Docket: 2016-1686(IT)G

BETWEEN:

MARGO DIANNE BOWKER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 10, 11, 12 and 13, 2020, at Vancouver, British Columbia.

Before: The Honourable Justice Sylvain Ouimet

Appearances:

Counsel for the Appellant:	Alistair G. Campbell Margaret MacDonald
Counsel for the Respondent:	Patrick Cashman Natasha Tso

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* by the Minister of National Revenue in respect of the appellant's 2010 taxation year is allowed, with costs and in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 2nd day of March 2021.

"Sylvain Ouimet"

Ouimet J.

Citation: 2021 TCC 14
Date: 20210302
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BETWEEN:

MARGO DIANNE BOWKER,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Ouimet J.

I. INTRODUCTION

[1] This is an appeal by Margo Dianne Bowker from reassessments made by the Minister of National Revenue (the "Minister") in respect of her 2010 taxation year.

[2] On April 30, 2011, Mrs. Bowker filed her income tax return for the 2010 taxation year. In the return, she reported a total income of $78,798. The total income reported by Mrs. Bowker consisted of employment income of $45,641 from the Bakerview Mennonite Brethren Church, other employment income of $22,181, Old Age Security benefits of $6,222, Canada Pension Plan benefits of $4,750 and interest income of $4.

[3] On May 12, 2011, the Minister initially assessed Mrs. Bowker's 2010 taxation year as filed.

[4] On March 26, 2012, an amended income tax return ("Amended Income Tax Return") was filed by DeMara Consulting Inc. ("DeMara") on behalf of Mrs. Bowker for her 2010 taxation year. The total income reported by Mrs. Bowker remained the same as reported in the income tax return originally filed, but net business losses of $666,447 were claimed in respect of a consulting business. The business losses consisted of a deduction claimed for interest expenses of $666,047 and professional fees of $400. Net capital losses of $333,024 were also claimed as a result of the disposition of bonds, debentures, promissory notes and other similar

properties. Finally, requests to carry back non-capital losses of $32,566, $39,021 and $50,214 to Mrs. Bowker's 2007, 2008 and 2009 taxation years, respectively, were also found in the return.

[5] On June 12, 2014, the Minister reassessed Mrs. Bowker's 2010 taxation year to disallow the business losses, the net capital losses and the carry-back losses claimed in her 2010 Amended Income Tax Return. Pursuant to subsection 163(2) of the *Income Tax Act* (the "ITA"), the Minister also imposed a gross negligence penalty of $139,032 on Mrs. Bowker.

II. ISSUE

[6] The issue in this appeal is as follows:

> Did the Minister rightfully impose on Mrs. Bowker a gross negligence penalty of $139,032 in respect of her 2010 Amended Income Tax Return pursuant to subsection 163(2) of the ITA?

[7] In answering this question, the Court will conduct an analysis to determine whether Mrs. Bowker knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of a false statement in her 2010 Amended Income Tax Return.

III. THE RELEVANT LEGISLATIVE PROVISIONS

[8] The key applicable provisions of the ITA are:

> 163(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% 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.

IV. THE FACTS

[9] At the time of the hearing, Mrs. Bowker was 77 years old and had been married to Melvyle Jesse Daniel Bowker since 1964. They lived together in Abbotsford, British Columbia.

[10] Mrs. Bowker obtained a Bachelor of Religious Education from the Canadian Bible College in Regina, Saskatchewan, in 1963. In 1996, she obtained a Master of Church Music in Kentucky, United States of America. The program included biblical and theological studies and the study of the organ. In 1999, Mrs. Bowker also obtained a Master of Theology from Regent College in Vancouver, British Columbia.

[11] Mrs. Bowker was involved in operating a bookstore for approximately a year and a half between 1976 and 1977. In the early 2000s, she taught English for a period of three years at the Gladwin Language Centre. From 2003 until her retirement in 2015, Mrs. Bowker worked as an assistant pastor at the Bakerview Mennonite Brethren Church in Abbotsford. Mrs. Bowker's responsibilities included planning for liturgies, which would take place each Sunday, arranging music, mentoring leaders and liturgists and visiting people in their homes or in the hospital.

[12] Mr. Bowker holds a Master of Piano Performance and he does not have any specific training with respect to taxation matters. In 2010, Mr. Bowker had been in charge of the couple's tax matters for a number of years, including the preparation of their income tax returns. According to Mrs. Bowker, he usually prepared her income tax return and she would review it before it was filed. In 2009, Mr. Bowker decided to use the services of an accountant to prepare their income tax returns. Mrs. Bowker said that Mr. Bowker made this decision because of developments in his music-related work and the possibility that he had to collect GST/HST for his work.

[13] On April 30, 2011, Mrs. Bowker's 2010 income tax return was filed. The return had been prepared by Mr. Couch, an accountant. On May 12, 2011, the Canada Revenue Agency (the "CRA") assessed Mrs. Bowker's return as filed. In May or June of the same year, Mr. Bowker heard, for the first time, about DeMara from an acquaintance, Mr. Jackson, as well as from Mrs. Bowker's brother-in-law, Mr. Belsey.

[14] Mr. Jackson told Mr. Bowker that he should participate in a DeMara conference call, which he did. According to Mrs. Bowker, after this call or a second one, Mr. Bowker explained the services offered by DeMara to her. He told her that

DeMara's services consisted of reviewing a person's income tax return to find out if that person was entitled to claim additional expenses or if there was anything else that may have been missed that could lead to a tax refund. He also told her that one of the principals of DeMara, Ms. Stancer, had extra knowledge and expertise in taxation because she had worked for the CRA. According to Mrs. Bowker, there was no indication that DeMara was a "de-taxer" group. Mrs. Bowker's understanding of the expression "de-taxers" was that they are people who "want to avoid paying taxes . . ."[1] Mrs. Bowker testified that if she and Mr. Bowker had believed that DeMara was part of such a group, they "would have run the other way"[2]. Mr. Bowker suggested that they visit DeMara's office to "see if they had a real office, [and] meet the people . . ."[3] before deciding if they were to use their services.

