

Docket: 2002-331(IT)G

BETWEEN:

ALBERT VAILLANCOURT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on June 9 and June 10, 2005, at Québec, Quebec and  
on September 19, September 20 and December 6, 2005,  
at Montréal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:

Christopher R. Mostovac

Counsel for the Respondent:

Pierre-Paul Trottier

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**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* in respect of the 1995 taxation year is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of October 2006.

"François Angers"

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Angers J.

Translation certified true  
on this 30th day of January 2008.

François Brunet, Revisor

Citation: 2006TCC395  
Date: 20061025  
Docket: 2002-331(IT)G

BETWEEN:

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and

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### **REASONS FOR JUDGMENT**

Angers J.

[1] This is an appeal from an assessment made on November 22, 2000, under subsection 160(1) of the *Income Tax Act* ("the Act"). The assessment seeks \$204,500 from the Appellant on account of amounts paid to him by his son René Vaillancourt from May 1, 1996, to December 31, 1998. The Appellant provided no consideration for these payments by his son, and is not challenging the assessment as such. The dispute between the parties pertains solely to the merits of the Notice of Reassessment for the year 1995 issued against the transferor on July 5, 2000, and, in particular, the deductibility of the commissions paid in respect of transactions involving shares of Les Laboratoires Aeterna Inc. ("Aeterna").

[2] The parties filed an amended agreement in court setting out the statements made in the preceding paragraph and adding that the Respondent will reconsider the assessment against the Appellant under section 160 of the Act on the basis that the net business income of \$383,336.80, which was added to the transferor's income as "Commissions on Aeterna share transactions", should be reduced by \$60,000, and that the penalties and interest in connection with this business income are to be reduced accordingly. The Respondent also consented to the deduction of the \$2,500 in legal fees paid by René Vaillancourt as expenses related to the purchase or sale of the Aeterna shares.

[3] Thus, the conflict between the parties is limited to the Appellant's request that the net business income added to the income of the transferor, his son René Vaillancourt, and the penalties and interest, be reduced further. Thus, the Court must determine whether it should be found that:

- 1) René Vaillancourt paid a \$100,000 commission to his brother Alain Vaillancourt in 1995 in recognition and consideration of his alleged efforts to attract purchasers of Aeterna shares;
- 2) René Vaillancourt gave Éric Dupont 75 thousand-dollar bills as a commission on the sale of Aeterna shares; and
- 3) René Vaillancourt gave Denis Godin a \$3,500 cheque in payment of a commission on René Vaillancourt's purchase of shares held by Placement A2Z24, represented by Gaétan R. Girard.

[4] During the hearing of this case, which took place on June 9, June 10, September 19, September 20 and December 6, 2005, the Court allowed the Appellant to challenge the penalties imposed by the Respondent on the transferor even though the amended agreement between the parties did not state that these penalties were in issue.

[5] This case dates back to 1995. René Vaillancourt said that he found out that a block of Aeterna shares was for sale, and that these shares would soon gain value on the stock exchange. Having already profited from his shares in the company in issue, he allegedly wanted other relatives and friends to benefit as well. Since the number of shareholders was limited to 50, René Vaillancourt created a partnership called Avaren which purchased 413,337 shares at a cost of \$2,776,483. The members of the Avaren partnership paid a higher amount, namely \$3,159,820, which accounts for the difference of \$383,336 that was added to René Vaillancourt's income by the assessment of July 5, 2000.

[6] René Vaillancourt is an accountant by training and has been an internal auditor with the Quebec workers' compensation board (CSST) since 1990. However, he was on leave of absence from his employment from November 1999 to March 2002, when he went to the Bahamas to get married and settle. He acknowledged that, upon leaving, he was aware that he was being audited by the Canada Customs and Revenue Agency (CCRA) because he had spoken with one of its officials. However, he said that he only became aware of the assessment upon his return in March 2002. His brother allegedly kept his mail during his absence and paid his bills. He added that he had no contacts during his trip and says that he did not ask his brother whether he had received anything from the

CCRA. In his testimony on this point, he said that his brother managed to reach him but that it was too late to object to the assessment by that time.

[7] René Vaillancourt claimed that he applied for an extension of time in which to object to the assessment. He allegedly sent a letter to this effect, but was unable to find it and provide a copy of it. The principal ground of his objection, if he had been able to make it, would have been that the auditor did not allow him to deduct the expenses incurred in 1995 from the income added to the amount reported on his return. It must be noted that René Vaillancourt's income tax return for the year 1995 makes no reference to the income that the CCRA added by virtue of the assessment of July 5, 2000, let alone expenses.

[8] Indeed, René Vaillancourt filed an amended tax return for the year 1995 on May 21, 1999. The purpose of the return was to report a capital gain that was realized before he left for the Bahamas. He retained a tax consultant in connection with the return, supposedly because he wanted to leave with a clear conscience. This amended return does not mention income derived from the Aeterna project either. Upon being questioned about this fact, René Vaillancourt declared that he forgot to compile the information on the project because he thought that he had handed everything over to his tax consultant.

[9] On October 8, 2003, René Vaillancourt faxed a letter to the person who was then his lawyer, explaining that according to his records, some \$175,709 in profit had been realized. He deducted a \$80,000 commission and a \$47,855 commission from this account, along with \$25,000 in interest expenses, \$2,500 in legal fees, and \$2,500 in other administrative fees, leaving a net profit of \$17,855. Indeed, he confirmed the commission amounts of \$80,000 and \$47,855 at the examination for discovery of December 16, 2003, except that he said that the amount of \$47,855 was subject to change but that he was certain of the \$80,000 amount. He said that one of his commissions was paid in shares, but did not know which one. At the examination for discovery, he was unable to say who the commissions were paid to and when they were paid. He added that if the commissions were paid in cash, he did not have the date of the payments. He undertook to check into all these facts.

[10] On February 4, 2005, René Vaillancourt's lawyer sent a letter to the Tax Litigation Directorate to follow up on the undertakings given at the examination for discovery. With respect to the commissions, the letter states that an investigation disclosed that the commission was not \$80,000, but \$100,000, and was paid to Alain Vaillancourt in shares in consideration of his involvement. With respect to the date of payment, the letter states that there is no exact date but

that the transaction took place at the time that the corporation became a publicly held corporation. The letter also states that there was no precise calculation in connection with that commission. The second commission of \$75,000 was supposedly paid to Éric Dupont. When he sold 250,000 shares, Avaren benefited from a 10% discount on the price of \$8.00 per share, that is to say, \$0.80 per share, and according to René Vaillancourt, Éric Dupont asked for a commission of \$0.30 per share, or \$75,000.

[11] I should also note that on March 18, 2005, in another letter sent to the Tax Litigation Directorate, counsel for the Appellant specified that the \$75,000 commission was hand-delivered to Éric Dupont in cash at the "Momento" restaurant in Québec. Counsel repeated that this commission followed a major sale of a block of shares by Éric Dupont in consideration of the commission. The letter repeats that \$100,000 worth of shares were transferred to Alain Vaillancourt in recognition of and as compensation for his assistance in finding purchasers for the Aeterna shares. This would explain the \$100,000 commission, and, in support of this assertion, an undated writing by Alain Vaillancourt is attached to the letter. Alain Vaillancourt confirmed that he received a commission worth \$90,000 to \$100,000 upon the sale of Aeterna shares in 1996.

[12] Later on, Alain Vaillancourt signed a declaration on May 18, 2005, stating that he received a \$100,000 commission from René Vaillancourt in 1995 for his efforts in attracting new investors. He further attests that he remitted \$75,000 in thousand-dollar bills to René Vaillancourt in 1995 for payment to Éric Dupont as a commission. The notes came from the Royal Bank in Drummondville, and the funds were from cheques payable to Avaren and endorsed by Alain Vaillancourt.

[13] Two days later, on May 20, Alain Vaillancourt signed a second declaration. In it, he confirmed that he received the \$100,000 commission from his brother, and provided more details about the agreement entered into with him. In particular, he said that his brother told him that the share price would be \$8.00 and included brokerage fees. His brother confirmed to him that he would be paid a commission of \$0.80 per share for each investor he attracted to the project. He confirmed that he attracted most of the investors to the project and that they paid him by making a cheque to the order of Avaren or of him personally. He asserted with certainty that the amount of the commission was \$100,000, that he keeps stringent accounting records in connection with his affairs, and that he recalls very well the amount received as a commission during the year 1995. He repeated that he gave his brother René \$75,000 in thousand-dollar bills so that René would give the money to Éric Dupont.

[14] In his testimony, René Vaillancourt specified that the commission paid to his brother Alain was \$100,000 and that it was paid out of the cheques issued to him by the Avaren partners for the purchase of the shares. His brother cashed the cheques, kept his commission and sent the balance to Avaren. He confirmed the agreement concerning the purchase of the block of Éric Dupont's shares and the remittance of \$75,000 in commission to Mr. Dupont. He offered in evidence a receipt from Denis Godin for a \$3,500 commission, which he found this year by accident. The receipt is dated January 19, 1995, but provides no details.

[15] He acknowledged that he is the source of the information contained in the letters that his lawyer sent to the director of tax litigation. He testified that he asked his brother for the information and that this is why it was now possible for him to be more specific than he was during his examination for discovery or when he provided information to his lawyer. When René Vaillancourt was cross-examined about his contradictions, including the fact that, at the examination for discovery, he did not know to whom the commissions had been paid, he said that he wanted to speak to his brother and wanted to be certain of the amount. On re-examination, he added that he did not state a name at the examination for discovery because he did not want to get anyone in trouble. He wanted to speak to Éric Dupont and his brother. He did not know whether his brother had reported his commission on his income tax return. He provided more details and testified that the agreement with his brother was that they would share the commission equally. He could not explain why his lawyer's letter of February 4, 2005, to the director of tax litigation stated that there was no precise calculation of the commission payable to his brother Alain and did not mention the equal sharing of the commission.

[16] As for the \$75,000 commission paid to Éric Dupont, René Vaillancourt testified that Mr. Dupont wanted the amount in cash so that he could carry out a 250,000-share transaction. After checking into the matter, he is now certain of the amount that he paid Éric Dupont. Since the transaction took place on April 28, 1995, he is now also certain that the commission was paid in May 1995. When questioned again about the source of the funds, he responded that he would have to ask his brother. He specified to his brother the amount that he needed, but not the amount of the notes. He asked his brother for this money because his brother could obtain it, whereas he could not do so because his relationship with the bank was not very good.

[17] Thus, René Vaillancourt apparently went to Montréal in April or May 1995 on business, and, upon his return, he went to his brother Alain's residence in

Drummondville in the late afternoon. He did not know how long he stayed there. His brother gave him a small letter-sized envelope which he believes was white, but he is not 100% certain. The envelope contained 75 thousand-dollar bills. He does not recall whether the bills were held together with an elastic band. When questioned about the letters from his lawyer dated February 4 and March 18, 2005, which stated that this commission was \$60,000, he said that his lawyer misinterpreted the information and did not understand what happened.

[18] He did not know whether he kept the envelope containing the 75 thousand-dollar bills on his person, or whether he put it in his car. When he got home, he placed the money in a strongbox until his appointment with Éric Dupont two to ten days later.

[19] In his examination-in-chief, René Vaillancourt was asked about his reaction to Éric Dupont's request, and he said that the transaction involved millions of dollars and that \$75,000 was nothing. He himself was a millionaire, and he was returning a favour. He felt that this was reasonable. He added that he earned \$200,000 in commissions during the transaction involving Éric Dupont. His brother Alain received \$100,000, Eric Dupont received \$75,000 and he was left with \$25,000, which he said compensated him for his efforts.

[20] When cross-examined about the amount of the commission payable to Éric Dupont, René Vaillancourt said that he did not ask Mr. Dupont for explanations and was not given any during their conversation. He added that the amount was arbitrary and that the information contained in his lawyer's letter dated February 4, 2005, set out a calculation that he did himself. He personally determined that it was \$0.30 per share for \$250,000. He gave the envelope to Éric Dupont at the door of the Momento restaurant following a dinner. He remembered that it was in May because there was no snow.

[21] Alain Vaillancourt said that in 1995, his brother René asked him whether he knew investors who wanted to make some good money on Aeterna shares. He himself had done well with these shares in 1994, and now he wanted those he knew to benefit. Indeed, he contacted 175 of the 217 Avaren partners who purchased Aeterna shares. He said that he and his brother did not want to make money from these transactions, but he acknowledged that they did.

[22] With respect to the purchase of the block of shares from Éric Dupont, including the profit of \$0.80 per share, it was Luc Dupont, Éric's brother, who informed him about the profit because he was not aware of it. His brother and he

agreed to share the profit equally, but he insisted that he just wanted to help out and had no intention of making money from the deal.

[23] The Avaren partners thus bought their Aeterna shares through René and Alain Vaillancourt by using Avaren as a go-between. The shares were purchased by certified cheque payable to Alain or René Vaillancourt. The cheques payable to Alain were cashed and he gave the money to René, less his share or commission. He confirmed in clear terms that he received a \$100,000 commission and that he used it to purchase Aeterna shares.

[24] Upon being cross-examined with respect to his first writing, in which he stated that he received a \$90,000-\$100,000 commission in 1996, Alain Vaillancourt acknowledged the error, but maintained that the amount of \$100,000 was within this range and said that he made a mistake as to the year. As for the stringent accounting that he referred to in his declaration of May 20, 2005, he said that he asked René if it would be useful for him to retain it all. His brother allegedly told him no, and he threw everything away, probably in 2000. He was questioned about the declaration of May 18, 2005, where he said that the amount of \$75,000 was from cheques payable to Avaren and endorsed by him, and about the declaration of May 20, 2005, where he attested that the amount was from cheques payable to Alain Vaillancourt. He was asked who told him about the error, and he replied that he discovered the error himself and that it was not his lawyer who found out about it, as had been suggested to him.

[25] Alain Vaillancourt confirmed that his brother René asked him on the telephone, while in transit, to free up \$75,000 in order to pay Éric Dupont a commission. He said that his brother René did not have the money to do so. Since he had good dealings with the Royal Bank in Drummondville, and, in order to do Éric Dupont a favour, he managed to obtain \$75,000. However, he said that he never found out why René wanted this money, but trusted him. He said that he was not surprised, but, rather, "struck" by the request.

[26] He went up to the teller at the Royal Bank and asked for 75 thousand-dollar bills. The money was handed to him personally, and he put it in his coat, brought it home, placed it on his bookcase and called René. René came by on Friday at suppertime and he gave him a small folded white envelope containing the \$1,000 bills. René told him that he remitted the money to Éric Dupont that weekend or the following week. He had no other discussions with his brother René concerning Éric Dupont's commission and said that he never managed to figure out the reason for the commission.

[27] On cross-examination, Alain Vaillancourt said that he cashed certified cheques payable to him in order to obtain the \$75,000. It took only about twenty minutes to secure the funds at the bank. He asked for 75 thousand-dollar bills. He remembers the colour of the bills and the white colour of the envelope. He placed the money, without an elastic band around it, in his trouser pockets. He had a windbreaker, not a suit jacket. He ended his testimony by saying that he personally put the money in an envelope at his home, that the bank did not put the money in the envelope, and that he was not offered an envelope.

[28] Éric Dupont is the chairman of Aeterna's board of directors. He testified, and the Respondent offered a solemn affirmation that he made on May 17, 2005. In that affirmation, Éric Dupont said, just as he did in his testimony, that he never asked René Vaillancourt for any cash payment in respect of the share capital of Aeterna that he sold, never received any such payment from him, never asked him for any commission in respect of the sale of those shares, and never received such a commission from him.

[29] Éric Dupont testified that on April 28, 1995, he sold Avaren a total of 250,000 Class A shares of Aeterna for a total selling price of \$1,800,000. He also referred to two other sales of Aeterna shares to Avaren which took place on March 2, 1995. He said that he paid Avaren, represented by René Vaillancourt, a \$12,000 commission related to sales of Aeterna shares in the previous year, that is to say, 1994. He also managed to reiterate this information after examining his accounting and tax records and his tax returns for the 1994 and 1995 taxation years.

[30] Éric Dupont has known René Vaillancourt since 1993 or 1994. He was more familiar with René's brother Ghislain, with whom he worked on creating a foundation to help cancer patients. He also knows Alain Vaillancourt. He believed that Avaren partners were all members of the Vaillancourt family. When he was cross-examined about his ties to the Vaillancourt family, Éric Dupont said that he was not aware of certain specific events and suggested that his brother Luc might have been the one who looked after those things. He recalls that Alain had some scientific knowledge. He recalls being at the Vaillancourt brothers' parents' house for their housewarming. As for whether he had a meal with René Vaillancourt, he says that he might have, though he rarely dined with shareholders. They preferred to see him work. He did not go to the Memento restaurant often. It was especially his brother who went there more regularly.

[31] When the hearing resumed on December 6, 2005, the Appellant, in rebuttal, called Alain Vaillancourt back to the witness stand. He explained his involvement in Aeterna's scientific research in late 1999 and early 2000. He was asked to test a new product with his patients, and Aeterna later invited him to deliver a presentation at its lab. However, he was unable to make it because of inclement weather.

[32] Alain Vaillancourt was questioned again about the delivery of the 75 thousand-dollar bills to his brother René. He now said that on May 5, 1995, he arranged to have a bank draft prepared, payable to René Vaillancourt for the purchase of Aeterna shares. The copy of the bank draft purchaser's receipt was offered in evidence (Exhibit A-11) and contains the names of the investors who paid money to purchase Aeterna shares through Avaren, and the amount that each of those investors paid. The total of all the amounts paid was \$257,000, but the bank draft was only for \$207,000. Alain Vaillancourt explained that he took the difference, that is to say, \$50,000, and that the other \$25,000 was from an investor named Gaston Houle. However, he was unable to obtain documents proving the source of the \$25,000.

[33] Alain Vaillancourt explained that he had been called upon to look for documents in connection with another file, and that it was only a few days before his testimony on the resumption of the hearing of this case that he contacted his brother René, who sent him a copy of the bank draft purchaser's receipt (Exhibit A-11) to which I referred in the preceding paragraph. The bank draft bears original handwritten notes stating the names of the investors and the amount of each investment, for a total of \$257,000, including \$50,000 in thousand-dollar bills.

[34] On cross-examination, Alain Vaillancourt confirmed that the \$75,000 was obtained from the bank on the same day, but from two different sources: \$50,000 from the bank draft, and \$25,000 following the endorsement of a \$25,000 cheque payable to him and signed by Gaston Houle. He added that he called the bank in advance to ask them to prepare 75 thousand-dollar bills because the bank was not authorized to keep so many banknotes of that denomination. During this cross-examination, counsel for the Respondent offered a copy of two \$25,000 cheques signed by Gaston Houle and payable to René Vaillancourt: a cheque dated April 13, 1995, and another cheque dated April 21, 1995, for the purchase of Aeterna shares. Upon being asked whether it was one of those cheques, Alain Vaillancourt answered that he recalled that Gaston Houle wrote him a \$25,000 cheque and that he used it to complete the \$75,000. He added that Gaston

Houle was an investor he knew and that he was testifying to the best of his recollection. As for the fact that his brother René was in possession of the bank draft purchaser's receipt, he answered that he must have sent it to him, but does not know why.

[35] Guylaine Yergeau is a customer service representative at the only Royal Bank branch in Drummondville. She has been working there since 1989. She serves customers during business hours, and orders money after the branch closes for the day. She knows Alain Vaillancourt but sees him less often than his wife, who goes to the bank each week.

[36] She testified that in 1995, the branch where she worked kept only four or five thousand-dollar bills regularly, that there was no minimum, and that such bills have not been circulated to customers in the past two or three years. She recalls having ordered thousand-dollar bills in 1995, but never more than ten such bills for a customer. They had to be ordered three or four days in advance if the branch did not have any. In 1995, it was the branch's practice to hand out large denominations or large amounts (exceeding \$2,000 or \$3,000) in an office, not at the counter.

[37] During her years of service at the bank, she never saw a customer deposit several thousand-dollar bills and another customer come in to ask for such bills soon enough thereafter for the bank to still have them in its possession.

[38] On cross-examination, she recognized the purchaser's receipt in respect of the \$207,000 bank draft payable to René Vaillancourt. The bank will only issue such a draft if it is sure that it is in possession of the funds for the customer who requests it. She does not know the handwriting of the annotations, and cannot explain why the purchaser's signature is not on the copy of the receipt.

[39] This entire matter began with an audit of Aeterna by the Quebec tax authorities. During the audit, it was discovered that René Vaillancourt registered the business name Avaren on February 24, 1994, and that he purchased and resold, at a profit, through Avaren, more than 300,000 common shares of Aeterna. René Vaillancourt's tax returns made no reference to these transactions.

[40] Roger Boisvert, one of the auditors, met René Vaillancourt a few times. One such time was October 19, 1998, when he was able to get more details about the transactions. Specifically, it was discovered that René Vaillancourt had been investing in securities for several years but that his tax returns made no mention of these investments except to the extent that he claimed financial and interest costs

of investments without reporting practically any investment income or any capital gains or losses from the years 1991 through 1997 inclusively.

[41] Maurice Hammond is an investigator. He met René Vaillancourt at his request twice. The first meeting took place on March 18, 1999. At the meeting, he notified René Vaillancourt of his investigation and of the fact that he had met nearly 80% of the Avaren investors and had managed to reconstruct the price of the shares bought and the price of the shares sold. Mr. Hammond submitted that the numbers are based on an average and that if he had continued his investigation, the total would have increased. René Vaillancourt explained to him the background of his interest in Aeterna and informed him that he had not reported his capital gain for the Avaren transactions because he had incurred capital losses, had given his tax consultant a mandate to calculate his gains and losses, and would provide the results as soon as the calculation was complete. He also spoke about the application of section 85 to a block of Aeterna shares giving rise to a capital gain, and said that he considered himself entitled to the capital gains exemption until April 1999.

[42] The second meeting took place on May 25, 1999. René Vaillancourt arrived with his tax consultant, who filed a T2057 rollover form under section 85 of the Act, a table of capital gains and losses realized in the course of the years 1987 through 1993, and copies of amended T1 tax returns for the years 1995, 1996 and 1997. These documents did not reveal any information about Avaren, and when the investigator raised the subject, the tax consultant was surprised. Mr. Vaillancourt and the consultant withdrew from the meeting for a few moments, and, upon returning, René Vaillancourt said that he did not make any money from that and the consultant said that the disposition of shares by Avaren was omitted from the amended returns on the basis that the shares in question were held in trust for his brothers. It certainly is true that the amended returns do not refer to any transactions involving Avaren's shares.

[43] Maurice Hammond heard nothing from René Vaillancourt or his tax consultant from May 1999 to May 2000. The investigation continued, and he tried to talk to René Vaillancourt in May 2000. He went to his home and learned from the neighbour that he had sold his house. Upon going to Mr. Vaillancourt's place of work, Mr. Hammond was informed that he had left for Mexico on a two-year leave and that he had married a Mexican woman in November 1999. He planned to settle in the Bahamas as a securities broker. Mr. Hammond was told that it was unlikely that he would return to his job at the end of his leave. Mr. Hammond met René's

brother Réjean, a Revenue Canada employee, who refused to give him René's address.

[44] The notice of assessment against René Vaillancourt was issued on July 5, 2000, and sent to his address on record with the CCRA. Mr. Hammond received a call from lawyer Daniel Bourgeois two days later, on July 7, 2000. Mr. Bourgeois told him that he represented René Vaillancourt and, on the same day, faxed him a mandate from René Vaillancourt authorizing him to represent him in dealings with Revenue Canada to discuss, negotiate and contest any notice of assessment, statement of account, writ of seizure or other process involving any taxation year.

[45] While this was unfolding, the investigators were aware that money was being transferred from René Vaillancourt to the Appellant. They therefore made a demand for payment and assessed the Appellant on July 7, 2000. Mr. Hammond and another investigator met the Appellant. He went to their office by bicycle and the demand for payment was submitted to him. The Appellant told the investigators that René was in Mexico and would not be coming back to Canada. Mr. Hammond specified that before meeting the Appellant, they contacted his son Réjean, who works for Revenue Canada, to ask him if he wanted to come with his father, given his age. He did not come with his father, and he said that if anything happened, he would hold the investigators responsible.

[46] On July 10, 2000, Mr. Bourgeois met with investigators Maurice Hammond and André Tremblay. He wanted to obtain information about the assessments, because he had nothing concerning his client. Accordingly, the investigators explained how the shares purchased and sold through Avaren were being treated, namely as business income; that other transactions, carried out in 1993, were being treated as capital gains transactions; and that the tardy election under section 85 was accepted. Mr. Bourgeois was also given explanations regarding the issue of collection, because René Vaillancourt had left Canada. Mr. Bourgeois was asked for René Vaillancourt's telephone number but refused to provide it. There were no subsequent meetings with Mr. Bourgeois.

[47] During the two meetings with the investigators, René Vaillancourt never raised the issue of the commission expenses that he is now claiming. With respect to the \$100,000 commission paid to Alain Vaillancourt, Mr. Hammond obtained Alain Vaillancourt's tax returns for the 1995 and 1996 taxation years and found no reference to this commission. He was not assessed because he went bankrupt in 2001.

[48] Mr. Hammond was notified of the commissions in January 2005 by counsel for the Respondent, and the amounts were different. Mr. Hammond also checked Éric Dupont's tax return and found nothing under this category; in his solemn affirmation of May 17, 2005, Mr. Dupont denies receiving such a commission.

[49] It was in January 2005, the same month that he was told about the other two commissions, that Mr. Hammond was told about the commission paid by René Vaillancourt of Placement A2Z24, represented by Gaétan R. Girard, to Denis Godin for the purchase of shares. Mr. Hammond examined the documentation in his possession and could see that \$3,500 was debited from René Vaillancourt's account. The cheque for René Vaillancourt's payment to Denis Godin, which bears the remark "commission", was offered in evidence, but without further information, as was a cheque for \$66,500 from René Vaillancourt to Gaétan Girard bearing the remark [TRANSLATION] "shares". Mr. Hammond did not receive any information or confirmation from Denis Godin about this matter. Mr. Hammond said that Denis Godin purchased no shares and did not know the meaning of the remark "commission" written on the cheque.

[50] As for the purchases of shares by Gaston Houle, Mr. Hammond traced two cheques for \$25,000 (Exhibits I-3 et I-4) made by Gaston Houle to René Vaillancourt, and no cheques payable to Alain Vaillancourt.

[51] According to Mr. Hammond, René Vaillancourt must have known that he had realized a considerable gain from the Aeterna share transactions carried out through Avaren, and his failure to report this income could only have been intentional. The documentation that he examined, which was provided to him by René Vaillancourt, clearly shows that he made money, and contradicts the statement that he made at the meeting with Mr. Hammond and his accountant in May 1999, to the effect that he did not make any money on the transactions.

[52] Mr. Hammond also said that René Vaillancourt is no neophyte. He has been trading in shares since 1986. He is aware of securities commission rules. Aeterna was a closely-held corporation, and he was aware of the 50-shareholder maximum which gave rise to the creation of Avaren. According to his employer, René Vaillancourt wanted to settle in the Bahamas as a securities broker. In 1992, he was enrolled as a financial management student, and appeared to be familiar with the *Income Tax Act* because he explained the application of sections 48.1 and 85.1 at the meetings. He also knows accounting; Mr. Hammond noted that

René Vaillancourt's financial statements stated that his net worth at May 31, 1996, was \$3.8 million (Exhibit I-1, tab 5).

[53] Mr. Hammond also took the number of transactions in issue into account. There were more than 200 transactions in 1995, and these involved 217 clients and almost 400,000 shares. The percentage of reported income in relation to unreported income is 700%.

[54] Should it then be found that the transferor, René Vaillancourt, paid three commissions to the three named persons, that is to say, Alain Vaillancourt, Éric Dupont and Denis Godin, in the amounts of \$100,000, \$75,000 and \$3,500, respectively? Should the penalties imposed by the Minister on René Vaillancourt's unreported net business income be confirmed as well? Was the testimony given, especially that of the brothers René and Alain Vaillancourt, reliable and credible evidence based on which the first question can be answered in the affirmative?

[55] The evidence adduced at trial leaves no doubt that the version of the facts given by René Vaillancourt with respect to this entire matter took so many different turns with the passage of time that I am convinced that, if the hearing had been postponed another time, a different version would, in all probability, have been provided.

[56] According to René and Alain Vaillancourt, profit was not a motive in the purchase of the Aeterna shares. They wanted their friends and family to benefit. Yet Avaren (René Vaillancourt) realized a profit of \$383,336.80, less the \$60,000 plus legal fees that the Minister recognized as expenses. Even if the commission expenses that he is claiming today were allowed, net taxable income would result. René Vaillancourt included no income from Avaren in his 1995 tax return or the tax return that he amended in 1999. He says that he did not make any money on this and that there was a trust.

[57] René Vaillancourt testified that after leaving Canada, he was unaware of the assessment of July 5, 2000 against him, and that he only found out about it when he returned in March 2002. He allegedly applied for an extension, but cannot adduce the letter substantiating that application. What is certain is that he did not appeal from his assessment. And yet, the auditor's evidence discloses that on July 7, he received a phone call from Daniel Bourgeois during which he was told that he represented René Vaillancourt and was duly authorized to represent him in dealings with Revenue Canada. In fact, there was a meeting with Mr. Bourgeois on

July 10, 2000, and everything about the assessment of July 5, 2000, was explained to him at that time.

[58] On October 8, 2003, René Vaillancourt sent a fax to his lawyer referring to an \$80,000 commission and a \$47,855 commission for the first time. He did not name the people to whom the commissions were paid and did not mention the \$3,500 commission paid to Denis Godin. He declared that the profit was \$175,709. Today, he does not dispute that the profit was \$383,336. In December 2003, when he testified under oath at the examination for discovery, he said that the \$47,855 was subject to change but that he was certain of the \$80,000 amount. He said that one of the commissions was paid in shares, but he did not know which. He could not say whom the commissions were paid to. Later, it was learned that the amount of \$80,000 was actually \$100,000 and was paid in shares to his brother Alain Vaillancourt when Aeterna became a publicly held corporation, although there was no precise calculation of the commission. It was also learned that the \$47,855 commission was actually a \$75,000 commission paid to Éric Dupont. Later on, it was learned that this commission was paid in cash in the form of 75 thousand-dollar bills in a Québec restaurant. The most surprising thing in this whole story is that René Vaillancourt, upon writing to his lawyer on October 8, 2003, or, worse still, upon testifying under oath at the examination for discovery, was unable to recall the people to whom the commissions had been paid. Later, however, he said that he did not want to put those people in trouble and that he wanted to talk to them first. Thus, he knew who they were.

[59] After it was established that a \$100,000 commission was paid to Alain Vaillancourt in Aeterna shares, it was learned that it was actually paid in cash. It was paid from the cheques written out to him by the Avaren partners; or was it the cheques made out to Avaren? Alain Vaillancourt said that he kept stringent accounting records, yet he said that the commission was \$90,000 to \$100,000, and he later said that it was \$100,000. These were the same stringent accounting records that Alain Vaillancourt threw away, probably in 2000, on the instructions of his brother René, who was outside Canada at the time and supposedly told him that there was no point in keeping them. Yet the assessments were made in 2000, and it might have been useful to keep the records if such records existed. It must also be recalled that the Vaillancourt brothers were not seeking to make a profit and that they agreed to share their undesired profits equally. Thus, the profit should have been split in two, and each should have reported his share in his income. Neither of them did this. Was this a shared profit or a paid commission? In his declaration, Alain Vaillancourt also said that a commission of \$0.80 per share was paid to him for each investor that he attracted

to the project. Thus, this is far from a 50/50 split. Alain Vaillancourt did not report this \$100,000 commission in his 1995 and 1996 income. In fact, he never reported it.

[60] The thing about this matter that is strange, to say the least, is Alain Vaillancourt's reaction upon being asked by his brother to free up \$75,000 in order to pay a commission to Éric Dupont. He was supposedly not surprised, but, rather, [TRANSLATION] "struck" by the request. He also said that he never found out why René wanted the money, and that he did not have other discussions with his brother about the subject; he said that he never managed to understand, and yet his brother told him that he paid the money to Éric Dupont. For his part, René Vaillancourt said that he did not ask Éric Dupont for any explanations regarding his request for a \$75,000 commission. In my opinion, this situation is strange to say the least.

[61] In order to obtain the 75 thousand-dollar bills, Alain Vaillancourt cashed \$75,000 worth of certified cheques payable to him. He went to the bank and, in less than 20 minutes, obtained 75 thousand-dollar bills, which he placed in his coat. He remembers the colour of the bills and the fact that the envelope was white. He said that he supplied the envelope himself because the bank gave him the bills without an envelope or an elastic band. However, on cross-examination, he said that he placed the 75 thousand-dollar bills in his trouser pockets. When he came back to testify upon the resumption of the trial, he said that, a few days earlier, he had contacted his brother, who sent him a copy of the purchaser's receipt of a \$207,000 bank draft payable to René Vaillancourt and dated May 5, 1995. Alain Vaillancourt now remembers that he cashed \$257,000 worth of cheques written by Avaren investors, and that the difference between the amount of \$207,000 and the amount of \$257,000 is the \$50,000 that he obtained in the form of 50 thousand-dollar bills. The other \$25,000 is from a cheque from Gaston Houle, another investor, but he does not have the documents.

[62] It must be recalled that René Vaillancourt asked his brother Alain to supply him with the \$75,000 because he did not have the means to do so. Yet, on May 5, he sent René a \$207,000 bank draft, payable to him, using the money from \$257,000 worth of certified cheques. Why didn't Alain Vaillancourt simply obtain a \$257,000 bank draft and send it to René? How is it that the receipt issued to the purchaser, Alain Vaillancourt, was found in René Vaillancourt's possession a few days before the trial resumed? Who wrote the investors' names in pen on the purchaser's receipt? What is the date of the payment or of the \$257,000 worth of cheques which were written by the investors named on the receipt? Where are the

documents that can substantiate the \$25,000 that Gaston Houle paid to Alain Vaillancourt to complete the \$75,000?

[63] Alain Vaillancourt's version of the facts is no more reliable than that of his brother René. Like René's version, it contains contradictions and implausible statements that do nothing but undermine his credibility to such an extent that it is impossible to determine where the truth lies. In my opinion, a mere reading of the summary of his testimony is enough to reach this conclusion. A recapitulation of the following versions should suffice:

- 1 – He testified that he and his brother did not intend to make a profit, but that is exactly what happened.
- 2 – He was supposed to split this profit equally, but the evidence does not point to this.
- 3 – Alain Vaillancourt kept stringent accounting records. His brother is the one who told him that he could throw everything out in 2000, while he was outside Canada. His declarations refer to a \$90,000 to \$100,000 commission and he made a mistake as to the year.
- 4 – Was the commission paid in shares or in cash?
- 5 – Did the \$75,000 intended to pay Éric Dupont come from cheques payable to Avaren or Alain Vaillancourt, or did it consist of a \$50,000 withholding from the \$207,000 bank draft made out to René Vaillancourt, plus \$25,000 from a cheque written by investor Gaston Houle?
- 6 – Why was the purchaser's receipt in René Vaillancourt's possession even though the purchaser was Alain Vaillancourt?
- 7 – Alain Vaillancourt said that he obtained the \$75,000 because his brother did not have the means to do so. Yet Alain had just sent René a \$207,000 bank draft. If the total amount of the cheques was \$257,000, why did he not simply send that amount to his brother?
- 8 – Did Alain Vaillancourt place the 75 thousand-dollar bills in his trousers or his coat? Did he receive them at the counter or in an office? Is it possible that he was handed this cash without being given or offered an envelope? (See Ms. Yergeau's testimony.)
- 9 – He remitted \$75,000 in cash to his brother to pay Éric Dupont and claims not to understand. He was not surprised, but [TRANSLATION] "struck" by the request.
- 10 – He did not report this \$100,000 commission in his 1995 and 1996 income.

[64] Éric Dupont's credibility was not impeached during his testimony, and neither was Ms. Yergeau's. Even if it was to Éric Dupont's advantage to deny having received such an amount of money as a commission upon the sale of his shares, he struck me as a responsible and forthright person whose credibility was not weakened to such an extent that I must reject his testimony.

[65] In view of these circumstances, the Appellant has not succeeded in persuading me, on a balance of probabilities, that his son René Vaillancourt paid his other son Alain Vaillancourt a \$100,000 commission in recognition and consideration of Alain's involvement in attracting purchasers of Aeterna shares, nor that he gave Éric Dupont 75 thousand-dollar bills in 1995 as a commission in respect of the sale of Aeterna shares.

[66] Furthermore, the Appellant has not satisfied me that René Vaillancourt paid Denis Godin \$3,500 as a commission in respect of the purchase, by René Vaillancourt, of shares held by Placement A2Z24, represented by Gaétan R. Girard. The documentary evidence adduced is insufficient to establish a connection with this transaction, and, given the number of share purchase and sale transactions carried out by René Vaillancourt during those years, the amount can be something quite different. In my opinion, Denis Godin and Gaétan Girard are the only ones who could have enlightened the Court with respect to all this, but the Appellant did not call them to testify. Based on this, I conclude that their testimony would not have been favourable.

[67] In addition, René Vaillancourt was imposed a penalty under subsection 163(2) of the Act, which reads:

163(2) **False statements or omissions.** 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 (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

...

[68] Thus, the onus is on the Minister to prove, on a balance of probabilities, that the imposition of a penalty on René Vaillancourt, the transferor in the case at bar, was warranted under the circumstances. It must therefore be shown that

René Vaillancourt, knowingly, or under circumstances amounting to gross negligence, made a false statement or omission in his income tax return.

[69] René Vaillancourt did not report the income that he derived from the Aeterna share transactions through Avaren in his 1995 tax return or in the return that he amended on May 21, 1999, for the years 1995, 1996 and 1997. His explanation for his failure to report this income remained nebulous; he said that he forgot to compile the information and that he thought he had handed everything to his tax consultant. It must be borne in mind that René Vaillancourt is an accountant by training, and has been an internal auditor at the CSST since 1990. René Vaillancourt met auditor Roger Boisvert on October 19, 1998, at which time it was learned that René Vaillancourt had been investing in securities for several years, specifically from 1991 to 1997, and that none of his tax returns mentioned these investments, except to claim the financial expenses and interest paid for the purpose of making investments.

[70] René Vaillancourt also met with Mr. Hammond, the investigator, on March 18, 1999, at which time he was apprised of the fact that Mr. Hammond had met with almost 80% of the Avaren investors. He was content to tell Mr. Hammond that he did not report capital gains because he had incurred losses in previous years and would provide a report about this. A few days after filing his amended 1995 income tax return, he and his tax consultant met with Mr. Hammond again, and the Avaren question was once again raised. Following a discussion with René Vaillancourt, and to the tax consultant's surprise, Mr. Hammond was told that René Vaillancourt had not made any money and that this was a trust that had been set up for his brothers. René Vaillancourt knew that this was false.

[71] Thus, in light of these few events and René Vaillancourt's conduct after these meetings, it is clear to me that René Vaillancourt never intended to report a penny of income or expenses in relation to the purchase and sale of Aeterna shares within Avaren. In addition, and as he admitted, it is clear that he made a profit; and even if I allowed the expenses that he is claiming, the profit would be large. René Vaillancourt never considered it important to account for the Aeterna share purchases by Avaren because he is having trouble reconstructing everything. Thus, he failed to report this income, and, in my opinion, he did so knowingly or under circumstances amounting to gross negligence according to the pronouncement of Strayer J. in *Venne v. The Queen*, No. 7-815-82, April 9, 1984, 84 DTC 6247 (F.C.T.D.), that is to say, the negligence must be more serious than a mere failure to exercise reasonable care. There must be a significant degree of negligence

tantamount to intentional acting — recklessness as to whether the Act is complied with or not. René Vaillancourt acted in such a manner in the case at bar.

[72] Consequently, the appeal is dismissed, and the Respondent shall be entitled to her costs.

Signed at Ottawa, Canada, this 25th day of October 2006.

"François Angers"

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Angers J.

Translation certified true  
on this 30th day of January 2008.

François Brunet, Revisor

CITATION: 2006TCC395  
COURT FILE NO.: 2002-331(IT)G  
STYLE OF CAUSE: Albert Vaillancourt and  
Her Majesty the Queen  
PLACE OF HEARING: Québec, Quebec  
DATE OF HEARING: June 9, 2005  
REASONS FOR JUDGMENT: The Honourable Justice François Angers  
DATE OF JUDGMENT: October 25, 2006

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