Docket: 2010-2203(IT)G

BETWEEN:

IBRAHIM ARIDI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 12, 2012, at Montreal, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant: Marie-Hélène Tremblay

Counsel for the Respondent: Mounes Ayadi

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is allowed, with costs, in accordance with the attached Reasons for Judgment, and the assessment is vacated.

Signed at Calgary, Alberta, this 1st day of May 2013.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 12th day of July 2013.

Erich Klein, Revisor

Citation: 2013 TCC 74
Date: 20130501
Docket: 2010-2203(IT)G

BETWEEN:

IBRAHIM ARIDI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] The appellant is appealing from a notice of reassessment dated July 30, 2009, made for the 2004 taxation year under subsection 152(4) of the *Income Tax Act*[1] (ITA). That subsection allows an assessment to be issued after the normal reassessment period, which is three years. The notice of reassessment adds $83,465 to the appellant's taxable income relating to the disposition of an immovable he owned. Relying on the advice of his tax accountant, who confirmed to him that under the ITA the gain could be deferred to a future date, the appellant did not report this income.

II. Summary of the relevant facts

[2] On March 2, 1999, the appellant purchased a 96-unit rental building.

[3] On March 24, 2004, the appellant sold an undivided half of the rental building to Antoine Jarjour. The proceeds from the sale of the undivided half were $2,400,000, and the adjusted cost base was $2,222,438. Accordingly, the appellant realized a capital gain of $177,562.

[1] R.S.C. 1985, c. 1 (5th Supp.) (ITA).

[4] In filing his income tax return for the 2004 taxation year, the appellant reported, among other things, a rental loss from an immovable and a capital loss from the disposition of shares. The appellant did not, however, report the capital gain realized on the sale of the undivided half of the immovable.

[5] Consequently, the Minister of National Revenue (the Minister) revised the calculation of the appellant's taxable capital gain for the 2004 taxation year as follows:

Capital gain from the sale of the undivided half of the immovable	$177,562
Capital loss reported by the appellant from the sale of shares	($10,633)
Revised capital gain	$166,929
Revised taxable capital gain	$83,465

[6] Relying on subsection 152(4) of the ITA, the Minister made and confirmed the reassessment after the normal reassessment period.

[7] Only the appellant was called to testify. His testimony was honest, precise and credible. The appellant is a civil engineer. He emigrated from Lebanon in 1976 and has since worked in Quebec, Labrador and Saudi Arabia. In 1999, he bought the immovable the disposition of which is at issue in this case. Since he was experiencing some financial difficulties, the appellant sold an undivided half of his immovable to Mr. Jarjour in March 2004. According to his testimony, he believed at that time that he would have to pay taxes because of the sale of the undivided half of the immovable, likely on the capital gain resulting therefrom.

[8] At the beginning of 2005, the appellant gave all his documents to his chartered accountant, Mr. Diab, in order that he might prepare his tax return for 2004. The appellant said that he had spent two hours with his accountant and that he had reviewed each document that he had given him for the preparation of his income tax return. Mr. Diab had provided his services to the appellant since his acquisition of the immovable in 1999.

[9] The evidence reveals that Mr. Diab told the appellant at the time that there were two ways to treat the sale of the undivided half of the immovable from a tax point of view: normal treatment, that is, the inclusion in income of a taxable capital gain from the sale of the immovable, or treatment as what the accountant called a [TRANSLATION] "rollover". The "rollover" treatment allowed the appellant to defer the tax owing as a result of the sale of the first half of the immovable until he disposed of the second half. Thus, the appellant had to pay taxes on the full capital gain only upon the sale of the entire immovable.

[10] The appellant chose the second option, namely, the "rollover" because, according to his testimony, [TRANSLATION] "the fact that this came from an expert, for me it meant that it was supposed to be legal and reasonable". The appellant also asked Mr. Diab for details on how the "rollover" worked. Mr. Diab therefore prepared the tax return accordingly, that is, without including the capital gain in the appellant's taxable income. The evidence also shows that the taxpayer treated appropriately all other tax aspects of his sale of the undivided part of the immovable. Indeed, since the date of sale, the appellant has included in his income only 50% of the rental income and deducted 50% the expenses related to the immovable.

[11] The evidence shows that the "rollover" proposed by Mr. Diab was not a rollover as generally understood tax specialists, that is, a transfer with deferral of tax under section 85 of the ITA. In fact, the proposed "rollover" had no legal or fiscal basis. It was a fabrication or an error on the part of the accountant, who presumably believed that, by making an election, the appellant could defer the capital gain realized until the other undivided part of the immovable was disposed of.

[12] Several times during his testimony, the appellant said that he had reviewed his tax return with his accountant before signing it. He said that he had asked questions and looked at the details proving that the sale had taken place. He also said that he had read the return from beginning to end and had asked general questions about the "rollover" before signing the return. The meeting, he said, lasted more than an hour.

III. Issues

[13] The issue is whether the Minister was correct in reassessing the appellant after the normal reassessment period for his 2004 taxation year. More specifically, the following two issues were raised:

(a) Does the phrase "person filing the return" in paragraph 152(4)(*a*) of the ITA also include an accountant or professional who prepares the taxpayer's return?

(b) Did the appellant make a misrepresentation that is attributable to neglect, carelessness or wilful default within the meaning of subsection 152(4) of the ITA?

IV. Positions of the parties

[14] With respect to the application of paragraph 152(4)(*a*) of the ITA with respect to assessments made after the normal period, the appellant admitted right away that there was a misrepresentation in that the capital gain was not included. However, the appellant argues that the misrepresentation is not attributable to his neglect, carelessness or wilful default. The appellant stated that he had been prudent and diligent and that he had acted as a reasonable person would have done in the circumstances. It was, rather, his accountant who made a mistake in telling him that the capital gain could be deferred until the other undivided half of the immovable was disposed of.

[15] With regard to the interpretation of the phrase "person filing the return" found in paragraph 152(4)(*a*) of the ITA, the appellant argues that that phrase does not include a taxpayer's outside accountant. The appellant argues that it applies, rather, to a taxpayer's representative, for example, the person who signs a corporation's return.

[16] In her submissions at trial, the respondent argued that, on the contrary, that phrase could apply to, among others, an accountant or professional who prepared the return for the taxpayer. It would thus be possible to attribute liability under section 152 of the ITA to the taxpayer when the accountant retained by the taxpayer has been negligent. Moreover, the respondent maintains that the accountant's error may be attributed to the taxpayer because of the rule of agency (*règle du mandat*). In other words, the appellant would become answerable for work done by a professional retained by him. If the professional makes an error attributable to his neglect, the appellant's recourse would be in civil liability.

[17] The respondent also argues that the appellant was negligent because he did not ask specific enough questions when he was reviewing his tax return. The respondent maintains that the taxpayer should have asked for further explanations regarding the treatment of the capital gain from the disposition of the immovable.

V. Analysis

The scope of the phrase "person filing the return" in paragraph 152(4)(*a*) of the ITA

[18] Subsection 152(4) of the ITA reads as follows:

> 152(4) 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, or
>
> (ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year.

[19] Over the years, the courts have adopted the modern method of statutory interpretation based on a textual, contextual and purposive analysis of statutory provisions.

[20] After analyzing the context in which the phrase "person filing the return" occurs, I am of the view that it cannot be given the broader scope suggested by the respondent. In my opinion, the "person filing the return" referred to in paragraph 152(4)(*a*) of the ITA corresponds to the person described in section 150 of the ITA.

[21] Subsection 150(1) of the ITA reads as follows:

> 150(1) Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,
>
> (*a*) in the case of a corporation, by or on behalf of the corporation within six months after the end of the year if
>
> (i) at any time in the year the corporation
>
> (A) is resident in Canada,

(B) carries on business in Canada, unless the corporation's only revenue from carrying on business in Canada in the year consists of amounts in respect of which tax was payable by the corporation under subsection 212(5.1),

(C) has a taxable capital gain (otherwise than from an excluded disposition), or

(D) disposes of a taxable Canadian property (otherwise than in an excluded disposition), or

(ii) tax under this Part

(A) is payable by the corporation for the year, or

(B) would be, but for a tax treaty, payable by the corporation for the year (otherwise than in respect of a disposition of taxable Canadian property that is treaty-protected property of the corporation);

(*b*) in the case of an individual who dies after October of the year and on or before the day that would be the individual's filing due date for the year if the individual had not died, by the individual's legal representatives on or before the day that is the later of the day on or before which the return would otherwise be required to be filed and the day that is 6 months after the day of death;

(c) in the case of an estate or trust, within 90 days from the end of the year;

(*d*) in the case of any other person, on or before

(i) the following April 30 by that person or, if the person is unable for any reason to file the return, by the person's guardian, committee or other legal representative (in this paragraph referred to as the person's “guardian”),

(ii) the following June 15 by that person or, if the person is unable for any reason to file the return, by the person's guardian where the person is

(A) an individual who carried on a business in the year, unless the expenditures made in the course of carrying on the business were primarily the cost or capital cost of tax shelter investments (as defined in subsection 143.2(1)), or

(B) at any time in the year a cohabiting spouse or common-law partner (within the meaning assigned by section 122.6) of an individual to whom clause (A) applies, or

> (iii) where at any time in the year the person is a cohabiting spouse or common-law partner (within the meaning assigned by section 122.6) of an individual to whom paragraph (*b*) applies for the year, on or before the day that is the later of the day on or before which the person's return would otherwise be required to be filed and the day that is 6 months after the day of the individual's death; or
>
> (*e*) in a case where no person described by paragraph (*a*), (*b*) or (*d*) has filed the return, by such person as is required by notice in writing from the Minister to file the return, within such reasonable time as the notice specifies.

[Emphasis added.]

[22] Thus, a tax return must be filed for each of a taxpayer's taxation years:

(a) in the case of a corporation, "by or on behalf of the corporation";

(b) in the case of an estate, "by the individual's legal representatives on or before the day that is the later of the day on or before which the return would otherwise be required to be filed";

(c) in the case of an individual, "by that person or, if the person is unable for any reason to file the return, by the person's guardian, committee or other legal representative";

(d) in all other cases, that is, "in a case where no person . . . has filed the return, by such person as is required by notice in writing from the Minister to file the return".

[23] Subsection 150(1) of the ITA thus contemplates specific situations in which certain people or their representatives must "file" the tax return for the taxpayer in question. One can conclude from these provisions that, in this context, the person who files the return is the legal or de facto representative of the taxpayer.

[24] In statutory interpretation, it is well established that one must presume that, in a piece of legislation, the same term has the same meaning throughout.[2] This is the principle of uniformity of expression.[3] Thus, unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act.[4] This is not an immutable principle, but rather a presumption

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[2] *Edwards v. Attorney-General for Canada*, [1930] A.C. 124.
[3] Pierre-André Côté, *Interprétation des lois*, 4th edition, Les Éditions Thémis, Montréal, p. 382.
[4] *Thomson v. Canada*, [1992] 1 S.C.R. 385.

"that must give way when circumstances demonstrate that such was not the intention pursued by Parliament".[5]

[25] In that sense, the phrase "person filing the return" in paragraph 152(4)(*a*) of the ITA must be interpreted in the same way as in section 150, unless the contrary is indicated by the context. In this case, the context, far from indicating to the contrary, confirms this interpretation.

[26] Thus, I am of the view that the phrase "person filing the return" in paragraph 152(4)(*a*) of the ITA refers to a person listed in subsection 150(1) of the ITA. Consequently, I cannot accept the respondent's argument that paragraph 152(4)(*a*) of the ITA applies as well to an accountant or professional who prepares the return. In addition, even if I accepted the respondent's position, I note that there is no evidence that the accountant filed the return. The evidence shows only that the accountant prepared the return for the appellant.

[27] Regarding the agency theory, the respondent stated that subsection 152(4) of the ITA applies to a taxpayer and to his or her agents. Thus, according to that argument, when the accountant is negligent in preparing the return, the taxpayer as principal must accept responsibility.

[28] On the one hand, as stated above, subsection 152(4) of the ITA refers to the filing of the return, and more specifically, to the person who files the return under subsection 150(1). Division I of Part I of the ITA makes no reference at all to the preparation of the return. The regime applicable to the filing of the return is, however, described in detail in sections 150 to 152. If Parliament had intended that subsection 152(4) of the ITA include the preparation of the return, it could have provided for it.

[29] On the other hand, article 2130 of the *Civil Code of Québec* (C.C.Q.) provides that "[m]andate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person . . . ."[6] The preparation of an income tax return does not constitute a juridical act performed with a third person. Therefore, I do not believe that the theory of the contract of mandate (agency) as regards third parties may be imported in support of the respondent's claims.[7]

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[5] *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 61.
[6] C.C.Q 1991.
[7] Articles 2160 to 2165 C.C.Q.

<u>Was the misrepresentation of facts attributable to neglect, carelessness or wilful default?</u>

[30] Section 152 of the ITA grants the Minister the power to assess tax, interest and penalties as provided for in the ITA. That section also sets out the times for making reassessments. Thus, under paragraph 152(3.1)(*b*) of the ITA, a taxpayer[8] may be reassessed during the period that ends three years after the day of sending of a notice of an original assessment for the taxation year. Subparagraph 152(4)(*a*)(i) of the ITA provides an exception to that general rule, however. Under that provision an assessment may be made after the normal reassessment period if the taxpayer or person filing the return has made any misrepresentation that is attributable to neglect, carelessness or wilful default. According to the case law, two requirements must be fulfilled for the subparagraph to apply: (a) there must be a misrepresentation, and (b) the misrepresentation must be attributable to neglect, carelessness or wilful default.[9]

[31] The purpose of this exception is therefore to allow the taxpayer to be assessed [TRANSLATION] "as he or she should have been" if not for the misrepresentation. One must, however, be wary of concluding that this exception makes it too easy to disregard the time limit. As stated by Justice Tardif in *Chaumont v. The Queen*,[10]

> To conclude that the appellant's conduct was a wilful default or that it constituted a sufficient error to permit the Minister to assess beyond the normal period, would affect any taxpayer's right to contest the merits of an assessment, and would cause the limitation period imposed by Parliament to be essentially theoretical.

[32] The leading case in this area is *Venne v. Canada*,[11] a decision rendered in 1984 by the Federal Court. In that decision, Justice Strayer stated in regard to neglect that it is established if it is shown that the taxpayer has not exercised reasonable care. More recently, the Federal Court of Appeal confirmed in *Gebhart v. Canada*,[12] that the lack of reasonable care referred to by Justice Strayer in *Venne* is the criterion that must be met in order for subparagraph 152(4)(*a*)(i) of the ITA to apply. Reasonable care is defined as the care that would be expected of a wise and prudent person in the same circumstances.[13]

[33] On the one hand, I accept the evidence that the accountant was negligent in proposing the erroneous rollover which led to the non-inclusion of the capital gain. It

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[8] Other than a mutual fund trust or a corporation other than a Canadian-controlled private corporation.
[9] *Boucher v. Canada*, 2004 FCA 46. See also *Venne v. Canada*, [1984] F.C.J. No. 314 (QL).
[10] 2009 TCC 493, para. 18.
[11] *Supra*, note 9.
[12] 2008 FCA 206.
[13] *Angus v. Canada*, [1998] F.C.J. No. 1694 (QL), at para. 7.

is clear from the evidence that, had it not been for the accountant's suggestion, the appellant would have included the capital gain in his income tax return.

[34] However, it is not the accountant's neglect that makes it possible to disregard the limitation period under subparagraph 152(4)(*a*)(i) of the ITA. It is the taxpayer's neglect at the time of the misrepresentation that must be analyzed. Can the taxpayer establish his own prudence and diligence and state that the misrepresentation is attributable to his accountant's neglect? The appellant maintains that he can. The respondent maintains that he cannot.

[35] There is abundant but divided case law with respect to the possibility for a taxpayer to assert, on the one hand, that he or she did not act negligently, and on the other hand, that the misrepresentation and neglect are attributable to the acts or the fault of the taxpayer's accountant and the taxpayer is not liable.

[36] In *Venne*, the appellant attempted to adduce evidence that his accountant was grossly negligent or incompetent.[14] While recognizing that many of the subtleties of tax law and accounting were beyond the understanding of the taxpayer, Justice Strayer nonetheless considered the appellant to have been negligent for two reasons. First, the evidence established that the taxpayer had not read his tax returns before signing them. Second, "the errors in the income tax returns should have been sufficiently obvious that a reasonable man of even limited education and experience . . . should have noticed". Finally, the judge stated the following:

> . . . While one cannot expect a person with the plaintiff's limited education and limited experience with accounting matters to understand fully the details of a tax return, in my view he cannot absolve himself from all responsibility by hiring what he now says to be a patently inadequate bookkeeper and leaving matters entirely in the latter's hands. . . .

[37] In *Snowball v. Canada*,[15] the taxpayer had not included in his income certain amounts related to a partnership interest. The taxpayer maintained that he had given all the necessary documents to his accountant and that the accountant inadvertently failed to include the income from the partnership. Judge Bowman, as he then was, dismissed the taxpayer's claims for two reasons. First, he was not satisfied that the taxpayer had given his accountant all the documents relating to the business operated by the partnership. Second, the taxpayer had not taken sufficient measures to ensure that the income from the partnership was reported.

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[14] *Supra*, note 9.
[15] [1996] T.C.J. No. 276 (QL).

[38] In *Nesbitt v. Canada*,[16] the Federal Court of Appeal concurred with the findings of the trial judge, who had dismissed the taxpayer's appeal. In *Nesbitt*, calculation errors were made by the accountant. The taxpayer acknowledged, however, that he had not carefully reviewed his return before signing it and that he had "'pretty much' relied on his accountant insofar as accuracy of the return was concerned".[17] Justice Heald went on to state that a taxpayer cannot blame any miscalculations or errors on the preparer of his income tax return.[18]

[39] In *Isnor v. Canada*,[19] an oral decision by Judge Bowie, it was abundantly clear from the evidence that the "chartered accountant was either dishonest or incompetent or both".[20] In that case, the taxpayers had briefly questioned the accountant, who told them "not to worry about it".[21] Judge Bowie considered, however, that the taxpayers had been negligent because, although they relied on their accountant, they understood that they were signing forms indicating that they had no income for any of the years at issue, while in reality they were withdrawing large sums of money.

[40] In *Gebhart*,[22] the Federal Court of Appeal dismissed the appeal of an estate that had failed to include in its income certain amounts from the deceased's RRSP. The executor and accountant retained were confused with regard to the bank accounts. According to the Federal Court of Appeal,

> 25 [The executor] knew, or ought to have known, that the proceeds from the closure of all RSPs owned by Mr. Gebhart at the time of his death were required to be included in the income of the Estate for 1996. . . .

[41] Further on, the Federal Court of Appeal stated as well:

> 26 . . . This confusion could easily have been cleared up by a visit or telephone call to CIBC-Mankota, where Mr. Gebhart had conducted his financial affairs. It was not a difficult problem to sort out and, in my view, [the executor] did not exercise reasonable care . . . .

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[16] [1996] F.C.J. No. 1470 (QL), aff'g [1996] F.C.J. No. 19 (QL).
[17] [1996] F.C.J. No. 19, para. 23.
[18] Ibid., para. 24.
[19] [2000] T.C.J. No. 622 (QL).
[20] Ibid., para. 3.
[21] Ibid., para. 7.
[22] *Supra*, note 12.

[42] Finally, in *College Park Motor Products Ltd. v. The Queen*,[23] Justice Bowie of this Court dismissed the taxpayer's appeal of an assessment of Part I.3 tax. In that case, the taxpayer's director and its outside accountant did not know the rules relating to Part I.3 tax and did not take them into account in the taxpayer's tax return. Justice Bowie found as follows:

> 19 If Mr. Ulmer had reviewed the draft returns as carefully as a wise and prudent taxpayer would, then he would have read the questions on page 2 and he would have seen there the questions relating to Part 1.3 tax. Not knowing what they referred to, he would have asked Mr. Baert what Part 1.3 tax is, and he would have learned that Mr. Baert did not know either. At that point they would have referred to the guide item 115, or some other source, and they would have learned that the answers to two of the questions relating to Part 1.3 should be "yes", that the Part 1.3 return should be filed with the T2 return, and that the small business deduction was not available to the appellants. It is immaterial whether the carelessness lies in failing to read all the questions on page 2, or, having read the questions, in failing to make the necessary inquiries to find out what Part 1.3 tax is all about. In either event, he did not take the required degree of care.

[43] These decisions have several points in common. For one thing, in each of them, the court came to the conclusion that the taxpayer had not carefully examined or had simply not read the tax returns before signing them. For another, in a number of these decisions, the court found that the taxpayer could have easily noticed the existence of the misrepresentation if the taxpayer had asked questions or taken the trouble to do a more thorough analysis. Lastly, in some cases, the court held that the taxpayer had to know, given the situation, that there was a misrepresentation.

[44] Having considered the aforementioned decisions, the following observation must be made. In each of them, the courts recognized that the accountant who had acted for the taxpayer had been negligent. However, they came to the conclusion that the taxpayer had also been somewhat negligent: hence, the application of subparagraph 152(4)(*a*)(i) of the ITA.

[45] The conduct of the appellant in the present case is different from that of the taxpayers in those decisions. It is clear that the accountant was negligent. However, the evidence shows that the appellant was not.

[46] The appellant knew that the sale of the undivided part of the immovable would result in a capital gain. He admitted that he believed that he would be taxed on the gain. It was when he gave his documents to his accountant that the accountant told

[23] 2009 TCC 409.

him of the possibility of deferral regarding the treatment of the capital gain. The appellant asked a few questions and accepted the accountant's proposal, which seemed advantageous. After the accountant had prepared the tax return, he met with the appellant to review the return. The meeting lasted more than an hour, and the taxpayer asked questions about the sale of the immovable as well as about the tax return in general.

[47] The respondent submitted that the appellant should have asked more precise and technical questions about the proposed "rollover". With respect, I do not believe that the appellant should have asked more questions. The appellant knew the normal tax treatment of the transaction he had just completed. A specialist, namely his accountant, told him of another treatment, one that was more complicated but advantageous. The appellant asked some questions and accepted the specialist's advice. He then reviewed the return and signed it. What more would a wise and prudent person have done?

[48] The appellant consulted a professional whose competencies and opinion he respected, as that professional had provided accounting services to him for the previous five years. He provided to the professional all the necessary documents. The appellant asked his accountant questions when appropriate and questioned him about the income tax return. I am of the opinion that the appellant's line of conduct was that of a wise and prudent person. The appellant's conduct in this case is more akin to that of the appellants in *McKellar v. The Queen*[24] and *O'Dea v. The Queen*,[25] two recent decisions in which this Court held that the taxpayer had not been negligent. In *McKellar*, the taxpayer had consulted a professional, asked him questions and taken the necessary steps to understand the return. Justice Rossiter, as he then was, held that the conduct of a wise and prudent person would not have been different than that of the appellant.[26]

[49] In *O'Dea*, Justice Campbell held that the limited partners had not acted negligently in consulting professionals before deducting the partnership's losses from their income. The taxpayers in that case had also relied on professional documents related to a public offering. Justice Campbell wrote the following:

> 104 . . . These individuals were involved as limited partners. They were not the directing minds nor were they involved in the initial structuring details. I believe they were acting in a reasonable and prudent manner in placing reliance on the

[24] 2007 TCC 266.
[25] 2009 TCC 295.
[26] *Supra*, note 24, para. 33.

> various professional opinions before making a decision to invest and should not be held to a higher standard. To do so would be to insist that they must personally investigate the technicalities of the various structures and arrangements of public offering documents. Therefore their reliance on the statements received from the Partnership will not amount to a failure to exercise reasonable care in filing their returns . . . .

[50] Subparagraph 152(4)(*a*)(i) of the ITA requires that the taxpayer have acted negligently. To rely upon and prove neglect on the part of the accountant or professional who acted for the taxpayer will not be sufficient to prevent the application of subparagraph 152(4)(*a*)(i) of the ITA. The taxpayer must also have acted diligently, or at the very least, must contradict the Minister's evidence that he had acted negligently. Thus, it is true that the accountant's neglect is no answer to an otherwise justified assessment. I believe, however, that, when the accountant's neglect is proven and the taxpayer has also demonstrated his or her own diligence or lack of neglect, subparagraph 152(4)(*a*)(i) of the ITA cannot apply.

[51] In order for me to have found in favour of the respondent, the wording of paragraph 152(4)(*a*) would have had to be as follows: ". . . the taxpayer, the person filing the return, <u>or any person who participated in preparing the return filed by them</u> . . . made any misrepresentation that is attributable to neglect, carelessness or wilful default". The underlined words are not part of the provision in question.

VI. Conclusion

[52] For all of the above reasons, I am of the view that the respondent has not discharged her burden of demonstrating, on the balance of probabilities, that the appellant acted negligently. On the contrary, the evidence shows that the appellant acted diligently. I would therefore allow the appeal with costs and order that the assessment be vacated.

Signed at Calgary, Alberta, this 1st day of May 2013.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 12th day of July 2013.

Erich Klein, Revisor

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