Citation: 2008 TCC 583
Date: 20081222
Docket: 2004-759(IT)G

BETWEEN:

BRIAN GALLERY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

(Whereas paragraph 51 of the Reasons for Judgment inadvertently stated the year 2007 instead of 1997, these Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment signed on December 10, 2008. In all other respects, the Reasons for Judgment remain the same.)

Jorré J.

Introduction

[1] The Appellant owned a numbered company, which I shall refer to as Sailings 1. In 1994 Sailings 1 sold its business and assets to another numbered company which I will refer to as Sailings 2.

[2] The purchase price was $11 million divided into three tranches. The amount of $8,270,000 was payable at closing. The balance was payable at various times.

[3] The Appellant also entered into a $1 million three-year employment contract with Sailings 2 beginning at the same time as the sale of Sailings 1 to Sailings 2. Sailings agreed to pay the Appellant $200,000 per year as well as an amount of $400,000 in March 1996.

[4] In filing his 1996 return the Appellant failed to include the amount of $400,000 payable pursuant to the employment contract.

[5] The Respondent reassessed the Appellant more than three years after the initial assessment and imposed penalties pursuant to subsection 163(2) of the *Income Tax Act* (the "*ITA*").

[6] There is no dispute that the $400,000 is taxable but the Appellant takes the position that:

a) the assessment was statute barred and,
b) there is no basis for the Minister to apply penalties pursuant to subsection 163(2).

[7] With respect to the statute barred issue, the issue is whether the Appellant made ". . . any misrepresentation . . . that is attributable to neglect, carelessness or wilful default . . .".

[8] With respect to the subsection 163(2) penalty, the issue is whether the Appellant ". . . 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 . . .".

The facts

[9] Much of the evidence is not in dispute, but the inferences to be drawn from that evidence are very much in dispute.

[10] The Appellant owned 113602 Canada Inc. (Sailings 1) and over a number of years, built up a successful business, a trade publication called Canadian Sailings.

[11] On March 9, 1994 Sailings 1 sold its business and assets to Sailings 2 (3011909 Canada Inc.). At the time, the Appellant was 59 years old.

[12] Sailings 2 was controlled by a company in New York, K-III Directory Corporation ("K-III").

[13] Under the sales agreement $8,270,000 was payable at closing in March 1994.

[14] Another amount of $230,000 referred to as the "Book Value Holdback" was subject to verification of the Book Value at closing and was payable no later than 140 days after the closing. The $230,000 amount was paid in 1994.

[15] Finally, payment of a third amount of $2,500,000 (the earn-out payments) was subject to the business meeting certain financial targets in calendar years 2004 and 2005. The entire $2,500,000 was paid prior to September 1995.

[16] Sailings 1 was amalgamated with Galbri Holdings Inc. on August 31, 1994. Galbri received the $2,500,000 payment.

[17] The full tax payable on the sale of the assets and business by Sailings 1 was paid in the year of the sale. No reserve could be taken[1].

[18] On the same day as Sailings 1 sold the business to Sailings 2, March 9, 1994, Sailings 2 and the Appellant entered into a three-year employment agreement whereby the Appellant would continue to manage the publication of Canadian Sailings and sell advertising. The employment agreement provided for a salary of $200,000 per year; it also provided that on March 9, 1996 Sailings 2 was to pay the Appellant $400,000[2]. Apart from the $400,000 the Appellant's salary was paid from Sailings 2's Canadian bank account.

[19] On April 3, 1996 K-III made a wire transfer of U.S. $296,186.60. This amount converted to Canadian dollars is $401,763.56, which was deposited into the Appellant's account.

[20] There are three aspects of this transfer that must be noted. First the payment was made by K-III and not Canadian Sailings. Second, although K-III appears to have intended to send Canadian $400,000, it in fact sent $401,763.56. Third, the K-III cheque request showed as instructions that the amount was to go to a specific account number which number was that of Galbri Holdings and not the Appellant[3].

[21] The evidence does not explain how it is that the payment went to the Appellant's account rather than that of Galbri Holdings.

[22] The amount of the wire transfer was debited to K-III's account on April 3, 1996 and credited to the Appellant's account on April 4, the next day. On the same day the Appellant transferred the funds from his account to Galbri Holdings' account.

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1 Transcript of June 19, 2007, questions 261 to 263 and 479.

2 Tab B, Exhibit A-1.

3 See tab 8 of Exhibit R-1, the K-III cheque request. The cheque request has a handwritten note: "Put to C.S. Acquisition Reserve". C.S. is no doubt a reference to Canadian Sailings.

[23] Sailings 2, when it filed its tax return for 1996, did not claim as a deduction the expense of the $400,000 it paid to the Appellant[4]. Subsequently, during the audit of Sailings 2, an audit that began in mid-2001 and was finalized in 2002, Sailings 2 requested and obtained the deduction of the $400,000. No T-4 was issued to the Appellant with respect to the $400,000. T-4s were issued for the Appellant's $200,000 yearly salary.

[24] An internal K-III memo dated March 11, 1994, two days after the sale of the business, describes the purchase[5]. On pages 1 and 2 at paragraphs 3 and 5, the purchase price is described as $8,900,000 plus an additional possible $2,500,000 based on earnings for a total of $11,400,000. The $8,900,000 includes a $400,000 amount for an employment bonus to the Appellant. On page 5 at paragraph 24, there is reference to the employment contract with the Appellant including the $400,000.

Testimony of the Appellant

[25] The Appellant testified about the origin and development of the business, the publication Canadian Sailings.

[26] He explained that he was editor of the publication and that his particular expertise and strength was at selling advertising. He also stated that numbers and accounting were not his forte.

[27] He also explained that while he would review financial documents and returns he very much relied on his chartered accountants, Paul Trudel and, subsequently, John Collyer, to correctly prepare his financial statements and tax returns. Making sure that he did things correctly was the job of his accountants; he paid them to do that.

[28] With respect to the $401,763.56, he recalled that the payments somehow got into his bank account. At the time he did not know why he was receiving the money but felt that it must be a payment in relation to the sale of the business by Sailings 1

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4 The evidence regarding this was at times difficult to follow. See evidence of Lucie Fortin at questions 27 to 41, 92, 93, 113 to 118, 125 to 148 and 156 to 159, as well as Exhibit A-2, tab 1, pages 2 (handwriting at bottom), 16, 19 and 20 (especially paragraph 4) and Exhibit R-1, tab 12. There seemed to be some question in the testimony as to whether Sailings 2 had claimed part of the $400,000 in its return (an amount of about $66,000, see page 16 of tab 1 of Exhibit A-2). Based primarily on tab 1 of Exhibit A-2, especially at pages 19 and 20, it is my conclusion that Sailings 2 did not claim a deduction for any part of the $400,000 when it filed its return. It erroneously claimed twice the salary payments to the Appellant, once in salaries on the financial statements and again on the T2S(1). If I am wrong in this conclusion, Sailings 2 did not claim approximately $334,000 of the $400,000, but did claim an amount of about $66,000.

5 See tab 5 of Exhibit R-1; there is another copy at tab 1 of Exhibit A-2.

and accordingly deposited the amount in the account of Galbri Holdings which had amalgamated with Sailings 1.

[29] Subsequently, the Appellant discussed it with Mr. Trudel, his accountant at the time. Mr. Trudel indicated to him: we have a problem, we will find out what it is and straighten it out. The Appellant said fine.

[30] The Appellant testified he heard nothing further about this from Mr. Trudel.

[31] He also testified that he had no intention of avoiding tax and has always been an honest person.

[32] At the time of the purchase the President and CEO of K-III was Allan Glass, someone he knows well and whom he considers a friend. After the sale when he worked for Sailings 2 he reported to Mr. Glass and was in contact regularly.

[33] In cross-examination he repeated that he put the $400,000 in the company's bank account because he thought the money was not his and did not know what to do with it.

[34] The Appellant agreed that he did not verify what it was and he did not ask Allan Glass but said he had given his accountant responsibility for taking care of his financial situation.

[35] His accountant said he would help but he did not subsequently check.

[36] In November 1996 Mr. Trudel signed a retirement agreement with his accounting firm[6]. Under the agreement he was to retire three years later but his clients were to be transferred gradually over the three years. In the case of the Appellant, Mr. Trudel worked on the corporate return of Galbri Holdings for the year ending August 31, 1996 — which had to be filed by the end of February 1997. After that the Appellant had Mr. Collyer as his accountant. Mr. Collyer prepared the Appellant's personal tax return for 1996 which would have been due at the end of April 1997.

[37] The Appellant testified that when Mr. Collyer took over this accounting, Mr. Collyer said he would check out the $400,000. The Appellant denied that Mr. Collyer had ever asked him to check into the amount.

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6 Exhibit A-2, tab 20, page 5.

[38] The Appellant agreed that he did not inquire further from Mr. Collyer what was to be done with the $400,000.

[39] The $400,000 was not included in his return.

[40] The Appellant was quite insistent that he expected Mr. Collyer to advise him if there was a problem, to make inquiries, if necessary, and to tell him what was supposed to be done.

[41] In re-examination the Appellant indicated that there were a lot of documents signed at the time of the sale and that he never re-read the package after the sale was completed[7].

Testimony of Paul Trudel

[42] Mr. Paul Trudel was the Appellant's chartered accountant for many years until early 1997 when he transferred the Appellant to Mr. John Collyer.

[43] Mr. Trudel described the Appellant as a good client who was organized, open and easy to work with. He stated that the Appellant relied on him to do the right thing for him.

[44] The Appellant had a bookkeeper who did all the accounting entries during the year. At the end of the year Mr. Trudel would prepare the financial statements, the corporate tax return and the Appellant's personal tax return.

[45] He described the Appellant's approach to tax as conservative, as very scrupulous and as unhesitating in doing the right thing. Mr. Trudel gave two examples.

[46] He described the Appellant as unsophisticated in accounting and tax matters.

[47] When Mr. Trudel finished preparing statements or tax returns he would sit down with the Appellant and they would review the statements or returns before they were finalized.

[48] Mr. Trudel prepared the tax return of Galbri Holdings for the fiscal year ending August 31, 1996 which had to be filed by the end of February 1997.

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[7] Transcript of June 19, 2007, page 222, questions 653 to 657. While the answers do not verbalize the quantity, the gestures made during the testimony indicated a large quantity of documents.

[49] When he worked on the tax return he found the $400,000 payment in the cash book of Galbri. It was not identified and the Appellant could not explain what it was for.

[50] Because time was running out and he had to complete the corporate tax return, Mr. Trudel made the decision to credit the $400,000 to the Appellant's shareholder account with Galbri.

[51] He also, some time after February **1997**, wrote up notes of items to be followed up. In the follow-up notes was an item regarding the $400,000[8].

[52] In these notes Mr. Trudel wrote by hand on the left centre of the sheet: "What is status of 296,176 U.S. from K-III? (401,763 Canadian)". To the right of that he wrote: "Personal fulfillment of performance 400,000 U.S. less DAS". Below this he wrote on the left centre: "Taxable in Brian's hands?" To the right and below that, and linked by an arrow he wrote: "Yes".

[53] This was written after the corporate return was filed in early 1997 and prior to the due date for the personal return.

[54] DAS stood for deductions at source and Mr. Trudel expected that a T-4 slip would come in for this.

[55] These notes were placed in the file for Galbri Holdings.

[56] The purpose of writing these notes on file was to insure that the item would be followed up. Mr. Trudel expected to deal with it in the personal return. However, Mr. Collyer took over the Appellant as a client before the personal return was filed and so Mr. Trudel did not deal with it.

[57] Mr. Trudel does not think he mentioned these notes to Mr. Collyer and he did not mention them to the Appellant. He did not place a copy of the notes in the Appellant's personal file.

[58] When Mr. Trudel decided to put the $400,000 in the shareholder account he told the Appellant that he was putting it there because he was not sure what to do with it and that they would check into it later.

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[8] Tab 11, Exhibit A-2.

[59] Mr. Trudel is not aware of the Appellant subsequently making inquiries into what the amount was for.

[60] After Mr. Trudel closed the financial statements of Galbri, the Appellant never brought up the $400,000 again with Mr. Trudel.

Testimony of John Collyer

[61] Mr. Collyer is a chartered accountant and took over the Appellant as a client in early 1997 from Mr. Trudel.

[62] He described the Appellant as a good client, one who was loyal, prudent and who listens to the advice given. He also described the Appellant as unsophisticated in tax or accounting matters, one who relies on the advice given.

[63] He also said the Appellant was very conservative in tax matters.

[64] The Appellant reviewed his tax returns and financial statements with Mr. Collyer and he would discuss the returns and statements.

[65] When Mr. Collyer prepared the Appellant's 1996 personal tax return he examined the Appellant's personal file but did not examine the corporate file at that time.

[66] When he reviewed the 1996 personal tax file with the Appellant he asked if there was anything missing. The Appellant said that there was not. He did not mention the $400,000.

[67] Before transferring the Appellant to Mr. Collyer, Mr. Trudel did not bring the notes to his attention.

[68] Mr. Collyer subsequently became aware of the $400,000 when preparing the corporate tax return of Galbri Holdings for the year ending August 31, 1997.

[69] He asked the Appellant about the amount and the Appellant could not explain why he had received the amount. The Appellant also said to him that as far as he was concerned it was an amount that belonged to the company. The Appellant also said to him that he had spoken to Mr. Trudel but Mr. Trudel had not resolved the item.

[70] Mr. Collyer asked Mr. Trudel about the amount but Mr. Trudel could not give him further information. He also testified that Mr. Trudel did not give him the assurance that it should have been included in the Appellant's income.

[71] Mr. Collyer was satisfied that it should not be taxed in the hands of the company because the company had no contracts with K-III and therefore it had no reason to receive income from K-III.

[72] The accounting firm did not amend the Appellant's personal tax return because the Appellant did not say to them that the $400,000 was his income for a certain transaction.

[73] He agreed that the Appellant would have been aware of the fact the $400,000 amount had not been declared after the preparation of the 1997 financial statements.

Testimony of Lucie Fortin

[74] Ms. Lucie Fortin is a CRA auditor. She was originally assigned to work on the audit of Sailings 2. That audit led to the assessment of the Appellant.

[75] She explained the assessment in issue. The key facts in her testimony are set out elsewhere in this decision.

Other facts

[76] The total income declared by the Appellant in his 1996 personal tax return was $211,054.09[9]. The financial statements for Galbri Holdings for the year ending August 31, 1996 show (approximately) gross revenues of $438,000, net earnings of $99,000, assets of $6,350,000 and shareholders' equity of $4,500,000.

[77] Apart from the penalty in issue CRA's information system does not show any penalty as having been levied against the Appellant or Sailings 1. With respect to Galbri Holdings, CRA's information system shows two penalties as having been levied — one relating to a late instalment and one relating to the late filing of a return. These do not appear to be significant. The system showed no other penalties regarding Galbri[10].

The law

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[9] Tab 14, Exhibit A-2.
[10] Tab 17, Exhibit A-2.

Statute barred years

[78] With respect to the question whether the Minister can reassess the test is set out in subparagraph 152(4)(*a*)(i) of the *ITA*. The issue is whether the Appellant made ". . . any misrepresentation . . . that is attributable to neglect, carelessness or wilful default . . .".

[79] There is no doubt that there was a misrepresentation insofar as the $400,000 was left out[11]. The question is whether there is neglect, carelessness or wilful default.

[80] In *Venne v. Canada*[12] Strayer J. sets out how the test in subparagraph 152(4)(*a*)(i) of the *ITA* is to be applied:

> I am satisfied that it is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(*a*)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the word "misrepresentation that is attributable to neglect" must mean, particularly when combined with other grounds such as "carelessness" or "wilful default" which refer to a higher degree of negligence or to intentional misconduct. Unless these words are superfluous in the section, which I am not able to assume, the term "neglect" involves a lesser standard of deficiency akin to that used in other fields of law such as the law of tort. See *Jet Metal Products Limited v. The Minister of National Revenue* (1979), 79 DTC 624 at 636-37 (T.R.B.).

Gross negligence penalty

[81] With respect to the subsection 163(2) penalty of the *ITA*, the issue is whether the Appellant ". . . 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 . . .[13]".

[82] In *Farm Business Consultants Inc. v. The Queen*[14], Bowman A.C.J. (as he then was) made the following comments:

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[11] *Nesbitt v. Canada*, [1996] F.C.J. No. 1470 (QL), paragraph 8: "A misrepresentation has occurred if there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment."

[12] [1984] F.C.J. No. 314 (QL), 84 DTC 6247 at 6251.

[13] Subsection 163(3) of the *ITA* is also relevant. It places the burden of proof of the facts justifying the penalties on the Respondent. As it will become apparent below, I will not need to consider the onus on either issue given that I am able to reach a conclusion on each based on the evidence.

[14] 95 DTC 200.

> A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). Conduct that warrants reopening a statute-barred year does not automatically justify a penalty and the routine imposition of penalties by the Minister is to be discouraged. Conduct of the type contemplated in paragraph 152(4)(*a*)(i) may in some circumstances also be used as the basis of a penalty under subsection 163(2), which involves the penalizing of conduct that requires a higher degree of reprehensibility. In such a case a court must, even in applying a civil standard of proof, scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established. Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted. I think that in this case the required degree of probability has been established by the respondent, and that no hypothesis that is inconsistent with that advanced by the respondent is sustainable on the basis of the evidence adduced.

[83] In examining this issue I must also consider whether the conduct of the Appellant amounted to wilful blindness. As stated by Nadon J.A. speaking for the court in *Panini v. Canada*[15]:

> . . . Consequently, the law will impute knowledge to a taxpayer who, in circumstances that dictate or strongly suggest that an inquiry should be made with respect to his or her tax situation, refuses or fails to commence such an inquiry without proper justification.

[84] Compared to subparagraph 152(4)(*a*)(i) of the *ITA*, much more is required before subsection 163(2) can be involved. In the *Venne* case, Strayer J. states:

> . . . "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. . . .

This is very understandable when one considers that subsection 163(2) imposes a penalty equal to 50% of the tax on the additional income added to the Appellant's income tax that was understated as a result of the false statement or omission. It is interesting to note that the minimum fine under subsection 239(1), the provision for criminal tax evasion, is also 50%[16].

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[15] 2006 FCA 224 at paragraph 43.

[16] *Venne* dealt with the 1978 taxation year. At that time the subsection 163(2) penalty was 25% and the minimum criminal fine under subsection 239(1) was also 25%.

Analysis[17]

[85] I found the evidence of all four witnesses to be credible. In particular, I would note that I accept the Appellant's evidence that he had no intention of avoiding tax and that he relied on his advisors to deal with any issues.

[86] Bearing these considerations in mind could the Minister reassess beyond the normal reassessment period? There is no question that there was a misrepresentation, the omission of the $400,000. Was such omission the result of neglect, carelessness or wilful default? Did the taxpayer exercise reasonable care?

[87] The contractual terms of the contract of employment was quite clear; it was a three-year $1 million contract payable at the sale of $200,000 with a further amount of $400,000 payable on the second anniversary. The seven-page contract of employment is not particularly complicated[18].

[88] Although the amount was received from K-III instead of Sailings 2, was paid late, was of an odd amount, $1,763.56 greater than the $400,000, and was not subsequently the subject of a T-4, it would have been quite straightforward for the Appellant to determine why he received it by asking the President of K-III, Allan Glass, a friend, to look into the origin of the payment.

[89] Mr. Trudel did find the $400,000 in the cash book. The Appellant and Mr. Trudel did speak about the $400,000 and the Appellant did expect Mr. Trudel to take care of it. However, the Appellant never followed up with Mr. Trudel after the time when Mr. Trudel told him he would put it in the shareholder account, complete the corporate return and deal with the $400,000 later. There is no evidence that the Appellant asked Mr. Collyer about the $400,000 prior to or at the time of the filing of

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[17] The parties also brought to my attention the following cases: *Sinclair v. Canada*, 2003 FCA 348; *Nesbitt v. Canada*, [1996] F.C.J. No. 1470 (QL); *Panini v. Canada*, 2006 FCA 224; *Lévesque Estate v. Canada*, [1995] T.C.J. No. 469 (QL); *Lemieux v. M.N.R.*, 81 DTC 144; *Wong (E.) v. Canada*, 4 G.T.C. 3188; *Regina Shoppers Mall Limited v. The Queen*, 90 DTC 6427; *The Queen v. Regina Shoppers Mall Limited*, 91 DTC 5101; *Reilly Estate v. The Queen*, 84 DTC 6001; *M.N.R. v. Bisson*, 72 DTC 6374; *Ouellet c. Québec (sous-ministre du Revenu)*, 1993 CarswellQue 535; *Robertson c. Sous-ministre du Revenu du Québec*, AZ-79091092; *Boucher v. The Queen*, 2004 DTC 6084; *Penn v. M.N.R.*, 71 DTC 71; *Cloutier v. The Queen*, 78 DTC 6485; *Snelgrove v. M.N.R.*, 79 DTC 780; *Continental Steel Ltd. v. The Queen*, 2000 DTC 1573; *Knudson v. M.N.R.*, 86 DTC 1576; *Larouche c. La Reine*, 2004 CCI 629; *The Queen v. Merkle*, 80 DTC 6027; *Findlay v. The Queen*, 97 DTC 1149; *Findlay v. The Queen*, 2000 DTC 6345; *Brygman v. M.N.R.*, 79 DTC 858; *Farm Business Consultants Inc. v. The Queen*, 95 DTC 200; *Farm Business Consultants Inc. v. The Queen*, 96 DTC 6085; *Julian c. La Reine*, 2004 CCI 330.

[18] Tab B, Exhibit A-1.

his personal tax return for 1996[19]; the $400,000 came up with Mr. Collyer later when preparing the corporate tax return for the year ending August 31, 1997.

[90] While there is no question that the Appellant received a large sum, $11 million, for the company, that amount was received prior to 1996; in 1996 he received a salary of approximately $211,000. A single payment of $400,000 received in his account was a large sum and one would expect a person to seek to determine the nature of the payment not just by leaving it with his advisor but by following up until satisfied that there was a satisfactory explanation.

[91] Here, he did put the issue in the hands of an advisor but he never followed up either with his advisor or with someone else such as Mr. Glass to determine definitely what the amount was even though his advisor, Mr. Trudel, was clearly not satisfied that it belonged to the company and told him that he was putting it in the shareholder account pending resolution.

[92] While I am satisfied that the omission was not wilful, I do find that the facts here lead to the conclusion that there was neglect or carelessness on the part of the Appellant; it has been established "that the taxpayer has not exercised reasonable care".

[93] As I indicated earlier I accept the Appellant's testimony and have concluded that the omission was not done knowingly. What remains is whether we have circumstances amounting to gross negligence (or circumstances of wilful blindness).

[94] While the Appellant could easily have made further inquiries, I am satisfied that he was a person who relied on his advisors and paid them to deal with issues and that he did in fact believe, wrongly, that the money must somehow relate to the sale.

[95] His behaviour is consistent with this in his having immediately transferred the money to the company's account on the same day he received it. It is also significant that the decision to put the amount in the shareholder account was made by Mr. Trudel, not the Appellant.

[96] Following his practice of relying on his advisors, he was satisfied to leave it in the hands of Mr. Trudel. Given his belief that it belonged to the company Sailings 1, and given that tax on the sale of the business had already been paid at the time of the sale in 1994, I can accept that in his mind there was not an outstanding issue.

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[19] Indeed Mr. Collyer did testify that when he presented the personal tax return to the Appellant he asked if anything was missing. The Appellant replied there was not. Clearly, the Appellant did not raise the $400,000 as an issue to consider for the personal tax return.

[97] Indeed, had Mr. Trudel not, as part of his transition to retirement, transferred the Appellant's file in early 1997 to Mr. Collyer, this case might well not have arisen.

[98] There was not an indifference as to whether the law was complied with. The conduct of the Appellant did not amount to wilful blindness; it did not amount to gross negligence[20].

Conclusion

[99] To summarize, the Respondent was entitled to reassess beyond the normal reassessment period but the circumstances do not justify the application of penalties pursuant to subsection 163(2).

[100] Accordingly, the appeal will be allowed and the matter referred back to the Minister for reconsideration and reassessment on the basis that the penalty under subsection 163(2) should be deleted.

[101] I wish to thank counsel for the parties.

[102] Before signing the judgment, I will ask Registry to contact the parties to make arrangements regarding submissions on the matter of costs.

Signed at Ottawa, Canada, this 22nd day of December 2008.

"Gaston Jorré"

Jorré J.

[20] During the hearing, there were comments to the effect that Sailings 2 seems to have been treated more leniently than the Appellant given that it should have and failed to issue a T-4. The Respondent argued that whether or not Sailings 2 received more favourable treatment was irrelevant: *Sinclair v. Canada*, 2003 FCA 348 at paragraph 7. I agree.

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REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF REASONS FOR JUDGMENT:	December 10, 2008
DATE OF AMENDED REASONS FOR JUDGMENT:	December 22, 2008

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