Docket: 2007-4004(IT)I

BETWEEN:

GHISLAIN LAPLANTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 16, 2008, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Annick Provencher

JUDGMENT

The appeal from the reassessment made pursuant to the *Income Tax Act* for the 2001, 2002, 2003 and 2004 taxation years and in respect of a medical expense tax credit of $407 claimed in the Appellant's income tax return for the 2001 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 16th day of June 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 28th day of July 2008.
Susan Deichert, Reviser

Citation: 2008TCC335
Date: 20080616
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BETWEEN:

GHISLAIN LAPLANTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] The only issue in this case is whether the Minister of National Revenue (the "Minister") was correct in imposing a penalty under subsection 163(2) of the *Income Tax Act* (the "Act") in respect of overstated rental expenses for the 2001, 2002, 2003 and 2004 taxation years and of a medical expense tax credit of $407 claimed in the Appellant's income tax return for the 2001 taxation year.

Facts

[2] During the taxation years at issue, the Appellant was the owner of income property located on Gareau Street in Longueuil (the "Property"), some eight kilometres away from his principal residence.

[3] The statements of income and expenses for the Property prepared by a tax preparer showed the following:

a) the statements of real estate rentals were prepared by a tax preparer;

		2001	2002	2003	2004
(i)	Rental income	$36,006	$36,126	$36,522	$37,278
(ii)	Rental expenses	$47,503	$35,957	$35,075	$33,837
(iii)	Income or loss reported before CCA claim	($11,497)	$ 169	$ 1,447	$ 3,971

[4] An audit of the Appellant's rental income and expenses for his 2001, 2002, 2003 and 2004 taxation years led the Minister to conclude that rental expenses had been overstated by $20,648, $12,991, $7,402 and $9,342 respectively. The overstated rental expenses were basically personal expenses and expenses not incurred in relation to the rental operation. The personal expenses were expenses related to the use of a motor vehicle and of his personal residence (telephone, electricity, insurance, cable, property taxes, maintenance and repairs). A penalty for gross negligence was applied to the amounts of the overstated rental expenses.

[5] In addition, the audit revealed that, in the 2001 taxation year, medical expenses totalling $3,625 reported by the Appellant, which had given rise to a medical expense tax credit of $407, had not actually been incurred. A gross negligence penalty was also applied in respect of the medical expense tax credit of $407 claimed for the 2001 taxation year.

[6] The Minister assessed the gross negligence penalty on the basis of the following information:

(i) the Appellant handled the budgeting for and administration of the Property (rental, taxes, maintenance, insurance, etc.) himself;

(ii) the Appellant therefore had an idea of the extent of expenses incurred;

(iii) the overstated rental expenses were expenses of a personal nature and the Appellant himself provided the invoices or other documents;

(iv) the Appellant should have noticed that the rental expenses were far too high;

(v) the Appellant signed the income tax returns for the taxation years in question.

[7] The Appellant testified that

(i) he was an industrial mechanic during the taxation years at issue;

(ii) he had his income tax returns for the 1999 and 2000 taxation years completed by Denis Gagnon, who did business out of his principal residence; the Court notes that the income tax returns prepared by Mr. Gagnon reported, in relation to the Property, gross income of $34,258 and net income of $7,000 for the 1999 taxation year, and gross income of $35,900 and net income of $9,000 for the 2000 taxation year;

(iii) on his brother's recommendation, he had hired Serge Cloutier, a chartered accountant, to prepare his income tax returns starting with the 2001 taxation year; Mr. Cloutier had accepted the job and had requested that the Appellant provide him with all invoices related to the use of an automobile and of his principal residence, stating that he would do the breakdown; Mr. Cloutier allegedly told the Appellant that he was entitled to deduct 50 per cent of all of his automobile expenses and 50 per cent of certain expenses related to his principal residence (electricity, telephone, insurance, municipal and school taxes, cable and Internet costs) as expenses incurred for the purpose of earning income from property;

(iv) he was not good with numbers or income tax matters and could not complete his income tax returns himself;

(v) he had confidence in Mr. Cloutier, as the latter was a chartered accountant who seemed more competent and organized than Mr. Gagnon; the Appellant explained in this regard that, unlike Mr. Gagnon, Mr. Cloutier had his business in a commercial building and had support staff;

(vi) he signed the income tax returns for the taxation years in question without checking them; he did not ask Mr. Cloutier about the sizeable difference in the net rental income when compared with the 1999 and 2000 taxation years, as he had confidence in him;

(vii) he did not incur any medical expenses in 2001; the Appellant explained that he had not known that Mr. Cloutier had reported medical expenses of $3,625 in his income tax return for the 2001 taxation year, resulting

in a medical expense tax credit of $407; the Appellant moreover admitted that, had he looked over his income tax return for the 2001 taxation year prior to signing it, he would have seen the false statement;

(viii) he did not have any automobile leasing expenses in the 2001 taxation year; the Appellant explained that he had not known that Mr. Cloutier had reported $6,477 in automobile leasing expenses in his income tax return for 2001; the Appellant admitted that, had he looked over his income tax return for that taxation year prior to signing it, he would have seen the false statement;

(ix) false statements were made in reporting the number of kilometres travelled in a motor vehicle for the purposes of earning income (23,472 km in 2001, 28,644 km in 2002, 31,376 km in 2003 and 26,750 km in 2004) in the Appellant's income tax returns for the taxation years in question; the Appellant admitted that, had he looked over his income tax returns prior to signing them, he would have been bound to see the false statements made by Mr. Cloutier without his knowledge;

(x) had he looked over his income tax returns for each of the taxation years in question prior to signing them, he would have seen a number of other false statements (in relation to expenses other than those indicated above) made by Mr. Cloutier without his knowledge.

