Docket: 2020-854(IT)G

BETWEEN:

MOSTAFA ABBASS,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on May 8, 9 and 18, 2023, at Montréal, Québec

Before: The Honourable Justice Jean Marc Gagnon

Appearances:

Counsel for the Appellant:	Hong Ky (Eric) Luu
Counsel for the Respondent:	Noémie Vespignani Alnashir Tharani

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JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal made in respect of the Notice of Reassessment dated November 27, 2017, for the 2010 taxation year, is hereby allowed, with costs.

Signed at Ottawa, Canada, this 29th day of December 2023.

"J.M. Gagnon"

Gagnon J.

Citation: 2023 TCC 169
Date: 20231229
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REASONS FOR JUDGMENT

Gagnon J.

I. Introduction

[1] This is an appeal by Mr. Mostafa Abbass from a reassessment made by notice dated November 27, 2017, under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended (**Act**) in respect of his taxation year ending December 31, 2010. In reassessing the Appellant for that year beyond the normal reassessment period under subsection 152(4) of the Act, the Minister of National Revenue (**Minister**) increased the Appellant's income by an amount of $92,522 and imposed gross negligence penalties under subsection 163(2) of the Act.

[2] Initially, the Minister conducted an audit of the Appellant's corporation, 9200-5164 Québec Inc. (**Corporation**), for its taxation years ending August 31, 2013, and 2014. During the audit, a decision was made by the Minister to expand the audit to include the Appellant personally due to, in the Minister's view, discrepancy between the declared income by the Appellant in 2010 and the Corporation and cash flows that the Corporation realized, and entries noticed by the Minister on line 2780 of Schedule 100 of the Corporation's T2 income tax return for its taxation year ending August 31, 2010. Schedule 100 is a prescribed form completed the corporate taxpayer showing balance sheet information as assets, liabilities, shareholder equity and retained earnings/deficit. Under liabilities, line 2780 of such form shows due to shareholders and directors by the corporate taxpayer, and other lines show other liability items. According to the Minister, the

Appellant failed to include additional income totalling $92,522 in his income tax return filed in respect of his 2010 taxation year. This discrepancy led to the reassessment under appeal.

[3] During the relevant period, the Corporation carried on a small/mid-size retail grocery store (**Grocery Store**) offering day-to-day products and products from the Middle East. Since its inception in August 2008, the Appellant was the Corporation's sole shareholder, director and officer.

[4] During the period under audit, and considering the limited knowledge of the Appellant with respect to financial and tax obligations, the Appellant was assisted by Mr. Mohy Ghandour (**Accountant**). He was the Appellant's and the Corporation's external accountant for a period including from 2008 until about 2016. The services performed by the Accountant included the completion and filing of the Corporation's prescribed income and sales tax forms and returns, and the Appellant's income tax returns.

II. Issues in dispute

[5] There are three main issues that could have to be decided in this appeal:

1. whether the Minister is statute barred from reassessing the Appellant under paragraph 152(4)(a) of the Act; which in essence requires the Court to decide whether the Appellant made a misrepresentation in filing his 2010 tax return attributable to neglect, carelessness or willful default;

2. if so, whether the Minister is justified to reassess the Appellant and include the amount of $92,522 in his 2010 taxation year;

3. if so, whether the Minister is justified to apply the penalty pursuant to subsection 163(2) of the Act.

[6] Although the first issue will be addressed first, the determination of the second issue is relevant and crucial to the determination of the first, particularly in determining whether there has been a misrepresentation in filing the Appellant's 2010 tax return, which is alleged to be the undeclared income of the Appellant for that year. Accordingly, I will address the undeclared income issue at the time and in the context of determining whether there has been a misrepresentation and if so, deal

with the issue of whether the same would amount to neglect, carelessness or wilful default afterwards.

III. Position of the Parties

[7] The Appellant argued that he did not earn an undeclared income of $92,522 in 2010, and neither would he have made a $92,522 loan to the Corporation in 2010. Moreover, he did not withdraw $82,219 from the Corporation in 2013.

[8] The Appellant adds that he did not make a misrepresentation that is attributable to neglect, carelessness or wilful default and did not commit fraud. The Appellant is of the view that pointing to a number on a balance sheet is not sufficient for the Respondent to meet the Respondent's burden. No evidence supports that the Appellant made a loan to the Corporation in 2010. Supposition and conjuncture are not sufficient. Therefore, the Respondent is foreclosed from reassessing the Appellant's 2010 taxation year.

[9] In any event, the Appellant did not knowingly, or under circumstances amounting to gross negligence, make a false statement in his 2010 income tax return.

[10] The Respondent relies on subsections 9(1), 152(4) and 163(2) of the Act to reassess the Appellant 2010 taxation year. The Appellant was aware of his responsibilities, well experienced and has retained a professional to assist him with his legal and tax obligations. The Respondent is of the view that the reassessment is valid as the Appellant made a misrepresentation attributable to neglect and/or carelessness. The Respondent is the view that he satisfied his burden under paragraph 152(4)(a) of the Act. The situation also justifies the inclusion of $92,522 in the Appellant's income for his 2010 taxation year. And as for subsection 152(4), the Respondent has established the conditions of subsection 163(2) of the Act.

IV. Facts

[11] The Appellant is 64 years old. He was born in Irak. He has the equivalent of a primary grade 5 education. During his adult life in Irak, he was working as a manual worker in the mining and industrial sector.

[12] The Appellant came to Canada in 1993 with his wife. They had three children in Canada. Having established residence in the Province of Québec, the Appellant took French lessons and received social welfare benefits. The Appellant did not have much success learning French or English. He estimates his level of French and

English at about 5% (both oral and written). The level of comprehension is also very low. The years following his arrival in Canada have not been beneficial in this regard either. The Court has experienced the Appellant's level of comprehension and the need for translation throughout the three-day hearing of the appeal.

[13] The Appellant had serious challenges to find work due to language barriers. Initially, he worked in farms situated on the Montréal south shore as a manual worker; he then worked in a restaurant making pizzas. Upon arrival in Canada, he relied on his wife for driving their car, and still today. Communications in French and in English remain a challenge even today.

[14] The Appellant did not attend school in Québec other than for the French lesson when he immigrated to Canada in 1993.

[15] At the relevant time, his children going to school in Québec, The Appellant relied and still rely on them to communicate with the authorities and the external world, including with paperwork and government documentation. This is particularly true for his oldest daughter since she was old enough to interact with others and translate communications (oral and written) to his father. However, at her young age, dealing with adults' obligations was not necessarily intuitive. When possible or where he considers it necessary, he relied on professionals to assist him.

[16] In or around 2005, the Appellant became interested in operating a small grocery store selling basic dairy products, and local ingredients including rice, meat, nuts, juices, water. Originally, he received assistance from Mr. Sadek Hussein who invested in the project. Mr. Hussein made a cash contribution and the Appellant was operating the grocery store. Mr. Hussein was also responsible for administrative and other legal and financial obligations. During the project with Mr. Hussein, the Appellant received a salary.

[17] In or about 2008, Mr. Hussain ceased to be involved. The Appellant incorporated the Corporation to pursue the Grocery Store operations. The Appellant was at all relevant times the sole shareholder, officer and director of the Corporation. The Court does not have details about the arrangements that took place between Mr. Hussein and the Appellant at that time.

[18] The Appellant had only one full-time employee with him (also an employee) to work in the Grocery Store. His son Mohamad Abbass (**Son**) also worked part-time after school hours stocking shelves with products.

[19] The Accountant, who had already been retained by Mr. Hussein in connection with the operations of the first grocery store, continued the same work with the Corporation and the Appellant. In summary, the Accountant prepared *inter alia* for the Corporation the financial statements, the income tax returns, the annual prescribed tax slips, the annual corporate filings, the instalment remittances and the Good and Services/Québec Sales Tax filing forms, and for the Appellant his income tax returns.

[20] In 2010, the Corporation moved the Grocery Store to another location due to financial constraints.

[21] Generally, the Appellant forwarded documents to the Accountant on a regular basis, including grocery store invoices, sales, purchases, mail received from the authorities. If he did not have someone to do it, the Appellant asked his employee who lived in the area to forward the documents on his return from work.

[22] Once a year, the Accountant came to visit the Appellant at the Grocery Store to ask him to sign annual forms, tax returns and tax forms that needed to be filed by the Corporation and the Appellant personally.

[23] The Canada Revenue Agency (**CRA**) conducted an income tax audit of the Corporation's taxation years ended August 31, 2013, and August 31, 2014 (**Audited Taxation Years**).

[24] The Court notes that the Corporation's CRA Income Tax Audit Report (**Corporation Audit Report**) was drafted and signed by Ms. Sisi Dun, although Ms. Sin Va Chau conducted the audit. Ms. Chau left the Audit Division after having presented the reassessment proposal to the Appellant and his daughter Fatima Abbass (**Daughter**).

[25] On pages 1 and 3 of the Corporation Audit Report, the CRA confirms a language barrier with the Appellant and the fact that he does not speak English or French. The CRA also confirms the need to translate to him all interactions at meetings and that he first assigned his daughter to represent him for the file. During these meetings, the CRA confirms that the Accountant initially accompanied the Appellant, or later by his Daughter with occasionally, the Appellant's representative at the time.

[26] The Corporation Audit Report confirms that the Corporation's audit was general and the Corporation's operations ceased in 2014. The CRA examined the

limited books and records obtained throughout the audit, including bank statements and partial invoices for the expenses claimed. Other documents were obtained through formal requirements.

[27] The CRA examined personal and corporate bank statements and tax returns, partial corporate invoices, personal credit cards statements and personal mortgage statement.

[28] In order to provide reasonable assurance that all income was declared by the Appellant the CRA conducted regarding the Appellant personally a rough net worth of the Appellant including his assets and liabilities, a withdrawal analysis, a credit cards examination, and a bank deposit test.

[29] In considering a rough net worth, the CRA referred to the cost of living analysis provided by the Appellant compared to the total available income of the household ($42,261 for 2013 and $49,575 for 2014) being reasonable and comparable with the average cost of living establish by Statistic Canada of $59,771 for 2013 and $60,762 for 2014. The CRA did not identify significant household assets and liabilities and the total household expenditures were considered reasonable based on the available income calculated for the household.

[30] After having completed the above review and analysis, the CRA concluded that a net worth assessment was not a relevant method applicable in the present case. Moreover, the CRA confirms that a bank deposit test for the Appellant did not identify any undeclared income and therefore the unidentified bank deposit analysis is not used as the IVI method for assessing revenue. The salary of the Appellant was paid in cash and not always deposited in his bank account. Therefore, this aspect was further analyzed and assessed in the bank deposit analysis for the Corporation.

[31] The bank deposit analysis for the Corporation and corporate expenses paid cash were used to assess the undeclared revenue for the Corporation. This situation resulted in assessing net undeclared revenue/sales for the Corporation of $32,712 in 2013 and $17,607 in 2014, plus a penalty on such undeclared amounts. The cost of living calculated for the household according to Statistic Canada was removed from the bank deposit analysis for the Corporation.

[32] The same date as for the Corporation Audit Report, a CRA Income Tax Audit Report (**Appellant Audit Report**), a CRA Assessment after Normal Reassessment Period Recommendation Report (**Appellant Reassessment Report**) and a CRA Penalty Recommendation Report (**Appellant Penalty Report**) was signed in respect

of the Appellant's personal 2010 taxation year. All reports were signed and drafted by the same auditor Ms. Sisi Dun under the same circumstances described in paragraph 24 above.

[33] To justify the Appellant Audit Report to include a variation in the due to shareholder account in Schedule 100 of the Corporation income tax return, the CRA affirms in the report that the result of the Corporation's audit indicates that the Appellant personally advanced to the Corporation $92,522 in 2010 and according to the Corporation's financial statements, the Appellant withdrew from this account a total of $82,219 in 2013.

[34] The CRA adds that considering the Appellant could not provide any explanations for this advance and based on his filling history, he did not have the financial capacity to make this loan, and as a result, the total amount ($92,522) is included as an undeclared income for the Appellant for 2010. The Minister based the reassessment for the undeclared income on section 3 and subsection 9(1) of the Act.

[35] The Appellant Audit Report confirms that the Appellant's representative, at a meeting on May 25, 2017, declared that the Appellant did not remember contributing $90,000 to the Corporation in 2010.

[36] In addition, the CRA states in the Appellant Audit Report that the Appellant could not provide any documentation for the advanced of $92,522 in 2010 and the withdrawal of $82,219 in 2013. The report also confirms CRA's view that the total withdrawal of $82,219 was not identified from the Corporation bank account and was not deposited in the Appellant's personal bank account.

[37] The CRA adds that the fact that the $82,219 reimbursement of the advance in 2013 could not be identified in the bank account has no bearing on whether the initial injunction of money made to the Corporation in 2010 is undeclared income. The CRA is of the view that based on the financial statements; they can reasonably conclude that the Appellant made the advance.

[38] Following the Appellant's representations, the Appellant Audit Report confirms that they do not base the undeclared revenue analysis on the estimated cost of living for the household. As mentioned in the Corporation Audit Report, the CRA concluded that the available income for the household is relatively reasonable to support the Appellant's family lifestyle.

[39] This was the sole reason for opening the Appellant's 2010 taxation year.

[40] The Appellant's 2010 taxation year was a statute barred year since May 27, 2014, and no waiver was obtained by the CRA. The Appellant Audit Report affirms that the facts gathered from the audit indicated that there were misrepresentations attributable to neglect and carelessness for purposes of subparagraph 152(4)(a)(i) of the Act. In addition, the CRA was of the view that the Appellant was grossly negligent and may even have intentionally disguised the information with regards to the source of the loan made to the Corporation to understate the income reported in his personal income tax return. On that basis, the CRA added the penalty under subsection 163(2) of the Act.

[41] The Appellant Audit Report confirms that the CRA believes having met its burden to reopen the 2010 statute barred year. To support this position, the CRA states that:

> The amount shows in the due to shareholder (shareholder loan) account, therefore implying the funds in fact came from the shareholder. Moreover, the sum reflected in due to shareholder account allowed the taxpayer to take money from the corporation tax-free. The taxpayer's declared income history does not demonstrate the capacity to advance this amount which leads us to believe the funds advanced were undeclared.

[42] The Appellant Audit Report did not identify other services being offered or rendered by the Appellant other than as employee of the Corporation.

[43] The Appellant Reassessment Report appears almost identical to the Appellant Penalty Report. Except for 3 lines (out of 4) in the conclusion section, the reports contain the same comments and the same paragraphs, even the same reference to knowingly and gross negligence although not relevant for subsection 152(4) purposes.

[44] The substance of both reports is largely reflected in the Appellant Audit Report. The Court adds the following information from the reports:

> a. During the audit period, the Appellant is the sole shareholder of the Corporation and an employee of the Corporation responsible for the business operation of the Corporation. The reports do not relate the Appellant to any other source of income.
>
> b. Considering the loan is very material compared to the Appellant's total income (he declared from 2008 to 2016, on average, an annual total income of $17,000), it is unlikely that he does not remember any details with regards to the advance of

such a large amount of money to the Corporation and the $82,219 withdrawal in 2013. It would seem that the Appellant has intentionally disguised the source of the loan or at least was grossly negligent in handling his business records.

c. The likelihood that the loan was recorded as an error is very low since there is an important variation in this account in 2013, a total amount of $82,291 was withdrawn and was also recorded in the financial statement.

d. The Corporation retained the services of an accountant for the bookkeeping and filing of tax returns. It indicates that the Corporation had the resources to adequately maintain its books and records.

e. The Appellant is a knowledgeable businessman with many years of experience in the food industry.

f. The variation in the Corporation's due to shareholders' account confirmed that the Appellant understood the operation of this account.

g. Considering that an accountant was hired for both business and personal, this supports that the Appellant was aware of the importance of fully grasping transactions made between himself and the Corporation. Therefore, it is reasonable to conclude that it is unlikely that the personal loan of $92,522 recorded in the Corporation was an error and that the Appellant had intentionally disguised the source of income of the loan to understate his declared income for 2010.

[45] In determining the Appellant's tax liability for the year at issue, the Minister made the following assumptions of fact:

a. The Appellant is the sole shareholder of the Corporation, which operates a mini-market known as Marché Sadek.

b. The Appellant is also an employee of the Corporation, responsible for its business operations.

c. Between 2008 and 2010, the Appellant reported taxable income in the amount of $15,724, $15,927 and $20,400 respectively.

d. In 2010, the Appellant advanced an amount of $92,522 to the Corporation.

e. In 2013, the Corporation partially reimbursed the Appellant his shareholder advance by an amount of $82,219.

[46] In determining that the Appellant made a misrepresentation attributable to neglect, carelessness or willful default in filing his tax return for the 2010 taxation year, the Minister relied on the following facts:

a. The facts contained at paragraph 11 of the present Reply.

b. The Appellant is an experienced and knowledgeable businessperson.

c. The amount of unreported income is significant in comparison with the Appellants reported income for the year at issue.

d. The Appellant retained the services of an accountant for the preparation of the Corporation's financial statements and to maintain its books and records.

e. The Appellant retained the services of the same accountant for his personal matters.

[47] Finally, in determining that the Appellant was liable to a penalty pursuant to subsection 163(2) of the ITA for the 2010 taxation year, the Minister relied on the facts contained at paragraphs 11 and 12 of the Reply.

V. Analysis

law

[48] Subsection 152(3.1) of the Act sets out the normal periods for reassessing. I do not believe that there is any dispute that the reassessment under appeal was made outside such normal assessment period so it is not necessary to delve into the detail of such provision.

[49] Subsection 152(4) of the Act is a provision that allows the Minister to reassess a taxpayer's return outside the normal assessment period and the part relevant to this appeal reads as follows:

> (4) Assessment and reassessment. The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom in a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (a)The taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

> (ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;
>
> [underlining added]

[50] No fraud is alleged by the Respondent. And there is no waiver filed with the Minister.

[51] The purpose of a statutory limitation period is to give some certainty to the tax system. In the *Tingley* [1] decision, the Tax Court mentions about the normal assessment period:

> The very purpose of the limitation period is to provide a window during which the Minister may review and make such reassessment and yet provide the taxpayer who has not made misrepresentations some certainty in their tax affairs.

[52] Clearly, the goal of certainty expressed above is dependent on the taxpayer not having made any misrepresentations. Where a misrepresentation is made, subsection 152(4) of the Act allows the Minister to reassess beyond the normal assessment period. However, such provision has limits. About lost opportunities to collect taxes, in *Regina Shoppers* [2], the Federal Court of Appeal states:

> The mere fact that a taxpayer may ultimately benefit from a failure of the taxing authority to properly reassess obviously does not constitute authority for reassessment which is not found in the legislation itself. There is no rule of equity or of common law which may somehow assist the taxing authority to obtain revenue which it has lost solely and entirely through its own negligence or failure to exercise the powers granted to it by the Act.

[53] Therefore, if the Minister can support that the conditions of paragraph 152(4)(a) of the Act are satisfied, this will mean that the Minister has the legislative authority to pursue the lost revenue. In *Jencik* [3], Bonner J stated this premise clearly:

> The Minister's right to reassess for 1994 to 1998 [the "statute barred years"] was therefore dependent on the Appellant having made misrepresentations attributable to neglect, carelessness or wilful default or having committed fraud as set out in subparagraph 152(4)(a)(i) of the Act.

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[1] *Tingley v R*, 1998 CanLII 31446 (TCC) [*Tingley*].
[2] *Canada v Regina Shoppers Mall Ltd.*, 1991 CanLII 13935 (FCA) [*Regina Shoppers*].
[3] *Jencik v The Queen*, 2004 TCC 295 [*Jencik*].

[54] In *DiCosmo* [4], the Federal Court of Appeal stated that the issue of whether an assessment is statute-barred must be specifically pleaded in order to ensure fairness and to permit all evidence to be put before the Court. In that decision, the Court upheld the decision of Woods J, who had declined to consider the issue of whether an assessment was statute-barred because the issue was not raised in the Notice of Appeal. Woods J made the following comments:

> … Taxpayers are required by the applicable Rules of the Court to state in their notices of appeal basic information as to the appeal, including the issues to be decided. Fairness dictates that the Crown can rely on these statements. In Mr. DiCosmo's notice of appeal, he states the issues to be decided and the statute bar issue is not among them. Accordingly, the Crown properly led no evidence on this point. It would be unfair to the Crown to have the Court considers this issue and I decline to do so.

[55] In the case at bar, the Appellant in the Further Amended Notice of Appeal raised subsection 152(4) and therefore, that subsection was at issue. In addition, the Respondent filed subsequently a Reply to the Further Amended Notice of Appeal and also raised subsection 152(4) as an issue to be decided by this Court.

[56] Therefore, the statute-bar issue is properly before the Court and will be addressed.

testimonial evidence

[57] At the hearing, Mr. Abbass, his Daughter, his Son and the Accountant testified, as did the CRA former auditor, Ms. Chau, who conducted the audit of the Appellant's 2010 taxation year.

Daughter & Son

[58] The Daughter was 16 in 2010 and the Son was 12.

[59] The Daughter and Son testified to essentially the same effect as to the family's origins, the parents' education, the living environment, and the challenges associated with the social environment, multicultural integration and the labour market. The perception of the financial environment in which the family lived was also the same for both children. Financial resources were limited and the children, now adults, left

[4] *DiCosmo v Canada*, 2017 FCA 60 [*DiCosmo*].

no impression of comfort during the relevant years. Any money the children could get by way of scholarships or otherwise was essentially for their parents.

[60] Both confirmed that they were unable to believe that their father could have enjoyed such a large amount as the income inclusion under appeal. Such a sum is simply not consistent with their perception of the situation in the relevant years.

[61] I find the children's testimony credible, nor was the Respondent able to attack their credibility, although with respect to the transactions that may have led to the reassessment under appeal the children had little if any involvement. Their involvement at this level was more apparent when the CRA proposed the reassessment against the Appellant.

Accountant

[62] During the relevant years, the Accountant confirmed being responsible for accounts reconciliation, remittances to the tax authorities and preparation of tax returns for the Corporation and the Appellant. He received the information from the Appellant and completed the filings accordingly.

[63] The Accountant's explanations boil down to an error he made when preparing the Corporation’s 2010 income tax return, which was repeated in subsequent years. According to him, the error is in Schedule 100 of the Corporation’s income tax return, for several years starting in 2010 and for the same reason. The accounting entry was a mischaracterization and involved amounts due to inventory suppliers at the end of the year. Consequently, it did not concern the Appellant. Line 2780 described as a due to shareholder(s)/director(s) was not the correct line to report the entry. The correct line should have been line 3140 (long-term debt). The entry in 2013 was not a payment made to the Appellant. It is simply a matter of poorly executed entries which could lead one to believe, when clear explanations are not adduced, that a benefit had been granted. He did not reflect the entry in the correct line. We do not know whether the Corporation's balance sheet was prepared in the same way as Schedule 100.

[64] In cross-examination, the Accountant confirmed not having discussed with the Appellant since, he believes, 2017 and he did not speak with the Appellant’s counsel prior to his testimony except to schedule his day in court. The cross-examination did not show that it was not an error or that an amount had been received by the Appellant as a result of the error. The Accountant denied that he was following the Appellant's instructions or that the Appellant who had informed him

of the error and how it should be rectified. He clearly stated that he only realized the error after he had been informed of the audit and the issue raised by the CRA. He prepared the documents on the basis of the information and documents he receives in support of the entries to justify the entries, the error is his. The Appellant did not point out the error to him, did not tell him what to do or what to say.

[65] The Accountant confines himself to briefly reviewing the filing documents when meeting with the Appellant. He testified that the Appellant is not in a position to read or comment on the documents. The Appellant is entirely dependent on him and it would almost be a waste of time to try to enter to details. The Accountant only addressed with the Appellant whether a balance is payable or whether a refund will be received.

[66] The testimony of the Accountant showed certainly some weaknesses. However, after careful consideration, I conclude that the Accountant's testimony is credible. I believe that on several occasions he demonstrated sincerity with respect to the quality of his services and that it was not up to the Appellant to assume his errors. And I do not believe that the Respondent was in a position to confirm having successfully (i) attacked the credibility of the Accountant as to what he did or did not do (ii) made the Accountant acknowledge that he followed the Appellant's instructions almost blindly (iii) imposed a central role on the Appellant (A) in the making of the error or (B) on how to rectify and document the error (in fact the accountant's solution does not even seem to have been put forward during the audit), or (C) in having approved the entries so the Appellant is responsible for the consequences.

Mr. Abbass

[67] The examination-in-chief of Mr. Abbass allowed to know more about his limited ability with the English language and limited knowledge of the operative environment of a small business in Canada. After having explained the circumstances of his immigration in Canada and the first years that followed, the Appellant was asked about his view on the entry on line 2780 (Liabilities-Due to shareholder(s)/director(s)) of Schedule 100 of the Corporation’s 2010 income tax return. The answer he provided is as follows:

> …First of all, I'm going to [capitulate]. This is long. It's not my specialty. Second, the accountants seem to have slipped it. I don't know how. Seems to have put this number or entered it. I don't know how. And third, even the tax authority, they just heard about it in 2016. So, how come? How would you want me to learn about it, me, who is not specialized in (indiscernible).

And about the accuracy of the amount:

> It's a wrong number. There's nothing of the sort.

[68] In cross-examination, the Respondent insisted on Tab 10 of the Appellant's Book of Documents, a letter dated July 5, 2018, from the Appellant addressed to the Appeals Division. The Respondent wanted him to confirm that not only did he sign the letter but also participated in drafting the letter. The Appellant was reluctant to admit he participated in drafting the letter arguing that the content was suggestions from the individual helping him drafting the letter. This person called Steven was not his representative or agent before the CRA. The Respondent also insisted on his signature on the income tax returns. The Appellant acknowledged having signed them but not prepared them.

[69] No direct question was asked about whether the Appellant made a loan to the Corporation, gave instructions about the Corporation's prescribed form Schedule 100, or directed the Accountant about explicit instructions on how to complete the Corporation's income tax returns. A reference to $92,522 only came once and it was from the Appellant's response to an indirect question about the help he received from the individual called Steven who helped him drafting the letter dated July 5, 2018, about the trouble created by the $92,000 amount. The Appellant was not questioned about salaries, expenses or sales.

[70] In summary, the cross-examination exercise of the Appellant did not add key or considerable support to the Respondent's position in respect of his burden under paragraph 152(4)(a) of the Act.

Ms. Chau

[71] In examination-in-chief, the auditor did not write any of the Corporation Audit Report, the Appellant Audit Report, the Appellant Reassessment Report or the Appellant Penalty Report. However, she confirmed that she agreed with the positions and comments expressed in these reports.

[72] She confirmed that the audit performed by the CRA was only the Audited Taxation Years. She confirmed the information described in the Corporation Audit Report. Mainly because deposits were lower than the income reported by the Corporation, she said that this mean that sales were not all deposited and cash was involved. The CRA added to deposits the amount of expenses that were paid cash,

and even after that, the CRA found discrepancies. The CRA concluded the income of the Corporation was underestimated by approximately $30,000.

[73] To explain the discrepancy, the auditor was able to show a methodology to identify links between deposits, expenses and declared income. But all methods tried by the CRA with the Appellant personal return did not allow them to reach similar results and corroborate the CRA's assumptions.

[74] The auditor explained that the CRA's interest in the Appellant 2010 taxation year came from the discrepancies found in 2012 and 2013. The CRA tried to reconcile the numbers and realized the shareholder due account in Schedule 100 of the Corporation's income tax return. CRA asked explanations about where the amount came from and the reason line 2780 (Schedule 100) moved from $100 in 2009 to $92,522 in 2010.

[75] The auditor identified a variation in the shareholder due account on line 2780 of Schedule 100 in the Corporation's 2013 income tax return. The account was reduced by about $82,000. She referred to this reduction as a withdrawal in favour of the Appellant, although no detailed or trace were provided as to the flow of money between the Corporation and the Appellant.

[76] The Respondent asked her how she reached the conclusion that the Appellant has earned $92,522 an unreported income for the 2010 taxation year. The witness answered:

> So, like I explained, it all began with the corporation where we concluded that there was undeclared revenue in the corporation. Also, with the income that the shareholder declares in 2010, in previous years in 2010, he had no financial capacity to inject the funds of $92,000 into the corporation, and then in 2014, withdrew $82,000.
>
> With that, also, other elements were considered. We also looked into the asset that the shareholder and the spouse owned. They owned a house of $575,000 that they purchased in 2011…

[77] With respect to other elements raised by the witness, no detail was provided. The Court defers to the Appellant Audit Report and the Appellant Reassessment Report with respect to reasons that could support the CRA's position.

[78] The witness was asked by the Court about what the CRA did with respect to the 2010 taxation year:

Justice Gagnon: Did you look at 2010?

Ms. Chau: We didn't extend our audit period to 2010.

Justice Gagnon: Oh, so you didn't ---

Ms. Chau: Exactly.

Justice Gagnon: --- look at 2010.

Ms. Chau: Exactly.

Justice Gagnon: So, the two years were 2013 and 2014?

Ms. Chau: 2013 and 2014. But I also, in preparation of the trial today, I had the Appellant's book. I went to 2012. Even in the personal bank account, there was no deposit of cheques for salaries. So, it convinced me that even in 2013, '14 I didn't see any. The previous years were probably done the same way.

[79] During the cross-examination, counsel for the Appellant questioned Ms. Chau about the extent of the audit in the Appellant Audit Report where the CRA says "the result of the audit indicates that Mr. Abbass personally advanced $92,000, roughly, in 2010 to the company, and according to the company's financial statements, Mr. Abbass withdrew from this account a total of roughly $82,000 in 2013":

Mr. Luu: … So, here, you mentioned an inflow of money in 2010 and an outflow of money in 2013, correct?

Ms. Chau: That's what is written, yes.

Mr. Luu: So, if we go back to 2010, you have no proof that Mr. Abbass withdrew $92,522 from his bank account, correct?

Ms. Chau: Correct. But in the due to shareholder account, that's what's reported by the taxpayer.

Mr. Luu: So, you have no proof that he withdrew that amount from his bank account, and except for this line on the balance sheet, you have no proof that the company received the actual amount in its bank account, correct?

Ms. Chau: This is the information reported by the taxpayer himself -- itself in its income tax returns.

Mr. Luu: I understand, Ms. Chau, and I understand your view, but can you answer with a clear yes or no?

Ms. Chau: Not in the bank account, no.

Mr. Luu: For 2013, and you state here pretty clearly that Mr. Abbass withdrew from this account, from the bank, I assume it's the bank account or the shareholder loan account, an amount of $82,219. But you have no proof that the corporation paid anything to Mr. Abbass. You have no proof that the corporation paid Mr. Abbass the amount of $82,219, correct?

Ms. Chau: Correct, but not in the bank account.

Mr. Luu: Do you have no proof also that Mr. Abbass received the amount of $82,219 in his bank account, in his personal bank account, correct?

Ms Chau: Of course not, in the bank account.

MR. LUU: And for 2013 and 20 -- you had access, and you were able to review the bank statements of the corporation for 2013 and 2014, correct?

Ms. Chau: Correct.

Mr. Luu: So, you reviewed the bank statements of the corporation for those two years, and you did not see anything?

Ms. Chau: That's correct.

Mr. Luu: And you also were able to look at Mr. Abbas' personal bank statement for 2013 and 2014, and you did not see any receipt of $82,219, correct?

Ms. Chau: That's correct. Not in the bank account.

Mr. Luu: Is it fair to say, therefore, Ms. Chau, that this amount, there is absolutely no proof of these inflows or outflows, whether it's in 2010 or 2013?

Ms. Chau: Because of undeclared revenue that are seen in 2013 and ’14, we have indication of undeclared revenue.

[80] In the same context, about the source of income and the absence of bank transfer in 2010 and 2013, the auditor added in cross-examination:

Ms. Chau: So, I just wanted to say they're not in bank account, but we know that the corporation works with cash. We know that there are undeclared revenue in 2013 and ’14. So, I don't see it in the bank account, but there are possibilities that are undeclared revenue that -- from the years before.

Mr. Luu: Is it fair to say, Ms. Chau, that you made an assumption that in 2010 this happened?

Ms. Chau: It would be a different assumption if we didn't conclude it with undeclared revenue 2013 and ’14. If the income tax return of 2013 and ’14 was no changes, no assessment, additional assessment done in the corporation, then we would have never -- plus, all the information of the shareholder’s income tax return from previous years, we would have never assumed anything other than this. But with all the elements put together, even if the amount is not seen in the bank account, we can say that they were undeclared revenue.

Mr. Luu: Sorry, Ms. Chau, let me rephrase my question. So, we know, and you admitted, that there is no proof of any withdrawal from Mr. Abbas' bank account, or any proof of the company receiving money in its bank account for 2010 in the amount of $92,000.

So, because of such absence of proof, I'm asking you, because there is no proof of those transactions, is it fair to say that you made an assumption with regard to the amount of $92,000 in 2010?

Ms. Chau: I don't see it as an assumption because there are elements to my analysis that pushed me towards that conclusion, saying that there were undeclared revenue, there were cash, there were non-deposited salary. So, there are other elements that we don't know, and if that is a withdrawal of 82,000 cash, that is possible too.

Mr. Luu: So, it's possible?

Ms. Chau: It is possible because of all the other elements that salaries were not deposited in the bank account as well. We don't see cheques; we don't see the amount of salary $14,000 or $20,000 deposited as a salary in the bank account. So, not every deposit were done through the bank account.

Mr. Luu: Are you referring to your work for 2013 and 2014 or ---

Ms. Chau: 2013, 2014.

Mr. Luu: But I'm asking you now, in relation to the 2010 taxation year, strictly in relation to the 2010 taxation year, if you set aside your audit of 2013 and 2014, is it fair to say that the due to shareholder entry of $92,622 showing on the balance sheet of the corporation's 2010 taxation year, is that the sole basis for you reassessing, Mr. Abbass, the unreported income for that year?

Ms. Chau: Not the sole basis, because I see the amount in the due to shareholder, not based on that amount in the income tax return. We considered other elements to support that inclusion of income.

Mr. Lu: But my question was specific. I asked you strictly in relation to the 2010 taxation year, except for that balance sheet entry, what else did you consider specifically, strictly for 2010?

> Ms. Chau: We considered -- yes, you're right. We considered also explanation and justification from the taxpayer. Nothing was received.
>
> Mr. Luu: So, basically, for 2010, you have this entry on the balance sheet, and then the absence, in your view, of explanations from the Appellant. So, that was the basis for you reassessing Mr. Abbass for 2010, correct?
>
> Ms. Chau: One of the elements, yes. And with the variation years after years, it couldn't be just ever because it extended over five years.

152(4)(a) test

[81] The onus is on the Minister to establish that the misrepresentations were made. This is well settled law recited in *Jencik* above, but also recently by the Federal Court of Appeal in the *Deyab* [5] decision:

> 40 … the onus was on the Minister to establish the facts that would justify the reassessments issued for the statute barred years.

[82] In *Vine Estate* [6], Webb JA described the onus in a two-step process as follows:

> In this case, there is no allegation of any fraud. Therefore, the onus is on the Minister to prove, on a balance of probabilities, that the taxpayer or the person filing the return:
>
> (a) has made a misrepresentation; and
>
> (b) such misrepresentation is attributable to neglect, carelessness or wilful default.

[83] Webb JA further stated:

> As in any civil case, if a person has the onus of proof for particular facts, the question for the trier of fact is whether, based on all of the evidence admitted during the hearing, that person has proven, on a balance of probabilities, that such facts exist. There is no shifting onus.

[84] Finally, it must be noted that the time for determining the misrepresentation is at the time of filing the tax return and that it remains a misrepresentation even if the Minister could have ascertained the true facts prior to the expiration of the

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[5] *Deyab v Canada*, 2020 FCA 222 [*Deyab*].
[6] *Vine Estate v Canada*, 2015 FCA 125 [*Vine Estate*].

limitation period. In *Vine Estate*, Webb JA confirmed and adopted the principles set out by Stayer JA in the *Nesbitt* [7] decision:

> 33. The principles as set out by this Court in Nesbitt are also applicable:
>
> 8. … It appears to me that one purpose of subsection 152(4) is to promote careful and accurate completion of income tax returns. Whether or not there is a misrepresentation through neglect or carelessness in the completion of a return is determinable at the time the return is filed. A misrepresentation has occurred if there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment. It remains a misrepresentation even if the Minister could or does, by a careful analysis of the supporting material, perceive the error on the return form. It would undermine the self-reporting nature of the tax system if taxpayers could be careless in the completion of returns while providing accurate basic data in working papers, on the chance that the Minister would not find the error but, if he did within four years, the worst consequence would be a correct reassessment at that time.
>
> [underlining added]

[85] Since the misrepresentation alleged by the Minister is the undeclared income of $92,622 in 2010, it follows that the Minister has first the onus of proving that such amount was in fact taxable income for the Appellant in the year under appeal and secondly that such misrepresentation was attributable to neglect, carelessness or wilful default. I will address these issues in order.

(i) misrepresentation: existence of undeclared income

[86] The evidence introduced by the Respondent came essentially from the Corporation's audit of the Audited Taxation Years. The CRA first found discrepancies in computing the Corporation's income for the Audited Taxation Years and decided to review the income declared by the Appellant for the same period. Although, the CRA did not reassess the Appellant for undeclared income in the Audited Taxation Years, the review led to line 2780 of Schedule 100 of the Corporation's income tax return where an amount as Due to shareholder(s)/director(s) appeared. The review then led to line 2780 of Schedule 100 of the Corporation's 2010 income tax return in order to explain the origin of the due to shareholder. Based on this sole finding, and the Appellant's denial of the authenticity of the entry on Schedule 100, the CRA came with the view that the Appellant personally advanced $92,522 in 2010 to the Corporation as described in

[7] *John G. Nesbitt v Canada*, 1996 CanLII 11569 (FCA) [*Nesbitt*].

Schedule 100 and according to the same Schedule 100 withdrew from this account a total of $82,219 in 2013. The CRA relied on subsection 9(1) of the Act to include the amount of $92,522 in the Appellant's income for the 2010 taxation year.

[87] The evidence does not identify or expose a source that could support the undeclared income for the year 2010. The CRA did not audit the 2010 taxation year of the Appellant nor the 2010 or 2011 taxation year of the Corporation. The Corporation's income relating to its 2010 and 2011 taxation years and the Appellant's income relating to his 2010 taxation year were not either confirmed or audited. No other form of control was exposed before the Court to verify the income realized in 2010 other than through the entry in Schedule 100 of the Corporation's income tax returns. The various procedures that have been put in place by the CRA to potentially reassess the Appellant for undeclared revenue in 2013 and 2014 have not been applied in 2010.

[88] For example, the Corporation Audit Report confirms that the CRA performed various tests in order to audit the Appellant in 2013 and 2014. Books, records, personal and corporate bank statements, invoices, other documents obtained through formal demand, personal credit cards statements were reviewed. A bank deposit test and a net worth analysis that included a cost of living analysis of the Appellant was also performed. These tests persuaded the CRA not to reassess the Appellant for undeclared revenue in 2013 and 2014.

[89] The context that explains CRA reasoning suggests that line 2780 of Schedule100 of the Corporation's 2010 income tax return is the sole basis to support the reassessment. The Appellant Audit Report and the Appellant Reassessment Report does not conclude that the review exposed in the preceding paragraph did not allow them to explain that the Appellant had an undeclared taxable income of $92,522 in the 2010 taxation year.

[90] Considering the conclusions reached by the CRA after having completed the analysis previously exposed, the only explanation to support the CRA decision to reassess the Appellant would appear to be exposed in paragraphs 33 and 34 above.

(ii) Neglect, carelessness or wilful default

[91] Whether or not there is a misrepresentation through neglect or carelessness in the completion of a return is determinable at the time the return is filed. The evidence introduced by the Respondent that is contemporary with the filing period of the Appellant's 2010 income tax return would seem to be the fact that the undeclared

revenue by the Appellant, if any, is material and would represent 454% of the declared income by the Appellant in 2010 ($20,400 declared compared to $92,522 undeclared). The obligation to act diligently, the position of the Appellant within the Corporation's affairs, the control exercised by the Appellant and the magnitude of the amount of undeclared support negligence or carelessness by the Appellant in filing his income tax return. However, without misrepresentation, this second part of the test has no weight.

(iii) the 152(4)(a) test in the present appeal

[92] In *Nesbitt*, after having confirmed that misrepresentation through neglect or carelessness in the completion of a return is determinable at the time the return is filed, the Federal Court of Appeal adds that a misrepresentation has occurred if there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment. The appeal court refers exclusively to the tax return form of the taxpayer subject to subparagraph 152(4)(a)(i) of the Act. This position in *Nesbitt* means, *a contrario*, that if such an incorrect statement on the return form does not exist, no misrepresentation is established.

[93] If the Court concludes that the Respondent did not satisfy his burden, i.e., that, on the balance of probabilities, facts have been established and support the existence of an undeclared income attributable to neglect, carelessness or wilful default at the time the Appellant filed his 2010 income tax return, then the test under 152(4)(a) of the Act is not satisfied and the 2010 statute barred taxation year can't be reassessed.

[94] After having considered all the evidence submitted by both parties, including exhibits, the Court is of the view that the evidence submitted by the Appellant supports that the Appellant did not have an undeclared income from the assumed source identified by the CRA. In particular, the cross-examinations by the Respondent did not discredit the testimony given by, or undermine the credibility of, the witnesses called by the Appellant. The accounting entry of $92,622 on line 2780 of Schedule 100 has been described by the Accountant as an error by himself alone, and the Appellant denied having instructed the Accountant to make that entry or made a loan of such magnitude in 2010 to the Corporation. The Accountant has testified to the same effect. The explanation given by the Accountant is conclusive in the Court's view, and was not contradicted. It is an error in the books regarding the qualification of the item concerned. In the present case, the Court has no reason to set aside the Appellant's position. The Court is not prepared to reject the Appellant and the Accountant testimony.

[95] In addition, no audit was performed by the CRA with respect to the taxation years of the Corporation and the Appellant that could have been involved with the assumed undeclared revenue. The CRA decided to rely strictly on the explanation that they considered not credible and not satisfactory. Adopting such a position was, according to them, sufficient to satisfy their burden under paragraph 152(4)(a) of the Act. The only position that the CRA was able to submit as evidence are facts and circumstances that occurred approximately 3 years after the filing date of the 2010 income tax return (i.e., the Audited Taxation Years) and infer that a similar situation likely exist in 2010. Not only those facts or circumstances occurred after the filing of 2010, they are not facts about the Appellant's state of mind at the time of filing the 2010 income tax return. Therefore, it becomes difficult to accept relying on such circumstances to satisfy the Respondent's burden to reassess a statute-barred year. As noted above, the cross-examination of the auditor was particularly revealing in this respect.

[96] The Court is facing the non-contradictory position exposed by the Appellant with the evidence of the Respondent exposing the accounting entry in Schedule 100 in the amount of $92,522 as the sole basis for the reassessment. Considering the quality of the evidence at the hearing, the absence of direct facts establishing the circumstances or the Appellant's state of mind existing at the time the Appellant filed his income tax return, the Court is of the view that the evidence does not support that, on the balance of probabilities, the Appellant, in 2010, earned a taxable income by virtue of subsection 9(1) from the Corporation, and personally advanced in 2010 $92,522 to the Corporation. Neither the Corporation Audit Report nor the Appellant Audit Report or the Appellant Reassessment Report supports serious grounds that could corroborate the Respondent's position. The review from the CRA in respect of the 2010 taxation year was superficial and not enough was done to convince the Court.

[97] In the *Hickman* [8] decision, the majority concurs with the general approach and the conclusion of Justice L'Heureux-Dubé. About financial statements, she states:

> The law is well established that accounting documents or accounting entries serve only to reflect transactions and that it is the reality of the facts that determines the true nature and substance of transactions:*Vander Nurseries Inc. v. The Queen*, 95 D.T.C. 91 (T.C.C.); *Mountwest Steel Ltd. v. The Queen* (1994), 2 G.T.C. 1087 (T.C.C.); *Uphill Holdings Ltd. v. M.N.R.*, 1992 CanLII 15077 (TCC), 93 D.T.C. 148 (T.C.C.); *M.N.R. v. Wardean Drilling Ltd.*, 1969 CanLII 1547 (CA EXC), 69 D.T.C. 5194 (Ex. Ct.); *M.N.R. v. Société Coopérative Agricole de la Vallée*

[8] *Hickman Motors Ltd. v Canada*, [1997]2 SCR 336 [*Hickman*].

> *d'Yamaska*, 2003 TCC 542 (CanLII), 57 D.T.C. 1078 (Ex. Ct.). Furthermore, where the ITA does not require supporting documentation, credible oral evidence from a taxpayer is sufficient notwithstanding the absence of records: *Weinberger v. M.N.R.*, 64 D.T.C. 5060 (Ex. Ct.); *Naka v. The Queen*, 95 D.T.C. 407 (T.C.C.); *Page v. The Queen*, 95 D.T.C. 373 (T.C.C.).
>
> [underlining added]

[98] The evidence introduced by the Respondent to support the misrepresentation, that was the alleged undeclared income, is not sufficient to uphold that, on the balance of probabilities, the Appellant had an undeclared income of $92,522 in 2010 and that such amount was then loaned to the Corporation. The evidence introduced by the Appellant in support of his position is considered credible by the Court and exposed a reasonable position, and remains too strong to rule in favour of the Respondent's position that there is an incorrect statement on the return form filed by the Appellant in respect of his 2010 taxation year. The test established in *Vine Estate* is not met. And if facts in 2013 and 2014 have been put forward before the Court and the Court is told that such facts *could* explain what happened in 2010, this is not sufficient to discharge the burden of proof. Unfortunately for the Respondent, not enough elements directly concerned the relevant taxation years.

[99] Therefore, the Respondent did not succeed in establishing, on the balance of probabilities, that the conditions in paragraph 152(4)(a) of the Act have been satisfied. The Respondent did not establish, on a balance of probabilities, the facts that would justify the right to reassess the Appellant's 2010 taxation year. On that basis, there is no need for the Court to review the reassessment or the penalty assessed under subsection 163(2) of the Act. The Minister did not have the right under the Act to reassess the Appellant's 2010 taxation year beyond the Appellant's normal reassessment period or assess penalty under subsection 163(2).

VI. Conclusion

[100] Based on the foregoing, the appeal is allowed with costs.

Signed at Ottawa, Canada, this 29th day of December 2023.

"J.M. Gagnon"

Gagnon J.

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