[15] In June 2011, Mrs. Bowker and Mr. Bowker drove to DeMara's office located in Vernon, British Columbia. DeMara's office was located in Vernon's downtown just off the main street. According to Mrs. Bowker, in the office "there was a little bit of a welcome area, reception area, and a few -- a number of people sitting at desks."[4] Once at DeMara's office, Mrs. Bowker waited in the lobby while Mr. Bowker went into an office to have a discussion with a DeMara employee. After quite some time, Mr. Bowker came out of the office with a "membership kit". Mr. Bowker told Mrs. Bowker that he thought that they should use DeMara's services and Mrs. Bowker agreed based on Mr. Bowker's recommendation. Mr. Bowker asked her to sign the documents included in the "membership kit", which she did. Mrs. Bowker understood that she had to sign the documents in order for them to use DeMara's services, so she signed them. At that time, Mrs. Bowker signed the following documents:

- Member Information Sheet;
- Confidentiality and Non-Disclosure Agreement;
- Authorization to Release Personal Tax Information to a Third Party;
- Serenity Bound Society Membership Form;
- Authorizing or Cancelling a Representative (form T1013);
- Request for a Business Number (form RC1); and
- Business Consent form (form RC59).

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[1] Transcript dated February 12, 2020, testimony of Mrs. Bowker, page 428 line 25.
[2] Transcript dated February 12, 2020, testimony of Mrs. Bowker, page 428 line 14.
[3] Transcript dated February 12, 2020, testimony of Mrs. Bowker, page 430 line 12.
[4] Transcript dated February 12, 2020, testimony of Mrs. Bowker, page 433 lines 6–8.

[16] After their first visit to DeMara's office, Mr. Bowker and Mrs. Bowker visited the office a second time before the end of the summer of 2011, on their way to visit family in Alberta. Mrs. Bowker testified that they brought some of the documents that DeMara had asked them to bring. Mrs. Bowker did not know what the documents were, as Mr. Bowker had gathered them. Mrs. Bowker did not enter DeMara's office on the second visit. Mrs. Bowker testified that she knew that Mr. Bowker had had discussions with a DeMara employee between their two visits, but that she did not know what the discussions were about. She also testified that she did not recall having any discussions with her husband about DeMara during that time.

[17] On March 26, 2012, DeMara filed the 2010 Amended Income Tax Return on behalf of Mrs. Bowker. The total income reported by Mrs. Bowker remained the same as found in the income tax return originally filed, but net business losses of $666,447 were claimed in respect of a "consulting business". Net capital losses of $333,024 were also claimed as a result of the disposition of bonds, debentures, promissory notes and other similar properties. Finally, requests to carry back non-capital losses of $32,566, $39,021 and $50,214 to Mrs. Bowker's 2007, 2008 and 2009 taxation years, respectively, were also found in the return. Mrs. Bowker testified that she did not know that DeMara had filed the Amended Income Tax Return and that she knew nothing about its contents. She became aware of it only later, but did not recall exactly when.

[18] While Mrs. Bowker knew that she had received letters from the CRA following the filing of the Amended Income Tax Return, she had no knowledge of the contents of the letters or of any of the communication that ensued between DeMara and the CRA. Per DeMara's request, all of the letters that Mrs. Bowker received from the CRA were sent directly to DeMara's office by Mr. Bowker.

[19] Between January and the end of March 2013, Mr. Bowker sent three letters by fax to the CRA on behalf of Mrs. Bowker. These letters were sent after Mrs. Bowker found out that a search warrant had been executed at DeMara's office. Mrs. Bowker told the Court that during this period, Mr. Belsey told Mr. Bowker some "very negative"[5] facts about Ms. Stancer. Mrs. Bowker believed that Mr. Belsey obtained this information from a former employee of DeMara, Mr. Earl. The letters to the CRA were written by Mr. Bowker, Mr. Belsey and Mr. Earl. There was no evidence provided as to why Mr. Belsey and Mr. Earl were involved in the

[5] Transcript dated February 12, 2020, testimony of Mrs. Bowker, page 473 lines 23–24.

preparation of these letters. Mrs. Bowker testified that while she signed the letters, she did not read them (except for one, but she recalled reading only part of it).

[20] According to Mrs. Bowker, the intent behind the first letter was to get back her personal documents that were seized by the CRA from DeMara's office. It was also to dissociate herself from DeMara. In the letter, Mrs. Bowker asked specifically for the "cancellation" of DeMara as her representative.

[21] According to Mrs. Bowker, the intent behind the second and third letters was to come to an agreement with the CRA regarding her 2010 and 2011 taxes and to once again attempt to distance herself from DeMara. In the letters, Mrs. Bowker stated that she had recently learned that DeMara had filed, on her behalf, an amended income tax return for the 2010 taxation year, in addition to her income tax return for the 2011 taxation year. She stated that the returns contained erroneous information because DeMara had "repositioned" her, an individual taxpayer, as a business, and that this was incorrect. Mrs. Bowker also stated that she did not give instructions to DeMara to file these returns and that she did not have a business during the 2010 taxation year. She also mentioned that she did not wish to claim loss carry-backs and she asked the CRA not to take into consideration the returns filed by DeMara but instead to rely on her original 2010 tax return, and the amount she estimated as owing for 2011, for assessment purposes. Mrs. Bowker also stated that she discovered that the process used by DeMara in order to file her returns was "illegal" and that the process was never disclosed to her. She stated that she had always been an honest taxpayer and attached a payment of $2,304.20, which she estimated was the amount of taxes owed for her 2011 taxation year. Mrs. Bowker requested that the gross negligence penalty be removed. However, numerous parts of these letters did not make any sense. According to the parties' counsel and to Mrs. Bowker herself, the letters contained language allegedly used by "de-taxers".