[8] The Court notes that Serge Charron, an investigator with the Canada Customs and Revenue Agency, testified that, as a result of his investigation of Mr. Cloutier, criminal proceedings for tax fraud had been brought against the latter, for having improperly inflated his clients' expenses. He also explained that 25 of Mr. Cloutier's 250 clients had disputes with the tax authorities regarding overstated expenses.

Analysis and conclusion

[9] Subsection 163(2) of the Act provides for the assessment of a penalty against anyone who knowingly or under circumstances amounting to gross negligence makes or participates in, assents to, or acquiesces in the making of a false statement or omission in a return for a taxation year. More precisely, the portion of subsection 163(2) of the Act that precedes the penalty calculation details reads as follows:

> **False statements or omissions**
>
> (2) 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 per cent of….

Under subsection 163(3) of the Act, the burden of establishing the facts justifying the assessment of the penalty is on the Minister and not the taxpayer. Subsection 163(3) of the Act reads as follows:

> Burden of proof in respect of penalties
>
> (3) Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[10] As stated by Mr. Justice Dussault in *Prud'homme v. Canada*, 2005 TCC 423, at paragraph 47,

> …the facts on which the imposition of a penalty for gross negligence under subsection 163(2) of the Act is based must be analysed having regard to their particular context, which means that drawing a comparison with the facts of another situation would be a purely random exercise, if not patently dangerous.

[11] The concept of "gross negligence" accepted in the case law is that defined by Mr. Justice Strayer in *Venne v. Canada (Minister of National Revenue – M.N.R.)* (F.C.T.D.), [1984] F.C.J. 314:

> …"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, an indifference as to whether the law is complied with or not….

[12] In *Da Costa v. Canada*, [2005] T.C.J. No. 396 (TCC informal procedure), the Honourable Chief Justice Bowman referred to the decision in *Undell v. M.N.R.*, [1969] C.T.C. 704, 70 DTC 6019 (Ex. Ct.), and two other decisions by Mr. Justice Ripp (as he then was) and made the following remarks:

> [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. The Queen*, 84 DTC 6247.
>
> …
>
> [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.

[13] Further, in *Villeneuve v. Canada*, 2004 DTC 6077, the Federal Court of Appeal made it clear that "gross negligence" could include wilful blindness in addition to an intentional act and wrongful intent. In that decision, Mr. Justice Létourneau said the following in this regard, at paragraph 6:

> With respect, I think the judge failed to consider the concept of gross negligence that may result from the wrongdoer's wilful blindness. Even a wrongful intent, which often takes the form of knowledge of one or more of the ingredients of the alleged act, may be established through proof of wilful blindness. In such cases the wrongdoer, while he may not have actual knowledge of the alleged ingredient, will be deemed to have that knowledge.

[14] In the Court's view, the Appellant in this case was grossly negligent in that he exhibited wilful blindness. When the Appellant signed his income tax returns for the taxation years in question, he knew very well that there was a very significant difference in the net rental income when compared with the 1999 and 2000 taxation

years, yet he did not try to ascertain why there was such a difference. The Appellant explained that he had relied on his accountant, who had told him that he was entitled to deduct 50 per cent of all expenses related to the use of an automobile and 50 per cent of certain expenses related to the use of his principal residence as expenses incurred to earn income from property. The Appellant explained that he had thought that the difference owed to the fact that such deductions had not been claimed in his returns for 1999 and 2000. The difference was so significant that the Appellant should in the Court's view have questioned Mr. Cloutier about it, especially since the Appellant was quite familiar with the extent of this type of new expense claimed, as he himself had compiled and given the various supporting documents for those expenses to Mr. Cloutier. This in the Court's view is an indication of wilful blindness, if not wilful conduct constituting gross negligence.

[15] In any event, the Court finds that the Appellant's negligence (in not looking at his income tax returns at all prior to signing them) was serious enough to justify the use of the somewhat pejorative epithet "gross". The Appellant's attitude was cavalier enough in this case to be tantamount to total indifference as to whether the law was complied with or not. Did the Appellant not admit that, had he looked at his income tax returns prior to signing them, he would have been bound to notice the many false statements they contained, statements allegedly made by Mr. Cloutier? The Appellant cannot avoid liability in this case by pointing the finger at his accountant. By attempting to shield himself in this way from any liability for his income tax returns, the Appellant is recklessly abandoning his responsibilities, duties and obligations under the Act. In this case, the Appellant had an obligation under the Act to at least quickly look at his income tax returns before signing them, especially since he himself admitted that, had he done so, he would have seen the false statements made by his accountant.

[16] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 16th day of June 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 28th day of July 2008.
Susan Deichert, Reviser

CITATION:	2008TCC335
COURT FILE NO.:	2007-4004(IT)I
STYLE OF CAUSE:	GHISLAIN LAPLANTE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 16, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	June 16, 2008

APPEARANCES:

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