Docket: 2012-1161(IT)G

BETWEEN:

LUCIE F. BRISSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Jacques J. Brisson (2012-2039(IT)G)
on June 26, 2013, at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Paul Klippenstein Martin Beaudry

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2008 taxation year is dismissed.

Costs are awarded to the Respondent.

Signed at Halifax, Nova Scotia, this 29th day of July 2013.

"V.A. Miller"

V.A. Miller J.

Docket: 2012-2039(IT)G

BETWEEN:

JACQUES J. BRISSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Lucie F. Brisson (2012-1161(IT)G)
on June 26, 2013, at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Paul Klippenstein Martin Beaudry

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the Appellant's 2008 taxation year is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the gross negligence penalties are to be reduced to $120,948.70.

Signed at Halifax, Nova Scotia, this 29th day of July 2013.

"V.A. Miller"

V.A. Miller J

Citation: 2013TCC235
Date: 20130729
Docket: 2012-1161(IT)G

BETWEEN:

LUCIE F. BRISSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2012-2039(IT)G

AND BETWEEN:

JACQUES J. BRISSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The Appellants, Jacques and Lucie Brisson, agreed that their appeals could be heard on common evidence. They are spouses to each other.

[2] The only issue in each appeal is whether the Minister of National Revenue (the "Minister") properly imposed gross negligence penalties against each of the Appellants for their 2008 taxation year.

[3] At the beginning of the hearing, counsel for the Respondent informed the Court that the amount of the gross negligence penalty for Mr. Brisson should be reduced from $127,567.06 to $120,948.70.

Facts

Mr. Brisson

[4] Mr. Brisson has been employed with Minto Communities Inc. ("Minto") for several years. He started with them as an assistant production manager and by 2000 he was the vice president of construction for low rise residential units. He holds this same position today.

[5] In this position, Mr. Brisson supervises a staff of 12 and he reports to the executive vice president of Minto who in turn reports directly to the owners of Minto.

[6] In 2008, Mr. Brisson reported T4 employment income from Minto in the amount of $256,300.

[7] Prior to 2008, Mr. Brisson always prepared his and his spouse's income tax returns. According to his evidence, he had been preparing his own return for approximately 35 years and in the last 10 years he used a software program to aid in his preparation.

[8] It was Mr. Brisson's evidence that, in the winter of 2009, he decided to look for someone else to prepare his income tax return. A friend recommended the Fiscal Arbitrators. He gave no reason for this decision and he gave no details about his friend. I asked him to explain his relationship with this "friend" but no answer was forthcoming. However, I did note that Mr. Brisson's demeanor visibly changed when I asked the question.

[9] Mr. Brisson met with Philipe Joanisse of the Fiscal Arbitrators who explained to him that the employees of Fiscal Arbitrators were professional tax consultants. He was told that Larry Watts who worked in the Toronto office was an accountant and had been employed by the Canada Revenue Agency ("CRA").

[10] However, Mr. Brisson admitted that Mr. Joanisse did not have an accounting certification nor did Mr. Joanisse tell him that he was an accountant. Mr. Brisson never met Larry Watts and he made no enquiries about the Fiscal Arbitrators.

[11] According to Mr. Brisson, Mr. Joanisse asked him to bring in his T4 for 2008 and his notices of assessment for 2005 to 2007 inclusive. After these documents were reviewed, the Fiscal Arbitrators would decide if they should prepare his 2008 income tax return.

[12] In April 2009, Mr. Brisson met again with Mr. Joanisse who stated that the Fiscal Arbitrators would prepare his 2008 income tax return and he recommended that Mr. Brisson should re-file his 2005, 2006 and 2007 returns. According to

calculations made by the Fiscal Arbitrators, Mr. Brisson would receive a refund. Mr. Brisson agreed that he would pay 20% of any refund he received to the Fiscal Arbitrators as fees; and, he would pay 40% of his refund to Frieslander Financial Inc. for the purchase of gold bullion and energy commodities. I assume that Frieslander Financial Inc. is a company controlled by the Fiscal Arbitrators or its principals.

[13] Mr. Brisson stated that he signed his 2008 income tax return but the Fiscal Arbitrators mailed it for him. He stated that he did not read his return. However, I have concluded from Mr. Brisson's documents (exhibit A-1, tab 1, page 3) that he mailed his own 2008 income tax return. In a letter dated May 16, 2009 from the Fiscal Arbitrators to Mr. Brisson, the Fiscal Arbitrators wrote that they had enclosed two copies of his 2008 income tax return with the letter. He was instructed to sign the income tax return by putting "Per" in front of his regular signature and send it and a request for loss carry-back to the CRA. They asked him to review the return "carefully before submitting to ensure that it is both accurate and complete". Also enclosed with the letter were a "Tax Completion Checklist" and a "Statement of Agent Activities". There are check marks on the checklist and Mr. Brisson signed the "Statement of Agent Activities" (See exhibit R-1, tab 1.1).

[14] The "Statement of Agent Activities" was included with the 2008 income tax return filed by Mr. Brisson. In this form, he calculated a loss of $876,260 as Claimed Agent Loss. I have reviewed this form and intended to summarize it but it is nonsensical. In the form, Mr. Brisson claims to be the principal for the agent JACQUES BRISSON.

[15] In his 2008 income tax return, Mr. Brisson reported the Claimed Agent Loss as a business loss. His employment income, dividends and investment income totaled $258,822.09 and he deducted this from the business loss of $876,260.10. He requested a loss carry-back of $617,438.00 to his 2005, 2006 and 2007 taxation years in the amounts of $206,738, $182,836 and $227,864, respectively.

[16] Fortunately for Mr. Brisson, he did not receive any of the refunds he claimed because he would have given 60% of those refunds to the Fiscal Arbitrators. His 2008 taxation year was assessed by notice dated March 26, 2010 to disallow the Claimed Agent Loss and the carry-back losses. A gross negligence penalty pursuant to subsection 163(2) of the *Income Tax Act* was imposed.

Mrs. Brisson

[17] Mrs. Brisson has been a registered nurse since 1977. She received her certificate from Algonquin College in 1977; and, at some later date, she received a degree from the University of Ottawa.

[18] She stated that she and her spouse were referred to the Fiscal Arbitrators by a friend. In response to a question from me, she stated that the friend did not use the Fiscal Arbitrators to prepare his income tax return.

[19] Mrs. Brisson did not know the Fiscal Arbitrators or whether they had a professional designation and she did not ask them. According to her notice of appeal, she never met any persons employed with the Fiscal Arbitrators. She had the Fiscal Arbitrators prepare her 2008 income tax return and she signed it based on information provided to her by her spouse.

[20] In her 2008 income tax return, she reported employment income of $66,779 and a business loss of $232,677.40. Included with her income tax return was a "Statement of Agent Activities" which purported to show the calculation of the business loss. Mrs. Brisson requested a loss carry-back of $165,898.40 to her 2005, 2006 and 2007 taxation years in the amounts of $54,630, $56,790 and $57,245, respectively. She received total refunds of $46,147 and the losses she claimed reduced her tax payable to nil for the 2005, 2006, 2007, and 2008 taxation years.

[21] Mrs. Brisson paid Lawrence Watt a fee equal to 20% of her refund ($9,229.63) for preparing her 2008 income tax return. She also gave $18,459.28 to Frieslander Financial Inc. for the purchase of gold bullion and energy commodities.

[22] When they were first contacted by the CRA in 2009 with respect to their 2008 income tax returns, the Appellants used form letters supplied by the Fiscal Arbitrators to respond to CRA's questions. It was Mr. Brisson's evidence that he did not realize that the Fiscal Arbitrators were a scam until it was explained to him in 2010 by a Collections Officer from the CRA. They have since re-filed their 2008 income tax returns and they have cooperated fully with the CRA.

The Law

[23] Subsection 163(2) of the *Income Tax Act* ("*ITA*") provides for the imposition of gross negligence penalties 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 …

[24] Pursuant to subsection 163(3) of the *ITA*, “the burden of establishing the facts justifying the assessment of the penalty is on the Minister”. The Crown must therefore prove (1) that the Appellants made a false statement or omission in their 2008 income tax returns, and (2) that the statement or omission was either made knowingly, or under circumstances amounting to gross negligence.

[25] An abundant case law has developed with respect to the application of subsection 163(2). Although each decision is deeply rooted in the specific facts of the case, some broad principles have been enunciated by the courts.

[26] The following passage from *Venne v The Queen*, 84 DTC 6247 (FCTD), at page 6256, has been quoted and referred to in numerous decisions of the Tax Court of Canada and the Federal Court of Appeal and remains the seminal definition of gross negligence.

> "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.

[27] In *Villeneuve v Canada*, 2004 FCA 20 the Federal Court of Appeal found that gross negligence could include wilful blindness in addition to intentional action and wrongful intent. In this regard, Justice Létourneau stated the following at paragraph 6 of that decision:

> With respect, I think the judge failed to consider the concept of gross negligence that may result from the wrongdoer's willful 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 willful blindness. In such cases the wrongdoer, while he may not have actual knowledge of the alleged ingredient, will be deemed to have that knowledge.

[28] Since *Villeneuve*, it is well established that actual knowledge by a taxpayer of the accountant's negligence is not required to a finding of gross negligence: *Brochu v Canada* 2011 TCC 75 at paragraph 20. Indeed, gross negligence also includes situations where a taxpayer blindly trusts the person who prepared his income tax return, as was recently held by Justice Bédard in *Laplante v The Queen*, 2008 TCC 335:

> **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 [his accountant]? 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.

[29] Former Chief Justice Bowman discussed some of the factors to consider when deciding whether gross negligence penalties were properly imposed. In *DeCosta v The Queen,* 2005 TCC 545 he stated:

> **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.

Analysis

[30] Mr. Brisson stated that he did not make an omission or a false statement in his 2008 income tax return. The evidence contradicted his testimony. It showed that he claimed a business loss of $876,260.10 in his return and yet in cross-examination he admitted that he did not have a business and the business loss he claimed did not occur. This is exactly the type of false statement that subsection 163(2) is intended to penalize and deter.

[31] The magnitude of his false statement was huge. In 2008, he earned employment income of $256,300.05 and investment income of $2,522.06. When he deducted his alleged business loss, Mr. Brisson reported a non-capital loss of $617,437.99 which he requested to be carried back to his 2005, 2006 and 2007 taxation years. He claimed a refund of $104,548.58 in 2008 and refunds in 2005, 2006 and 2007. If Mr. Brisson had been assessed in accordance with the return he filed, he would have had no tax payable for 2005, 2006, 2007 and 2008.

[32] Mr. Brisson stated that he does not have an accounting background and he didn't understand the terminology used by the Fiscal Arbitrators. When he started to work at Minto he was only a carpenter. He was not hired by Minto for his

administrative skills. All of this may be true; but I have concluded that he must have honed his administrative skills with Minto. As vice president with Minto, he has significant responsibility and accountability. He is responsible for the workmanship of those he supervises and he has to ensure that they adhere to all building codes for the residential units. He reports indirectly to the owners of Minto. Mr. Brisson personally owned residential rental properties in 2005, 2006 2007 and 2008. By 2008, he owned nine rental properties. He managed the properties himself; he negotiated the leases with his tenants; and, he kept the books for his properties. He is not a novice to the business world.

[33] Mr. Brisson had knowledge of the income tax system. He completed his own income tax return for 35 years. In 2005, 2006 and 2007, his employment income was $220,667, $201,886 and $236,986. The largest refund he received in these years was $9,417.86. When he was told by the Fiscal Arbitrators that he would be eligible for a refund of $104,548.58 (almost one-half of his employment income), Mr. Brisson should have sought a second opinion. The evidence showed that he did not consult with anyone. He did not seek advice from the CRA.

[34] Mr. Brisson stated that he was told by the Fiscal Arbitrators that the method they used to calculate his refund was like the RRSP program. He would receive a refund and he had to use 40% of the refund he received to purchase gold bullion and energy commodities from them. He could then get a deduction for the purchase as he did with an RRSP. However, Mr. Brisson was familiar with the RRSP program; he reported a RRSP deduction in 2006 and 2007. He knew that one had to invest in a RRSP before he could deduct the amount from his income.

[35] Considering Mr. Brisson's business experience, that he had prepared his own income tax returns for 35 years and the magnitude of the false statement he reported in his 2008 income tax return, I have concluded that Mr. Brisson knew that the amounts he reported in his return were false and I have concluded that the gross negligence penalties were properly imposed.

[36] Mr. Brisson stated that he did not read his 2008 income tax return prior to signing it. According to his own exhibit, Mr. Brisson was instructed to review his return carefully and I have concluded that he did read his return. If Mr. Brisson truly did not know that he was participating in a scam on the tax system, then he was wilfully blind. He was willing to sign his income tax return and join in the deception in exchange for a refund of all the taxes he had paid in 2005, 2006, 2007 and 2008.

[37] Mrs. Brisson is well educated. She stated that she did not have a business and the business loss she reported in her 2008 income tax return was false. She didn't

understand the calculations made by the Fiscal Arbitrators and she didn't ask anyone to explain the calculations. She assumed the Fiscal Arbitrators were professionals but she had not met them and she made no enquiries. Mrs. Brisson said she relied on her spouse. It is my view that Mrs. Brisson had an obligation to ascertain the accuracy of her own income tax return prior to signing and mailing it to the CRA. At the time that she signed her income tax return, Mrs. Brisson knew she had not made a business loss. She did not even have a business. However, she signed her income tax return certifying that the information given in her return was correct, complete and fully disclosed all of her income.

[38] Considering Mrs. Brisson's education and the magnitude of her false statement, I have concluded that Mrs. Brisson knowingly made a false statement in her 2008 income tax return and gross negligence penalties were properly assessed against her as well.

[39] Mr. Brisson's appeal is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the gross negligence penalties are to be reduced to $120,948.70.

[40] Mrs. Brisson's appeal is dismissed.

[41] The Respondent is awarded one set of costs.

Signed at Halifax, Nova Scotia, this 29th day of July 2013.

"V.A. Miller"

V.A. Miller J.

CITATION:	2013TCC235
COURT FILE NO.:	2012-1161(IT)G
STYLE OF CAUSE:	LUCIE F. BRISSON AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 26, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	July 29, 2013

APPEARANCES:

For the Appellant:	The Appellant herself/himself
Counsel for the Respondent:	Paul Klippenstein Martin Beaudry

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada