Docket: 2013-1709(IT)G

BETWEEN:

FLORENCE SPURVEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of Brendan Spurvey (2013-1710(IT)G) on October 14, 2015, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Tony Cheung

JUDGMENT

For the attached reasons for judgment, the appeal from the assessments made under the *Income Tax Act* for the 2008 and 2009 taxation years is dismissed.

The Respondent is entitled to her costs if she wants them.

Signed at Toronto, Ontario, this 1st day of December 2015.

"Rommel G. Masse"

Masse D.J.

Docket: 2013-1710(IT)G

BETWEEN:

BRENDAN SPURVEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Citation: 2015 TCC 300
Date: 20151201
Dockets: 2013-1709(IT)G
2013-1710(IT)G

BETWEEN:

FLORENCE SPURVEY,
BRENDAN SPURVEY,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

Overview

[1] These two appeals were heard together on common evidence.

[2] Florence and Brendan Spurvey are appealing the penalties for gross negligence that were imposed on them pursuant to subsection 163(2) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the "Act") in relation to their 2008 and 2009 taxation years. They were referred by a friend to unscrupulous tax preparers who led them to believe they would get huge tax refunds of all the taxes they had paid in the last 10 years. This was done by claiming very large fictitious business losses. The fact is that the Appellants never owned or operated any kind of business at all during those years. The Canada Revenue Agency (the "CRA") denied the losses and penalized the Appellants pursuant to subsection 163(2) of the Act. This case pertains only to the penalties that were imposed.

[3] The issue is simply whether the Appellants either knowingly, or in circumstances amounting to gross negligence, made or acquiesced in the making of false statements in their returns so as to attract the harsh penalties provided for in subsection 163(2) of the Act.

Factual Context

[4] Florence and Brendan Spurvey are two senior citizens who were duped by a friend, Colleen Thompson, and an unknown tax preparer named Alex, whom the Spurveys never even met. During the years in question, they earned modest income from employment, pension income, old age security, Canada pension and employment insurance. Florence is a high school graduate and is a trained registered practical nurse. She has worked as such for the past 28 years. She has in the past operated a home craft business and so she understands concepts like business income and expenses as well as profit and loss. During 2008 and 2009, Florence was employed at the Runnymede Health Care Centre. At no time during those years did she own or operate any kind of a business.

[5] Brendan Spurvey has a grade 11 high school education and is a trained and certified tradesman in four different trades: pipefitter and steamfitter, oil burner mechanic, marine diesel mechanic and electrician. However, he never worked at any of them. He was employed by Canadian Tire for about 20 years until 2008 or 2009. He never owned or operated a business. In the past Florence and Brendan used Softron Tax Preparers to prepare their tax returns. The fee was in the range of $40 to $120 each for this service. Florence stated that she never got any refunds in the past that she can remember. Brendan states that he never got much of a refund in the past; sometimes he got a bit of money back and other years he had to pay a bit more taxes.

[6] Back in 2009, Colleen Thompson, who was a friend of Florence, told them that they could obtain a refund of all taxes paid dating back to the past 10 years. All Florence and Brendan had to do was submit copies of their tax returns dating back to 1999. These were to be passed on to a third party who would take care of all the paperwork. In return, the third party was to be paid 45% of any tax refunds that were received. The Spurveys asked Ms. Thompson how this could be; how could they get a refund of all taxes paid over the last 10 years? Ms. Thompson told them that years ago, one of the Prime Ministers of Canada had put a clause into the Constitution making this tax holiday scheme legal and that they had nothing to worry about. This information had been on the Internet, but had since been taken down. Ms. Thompson worked with a group of lawyers so Florence put some faith in what Ms. Thompson was saying. Brendan testified that he did not know if Ms. Thompson was an accountant or a lawyer; she could be a janitor for all he knew. She claimed she worked with some lawyers but Brendan does not know who they are. Brendan believes that Ms. Thompson was out to recruit people to participate in this scheme.

[7] Florence and Brendan got copies of their returns, gave them to Ms. Thompson and signed papers that were given to them by Ms. Thompson. Ms. Thompson supposedly gave all of this paperwork to a person named Muntaz Rasool who would take care of things. Brendan testified that he never spoke to Mr. Rasool; only Florence did. Florence only spoke to him over the phone, perhaps two times. Mr. Rasool assured her that this scheme was all legal. At one point in time, Ms. Thompson told Florence that Mr. Rasool took too much time to prepare the returns, so the paperwork was turned over to another person named Alex. The Spurveys do not know his last name. Florence did ask Ms. Thompson what was Alex's last name, but Ms. Thompson never did answer. The Spurveys never did get the name of the company or outfit that Mr. Rasool and Alex worked for. Florence did speak to Alex on the phone but Brendan never did. Alex told Florence that he was a tax arbitrator with the Tax Arbitration Board. Alex also assured her that this scheme was all legal and it was her right under the Constitution to receive 10 years of back taxes. She asked Alex to explain this to her, but Alex gave her a speech using words that were beyond her understanding. She told him she did not understand and his response was that she did not need to understand. She was simply told by Ms. Thompson and by Alex to sign her returns and other documents; everything was perfectly legal and it was in the Constitution. The Spurveys did not seek any further clarifications from anybody, not from another tax preparer, not from an accountant, not from a lawyer and not from the CRA. It is clear that they never checked out and probably never asked for any references regarding Alex. They simply went on faith and the expectation of getting back a lot of money.

[8] Florence admits having signed a T1 adjustment request for 2008 on September 16, 2009 (Exhibit R-1, Tab 5) and a related request for loss carryback to the years 2005, 2006 and 2007 on September 18, 2009 (Exhibit R-1, Tab 6). In this T1 adjustment request, she claimed business losses in the amount of $180,559. The so-called business was that of an "agent" and the losses are detailed in the statement of agent activities (Exhibit R-1, Tab 3). She requested to use $51,457 of this business loss against her income in the 2008 taxation year and requested that the unused balance be carried back and applied to her 2005, 2006 and 2007 taxation years (Exhibit R-1, Tab 6).

[9] On April 1, 2010, Florence signed her 2009 tax return (Exhibit R-1, Tab 2) and a related request for loss carryback (Exhibit R-1, Tab 8). In her 2009 tax return, Florence claimed business losses in the amount of $196,613.39. Again, the business was that of an "agent" and the losses are detailed in the statement of agent activities (Exhibit R-1, Tab 4). Florence requested to use $61,639.39 of the 2009

business losses against her income in the 2009 taxation year and requested that the unused balance of $134,974 be carried back to her 2006, 2007 and 2008 taxation years (Exhibit R-1, Tab 8).

[10] Florence did not understand any of these documents or what they contained, but she signed them anyway. She did not seek the advice of an accountant, a lawyer, the CRA or any other person who could explain them to her. She admits that she was expecting to get a refund of $9,571. That refund is much bigger than she had ever gotten in the past and, in fact, she had never gotten a refund in the past. She did question Alex about the size of this refund, but she did not understand his response. In spite of that, she still did not seek advice from anyone else.

[11] Brendan reviewed and signed all documents that were presented to him by Ms. Thompson. On September 16, 2009 he signed a T1 adjustment request for 2008 (Exhibit R-2, Tab 4) and a related request for loss carryback to the years 2005, 2006 and 2007 dated September 18, 2009 (Exhibit R-2, Tab 5). In this T1 adjustment request, Brendan claimed business losses in the amount of $302,592. The business was that of an "agent" and the losses are detailed in the statement of agent activities for 2008 (Exhibit R-2, Tab 2). Brendan requested to use $52,823 of this business loss against his income in the 2008 taxation year and requested that the unused balance be carried back and applied to his 2005, 2006, and 2007 taxation years (Exhibit R-2, Tab 5).

[12] On April 1, 2010, Brendan signed his 2009 tax return (Exhibit R-2, Tab 7) together with a request for loss carryback to the years 2006, 2007 and 2008 (Exhibit R-2, Tab 8). Brendan claimed business losses in the amount of $288,354.11. Again, the business was that of an "agent" and the losses are detailed in the statement of agent activities (Exhibit R-2, Tab 3). Brendan requested to use $45,203.11 of the 2009 business losses against his income in the 2009 taxation year and requested that the unused balance of $243,151 be carried back to his 2006, 2007 and 2008 taxation years (Exhibit R-2, Tab 8).

[13] Brendan admits to looking these documents over, reading them and signing them. Florence thinks she may have looked at the documents when she signed them. By signing their returns and the requests for loss carryback, both Florence and Brendan certified that the information contained therein was correct and complete. All the documents are signed "per Florence Spurvey" or "per Brendan Spurvey" as the case may be. It is also clear that the tax preparer did not indicate on the signature page of the return who had prepared the return (Exhibit R-1, Tab 2, page 33; Exhibit R-2, Tab 7, page 39). Brendan saw the large numbers described

as business losses. He testified that he knew the numbers did not look right at the time. He and Florence went along with whatever Ms. Thompson and Alex said because they were expecting a big amount. I find that Brendan's suspicions were definitely aroused and he admits that this entire scheme, as it was explained to him, rang a bell for him.

[14] On December 4, 2009, the CRA sent letters to both Florence and Brendan questioning their T1 adjustment requests for the 2008 taxation year. These letters asked them to complete a business questionnaire, provide the identity of their tax preparer, provide all source documents supporting their claimed business expenses, as well as all information in support of their claim that they were operating a business. This demand letter most certainly raised some red flags concerning the propriety of what they had done for 2008. However, they did not respond to this letter but instead sent it to Alex who prepared a response (Exhibit R-1, Tab 1; Exhibit R-2, Tab 1). These responses are identical in wording. They make no sense at all and are completely non-responsive to the concerns raised by the CRA. What is revealing, however, is that the letters sent by CRA to Florence and Brendan, which clearly raise some obvious concerns, were sent to them before they submitted their 2009 tax returns. Yet, in spite of these obvious red flags, Florence and Brendan still allowed Alex to prepare and file their 2009 tax returns in April 2010 when they knew that the CRA was questioning their business expenses for 2008.

[15] The CRA sent another demand letter to Florence and Brendan on June 18, 2010 (Exhibit R-1, Tab 9; Exhibit R-2, Tab 9) advising them that the CRA was proposing to disallow their claimed business losses for 2008 as well as their request for loss carryback. These letters also required them to provide proof of their business expenses for 2009 — which did not exist. Again, they did not respond to these letters from the CRA and instead provided them to Alex who prepared a reply (Exhibit R-1, Tab 10; Exhibit R-2, Tab 10). These replies are again identical in wording to each other and again are completely non-responsive to the concerns raised by the CRA. Again, these responses are complete and utter nonsense. It is to be emphasized that all of these documents were supposedly prepared by Alex and yet nowhere is he indicated as the author of any of the documents.

[16] The Minister of National Revenue (the "Minister") disallowed the claimed business losses for both the 2008 and 2009 taxation years. Notices of reassessment for 2008 and notices of assessment for 2009 were sent to the Appellants. The Appellants were assessed penalties for gross negligence pursuant to subsection

163(2) of the Act. As already indicated, these penalties for gross negligence are the subject of the present appeals.

[17] Although they signed the documents, both Florence and Brendan indicated that they did not understand them. They do not know how the numbers in all these documents were calculated and they did not understand what was involved. However, Brendan agrees that the numbers did not look right. They testified that they did not know what "statement of agent activities" meant or what the business activity of "agent" meant; they did not understand any of this. They acknowledge that the box reserved for the identification of the tax preparer was left blank. They trusted Alex to do the right thing even though he did not identify himself on the returns as the professional tax preparer. They did not ask anyone else about Alex. They did not seek counsel from another tax preparer, an accountant, a lawyer or the CRA even though they did not understand what Alex was doing or his explanations. They simply put all their faith and confidence in Ms. Thompson and Alex in the hopes of receiving large refunds. Florence acknowledges that she was expecting a refund of about $9,500 for 2009 which seemed large to her given that she had never gotten refunds in the past. Brendan simply went along with the scheme because he was expecting big money — all his taxes for the last 10 years. They in fact did not get any refund at all.

Legislative Dispositions

[18] Subsection 163(2) of the Act reads in part as follows:

> 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 . . .

[19] According to subsection 163(3), the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

Analysis

[20] I will apply the same analysis as I did in the case of *Chartrand v. The Queen*, 2012-3534(IT)G.

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

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

[22] There can be no question that the Appellants' 2008 T1 adjustment requests, their 2009 tax returns and their related requests for loss carryback contained false statements. The Appellants never owned or operated any kind of a business during the years under consideration and therefore could not have had any business income or business expenses. Their claims for business losses have no foundation in fact and are patently false.

[23] Did the Appellants make false statements either knowingly or in circumstances amounting to gross negligence? I will restrict this analysis only to the issue of gross negligence. The burden of proof lies on the Crown. It is not sufficient for the Crown to prove mere negligence; it must go beyond simple negligence and prove that the Appellants were grossly negligent.

[24] Negligence is defined as the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. This definition of negligence is very well known in Anglo-Canadian jurisprudence such that no authority need be cited for it. However, gross negligence requires something more than mere negligence. Gross negligence involves greater neglect than simply a failure to use reasonable care. It involves a high degree of negligence tantamount to intentional acting or indifference as to whether the law is complied with or not; see *Venne v. Canada*, [1984] F.C.J. No. 314 (QL). In *Venne*, Justice Strayer of the Federal Court (Trial Division) cautions that subsection 163(2) of the Act "is a penal provision and it must be interpreted restrictively so that if there is a reasonable interpretation which will avoid the penalty in a particular case that construction should be adopted" and the taxpayer should be given the benefit of the doubt. In *Farm Business Consultants Inc. v. Canada*, [1994] T.C.J. No. 760 (QL), Justice Bowman (as he then was) of the Tax Court of Canada stated at paragraph 23 that the words "gross negligence" in subsection 163(2) imply conduct characterized by so high a degree of negligence that it borders on recklessness. In such a case a court must, even in applying a civil standard of proof, scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established (paragraph 28).

[25] It is also well-settled law that gross negligence can include "wilful blindness". The doctrine of wilful blindness is well known to the criminal law. The

concept of "wilful blindness" in the context of the criminal law was fully explained by Justice Cory of the Supreme Court of Canada in the decision in *R. v. Hinchey*, [1996] 3 S.C.R. 1128. The rule is that if a party has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. Stated otherwise, "wilful blindness" occurs where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth, preferring instead to remain ignorant. There is a suspicion which the defendant deliberately omits to turn into certain knowledge. The defendant "shut his eyes" or was "wilfully blind".

[26] It has been held that the concept of "wilful blindness" is applicable to tax cases; see *Canada v. Villeneuve*, 2004 FCA 20, and *Panini v. Canada*, 2006 FCA 224. In *Panini*, Justice Nadon made it clear that the concept of "wilful blindness" is included in "gross negligence" as that term is used in subsection 163(2) of the Act. He stated:

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

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

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

No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence (see *DeCosta v. The Queen*, 2005 TCC 545, at paragraph 11; *Bhatti v. The Queen*, 2013 TCC 143, at paragraph 24; and *McLeod v. The Queen*, 2013 TCC 228, at paragraph 14).

[28] In *Torres v. The Queen*, 2013 TCC 380, Justice C. Miller conducted a very thorough review of the jurisprudence regarding gross negligence penalties under subsection 163(2) of the Act. He was able to distill the governing principles to be applied and the factors to be considered. I paraphrase his *dicta* found at paragraph 65:

a) Knowledge of a false statement can be imputed by wilful blindness.

b) The concept of wilful blindness can be applied to gross negligence penalties pursuant to subsection 163(2) of the Act . . . .

c) In determining wilful blindness, consideration must be given to the education and experience of the taxpayer.

d) To find wilful blindness there must be a need or a suspicion for an inquiry.

e) Circumstances that would indicate a need for an inquiry prior to filing, or flashing red lights as I called it in the *Bhatti* decision, include the following:

   i) the magnitude of the advantage or omission;

   ii) the blatantness of the false statement and how readily detectable it is;

   iii) the lack of acknowledgment by the tax preparer who prepared the return in the return itself;

   iv) unusual requests made by the tax preparer;

   v) the tax preparer being previously unknown to the taxpayer;

   vi) incomprehensible explanations by the tax preparer;

   vii) whether others engaged the tax preparer or warned against doing so, or the taxpayer himself or herself expresses concern about telling others.

f) The final requirement for wilful blindness is that the taxpayer makes no inquiry of the tax preparer to understand the return, nor makes any inquiry of a third party, nor the CRA itself.

[29] This is certainly not an exhaustive list and there may be other factors that ought to be considered depending on the circumstances of any particular case. I am of the view that Justice C. Miller provides an excellent template to be used in the analysis of cases of alleged gross negligence. I go on to consider these factors.

Education and Experience of the Taxpayer

[30] Florence Spurvey has a high school education and had the intelligence to become a trained practical nurse, a profession that she has enjoyed for some 28 years. Although she professes not to understand accounting principles or income taxes, she understands the concepts of business expenses and profit and loss since she did engage in a very small home based craft business in the past.

[31] Brendan Spurvey has a grade 11 high school education and was able to learn four different skilled trades although he states that he did not practice any of them. In my view, it is quite an accomplishment to be able to learn four different trades.

[32] They have had experience with tax preparers in the past. The Appellants are intelligent, articulate and literate. They are not so lacking in education or basic understanding of concepts such as business, profit and loss or taxes as to claim ignorance. Education, experience and intelligence are not factors that could relieve them of a finding they made false statements under circumstances amounting to gross negligence.

Suspicion or Need to Make an Inquiry

[33] There were ample and obvious warning signs or "red flags" that should have aroused the Appellants' suspicions and awakened in them the need to make further inquiries.

The Absurd Nature of the Proposed Scheme

[34] Florence and Brendan were both told that they had a constitutional right to a tax holiday such that they could expect to obtain a refund of all their taxes paid over the last 10 years if they used the services recommended to them by Ms. Thompson. This is such a ludicrous proposition in and of itself as to defy any semblance of credulity. To blindly accept such a ridiculous assertion from a previously unknown person whose last name they don't know and whom they still have not met, without verifying the legitimacy of what was being proposed is, quite frankly, astounding. One does not have to engage in much thought before concluding that if every citizen took advantage of this so-called constitutionally sanctioned scheme, then the entire country would soon be bankrupt. The Spurveys should have asked themselves, if this scheme was in the Constitution, why was it not well known by the public and why was it not well publicized by the CRA and by the government of Canada? Why would Softron or any other respected tax preparer not have recommended this tax savings strategy to them? If this scheme was in fact on the Internet, and it was not only legal but a constitutional right, why was the Internet site taken down? These obvious questions just scream out for answers. The specious nature of the proposed tax savings scheme is a factor that weighs heavily towards a finding of wilful blindness.

The Fee Structure

[35] The fee structure proposed by the tax preparer is concerning. In prior years, the Appellants paid Softron from $40 to $120 to prepare their returns. In the instant case, the tax preparer charged a fee of 45% of any monies refunded by the CRA — an extremely high fee given that the Appellants were seeking the return of all of their taxes paid over the last 10 years. This fee structure was so different from that of their prior tax preparer that it gives rise to the need to question the legitimacy of the tax preparer. This is another factor indicating wilful blindness.

Anonymity of the Tax Preparer

[36] There was always some distance that was maintained between the Spurveys and the tax preparer. They in fact never met Alex, whose last name they did not know. They never had any personal interviews with him and they never attended Alex's office in order to review their tax situation or their returns — very unusual when dealing with a supposed professional. Their only contact with Alex was essentially through Ms. Thompson and no one else. Florence did have some telephone communication with Alex, but Brendan never did. The fact that they never personally met the anonymous and faceless Alex gives rise to a great deal of suspicion. This is another strong factor that weighs in favour of a finding of wilful blindness.

Magnitude of the Advantage

[37] The Appellants were hoping to receive all the taxes that they had paid in the past 10 years. This was a significant advantage compared to their true income and compared to what they were entitled to in past years. This did or at least should have alerted them that something was just not right. This was a bright red flag that weighs towards a finding of wilful blindness.

Blatantly False Statement — Readily Detectable

[38] The Appellants claimed huge business expenses when they in fact were not even in business. The assertion that they were in business and that they had incurred huge business expenses was patently false. This blatant falsehood would have been easily and readily detected by simply taking more than just a cursory look at the documents that Alex had prepared for them. No one could reasonably believe that they could claim such large business losses when not actually engaged in business. In and of itself, this blatantly false claim of such large business expenses is sufficient to raise more than a suspicion — it cries out for further investigation.

Tax Preparer does not Acknowledge Preparing Returns

[39] It is obvious that the Appellants paid someone to prepare their tax returns. Yet, the tax preparer did not complete the box reserved for tax professionals. This box, on the last page of the return, is right beside the line to be signed by the Appellants certifying the information is correct and complete. This box labelled "For professional tax preparers only" is obvious to the taxpayer who signs the return. The fact that it was left empty should have alerted the Appellants to the fact that the tax preparer may have wished to remain anonymous to the CRA. This may not be a major point, but when considered cumulatively with all the other warning signs, it should have aroused suspicion in the mind of the Appellants.

Tax Preparer Makes Unusual Requests

[40] The Appellants were instructed to sign their returns after the word "per" that was handwritten on the signature line. Again, this is not a major factor, but the word "per" should have raised some concerns in the mind of the Appellants.

Tax Preparer Previously Unknown to Taxpayers

[41] As I have already indicated, Alex was previously unknown to the Appellants. The Appellants in fact never did meet him. The Appellants only knew Alex through Ms. Thompson. This is perhaps a small factor, but when taken together with all the other factors, it should have alerted the Appellants to undertake further investigation with regard to Alex. The Appellants did no due diligence; they were blinded by the desire to obtain huge tax refunds.

Explanation by Tax Preparer Regarding False Statement is Incomprehensible

[42] Whenever Florence asked questions of Alex, the explanations provided did not make any sense to her. She told him that she did not understand. Rather than provide clarifications, Alex simply told her that she did not need to understand. His incomprehensible explanations and his statement that she did not need to understand give rise to much suspicion. Brendan never even spoke to Alex and thus did not ask any questions. Brendan was only interested in getting huge tax refunds.

Others do not do it or the Taxpayer is Warned Against it or the Taxpayer is Fearful of Telling Others

[43] This is not a factor in the circumstances of this particular case.

Lack of Inquiries of Other Professionals or of the CRA

[44] It is clear that the Appellants did not understand their returns or how the numbers were calculated. Brendan admitted that the numbers just did not look right. The explanations provided by Alex were not satisfactory. Yet, the Appellants did not seek clarification from any other professionals such as a tax accountant, a tax lawyer or from the CRA. I conclude there were sufficient warning signs to cause the Appellants to make further inquiries of other professionals. As stated by Justice V.A. Miller in *Janovsky v. The Queen*, 2013 TCC 140:

> 24 . . . If he [the taxpayer] indeed did not understand the terminology used by FA in his return and if he did not understand how FA calculated his expenses, then he had a duty to ask others aside from FA. . . .

[45] In the instant case, if the Appellants truly did not understand what the tax preparer was doing, then they should have sought advice elsewhere. This, they did not do. Their failure to seek out advice from other professionals or even from the CRA in the face of the highly questionable information contained in their tax returns and the lack of appropriate explanation is another indicator of wilful blindness.

CRA's Demand for Information Regarding 2008

[46] As already indicated, the CRA sent a letter dated December 4, 2009 to the Appellants requesting documentation and information in regard to their claimed business losses in 2008 and the related request for loss carryback. This letter most certainly must have alerted the Appellants to the fact that their 2008 T1 adjustment request and related request for loss carryback were questionable. What is revealing, however, is that the letters sent by CRA to Florence and Brendan, which clearly raise some obvious concerns, were sent to them ***before*** they submitted their 2009 tax returns. Yet, in spite of these obvious concerns, Florence and Brendan still allowed Alex to prepare their 2009 tax returns in April 2010 when they knew that the CRA was questioning their business expenses. The CRA letter was a clear indication that there were serious problems, yet the Appellants chose to ignore this important warning sign. They were wilfully blind.

Appellants' Blind Trust in Tax Preparer

[47] The Appellants simply indicated that they trusted Alex.

[48] In some cases, a taxpayer can shed blame by pointing to negligent or dishonest professionals in whom the taxpayer reposed his trust and confidence; for example, see *Lavoie c. La Reine*, 2015 CCI 228, a case where the taxpayers relied on a lawyer whom they had known and trusted for more than 30 years and who was a trusted friend. However, cases abound where the taxpayers could not avoid penalties for gross negligence by placing blind faith and trust in their tax preparers without at least taking some steps to verify the correctness of the information supplied in their tax return.

[49] In *Gingras v. Canada*, [2000] T.C.J. No. 541 (QL), Justice Tardif wrote:

> 19 Relying on an expert or on someone who presents himself as such in no way absolves from responsibility those who certify by their signature that their returns are truthful.
>
> . . .
>
> 30 It is the person signing a return of income who is accountable for false information provided in that return, not the agent who completed it, regardless of the agent's skills or qualifications.

[50] In *DeCosta*, above, Chief Justice Bowman stated:

> 12 . . . While of course his accountant must bear some responsibility I do not think it can be said that the appellant can nonchalantly sign his return and turn a blind eye to the omission of an amount that is almost twice as much as that which he declared. So cavalier an attitude goes beyond simple carelessness.

[51] In *Laplante v. The Queen*, 2008 TCC 335, Justice Bédard wrote:

> 15 In any event, the Court finds that the Appellant's negligence (in not looking at his income tax returns <u>at all</u> prior to signing them) was serious enough to justify the use of the somewhat pejorative epithet "gross". The Appellant's attitude was cavalier enough in this case to be tantamount to total indifference as to whether the law was complied with or not. Did the Appellant not admit that, had he looked at his income tax returns prior to signing them, he would have been bound to notice the many false statements they contained, statements allegedly made by Mr. Cloutier? The Appellant cannot avoid liability in this case by pointing the finger at his accountant. By attempting to shield himself in this way from any liability for his income tax returns, the Appellant is recklessly abandoning his responsibilities, duties and obligations under the Act. In this case, the Appellant had an obligation under the Act to at least quickly look at his income tax returns

> before signing them, especially since he himself admitted that, had he done so, he would have seen the false statements made by his accountant.
>
> [Emphasis in original.]

[52] In *Brochu v. The Queen*, 2011 TCC 75, gross negligence penalties were upheld in a case where the taxpayer simply trusted her accountant's statements that everything was fine. She had quickly leafed through the return and claimed that she did not understand the words "business income" and "credit", but yet had not asked her accountant nor anyone else any questions in order to ensure that her income and expenses were properly accounted for. Justice Favreau of this Court was of the view that the fact that the taxpayer did not think it necessary to become informed amounted to carelessness which constituted gross negligence.

[53] In *Bhatti*, above, Justice C. Miller pointed out:

> 30 . . . It is simply insufficient to say I did not review my returns. Blindly 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 the other . . . .

[54] In *Janovsky*, above, Justice V.A. Miller stated:

> 22 The Appellant said he reviewed his return before he signed it and he did not ask any questions. He stated that he placed his trust in FA as they were tax experts. I find this statement to be implausible. He attended one meeting with the FA in 2009. He had never heard of them before and yet between his meeting with them and his filing his return in June 2010, he made no enquiries about the FA. He did not question their credentials or their claims. In his desire to receive a large refund, the Appellant did not try to educate himself about the FA.
>
> 23 Considering the Appellant's education and the magnitude of the false statement he reported in his 2009 return, it is my view that the Appellant knew that the amounts reported in his return were fake.

[55] Another recent example can be found in the matter of *Atutornu v. The Queen*, 2014 TCC 174, where the taxpayers simply 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 their returns.

Conclusion

[56] There is no doubt that the Appellants' 2008 T1 adjustment requests, their 2009 tax returns and the related requests for loss carryback contained false statements — the Appellants did not carry on a business and they did not incur any business losses whatsoever. I can come to no other conclusion than that the Appellants were wilfully blind as to the speciousness of these statements. There were many red flags or warning signs and they simply ignored them all. I am satisfied that the Crown has discharged its burden of proof and I am satisfied that the Appellants made the false statements in their returns in circumstances amounting to gross negligence. As such, they are properly subject to the penalties imposed pursuant to subsection 163(2) of the Act.

[57] The Appellants are people of modest means and the penalties are very harsh. The Appellants will certainly suffer hardship as a result of these penalties. However, I can offer no relief against the harshness of the penalties. The only question I can decide is whether the penalties are well founded or not.

[58] The Court draws to the Appellants' attention the fact that a waiver of the penalty and interest may be sought from the CRA pursuant to the taxpayer relief provisions in subsection 220(3.1) of the Act. This Court has no role to play in relation to such applications and it should be made clear that a waiver of penalty and interest lies entirely in the discretion of the Minister. Such an application is made to the CRA; the CRA publishes an information circular (IC07-1) as well as a form (RC4288) for making taxpayer relief applications.

[59] For all the foregoing reasons, these appeals are dismissed. The Respondent is entitled to her costs if she wants them.

Signed at Toronto, Ontario, this 1st day of December 2015.

"Rommel G. Masse"

Masse D.J.

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APPEARANCES:	
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