[OFFICIAL ENGLISH TRANSLATION]

2001-170(IT)I

BETWEEN:

ROBIN VILLENEUVE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on August 30, 2002, at Chicoutimi, Quebec, by

the Honourable Judge Louise Lamarre Proulx

Appearances

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Martin Gentile

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1989, 1990, 1991, 1992 and 1993 taxation years are allowed on the basis that the penalties and related interest shall be cancelled, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of December 2002.

"Louise Lamarre Proulx"

J.T.C.C.

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Date: 20021212
Docket: 2001-170(IT)I

BETWEEN:

ROBIN VILLENEUVE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Lamarre Proulx, J.T.C.C.

[1] These are appeals under the informal procedure concerning the 1989 to 1993 taxation years.

[2] The points at issue concern the refund of tax credits incorrectly claimed and the assessment of penalties and interest under subsection 163(2) of the *Income Tax Act* (the "*Act*").

[3] The facts on which the Minister of National Revenue (the "Minister") relied in making his reassessments are described in paragraphs 2, 3, 4 and 8 of the Reply to the Notice of Appeal (the "Reply") as follows:

> [TRANSLATION]
>
> 2. By notices of reassessment dated June 22, 2000, the Minister disallowed, among other things, the equivalent-to-married and dependent tax credits in computing non-refundable tax credits and the child tax credit in computing federal credits, which credits had

previously been allowed for the 1989, 1990, 1991 and 1992 taxation years.

3. By notices of reassessment dated June 22, 2000, in computing non-refundable tax credits, the Minister disallowed the equivalent-to-married credit previously allowed for the 1993 taxation year.

4. By notices of reassessment dated June 22, 2000, in computing the appellant's income, the Minister disallowed, among other things, the amounts of $374, $381, $388 and $399 in respect of family allowance for the 1989, 1990, 1991 and 1992 taxation years.

...

8. In making and confirming the notices of reassessment dated June 22, 2000, the Minister assumed, in particular, the following facts:

(a) the case arises from an internal investigation of certain employees at the Jonquière Tax Centre who had established a scheme to provide certain persons with fraudulent tax refunds in consideration of a commission based on a percentage of the said refunds;

(b) on June 5, 1995, the appellant received a total tax refund of $12,260.05 for the 1989, 1990, 1991, 1992 and 1993 taxation years as a result of reassessments dated May 30, 1995;

(c) that same day, June 5, 1995, the appellant deposited a net amount of $4,260.05 at the Saint-François Xavier Caisse populaire, Rivière-du-Moulin service centre, after withdrawing a cash amount of $8,000;

(d) the notices of reassessment dated May 30, 1995, for the 1989, 1990, 1991 and 1992 taxation years established that the appellant was the father of two children and, among other things, allowed the equivalent-to-married and dependent tax credits in computing non-refundable tax credits;

(e) the notices of reassessment dated May 30, 1995, for the 1989, 1990, 1991 and 1992 taxation years established that the appellant was the father of two children and, among other things, allowed a child tax credit in computing federal credits;

(f) the notice of reassessment dated May 30, 1995, for the 1993 taxation year established that the appellant was the father of

one child and allowed an equivalent-to-married credit in computing non-refundable tax credits;

(g) the appellant told the Minister's investigators that he was not married and had never had a child during the taxation years in issue;

(h) the appellant told the Minister's investigators that he had met Mario Boucher at a bar in the region and that he had repaired Mr. Boucher's motorcycle a number of times;

(i) the appellant told the Minister's investigators that Mario Boucher had informed him that he was employed by Revenue Canada and told him that he was entitled to a tax refund;

(j) the appellant admitted that, when he received the tax refund cheque, he had not understood why he was entitled to such a tax refund for the 1989, 1990, 1991, 1992 and 1993 taxation years;

(k) the appellant made no attempt to inquire of the Minister as to the reasons for a total tax refund such as that for the 1989, 1990, 1991, 1992 and 1993 taxation years;

(l) it is the Minister's view that the negligence displayed in this matter was tantamount to complicity;

(m) in support of the reassessments dated May 30, 1995, for the 1989, 1990, 1991, 1992 and 1993 taxation years, the appellant made a misrepresentation attributable to neglect, carelessness or wilful default or committed any fraud in filing a return or in supplying any information under the "*Act*";

(n) the claim of non-refundable tax credits, in respect of the equivalent-to-married and dependent credits, and of federal credits, in respect of the child tax credit, for the 1989, 1990, 1991 and 1992 taxation years and the claim of only a non-refundable tax credit, in respect of the equivalent-to-married credit for the 1993 taxation year, led 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 returns of income filed for the 1989, 1990, 1991, 1992 and 1993 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.

