposes of the *Act*, and must include the income therefrom when reporting income for the purposes of the *Act*.

[153] The tests used by the courts in determining whether a gain is on income or capital account have been set out in a number of cases, including *Taylor v.*

⁵⁹ Respondent’s Written Submissions, at paragraph 2.

Minister of National Revenue,⁶⁰ *Racine v. Minister of National Revenue*,⁶¹ *Happy Valley Farms Ltd. v. Minister of National Revenue*,⁶² *Sangha v. Her Majesty the Queen*,⁶³ and *Belcourt Properties Inc. v. Her Majesty the Queen*.⁶⁴

[154] The summary of the law set out in *Happy Valley* was followed in both *Belcourt* (at paragraph 30) and *Sangha* (at paragraph 18). In *Happy Valley*, the court stated the following at paragraphs 13-20 in summarizing the tests used to determine whether a gain is of an income or capital nature:

13 Since income tax was introduced in Canada, a considerable amount of jurisprudence has arisen from the use of the phrase “adventure or concern in the nature of trade” used in the extended definition of business in subsection 248(1) of the *Income Tax Act*. This legislative provision states the “business” includes a profession, calling, trade, manufacture or undertaking of any kind whatever and includes “an adventure or concern in the nature of trade but does not include an office or employment.” The most comprehensive analysis of the meaning of “adventure in the nature of trade” is found in *Minister of National Revenue v. Taylor*, [1956] C.T.C. 189, 56 D.T.C. 1125 (Ex. Ct.) where the Court set out a number of tests to be applied to determine when a transaction, which is not itself a trade or business, can be held to be “an adventure or concern in the nature of trade”. The decision makes it clear that the question to be answered, in cases of this nature is, was the asset acquired by the taxpayer as an investment or was it not. If not, then any gain realized by the taxpayer upon the sale of the asset is taxable as income. Whether an asset was acquired as an investment is to be determined by all the facts of a particular case including, the course of conduct of the taxpayer, the nature of the subject property, the probability of the asset producing income without the need to be turned over and the similarity of the transaction in question to a trading transaction.

14 Several tests, many of them similar to those pronounced by the Court in the Taylor case, have been used by the courts in determining whether a gain is of an income or capital nature. These include:

1. *The nature of the property sold.* Although virtually any form of property may be acquired to be dealt in, those forms of property, such as manufactured articles, which are generally the subject of trading only are rarely the subject of investment. Property which does not yield to its owner an income or personal enjoyment simply by virtue of its ownership is more likely to have been acquired for the purpose of sale than property that does.

⁶⁰ [1956] CTC 189, 56 DTC 1125 (Ex Ct).

⁶¹ [1965] CTC 150, 65 DTC 5098 (Ex Ct).

⁶² [1986] 2 CTC 259, 86 DTC 6421 (FCTD) [*Happy Valley*].

⁶³ 2013 TCC 69.

⁶⁴ 2014 TCC 208.

2. *The length of period of ownership.* Generally, property meant to be dealt in is realized within a short time after acquisition. Nevertheless, there are many exceptions to this general rule.

3. *The frequency or number of other similar transactions by the taxpayer.* If the same sort of property has been sold in succession over a period of years or there are several sales at about the same date, a presumption arises that there has been dealing in respect of the property.

4. *Work expended on or in connection with the property realized.* If effort is put into bringing the property into a more marketable condition during the ownership of the taxpayer or if special efforts are made to find or attract purchasers (such as the opening of an office or advertising) there is some evidence of dealing in the property.

5. *The circumstances that were responsible for the sale of the property.* There may exist some explanation, such as a sudden emergency or an opportunity calling for ready money, that will preclude a finding that the plan of dealing in the property was what caused the original purchase.

6. *Motive.* The motive of the taxpayer is never irrelevant in any of these cases. The intention at the time of acquiring an asset as inferred from surrounding circumstances and direct evidence is one of the most important elements in determining whether a gain is of a capital or income nature.

15 While all of the above factors have been considered by the courts, it is the last one, the question of motive or intention which has been most developed. That, in addition to consideration of the taxpayer's whole course of conduct while in possession of the asset, is what in the end generally influences the finding of the court.

16 This test has been carried one step further by Canadian courts into what has generally been referred to as the “secondary intention” test. This has meant, in some cases, that even where it could be established that a taxpayer's main intention was investment, a gain on the sale of the asset would be held *taxable* as income if the court believed that, at the time of acquisition, the taxpayer had in mind the possibility of selling the asset if his investment project did not, for whatever reason, materialize. In *Racine, Demers and Nolan v. Minister of National Revenue*, [1965] C.T.C. 150, 65 D.T.C. 5098 (Ex. Ct.), Noel, J. provided the following summary of the secondary intention test at 159 (D.T.C. 5103):

... the fact alone that a person buying a property with the aim of using it as capital could be induced to resell it if a sufficiently high price were offered to him, is not sufficient to change an acquisition of capital into an adventure in the nature of trade. In fact, this is not what must be understood by a “secondary intention” if one wants to utilize this term.

To give to a transaction which involves the acquisition of capital the double character of also being at the same time an adventure in the nature of trade, the purchaser must have in his mind, at the moment of the purchase, the possibility of reselling as an operating motivation for the acquisition; that is to say that he must have had in mind that upon a certain type of circumstances arising he had hopes of being able to resell it at a profit instead of using the thing purchased for purposes of capital. Generally speaking, a decision that such a motivation exists will have to be based on inferences flowing from circumstances surrounding the transaction rather than on direct evidence of what the purchaser had in mind.

17 In *Armstrong v. The Queen*, [1985] 2 C.T.C. 179, 85 D.T.C. 5396; (F.C.T.D.) I had an opportunity to consider this “secondary intention” test as laid down by Noel, J. in the *Racine* case. As I pointed out in the *Armstrong* case, the notion of secondary intention is nowhere enshrined in the *Income Tax Act*. In *Hiwako Investments Limited v. The Queen*, [1978] C.T.C. 378, 78 D.T.C. 6281 (F.C.A.), the Chief Justice of the Federal Court stated at 384 (D.T.C. 6285) that the term “secondary intention”:

... does no more than refer to a practical approach for determining certain questions that arise in connection with “trading cases” but there is no principle of law that is represented by this tag. The three principle, if not the only, sources of income are businesses, property and offices or employments (section 3). Except in very exceptional cases, a gain on the purchase and re-sale of property must have as its source a “business” within the meaning of that term as extended by section 139 [now section 248(1)].

18 The ultimate purpose therefore, of applying the tests set out above to the facts of this case, including the test of intention, is to determine whether the purchase and eventual sale of Field Farm was a business or an adventure in the nature of trade.

19 Where the nature of the property in question is such that it cannot produce income but must be sold to produce profit, the inference is that the transaction is an adventure in the nature of trade. The *Taylor* case (supra) is one such case in point where the subject matter was led. In two United Kingdom cases, *Rutledge v. C.I.R.*, 14 T.C. 490 the subject property was toilet paper and in *C.I.R. v. Fraser*, 24 T.C. 598 where it was whiskey. In *David C. McDonald v. The Queen*, [1974] C.T.C. 836, 74 D.T.C. 6644 (F.C.A.), vacant land was held to fall into this category.

20 Another test developed by the jurisprudence is the frequency of similar transactions engaged in by the taxpayer. Although profit from an isolated transaction may or may not be found to be taxable, a large number of similar transactions will generally lead to the conclusion that a taxpayer is carrying on a

business. In addition, the length of time an asset is held is an indicative element, with the presumption being that the longer the taxpayer held on to the asset, the more likely it is to be in the nature of an investment.

[emphasis added]

[155] As noted in paragraph 15 in *Happy Valley*, courts have found that the question of motive or intention is an important factor. In *Canada Safeway Ltd. v. Her Majesty the Queen*,⁶⁵ the Federal Court of Appeal noted the following with respect to this test at paragraph 61:

61 A number of principles emerge from these decisions which I believe can be summarized as follows. First, the boundary between income and capital gains cannot easily be drawn and, as a consequence, consideration of various factors, including the taxpayer's intent at the time of acquiring the property at issue, becomes necessary for a proper determination. Second, for the transaction to constitute an adventure in the nature of trade, the possibility of resale, as an operating motivation for the purchase, must have been in the mind of the taxpayer. In order to make that determination, inferences will have to be drawn from all of the circumstances. In other words, the taxpayer's whole course of conduct has to be assessed. Third, with respect to "secondary intention", it also must also have existed at the time of acquisition of the property and it must have been an operating motivation in the acquisition of the property. Fourth, the fact that the taxpayer contemplated the possibility of resale of his or her property is not, in itself, sufficient to conclude in the existence of an adventure in the nature of trade. In *Principles of Canadian Income Tax Law, supra*, the learned authors, in discussing the applicable test in relation to the existence of a "secondary intention", opine that "the secondary intention doctrine will not be satisfied unless the prospect of resale at a profit was an important consideration in the decision to acquire the property" (see page 337). I agree entirely with that proposition. Fifth, the viva voce evidence of the taxpayer with respect to his or her intention is not conclusive and has to be tested in the light of all the surrounding circumstances.

[156] In this case, the parties do not dispute the law. However, their positions differ in the application of the law to the facts. In my view, however, it is abundantly clear from the evidence in this case that Mr. Wall carried on the development of the Three Homes in the course of a real estate development business which he carried on as a sole proprietor, and that the profit he earned therefrom was accordingly earned on account of income. As discussed further below, I am therefor of the view that Mr. Wall was required to include the profits he earned from the sale of the Three Homes when reporting his income in his 2006, 2008, and 2010 taxation years.

⁶⁵ 2008 FCA 24.

(1) Nature of the properties

[157] Although a house in and of itself is not indicative of capital or inventory,⁶⁶ the speculative nature of the housing market in Vancouver is important to the context of the income versus capital determination. As a sophisticated business person, who was well versed in real estate sales and development in the Vancouver area, Mr. Wall would have known that the Three Homes could be acquired and developed for a cost that was below their eventual resale value. The evidence shows that the Three Homes were run down when Mr. Wall purchased them, and that once they were developed, their value increased substantially. Based on all of the evidence, it is my view that Mr. Wall purchased each of the Three Homes with the intention of tearing down the existing structure and building a new home. In my view, Mr. Wall's investment in these properties was speculative in nature and he was aware that Vancouver's housing market was capable of producing significant returns at that time. His skills as a business person allowed him to take advantage of the nature of these properties. On a balance of probabilities, it is my view that this factor indicates that the gains on the sale of each of the Three Homes was of an income nature.

(2) Length of period of ownership

[158] In my view, the relatively short length of ownership indicates that the Three Homes were each sold on income account. As noted above, Mr. Wall owned 4007 West 21st Avenue for approximately 16 months, 4324 West 14th Avenue for approximately 21 months, and 4668 West 14th Avenue for approximately 16 months. In each case, this included the time necessary to demolish the old home, build a new home and sell it. Based on all of the evidence, including the deficiencies listed in the various closing documents, it is my view that each of the Three Homes was under construction substantially all of the time that Mr. Wall owned them, and that each of the Three Homes was sold around the time that construction was completed. I also note that during this time period Mr. Wall was also involved in the purchase, redevelopment and resale of properties which he effected in the names of Mr. Henry Wall (his father) and Ms. Pillon (his "friend").

[159] Mr. Wall argued that if he wanted to be a developer, he could have built the Three Homes faster and could have developed more of them during the same time period. Mr. Wall also testified that he thought the Three Homes needed to be lived in for a certain period of time before he could claim the principal residence

⁶⁶ See *Sangha*, 2013 TCC 69, at para 19.

exemption. Based on all of the evidence, it is my view that Mr. Wall timed the development of each of the Three Homes on the basis that he wanted to structure each transaction so that he could claim the principal residence exemption in each case. As noted above, I also note that he was in fact carrying on other development activities during this same time period, but he effected that other development activity through Henry Wall and Ms. Pillon.

[160] On a balance of probabilities, it is my view that this factor indicates that the gains on the sale of each of the Three Homes was of an income nature. In this respect, it is my view that the evidence shows that Mr. Wall was selling homes as he developed them while trying to meet the requirements for the principal residence exemption so that he could avoid paying tax on his profits.

(3) Frequency or number of other similar transactions

[161] Mr. Wall's frequent and similar transactions with residential real estate properties lead to the conclusion that the profits from the sales of the Three Homes were on income account. With respect to the Three Homes, Mr. Wall purchased increasingly more expensive properties, demolished the existing structure, built a new home, and then sold the property as soon as construction was complete. This pattern extends beyond the Three Homes and includes his interactions with properties transacted with by Mr. Henry Wall and Ms. Pillon. Mr. Wall had also previously engaged in similar transactions as a property developer through his corporation, Pocido. In my view, Mr. Wall is a sophisticated property developer who has the skills to quickly develop and sell properties for significant returns. In my view, Mr. Wall was in the business of developing properties and he developed the Three Homes as part of this business.

(4) Work expended on or in connection with the property realized

[162] It is apparent that Mr. Wall expended a good deal of effort purchasing, redeveloping and selling the Three Homes. Based on his reported income, and the lack of evidence indicating he had any material commission income from unrelated third parties, it is apparent that the majority of his work efforts during the period under appeal involved purchasing, redeveloping and selling real estate, including the Three Homes and properties which he effected in the name of his father (Henry Wall) and his "friend", Ms. Pillon. In this respect, I note that while Mr. Wall claimed to be a realtor, all or substantially all of his commission income during the period under appeal was from referral fees related to his properties and properties

transacted in the name of Henry Wall and Ms. Pillon.⁶⁷ Overall, the evidence shows that Mr. Wall undertook significant efforts to make the Three Homes more valuable and he sold them as soon as they were fully developed at a substantial profit. Mr. Wall gave no evidence that he worked on anything else during the relevant period and he gave no other credible explanation for his income.

(5) Circumstances responsible for the sale of the property

[163] Mr. Wall testified and argued that he purchased each of the Three Homes with the intention of living in each one with his son, but that he was forced to sell each of the Three Homes because of unforeseen circumstances involving unexpected personal expenses and accumulated debts. Based on all of the evidence, it is my view that Mr. Wall's testimony about his financial circumstances, and the reasons he sold each of the Three Homes, is not credible. Mr. Wall did not provide any evidence, other than his *viva voce* testimony, that he had overwhelming debts. For example, there was no evidence of any demand letters or other collection actions taken by his financial institution, and there was no evidence of any financial restructuring he undertook to deal with his accumulated debts in each case. He also did not sell any other available personal assets, such as his airplane, to pay down his debts. For example, rather than using the proceeds from the sale of the Vacant Lot to repay his debts, Mr. Wall used the proceeds from the sale of the Vacant Lot to make the down payment on 2612 Patricia Crescent. In addition, after selling each of the Three Homes to allegedly repay his debts, Mr. Wall subsequently purchased an even more expensive home with a larger mortgage without any verifiable change in his financial circumstances. For example, I note that the mortgage for the first property was \$812,500, the mortgage for the second property was \$1,125,000 and the mortgage for the third property was \$2,100,000.

[164] I also note that Mr. Wall contributed \$13,000 to his RRSP in 2006, which is inconsistent with his testimony that he sold the 4007 West 21st Avenue property in early 2006 because of purported financial difficulties.

[165] Mr. Wall claimed that he could afford to purchase each of the Three Homes because he had savings and because he obtained financing from family and friends. He also claimed he had plans to rent out a basement apartment in each of the Three

⁶⁷ See Exhibit R-1, Tab 70 and testimony of the Appellant, October 25, 2016. From January 1, 2005 to December 31, 2010, it is apparent that the Appellant earned commission income from only 7 transactions, all of which relate to properties owned by himself, his father or Ms. Pillon.

Homes, that he had plans to have Ms. Pillon help make the mortgage payments, that he had plans to make more commission income, and that he had plans to undertake more real estate developments. However, there was no credible evidence that he made any effort to undertake any of the foregoing, and it is my view that none of his claims are credible. In my view, there was also no evidence to suggest that Mr. Wall could have afforded to retain ownership of any of the Three Homes after purchasing and redeveloping them based on his available assets or his reported income. For example, Mr. Wall's reported annual income for income tax purposes throughout much of his career as a realtor and property developer was very low. For example, during the taxation years 1998 to 2010, he did not report income for tax purposes in excess of \$29,000. Rather, as listed above, he reported total income for tax purposes between \$7,000 and \$18,000 in 10 of those taxation years, and reported total income for tax purposes of \$23,000, \$26,036 and \$29,000 for the other three taxation years.

[166] Mr. Wall testified that he allowed the bank to embellish his mortgage applications to show that he had greater assets and annual income than he did so that his applications would be approved. His mortgage applications also showed that he was a property developer. Mr. Wall testified that he would have needed a substantial down payment (of approximately 35%) in order to obtain the mortgages for each of the Three Homes. However, I note that he did not provide any evidence to show the source of these funds, other than his profits from his redevelopment of properties, including the Three Homes. In my view, it is unlikely that he was able to save the necessary amount based on his reported taxable income. I also note that Mr. Wall made mortgage payments for each of the Three Homes that were substantial in relation to his reported annual income, and that the mortgage payments were, for the most part, interest only.

[167] Mr. Wall testified that, in addition to his debts, he sold 4668 West 14th Avenue because his son did not want to live with him any longer and because he wanted a lifestyle change. The evidence, however, contradicts Mr. Wall's reasons, particularly in relation to 2612 Patricia Crescent – the house where Mr. Wall moved after selling 4668 West 14th Avenue. Mr. Wall's testimony was that 2612 Patricia Crescent was his father's vacation home. Other evidence shows that Mr. Wall sold the Vacant Lot so that he could make a down payment on 2612 Patricia Crescent, that Mr. Wall took a mortgage and made most if not all of the payments on 2612 Patricia Crescent, and that Mr. Henry Wall transferred 2612 Patricia Crescent to Mr. Wall for \$1. Although Mr. Henry Wall may have been the legal owner of 2612 Patricia Crescent, there was no evidence that he made any financial contributions to 2612 Patricia Crescent. I also note that Mr. Wall completed the

sale of 4668 West 14th Avenue in November 2010, when his son still had much of his last year of school ahead of him, which contradicts his testimony that he purchased each of the Three Homes so that his son could be close to his school and his mother.

[168] I also note that Mr. Wall advised the CRA, in his letter of January 12, 2012, that he sold the 4668 West 14th Avenue property so he could move in with his parents and provide them with assistance because his elderly parents required a full time caregiver.⁶⁸ I note that Mr. Wall provided no evidence in support of this position, and it is contradictory to his testimony at trial that he sold the property because of his purported financial difficulties.

[169] In my view, based on all of the evidence, the stated reasons Mr. Wall has given to this Court for selling each of the Three Homes is neither credible nor plausible. Rather, it is my view that Mr. Wall purchased each of Three Homes with the intention of redeveloping each of the properties and then reselling them at a profit once construction was completed, which is what he in fact did in each case.

(6) Motive

[170] As previously noted, Mr. Wall testified and argued that he purchased each of the Three Homes with the intention of living in each one as his principal residence with his son, but that his intentions were frustrated by unforeseen circumstances which forced him to sell each of the Three Homes, in turn. As discussed at paragraph 61 of *Safeway*, “*viva voce* evidence of the taxpayer with respect to his or her intention is not conclusive and has to be tested in the light of all the surrounding circumstances”.

[171] As discussed above, considering all of the evidence, I do not find Mr. Wall’s stated intentions to be credible or plausible. Rather, it is my view that Mr. Wall’s conduct and the surrounding circumstances demonstrate that he acquired each of the Three Homes with the intention of reselling each of them at a profit, which is what he did. There is, in my view, no other plausible conclusion that can be drawn when considering all of the evidence in this case.

[172] Overall, considering all of the evidence in this case, I note that Mr. Wall is a sophisticated businessman with expertise in real estate sales and development. He knew how to undertake and finance the redevelopment of undervalued properties

⁶⁸ Exhibit R-3, Tab 6, page 2.

in Vancouver's skyrocketing real estate market. Mr. Wall engaged in a pattern of purchasing run down houses, demolishing them, building new homes, and reselling them for a substantial profit as soon as construction was completed. It is also clear that Mr. Wall could not afford to pay the mortgages on each of the Three Homes in the long term based on his reported income. His reported income was too low and there was no evidence of any savings or alternative financing that Mr. Wall could use to pay his mortgages for each of the Three Homes in the long term. Rather, it is my view that Mr. Wall used the mortgage financing to finance his real estate development business, and that he repaid his accumulated debts when he sold the related property. Mr. Wall also sold each of the Three Homes for a profit, instead of selling other personal assets to pay down his debts. Mr. Wall also maintained or had access to other properties (such as his Apartment and Ms. Pillon's residence) where he could live during the period under appeal, including after reselling each of the Three Homes.

[173] In considering all of the evidence in this case, I note that the Appellant's testimony was quite vague, especially in relation to many of the important facts relevant to his appeal. It is also my view that Mr. Wall's testimony was both evasive and dismissive. I also note that he had very little documentation relating to his purchase, redevelopment and sale of the Three Homes, notwithstanding his significant business experience. He also did not call Ms. Pillon, Ms. Pillon's children, or his accountant to testify. I have drawn an adverse inference from Mr. Wall's failure to call relevant witnesses to testify or to retain and submit important documentary evidence in relation to his development activities.

[174] Based on all of the foregoing, it is my view, on a balance of probabilities, that Mr. Wall sold each of the Three Homes on account of income in the course of a property development business which he carried on as a sole proprietor.

B. If Mr. Wall sold the Three Homes on account of capital, could he claim the principal residence exemption in respect of any of the Three Homes pursuant to paragraph 40(2)(b) of the *Act*?

[175] Because of my finding that Mr. Wall sold each of the Three Homes on account of income in the course of a real estate development business, it is my view that Mr. Wall cannot claim the principal residence exemption pursuant to paragraph 40(2)(b) of the *Act*. In this respect, it is clear that the principal residence exemption is only available to taxpayers who hold and sell their property on account of capital.

[176] Even if Mr. Wall held and sold each of the Three Homes on account of capital, on a balance of probabilities, it is my view that he did not meet the legislative requirements necessary to claim the principal residence exemption in respect of each of the Three Homes. In particular, it is my view, on a balance of probabilities, that there is insufficient credible evidence to conclude that Mr. Wall (or his son, a spouse, a former spouse, a common law partner, or a former common law partner) “ordinarily inhabited” any of the Three Homes at any time.

[177] Paragraph 3(b) of the *Act* provides that a taxpayer’s income for a taxation year includes taxable capital gains in excess of allowable capital losses. Paragraphs 38(a) and (b) of the *Act* define taxable capital gains and allowable capital losses as ½ of the taxpayer’s capital gains and losses, respectively. Subsection 40(1) of the *Act*, in turn, sets out the general rules for computing capital gains and losses. Paragraph 40(2)(b) provides an exception, commonly referred to as the principal residence exemption, to the general rules in subsection 40(1). Paragraph 40(2)(b) generally exempts a taxpayer’s capital gain from the disposition of the taxpayer’s “principal residence” from inclusion in income in specified circumstances.

[178] Pursuant to the definition of “principal residence” set out in section 54 of the *Act*, a

“principal residence of a taxpayer for a taxation year means a particular property that is a housing unit ... that is owned ... in the year by the taxpayer, if ... the housing unit was ordinarily inhabited in the year by the taxpayer, by the taxpayer’s spouse or common-law partner or former spouse or common-law partner or by a child of the taxpayer ...”. [emphasis added]

[179] Pursuant to paragraph 40(2)(b) and section 54 of the *Act*, for the principal residence exemption to apply, a taxpayer must have “ordinarily inhabited” a property during the periods that the property is claimed as the taxpayer’s principal residence. There is no definition of “ordinarily inhabited” in the *Act*, but in *Flanagan v Minister of National Revenue*,⁶⁹ at paragraphs 27 to 29, the “ordinarily resident” rule from *Thomson v Minister of National Revenue*,⁷⁰ was used to establish the meaning of “ordinarily inhabited” as follows:

27 The courts have discussed on several occasions the meaning of the expression “ordinarily resident”, as that expression was used in subsection 139(4) of the *Act*, as it read prior to 1972. In *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, [1946] C.T.C. 51, 2 D.T.C. 812 the Supreme Court of Canada found

⁶⁹ [1989] 2 CTC 2395, 89 DTC 615 [*Flanagan*].

⁷⁰ [1946] SCR 209, [1946] CTC 51.

there was nothing of a casual or non-permanent character about the taxpayer's residence in New Brunswick even though he lived there, during the years in appeal, from May to October, less than 183 days in each year. He resided the rest of year in the United States. Rand, J. on page 64 (D.T.C. 815) stated that:

The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

28 Kellock, J. at pages 67 and 68 (D.T.C. 819 and 820), stated as follows:

"Ordinarily" is defined as "in conformity with rule or established custom or practice," "as a matter of regular practice or occurrence," "in the ordinary or usual course of events," "usually," "commonly," "as is normal or usual." "Sojourn" in clause (b) is to be contrasted with "resident" in clause (a). A mere sojourn is not within the section unless the sojourn continues beyond the stated period. In my opinion, the appellant is not to be described as a sojourner in respect of the years in question but as a person residing in Canada within the meaning of clause (a). There is not the slightest difference between his use of his Canadian home and that of either of his two American homes. All three establishments are essentially of the same nature and are equally regarded by him as "homes" in the same sense. The appellant's residence in each is in the ordinary and habitual course of his life and there is no difference in the quality of his occupation in any one of them, although he may and does occupy each at different periods of the year.

29 The word "ordinarily" does not, therefore, restrict a person to having residence in one country; a person may ordinarily inhabit more than one housing unit in a year if he does so in the course of the customary mode of his life: this too is a question of fact. The respondent agrees that a seasonal residence may be a taxpayer's principal residence. Paragraph 9 of the respondent's Interpretation Bulletin IT-120R3 reads as follows:

The question of whether a residence was "ordinarily inhabited" during a taxation year by a taxpayer, the taxpayer's spouse or former spouse, or a child of the taxpayer must be resolved on the facts in each particular case. Where the residence has been occupied by such a person for only a short period of time during a taxation year (such as a seasonal residence occupied during a taxpayer's vacation or a house which was sold early or bought late

in a taxation year), it is the Department's view that the taxpayer "ordinarily inhabited" that residence in the year, provided that the principal reason for owning the property was not for the purpose of gaining or producing income therefrom. In circumstances where a taxpayer receives incidental rental income from a seasonal residence, such property is not considered to be owned for the purpose of gaining or producing income therefrom.

[180] In *Rebus v. the Queen*,⁷¹ the Court interpreted "ordinarily inhabit" to mean "normally occupy as a home". In *Sidhu v Her Majesty the Queen*, the ordinarily inhabited rule from *Flanagan* was interpreted as follows:

... a casual residence, which is a residence occupied by a person but which is not reflective of where that person lives in the course of his/her customary mode of life, is not a residence at which that person "ordinarily" resides.⁷²

[181] As discussed above, length of ownership is one of the factors used to determine whether a property is held on account of income or capital.⁷³ Once it is determined that a property is held on account of capital, then it is necessary to determine if the "ordinarily inhabited" requirement for the principal residence exemption has been met. In *Sangha*, the Court acknowledged that the duration a property was ordinarily inhabited is not a factor in determining whether a taxpayer can claim the principal residence exemption.⁷⁴ Of course, the duration that a property was ordinarily inhabited does factor into the computation of the principal residence exemption in paragraph 40(2)(b) once it is determined that it otherwise applies.

[182] In this case, Mr. Wall has testified that he lived in each of the Three Homes with his son, Alexander Wall, and therefore argues that he did ordinarily inhabit each of the Three Homes. Alexander Wall also testified that he lived in each of the Three Homes. However, I found their testimony to be vague and not credible in respect of the degree, if any, of occupation each of them had in the Three Homes. Mr. Velve and Mr. Daudet also provided testimony regarding Mr. Wall's occupation of the Three Homes. As discussed above, I also found their testimony to be vague and I have placed little weight on their testimony regarding Mr. Wall's purported occupation of the Three Homes. I also note that the only bills that Mr. Wall had in relation to the Three Homes were for expenses such as gas and

⁷¹ [2002] 3 C.T.C. 2328, at paragraph 23.

⁷² 2004 TCC 174, at para 21.

⁷³ See *Happy Valley*, at para 14.

⁷⁴ *Sangha*, 2013 TCC 69, at para 20, citing *Palardy v Her Majesty the Queen*, 2011 TCC 108.

Insurance, which are expenses that he would have incurred during the redevelopment of the Three Homes even if he never lived in them. They are thus not indicative of ordinarily inhabiting the Three Homes. There were, for example, no cable or internet bills, and there was no evidence to suggest that he ever used the address of any of the Three Homes as his address on his bank or credit card statements, his driver's license or on his tax returns.

[183] I also note that the Three Homes were listed as new, and there were substantial deficiencies that had to be remedied prior to closing. There was also a budget for appliances.

[184] During the period under appeal, Mr. Wall had access to a number of residences, including his Apartment, the residences and properties owned or rented by Ms. Pillon, his parent's properties, and the Three Homes. Considering all of the evidence on a balance of probabilities, it is unclear where Mr. Wall resided at any given time. A generous interpretation of the evidence is that Mr. Wall moved some furniture into each of the Three Homes and casually resided or camped out in each of the Three Homes with the intention of creating a façade for the purpose of claiming the principal residence exemption. A more pessimistic interpretation of the evidence is that Mr. Wall did not inhabit the Three Homes at all. In my view, the fact that he kept his Apartment, used the Apartment and other properties as his mailing address, sold the Three Homes as soon as construction was complete, and could not provide any reliable evidence to establish that he lived in the Three Homes in the course of his customary mode of life indicates that he did not ordinarily inhabit them. As discussed above, it is my view that Mr. Wall's testimony was not credible. On a balance of probabilities, it is my view that Mr. Wall did not ordinarily inhabit any of the Three Homes for any period of time. As a result, it is my view that none of the Three Homes were Mr. Wall's "principal residence" because he did not ordinarily inhabit any of them. Thus he cannot claim the principal residence exemption in respect of any of the Three Homes.

C. Did the Minister properly assess penalties pursuant to subsection 163(2) of the *Act* in respect of Mr. Wall's 2006, 2008 and 2010 taxation years?

[185] In this case, the Minister assessed penalties (often referred to as gross negligence penalties) pursuant to subsection 163(2) of the *Act* in respect of Mr. Wall's failure to report his profit from the sale of the Three Homes and the Vacant Lot in his 2006, 2008 and 2010 taxation years. As previously noted, Mr. Wall testified that he did not report his gains on the sale of the Three Homes on the basis that he had built and occupied each of the Three Homes as his

principal residence. Notwithstanding his significant business and real estate experience, Mr. Wall also testified that he overlooked reporting the significant gain on the sale of the Vacant Lot.

[186] In this case, the Respondent argues that Mr. Wall knowingly made false statements or omissions in his 2006, 2008 and 2010 income tax returns by not reporting his profits and gains from the disposition of the Three Homes and the Vacant Lot. In the alternative, the Respondent argues that Mr. Wall was willfully blind or grossly negligent in not reporting his profits and gains from the disposition of the Three Homes and the Vacant Lot. As such, the Respondent argues that the Minister properly imposed subsection 163(2) penalties in this case. I agree with the Respondent for the reasons that follow.

[187] Subsection 163(2) of the *Act* provides as follows:

“(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 ...”

[emphasis added]

[188] In *Gray v Her Majesty the Queen*, 2016 TCC 54, the Court found the following at paragraphs 22 to 36 in relation to the application of subsection 163(2) penalties:

22 It is axiomatic that our system of taxation is both self-reporting and self-assessing. It relies on the honesty and integrity of the individual taxpayer. It is based on the "honour system". The taxpayer has a duty to report his taxable income completely, correctly and accurately, no matter who prepares the return. Therefore, the taxpayer must be vigilant in ensuring the completeness and accuracy of the information contained in his return. As noted by Justice Martineau in *Northview Apartments Ltd. v. Canada (Attorney General)*, 2009 FC 74 (F.C.), at paragraph 11: "It is the essence of our tax collection system that taxpayers are sole responsible for self-assessment and self-reporting to the CRA."

...

24 The penalties provided for in section 163 of the Act have been conceived in order to ensure the integrity of our self-assessing and self-reporting system and to encourage a taxpayer to exercise care and accuracy in the preparation of his return, no matter who prepares the return. In *Sbrollini v. R.*, 2015 TCC 178

(T.C.C. [Informal Procedure]), Justice Boyle of this Court opined that the penalty provisions set out in subsection 163(2) of the Act reflect:

15 ... the significance and importance of the requirements of honesty and accuracy in the Canadian self-reporting income tax system... .

16 Such penalties are properly payable ... if [a taxpayer] knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in, the making of false statements or omissions in his returns.

25 Therefore, I am of the view that the decision of whether or not a taxpayer should be subjected to the penalties under subsection 163(2) of the Act should be determined in light of the positive responsibilities and duties of the taxpayer to accurately and completely report his income in a self-reporting and self-assessing system.

26 There are two necessary elements that must be established in order to find liability for subsection 163(2) penalties:

(a) a false statement in a return, and

(b) knowledge or gross negligence in the making of, participating in, assenting to or acquiescing in the making of, that false statement.

...

30 There is a difference between ordinary negligence and gross negligence. Several of my colleagues and myself have canvassed the law in this area on many occasions in recent decisions. Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. Gross negligence involves greater neglect than simply a failure to use reasonable care. It involves a high degree of negligence tantamount to intentional acting or indifference as to whether the law is complied with or not; see *Venne*, above. In *Venne*, Justice Strayer of the Federal Court (Trial Division) stated that subsection 163(2) is a penal provision and must be construed strictly. These penalties ought to be imposed only where there is a high degree of blameworthiness involving knowing or reckless misconduct.

31 However, in *Guindon*, above, the Supreme Court of Canada held that section 163.2 of the Act, which provides for the imposition of gross negligence penalties against third party tax preparers, is not a penal provision. The section provides for an administrative penalty that is primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity — the purpose being to promote honesty and deter gross negligence, qualities that are essential to the self-reporting system of income tax assessment. I am of the view that the same can be said of the penalties provided for in subsection 163(2) with which we are dealing. One should therefore not look for proof approaching the standard of beyond a

reasonable doubt before concluding that the imposition of penalties as provided by subsection 163(2) is justified. Nonetheless, the penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes made by a taxpayer.

32 It is also well-settled law that gross negligence can include "wilful blindness". The concept of "wilful blindness", well known to the criminal law, was explained by Justice Cory of the Supreme Court of Canada in *Hinchey*, above. The rule is that if a party has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.

33 It has been held that the concept of "wilful blindness" is applicable to tax cases; see *Villeneuve*, above, and *Panini*, above. In *Panini*, Justice Nadon made it clear that the concept of "wilful blindness" is included in "gross negligence" as that term is used in subsection 163(2) of the Act. He stated:

43 ... the law will impute knowledge to a taxpayer who, in circumstances that dictate or strongly suggest that an inquiry should be made with respect to his or her tax situation, refuses or fails to commence such an inquiry without proper justification.

34 It has been held that in drawing the line between "ordinary" negligence or neglect and "gross" negligence, a number of factors have to be considered:

- (a) the magnitude of the omission in relation to the income declared,
- (b) the opportunity the taxpayer had to detect the error,
- (c) the taxpayer's education and apparent intelligence,
- (d) genuine effort to comply.

Obviously, no single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence (see *DeCosta*, above, at paragraph 11; *Bhatti*, above, at paragraph 24; and *McLeod*, above, at paragraph 14).

35 In *Torres*, above, Justice C. Miller of this Court conducted a very thorough review of the jurisprudence regarding gross negligence penalties under subsection 163(2) of the Act. He summarized the governing principles to be applied at paragraph 65:

- a) Knowledge of a false statement can be imputed by wilful blindness.
- b) The concept of wilful blindness can be applied to gross negligence penalties pursuant to subsection 163(2) of the Act

- c) In determining wilful blindness, consideration must be given to the education and experience of the taxpayer.
- d) To find wilful blindness there must be a need or a suspicion for an inquiry.
- e) Circumstances that would indicate a need for an inquiry prior to filing ... include the following:
 - i) the magnitude of the advantage or omission;
 - ii) the blatantness of the false statement and how readily detectable it is;
 - iii) the lack of acknowledgment by the tax preparer who prepared the return in the return itself;
 - iv) unusual requests made by the tax preparer;
 - v) the tax preparer being previously unknown to the taxpayer;
 - vi) incomprehensible explanations by the tax preparer;
 - vii) whether others engaged the tax preparer or warned against doing so, or the taxpayer himself or herself expresses concern about telling others.
- f) The final requirement for wilful blindness is that the taxpayer makes no inquiry of the tax preparer to understand the return, nor makes any inquiry of a third party, nor the CRA itself.

36 This is certainly not an exhaustive list.

[189] Pursuant to subsection 163(3) of the *Act*, the burden of establishing the facts justifying the assessment of a penalty under subsection 163(2) is on the Minister. As noted in *Lacroix v Her Majesty the Queen*, 2008 FCA 241, at paragraph 32:

32 What, then, of the burden of proof on the Minister? How does he discharge this burden? There may be circumstances where the Minister would be able to show direct evidence of the taxpayer's state of mind at the time the tax return was filed. However, in the vast majority of cases, the Minister will be limited to undermining the taxpayer's credibility by either adducing evidence or cross-examining the taxpayer. Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of subparagraph 152(4)(a)(i) and subsection 162(3).

[190] In this case, for the reasons previously given, it is my view that Mr. Wall was required to include his profits and gains from the dispositions of the Three Homes and the Vacant Lot in his income for his respective 2006, 2008 and 2010 taxation years. As a result, it is my view that Mr. Wall made a misstatement or omission in his 2006, 2008 and 2010 taxation years when he failed to report his profits and gains from the dispositions of the Three Homes and the Vacant Lot. As such, it is necessary to determine if he did so knowingly or in circumstances amounting to gross negligence. In my view, considering all of the evidence on a balance of probabilities, he did so both knowingly and in circumstances amounting to gross negligence.

[191] Mr. Wall is a knowledgeable business person, real estate developer and real estate agent with many years' experience. It is clear from his testimony and his past experience developing properties, including through his corporation Pocado, that he understood his tax reporting obligations in relation to real estate development activities. He also contacted both the CRA and his accountant to obtain information about how he could claim the principal residence exemption on his sale of the Three Homes. Mr. Wall reported taxable income of \$26,036, \$15,547 and \$15,684 in his 2006, 2008 and 2010 taxation years. In this respect, Mr. Wall testified that he reviewed his tax returns before his accountant filed them and he knew the profits from the sales of the Three Homes were not reflected in his tax returns. He testified that he simply forgot to report his gain on the sale of the Vacant Lot in his 2006 tax return.

[192] As previously noted, it is my view that Mr. Wall's testimony was not credible in many respects. Considering all of the evidence, it is my view that Mr. Wall knowingly determined that he would not report his income from the sale of the Three Homes on the basis that he would claim the principal residence exemption in respect of each of the Three Homes. Given his admitted knowledge and expertise, I also do not believe Mr. Wall when he says he simply forgot to report his gain from the sale of the Vacant Lot. As such, it is my view that Mr. Wall knowingly made false statements or omissions in his 2006, 2008 and 2010 income tax returns when he failed to report the profits and gains from his sale of the Three Homes and the Vacant Lot. As such, it is my view that the Minister has met her burden with respect to the application of subsection 163(2) penalties in this case for each of the taxation years under appeal.

[193] It is also my view that Mr. Wall made misstatements or omissions in his 2006, 2008 and 2010 income tax returns in circumstances that were both willfully blind and grossly negligent.

[194] In *Wynter v Her Majesty the Queen*, 2017 FCA 195, the Court found at paragraph 20 that:

“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.”

[195] As discussed in *Venne v Her Majesty the Queen*, [1984] C.T.C. 223; 84 D.T.C. 6247 at paragraph 37:

“‘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.”

[196] In this case, Mr. Wall’s conduct is consistent with both willful blindness and this definition of gross negligence. The evidence shows that Mr. Wall contacted his accountant and the CRA to familiarize himself with the principal residence exemption but he failed to seek specific information about whether the profits from the sales of the Three Homes qualified for the principal residence exemption. He also testified that he forgot to report his gain from the sale of the Vacant Lot, notwithstanding his significant expertise and the fact that he reported very little other income.

[197] Mr. Wall testified that he could not remember what he said to his accountant, but during discovery, Mr. Wall said that he asked his accountant about selling his properties:

I would ask him a question like "How long do I have to live in the property if I ever wanted to sell it and not have to worry about stuff?" And then he said the same thing as when I called the CRA. They said it's such a grey area. He said "If you have a good reason to sell, then sell, don't worry about it."⁷⁵

[198] During discovery, Mr. Wall said that he didn’t tell his accountant about the sale of 4007 West 21st Avenue. Mr. Wall also testified that he could not remember whether he told his accountant about the sales of the other two homes, but testified that he did not see why he had to, given that it was his position that each of the Three Homes was his principal residence.

[199] Mr. Wall operated his real estate development business as a sole proprietor for many years. He was an experienced and sophisticated residential real estate business person who knew how to effectively take advantage of the Vancouver real

⁷⁵ Transcript, volume 3, page 508.

estate market. Considering all of the evidence, including Mr. Wall's testimony, it is my view that his experience and knowledge should have alerted him to the fact that the profits and gains from the sales of the Four Properties should have been included in his income in his 2006, 2008 and 2010 taxation years.

[200] It is also my view that the magnitude of Mr. Wall's unreported profits from his development business in comparison to his reported income favours the imposition of gross negligence penalties. For example, I note that:

- (a) Mr. Wall's reported income in 2006 was \$26,036 and his unreported profits from the sales of the Vacant Lot and 4007 West 21st Avenue totaled \$651,322.69, and therefore Mr. Wall's unreported income in 2006 was 2502% greater than his reported income.
- (b) Mr. Wall's reported income in 2008 was \$15,547 and his profits from the sale of 4324 West 14th Avenue were \$772,402.66, and therefore Mr. Wall's unreported income in 2008 was 4968% greater than his reported income.
- (c) Mr. Wall's reported income in 2010 was \$15,684 and his profits from the sale of 4668 West 14th Avenue were \$810,693.31, and therefore Mr. Wall's unreported income in 2010 was 5169% greater than his reported income.

[201] It is my view that Mr. Wall's false statements or omissions were blatant and readily determinable, which favors the imposition of gross negligence penalties. Even a very cursory review of the circumstances shows that the profits from the sales of the Four Properties should have been reported. Mr. Wall is a knowledgeable and experienced real estate developer who knew that tax is payable on business income from real estate developments. In my view, he acquired each of the Three Homes with the intention of reselling them at a profit. However, he attempted to conceal his development business by attempting to create a façade of inhabiting the properties and claiming the principal residence deduction. In my view, the circumstances surrounding the acquisition, redevelopment and sale of each of the Three Homes can only be interpreted as a business activity. In addition, Mr. Wall's excuse for failing to report the profits from the sale of the Vacant Lot is simply not credible. As a realtor and a developer he must have known that tax was payable on his profits from the sale of the Vacant Lot. In my view, he simply chose not to report it. Failing to report the income from this property on his 2006 tax return was a blatant false statement.

[202] It is also my view that Mr. Wall did not make genuine efforts to comply with his reporting obligations under the *Act*. For example, he did not keep detailed books and records of his development activities, and did not provide all of the necessary information to his accountant or obtain specific advice from his accountant or another knowledgeable tax professional about his development activities. In my view, Mr. Wall unduly attempted to rely on the principal residence exemption to shield his significant profits from his real estate development business from taxation under the *Act*. I also note that there was evidence to suggest that Mr. Wall also took further efforts to shield his profits from taxation by undertaking some of his real estate development activities in the names of his father, Henry Wall, and his “friend”, Ms. Pillon.

[203] Overall, based on all of the evidence in this case, it is my view that Mr. Wall knowingly made false statements or omissions in his 2006, 2008 and 2010 tax returns. It is also my view that Mr. Wall was willfully blind and grossly negligent in making those false statements and omissions. It is therefore my view that Mr. Wall is liable for the penalties imposed by the Minister pursuant to subsection 163(2) of the *Act* for the taxation years under appeal.

D. Was the Minister able to reassess Mr. Wall beyond the normal reassessment period in respect of his 2006, 2008 and 2010 taxation years pursuant to subsection 152(4) of the *Act*?

[204] In this case, the reassessments of Mr. Wall’s 2006 and 2008 taxation years were issued by the Minister beyond the normal reassessment period pursuant to subparagraph 152(4)(a)(i) of the *Act*. While the Minister’s October 7, 2013, Notice of Reassessment of Mr. Wall’s 2010 taxation year was not issued beyond the normal reassessment period, the Minister’s subsequent May 4, 2015, Notice of Reassessment of Mr. Wall’s 2010 taxation year was also issued beyond the normal reassessment period pursuant to subparagraph 152(4)(a)(i) of the *Act*. Considering all of the evidence in this case on a balance of probabilities, it is my view that the Minister properly reassessed Mr. Wall’s 2006, 2008, and 2010 taxation years beyond the normal reassessment period pursuant to subparagraph 152(4)(a)(i) of the *Act*.

[205] Pursuant to subparagraph 152(4)(a)(i) of the *Act*, the Minister may assess or reassess a taxpayer for a taxation year at any time if:

- (a) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act ...

[emphasis added]

[206] For the reasons provided above, it is my view that Mr. Wall made misrepresentations in his 2006, 2008 and 2010 income tax returns when he failed to report the profits and gain from his sale of the Three Homes and the Vacant Lot in his tax returns for those taxation years.

[207] For the reasons provided above, it is also my view that the Respondent has established, on a balance of probabilities, that those misrepresentations were attributable to neglect, carelessness or wilful default in each of those taxation years. In my view, Mr. Wall's testimony is not credible. He had virtually no records or receipts to substantiate his claims. To the contrary, as discussed regarding gross negligence penalties, there is substantial evidence that Mr. Wall knowingly made, or was negligent or careless in making, the misrepresentations in his income tax returns for the taxation years under appeal.

E. Was the sale of each of the Three Homes subject to GST?

[208] Pursuant to section 165 of the *ETA*, GST applies to a "taxable supply made in Canada". Pursuant to the definitions of "taxable supply", "supply" and "commercial activity" set out in subsection 123(1) of the *ETA*, GST therefore applies to the supply of real property located in Canada, except where the supply of the real property is an exempt supply made in accordance with Schedule V of Part IX of the *ETA*.

[209] In this case, the Appellant argued that he was not a "builder" in respect of each of the Three Homes, as that term is defined for GST purposes in subsection 123(1) of the *ETA*, and that therefore the sale of each of the Three Homes was exempt from the application of GST pursuant to section 2 of Schedule V of Part IX of the *ETA*. In contrast, the Respondent argued that the Appellant was a "builder" in respect of each of the Three Homes, as that term is defined for GST purposes in subsection 123(1) of the *ETA*, and that therefore the sale of each of the Three Homes was not exempt from the application of GST pursuant to section 2 of Schedule V of Part IX of the *ETA*. The Respondent also argued that each of the Three Homes was not used "primarily as a place of residence of the [Appellant], an individual related to the [Appellant] or a former spouse or common-law partner of

the [Appellant]”⁷⁶ after each such home was substantially completed, such that the sale of each of the Three Homes was also not exempt from the application of GST pursuant to section 3 of Schedule V of Part IX of the *ETA*. Although the Appellant did not specifically plead or argue that section 3 of Schedule V of Part IX of the *ETA* should apply to exempt the sale of each of the Three Homes by the Appellant, the Appellant did argue in his Notice of Appeal in each of 2013-3996(GST)G and 2013-3997(GST)G that he occupied each of the Three Homes as his “principle and/or primary residence”.

[210] At the relevant times, the definition of “builder” as set out in subsection 123(1) of the *ETA* provided as follows:

“builder” of a residential complex or of an addition to a multiple unit residential complex means a person who

(a) at a time when the person has an interest in the real property on which the complex is situated, carries on or engages another person to carry on for the person

(i) in the case of an addition to a multiple unit residential complex, the construction of the addition to the multiple unit residential complex,

(ii) in the case of a residential condominium unit, the construction of the condominium complex in which the unit is situated, and⁷⁷

(iii) in any other case, the construction or substantial renovation of the complex,

(b) acquires an interest in the complex at a time when

(i) in the case of an addition to a multiple unit residential complex, the addition is under construction, and

(ii) in any other case, the complex is under construction or substantial renovation,

⁷⁶ See section 3 of Schedule V of Part IX of the *ETA*.

⁷⁷ Subparagraph (a)(ii) of the definition of “builder” was repealed by S.C. 2014, c. 39, subsection 92(3), with application generally to the sale of a residential complex after April 8, 2014 (subject to specified exceptions). The amendment is not relevant for the purposes of these Appeals.

(c) in the case of a mobile home or floating home, makes a supply of the home before the home has been used or occupied by any individual as a place of residence,

(d) acquires an interest in the complex

(i) in the case of a condominium complex or residential condominium unit, at a time when the complex is not registered as a condominium, or

(ii) in any case, before it has been occupied by an individual as a place of residence or lodging,

for the primary purpose of

(iii) making one or more supplies of the complex or parts thereof or interests therein by way of sale, or

(iv) making one or more supplies of the complex or parts thereof by way of lease, licence or similar arrangement to persons other than to individuals who are acquiring the complex or parts otherwise than in the course of a business or an adventure or concern in the nature of trade, or

(e) in any case, is deemed under subsection 190(1) to be a builder of the complex,

but does not include

(f) an individual described by paragraph (a), (b) or (d) who

(i) carries on the construction or substantial renovation,

(ii) engages another person to carry on the construction or substantial renovation for the individual, or

(iii) acquires the complex or interest in it,

otherwise than in the course of a business or an adventure or concern in the nature of trade,

(g) an individual described in paragraph (c) who makes a supply of the mobile home or floating home otherwise than in the course of a business or an adventure or concern in the nature of trade, or

(h) a person described in any of paragraphs (a) to (c) whose only interest in the complex is a right to purchase the complex or an interest in it from a builder of the complex;

[emphasis added]

[211] In this case, based on all of the evidence, it is clear that Mr. Wall had an interest in the real property on which each of the Three Homes were situated at a time when he carried on or engaged another person to carry on the construction of each of the Three Homes. In this case, Mr. Wall also admitted that he managed the construction of each of the Three Homes. It is therefore clear that Mr. Wall meets the criteria set out in paragraph (a) of the definition of “builder” in respect of each of the Three Homes.

[212] As previously discussed, it is also my view that Mr. Wall carried on the construction of each of the Three Homes in the course of a development business which he carried on as a sole proprietor. As such, it is my view that paragraph (f) of the definition of “builder” does not apply to Mr. Wall in respect of his construction of each of the Three Homes. As it is clear that paragraphs (g) and (h) of the definition of “builder” also do not apply to Mr. Wall in respect of his construction of each of the Three Homes, it is my view that Mr. Wall was a “builder” in respect of his construction of each of the Three Homes. As such, it is my view that section 2 of Schedule V of Part IX of the *ETA* did not apply to exempt the sale of each of the Three Homes by the Appellant from the application of GST.

[213] Although not specifically pleaded or argued by the Appellant, it is also my view that section 3 of Schedule V of Part IX of the *ETA* did not apply to exempt the sale of each of the Three Homes by Mr. Wall from the application of GST. In this respect, based on a balance of probabilities and on all of the evidence presented in this case (as discussed above), it is my view that each of the Three Homes were not used “primarily as a place of residence of the [Appellant], an individual related to the [Appellant] or a former spouse or common-law partner of the [Appellant]”⁷⁸ after each such home was substantially completed, such that the sale of each of the Three Homes was also not exempt from the application of GST pursuant to section 3 of Schedule V of Part IX of the *ETA*.

⁷⁸ See section 3 of Schedule V of Part IX of the *ETA*.

[214] As no exempting provision applied to the sale of each of the Three Homes, it is my view that the sale of each of the Three Homes was subject to applicable GST.

F. GST Failure to File Penalties – section 280.1

[215] The Minister imposed penalties pursuant to section 280.1 of the *ETA* in respect of Mr. Wall's sale of the Vacant Lot and the Three Homes. As the Respondent has conceded that GST did not apply to the sale of the Vacant Lot, that penalty will consequentially no longer apply in respect of the sale of that property.

[216] Section 280.1 was added to the *ETA* by S.C. 2006, c. 4, subsection 147(1), applicable”

(a) in respect of any return that is required to be filed under Part IX of the Act on or after April 1, 2007; and

(b) in respect of any return that is required to be filed under Part IX of the Act before that day if it is not filed on or before March 31, 2007, in which case the day on or before which the return is required to be filed is deemed to be March 31, 2007, for the purposes of calculating any penalty under that section.⁷⁹

[217] Section 280.1 of the *ETA* imposes a penalty where a person “fails to file a return for a reporting period as and when required under” Part IX of the *ETA*. In this case, as previously discussed, it is my view that Mr. Wall was required to collect and remit GST in respect of the sale of each of the Three Homes, which he did not do. The Respondent argues that there was no due diligence on the part of Mr. Wall in respect of his compliance with his obligations under the *ETA*, and that he therefore cannot rely on the due diligence defence in respect of these penalties. In this respect, I note that Mr. Wall did not raise due diligence as a defence in these Appeals. In any event, based on all of the evidence, it is my view that Mr. Wall did not exercise due diligence in complying with his obligations to collect, remit and report GST on the sale of the Three Homes.

[218] Mr. Wall also did not raise any issues with respect to the computation of the penalty imposed by the Minister pursuant to section 280.1 of the *ETA*, including with respect to its effective dates. I have accordingly not considered this issue further.

G. GST Late Remitting Penalties – Former Paragraph 280(1)(a)

⁷⁹ S.C. 2006, c.4, subsection 147(2).

[219] Subsection 280(1) of the *ETA* was amended by S.C. 2006, c. 4, subsection 146(1). Those amendments came into force on April 1, 2007.⁸⁰ Subsection 280(1) of the *ETA* formerly read:

(1) Penalty and interest — Subject to this section and section 281, where a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay on the amount not remitted or paid

(a) a penalty of 6% per year, and

(b) interest at the prescribed rate,

computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

[220] In this case, the Minister also imposed penalties pursuant to former paragraph 280(1)(a) of the *ETA* in respect of Mr. Wall's sale of the Vacant Lot and the 4007 West 21st Avenue property. As the Respondent has conceded that GST did not apply to the sale of the Vacant Lot, that penalty will consequentially no longer apply in respect of the sale of that property.

[221] As noted above, former paragraph 280(1)(a) of the *ETA* imposed a penalty "where a person fails to remit or pay an amount to the Receiver General when required under" Part IX of the *ETA*. In this case, as previously discussed, it is my view that Mr. Wall was required to collect and remit GST in respect of the sale of the 4007 West 21st Avenue property, which he did not do. The Respondent argues that there was no due diligence on the part of Mr. Wall in respect of his compliance with his obligations under the *ETA*, and that he therefore cannot rely on the due diligence defence in respect of these penalties. In this respect, I note that Mr. Wall did not raise due diligence as a defence in these Appeals. In any event, based on all of the evidence, it is my view that Mr. Wall did not exercise due diligence in complying with his obligations to collect, remit and report GST on the sale of the 4007 West 21st Avenue property.

[222] Mr. Wall also did not raise any issues with respect to the computation of the penalty imposed by the Minister pursuant to paragraph 280(1)(a) of the *ETA*, including with respect to its effective dates. I have accordingly not considered this issue further.

⁸⁰ S.C. 2006, c.4. subsection 146(11).

V. CONCLUSION

[223] Overall, it is my view that Mr. Wall sold the Three Homes in the course of a development business which he carried on as a sole proprietor during the taxation years under appeal herein. As such, it is my view that the profit he earned from the sale of each of the Three Homes was on account of income, and should have been reported in his 2006, 2008 and 2010 taxation years. As the sale of each of the Three Homes was on account of income, it is also my view that Mr. Wall could not rely on the principal residence exemption in paragraph 40(2)(b) of the *Act* in respect of the profit he earned on the sale of each of the Three Homes. Based on all of the evidence, it is also my view that the Minister properly assessed Mr. Wall beyond the normal reassessment period pursuant to subsection 152(4) of the *Act* and properly assessed penalties pursuant to subsection 163(2) of the *Act*. In my view, Mr. Wall was also a builder of the Three Homes for the purposes of the *ETA* and did not use any of the Three Homes primarily as a place of residence. As such, it is my view that the sale of each of the Three Homes was subject to the applicable rate of GST. As Mr. Wall did not collect, remit or report any GST with respect to the sale of the Three Homes, it is also my view that he was properly subject to penalties pursuant to section 280.1 and paragraph 280(1)(a) of the *ETA*.

[224] Based on all of the foregoing, Mr. Wall's Appeals are allowed solely for the purpose of giving effect to the concessions made by the Respondent. The assessments and reassessments under appeal are therefore referred back to the Minister for reconsideration and reassessment on the basis that:

- (a) Mr. Wall's net business income for his 2006 taxation year should be reduced by \$126,000 in respect of his sale of the Vacant Lot at 2761 Patricia Crescent, Savary Island;
- (b) Mr. Wall's income for his 2006 taxation year should be increased by \$63,000 in respect of the taxable capital gain he earned in respect of his sale of the Vacant Lot at 2761 Patricia Crescent, Savary Island;
- (c) Mr. Wall was not required to collect or remit GST in respect of his sale in 2006 of the Vacant Lot at 2761 Patricia Crescent, Savary Island, and as a result the amount of net GST which he was required to remit in respect of his reporting period July 1, 2006 to September 30, 2006 should be reduced by \$9,000;

- (d) Mr. Wall's net business income for his 2006 taxation year should be reduced by \$159,370 (being the difference between \$810,693 and \$651,323), to reflect an error conceded by the Respondent and described in paragraphs 14 and 23 of her Reply in matter 2014-4354(IT)G;
- (e) The amount of applicable interest and penalties which was assessed should be consequentially reduced in respect of the foregoing paragraphs (a) to (d); and
- (f) Mr. Wall's Appeals are dismissed in all other respects.

VI. COSTS

[225] Costs are awarded to the Respondent. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Respondent shall have a further 30 days to file written submissions on costs and the Appellant shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Halifax, Nova Scotia this 14th day of August 2019.

“Henry A. Visser”

Visser J.

CITATION: 2019 TCC 168

COURT FILE NO.: 2013-3996(GST)G; 2013-3997(GST)G;
2014-4354(IT)G

STYLE OF CAUSE: JOHN WALL AND HER MAJESTY THE
QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 24, 25 & 26, 2016
April 26 & 27, 2017,

REASONS FOR JUDGMENT BY: The Honourable Justice Henry A. Visser

DATE OF JUDGMENT: August 14, 2019

APPEARANCES:

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