Docket: 2012-3273(IT)G

BETWEEN:

GEORGE DE GENNARO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 29, 2016, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Peter Aprile Yoni Moussadji
Counsel for the Respondent:	H. Annette Evans

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessment made under the *Income Tax Act* for the 2008 taxation year, notice of which is dated March 24, 2011, is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 2nd day of May 2016.

"J.R. Owen"

Owen J.

Citation: 2016 TCC 108
Date: 20160502
Docket: 2012-3273(IT)G

BETWEEN:

GEORGE DE GENNARO,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Owen J.

[1] This is an appeal by George De Gennaro of the reassessment of his 2008 taxation year by notice dated March 24, 2011 (the "Reassessment"). By the Reassessment, the Minister of National Revenue (the "Minister") denied a loss of $696,134 (the "Adjustment Loss") claimed by Mr. De Gennaro in a T1 Adjustment Request filed by him for his 2008 taxation year (the "2008 Adjustment Request") and assessed a penalty under subsection 163(2) of the *Income Tax Act* (the "ITA") in the amount of $100,939.70 (the "penalty").

[2] The Appellant was not present at the hearing in person but was represented by his counsel. The Appellant was not subpoenaed by the Respondent as a witness, so he was certainly not compelled to attend. The absence of the Appellant meant that the Respondent could not rely on subsections 146(2) and (3) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") to call and cross-examine the Appellant.

[3] The Respondent's only witness was Mr. Suleman, who is the Canada Revenue Agency ("CRA") litigation officer assigned to the Appellant's appeal. Mr. Suleman had no personal knowledge of the audit or the administrative appeal that followed the filing of a notice of objection by the Appellant. Mr. Suleman's testimony was directed solely at the identification of copies of documents that he had obtained from the files maintained by the CRA in respect of the Appellant.

[4] With the consent of counsel for the Appellant, the documents identified by Mr. Suleman as being part of the Appellant's CRA file were marked as exhibits.

[5] Following the testimony of Mr. Suleman, the Respondent asked to read in extensive portions of the examination for discovery of the Appellant under subsection 100(1) of the Rules (collectively, the "Respondent's Read-Ins").[1] The examination for discovery of the Appellant was in the form of written questions and answers under sections 114 and 115 of the Rules. The Court took a 2½-hour recess for the Appellant's counsel to review the proposed read-ins. With the exception of clarifying one answer, the Appellant's counsel did not object to the read-ins proposed by the Respondent, and as the evidence in the read-ins was otherwise admissible I allowed all of the proposed read-ins.

[6] The Respondent did not object to the Appellant's proposed read-ins to qualify or explain the read-ins of the Respondent (collectively, the "Appellant's Read-Ins"), which I also allowed.

[7] I note that, generally speaking, the basis on which evidence given on an examination for discovery may be read in and form part of the evidentiary record is that the statements are admissions by the party being discovered.[2] The Respondent is taken to adopt the evidence read in by the Respondent whether that evidence is favourable or unfavourable to the Respondent's case.[3]

[8] The discovery read-ins by the Respondent and the Appellant are attached to these reasons as Appendix A. I have taken the following salient facts from the read-ins.

[9] The Appellant is a high school graduate with 2½ years of college.[4] The Appellant was employed full-time by Ontario Hydro from 1978 to 2008. He started

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[1] Prior to the commencement of the hearing, the Respondent made a motion to have the four-day notice requirement in Practice Note 8 waived. The Respondent in fact gave two days' notice to the Appellant after being told that the Appellant would not be present at the hearing. It is, of course, incumbent on counsel to ensure that the deadlines in the Rules and the Practice Notes are complied with. However, as the Appellant was given two days' notice (as opposed to no notice), I concluded that in this particular case there would be no material prejudice to the Appellant from the waiver of the four-day notice period, and so I allowed the motion and waived the notice period applicable to the Respondent. I also waived the notice period for the Appellant to read in portions of the examination for discovery of the Appellant that qualify or explain the answers read in by the Respondent.

[2] See, generally, Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed.(Markham, Ont.: LexisNexis, 2014), at paragraph 16.168 and Stanley Schiff, *Evidence in the Litigation Process*, Master Edition (Scarborough, Ont.: Carswell, 1993), at page 445.

[3] See, for example, *Mackow v. Sood*, 1993 ABCA 152 (CanLII) at paragraph 15.

[4] Question 9 of the Respondent's Read-Ins.

as a mechanical maintainer in the nuclear generating division, progressed to journeyman and was promoted to first line manager after 22 years.[5] During the years relevant to this appeal, his duties involved supervising Bruce Power's Outage Maintenance Services Department, which included "running inspection programs during power outages, preparing pre-job briefs, preparing work reports, coordinating surrounding work or supporting tasks, liaising between Bruce Power and other contractors or work groups, and developing and scheduling the work plan."[6] In January 2009, the Appellant incorporated a numbered company and through that company provides "Consultation Services for First Line Management Supervisory services."[7]

[10] The Appellant e-filed his 2008 T1 income tax return.[8] Michael Bolton of BDO Canada prepared the return on the basis of the Appellant's information slips.[9]

[11] The Appellant first contacted Mr. Tom Thompson by telephone in March or April 2009.[10] The Appellant told Mr. Thompson that a friend had received a $50,000 income tax refund after Mr. Thompson prepared his return. The Appellant asked Mr. Thompson for a meeting so that he could give the Appellant information on that filing position.[11]

[12] The Appellant met with Mr. Thompson three times at the Appellant's house, but never at Mr. Thompson's office.[12] The meetings were in or around early April 2009, early June 2009 and mid-June 2009.[13] The Appellant did not ask Mr. Thompson or anyone affiliated with him for references.[14] The Appellant provided Mr. Thompson with his T4 slips and other documents for 2008 in or about early June 2009.[15]

[13] The Appellant took rough notes of his meetings with Mr. Thompson, which indicate the basic aspects of the proposal that led to the filing of the 2008 Adjustment Request.[16] Paragraph 14 of the Appellant's Notice of Appeal states that

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[5] Question 10 of the Respondent's Read-Ins.
[6] Question 11 of the Respondent's Read-Ins.
[7] Questions 13 and 21 of the Respondent's Read-Ins.
[8] Question 14 of the Respondent's Read-Ins.
[9] Question 15 of the Respondent's Read-Ins.
[10] Questions 23 and 24 of the Respondent's Read-Ins.
[11] Question 24 of the Respondent's Read-Ins.
[12] Questions 25 and 39 of the Respondent's Read-Ins.
[13] Question 25 of the Respondent's Read-Ins.
[14] Question 40 of the Respondent's Read-Ins.
[15] Question 58 of the Respondent's Read-Ins.
[16] Question 27 of the Respondent's Read-Ins.

four tax lawyers developed the filing position but, when asked about these four individuals, the Appellant answered that he had not met with them, did not know their identities and did not know how to contact them.[17]

[14] The Appellant conceded that the so-called "detax" filing position presented by Mr. Thompson has no basis in law and is incorrect, although he also states that he did not understand that at the time he filed the 2008 Adjustment Request.[18] Mr. Thompson's explanation of the detax filing position is as set out below.

[15] Specifically, Tom Thompson stated that the agency-principal distinction allows the Government of Canada to use an individual's personal registration number or birth certificate number as a bond account, against which the Government borrows funds from foreign sources to allow it to get good rates, make money on citizens, and "bolster" government coffers. Tom Thompson also stated that a person's social insurance number functions like a company, separate from the person him- or herself, and that the CRA has to refund taxes to the individual but not to the social insurance number.[19]

[16] The Appellant attempted to improve his understanding of the plan, and did in fact improve his understanding of it, by asking Mr. Thompson questions.[20] The Appellant says that he was not cautioned against the plan by his accountant or his financial planner and that he was persuaded that the plan relied on a little-known legal loophole and was legitimate by the fact that others had received refunds.[21] The Appellant did not have any notes or documents when he discussed the plan with his accountant.[22]

[17] Mr. Thompson prepared and delivered the completed 2008 Adjustment Request to the Appellant in or about mid-June 2009.[23] The Appellant reviewed the completed 2008 Adjustment Request, the Request for Loss Carryback and the Statement of Agent Activities before he signed these documents.[24]

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[17] Question 30 of the Respondent's Read-Ins.
[18] Question 20 of the Respondent's Read-Ins.
[19] Question 20 of the Respondent's Read-Ins. See also question 29.
[20] Question 69 of the Respondent's Read-Ins.
[21] Question 31 of the Respondent's Read-Ins and question 35 of the Appellant's Read-Ins.
[22] Question 33 of the Appellant's Read-Ins.
[23] Questions 16, 18 and 59 of the Respondent's Read-Ins.
[24] Question 61 of the Respondent's Read-Ins. Both documents are in Exhibit R-1. In the Respondent's Read-Ins, the Appellant identifies the Statement of Agent Activities and the Request for Loss Carryback as being in Tabs 2 and 3 respectively of the Respondent's book of documents. However, during the hearing, the Respondent's counsel stated

[18] The Appellant signed and then mailed the 2008 Adjustment Request.[25] He filed the Statement of Agent Activities with the 2008 Adjustment Request.[26] This statement identified the following three material amounts included in the computation of the amount of $696,134 identified on the 2008 Adjustment Request as a negative adjustment to Line 135[27] of the Appellant's 2008 T1 income tax return (the Appellant believed he was the principal and his social insurance number was his agent):[28]

> **B.** Line 162 ***Total money collected as Agent for Principal: $190,589.66**
>
> Minus:
>
> . . .
>
> *Amount to principal in exchange for labour $703,287.78
>
> . . .
>
> [Minus]
>
> *Money Collected as Agent for Principal and reported by third parties and Already Posted on lines 101-130 via **T4's, T5's, T3's, Other slips, etc.**
>
> $183,435.67

[19] The Appellant has never conducted a business personally and understands now that he did not have a business loss in 2008.[29] The Appellant was aware at the time that he signed the 2008 Adjustment Request that he was reporting a business loss of $696,134.[30] The Appellant reported this business loss because Tom Thompson had advised him that this was the "technical method required to file in accordance with the legal loophole."[31] The Appellant now agrees that the loss stated on the 2008 Adjustment Request was a false business loss.[32]

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that the same documents were also in Tab 1 (together with the 2008 Adjustment Request), which is correct. To avoid duplication, only Tab 1 was entered as an exhibit.

[25] Questions 17, 18 and 19 of the Respondent's Read-Ins.

[26] Question 70 of the Respondent's Read-Ins.

[27] Line 135 of the T1 return states the taxpayer's net business income for the year. A negative number indicates a loss from business.

[28] Question 71 of the Respondent's Read-Ins. The Appellant also refers to his understanding as set out in question 29 of the Respondent's Read-Ins.

[29] Questions 13 and 65 of the Respondent's Read-Ins.

[30] Question 67 of the Respondent's Read-Ins.

[31] Question 66 of the Respondent's Read-Ins.

[32] Question 68 of the Respondent's Read-Ins.

[20] The Appellant believed that he would receive a full or partial refund of the income tax withheld at source for 2008.[33] The largest refund received by the Appellant prior to 2008 was $15,000 received after he had made a $34,000 RRSP contribution in or about the 1998 taxation year.[34]

[21] The Appellant reviewed a Request for Loss Carryback prepared by Mr. Thompson and was aware that he was claiming refunds for the 2005, 2006 and 2007 taxation years.[35] The Appellant signed the request on or around June 15, 2009 and filed it by mail.[36] After Mr. Thompson delivered the request to the Appellant, the Appellant did not communicate with anyone affiliated with Mr. Thompson to discuss the request prior to mailing it.[37]

I. Position of the Appellant

[22] Counsel for the Appellant submits that the Appellant should not be liable for the penalty assessed by the Minister under subsection 163(2) of the ITA. The burden of establishing the facts justifying the assessment of the penalty falls on the Minister and the Minister has not satisfied that burden. In particular, counsel submits that there is no evidence to support the conclusion that the Appellant failed to consult a third party advisor regarding the plan prior to filing the 2008 Adjustment Request. In fact, counsel submits, the Appellant stated in answer to questions 33 and 35 of the Appellant's Read-Ins that he did discuss the plan with his accountant and financial advisor and that neither cautioned him against it.

[23] The Appellant submits that, as the Respondent's Read-Ins are the only evidence on this point, the Respondent has failed to establish the third requirement for a finding of wilful blindness identified in *Torres v. The Queen*, 2013 TCC 380[38] at paragraph 65(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.

II. Position of the Respondent

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[33] Question 74 of the Respondent's Read-Ins.
[34] Question 76 of the Respondent's Read-Ins.
[35] Question 84 of the Respondent's Read-Ins.
[36] Questions 79 and 81 of the Respondent's Read-Ins.
[37] Question 87 of the Respondent's Read-Ins.
[38] Affirmed under the name *Strachan v. The Queen*, 2015 FCA 60.

[24] The Respondent acknowledges that subsections 163(2) and (3) of the ITA place the onus on the Minister to establish that the Appellant has made a false statement in a return, form, certificate, statement or answer and that the false statement was made by the Appellant knowingly or under circumstances amounting to gross negligence.

[25] The Respondent submits on the basis of the factors identified in *Torres* that the Appellant, either knowingly or under circumstances amounting to gross negligence, made a false statement in the 2008 Adjustment Request. In making this submission, counsel for the Respondent acknowledges that the evidence available to the Court in this case in support of the assessment of a penalty against the Appellant under subsection 163(2) of the ITA is confined to the four corners of the discovery read-ins and the documents in evidence that are identified by the Appellant in the read-ins.

III. Analysis

A. The Standard of Proof and the Burden of Proof under Subsections 163(2) and 163(3) of the ITA

[26] The issue in this appeal is whether the Appellant is subject to the penalty assessed by the Minister under subsection 163(2) of the ITA. In *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, the Supreme Court of Canada confirmed that the penalty provisions found in Part I, Division I of the ITA impose civil penalties and not criminal penalties. Subsection 163(2) is found in Part I, Division I of the ITA. Accordingly, the standard of proof that must be met in order for the Court to uphold a penalty assessed under subsection 163(2) of the ITA is proof on a balance of probabilities.

[27] The Supreme Court explained this standard in civil cases in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 at paragraphs 45 to 49:

> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard

to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[47] Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B*, at para. 72:

> Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

[48] Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:

> Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.[39]

[28] The introductory words of subsection 163(2) of the ITA state:

Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the

[39] See, also, paragraph 94 of *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23.

> making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of . . .

[29] The introductory words identify two conditions that must be satisfied if the assessment by the Minister of a penalty under subsection 163(2) of the ITA is to be maintained.

[30] First, the Appellant must have made, participated in, assented to or acquiesced in the making of a false statement or omission in a return, form, certificate, statement or answer, referred to collectively as a "return".

[31] The terms "false statement" and "omission" do not identify the mental requirement for the penalty, which is instead identified in the second requirement.[40] Accordingly, for the purposes of subsection 163(2) of the ITA, a "false statement" is simply a statement that is untrue and an "omission" is simply something that is left out.

[32] Second, the false statement or omission must have been made by the Appellant knowingly or under circumstances amounting to gross negligence, or the Appellant must have participated in, assented to or acquiesced in the making of the false statement or omission knowingly or under circumstances amounting to gross negligence.

[33] Under subsection 163(3) of the ITA, the Minister has the burden of establishing the facts that justify the assessment of a penalty under subsection 163(2) of the ITA.[41] This burden is described by the Federal Court of Appeal in *Lacroix v. The Queen*, 2008 FCA 241 at paragraph 26, as follows:

> Although the Minister has the benefit of the assumptions of fact underlying the reassessment, he does not enjoy any similar advantage with regard to proving the facts justifying a reassessment beyond the statutory period, or those facts justifying the assessment of a penalty for the taxpayer's misconduct in filing his

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[40] This can be contrasted with the use of the phrase "false or deceptive statements" in paragraph 239(1)(*a*) of the ITA, which encompasses the *mens rea* for the offence described in that paragraph.

[41] I note that because subsection 163(3) of the ITA is an unambiguous statutory rule, the Court has no authority to alter or shift the burden of proof imposed by this rule. See also, *Vine Estate v. Canada*, 2015 FCA 125, [2015] 4 F.C.R. 698 at paragraph 25.

> tax return. The Minister is undeniably required to adduce facts justifying these exceptional measures.

[34] The manner in which this burden may be satisfied is described by the Court at paragraph 32:

> What, then, of the burden of proof on the Minister? How does he discharge this burden? There may be circumstances where the Minister would be able to show direct evidence of the taxpayer's state of mind at the time the tax return was filed. However, in the vast majority of cases, the Minister will be limited to undermining the taxpayer's credibility by either adducing evidence or cross-examining the taxpayer. Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of subparagraph 152(4)(*a*)(i) and subsection 162(3) [*sic*].

[35] The result of the combination of the civil standard of proof and the burden of proof applicable under subsection 163(2) of the ITA is that the Respondent has the burden of establishing on a balance of probabilities facts that lead to the legal conclusion that the Appellant knowingly or in circumstances amounting to gross negligence made a false statement in a return. The role of the trial judge is to carefully scrutinize all of the evidence (including any admissible evidence of the Respondent obtained by the Respondent through the discovery or cross-examination of the Appellant and any admissible evidence presented by the Appellant to rebut or qualify the evidence of the Respondent) to determine if the burden of proof imposed on the Minister has been met to the civil standard of proof. [42]

[36] In *Farm Business Consultants Inc. v. The Queen*, 95 DTC 200 (TCC) (affirmed by the FCA at 96 DTC 6085), Judge Bowman (as he then was) stated at pages 205-206:

> A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). Conduct that warrants reopening a statute-barred year does not automatically justify a penalty and the routine imposition of penalties by the Minister is to be discouraged. . . . Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted. . . .

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[42] See also, *Vine*, *supra* footnote 41, at paragraph 25.

[37] Judge Bowman highlights two points. First, subparagraph 152(4)(*a*)(i) of the ITA imposes different standards[43] with respect to opening up an otherwise statute-barred year than does subsection 163(2) of the ITA for the assessment of a penalty. Consequently, the fact that one of the standards in subparagraph 152(4)(*a*)(i) of the ITA is met is not, in and of itself, a basis for imposing a penalty under subsection 163(2) of the ITA. Second, where the facts suggest two equally possible results, the benefit of the doubt goes to the taxpayer. Another way of stating this is to say that in such a case the Minister has not met the requirement under subsection 163(3) of the ITA of establishing on a balance of probabilities facts that justify the assessment of the penalty.

B. False Statement or Omission

[38] The Respondent submits that the Appellant made a false statement in a return[44] when he signed the 2008 Adjustment Request in order to claim a business loss of $696,134 for 2008.

[39] In the answers to questions 13, 16 to 19, and 65 to 68 of the Respondent's Read-Ins, the Appellant states that Mr. Thompson prepared the 2008 Adjustment Request but that he (the Appellant) signed the form and mailed it to the CRA. The Appellant also states that he subsequently came to understand that he was not carrying on a business in 2008 and that he did not have a business loss in 2008. In light of these admissions by the Appellant, the $696,134 figure identified as a business loss on the 2008 Adjustment Request is a false statement made by the Appellant in a return.

C. Knowingly, or Under Circumstances Amounting to Gross Negligence

[40] The remaining question is whether the false statement in the 2008 Adjustment Request was made by the Appellant knowingly or under circumstances amounting to gross negligence. The false statement was made at the time the Appellant signed the 2008 Adjustment Request. Accordingly, this determination must be made as at the time the Appellant signed the 2008 Adjustment Request.

(1) Knowingly

[43] There must be a misrepresentation attributable to neglect, carelessness, or wilful default, or there must be fraud in filing the return or in supplying any information under the ITA.
[44] The word "return" is defined in subsection 163(2) as "a return, form, certificate, statement or answer".

[41] A textual reading of the term "knowingly" requires that the Appellant subjectively knew that the impugned statement was false when it was made. The context of the word "knowingly", which is in contrast to "circumstances amounting to gross negligence", supports this meaning.

[42] Some of the cases addressing subsection 163(2) of the ITA might be read as suggesting that knowledge can be imputed through a finding of wilful blindness.[45] However, I do not believe that these cases are suggesting that wilful blindness is a substitute for the subjective knowledge required by the word "knowingly". Rather, they simply confirm that wilful blindness is sufficient to establish "circumstances amounting to gross negligence". This is made clear in the reasons of the Federal Court of Appeal in *Attorney General of Canada v. Villeneuve*, 2004 FCA 20 at paragraph 6, *Panini v. The Queen*, 2006 FCA 224 at paragraphs 41 to 43 and *Strachan v. The Queen*, 2015 FCA 60 at paragraph 4.

[43] I note that this interpretation is also consistent with the fact that in criminal matters wilful blindness can substitute for actual knowledge whenever knowledge is a component of *mens rea*, but cannot be used to impute subjective knowledge where such knowledge is a statutory requirement for the criminal offence.[46]

[44] Turning to the evidence presented by the Respondent in the form of the Respondent's Read-Ins, it is clear from the Appellant's answers to questions 65 and 68 of the Respondent's Read-Ins that the Appellant did not conduct any business in 2008 and as a consequence could not have made any outlay or incurred any expense that would qualify as a deductible business expense. In my view, even a rudimentary understanding of Canada's income tax system is sufficient for an average individual to be aware that deductible business losses do not simply appear out of thin air. However, the only evidence I have on the Appellant's subjective knowledge is the evidence from the Respondent's Read-Ins. In his answer to question 68, the Appellant states that "at the time I signed the T1 Adjustment, I did not believe it [the loss of $696,134] was a false business loss. I believed I was filing in accordance with the law." The Appellant elaborates on his understanding of the loss in his answers to questions 20, 29 and 31 of the Respondent's Read-Ins.

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[45] For example, *Panini v. The Queen*, 2006 FCA 224 at paragraph 43. However, the Court's description of wilful blindness in that paragraph must be read in light of paragraphs 41 and 42 of the judgment, which make it clear that a finding of wilful blindness is a basis for a finding of gross negligence. This is discussed in more detail later on in these reasons.

[46] See, for example, *Shand v. The Queen*, 2011 ONCA 5, a case involving a charge of murder under paragraph 229(*c*) of the *Criminal Code*. An application for leave to appeal to the Supreme Court of Canada was dismissed on January 19, 2012.

[45] In light of the Appellant's uncontradicted evidence regarding his subjective understanding of the basis for the claimed business loss at the time he signed the 2008 Adjustment Request, I have no choice but to accept that the false statement in the 2008 Adjustment Request was not made by the Appellant knowingly. This leaves only the question of whether the false statement was made by the Appellant under circumstances amounting to gross negligence.

(2) Under Circumstances Amounting to Gross Negligence

(a) General Comments on Negligence

[46] The concept of negligence is well understood in tort law; however, the concept of "gross negligence" is not a staple concept in that area of the law. Philip H. Osborne states in *The Law of Torts* (5th ed.):

> . . . Negligence is conduct that gives rise to a foreseeable and substantial risk of its consequences. As the likelihood of the consequences increases, the conduct of the defendant may be described first as *grossly negligent* and then as *reckless*.[47]

[47] The author then adds the following footnote:

> These concepts [i.e., gross negligence and recklessness] play no significant role in tort law. At common law they are drawn within the umbrella concept of negligence. There are, however, some legislative provisions that require the proof of gross negligence or recklessness in order to establish statutory causes of action.[48]

[48] In a glossary of terms, the author defines "gross negligence" as "[c]onduct that carries a high degree of risk."[49] Negligence is defined as a "tort based on careless conduct or conduct that creates a reasonably foreseeable risk of harm."[50]

[49] The standard against which conduct is assessed is that of a reasonable person, which is an objective standard. Osborne explains:

> . . . The common law has, however, typically resorted to the *reasonable person* when it is in need of a normative standard of conduct, and negligence law is no

[47] Philip H. Osborne, *The Law of Torts*, (5th ed.)(Toronto: Irwin Law, 2015) at page 264.
[48] Osborne, *supra*, at page 264 footnote 1.
[49] Osborne, *supra*, at page 485.
[50] Osborne, *supra*, at page 486.

> exception. The standard of care that must be met in the tort of negligence is that of the reasonably careful person in the circumstances of the defendant.[51]

[50] In the area of criminal law, the Supreme Court of Canada has consistently held that in offences that involve a determination of negligence, the minimum standard that must be applied is that of a marked departure from the conduct of a reasonable person in the same circumstances.[52] The Court explains the basis for the higher standard (when compared to the civil standard for negligence) as follows:

> In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver's liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.
>
> For that reason, the objective test, as modified to suit the criminal setting, requires proof of a *marked departure* from the standard of care that a reasonable person would observe in all the circumstances. As stated earlier, it is only when there is a marked departure from the norm that objectively dangerous conduct demonstrates sufficient blameworthiness to support a finding of penal liability. With the marked departure, the act of dangerous driving is accompanied with the presence of sufficient *mens rea* and the offence is made out.[53]
>
> [Emphasis added.]

[51] The Court elaborates on the standard of care that a reasonable person would observe in all the circumstances:

> . . . Short of incapacity to appreciate the risk or incapacity to avoid creating it, personal attributes such as age, experience and education are not relevant. The standard against which the conduct must be measured is always the same - it is the conduct expected of the reasonably prudent person in the circumstances. The reasonable person, however, must be put in the circumstances the accused found himself in when the events occurred in order to assess the reasonableness of the conduct.[54]

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[51] Osborne, *supra*, at pages 27-28.
[52] See, for example, *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, a case involving a charge of dangerous operation of a motor vehicle causing death. *Beatty* was applied in *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60.
[53] *Beatty*, *supra*, paragraphs 35 and 36.
[54] *Beatty*, *supra*, paragraph 40.

[52] In the case of criminal negligence such as criminal negligence causing death, the standard adopted by the Supreme Court is that of a marked and substantial departure from reasonable conduct.[55] Professor Roach observes:

> The decision in *J.F.* recognizes subtle and fine distinctions in the degree of objective fault between the general rule of proof of a marked departure from reasonable conduct, and the higher standard of marked and substantial departure from reasonable conduct that is required for criminal negligence.[56]

[53] In either case, the conduct is measured against the standard of care that a reasonable person would observe in all the circumstances, without regard to the personal attributes of the offender, unless it is established that the individual cannot reasonably be held responsible for satisfying that standard. Professor Roach describes the exception to the reasonable person standard as follows:

> In short, the reasonable person will not be invested with the personal characteristics of the accused unless the characteristics are so extreme as to create an incapacity to appreciate the prohibited risk or the quality of the prohibited conduct.[57]

[54] To summarize, in criminal law (as in tort law) the standard against which the marked departure and marked and substantial departure requirements are applied is an objective one except that the reasonable person is placed in the circumstances of the offender to determine the conduct expected of a reasonable person in those circumstances.

[55] In my view, these principles are instructive in applying the gross negligence standard in subsection 163(2) of the ITA.

(b) Gross Negligence under Subsection 163(2) of the ITA

[56] The phrase "gross negligence" as used in subsection 163(2) of the ITA was considered in the widely adopted decision of *Venne v. The Queen*, 84 DTC 6247 (FCTD). At page 6256 of that decision, Strayer J. stated:

> . . . "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

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[55] See, for example, *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, a case involving the charges of manslaughter by criminal negligence and manslaughter by failing to provide the necessaries of life.
[56] Kent Roach, *Criminal Law*, 6th ed.(Toronto: Irwin Law, 2015), at page 204.
[57] *Supra*, at page 201.

> tantamount to intentional acting, an indifference as to whether the law is complied with or not. . . .

[57] Clearly, there is a parallel between this description of gross negligence and the standard for a finding of negligence under the criminal law. Both require at least a marked departure from the conduct of a reasonable person in the circumstances. In fact, the description in *Venne* may best be equated with the "marked and substantial departure" standard required for a finding of criminal negligence.

[58] Gross negligence for the purposes of subsection 163(2) of the ITA has been found to exist in circumstances involving wilful blindness. In *Villeneuve*, supra, the Federal Court of Appeal stated at paragraph 6:

> With respect, I think the judge failed to consider the concept of gross negligence that may result from the wrongdoer's willful blindness.

[59] In *Strachan*, *supra*, the Federal Court of Appeal agreed with the trial judge's finding of wilful blindness in a case involving a similar detaxing scheme to the one in issue here. It is instructive to repeat the reasons of the Court in their entirety:

> [1] Subsection 163(2) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) renders a taxpayer liable to payment of a penalty when the taxpayer knowingly, or under circumstances amounting to gross negligence, makes a false statement in a return.
>
> [2] For reasons cited as 2013 TCC 380, a judge of the Tax Court of Canada dismissed an appeal brought by the appellant from the assessment of a gross negligence penalty in respect of the 2007 taxation year. The facts giving rise to the imposition of the penalty were that the appellant, at the behest of an unscrupulous tax preparer, claimed a fictitious business loss in an amount sufficient to generate a complete refund of all taxes paid by the appellant in respect of her employment income.
>
> [3] While counsel for the appellant asserts various errors on the part of the Judge, the appellant has failed to establish any basis for interfering with the judgment of the Tax Court. We reach this conclusion on the following basis.
>
> [4] 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** (*Canada (Attorney General) v. Villeneuve*, 2004

> FCA 20, 327 N.R. 186, at paragraph 6; *Panini v. Canada*, 2006 FCA 224, [2006] F.C.J. No. 955, at paragraphs 41-43).
>
> [5] Contrary to counsel for the appellant's submissions, the Judge's reasons demonstrate that he properly considered the appellant's background and circumstances.
>
> [6] Second, the appellant has failed to establish that the Judge misapplied the correct legal test. No palpable and overriding error has been shown in the Judge's finding of mixed fact and law that given the numerous "warning" signs, the appellant was required to make further inquiries of her tax preparer, an independent advisor or the Canada Revenue Agency itself before signing her tax return. **Nor has any palpable and overriding error been shown in the Judge's conclusion that the circumstances precluded a defence that, based upon the wrongful representations of her tax preparer, the appellant believed that what she was doing was permissible.**
>
> [Emphasis added.]

[60] The Court makes several important points. First, it confirms that gross negligence may be proven by establishing wilful blindness on the part of the taxpayer. Second, the Court confirms that an aspect of a finding of wilful blindness is a failure by a taxpayer to seek out advice when faced with clear warning signs indicating that something is amiss. Finally, the Court confirms that, in the face of clear warning signs, a taxpayer cannot hide behind the wrongful representations of his or her tax preparer.

[61] It is important to recognize, however, that a finding of wilful blindness is but one basis on which to conclude that a false statement in a return was made under circumstances amounting to gross negligence. One must not lose sight of the basic question of whether the false statement or omission was made in circumstances amounting to gross negligence. A finding of wilful blindness is simply a finding that, in a particular set of circumstances, the actions of the taxpayer support a finding of gross negligence. The concept of wilful blindness is not intended to limit the circumstances in which a finding of gross negligence may be made.

[62] As stated in *Venne*, a finding of "gross negligence" requires a high degree of negligence. The existence (or non-existence) of a high degree of negligence is determined by reference to the objective standard of a reasonable person in the same circumstances as the person against whom the penalty is assessed and not by

reference to the subjective beliefs or characteristics of this person.[58] The objective standard is only relaxed if it is established that the person is incapable of understanding the duty not to make a false statement or an omission in a return.

[63] In summary, for the purposes of this case, absent evidence that the Appellant was incapable of understanding his duty not to make a false statement or an omission in a return,[59] to establish circumstances amounting to gross negligence, the Respondent must establish on a balance of probabilities facts that lead to the conclusion that the making of the false statement in the 2008 Adjustment Request by the Appellant was a marked and substantial departure from the conduct of a reasonable person in the same circumstances. It is through this prism that I will review the evidence presented by the Respondent in the form of the Respondent's Read-Ins.

(c) Application of the Law to the Facts

[64] The Appellant graduated from high school and has 2½ years of college. He was employed by Ontario Hydro from 1978 to 2008, first as a mechanical maintainer in the nuclear generating division, then as a journeyman and finally, after 22 years, as a first line manager, which is a supervisory position. The Appellant performed substantial duties in the course of his employment, including the supervision of others. In 2009, the Appellant incorporated a corporation and provided first line management services to Bruce Power through that corporation.

[65] The education and employment duties and experience of the Appellant strongly suggest that he was capable of understanding his duty not to make a false statement or omission in a return. The Appellant had a reasonable level of education and his employment required him to carry out reasonably complex duties, including the supervision of others.[60] To the extent that the facts suggest that the Appellant may have been gullible, that is a personal trait that is not material to the determination of gross negligence.

[66] The Appellant knew when he signed the 2008 Adjustment Request that he was claiming a business loss of $696,134. He also anticipated a refund. I have no doubt that a reasonable person presented with the plan advocated by

[58] As stated above, subjective knowledge is, however, relevant to the "knowingly" standard in subsection 163(2) of the ITA.
[59] The burden of establishing such incapacity is on the Appellant.
[60] In any event, as stated earlier, the onus to establish incapacity is on the Appellant.

Mr. Thompson would immediately recognize that there was something seriously wrong with the plan and that it is not possible to materialize a $696,134 business loss out of thin air, regardless of the nature of the purported loophole. Nevertheless, notwithstanding his education and employment experience, the Appellant claimed a $696,134 business loss in the absence of an actual business and actual business expenses. In my view, these facts alone suggest conduct that is a marked and substantial departure from that of a reasonable person in the same circumstances.

[67] There are other facts that support this conclusion. The business loss claimed by the Appellant was almost four times the Appellant's employment income for his 2008 taxation year. The claim for the loss not only eliminated his income for 2008 but created a non-capital loss of $522,826 that the Appellant attempted to carryback to his 2005, 2006 and 2007 taxation years. If allowed, the business loss claimed by the Appellant would have eliminated all income tax otherwise payable for 2008. It also appears very likely that the loss would have eliminated all or a significant portion of the tax paid by the Appellant in 2005, 2006 and 2007.[61] In my view, a reasonable person would view such a remarkable result with great suspicion and would not pursue such a course of action without confirmation from an independent advisor or the CRA that the position taken in the T1 Adjustment Request had merit.[62] The failure of an advisor, who may or may not have been aware of the details of the plan, to caution the Appellant against the plan is not confirmation of the merit of the plan.

[68] Prior to 2008, the only significant refund received by the Appellant was $15,000 and resulted from a $34,000 RRSP contribution. The refund promised by the plan was at least four times larger for 2008 alone and did not require any actual outlay or expenditure by the Appellant. Again, a reasonable person would view such a remarkable result with great suspicion.

[69] Mr. Thompson's name does not appear anywhere on the 2008 Adjustment Request even though he prepared the request for the Appellant. A reasonable person would question why Mr. Thompson's name is missing from the form.

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[61] I do not have direct evidence as to the effect of the loss carry-back, if it were allowed. However, it seems unlikely, given the Appellant's 2008 income and the nature of his employment, that the Appellant's income was significantly different in 2005, 2006 and 2007.

[62] The suggestion that the Appellant relied on Mr. Thompson is addressed below.

[70] The Appellant communicated with Mr. Thompson primarily by telephone and e-mail. The Appellant met with Mr. Thompson in his (the Appellant's) home and did not attend Mr. Thompson's office in Kincardine. A reasonable person would want to visit the office of an individual advocating a tax plan that produces such a remarkable result if for no other reason than to confirm that the individual actually had an office.

[71] The Appellant could not identify, and did not meet with, any of the four tax lawyers credited with having conceived the plan. A reasonable person would have insisted on discussing a tax plan that generates such a remarkable result with at least one of the four tax lawyers who purportedly came up with the plan.

[72] The Appellant was given the 2008 Adjustment Request with the word "per" before the place where he was to sign the form. A reasonable person would have questioned why the word "per" was being used on a form that had to be signed by that person.

[73] Mr. Thompson was not known to the Appellant prior to his retaining him to prepare the 2008 Adjustment Request. A reasonable person would be very wary of tax advice from a stranger that produces such a remarkable result, and would seek reliable confirmation that the advice is correct.

[74] The Appellant initiated contact with Mr. Thompson on the recommendation of a friend who had received an inordinately large tax refund. A reasonable person would be suspicious of a recommendation based on a filing position that generates an inordinately large tax refund. As well, the fact that a refund was given is not proof of a valid tax plan.

[75] The Appellant did not ask for or receive references from Mr. Thompson. A reasonable person would want to ensure that the individual advocating a tax plan that produces such a remarkable result had legitimate references.

[76] The Appellant states in his discovery evidence that he relied on Mr. Thompson's explanation of the plan and that he believed he was relying on a legal loophole to create the business loss.[63] The Appellant explained his understanding of the plan in his answers to questions 20 and 29 of the Respondent's Read-Ins:

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[63] I consider this fact to be relevant because it relates to one aspect of the circumstances under which the "reasonable person" is considered to be acting, as required by the application of a gross negligence standard.

> . . . the agency-principal distinction allows the Government of Canada to use an individual's personal registration number or Birth Certificate number as a bond account, against which the Government borrows funds from foreign sources, to allow the Government [to] get good rates, make money on citizens, and bolster the coffers. Tom Thompson also stated that a person's social insurance number functions like a company, separate from the person him- or herself, and that CRA has to refund taxes to the individual but not to the SIN.

[77] The Appellant explains his understanding of the Statement of Agent Activities filed with the 2008 Adjustment Request in his answer to question 71:

> My understanding of the Statement of Agent Activities is set out in my response to question 29. I believe that I was the principal and my social insurance number was my agent.

[78] The explanation provided by Mr. Thompson is on its face patently absurd and no reasonable person would accept that explanation in support of a $696,134 business loss that has no other justification whatsoever. The idea that a social insurance number functions like a company or that a social insurance number can be an agent of the person holding that number is ridiculous. The idea that a loss of $696,134 can, in effect, be plucked out of thin air is also ridiculous.

[79] The explanation in the answers to questions 20, 29 and 71 of the Respondent's Read-Ins is not the description of a tax plan or of a legal loophole. Rather, it is pure nonsense and gobbledegook. In my view, no reasonable person would accept Mr. Thompson's explanation in support of a tax plan that produces a $696,134 business loss purportedly on the basis of a legal loophole. Accordingly, the fact that the representations of Mr. Thompson are part of the circumstances in which the reasonable person is placed is of no assistance to the Appellant.

[80] The Appellant indicates in his discovery evidence that he discussed the plan with his accountant and with his financial advisor and that they did not caution him against the plan. I have already noted that a failure to caution against the plan is not the same as confirmation that the plan has merit, which a reasonable person would seek in the circumstances. In any event, the Appellant also states that he did not have any notes or documents when he discussed the plan with his accountant, Again, those are not the actions of a reasonable person in the circumstances.

[81] The Appellant's counsel submits that the Respondent has failed to produce evidence that the Appellant did not seek the advice of a third party and therefore has not met the burden established by subsection 163(3) of the ITA. In my view, the absence of such evidence is not fatal to the position of the Respondent because

it is the totality of the evidence that must be considered in determining whether the Respondent has met the burden established by that subsection. After careful consideration of all of the Respondent's evidence regarding the circumstances of the false statement made by the Appellant in the 2008 Adjustment Request, I am of the view that the burden on the Respondent established by subsection 163(3) of the ITA has been satisfied.

[82] In particular, the Appellant's signing and filing of the 2008 Adjustment Request in the circumstances disclosed by the evidence tendered by the Respondent represents a marked and substantial departure from the conduct of a reasonable person in the same circumstances and constitutes gross negligence as described in *Venne*. Accordingly, the false statement made by the Appellant in the 2008 Adjustment Request was made in circumstances amounting to gross negligence.

[83] If the Appellant wished to explain why the facts disclosed by the evidence of the Respondent do not properly reflect the facts that should be considered by this Court, it was incumbent on him to testify, which he chose not to do.

[84] For the foregoing reasons, the appeal of the Appellant is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 2nd day of May 2016.

"J.R. Owen"

Owen J.

APPENDIX

RESPONDENT'S READ-INS FROM THE WRITTEN EXAMINATION FOR DISCOVERY OF GEORGE DEGENNARO

	Respondent's Question	**Appellant's Answer**
5.	Have you fully informed yourself with all facts relating to the matters at issue in this appeal?	Yes.
6.	Please confirm that you have reviewed the Notice of Appeal and Reply for the purposes of this appeal.	I confirm.
7.	Have you reviewed the documents in your List of Documents and the documents in the Respondent's List of Documents?	Yes.
9.	Please describe your educational background, including any degrees or designations that you have earned and the dates that you received them.	I received my high school diploma in 1974. From 1976 to 1978, I completed two and a half years of a four-year course at Ryerson Polytechnical Institute. I did not graduate.

10.	Please describe your employment background, including your current occupation.	In high school, I worked as a gas jockey and a night watchman. In the 1976 to 1978 years, I had a summer job with Ontario Hydro as in-site maintenance. After I withdrew from Ryerson, I obtained full-time employment with Ontario Hydro as a Mechanical Maintainer in the Nuclear Generating Division. I then progressed to a journeyman position. After working for 22 years, I was promoted to be a FLM – First Line Manager (supervisor position). I held that position until I retired from my employment in December, 2008. I am currently working for 2183017 Ontario Inc., which provides FLM supervising duties to Bruce Power.
11.	Please describe what duties you are required to perform in your employment.	During the relevant years for this appeal, my duties were supervising Bruce Power's Outage Maintenance Services Department. These included running inspection programs during power outages, preparing pre-job briefs, preparing work reports, co-ordinating surrounding work or supporting tasks, liaising between Bruce Power and other contractors or work groups, and developing and scheduling the work plan.

12.	If you are not currently employed please describe: a) Your last employer; b) The job/title you held with this employer; c) How many years you worked with this employer; d) The duties you held with this employer; and e) Any promotions you received with this employer.	N/A
13.	Please describe any business you have owned or operated, including dates of when you stopped owning or operating any such businesses.	I owned 2183017 Ontario Inc., which is a contracting company. I incorporated this company in January, 2009. It is currently in use.
14.	By what method did you file your initial 2008 tax return (ie: paper return, e-file etc)?	I e-filed my 2008 tax return.
15.	Who, if anyone, helped you prepare and file it?	My accountant at the time, Michael Bolton, BDO Canada, prepared my 2008 tax return based on my information slips.
16.	In your Notice of Appeal, you state that Tom Thompson prepared various tax documents and forms including a T1 Adjustment request for the 2008 taxation year. Is this correct?	Yes.
17.	How was your T1 Adjustment Request for the 2008 taxation year sent to the Canada Revenue Agency (the "CRA") (ie: electronically, by mail)?	I sent the T1 Adjustment by mail.
18.	Who, if not you, filed your T1 Adjustment Request with the CRA?	I mailed the T1 Adjustment, but Tom Thompson prepared it.

19.	Confirm that your signature appears on the T1 Adjustment Request for the 2008 taxation year, at Tab 1 of the Respondent's Book of Documents after the word "per".	I confirm my signature.

20.	At paragraph 2 of your Notice of Appeal you state that you were persuaded to file a request for an adjustment for your 2008 tax filings and a loss carryback based on 'detax' interpretation of the law. What is your understanding of 'detax interpretation of the law'?	At the time Tom Thompson prepared my T1 Adjustment, I had not heard the term "detax interpretation of the law". I now understand that the filing position Tom Thompson advised me to take, and that he used to prepare my T1 Adjustment, is the detax interpretation of the law. Presently, my understanding of the detax interpretation of the law is that it has no basis in law and is incorrect. At the time Tom Thompson prepared, and at the time I mailed, my T1 Adjustment, my understanding was based on Tom Thompson's explanation of the legal distinction between principal and agent. Specifically, Tom Thompson stated that the agency-principal distinction allows the Government of Canada to use an individual's personal registration number or Birth Certificate number as a bond account, against which the Government borrows funds from foreign sources, to allow the Government get good rates, make money on citizens, and bolster the coffers. Tom Thompson also stated that a person's social insurance number functions like a company, separate from the person him- or herself, and that CRA has to refund taxes to the individual but not to the SIN.

21.	At paragraph 8 of your Notice of Appeal you state that "the Appellant's corporation provided Bruce Power with maintenance consulting under a contract for services." What is the name of your corporation? a) What kind of business does your corporation conduct? b) Who are the directors and shareholders of this corporation? c) What is your primary role with this corporation?	2183071 Ontario Inc. a) Consultation Services for First Line Management Supervisory services. b) My spouse, Jennifer DeGennaro, and I are the sole shareholders and directors. c) My primary role with this corporation is to perform services on the corporation's behalf.
22.	Please provide the name and contact information of the accountant that you refer to in paragraph 9 of your Notice of Appeal.	Michael Bolton, BDO Canada, Port Elgin Accounting, 625 Mill Street, Port Elgin, Ontario N0H 2C0, Tel: (519) 832-2049.
23.	When did you first contact Mr. Tom Thompson?	March or April, 2009
24.	What was the method of contact? Please provide me with any communication in respect of your first contact with Mr. Thompson.	My method of communication with Tom Thompson was telephone. I told him that my friend had received a tax refund for just under $50,000 dollars after Tom prepared his tax return. I asked Tom for a meeting so he could give me information on this filing position. He said that he was able to meet.

25.	How many times did you meet at your home with Mr. Tom Thompson? Please state the date and reason for meeting him.	I met Tom Thompson at my house three times. The first meeting was in or around early April, 2009. The purpose was for me to get initial information regarding his tax knowledge and tax filing opportunities. The second meeting was in or around early June, 2009. The purpose was for me to give Tom a summary of my income tax account for the previous few years. In our first meeting Tom instructed me to request this summary from CRA and provide it to him because this information would allow him to complete the T1 adjustment. The third meeting was in or about mid June, 2009. The purpose of this meeting was for Tom to deliver to me the T1 adjustment for the 2008 year.
27.	Please provide us with any notes that you or anyone else took at these meetings.	I took rough notes on various pieces of paper. My notes stated the following: Principal for the Agent, registration # or Birth Certificate is a bond # account, Gov makes money from SIN numbers, gives them ability to borrow funds against persons SIN, 4 Toronto lawyers, 40% of the first refund to escrow account, at the 2nd meeting he changed it to 30%, others have received refunds, CRA has to refund this money.
28.	Please provide us with any documents that you or anyone else present received at these meetings.	I did not receive documents at these meetings.

29.	What is your understanding of the 'Plan' that you refer to at paragraph 14 of your Notice of Appeal?	At the time I filed my T1 Adjustment, my understanding of the "Plan" referred to in paragraph 14 of the Notice of Appeal, was based on Tom Thompson's explanation of the legal distinction between principal and agent. Specifically, Tom Thompson stated that the agency-principal distinction allows the Government of Canada to use an individual's personal registration number or Birth Certificate number as a bond account, against which the Government borrows funds from foreign sources, to allow the Government get good rates, make money on citizens, and bolster the coffers. Tom Thompson also stated that a person's social insurance number functions like a company, separate from the person him- or herself, and that CRA has to refund taxes to the individual but not to the SIN.
30.	At paragraph 14 of your Notice of Appeal you state that Mr. Thompson had a team of four tax lawyers who could file adjustments that would cause the government to refund the tax that you improperly paid. Please provide the current contact information of these four lawyers and of Mr. Tom Thompson.	I do not know who Tom Thompson's four tax lawyers were. I did not meet them and do not have their contact information. Tom Thompson's contact information is: 140 Kitchener Street, Kincardine, Ontario, Tel: (519) 396-6027, (226) 930-0484, (519) 396-1177, email: tommyt1957@live.com, and tomthompson@tnt.com.

31.	At paragraph 15 you state that you asked Mr. Thompson several questions about the Plan. Please detail the questions that you asked and the answers received. Please also provide any documents that you relied on when asking these questions.	I asked Tom Thompson to explain the basis for the T1 Adjustment. He responded with the explanation as I set out in my answer to question 29. I asked about whether this plan was legitimate. He said yes. To support that it was legitimate, he stated that CRA refunded other individuals (a fact I knew to be true). He stated that this was a not a well-known loophole in the *Income Tax Act,* but was legal and CRA had to honour it. I told him, point blank, that I did not want to get involved if this was fraudulent. He emphatically denied that it was fraudulent. I did not rely on documents when asking him these questions.
38.	How did you communicate with Tom Thompson? Please provide me with all copies of correspondence between yourself and Tom Thompson or any individuals affiliated with Tom Thompson and the Plan, including printouts of any email communication.	I communicated with Tom Thompson primarily by phone. In addition, I had several email exchanges with Tom. Enclosed as Appendix "A" are my emails with Tom.
39.	Where did Tom Thompson and the tax lawyers operate their business from? Did you ever attend that place? If so, describe the place of business, provide me with the address and advise me of the dates and the number of times you attended there.	Tom Thompson operated out of an office in Kincardine. I do not know where Tom's lawyers operated. I did not attend Tom's office or Tom's lawyers' office.
40.	Did you ask Mr. Thompson and or anyone affiliated with him for references before retaining their services? If so, provide the details of your contact with those references.	No.

41.	At paragraph 22 of your Notice of Appeal, you also state tax lawyers prepared various documents and forms including a T1 Adjustment Request related to your 2008 taxation year and a Request for Loss Carryback. Please provide the names and contact information for these 'tax lawyers'.	I do not have the names or contact information for the lawyers.
43.	Did you ever have any contact with Mr. DiMauro? If so, please tell me how many times, how you met him and what form of communication you had with him. Please provide me with any documents in respect of this communication including print outs of any emails.	My first contact with Alex DiMauro was after CRA issued the reassessment that I am appealing. I first met him at a tax seminar that he and Tom Thompson held. After the seminar I had an email exchange with him regarding how to respond to CRA's reassessment. Enclosed as Appendix "B" are my emails with Alex.
57.	During the 2008 taxation year, you were employed by Bruce Power and received T4 income, correct? If this is not correct, please provide me with the details of your income earned in 2008.	Correct.
58.	Did you provide Tom Thompson with your T4 slips and other documents for the 2008 taxation year? If so, when did you provide this information to him?	Yes. I gave Tom Thompson the documents in or about early June, 2009.
59.	When did you receive a copy of your T1 Adjustment Request for the 2008 taxation year?	Tom Thompson delivered to me the T1 Adjustment Request in or about mid June, 2009.
61.	Did you review the T1 Adjustment Request and the Request for Loss Carryback and the Statement of Agent Activities for the 2008 taxation year before you signed it?	Yes.

65.	Did you have a business loss, as detailed in your T1 Adjustment Request for the 2008 taxation year (Tab 1 of the Respondent's Book of Documents) at line 135 in the negative amount of $696,134?	I understand now that did not have a business loss of $696,134.
66.	If not, why did you report this amount?	I reported this business loss because Tom Thompson advised, and I believed, that this was the technical method required to file in accordance with the legal loophole.
67.	Were you aware at that time that you signed your T1 Adjustment Request for the 2008 taxation year that you were reporting a business loss of $696,134 on line 135 of your T1 Adjustment Request for the 2008 taxation year? If not, why not?	Yes, at the time, I was aware that I reported a business loss of $696,134.
68.	Do you agree that the T1 Adjustment Request that you filed for the 2008 taxation year claimed a false business loss?	I now agree that this was a false business loss, however, at the time I signed the T1 Adjustment, I did not believe it was a false business loss. I believed that I was filing in accordance with the law.
69.	What did you understand the business loss to be? What steps did you take to gain an understanding or improve your understanding of the business loss?	My understanding of the business loss is as set out in my answer to question 29. I tried to improve my understanding, and did improve my understanding, by asking Tom Thompson questions as set out in my answers to questions 31 and 32. In addition, I asked my accountant and financial planner, as set out in my responses to questions 34 and 35.

70.	The Statement of Agent Activities located at Tab 2 of the Respondent's Book of Documents was filed with your 2008 T1 Adjustment Request, correct?	Correct.
71.	Describe your understanding of the Statement of Agent Activities and identify who the agent and the principal are.	My understanding of the Statement of Agent Activities is set out in my response to question 29. I believe that I was the principal and my social insurance number was my agent.
73.	What are all the steps you took to confirm that your T1 Adjustment Request for the 2008 taxation year was accurate before you signed it?	I reviewed the T1 Adjustment Request and believed that the income number was my income for the year, however, I did not check for accuracy or confirm the other numbers because my understanding was that they were required to comply with the legal loophole. In these circumstances, I had nothing else to confirm.
74.	When you signed the T1 Adjustment Request for the 2008 taxation year, did you understand that you would receive a refund of all taxes withheld at source for the 2008 taxation year?	I believed that I would receive a refund of the 2008 taxes withheld, or, if CRA disallowed some of my claim, I would receive a refund of a different amount.
75.	What did you understand the reason for the refund to be?	My understanding for the refund is based on my understanding of the Plan as set out in my response to question 29.
76.	Have you received a refund in an amount exceeding $5,000.00 prior to 2009? If so, provide the details.	Yes. In or about the 1998 year, I made a spousal RRSP contribution of approximately $34,000, and received a refund of approximately $15,000.

77.	Did you request copies of your tax return printouts for the 2006, 2007 and 2008 taxation years? If so, when and why?	Yes, I requested my tax information in or around May, 2009. I requested the information at the instruction of Tom Thompson, so he could prepare my T1 adjustment.
78.	Who prepared your Request for Loss Carryback (at Tab 3 of the Respondent's Book of Documents)?	Tom Thompson prepared the Request for Loss Carryback.
79.	Who filed your Request for Loss Carryback and how (eg. Electronically, by mail)?	I filed the Request for Loss Carryback by mail.
80.	Confirm that your signature appears on the last page of the Request for Loss Carryback after the word "per:"?	I confirm my signature.
81.	When did you sign the Request for Loss Carryback?	I signed the Request for Loss Carryback on or around June 15, 2009.
82.	Did you provide Tom Thompson with your tax return information for previous tax years? If so, when did you provide this information and why? If no, who calculated the non-capital losses for 2005, 2006 and 2007 on lines 6625, 6626 and 6627 of the Request for Loss Carryback?	Answered in my response to question 77.
84.	Did you review the Request for Loss Carryback before you signed it? If so, were you aware at that time that you were claiming additional refunds of all taxes you paid in the 2005, 2006 and 2007 taxation years?	I reviewed the Request for Loss Carryback and was aware that I was claiming refunds for these years.

85.	What steps did you take to confirm that the Request for Loss Carryback was accurate before you signed it?	Similar to my response to question 73, my understanding was that the numbers set out in the Request for Loss Carryback were required to file in accordance with the legal loophole. Based on my understanding of how the legal loophole operated, I did not have anything to confirm. I merely reviewed the income amount and believed it was my income for the year.
86.	Why did you believe you were going to receive additional refunds as a result of the Request for Loss Carryback?	I believed I was going to receive refunds for the prior years because of my understanding of the Plan as set out in my response to question 29.
87.	Prior to filing your Request for Loss Carryback, did you communicate with anyone affiliated with Tom Thompson to discuss the Request for Loss Carryback? If so, please provide the details of your communications and any documents that relate to those communications.	After Tom Thompson delivered to me the Request for Loss Carryback, I did not communicate with anyone affiliated with Tom Thompson prior to mailing the Request for Loss Carryback.
90.	Who prepared your tax return for the 2009 taxation year? Please provide the individual's name and current contact information.	Brian Venerus prepared my 2009 tax return. His contact information is in my response to question 33.
91.	Did you receive a letter from the Canada Revenue Agency ("CRA") dated October 23, 2009 after your T1 Adjustment Request for the 2008 taxation year was filed? Confirm that the document at Tab 3 of the Appellant's Book of Documents is a copy of that letter.	Yes, I received the letter at Tab 3 of the Appellant's Book of Documents.
92.	When you received the CRA's letter dated October 23, 2009, were you concerned? Why or why not?	Yes, I was concerned because the letter was asking for information that I did not have.

93.	What did you do after receiving the October 23, 2009, letter?	I contact Tom Thomson by phone, read to him the details in the letter, and requested that he contact CRA on my behalf. He said that he would.
94.	Did you contact anyone affiliated with Tom Thompson or Tom Thompson himself following receipt of CRA's letter dated October 23, 2009? If so, did you ask him/them to explain why the CRA was asking questions about your request to adjust your income tax return for the 2008 taxation year? What was the response you received from Tom Thompson or anyone on his behalf?	As answered in my response to question 93, I contacted Mr Thompson by phone. I did not ask him for an explanation as to why CRA was asking about my T1 Adjustment. I wanted him to contact the CRA directly to answer the CRA's questions directly, because, although I understood the Plan as he explained it to me, Tom was able to explain it better than me.
96.	Did you respond to the CRA's letter dated October 23, 2009? If so, please provide a copy of the document / communication responding to the CRA's letter.	I called Krista Kirvan, who sent the letter on CRA's behalf, on November 20, 2009, at 4:35pm and left a voice message.
97.	Please confirm that you received the document at Tab 5 of the Appellant's Book of Documents.	I confirm that I received the document at Tab 5 of the Appellant's Book of Documents.
98.	What did you do after receiving the letter at Tab 5 of the Appellant's Book of Documents?	I phoned Tom Thompson and demanded that he contact the CRA agent identified in the letter. He said he would talk to his lawyers to address CRA's letter. In addition, I emailed Tom (see appendix "A").

99.	Did you contact anyone affiliated with Tom Thompson or Tom Thompson himself following receipt of CRA's letter at Tab 5 of the Appellant's Book of Documents? If so, did you ask him/them to explain why the CRA was asking questions about your request to adjust your income tax return for the 2008 taxation year? What was the response you received from Tom Thompson or anyone on his behalf?	Answered in my response to question 98.
101.	Did you respond to the CRA's letter at Tab 5 of the Appellant's Book of Documents? If so, please provide a copy of the document / communication responding to CRA's letter.	I did not respond to CRA's letter.
102.	Please confirm that you received the letter dated January 21, 2011 at Tab 6 of the Appellant's Book of Documents.	I confirm that I received the document at Tab 6 of the Appellant's Book of Documents.
103.	What did you do after receiving the letter at Tab 6 of the Appellant's Book of Documents?	I phoned and emailed Tom Thompson demanding that he contact CRA to deal with the issues raised in CRA's letter.
104.	Did you contact anyone affiliated with Tom Thompson or Tom Thompson himself following receipt of CRA's letter at Tab 6 of the Appellant's Book of Documents? If so, did you ask him/them to explain why the CRA was proposing to deny the request for Gross Business Income for the 2008 taxation year? What was the response you received from Tom Thompson or anyone on his behalf?	Yes, Tom Thompson referred me to Alex DiMauro. I did not ask for an explanation as to why CRA was asking about my T1 Adjustment. Once again, I wanted Tom or Alex to contact CRA directly to answer CRA's questions directly, because, although I understood the Plan as he explained it to me, they were able to explain it better than me.

106.	Did you respond to the CRA's letter at Tab 6 of the Appellant's Book of Documents? If so, please provide a copy of the document / communication responding to the CRA's letter.	I did not respond to CRA's letter.
107.	Please confirm that you received the CRA's letter dated March 11, 2011 at Tab 8 of the Appellant's Book of Documents.	I confirm that I received the document at Tab 8 of the Appellant's Book of Documents.
108.	What did you do after receiving the letter at Tab 8 of the Appellant's Book of Documents?	I tried to contact Tom Thompson by phone but was unable to reach him. He did not respond to voice messages. I contacted Alex DiMauro by phone and read the contents of the letter to him and insisted that he deal with the letter promptly. Alex stated that he would prepare the notice of objection on my behalf.
109.	Did you contact anyone affiliated with Tom Thompson or Tom Thompson himself following receipt of CRA's letter at Tab 8 of the Appellant's Book of Documents? If so, did you ask him/them to explain why the CRA was proposing to deny the request for Business Loss for the 2008 taxation year and why the CRA was levying penalties on the Business Loss requested? What was the response you received from Tom Thompson or anyone on his behalf?	Answered in my response to question 108. I asked Alex DiMauro why CRA was denying the adjustment. Alex's response was that it was due to the large amount of my refund request.
111.	Did you respond to the CRA's letter at Tab 8 of the Appellant's Book of Documents? If so, please provide a copy of the document / communication responding to the CRA's letter.	I did not respond to CRA's letter.
112.	A Notice of Reassessment was issued on March 24, 2011, correct? (Tab 11 of the Appellant's Book of Documents).	Correct.

113.	Did you file a Notice of Objection to the 2008 Notice of Reassessment? If so, please confirm that the document at Tab 7 of the Respondent's Book of Documents is a copy of your Notice of Objection.	Yes, I filed a notice of objection that Alex DiMauro prepared for me. It is at Tab 7 of the Respondent's Book of Documents.
114.	Please confirm that your signature appears after the word By: on the Notice of Objection at Tab 7 of the Respondent's Book of Documents.	Confirmed.
115.	Why did you sign your name with the word "by" in front of it on your Notice of Objection?	Alex DiMauro instructed me to sign in this fashion.
116.	At any time prior to filing your Notice of Objection, did you communicate with anyone other than Tom Thompson or individuals affiliated with Tom Thompson and/or Fiscal Arbitrators to discuss your exchange with the CRA and your Request for an Adjustment for the 2008 taxation year? If so, please provide the details of your communications and any documents that related to those communications.	No.
117.	Did someone prepare the Notice of Objection at Tab 7 of the Respondent's Book of Documents on your behalf? If so, who?	Yes, Alex DiMauro prepared the Notice of Objection.
118.	Your Notice of Objection states that "the auditor's belief's, opinions, allegations, submissions relied upon for the above assessments are unfounded and hereby denied. No offer or agreement to contract under these terms have been accepted. All amounts claimed are allowed under section 20 of the Income Tax Act as paid to the animator for prior years…etc". Can you please explain what you mean by the relevant facts and reasons stated in your Notice of Objection?	I cannot explain these facts and reasons because it is not my wording. In any event, this is not relevant for this appeal because I am only appealing the gross negligence penalties.

119.	Did you receive a letter from the CRA dated March 5, 2012? Confirm that the document at Tab 8 of the Respondent's Book of Documents is a copy of that letter.	I confirm that I received the document at Tab 8 of the Respondent's Book of Documents.
120.	Did you respond to the CRA's letter dated March 5, 2012? Confirm that the letters at Tab 14 of the Appellant's Book of Documents are the letters in response to the CRA's letter dated March 5, 2012 to you.	Yes, my response is at Tab 14 of the Appellant's Book of Documents.
121.	Did you draft the letters at Tab 14 of the Appellant's Book of Documents?	No, I did not draft the letters at Tab 14 of the Appellant's Book of Documents.
123.	If your answer to question 121 is 'no', who prepared these letters, at Tab 14 of the Appellant's Book of Documents?	Alex DiMauro.
124.	Did you read the letters at 14 of the Appellant's Book of Documents before they were sent to CRA?	Yes.
125.	Did you discuss the contents of these letters with Tom Thompson or any of his affiliates or Fiscal Arbitrators or any of its affiliates prior to sending these letters to CRA?	Yes, I discussed the contents of the letter with Alex DiMauro.

126.	If the answer to question 125 is 'yes', please provide me with: a) The contact information of the individuals you had communication with; b) The questions that you asked; c) The answers that you received; d) Any documents that you relied upon when asking these questions; and e) Any documents received during any of these communications.	a) Alex DiMauro's contact info is in my response to question 42. b) I asked whether this letter will address CRA's questions and assist me in CRA's audit. c) Alex's response was that it would respond to CRA's questions and assist me. d) I did not rely on any documents when asking these questions. e) Enclosed as appendix "B" is my email exchange with Alex DiMauro.
127.	Please confirm that you received the Notice of Confirmation for your 2008 taxation year dated May 16, 2012, which is at Tab 11 of the Respondent's Book of Documents.	I confirm that I received the Notice of Confirmation at Tab 11 of the Respondent's Book of Documents.
128.	What did you do when you received the Notice of Confirmation?	I contacted Alex DiMauro to inform him that his letters and Notice of Objection did not achieve the desired result. I asked him whether he was making further submissions and what the next step was. He informed me that he could no longer help me. I contacted my accountant, Brian Venerus, for a referral to a tax lawyer.

134.	Are there any additional facts that you wish to provide? Please state what they are and explain them.	I do not have additional facts to provide.
138.	Please confirm that you have reviewed the answers provided in response to these questions and that you believe, to the best of your ability, that they are wholly truthful.	I confirm that my response to these questions are wholly truthful.

APPELLANT'S READ-INS OF THE RESPONDENT'S WRITTEN EXAMINATION FOR DISCOVERY OF GEORGE DEGENNARO

33.	Referring to paragraph 18 of your Notice of Appeal, please provide me with the name and contact information of the accountant that you discussed the Plan with. Also provide me with any notes or documents that you referred to when discussing the Plan with your accountant.	I discussed the Plan with an accountant, Brian Venerus, of VS LLP. His contact information is 102-2600 Skymark Avenue, Building 10, Mississauga, Ontario, L4W 5B2, Tel: (416) 642-7558 and (416) 907-4667, email: bvenerus@vsllp.ca. I did not have any notes or documents when discussing the Plan with Brian.
35.	Why did you decide to file a T1 Adjustment Request and a Request for Loss Carryback for the 2008 taxation year?	As stated in my answers to questions 20 and 29, I believed that there was a legal loophole in the *Income Tax Act* that provided for refunds in certain circumstances. In addition, as I set out in my answer to question 32, I believed that if CRA was going to make changes to a tax return or adjustment, CRA would do so when it issued the assessment, not through a reassessment several years after issuing the assessment. I knew that two other individuals filed adjustments in this manner and received refunds from the CRA, therefore, I believed that this was a legitimate filing position – simply a little-known legal loophole that CRA had not closed. My accountant, Brian Venerus, and my financial planner, Deborah Moore, did not caution against it. In short, I believed Tom Thompson's explanation that this was a little-known loophole.

37.	If you were introduced to Tom Thompson by another person, provide the name and most recent contact information for that person and describe your relationship with that person. This description must include when you met the person, under what circumstances you met the person and your understanding of the person's knowledge of accounting, financial or tax matters.	Tom Underwood introduced me to Tom Thompson. Tom Underwood's contact information is 341 Stickel Street, Port Elgin, Ontario, Tel: (519) 389-2903. Tom Underwood and I have been friends for approximately 20 years. It was my understanding that Tom Underwood was a savvy investor with some knowledge on tax matters.
63.	Specifically, did you receive the total income on your T1 Adjustment Request (Tab 1 of the Respondent's Book of Documents) at line 162 where you reported income of $190,590?	At this time, I recognize that I did not receive income of $190,590. At the relevant time, I did not identify that this was different than the income I received in the 2008 year, $183,485.
64.	If not, why did you report this amount?	I did not identify that this was different than the amount I actually earned in the 2008 year, $183,485. In other years, I earned up to $196,000 and, therefore, the amount of $190,590 was not extraordinary.
89.	Is it your position in this litigation that you took reasonable steps to ensure that your income, taxes payable and credits were accurately reported in your 2008 T1 Adjustment Request and the Request for Loss Carryback? If so, and other than those discussed in answer to the above questions, what are all of the facts that you know or that you have been informed of that lead you to believe that you reasonably reported your income, taxes payable and credits?	I believe I took reasonable steps. The facts are as set out in my Notice of Appeal and in my responses to the Respondent's questions.

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