Docket: 2007-3015(IT)G

BETWEEN:

GILLES CHARRON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 29, 2009, at Montréal, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Louis L'Heureux

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2002 taxation year is dismissed, with costs in favour of the Respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of May 2009.

"Alain Tardif"

Tardif J.

Translation certified true
on this 16th day of June 2009.

François Brunet, Revisor

Citation: 2009 TCC 290
Date: 20090528
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REASONS FOR JUDGMENT

Tardif J.

Year in issue

[1] This is an appeal pertaining to the 2002 taxation year. The assessment imposes a penalty on the ground that the Appellant overvalued by $402,225 the losses resulting from his numerous securities transactions for the 2002 taxation year.

Issue

[2] Was the penalty Minister imposed by on the Appellant under subsection 163(2) of the *Income Tax Act* ("the *Act*") for the 2002 taxation year warranted?

[3] The answer to that question must follow from an analysis of the facts in niew of subsection 163(2) of the *Act*, which reads as follows:

> **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
>
> …

[4] The Respondent bears the burden of proof in this matter. The evidence consisted of the testimony of the Appellant, of Charles Landreville, chartered accountant, and of Pierre-Luc Meunier, in his capacity as auditor of the Appellant's income tax returns.

[5] The Appellant explained and described his long career as an investment advisor with several of the most reputable institutions in this field.

[6] After the Appellant was selected for a tax audit, an initial telephone conversation took place in which the auditor, Pierre-Luc Meunier, asked the Appellant to gather all the relevant documents to enable Mr. Meunier to audit the 2000, 2001 and 2002 taxation years.

[7] For the taxation years in issue, most if not all of the Appellant's income was derived from the buying and selling of shares on the Canadian and U.S. stock markets.

[8] At their first meeting in a restaurant a few weeks after the initial telephone contact, the Appellant had with him and gave the auditor the relevant documents for the 2000 and 2001 taxation years. He did not have the documents for the 2002 taxation year at that time.

[9] The Appellant suggested to the auditor that the 2002 taxation year not be audited if the audit of the 2000 and 2001 taxation years showed that he had met the requirements and fulfilled his tax obligations. That is the explanation he gave for not having the relevant documents for 2002 at that time.

[10] An analysis of the information and documents provided for the 2000 and 2001 taxation years showed fairly quickly that everything was satisfactory and acceptable.

[11] However, the auditor did not follow the Appellant's suggestion or recommendation that he not audit the 2002 taxation year. Instead, he insisted that the information and documents for 2002 be given to him, finding it suspicious and

very odd that the Appellant would urge him so strongly not to audit the 2002 taxation year.

[12] The auditor thus renewed his request to obtain the documents for 2002, but the Appellant continued to show reluctance to accede to that request, adding that he would have to pay substantial costs to the institution in order to obtain the information and documents requested.

[13] To avoid having the Appellant pay those costs, it was agreed that the auditor would send a letter of requirement instructing the institution to prepare and remit the relevant documents at a lower cost.

[14] Despite clear, plain and precise instructions regarding the documents required, the Appellant submitted incomplete documents which were found, after a very cursory analysis, to contain a major discrepancy, and, moreover, which a simple reading showed to be incomplete and unreliable.

[15] In addition, the documents contained a gross and obvious error, namely stating that the loss claimed resulted from the purchase and sale of securities in 2002.

[16] The documents indicated all purchases and all sales, but did not take into account unsold shares, thus rendering the exercise entirely futile and contrary to even the most elementary rules for computing the amount of eligible losses for the 2002 taxation year. In other words, unsold securities appeared in the report, thus distorting the calculation of the value of the unsold shares.

[17] Once this was discovered, it became even more imperative that the Appellant provide all useful, relevant and reliable documents to establish the actual loss that he was entitled to claim.

[18] There were major contradictions in the accounts of what followed. The Appellant said that he had asked the auditor to provide a rough estimate of the loss that he was entitled to claim. Mr. Meunier, still according to the Appellant, came up with an estimate of between $70,000 and $80,000 for 2002.

[19] On the basis of that arbitrary assessment provided by the auditor, the Appellant drew up a detailed document showing a loss somewhat above $70,000. The Appellant said that he had done so at the express request of the auditor. The Appellant claimed that it had been tacitly agreed that it was sufficient to prepare a

document showing a loss of $70,000 to $75,000 to close the file and end Mr. Meunier's audit mandate. According to the Appellant, he therefore prepared a document to put an end to the audit, knowing that it was untruthful.

[20] The Appellant said that he had drafted this cursory, imprecise and unreliable document because he thought that he simply had to justify the auditor's arbitrary estimation of the amount of the loss. Given this rather farfetched explanation, the Appellant then stated that he had been deliberately entrapped by Mr. Meunier, whom he criticized for his supposed arrogance, ignorance, inexperience and youth.

[21] There again, the auditor soon found that the document contained several errors and information that was quite simply false, in particular with regard to the average price.

[22] The auditor then demanded more complete and reliable documents so that a proper audit could be conducted, especially since the Appellant's conduct confirmed his initial suspicions that he was plainly trying to hide the truth as to the eligible losses for 2002.

[23] A colleague of the Appellant's stated that there were difficulties in obtaining reliable documents. He explained different situations that could cause account statements to be unreliable.

[24] He gave the example of a client coming from another broker, saying that it was impossible to know what had happened before the transfer. In that type of situation it became difficult, if not impossible, to determine a true average price and the amount indicated was thus either arbitrary or based on intuition. He also said that an advisor could make changes to certain account statements, and vigilance was therefore called for regarding the quality and provenance of any statement.

[25] He nevertheless acknowledged that the statements issued by brokers were generally reliable and satisfactory. At the end of the day, relevant and reliable documents were given to the auditor.

[26] The audit that was finally conducted thanks to the relevant documents – after the Appellant's many reservations and attempts to avoid it, after the filing of incomplete and inappropriate documents, after the filing of a misleading document – established convincingly and decisively that the Appellant had overvalued his losses by $402,255.

[27] Faced with this situation, which was awkward to say the least, to the point where it became impossible to challenge the audit's findings regarding the assessment of losses, and faced with the evidence that the amount of the losses had been inflated considerably, the Appellant advanced a whole series of explanations and excuses to seek the vacating of the penalty that led to the assessment.

[28] In particular, he argued that he did not have the requisite knowledge to compute the losses incurred precisely and that he had been the subject of an audit in which he had been conned. He also said that he had been misled by people who were clearly acting in bad faith.

[29] He also criticized the accountant for not having offered to check things thoroughly for him. He submitted that he did not have the necessary knowledge to do the work properly, even though the work was satisfactory for the first two years targeted by the audit. In his written arguments, he said that he had 10 years' experience, although the evidence disclosed that it was 20 years. In short, the Appellant claimed that he had always been vigilant and prudent and conducted himself normally, without fault or negligence, adding that he was an honest taxpayer acting in good faith who had always fulfilled his tax duties. In his response to the Respondent's Reply to the Notice of Appeal, he wrote:

> [TRANSLATION]
>
> 12. The appellant did not attempt to conceal anything whatsoever from the tax authorities. He cooperated with the auditor and trusted him, but the auditor tried to entrap him.
>
> 13. It is true that the appellant was negligent in filling out his 2002 income tax return, he was uninterested in going over his financial setbacks again and was careless in preparing his tax return. Nevertheless, he acted in good faith and should not be penalized under subsection 163(2) of the ITA.

[30] The Appellant also criticized the auditor for misleading him following the draft assessment. He had further complaints concerning the person responsible for considering his Notice of Objection.

[31] According to the Appellant, the auditor called him by mistake, thinking he was calling a towing service, no doubt because of a mix-up in the telephone number. The Appellant interpreted this error as being an attempt at intimidation, or even corruption.

[32] The imposition of a penalty under subsection 163(2) of the *Act* is certainly a punitive measure that is clearly aimed at making taxpayers understand the importance of filing income tax returns with accurate information and figures.

[33] To report income in accordance with the provisions of the *Act* is not an arbitrary or intuitive exercise, but calls for meticulousness, discipline and rigour and may require the help of a competent person.

[34] Since good faith is presumed, a mistake, an omission and ignorance may in some cases explain an error in an income tax return. However, the error must be something minor or trivial having in view of the figures in question and the overall context and circumstances. Wilful blindness, recklessness and carelessness are not acceptable excuses, especially when the result shows considerable discrepancies between the information provided and the reality.

[35] Indeed, where a discrepancy represents large amounts and the taxpayer is a well-informed person working in a field where tax implications are a concern, it becomes extremely difficult to explain and especially to justify appreciable discrepancies.

[36] Inexperience and ignorance are not acceptable arguments, particularly where large amounts are concerned. The tax payable does not depend on knowledge, experience, education, and so on; it is determined by the *Act* and everyone, without exception, is subject to it.

[37] The Appellant has complained that his accountant had not offered to check the loss incurred more thoroughly. This explanation and this complaint are unfounded, even farfetched. The Appellant gave his accountant the information and details that he prepared himself. The accountant signed everything but had nothing to do with the accuracy of the content. Indeed, the Appellant proceeded the same way for the 2000 and 2001 taxation years, which were found to be in compliance.

[38] The Appellant is an intelligent and articulate person who possesses, without the shadow of a doubt, knowledge and skills in his field of work, as demonstrated by the length of his career with the most reputable brokerage firms.

[39] Computing losses incurred is relatively simple and easy to do. The precise calculation of a loss is also very simple, particularly with statements in hand from the brokers handling the funds.

[40] I would also point out that the Appellant had for years been making stock-market transactions worth hundreds of thousands of dollars. On the implausible and improbable theory that the Appellant was not comfortable or not sufficiently knowledgeable to calculate losses incurred, he had to retain a qualified and competent person to provide an accurate statement of the loss claimed.

[41] The following factors should be noted: the Appellant's knowledge; the type of work he had been performing for many years; his experience; the clarity and quality of his income tax returns for the two years preceding the year in issue, namely 2000 and 2001; his attempt the dissuade the auditor from auditing the year in issue; the non-disclosure of the statement which existed during the audit; the attempt to submit a document that he knew to be false or inaccurate; the unwarranted refusal to file a corrected and accurate return; his unjustifiable stubbornness in clinging to an untenable position; and the type of mandate he gave his accountant. His complaints regarding everyone involved (the auditors, the appeals officer and the accountant), his explanations and general conduct, and his farfetched explanations are sufficient evidence from which to find that the Appellant's justifications and explanations are in no way credible and must be rejected.

[42] Moreover, considerable time elapsed between the first contact with the auditor and the discovery of the actual amount of the loss. During that whole period, the Appellant could easily have taken corrective measures and cooperated, but no, he showed mainly stubbornness and devoted all of his energy to fighting the auditor's initiatives.

[43] In the introduction to his written submissions, the Appellant wrote:

> [TRANSLATION]
>
> 1. For the purposes of computing his income for the 2002 taxation year, the appellant overvalued his losses resulting from his securities transactions in his U.S. account by US$249,200.
>
> ...

3. Because mainly (**1**) the appellant should not pay any penalty for having used the 2002 securities transactions form duly issued by his employer, which he believed was accurate (**2**) the appellant acted in good faith (**3**) the appellant did not make any false statements or omissions, he used the wrong form which seemed official (**4**) the appellant should not pay a penalty owing to the undue obstinacy of the Department's rookie auditor.

[44] Under the heading [TRANSLATION] "Representations", the Appellant wrote:

[TRANSLATION]

11. The appellant did not make any false statements or omissions.

[45] As for the content of the other paragraphs, totalling 55, the Appellant argued that this was a minor error, especially since he had only finished high school and taken a correspondence course in securities.

[46] While acknowledging the error, he blamed the way in which statements from brokerage firms were prepared, which, he argued, caused a certain confusion.

[47] He has repeatedly blamed the auditor and questioned his competence:

[TRANSLATION]

3. ... the undue obstinacy of the Department's rookie auditor.

...

31. The appellant taxpayer was not surprised to see the auditor become involved in his file, having himself worked for Revenue Canada in the 1980s, one year as a CR-3 and one year as a CR-4 in primary audit. And knowing the complexity of his file and the many transactions and large sums, he thought that the auditor would recalculate but not try to entrap him.

32. The rookie Meunier, the auditor of the file, was only 24 and had barely a few months' experience when he began auditing the appellant in June 2004.

...

36. For five (5) months, the auditor tried without success to obtain the gains and losses document from the Desjardins Securities brokerage firm, as mentioned in the T2020 document issued by the agency and filed with the Court by the appellant. This delayed the audit.

37. An experienced auditor would not have made that request to the brokerage firm, not having to submit this internal document.

...

39. The appellant urged the auditor to speed things up but the auditor said that he had courses, there was also a strike, all of that irritated the appellant and created animosity between the parties.

40. In early December 2004, the auditor telephoned the appellant, asking if he could send him a tow truck. The appellant refused, finding this practice unethical.

41. In mid-December 2004, the auditor came to deliver the securities transaction report to the appellant, explaining that he could not take the report; he then tried to entrap the appellant and to have him produce new calculations while indicating that in his opinion the loss should be reduced to between 65 and 85 thousand dollars.

...

43. The auditor Meunier did not ask the appellant to use the account statements; if that had been the case, the appellant would have complied and produced a much more meticulous report.

...

45. Ms. Dilala was stunned by Mr. Meunier's attitude and asked the appellant to make representations within thirty (30) days.

46. At the end of that meeting, the auditor Meunier saw the appellant out and pointed out the counter and where he had to file his appeal.

47. This questionable attitude consciously aimed at confusing the appellant worked. The appellant did file an appeal within thirty (30) days instead of meeting with Ms. Dilala. The appellant never met with Mr. Meunier's supervisor. This hurried appeal document was filed in evidence by the appellant.

...

49. The auditor Meunier came to testify in Court even though he was on parental leave, having recently become the father of triplets, which demonstrates his stubborn determination to penalize the appellant taxpayer, making the latter go so far as to think that Mr. Meunier had a personal dislike for him.

[48] The least that can be said is that the Appellant spent a lot of time criticizing the auditor. Was the auditor overly zealous, to the point of invalidating the grounds for the assessment?

[49] The Appellant first made the auditor suspicious by attempting to dissuade him from auditing the 2002 taxation year. He also provided the auditor with a totally inadequate document for the computation of the amount of the losses, namely a list of purchases and sales that did not take into account unsold securities, thus creating an artificially inflated loss.

[50] As an intelligent person with a high school diploma and who took a correspondence course in securities, with 10 years' experience (20 years according to the evidence) at the largest brokerage firms and with at his disposal several different statements of stock-market transactions, the Appellant knew full well what was reliable. He chose, by all sorts of means, to mislead the auditor by suggesting different tracks.

[51] I note also that he wrote the following:

> [TRANSLATION]
>
> 16. It was logical and reasonable for the appellant to believe that he had suffered a loss of US$249,200 since the U.S. market, the nasdaq, had lost 50% of its value in 2002, while a loss of US$249,200 represented barely less than 10% of the securities traded.
>
> ...
>
> 18. The number of zeros has nothing to do with the existence or non-existence of the right. Moreover, $390,000 may seem like a large amount but the total transacted in 2002 was over $5 million and for the euphoric period from 2000 to 2002 the total reached $30 million, so $390,000 is roughly 1% of the total.
>
> 19. At that time, the reports issued by brokerage firms led to confusion.
>
> ...
>
> 31. The appellant taxpayer was not surprised to see the auditor become involved in his file, having himself worked for Revenue Canada in the 1980s, one year as a CR-3 and one year as a CR-4 in primary audit. And knowing the complexity of his file and the many transactions and large sums, he thought that the auditor would recalculate but not try to entrap him.

...

35. The appellant is a credible advisor who always obeys the law.

...

37. An experienced auditor would never have made that request to the brokerage firm, not having to submit this internal document.

[52] There is no doubt in my mind that the Respondent has discharged her burden of proof. The evidence shows, on a balance of probabilities, that the Appellant deliberately and knowingly decided to report losses that were greatly overstated owing to circumstances he considered favourable in that the vast majority of investors in the stock market, if not all, had sustained considerable losses.

[53] Not only did he knowingly make that choice, he then made every effort and attempt to distract the auditor. He took it for granted that the auditor was young, inexperienced and a little naïve and tried from the very start to persuade him not to take an interest in his tax return, which he knew to be inaccurate. Rather than choose to amend his tax return to make it accurate, he tried again and again to have the auditor drop the matter.

[54] Even when faced with the obvious and unavoidable, he still tried to deflect the blame on the auditor, his accountant and the person responsible for the objection, even adding that he had neither the knowledge nor the skills to provide the real figures, although he had done so for the two preceding taxation years, 2000 and 2001.

[55] These facts are sufficient to support a finding that the penalty was entirely warranted, since the evidence also leads to the conclusion that the Appellant deliberately made a false and misleading statement regarding the amount of the loss.

[56] Since the penalty is entirely warranted, the appeal is therefore dismissed, with costs in favour of the Respondent.

Signed at Ottawa, Canada, this 28th day of May 2009.

"Alain Tardif"

Tardif J.

Translation certified true
on this 16th day of June 2009.

François Brunet, Revisor

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Louis L'Heureux

COUNSEL OF RECORD:

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Name:

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