

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20220407**

**Docket: A-219-20**

**Citation: 2022 FCA 60**

**CORAM: GLEASON J.A.  
MACTAVISH J.A.  
MONAGHAN J.A.**

**BETWEEN:**

**COLIN WOOD**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard by online video conference hosted by the Registry on February 3, 2022.

Judgment delivered at Ottawa, Ontario, on April 7, 2022.

**REASONS FOR JUDGMENT BY:**

**MONAGHAN J.A.**

**CONCURRED IN BY:**

**GLEASON J.A.  
MACTAVISH J.A.**

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**REASONS FOR JUDGMENT**

**MONAGHAN J.A.**

[1] The appellant, Colin Wood, appeals the Tax Court of Canada's decision in *Wood v. The Queen* (2020 TCC 87, per Lafleur J.). The Tax Court dismissed his appeal of reassessments of his 2011 and 2012 taxation years made following an audit of Mr. Wood's returns for those years.

[2] In the absence of business records from Mr. Wood, the Canada Revenue Agency ("CRA") conducted a bank deposit analysis and thereby identified unexplained revenues of

\$236,956 in 2011 and \$1,154,356 in 2012. The CRA accepted that Mr. Wood incurred expenses to earn those revenues and so assessed taxes on unreported net business income of \$226,613 in 2011 and \$195,085 in 2012.

[3] The reassessments also imposed penalties under subsection 163(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Under that provision, a 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 ... filed or made in respect of a taxation year” is liable to a penalty.

[4] Before the Tax Court, Mr. Wood did not dispute receipt of the unreported revenues. Rather, his position before the Tax Court and this Court is the same. He was uncertain whether the 2011 unreported amounts had the quality of income and so did not report them. In 2012, he says he used a net method for computing income. That is, rather than report gross revenue, expenses, and net income from his business activities, Mr. Wood claims to have reported net income only. He says that virtually all of the unreported revenues in 2012 were offset by expenses, some of which were not accepted by the CRA.

[5] The Tax Court was not persuaded by Mr. Wood’s evidence. It concluded that the 2011 unreported amounts either were received as commissions for services rendered by Mr. Wood or were entirely unexplained. The Tax Court found “[n]o reliable and credible evidence was adduced as to the existence of any conditions or restrictions attached to these amounts”. As to 2012, Mr. Wood did not persuade the Tax Court that he incurred any expenses beyond those

allowed by the CRA. Finally, the Tax Court concluded that the respondent had established that Mr. Wood's tax returns contained false statements or omissions made in circumstances that amounted to gross negligence. Accordingly, it dismissed his appeal.

[6] Before this Court, Mr. Wood raises several grounds of appeal:

1. The Tax Court erred in not accepting that the unreported amount in 2011 was unearned income and not required to be included in income;
2. The Tax Court erred in not accepting his evidence concerning additional expenses incurred to earn income in 2012;
3. The Tax Court erred in drawing an adverse inference from his failure to call two witnesses; and
4. The Tax Court erred in applying the law with respect to liability for subsection 163(2) penalties.

[7] For the reasons that follow, I would dismiss the appeal.

I. Standard of Review

[8] The parties submit, and I agree, that the appellate standard of review applies in this case. Thus, the applicable standard for questions of fact and questions of mixed fact and law (except to the extent there is an extricable question of law) is palpable and overriding error; for questions of

law the applicable standard is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*].

II. *Overview of Tax Court Decision on Unreported Income*

[9] The unreported gross revenues (and resulting net business income) in 2011 and 2012 arose from different business activities.

[10] Those in 2011 came from two sources: most significantly from SG Marketing and Shivdat Ganesh (the owner of SG Marketing), but approximately \$28,000 from other sources.

[11] Mr. Wood provided services to SG Marketing, the owner and operator of what Mr. Wood says was an online penny auction. He described the services he provided as including procuring product and shipping it to auction winners. For those services, he earned commissions and was reimbursed for expenses. The online auction business started in August 2011 following several months of preparation. It was very successful, with sales in excess of \$1,600,000 within a few weeks. However, because of a dispute between SG Marketing and Moneris, a debit and credit card processing service, Moneris froze SG Marketing's merchant account. Unable to process credit card payments, the business ceased operations. Customers began to demand refunds from SG Marketing and from their credit card companies. Litigation ensued between SG Marketing/Mr. Ganesh and Moneris and certain banks. That litigation ultimately settled with SG Marketing forfeiting the US\$550,000 in its frozen merchant account and agreeing to pay an additional US\$150,000 to one of the banks.

[12] Mr. Wood's explanation for not reporting the revenues received from SG Marketing/Mr. Ganesh was his concern that he might be required to repay some of it because of the litigation, the customer demands for refunds, and his failure to deliver the products he should have delivered to auction winners. However, Mr. Wood was not a party to the litigation and his bank accounts were not affected by the actions taken by Moneris and the banks.

[13] In 2012, Mr. Wood operated an online DVD sales business in collaboration with MJ Marketing Ventures Inc. (MJ Marketing), a corporation owned by his lifelong friend and frequent business partner, Martin Juchniewicz. MJ Marketing was responsible for managing the website and advertising. Customers paid for the DVDs using credit cards, and those amounts, net of a fee charged by the credit card processing service, were deposited in Mr. Wood's account. Mr. Wood paid all the expenses, including amounts to MJ Marketing for its services.

[14] In 2013, Mr. Wood was charged with fraud, organized crime and possession of the proceeds of crime in relation to the DVD business. He ultimately pleaded guilty to fraud and paid an amount in restitution.

[15] Mr. Wood did not dispute that he did not report revenues of \$1,154,356 from the DVD business, but claimed he used the net method of reporting income. He claims that he paid an additional \$193,643 to MJ Marketing in cash, which was not included in the expenses he previously claimed and that were allowed by the CRA. In support, he submitted three invoices/receipts from MJ Marketing.

[16] As the Tax Court observed, Mr. Wood bore the burden of establishing, on a balance of probabilities, that the assessments of unreported income were incorrect. The Tax Court decided that he did not meet that burden. The Tax Court said Mr. Wood's testimony at trial was "confusing, unclear and seemed incomplete" and found it "unreliable and not credible". It also "was inconsistent with prior statements made to the CRA ... in the notice of objection and in the Fresh as Amended Notice of Appeal" before the Tax Court. Mr. Wood's other witness, Glen Lancaster, was also found by the Tax Court to be unreliable. The Tax Court found that material facts lacked evidence and the invoices/receipts from MJ Marketing were not authentic.

III. Appeal on Unreported Income

[17] The appellant's memorandum of fact and law summarizes his evidence, quotes extensively from the transcript of the hearing before the Tax Court, and asserts that the Tax Court was "unfair in [its] assessment of the evidence" and "adopted the arguments of the [respondent] and ... did not ... touch upon the closing submissions of the Appellant's counsel".

[18] The Tax Court was not required to accept Mr. Wood's explanation of the facts. Rather, the Tax Court was required to consider and weigh all the evidence before it. It did so, and given that evidence, the Tax Court was not convinced by Mr. Wood's explanation for reasons it explained. The Tax Court is in the best position to review and assess the evidence, including the documents and the testimony.

[19] Moreover, “where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged”: *Housen* at para. 24. The Tax Court enjoyed that advantage here.

[20] In effect, Mr. Wood is asking this Court to re-examine the evidence, reweigh it, and come to our own findings of fact. Without a palpable and overriding error on the part of the Tax Court, that is not something we may do: *Singh v. Canada*, 2020 FCA 146, 2020 D.T.C. 5077 at para. 6 and *AE Hospitality Ltd. v. Canada (National Revenue)*, 2020 FCA 207 at para. 15.

[21] I have reviewed the record carefully, including the transcripts from the hearing. I see nothing in the Tax Court’s assessment of the evidence, including its assessment of the testimony and its conclusion about the authenticity of the invoices/receipts that approaches palpable and overriding error.

#### IV. Adverse Inferences

[22] The Tax Court drew an adverse inference from Mr. Wood’s failure to call Mr. Ganesh and Mr. Juchniewicz. Mr. Wood says this was an error. I disagree.

[23] A decision to draw an adverse inference is a discretionary matter for the trial judge. Whether “an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts”: *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236 at para. 107, quoting from *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at para. 73.