[4] The reasons in the Notice of Appeal are as follows:

[TRANSLATION]

> ...
>
> My godfather, Hector Villeneuve, had always done my taxes since I had been in the labour market, and had done so free of charge, being a Hydro-Québec pensioner. He died in 1993.
>
> In 1994, I met Mario Boucher and, after I made a few repairs to his motorcycle, he informed me that he was employed by the Department of Revenue Canada. He offered to prepare my income tax return for 1994. I accepted and he subsequently told me that I was entitled to an additional amount of $12,000, which had not been claimed.
>
> He himself completed the form, which he had me sign. Being very naive and trusting that person, particularly since he was an employee of the Department of Revenue and had told me he was a tax specialist, I did not hesitate. I received this cheque, which I cashed without asking any questions. I was in good faith; he told me I was entitled to it.
>
> I received $12,000 in 1995, retroactive five years, that is, for 1989 to 1994, believing that that was normal. Why are you now claiming $29,800, which is due to an error by your employee at the Department of Revenue?
>
> Responsibility for this claim is mostly attributable to Mario Boucher, your employee at the Department of Revenue, who, out of gratitude for repairing his motorcycle, offered to prepare my taxes and to obtain this grant, without my being aware of the type of grant or of what right. **If I was not entitled to the grant at the time, the Minister should simply not have awarded it.** That is not my responsibility.
>
> Being in good faith, I am prepared to repay the amount received, but the penalty and interest are not my responsibility. Attached please find the information requested.

...

[5] The appellant is a welder-fitter. At the time of the hearing, he was not working because he had had a car accident, which had apparently triggered post-traumatic arthritis in him.

[6] He admitted subparagraphs 8(b), (c) and (g) to (k) of the Reply. He said that he knew nothing of the facts stated in subparagraph 8(f) of the Reply because he did not know why he had received a refund. Mr. Boucher had simply told him that he was entitled to tax refunds.

[7] The appellant stated that repairing Harley-Davidson motorcycles had been a hobby for 15 years. He had done that for Mr. Boucher. Mr. Boucher asked him for his social insurance number to enable him to check his taxes because he purportedly told him that his uncle, who had prepared his tax returns, might not have claimed everything he was entitled to claim. The appellant said he trusted Mr. Boucher because he was a tax specialist. He himself knew nothing at all about it.

[8] The appellant received a cheque for $12,000 in 1995. He contends that he did not give Mr. Boucher $8,000. He immediately withdrew $8,000 in cash in order to repay a friend a loan.

[9] The appellant stated that, in 1994, he had begun to build himself a house and had to borrow money. When the tax refund arrived, he took advantage of it to repay his loans. He said that *he would not have given Mr. Boucher a cent*. He had made a major repair to his motorcycle easily worth $2,000. However, while the appellant had supplied his time, Mr. Boucher had paid for the parts.

[10] The appellant confirmed that Mr. Boucher had completed a number of his tax returns. He had charged $40 for that, but the appellant nevertheless contends that he gave Mr. Boucher nothing for the tax refund:

> [TRANSLATION]
>
> A. The time the substantial amount arrived, that time I didn't pay him. He gave it to me and said, "Here, this is an amount you're entitled to..."
>
> ...

A. You know, if I had known that before, do you think I would have done something like that? Risk losing my house, which I worked my heart out to build? I would never have played at that.

...

[11] The appellant concluded his testimony by saying that the affair had been a scam. He had been a victim like the other appellants whose testimony he had heard before his own. He also argued that he had never had any debts with Revenue Canada and had always wanted to comply with the *Act*.

[12] Rolland Pelletier, the respondent's witness, testified at the hearing of the first appeal heard that same day, that of Dany Houde (2001-824(IT)I). The appellant heard that testimony. I have quoted a passage from it concerning the fraudulent refund recipients, who said they had not paid any amount of money in return, at pages 23 and 24 of the transcript in the said appeal:

[TRANSLATION]

Q. And then earlier, Mr. Pelletier, we heard that there was an amount handed over either to Mario Boucher or to Réjean Simard in most of the cases. Can you give an approximate figure, in how many cases you think that was done? Was it the majority? Was that the pattern of the fraud that was carried out in this way?

A. Yes.

Q. Can you explain?

A. Well, most of the people told us that they had handed over a certain amount of money, while others told us they had handed over nothing. However, when we checked their bank accounts, an amount equivalent to 66 percent had been withdrawn a few days later.

...

Arguments

[13] Counsel for the respondent observed that this case was different from the other two and that the appellant did not admit handing over two-thirds of the amount received to Mr. Boucher. He recalled that Mr. Pelletier had stated in his testimony that nearly two-thirds of the taxpayers involved in this matter had admitted

paying back a significant sum. As to those who made no admission, nevertheless, there was always a large withdrawal from their bank account of approximately two-thirds of the amount a few days after the deposit. Counsel for the respondent argued that Mr. Boucher could not have done so without receiving payment in return and that it must be presumed that the $8,000 withdrawal made by the appellant, purportedly to repay a loan for the construction of his house, was made to pay the originator of the tax refund.

Conclusion

[14] The appellant did not admit that he had made a payment to the originator of the refund, but he did admit that he had immediately withdrawn two-thirds of the amount. He claimed that it had been to repay a loan that he had contracted with a friend in order to build his house.

[15] The evidence presented in this case by the respondent is evidence by presumption of fact. Presumption of fact is defined as follows in *La preuve civile*, Jean-Claude Royer, Les Éditions Yvon Blais Inc., 1987, at page 296:

> [TRANSLATION]
>
> 798 – *Definition* - A presumption of fact is the conclusion the tribunal draws from one or more known facts to an unknown fact.

[16] Article 2849 of the *Civil Code of Quebec*, which appears in the book on evidence, reads as follows:

> Presumptions which are not established by law are left to the discretion of the court which shall take only serious, precise and concordant presumptions into consideration.

[17] I refer to a decision by Marceau J., as he then was, of the Federal Court - Trial Division, in *Canadian Titanium Pigments Ltd. v. Fratelli D'Amico Armatori*, [1979] F.C.J. No. 206 (Q.L.), more particularly to paragraphs 12 to 15:

> 12. As I mentioned, plaintiff is not able to present direct evidence for either of its two propositions: I explained in my introductory remarks on the case that it only became aware after the fact that its pipes had been broken, and was only able to associate this with the passage of the Mare Placido some time afterwards. Plaintiff sought to prove its assertions solely by indirect evidence, that is by presumptions on two levels, so to

> speak, for as we shall see certain of the facts which, in its submission, support its conclusions can themselves only be proven by presumptions.
>
> 13. There is certainly no need to emphasize that evidence demonstrating the existence of a fact through presumptions is admissible: in practice, it is even a means of proof which, in an area such as civil liability, can often be more effective than any other. There is also no need to dwell at any length on the principles in accordance with which evidence of this kind must be analyzed. This is all well established. The rules applicable in this area, which are derived from logic as well as from legal theory, are all essentially the same in civil law as in the common law, and that is why, be it noted in passing, I do not place any importance on the question of whether the case should be dealt with exclusively in accordance with Quebec law -- as counsel for both parties assumed, undoubtedly on the assumption that the cause of action arose in Quebec and that the trial took place there -- or with the law which this Court, in its admiralty jurisdiction, received from the Courts which preceded it -- as might be argued.
>
> 14. It is well recognized that in order to win its case plaintiff must put forward presumptions that command acceptance in number as well as in weight, in the exactness of their application and their concurring effect -- here I adopt concepts used by commentators and the courts in Quebec and derived from Art 1353 of the French Code. However, we should not forget that this acceptance does not need to be based on incontrovertible evidence: such a level of certainty goes beyond the requirements of the civil law; it will be based merely on a relative conviction, derived from a rational deduction from the facts and circumstances.
>
> 15. I must therefore examine these facts and circumstances, disclosed by the hearing, and consider whether sufficiently convincing evidence can be rationally deduced from them of the truth of the two propositions on which the action is based.

[18] I have emphasized the passages I find most enlightening.

[19] Reference should also be made to the decision of the Supreme Court of Canada in *Lévesque v. Comeau et al.*, [1970] S.C.R. 1010, at pages 1012 and 1013:

> ... She alone could bring before the Court the evidence of those facts and she failed to do it. In my opinion, the rule to be applied in

> such circumstances is that a Court must presume that such evidence would adversely affect her case....

[20] The appellant admitted subparagraph 8(c) of the Reply regarding the fact that the appellant withdrew $8,000 in cash the same day the deposit was made. That is standard procedure under this scheme. The statement that he did not pay a cent for the service rendered by the originator of the refund is not plausible. The evidence of the repayment of an $8,000 loan made by a friend for the construction of his house is not supported by any supporting document.

[21] I am convinced on the basis of a rational deduction from the facts and circumstances, that is, the immediate withdrawal of $8,000 corresponding to two-thirds of the amount of the refund and the absence of valid evidence of the repayment of a loan from a friend, that the appellant was not an exception to the system of paying two-thirds of the amount of the refund received, an organized scheme proven by the respondent.

[22] The appellant must remit the amount of the tax refund overpayment made to him in full and with interest.

[23] As to the penalty assessed under subsection 163(2) of the *Act*, in *Jean-Marc Simard v. Canada*, [2002] T.C.J. No. 265 (Q.L.), I found that the Court had discretion to adjust the amount assessed on the basis of the taxpayer's ability to pay, his wrongful intent and his previous behaviour. The respondent appealed from that decision.

[24] Pending the decision of the Federal Court of Appeal, I believe it more prudent for the moment to follow the example of that Court of Appeal in a recent decision in *Chabot v. Canada*, [2001] F.C.J. No. 1829 (Q.L.). In that decision, it did not evaluate the degree of the taxpayer's wrongful intent but completely excluded him from any application of subsection 163(2) of the *Act* on the ground that the taxpayer had been caught in an ambush. That particular taxpayer had claimed tax credits for charitable gifts. In 1992, he made a charitable donation of $10,000 for which he had in fact paid $2,800 and, in 1993 and 1994, gifts of $15,000 and $8,000, whereas he had paid a total of $2,500.

[25] Paragraphs 40 and 41 are reproduced:

> 40. I also note that Denis Lemieux, an investigator with Revenue Canada, explained to the Court that no action had been

> taken against the foundations involved themselves because, in the Department's view:
>
> > [TRANSLATION]
> >
> > ... they had been caught in an ambush. It had grown completely out of proportion for them. They were genuinely ... they are not specialists when it comes to artwork. They found the offer very appealing....
> >
> > These are foundations; there was no criminal intent on the part of these people. They realized themselves that they were in the wrong.
> >
> > (Appendix 6, pages 25 and 26)
>
> **In his own way, Mr. Chabot too "got caught in an ambush" and, in his own way, he too "found the offer appealing."**
>
> 41. In these circumstances, I find it difficult to understand why Revenue Canada would assess penalties against such small taxpayers who, in good faith, tried to benefit from a tax credit that Revenue Canada itself dangled in front of their eyes and which, according to the guide, seemed so easy to obtain.
>
> (My emphasis.)

[26] I believe that the appellant also got caught in an ambush. It was not he who had developed the scheme. The proposition was put to him by a Revenue Canada employee. No mention was made to him of fraudulent acts. He was told that it was possible he had not claimed all the tax refunds to which he had been entitled. He received a substantial amount of money in the form of a tax refund.

[27] He claims he gave Mr. Boucher nothing in return, which the Court does not believe for the reasons given above. Moreover, like the other appellants, he stated that he had been the victim of cunning predators. I agree with that view of the situation. This was indeed a situation in which the appellant was caught in an ambush. There was no sign of a deliberate decision by the appellant to violate the *Act*.

[28] There is always a share of responsibility in actions taken, except for purely accidental acts. It is a serious act to hand over money to government officials when they are performing their duties.

[29] Subsection 163(2) of the *Act*, however, requires that false statements or omissions be made knowingly or in circumstances amounting to gross negligence. In other words, that subsection requires wrongful intent. It is my view that the Court must be all the more certain of wrongful intent where the resulting penalty is an extremely large amount and would be particularly onerous for the taxpayer, as is the case here.

[30] As I stated in *Jean-Marc Simard*, *supra*, for taxpayers with moderate incomes, the repayment of tax refund overpayments, plus interest, is in itself highly onerous; I must therefore be all the more convinced of the taxpayer's wrongful intent in order to add penalties and interest which, in this case, amount to very large sums.

[31] The appellant has a good trade, but he is neither an accountant nor a legal expert. Based on what he said in his testimony and in his Notice of Appeal, he has always filed his tax returns every year and has always wanted to be in compliance with the *Act*. That statement was not contradicted by the respondent.

[32] In my view, the act he committed at the outset resulted from a lack of awareness or an error in judging the trust that should be placed in a Revenue Canada employee and not from wrongful intent. He was then caught in an ambush. As he said, he was prey to cunning predators who knew how to play on trust and on the lure of tax overpayments.

[33] The more educated a person is, the harder it will be for that person to avoid the application of subsection 163(2) of the *Act* on the ground of an error in judgment in circumstances such as those in the instant case. In this instance, however, I find that the appellant did not form the wrongful intent required by subsection 163(2) of the *Act*.

[34] Accordingly, the appeal is allowed on the basis that the penalties and related interest shall be cancelled.

Signed at Ottawa, Canada, this 12th day of December 2002.

"Louise Lamarre Proulx"

J.T.C.C.