Dossier: 2014-259(IT)I

BETWEEN:

SYLVAIN ROUSSEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on December 11, 2017, at Montréal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the appellant:	The Appellant himself
Counsel for the Respondent:	Alain Gareau

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* in respect of the 2008 taxation year is dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 10th day of January 2018.

"Guy Smith"

Smith J.

Citation: 2018 TCC 9
Date: 20180110
Docket: 2014-259(IT)I

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REASONS FOR JUDGEMENT

Smith J.

[1] Sylvain Rousseau is appealing under the informal procedure from an assessment made by the Minister of National Revenue (the "Minister") in respect of the 2008 taxation year. In that assessment, the Minister disallowed business losses in the amount of $208,660.43 and imposed a penalty for gross negligence in the amount of $20,537 under subsection 163(2) of the *Income Tax Act* (the "Act").

[2] The Appellant acknowledged that he did not have a business and that he did not incur business losses in 2008, therefore the only issue is whether the Minister was justified in imposing said penalty.

Factual context

[3] In the year in question, the Appellant was an employee of Bombardier Aerospace, where he had been a site supervisor since 1999. He previously completed a college diploma in mechanical engineering, a three-year program.

[4] To provide context, the Appellant explained that he had always been very active as a volunteer for sports activities, particularly school soccer teams. He noted a need for a more sustainable and ecological playing surface and made some efforts in 2007 and 2008. To that end, he contacted certain people in Boston and

prepared a business plan. He then sought funding and approached several financial institutions, including the National Bank and the Federal Business Development Bank. He was unsuccessful and acknowledges that his expertise is mainly technical.

[5] It was in that context that he met one Martial Frigon from the Gatineau, Quebec area. The latter claimed that he could find funding for the project in question and helped him set up the corporation "Eco-Fields Inc.". According to the Appellant, Mr. Frigon is a lawyer or a former member of the Quebec Bar.

[6] It was through that individual that he learned of the group Fiscal Arbitrators ("FA"). He met Carleton Branch and Pierre Joanisse (in the fall of 2008 or early 2009) and attended a presentation in Ottawa that was held in English, although some explanations were offered in French.

[7] The presenters showed him the tax "bible" and explained that they had developed an entirely legal technique for recovering income tax paid in past years. According to the Appellant, copies of tax refund cheques for $20,000 to $30,000 were circulated among the participants as supporting proof. There was a presentation on a video projector screen.

[8] Following the presentation, FA representatives asked him to fill out a table (Exhibit A-3) to indicate his income earned and federal tax paid and a second table for the provincial level for the 1999 to 2007 tax years. Those tables were completed in the form of spreadsheets. Three columns were left empty with the indication [TRANSLATION] "To be completed by Fiscal Arbitrators". The Appellant's signature appears at the bottom of both tables.

[9] The Appellant noted that the tables did not indicate a business loss, but what he had earned as salary and what he had paid in taxes. He understood that that information was needed in order to file the tax refund claim.

[10] The Appellant added that, after he signed his income tax return in September 2009, there was a conflict with Mr. Frigon, as he had taken over the new corporation by appointing himself as the sole director. There was a confrontation in November 2009 and that is why the Appellant did not summon him to appear at this hearing.

The 2008 income tax return

[11] The income tax return for the year in question was completed and the Appellant met with FA representatives in September 2009. He noted that his employment income was $38,250.83 and that he had other income of $13,829.26. He claims that he did not notice the business loss resulting in a negative total income of $156,580.14 or, if he did notice it when he signed the return, he did not understand it.

[12] However, he noticed the "Statement of Agent Activities" that was not on the standard form, but was prepared using word processing software. He noticed that there were figures and expressions that he did not understand.

[13] In particular, it indicated that he had received an amount of $59,023.39 "as agent for principal and reported by third parties". An amount of $215,545.53 was then deducted and indicated as an "amount to principal in exchange for labour", resulting in a total loss of $208,660.43.

[14] At the bottom of that document, we read the following phrase: [TRANSLATION] "I certify that I am the agent SYLVAIN ROUSSEAU and declare that this information is accurate on December 31, 2008".

[15] In his testimony, the appellant indicated that he noticed that his name was written in ink in block letters and that it was not his signature. He concluded, however, that the document was prepared by FA representatives from the tables that he himself had prepared previously.

[16] The past page of the document is signed by the appellant, although "per" appears before his name. The box for the tax preparer is completed with the name "FA" and the following address: "FA, 554T, 2C3 AB A1B 2C3" followed by a telephone number.

[17] The appellant insisted on the fact that his name in block letters is not his signature and that he did not understand the document in question. He nonetheless signed the return, as indicated above, and mailed it without keeping a copy.

[18] During cross-examination, the appellant acknowledged that, in the past, his income tax returns were prepared by a technician accountant at a cost of $60 to $80. He nonetheless agreed to pay fees of $2,108.99 (Exhibit I-1) made out to Lawrence Watts, associated with the FA. The appellant is of the view that that

amount, although high compared to what he usually paid, reflected the value of the services rendered by the FA group.

[19] The appellant added that he not completely understand everything because the income tax return was prepared in English. In September 2011, he sent an email to FA asking that they provide a French translation. They replied that that service was not available.

The law

[20] The penalty for gross negligence is set out in subsection 163(2) of the Act, but under subsection 163(3), the burden is on the Minister to establish the facts on which the assessment of the penalty is based. Those provisions read as follows:

> 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 […]
>
> 163(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.

[21] It is agreed that the penalty is onerous, but there is a reason for it, as the obligation to report income is one of the cornerstones of the Canadian tax system. As explained by the Supreme Court of Canada in *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757:

> [49] Every person resident in Canada during a given taxation year is obligated to pay tax on his or her taxable income, as computed under rules prescribed by the Act (ITA, s. 2; *Smerchanski v. M.R.N.*, [1977] 2 S.C.R. 23, at p. 32, per Laskin C.J.). The process of tax collection relies primarily upon taxpayer self-assessment and self-reporting: taxpayers are obliged to estimate their annual income tax payable (s. 151) [...]
>
> [50] While voluntary compliance and self-assessment comprise the essence of the ITA's regulatory structure, the tax system is equipped with "persuasive inducements to encourage taxpayers to disclose their income": Krishna, *supra*, at p. 767. In this connection, Krishna writes at p. 772, the "system is 'voluntary' only in the sense that a taxpayer must file income tax returns without being called upon to do so by the Minister". For example, in promotion of the scheme's

> self-reporting aspect, s. 162 of the ITA creates monetary penalties for persons who fail to file their income returns. Likewise, to encourage care and accuracy in the self-assessment task, s. 163 of the Act sets up penalties of the same sort for persons who repeatedly fail to report required amounts, or who are complicit or grossly negligent in the making of false statements or omissions.
>
> [Emphasis added.]

[22] It is therefore in that legal context that the facts on which the Minister based the assessment of the penalty must be analyzed. As indicated in *Lauzon v. The Queen*, 2016 TCC 171:

> [21] There are two necessary elements that must be established in order to find liability for subsection 163(2) penalties:
>
> a) a false statement in a return; and
>
> b) knowledge or gross negligence in the making of, participating in, assenting to or acquiescing in the making of, that false statement.

[23] The appellant acknowledges that there was a false statement in his return, but because the Minister is not alleging that the appellant "knowingly" made it, the main issue that the court must examine is therefore whether there was "gross negligence" on the appellant's part in making a false statement.

[24] In *Malette v. The Queen*, 2016 TCC 27, the Court examined the characteristics of gross negligence:

> [24] Negligence is defined as the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. Gross negligence involves greater neglect than simply a failure to use reasonable care. It involves a high degree of negligence tantamount to intentional acting or indifference as to whether the law is complied with or not; see *Venne v. Canada*, [1984] F.C.J. No. 314 (QL). In *Farm Business Consultants Inc. v. Canada*, [1994] T.C.J. No 760 (QL), Justice Bowman (as he then was) of the Tax Court of Canada stated at paragraph 23 that the words "gross negligence" in subsection 163(2) imply conduct characterized by so high a degree of negligence that it borders on recklessness. 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 (paragraph 28).
>
> [25] It is also well-settled law that gross negligence can include "wilful blindness". The concept of "wilful blindness", well known to the criminal law,

was explained by Justice Cory of the Supreme Court of Canada in the decision in *R. v. Hinchey*, [1996] 3 S.C.R. 1128. The rule is that if a party has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. "Wilful blindness" occurs where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth, preferring instead to remain ignorant. There is a suspicion which the defendant deliberately omits to turn into certain knowledge. The defendant "shut his eyes" or was "wilfully blind".

[26] The concept of "wilful blindness" is applicable to tax cases; see *Canada v. Villeneuve*, 2004 FCA 20, and *Panini v. Canada*, 2006 CAF 224. In *Panini*, Justice Nadon made it clear that the concept of "wilful" blindness" is included in "gross negligence" as that term is used in subsection 163(2) of the Act. He stated:

> 43 . . . 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.

[27] It has been held that in drawing the line between "ordinary" negligence or neglect and "gross" negligence, a number of factors have to be considered:

> (a) the magnitude of the omission in relation to the income declared,
>
> (b) the opportunity the taxpayer had to detect the error,
>
> (c) the taxpayer's education and apparent intelligence,
>
> (d) genuine effort to comply.

No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence (see *DeCosta v. The Queen*, 2005 TCC 545, at paragraph 11; *Bhatti v. The Queen*, 2013 TCC 143, at paragraph 24; and *McLeod v. The Queen*, 2013 TCC 228, at paragraph 14).

[Emphasis added.]

[25] The respondent also referred the Court to *Torres v. the Queen*, 2013 TCC 380, in which several taxpayers had reported fictitious business losses following presentations by the FA group. Miller J reviewed the issue of "wilful blindness", indicating:

> [65] […]
>
> e) Circumstances that would indicate a need for an inquiry prior to filing, or flashing red lights as I called it in the *Bhatti* decision, include the following:
>
> i) the magnitude of the advantage or omission;
>
> ii) the blantantness of the false statement and how readily detectable it is;
>
> iii) the lack of acknowledgement by the tax preparer who prepared the return in the return itself;
>
> iv) unusual requests made by the tax preparer;
>
> v) the tax preparer being previously unknown to the taxpayer;
>
> vi) incomprehensible explanations by the tax preparer;
>
> vii) whether others engaged the tax preparer or warned against doing so, or the taxpayer himself or herself expresses concern about telling others.
>
> f) The final requirement for wilful blindness is that the taxpayer makes no inquiry of the tax preparer to understand the return, nor makes any inquiry of a third party, nor the CRA itself.

[26] In this case, the appellant claims that he first relied on Mr. Frigon in the context of seeking funding for his business plan, which he assigned to the alleged experts in the FA group.

[27] That issue was examined in *Lavoie v. The Queen*, 2015 TCC 228, in which the Court allowed the appeal from the penalty for gross negligence in circumstances in which the taxpayer relied on his lawyer, who he had known for 30 years. Thus, in very exceptional circumstances, a taxpayer who has relied on negligent or dishonest professionals can be exonerated from the penalty.

[28] In *Strachan v. The Queen*, 2015 FCA 60, the Federal Court of Appeal had to decide an appeal in which "the appellant, at the behest of an unscrupulous tax preparer, claimed a fictitious business loss in an amount sufficient to generate a complete refund of all taxes paid by the appellant in respect of her employment income" (at para 2). Dawson J. concluded:

> [6] […] Nor has any palpable and overriding error been shown in the Judge's conclusion that the circumstances precluded a defence that, based upon the wrongful representations of her tax preparer, the appellant believed that what she was doing was permissible.
>
> [Emphasis added.]

[29] Thus, except in very exceptional circumstances, such as a long-standing professional relationship, a taxpayer cannot claim that he relied on third parties (even if they present themselves as tax specialists) and that he thought what he "was doing was permissible": *Strachan*, above, at para 6.

Analysis

[30] First, the Court must analyze the issue of the appellant's credibility and determine whether his testimony was candid and honest. In particular, the Court must be satisfied that his presentation of the facts was realistic, plausible and probable.

[31] Considering the appellant's testimony as a whole, I conclude that he did not testify frankly regarding the circumstances surrounding his meeting with Mr. Frigon and the search for funding. Without more details and, particularly, without any documents, such as a business card, a business plan or a credit application, to corroborate the project, the idea that he was seeking funding, in the view of the Court, remains incomplete, and even farfetched. The only likely conclusion, and the one relevant to this case, is that the appellant met a certain Mr. Frigon, who introduced him to the FA group.

[32] In the end, there was no link between seeking funding and the tax refund in question. The appellant also admitted that he realized that the amount recovered likely could not be used to fund his business project.

[33] As for the representatives of the FA group, it is clear to the Court that they are scrupulous crooks and fraudsters. Moreover, Lawrence Watts was found guilty of fraud, as reported in: *The Queen v. Watts*, 2016 ONSC 4843. However, the appellant was also a victim of his own greed. He let himself be caught up by the idea of a scheme for recovering taxes. The income tax return was signed quickly and he did not feel the need to keep a copy of it for his own records.

[34] Were there alarm signals? The appellant acknowledged that he saw the document with his name in block letters and that it was not his signature. There

were figures and expressions that he did not understand. He acknowledged that he had doubts and suspicions. As well, the document was in English and his understanding was limited. It was not until September 2011, after receiving the notice of assessment, that he asked the FA group to provide him with a translation. However, it was too late, because the return had been signed and mailed in September 2009.

[35] Moreover, while the appellant completed his income tax returns for previous years through a technician accountant for a modest sum, he agreed to pay fees of $2,108.99 to the FA group, representing almost half of the anticipated refund. He must have realized that something was not right when he was charged such a high amount.

[36] I would add that the Court is not insensitive to the Appellant's personal circumstances, particularly his divorce at the time and his health problems, as confirmed by his osteopath (Exhibit A-8). However, those circumstances do not explain, and particularly do not excuse, signing an income tax return when it is clear that he should have sought advice from a third party, from an accountant or from a CRA representative. The appellant chose to close his eyes and take a risk in the hopes of obtaining a tax refund.

[37] For these reasons, I conclude that the Minister has discharged his burden, allowing the Court to conclude that the appellant made a false statement on his income tax return for the tax year in question, in circumstances amounting to gross negligence. It therefore follows that the appellant is subject to the penalty assessed under subsection 163(2) of the Act.

[38] The appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 10th day of January 2018.

"Guy Smith"

Smith J.

CITATION:	2018 TCC 9
COURT FILE NO.:	2014-259(IT)I
STYLE OF CAUSE:	SYLVAIN ROUSSEAU v. HER MAJESTY THE QUEEN
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APPEARANCES:

For the Appellant:	The appellant himself
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COUNSEL OF RECORD:

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