V. PARTIES' POSITIONS

A. The respondent's position

[22] The respondent took the position that Mrs. Bowker made a false statement by signing the form requesting a business number for a business that did not exist and that she participated in the making of false statements in the 2010 Amended Income Tax Return as the false statements in the 2010 Amended Income Tax Return were made as a result of her signing the form requesting a business number. The respondent submitted that, pursuant to subsection 163(2) of the ITA, if the Court finds that Mrs. Bowker read the form requesting a business number prior to signing it, she knowingly made a false statement, and if the Court finds that she signed the form without reading it, she was grossly negligent.

[23] The respondent also submitted that if Mrs. Bowker did not know she was requesting a business number for the purpose of gaining increased tax refunds, she closed her eyes to this fact and was therefore wilfully blind. For the respondent, there were sufficient warning signs to require Mrs. Bowker to make further inquiries prior to filing her 2010 Amended Income Tax Return, but she did not make those inquiries.

B. The appellant's position

[24] In his submissions, Mrs. Bowker's counsel admitted that Mrs. Bowker's 2010 Amended Income Tax Return contained false statements. However, he submitted that the gross negligence penalty should be vacated as the Minister has not met the burden of establishing the facts justifying the assessment of the penalty. According to counsel, Mrs. Bowker did not "make" the false statements since she did not authorize DeMara to file the return. Also, there is no basis for finding that Mrs. Bowker "participated in, assented to or acquiesced in the making of" the false statements since she did not have knowledge of the filing of the return and did not provide any information to help DeMara make the false statements. Finally, counsel submitted that if the Court were to find that Mrs. Bowker did participate in, assent to or acquiesce in the making of the false statements, there is no basis for finding that she did so knowingly or in circumstances amounting to gross negligence.

VI. ANALYSIS

[25] Under subsection 163(2) of the ITA, the Minister can impose penalties on a taxpayer if the taxpayer knowingly, or under circumstances amounting to gross negligence, made, participated in, assented to or acquiesced in the making of a false statement in an income tax return. Under subsection 163(3) of the ITA, the Minister has the burden of proving, on a balance of probabilities, the facts that justify the imposition of a penalty under subsection 163(2) of the ITA.

[26] Subsections 163(2) and 163(3) of the ITA read as follows:

> 163(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% 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.

[27] Therefore, the Minister has the burden of establishing, on a balance of probabilities, that a taxpayer either knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of a false statement in an income tax return.[6] Accordingly, for subsection 163(2) of the ITA to be applicable, the following two questions must be answered: Has the taxpayer made or participated in, assented to or acquiesced in the making of a false statement in an income tax return? If the taxpayer has made or participated in, assented to or acquiesced in the making of a false statement in an income tax return, did the taxpayer do so knowingly, or under circumstances amounting to gross negligence?[7]

A. Did Mrs. Bowker make or participate in, assent to or acquiesce in the making of a false statement or omission in her 2010 Amended Income Tax Return?

[28] During her testimony, Mrs. Bowker admitted that her 2010 Amended Income Tax Return contained false statements. She admitted that in the 2010 taxation year,

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[6] See *Kim v. The Queen*, 2019 FCA 210 at paras 15 and 16.
[7] See *Peck v. The Queen*, 2018 TCC 52 at paras 41 and 42.

she did not operate a business of any kind and therefore did not have any business losses. She also admitted that she did not have any capital losses in that year. However, the evidence is that Mrs. Bowker did not make, assent to or acquiesce in the making of these false statements. According to her testimony, DeMara filed her 2010 Amended Income Tax Return without her knowledge. Mrs. Bowker did not sign the Amended Income Tax Return and she testified that she did not see the Amended Income Tax Return before it was filed. In her testimony, Mrs. Bowker also stated that she did not have any discussions with Mr. Bowker or anyone else with respect to the Amended Income Tax Return before it was sent to the CRA by DeMara. The evidence is that it was Mr. Bowker who sent DeMara the documents that were used to prepare the Amended Income Tax Return, not Mrs. Bowker. While Mrs. Bowker knew that Mr. Bowker had provided the documents to DeMara, she never asked him what they were or why they were provided to DeMara. At all material times, Mr. Bowker was the individual who was in communication with DeMara, not Mrs. Bowker. Mrs. Bowker was a very credible witness. Her testimony was very detailed considering she was testifying on facts that took place approximately ten years prior. The Court has no reason to believe that she did not testify truthfully and therefore accepts her recollection of these facts in the absence of any evidence to the contrary.

[29] Counsel for the respondent submitted that just because Mrs. Bowker did not sign the Amended Income Tax Return does not mean that Mrs. Bowker is allowed to escape liability under subsection 163(2) of the ITA. The fact that she did not sign the return is irrelevant in this case because the Court has concluded that Mrs. Bowker did not see or participate in the preparation of the Amended Income Tax Return. As for the decision of *Stein v. The Queen*,[8] referred to by counsel to support the respondent's submissions, it can be distinguished from this case because in the *Stein* decision, the Court concluded that the taxpayer had participated in the preparation of the return and that the return had been prepared on his instructions.

[30] That being said, Mrs. Bowker told the Court that she did recall signing the Request for a Business Number form (form RC1) and the Business Consent form (form RC59). These documents were used by DeMara to obtain a business number and an account number for a consulting business for Mrs. Bowker.[9] Since the false statements in the Amended Income Tax Return were losses pertaining to a business and the evidence is that Mrs. Bowker never had such losses, the Court agrees with the respondent that there is enough evidence to conclude, on a balance of

[8] *Stein v. The Queen*, 2015 TCC 176 at para. 41.
[9] Respondent's Book of Documents, Vol 1., Tab 26.

probabilities, that Mrs. Bowker participated in the making of the false statements found in her 2010 Amended Income Tax Return by signing the Request for a Business Number form and the Business Consent form.

[31] Consequently, this Court has to determine whether Mrs. Bowker knowingly participated in the making of these false statements or did so under circumstances amounting to gross negligence.

B. Did Mrs. Bowker knowingly, or under circumstances amounting to gross negligence, participate in the making of the false statements in her 2010 Amended Income Tax Return?

1. Did Mrs. Bowker knowingly participate in the making of the false statements in her 2010 Amended Income Tax Return?

[32] The knowledge requirement under subsection 163(2) of the ITA can be met if the Minister establishes, on a balance of probabilities, that Mrs. Bowker knew that she participated in the making of the false statements or that she intended to participate in the making of the false statements.[10] The knowledge requirement can also be met if the Minister establishes that Mrs. Bowker was wilfully blind to the making of the false statements.[11]

a) Did Mrs. Bowker know that she participated in the making of the false statements or did she intend to participate in the making of the false statements?

[33] The documents used by DeMara to make the false statements in Mrs. Bowker's 2010 Amended Income Tax Return were the documents in the "membership kit" and the documents that Mr. Bowker provided to DeMara on Mr. and Mrs. Bowker's second visit to DeMara's office.

[34] With respect to the documents found in the "membership kit", according to Mrs. Bowker's testimony, Mr. Bowker asked her to sign the documents so that she could use DeMara's services. Mrs. Bowker testified that she did sign the documents found in the "membership kit" and that she believed that these documents were part of the process of hiring DeMara. There is no evidence that she knew or intended that

[10] *Wynter v. The Queen*, 2017 FCA 195 at para. 17 [*Wynte*r].
[11] *Wynter* at paras 13 and 17. See also *Canada (Attorney General) v. Villeneuve*, 2004 FCA 20 at para. 6.

these documents would be used by DeMara to make false statements in her Amended Income Tax Return.

[35] With respect to the documents that were provided to DeMara by Mr. Bowker, the evidence is that it was Mr. Bowker who gathered them and provided them to DeMara, not Mrs. Bowker. As such, she could not have known or intended that these documents would be used to make false statements.

[36] Having determined that Mrs. Bowker did not know that she was participating in the making of the false statements in her 2010 Amended Income Tax Return and that she did not intend to do so either, the Court has to determine whether Mrs. Bowker was wilfully blind with respect to the false statements.

b) Was Mrs. Bowker wilfully blind with respect to the false statements?

[37] In *Wynter*, the Federal Court of Appeal described wilful blindness in the context of the application of subsection 163(2) of the ITA as follows:

> 13 A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: *R. v. Briscoe*, 2010 SCC 13 at paras. 23-24, [2010] 1 S.C.R. 411 (Briscoe); Sansregret at para. 24 . . .[12]
>
> [Emphasis added.]

[38] In the *Wynter* decision, the Federal Court of Appeal also stated that wilful blindness is determined by reference to the taxpayer's subjective state of mind.[13] The Court stated that ". . . wilful blindness pivots on a finding [by the court] that the taxpayer deliberately chose not to make inquiries in order to avoid verifying that which might be such an inconvenient truth."[14] The Court also stated that the essential factual element of wilful blindness is a finding that the taxpayer deliberately ignored facts, as it "connotes 'an actual process of suppressing a suspicion'".[15]

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[12] *Wynter* at para. 13.
[13] *Wynter* at para. 12.
[14] *Wynter* at para. 17.
[15] *Wynter* at para. 17, citing *R. v. Briscoe*, 2010 SCC 13 at para. 24.

[39] In *Peck v. The Queen*,[16] this Court described the concept of subjective knowledge in the context of the application of subsection 163(2) of the ITA as follows:

> 45 As also suggested in *Wynter*, the subjective knowledge of the Appellant may be proven by evidence establishing on a balance of probabilities that the Appellant was wilfully blind as to whether the statements in the Return and the Request were false. This is a helpful clarification of the point that wilful blindness is used to attribute subjective knowledge to the Appellant and that wilful blindness and gross negligence are different legal concepts.
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> 46 To establish wilful blindness, the evidence must prove on a balance of probabilities that the Appellant subjectively knew that the false statements in the Return and the Request were probably false but deliberately chose not to make further inquiries because he subjectively knew or strongly suspected that the inquiries would provide him with the knowledge that the statements were indeed false (see *Sansregret v. The Queen*, [1985] 1 S.C.R. 570 at 584, *R. v. Jorgensen*, [1995] 4 S.C.R. 55 at paragraphs 102 and 103 and *Briscoe v. The Queen*, 2010 SCC 13, [2010] 1 S.C.R. 411 at paragraphs 21 to 23). The wilful blindness test is summarized in *Wynter* as follows:
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> > [13] A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: *R. v. Briscoe*, 2010 SCC 13 at paras. 23-24, [2010] 1 S.C.R. 411 (*Briscoe*); *Sansregret* at para. 24. In these circumstances, the doctrine of wilful blindness imputes knowledge to a taxpayer: *Briscoe* at para. 21. . . .
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> 47 The subjective knowledge required for a finding of actual knowledge or wilful blindness refers to the actual or subjective knowledge of the person committing the prohibited act and not the objective or constructive knowledge of a reasonable person in the same circumstances (see, generally, *Shand v. The Queen*, 2011 ONCA 5 at paragraph 188 and *Roks v. The Queen*, 2011 ONCA 526 at paragraph 132).
>
> 48 Actual subjective knowledge and wilful blindness may be proven by direct evidence, by circumstantial evidence or by a combination of the two. The determination of whether there is actual subjective knowledge or wilful blindness must be made in light of all the circumstances.
>
> 49 The subjective nature of the wilful blindness standard versus the objective nature of the gross negligence standard means that conduct that contributes to a finding of wilful blindness may support a finding of gross negligence, but the converse is not necessarily true. For example, the fact that a reasonable person in the same

[16] *Peck v. The Queen*, 2018 TCC 52.

> circumstances would have made inquiries does not support a finding of wilful blindness but can support a finding of gross negligence. In *Briscoe*, the Supreme Court of Canada explains this distinction as follows:
>
> > [24] Professor Don Stuart makes the useful observation that the expression "deliberate ignorance" seems more descriptive than "wilful blindness", as it connotes "an actual process of suppressing a suspicion". Properly understood in this way, "the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind" (*Canadian Criminal Law: A Treatise* (5th ed. 2007), at p. 241). While a failure to inquire may be evidence of recklessness or criminal negligence, as for example, where a failure to inquire is a marked departure from the conduct expected of a reasonable person, wilful blindness is not simply a failure to inquire but, to repeat Professor Stuart's words, "deliberate ignorance".
>
> 50 The subjective nature of the wilful blindness standard also means that the personal attributes of the individual may be considered in determining whether the individual is wilfully blind.

[40] Therefore, wilful blindness will be established if the respondent proves, on a balance of probabilities, that Mrs. Bowker subjectively had concerns or suspicions that DeMara might make a false statement in her tax return and that Mrs. Bowker did not make any further inquiries. In order to establish that Mrs. Bowker subjectively had concerns or suspicions that DeMara might make a false statement in her tax return, the respondent has to first establish the existence of suspicious circumstances, referred to by the courts as "red flags". Second, the respondent has to establish that these suspicious circumstances or "red flags" indicated a need for Mrs. Bowker to inquire into the accuracy of her return.

[41] In *Torres v. The Queen*,[17] this Court enumerated a number of circumstances that can be considered "red flags":

> i) the magnitude of the advantage or omission;
> ii) the blatantness of the false statement and how readily detectable it is;
> iii) the lack of acknowledgment 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;

[17] *Torres v. The Queen*, 2013 TCC 380 at para. 65.

> vii) whether others engaged the tax preparer or warned against doing so, or the taxpayer himself or herself expresses concern about telling others

[42] These are only examples of circumstances that can be taken into consideration by the Court. Whether the circumstances listed above constitute "red flags" depends on the circumstances of each case. Of course, any other relevant circumstances can be taken into consideration by the Court in order to make a determination of wilful blindness.[18]

[43] In this case, this Court has concluded that Mrs. Bowker was not wilfully blind. The Court has concluded that the so-called "red flags" or "flashing red lights" described by the respondent in her submissions were not sufficient to conclude that Mrs. Bowker was wilfully blind. On the basis of Mrs. Bowker's testimony, and taking her personal attributes into account, it can be concluded that the "red flags" mentioned by the respondent did not indicate to Mrs. Bowker that she should inquire into the accuracy of her return. The Court will summarize and comment on the submissions made by the respondent with respect to each of the so-called "red flags" that the respondent raised.

Magnitude of the advantage

[44] The respondent submitted that because DeMara sent a notice of the refund of tax to Mr. Bowker by email, it is more likely than not that he told Mrs. Bowker that she would be receiving a refund given that they were expecting one by using DeMara's services. The respondent further submitted that the magnitude of this advantage was significant and that the same could be said about the business and capital losses claimed in the Amended Income Tax Return.

[45] The Court agrees with the respondent that these advantages were significant. However, in order for the Court to agree with the respondent's entire submission, the Court would have to disregard Mrs. Bowker's testimony. Mrs. Bowker clearly told the Court that Mr. Bowker did not tell her that she would get a refund. Mrs. Bowker also told the Court that DeMara never promised Mr. Bowker that they would be able to obtain a tax refund for her. Given the evidence provided by Mrs. Bowker and the fact that the Court determined that she was a credible witness, the Court cannot consider the magnitude of the advantage a "red flag".

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[18] *Stone v. The Queen*, 2019 TCC 253 at para. 24. *Wardlaw v. The Queen*, 2019 TCC 199 at para. 34.

Blatantness of the false statement

[46] The respondent submitted that the Request for a Business Number form that Mrs. Bowker signed was a "red flag". The Court agrees with the respondent that if a taxpayer is required to sign a Request for a Business Number form when the taxpayer does not have a business, it may be a "red flag". However, in this case, this "red flag" did not indicate to Mrs. Bowker that she should inquire into the accuracy of her return. Mrs. Bowker testified that her understanding was that completing the Request for a Business Number form was part of DeMara's process and that she was cooperating with the process. It did not raise any concerns in her mind that she was seeking a business number for tax purposes for a business that did not exist as it was part of the process. Ms. Bowker testified that Mr. Bowker and herself have a fairly high trust factor in their relationships with people.[19] As such, taking into consideration Mrs. Bowker's personal attributes and her credible explanation, the Court determined that the fact that Mrs. Bowker was ask to sign a Business Number form did not indicate to her that she should make further inquiry.

Unusual requests made by the tax preparer

[47] The respondent submitted that the fact that DeMara had asked Mrs. Bowker to sign a confidentiality agreement and a Serenity Bound Society membership form was an unusual request. This request was made right after Mr. Bowker's initial meeting with an employee of DeMara and also right after he had recommended to Mrs. Bowker that she use DeMara's services. Counsel reminded the Court that Mrs. Bowker's testimony was that she was never asked to sign such forms by previous tax preparers.

[48] The Court agrees with counsel that these were unusual requests and that asking for a signature on these documents may be a "red flag". However, considering Mrs. Bowker's complete confidence in Mr. Bowker's capacity to handle her tax affairs and the fact that she was in DeMara's office when she signed the documents, which looked like any other professional tax preparer's office, she did not determine that it was necessary to ask questions and relied instead on Mr. Bowker's recommendation. Once again, taking into consideration Mrs. Bowker personal attributes and her credible explanation, the Court determined that the fact that Mrs. Bowker was ask to sign a confidentiality agreement and a Serenity Bound Society

[19] Transcript dated February 12, 2020, testimony of Mrs. Bowker, page 442.

membership form did not indicate to Mrs. Bowker that she should inquire into the accuracy of her return.

[49] The respondent also submitted that a sign on the door to DeMara's office that contained a religious connotation should have aroused Mrs. Bowker's suspicions. However, as the Court has not seen the sign and was not provided with a clear description of what the sign was or how it looked, it is impossible for the Court to consider the sign a "red flag".

The tax preparer being previously unknown to the taxpayer

[50] In her submissions, the respondent submitted that the fact that DeMara was unknown to Mrs. Bowker was a "red flag". The respondent also submitted that the fact that DeMara was recommended to Mr. Bowker by an acquaintance who was not very well known to Mr. and Mrs. Bowker was also a "red flag". According to counsel, the fact that Mrs. Bowker's initial 2010 tax return had been previously filed by Mr. Couch without "incident" and that Mrs. Bowker did not question Mr. Bowker or DeMara as to how DeMara's "process" would enable her to obtain further deductions not previously claimed is indicative of wilful blindness.

[51] The decision by a taxpayer to hire a tax preparer that is unknown to the taxpayer and solely based on a referral is not unusual and is not usually a "red flag". The same can be said about a taxpayer's decision to hire a new tax preparer based on its representations that it may be able to get a tax refund that another tax preparer cannot. It might well be that in some circumstances these situations can be considered "red flags", but it is not the case here. Mr. Bowker and Mrs. Bowker did their due diligence. Before hiring DeMara they went and looked at DeMara's offices to make sure that they were professional tax preparers. Two witnesses have told the Court that DeMara's offices looked like any other professional tax preparer's office. Furthermore, the fact that Mr. Bowker previously hired an accountant, Mr. Couch, seems to indicate that when he deemed it necessary, he hired professional help in order to complete the couple's tax returns and therefore acted as a diligent taxpayer. The Court has concluded that the fact that DeMara was unknown to Mrs. Bowker, the fact that DeMara was recommended by an acquaintance who was not very well known to Mr. and Mrs. Bowker and that DeMara made representations that they may be able to obtain a tax refund were not "red flags" in this case.

[52] Finally, in her written submissions, the respondent put a lot of emphasis on the fact that Mrs. Bowker did not ask any questions about DeMara's "process". The respondent submitted that when a tax preparer makes representations about using a

"special process", it is a "red flag". The word "process" was used by Mrs. Bowker during her testimony in reference to the documents that had to be signed in order for her to use DeMara's services or in reference to the work that DeMara would do on her behalf. It was not used by Mrs. Bowker to describe a "special process". Mrs. Bowker was only told by Mr. Bowker that DeMara would review her tax return to determine if she was entitled to additional deductions and a tax refund. No promises were made, and no "special process" was mentioned to her. Therefore, there was no reason for Mrs. Bowker to ask any questions related to DeMara's process.

[53] In conclusion, the Court has determined that Mrs. Bowker was not wilfully blind based on the comments made above with respect to the alleged "red flags" and in consideration of the following facts:

1- Mrs. Bowker is a literate, articulate and intelligent individual, but there is no evidence that she had any specific income tax or accounting knowledge; she relied on the services of Mr. Bowker to prepare her tax returns throughout the course of her working career;

2- Mrs. Bowker had complete confidence in Mr. Bowker's capacity to handle her tax affairs, even if it meant Mr. Bowker seeking outside assistance to complete her tax returns;

3- DeMara's offices looked like any other professional tax preparer's office;

4- Mrs. Bowker did not have the opportunity to review the Amended Income Tax Return before it was sent to the CRA;

5- Mrs. Bowker did not receive emails from DeMara or have any direct communication with DeMara;

6- Mrs. Bowker did not participate in any of DeMara's conference calls or information sessions;

7- Mrs. Bowker did not provide any documents to DeMara aside from the documents she signed in the "membership kit"; and

8- Mrs. Bowker testified that she did not have any concerns or suspicions that DeMara might make false statements in her tax return.

[54] As such, the Court finds that Mrs. Bowker did not knowingly participate in the making of the false statements in her 2010 Amended Income Tax Return.

2. Did Mrs. Bowker, under circumstances amounting to gross negligence, participate in the making of the false statements in her 2010 Amended Income Tax Return?

[55] In the *Wynter* decision, the Federal Court of Appeal defined gross negligence in the context of the application of subsection 163(2) of the ITA as follows:

> 18 Gross negligence is distinct from wilful blindness. It arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer. Simply put, if the wilfully blind taxpayer knew better, the grossly negligent taxpayer ought to have known better.
>
> 19 Gross negligence requires a higher degree of neglect than a mere failure to take reasonable care. It is a marked or significant departure from what would be expected. It is more than carelessness or misstatements. The point is captured in the decision of this Court in *Zsoldos v. Canada (Attorney General)*, 2004 FCA 338 at para. 21, 2004 D.T.C. 6672:
>
> In assessing the penalties for gross negligence, the Minister must prove a high degree of negligence, one that is tantamount to intentional acting or an indifference as to whether the law is complied with or not. (See *Venne v. R.* (1984), 84 D.T.C. 6247 (Fed. T.D.), at 6256.)
>
> [Emphasis added.]

[56] In the *Wynter* decision, the Federal Court of Appeal also stated that the test to determine if a taxpayer was grossly negligent is an objective test. The Court described the test as follows:

> 21 While subjective considerations may play a role in either analysis, gross negligence is determined with reference to an objective test. In particular, where gross negligence is alleged, I would expect consideration of whether the conduct of the taxpayer at issue is such a marked departure from what would be expected that it constitutes a high degree of negligence sufficient to be characterized as a marked departure from the standards, practices, and due diligence expected of a responsible taxpayer. The cautionary words of the Supreme Court of Canada in *Guindon*, at paragraph 61, are equally applicable here; these penalties "are meant to capture serious conduct, not ordinary negligence or simple mistakes".
>
> [Emphasis added.]

[57] Therefore, the Court has to determine if Mrs. Bowker's conduct was such a marked departure from what would be expected of a reasonable and responsible taxpayer that it can be characterized as a marked departure from the standards,

practices, and due diligence expected of a such a taxpayer. The Court should keep in mind that subsection 163(2) of the ITA is meant to capture only serious conduct, not ordinary negligence or simple mistakes.

[58] The Court has concluded that Mrs. Bowker was negligent. She should have asked Mr. Bowker questions about why she was signing a form requesting a business number, a confidentiality agreement and a Serenity Bound Society membership form. She also should have asked Mr. Bowker about the status of the work being done by DeMara. That being said, at all material times, she was following the recommendations of Mr. Bowker, someone in whom she had complete trust. Before 2010, Mr. Bowker had always been in charge of preparing Mrs. Bowker's tax returns. There is no evidence that Mrs. Bowker had any tax-related issues prior to 2010 using the "services" of Mr. Bowker. Therefore, there is no reason why a reasonable and responsible taxpayer in a similar position to Mrs. Bowker would not have had complete confidence in Mr. Bowker's "services" as well. After all, he was a trusted family member. Furthermore, Mrs. Bowker did not have any information prior to the filing of her Amended Income Tax Return that could have led her to believe that DeMara was not a legitimate tax preparer or that it would file an Amended Income Tax Return on her behalf that contained false statements.

[59] In conclusion, the Court has determined that while Mrs. Bowker made some mistakes, her conduct did not markedly depart from what would be expected from a reasonable and responsible taxpayer in the circumstances. As such, the Court finds that Mrs. Bowker did not, under circumstances amounting to gross negligence, participate in the making of the false statements in her 2010 Amended Income Tax Return.

[60] The Court will now comment on some of the respondent's other written submissions. The Court will not comment on all of them simply because some of them are not supported by the facts and/or because the cases referred to by counsel to support these submissions can be distinguished from the case at bar.

Mrs. Bowker's failure to call Mr. Bowker as a witness

[61] Counsel for the respondent submitted that the Court should draw an adverse inference against Mrs. Bowker because she failed to call Mr. Bowker as a witness. According to the respondent, Mrs. Bowker should have called Mr. Bowker to testify in order to corroborate certain facts since he played a central role with respect to her involvement with DeMara. Counsel submitted that Mrs. Bowker failed to call Mr. Bowker because his account of the events would not support her account of the

events. Finally, counsel submitted that ". . . the failure to call [Mr. Bowker] must adversely affect the weight and credibility of her account, an account so fantastic and unlikely to be true, that [Mrs. Bowker] would have called her spouse for corroboration, if she was testifying truthfully."[20]

[62] The Court will not draw such an inference. There are multiple reasons for the Court not to do so, including the clear risk of reversing the burden of proof and interfering with the strategic litigation choices of the parties.[21] An adverse inference should only be drawn by the Court in circumstances where the evidence of the person who was not called would have been superior to other similar evidence.[22] This is not the case here. No one is in a better position to provide evidence on Mrs. Bowker's knowledge of DeMara's activities and the circumstances which may have raised suspicions than Mrs. Bowker herself. Furthermore, as previously stated, under subsection 163(3) of the ITA, the respondent has the burden of proving the facts that justify the imposition of a penalty under subsection 163(2) of the ITA. The Court would certainly have appreciated if the respondent had called Mr. Bowker to testify; however, the respondent also chose not to call Mr. Bowker to testify. It was the respondent's choice to make, but the respondent certainly cannot complain about Mr. Bowker's lack of testimony when the respondent could have called him to testify but deliberately chose not to do so, especially considering that the respondent stated in her written submissions that Mr. Bowker played a central role with respect to Mrs. Bowker's involvement with DeMara. Then why did the respondent not call Mr. Bowker to testify? There might be a good reason, but the Court was not informed of it.

Mrs. Bowker's reliance on a trusted family member

[63] Relying on *Bonhomme v. The Queen*,[23] the respondent submitted that the law does not allow Mrs. Bowker to use Mr. Bowker as a "shield" to absolve her from her responsibilities and obligations under the ITA. The Court does not agree with this submission. The Court believes that in some circumstances, it is possible for taxpayers to escape from the application of subsection 163(2) of the ITA by relying on a third party to take care of their tax matters, such as when a taxpayer honestly relies on a trusted accountant or a trusted family member. This Court already

[20] Respondent's Memorandum of Fact and Law at para. 62.
[21] *R. v. Degraw*, 2018 ONCA 51 at para. 31.
[22] Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed., (Toronto: LexisNexis, 2018), s. 6.471 at 406–07, referring to *Chabot v. Chaube*, 2014 BCSC 300 at para. 143.
[23] *Bonhomme v. The Queen*, 2016 TCC 152 at para. 56 [*Bonhomme*].

concluded that this was possible in *Mahdi v. The Queen*,[24] a decision submitted for the Court's consideration by the respondent. In this case, the evidence is that Mrs. Bowker honestly relied on her husband, who was a trusted family member.

[64] In *Bonhomme*, the Minister reassessed several of the appellant's taxation years in order to deny expenses that she had claimed, to include shareholder benefits in her income, and to assess gross negligence penalties.[25] It appears that for the most part Ms. Bonhomme did not testify on her own behalf and that all evidence in support of her appeal came from her husband.[26] The Court did not find her husband's testimony reliable.[27] The Court stated that Ms. Bonhomme provided very little testimony and that at trial, Ms. Bonhomme stated that she had relied on her husband to prepare her taxes and trusted that he had done so correctly and that she had not reviewed her returns but had simply signed them. The Court also found that Ms. Bonhomme demonstrated indifference as to whether she complied with the ITA or not, that she was late in filing her returns for four of the five years at issue, that she commingled her and her corporation's business affairs unnecessarily, that neither she nor her corporation kept proper books and records that would have allowed her to determine her income, that she only filed returns for her corporation when forced to do so by court order under threat of imprisonment, that she knew that significant amounts of money were being deposited to her personal bank account, that she and her corporation were not filing tax returns, and that she and her corporation were being pressured by the Minister to do so.[28]

[65] In light of all of the Court's findings, the *Bonhomme* decision can easily be distinguished from the present case. The facts in the two cases have nearly nothing in common. In this case, for example, Mr. Bowker did not testify and Mrs. Bowker provided a very detailed testimony at trial. Unlike Ms. Bonhomme, Mrs. Bowker did not demonstrate an indifference as to whether she complied with the ITA or not, and there is no evidence that Mrs. Bowker was late in filing any of her returns.

DeMara's statements with respect to Ms. Stancer's past work experience, and Mrs. Bowker's alleged knowledge of DeMara's "special process" in relation to the preparation of her income tax return.

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[24] *Mahdi v. The Queen*, 2018 TCC 149 at paras 60 and 61.
[25] *Bonhomme* at para. 1.
[26] *Bonhomme* at paras 12 and 84.
[27] *Bonhomme* at paras 12 and 84.
[28] *Bonhomme* at paras 54 and 55.

[66] The respondent also relies on *Brathwaite v. The Queen*.[29] In *Brathwaite*, the taxpayer did not know the tax preparer and relied on a recommendation her husband received from an acquaintance. Ms. Brathwaite accepted the tax preparer's statement that he had been an employee at the CRA, where he acquired special expertise in providing clients with the means to reduce their income tax burden by using what he described as "little-known techniques". In *Brathwaite*, the Court determined that there was a need for Ms. Brathwaite to make an inquiry, and this Court can only assume that the reference to "little-known techniques" was a "red flag". This Court does not believe that a "red flag" exists just because a tax preparer worked for the CRA and tells a taxpayer that he or she has a good or special understanding of the ITA. If a tax preparer mentions a "special process" or "little-known techniques", it could be a "red flag" depending on the circumstances, such as the level of sophistication of the taxpayer, but it will not always be a "red flag". In any event, in this case, the evidence is not that Mrs. Bowker was told by Mr. Bowker that DeMara used a "special process" or knew of "little-known techniques". The fact that Ms. Stancer used to work for the CRA could actually be perceived as the opposite of a "red flag" and more of a good thing; this fact could have provided a higher level of comfort to a taxpayer who was using DeMara's services for the first time.

Mrs. Bowker's conduct after the Amended Income Tax Return was filed

[67] The respondent submitted that a taxpayer's conduct after a return is filed can be used to find that the taxpayer had the requisite mental culpability at the time of filing, as required under subsection l63 (2) of the ITA. The Federal Court of Appeal has held that this is a proper use of such evidence.[30] While it might be possible to establish culpability in such a way, it all depends on the circumstances.

[68] In this case, counsel submitted that Mrs. Bowker's conduct after the Amended Income Tax Return was filed demonstrates a continued indifference and lack of responsibility towards her own tax affairs. Counsel submitted that "[a]fter receiving inquiries from the CRA and realizing that DeMara has filed the Amended Return containing false statements claiming hundreds of thousands of dollars in fictitious business losses, [Mrs. Bowker] testified that she continued to abdicate responsibility for her tax affairs to her husband and other individuals whom she did not even know and had never met or spoken to."[31] Counsel further submitted that "[s]he allegedly continued to sign documents without reading them or failed to make any effort to

[29] *Brathwaite v. The Queen*, 2016 TCC 29 [Brathwaite].
[30] *Mullen v. Canada*, 2013 FCA 101 at para. 7.
[31] Respondent's Memorandum of Fact and Law at para. 71.

understand their contents, [and that if] the Court finds this to be truthful, it is overwhelming evidence of a pattern of wilful blindness and gross negligence."[32]

[69] The Court disagrees with the conclusion drawn by counsel. While the evidence is that Mrs. Bowker continued to trust Mr. Bowker and his handling of her tax affairs, including the sending of several letters to the CRA on her behalf after she found out that DeMara had filed the Amended Income Tax Return, it does not prove that she was wilfully blind or grossly negligent at or before the time the Amended Income Tax Return was filed. The Court does not have enough evidence on the circumstances of her continued reliance on her husband or on the circumstances surrounding the preparation of the letters sent to the CRA after the Amended Income Tax Return was filed to make a determination on this issue.

VII. CONCLUSION

[70] The Court concludes, on a balance of probabilities, that Mrs. Bowker did not knowingly, or under circumstances amounting to gross negligence, make or participate in, assent to or acquiesce in the making of a false statement in her 2010 Amended Income Tax Return.

[71] Therefore, the Minister did not rightfully impose on Mrs. Bowker a gross negligence penalty of $139,032 in respect of her 2010 Amended Income Tax Return pursuant to subsection 163(2) of the ITA. As such, the gross negligence penalty is vacated.

[72] For all these reasons, the appeal is allowed, with costs.

Signed at Ottawa, Canada, this 2nd day of March 2021.

"Sylvain Ouimet"

Ouimet J.

[32] Respondent's Memorandum of Fact and Law at para. 71.

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