

[OFFICIAL ENGLISH TRANSLATION]

2001-1077(IT)I

BETWEEN:

RÉJEAN GOSSELIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on September 3, 2002, at Roberval, Quebec, by

the Honourable Judge François Angers

Appearances

Counsel for the Appellant:

Martin Dallaire

Counsel for the Respondent:

Philippe Dupuis

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1994, 1995 and 1996 taxation years are dismissed.

Signed at Ottawa, Canada, this 30th day of September 2002.

"François Angers"

J.T.C.C.

Translation certified true
on this 22nd day of December 2003.

Sophie Debbané, Revisor

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Date: 20020930
Docket: 2001-1077(IT)I

BETWEEN:

RÉJEAN GOSSELIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers, J.T.C.C.

[1] The point for determination in this appeal, instituted under the informal procedure, is whether the appellant was validly assessed a penalty for the 1994, 1995 and 1996 taxation years for deducting non-capital losses of other years for each of the taxation years concerned. The fact that the appellant was not entitled to deduct the amounts claimed annually in respect of non-capital losses of other years in computing his taxable income for the three years in question was not disputed.

[2] The facts on which the Minister of National Revenue (the "Minister") based the assessments for the three years in issue and that the appellant admitted at the hearing are as follows:

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- (a) the case originates from an internal investigation of certain employees of the Jonquière Tax Centre who had set up a scheme to provide certain persons with fraudulent tax refunds in consideration for a commission based on a percentage of the said refunds;
- (b) on April 28, 1997, the appellant received a total tax refund of \$7,772.13 for the 1994, 1995 and 1996 taxation years as a result of reassessments issued on that same date;
- (c) the notices of reassessment dated April 28, 1997, for the 1994, 1995 and 1996 taxation years allowed the appellant, in computing his taxable income, a deduction in respect of non-capital losses of other years for each of the said taxation years;
- (d) the claim of a deduction for non-capital losses of other years for the 1994, 1995 and 1996 taxation years had been made possible by the fraudulent entry in the department's computer system of a business investment loss totalling a gross amount of \$98,500 for the 1990 taxation year;
- (e) the appellant admitted to the Minister's investigators by solemn declaration that he had listened to a suggestion by a certain Guy Joncas, whom he had known since 1994, who offered to have his income tax returns revised by two persons who worked at the Jonquière Tax Centre, and it was for that purpose that the appellant gave him his social insurance number;
- (f) the appellant did not know the nature of the deduction that would be claimed on his tax returns or the total amount of the resulting refund;
- (h) the appellant admitted to the Minister's investigators by solemn declaration that, after he had received a refund cheque totalling approximately \$7,000, Mr. Joncas went to meet him to ask him, on behalf of the two persons working at the Jonquière Tax Centre, to hand over \$5,000, which he refused to do, and, in return, he asked that the refund be cancelled;
- (i) the appellant alleged to the Minister's investigators by solemn declaration that Mr. Joncas had told him that it would be impossible to proceed with reassessments to have the refund cancelled;

- (j) the appellant admitted to the Minister's investigators by solemn declaration that he had panicked, that he had filed his balance sheet and that he had declared the said sum of \$5,000 in his bankruptcy;
- (k) the appellant did not approach the Minister at all:
 - (i) to communicate with the authorities of the Jonquière Tax Centre, or
 - (ii) to simply return the cheque to the said authorities;

The facts the appellant denied or knew nothing of are as follows:

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- (g) the appellant contended to the Minister's investigators by solemn declaration that he had never incurred a business loss totalling a gross amount of \$98,000;
- (l) in the Minister's view, the negligence the appellant displayed in this case was similar to aiding and abetting;
- (m) with respect to the 1994, 1995 and 1996 taxation years, the appellant made a misrepresentation attributable to neglect, carelessness or wilful default or committed any fraud in filing the return or in supplying any information under the "Act";
- (n) the deduction claimed in respect of non-capital losses of other years for each of the 1994, 1995 and 1996 taxation years leads the Minister to believe that the appellant knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of, a false statement or omission in the income tax returns filed for the 1994, 1995 and 1996 taxation years, as a result of which the tax that he would have been required to pay based on the information provided in the tax returns filed for those years was less than the amount of tax payable for those years.

[3] The appellant's solemn declaration was filed in evidence as Exhibit I-2. In the penultimate paragraph, he admits that he never incurred a business loss of \$98,000 because he was a driver/truck driver. The appellant admitted subparagraphs (d), (f) and (j) but wanted to add comments in his testimony.

[4] The appellant in fact testified in a manner consistent with his admissions relating to the Reply to the Notice of Appeal but provided more details. He said

that, at the time, that is in 1997, he was employed by the newspaper "Étoile du Lac". While preparing an advertisement for H & R Block, he engaged in a discussion with Guy Joncas, a journalist with the same newspaper, about how dissatisfied he was with his tax returns prepared by H & R Block. At that point, Guy Joncas informed him that it was possible to have his tax returns revised for the previous five years. In order for this to be done, he had two former classmates who worked for the Department of Revenue as inspectors hired to detect tax evaders. The appellant had only to provide him with his social insurance number so that those two classmates could examine his returns for the previous five years, and the appellant did so. He described Guy Joncas as an extraordinary person, and, knowing nothing about accounting or income tax, the appellant trusted him.

[5] On April 28, 1997, barely one month later, the appellant received a cheque from the Government of Canada for \$7,772.13, without signing any documents or amended returns. He said he was very surprised to receive the cheque. He had thought he would receive only \$200 or \$300. He admitted he "panicked" and did not know what to do. The next day, Guy Joncas went to see the appellant to ask him for the sum of \$5,000, which the two employees of the Department were demanding. The appellant refused to pay the amount because, in his mind, it would make him guilty. That also confirmed what he had thought the day before—that this situation was entirely abnormal. He also feared that the situation would get worse if he returned the cheque. He instinctively decided to deposit the cheque, which he did that same day, that is, on April 29, 1997. He then asked Guy Joncas to have the matter cancelled by the two employees, something Guy Joncas answered he could not do. He then decided to wait for the Department of Revenue to claim the refund from him. A request was eventually forwarded by Revenue Canada on June 30, 2000, following a lengthy internal investigation at the Department.

[6] In the meantime, on September 15, 1998, the appellant declared bankruptcy. From the moment he received the cheque until a meeting with a Revenue Canada investigator, Roland Pelletier, in May 2000, he did not speak of the matter with any representative of the Department of Revenue, claiming that he no longer trusted anyone and that he was afraid someone might think he was involved in the scheme.

[7] It was not until May 1998 that an employee of the Revenue Department realized that the Department had paid tax refunds to taxpayers without there being any supporting documents in their files. Together with others, Roland Pelletier was responsible for investigating the matter. The findings of that investigation led to the conviction of two Revenue Department employees. The investigation revealed

that approximately 45 taxpayers had been contacted by the two employees or third persons and that those employees had received 66 2/3 percent of the tax refund received by the taxpayer. Guy Joncas was apparently involved in four or five of the cases, including the instant case.

[8] Every person who knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty (subsection 163(2) of the *Income Tax Act*). In *Venne v. Her Majesty the Queen*, 84 DTC 6247, gross negligence was defined as involving greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not. It is clear in the instant case that, at all times, the appellant did not know how Mr. Joncas' friends had managed to obtain a tax refund of more than \$7,000 for him. He signed no documents that could amend his tax returns for the years in issue, and he was not aware that he had to pay a percentage of the amount received for the service. In fact, he was surprised when he received the refund in question.

[9] Having said that, I must now analyze the appellant's behaviour from the time he had received the refund to April 1997. At first, he was surprised at the amount, and, the next day, in his conversation with Mr. Joncas, he learned that he had to pay a percentage of the amount to Mr. Joncas' friends. That conversation confirmed in his mind that there was something abnormal in all of that situation. He nevertheless chose to cash the cheque and ask Mr. Joncas to do what was needed for the Department to claim the same amount from him. I understand that the appellant was in the midst of a separation at the time and was going through a difficult period. His good judgment may have been affected, but I do not believe these reasons can be argued for the period from when the cheque was deposited to his meeting with Roland Pelletier, nearly three years later. The appellant would have had many opportunities to inquire of responsible people as to the approach to take in a situation such as that. When he received the refund cheque, he had enough doubt in his mind as to the legitimacy of the refund and, at that point, should have approached authorities to correct the matter. The appellant chose to do nothing. This lack of action on his part demonstrates his carelessness in and indifference toward compliance with the act. His behaviour, in my view, constitutes a high degree of negligence, which I characterize as gross negligence. He took advantage of the money knowing that it had been obtained under abnormal circumstances. By failing to act, he therefore acquiesced in the making of false

statements by Mr. Joncas' two friends to obtain the refund. His financial situation deteriorated and he benefited from the refund obtained.

[10] I am therefore satisfied that the respondent showed on a balance of probabilities that she had valid grounds to assess a penalty for each of the taxation years in issue. The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 30th day of September 2002.

"François Angers"

J.T.C.C.

Translation certified true
on this 22nd day of December 2003.

Sophie Debbané, Revisor