Docket: 2013-2685(IT)I

BETWEEN:

EDWIN MORTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 11, 2013, at Ottawa, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Gregory Sanders
Counsel for the Respondent:	Ryan Gellings

JUDGMENT

In accordance with the Reasons for Judgment attached, the Appeal in respect of taxation years 1998, 1999, 2000 and 2001 are dismissed and, accordingly, the penalties imposed by the Minister for those taxation years are upheld.

Signed at Toronto, Ontario, this 7th day of March 2014.

"R.S. Bocock"

Bocock J.

Citation: 2014TCC72
Date: 20140307
Docket: 2013-2685(IT)I

BETWEEN:

EDWIN MORTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bocock J.

I. Nature of Appeal

[1] Under subsection 163(2) of the *Income Tax Act* (the "*Act*"), the Minister of National Revenue (the "Minister") may impose a penalty where a taxpayer is grossly negligent or knowingly makes a false statement in filing a return, form, certificate or answer relating to a taxation year.

[2] The Appellant, Mr. Morton, filed his income tax returns for 1998, 1999, 2000 and 2001 (the "Relevant Years"); he paid taxes calculated on taxable income of $105,677.00, $118,529.00, $198,530.00 and $151,107.00 for each respective year. These returns were reassessed as filed by the Minister. The normal reassessment periods expired, but in 2008, the taxpayer, utilizing the provisions of subsection 152(4.2) filed T1 Adjustment Requests (the "Requests") with the Canada Revenue Agency ("CRA").

[3] Mr. Morton requested that his income, as previously filed and assessed in the returns, be adjusted to include the following amounts of business income and expenses for each tax year:

T1 – Adjustment Request – Form T1-ADJE(08)			
Tax Year	Additional Other Income described in Requests as "Additional Money Collected as Agent for Principal"	Additional Other Expenses described in Requests as "Money Paid to Principal as Agent"	Adjusted Net Income (Loss)
1998	$25,689.00	($124,664.00)	($98,975.00)
1999	$26,777.00	($159,518.00)	($132,741.00)
2000	$29,584.00	($247,449.00)	($217,865.00)
2001	$28,654.00	($186,509.00)	($157,853.00)

[4] Each amount in the final column in the chart above if, and when, applied by the Minister to the taxable income contained in the previously filed returns would have generated an aggregate refund amount of all tax previously withheld from the Appellant at source. If acted upon, the Requests would have generated refunds in excess of $202,000.00. This did not occur. The Minister denied the Requests and calculated and levied penalties (the "Penalties"). The amounts of the Penalties were agreed at the commencement of the hearing: $12,999.42, $16,365.84 $28,215 and $17,732.97 for each of the Relevant Years. Mr. Morton appeals to vacate the Penalties.

II. Testimony

[5] Mr. Morton admitted or testified that there was no documentation to substantiate any of the income, expenses or losses claimed in the Requests. Mr. Morton confirmed in testimony that he knew when he made the Requests that he did not receive the income nor incur the expenses claimed. The Appellant offered reasons for these knowing acts: stress related to financial difficulties, marriage breakdown and the loss of access to his business books and records in 2007 and 2008 some years after filing the returns. Accordingly, Mr. Morton submitted the Requests without a detailed review, knowing the massive amounts were fictitious. He stated he did so in the hope of initiating the Requests and thereafter filing accurate amounts with supporting documentation. He stated that he gave no thought to the fact the CRA would review and might rely upon the Requests. Instead, he stated that he felt that CRA would first request supporting materials. If he located same, he could adjust his Requests to conform to the then hopefully accessible documents. If he

could not locate the documentation or it did not exist, he would simply forswear the Requests.

III. Summary of Appellant's Submissions

[6] Appellant's counsel offers the following for vacating the penalties:

(i) the reassessment is statute barred since factually no misrepresentation has occurred in the filing of a return under subsection 152(4) of the *Act*; but merely in supplying information under the *Act*, and in the absence of fraud, mere information supplied to the Minister is not sufficient to reassess outside the normal reassessment period;

(ii) no refund nor notice of reassessment was generated by which the Minister conferred or evidenced a benefit to the Appellant arising from the fictitious Requests;

(iii) in any event, no gross negligence, giving rise to a penalty, has occurred since a T1-Adjustment Request is not a return, form, or certificate prescribed under subsection 162(3) of the *Act*; and,

(iv) various interpretation circulars, advance rulings and policy papers of the CRA indicate penalties will only be assessed in respect of an income tax return and not in the instance of an audit or a statute barred adjustment request.

IV. Analysis and Decision

[7] Prior to a point by point analysis of the evidence in light of the Appellant's submissions, the Court finds, as a matter of fact based upon admissions and testimony, that Mr. Morton intentionally, knowingly and without reliance on another person or advisor supplied false information in the Requests. He claimed quantitatively enormous amounts as fictitious expenses for the Relevant Years. Although gross negligence would be sufficient, the Court finds Mr. Morton sought to utilize subsection 152(4.2) and the Requests to adjust his tax returns by knowingly making such false statements. Further, no documentary evidence was tendered supporting the claimed stress reaction of sufficient seriousness to mitigate or explain such a finding of gross negligence (*Rohani v R*, 2009 TCC 88).

[8] Given the foregoing, unless the Appellant's legal arguments are accepted, the Penalties shall stand. For the reasons that follow, the Court rejects these arguments, dismisses the appeal and upholds the Penalties.

a) No misrepresentation in filing a return or fraud in providing information under subsection 152(4)

[9] As to the absence of misrepresentation on a return or fraud under subsection 152(4) of the *Act*, the factual findings of this Court simply do not support such an assertion. The Appellant is an electronic systems engineer, schooled in England and a professional engineer in good standing in this country and of similar designation in the United Kingdom. By his own testimony, he analyses systems from a high level, focusing on their supervision from inception to conclusion. By contrast, his testimony that he was not aware of the object, intent and consequences of filing the Requests belies certain obvious and conflicting facts. Firstly, Mr. Morton fastidiously and accurately filed all his previous tax returns including those for the Relevant Years. Secondly, he experienced inexplicable premonitions of unclaimed income, expenses and potential losses which coincidentally and conveniently arose after losing possession of the alleged records, rather than during the six to eight previous years he had custody of same and during which period he accurately filed his tax returns. Thirdly, he knew exactly the form to complete and submit in order to make the Requests purportedly without assistance from others. This is in contrast to the proclaimed uncertainty, ignorance and naïveté of the process otherwise knowingly initiated without supporting information or the disclosure to the Minister of Mr. Morton's alleged predicament (loss of records) against the looming ten year limitation under subsection 152(4.2).

[10] Factually the court finds that the Mr. Morton needed cash; the filing of these fictitious Requests would be a convenient and quick solution and would otherwise, as he may have originally thought, be carried out with impunity. Given the education of the Appellant, his remarkable memory during testimony of his career path and precise advancement dates, his history of previous compliance and, thereafter, his incongruous and inexplicable absence of comprehension, this Court finds these T1-Amendment Requests were not only misrepresentations, but they were quantitatively massive, *prima facie* fraudulent misrepresentations of Mr. Morton's alleged income and expenses for the Relevant Years. They were delivered, unsolicited, as "information" supplied under the *Act*. The sole purpose for conjuring up these extraordinary amounts and supplying them to the Minister was to manufacture the artifice of a tax refund of all amounts previously withheld and constituting tax paid. Given that finding of fact, the subsequent proffered befuddlement of Mr. Morton is simply, on balance, not believable.

[11] This factual finding of fraud in supplying information under the *Act* clearly removes any argument submitted by Appellant's counsel that innocent misrepresentation in the supply of information is not sufficient for the reassessment outside the normal reassessment period. Whatever legal conclusions may be drawn from *Ross v Her Majesty The Queen*, 2013 TCC 333, such *obiter dicta* will never suggest that fraudulent misrepresentation, when found as a matter of fact, precludes the application of reassessment rights by the Minister outside the normal reassessment period. Thus, reference to College *Park Motors v Her Majesty the Queen*, 2009 TCC 409 is similarly inapplicable. Additionally, Mr. Morton sought to have the Relevant Years reopened and deliberately requested that his taxable income be re-examined after the normal reassessment period. He requested that the Minister infuse the fictitious numbers into an otherwise statute barred assessment years. Such a request could not be factually further from the discovery of innocent misrepresentation through a CRA audit or investigation as was the case in *Ross* and *College Park Motors.*

b) The Absence of a Refund or Reassessment reliant upon the Request precludes a penalty

[12] The absence of a reassessment or refund issued by the Minister, in reliance upon the Request, as a bar to imposing the Penalties lacks entirely an appreciation of this taxpayer's intention, the intention and expectation of each taxpayer under the *Act* when filing a T1 – Adjustment Request and the plain meaning of subsections 152(4) and 152(4.2).

[13] The location of the statutory provision (subsection 152(4.2)), which permits the Requests and the taxpayers ability to make application and request a re-determination, immediately follows the right of the Minister to reassess beyond the normal reassessment period. Subsection 152(4.2) allows the taxpayer an extended period to apply and request a redetermination by the Minister, even after the time when the Minister unilaterally may not do so. The Minister normally has three years to reassess, but the taxpayer has ten years to make an adjustment request, albeit any re-determination, when requested by the taxpayer, is discretionary on the part of the Minister.

[14] The relevant provisions of subsection 152(4.2) are as follows:

> (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at

> that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,
>
> > (*a*) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and
> >
> > (*b*) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.

[15] If one requests an adjustment, one expects the Minister to reasonably consider it, reopen the taxation year in question and act upon the request. In exercising that discretion, the Minister may reassess tax, interest or penalties (paragraph 4.2(*a*)) and re-determine the amount to be paid on account of tax (paragraph 4.2(*b*)). To suggest that the failure to issue a notice of reassessment and/or pay a refund bars the imposition of a penalty is legally non-sensical. As an example, if that were true, the ability of the Minister to levy penalties would be perfected provided CRA issued a reassessment reliant upon the Request, and then immediately issued a further reassessment rescinding the first reliant reassessment. The existence of a single day or a matter of minutes would suffice. The Court imagines and anticipates the outrage of taxpayers and their counsel over such duplicitous Ministerial conduct designed solely to feign reliance upon a brazenly concocted T1 - Amendment Request.

[16] Further, if the combined effect of subsections 152(4.2) and 163(2) were such to preclude imposing a penalty unless a notice of reassessment or refund indicates reliance by the Minister upon the fraudulent misrepresentation, the absurdity is additionally manifest. Where the precondition for reassessment under 154(2) exists (in this appeal, fraudulent misrepresentation), the period for reassessment is limitless. In this very appeal given such facts, the Minister could issue a reassessment tomorrow, revoke it by further reassessment the day following and with the latter impose the Penalties. Instead, the Minister has rightfully evaluated the Appellant's ploy for what it was and assessed the Penalties in one step.

[17] Moreover, when one examines the context and purpose of the section, it allows the Minister, "for the purpose of determining"…",the amount of a refund or a reduction of an amount payable,"…"to reassess tax, interest or penalties" …"payable by the taxpayer in respect of that year"(*underscoring added*). Simply put, for the purpose of determining the amount of the refund request, the Minister denied the Request and imposed a penalty, but both actions related to the determination of the

amount of a refund, as requested by the taxpayer when instituting the Requests. Subparagraph 152(4.2)(a), as reproduced above, includes reference to penalties and does not by its plain wording limit the Minister to "reduce", but to "reassess" tax, interest and penalties.

c) T1-Adjustiment Request not a "return" within meaning of 163(2)

[18] Appellant's counsel further submits that subsection 163(2) does not apply because the Requests made by the Appellant were not "returns" within the meaning of that subsection or under the *Act*, generally. Further, Appellant's counsel argues that a T1 – Amendment Request is not a "return" because all of the words "form", "certificate","statement" or "answer" have specific meanings when they are used in subsection 163(2) of the *Act* and do not include by definition a T1 – Amendment Request.

[19] The Court turns to the actual subsection:

> 163(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
>
> (*a*) the amount, if any, by which
>
> (i) the amount, if any, by which
>
> (A) the tax for the year that would be payable by the person under this Act
>
> exceeds
>
> (B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year
>
> if the person's taxable income for the year were computed by adding to the taxable income reported by the person in the person's return for the year that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission and if the person's tax payable for the year were computed by subtracting from the deductions from the tax otherwise payable by the person for the year such portion of any such deduction as may reasonably be attributable to the false statement or omission
>
> exceeds

> (ii) the amount, if any, by which
>
> > (A) the tax for the year that would have been payable by the person under this Act
>
> exceeds
>
> > (B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year
>
> had the person's tax payable for the year been assessed on the basis of the information provided in the person's return for the year,

[20] A simple examination of the subsection renders such an argument deficient of logic and meaning. As to purpose and context, the simplistic and efficient use of T1-Amendment Requests allows taxpayers to effectively apply to "amend" their returns without the need for taxpayers to file fully amended returns where they wish to initiate a request within subsection 152(4.2) or where taxpayers are otherwise beyond the period to do so.

[21] In fact, a T1 – Amendment Request very closely emulates a T1 – Tax Return in both form and content. It employs a similar format, numbered line items and, more importantly, the taxpayer's certification that the "information on this form and any documents attached is, to the best of my knowledge, correct and complete."

[22] The use of this "form", although not officially prescribed under the *Act*, is a fast, convenient and accepted method by which taxpayers make application for a determination under subsection 152(4.2) of the *Act*. To suggest that the Minister, through the CRA, taxpayers and this Court alike should not consider this "application" as a "form" containing "statements" and the concluding "certificate" as the very process to initiate and cause a determination under subsection 152(4.2), including the possibility of triggering the broad wording of subsection 163(2), is not legally supportable. Such a suggestion ignores the plain text, but also the context and purpose of both sections and the self-filing, voluntary nature of the regime embedded within the *Act*. Additionally, in the context of subsection 163(2) itself, the use of the words "in this section" instructively redefines the sense of such words to their ordinary meaning and deems them a "return" thereby removing such words from their otherwise specifically ascribed definitions found elsewhere in the *Act*.

[23] Plainly and clearly, a T1-Amendment Request, and the information certified within it by the taxpayer to be accurate, is a "return" within the meaning of the imbedded definition of subsection 163(2) of the *Act*. In this appeal, save for the

taxpayers name and address, all of the information included in such a "form", "certificate" or "statement" (collectively defined in the subsection as a "return") was knowingly, unilaterally and falsely made solely to generate a refund and lessen tax otherwise correctly assessed and payable. The plain meaning of subsection 163(2) and its context and purpose within the *Act*, when coupled with the fraudulent misrepresentations of the Appellant, yearn for the imposition of the Penalties.

d) CRA Interpretation Bulletins and Advance Rulings

[24] Lastly, Appellant's counsel indicated that a certain Information Circular (IC07-1 Taxpayer Relief Provisions) and CRA Technical Interpretation Documents (2010-035651117 and 2009-034429117) provide guidance to the Court to the effect that penalties are not to be imposed on T1-Amendment Requests. Information Circular IC07-1 and specifically paragraph 74 therein as referenced by Counsel, states that CRA will not generally accept a request where the adjustment of a statute-barred year of an individual would result in the increase of taxes, interest or penalties to the returns of other individuals that are statute-barred from reassessment. Even if the wording were unequivocal (i.e. if the word "generally" did not appear), it would be inapplicable to this case since no other taxpayer is involved. As to the advance rulings cited, one relates to a CRA instituted audit and the other to the methodology of calculation of penalties. Neither of these fact situations is analogous to that before the Court, even if either were binding authority.

[25] Accordingly, the appeal is dismissed and the Penalties are upheld. There shall be no order as to costs.

Signed at Toronto, Ontario, this 7th day of March 2014.

"R.S. Bocock"

Bocock J.

CITATION:	2014TCC72
COURT FILE NO.:	2013-2685(IT)I
STYLE OF CAUSE:	EDWIN MORTON AND HER MAJESTY THE QUEEN
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