[24] Mr. Wood had no books and records, and no documents describing his arrangements with SG Marketing in 2011 or with MJ Marketing in 2012. While he had an explanation—the police seized the books and records in connection with the criminal investigation and did not return them—that did not relieve Mr. Wood of the obligation to lead evidence to establish, on a balance of probabilities, that the assessments of unreported income were incorrect. As the Tax Court said, Mr. Wood needed to “present detailed and cogent testimony, and supporting evidence where possible, to explain the various deposits ... and why they should not be included in the calculation of his income”.

[25] To do so, Mr. Wood chose to rely solely on his testimony and the testimony of his accountant, Mr. Lancaster. While Mr. Lancaster was also the accountant for Mr. Ganesh and Mr. Juchniewicz, Mr. Lancaster was not the party to the business arrangements with Mr. Wood that were central to his appeal. At best, Mr. Lancaster’s testimony would be hearsay and second hand. The Tax Court described it as “surprisingly vague” and “unreliable” and said that “Mr. Lancaster struggled to remember the name of the business, and he could not remember when the lawsuit [about the online auction] commenced, even though he was named as a defendant”. His testimony also was inconsistent with Mr. Wood’s testimony in some respects.

[26] Central to Mr. Wood’s 2011 appeal is that the funds he received from SG Marketing/Mr. Ganesh were for products or services not yet rendered and were potentially repayable to Mr. Ganesh. As the Tax Court observed, Mr. Ganesh’s “testimony was central to establishing the nature of the amounts transferred by SG Marketing/Mr. Ganesh into Mr. Wood’s bank accounts”

and Mr. Ganesh “could have been summoned to bring the relevant documentation” describing the relationship among the parties to the online auction business.

[27] Similarly, central to the appeal of his 2012 reassessment is Mr. Wood’s claim that the invoices/receipts represented amounts he paid MJ Marketing in excess of previously claimed expenses allowed by the CRA. Again, “Mr. Juchniewicz’s testimony was central to establishing the authenticity of the [invoices/receipts] as well as to establishing the fact that an amount of \$193,643 was paid to MJ Marketing in cash...in addition to other amounts MJ Marketing had received” from Mr. Wood.

[28] In the circumstances, the Tax Court had ample justification for drawing an adverse inference from Mr. Wood’s failure to call Mr. Ganesh and Mr. Juchniewicz.

V. Subsection 163(2) Penalties

[29] As expressly recognized by the Tax Court, the respondent had “the burden of proving on a balance of probabilities the facts justifying the assessment of penalties against Mr. Wood under subsection 163(2) for both taxation years”. To do so, the respondent had to show (i) that “Mr. Wood made a false statement in his income tax returns” and (ii) that he did so “knowingly or under circumstances amounting to gross negligence”.

[30] Mr. Wood argues that the Tax Court erred in applying the law and thereby shifted the burden of establishing that the two conditions were not met onto him. In particular, he argues that penalties under subsection 163(2) may be imposed only when there is evidence of

intentional acting, relying on *Deyab v. Canada*, 2020 FCA 222 [*Deyab*], decided by this Court after the Tax Court decision in his appeal.

[31] With respect, Mr. Wood is misreading *Deyab*. It is true that in *Deyab* this Court said (at para. 63) “[c]onduct that would justify the assessment of a gross negligence penalty is conduct that is tantamount to intentional acting”. But the phrase “tantamount to intentional acting” conveys something broader than intentional acting, as is evident from the passage from *Guindon v. Canada*, 2015 SCC 41, quoted in *Deyab* immediately before its “tantamount to intentional acting” statement. That phrase encompasses “an indifference as to whether the law is complied with” (*Venne v. The Queen* (1984), 84 D.T.C. 6247, [1984] C.T.C. 223 (Fed.T.D.) at 6256 [*Venne*]) or wilful blindness—that is, turning “a blind eye to the truth and accuracy of statements made in [the] income tax return” (*Wynter v. The Queen*, 2017 FCA 195 [*Wynter*]).

[32] *Deyab* did not overrule *Lacroix v. Canada*, 2008 FCA 241 [*Lacroix*], nor mandate that a taxpayer be given the benefit of the doubt. Rather, this Court cautioned not to interpret *Lacroix* as requiring that a taxpayer in all circumstances identify the source of unreported income and show it is not taxable in order to set aside a penalty under subsection 163(2).

[33] The difference between *Lacroix* and *Deyab* is not the relevant legal principles, but the facts. In *Lacroix* (at para. 30) the “only explanation offered by the taxpayer [for the misrepresentation] was found not to be credible”. As this Court said in *Deyab* (at para. 69), “[i]n the circumstances of *Lacroix*, the failure to provide a credible explanation was sufficient to justify the assessment of the gross negligence penalty”.

[34] In contrast, in *Deyab*, the taxpayer's explanation was both consistently maintained and consistent with other evidence that "support[ed] a viable and reasonable hypothesis" that the unreported amounts in that case might not have been income (*Deyab* at para. 76). In those circumstances—two viable and reasonable hypotheses, only one of which supports the penalty—it was appropriate to give the taxpayer the benefit of the doubt: *Farm Business Consultants Inc. v. The Queen*, [1994] 2 C.T.C. 2450 at 2457, 95 D.T.C. 200 at 205-206, aff'd [1996] F.C.J. No. 82, [1996] 2 C.T.C. 200 (F.C.A.).

[35] In contrast, the Tax Court found that Mr. Wood failed to provide a viable and reasonable explanation for the large amounts of unreported income. As in *Lacroix*, "the only explanation offered by the taxpayer was found not to be credible" (*Lacroix* at para. 30). Unlike the taxpayer in *Deyab*, Mr. Wood's explanation changed over time. The Tax Court observed Mr. Wood's "testimony at trial was inconsistent with prior statements made in the notice of objection and in the Fresh as Amended Notice of Appeal". In addition, Mr. Wood never provided documents to substantiate his claims promised during the audit and following his notice of objection.

[36] Unlike the taxpayer in *Deyab*, Mr. Wood had no other credible evidence consistent with the explanations he offered. Indeed, evidence inconsistent with his explanation is on the record. Mr. Wood's explanation for not reporting gross revenues in excess of \$1,100,000 in 2012 was that he used a net method for reporting income. Yet this is entirely inconsistent with the tax returns he filed in 2011 and 2012. Each return includes a statement of business activities reporting gross sales, commissions or fees, as well as significant expenses by category (including advertising, supplies, shipping, and office expenses) to arrive at net income. Mr. Wood took the

same approach in his statements of real estate rentals; for each property gross rent and expenses by category are reported to arrive at net income. The Tax Court found the receipts/invoices were not authentic because of inconsistencies in the testimony from Mr. Wood and Mr. Lancaster about when they were received and their appearance in March 2018, after the appeal was commenced in the Tax Court and a Fresh as Amended Notice of Appeal was filed.

[37] The Tax Court correctly identified that the respondent bore the onus of establishing that the conditions for the subsection 163(2) penalty were met. The Tax Court identified and applied the relevant principles from *Lacroix, Venne* and *Wynter*. The Tax Court had ample reason to doubt the veracity of Mr. Wood's explanation.

[38] Mr. Wood did not contest that he did not report the gross revenues in his 2011 or 2012 returns. Therefore it is clear there was a misrepresentation or omission.

[39] The Tax Court found "Mr. Wood's conduct in 2011 and 2012 showed a marked and substantial departure from the expected conduct of a reasonable businessperson in the same circumstances". Mr. Wood "had neither a bookkeeper nor accounting software to...keep track of significant revenues and expenses." The accountant's practice of relying only on interviews, bank statements and credit card statements to prepare tax returns "departs markedly from the standard to be expected". And, Mr. Wood "failed to provide a 'viable and reasonable hypothesis' regarding the large amounts of unreported income in 2011" or for not reporting revenues in excess of \$1.1 million in 2012. Accordingly, the Tax Court concluded Mr. Wood made the misrepresentation or omission in circumstances that amount to gross negligence.

[40] I see no error of law or palpable and overriding error of fact in the Tax Court's conclusions.

VI. Conclusion

[41] Accordingly, I would dismiss the appeal with costs.

"K.A. Siobhan Monaghan"

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J.A.

"I agree  
Mary J.L. Gleason J.A."

"I agree  
Anne L. Mactavish J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-219-20

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE LAFLEUR DATED  
AUGUST 19, 2020, NO. 2017-4185(IT)G**

**STYLE OF CAUSE:** COLIN WOOD v. HER MAJESTY  
THE QUEEN

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** FEBRUARY 3, 2022

**REASONS FOR JUDGMENT BY:** MONAGHAN J.A.

**CONCURRED IN BY:** GLEASON J.A.  
MACTAVISH J.A.

**DATED:** APRIL 7, 2022

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