Docket: 2006-769(IT)G

BETWEEN:

DR. GALDINO PONTARINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 15, 16 and 17 2009, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant:	Douglas D. Langley
Counsel for the respondent:	Bobby J. Sood Amit Ummat

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* with respect to the appellant's 1997, 1998, 1999, 2000 and 2001 taxation years is allowed in part and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the Partial Consent to Judgment and the reasons herein.

Costs are payable by the taxpayer to the Crown.

Signed at Ottawa, Canada, this 10th day of August 2009.

"Patrick Boyle"

Boyle J.

Citation: 2009 TCC 395
Date: 20090810
Docket: 2006-769(IT)G

BETWEEN:

DR. GALDINO PONTARINI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The taxpayer, Dr. Pontarini, contends that penalties were not properly imposed under subsection 163(2) of the *Income Tax Act* (the "*Act*") in respect of the five years of reassessments in issue. The reassessments involved significant underreporting of income and significant overstating of expenses by Dr. Pontarini. The substantive issues were all resolved by the time the three-day trial began and a Partial Consent to Judgment was filed with the Court. In a case such as this, the onus is on the Crown to prove that the taxpayer made false statements or omissions either intentionally or in circumstances amounting to gross negligence as those phrases have been defined by the courts. The Crown needs to prove this on a balance of probabilities standard.

[2] I heard two witnesses for the taxpayer, Dr. Pontarini himself as well as his psychiatrist, Dr. Pohlman, who testified for less than one hour.

[3] Taxpayer's counsel put forward two arguments against the gross negligence penalties:

1) Dr. Pontarini's actions constituted filing positions that ultimately proved incorrect and unsuccessful but fall short of being false statements or omissions made intentionally or in circumstances amounting to gross negligence; and

2) Dr. Pontarini's mental health and other stressors in his life made it reasonable for him to think that what he did was not to make a false statement or omission in his return.

I. Facts

[4] The evidence is that Dr. Pontarini was extremely hard-working and ran a very financially successful medical practice. In addition to his full-time practice at his clinic, he worked full shifts in the emergency department of a Mississauga hospital. Prior to the Ontario Bob Rae NDP government introducing amendments to the amounts the provincial health insurance plan would pay for doctor services on an annualized basis, Dr. Pontarini testified that his personal billings from his general practice in Mississauga placed him amongst OHIP's highest paid doctors.

[5] Dr. Pontarini was one of the few general practitioners adversely affected by the OHIP changes which introduced a progressive fee claw-back imposed on billings beyond certain thresholds. The effect of this in the years in question was to reduce his revenue from his practice by about 25% from what it would have been but for the OHIP changes.

[6] The evidence detailed that Dr. Pontarini had a lengthy history of mental health concerns for which he regularly received treatment during periods of his adult life beginning in medical school, but which did not interfere with his ability to practise medicine.

[7] Another stress factor detailed by Dr. Pontarini in his evidence was the impact of his criminal conviction for trafficking in narcotics. This related to his over-prescribing of morphine-based narcotics to two apparently unsavoury characters. His criminal conviction led to the suspension of his medical licence.

[8] Dr. Pontarini testified that, with respect to the narcotics trafficking conviction, his prescriptions began innocently, reasonably and in good faith in accordance with normal medical standards, however, his participation increased to what he described as unreasonable levels before he tried to end his involvement. It was only after that, according to his own testimony, that any threats of harm were made to him or his family if he failed to continue to illegally prescribe the supply of narcotics.

[9] Prior to the years in question, Dr. Pontarini experienced significant financial difficulties which were a combination of his falling revenues and some reassessed tax shelters. This in turn resulted in the loss of his 12,000 plus square-foot home on 1.5 acres in Mississauga, protracted legal proceedings and other difficulties.

[10] Prior to the years in question, Dr. Pontarini had dropped his emergency shifts; his OHIP revenues and his income were correspondingly reduced. Dr. Pontarini testified that he voluntarily chose to cut his emergency work because of the stresses and difficulties in his life created by, amongst other things, the impact an extra-marital affair was having on his marriage. The evidence of Dr. Pohlman was that Dr. Pontarini was asked by the hospital to resign from the emergency work because of the difficulties created by an extra-marital affair he was having with another emergency department colleague. I accept that both are correct descriptions. This, perhaps with the other difficulties faced by him or him and his wife, contributed to marital difficulties which resulted in a six-month separation. I detail this level of personal information only because it has been put forward by the taxpayer and his counsel as part of Dr. Pontarini's overall stressed state of mind and mental health at the time.

[11] Dr. Pontarini practised in a clinic partnership with other doctors. The medical clinic's chartered accountants prepared annual financial statements for the doctors. These included allocating the revenues and the fixed and variable expenses amongst the doctors in accordance with the revenue and expense sharing provisions of the partnership. The clinic had a staff bookkeeper who kept track of each doctor's clinic and practice expenses for which the doctor was personally responsible apart from the partnership. The bookkeeper also reconciled the OHIP revenue statements received by each doctor and provided them to the clinic's accountants. Both the accountants and the bookkeeper provided clear written communication to Dr. Pontarini and his partners of this information. The accountants provided financial statements prepared by them together with revenue allocation information in early to mid-April in time for tax filings.

[12] Dr. Pontarini used his own chartered accountant to do his taxes separate from the firm used by the medical clinic. He did not provide to his accountant the clinic's financial statements nor did he provide the letters from the clinic's chartered accountants setting out his allocation of partnership, revenues and expenses. Instead, as a taxpayer is entitled to do, he prepared his own listing of his share of partnership revenues and expenses, the expenses of running his office within the clinic for which the partnership was not responsible, as well as other business-related expenses incurred personally. In doing so however, Dr. Pontarini significantly overstated his

expenses and understated his revenues; he even understated his gross revenue from the partnership as reported by the clinic's accountants.

[13] The Canada Revenue Agency ("CRA") had previously audited the doctor for prior years. The CRA audited the doctor for the years in issue after it was noted that his net professional income was reported as only between 10% and 20% of his gross professional income. This led to a criminal investigation, a search and seizure at his home, and tax evasion charges. Dr. Pontarini pleaded guilty to tax evasion. He had been charged with 10 counts, one for understating his income in each of the years in question and one for overstating his expenses for each year. He pleaded guilty to at least one count. There was some possible confusion about how many counts he pleaded guilty to, however, he said he was fined $200,000 and, since the fine for tax evasion is a function of the tax sought to be evaded, I can infer that he pled guilty to a serious and substantial amount of tax evasion for the years in question.

[14] A major portion of the amounts of unreported income and overstated expense related to the OHIP claw-back. In the years in question, Dr. Pontarini approached this in a most surprising manner. By way of example, if the aggregate OHIP fees for services in the year were say $400,000 prior to the application of the threshold claw-back formula, and that formula reduced his OHIP revenue entitlement by $100,000 to $300,000, he made downward adjustments to his gross revenues and upward adjustments to his expenses of the $100,000 unearned and unpaid amount. He initially said he took 50% of the claw-back for which he was unpaid and reduced his gross revenues. It should be noted that there was no line item making that adjustment on the information he gave to his personal accountant. The other 50% he testified he used to increase his expenses. He said he believed he was entitled to do this because (i) the unpaid services which he provided to his community were an investment in his practice which he felt should, in the spirit of taxing statutes, be allowed as an expense, and (ii) had another doctor who had not hit his or her threshold provided these same services, that doctor would have been paid in full. It was striking that the approach of taking one-half as a revenue reduction and the other half as an expense was not consistent with his oft-repeated explanation that he could rationalize the claw-back as being an expense. Further, the following day in cross-examination, when faced with his own tax summary information prepared by him for his personal accountant and it was clear that he did not take such a 50/50 approach to it in the years in question, he significantly and materially changed his testimony from what he had told the Court the day before.

II. The Psychiatric Evidence

[15] Dr. Pohlman described Dr. Pontarini as a hard-working doctor whose life seemed to be a mess. He described him as turbulent and impulsive which caused him to run into trouble with the College of Physicians and Surgeons and with the hospital, as well as socially naïve and a loner. From a psychological point of view, he did not regard Dr. Pontarini as ill and he had no perceptual abnormalities and no cognitive dysfunction or other problems thinking. He had no real mood disorder such as manic depression although he had periods of discouragement. While he did not regard Dr. Pontarini clinically depressed, he described him as having reactive depression to stressful events or circumstances. He did not think Dr. Pontarini suffered from any personality disorder but he had an odd personality combined with difficulty making good judgments in determining what was appropriate. While not clinically dissociative, he described the doctor's overall personality as being one that would seek to avoid problems instead of resolving them. Dr. Pontarini had testified he suffered panic attacks in the years in question. Dr. Pohlman said those were not raised but Dr. Pontarini had described episodes of rage where he felt close to breaking. Similarly, Dr. Pontarini did not raise the issue of blackouts with Dr. Pohlman although Dr. Pontarini did in his own testimony.

[16] Dr. Pohlman said Dr. Pontarini was not a good patient. He was not cooperative and could not explore himself as needed and there were a number of things it now turns out he did not tell Dr. Pohlman about. Dr. Pohlman did not use any medication in his treatment of Dr. Pontarini other than a small dose of a minor tranquilizer being prescribed to be used at times. Dr. Pohlman said much of Dr. Pontarini's problem was his own self-destructive behaviours. Dr. Pontarini's description of his mental health problems and medical treatment was at significant odds with that of Dr. Pohlman who treated him and who was unaware whether Dr. Pontarini had been treated by other mental health professionals. While none of Dr. Pohlman's assessments of the emotional or mental state of Dr. Pontarini were issues I would normally consider worthy of this level of detailed summary, since Dr. Pontarini and his counsel put them forward strongly to excuse and explain Dr. Pontarini's penalty assessments, I feel obliged to summarize them to the extent I have.

[17] Dr. Pohlman's testimony was that, during the years in which he treated him, including the years in question, Dr. Pontarini was not ill nor was his mental health significantly impaired. He described Dr. Pontarini as a person with a difficult and troubled personality who had avoidant personality struggles, was naïve and had impaired judgment.

III. Credibility Issues

[18] After hearing extensive testimony over two days from Dr. Pontarini, and in light of the evidence of Dr. Pohlman and the other evidence submitted, I am obliged to make findings of credibility involving Dr. Pontarini in order to resolve this appeal. I am unable to accept the truthfulness and completeness of Dr. Pontarini's evidence. I make this finding for a number of reasons, including the following:

a) The evidence regarding his medical health: the testimony of Dr. Pontarini regarding his mental health issues, diagnosis and treatments differed considerably from that of his own psychiatrist, Dr. Pohlman. In essence Dr. Pohlman concluded Dr. Pontarini was not ill in any clinical sense of the term and, while he did not suffer any clinical personality disorders, he did have a difficult personality in many respects which caused him to want to be looked up to and respected, created difficulties in his dealings with other people, and he tended to avoidance of problems. I am also confirmed in my assessment of Dr. Pontarini's credibility by his psychiatrist's testimony that made it clear Dr. Pontarini was neither forthcoming nor cooperative with him in the doctor-patient relationship.

b) The taxpayer's different testimony regarding the existence of two versions of his tax summary information and which version he provided to his accountant Mr. Spiegel: in his examination-in-chief, Dr. Pontarini clearly and equivocally identified a document headed Tax Summary Information which reported gross revenues correctly, i.e.: without any OHIP adjustment, as that which he provided to his accountant to prepare his tax return. When faced in cross-examination with a similar but materially different tax summary document which showed a much reduced revenue and appeared to have been seized at the accountant's office and had the accountant's handwritten notes on it, Dr. Pontarini's evidence changed materially and he could recall that he had brought both with him but only gave the second adjusted version to the accountant for their meeting at his office.

c) The taxpayer's testimony regarding how he made the adjustments for the OHIP claw-back amounts: in response to one of my direct questions on how he had split the OHIP claw-back amount between reducing his revenues and increasing his expenses, he told me clearly that he split it so that 50% of it was a revenue adjustment and 50% was an expense adjustment. When this came up later in cross-examination, his explanation changed accordingly and his recollection of his past approach became much more generalized.

d) The taxpayer's limited recollection of making inquiries about expensing the OHIP claw-back amount: Dr. Pontarini testified he could recall making a telephone call to the CRA to ask about treating an amount in respect of the OHIP claw-back as an expense. He also testified he recalled clearly asking his accountant, Mr. Spiegel, about it. Remarkably, he not only does not recall the specifics of the CRA's answer or Mr. Spiegel's discussion, he does not recall the thrust of whether they told him he could do it or he could not do it.

e) I am most troubled by the taxpayer testifying that he recalled discussing the OHIP claw-back adjustments with his accountant, Mr. Spiegel, but that Mr. Spiegel was not called to testify. No explanation was given by the taxpayer's counsel for why Mr. Spiegel was not testifying. It seems there are only a limited number of things Mr. Spiegel could have said regarding his meetings with Dr. Pontarini to review the Tax Summary Information and the discussions regarding the OHIP claw-back adjustments Dr. Pontarini sought to make. Had Mr. Spiegel testified, he might have said he did not recall any conversation whatsoever. He might have said that he recalled being asked the question but did not recall anything regarding his answer. These possibilities are two that would be helpful, or at least not harmful, to Dr. Pontarini's position. Mr. Spiegel might have said he told Dr. Pontarini that he could make the adjustments in the manner adopted and that, while they may be challenged, they were not unreasonable filing positions. If that would have been Mr. Spiegel's testimony, I assume the taxpayer would have called him. He did not. The remaining possibilities include that either Mr. Spiegel would say he was certain that in his recollection no such conversation happened which would not be helpful to Dr. Pontarini, or that Dr. Pontarini had asked the question and that his response was that such adjustments could not be made. That may well have been the case and would be harmful to Dr. Pontarini's position. Since Dr. Pontarini's Tax Summary Information prepared for Mr. Spiegel did not itemize any deduction in respect of the OHIP claw-back adjustment and he merely reduced his gross revenues and overstated existing expense categories, Mr. Spiegel would have no way of knowing that this advice was not followed or that he was in any way complicit in preparing Dr. Pontarini's tax returns contrary to his advice. Mr. Spiegel might also have said "you will not like my answer so withdraw your question" which would point toward Dr. Pontarini's wilful blindness. Mr. Spiegel's absence informs my assessment of credibility.

[19] For all of these reasons, I have approached the taxpayer's testimony, even when plausibly consistent with documentary evidence, as suspect, self-serving and misleading.

IV. Findings and Analysis

[20] In order for subsection 163(2) penalties to be upheld, the Crown must show that Dr. Pontarini made false statements or omissions in his returns knowingly or under circumstances amounting to gross negligence. Gross negligence involves a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not: *Venne v. The Queen*, 84 DTC 6247 (FCTD). Wilful blindness can constitute gross negligence. 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. Actual knowledge will be imputed to a taxpayer whose circumstances strongly suggest an inquiry should be made with respect to his tax situation if he does not make such an inquiry without reasonable justification. See *Panini v. The Queen*, 2006 FCA 224, 2006 DTC 6450.

[21] Subsection 163(3) of the *Act* provides that it is the Minister of National Revenue that has the burden of establishing the facts justifying the imposition of a subsection 163(2) penalty. The standard of proof required is a balance of probabilities standard. There is no greater standard of proof applicable because a penalty assessment is involved. It may in some situations be the case that, in balancing probabilities, a court should consider that a more serious allegation or offence may be considered less likely to occur and therefore require stronger evidence to tip the balance. That does not create a new and greater standard of proof than a balance of probabilities. It merely recognizes, from a common sense point of view, that inherent probabilities are a necessary consideration in determining what the facts are on a balance of probabilities basis: *In re B (Children)*, [2008] UKHL 35.

[22] Justice Webb of this Court has written a commendable review and summary of this aspect of balancing probabilities in *Lesnick v. The Queen*, 2008 TCC 522, 2008 DTC 4861, in paragraphs 10 through 16.

[23] Dr. Pontarini's guilty plea of tax evasion provides some possible evidence of his intention to make the false statements and omissions. It is not incontrovertible evidence by reason of either issue estoppel or abuse of process because he pleaded guilty. Dr. Pontarini testified he pleaded guilty because the Crown would have been pursuing a jail sentence had it proceeded to trial. Aside from his guilty plea, there is

ample evidence for me to conclude that Dr. Pontarini's false statements and omissions were intentional or made in circumstances amounting to gross negligence.

[24] Many Canadian taxpayers have dealt with stressful periods in their lives. Financial difficulties, mental difficulties, failing business relationships, changing business circumstances, regrettable involvement in criminal activity, health problems, and threats to one's personal safety are, regretfully perhaps, not entirely uncommon occurrences. I appreciate fully that when they happen they can have huge and negative, potentially devastating impacts on those affected. But, to have any of these circumstances or their combined effect excuse Dr. Pontarini's approach to tax reporting would require me to be satisfied that they were not just major distractions in his life but were debilitating and incapacitating to the extent of interfering with his ability to function or think in a rational fashion. I am not at all satisfied of this. For example, Dr. Pontarini's mental health problems did not rise to the level of him being delusional and how else could a smart and educated man fail to appreciate money he did not receive from OHIP as revenue did not need to be deducted a second time? And how else could that possibly lead to treating only half of the reduction as an expense and using the other half to reduce reported gross revenues?

[25] With respect to the taxpayer's claim that his mental state and stressful life caused him to fail to appreciate that his approach was a false statement or an omission, or negated his ability to form an intention to be grossly negligent in adopting such an approach, I can do no better than to refer to the former Chief Justice Bowman's decision in *Cox v. The Queen*, 2002 DTC 1515. In that case, the taxpayer was a diagnosed paranoid schizophrenic whose symptoms included delusions and hallucinations. In that case, then Associate Chief Justice Bowman struggled with the issue of whether or not a taxpayer in those significantly more extreme circumstances should or should not be subject to penalties. While Bowman A.C.J. decided the taxpayer in that case should not be subject to penalties, he acknowledged that others could reasonably disagree and have found the taxpayer subject to penalties. At paragraph 23 he wrote:

> For a penalty to be imposed under subsection 163(2) two elements must be present: a misstatement or omission in a return and a requisite mental state. The first element is obviously present. But can it be said that a person who suffers from the type of paranoid schizophrenia that I have described above, who has hallucinations, hears voices, and is divorced from reality for a large part of the time, can have the requisite mental state to justify a penalty under subsection 163(2)? Perhaps. But then again, perhaps not. From my observation of the appellant I think the better view is that he did not. Others might see it differently and I would respect that view. It would not be without merit. He was after all smart enough to make money from his investments.

> He did also have the wit to defraud the welfare authorities for which he went to jail. He subsequently made full restitution. Where, however, the court has such doubt I think the safer course is to give the benefit of that doubt to the appellant.

[26] These comments of Bowman A.C.J. identify where he believed the line could be found: far cry from Dr. Pontarini's circumstances even as he described them. I find that there was no credible evidence of a material, physical or mental health illness, condition or treatment that interfered with Dr. Pontarini's ability to comprehend or reason or that in any way negated his ability to form the intention or to behave with gross negligence as required by subsection 163(2).

[27] It was clear that the gross revenues allocated to each doctor, as assembled from the OHIP statements by the bookkeeper and the clinic's accountants, only included the amounts actually paid by OHIP as set out in OHIP's monthly statements to Dr. Pontarini and the deposits to his personal bank account. This is clear from his monthly OHIP statements themselves, and from the information supplied to Dr. Pontarini by the bookkeeper, and from the financial statement information received by Dr. Pontarini and his partners. Dr. Pontarini acknowledged that he understood the information when received from the clinic's accountants to be allocating revenue on this basis at the time he received it from them. I find that he clearly understood that the OHIP claw-back amounts were not recognized in his revenues in any fashion as they had been reported to him.

[28] The taxpayer's explanation and his testimony regarding the different Tax Summary Information revenue numbers were unsatisfactory. I find he altered his Tax Summary Information for purposes of the CRA audit and investigation. I do not accept that he had both versions with him at his meeting with Mr. Spiegel. I do not accept the doctor's testimony that the version with the correct gross revenue numbers, but with other offsetting deductions added instead, even existed at the time of his meetings with his accountant.

[29] I find that Dr. Pontarini's approach to making adjustments in his tax returns in respect of the unpaid OHIP claw-back amounts is properly subject to penalties. He clearly knew he had provided services for which he was paid in accordance with the OHIP formula but that the formula reduced the amount he received as compared with doctors who had not exceeded their threshold. He did not make the mistake of thinking it was an expense he paid; he said he clearly understood he did not pay it. His rationalization was that he had provided a service for which he was not paid and should therefore get a deduction for the value of the unpaid services as some form of investment that could be equated to an expense that he made in his practice. He said

he was angry with the OHIP formula and he was disappointed with his government. He did not feel it was a fair assessment of the services he provided in good faith since other doctors would have been paid in full for the same services. I find that Dr. Pontarini's OHIP claw-back adjustments in his tax returns in the years in question were political acts because he disagreed with the policy behind the changes to the OHIP formula which adversely affected him and a significant minority of other Ontario doctors. According to Dr. Pontarini's testimony only 5% of Ontario doctors were affected by the threshold claw-backs.

[30] The issue of deducting OHIP claw-backs has previously been considered by this Court in *Deep v. The Queen*, 2006 TCC 315, 2006 DTC 3033 (affirmed 2007 FCA 366, 2008 DTC 6016; leave to appeal to the Supreme Court of Canada denied). Like Dr. Deep before him, Dr. Pontarini sought to fashion his own tax remedy for the OHIP claw-back. Dr. Deep, in very similar circumstances, deducted the OHIP claw-back as a gift to the Crown. Dr. Pontarini testified he regarded the value of his unpaid services as an investment in his practice that should, in spirit, be recognized as an expense. That this is not how he in fact approached the adjustments he made belies the lack of truthfulness in his own testimony. Just as Dr. Deep was subject to penalties for his intentional or grossly negligent false statements, so too Dr. Pontarini is entirely properly subject to penalties for his intentional or grossly negligent false statements or omissions. This is not a close case.

[31] Dr. Pontarini's approach to the OHIP claw-back was neither a filing position he developed that was not successful nor any other form of forgivable misconception. I have difficulty seeing how a filing position not disclosed on the return filed is a filing position.

[32] Dr. Pontarini arranged that Dr. Kates, an associate physician in the clinic who effectively sublet some of Dr. Pontarini's space in which to conduct his practice, made out his cheques directly to Dr. Pontarini. Dr. Pontarini deposited those in his personal bank account, which was the bank account Dr. Pontarini also used to pay his share of office expenses monthly against statements received from the bookkeeper. These $3,500 monthly cheques from Dr. Kates were never reported to the CRA, nor were they reported to the clinic's accountants or the clinic's bookkeeper as amounts received from Dr. Kates which should have been added to his or his company's rental income or should have reduced his share of office expenses. Unlike the similar payments received from the tenant medical laboratory in the clinic and from the doctor on *locum* during Dr. Pontarini's suspension, the amounts from Dr. Kates were not paid directly to the clinic's bookkeeper to be credited as payments toward Dr. Pontarini's share of the clinic expenses. I conclude that Dr. Pontarini put these

arrangements in place in this fashion to permit him to fail to report this income. The Dr. Kates amounts of over $40,000 per year were amongst the next most significant understated revenue or overstated expense items in the reassessments.

[33] No explanation was offered of why Dr. Kates' arrangements were not documented, nor why his cheques were paid to Dr. Pontarini and deposited into Dr. Pontarini's account. No explanation was offered of why they were not paid to or made known to the bookkeeper, nor was there evidence why they were not dealt with in the same manner as the lab rental payments and the payments from the doctor on *locum*.

[34] The deduction by Dr. Pontarini in one year of $24,000 of interest on the $75,000 debt to Dominion Roof for the roof on his home, which was secured by a mortgage on his interest in his clinic building, was entirely unreasonable. I do not accept that he believed that because the debt was secured on his business it could give rise to a business expense anymore than I accept that he deducted an aggregate amount of interest accrued over a number of years in that one year for reasons unrelated to the OHIP claw-back adjustments he sought to make.

[35] I find virtually all of Dr. Pontarini's explanations for his other categories of overstated expenses to be incredible as well. His own phone, fax and copier, the examples he kept coming back to, could not cost anywhere near the amount of his inflated personal clinic expenses.

[36] My conclusions of Dr. Pontarini's credibility combined with my findings regarding the significant overstatings and understatings in respect of the OHIP claw-back, the Dr. Kates payments and the overstated personal clinic expenses taint my perception of the evidence of all of the remaining reassessed overstated business expenses, such as the car and home office, which have also been significantly reduced by the Partial Consent to Judgment. I find that all of his other disallowed aggressive or fictitious expenses are also properly subject to penalties.

[37] Further evidence of Dr. Pontarini's intention can be seen from his entire course of conduct. He made adjustments from year to year on how best to not show the OHIP claw-back adjustments and he reworked his drafts before taking them to his accountant. His reported expenses averaged approximately 85% of his reported gross revenue, which he had already adjusted downward; this was further evidence of the knowing or gross negligent nature of his actions. Even further, the fact that his net professional income reported in each year did not cover, or barely covered, the amount of the five-sixths of his house expenses reported to his accountant that did

not relate to his home office also confirms his understatements and overstatements as intentional or grossly negligent.

[38] Dr. Pontarini was under considerable stress during the period from a number of sources, some of which were caused by him, some by others, and some by his medical conditions. However, he was able to focus on and maintain his medical practice. Similarly, he was able to focus on and repair his family relationships. I find that Dr. Pontarini not only chose not to focus the same diligence and attention on his tax compliance responsibilities, he intentionally underreported his income and overstated his expenses for which he must now accept responsibility.

[39] The penalties assessed are to be reduced only to reflect the reassessments of tax to be done in accordance with the Partial Consent to Judgment. All remaining reassessed adjustments are properly subject to penalties. To that extent only the appeal is allowed. Costs are to be payable by Dr. Pontarini to the Crown.

Signed at Ottawa, Canada, this 10th day of August 2009.

"Patrick Boyle"

Boyle J.

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