Docket: 2014-40(IT)G

BETWEEN:

CHIEN CHUNG TANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 15 and 16, 2017, at Halifax, Nova Scotia

Before: The Honourable Justice Dominique Lafleur

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	David I. Besler

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* (Canada) for the 2005, 2006 and 2007 taxation years is allowed, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

The parties shall bear their own costs, subject to either party's right to make further submissions within 30 days of the date of this judgment.

Signed at Ottawa, Canada, this 7th day of September 2017.

"Dominique Lafleur"

Lafleur J.

Citation: 2017 TCC 168
Date: 20170907
Docket: 2014-40(IT)G

BETWEEN:

CHIEN CHUNG TANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lafleur J.

A. OVERVIEW

[1] This appeal relates to net worth assessments issued to Chien Chung Tang by the Minister of National Revenue (the "Minister") under the *Income Tax Act* (the "Act") for the 2005, 2006, and 2007 taxation years. During the taxation years in question, Mr. Tang's activity consisted in the purchase and sale of real estate and the leasing of properties.

[2] Mr. Tang represented himself at the hearing. Although he was represented by counsel until shortly before his first scheduled hearing, he dismissed his counsel and did not find it convenient to retain a new attorney. At the initial hearing in March 2016, Mr. Tang seemed confused as to his legal burden with respect to the case he had to meet. To ensure that the case was decided on the merits, I adjourned the hearing. A new hearing date was set for May 2017, over one year later, and I urged Mr. Tang, given the rigours of this Court's General Procedure process, to retain a new counsel so as to receive adequate representation. Mr. Tang nonetheless insisted on representing himself. To accommodate Mr. Tang's wishes, this Court scheduled two trial management conference calls in order to ensure that Mr. Tang understood the General Procedure process and his obligations with respect to disproving the Minister's assumptions.

[3] Mr. Tang came to Canada through the business immigration program in 1994, but he is no longer a resident in Canada. Under the business immigration program, Mr. Tang could not be an employee but rather had to create his own business. He invested in real estate properties to derive rental income, and he also bought and sold properties. Mr. Tang supported his community, making an important donation to his local YMCA and gave financial assistance to a theater company in Amherst, Nova Scotia. Mr. Tang noted that his fluency in English had declined since he left Canada in late 2009. I allowed Mr. Tang's son, Chia-Hao Tang, to be seated beside his father at the counsel's table and to assist his father during the hearing. However, I did not allow Mr. Tang's son to address the Court directly, otherwise than as a witness.

[4] At trial, Mr. Tang and his son, Chia-Hao, testified in support of the Appellant's position. Chris Coghlin, an auditor from the Canada Revenue Agency ("CRA"), testified on behalf of the Minister.

[5] On the basis of a net worth analysis, Mr. Tang was reassessed to include additional income for the 2005 to 2007 taxation years in the amounts of $122,100, $291,663, and $74,943, respectively. Gross negligence penalties for each of the taxation years at issue were also assessed under subsection 163(2) of the Act.

B. THE ISSUES

[6] The issues arising from this appeal are as follows: (1) has income been properly determined? (2) was the 2005 taxation year properly reassessed beyond the normal reassessment period pursuant to subparagraph 152(4)(*a*)(i) of the Act? and (3) were gross negligence penalties properly assessed?

C. THE POSITION OF THE PARTIES

1. The Appellant's position

[7] According to Mr. Tang, the Minister's calculations are wrong as the Minister did not take into account various loans he had received from family members, including Mr. Tang's share of his father's inheritance received by way of loan and various amounts received from a corporation called Neostar Technologies Co. Ltd. Furthermore, Mr. Tang submits that the amount of the Shareholders' loan balance in Tang Dynasty Investments Limited as of December 31, 2004, has been understated and the amount of the personal expenditures indicated in Schedule D to the Reply were clearly overstated. Mr. Tang also pointed out that he had sold

various properties over the years and used the proceeds to pay his family's living expenses.

2. The Respondent's position

[8] According to the Respondent, the answers given by Mr. Tang on the written examination for discovery questions indicate that the sole issue before me relates to the 2005 taxation year and, more specifically, to loans from family members in the aggregate amount of $385,288 and the amount of the opening balance of the Shareholders' loan in Tang Dynasty Investments Limited as of December 31, 2004. As Mr. Tang has indicated in his answers in discovery, he was to advise if he had any other issue with the Minister's net worth calculations but Mr. Tang did not. For that reason, according to the Respondent, I should not entertain any other issue in this appeal. I will discuss this matter further below.

