Docket: 2013-3259(IT)I

BETWEEN:

SEAN O'HAGAN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on January 19, 2023, at Windsor, Ontario

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	Eric Floryancic
Counsel for the Respondent:	Alexander Nguyen

AMENDED JUDGMENT

The Appellant's appeal of the November 15, 2011 assessment for the Appellant's 2009 taxation year pertaining to the assessed penalty per subsection 163(2) of the federal *Income Tax Act* is dismissed [deleted].

This Amended Judgment is issued in substitution of the Judgment dated May 2, 2023.

Signed at Ottawa, Canada, this 5th day of May 2023.

"B. Russell"

Russell J.

Citation: 2023 TCC 52
Date: May 2, 2023
Docket: 2013-3259(IT)I

BETWEEN:

SEAN O'HAGAN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Russell J.

I. Introduction:

[1] The appellant, Sean O'Hagan, appeals an assessed penalty of $25,286[1], raised November 15, 2011 per subsection 163(2) of the federal *Income Tax Act* (Act). A subsection 163(2) penalty is often referred to as a "gross negligence penalty".

II. Statutory Provision:

[2] Subsection 163(2) reads, in relevant part:

> 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 one half of the tax amount at issue]. (underlining added)

III. Evidence:

[1] All dollar amounts are expressed ab

[3] The Minister of National Revenue assessed this penalty because of a false statement in the appellant's 2009 income tax return, filed in May 2010. The false statement was that in 2009 the appellant, i.e. Mr. O'Hagan, had sustained a business loss of $214,176.

[4] The appellant acknowledges that that was a false statement. But he maintains that he did not, as subsection 163(2) specifies, "knowingly or under circumstances amounting to gross negligence" make, participate in, assent to or acquiesce in the making of that false statement. Thus he says that the subsection 163(2) penalty was wrongly assessed.

[5] The appellant testified as to his educational background, saying he had completed his secondary school education. Subsequently, by 2009 he had experienced a decade or more of manual employment including in house construction and factory work for a car manufacturer. His father, with assistance from him, had prepared his annual income tax returns. Hailstorms in southern Ontario in 2008 prompted commencement of the appellant's involvement in the business of vehicular "paintless dent repair". In mid-2009 he retained an accounting firm – G.L. Fraser and Associates – to prepare his 2009 tax return.

[6] The appellant testified also that in 2009 his friend Pierre recommended that the appellant consult another accounting firm, identified as DSC, that could "double check" his return. The appellant testified that he contacted DSC, and met with a DSC representative. He testified that he engaged DSC to "double check" his 2009 tax return that the Fraser accounting firm was to prepare.

[7] However, he ended up signing a 2009 tax return for himself prepared by DSC, dating it May 18, 2010.

[8] He testified that he was not aware that what he was signing was a tax return.

[9] In the DSC prepared tax rerun that he signed and was filed accordingly, the term "per:" appears immediately before his signature (which he acknowledged was his) on page 4 of the DSC prepared tax return. But he did not know why that was there. He did not ask anyone. Also the nearby box in the tax return, for "professional tax preparers only" identification, had been left blank.

[10] On page 2 of the return, "gross business income" is shown as $42,074 and "net business income" is relatively prominently shown as a negative six figure amount being, "-214,176".

[11] On page 3 of the return, "total income" is shown as a negative amount of "-213,628"; also "net income" is shown as "NIL"; and also "taxable income" is shown as "NIL". On page 4 above the appellant's signature, "Total payable" and "Balance owing" are both shown as "NIL".

[12] Above the appellant's signature appears the printed statement: "I certify that the information given on this return, and in any documents, attached is correct, complete, and fully discloses all my income." Immediately below the appellant's signature is the printed statement: "It is a serious offence to make a false return."

[13] Additionally, as part of the tax return is a completed CRA form entitled, "Statement of Business or Professional Activities" showing that the appellant's "Receipts as Agent" were said to be "$42,074", with expenses stated as being "$256,250.30", yielding a net loss of a negative amount, being "-214,176.10".

[14] Also, attached as the final part of the entire tax return is a completed CRA form entitled "Request for Loss Carryback". The appellant signed this too, with the form indicating a requested non-capital loss of $48,184 to be applied to his 2006 year; and a non-capital loss of $80,647 to be applied to his 2007 year; and a non-capital loss of $88,297 to be applied to his 2008 year. The appellant signed this document in the signature box on its second of two pages, together with hand-written date of May 18, 2010. Immediately above the appellant's signature is the printed statement: "Certification. I certify that the information given on this form is correct and complete."

[15] The appellant mailed this signed return including the signed request for loss Carryback back to DSC for filing. He made no enquiries of DSC as to anything about it.

[16] As noted the appellant submits that he was unaware that what he had signed from DSC was a 2009 tax return and also the accompanying Request for Loss Carryback form. He testified that DSC was only supposed to double check the return that the Fraser accounting firm was preparing. I do not accept either of these statements as true, as noted below.

[17] As well, he testified that he was working in Alberta during much of 2010 doing hail damage work, and he was not aware of CRA mail sent to his Ontario home address (the only address CRA had for him) including a letter dated November 2, 2010 from CRA auditor Ms. Sawatsky (who also testified), which included a

questionnaire for him to complete, to give more information as to the very large business loss reported in his filed 2009 return.

[18] The questionnaire was never completed. The letter was not responded to. The appellant's parents, with whom he lived in Ontario, forwarded mail to him in Alberta in 2010 but he says he never saw any mail addressed to him from CRA. He also testified that he was stressed and his life was in "chaos" with all the hail damage work he was doing in Alberta and moving from hotel to hotel in doing so.

[19] A second return for the appellant's 2009 year, this one prepared by the Fraser accounting firm, signed by the appellant and dated April 11, 2011, i.e. two years later, was filed at or shortly after that date, then revising the previously claimed business loss, to report instead net business income of $16,141.

[20] This prompted a proposal letter from CRA auditor Ms. Sawatsky, dated July 26, 201l, proposing that the year be assessed as per the second return but with a subsection 163(2) penalty in light of the false statements in the initial return.

[21] The appellant was assessed accordingly on November 15, 2011 as had been proposed, which assessment included the herein appealed penalty.

[22] On January 6, 2012, CRA received a single page notice of objection regarding the said assessment, apparently prepared by DSC and signed by the appellant. It refers to the appellant as the "cestui que trust" and cites the *Income Tax War Act*, *1917*, and makes other irrelevant and non-specific references. The appellant testified that he signed it without reading it, or asking anyone what it means. He agreed that that was similar to what he had done with the DSC return.

IV. Parties' Positions:

[23] The onus is on the respondent Crown to establish that the appealed penalty assessment is proper. The respondent points to the facts that the appellant signed the 2009 return and as well the accompanying Request for Loss Carryback form, both prepared by DSC, without review of either.

[24] The respondent also cites the substantial quantum of the claimed loss for carryback to earlier taxation years, being over $200,000, and based on fictional 2009 expenses exceeding $250,000. The respondent submits that the appellant was wilfully blind to the false statements in the DSC prepared return. In this regard there were various circumstances that indicated the need for further enquiry before filing.

[25] Appellant's counsel asserts that his client did not recognize that he was signing a tax return when he signed the DSC prepared return that contained the false statement. As well, there is not evidence of wilful blindness as he did not know he was signing a return. He expected the Fraser prepared return to be filed. He said his client put blind faith in the tax advisers, referring to DSC. Counsel said that that is "dumb" and "negligent", but "blind faith is not in itself grossly negligent." Gross negligence requires a high degree of negligence.

V. Legal Principles:

[26] What legal principles guide the application of subsection 163(2)? In 2017, the Federal Court of Appeal (FCA) in *Wynter v. R.*[2] stated that "knowledge" and "gross negligence" in subsection 163(2) are not conjunctive, and that the respondent need only prove one to impose gross negligence penalties.

[27] Also, in *Wynter*, the FCA stated, referencing wilful blindness:[3]

> There is no question that, while conceptually different, gross negligence and wilful blindness may merge to some extent in their application. A taxpayer who turns a blind eye to the truth and accuracy of statements made in their income tax return is wilfully blind, and is also grossly negligent. (underlining added)

[28] The classic description of gross negligence for a tax penalty is found in the 1984 Federal Court Trial Division decision of *Venne v. R.*[4] by Strayer J. as he then was. It was approved by the Supreme Court of Canada in *Guindon v. Canada*[5] as follows:

> '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, and indifference as to whether the law is complied with or not.

[29] Also, factors that a court may consider in determining whether a taxpayer was grossly negligent include but are not limited to, the magnitude of the omission, the opportunity the taxpayer had to detect the error, the taxpayer's education and intelligence, and a genuine effort to comply.[6]

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[2] *Wynter v R.*, 2017 FCA 195, para. 11
[3] *Wynter*, para. 20
[4] *Venne v. R.*,1984 CarswellNat 210 (FCTD)
[5] *Guindon v. Canada*, 2015 SCC 41, para. 60
[6] *Gray v. R.*, 2016 TCC 54

[30] Further, a taxpayer's general knowledge of business and tax matters is relevant when determining the requisite degree of negligence.[7]

[31] In *Torres v. R.*[8], C. Miller J. of this Court discussed wilful blindness in respect of subsection 163(2) penalties. He accepted that wilful blindness can impute knowledge as well as constitute gross negligence. He identified various "warning signs" that indicate a need or a suspicion for an enquiry, including:

> a. "magnitude of the advantage". In the present case the magnitude of the sought advantage is substantial, being a full refund for the 2009 taxation year plus loss carryback requests for three previous years totalling $217,128;
>
> b. "blatantness of false statement - readily detectable". Here the readily detectable false statements in the filed tax return were the $256,250 business expense claim and the claimed business loss of $214,176, both readily detectable;
>
> c. "tax preparer does not acknowledge preparing return". Here the DSC tax preparer did not self-identify in the space provided in the tax return for doing so, which space was adjacent to the space for the taxpayer's signature;
>
> d. "tax preparer makes unusual requests". The DSC tax preparer requested the appellant to obtain copies of returns for several prior years, which he did, stating his belief that these were for the tax preparer to also "double check". This is not a usual request;
>
> e. "tax preparer previously unknown to taxpayer". It is surely the case here that the DSC tax preparer was previously unknown to the appellant;
>
> f. "explanation by tax preparer regarding false statement is incomprehensible". That is consistent with the appellant's admission in his Notice of Appeal, para. (c) that he "did not understand the technical filing position taken by the tax return preparers".

[32] In *Bhatti v. R.*[9], which preceded *Torres*, Justice Miller, in addressing whether an assessment of a subsection 163(2) penalty was well founded, wrote:

> It is simply insufficient to say I did not review my returns. Blindly entrusting your affairs to another without even a minimal amount of verifying the correctness of the return goes beyond carelessness. So, even if [the taxpayer] did not knowingly

[7] *Venne, supra*
[8] *Torres v. R.*, 2013 TCC 380
[9] *Bhatti v. R.*, 2013 TCC 143, para. 30

> make a false omission, [the taxpayer] certainly displayed the cavalier attitude of not caring one way or the other. (underlining added)

[33] In *Paul Lauzon v. Her Majesty*, 2016 FCA 298, the FCA addressed whether a subsection 163(2) penalty was appropriate where false business losses had been claimed. In this matter a deduction of $308,073 was claimed, with a loss carryback request that would have allowed for refund of the taxpayer's entire tax for the years 2005 to 2008. The losses claimed were totally fictitious, having been made up by the tax return preparer from Fiscal Arbitrators.

[34] The FCA dismissed the appeal, upholding the Tax Court's denial of the appeal. In so doing the FCA referenced para. 4 of its decision in *Strachan v. R.*[10], as to the legal test for determining gross negligence in respect of subsection 163(2) penalties:

> Gross negligence may be established, where a taxpayer is wilfully blind to the relevant facts, in circumstances where the taxpayer becomes aware of the need for some inquiry, but declines to make the inquiry because the taxpayer does not want to know the truth…

[35] In *Nesbitt v. Her Majesty*[11], the FCA per Strayer J.A. observed that, "[w]hether or not there is misrepresentation through neglect or carelessness in the completion of a return is determinable at the time the return is filed."

[36] In my view this logic applies equally to false statements or omissions within the meaning of subsection 163(2) of the Act. That is, whether such false statements or omissions in a return justify a subsection 163(2) penalty is determinable at the time the return is filed.

[37] Accordingly, I do not consider evidence heard that post-dates the filing of the 2009 return containing the false statement is of relevance to the matter of whether or not the herein appealed penalty was properly assessed.

VI. Analysis:

[38] Upon consideration of the above cited evidence and jurisprudence I have concluded that this appeal should be dismissed.

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[10] *Strachan v. R.*, 2015 FCA 60
[11] *Nesbitt v. R.*, A-54-96, para. 8

[39] The appellant admits he signed both the DSC return and the accompanying Request for Loss Carryback form without reviewing same before signing. As well, this was despite the printed caution within the signature box for these forms that the signature certifies the truth of the information in the document.

[40] Also, there was no suitable explanation for why the return 2009 taxation year prepared by the Fraser accounting firm was not signed and filed, as opposed to the DSC return. Additionally, there was no explanation for why, if DSC had been engaged to "double check" any Fraser accounting firm prepared returns, the appellant instead signed a return prepared by DSC.

[41] Also, I do not accept appellant's counsel's submission that the appellant was unaware that he was signing a tax return, when he signed the tax return that DSC had prepared, together with the accompanying Request for Loss Carryback form. The appellant had full secondary school education. Also, he had been out in the working world for at least a decade or more by early 2010 when he was readying to file his 2009 return.

[42] Also, I do not accept the appellant's testimony that DSC said it would simply "double check" the Fraser firm's return prepared for the appellant. I believe the appellant did have discussion with DSC about obtaining a tax refund and that DSC would prepare the return to be filed, as was in fact done. DSC would not have prepared a tax return that the appellant readily signed if otherwise.

[43] In fact, in the appellant's Notice of Appeal at para. (c), it is pleaded (which could be taken as admissions), that "[t]he tax preparers represented that they had a tax plan that would result in refunds [sic] for the 2009 taxation year." And, as additionally pleaded, "[t]he tax return preparers sent two documents to the Appellant. The Appellant signed and returned the two documents to the tax return preparers. The tax return preparers filed the Appellant's 2009 tax return."

[44] In my view that is what happened here.

[45] These factors apply in this case. Any let alone all should have prompted the appellant to enquire regarding the tax documents he was being asked to sign, which he should have done in any event. However, by his own admission the appellant simply signed the documents without any review, or any enquiry made to the DSC tax return preparers.

[46] The presence of the various red flags identified in *Torres* substantially contributes to the degree of negligence inherent in making the false statement that in 2009 the appellant had incurred a business loss of $214,176. The appellant would readily know this was not the case. He actually had a net business income of $16,141 as subsequently reported two years later upon the filing of the Fraser firm's prepared return for 2009.

[47] The above-noted *Torres* factors each signal a need for the appellant to first review the prepared tax return and related Request for Loss Carryback, to ensure their correctness, rather than signing the two documents without any review. Nevertheless, the appellant made no effort, however cursory, to verify the accuracy and completeness of his return before singing same,

[48] The appellant's complete failure to review or inquire, in the presence of these several *Torres* factors signaling the need for review or inquiry, constitutes in my view wilful blindness well sufficient to establish gross negligence for subsection 163(2) purposes. Of note, our tax system in Canada is based on accurate self-reporting and self-assessing.

VII. Conclusion:

[49] I conclude that the subject subsection 163(2) penalty was rightly assessed. Gross negligence through wilful blindness is here established where the taxpayer has signed the prepared tax return without any effort at all to first look over the return.

[50] Factors that aggravate this situation are that the appellant is reasonably well educated and had business experience. As well, this was the first time the appellant had engaged DSC. Also, DSC did not self-identify in the return as the tax preparer, notwithstanding the box for doing so, adjacent to the taxpayer's signature box, where the appellant signed. Yet this prompted no enquiry from the appellant.

[51] The appellant claimed he did not recognize that he was signing a tax return. As stated above, this I disbelieve. The appellant has on multiple occasions over the years, as a reasonably educated and business experienced adult, signed his own tax returns. Surely someone who has completed secondary school education can identify a tax return. And if truly he did not know what it was, would not that have been all the more reason to look more closely at the document to determine what the document was (which also may have led him to the several false statements therein).

[52] I conclude that the appellant, under circumstances of wilful blindness amounting to gross negligence, made or acquiesced in the making of a false statement in a return. Accordingly, this appeal of the assessed subsection 163(2) penalty will be dismissed.

Signed at Ottawa, Canada, this 2nd day of May 2023.

"B. Russell"

Russell J.

CITATION:	2023 TCC 52
COURT FILE NO.:	2013-3259(IT)I
STYLE OF CAUSE:	SEAN O'HAGAN AND HIS MAJESTY THE KING
PLACE OF HEARING:	Windsor, Ontario
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