Docket: 2005-3159(IT)G

BETWEEN:

JACK HOUGASSIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 8, 2007, at Kitchener, Ontario.

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: J. Stephen Schmidt
Counsel for the Respondent: Justine Malone

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* ("*Act*") for the 2000 taxation year in relation to the penalties imposed pursuant to subsection 163(2) of that *Act* on the unreported interest income of $275,435 is dismissed, with costs.

Signed at Ottawa, Ontario, this 22nd day of May 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC293
Date: 20070522
Docket: 2005-3159(IT)G

BETWEEN:

JACK HOUGASSIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant was reassessed to include in his income for the year 2000 additional interest income of $275,435 and to impose a penalty under subsection 163(2) of the *Income Tax Act* (“*Act*”) in relation to this unreported interest income. There was also a separate reassessment for other unreported income for 2000 and a penalty under subsection 163(2) of the *Act* on that amount for 2000 but these other amounts are not included in this appeal. The only matter that was appealed to this Court was the imposition of the penalty under subsection 163(2) of the *Act* on the unreported interest income of $275,435 for 2000.

[2] The actual amount of interest income reported by the Appellant on his 2000 income tax return was $985. Since the amount of unreported interest income (which is not in dispute) was $275,435, the total amount of interest income of the Appellant for 2000 was $276,420. The Appellant therefore reported less than 0.36% of his actual interest on his tax return.

[3] Linda Death, the Private Banking representative of the Bank of Montreal who was responsible for the bank accounts of the Appellant, testified that the Appellant had negotiated a special rate of interest for his accounts that was higher than the normal rate of interest. This was confirmed by the Appellant who testified that the special rate of interest was a factor in moving the accounts to the Bank of Montreal.

[4] Because the accounts had a special rate of interest, every year there would be two T5s generated – one by the Bank of Montreal computer system that would calculate interest at the standard rate and a second amended T5 that would replace the computer generated one. This second T5 was prepared manually by Linda Death and she would arrange to have it delivered to or picked up by Mrs. Hougassian, the Appellant's spouse.

[5] The interest in question related to a particular joint bank account in the names of the Appellant and his spouse. The amount in this bank account ranged from a low of approximately $3.4 million to a high of over $6.1 million. From the evidence presented it would appear that the T5 generated by the Bank of Montreal computer for this account showed interest of $7,807. However the passbook for the account shows that the amount of interest for the months of January and February (which are the two months during which the account balance was the lowest) were $13,869 and $13,796 respectively.

[6] For each year (including 2000) the Appellant simply took the T5s and other tax information that his wife had sorted into folders and delivered these to their accountant who prepared their personal tax returns. The same accountant had been preparing their personal tax returns for several years. The Appellant was not a detail person and did not look at his tax return after it had been prepared by the accountant other than to determine whether he owed money or was entitled to a refund and to sign it. He testified that if he would have looked at the amount reported for interest income he would immediately have known that the amount of $985 was incorrect.

[7] His total income for the year 2000 was $3,154,851 and counsel for the Respondent argued that the unreported interest income was a small percentage of the total income of the Appellant for 2000 and therefore by only looking at the total income the missing interest would not be noticed. However, the total income of the Appellant was comprised of five items – Employment Income ($2,000,000), Dividends ($3,022), Interest ($985), Partnership Income ($31,038) and Taxable Capital Gains ($1,119,806), based on the reconstructed tax return of the Appellant for 2000. The amount of interest is a separate line item on the tax return and it is blatantly obvious that the amount reported was too low. Someone had to insert the amount of $985 as interest income on the Appellant's tax return. In the previous year the amount of interest paid on this account was $124,403. With interest of over $100,000 in the previous year and employment income of $2,000,000 and taxable capital gains of over $1 million in the 2000 year, the insertion of only $985 as interest for 2000 was more than simple carelessness. The accountant who

prepared the tax return was not called as a witness. The Appellant stated that the accountant is now about 83 years old and unable to recall many details.

[8] The Appellant is a very successful and intelligent businessman who clearly knew that he had maintained significant amounts of cash in this bank account in 2000 and who knew that he was entitled to a greater rate of interest than the standard rate paid by the Bank of Montreal. The Appellant testified that the computer generated T5 of $7,807 for 2000 had to be too low based on the amounts that he maintained in that account in 2000. Obviously if $7,807 is too low, then $985 is clearly a significant understatement of the interest earned.

[9] As noted above the only issue in this case is whether the assessment of a penalty pursuant to subsection 163(2) of the *Act* in relation to the unreported interest income is valid.

[10] In *Venne v. The Queen*, [1984] C.T.C. 223, 84 DTC 6247, Strayer J. of the F.C.T.D. made the following comments on the meaning of gross negligence for the purposes of penalties imposed under subsection 163(2) of the *Act*:

> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, **<u>an indifference as to whether the law is complied with or not</u>**.
>
> (emphasis added)

[11] As noted above, the insertion of only $985 as interest for 2000 in this case was more than simple carelessness. It showed an indifference as to whether the *Act* was complied with or not. In this case the Appellant testified that his tax return was prepared by his accountant with very little input from the Appellant. The Appellant testified that he had only a very brief discussion with the accountant when he dropped off the information and then simply picked up his return when it was ready, glanced at his return, signed it and filed it. The question is then whether the Appellant can absolve himself from the imposition of the penalty under subsection 163(2) of the *Act* on the basis that he did not complete the tax return (and therefore he did not insert the amount of $985 as interest) and he did not review the return in any detail.

[12] In *Udell v. M.N.R.*, 70 DTC 6019, Cattanach J. of the Exchequer Court of Canada found that the gross negligence of the accountant could not be attributed to

the appellant in that case. However in the *Udell* case the appellant had kept complete and accurate records of his income and all of these records were provided to the accountant. In the present case there was no evidence that the amended T5 for the account in question was provided to the accountant. The amended T5 for this account for 2000 was not produced and it is not clear whether this amended T5 was misplaced or included in the files delivered to the accountant. Linda Death testified that the amended T5 was produced every year and delivered to Mrs. Hougassian. I accept her testimony and therefore the amended T5 would have been prepared for 2000 and delivered to Mrs. Hougassian.

[13] In *DeCock v. M.N.R.,* 84 DTC 1523, Rip J. (as he then was) made the following comments:

> 34 The appellant knows full well the consequences of filing an income tax return containing — if that is the word — an omission of income. He had been convicted previously of failing to report income and was fined and assessed a penalty. And what he says his behaviour was when it came to sign the return is simply not credible: while he says he "glanced" at the return to check his address he was not even curious to find out his income for the year, or, what I find even more difficult to accept, how much tax he had to pay for the year.
>
> 35 True — if we accept the appellant's evidence — the appellant's accountant was extremely negligent. **But a taxpayer, in particular a businessman who knew his various sources of income, cannot and does not exculpate himself from liability by handing over his tax affairs to a professional and blindly, without question, and in this case without even any interest, accepting what the professional has done.**
>
> (emphasis added)

[14] In the later case of *Foreman* v. *R.*, [2001] 1 C.T.C. 2342, Rip J. (as he then was) made the following comments:

> 21 This is not a case where any error is attributable only to the accountant, as in Udell v. Minister of National Revenue. In Udell, the taxpayer kept meticulous records in an account book and gave the book to his accountant to prepare his tax return. Complete and accurate records were given to the accountant. Certainly, this is not the situation at bar. Mr. Foreman was privy to any gross negligence of Ms. Job. He knew - or was in a position to know - that the tax return had errors. Mr. Foreman was indifferent as whether the Act was complied with or not, so long as he got a refund.

[15] In the case of *DeCosta* v. *R.*, 2005 DTC 1436, Bowman C.J. dealt with the *Udell* case and the two decisions of Rip J. (as he then was) referred to above and made the following comments:

> 9 I have no difficulty in reconciling the decision of Cattanach J. with those of Rip J. They each depend on a finding of fact by the court with respect to the degree of involvement of the taxpayers. The question in every case is, leaving aside the question of wilfulness, which is not suggested here,
>
> (a) was the taxpayer negligent in making a misstatement or omission in the return? and
>
> (b) was the negligence so great as to justify the use of the somewhat pejorative epithet 'gross'?
>
> This is, I believe, consistent with the principle enunciated by Strayer J. in Venne v. R. (1984), 84 D.T.C. 6247 (Fed. T.D.).
>
> . . .
>
> 11 In drawing the line between "ordinary" negligence or neglect and "gross" negligence a number of factors have to be considered. One of course is the magnitude of the omission in relation to the income declared. Another is the opportunity the taxpayer had to detect the error. Another is the taxpayer's education and apparent intelligence. No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence.

> 12 What do we have here? A highly intelligent man who declares $30,000.00 in employment income and fails to declare gross sales of about $134,000.00 and net profits of $54,000.00. **While of course his accountant must bear some responsibility I do not think it can be said that the appellant can nonchalantly sign his return and turn a blind eye to the omission of an amount that is almost twice as much as that which he declared. So cavalier an attitude goes beyond simple carelessness.**
>
> (emphasis added)

[16] In this case the error was significant. Only interest of $985 was reported. The total amount of interest income of the Appellant for 2000 was $276,420. The Appellant therefore reported less than 0.36% of his actual interest on his tax return. The Appellant was the person who negotiated the higher rate of interest on his account and he knew the balance in the account and the magnitude of interest that the balance should have generated. Any quick review of the line items in the tax return would have identified the fact that the interest was understated. He had the opportunity to review his tax return but neither the interest nor the desire to do so. The failure of the Appellant to detect the error and to ensure that the correct amount of interest was reported in this case was more than simple carelessness, it showed that the Appellant was indifferent with respect to whether he complied with the *Act*.

[17] As a result the appeal is dismissed, with costs.

Signed at Ottawa, Ontario, this 22nd day of May 2007.

"Wyman W. Webb"

Webb J.

CITATION:	2007TCC293
COURT FILE NO.:	2005-3159(IT)G
STYLE OF CAUSE:	JACK HOUGASSIAN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Kitchener, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
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APPEARANCES:

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Counsel for the Respondent:	Justine Malone

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