D. DISCUSSION

1. The net worth method and the burden of proof

[9] The net worth method "is based on an assumption that if one subtracts a taxpayer's net worth at the beginning of a year from that at the end, adds the taxpayer's expenditures in the year, deletes non-taxable receipts and accretions to value of existing assets, the net result, less any amount declared by the taxpayer, must be attributable to unreported income earned in the year, unless the taxpayer can demonstrate otherwise. It is at best an unsatisfactory method, arbitrary and inaccurate but sometimes it is the only means of approximating the income of a taxpayer" (*Bigayan v R* (1999), [2000] 1 CTC 2229, 2000 DTC 1619 at para 2 [*Bigayan*]).

[10] In order to successfully challenge these assessments, Mr. Tang must present detailed and cogent testimony, and supporting evidence where possible, to explain the apparent increases in net worth. Mr. Tang can succeed in his appeal provided the evidence given by him constitutes a *prima facie* rebuttal of the assumptions made by the Minister. For example, he can succeed either by establishing on a balance of probabilities new facts not considered by the Minister showing that he did not earn the alleged unreported income, or by demonstrating that the Minister's assumptions of fact are wrong. Once a *prima facie* case is made out, the burden of proof shifts back to the Minister, who must then establish, on a balance of probabilities, the facts required to support the reassessments.

[11] This process was described in *Hickman Motors Ltd v Canada*, [1997] 2 SCR 336 at paras 92–93, 97 DTC 5363, where the Supreme Court noted that:

> 92 The Minister, in making assessments, proceeds on assumptions and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment. The initial burden is only to "demolish" the exact assumptions made by the Minister but no more.
>
> 93 This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case. ... The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions....

[Citations omitted; emphasis in the original.]

[12] As stated by the Federal Court of Appeal in *Lacroix v Canada*, 2008 FCA 241 at para 20, 2009 DTC 5029, the application of the net worth method does not change this standard of proof:

> 20 Where the Minister presumes that the income detected using the net worth method is taxable income, the onus is on the taxpayer to demolish this presumption. If the taxpayer presents credible evidence that the amount in question is not income, the Minister must then go beyond these assumptions of fact and file evidence proving the existence of this income.

[13] In addition to providing evidence to rebut the Minister's assumptions, there is a second way to rebut a net worth assessment—namely, to show that it is somehow inherently flawed. As Justice Bowman, as he then was, explained it in *Bigayan (supra* at paras 3–4):

> 3 The best method of challenging a net worth assessment is to put forth evidence of what the taxpayer's income actually is. A less satisfactory, but nonetheless acceptable method is described by Cameron J. in *Chernenkoff v. Minister of National Revenue*, 49 DTC 680 at page 683:
>
>> In the absence of records, the alternative course open to the appellant was to prove that even on a proper and complete "net worth" basis the assessments were wrong.
>
> 4 This method of challenging a net worth assessment is accepted, but even after the adjustments have been completed one is left with the uneasy feeling that the truth has not been fully uncovered. Tinkering with an inherently flawed and

> imperfect vehicle is not likely to perfect it. The appellant chose to use the second method.

[14] Thus, Mr. Tang's credibility and his evidence will be determinative (*Landry v The Queen*, 2009 TCC 399 at para 47, 2009 DTC 1359 [*Landry*]; *Roy v The Queen*, 2006 TCC 226, 2008 DTC 3224). This Court, however, may also consider the overall reasonableness of the net worth assessment in its determination of whether to allow the appeal.

[15] Although the foregoing shows that Mr. Tang will generally bear the burden to disprove the Minister's assumptions, the Minister will have the burden of proving her assumptions, on a balance of probabilities, with respect to gross negligence penalties and any statute-barred years. I will discuss these issues following an analysis of Mr. Tang's arguments and the substance of the net worth assessment.

2. Preliminary issue: Objections to documents

[16] As a preliminary issue, the Respondent objected to Mr. Tang's translated documents being admitted into evidence. In particular, the Respondent argues that, because counsel did not have an opportunity to examine the translator of the documents, they should not be admitted.

[17] Prior to the hearing, Mr. Tang, through counsel, sent numerous translated foreign financial documents, with copies of the originals, to the Minister's counsel at the Department of Justice (Exhibit A-1). These documents were sent as part of settlement discussions between the parties.

[18] At trial, Mr. Tang offered the foreign financial documents originally sent to the Department of Justice in evidence (Exhibit A-1). Mr. Tang also offered additional foreign financial and tax documents in support of his position (Exhibits A-2 through A-9).

