Tax Court of Canada | Cour canadienne de l'impôt

Docket: 2022-917(IT)G

BETWEEN:

DAVID CARONI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on March 18, 19 and 20th, 2025, at Montréal, Québec

Before: The Honourable Justice Michael U. Ezri

Appearances:

Counsel for the Appellant:	Richard Généreux
Counsel for the Respondent:	Marie-Claude Landry

JUDGMENT

In accordance with the attached reasons:

1. Working paper FT3000R-1 of the Canada Revenue Agency auditor, Diana Ngo, which was marked for identification purposes only, as Exhibit X-3 is now marked as Exhibit I-10;

2. Working paper FT3000R of the Canada Revenue Agency auditor, Diana Ngo, which was marked for identification purposes only, as Exhibit X-2 is now marked as Exhibit I-11;

3. The appeal from the reassessment issued under the *Income Tax Act* (the *Act*) for the 2012 tax year is dismissed;

4. The appeal from the reassessment issued under the *Act* for the 2013 tax year is allowed and the assessment is vacated;

5. The appeals from the reassessments issued under the *Act* for the 2010, 2011 and 2014 tax years are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

    a. for the tax years 2010 and 2011, the penalties imposed under subsection 163(2) of the *Act* are vacated;

    b. for the 2014 tax year the amount of unreported income of the appellant is reduced from $134,562 to $60,062 and the penalty imposed under subsection 163(2) of the *Act* is vacated.

6. Given the results of the appeal and my comments in the reasons for judgment, no costs are awarded.

Signed this 1st day of August 2025.

"Michael Ezri"

Ezri J.

Tax Court of Canada Cour canadienne de l'impôt

Citation: 2025 TCC 101
Date: 20250801
Docket: 2022-917(IT)G

BETWEEN:

DAVID CARONI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent

REASONS FOR JUDGMENT

Ezri J.

I. **Overview**

[1] The Canada Revenue Agency (the "CRA") assessed David Caroni for underreporting income for five taxation years, covering 2010 to 2014. All the years were statute barred when assessed and all the years were subject to penalties under subsection 163(2) of the *Income Tax Act* (the *Act*). The income allegedly underreported was in the $50,000 range for each of the 2010 to 2013 tax years and $135,000 for the 2014 tax year.

[2] The appeal for 2012 is to be dismissed. The appeal for 2013 is to be allowed in full and the assessment vacated. For the remaining years, the results are mixed. Penalties are vacated for 2010 and 2011 and for 2014, the unreported income is adjusted downward, and penalties are vacated.

[3] The three issues raised are:

a. The correctness of the assessments;

b. The existence of a basis to open up the statute barred years; and

c. The justification for the penalties.

[4] The trial also included a number of discussions regarding matters of evidence and a non-suit type motion brought by the appellant.

II. **Factual Background**

[5] David Caroni grew up in France where he worked in the area of information management. He also completed work on an MBA. Mr. Caroni commenced his business career as a salesperson for information management systems. In 1993, he started a company, Absystems France ("France") which grew over time expanding into various parts of France as well as Belgium and Luxembourg. Mr. Caroni moved to Canada in 2001 and at that time changed the ownership structure of his holdings, creating a holding company that held part of France and that, in consequence, owed Mr. Caroni a substantial sum of money. In 2006, the business was sold to another company Cyborg, with payments due to Mr. Caroni's holding company. Those payments were made over time up to and including payments in 2010.

[6] In Canada, Mr. Caroni and his wife raised a family and Mr. Caroni worked for a number of different technology companies, receiving T4 income therefrom. In 2008, just as his then employer, Biocognisafe, was about to complete a round of financing, the global financial crisis hit, and those financing arrangements fell though leaving Mr. Caroni at something of a crossroads.

[7] Mr. Caroni opted to move away from the world of technology and into construction and development. In 2009 he set up 9219-9355 Quebec Inc. ("9219"). Around 2010, 9219 purchased 567 Lakeshore Drive in Beaconsfield for the purpose of demolishing the existing structure, building a house and then selling it. As I understood the evidence, Mr. Caroni advanced to 9219 the money for the property out of his own funds and advanced to the company money for the construction out of loans received from his mother in France. His mother's funding amounted to approximately 600,000 euros.

[8] At the same time, Mr. Caroni also agreed to act as a project manager for a Mr. Merlin on another property. Mr. Caroni testified to having caused 9219 to invoice Mr. Merlin $84,000 plus tax.

[9] In 2013, the house at 567 Lakeshore Drive was completed and sold albeit at a loss. However, this freed up the money that had been tied up in the house for use on other projects.

[10] The project that piqued Mr. Caroni's interest was the manufacture of prefabricated walls which would be used in commercial buildings of four storeys or more. The arrangements were a bit complex, but one company set up by Mr. Caroni, 8480842 Canada Inc ("848"), purchased the assets and name of a prefabricated wall business called Tibetral, while 9219 leased a factory in Granby and ultimately performed work on a number of projects including the City Hall in Brossard, Quebec. However, Mr. Caroni's timing was not good. Problems on the Brossard job, coupled with a slowdown in contract work throughout Quebec occasioned by a provincial government inquiry into municipal corruption (the Charbonneau Commission), drove 9219 into bankruptcy by 2017.

[11] The appellant urges three important findings on this Court in respect of this background:

a. The appellant had basically no taxable sources of income during the 2010 to 2014 years, except perhaps for the Merlin contract work;

b. The appellant had no profitable business from which to draw funds since neither the 567 Lakeshore Drive project nor the pre-fabrication work were profitable; and

c. All sources of funds available to the appellant were non-taxable comprising:

    i. Loans and gifts from his mother;

    ii. Loans and gifts from his in-laws; and

    iii. Mortgage financing.

[12] In light of those facts the appellant argues that there could be no unreported income.

A. <u>The CRA Audit and Assessment in Brief</u>

[13] Notwithstanding the appellant's apparent lack of taxable income, the CRA audited and assessed the appellant for 2010 to 2014. For 2010 and 2011, the audits were limited to adding to income, advances to, and drawdowns from, the 9219 shareholder loan account that were not properly recorded by 9219. The initial 2010 reassessment added some $650,000 to the appellant's income, however at objection, loan documents from the appellant's family reduced that amount to $48,450. No changes were made to 2011. For 2012 to 2014, the CRA performed a

full net worth analysis that it corroborated by reviewing deposits and withdrawals. Those reassessments were not varied at objection.

[14] All the years were statute barred and assessed under subsection 152(4) of the *Act*. In addition, each year was subject to penalties under subsection 163(2) of the *Act*.

B. A Preliminary Comment about the Discovery or lack thereof in this appeal

[15] The adjustments in issue, except for 2014, all appear to me to fall below the threshold that would require recourse to this Court's General Procedure. One may therefore conclude that the General Procedure process was pursued to allow the parties to engage in discovery and narrow the issues before trial. That conclusion, sadly, is not correct. While the parties did exchange documents, neither party engaged in oral or written discovery. That omission weighed more on the appellant than on the respondent. The appellant spent a great deal of time trying to understand and verify the work done by the CRA as for example in the detailed review of certain transfers from the appellant's family referenced below.

[16] The appellant explained that discovery was not necessary because the respondent had the burden of proof in this case. That kind of reasoning is not acceptable. Net worth assessments are intricate and complex involving dozens or even hundreds of adjustments that may be contested. One of the key functions of discovery is to narrow the issues at trial. That function is not affected in any way, by a party's belief that it does or does not bear the burden of proof at trial. On the contrary, the Crown rarely bears the burden of proof in Tax Court but often (though oddly not in this case) pursues discovery to better understand the facts and documents with which the appellant is often already intimately familiar.

[17] Parties who insist on coming to Court without doing the required preparatory work to narrow the issues to be tried can expect to deal with the consequences when the time comes to award costs.

C. The Evidence Issues

(1) General Principles and Observations

[18] Discovery is also useful because it permits parties to either narrow or at least identify areas of difficulty regarding the admissibility of evidence. The lack of such an exercise in this case, complicated the presentation of the evidence.

[19] At the start of the trial, the parties advised that, by "agreement", the respondent's two volume 48-tab book of documents would be marked as an exhibit as would the appellant's shorter 22-tab book of documents. I might add that the respondent appears to have taken a 'kitchen sink' approach to its evidence. The "index" to their book of documents was actually the respondent's Rule 81 list of documents. The respondent made no attempt to curate its compendious productions and adduce only the ones that were actually relevant for trial. In the end, the respondent marked only 14 exhibits, a number of which came from the appellant's book of documents. The appellant too did not tender all of the items in its book of documents which was smaller than the respondent's book, but which contained some of the same documents as found in the respondent's book.

[20] Returning to the "agreement" of the parties, I refused to admit the books of documents into evidence because the parties had not reached an agreement as to the extent to which the "admitted" documents would be adduced for the truth of their contents. In fact, neither party had a strong grasp on the reasons why any document might be adduced. It was explained to me that the procedure proposed was common in Quebec. Actually, it is equally common outside of Quebec and it has attracted the attention of the Ontario Courts. In *Girao v Cunningham*, the Ontario Court of Appeal citing to Justice Sopinka's text, the Trial of an Action, noted that agreed trial document briefs are quite usual. The Court citied to its own earlier jurisprudence which held that:

> 54 When a document brief is tendered at trial, the record should reflect clearly the use the parties may make of it. Such use may range from the binder's acting merely as a convenient repository of documents, each of which must be proved in the ordinary way, through an agreement about the authenticity of the documents, all the way to an agreement that the documents can be taken as proof of the truth of their contents. Absent an agreement by the parties on the permitted use of a document brief, the trial judge should make an early ruling about its use.[1]

The Court went on to repeat earlier jurisprudence to the effect that,

> "…counsel [often] differ on the precise basis on which a **document** in the brief is being tendered or whether it was to have been included, as the implications materialize in the course of the trial."

---

[1] *Girao v Cunningham* 2020 ONCA 260, para 25, citing to *Blake v Dominion of Canada General Insurance Company*, 2015 ONCA 165, para 54.

and concluded by setting out some basic issues for counsel to consider in respect of documents, which I summarize as:

a. Originals or copies;

b. Dating of documents;

c. Truth of contents or some other purpose like showing state of mind;

d. Objections to listed documents; and

e. Limits on additional documents.[2]

[21] In *Paradis*, the parties proposed to enter over 1600 documents in a joint book as a single exhibit. The Federal Court trial judge demurred preferring to enter the documents one at a time as the witnesses addressed the material, though she did leave the door open to reference other documents in the book at the end of the trial. The Judge also cautioned that "the Joint Book of Documents could not act as a document dump on the Court"[3]. To the same effect, the Ontario Court of Appeal reminds judges that:

> …any agreement between counsel as to the admissibility of documents is not automatically binding on the trial judge, who remains at all times the gatekeeper of the evidence.[4]

(2) The Contested Documents

[22] During the course of the hearing, I gave rulings excluding some of the documents tendered as exhibits, though they were given numbers X-1 to X-5 for identification purposes. Counsel for the respondent asked that I revisit my rulings in light of the way that the documents were used at the hearing. I agreed to take the matter under deliberation, and I rule on those documents now:

(3) X-1: The Audit Report

[23] The audit report was put to the auditor in her direct and cross examination. The respondent asked that it be marked as an exhibit; the appellant objected and I

---

[2] *Ibid*, para 33.
[3] *Paradis Honey Ltd. v Canada (Minister of Agriculture and Agrifood)* 2024 FC 1921, para 44.
[4] *Bruno v Da Costa* 2020 ONCA 602, para 55.

declined to do so, though it was marked as an aide memoire with identification number X-1.

[24] There is no hard and fast rule in this Court as to the admissibility of audit reports, nor should there be. Sometimes, they are admitted at the request of a taxpayer. In that case, they are often considered as a party admission, a recognized exception to the hearsay rule. In other instances, they may be admitted at the request of the respondent, often not for the truth of the contents but, simply as evidence that the Minister made, or did not make, particular assumptions of fact.

[25] In this case, the respondent had the burden of proving that the appellant had unreported income, therefore the Minister's assumptions were less contentious than usual. The real issue is whether the report can be used to establish the truth of the facts contained therein. However, at the hearing, the CRA auditor who prepared the report, Diana Ngo, testified in chief and was cross-examined. It is difficult to appreciate what the report adds to her testimony such that it needs to be an exhibit. If Ms. Ngo could not have remembered her audit, the report might have been entered as past recollection recorded, but she seemed to be able to testify without recourse to the report, except perhaps to refresh her memory. There is no clear reason as to why the audit report, which is an out of court statement and so hearsay, needs to be admitted. I maintain my refusal to admit the report as an exhibit though it will remain in the record marked as X-1 for identification purposes in the event that recourse is needed to the document on appeal.

(4) X-4 and X-5: The 152(4) and 163(2) reports

[26] The respondent also proposed to mark as exhibits Ms. Ngo's reports on re-opening the statute barred years (the 152(4) report) and the report imposing the penalties under subsection 163(2) of the *Act*. Again, I had great difficulty in understanding what evidentiary purpose they might serve. Ms. Ngo may have found the documents useful to refresh her memory, but they did not replace her testimony. I see no reason to change my ruling and mark these reports as exhibits, though they may remain marked for identification only as X-4 and X-5 respectively.

(5) X-2 and X-3: The Working Papers

[27] The appellant objected to certain working papers on the basis that, like the audit report, they simply summarize the auditor's findings and were not being adduced for the truth of their contents. Of particular concern was working paper

FT3000R. That document referred to the auditor's view that for 2010 there was $650,660 in unexplained advances between the appellant and 9219. Since the CRA later reduced this to just over $50,000 at objections, this part of the working paper was not being adduced for the truth of its contents.

[28] However, having reconsidered the matter and after having had the benefit of seeing the use to which the working papers were put, I am satisfied that they should be marked as trial exhibits and not merely for identification as aide memoires.

[29] Working paper FT3000R-1 was marked for identification only as X-3. It lists each of the transactions that comprised the $1.15 million in shareholder advances for 2010 and then backs out just over $505,000 in advances that were traced back to the appellant's mother leaving the balance of $650,000 which was initially reassessed. It also lists each of the 2011 transfers that were reassessed and not further adjusted at objections. Particularly for 2011, having the transactions set out in that way is both useful and probative. There are other documents such as I-2[5] which is 9219's actual listing of shareholder loan transactions, but it is much longer and includes many other transactions. In my view the working paper is evidence of the matters that it records and should be admitted albeit, the 2010 facts have been superseded. That working paper will become exhibit I-10.

[30] Working paper FT3000R was marked for identification as X-2. It is similar to FT3000R-1 in that it lists the untraced shareholder advances for 2010 and 2011. It also references the requests made by the CRA for supporting documents which were not received. It goes on to explain that in March and April of 2018 sufficient documents were received to allow the $505,000 adjustment described above. The appellant in argument referenced the large 2010 objections adjustment as evidence regarding the reliability of the audit work. The working paper paints a different picture of the CRA struggling to get documents in a timely way and then not having everything that they needed to allow all the adjustments requested. This working paper is relevant and will now be marked as Exhibit I-11.

[31] For both I-10 and I-11 I give no weight to the statements that in 2010 there was $650,000 in untraced shareholder advances because the CRA subsequently adjusted those amounts.

---

[5]Respondent's trial docs, tab 19.

D. The Burden of Proof and the Non-Suit Motion

[32] At the start of the hearing, the appellant indicated that the respondent needed to present its case first since all of the years were statute barred. The respondent also had the burden of proving that the subsection 163(2) penalty was properly applied for each year. The respondent agreed and proceeded first by calling Ms. Ngo to testify. Respondent's counsel did not call the appellant as a witness, though she was free to do so.

[33] There was no daylight between the respondent's position on the correctness of the assessment and its position on re-opening the statute barred years and imposing the 163(2) penalty. If the assessments are correct, then the appellant underreported his income by over $50,000 a year for five straight years which could support re-opening the statute barred years and imposing penalties.

[34] At the conclusion of the Crown's evidence, the appellant moved to have the appeal summarily allowed on the basis that the Crown's evidence was insufficient to discharge its burden of proving a misrepresentation sufficient to open up any of the years in issue.

[35] In these reasons, I dismiss that motion. However, because of the complex arguments that I heard, and because the motion does not affect the outcome of the case, my reasons are set out at the end of this decision.

E. The Disputes over the Audit Method and results

[36] The basic areas of dispute between the parties, with respect to the income adjustments were the following:

a. Ms. Ngo raised concerns over the fact that the appellant had substantial personal expenses and he advanced funds to 9219 while reporting almost no income. The CRA was also concerned about the reliability of the corporate books and records. As a related issue, the CRA was aware that Mr. Caroni had access to money in Europe, but it often could not trace those funds to Canada suggesting that they were not a source of funds during the periods in issue.

b. The appellant argued that there was nothing to assess because there were no taxable sources of income, and his businesses ultimately went bankrupt while they had large shareholder loans still outstanding to him. Without

limiting that position, a number of specific audit adjustments were canvassed by the appellant, notably:

i. For 2010 and 2011, the appellant takes issue with the allegation that some of his contributions to the shareholder loan account could not be traced to non-taxable income sources;

ii. For 2012, the appellant disputes the inclusion in the net worth of $39,000 worth of personal credit card bills paid by 9219. In the same year, the CRA added $43,000 to the net worth in respect of corporate expenses paid by the appellant. The appellant found it contradictory that the CRA included both personal credit cards paid by 9219, and corporate expenses paid by the appellant personally;

iii. For 2012 to 2014, the appellant alleges that the auditor failed to allow enough of a deduction for personal credit card purchases that were actually made to fund corporate operations; and

iv. For 2014, the appellant claims that the auditor erred in not including as a liability certain mortgage proceeds.

F. The appellant's "no taxable source" argument

[37] I do not find that the appellant's argument that he had no taxable source of income sufficient to carry the day in this case.

[38] To start with, I found that Ms. Ngo, though inexperienced in 2016, did a good job defending her assessment. She carefully described how, when she was assigned the audit file, she did reliability tests in the form of a rough deposit analysis and sketch of a net worth. The results demonstrated a discrepancy of over $200,000 in each of 2012 and 2013. Given the lack of reported income and the inability to explain the appellant's revenue sources, she felt that a net worth analysis was required. She carefully explained each of the adjustments. She also explained that she corroborated her work by conducting a deposit analysis. She was careful to adjust amounts that could be traced or accounted for as business expenditures. Ms. Ngo explained that she deducted from the net worth all amounts that could be traced into the appellant's personal or corporate Canadian bank accounts that originated from his mother. Those removed amounts totalled almost $1 million for the 2012 to 2014 tax years. She removed another $400,000 in deposits that could otherwise be explained by reference to other non-taxable

income sources as well as a number of transfers that were explained to her over the course of the audit.

[39] Ms. Ngo walked the court through the 9219 shareholder loan account. She pointed out the unidentified deposits to that loan account from the appellant. As she explained, such deposits must be traced to non-taxable sources or declared, because they may be later drawn down from that shareholder account on a tax-free basis. So, for example, Ms. Ngo, initially identified $505,038.93 in electronic transfers to the account that originated with Mr. Caroni's mother and so were not taxable. Later representations identified additional advances reducing the final assessment to $48,460 for 2010.

[40] Ms. Ngo explained that 9219 was also not recording all drawdowns from the shareholder loan account. For example, in 2012, some $39,000 was drawn from the shareholder loan account to pay credit-card expenses of Mr. Caroni, but not recorded in the corporate books. Ms. Ngo explained that such payments were taxed only in Mr. Caroni's hands; they were not also treated as additional corporate income.

[41] As an example of a transaction that she did not accept for 2010[6], Ms. Ngo pointed to a 14,000 euro withdrawal from the appellant's European company on November 19, 2010 and deposited in Mr. Caroni's personal account in France[7]. However, Ms. Ngo did not reduce the 2010 assessment by this amount, because she could not establish that the funds made their way to Canada.

[42] In cross-examination, Ms. Ngo demonstrated a good comprehension of her file. She was asked by counsel for the appellant to trace different transactions from 2012 to 2014 that appellant's counsel believed should be excluded from the assessment. Here are two examples:

a. A transfer of 11,700 Euros ($17,000 CAD) from Mr. Caroni's European company to Canada on July 11,2014[8] which Ms. Ngo did exclude from the

---

[6]Ex I-4 respondent's tab 5 Absystem bank statements.
[7] Ex I-5, respondent's tab 6.
[8] Recorded by Ms. Ngo at Ex. I9 p. 66 as $17,055 CAD

net worth as part of a $28,000 exclusion of transfers from France to Canada for 2014[9]; and

b. A cheque for $35,000 from a law firm to Mr. Caroni on October 10, 2012[10] which Ms. Ngo excluded from the net worth as an explained deposit.

[43] Turning from the auditor to the appellant, I found Mr. Caroni to be a candid witness, however I found his evidence to be rather general and he did little to undermine the evidence of Ms. Ngo, other than to reiterate that he had no taxable sources of income and no business profits on which to draw. These arguments are not persuasive. He had sale proceeds from the house that 9219 built and he did have at least one source of business income, which was the Merlin contract. Further, the profitability of Mr. Caroni's business is of little to no assistance in determining whether he had taxable income. At a certain point in the proceedings, Crown counsel complained that by drawing down the 9219 shareholder account instead of receiving a salary, the appellant had set up his affairs to avoid paying taxes. I indicated that taxpayer was entitled to structure his affairs in that manner, but that cuts both ways. Improperly documented payments such as payments of the appellant's credit cards by 9219 of $39,000 in 2012 are susceptible to being taxed on a net worth, as are deposits and expenditures that lack identifiable sources, even where the underlying businesses are ultimately not profitable.

[44] It did not help Mr. Caroni that he failed to call either the CFO of 9219, Pablo Hernandez, or the accountants who prepared the financial statements of 9219 to testify. I do not draw an adverse inference from that decision, but I do find that Mr. Caroni did not have a sufficiently detailed grasp of the minutiae of the day-to-day financial affairs of his business to provide the kind of detailed testimony required to meaningfully address the specific findings of the CRA.

[45] The appellant pointed to the large reduction in the 2010 assessment at objection as evidence that the CRA auditor was not reliable. I disagree. New information relevant to 2010 kept coming into the CRA throughout the audit stage and continuing into the objection stage resulting in the 2010 reassessment.

---

[9] Exclusion is found in net worth summary at Ex A-2 p. 7 for 2014 line "Virement provenant de la société de gestion en France". At p. 64-65, Ms. Ngo traced the balance of the $28,000 adjustment to p. 79 of I-9.

[10] I-9, p. 20, line 2, and excluded.

[46] On balance, I prefer the concrete explanations of the auditor as to what she did and why, to the broadside attack of the appellant, founded on his subjective perceptions that the audit couldn't be right since he had no taxable income sources during the period in issue.

[47] I turn then to the numerous specific adjustments that were contested during the hearing.

G. 2010 and 2011

[48] In 2010, seven advances to the shareholder loan account totalling $48,460 were added to the appellant's 2010 income. The largest of the advances was $30,000 which was a transfer into the account on June 18, 2010. Neither at audit nor at objections could the CRA source that or any of the other six transfers to one of the appellant's non-taxable sources. The appellant in his evidence did not address these transfers. No adjustment is warranted to that income inclusion.

[49] In 2011, the appellant made seven unexplained transfers into the 9219's shareholder loan account totalling $55,310. The two largest transfers were for $24,000 on March 7, 2011, and $22,000 a week later on March 15, 2011. Again, the CRA was not able to source those or the other five transfers to the appellant's non-taxable sources. The appellant in his evidence did not address these transfers and so again no adjustment is warranted to the resulting income inclusion.

H. 2012

[50] 2012 is the first year in which income inclusions were based on a net worth method. The 2012 income inclusion was for $50,902 and the single largest component of that inclusion was $39,226.60. That sum consisted of payments by 9219 of the appellant's personal credit cards with no corresponding reduction to the shareholder loan account. The issue here is whether any of that $39,226.6 was spent on behalf of 9219.

[51] At trial, the appellant testified that he often used personal credit cards to pay corporate expenses. Ms. Ngo, in preparing the net worth recognized that to be the case, but she could only identify $6,000 in corporate expenses paid by Mr. Caroni. She backed out of the appellant's personal expenses the $6,000 in expenses that she attributed to outlays spent by the appellant for 9219. So, the CRA's assessing position was that no more than $6,000 was spent in 2012 by the appellant on his own credit cards for 9219.

[52] During the hearing, I raised concerns that the respondent did not present much in the way of detail regarding the nature of the $6,000 adjustment to assure me that this covered all corporate expenses paid by the appellant. That said, I am satisfied that the CRA did make some attempt to isolate corporate expenses paid by the appellant. In cross-examination, Ms. Ngo explained that 9219 had recorded $6,000 as being the amount of corporate expenses paid by Mr. Caroni based on a review of his bank and credit card statements. Further, the CRA provided a detailed list of the categories of personal expenses of the appellant. Many of them clearly were not related to the corporation's activities. For example, the appellant's 2012 expenses list $30,000 in groceries, $11,000 in tuition fees, and $20,000 in municipal taxes.

[53] The appellant's counsel in his questions suggested that perhaps there were additional corporate expenses paid by Mr. Caroni that had not been recorded in 9219's books, but the appellant adduced no evidence at all to specify an amount in excess of $6,000 that was attributable to corporate expenses. In the face of the auditor's evidence, he needed to do that.

[54] Finally, timing is a problem. The appellant testified that 9219's work on the renovation of 567 Lakeshore Drive was ongoing, but no evidence was presented to help nail this down. The appellant testified that the house was sold in 2013 but does that mean that all expenses were paid in 2012? The appellant testified that some contractors were paid by (personal) credit card, but no details were provided as to amounts paid or taxation year in which payments were made. The appellant testified that 9219 prepared GST returns annually during this period and so it would send all the bills to the accountant. Presumably, if the contractors were invoicing 9219 the details on amounts and payments would have been available but they were not provided to the Court. I was left with no evidence to reduce the net worth by more than the $6,000 already accounted for by the CRA.

I. 2013

[55] The CRA added just under $50,000 to the appellant's reported income for the 2013 tax year. However, the arithmetic to get to that result includes two large transactions.

[56] There was an approximately $245,000 transaction involving the 9219 shareholder loan account. $145,457 was debited from the account on April 9, 2013, and another $100,000 was debited from the account on April 15, 2013. Normally this would be "good" for the appellant because it reduces an asset

of the appellant, namely the credit balance in his account. However, the auditor essentially negated the drawdown by adding the $245,000 back into the net worth as an unexplained expense.

[57] In cross-examination, it was put to the auditor that these amounts were explained as transfers to related companies. Ms. Ngo did not dispute that explanation, but she testified that it would have made no difference to the net worth. In her view, had she known that there were other companies owned by the appellant, she would have offset the decrease to the 9219 account by increasing the shareholder loan accounts of the other businesses. This would have resulted in no change to the net worth since the decrease to one asset would have been offset by an increase to another asset. It would be like taking money out of one's left pant pocket and putting it in the right pant pocket.

[58] I agree with the auditor that the appellant's explanations don't change the net worth. A movement of funds from one bank account that a taxpayer owns to another that he owns results in no net change to the net worth.

[59] I am far less convinced by a second adjustment in 2013. In that year, the shareholder loan account for 9219 was debited by $200,000. That money was used to pay down some debt owing by the appellant to his mother. Normally, if an asset goes down by $200,000 in order to pay a debt, the debt liability also goes down by $200,000 resulting in no net change. However, Ms. Ngo explained that she never established a corresponding net worth liability for the amounts owing to the mother because she could not obtain loan balances, so there was no liability to reduce. Instead, just like the $245,000 just discussed, the auditor offset the reduction in the shareholder loan account by adding $200,000 to the expenses of the appellant. However, the source of the $200,000 is known to be non-taxable. That leaves this Court with a $200,000 asset reduction that is not offset by either a reduction to a liability or an expense that is paid out of taxable revenue sources.

[60] Try as I might I have not been able to accept the auditor's explanation for the inclusion of the $200,000 as an unexplained expense that is needed to offset the reduction to the shareholder loan account. I think that the inclusion is a methodological mistake in these circumstances. If the amount does not reduce a liability because no liability was set up, then there is no corresponding adjustment. By way of analogy, if the appellant had a $200,000 asset that burned to the ground in 2013 and was not insured then his net worth would simply decline in the year by that amount.

[61] I also cannot reconcile the adjustment with the auditor's testimony in chief where she explained that in order to live, a taxpayer has to have income to pay personal expenses and so the expenses are added to the net worth. Here however, the 'expense' of $200,000 has a non-taxable source. By contrast, the auditor added to the net worth, $30,000 in repayments to Mr. Caroni's mother in 2012 and another $30,000 in 2013 that did not have a non-taxable source. It is inconsistent to include in income, loan repayments that have a non-taxable source and loan repayments that have no source and so may be taxable. I can do no better than to quote Ms. Ngo's testimony on the question of when it is appropriate to add to a net worth, the repayment of loans to Ms. Caroni:

> [TRANSLATION]
>
> In that file, what I saw from the bank accounts was that there had been transfers to Ms. Caroni. Therefore, drawdowns of $30,000, $20,000 and $10,000 must be added, which you see.
>
> As a result, this amount is added in order to explain, in the net worth, that the taxpayer should have had these funds to be able to repay Ms. Caroni.[11]

That evidence explains why the $60,000 in unsourced loan repayments was added to the net worth, but not why the $200,000 in repayments from a clearly identified non-taxable source, the shareholder loan account, should be added to income.

[62] That being the case, the net worth analysis is overstated by $200,000 which far exceeds the $50,000 that was added by the CRA to income for 2013. There should therefore be no income inclusion in 2013.

J. 2014

[63] In 2014, Mr. Caroni took a personal mortgage to acquire equipment which went into the 848 company, and which was later transferred over to 9219. This partly explains the increase in the shareholder loan account for the year ending 2015. The particular assets acquired with the mortgage proceeds were described as a commercial equipment lift and a kind of punch for punching through thick sheet metal.

---

[11] Transcript of evidence in Chief of Ms. Ngo, March 18, 2025, p. 71 to 72 [emphasis added].

[64] The CRA added $134,562 to the appellant's 2014 income as a result of the increase in the shareholder loan account. In principle, any money received in that account from the mortgage would be offset by a new mortgage liability. Further any transfer of assets from 848 to 9219 would also be a wash. However, that is not what happened. The CRA did not set up a new liability for the mortgage and it did not record any 848 assets or transfers.

[65] I therefore find that the net worth for 2014 is overstated because the appellant's 9219 shareholder loan account increased by virtue of a transfer over of equipment from 848 Canada Inc. with no corresponding decline to an asset account or any increase to a liability account. However, I limit that overstatement to $74,500 which is the increase in the value of machinery and equipment in the financial statements of 9219 in the 2015 financial statements. Per those statements:

a. 9219's balance sheet and notes thereto (Ex A-6) show that capital assets, specifically machinery and equipment increased by only $74,500 between April 2014 and March 2015; and

b. the closing balance on that shareholder loan account per the financial statements as at April 30, 2014 was just about $292,000 which is close to the amount of $301,207 in the auditor's net worth. The balance as of December 31, 2014 was $431,186.47.

[66] No party put into evidence a transaction list for the year ending 2014 which could be used to drill down further into the issue. However, the financials disclose the following:

a. there is enough of an increase in the shareholder loan account between May 1, 2014 and December 31, of 2014 to support an asset transfer to 9219 of up to $130,000 (431,000 - $301,000), but;

b. no more than $74,500 could be attributed to such a transfer based on a review of the equipment listed on 9219's 2015 financial statements.

In my opinion the 2014 assessment is therefore overstated by $74,500.

[67] The appellant also drew my attention to a working paper that listed unexplained withdrawals from 9219's shareholder loan account.[12] A $50,000 year end entry from April 30, 2014, described as an "regularisation amortissement" was one of the unexplained withdrawals. During direct examination, Ms. Ngo explained that the net worth took account of increases to the shareholder loan account in respect of advances to 9219 from sources that could not be traced because Mr. Caroni had to have the funds to inject into 9219.

[68] In cross-examination, appellant's counsel suggested that the item was an accounting entry only. Ms. Ngo responded that anything that enriched the appellant had to be reflected in the net worth. She noted that even accounting entries can produce repayments that are received tax free, as compared with amounts received as salary or dividends and so they must be explained.

[69] The appellant did not explain the transaction and did not indicate whether the item was indeed just an accounting entry without real world consequences for the net worth. In particular, he did not address the issue raised by Ms. Ngo in the direct examination of the accounting entry forming the basis for a tax-free return of funds at that date or at some future date. In the absence of testimony from 9219's accountants or CFO and absent any other evidence on these points, I am not prepared to remove the item from the net worth adjustments.

[70] Finally, the appellant took issue with a portion of the auditor's characterization of some of the January to April 2014 adjustments as being related to $43,085 in unidentified corporate expenses paid by the appellant. The appellant saw in this an inconsistency in the CRA's approach to the net worth. The appellant was being assessed when 9219 paid his credit cards but also when he paid the corporation's expenses. I see no inconsistency. Ms. Ngo testified that she could not trace the source transactions for the increases to the shareholder loan account. Where withdrawals from personal accounts could be linked to the business, they were recognized as reducing the personal expenses and hence the net worth adjustment for the appellant. For example, the January to April 2014, wp page FT 8000R-5, shows that $10,260 was removed from the net worth in that way. If the appellant wanted to demonstrate that the amount should have been higher, he could have done so.

---

[12] Ex A-2, appellant's copy of CRA letter and attachments, p.28 and 29 being ft 8000R-18, p. 1 and 2; the entry is at bottom of p. 29.

K. Conclusion on Audit Issues

[71] The review of the audit itself therefore reveals that the 2013 adjustments are not warranted, and the 2014 adjustments are overstated and need to be reduced by $74,500. I find no other adjustments to make for the remaining tax years. I turn then to the statute barred issue and to the penalties.

L. Statute Barred Years

[72] Subsection 152(4) prohibits the Minister from making a reassessment after the three year "normal reassessment period".[13]

[73] For 2013, there is no remaining addition to the appellant's income so there can be no question that the Minister was not entitled to re-open that year and assess after the limitation period. I turn then to the remaining years, 2010, 2011, 2012, and 2014.

[74] The appellant advanced two arguments against the CRA's issuance of assessments after that "normal reassessment period", namely that:

a. The CRA auditor lacked a solid foundation to inquire into the appellant's affairs in the first place. She knew when she interviewed the appellant for the first time that he had sources of funds from his mother and father-in-law sufficient to explain his lack of reported income; and

b. The amounts assessed were not material having regards to his total outflows for the tax years in issue. For example, in 2012 the $51,000 assessed was only 6% of total funds withdrawn from all bank accounts. In 2013, that ratio was just under 6% and in 2014, it was only 14%.

[75] The first argument is legally irrelevant. The focus of subsection 152(4) is not on the Minister's conduct but on the taxpayer's conduct. The Minister often starts off with an incomplete or even an erroneous picture of a taxpayer's affairs. What matters is whether the final assessment can be justified on the basis that the taxpayer made a misrepresentation attributable to neglect, carelessness, or wilful

[13] *Act*, ss. 152(3.1), definition of "normal reassessment period" ("la période normale de nouvelle cotisation").

default, or has committed fraud in filing the return or supplying information under the *Act*.

[76] The second argument has some merit, but there are other ways to approach the issue. For example, in 2012, the assessed amount of some $50,000 represents 6% of all withdrawals referenced by the appellant, but it also represents infinitely more than the income declared by the appellant since he reported no taxable income at all in the year. Similar considerations apply for 2014 where only $5,000 in income was declared. Even allowing for the adjustment that I am making to 2014, the appellant's income for 2014 is around $60,000 and he reported only $5,000, i.e. less than 1/12 of that amount. In 2010, only $3,900 in income was declared as against an assessment of almost $49,000 in unreported income, and for 2011 no income was reported and $55,000 was assessed.

[77] For all of the years, except 2013, the appellant made a material misrepresentation. The issue to be determined is whether the misrepresentation was attributable to neglect, carelessness or wilful default.

[78] I have no hesitation in finding that Mr. Caroni was at a minimum careless and/or negligent. I say that because:

a. The amounts of unreported income were high;

b. Mr. Caroni was a relatively sophisticated individual in terms of his intelligence, his education and his experience;

c. There was extensive comingling of business and personal expenses with significant deficiencies in tracking those expenses. It resulted in improper accounting for drawdowns from the shareholder loan account. Counsel for Mr. Caroni fairly acknowledged that bookkeeping entries were not complete while arguing that this was not determinative in computing underreported income. Even if that were the case, the omissions are relevant when considering whether the tax years are statute barred;

d. There was a pattern of neglect. By the 2014 tax year, the appellant had under reported income in four of his last five tax years; and

e. I heard no countervailing evidence to establish how, if at all Mr. Caroni had been duly diligent in preparing and filing his tax returns. I heard no evidence as to who prepared the returns, as to what kind of review Mr. Caroni did of the returns, as to what systems or controls he put in place

> to ensure that his books and records were being properly prepared. I reiterate as well that neither the 9219 CFO, nor any of the accountants testified with respect to their work on behalf of Mr. Caroni or 9219.

[79] In argument, counsel for the appellant, relying on *Boies*, urged on me the proposition that the facts of one tax year should not form the basis to re-open another statute barred tax year. I think that takes the matter too far. In *Boies*, the Quebec Court of Appeal allowed the appeal for the 2005 tax year because, the existence of false representations in the 2007 tax year,

> [TRANSLATION]
>
> does not, in the absence of other elements, make it possible to infer that he made false representations in all his returns and to assess him for statute-barred years solely on that basis.[14]

[80] The Court went on to note that the Revenu Quebec auditor found discrepancies in 2005 but could not show that they were based on a false representation.

[81] I don't take that decision to mean that a Court can never look at the totality of a taxpayer's conduct over a period of time in determining whether a particular omission was due to carelessness or neglect. It means just what it says: an inference from one year to another, without more, may be inadequate to support assessing a statute barred year. The Quebec Court of Appeal said as much in the 2024 *Boismenu* decision where, citing to several cases including *Boies*, it held that:

> [TRANSLATION]
>
> Therefore, the judge may consider all the evidence adduced in order to determine whether the Agency has established, on a balance of probabilities, that the taxpayer made a misrepresentation that is attributable to wilful default or negligence.[15]

[82] The Court of Appeal went on to specifically find that the trial court had not erred when it relied on the fact that the taxpayer had repeatedly filed false returns

---

[14] *Boies c Quebec (Agence du revenu)*, 2021, QCCA 107, para 38 [emphasis added].
[15] *Boismenu c Quebec* (Agence du revenu) 2024 QCCA 962, para 19.

in finding that the Revenu Quebec had discharged its burden of proof.[16] The Court of Appeal citing to its own prior jurisprudence wrote that:

> [TRANSLATION]
>
> Mr. Boismenu collaborated poorly during the audit. He is now contending that it is only his actions at the time the return was filed that should be considered. This argument has no merit, as the Court explains in *Tanis c. Agence du revenu du Québec*:
>
> > If the moment relevant to the existence of the misrepresentation is the moment that the return containing the misrepresented income was filed, the taxpayer's actions following this filing, including his or her actions during the investigation, may be considered in order to establish objective fault, in this case negligence, at the time of the filing.[17]

[83] In this case, I don't think I can or should totally ignore the repeated failure to properly report income by a capable and experienced businessman in concluding that the failures at the time that each return was filed, were at best, a result of carelessness or indifference in discharging his self-reporting obligations under the *Act*. I also am not stuck in a factual vacuum as the trial judge was in *Boies*. I had the benefit of the auditor's detailed evidence on how and why she arrived at the unreported revenue amounts that she did. Her evidence on the poor state of the books and records and the difficulty of tracing fund flows does support a finding that the appellant's omissions were the result of carelessness or negligence.

M. Gross Negligence

[84] The CRA also assessed gross negligence penalties. I don't think that it has proven however, that the appellant's conduct arises to the level of having acted knowingly or under circumstances amounting to gross negligence for all of the years in issue.

[85] It is well established that the conduct required to support the imposition of a penalty under subsection 163(2) of the *Act* is more pronounced and deliberate than the conduct that permits opening up a statute barred year.

---

[16] *Ibid*. para 27.
[17] *Ibid*. para 28 [emphasis added].

[86] To demonstrate that a taxpayer acted knowingly, it must be shown that he actually knew of the falsity of the statement or that he was wilfully blind i.e. he did deliberately choose not to make inquiries.[18]

[87] I don't think that Mr. Caroni acted knowingly or with wilful blindness. My impression remains that Mr. Caroni was basically an honest man who did not set out to avoid paying taxes but didn't bother to ensure that none were payable either.

[88] More difficult is the question of whether Mr. Caroni was grossly negligent. This standard has been canvassed in numerous cases most of which refer back to *Venne* which held that:

> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.[19]

[89] I think that Mr. Caroni did not know that he had income to report because his business ventures between 2010 and 2014 were not profitable. That said, I must also consider if Mr. Caroni's failure to know that he had income to report especially in light of the number of years in which this occurred, establish such a degree of negligence as to amount to intentional acting. Frankly I think it's a close call, especially for 2012 which marked the third year in a row that Mr. Caroni failed to report, not just the right amount of income, but any income at all.

[90] I think that for 2010 and 2011, Mr. Caroni's conduct is merely negligent. His treatment of the 9219 shareholder loan account, especially the failure to properly record drawdowns on that account, is not commendable but it does not rise to the level of intentional misconduct.

[91] For 2012, I think it is one time too many. Mr. Caroni's conduct was grossly negligent. It was the third year in a row that little or no income was reported that he had huge personal expenses, and that no real attempt to properly measure his income was undertaken. I also refer again to Ms. Ngo's evidence that 9219 made just over $39,000 in payments on the appellant's credit cards without reducing the shareholder loan balance. Mr. Caroni is too intelligent and too sophisticated to

---

[18] *Wynter v R*, 2017 FCA 195, para. 17.
[19] *Venne v The Queen*, [1984] C.T.C. 223, 84 D.T.C. 6247 (F.C.T.D.) at para 37

overlook the 2012 omission. The subsection 163(2) penalty should apply to that tax year.

[92] I don't think that the same holds true for 2014. In 2014, Mr. Caroni's actions are negligent but not more than that. He had a new business that was not generating income, and his financial situation had begun to deteriorate to a point that he may have not realized that he could still have taxable income. Further, I have found that he did not have unreported taxable income in 2013, so the pattern of misconduct is somewhat attenuated. I would not maintain a subsection 163(2) penalty for 2014.

[93] The result is that penalties are vacated for all years except 2012.

N. The Motion for Non-Suit

(1) Nature of Appellant's Motion

[94] I return again to the appellant's motion brought at the close of the respondent's evidence for a judgment allowing the appeals and vacating the reassessments. Appellant's counsel brought the motion because he thought that the respondent's case was weak, and he thought it would prejudice the appellant to testify because in so doing he might inadvertently improve the evidence of the respondent.[20] Appellant's counsel was clear in his oral and written argument that the Crown had not discharged its burden of proof, saying:

> [TRANSLATION]
>
> … I mean by the respondent and as regards the burden of proof, we consider that at this stage, they have not discharged their burden to go to the heart of the statute-barred period, and to avoid unfairness before we begin …
>
> [T]he evidence in terms of the statutory bar is very weak and does not meet the burden, this would be perpetuating an abuse of process.[21]
>
> And
>
> [TRANSLATION]

---

[20] Transcript of March 19, hearing, p. 125, lines 12-15.
[21] Transcript of March 19, hearing p. 128 line 24 to 26.

> Indeed, the respondent, in presenting his evidence, failed to meet his burden of proof to allow for the lifting of the statutory bar regarding the years at issue.[22]

[95] Appellant's counsel in written argument described his motion as being similar to a non-suit that exists in the criminal law context:

> [TRANSLATION]
>
> … as this is a statutory bar, which is equivalent to a "*fin de non-recevoir*" in law, there is nothing preventing us from asking the Court for leave to bring a motion similar to a criminal law motion for non-suit, a motion to dismiss the challenge because the evidence is in and, in our humble opinion, they have not met any statutory bar.[23]

[96] After hearing, in a summary way, the appellant's oral request and following a break, I brought to the attention of appellant's counsel the decision of Bowman J. (as he then was), in *410812 Ontario Ltd*. on what he described as a motion for non-suit («non-lieu»).[24] His comments appear to precisely describe the issue raised by the appellant and I adopted his approach. Bowman J.'s comments, briefly summarized, were these:

a. A party moving for a non-suit should be asked whether they want to call evidence before arguing the motion. If such evidence is called it may be considered by the judge in ruling on the non-suit motion;

b. If the motion is dismissed, the moving party is bound by their election and can call no further evidence; and

c. Where the non-suit fails, the appellant can still argue that the evidence was insufficient to satisfy the onus on the party bearing it.[25]

[97] The appellant here, elected to call evidence and so I reserved on the motion. The appellant in his supplemental submissions asserts that Justice Bowman changed his views on the election issue in a later case.[26] Actually, the textbooks do

---

[22] Appellant's supplemental written submissions, para 5.
[23] *Ibid.* p. 124.
[24] *410812 Ontario Ltd v R*, [2002] CarswellNat 5937 (TCC IP).
[25] *Ibid*, para 34.
[26] *943372 c R*, 2007 CCI 294, para 14.

still refer to the election as an important element of the non-suit motion.[27] In this case it does not matter because I base my decision on the motion on the respondent's evidence alone rather than on the testimony given by the appellant after electing to call evidence.

(2) The Appellant's Motion is a non-suit motion

[98] In his written argument, the appellant disputes that his motion was a non-suit motion, even if it was similar in nature to one, writing that it was more in the nature of an abuse of process motion:

> [TRANSLATION]
>
> Although there are similarities, this is not a "motion for non-suit". This is a motion alleging abuse of process in light of the "*fin de non-recevoir*" (the statutory bar);[28]

(3) The legal test on a non-suit motion

[99] I think that the motion is a non-suit motion and that it fails because the respondent led sufficient evidence to allow the pleaded issues to be considered by a trier of fact. A motion of the type brought by the appellant does not permit the trier of fact to weigh that evidence or arrive at a conclusion as to whether the party with a burden of proof has discharged that burden on a balance of probability.

[100] It is useful to return to the foundational principles of what happens at a trial in order to better understand why this motion fails. The first foundational principle is so obvious as to barely need repeating. A Court should not assess or weigh the evidence before it (other than to determine admissibility) until the case is closed.[29] To do otherwise is to prejudge the outcome of the case and that is usually considered a bad thing for a judge to do. Thus, a motion, mid-trial about the sufficiency of the other party's case, cannot be a request to weigh the evidence. It must be an assertion that the opposing party has failed to lead any evidence on one or more of the constituent elements of the case.

---

[27] Lederman et al, Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed. (LexisNexis Canada Inc. 2022) [hereinafter, Sopinka] § 5.02 [1], para. 5.6 and 5.7.
[28] Appellant's supplemental written submissions, para 5.
[29] Sopinka § 3.03 [1], para. 3.10.

[101] So how does a litigant get to truncate the judicial process and have a judge look at the evidence before a trial is over? The appellant describes his motion as rooted in abuse of process having regard to the plea that the assessments are prescribed i.e. statute barred. One option, which was briefly mentioned at the hearing would have been to strike the respondent's pleading under Rule 53 as an abuse of process. However, counsel noted that the respondent's allegations would be presumed to be true for the purpose of Rule 53 and of course the appellant does not concede that the respondent's allegations can be presumed to be true and that the appellant can still win its case.

[102] I might add that Professor Mew in his textbook on limitations law states that bringing an action out of time is not generally an abuse of process.[30] I agree, and appellant's counsel pointed to no authority that a statute barred assessment, even one that is vacated in court, automatically constitutes an abuse of process.

[103] Professor Mew also sets out several other possibilities under Ontario Civil Procedure to deal with a limitations issue summarily: i.e.

a. Summary judgment;

b. Determination of an issue before trial;

c. Special case that states a question of law; and

d. Determination of the issue at trial.

[104] The above options, except for the last one, are all pre-trial types of proceedings which in some cases have analogs to procedure in this Court. However, since the appellant did not avail himself of any of those procedures, the only remaining option is determination at a trial. Professor Mew says of this option:

> "the action may be permitted to take its ordinary course, reserving the issue of the limitation defence to the trial itself".[31]

[105] So, Professor Mew instructs us that there are several options to determine a limitations issue, but the only option open to us here is a trial which runs in the ordinary course. That takes us back to where we started. In the ordinary course of

---

[30] *Ibid*.
[31] see G. Mew et al, The Law of Limitations, 4th Ed. (Lexis Nexis Canada Inc. 2023), c. 5.05.

a trial, judges don't assess the evidence until the end of the trial which means that the appellant's assertion that the respondent failed to meet its burden of proof is prematurely moved.

[106] However, during a trial, a party can bring a motion for a non-suit (« non-lieu ») after the close of the evidence of the party with the burden of proof, but the only issue in such a motion is whether the party had discharged its evidential burden (« *charge de présentation* »), not its persuasive burden (« *charge de persuasion* »).

> *(4) Non-Suits decide whether evidence was presented not whether a burden was discharged*

[107] The test on a non-suit is **not** whether the party bearing the onus has failed to prove its case on a balance of probability, but rather whether the party with that burden has led any evidence which supports that party's case. A party who moves a non-suit is arguing that the opposing party has not met this evidential burden.

[108] In response, the party bearing an evidential burden must be able to point to evidence of the existence or non-existence of a given fact or issue to allow that factual question to be considered by the trier of fact.[32]

[109] The evidential burden is not about weighing evidence or determining facts. The party with an evidential burden **is not required to convince the** trier of fact of anything, but only to point out evidence which suggests that certain facts existed.[33] The Court considers, as a legal question and not as a factual question, whether sufficient evidence exists to satisfy the evidential burden.[34] In civil proceedings, such as negligence, (and I think by analogy, in tax cases too), the party alleging something must,

> "…adduce sufficient evidence of the defendant's negligence to overcome a motion for non-suit".[35] Finally, and to be clear, "the discharge of an evidential burden proves nothing - it merely raises an issue".[36]

---

[32] *Ibid*.
[33] *R. v Schwartz*, [1988] 2 S.C.R. 443 at 467 [emphasis added]; Sopinka § 3.26.
[34] Sopinka, supra note 8, 3.9 and see also § 5.02 [1], ¶5.5.
[35] *Ibid*, § 3.03 [3], 3.26.
[36] *Ibid*, § 3.04 [1], 3.28, quoting from R v Hunt, [1987] AC 352, at 385 (HL).

[110] By contrast, the persuasive burden is the burden to prove one's case beyond a reasonable doubt or on a balance of probabilities depending on the type of case.[37] The persuasive burden raises a question of fact, not law.[38] This requires weighing the evidence, drawing inferences and making findings of fact.

[111] As already stated, a Court should not assess or weigh the evidence before it until the case is closed.[39] Thus, a motion for non-suit is not a request to weigh the evidence; it is an assertion that the opposing party has failed to lead any evidence on one or more of the constituent elements of the case.

O. *Decision on the Non-Suit*

[112] I dismiss the non-suit motion because the respondent did lead evidence on all of the issues before me. In particular, the respondent called the CRA auditor. That auditor testified as to the amounts assessed and the basis for the assessments for each tax year. She showed her arithmetic and demonstrated that, if her evidence were accepted, there were understatements in the appellant's reported income in each year under appeal. The understatements were not *de minimis* and they could support an inference of carelessness, negligence, wilful default or gross negligence. The auditor testified that 9219's shareholder loan account was missing entries and was not reliable.

[113] The evidence led was sufficient to be placed before a trier of fact to determine whether the respondent discharged the burden of proving on a balance of probabilities that Mr. Caroni omitted to report income, and that the omission was due to carelessness, neglect or wilful default so as to permit a reassessment outside of the Normal Reassessment Period.

[114] The appellant's argument that the respondent's evidence was weak and so did not discharge its burden of proof was at best, an argument that the respondent did not discharge its persuasive burden. I could not address that argument without weighing the evidence, and I could not weigh the evidence until the trial was over, so the motion has to be dismissed.

---

[37] *Ibid*. 3.8 and see also § 5.02 [1], 5.5.
[38] *Ibid*. 3.12.
[39] *Ibid*. 3.10.

(1) Is the Result different when considered through the lens of Civil Code concept of « fin de non-recevoir »?

[115] In his supplemental written submissions, the appellant invoked what the Quebec Civil Code (the Code) calls in article 2921, a « fin de non-recevoir »[40] in deciding whether the Minister was permitted to assess beyond the Normal Reassessment Period.

[116] Article 2921 of the Code is part of Title 3 of the Code dealing with extinctive prescription which is in turn part of Book 8 of the Code on Prescription. The subject matter of Book 8 includes what common law lawyers would recognize as statutes of limitation. So, for example, Title 1 deals with general rules governing prescription including, running of prescriptive periods, interruption of the prescriptive period, renunciation of prescription and suspension of prescription. Title 2 of book 8 deals with acquiring ownership rights by prescription for example, what the common law might call, adverse possession. Title 3 as noted deals with extinction of prescription and specifies a 10-year default period for extinctive prescription.

[117] Knowing, as we now do, that a « fin de non-recevoir » is a kind of limitations rule, doesn't really address the appellant's problem on the motion. The appellant still wanted me to weigh evidence, before the trial ended and find against the respondent on the basis that neglect, or carelessness was not established. I cannot do that other than on the basis of a non-suit motion.

[118] Also left unexplained in the appellant's submissions is how one can invoke Article 2921 of the Code in a case where the limitation period is contained in the ITA and not in either the Code or in a provincial tax statute. The Supreme Court in *Markevich* held that where the *Act* does not specify a limitation period, then federal (or for a provincial debt,) even provincial limitation law can apply, but it explicitly noted that the *Act* does have its own limitation period for assessing, holding that:

> The assessment provisions of the ITA are clearly stated on prescription.

And

> Numerous provisions in the ITA expressly stipulate that the Minister may make an assessment "at any time": see ss. 152(4)…Parliament has demonstrated a clear

---

[40] *Code Civil du Quebec,* SQ, 1991, c. 64, s. 2921.

> willingness to address the issue of limitation periods in the ITA where it sees fit to do so.[41]

[119] The appellant in its written submissions reasoned by analogy to the judicial treatment of similar provisions in the Quebec *Income Tax Act* to demonstrate that the normal reassessment period is of an absolute nature. In particular, he cited to paragraph 33 of *Barber c Quebec*. This case is of no assistance because the issue before that Court, on a complex fact pattern, had nothing at all to do with establishing any kind of misrepresentation.

[120] In *Barber*, Revenu Quebec had reassessed 1988 to 1991 after the prescribed period to add tax and consequentially reassessed 1992 and 1993 to allow a related deduction. On appeal, Revenu Quebec failed to show a negligent misrepresentation, and the 1988 to 1991 reassessments were vacated. Revenu Quebec again reassessed 1988 to 1991 ostensibly to delete the taxes imposed by the vacated reassessments. This may have been unnecessary, but it allowed Revenu Quebec to issue consequential reassessments to remove the related deductions previously allowed in 1992 and 1993, but by then the 1992 and 1993 years were also statute barred and it was those 1992 and 1993 reassessments to remove the deduction that were challenged.

[121] The Quebec Court of Appeal had to decide whether on those facts, Revenu Quebec could issue new reassessments for 1988 to 1991 which would in turn permit the issuance of new consequential reassessments for 1992 to 1993. In that context, the Court of Appeal contrasted the Minister's power to issue an assessment following a court decision that did not turn on a statute barred issue, with a court decision that was based on a statute barred issue and said that in that latter case:

> [TRANSLATION]
>
> [33] But the situation in the case of prescriptions is not that one [i.e. not the situation where the assessment can be referred back]. A statutory bar is an absolute "*fin de non-recevoir*": it extinguishes the Minister's entitlement to make an assessment/reassessment, exempts the court from ruling on the merits of the issue, and vacates an assessment that is otherwise compliant with the legislation.[42]

---

[41] *Markevich v R*, 2003 SCC 9, paras 13 and 16.
[42] *Barber c Quebec (Sous-Ministre du Revenu*) 2008 QCCA 1421, para. 33.

[122] Those comments deal with what happens after the Minister has failed to prove negligence sufficient to open up a statute barred year, and the Minister then wants to issue further reassessments for those years in order to ground the issuance of further consequential reassessments that are now also statute barred and in no way tainted by allegations of negligent misconduct sufficient to otherwise open them up. Those remarks on the general attributes of prescription do not bear on how or when a party can challenge the sufficiency of the Minister's evidence that a taxpayer made a misrepresentation attributable to neglect or wilful default. An assessment after the "Normal Reassessment Period" is clearly not absolutely prescribed since subsection 152(4) expressly stipulates the circumstances under which, the prescription will not apply.

(2) The Misiak Wrinkle

[123] The appellant then turns from *Barber* to *Misiak* this time to try to preclude reliance on the respondent's evidence at all, such that there is no case for the appellant to answer. *Misiak* does not get the job done. In *Misiak,* Hogan J. held that the statute barred net worth assessments before him should be vacated. He had been presented with a case in which the appellant testified that he lived frugally. The respondent in *Misiak* did not call a CRA witness and relied solely on Statistics Canada data regarding the spending habits of a typical family. The appellant's written submissions quoted paragraph 17 where the Court held that:

> [17] The evidence presented by the Minister in the present situation does not meet this standard.[43]

[124] It might have been preferable for the appellant to quote paragraph 16 of the decision which provides important context. It shows that the Court was not deciding the issue as a non-suit but was deciding the case at the end of trial applying the balance of probability standard of persuasion:

> [16] However, when the proverbial shoe is on the other foot and the year is otherwise statute-barred, the Minister faces the very same evidentiary burden: the Minister must lead reliable evidence to establish on a balance of probabilities that the taxpayer has understated his income as a result of neglect, carelessness or wilful default on his part.[44]

---

[43] *Misiak v R,* 2011 TCC 1, (IP), para 16.
[44] *Ibid,* para 17, [emphasis added].

[125] Justice Hogan was entitled to weigh the evidence and decide whether or not the Crown had discharged its persuasive burden because the trial was over. Justice Hogan said nothing about whether evidence of an alleged discrepancy in a net worth could or could not be used to survive a motion for non-suit, still less did he say that in every case, the Minister was precluded from relying on a net worth discrepancy to infer carelessness, neglect or wilful default sufficient to justify assessing outside the Normal Reassessment Period. His finding was simply that no such discrepancy had been established on a balance of probabilities on the facts before him.

[126] The references to the *Code Civil*, to *Barber*, and to *Misiak* are not helpful. Subsection 152(4) provides for a limitation period and also provides for exceptions to that limitation period. The issue on the motion had to be limited to whether any evidence has been adduced to show that a misrepresentation attributable to careless, neglect or wilful default was made. The motion was not the time or place to weigh or evaluate that evidence to determine whether the respondent had discharged its burden to prove neglect, or carelessness on a balance of probability.

(3) A Closing word on non-suits in the Tax Court

[127] As I penned 30 plus paragraphs on the subject of non-suits, I have been troubled by the utility not only of this non-suit motion, but of non-suit motions in general. Such suits accomplish nothing and should be more or less precluded in the Tax Court. I say that because if, as still seems to be the case, the moving party must be put to an election as to whether to call evidence or not, the suit serves no purpose. If evidence is called, then no time has been saved. If no evidence is called, then the judge does not need to decide the non-suit motion because she can simply decide the case once and for all on the basis of the record and the arguments. In saying this, I draw again on the Sopinka text where the authors make much the same point with respect to non-suit motions:

> In Ontario civil non-jury trials, the motion makes little sense if the defendant does not intend to call any evidence because the defendant must show there is no reasonable case to answer to succeed on a non-suit motion. This is a more onerous threshold to satisfy than arguing that the plaintiff's case should fail because she or he failed to prove her or his case to a balance of probabilities.[45]

---

[45] Sopinka, *supra* note 27, 5.02 [1], 5.7

[128] One possible purpose that might be served by such a motion would be to open a window into what the judge is thinking about the strength of the other party's case. This should be discouraged. While the judge hearing a non-suit will know that she should not weigh the evidence, the motion here illustrates how confusing it can be to navigate the line between determining the legal sufficiency of the evidence and the question of whether a party has met its persuasive burden. The non-suit can quickly turn into a trap that undermines the integrity and the efficiency of the trial process.

[129] Finally, I note that while the respondent had the burden of proof in this case, it is often the taxpayer who has the burden of proof thus opening the door for a proliferation of non-suit motions from the Crown. Such motions could circumscribe one of the most important functions of this court, which is to allow taxpayers to hear, in full, the case of the respondent and not simply to be confronted with the blank wall of a non-suit motion after they have shown their cards.

[130] For all of these reasons, non-suit motions should rarely if ever be entertained in this Court.

III. **Costs**

[131] Because success is divided in this case, no costs are awarded. Even if it had been otherwise, I would have been loath to award costs where the parties did not use the discovery process to narrow the substantive or evidentiary issues in dispute before trial in this case.

Signed at Ottawa, Canada, this 1st day of August 2025.

"Michael Ezri"

Ezri J.

CITATION:	2025 TCC 101
COURT FILE NO.:	2022-917(IT)G
STYLE OF CAUSE:	DAVID CARONI AND HIS MAJESTY THE KING
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	March 18,19, and 20, 2025
MOTIFS DE JUGEMENT PAR:	The Honourable Justice Michael U. Ezri
WRITTEN SUBMISSIONS:	March 31, 2025 – Appellant
	April 4, 2025 - Respondent
DATE OF JUDGMENT:	August 1, 2025

APPEARANCES:

Counsel for the Appellant:	Richard Généreux
Counsel for the Respondent:	Marie-Claude Landry

COUNSEL OF RECORD:

For the Appellant:	
Name:	Richard Généreux
Firm:	Services Juridiques Evolex Inc.
For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada