Citation: 2016 TCC 98

2013-2193(IT)G

BETWEEN:

BRENDA SAM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Toronto, Ontario, on November 24, 2015, be filed with very minor corrections.

"D.W. Rowe"
Rowe D.J.

Signed at Sidney, British Columbia, on April 15, 2016.

Court File No. 2013-2193(IT)G

TAX COURT OF CANADA

BETWEEN:

BRENDA SAM

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

TRANSCRIPT OF ORAL REASONS
HEARD BEFORE THE HONOURABLE JUSTICE ROWE
Federal Judicial Centre,
180 Queen Street West, Toronto, Ontario,
on Tuesday, November 24, 2015 at 2:45 p.m.

APPEARANCES:

Jeffrey Radnoff	for the Appellant
Tony Cheung	for the Respondent

Also Present:

Carol Forde	Court Registrar
Miriam Claerhout	Court Reporter

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--- Upon commencing delivery of oral reasons on Tuesday, November 24, 2015 at 2:45 p.m.

DELIVERY OF ORAL REASONS:

JUSTICE ROWE: The Appellant appealed from a reassessment with respect to her 2009 taxation year. In filing the return for that year, she claimed certain losses which were denied by the Minister of National Revenue in issuing the particular assessment. Again, a situation where there had been a request to carry back non-capital losses.

Now, in the case of *Brisson v Canada*, 2013 TCJ No. 210, Justice Valerie Miller dealt with the situation of the imposition of penalties pursuant to subsection 163 of the *Income Tax Act*, and at paragraph 24 of her judgment, she said this:

> Pursuant to subsection 163(3) of the *Income Tax Act*, the burden of establishing the facts justifying the assessment of the penalty is on the Minister. The Crown must therefore prove (1) that the Appellants made a false statement or omission in their 2008 income tax returns, and (2) that the statement or omission was either made knowingly, or under circumstances amounting to gross negligence.
>
> Paragraph 25: An abundant case law has developed with respect to the application of subsection

163(2). Although each decision is deeply rooted in the specific facts of the case, some broad principles have been enunciated by the courts.

26. The following passage from *Venne v The Queen*, 84 DTC 6247 (FCTD), at page 6256, has been quoted and referred to in numerous decisions of the Tax Court of Canada and the Federal Court of Appeal and remains the seminal definition of gross negligence.

> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

27. In *Villeneuve v Canada*, 2004 FCA 20, the Federal Court of Appeal found that gross negligence could include wilful blindness in addition to intentional action and wrongful intent. In this regard, Justice Létourneau stated the following at paragraph 6 of that decision:

> With respect, I think the judge failed to consider the concept of gross negligence that may result from the wrongdoer's willful blindness. Even a wrongful intent, which often takes the form of knowledge of one or more of the ingredients of the alleged act, may be

> established through proof of willful blindness. In such cases the wrongdoer, while he may not have actual knowledge of the alleged ingredient, will still be deemed to have that knowledge.

Justice Valerie Miller goes on to say that since *Villeneuve*, it is well established that actual knowledge by a taxpayer of the accountant's negligence is not required for a finding of gross negligence, and there is reference to the case of *Brochu*.

Now, we are all well aware of the decision of Mr. Justice Campbell Miller in *Torres*. That decision was approved by the Federal Court of Appeal at 2015 FCJ No. 252. At paragraph 4, Justice Dawson speaking for the court said:

> First, as conceded in oral argument by counsel for the appellant, the Judge made no error in articulating the applicable legal test. Gross negligence may be established where a taxpayer is willfully blind to the relevant facts in circumstances where the taxpayer becomes aware of the need for some inquiry but declines to make the inquiry because the taxpayer does not want to know the truth.

The reference there again is to the *Villeneuve* decision.

Then the judgment of Mr. Justice Campell

Miller in *Torres*, he discusses the various indicia that are to be considered, considering the person's education and the amount of the refund, whether there are any flashing red lights or flags, and whether they basically knew what was going on and the magnitude of the advantage to be gained.

In this particular instance, the evidence of the Appellant - which I accept - is that her tax returns had been done for many, many years by her sister-in-law who she understood to have a university background with respect to accounting, and in many years, she had obtained some refunds because of the deductibility of union fees paid to teachers' union or its equivalent, and also for an RRSP.

In 2004, 2005, her sister-in-law Denise Hunt started to work for an entity called DSC. The Appellant continued to get her taxes done there and would see her at DSC and met a number of employees, including the receptionist.

Ms. Hunt died at the end of January in 2010. At that point, Ms. Hunt had done the Appellant's taxes up to the 2008 taxation year. So the Appellant goes to the DSC office with her previous tax return in hand that had been done by her sister-in-law and makes inquiries as to whether they would prepare the return. She was informed that they would prepare the return by means of referring it to somebody else. Ms. Sam asked,

"Who is that person?" Well, the response is, "Don't worry about it because that individual has done thousands of returns and the return will come here and you come back and you can sign it."

So, she goes back there and she has a cursory look at it and signs the return and then signs the loss carryback, but the actual return itself according to the book of documents is flawed because there are some lines crossed out without any explanation as to when or by whom, and as a consequence, any ambiguity there has to be resolved in favour of the Appellant.

Now, practically speaking and looking at this, especially when Ms. Sam was referred to Larry Watts who told her don't worry about this and provided her with letters that are complete nonsense, gobbledygook, and irrational stringing together of words, she went along with it because she thought she was getting this advice. That it was valid advice from somebody that should know what he was doing.

In contrast to what is sometimes the situation in these cases, the Appellant was not pitched to specifically hire Larry Watts or whoever did do that return as an agent for DSC on the basis that there would be a refund. She wasn't specifically pitched on the basis that when that refund came in, she would owe a percentage on a sliding scale to the entity.

Her sister-in-law had done her return for

many years for about a hundred dollars and that seemed reasonable, but also, it didn't seem unreasonable with a quotation by a person called Janet at DSC that the return might be up to about $600. So there weren't any real red flags or lights flashing at this particular point.

Where did Ms. Sam go wrong subsequently? Well, fortunately, the refund wasn't sent out. Instead of going directly to CRA, she went back to DSC, and I can understand that the first time. But when that letter or letters were provided to her to sign and to send back to CRA, they, in my opinion, were obviously so nonsensical that she should literally just have torn them up.

But that does not mean that she had the requisite intent at the outset. In my view of the evidence, there was no actual knowledge by her of this scam and her acts and omissions were attributable to human failure. They were attributable to carelessness on her part. When as individuals who deal with these cases on a regular basis see this kind of conduct, one has to be very careful not to impose our concepts of awareness on people who are just seeking some advice.

This is not one of those circumstances where the Appellant had been pitched on the basis that somehow she could be separated from her social insurance number. Really, she literally accepted the advice that she was given, but when you look at the complete body of the evidence and her testimony, which I find to be credible, it does not reveal that she qualifies to be the

subject of the imposition of the gross penalties imposed by the Minister pursuant to subsection 163(2) of the *Act*.

As I said to counsel who has the onus here, close, but this isn't horseshoes, and therefore, the Appellant is entitled to that inability of the Crown to discharge its burden. Therefore, the appeal is allowed.

The assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the penalty imposed with respect to the 2009 taxation year be deleted.

MR. RADNOFF: Thank you very much, Your Honour. My client obviously thanks you, and the only thing is if the appeal is allowed with costs. Shall we deal with that now?

JUSTICE ROWE: You can. I want to tell you in these circumstances, I am not too eager to hand out costs much.

MR. RADNOFF: I understand, but in these circumstances, I think she unwittingly became involved in something that she didn't feel -- having said that, I am asking you for the benefit of my client, but I understand whichever order you make, obviously --

JUSTICE ROWE: Any comment on costs, Mr. Cheung?

MR. CHEUNG: Just that, Your Honour, if the court is inclined to award costs, the Respondent submits that tariff costs is appropriate.

JUSTICE ROWE: Well, I was thinking of not

even going that far. I was just thinking of a fixed number.

MR. CHEUNG: In that case, Your Honour, the Respondent suggests a fixed amount of $1,000 inclusive of disbursements.

MR. RADNOFF: The reality is even if she was awarded $5,000 in costs, that would be a fraction of what it costs reasonably for a taxpayer to come here.

JUSTICE ROWE: I know.

MR. RADNOFF: I would say $5,000 is not unreasonable. It is an amount that I think is fair. She still has to --

JUSTICE ROWE: How much are your disbursements?

MR. RADNOFF: With the disbursements, it is about $400 to do the appeal, so I would assume disbursements are between $750 to $1,000 roughly.

JUSTICE ROWE: All right. I am also awarding costs in the sum of $3,000 plus disbursements.

MR. RADNOFF: Thank you, Your Honour.

JUSTICE ROWE: That is a fixed sum awarded pursuant to the relevant rule.

MR. RADNOFF: Thank you.

--- Whereupon the oral reasons for decision concluded at 2:59 p.m.