Docket: 2013-1178(IT)G

BETWEEN:

EDWARD GRAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 6, 2015, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the Appellant:	Jeffrey Radnoff Charles Hayworth (student-at-law)
Counsel for the Respondent:	Christian Cheong

JUDGMENT

For the attached reasons for judgment, the appeal from the assessment made under the *Income Tax Act* for the 2008 taxation year is dismissed.

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

Signed at Kingston, Ontario, this 8th day of March 2016.

"Rommel G. Masse"

Masse D.J.

Citation: 2016 TCC 54
Date: 20160308
Docket: 2013-1178(IT)G

BETWEEN:

EDWARD GRAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

Overview

[1] The Appellant, Edward Gray, is appealing the penalty for gross negligence that was imposed on him pursuant to subsection 163(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act") in relation to his 2008 taxation year and a related request for loss carryback to the 2005, 2006 and 2007 taxation years. The Appellant's tax preparer prepared the Appellant's tax return in such a way as to claim very large fictitious business losses. These business losses, if allowed, would result in the refund to the Appellant of all the taxes paid or deducted at source for the 2005, 2006, 2007 and 2008 taxation years. The fact is that the Appellant never owned or operated any kind of business at all during the taxation period under consideration. The Canada Revenue Agency (the "CRA") disallowed the losses and penalized the Appellant pursuant to subsection 163(2) of the Act. This case pertains only to the penalties that were imposed.

Factual Context

[2] The Appellant is an 85-year-old gentleman. He went to university from 1949 to 1952 in Montreal. He took one year of commerce but that was not for him. Therefore, he switched to arts and pre-med but he left school without obtaining a degree. After leaving school, he went to Europe for a while. On returning to

Canada, he qualified to become a pilot. He found work with Trans-Canada Air Lines (now Air Canada). He flew for Air Canada he says for "35 years, 5 months and 2 days" (transcript, page 8). I get the impression that he is a man who greatly enjoyed his professional career. He retired from Air Canada in 1990.

[3] He has no business or accounting experience and he has always had someone else prepare his tax returns. At first he had Guardian Trust prepare his tax returns and for two years he had someone from TACS, a tax company, do his tax returns for him. However, he found that TACS was outrageously expensive for what was seemingly a fairly simple tax return. He believes the fee was about $500.

[4] Mr. Gray has known Ted Strachan for about 20 years. Their wives are best of friends. Mr. Strachan referred the Appellant to a person named Carlton Branch, who had done Mr. Strachan's tax returns for some time. Mr. Gray retained Mr. Branch to do his tax returns and Mr. Branch did so for about four or five years without incident.

[5] Tax time came around in April 2009. Mr. Branch came to Mr. Gray's house to obtain his tax information as he usually did. At that time, there were several people present, the Appellant's wife, Mr. Strachan and his wife Carrol Strachan, Norman Galt and his wife Margaret Galt. Mr. Gray has known the Galts for about 10 years. This meeting was really in the nature of a sales pitch by Mr. Branch on behalf of Fiscal Arbitrators, a firm of professional tax preparers of which he and a colleague, Larry Watts, were members. At this meeting, Mr. Branch told the group that there was a new method of doing tax returns that resulted in good refunds. According to Mr. Gray, Mr. Branch did a very smooth job of explaining how the whole thing worked although Mr. Gray had some difficulty in explaining this method. Mr. Gray was given to understand that the government simply regarded him as a social insurance number and that he, as a natural person, was a separate and distinct person for tax purposes. It was explained to him that he could claim business losses; these business losses really amount to his personal living expenses, which is what he says the social insurance number was paid to keep him alive. I have to confess that this method makes no sense at all to me. Mr. Branch stated that this method was completely above board and perfectly legal. Mr. Branch had worked for the CRA in the past and so he had the aura of expertise. Mr. Strachan stated that his wife Carrol had received a significant refund and she confirmed at this meeting that she in fact did receive a significant refund using this method. Consequently, Mr. Gray felt confident that this new way of doing tax returns was indeed above board. Mr. Branch explained that if they chose to use this method, then they had to agree that, if there were any communications

with the CRA, they should insist that it all be done in writing and that Mr. Branch would take care of any responses to the CRA.

[6] Mr. Galt was at this meeting. He worked as a banker for 28 years and held a variety of responsible positions. Mr. Galt provided his recollection of the meeting. He understood that Carlton Branch and Larry Watts were partners in a company called Fiscal Arbitrators ("FA"). They had extensive experience with the CRA. Mr. Galt understood that FA had developed a new methodology of filing tax returns. Over a thousand people across Canada had signed on to this new method. Ms. Strachan confirmed that she herself had received a refund using this method. Mr. Galt stated that the methodology was extremely confusing and convoluted. He stated that the taxpayer filed as if he was outside of the normal method. According to this method, individuals had the right to deduct individual expenses and they were not beholden to report anything to the government. Mr. Galt realized that this was a big conundrum. This method had not been tried by anybody else other than FA. Mr. Galt did not know if the CRA would allow or disallow it. He was cautious about doing it. He questioned Mr. Branch extensively about it and he decided to file his 2008 tax return the normal way. However, FA did file a claim for prior years on his behalf but it was disallowed by the CRA.

[7] FA did prepare the 2008 tax return for Mr. Gray and Mr. Gray did file it. A copy of the return can be found at Exhibit R-1, Tab 1. Although not admitting that he signed this return, the Appellant states that the signature on the last page of the return looks like his. I find as a fact on the balance of probabilities that it is his signature. Just above the Appellant's signature on the last page, there appears the usual certification that the taxpayer certifies that the information contained in the return and attached documents is complete and accurate and fully discloses all his income. He says that he did not see this. Just below his signature, there appears the warning that it is a serious offence to make a false return. He says that he may not have seen this but he is aware that you do not lie on your tax return. Just in front of his signature appears the word "per". He does not know who wrote this but he does not think that he did. He was simply told to sign "per" because that was the way it is done. He did not notice that box 490, reserved for the identification of the professional tax preparer that prepared the return, was left blank.

[8] The Appellant's return contains some blatantly false information. In his return, the Appellant claimed that he suffered net business losses for the year amounting to $458,476.10. This is completely and utterly false. The Appellant's only significant income during the 2008 taxation year was primarily pension income, Canada Pension Plan benefits, Old Age Security pension and income from

a Registered Retirement Income Fund — he had no business income. The Appellant never owned or operated any business whatsoever during 2008 and he never incurred the business expenses that were claimed. He simply does not know how any of the figures in his return were calculated. He certainly never provided FA with any information that would permit the calculation of those numbers.

[9] The Appellant states that he did not notice that he was to get a refund of some $40,800 for 2008. However, the refund is conspicuously shown just to the right of his signature on the last page of his return. It would be very difficult not to notice it. In addition, it is only human nature for a taxpayer to want to know the amount of his tax return. In past years, the Appellant usually ended up owing some additional tax rather than getting a refund.

[10] The Appellant also signed a request for loss carryback on May 10, 2009 (Exhibit R-1, Tab 1, pages 14 and 15), but he claims that he did not know that he did so. It is clearly his signature and therefore I find that he did sign this document. The Appellant claimed a portion of these business losses against his 2008 income and he requested that the balance be carried back and applied to his 2005, 2006 and 2007 taxation years. If these business losses were allowed, this would result in the Appellant having all the taxes that he had paid or were deducted at source refunded to him for 2005 through to 2008. He would have gotten a tax holiday for those four years. He states that he never authorized claiming a loss carryback and he states that he did not realize that he would not have had to pay taxes.

[11] The Appellant admits that he did look at his return, but it did not mean much to him because when it comes to numbers his brain turns to mush. He stated that the numbers he saw on the return seemed very large. He states that he may have seen that he was claiming business losses of more than $458,000. He queried this and he was informed that this is the way it is done. He was told "don't worry, that is — those things are the expenses for keeping you alive" (transcript, page 14). Mr. Gray admits that he did not provide any information to his tax preparer that would permit the calculation of that number. He does not know how this number was determined. He took no steps at all to verify the accuracy of the information that was contained therein. He says that he asked a lot of questions, but the answers that he was given eluded him.

[12] The Appellant received a letter from FA, a copy of which can be found at Exhibit A-1, Tab 2. He claims that he does not recall receiving it but he frankly admits that he is sure that he did. This letter purports to be a schedule to an agreement that he had with FA dated July 15, 2008. This agreement provided for

an initial fee of $500 and 10% of any refund (less the initial fee). The Appellant says that, at some point, this became 20% of any refund; he cannot explain how this happened. The total refund was estimated to be $130,114.29 for the four years spanning from 2004 to 2007. He does not remember paying the $500. He was only told that they would do his 2008 tax return and later on in the game he learned that they had thrown in a few other years.

[13] The CRA sent a letter to the Appellant on November 13, 2009 (Exhibit R-1, Tab 3) questioning his business losses and seeking documentary proof of the claimed business losses. When the Appellant saw this letter he was upset. He had no idea how he should respond to it so he tried to get a hold of Mr. Branch. He was not successful. He ended up talking to Mr. Watts who told him to send him the letter and he would respond to it. The response that Mr. Watts provided to the Appellant did not make any sense to him. More letters came from the CRA and the Appellant again gave them to Mr. Watts who looked after drafting a response. All the responses were nonsensical. Still, the Appellant did exactly as he was instructed to do by FA. One response in particular, which is shown at Exhibit A-1, Tab 24, is absolutely ridiculous. The Appellant was instructed to put a 3 cent or 5 cent stamp at the bottom right hand of the letter of response and to write his signature across the stamp at a 45 degree angle from the bottom left corner of the stamp to the top right corner of the stamp. He found that confusing but he never got an explanation as to why he should do this. Any explanations provided by Mr. Watts were always evasive and did not really make much sense. Mr. Watts would simply say most of the time that he would take care of it. The Appellant never did communicate with the CRA directly and never provided the information that the CRA requested. He continued to deal with FA since he did not know who else to turn to. He never sought any advice from any other person.

[14] Ultimately, the Minister of National Revenue (the "Minister") disallowed the claimed business losses, denied the request for loss carryback and applied a penalty pursuant to subsection 163(2) of the Act. The Appellant objected to this assessment but the Minister confirmed the assessment, hence the appeal to this Court.

[15] It is argued that Mr. Gray ought not to be held liable for gross negligence penalties because he had no knowledge of the false statements contained in his 2008 tax return nor was he wilfully blind or otherwise grossly negligent. It is argued that it is not wilful blindness or gross negligence to rely on the advice of a trusted tax preparer. Such reliance negates any finding of intentional conduct required for the assessment of gross negligence penalties. It is argued that

Mr. Gray honestly believed that he was entitled to a tax refund based on the advice of Mr. Branch and also based on the fact that Ms. Strachan had received a refund. He believed that this was completely above board. It is unjust to punish the Appellant for the wrongdoing of FA since he is an innocent victim of FA's fraudulent conduct. The Appellant therefore prays that his appeal be allowed with costs and that this Court waive the penalties and interest that are the subject of the present appeal.

[16] The Respondent is of the view that the Appellant never owned or operated any kind of business during 2008 and that his claimed business losses are obviously false. These false statements are of such a magnitude that, if allowed, would result in the refund of all taxes withheld or paid over the last four years. The Respondent submits that the Appellant knowingly made these false statements. In the alternative, the Appellant made, participated in, assented to or acquiesced in the making of, these false statements in circumstances amounting to gross negligence. At the very least, the Appellant was wilfully blind regarding the falseness of the statements contained in his tax return. The Respondent urges this Court to dismiss the appeal with costs.

Legislative Dispositions

[17] 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 . . .

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

Analysis

[19] Counsel for the Appellant has done a great deal of research and has supplied a book of authorities for my guidance. These authorities are: *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *Udell v. M.N.R.*, [1969] C.T.C. 704 (Ex. Ct.); *Venne v. Canada*, [1984] F.C.J. No. 314 (QL); *Dunleavy v. The Queen*, [1993] 1 C.T.C. 2648 (TCC); *Farm Business Consultants Inc. v. Canada*, [1994] T.C.J. No. 760 (QL), affirmed by the Federal Court of Appeal, [1996] F.C.J. No. 82 (QL); *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *Carlson v. The Queen*, [1998] 2 C.T.C. 2476 (TCC); *897366 Ontario*

Ltd. v. Canada, [2000] T.C.J. No. 117 (QL); *Findlay v. Canada*, [2000] F.C.J. No. 731 (QL); *Turcotte v. The Queen*, [2002] 2 C.T.C. 2806 (TCC); *Isaza v. The Queen*, [2002] 3 C.T.C. 2107 (TCC); *Therrien v. The Queen*, [2002] 3 C.T.C. 2141 (TCC); *410812 Ontario Ltd. v. Canada*, [2002] T.C.J. No. 176 (QL); *McGhee v. The Queen*, 2003 TCC 265; *Bernick v. The Queen*, 2003 TCC 433, affirmed by the Federal Court of Appeal, 2004 FCA 191; *Klotz v. The Queen*, 2004 TCC 147; *St-Pierre v. Canada*, [2002] T.C.J. No. 613 (QL); *Julian v. The Queen*, 2004 TCC 330; *Caron v. Canada*, [2002] T.C.J. No. 696 (QL); *Larouche v. The Queen*, 2004 TCC 629; *Mark v. The Queen*, 2006 TCC 35; *Hine v. The Queen*, 2012 TCC 295; and *Murugesu v. The Queen*, 2013 TCC 21.

[20] Counsel for the Respondent has also provided a book of authorities. These authorities are: *Venne v. Canada*, [1984] F.C.J. No. 314 (QL); *Canada v. Villeneuve*, 2004 FCA 20; *DeCosta v. The Queen*, 2005 TCC 545; *Panini v. Canada*, 2006 FCA 224; *Laplante v. The Queen*, 2008 TCC 335; *Gélinas v. The Queen*, 2009 TCC 136; *Chénard v. The Queen*, 2012 TCC 211; *Bhatti v. The Queen*, 2013 TCC 143; *Mullen v. Canada*, 2013 FCA 101; *Janovsky v. The Queen*, 2013 TCC 140; *McLeod v. The Queen*, 2013 TCC 228; *Brisson v. The Queen*, 2013 TCC 235; *Torres v. The Queen*, 2013 TCC 380, affirmed by the Federal Court of Appeal, 2015 FCA 60; *Allison v. The Queen* (February 4, 2014), TCC, 2013-2144(IT)I; *Guindon v. Canada*, 2015 SCC 41; *Lavoie c. La Reine*, 2015 CCI 228; and *Atutornu v. The Queen*, 2014 TCC 174.

[21] I am thankful to counsel for this helpful review of the authorities.

[22] It is axiomatic that our system of taxation is both self-reporting and self-assessing. It relies on the honesty and integrity of the individual taxpayer. It is based on the "honour system". The taxpayer has a duty to report his taxable income completely, correctly and accurately, no matter who prepares the return. Therefore, the taxpayer must be vigilant in ensuring the completeness and accuracy of the information contained in his return. As noted by Justice Martineau in *Northview Apartments Ltd. v. Canada (Attorney General)*, 2009 FC 74, at paragraph 11: "It is the essence of our tax collection system that taxpayers are sole responsible for self-assessment and self-reporting to the CRA."

[23] In the matter of *R. v. Jarvis*, 2002 SCC 73, Justices Iacobucci and Major of the Supreme Court of Canada explained the responsibilities and duties of taxpayers as well as some of the measures in the Act designed to encourage compliance:

> 49 Every person resident in Canada during a given taxation year is obligated to pay tax on his or her taxable income, as computed under rules prescribed by the Act (ITA, s. 2 . . .). The process of tax collection relies primarily upon taxpayer self-assessment and self-reporting: taxpayers are obliged to estimate their annual income tax payable (s. 151), and to disclose this estimate to the CCRA in the income return that they are required to file (s. 150(1)). . . . Upon receipt of a taxpayer's return, the Minister is directed, "with all due dispatch", to conduct an examination and original assessment of the amount of tax to be paid or refunded, and to remit a notice of assessment to this effect (ss. 152(1) and 152(2)). Subject to certain time limitations, the Minister may subsequently reassess or make an additional assessment of a taxpayer's yearly tax liability (s. 152(4)).
>
> 50 While voluntary compliance and self-assessment comprise the essence of the ITA's regulatory structure, the tax system is equipped with "persuasive inducements to encourage taxpayers to disclose their income" . . . . For example, in promotion of the scheme's self-reporting aspect, s. 162 of the ITA creates monetary penalties for persons who fail to file their income returns. Likewise, to encourage care and accuracy in the self-assessment task, s. 163 of the Act sets up penalties of the same sort for persons who repeatedly fail to report required amounts, or who are complicit or grossly negligent in the making of false statements or omissions.
>
> 51 It follows from the tax scheme's basic self-assessment and self-reporting characteristics that the success of its administration depends primarily upon taxpayer forthrightness. As Cory J. stated in *Knox Contracting*, *supra*, at p. 350: "The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed." It is therefore not surprising that the Act exhibits a concern to limit the possibility that a taxpayer may attempt "to take advantage of the self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act" . . . .
>
> [Emphasis added. Citations omitted.]

[24] The penalties provided for in section 163 of the Act have been conceived in order to ensure the integrity of our self-assessing and self-reporting system and to encourage a taxpayer to exercise care and accuracy in the preparation of his return, no matter who prepares the return. In *Sbrollini v. The Queen*, 2015 TCC 178, Justice Boyle of this Court opined that the penalty provisions set out in subsection 163(2) of the Act reflect:

> 15 . . . the significance and importance of the requirements of honesty and accuracy in the Canadian self-reporting income tax system. . . .

> 16 Such penalties are properly payable . . . if [a taxpayer] knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in, the making of false statements or omissions in his returns.

[25] Therefore, I am of the view that the decision of whether or not a taxpayer should be subjected to the penalties under subsection 163(2) of the Act should be determined in light of the positive responsibilities and duties of the taxpayer to accurately and completely report his income in a self-reporting and self-assessing system.

[26] 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, participating in, assenting to or acquiescing in the making of, that false statement.

[27] It cannot be disputed that Mr. Gray's 2008 tax return contained false statements. He never owned or operated any kind of business during that year. His claim for business losses is patently false.

[28] Under cross-examination, Mr. Gray admits that he did take a look at his return before filing it although he claims that he really did not understand it. He also stated that he did see some numbers on the return and they seemed very large. He states that he may have seen that he was claiming business losses of more than $458,000. Mr. Gray does not know how this number was calculated and he admits that he did not provide any information to FA that would permit the calculation of that number. Therefore, he must have known that these numbers had no foundation in fact. I come to the conclusion on the balance of probabilities that the Appellant had knowledge that his tax return contained false information and that he came to this realization when he saw the unusually large numbers in his return that are patently obvious and that are described on the return as business losses. This finding is sufficient in and of itself to justify the imposition of penalties pursuant to subsection 163(2) of the Act.

[29] If I am mistaken in concluding that the Appellant had knowledge of the false information, then I must go on and consider whether or not he made, participated in, assented to or acquiesced in the making of, the false statement that was in his return in circumstances amounting to gross negligence.

[30] There is a difference between ordinary negligence and gross negligence. Several of my colleagues and myself have canvassed the law in this area on many occasions in recent decisions. Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. 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*, above. In *Venne*, Justice Strayer of the Federal Court (Trial Division) stated that subsection 163(2) is a penal provision and must be construed strictly. These penalties ought to be imposed only where there is a high degree of blameworthiness involving knowing or reckless misconduct.

[31] However, in *Guindon*, above, the Supreme Court of Canada held that section 163.2 of the Act, which provides for the imposition of gross negligence penalties against third party tax preparers, is not a penal provision. The section provides for an administrative penalty that is primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity — the purpose being to promote honesty and deter gross negligence, qualities that are essential to the self-reporting system of income tax assessment. I am of the view that the same can be said of the penalties provided for in subsection 163(2) with which we are dealing. One should therefore not look for proof approaching the standard of beyond a reasonable doubt before concluding that the imposition of penalties as provided by subsection 163(2) is justified. Nonetheless, the penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes made by a taxpayer.

[32] It is also well-settled law that gross negligence can include "wilful blindness". The concept of "wilful blindness", well known to the criminal law, was explained by Justice Cory of the Supreme Court of Canada in *Hinchey*, above. 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.

[33] It has been held that the concept of "wilful blindness" is applicable to tax cases; see *Villeneuve*, above, and *Panini*, above. 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.

[34] 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.

Obviously, 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*, above, at paragraph 11; *Bhatti*, above, at paragraph 24; and *McLeod*, above, at paragraph 14).

[35] In *Torres*, above, Justice C. Miller of this Court conducted a very thorough review of the jurisprudence regarding gross negligence penalties under subsection 163(2) of the Act. He summarized the governing principles to be applied 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 . . . 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.

[36] This is certainly not an exhaustive list.

[37] The Appellant is an intelligent, sophisticated and articulate person who has engaged in post-secondary studies in commerce and pre-med. He is intelligent enough to have qualified to be an airline pilot — quite an accomplishment in my view. Although he professes to not have much of an understanding of tax returns, he knows the difference between business income and employment income. He knows the difference between profit and loss. Education, experience and intelligence are not factors that could relieve the Appellant of a finding that he made false statements under circumstances amounting to gross negligence.

[38] There were ample warning signs that should have aroused the Appellant's suspicions and motivated in him the need to make further inquiries:

(a) **Speciousness of the Tax Savings Scheme** — Mr. Branch had prepared the Appellant's tax returns for a few years in the past without incident, then for 2008, Mr. Branch suggests a totally different and new method of tax preparation. This should arouse some curiosity and certainly some questions about what was amiss with the way Mr. Branch had prepared his returns in the past. The scheme proposed by Mr. Branch and FA was on its face ridiculous and this should have been immediately obvious to the Appellant. The theory that there was a way that an individual could be separated from his social insurance number and thus create two separate entities for tax purposes is ludicrous. No one can honestly believe that personal expenses could be charged against personal income in the guise of business expenses. Even if the Appellant believed this scheme to be legitimate, he should have asked himself how Mr. Branch and FA came up with the numbers that they did. The business losses reported in the Appellant's 2008 tax return make no sense at all and the Appellant knew this. This is a factor that strongly suggests gross negligence through wilful blindness.

(b) **The Fee Structure** — The Appellant testified that his prior tax preparer, TACS, charged him outrageous fees just for completing a seemingly simple tax return. Yet, FA charged him the exact same fee of $500 plus 10% of any refund (less the initial fee). This later turned out to be 20%. It is clear that the Appellant was expecting a significant return compared to other years and therefore the fee that he would have had to pay would have been very large, amounting to several thousands of dollars. The tax return prepared by FA was not all that complicated so as to justify such an exorbitant fee considering that FA only filled out some forms based on the limited information that the Appellant would have supplied to FA. This should have been a bright red flag for the Appellant.

(c) **Lack of Explanations by Tax Preparer** — It is clear that the Appellant did not have much understanding of the new methodology being proposed by Mr. Branch and FA. Such a situation would require some explanations on the part of the tax preparer. Any explanations provided were woefully inadequate and basically consisted of "don't worry". A true professional would want to make sure that his clients understood the scope of what was being done and why, especially when there is a radical departure from an established methodology. The lack of full and adequate explanations in these circumstances and the elusive answers provided by the tax preparer should have alerted the Appellant to the fact that there was something at play that was simply not correct.

(d) **Magnitude of the Advantage** — The Appellant states that he did not notice that he was to get a refund of some $40,800 for 2008. However, the refund is conspicuously shown just to the right of his signature on the last page of his return. It would be very difficult not to notice it. I cannot accept his assertion that he did not notice this; it would have been obvious to anyone who even glanced at the signature page. In addition, it is only human nature for a taxpayer to want to know the amount of his tax refund. The letter shown at Exhibit A-1, Tab 2, which the Appellant admits he in all likelihood received, indicates that he could expect to receive a total refund of about $130,000 for the years 2004 to 2007. This was highly questionable since nothing had changed in his fiscal situation and in the past the Appellant usually had to pay some additional taxes rather than obtain a refund. Mr. Branch had prepared his returns for the last few years and, all of a

sudden, it is discovered that the Appellant should have gotten huge refunds during those years? Mr. Branch was supposed to have been a former employee of the CRA. If what was being proposed was legitimate, why was it that Mr. Branch had not suggested it right from the beginning? This should have led the Appellant to question the scheme that Mr. Branch was proposing. What was it that Mr. Branch, a supposedly professional taxman, had missed in the past that would now result in a tax advantage of some $130,000? The magnitude of this advantage was a glaringly bright red flag that should have motivated the Appellant to question what it was that his tax preparer was doing.

(e) **Blatantly and Readily Detectable False Statements** — The business losses indicated in the 2008 tax return were huge, amounting to about $458,500. This was blatantly false information. The Appellant saw this very large number. Even if he did not see it or did not notice it, then he certainly should have — it was readily and easily detectable. This is another glaring factor that points towards gross negligence through wilful blindness.

(f) **Tax Preparer does not Acknowledge Preparing Return** — Box 490 of the return is reserved for the identification of the professional tax preparer that prepared the return. It is empty. The Appellant's assertion that he did not notice box 490 is difficult to accept since this box appears right beside his signature on the last page of the return. He must have seen it and he should have asked himself why it was that Mr. Branch, Mr. Watts or FA did not want to identify themselves to the CRA. If the Appellant indeed did not see this box, then this demonstrated carelessness on his part in that he could not be bothered to take a look at his return.

(g) **Lack of Inquiries of Other Professionals or the CRA** — When the Appellant did not receive any adequate explanations from his tax preparer, he did not seek any advice from a tax accountant, a tax lawyer, his past tax preparers or any other known tax preparer or even the CRA. He simply chose not to inform himself. He should have and his failure to do so shows that he chose to remain in ignorance. This is indicative of wilful blindness.

(h) **Genuine Effort to Comply with the Law** — I am of the view that the Appellant made no effort to comply with the law. This is certainly borne out by his after-the-fact conduct. When he got a letter from the CRA questioning his business losses, rather than respond directly to the CRA and take his tax preparer to task, he gave the CRA letter to Mr. Watts. The response that was prepared for the Appellant made no sense at all and was not in any way responsive to the valid concerns raised by the CRA. Yet, he still sent it on to the CRA. He must have known when he got the first letter from the CRA that Mr. Branch or FA had done something dreadfully wrong and he no longer had any reason to trust them. Still, he continued with the obstructionist conduct advocated by Mr. Watts. The response shown at Exhibit A-1, Tab 24, together with Mr. Watts' instructions to the Appellant to write his signature from the bottom left corner to the upper right corner at a 45 degree angle across a 3 cent or 5 cent stamp, is ridiculous and the Appellant could not honestly believe that this letter was a *bona fide* response to the concerns raised by the CRA. This after-the-fact conduct gives an indication as to his mindset throughout; see *Mullen*, above, at paragraph 7 regarding after-the-fact conduct.

All the foregoing factors should have aroused the Appellant's suspicions concerning FA and should have incited the Appellant to question what was going on. However, he did not. In fact, he did nothing. He chose to remain ignorant, preferring instead to place his complete and unquestioning trust and confidence in Mr. Branch, Mr. Watts and FA. Such conduct in refusing to inform himself, even in general terms of what was contained in his return, is not only evidence of wilful blindness, but is conduct otherwise amounting to gross negligence in my opinion.

[39] The Appellant argues that he is the innocent victim of people whom he trusted. He takes the position that he honestly believed that what Mr. Branch was proposing was perfectly legal. 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*, above, 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. Counsel for the Appellant has also provided other examples of cases where it has been held that a taxpayer ought not to be responsible for gross negligence penalties where the taxpayer honestly relies on a trusted financial advisor, tax preparer, friend or family member (see *Mark*, above, at paragraphs 18 and 19; *Findlay*, above, at paragraph 27; *Hine*, above, at paragraphs 9, 35, 42 and 51 — reliance on spouse; *Udell*, above, at paragraph 44

— reliance on accountant; *Murugesu*, above, at paragraphs 54 and 55 — recent immigrant chose an accountant recommended by members of his community; and *Klotz*, above, at paragraphs 70 and 72 — reliance on financial advisor). It is also argued that when a taxpayer honestly but wrongly believes that what the tax preparer has done is right, he cannot be liable for gross negligence penalties. Reliance on a trusted advisor will negate a finding of wilful blindness because a person does not question something that he believes and would not bother to verify something about which he has no doubt (see *Larouche*, above, at paragraphs 25 and 26; *McGhee*, above, at paragraph 27; *Dunleavy*, above, at paragraph 50; and *Carlson*, above, at paragraphs 33 and 36).

[40] However, many examples can be cited of situations 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 returns. Quite apart from wilful blindness, taxpayers who take no steps whatsoever to verify the completeness and accuracy of the information contained in their returns may thereby face penalties for gross negligence.

[41] In *Gingras v. Canada*, [2000] T.C.J. No. 541 (QL), just as in the case at bar, the appellants contended that they had always acted in good faith and that they believed that their tax preparer was conducting a responsible and reliable business, adding that they had little or no knowledge of tax matters. 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.
>
> 20 The appellants signed returns of income containing false and untruthful information and cannot claim that this was done without their knowledge. They had an obligation to ensure that all the information contained in their returns was truthful. If, as the theory put forward by Ratelle [the tax preparer] goes, every taxpayer is entitled to a total exemption from tax once in his life, which is not the case, this did not allow the appellants to submit false statements in order to exercise the alleged privilege, or justify them in so doing.

[42] Justice Tardif further wrote:

> 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.

> 31 With respect to penalties, the burden of proof is on the respondent. It was clearly shown on a preponderance of the evidence adduced that the appellants submitted in their respective returns major false statements which had significant impact on their tax burden. They could not have been unaware that these statements were false. The Court can understand that the taxpayers might have been incapable, inexperienced and incompetent when it came to preparing their income tax returns. However, it is utterly reprehensible to certify by one's signature that the information provided is correct when one knows or ought to know that it contains false statements. Such conduct is a sufficient basis for a finding of gross negligence justifying the assessment of the applicable penalties.
>
> [Emphasis added.]

[43] 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.

[44] In *Laplante*, above, Justice Bédard wrote:

> 15 In any event, the Court finds that the Appellant's negligence (in not looking at his income tax returns at all 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 added.]

[45] In *Brown v. The Queen*, 2009 TCC 28, Justice Bowie stated:

> 20 Quite apart from all of that, in respect of the gross negligence penalties under the *Income Tax Act*, the Appellant in his own evidence early on made it clear that he signed his returns for each of the four years under appeal without having paid the least attention to what income was included in them and what expenses were claimed in them. He said that he kept the records that he kept, prepared spreadsheets from them and gave them to a tax preparer who, in each year,

prepared the returns for him based on the material that he gave her. We did not hear from her on that, but taking that statement at its face value, it still leaves the Appellant with an onus to look at the completed return before signing it and filing it with the Minister. The declaration that the taxpayer makes when he signs that form is,

> I certify that the information given on this return and in any documents attached is correct, complete and fully discloses all my income.

To sign an income tax return and make that certification without having even glanced at the contents of the return, because that is what I understood his evidence to be is of itself, in my view, gross negligence that justifies the penalties.

[Emphasis added.]

[46] In *Gélinas*, above, Justice Bédard stated:

> 11 . . . I am of the opinion that the Appellant's negligence (based on the fact that he did not check his entire return before his accountant sent it to the Canada Customs and Revenue Agency) was serious enough to justify using the somewhat pejorative epithet "gross". The Appellant's attitude was so cavalier that it translates to a complete indifference in terms of respecting the Act. If the Appellant had examined his income tax return for the 2004 taxation year, he would likely have discovered the false statement contained within (a statement which apparently was made by his accountant) in terms of the size of the amounts of unreported income and other factors analyzed above. The Appellant cannot absolve himself of his responsibility by pointing the finger at his accountant. By attempting to absolve himself of all responsibility with respect to his income tax returns, the Appellant is being negligent by ignoring the responsibilities, duties and obligations imposed by the Act. Also, the Act imposes a minimum obligation to the Appellant to check his income tax return for the 2004 taxation year before his accountant sends it in; in addition, a more than cursory glance would have permitted him, in my opinion to find the false statement that his accountant had made.
>
> [Emphasis added.]

[47] 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 or 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 get

informed amounted to carelessness amounting to gross negligence. This is not much different from the case at hand.

[48] 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.
>
> 24 If I am incorrect and the Appellant did not knowingly make the false statement, then I find that he was wilfully blind. If he 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. In a self-assessing system such as ours, the Appellant had a duty to ensure that his income and expenses were correctly reported. Our system of taxation is both self-reporting and self-assessing and it depends on the honesty and integrity of the taxpayers for its success: *R. v. McKinlay Transport Ltd.*, [1990] 1 SCR 627. The Appellant's cavalier attitude demonstrated such a high degree of negligence of wilful blindness that it qualified as gross negligence: *Chénard v. The Queen*, 2012 TCC 211.
>
> [Emphasis added.]

[49] 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. . . .

[50] Another recent example can be found in the matter of *Atutornu*, above, where the taxpayers simply signed their returns where they were told to sign and 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. Justice Jorré held that gross negligence penalties pursuant to subsection 163(2) were appropriate in the circumstances.

[51] In the leading case of *Torres*, above, Justice C. Miller heard the appeals of six taxpayers who were satisfied that FA were professional people, former CRA officials who knew what they were doing. The taxpayers believed FA to be legitimate and they all trusted FA to properly prepare their tax returns. FA convinced the taxpayers to become involved in a scam identical to the one here under consideration. All the taxpayers were confident that they were entitled to the refunds they were claiming. They had been completely and utterly convinced so by superb conmen. The CRA disallowed the claimed business losses and imposed gross negligence penalties. Justice C. Miller dismissed their appeals even though the taxpayers put "unwavering faith in representatives of Fiscal Arbitrators to prepare their returns in a manner that would produce the sought after refunds". Even though the taxpayers were credible and believed that what FA had done was legitimate, and even though they all trusted FA, Justice C. Miller found that they were all wilfully blind and dismissed their appeals against the assessment of penalties for gross negligence. A further appeal to the Federal Court of Appeal was dismissed.

[52] It is difficult for me to see how the case of the Appellant can be distinguished from that of any of the taxpayers in *Torres*.

Conclusion

[53] There is no doubt that the Appellant's 2008 tax return contained false statements — the Appellant did not carry on a business and he did not incur any business losses whatsoever. I am of the view that, in the circumstances of the present case, the Appellant had knowledge of the false statements or at the very least he was wilfully blind or otherwise grossly negligent in the making of, participating in, assenting to or acquiescing in the making of, a false statement in his return. He signed his return and thus certified that the return was complete and accurate — it was not. He had a duty to exercise care and accuracy in the completion of his return and he failed in this duty, making no effort at all to verify the accuracy and completeness of his return. His actions are not only negligent, but are grossly negligent. As such, he is properly subject to the penalties imposed on him pursuant to subsection 163(2) of the Act.

[54] For all the foregoing reasons, this appeal is dismissed. The Respondent is entitled to her costs if she wants them.

Signed at Kingston, Ontario, this 8th day of March 2016.

"Rommel G. Masse"

Masse D.J.

CITATION:	2016 TCC 54
COURT FILE NO.:	2013-1178(IT)G
STYLE OF CAUSE:	EDWARD GRAY v. THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 6, 2015
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	March 8, 2016

APPEARANCES:

Counsel for the Appellant:	Jeffrey Radnoff Charles Hayworth (student-at-law)
Counsel for the Respondent:	Christian Cheong

COUNSEL OF RECORD:

For the Appellant:	Jeffrey Radnoff
Firm:	DioGuardi Tax Law Mississauga, Ontario
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada