Docket: 2012-4217(IT)G

BETWEEN:

ROBERT FRANSEN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on February 8, 2023, at Windsor, Ontario

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Roland P. Schwalm
Counsel for the Respondent:	Steven D. Leckie

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2009 taxation year is dismissed.

Costs are payable to the respondent. The parties shall have 30 days from the date of this Judgment to reach an agreement on costs. Failing that, the parties shall have 30 days to file written submissions on costs. Submissions shall be no more than 10 pages.

Signed at Ottawa, Canada this 27th day of July 2023.

"K. Lyons"

Lyons J.

Citation: 2023 TCC 107
Date: 20230727
Docket: 2012-4217(IT)G

BETWEEN:

ROBERT FRANSEN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] Robert Fransen, the appellant, appeals the assessment against him made by the Minister of National Revenue for the 2009 taxation year ("2009"). The Minister levied a penalty pursuant to subsection 163(2) of the *Income Tax Act* arising from a fictitious net business loss of $333,418 ("purported loss") reported by Mr. Fransen, with the assistance of Financial Arbitrators and DSC Lifestyles ("DSC"), in filing his income tax return for 2009 ("Return"). The purported loss would eliminate tax withheld from his employment and other sources of income in 2009. A request was made to carry back and apply the remaining portion of the purported loss to the 2006, 2007 and 2008 taxation years (the "three previous years").

[2] In these reasons, I will refer to Fiscal Arbitrators and DSC interchangeably.

[3] Janilee Sawatzky, the Canada Revenue Agency auditor, was called to testify for the respondent. Mr. Fransen testified on his own behalf.

[4] It is undisputed between the parties that the purported loss is fictitious and constituted a false statement in the Return.

[5] All references to provisions that follow are to the *Income Tax Act* unless otherwise indicated.

I. ISSUE

[6] The sole issue is whether or not Mr. Fransen knowingly or under circumstances amounting to gross negligence made a false statement in his 2009 Return.

II. LAW

[7] To impose a penalty under subsection 163(2), the Minister has the onus, under subsection 163(3), to show that Mr. Fransen made a false statement in his 2009 Return and he did so knowingly or under circumstances amounting to gross negligence.

[64] The relevant part of subsection 163(2) reads:

> (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 […] in a return, form, certificate, [or] statement […] ([…] a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty […]

[8] The Minister must establish two elements to impose a penalty pursuant to subsection 163(2):

1) A false statement or omission in a return; and
2) Knowledge or gross negligence in making of participating in, amounting to, or acquiescing in the making of that false statement or omission.

[9] In *Wynter v. Canada*, 2017 FCA 195, 2017 CarswellNat 5049 ("*Wynter*"), the Federal Court of Appeal highlights what is at issue under subsection 163(2) is a penalty which may be imposed by a finding of knowledge or a finding of gross negligence. It discussed the distinction between knowledge and gross negligence as follows:

> The distinction between gross negligence - determined by an objective assessment of the comportment of the taxpayer - and wilful blindness - determined by reference to the taxpayer's subjective state of mind - has a long history. Admittedly, it is, on occasion, a fine distinction and one that is not always clearly

> drawn. Nonetheless, Parliament is taken to have been cognizant of the distinction.[1]

[10] Knowledge of a false statement in a return can be imputed to the taxpayer by a finding of wilful blindness through the choice of the taxpayer not to inquire. As noted by the Court:

> In sum, the law will impute knowledge to a taxpayer who, in circumstances that suggest inquiry should be made, chooses not to do so. The knowledge requirement is satisfied through the choice of the taxpayer not to inquire, not through a positive finding of an intention to cheat.[2]

[11] In describing the test for wilful blindness, the Court states:

> A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: […] In these circumstances, the doctrine of wilful blindness imputes knowledge to a taxpayer: […] Wilful blindness is the doctrine or mechanism by which the knowledge requirement under subsection 163(2) is met.[3]

[12] Willful blindness therefore hinges on a finding that the taxpayer deliberately chose not to make inquiries to avoid verifying that which might be an inconvenient truth thus was deliberately ignorant.

[13] Subsection 163(2) also applies where a taxpayer makes a false statement under circumstances amounting to gross negligence.

[14] As articulated by Justice Strayer in *Venne v. The Queen*, 1984 CanLII 5717 (FC), [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…" In *Wynter* the Court endorsed that and elaborated that the conduct of the taxpayer at issue is a marked departure from what would be expected hence constitutes a high degree of negligence.[4]

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[1] *Wynter*, paragraph 12.
[2] *Wynter*, paragraph 16.
[3] *Wynter*, paragraph 13.
[4] *Wynter*, paragraph 21.

[15] The Supreme Court of Canada in *Guindon v. The Queen*, 2015 SCC 41 (CanLII) (at paragraph 60), in discussing what constitutes gross negligence cited the following comments of this Court in *Sidhu v. The Queen*, 2004 TCC 174 (CanLII):

> Actions "tantamount" to intentional actions are actions from which an imputed intention can be found such as actions demonstrating "an indifference as to whether the law is complied with or not" … The burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes. The burden is to prove on a balance of probability such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense. [paragraph 23] …

[16] This Court has 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 misrepresentation in relation to the income declared;
(b) The opportunity the taxpayer had to detect the error;
(c) The taxpayer's education and apparent intelligence; and
(d) The genuine effort to comply.

[17] Each factor must be assigned the appropriate weight in the context of the overall picture that emerges based on the evidence.[5]

[18] The objective standard against which the conduct of the taxpayer is measured is that of the expected conduct of a reasonable person in the same circumstances as the taxpayer. The only exception to that standard is if the taxpayer is incapable of understanding the obligation not to make a false statement or omission in their income tax return.[6]

[19] The Court has held the terms knowledge and gross negligence in subsection 163(2) are not conjunctive, such that the respondent need only prove one to impose a penalty.

III. FACTS

[20] Mr. Fransen, a construction electrician in the industry for 34 years, graduated from high school, went into a trade as an electrician and obtained his

[5] *DeCosta v. The Queen*, 2005 TCC 545.
[6] *Peck v The Queen*, 2018 TCC 52, 2018 CarswellNat 970.

certification at St Clair College involving a five-year process. It was 90 percent hands-on learning with the remaining component spent in-class for 24 weeks (three eight-week terms annually) over a few years. In cross-examination, it was established that he had obtained certification at Fanshaw College as a diesel mechanic. He served as an apprentice for 4.5 years including a similar component spent in-class for 24 weeks over a period of time. After certification, he worked as a diesel mechanic for 18 months before returning to work as a construction electrician.

[21] Since 1988 up to the 2009 taxation year, Mr. Fransen gave his tax source documents to his father, who then gave them to his acquaintance at BDO Canada LLP ("BDO") for preparation and then filing of the return after Mr. Fransen signed it which he did not review.

DSC Lifestyles

[22] Mr. Fransen testified that at the time he became involved with Financial Arbitrators pertaining to the 2009 taxation year, the name of its local franchise was DSC Lifestyles.

[23] Colin Barnes, Lonny's brother-in-law at that time, introduced Bruce Blair at DSC to Mr. Fransen. Lonny is Mr. Fransen's best friend whom Mr. Fransen was living with at that time. Most of his communication had been with Mr. Barnes who had given Mr. Fransen all the DSC information. He showed Mr. Fransen the refunds and a cheque he had received for the previous year which appeared legitimate and was comforted by that. Mr. Fransen confided in his brother-in-law, Lonny and Mr. Barnes ("confidants").

[24] Mr. Fransen described DSC's office as looking like a regular, legitimate office doing tax business. DSC had put on a seminar in the winter which he attended. On his first visit to DSC's office on March 18, 2010, Mr. Fransen signed and initialled the document titled Application and Agreement. He had dropped off his "tax stuff" for 2009 for Bruce Blair, the professional preparing his Return. He was confident DSC was legitimate and filed taxes properly.

[25] Janilee Sawatzky graduated with a grade 12 education, qualified as a computer analyst at Red River College, and after obtaining a business management diploma at international correspondence school, she obtained an accounting certificate at Red River College. She commenced employment at CRA in 1992 and

until 2002 was an assessing clerk. Between 2002 to 2014, she was a senior office auditor. Since 2014 to current, she is a team leader in refund exams.

2009 Return

[26] Ms. Sawatzky testified that the social insurance number on the Return had been redacted and identified markings together with the rationale for the marking she had made on the Return after determining there was no self-employment business.[7] One example, at line 119, shows she circled numbers and wrote in the correction of the T4E slip.[8] All of which were satisfactorily explained and appropriately differentiated so as to make clear what had been reported by Mr. Fransen in the Return. The last page of the Return indicates "It is a serious offence to make a false return".

[27] Mr. Fransen testified he had received a letter from DSC to sign the Return. When he arrived at its office on May 4, 2010 he was given a folder containing the Return with sticky notes indicating where to sign. He spent five minutes and signed it without reviewing it or its contents.

Statement of Business or Professional Activities

[28] In the Statement of Business or Professional Activities form, included in the Return, Ms. Sawatzky noted that Part 3 reports "RECEIPTS AS AGENT … gross business income" of $87,859. 56 ("business activities form"). That amount was typed in by Mr. Fransen, or someone on his behalf, on seven separate lines.[9] Part 5 reports "Other expenses … AMT TO PRINCIPAL FR AGENT" of $421,008 but she does not know what that relates to; that amount was typed on three separate lines. The purported loss was typed on six separate lines in Parts 3 and 5.

[29] Mr. Fransen testified he did not recall seeing the business activities form. Had he done so, it would not have made sense to him. In cross-examination, he said he did not review such form, nor the gross business income line on the Return, did not look at the page that shows the purported loss amount and agreed the language in Parts 3 and 5 is nonsensical.

Request for Loss Carryback

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[7] Exhibit R1, Tab 1.
[8] Other CRA officials made markings during the processing of the return.
[9] Exhibit R1, Tab 2.

[30] Ms. Sawatzky referred to the Request for Loss Carryback (the "Request") signed by Mr. Fransen, also dated May 4, 2010, in which he asked that part of the purported loss be allowed as a net business loss for 2009 and the resulting non-capital loss totalling $259,190 be carried back and applied to the three previous years.[10] The Request was in the Return at the time of filing and she received these together albeit the Request is a separate page.

[31] Comparing the original Return and the copy of it and comparing the original Request and the copy of it, Ms. Sawatsky noticed the signature on the signature line is in black ink and the certification box in blue ink speculating these were perhaps written by someone else but she does not know. In cross-examination, she agreed she cannot say if the different colour ink than the signature on the original Return came before, after or at the time he signed it. For the Request, she agrees this could have been done at different times.

[32] Even though page 2 of the Request, a blank page, shows he signed it, he does not recall the Request nor reviewing it at the time he signed the Return. If he saw it, he did not read it. In cross-examination, he said he could not say he saw nor read the Request. If he had read it, he would not have understood it.

Refund

[33] It is undisputed that when signing the Return Mr. Fransen saw the anticipated refund of $20,947.91 (the "refund").

[34] Ms. Sawatzky explained the Income and Deductions printouts contain information from CRA's database, Option C, and indicate as follows. First, he had received $4,838,30, nil, $1,904.15 and $1,597.26 as refunds for 2005, 2006, 2007 and 2008 taxation years, respectively.[11] In cross-examination, she said without the purported loss his refund in 2009 would have been $2,003.03. Second, his tax returns for 2005 to 2008 inclusive, were all e-filed by BDO as his representative, whereas his 2009 return does not indicate who filed it, the method of filing changed to "a paper return" yet it indicates BDO as the representative.[12]

CRA Communications

[10] Exhibit R1, Tab 3. The purported loss amount is claimed in section I.
[11] Exhibit R1, Tabs 12 to 16.
[12] Exhibit R1, Tabs 12 to 16.

[35] Ms. Sawatzky outlined CRA's communications, authored by her, with Mr. Fransen. CRA's contact letter of August 5, 2010 sent to him, enclosed a questionnaire regarding the purported business activities in 2009, particularized to include the amounts he reported, sought documentation for gross business income of $87,589.56 and other expenses of $421,008 reported on the business activities form.[13] He said he did not understand CRA's letter, called Mr. Blair, handed the blank questionnaire to Mr. Blair and signed the response "Notice" of August 13, 2010, that was sent to Ms. Sawatzky. [14]

[36] CRA's proposal letter of December 3, 2010 sent to Mr. Fransen reiterates the need for documentation to conduct a review of the gross business income and the purported loss reported and proposed to deny those amounts; penalties were also under consideration.[15] He did not read this letter because Mr. Blair mentioned that any letter he receives should go back to Mr. Blair. He reassured Mr. Fransen all is fine.

[37] Another "Notice" of December 20, 2010, unsigned, was sent to Ms. Sawatzky. Mr. Fransen did recall seeing it. She remarked neither Notices provided the information nor documentation CRA had previously sought thus considered them irrelevant.[16] In cross-examination, she said recalls the last Notice but he never responded to her requests.

[38] After taking into consideration the history of how Mr. Fransen filed, if he filed on time, the type of income and deductions and if there was any contact between him and CRA, Ms. Sawatzky determined Mr. Fransen had some knowledge and familiarity regarding the *Income Tax Act*, he had requested reassessments for the three previous years and a notice of assessment was sent to him reflecting a penalty.[17]

[39] In re-examination, he testified it was when he received the notice of assessment and received a bill owing money, it occurred to him there was a concern. Mr. Fransen brought it to Mr. Blair's attention and his father talked to his BDO acquaintance. A notice of objection, signed by him, was filed with CRA but he did not prepare it and he later received the notice of confirmation; he did not

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[13] Exhibit R1, Tab 4.
[14] Exhibit R1, Tab 5.
[15] Exhibit R1, Tab 6.
[16] Exhibit R1, Tab 7.
[17] Exhibit R1, Tab 8. February 16, 2011.

understand either document.[18] On several occasions, Mr. Blair reassured him everything was taken care of and had to "talk him off the ledge."

[40] Ms. Sawatzky's evidence was clear, concise and corroborated by documentary evidence.

IV. PARTIES' POSITIONS

[41] The respondent's position is the false information in the Return and other facts demonstrate that Mr. Fransen chose to ignore the warning signs and therefore was wilfully blind. Alarm bells suggest he must have known about the need to inquire about the Return, but chose not to do so. By signing the Return and reporting a fictitious business loss, Mr. Fransen was wilfully blind and grossly negligent even if he did not have actual knowledge of the false statement. As such, he was wilfully blind to the false statement. Even if he was not wilfully blind, he was grossly negligent in filing the Return.

[42] Mr. Fransen's position is at the time of signing the Return, there was no knowledge of false statements nor were there flashing red lights. Unlike other cases involving Fiscal Arbitrators, there is no evidence that he participated in such activities. His situation is different. He was alienated from his father who hitherto for many years had previously arranged for his tax filings with his BDO acquaintance but for 2009 found himself on DSC's doorstep. He followed the same approach and conducted himself in the manner had it been with BDO. Therefore, he was not willfully blind. While he acknowledges he was negligent, he submits he did not reach the threshold of gross negligence.

V. ANALYSIS

[43] With the foregoing in mind, I now turn to consider whether the respondent established that Mr. Fransen had knowledge of or was grossly negligent in making false statements in the Return. The evidence was that Mr. Fransen did not have actual knowledge that the Return, the business activities form and the Request contained false statements at the time of signing the Return. Given that, the question becomes whether Mr. Fransen was wilfully blind.[19]

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[18] Exhibit R1, Tab 9, Notice of Objection, March 14, 2011 and Tab 10, Notice of Confirmation, July 18, 2012.

[19] I will use statement to include statements.

Willful Blindness

[44] Establishing wilful blindness presupposes Mr. Fransen strongly suspected, without knowing, that the statement in the Return was false but deliberately chose not to inquire (thus was deliberately ignorant) because the inquiry would have provided him with knowledge that the statement was false.

[45] To assist in determining whether a taxpayer is wilfully blind, in *Torres et al. v The Queen*, 2013 TCC 380, 2014 D.T.C *(*"*Torres*"*)* Justice C. Miller set out a framework, (i) to (iv) below, and summarized certain principles.[20]

(i) Education and experience

[46] Education and experience is to be considered in determining whether there was wilful blindness. Admittedly, Mr. Fransen's submission that his "hands-on practical training" is not an area, unlike other disciplines, that would have expertise in taxation or business losses and has little to do with accounting or law. However, in instances where fictitious losses have been claimed, the education and experience bar is not set overly high. This principle was discussed in *Manhue v the Queen 2018 TCC 71,* in which Justice Sommerfeldt conducts a comprehensive review of cases involving taxpayers (with a range of education and experience) and Fiscal Arbitrators.[21] Many, if not all, of the taxpayers in the review where penalties were imposed did not obtain certification in two trades.

[47] I do not accept Mr. Fransen's assertion it would be too arduous for him to look at a page and go through it because he is a slow reader. His jobs required him to read and be familiar with numbers and he had spent almost a year of in-class learning. I find he had a sufficient level of reading comprehension that would have equipped him to notice something was amiss had he taken the time to review the Return and its contents.

(ii) Suspicion or Need for an Inquiry

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[20] *Torres* framework was affirmed in *Strachan v The Queen*, 2015 FCA 60. *Torres* involved Fiscal Arbitrators where taxpayers attended presentations, received pamphlets, kits and engaged in activities such as buying back the social security number and using "per" on the Request for Loss Carryback form.

[21] *Torres* is cited. At paragraph 32, *Manhue* had completed one semester at a university after high school and later worked at a General Motors plant for two decades and penalties were imposed.

[48] Mr. Fransen submits he was referred to DSC, followed the same approach that he normally did with his father by dropping off his source documents and then he came back and signed off on the Return once BDO completed them.

[49] Documentary evidence produced by Ms. Sawatzky does not suggest the approach was the same. The documents are titled the Application and Agreement (the "Agreement"), Robert Fransen Tax Summary (the "Summary"), the Disclosure, Disclaimer and Indemnity page (the "DDI Page") and Tax Checklist-2009 (with his contact information and other information).[22]

[50] In cross-examination, he said he does not recall seeing these documents. Mr. Fransen then acknowledged he had signed the Agreement on March 18, 2010, two months before signing the Return. His evidence regarding the Agreement is inconsistent and confusing. He did not recall seeing page 1 or recall it being presented to him and then said he did not "really" read it which presupposes he had some recollection. To compound the inconsistency, at some point he said he read whatever he initialled and he had initialled the following term on page 1. It states, in part, that the:

> Applicant agrees to pay to Fiscal Arbitrators or its nominee a fee which is equal to 20% of the determined financial benefit amount received or as per the attached Schedule A.

[51] He acknowledged that under the Agreement he would pay DSC a 20 percent fee, based on whatever he was refunded, upon receipt of his refund cheque. I do not accept his evidence he did not read the Agreement and find his evidence not credible on this aspect.

[52] The Summary is consistent with the Agreement in stating the fee is "Due when ANY refunds/Assessments Received AND AS RECEIVED." It also shows the estimated refund, $20,947.91, for 2009 and an estimated refund for each of the three previous years ranging between approximately $21,000.00 to $26,000.00. Based on the estimated refunds, the "Fee Due" to DSC is estimated to be in excess of $18,000. In cross-examination, Mr. Fransen agreed he saw the $20,947.91 refund amount on the last page of the Return, refuted the suggestion that the reason he went to DSC was to get large refunds and said he had spoken with his confidants.

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[22] Exhibit R1, Tab 11. Ms. Sawatzky produced four documents from CRA's special investigations unit that had been seized from Fiscal Arbitrators. The Summary shows the estimated tax refund for 2009 and for each of the three previous years.

[53] Mr. Fransen remarked it was not unusual for him to receive substantial refunds before the 2009 taxation year. I do not accept that. The evidence presented, at least back to 2005, indicate there were three modest refunds and one year where there was no refund. Surely, upon signing the Return and seeing the large refund, this would have created a suspicion on his part prompting him to make an inquiry but chose not to. Prudence dictated upon seeing the refund, he should have stopped to ask is the refund too good to be true.

[54] At the top of the Agreement, it shows "(Alternative Tax Filing Educational Information)". Educational information is similarly featured in the DDI Page. It indicates:

> All information, materials, products and services provided by Fiscal Arbitrators … is solely for educational and private purposes, not intended to replace or serve as legal, accounting, tax, or other professional advice. We are not lawyers, attorneys, paralegals, CA's, accountants, tax consultants, or legal counsellors.

[55] Providing educational information and the fact they do not serve as accounting, tax or other professional advisors, should have caused him to be suspicious. This contradicts his assertion he was relying on professionals. I infer that Mr. Fransen likely received the DDI Page and the Summary at or around the time he signed the Agreement.

[56] I have difficulty accepting Mr. Fransen's response in cross-examination that he had not noticed nor recalled seeing "per" adjacent to the signature line in the Return or the Request when he signed these documents. I also question that he did not see on the front page of the Return he is described as self-employed in Ontario. These anomalies should have caused him to inquire further.

(iii) Circumstances indicating a need for inquiry or flashing red lights

[57] Mr. Fransen argues there were no flashing red lights or warning times at the time of filing the Return.

[58] The relevant point in time for the determination is the time of filing the Return.

(1) <u>Magnitude of the advantage (or omission)</u>

[59] Magnitude of the advantage is the first *Torres* factor for consideration. In his Return, Mr. Fransen reported a net business loss of $333,418, employment income

of $69,770.60, and refund of $20,947.91. Of the $333,418, Mr. Fransen requested that the $259,190 remaining loss be carried back to the three previous years.

[60] The purported loss was significant when compared with his employment income. The application of such loss would have eliminated tax withheld from his employment income and all other sources of income in 2009 and culminated in the refund for 2009. As well, he would have been able to apply the remaining loss to the three previous years generating refunds for the taxes he had paid over the three previous years.

[61] The magnitude of the purported losses in my view is a significant factor. Even with "hands-on practical training" and even if he did not understand the finer details that go into the preparation of a tax return or understands tax matters, he could have questioned the refund anticipated for 2009. This would have led him to the purported losses.

(2) Blatantness and detectability of false statement

[62] One of Mr. Fransen's submissions was given the multiple employers, it would have been simpler for him to have a single employer with only one T4 in order for him to comprehend where he stood. I note there are only two employers thus two T4's.

[63] Mr. Fransen reported employment income, other income, gross business income and net business loss and requested a non-capital loss (for the previous three years) as entries in the Return.[23] The amounts for each of those entries are $69,770.60, $4,457.84, $87,589.56, $333,418.44 and $259,190, respectively. The last three amounts are predicated on fictitious amounts and are readily apparent from page 2 of the Return.

[64] References throughout the Return to "business" are conspicuous. Two of the entries use the term "business", page 1 of it indicates he was self-employed and the business activity form was included. Since Mr. Fransen knew he did not carry on a business in 2009, these should have invited questions.

[23] Lines 101, 104, 162, 135 and 50, respectively.

[65] False information is patently obvious in several parts of the business activities form. In Part 3, page 1 it shows "RECEIPTS AS AGENT" in the amount of 87,589.56; this amount appears in seven boxes over two pages. Part 5, page 2 shows "AMT TO PRINCIPAL FR AGENT", with the amount of $421,008.00 which also appears in two other boxes. The purported loss, $333,418.44, appears once in Part 5 and five times in Part 6.[24] He agreed the language in Parts 3 and 5 is nonsensical. These entries would have been highly visible and easily detectable.

[66] False information is detectible in the Request. He signed on page 2 which is blank and page 1 includes the purported loss with a sizeable portion of it being carried back to three previous years.

[67] Again, he saw and had detected the substantial refund on the last page.[25]

[68] All of which lead me to conclude that the false statements in the Return, the business activities form and the Request are blatant and readily detectible.

(3) <u>Tax preparer does not acknowledge prepared return</u>

[69] Mr. Blair did not complete the tax preparer's box (490) showing his or DSC's name and contact information on the last page of the Return. During cross-examination, Mr. Fransen indicated he did not find it strange that it was left blank. Given that Mr. Fransen was paying a fee to prepare his Return, this should have raised a red flag for him. As noted in *Torres*, combined with other factors the lack of acknowledgement by the tax preparer should have signalled to the taxpayer that the tax preparer did not want their name identified by CRA as having anything to do with the return.

(4) <u>Unusual requests by tax preparer</u>

[70] Unusual requests were made by Financial Arbitrators and Mr. Blair of Mr. Fransen. The Agreement requires him to agree to respond to any CRA non-written inquiries with a request to communicate only in writing excluding e-mail; to forward any written inquiries immediately to Fiscal Arbitrators before any responses to CRA are made; not to discuss with any third party any of the tax information provided to or received from Fiscal Arbitrators and is void if disclosed to a third party. It also mentions the 20 per cent refund fee charged. Mr. Fransen

[24] Exhibit R1, Tab 2.
[25] Line 484.

testified he was obliged to go to Mr. Blair for any response to CRA and Mr. Blair would "see, say and direct" such communications. Combined, these requests are unusual and should have raised red flags for Mr. Fransen.

(5) **Previously unknown tax preparer**

[71] Before the 2009 taxation year and the previous 20 years, Mr. Fransen's father had taken care of his tax returns by enlisting his BDO acquaintance. For 2009, Mr. Barnes gave Mr. Fransen all the information and told him who he should speak with and introduced him to Mr. Blair. There is no evidence that Mr. Fransen knew anything about Mr. Blair (or DSC), had researched his background or checked his credentials. He only knew he had prepared Mr. Fransen's confidants returns.

(6) Incomprehensible explanation by tax preparer;

[72] Mr. Fransen did not testify as to any incomprehensible explanations provided by Mr. Blair before filing the Return. When he went to sign the Return, it was waiting for him with sticky notes. This factor is irrelevant.

(7) Conduct of others, warnings or expresses concerns about telling others

[73] There is no evidence that anyone else warned Mr. Fransen against engaging DSC nor was he fearful about telling others. Rather, Mr. Barnes had shared information about past refunds and his confidants were involved with DSC. This factor is irrelevant.

(iv) Inquiry to understand tax return

[74] Given the refund was much larger than any others received in the preceding few years, Mr. Fransen must have felt the need to inquire further. However, there was no evidence he sought an explanation to understand the Return. Rather, his evidence was that upon receipt of the Return, he signed it, without reviewing it, which took five minutes. Mr. Blair was not present and even if he was so inclined to ask a question (suggesting he had none), no one was around other than a reception person. Of course, had he wanted, he could have delayed signing the Return and made an inquiry until he was satisfied he could properly make the certification as to accuracy of the information in the Return. Had he taken the time

to even glance at the Return and its contents, it would not have made any sense because he had no business.

[75] Mr. Fransen's evidence suffered from his inability to recall, it was obtuse, and there were some inconsistencies leading me to question, in general, the reliability of his testimony.

VI. SUMMARY

[76] Two of the red flags (noted in paragraphs 74 and 75 above) were not present in Mr. Fransen's situation. However, there were a number of other red flags that should have put him on notice. A few examples will suffice. Mr. Fransen was aware he would be obtaining a refund spanning four years. This would have been an advantage of significant magnitude. He chose not to inquire about the $20,947.91 refund, even though it was significantly larger than any refunds he historically received.

[77] Entries on page 2 of the Return used to claim the refund in 2009 were blatant and readily detectible even if he had only glanced at the Return. The fictitious losses were in excess of four and half times the employment income he had reported in 2009.

[78] The $333,418.44 amount was mentioned nine times in the Return, the Request and business activities form yet he had no business. The business activities form reflects unusual language as does the Agreement and the DDI Page and unusual requests were made by the tax preparer.

[79] It seems to me in signing the Return without reviewing it, Mr. Fransen was looking in the other direction thereby acknowledging he did not want to know and deliberately ignoring the contents of the Return. He said had he read the Return he would not have understood it, but he made no effort to ask a third party to explain and could have chose to make inquiries with someone other than Mr. Blair.

[80] In my view, he chose not to inquire because he strongly suspected, or suppressed a suspicion, that the inquiry would have provided him with knowledge that the statement in the Return was false thereby he would have discovered such inconvenient truth. This amounts to wilful blindness and the knowledge of the false statement is imputed to Mr. Fransen. I find he was wilfully blind at the time he signed the Return.

Gross negligence

[81] Given my conclusion above, it is strictly unnecessary to address the issue of gross negligence. However, I will briefly address it.

[82] The evidence demonstrates Mr. Fransen signed the Return without reviewing it or its contents and merely followed the placement of the sticky notes in placing his signature on the Return. How then was he able to sign on the back page "I certify that the information given on this form is correct and complete."? The answer is he could not provide such certification. He took the same approach when signing the Request without reviewing it. There was no evidence he was incapable of understanding the obligation not to make a false statement in the Return.

[83] Failure to review a return at all is suffice to find that any false statements in the Return are made in circumstances amounting to gross negligence, hence justify the penalty.

[84] A number of cases have found gross negligence and upheld penalties in instances where taxpayers had blindly relied on the advice of their tax preparer without reading or reviewing their returns and without making any effort whatsoever to verify the accuracy of the returns.[26]

[85] In *Bhatti v The Queen, 2013 TCC 143* Justice C. Miller points out:

> 30. …It is simply insufficient to say, 'I did not review my returns.' Blindingly entrusting your affairs to another without even a minimal amount of verifying the correctness of the return goes beyond carelessness. So, even if she did not knowingly make a false omission, she certainly displayed the cavalier attitude of not caring one way or another.

[86] The same applies to Mr. Fransen. I find his conduct to be a marked departure as to what a reasonable person (taxpayer) would have done in such circumstances. Had he taken the time to review the Return and the business activities form, it would have been readily apparent that the claim of being self-employed and significant business losses were false. He was educated, at a minimal of average intelligence and had the opportunity to review the Return and its contents but decided not to. He abdicated his responsibility and made no effort to comply with

[26] *Atutornu v. The Queen,* 2014 TCC 174. *Maynard v. The Queen,* 2016 TCC 21.

the requirements of *the Income Tax Act* that the information in his Return was accurate and complete.

[87] I am satisfied that the respondent demonstrated on a balance of probabilities that Mr. Fransen knowingly and under circumstances amounting to gross negligence made false statements at the time of filing the Return in claiming the substantial business losses and requesting loss carry back be applied to his previous three taxation years.

VII. CONCLUSION

[88] Based on the foregoing, I conclude that in the circumstances of this case, by signing the Return without reviewing it or its contents and reporting the fictitious business losses and requesting loss carry backs for the three previous years, Mr. Fransen was both wilfully blind and grossly negligent.

[89] For these reasons, the appeal is dismissed with costs payable to the respondent.

Signed at Ottawa, Ontario, this 27th day of July 2023.

"K. Lyons"

Lyons J.

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