Docket: 2012-2543(IT)I

BETWEEN:

HENRI CANTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 16, 2014, at Montréal, Quebec.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Martin Lamoureux

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* ("Act") for the 2008 taxation year is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the Minister was not justified in imposing the penalty provided for in subsection 163(2) of the Act.

Signed at Ottawa, Canada, this 24th day of April 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 6th day of June 2014
Daniela Guglietta, Translator

Citation: 2014 TCC 116
Date: 20140424
Docket: 2012-2543(IT)I

BETWEEN:

HENRI CANTIN,

Appellant,

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REASONS FOR JUDGMENT

Masse D.J.

[1] This is an appeal from a reassessment dated July 11, 2011, in respect of the 2008 taxation year whereby the Minister of National Revenue (the Minister) imposed a penalty for gross negligence under subsection 163(2) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), as amended (the Act), in the amount of $5,29272 plus related interest.

[2] The issue raised in this appeal is whether the Minister was entitled to impose a penalty pursuant to subsection 163(2) of the Act. The Minister determined that the appellant knowingly, or in circumstances amounting to gross negligence, made a false statement or omission in his income tax return filed for the 2008 taxation year.

Factual background

[3] The appellant is a seasoned lawyer, member of the Barreau du Québec for 50 years. At the beginning of the 2008 taxation year, he had been a shareholder of Cantin, Cantin, Cliche Avocats Inc. (Avocats Inc.), since January 1, 2005, date of the company's incorporation. He owned a one-third stake in Avocats Inc. According to the appellant, in 2008, *An Act respecting the Barreau du Québec* (*Act respecting the*

Barreau du Québec) allowed lawyers to incorporate individually, which had not been the previously permitted. Thus, the appellant incorporated himself as a holding company ("holding") on January 29, 2008 (see Exhibit A-1) as 9191-8854 Québec Inc. (Cantin Inc.). In January 2008, Avocats Inc. paid a taxable dividend to its shareholders, equivalent to the company's retained earnings. The portion of the dividend paid to the appellant was $65,750. A T5 slip was filed by the accountants of Avocats Inc. (who are not the appellant's personal accountants) with respect to this dividend in January 2008, which was submitted to the Minister as required.

[4] In February 2008, Avocats Inc. underwent a corporate restructuring to allow its members to benefit from the changes in the *Act respecting the Barreau du Québec* so as to incorporate themselves. Following said corporate restructuring, Cantin Inc. became a one-third shareholder in Avocats Inc., replacing the appellant as one of the shareholders of Avocats Inc.

[5] In filing his income tax return for the 2008 taxation year, the appellant reported total income in the amount of $58,493. However, he failed to report income in the amount of $65,750 as a taxable dividend paid to him by Avocats Inc., as reflected on the T5 slip issued by Avocats Inc. On May 7, 2009, the Minister of National Revenue (the Minister) issued to the appellant an initial Notice of Assessment for the 2008 taxation year. On July 11, 2011, the Minister issued a reassessment to make an adjustment by adding to the appellant's income the unreported taxable dividend of $65,750, and a penalty in the amount of $5,292.72 for gross negligence, under subsection 163(2) of the Act. On August 31, 2011, the appellant served on the Minister a Notice of Objection against the reassessment. On March 15, 2012, the Minister confirmed the reassessment. Hence, the present appeal. The appellant challenges only the imposition of the penalty for gross negligence.

[6] Louis Bourdages is a chartered accountant and he is the appellant's personal accountant. Mr. Bourdages has nothing to do with the accountants of Avocats Inc. He is responsible for filing the appellant's personal income tax returns. Mr. Bourdages and the appellant testified that in April 2009, the appellant went to Mr. Bourdages' office with all the necessary documents to prepare his income tax return for the 2008 taxation year. However, the appellant did not have his copy of the T5 slip issued to him following payment of the dividend. Mr. Bourdages prepared the appellant's income tax return and submitted it to the Minister electronically, therefore the return is not signed. He submitted a copy to the appellant. Mr. Bourdages explains that he had no personal knowledge of the T5 slip and, therefore, was unable to bring to the appellant's attention the receipt of such dividend and the need to report the dividend

as income. It should be noted that the appellant reported all dividends in the past, including a dividend reported in 2007.

[7] On August 18, 2010, Revenu Québec issued to the appellant a Notice of Assessment whereby the appellant's income was recomputed to take into account the dividend he received from Avocats Inc. (see Exhibit I-2). No sooner had the appellant received the Notice of Assessment, than he discussed it with Mr. Bourdages, who told him what it was. The appellant was well aware that that he had been paid a dividend and that he was issued a T5 slip, but he believed the dividend had been paid to his "holding", meaning Cantin Inc., and not to him in a personal capacity. The appellant states that he meticulously searched through all his belongings after learning of the omission to find the missing T5 slip, but he did not find anything. According to the appellant, he had always and without exception, included all the slips he received and does not understand why he would not have included the T5 slip if he had had it in his possession.

[8] The appellant immediately sought to inform the Minister and file an Adjustment Request. According to Mr. Bourdages, a T1 Adjustment Request (the T1-ADJ") was filed with the Minister in November 2010. Said T1-ADJ was never received by the Minister and, therefore, the Minister failed to make a reassessment. Thus, a second Adjustment Request was sent on March 15, 2011 (see Exhibits A-2 and I-1) with a copy of the T5 slip. Following receipt of the Notice of Reassessment dated July 11, 2011, the appellant paid all taxes attributable to the dividend and related interest.

[9] The appellant tells us that although he is a lawyer, he knows nothing about taxation and relies on his partner, Maurice Cantin, and his accountants for tax matters. The appellant states that Mr. Bourdages had asked him whether he had received a dividend in 2008 as he did in 2007, and he said no. He assumed that the dividend was paid to Cantin Inc., his "holding". The appellant testified that he never saw the T5 slip that Avocats Inc. allegedly issued to him. He came to the conclusion that his copy of the T5 slip was lost. The appellant states that he always reported all his income, including the dividends paid to him in the past, and he always paid all his taxes. He obtained a copy of the T5 slip and included it in the T1-ADJ that was filed with the Minister in March 2010. He did not hide anything and the omission to report the dividend as income is just that, a mere omission that should not result in a penalty for gross negligence.

Appellant's position

[10] The appellant submits that he did not knowingly make a false statement in filing his tax return. An omission was certainly made, because he does not contest that he should have reported as income the taxable dividend he received from Avocats Inc. However, that omission was not made under circumstances amounting to gross negligence. He therefore asks that the appeal be allowed and that the penalty imposed under subsection 163(2) of the Act be cancelled.

Respondent's position

[11] The respondent submits that the appellant knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of, a false statement or omission in filing his tax return by failing to report taxable dividends of $65,750 for the 2008 taxation year. The appellant was at least wilfully blind in managing his tax affairs. Thus, the Minister was justified in imposing on the appellant the penalty of $5,292.72 in accordance with subsection 163(2) of the Act, plus related interest. The respondent requests that the appeal be dismissed.

Statutory provisions

[12] The relevant provisions of the Act read as follows:

> . . .
>
> 163(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty. . . .
>
> 163(3) Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

Analysis

[13] Of course, in a case such as this, the onus is on the respondent to prove that the taxpayer made false statements or omissions either knowingly or under

circumstances amounting to gross negligence as those phrases have been defined by the courts. The respondent needs to prove this on a balance of probabilities standard.

[14] In *Farm Business Consultants Inc. v. Canada*, [1994] T.C.J. No. 760 (QL), Associate Chief Judge Bowman held that subsection 163(2) is a penal provision and that in applying it if there is doubt as to the type of conduct to which the misrepresentation is attributable the benefit of that doubt should be given to the taxpayer. Judge Bowman adds as follows:

> [28] A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2) . . . . In such a case a court must, even in applying a civil standard of proof, scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established[3]. Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted.

[15] The concept of "gross negligence" accepted in the case law is that, which is defined by Justice Strayer in *Lucien Venne v. The Queen*, 84 DTC 6247, at page 6256:

> . . . "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. . . .

[16] There is no question that the concept of "wilful blindness" is applicable to tax cases. In *Canada v. Villeneuve*, 2004 FCA 20, the Federal Court of Appeal, per Justice Létourneau, stated:

> [6] With respect, I think the judge failed to consider the concept of gross negligence that may result from the wrongdoer's willful blindness. Even a wrongful intent, which often takes the form of knowledge of one or more of the ingredients of the alleged act, may be established through proof of willful blindness. In such cases the wrongdoer, while he may not have actual knowledge of the alleged ingredient, will be deemed to have that knowledge.

[17] Wilful blindness involves a person choosing to remain ignorant when one is aware of the need to make inquiry on a matter but would prefer not to know the correct answer. The law will impute knowledge be to a taxpayer who, in that dictate or strongly suggest that an inquiry should be made with respect to his or her tax situation, refuses or

fails to commence such an inquiry without proper justification: *Panini v. The Queen*, 2006 FCA 224, [2006] F.C.J. No. 955 (FCA) (QL), 2006 DTC 6450.

[18] Generally, when there is a significant discrepancy between the amount of income reported and the amount of income that a taxpayer ought to have reported, this constitutes a circumstance that strongly suggests that an inquiry should be made with respect to the taxpayer's tax situation. Such a discrepancy sounds off alarm bells: see for example *Moraes v. Canada*, [1996] T.C.J. No. 1493 (QL); *Ling Yip v. The Queen*, Court File No. 1999-642(IT)G; *Archibald v. Canada*, [2000] T.C.J. No. 846 (QL); *Hébert v. The Queen*, 2009 TCC 124, [2009] T.C.J. No. 79 (QL); *Blanchette v. The Queen*, 2009 TCC 263, [2009] T.C.J. No. 193 (QL); and *Griffin v. The Queen*, 2011 TCC 531, [2011] T.C.J. No. 433.

[19] In *DeCosta v. Canada*, 2005 TCC 545, Justice Bowman stated the following, at paragraphs 11 and 12:

> [11] In drawing the line between "ordinary" negligence or neglect and "gross" negligence a number of factors have to be considered. One of course is the magnitude of the omission in relation to the income declared. Another is the opportunity the taxpayer had to detect the error. Another is the taxpayer's education and apparent intelligence. No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence.
>
> [12] What do we have here? A highly intelligent man who declares $30,000.00 in employment income and fails to declare gross sales of about $134,000.00 and net profits of $54,000.00. While of course his accountant must bear some responsibility I do not think it can be said that the appellant can nonchalantly sign his return and turn a blind eye to the omission of an amount that is almost twice as much as that which he declared. So cavalier an attitude goes beyond simple carelessness.

[20] In the case at bar, there is no question as to the appellant's honesty. As he indicates in his Notice of Appeal, the T5 slip came from the company of which he was a shareholder. Thus, it would have been more than reckless on his part to intentionally fail to report the dividend in filing his tax return for 2008. I believe the appellant when he says that he had no intention of making a false statement. I find that he did not knowingly make a false statement.

[21] While there was an omission, can it be said that this omission was made under circumstances amounting to gross negligence? Gross negligence requires more than 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.

Thus, ordinary negligence is not sufficient to warrant a finding of gross negligence on the appellant's part.

[22] It is true that in the case at bar there is a significant discrepancy between the income reported by the appellant and the income that he ought to have reported. This factor may raise the application of the principle of wilful blindness. However, Exhibit A-3, which is a comparative summary for the years 2001 to 2012, indicates that the taxable income reported by the appellant may vary from one year to another by very large amounts; sometimes by more than $100,000. Therefore, the income gap factor carries less weight. It is also true that the appellant was aware that Avocats Inc. had paid a dividend of $65,750 in January 2008. He stated to us that he believed the dividend was paid to Cantin Inc., his "holding". In my opinion, the appellant's belief, although erroneous, was not unreasonable considering that the corporate restructuring of Avocats Inc., the incorporation of Cantin Inc. and the payment of the dividend all happened at the same time. He incorporated himself as a holding company for the purpose of benefitting from the tax provisions benefitting corporations. It is not difficult to conceive that the appellant may have reasonably believed in error that the dividend may have been paid to Cantin Inc. instead of being paid directly to him.

[23] The appellant is a lawyer, a highly educated and highly intelligent man. I have the impression that he is a businessman who handles his affairs honestly and with integrity. However, he knows nothing about taxation and when it comes to tax matters, he relies on the knowledge of his partner and that of his accountants. With the exception of the 2008 taxation year, he has always reported all his income and always paid all related taxes. I accept that he never intended to make a false statement in filing his tax return. I accept that, once the omission was detected, the appellant filed an Adjustment Request and when he received the Notice of Reassessment, he paid all taxes and related interest. I am of the view that the appellant was negligent under all circumstances, but I am not persuaded that his negligence involved greater neglect than simply a failure to use reasonable care. I cannot characterize the appellant as being a man who shows indifference as to whether the law is complied with or not. In any event, I highly doubt that the degree of negligence shown by the appellant goes beyond the ordinary negligence manifesting itself into a high degree of negligence tantamount to intentional acting. It is therefore a lack of ordinary care and not gross negligence.

Conclusion

[24] For these reasons, I allow the appeal and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that the Minister was not justified in imposing the penalty provided for in subsection 163(2) of the Act.

Signed at Ottawa, Canada, this 24th day of April 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 6th day of June 2014
Daniela Guglietta, Translator

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STYLE OF CAUSE:	HENRI CANTIN v. HER MAJESTY THE QUEEN
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DATE OF HEARING:	January 16, 2014
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	April 24, 2014

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Martin Lamoureux

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

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