Docket: 2008-3233(IT)I

BETWEEN:

MAURICE MOMPÉROUSSE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard January 20, 2010, at Montréal, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Simon Olivier de Launière

JUDGMENT

The appeal from the reassessments under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years are allowed, without costs, and the case is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment.

It is ordered that the filing fee of $100 be reimbursed to the appellant.

Signed at Ottawa, Canada, this 25th day of March 2010.

"Robert J. Hogan"

Hogan J

Translation certified true
on this 11th day of June 2010.
Bella Lewkowicz, Translator

Citation: 2010 TCC 172
Date: 20100325
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REASONS FOR JUDGMENT

Hogan J.

INTRODUCTION

[1] This is an appeal for the 2003, 2004 and 2005 taxation years. The Minister of National Revenue (the Minister) issued a Notice of Reassessment to Maurice Mompérousse (the appellant) using an alternative method, the projection method.

[2] In producing his income tax returns for each of the taxation years at issue, the appellant declared the amounts $1,095, $2,321 and $5,072, respectively, as business income. The Minister made the following changes for the years at issue:

(a) revision of net business income to the amounts $14,374, $19,704 and $17,366 respectively,

(b) establishment, as a penalty for gross negligence, amounts of $2,136.23, $2,247.39 and $1,186.70 respectively.

[3] The issues are whether:

(a) the appellant earned the undeclared income described above,

(b) the Minister set out conditions that support the imposition of a gross negligence penalty,
(c) the Minister satisfied the burden of proof with respect to the facts that must be shown to allow the establishment of a Notice of Reassessment after the standard reassessment period for the 2003 taxation year.

THE FACTS

[4] The appellant is a taxi driver. He has a T-11 licence that allows him to operate his business in downtown Montreal and Montreal North. He owns his taxi, which cost approximately $45,000. He financed the purchase of this car with the assistance of a financial institution. He has a taxi permit for which he paid around $56,000.

[5] The appellant lives in Laval with his spouse and their four children. The couple owns a home that cost approximately $95,000.

[6] The appellant's tax file was chosen to be audited by an audit program used by the Canada Revenue Agency (CRA) for the taxi industry.

[7] The evidence shows that the appellant did not maintain adequate books and accounting records for his company. The appellant keeps notes in an agenda where he marks the total for one week's work by issuing approximate gross receipts at the end of each week. He did not account for the number of trips with or without passengers, nor the kilometrage, nor the revenue earned for each trip.

[8] Émilie Bergeron, CRA auditor in charge of examining the appellant's file, analyzed the appellant's bank deposits. The analysis showed that the appellant only deposited a part of the income necessary to pay the car loan and mortgage into the business account. The majority of the appellant's personal expenses were paid in cash from his business income. The auditor then estimated the net worth, given the insufficient bookkeeping. This net worth determination in tab 5 of Exhibit I-1 shows that the family income declared cannot provide for the needs of a family with four children.

[9] Ms. Bergeron used the projection method to establish the existence of undeclared income. For the 2003, 2004 and 2005 taxation years, the Minister assumed that the appellant traveled a total of 46,048 km, 45,668 km and 43,758 km, respectively, based on the taxi's maintenance records, obtained from the Société de l'assurance automobile du Québec. The Minister also took into account the following data to establish the appellant's undeclared business income:

		2003	2004	2005
(a)	total kilometrage	46,048	45,668	43,758
(b)	less: personal kilometrage	18,419	18,267	17,503
(c)	appellant's kilometrage — business	27,629	27,401	26,255
(d)	trips with clients (50 %)	13,814	13,700	13,127
(e)	rate … per kilometre	$1.20	$1.30	$1.30
(f)	number of trips (5 km/client)	2,76[3]	2,740	2,625
(g)	income — fare … per kilometre			
	13,814 x $1.20	$16,577		
	13,700 x $1.30		$17,810	
	13,127 x $1.30			$17,065
(h)	departure fare — client	$2.50	$2.75	$2.75
(i)	tips	10%	10%	10%

[10] The analysis of the data above allowed the Minister to identify gaps between the gross business income declared and the net business income calculated using the projection method:

		2003	2004	2005
(i)	income [per] kilometres [traveled]	$16,577	$17,810	$17,065
(ii)	income — departure fee per client			
	2,763 x $2.50	$6,907		
	2,740 x $2.75		$7,535	
	2,625 x $2.75			$7,220
(iii)	tips			
	($16,577 + $6,907) x 10%	$2,349		
	($17,810 + $7,535) x 10%		$2,535	
	($17,065 + $7,220) x 10%	_____	_____	$2,429

(iv)	revised gross business income	$25,833	$27,880	$26,714
(v)	less: gross declared business income	$13,660	$13,040	$17,387
(vi)	gaps — gross business revenue	$12,173	$14,840	$9,327

[11] Following the appellant's failure to declare the total income from his taxi company, the Minister established a gross negligence penalty, based on the undeclared net income.

[12] The Minister also disallowed, as a result of the business expenses related to the taxi for the years at issue, a part of the appellant's expenses because his rate of personal vehicle use was 40%, rather than the 20% indicated on his income tax return:

		2003	2004	2005
(i)	revised personal use	40%	40%	40%
(ii)	disallowed expenses (vehicle fees [automobile])			
	(a) $5,530 x 20%	$1,106		
	(b) $12,713 x 20%		$2,543	
	(c) $14,833 x 20%			$2,967

[13] Following the calculations above, the Minster made the following changes when calculating the appellant's income:

		2003	2004	2005
(i)	undeclared gross business income	$12,173	$14,840	$9,327
(ii)	disallowed business expenses	$1,106	$2,543	$2,967
		$13,279	$17,383	$12,294

ANALYSIS

[14] It is a well-established fact that within the Canadian tax system, the Minister may establish arbitrary assessments, using any appropriate method, while considering specific circumstances.[1] Did the appellant earn undeclared income?

[15] In this case, the total kilometrage traveled by the appellant during each year in question comes directly from reading the odometer, which for regulatory purposes, is done every six months. The other data held by the Minister comes from regulations applicable to the taxi industry or from statistics established by the Commission des transports du Québec during a public inquiry, the purpose of which is to set the rates applicable to Montreal Island and elsewhere in Quebec. The statistics were accepted by various associations that participated in public debates on behalf of taxi drivers on Montreal Island. The appellant does not accept the Minister's calculations, but does not offer any alternative method for consideration, he is unable to specify the number of paid trips made each day for his own business and the corresponding income.

Assessment and reassessment (limitation period)

[16] The term "normal reassessment period" is defined as follows by subsection 152(3.1) of the *Income Tax Act* (the ITA):

> **152(3.1) Definition of "normal reassessment period"** —For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is
>
> > (*a*) where at the end of the year the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the period that ends 4 years after the earlier of the day of mailing of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of mailing of an original notification that no tax is payable by the taxpayer for the year; and
> >
> > (*b*) in any other case, the period that ends 3 years after the earlier of the day of mailing of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of mailing of an original notification that no tax is payable by the taxpayer for the year.

[17] Subparagraph 152(4)(*a*)(i) of the ITA focuses on the limitation period for making these assessments:

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[1] *Hsu v. The Queen*, 2001 FCA 240, paragraph 22; *Richard v. Canada*, [1997] T.C.J. No. 643 (QL), paragraphs 13 and 15.

> **152(4) Assessment and reassessment** —The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (*a*) the taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act,
>
> …
>
> [My emphasis.]

[18] Chief Justice Bowman (as he was then known) said in *Biros v. The Queen* that "The Minister has the onus of establishing misrepresentation in order to open up the statute-barred year."[2]

[19] Justice Bowie reiterated this in *College Park Motors Ltd. v. The Queen*:[3]

> 20 …subparagraph 152(4)(*a*)(i) is not penal but remedial. It balances the need for taxpayers to have some finality in respect of their taxes for the year with the requirement of a self-reporting system that the taxing authority not be foreclosed from reassessing in those instances where a taxpayer's conduct, whether through lack of care or attention at one end of the scale, or willful fraud at the other end, has resulted in an assessment more favourable to the taxpayer than it should have been. This, quite rightly, is not a penalty case. …

[20] The judge also stated that subparagraph 152(4)(*a*)(i) "…is not at all concerned with establishing culpability on the part of the taxpayer. Other provisions of the *Act* are in place to do that. …".[4]

[21] Justice Tardif reviewed the caselaw regarding the meaning of "neglect" or "misrepresentation" in subparagraph 152(4)(*a*)(i) in *Savard v. The Queen*.[5] The judge

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[2] 2007 TCC 248, paragraph 24.
[3] 2009 TCC 409.
[4] *Ibid.*, paragraph 13.

quoted, with approval, the following from Justice Carling from the Tax Review Board in *J.J. Froese v. M.N.R.*:[6]

> I do not believe that in this context any inference other than their generally accepted meaning can or should be given to the words "neglect" or "carelessness" which is the contrary of the reasonable care that is ordinarily, usually, or normally given by a wise and prudent person in any given circumstances.

[22] Justice Strayer of the Federal Court declared the following in *Venne v. Canada*[7] with respect to the Minister's burden:

> [I]t is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(*a*)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the words "misrepresentation that is attributable to neglects" must mean, particularly when combined with other grounds such as "carelessness" or "wilful default" which refer to a higher degree of negligence or to intentional misconduct.

[23] Justice Strayer concluded that the taxpayer did not demonstrate reasonable care in preparing and producing his income tax returns and noted that "[t]his conclusion is based partly on the magnitude of the unreported income."[8]

[24] The Federal Court of Appeal (the FCA), per Justice Pelletier, recognized in *Lacroix v. Canada*[9] that in the majority of cases, the Minister would have difficulty showing direct evidence of the taxpayer's state of mind at the time the income tax return was filed:

> 32 …Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of subparagraph 152(4)(*a*)(i) and subsection 162(3) [*sic*].

[25] The analysis of Justice Létourneau of the FCA in *Molenaar v. Canada*[10] followed in the same vein as Justice Pelletier's analysis in *Lacroix* :

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[5] 2008 TCC 62.
[6] *Ibid.*, paragraph 52, citing *Froese*, [1981] C.T.C. 2282, page 2288.
[7] [1984] FCA No. 314 (QL); see also *Savard*, paragraph 53.
[8] *Ibid.*
[9] 2008 FCA 241.
[10] 2004 FCA 349.

> 4 Once the Ministère establishes on the basis of reliable information that there is a discrepancy, and a substantial one in the case at bar, between a taxpayer's assets and his expenses, and that discrepancy continues to be unexplained and inexplicable, the Ministère has discharged its burden of proof. …

Penalties

[26] Subsection 163(2) of the ITA penalizes a taxpayer who knowingly or in circumstances amounting to gross negligence, makes a false statement or omission in a return:

> **163(2) False statements of omission** — 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: …

[27] Subsection 163(3) of the ITA puts the burden on the Minister to prove that the circumstances justifying a penalty pursuant to subsection 163(2) are present:

> **163(3) Burden of proof in respect of penalties** — here, 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.

[28] In subsection 163(2) and in caselaw, it is up to the Minister to show the facts justifying a penalty pursuant to subsection 163(2).[11] In *Corriveau v. Canada*,[12] Judge Archambault describes the Minister's burden as follows:

> 26 Since the Minister has the burden of establishing the facts justifying the assessment of penalties, he must prove: (1) that the taxpayer made a false statement or omission in a return, and (2) that the false statement or omission was made knowingly or under circumstances amounting to gross negligence.

[29] In *Venne*, Justice Strayer said, with respect to subsection163(2):

> One must keep in mind, as Cattanach, J. said in the Udell case supra that this is a penal provision and it must be construed strictly. The sub-section obviously does not

[11] *Lacroix*, paragraph 26; *Venne*, paragraph 35.
[12] [1998] T.C.J. No. 1122 (QL).

> seek to impose absolute liability but instead only authorizes penalties where there is a high degree of blameworthiness involving knowing or reckless misconduct.[13]

[30] In *Morin v. M.N.R.*,[14] Chief Judge Couture said:

> To escape the penalties provided in subsection 163(2) of the Act, it is necessary, in my opinion, that the taxpayer's attitude and general behaviour be such that no doubt can seriously be entertained as to his good faith and credibility throughout the entire period covered by the assessment ….

[31] In *Venne*, the FCA says:

> "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.[15]

[32] In *Farm Business Consultants Inc. v. Canada*,[16] Justice Bowman says:

> 22 …If, however, it is misrepresentation attributable to "wilful default" it is much more difficult to conclude that it is not equally a "false statement" which the appellant made "knowingly" within the meaning of subsection 163(2). …

The judge also said that the expressions “neglect” and “carelessness” in subparagraph 152(4)(*a*)(i) are included in the expression “gross negligence” in subsection 163(2) and the expression “wilful default” in subparagraph 152(4)*a*)(i) is implicitly included in the expression “knowingly” in subsection 163(2):

> 23 …"Neglect, carelessness, wilful default or... fraud" (negligence, inattention, omission volontaire ou... fraude) cover a wide range of non-feasance or misfeasance, innocent or intentional, to which a misrepresentation in a return may be attributable. There is no hiatus between the words in this series, which starts with ordinary neglect and proceeds by gradual degrees to fraud which would justify a penalty under subsection 163(2). The type of carelessness or neglect encompassed by subparagraph 152(4)(a)(i) may include, but is not as extensive as, that contemplated in the words "gross negligence" in subsection 163(2) ("faute lourde") which implies conduct characterized by so high a degree of negligence that it borders on recklessness. It would be difficult to conclude that the state of mind required for "wilful default" ("omission volontaire") is not the same as that implicit in the word "knowingly" ("sciemment").

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[13] Note 7.
[14] [1988] T.C.J. No. 108 (QL).
[15] Note 7.
[16] [1994] T.C.J. n° 760 (QL); confirmed [1996] A.C.F. n° 82 (QL).

[33] In *Lacroix*,[17] the FCA concluded that the taxpayer had committed gross negligence. According to the Court, the taxpayer had not provided a credible explanation for the misrepresentation of facts in the income tax return:

> 29 …In the case at bar, the Minister found undeclared income and asked the taxpayer to justify it. The taxpayer provided an explanation that neither the Minister nor the Tax Court of Canada found to be credible. Accordingly, there is no viable and reasonable hypothesis that could lead the decision-maker to give the taxpayer the benefit of the doubt. The only hypothesis offered was deemed not to be credible.
>
> 30 The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts, and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanations he gave were found not to be credible. In my view, given such circumstances, one must come to the inevitable conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence. This justifies not only a penalty, but also a reassessment beyond the statutory period.

[34] The FCA comments in *Lacroix* summarize the conclusion applicable in this case. The Minister has met his burden of proof. The Minister has highlighted the gaps between the gross business income declared by the appellant and the net business income calculated using the projection method. Even though the appellant does not accept the Minister's calculations, he does not offer any viable replacement. The appellant did not keeping adequate books or accounting registers and is therefore incapable of specifying how many paid trips he made for his business and the corresponding income. The appellant maintains that his business only earned a modest income. He explained that he bought his taxi permit for the capital gain potential resulting from the resale of the permit, not for the company's annual income. The Court strongly doubts that this permit would increase in value if the business were not profitable. It is also unlikely that a financial institution would agree to approximately $100,000 in financing for the appellant to run a tax business that, according to him, would only enable him to earn the modest income declared.

[35] The estimate of the net earnings by the auditor show that the family income declared cannot support the needs of a family with four children. The appellant did not offer any credible explanations for the gap between the cost of living for his family and the modest net income declared.

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[17] Note 9.

Travel expenses

[36] In his income tax returns for the 2003, 2004 and 2005 taxation years, the appellant claimed amounts of $12,565, $10,719 and $12,315, respectively, as expenses for earning business income. In his 2003 income tax return, the appellant indicated that 80% of the kilometrage he traveled in his taxi was to earn business income. The appellant testified at the trial that this percentage was also applicable in 2004 and 2005.

[37] The evidence shows that during the audit, the appellant told the auditor that the return trip from his home in Laval to Montreal was 40 km, which he traveled five times a week, 48 weeks of the year. The appellant argued that this kilometrage should be excluded from the calculation of his income because he was only able to serve customers on Montreal Island. However, according to the appellant, he insisted that the expenses to travel from home to Montreal Island remain business expenses because he uses his residence as a place to store his car and handle all the administrative duties for his taxi business.

[38] The evidence shows that the auditor classified this return trip kilometrage as personal kilometrage, reducing the percentage of commercial use from 80% to 60%. As a result the Minister disallowed the appellant expenses of $1,106 for 2003, $2,543 for 2004 and $2,967 for 2005. I believe the Minister was incorrect in deeming these expenses as personal ones. The appellant's main tool for generating business income is his car. He must keep his car someplace safe to ensure that it is available the next day to serve clients. He cannot work without a safe place to keep his car to prevent theft or damages. As a result, I find that the return kilometrage represents a business expense and not a personal one. On this subject, I would draw attention to Interpretation Bulletin IT-521R "Motor Vehicle Expenses Claimed by Self-Employed Individuals", which reads as follows:

> **General Remarks**
>
> **24.** Although expenses incurred in travelling between different premises of the same business are deductible by an individual who otherwise qualifies, expenses incurred by the individual for the purpose of travelling between the individual's home and place of business are not, unless it is established that the home is the base of business operations. If the individual has an office or other fixed place of business located elsewhere, the home is normally regarded as not being the base of business operations. The fact that all services are rendered at some other person's place of business does not necessarily make that place the individual's base of business operations. The individual's home may be the base of business operations even

> though a room therein is not set aside and used solely for the purpose of earning income.
> The following are examples of homes that may be regarded as the base of business operations:
> …
> (c) the home of a plumber, electrician or painter whose office is at home where all supplies are kept, who has no other place of business and who renders all services to customers at whatever places are necessary to fulfill contractual obligations.
>
> [My emphasis.]

[39] I make no legitimate distinction between the case of the plumber described previously and the one of the appellant. The appellant must park his car in a secure area. He uses his home to do administrative work. As a result, the expenses incurred by the appellant for the return trip home are business expenses. I emphasize that this conclusion will not affect the calculations of the appellant's income, as argued by counsel for the respondent. The evidence shows that the appellant was not able to do business anywhere other than on Montreal Island.

CONCLUSION

[40] For these reasons, I allow this appeal in part only. The reassessments are referred back to the Minister to permit the deduction of additional business expenses of $1,106 for 2003, $2,543 for 2004 and $2,967 for 2005. All the other elements of the reassessments remain unchanged.

Signed at Ottawa, Canada, this 25th day of March 2010.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 11th day of June 2010.
Bella Lewkowicz, Translator

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APPEARANCES:

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COUNSEL OF RECORD:

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