[19] All of Mr. Tang's foreign financial documents were translated by T-United Translation Service, and were authenticated by Yuan-Sun Chao of the Notary Public Office of the Taiwan Taipei District Court. The affidavit from T-United Translation Service attached to each document reads "I certify that this translation, to the best of my knowledge and belief, is a true and correct English version of the attached original." The affidavit is signed, dated, stamped, and sealed by the translator. The Notary Public's stamp notes that "the signature(s)/seal(s) of

translator in this document is/are authentic. This translated version is hereby certified to be true to the meaning of the attached original.” [Emphasis added.] The Notary Public’s stamp is signed, sealed, and dated.

[20] On the whole, Mr. Tang’s translated documents comply with section 89 of the *Tax Court of Canada Rules (General Procedure)* (“Rule 89”) and sections 52–54 of the *Canada Evidence Act*, and should, therefore, be admitted. All translated documents that I accepted as evidence at the hearing appeared on Mr. Tang’s list of documents (APPELLANT’S LIST OF DOCUMENTS (Partial Disclosure) at items 19–20, 27–53). The Minister’s objection is out of place to the extent that it is not based on a demonstrable concern about the quality of the translations. Such a demonstrable concern could be shown with either expert evidence or an alternative translation.

[21] Under Rule 89, the Tax Court judge has discretion with respect to which documents to admit. It begins with the words “Unless the Court otherwise directs,” and then sets out the general criteria for admission as evidence; namely, reference in a pleading or a list, production in examination for discovery, or production by a witness who is not under the control of one of the parties. It reads as follows:

89. Use at Hearing — (1) Unless the Court otherwise directs, except with the consent in writing of the other party or where discovery of documents has been waived by the other party, no document shall be used in evidence by a party unless

(a) reference to it appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding,

(b) it has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery, or

(c) it has been produced by a witness who is not, in the opinion of the Court, under the control of the party.

89 Utilisation des documents à l’audience — (1) Sauf directive contraire de la Cour, ou sauf si les autres parties ont renoncé au droit d’obtenir communication de documents ou ont consenti par écrit à ce que des documents soient utilisés en preuve, aucun document ne doit être utilisé en preuve par une partie à moins, selon le cas :

a) qu’il ne soit mentionné dans les actes de procédure, ou dans une liste ou une déclaration sous serment déposée et signifiée par une partie à l’instance;

b) qu’il n’ait été produit par l’une des parties, ou par quelques personnes interrogées pour le compte de l’une des parties, au cours d’un interrogatoire préalable;

c) qu’il n’ait été produit par un témoin qui n’est pas, de l’avis de la Cour, sous

le contrôle de la partie.

(2) Unless the Court otherwise directs, subsection (1) does not apply to a document that is used solely as a foundation for or as part of a question in cross-examination or re-examination.

(2) Sauf directive contraire de la Cour, le paragraphe (1) ne s'applique pas au document utilisé uniquement comme fondement ou comme partie d'une question dans un contre-interrogatoire ou en réinterrogatoire.

[22] Under the opening words of Rule 89, "Unless the Court otherwise directs," the Tax Court judge has discretion concerning the admissibility of evidence. The philosophy of the rule is to ensure the flexibility necessary to admit evidence based on its relevance at the trial. The standard of relevance was affirmed most recently by the Supreme Court in *Globe and Mail v Canada (AG)*, 2010 SCC 41 at para 56, [2010] 2 SCR 592 [*Globe and Mail*]:

> 56 [I]n civil litigation proceedings, the presumption is that all relevant evidence is admissible and that all those called to testify with respect to relevant evidence are compellable....

[23] *Globe and Mail*, *supra*, follows the principles set out in *Mitchell v MNR*, 2001 SCC 33 at para 30, [2001] 1 SCR 911; it was noted that the rules of evidence should facilitate justice, not hinder it. The Supreme Court set out three factors for evaluating the admissibility of evidence; namely, 1) that it must be useful and relevant, 2) that it must be reasonably reliable, and 3) that it may nonetheless be excluded if it hinders the search for truth.

[24] That being said, the translated documents provided by Mr. Tang do not require this Court to exercise any discretion since these documents already meet the requirements set out by Rule 89.

[25] First, I have only admitted documents that appeared on Mr. Tang's list of documents. At trial, several documents, translated or otherwise, were excluded, precisely because they did not appear on Mr. Tang's list of documents. In addition, Mr. Tang produced some of the translated documents as part of the discovery process, as evidenced by Exhibit A-1 as well as Exhibits A-4 to A-7. In view of these two factors, the translated documents meet the threshold for admission set out in Rule 89.

[26] One could argue that the fact that Mr. Tang's documents are translated could taint the general standard for admission found in Rule 89. This taint would

arguably apply if the opposing party were taken by surprise by the production of translated documents and therefore prejudiced by it.

[27] This concern, however, seems quite absent in this case. The list of documents clearly indicated that some of Mr. Tang's documents appeared in translated form. The Minister was made aware of the translation issue prior to the hearing.

[28] If the Minister had a problem with the translation, this issue should have been brought up in a trial management conference call, such as the ones held on March 21 and April 28, 2017. Further, even if the Minister had an opportunity to cross examine Mr. Tang's translator, it is unclear what, absent additional expert evidence or testimony, such an examination could prove, as the Crown counsel did not have any knowledge of Mandarin.

[29] In other words, an opportunity to examine Mr. Tang's translator would, without expert evidence or an alternative translation, have had no impact on the admissibility of the translated documents. The objection, therefore, seems not to address any real underlying concern, but rather seems to be made merely for the sake of objecting.

[30] I further note that sections 52–54 of the *Canada Evidence Act* provides for a presumption of authenticity with respect to the official nature of the notarization or declaration of documentary evidence in certain cases. Paragraph 52(*e*) of the *Canada Evidence Act* designates "judicial officials in a foreign country in respect of oaths, affidavits, solemn affirmations, declarations or similar documents that the official is authorized to administer, take or receive" as a specific class of persons; and section 53 then deems that the documents authorized by that class "are as valid and effectual and are of the like force and effect to all intents and purposes as if they had been administered, taken or received in Canada by a person authorized". Subsection 54(2) of the *Canada Evidence Act* provides for a presumption of authenticity with respect to the official nature of the notarization or declaration by noting that an "affidavit, solemn affirmation, declaration or other similar statement taken or received in a foreign country by an official referred to in paragraph 52(*e*) shall be admitted in evidence without proof of the signature or official character of the official appearing to have signed the affidavit, solemn affirmation, declaration or other statement."

[31] The British Columbia Court of Appeal has noted that the definition of "judicial official" is not restricted to judges alone, but rather extends to any person

who has the legal capacity of a person to administer an oath or similar function under the relevant domestic law (*R v Jahanrakhshan*, 2013 BCCA 128 at para 19, [2013] BCJ No 521 (QL)). The notarial seal on Mr. Tang's documents is from a "Notary Public Office of Taiwan Taipei District Court," and I find that this meets the standard of "judicial official".

[32] Thus, having ruled that Rule 89 is no obstacle to the admission of Mr. Tang's documents, subsection 54(2) of the *Canada Evidence Act* allows me to accept the official character of the signing notary public. I note that the Notary Public's stamp attests to the authenticity of the signature and the seal of the translator, as well as certifying that the translated version of Mr. Tang's document is "certified to be true to the meaning of the attached original."

[33] When viewed as a whole, and without the Crown presenting an alternative translation or expert testimony, there is no question that Mr. Tang's documents should be admitted into evidence.

3. Net worth assessment

[34] The net worth assessment, which imputed income on both Mr. Tang and his former spouse (whose income is not at issue in this appeal), showed income calculated under the net worth method as $244,200, $583,326 and $149,886 for the 2005, 2006 and 2007 taxation years respectively. That makes for a combined total alleged unreported income of $977,412 for both Mr. Tang and his former spouse. Mr. Tang's share of that combined total alleged unreported income is 50% or $488,706.

[35] Mr. Tang submits that any apparent increase in net worth is due to a series of loans that were either omitted from, or understated in, the net worth assessment. Mr. Tang also argues that the CRA's net worth assessment is fundamentally flawed and thus undermines its credibility.

[36] In terms of the loans, Mr. Tang submits that he received loans totalling $385,288 from his aunt on his mother's side (and her family), a loan of $439,216 from his family in Taiwan (which is part of his father's inheritance), and a loan of $125,000 from Neostar Technologies Co. Ltd.

[37] Furthermore, Mr. Tang also submits that the Shareholders' loan balance in Tang Dynasty Investments Limited for $325,362 as of December 31, 2004, was

undervalued due to an accounting error, and should instead be recorded as a loan for $558,610.89.

[38] When assessing credibility of a witness, I can consider inconsistencies, the attitude and demeanour of the witness, motives to fabricate evidence, and the overall sense of the evidence. Justice Valerie Miller in *Nichols v The Queen*, 2009 TCC 334, 2009 DTC 1203, stated at para 23:

> 23 In assessing credibility I can consider inconsistencies or weaknesses in the evidence of witnesses, including internal inconsistencies (that is, whether the testimony changed while on the stand or from that given at discovery), prior inconsistent statements, and external inconsistencies (that is, whether the evidence of the witness is inconsistent with independent evidence which has been accepted by me). Second, I can assess the attitude and demeanour of the witness. Third, I can assess whether the witness has a motive to fabricate evidence or to mislead the court. Finally, I can consider the overall sense of the evidence. That is, when common sense is applied to the testimony, does it suggest that the evidence is impossible or highly improbable.

[39] Overall, I found Mr. Tang's testimony, although often unclear, to be credible. Given the credibility of Mr. Tang's testimony and the evidence that he provided, I find that he made out a *prima facie* rebuttal of the Minister's assumptions with respect to the loan of $385,288 from his aunt (and aunt's family) and the loan of $439,216 from his family. As with the net worth assessment, where Mr. Tang was assigned half of the additional income, Mr. Tang's share of these loans would again be 50%—$192,644 for the loans from his aunt and $219,608 for the loan from his family, giving a total of $412,252. These amounts would reduce Mr. Tang's additional income as per the net worth assessment by approximately 84%. Concerning these loans, the Crown did not produce sufficient evidence or argument to refute Mr. Tang's *prima facie* rebuttal. However, I find that Mr. Tang did not make out a *prima facie* case with respect to the various loans from Neostar Technologies Co. Ltd., the opening balance of the Shareholders' loan in Tang Dynasty Investments Limited and in respect of Schedule D of the Reply.

[40] Net worth assessments are frequently vacated when, on the basis of *viva voce* or documentary evidence, the taxpayer succeeds in discharging his burden (*Morneau v Canada*, 2003 FCA 472, 2006 DTC 6635, and *Landry*, *supra* at para 50). Applying the aforementioned criteria to the evidence before me, I have concluded that the Mr. Tang produced the evidence required to challenge the net worth assessment under appeal. By demolishing the Minister's assumptions with

respect to loans related to approximately 84% of the allegedly unreported income, Mr. Tang has discharged his burden to that extent.

(1) loans from Mr. Tang's aunt (and her family)

[41] For the loans totalling $385,288 from Mr. Tang's aunt, Ms. Liao Li Shou Chon, as well as other members of Ms. Liao's family, Mr. Tang presented a series of bank transfer documents and personal loan agreements (Exhibit A-1) all dated as of 2005. While the bank transfer documents included under Exhibit A-1 did not show direct evidence of the transfer between Mr. Tang's aunt and Mr. Tang, they did corroborate the amounts at issue. Mr. Tang explained to the Court that the transfers were made from his aunt's accounts (as well as other members of Ms. Liao's family; that is, Mr. Tang's uncle and cousin) to his bank account in Taiwan and then transferred from his bank account in Taiwan to Canada. Mr. Tang's brother acted for Mr. Tang in Taiwan under a power of attorney, having authority to act on his behalf for banking purposes. The Crown suggested that the personal loan agreements were created in preparation for the audit, and were therefore of little value. Mr. Tang and his son, however, noted that Taiwanese cultural practices would not normally require a written loan document for an inter-family loan, and that the drafting of this written version of the agreement to embody their understanding was therefore appropriate, even if that was done after the fact. Mr. Tang was also able to produce a document from the Taipei International Commercial Bank showing a transfer from Ms. Liao Li Shou Chon to Mr. Tang (Exhibit A-7), as well as documents showing transfers from Mr. Tang's cousin and uncle to Mr. Tang (Exhibits A-4, A-5 & A-6). Mr. Tang explained that the transfers from Mr. Tang's cousin and uncle were made on behalf of his aunt, and these transfers conformed to his family's practices of sharing money.

(2) loan from Mr. Tang's family (father's inheritance)

[42] Concerning the loan of $439,216 from his family in Taiwan, Mr. Tang produced two documents, entitled "IOUs", corroborating the amount of the loan (Exhibit A-2). Mr. Tang explained in great detail that this loan was made against property that he had inherited when his father passed away, and set out the parameters of how the inheritance property was used by his family and how the loan was effectuated. Mr. Tang testified that he received 20% of his father's estate, which provided collateral for the loan, and he used said loan amounts to pay for personal expenditures. According to Mr. Tang's son, his father and uncles did not have to work to earn their living because they had sufficient resources from his grandfather's inheritance.

[43] The Crown questioned the relevancy of these documents as they show a loan to Mr. Tang's mother and not to Mr. Tang himself. While the translated name of these documents is the informal "IOU", they appear to be fully considered and properly set out loan agreement documents. The documents set out the terms of the agreement in some detail, and also identify the parties by name, seal, and address. Mr. Tang is described as a joint guarantor in one document and a collateral provider, as well as joint guarantor and joint debtor in another document. I am of the view that these documents are relevant for the purposes of Mr. Tang's appeal and tend to give credibility to Mr. Tang's assertions that he received money as a loan.

[44] However, as mentioned above, at the hearing, the Crown objected that I consider that issue given the answers provided by Mr. Tang on the written examination for discovery questions indicating that the sole issue Mr. Tang has under the net worth calculation, unless he was to advise otherwise, relates to loans from family members in the aggregate amount of $385,288 (loan from his aunt) and the amount of the opening balance of the Shareholders' loan in Tang Dynasty Investments Limited as of December 31, 2004. I do not agree with the Crown and I am of the view that I should examine that issue, for the reasons set out below.

[45] In *Apotex Inc v Merck & Co*, 2003 FCA 438 at para 14, [2003] FCJ No 1725 (QL), the Federal Court of Appeal stated that "[o]ne of the purposes of discovery is to simplify proof at trial and another is to narrow the issues which remain in dispute". More recently, in *Canada v Lehigh Cement Limited*, 2011 FCA 120, 2011 DTC 5069, the Federal Court of Appeal stated:

> 30 First, I believe that the general purpose of oral discovery has not changed. Justice Hugessen described that purpose in the following terms in *Montana Band v. Canada,* [2000] 1 F.C. 267 (T.D.) at paragraph 5:
>
> > The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial....

[46] I recognized that Mr. Tang was represented by counsel during that period. However, Mr. Tang testified that he did not understand that he was limiting the

issues at the discovery process. He explained that, as he was out of the country, that made the whole process very difficult. After March 2016, Mr. Tang was a self-represented litigant and decided to represent himself at the hearing. Further, I also note that, during the trial management conference calls held prior to the hearing, Mr. Tang made reference to the fact that, in his opinion, there were many errors in the net worth calculation and he said that he would offer evidence at trial in that respect. Prior to the hearing, Mr. Tang also sent documents to the Crown. According to the Crown, the format of said documents did not allow copies to be made and it was not possible to make sense of the documents. It is not possible to determine which documents were sent by Mr. Tang. Finally, I note that the Notice of Appeal refers to the inheritance that Mr. Tang received from his father, which further supports the notion that the Crown had full and ample notice of the issue. I am of the view that the Crown had not been "put at a disadvantage by being taken by surprise at trial" (*Montana Band*, *supra*).

[47] In addition, the Crown asks me to conclude that the reason why the CRA was never provided a copy of said loan documents was because if the father's inheritance and the income-earning assets owned in Taiwan as shown in the Taiwanese income tax returns, filed as Exhibits A-3, A-8, and A-9, would have been taken into consideration in the net worth calculation, the results would have been unfavourable to Mr. Tang. I am of the view that it is far from being clear that the results would not have been favourable to Mr. Tang. First, the income reported in the Taiwanese tax returns is not very substantial (less than $20,000 annually for 2006 and 2007). Also, I have to take into account that Mr. Tang left Canada in 2009 and that he was not represented during the audit period but sought representation only at the objection stage.

(3) loan from Neostar Technologies Co. Ltd.

[48] With respect to the $125,000 loan from Neostar Technologies Co. Ltd., I did not accept any evidence related to this loan, and accordingly, I do not have to rule on the Crown's objection to the examination, by this Court, of that issue given the answer to the written examination for discovery questions. Neostar Technologies Co. Ltd. apparently acts as an agent for Mr. Tang with respect to the transfer of personal loan amounts from his family members. The documents concerning this loan, however, did not appear in either party's list of documents, and were not adduced at discovery. Further, Mr. Tang is neither a director nor a shareholder of Neostar Technologies Co. Ltd., and thus could not speak personally to the accuracy or context of such documents. Had I admitted these documents, the Crown would

have been at an unfair disadvantage as it would have had no prior notice of such documents and would not have been able to cross-examine a person who could speak to the relevance and nature of the documents. I note that Mr. Coghlin, the CRA auditor, testified that he had allowed a portion of that amount in the calculation of the net worth.

(4) Shareholders' loan balance in Tang Dynasty Investments Limited

[49] As regards the Shareholders' loan balance in Tang Dynasty Investments Limited for $325,362, which appears in Schedule B to the Reply, Mr. Tang submits that this loan was undervalued due to an accounting error, and should instead be recorded as a loan for $558,610.89. In support of his position, Mr. Tang has produced financial statements from Tang Dynasty Investments Limited, which shows an amount of $558,610.89 (Exhibit R-1, Tab 78). Mr. Coghlin, the CRA auditor, noted that the lower amount came from Tang Dynasty Investments Limited's T2 corporate tax return. Unfortunately, Mr. Tang was unable to have Mr. Darrell Jessome, the accountant who prepared both the financial statements and T2 corporate tax return, to testify in order to explain the context and reasons for this discrepancy. Accordingly, given the absence of evidence submitted by Mr. Tang on this issue and Mr. Coghlin's evidence, I find that the amount of the opening Shareholders' loan balance in Tang Dynasty Investments Limited was equal to $325,362 as of December 31, 2004.

(5) personal expenditures calculations in the net worth assessment (Schedule D of the Reply)

[50] Finally, Mr. Tang has argued that the net worth assessment shows indications of haphazard preparation. In particular, in Schedule D of the Reply, Mr. Tang noted that the amounts for water, fuel, and electricity fluctuate dramatically, from over $42,000 in 2004, to $6600 and $4553 in 2005 and 2006 respectively. In addition, Mr. Tang observed that his communications expenses seemed unreasonably high and also fluctuated a great deal, with $18,222 in 2004, $10,605 in 2005, and $14,967 in 2006. Mr. Coghlin, the CRA auditor, testified that all the amounts indicated on Schedule D of the Reply are not estimates and can all be traced back to either bank statements or credit card statements. I am not convinced that Mr. Tang, on the basis of the inaccuracy of the amounts listed in Schedule D of the Reply, has made out a *prima facie* rebuttal of the Minister's assumptions. Furthermore, I find that the Crown produced sufficient evidence or argument to refute the concerns raised by Mr. Tang with respect to the accuracy of Schedule D, which forms part of the net worth assessment.

4. Gross negligence penalties

[51] Subsection 163(2) of the Act provides that "[e]very person who, knowingly, or under circumstances amounting to gross negligence, has made ... a false statement or omission in a return" is liable to a penalty.

[52] The burden of establishing the facts justifying the assessment of the penalty is on the Minister, under subsection 163(3) of the Act.

[53] According to the very wording of subsection 163(2) of the Act, two elements are required for a penalty to apply: (1) a mental element ("knowingly, or under circumstances amounting to gross negligence") and (2) a material element ("has made ... a false statement or omission in a return").

[54] Regarding the material element, the case law holds that an incorrect statement in an income tax return amounts to a misrepresentation (*Nesbitt v The Queen*, 96 DTC 6045, [1996] FCJ No 19 (FCTD) (QL); *D'Andrea v The Queen*, 2011 TCC 298, 2011 DTC 1234, para 35).

[55] Regarding the mental element, two possible scenarios have to be examined for penalties to apply: did Mr. Tang <u>knowingly</u> make a false statement or omission or did he make a false statement <u>under circumstances amounting to gross negligence</u>?

[56] In *Can-Am Realty Ltd v Canada*, [1994] 1 CTC 336, 94 DTC 6293, the Tax Court described the type of conduct that would be required to support a gross negligence ruling as "exceptional" and "flagrant" conduct. In *Venne v The Queen*, 84 DTC 6247 at 6256, [1984] FCJ No 314 (FCTD) (QL), Justice Strayer noted that gross negligence "must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not."

[57] In *Strachan v The Queen*, 2015 FCA 60, 2015 DTC 5044, the Federal Court of Appeal ruled that gross negligence could also result from the wilful blindness of the taxpayer.

[58] The penalties assessed under subsection 163(2) of the Act must be imposed only where the evidence clearly justifies it. If the evidence leaves any doubt that the gross negligence penalties should be applied in the circumstances of the appeal, then the only fair conclusion is that the taxpayer must receive the benefit of the doubt in those circumstances.

[59] As I have concluded above, Mr. Tang has rebutted the net worth assessment to the extent of 84% of the additional income assessed. I further note that the Crown did not show sufficient evidence for me to find such exceptional or flagrant conduct worthy of being labeled gross negligence. Also, the Crown did not show sufficient evidence for me to find that Mr. Tang knowingly made a false statement or omission.

[60] For the foregoing reasons, the gross negligence penalties should not apply.

5. Statute-barred year: 2005 taxation year

[61] The three taxation years at issues in this appeal—2005, 2006, and 2007—were reassessed on November 29, 2010. Mr. Tang's 2005 taxation year was initially assessed on October 2, 2006, and was not reassessed until November 29, 2010. The delay is greater than the three-year limit applicable to Mr. Tang, which is defined in paragraph 152(3.1)(*b*) of the Act as the normal reassessment period.

[62] Where the Minister issues a reassessment in relation to a taxation year after the expiration of the normal reassessment period, the Minister, pursuant to subparagraph 152(4)(*a*)(i) of the Act, has the onus of establishing that the taxpayer has made a misrepresentation and that that misrepresentation was attributable to neglect, carelessness, or wilful default, or that the taxpayer has committed fraud in filing his tax return or in supplying information under the Act in relation to that taxation year.

[63] The Crown submits that I should restrict my examination to the issues still subsisting after discovery, i.e. the loans from Mr. Tang's aunt and amounts of the Shareholders' loan balance in Tang Dynasty Investments Limited, and not inquire as to whether the reassessment pertaining to the 2005 taxation year was statute-barred. I disagree.

[64] Mr. Tang's Notice of Appeal, as I read it, appears to put the entire net worth assessment at issue. The Crown explicitly cites subsection 152(4) of the Act in paragraph 12 of its Reply, thus anticipating this issue. Further, the written examination for discovery did not consider the issue of statute-barred years, and, perhaps most importantly, I have no evidence before me that Mr. Tang had signed a waiver as contemplated by subparagraph 152(4)(*a*)(ii) of the Act. The limitation periods provided for in the Act offer a kind of procedural protection to taxpayers. Absent an explicit waiver or an agreement of the parties, I cannot disregard them.

[65] The Crown also argued that assessments relating to a loss taxation year were unaffected by the three-year limitation. However, subsection 152(1.1) of the Act, concerning the requirement for a determination of losses to start the prescription clock, cannot apply when the taxpayer already has a valid initial assessment. Because Mr. Tang had a valid assessment as of October 2, 2006, according to paragraph 5 of the Reply, the requirement for a loss determination is inapplicable. The Minister therefore has the burden of showing that there was misrepresentation attributable to neglect, carelessness, or wilful default, as set out in subparagraph 152(4)(*a*)(i) of the Act.

[66] I have found that Mr. Tang has rebutted the net worth assessment to the extent of 84% of the additional income; nonetheless, I find that the Crown has successfully showed misrepresentation: I am of the view that Mr. Tang did not exercise reasonable care in the completion of his returns. The evidence showed that Mr. Tang was involved in the day-to-day management of the business and that he and his former spouse were responsible for their banking activities. I am of the view that Mr. Tang acted with carelessness in filing his income tax returns.

[67] The Minister has met her burden in that regard and Mr. Tang's 2005 taxation year is thus not statute-barred.

E. CONCLUSION

1. The Act

[68] The Minister has met her burden to show that Mr. Tang has made a misrepresentation that met the standard set out in subparagraph 152(4)(*a*)(i) of the Act and, therefore, the 2005 taxation year is not statute-barred.

[69] In respect of the reassessments for the 2005, 2006 and 2007 taxation years, since the Minister presented no evidence showing that Mr. Tang's behaviour met the standard set out in subsection 163(2) of the Act, the gross negligence penalties will be deleted.

[70] Mr. Tang has given reasonable explanations with respect to how he maintained his lifestyle during the 2005, 2006 and 2007 taxation years, taking into consideration the loans from his aunt and the loans from his family, which account for approximately 84% of additional income assessed under the net worth assessment. Therefore, these loans will be reflected in the net worth assessment and the additional income assessed under the net worth method for each taxation

year will be reduced by 84%. In other words, only 16% of the additional income calculated under the net worth method will be assessed.

[71] The appeal for the 2005, 2006 and 2007 taxation years is accordingly allowed, and the reassessments for those years are referred back to the Minister for reconsideration and reassessment on that foregoing basis.

2. Costs

[72] As a general rule, a successful litigant is entitled to party and party costs in accordance with the Tariff. In awarding costs, however, this Court has broad discretion under section 147 of the *Tax Court of Canada Rules (General Procedure)* and section 18.26 of the *Tax Court of Canada Act*.

[73] While Mr. Tang's position has mostly prevailed in this appeal, his lack of adequate preparation required the adjournment of the originally scheduled hearing and, generally, delayed the proceedings.

[74] The parties shall accordingly bear their own costs, subject to either party's right to make further submissions within 30 days of the date of this judgment.

Signed at Ottawa, Canada, this 7th day of September 2017.

"Dominique Lafleur"

Lafleur J.

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COURT FILE NO.:	2014-40(IT)G
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REASONS FOR JUDGMENT BY:	The Honourable Justice Dominique Lafleur
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	David I. Besler

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada