Docket: 2018-848(IT)G

BETWEEN:

MOHAMMAD YADGAR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on March 20, 2023, at Toronto, Ontario

Before: The Honourable Justice Gabrielle St-Hilaire

Appearances:

Counsel for the Appellant:	Osborne G. Barnwell
Counsel for the Respondent:	Amin Nur

JUDGMENT

In accordance with the attached reasons for judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2006, 2007, 2008 and 2009 taxation years is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 18th day of July 2023.

"Gabrielle St-Hilaire"

St-Hilaire J.

Citation: 2023 TCC 104
Date: 20230718
Docket: 2018-848(IT)G

BETWEEN:

MOHAMMAD YADGAR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

St-Hilaire J.

I. Introduction

[1] This is an appeal by Mohammad Yadgar (the Appellant) from reassessments made under subsection 15(1) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) (Act). In reassessing the Appellant for the 2006, 2007, 2008 and 2009 taxation years, the Minister of National Revenue (Minister) added amounts to the Appellant's income as shareholder appropriations totalling $512,211 and imposed gross negligence penalties.

[2] The Appellant was born in Afghanistan where he graduated from high school and studied physics in university for two years. After spending some time in Pakistan, he immigrated to Canada in 1995. Shortly after coming to Canada, and although not trained as a butcher in Afghanistan, the Appellant found work in that capacity at Paradise Fine Foods, a Toronto market specializing in halal meats. He later worked as a butcher for Sardar Shanawazi at his Mississauga supermarket called Kabul Farms, a business operated as a sole proprietorship. In 2004, Kabul Farms Inc. was incorporated (Kabul), with the Appellant and Sardar Shanawazi each owning 50% of the common shares.

[3] Within three or four months, and although it is unclear exactly when this occurred, the Appellant purchased Sardar Shanawazi's share of the corporation. At

some point in 2004 and from then on, the Appellant was the only one involved in running the business and making transactions in Kabul's business account.

[4] During the taxation years in issue, the Appellant was also the sole shareholder of 1648074 Ontario Inc., a corporation operating a grocery store. In addition, he was a shareholder in Amana Canadian Ltd., a corporation operating a storage business.

[5] The Minister performed a bank deposit analysis of Kabul as well as that of the Appellant's and his spouse's joint bank accounts. At the objection stage, the Appellant provided revised schedules showing shareholder appropriations in the amounts of $194,579, $272,985, $23,679 and $20,968 for the 2006, 2007, 2008 and 2009 taxation years respectively.

II. Issues

[6] The Appellant is not challenging the correctness of the amounts, totalling $512,211, included in his income pursuant to subsection 15(1) of the Act for the taxation years in issue. He is, however, challenging the correctness of the Minister's assessment beyond the normal reassessment period as well as the correctness of the assessment of gross negligence penalties. It is not disputed that the reassessments were made after the normal reassessment period. Hence, the two issues before the Court are can be summarized as follows:

i. was the Minister justified in reassessing the Appellant after the normal reassessment period for the 2006, 2007, 2008 and 2009 taxation years? And

ii. was the Minister justified in imposing gross negligence penalties for the 2006, 2007, 2008 and 2009 taxation years?

III. Information about Kabul's assessments

[7] In his Notice of Appeal, the Appellant stated that he was relying on the facts pled in Kabul's appeal (file no 2016-3660(IT)G) given that the audit in that file had led to the Appellant's reassessments. Kabul had not filed any income tax returns for the taxation years in issue. The parties filed a Consent to Judgment in Kabul's appeal referring the matter back to the Minister for reconsideration and reassessment on the basis that Kabul had the following unreported sales and gross profits for the taxation years ending May 31, 2005, 2006, 2007, 2008 and 2009 and that the penalties be vacated:

Year	2005	2006	2007	2008	2009
Sales	$2,237,324	$2,460,926	$2,887,950	$2,755,685	$2,547,001
Gross Profits	$314,192	$306,520	$266,355	$400,220	$198,343

[8] The Court issued a Judgment dated November 23, 2016, allowing the appeal in accordance with the terms of the Consent to Judgment.

[9] At trial, the Appellant asserted that his accountant at the time, Costa Abinajem (Costa, as he was so referred to by the Appellant at trial), advised him to open a second bank account and to make deposits of cash sales into his personal account, and that of his spouse, to avoid 'some' charges. Further, the Appellant acknowledged that monies from Kabul were deposited into his personal bank accounts.

IV. Analysis

Reassessment beyond the normal reassessment period

[10] In addressing the first issue in this appeal, the Court must determine whether the Minister was justified in reassessing the Appellant beyond the normal reassessment period for the 2006, 2007, 2008 and 2009 taxation years. For the reasons that follow, I find that the Minister has met his burden to so reassess.

[11] Subsection 152(4) of the Act sets out the Minister's right to assess beyond the normal reassessment period determined under subsection 152(3.1). More specifically relevant to this appeal, subparagraph 152(4)(a)(i) provides as follows:

152 (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if	**152 (4)** Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :
(a) the taxpayer or person filing the return	**a)** le contribuable ou la personne produisant la déclaration :
(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, or	**(i)** soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

[12] In *MF Electric Incorporated v R*, 2023 TCC 60, at paras 31-33 [*MF Electric*], I discussed the principles which I believe should apply to the determination of whether the Minister is justified in reassessing beyond the normal reassessment period, as follows:

> [31] The wording of subparagraph 152(4)(a)(i) is such that it is sufficient for the Minister to establish neglect or carelessness without having to consider whether there was wilful default or fraud (see *Deyab v Canada*, 2020 FCA 222 at paras 58-61 [*Deyab*]). Having said this, the burden is on the Minister to establish both that the taxpayer or the person filing the return has made a misrepresentation *and* that it is attributable to neglect, carelessness, wilful default or fraud (see *Vine v R*, 2015 FCA 125 at paras 23-24).
>
> [32] The Minister's burden is to establish that there has been a misrepresentation at the time the return is filed. In commenting on the issue of timing in *Nesbitt v Canada*, 96 DTC 6588 at para 8, the Federal Court of Appeal expressed its view of the purpose of subsection 152(4) as follows:

> It appears to me that one purpose of subsection 152(4) is to promote careful and accurate completion of income tax returns. Whether or not there is misrepresentation through neglect or carelessness in the completion of a return is determinable at the time the return is filed. A misrepresentation has occurred if there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment. It remains a misrepresentation even if the Minister could or does, by a careful analysis of the supporting material, perceive the error on the return form. It would undermine the self-reporting nature of the tax system if taxpayers could be careless in the completion of returns while providing accurate basic data in working papers, on the chance that the Minister would not find the error but, if he did within four years, the worst consequence would be a correct reassessment at that time.
>
> [Underlining added]
>
> [33] Courts have consistently held that the threshold for establishing misrepresentation is low. In support of this view, in Francis & Associates v R, 2014 TCC 137 at para 20, Justice Bocock wrote as follows:
>
> > A misrepresentation is any statement that is "incorrect.": *Minister of National Revenue v. Foot*, [1964] C.T.C. 317 (Can. Ex. Ct.). Also, several cases have indicated that "any" error made in a return filed is tantamount to a misrepresentation, *Minister of National Revenue v. Taylor*, [1961] C.T.C. 211 (Can. Ex. Ct.), *Nesbitt v. R.*, and *Ridge Run Developments Inc. v. R.*, [2007] 3 C.T.C. 2605 (T.C.C. [General Procedure]). Therefore, the threshold to establish a misrepresentation is low.

[13] In this case, the Respondent has not alleged fraud, but rather, has alleged that the Appellant made misrepresentations that are attributable to neglect, carelessness or wilful default.

[14] In filing his returns for the relevant taxation years, the Appellant reported the following amounts of income, which are significantly lower than the amounts of unreported income reassessed, the correctness of which he does not challenge:

Taxation Year	2006	2007	2008	2009
Unreported Income	$194,579	$272,985	$23,679	$20,968
Reported Income	$10,600	$10,300	$6,300	$10,950

[15] Since the Appellant is not challenging the correctness of the amounts assessed as income for the relevant taxation years, the income he reported is incorrect. In my view, that is sufficient to establish that he, or the person filing his return, made misrepresentations in filing his returns or in supplying any

information under the Act as provided by subparagraph 152(4)(a)(i). I note that Sajid Usmani, the Appellant's new accountant, testified at the hearing but Costa did not. Sajid Usmani explained that he retrieved the Appellant's documents and prepared schedules reflecting deposits and withdrawals in Kabul's and the Appellant's bank accounts and determined the amounts of income that had gone unreported, which are the amounts accepted by the Minister and reassessed as reflected in paragraph 13 above. However, as asserted by the Federal Court of Appeal in *Nesbitt*, *supra* at para 8, "[i]t remains a misrepresentation even if the Minister could or does, by a careful analysis of the supporting material, perceive the error on the return." Thus, since the misrepresentations occurred when the returns were filed, it is irrelevant that the Appellant retained the services of a new accountant after the returns prepared by Costa were filed incorrectly.

[16] As mentioned earlier, the Minister must establish, not only that the Appellant made misrepresentations, but also, that they are attributable to neglect, carelessness or wilful default. The Appellant testified that Costa was both Kabul's accountant and his personal accountant. He stated that Costa was the accountant for the first business where he worked, Paradise Fine Foods, and that Costa had been preparing his tax returns since that time. Costa continued to prepare the Appellant's personal returns when he worked at Kabul Farms for Sardar Shanawazi, for whom Costa was also the accountant. After the incorporation of Kabul, including when he became the sole shareholder, the Appellant continued to seek the services of Costa. I note that Costa was involved in the incorporation of both Kabul, 1648074 Ontario Inc. and Amana Canadian Ltd.

[17] The Appellant testified that he took his business records (invoices, cash register slips and mail) to Costa every two to three months. Sometimes Costa visited him such that they met every month or two, for an estimated total of 30 times over the course of the relevant taxation years. He stated that Costa filed his personal returns but that he never signed them. Further, the Appellant asserted that he did not know where the numbers for the income reported came from.

[18] The Appellant testified that he supported a family of six during the relevant taxation years. The total income reported by the Appellant and his wife was insufficient to pay the family's living expenses, including mortgage payments on the home purchased in 2006, nor was it sufficient to provide the funds that Kabul had reported as loans received from the Appellant in the amount of more than 3 million dollars.

[19] The Appellant may not have had a sophisticated knowledge of the tax system, but I understood from his testimony that he had been filing his income tax returns since his very first job at Paradise Fine Foods in 1995, hence he had been filing returns for a decade prior to the taxation years in issue. He was a shareholder of three corporations, a director of two. He was the sole shareholder of a very successful business, Kabul, having sales well over 2 million dollars and profits ranging from about $200,000 to $400,000 per year in its taxation years ending between 2005 and 2009. In addition, the Appellant owned property in Afghanistan, which he later sold and used the proceeds to purchase property in Ontario. He first purchased land for $290,000 and later purchased a home for $456,827, with a down payment of $27,000 and a mortgage for the balance.

[20] The Appellant has now acknowledged that his income for the relevant taxation years was significantly underreported, and he made no inquiries at any time to confirm the appropriateness of the amounts being reported. He also acknowledged that Costa recommended he open another bank account to avoid charges. Borrowing the words of the Federal Court of Appeal in *Regina Shoppers Mall Ltd v R* [1991] F.C.J. No 52 (FCA) at para 7 [*Regina Shoppers*], I find that the Appellant did not "thoughtfully, deliberately and carefully assess the situation" before filing his returns; he was content to rely on the trust he claimed to have in Costa. In *Regina Shoppers*, the Federal Court of Appeal found that it had been established "that the care that must be exercised must be that of a wise and prudent person and that the report must be made in a manner that the taxpayer truly believes to be correct" (see *MF Electric*, supra at para 36). A wise and prudent person would have reviewed his returns and would have noticed the income being reported.

[21] At the hearing, the Appellant stated that he delegated everything to Costa, that he compiled his receipts and invoices and gave them to Costa, that he did not review his returns, and in spite of meeting with Costa about 30 times, did not ask any questions. Counsel submitted that the Appellant had reason to believe in Costa as he had met him at his first job and Costa was recommended to him and further that, although he was successful in business, he did not "know tax". Counsel relied on this Court's decision in *Aridi v R*, 2013 TCC 74 at paras 43 to 45, wherein Justice Hogan found that the accountant had been negligent but that the taxpayer had not. In my view, the circumstances in *Aridi* are entirely different from those in the present appeal. Suffice it to say that, in *Aridi*, the taxpayer knew there may be tax consequences to the transaction in question, provided his accountant with all the necessary documents and questioned him about his income tax return. Justice Hogan asserted that "[t]o rely upon and prove neglect on the part of the accountant

or professional who acted for the taxpayer will not be sufficient to prevent the application of subparagraph 152(4)(a)(i) of the ITA. The taxpayer must also have acted diligently, or at the very least, must contradict the Minister's evidence that he had acted negligently" (*Aridi*, *supra* at para 50).

[22] In this case, the Appellant took no steps to confirm the accuracy of his returns. He simply did not ask any questions. I find that the Appellant cannot shield himself from the consequences of subparagraph 152(4)(a)(i) by shifting the blame to Costa (see for example *Snowball v R*, [1996] T.C.J. No. 276 at para 18; see also *Daszkiewicz v R*, 2016 TCC 44). The Appellant has fallen short of exercising reasonable care (see *Venne v R*, [1984] FCJ No 314 (FCTD) at para 16 [*Venne*]).

[23] In light of the above, I find that the Appellant made misrepresentations in filing his returns for the 2006, 2007, 2008 and 2009 taxation years *and* further, that these misrepresentations are attributable to neglect or carelessness. This is sufficient to support a finding that the Minister has met the burden to reassess the Appellant after the normal reassessment period for the relevant taxation years.

Penalties under subparagraph 163(2)

[24] In addressing the second issue in this appeal, the Court must determine whether the Minister was justified in imposing penalties pursuant to subsection 163(2) of the Act with regards to the understated income in the Appellant's 2006, 2007, 2008 and 2009 taxation years.

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

(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of…	(2) Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, un formulaire, un certificat, un état ou une réponse (appelé « déclaration » au présent article) rempli, produit ou présenté, selon le cas, pour une année d'imposition pour l'application de la présente loi, ou y participe, y consent ou y acquiesce est passible d'une pénalité égale, sans être inférieure à 100 $, à 50 % du total

des montants suivants…

[26] As provided by subsection 163(3) of the Act, the Minister bears the burden of establishing the facts that justify the assessment of a penalty under subsection 163(2). Hence, the Minister must show that the Appellant made, or participated in, or assented to, or acquiesced in, the making of a false statement *and* did so knowingly or did so under circumstances amounting to gross negligence.

[27] In this case, the Appellant acknowledged that he underreported his income and that the amounts reassessed are correct. In failing to report his income correctly, the Appellant has made a false statement such that the first element of subsection 163(2) is established. In the circumstances, the more pressing question is whether the Appellant made the false statement "knowingly" or "under circumstances amounting to gross negligence" as required by subsection 163(2).

[28] Since the oft-quoted case in *Venne*, *supra*, courts have consistently held that "gross negligence" requires greater neglect than simply failing to exercise reasonable care, which might otherwise be sufficient for the application of subparagraph 152(4)(a)(i) discussed earlier. In *Venne*, *supra* at para 37, the Federal Court stated that gross negligence "must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not". This was found to mean, "akin to burying one's head in the sand" (see *Guindon v Canada*, 2015 SCC 41 at para 60).

[29] In *Wynter v Canada*, 2017 FCA 195 [*Wynter*], the Federal Court of Appeal asserted that the Minister could meet its burden of showing that the false statement was made knowingly by demonstrating that the taxpayer was wilfully blind such that knowledge could be imputed to the taxpayer (see also *MF Electric*, *supra*). Further, in *Wynter*, the Federal Court of Appeal asserted that gross negligence, which is distinct from wilful blindness, "arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer. Simply put, if the wilfully blind taxpayer knew better, the grossly negligent taxpayer ought to have known better" [*Wynter, supra* at para 18].

[30] For the reasons that follow, I conclude that the Appellant made misrepresentations under circumstances amounting to gross negligence.

[31] With respect, I find that Counsel for the Appellant did not clearly differentiate his position regarding the application of subsection 163(2) from that

of the application of subsection 152(4). He did refer to the decision in *Venne* underlining the different standards that apply to these two provisions. He submitted that the Appellant came to Canada as a refuge, worked as a butcher where he could serve many clients speaking his native language of Dari while he knew very little English, and that his conduct had to be assessed through the lens of an unsophisticated taxpayer.

[32] Counsel criticized the Respondent for not having called the auditor as a witness. In this regard, I note that in *Lacroix v R*, 2008 FCA 241 at para 32, the Federal Court of Appeal asserted that "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." When the Federal Court of Appeal later commented on its decision in *Lacroix*, it did so to clarify that the circumstances related to the failure to report income must be examined to establish whether the requirements of each provision have been met. The Court asserted that this ought not to be conflated with a finding that an unreported amount of income is taxable, a finding that does not inevitably lead to a conclusion that a gross negligence penalty is justified, but did not otherwise comment on the manner in which the Minister can discharge its evidentiary burden (see *Deyab v Canada*, 2020 FCA 222 at paras 65-66 and *Khanna v Canada*, 2022 FCA 84 at paras 23-24).

[33] In determining whether the Appellant was grossly negligent, the Appellant's personal characteristics, including his education, intelligence and experience, are not relevant. In this regard, I find the remarks of Justice Owen, in *Peck v R*, 2018 TCC 52 at paras 50 and 51, instructive regarding the relevance of a taxpayer's personal attributes. He wrote as follows:

> [50] The subjective nature of the wilful blindness standard also means that the personal attributes of the individual may be considered in determining whether the individual is wilfully blind.
>
> [51] In contrast, the objective nature of the gross negligence standard means that the personal attributes of the individual are not relevant unless the individual establishes that he or she is incapable of understanding the risk the individual has failed to avoid (see *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49 at paragraph 40).

[34] As mentioned earlier, gross negligence arises when a taxpayer's conduct is found to fall markedly below what would be expected of a reasonable person. In my view, the Appellant's conduct represents a marked departure from what would be expected of a reasonable person in his circumstances. Query, what can be

expected of a reasonable person in the same circumstances. A reasonable person in the circumstances of the Appellant would have asked to see his income tax returns. A reasonable person would have reviewed his income tax returns and would have noticed the alarmingly low amounts of income being reported. A reasonable person would have asked questions of his accountant regarding the reported income. If concerned with the accountant's explanations, a reasonable person would have sought independent advice. A reasonable person in the Appellant's circumstances would have asked questions about the corporation's income tax returns and the monies he was moving between his personal and the corporate accounts.

[35] In my view, the Appellant's conduct represented a marked departure from the conduct one would expect from a reasonable person placed in the same circumstances. The Appellant provided no explanation for his false statements other than to say that he relied on his accountant to prepare his returns. Like the taxpayer in *Peck*, *supra*, the Appellant cannot simply throw his hands up and say that he blindly relied on his accountant, without making any attempt at seeking a better understanding of his obligations and without making any effort to verify the accuracy of the income reported in his income tax returns.

[36] For these reasons, I find that the Minister has established that the Appellant made false statements in his returns for the 2006, 2007, 2008 and 2009 taxation years *and* did so under circumstances amounting to gross negligence.

V. Conclusion

[37] For all of the above reasons, I conclude that the Minister was justified:

i. in reassessing the Appellant after the normal reassessment period for the 2006, 2007, 2008 and 2009 taxation years; and
ii. in imposing gross negligence penalties for his failure to report income for the 2006, 2007, 2008 and 2009 taxation years.

[38] The appeal for the 2006, 2007, 2008 and 2009 taxation years is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 18th day of July 2023.

"Gabrielle St-Hilaire"

St-Hilaire J.

CITATION:	2023 TCC 104
COURT FILE NO.:	2018-848(IT)G
STYLE OF CAUSE:	MOHAMMAD YADGAR AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 20, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Gabrielle St-Hilaire
DATE OF JUDGMENT:	July 18, 2023

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