Dockets: 2012-4256(IT)G
2014-2909(IT)G
2015-883(IT)G

BETWEEN:

WARREN BRADSHAW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence on December 8, 2016
at Hamilton, Ontario

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Dominique Gallant

JUDGMENT

In accordance with the attached Reasons for Judgment:

1. The appeals with respect to reassessments made under the *Income Tax Act* for the Appellant's 2008, 2009, 2010 and 2011 taxation years are dismissed.

2. Costs are awarded to the Respondent.

Signed at Antigonish, Nova Scotia, this 27th day of June 2017.

"S. D'Arcy"

D'Arcy J.

Citation: 2017 TCC 123
Date: 20170627
Dockets: 2012-4256(IT)G
2014-2909(IT)G
2015-883(IT)G

BETWEEN:

WARREN BRADSHAW,

Appellant,

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Respondent.

REASONS FOR JUDGMENT

D'Arcy J.

[1] The three appeals before the Court are in respect of the Appellant's 2008, 2009, 2010 and 2011 taxation years. The Court heard the appeals together on common evidence.

[2] The Appellant reported a loss from a business on his income tax return for each of the relevant years, as follows:

- 2008 taxation year: loss of $946,479
- 2009 taxation year: loss of $16,537
- 2010 taxation year: loss of $222,198
- 2011 taxation year: loss of $268,916

[3] For the 2008 taxation year, the purported business loss is shown on a form included as part of the Appellant's 2008 tax return that is titled Statement of Agent Activities (the "Statement of Agent Activities"). The Appellant included with his income tax returns for the 2009, 2010 and 2011 taxation years the CRA form T2125 titled Statement of Business or Professional Activities (for 2009 and 2010) and Statement of Business Activities (for 2011). For each year, the filed form

states that the main product or service of the Appellant's purported business was "agent".

[4] The Appellant claimed the business losses after attending a seminar and receiving advice from a Mr. Larry Watts. The Appellant referred to Mr. Watts as being with an entity known as the Fiscal Arbitrators.

[5] The Appellant filed with his 2008 income tax return a signed request for loss carry-back. Specifically, it was requested that $922,600 of the business loss reported on his 2008 income tax return be carried back and applied against his 2005, 2006 and 2007 taxation years.

[6] Through a number of assessments and reassessments, the Minister denied all of the business losses claimed by the Appellant. She did not process the $922,600 loss carry-back request. The Minister also assessed gross negligence penalties.

[7] In his notice of appeal for each of the taxation years at issue, the Appellant is challenging the imposition of the gross negligence penalty.

[8] In his notices of appeal for the 2009, 2010 and 2011 taxation years, the Appellant also appears to be challenging the denial of the business losses. On cross-examination, he stated that he still maintains that he had a business loss for each of the relevant years.

[9] The Minister also denied certain rental losses claimed by the Appellant in his tax returns filed for the 2009 and 2011 taxation years.

[10] The Appellant did not provide any evidence in chief.

[11] The Respondent called two witnesses: Ms. Kim Robinson (a CRA appeals officer) and the Appellant.

[12] I found Ms. Robinson to be a credible witness. I did not find the Appellant to be a credible witness. In most instances, he either did not answer the question put to him by counsel for the Respondent or he provided a vague answer. On numerous occasions his answer to counsel's question was "I don't recall without reviewing it" or words to like effect.

[13] For example, during her examination of the Appellant, counsel for the Respondent took the Appellant to the Statement of Agent Activities that he had

included with his 2008 income tax return. The statement shows revenue of $31,519.77 (including one item for $21,364.67) and two expense items: an expense of $954,119.77 identified as “Amount to principal in exchange for labour” and an expense of $23,878.61 identified as “Money Collected as Agent for Principal and reported by third parties”.

[14] The following exchange occurred between counsel and the Appellant with respect to the Statement of Agent Activities:

> Q. Do you know where these numbers come from, the $21,364, et cetera?
>
> A. I don't recall without reviewing it.
>
> Q. Okay. I am just going to ask you about the large amount here. There is an amount for $954,119.77. It says "Amount to principal in exchange for labour". Do you understand what that means?
>
> A. I don't recall without reviewing it.
>
> Q. Okay. What this particular statement suggests is that there is a net loss of $949,000 and change. Did you lose $946,000 in 2008?
>
> A. I don't recall that without reviewing it.
>
> Q. It seems to be the kind of thing that one would recall if you lost almost a million dollars, wouldn't it?
>
> A. Well, for some people, yes. But I don't-- well, I can't recall it without reviewing it. Eight years ago.

[15] This is one example of the numerous instances where the Appellant either did not answer counsel’s question with respect to his income tax filings or provided a vague answer. I do not accept that an intelligent person such as the Appellant could not remember the reason why he claimed an expense of approximately $954,000 in his tax returns. His conduct while being examined by counsel for the Respondent destroyed his credibility.

I. Deductibility of Business Losses

[16] I will first deal with the deductibility of the claimed business losses.

[17] The Reply for each of the relevant years except 2008 states that, when assessing the Appellant, the Minister assumed the following with respect to the business losses claimed by the Appellant:

- The Appellant was not engaged in any business, including in a business as an agent.
- The Appellant's alleged business was not a source of income.
- The Appellant did not have any expenses in respect to his alleged business.

[18] As I noted previously, the Appellant declined to provide any evidence in chief.

[19] In other words, he did not provide any evidence to rebut the Minister's assumptions. He did attempt to file an affidavit. I did not allow the Appellant to file the affidavit since he was present at the hearing. It is well established that parties should provide their evidence by oral testimony. This allows the opposing party to cross-examine the witness and the judge to assess the credibility of the witness. This is certainly the case when, as in the current appeal, the Appellant's credibility is at issue and the evidence is contentious.

[20] After the Respondent finished her examination of the Appellant, I allowed the Appellant to provide oral testimony by reading in his affidavit. I then provided counsel for the Respondent the opportunity to cross-examine on the Appellant's oral testimony. I appreciate that it is unusual to allow the Appellant to provide oral evidence for the first time after the Respondent has presented her witnesses. However, I wanted to provide the Appellant with every opportunity to present his evidence, and there was no prejudice to the Respondent since I provided her the opportunity to cross-examine on the testimony.

[21] The Appellant's oral testimony was in the nature of argument. He stated that he believes he is allowed to arrange his affairs so as to pay less tax and asserted his right to operate a business and only be taxed on the net profit from such business.

[22] I agree with his comments. However, this is not the issue before the Court. The issue before the Court in respect of the 2009, 2010 and 2011 taxations years is whether, as a question of fact, the Appellant carried on a business. When assessing the Appellant, the Minister assumed that the Appellant did not carry on a business. The Appellant did not present the Court with any evidence to rebut this assumption.

[23] Through her examination of Ms. Robinson and the Appellant, the Respondent provided evidence to support the Minister's assumptions.

[24] For example, Exhibit R-1 is the Appellant's 2008 tax return. As discussed previously, he included with the return a Statement of Agent Activities, which shows a loss of $946,479. This loss was claimed on the 2008 tax return.

[25] During his examination by counsel for the Respondent, the Appellant stated that he prepared the Statement of Agent Activities with the help of a Mr. Watts. He then noted the following with respect to the nature of the purported agency business:

> Q. . . . Did you review-- so you say you prepared this statement of agent activities with Mr. Watts. Do you understand what this means? Like, if we look at that statement of agent activity, there is "business service agent". Do you know what that means?
>
> A. The business service agent is me.
>
> Q. You're an agent?
>
> A. Yes.
>
> Q. An agent for what?
>
> A. A business. I am a business.
>
> Q. You are a business? What do you do?
>
> A. I am an agent. The Ontario government has given me permission to be one.
>
> Q. How so?
>
> A. Could I provide you with a document?
>
> Q. No, just your explanation. What do you understand or how can you explain that?
>
> A. For me, it is just to operate my affairs.
>
> Q. Your personal affairs?

> A. My personal affairs or business affairs.[1]

[26] The Appellant provided the following explanation of this so-called agency in a letter to the Canada Revenue Agency dated May 31, 2010:

> The terms of the private contract of agency between the free will man commonly called Warren, of the Bradshaw family, who is the principal, the contributing beneficiary and the true party in interest for the fictional entity/person/trust called WARREN BRADSHAW, which, by necessity, is the agent in commerce for the principal; is not subject to the scrutiny of a third party entity, and therefore; any private dealings between the principal and agent cannot be released to the Canada Revenue Agency ("CRA") and or you Debbie Thorne ("DT") and any and all agents of the CRA.

[27] The Appellant's position is that, from 2008 to 2011 he carried on a business of acting as agent for himself and that, over the four years, he incurred losses of almost $1.5 million. The losses appear to be based on amounts he paid to himself. For example, included with the Appellant's 2010 income tax return is a T5 summary issued by the Appellant, which purports to show that he paid $222,198.79 of interest to himself. This so-called interest is then deducted on his income tax return as a business loss.

[28] The Appellant's argument that he carried on a business of providing agency services to himself is nonsense; no business existed. His claiming of almost $1.5 million of business losses in respect of a fictitious business was a rather weak attempt to avoid the payment of taxes.

II. <u>Gross Negligence Penalties</u>

[29] The introductory words of subsection 163(2) of the *Income Tax Act* state:

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

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[1] Transcript page 40.

[30] The introductory words identify two conditions that must be satisfied if the assessment by the Minister of a penalty under subsection 163(2) of the *Income Tax Act* is to be maintained.

[31] First, the Appellant must have made, participated in, assented to, or acquiesced in the making of a false statement or omission in a return, form, certificate, statement or answer.

[32] Second, the false statement or omission must have been made by the Appellant knowingly or under circumstances amounting to gross negligence, or the Appellant must have participated in, assented to or acquiesced in the making of the false statement or omission knowingly or under circumstances amounting to gross negligence.

[33] Under subsection 163(3) of the *Income Tax Act*, the Minister has the burden of establishing the facts that justify the assessment of a penalty under subsection 163(2).

[34] The Appellant reviewed and signed each of the tax returns for the relevant years. Each return claimed a loss from a business of acting as agent. As a question of fact, such a business did not exist. The Appellant's previously discussed explanation of the purported agency business is absurd.

[35] Further, the Appellant knows what constitutes a business. He has been involved in the family business for a significant period.

[36] As a question of fact, the first condition of subsection 163(2) is satisfied.

[37] By signing and filing his 2008, 2009, 2010 and 2011 income tax returns and the request for loss carry-back, the Appellant made or participated in, assented to or acquiesced in the making of a false statement in his return and on a form.

[38] I must now determine if the Appellant made the false statements knowingly or under circumstances amounting to gross negligence. That determination must be made as at the time at which the Appellant signed his income tax returns and the request for the carry-back of the losses from the purported agency business.

[39] I will first consider whether the Appellant made the false statements under circumstances amounting to gross negligence.

[40] The phrase "gross negligence" as used in subsection 163(2) was considered in the widely adopted decision of *Venne v. The Queen*, 84 DTC 6247 (FCTD). At page 6256 of that decision, Strayer J. stated:

> . . . "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. . . .

[41] As stated in *Venne*, a finding of "gross negligence" requires a high degree of negligence. The existence (or non-existence) of a high degree of negligence is determined by reference to the objective standard of a reasonable person in the same circumstances as the person against whom the penalty is assessed and not by reference to the subjective beliefs or characteristics of this person.

[42] The objective standard is only relaxed if it is established that the person is incapable of understanding the duty not to make a false statement or an omission in a return.[2]

[43] It is clear from the evidence before me that the Appellant is capable of understanding his duty not to make a false statement or an omission in a return. He is an intelligent person, and clearly knows his duty to file his tax returns and report his actual income.

[44] As a result, the Respondent must establish on a balance of probabilities facts that lead to the conclusion that the making by the Appellant of the false statements in his 2008, 2009, 2010 and 2011 income tax returns was such a marked and substantial departure from the conduct of a reasonable person in the same circumstances that it constituted gross negligence.

[45] The Respondent has established such facts.

[46] In my view, a reasonable person presented with a plan such as the one presented to the Appellant by the Fiscal Arbitrators would immediately realize that there was something seriously wrong with the plan. A reasonable person would realize that business losses do not materialize out of thin air and that he is not a "fictional entity/person/trust".

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[2] See *De Gennaro* v. *The Queen*, 2016 TCC 108, at paragraphs 62 and 63.

[47] The description of the tax plan provided by Mr. Watts on behalf of the Fiscal Arbitrators prior to the Appellant filing his tax returns was patently absurd, and no reasonable person would accept such an explanation or file a return based on such an absurd explanation.

[48] This alone is sufficient for a finding of conduct that is such a marked and substantial departure from the conduct of a reasonable person that it constituted gross negligence.

[49] There are other factors that support such a conclusion.

[50] A reasonable person faced with such a scheme would have sought advice from a professional accountant or lawyer, especially when the amounts at issue were almost $1.5 million. The Appellant testified that he did not seek advice from his previous accountant or any other professional.

[51] The magnitude of the losses claimed by the Appellant compared to the Appellant's historic income would raise significant suspicion in a reasonable person. Exhibit R-19 shows that the loss claimed by the Appellant on his 2008 income tax return would have eliminated the tax he would otherwise have paid for 2008 and all or most of the tax he had paid in 2005, 2006 and 2007.

[52] In my view, on the evidence before me, the Appellant's signing and filing of his 2008, 2009, 2010 and 2011 income tax returns and the request for loss carry-back represents such a marked and substantial departure from the conduct of a reasonable person in the same circumstances that it constitutes gross negligence as described in *Venne*.

[53] As a result, the false statements made by the Appellant in his 2008, 2009, 2010 and 2011 income tax returns in respect of fictitious business losses and in the request for loss carry-back were made in circumstances amounting to gross negligence.

III. Other Issues

[54] It is not clear to me whether the Appellant is challenging the Minister's denial of rental losses claimed in the Appellant's 2009 and 2011 income tax returns. However, the Appellant presented no evidence with respect to the denied rental losses.

[55] During his testimony, the Appellant stated the following:

> The affiant believes that his rights under sections 6(2)(b) and [15(1)] of the Charter of Rights and Freedoms have been abridged, as the administration of the Income Tax Act by the Minister did not account for the appellant's right to pursue the gaining of a livelihood and to equal benefits under the law.

[56] He provided no further argument or evidence with respect to his allegation.

[57] Paragraph 6(2)(b) of the *Canadian Charter of Rights and Freedoms* sets out the right of Canadians to pursue the gaining of a livelihood in any province. Subsection 15(1) guarantees Canadians equality before and under the law and equal protection and benefit of the law without discrimination.

[58] The Appellant’s rights under paragraph 6(2)(b) and subsection 15(1) are not violated when the Minister carries out her statutory duty to assess the Appellant for his failure to pay taxes as a result of the claiming of losses from a fictitious business.

[59] For the foregoing reasons, the appeals are dismissed with costs to the Respondent.

Signed at Antigonish, Nova Scotia, this 27th day of June 2017.

“S. D’Arcy”

D'Arcy J.

CITATION:	2017 TCC 123
COURT FILE NOs.:	2012-4256(IT)G 2014-2909(IT)G 2015-883(IT)G
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Dominique Gallant

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	n/a

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada