

Docket: 2011-1901(IT)G

BETWEEN:

NORMAND VACHON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 7 and 8, 2013, at Montréal, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellant:	Dominic C. Belley Vincent Dionne
Counsel for the respondent:	Anne Poirier

JUDGMENT

With regard to the 2002 taxation year, the appeal is allowed in accordance with the terms of the Consent to Judgment agreed upon by the parties, the original of which is attached and is an integral part of this judgment.

With regard to the 2003 and 2004 taxation years, the appeal is allowed in that the assessments are confirmed as justified and well founded, in accordance with the attached Reasons for Judgment.

Lastly, the penalties are cancelled.

With costs to the respondent.

Signed at Ottawa, Canada, this 24th day of October 2013.

"Alain Tardif"

Tardif J.

Translation certified true
on this 11th day of February 2014.

François Brunet, Revisor

Citation: 2013 TCC 330
Date: 20131024
Docket: 2011-1901(IT)G

BETWEEN:

NORMAND VACHON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] The appeal is essentially with regard to the 2003 and 2004 taxation years. The 2002 taxation year was the subject of a consent, which is attached to this judgment and is an integral part of it.

[2] The Minister of National Revenue (the Minister) assessed the appellant for unreported income "outside the normal reassessment period" based on subparagraph 152(4)(a)(i) of the *Income Tax Act* (the Act), which provides:

Assessment and reassessment

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...

[Emphasis added.]

[3] The Minister also imposed a penalty pursuant to subsection 163(2), which states:

False statements or omissions

163(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty...

[Emphasis added.]

[4] The appellant is a businessman with more than 35 years of experience as director and manager in large international businesses. He therefore acquired exceptional expertise.

[5] On August 21, 2003, he created his own human resources and business restructuring consulting firm.

[6] As a self-employed worker or consultant, his services were retained by L'Ébénisterie St-Patrick from January to July 2002 for \$151,063, then by Produits métalliques Roy inc. ("PMR") from July 2002 to December 2004 for \$829,320.

[7] His compensation was around \$1,200 a day plus the repayment of certain expenses. Only the income earned from PMR is in dispute.

[8] At that time, his status as a self-employed worker was challenged before the Tax Court of Canada, which found that the appellant was an employee.

[9] That judgment was appealed before the Federal Court of Appeal; the Tax Court of Canada judgment was overturned and the appellant's work was held to be not insurable because, as he had submitted, it was work performed as a self-employed worker.

[10] The appellant's record leaves no doubt as to his qualities and skills, which were such that he had exceptional success with the businesses that retained his services.

[11] Articulate, educated, clear-sighted and armed with extensive experience, he was very successful in the various management mandates conferred on him.

[12] First, the appellant testified simply, spontaneously and clearly, which showed he was disciplined and exceptionally qualified in his professional area of work, namely human resources and business restructuring. Highly educated, he first worked as an employee for a very large business in particular.

[13] The first part of his testimony led to the conclusion that he built an exceptional reputation and acquired vast knowledge essential to the proper operations and development of businesses, regardless of the economic area of activity. Starting and restructuring businesses require multi-faceted knowledge.

[14] However, when he testified about his personal income and tax obligations, the picture was not the same.

[15] The appellant stated that his knowledge of tax matters was very basic at best. He indicated that his overall personal income was subject to an obligation to pay more or less 50% in taxes, or approximately \$150,000 for income of \$300,000.

[16] He also stated that he knew an RRSP (Registered Retirement Savings Plan) was advantageous in that it allowed for significant tax savings.

[17] The appellant also knew that the expenses incurred during his work as a consultant could offset the income earned, if the expenses were directly related to the execution of his work.

[18] He stated very early that his ignorance of tax matters led him to retain H&R Block to complete his annual tax returns. Mr. Simard, an employee of H&R Block, was responsible for his file when he worked as an employee.

[19] When he became a self-employed worker, he continued to work with the same Mr. Simard, even though his career path was unstable and he had terminated his relationship with H&R Block, started his own business, and changed business names a few times. He also explained and insisted that the two of them had developed a relationship of trust.

[20] As clear and precise as the first part of his testimony was, the second part was equally unclear, even confused at times. Moreover, it was even contradictory on certain points, in particular regarding the attention he paid to Mr. Simard's work, which consisted of taking care of his accounting and tax returns.

[21] The appellant explained that Mr. Simard took care of everything using the documents he brought him, such as invoices for fees, expenses, etc. Mr. Simard did

the accounting work; the appellant prepared the cheques and signed them according to Mr. Simard's instructions. At the beginning, the appellant seemed to pay Mr. Simard's fees with a specific cheque and the taxes using separate cheques made out to the tax creditors. Then, it seems the method changed. The appellant admitted that, on many occasions, he wrote cheques to various entities Mr. Simard mentioned to him and with which he had no relationship of any sort. He simply executed Mr. Simard's instructions.

[22] The fact that a person as clear-sighted, meticulous and structured as the appellant would become so careless and irresponsible when it came to his tax responsibilities raises many questions for the respondent and the court.

[23] The appellant essentially referred to his lack of knowledge and the absolute confidence he had in Mr. Simard who, in his opinion, had always acted properly, and had done so for a long time.

[24] To explain his nonchalance, indeed his recklessness with regard to his tax obligations, he stated that, despite his lack of knowledge in the field, he believed that the case regarding his status as self-employed worker would have a significant impact. He stated that this was his opinion and added he did not believe it was necessary to discuss this with counsel representing him in the insurability case.

[25] The appellant went through a stressful period because of the case regarding his status as self-employed worker versus employee. The difference between the two clearly had a significant impact, particularly with regard to taxable income; for a self-employed worker this takes into consideration all expenses incurred for the purpose of earning income, whereas an employee is usually not eligible to deduct certain, usually very numerous, expenses. According to the appellant, the questioning of his status was abusive to the point that the respondent's position could be considered harassment. His judgment on this issue certainly does not have the same quality as that which earned him such recognition professionally.

[26] The appellant constantly used the issue of the insurability of his work with the Canada Revenue Agency (CRA) to explain or justify certain peculiar and highly disputable aspects of his behaviour. He also stated and repeated that he sincerely believed that his entire tax matter would be settled automatically with the final outcome of the case regarding his status, repeating that he had little to no knowledge of tax matters.

[27] In support of his case, the appellant called an expert as a witness. This expert's work showed conclusively that the appellant indeed paid significant amounts that

normally should have been used to pay all or part of his tax debt. However, this was not at all what happened. Instead, Mr. Simard diverted the amounts in question to serve his own interests, thereby defrauding the appellant.

[28] The expert's involvement in the appellant's case raised particular interest because this was certainly not a case in which the parties usually call upon an expert.

[29] The expert's work was useful for understanding, but also for demonstrating the scope of the fraud the appellant was involved in as a victim.

[30] His involvement established somewhat conclusively and therefore very convincingly that the appellant indeed paid, while not the total, significant amounts that were never remitted to the appropriate tax authorities, but were essentially used to the profit and advantage of his mandatary Mr. Simard's personal interests.

[31] As to the expert's contribution to the two issues in question, I feel that, with respect to any other opinions, the expert's work showed unequivocally that the appellant was a victim of fraud.

[32] Was he the victim of a skilful strategist that was impossible or at least difficult to detect or uncover? I do not think so, although the appellant stated and repeated that this was not an unwarranted relationship of trust, but a trust that had developed over the years to the point where he had complete trust in him.

[33] Signing cheques for large amounts to a person who is not the beneficiary is something fundamentally careless and unjustifiably careless for someone moderately reasonable and careful. As such, the appellant was, to a certain extent, the architect of his own misfortune.

[34] With ongoing business relationships it is normal that trust is created and develops; it is also normal, usual and cautious, particularly for someone whose fields of expertise include human resources, to occasionally conduct verifications as to the quality and honesty of the work performed.

[35] A relationship of trust should never be absolute, without the risk of becoming responsible for something that could have been avoided by simply being attentive and taking basic precautions.

[36] The appellant is a savvy, educated businessman, who was perfectly aware of human weaknesses because of his training in industrial relations. He can certainly not hide behind an explanation of the innocence of a beginner with no experience in

human behaviour. The fact that he signed cheques for substantial amounts to persons other than the beneficiary of the amount shows carelessness to the point that it can be considered negligence.

[37] Habits, routine and comfort in a business relationship do not automatically prevent errors or abuse, therefore the reflex to be vigilant and cautious should never be put aside. Yes, it is human nature to let oneself go, but it is also expected that one must be responsible for the civil and administrative consequences of such inaction.

[38] The appellant has a high level of academic training to which he adds exceptional analytical and management skills, and he has the ability to implement relevant solutions that produce remarkable results. Such expertise and such results certainly do not come from taking everything for granted and never questioning anything when in a relationship of trust.

[39] The appellant, despite the extent of his knowledge, his vast and sought-after expertise in administrative management and his ultra-specialization in human resources matters, claimed and repeatedly insisted that he had no knowledge of tax matters. On this, the evidence shows that the appellant had the knowledge that is commonly found in the general public.

[40] The tax dispute in his appeal involves an issue for which all or nearly all taxpayers are aware of the requirements provided by the Act, namely knowing that everyone must pay taxes and that generally, the higher the income, the greater the tax burden. Added to this, perhaps to a lesser extent, is the fact that an RRSP reduces a taxpayer's tax burden and lastly, that the expenses incurred when carrying out a mandate as a consultant are deductible.

[41] The appellant is not, and was not, during the years in question, an exception to this virtually absolute rule. Indeed, not only did the appellant know that he should pay his taxes, he quickly and simply admitted as much; he knew that an RRSP was beneficial and roughly knew that the percentage of taxes to which his income was subject was more or less 50%.

[42] The appellant's main submission is that he paid the tax amounts he owed; but he also acknowledges that the amounts in question were not paid to the true debtor, in this case, the respondent.

[43] Moreover, the appellant also submits that he was not responsible for the fact he probably signed tax returns that were not the same as those his agent submitted, since

his attention was directed at documents that did not comply with those sent to the tax authorities or were simply false.

[44] Indeed, he was dealing with a con artist; however, I feel it is important to note that the con artist in question had a much easier time with his malicious scheme because of the appellant's carelessness, lack of attention and excessive and unwarranted trust.

[45] The appellant had to read and follow-up on correspondence the respondent prepared. He had to verify the quality of Mr. Simard's work. He especially had to question his motives as to the cheques he was asked to prepare. It was his responsibility to understand and verify the accuracy and details of the fees paid, to ascertain what amount of the cheques was for the fees and what amount was for taxes.

[46] It is human nature to be vulnerable before wise and savvy fraudsters, but not all have the same vulnerability and all must rely on their own resources to protect themselves from fraudulent initiatives, which are numerous and widespread in society, and particularly when faced with signs of trouble and behaviour that normally trigger a reflex of suspicion.

[47] The appellant was careless. This appears from his own testimony. First, in the transcript at page 36, lines 2 to 12:

[TRANSLATION]

"Your return will be ready this day or that day." It was not ready. They called me back. There was a delay, OK, etc. With him, it was always... He is a conscientious guy, in that he was always there on the day and at the time agreed to and also the documents were well prepared. I conducted a complete review with him and I would see that all the information was there and everything was there. So that made him reliable.

...

[See transcript at page 54, lines 10 to 26.]

Q. We talked about the company earlier.

A. The way he operated in 2003, even if I had instalments to pay or whatever, when I would get there, I always asked: "OK. How much do I owe? What do I need to do?" And then I paid him his fees. I wrote his cheque, ok, as such, for his fees, and then I would to Revenue Canada, ok, or Revenue Quebec, for the given period.

Q. Hm.

A. Then I would write a cheque, ok, at that time, based on the amount I owed. I would give him the cheque. He was the one who took care of it to be able to file the reports meaning doing or completing the rest, in terms of paperwork, etc.

...

[See transcript at page 55, lines 1 to 13, and page 56, lines 1 to 17.]

HIS HONOUR: When you say: "I wrote the cheque", who wrote the cheque to Revenue Canada and Revenue Quebec?

WITNESS: It was me, but I gave it to him.

HIS HONOUR: O.K.

WITNESS: I was the one who always wrote the cheque to Revenue Canada, so I knew the amount.

HIS HONOUR: But according to the instructions he gave you?

WITNESS: The...

HIS HONOUR: You wrote the cheque to Revenue Canada.

WITNESS: Exactly.

...

Then after that, yes, well, what I did was I wrote the cheque. I always wrote the cheque like that. It was always my signature there on the actual cheque. Then I would say: "Here, here is the cheque. Proceed. How much do I owe you for your fees?" And then I paid his fees. But, this was a reliable guy who did his job well. When I got there, he was always well prepared, meaning that, for all intents and purposes, ok, I didn't really have many questions to ask. He went over all the elements. He made sure he answered my questions. It was the same as it had always been.

...

[See transcript at page 67, lines 25 to 28.]

Q. If you go to page 11, Mr. Vachon, you have a \$10,000 cheque dated June 13, 2004, payable to Les Industries Flamenco.

A. Hm.

[See transcript at page 68, lines 1 to 28.]

Q. Now, can you explain to the Court what this is?

A. That, actually, if memory serves, was... What he did was he changed. He was with H & R Block and then at one point, he was no longer with H & R Block and then he got new offices that were almost across from, ok, uh, on the other side of the road, ok, like, in a shopping centre.

Q. Yes.

A. He had space there with, I don't know, a couple of offices and professionals who seemed to work there. So, from what I remember, that's it. Ok, at that time, and that was the name of his company, ok, so yeah.

Q. And if you went...

HIS HONOUR: This is the accountant's company or the company for which he worked?

WITNESS: His own business. He always told me it was his business. When he left H & R Block, what he told me was... He opened... He opened his own firm. He opened his company. This is his company.

HIS HONOUR: Tell me, this guy, was he a CA, was he a CGA? Was...

[See transcript at page 69, lines 1 to 27, page 70, lines 1 to 28, page 71, lines 1 to 28, and page 72, lines 1 to 3.]

WITNESS: You ask me this question and honestly, I never checked this out. It is because when he was at H & R Block, for me, you know... Before that, I dealt with H & R Block. Usually, it was always... I guess that accountants work there, ok, so yeah. He said he was an accountant. But I never asked for his papers because I knew him before personally, meaning, on a... He did taxes on... personal taxes, so... Since I was in Repentigny. So let's say from '95, '96, '97, nothing changed, up until 2002, 2003, uh, when it started to change.

Q. Les Industries Flamenco, you, do you have shares in that?

A. No.

Q. You are not a shareholder of this---

A. No, no.

Q. ---company?

A. No. I don't even know what that is exactly, you know? I guess it is his company, the accountants, the people who are there, yeah.

Q. If you go to page 14, you have a cheque to Capital Finances Services. I don't know... The print is not that great, but are you able to recognize your signature, Mr. Vachon?

A. Yes, that is my signature.

Q. Capital Finances Services, what is that?

A. April billing... He left Repentigny, ok, like, to go to Terrebonne. I guess it's that, but I...

Q. To the best of your recollection, Capital Finances Services...

A. It's the company, the other company he was in, ok, yeah.

Q. "He" being?

A. Daniel Simard.

Q. Daniel Simard.

A. Because he left Repentigny to go to Terrebonne then.

Q. And you, do you have shares in Capital Finances Services?

A. No.

Q. So if you go to page 15, there is a cheque payable to ImpôtExpert. Do you recognize your signature here too?

A. Yes. Quarterly accounting, ok, like, ImpôtExpert, yes. Honestly, I...

Q. ImpôtExpert as best you can remember, is this also Mr. Simard?

A. Yes, that's him.

Q. And you, do you have shares in ImpôtExpert?

A. No, no.

Q. Ok.

A. I don't remember what he told me. He must have changed the company or whatever.

Q. If you go to page 20, there is cheque payable to Gestion PSC Inc.

A. Page 20?

Q. Page 20. Do you see that, Gestion PSC Inc.?

A. Yes.

Q. Can you recognize your signature?

A. Yes.

Q. \$3,500.

A. And at the bottom, what is that, "DAS---

Q. "DAS".

A. ---Federal"?

Q. "Federal DAS."

A. What is that, "DAS"?

Q. Deductions at source. That's how I understand it. But Gestion PSC,---

A. No.

Q. ---is this the name of a company Mr. Simard mentioned to you?

A. Of course because, you know, if I wrote a cheque and then wrote him a cheque, I would say: "Who do I make it out to, ok, like that?"

[Emphasis added.]

[48] First, the appellant was clear about the fact he was wise, careful and vigilant about Mr. Simard's work. He even noted that not hearing from the respondent was, in a way, a confirmation of the quality of Mr. Simard's work. From the transcript at page 58, lines 1 to 6, he states:

[TRANSLATION]

A. Yes, absolutely. Well, I mean, Revenue Canada is usually so fast that, if, let's say, a tax return I made wasn't right, I'm sure that Revenue Canada would have gotten back to me quickly, ok, at the time. They would not have gone to the accountant, but would have gotten back to me on that...

[49] Second, it is also very clear and unequivocal that his criteria for caution and his instincts to be prudent became diluted to the point of becoming nonexistent, for absolutely no reason. His failure to significantly follow up, with regard to the letters

by Jean-Paul Payette from the audit division on April 2, June 15 and September 11, 2007, is very revealing.

[50] The argument that the case regarding the insurability of his work explained and justified his inaction is not a valid excuse, especially for a person as qualified and resourceful as the appellant.

[51] When Mr. Simard became ill, he could have contacted either Mr. Payette, or another accountant, especially when he was informed that no return date could be given for Mr. Simard. The appellant himself stated that Mr. Simard was disciplined and structured, did he not? This was a fairly major change that should have raised suspicions in a reasonable person.

[52] In the summer of 2007, when Mr. Simard, described by the appellant as reliable, quick, methodical and disciplined, admitted that he lost his file, again, he should have acted quickly and efficiently, by contacting the respondent and/or her representatives.

[53] All the justifications and excuses that followed seem trivial other than to confirm the negligence, recklessness and carelessness, and to point to a fault that is severe enough to allow the respondent to make an assessment outside the normal statutory period.

[54] If the appellant had been careful, vigilant and blameless, as he claimed, when he discovered certain abnormalities, irregularities, etc., he should have taken the initiative of verifying and validating the quality and accuracy of the work done by Mr. Simard over the previous years.

[55] In that respect, the appellant himself submitted convincing, relevant and very revealing evidence. Indeed, the transcript from the criminal investigation concerning Mr. Simard showed that he faced criminal charges following certain findings of one of his clients who can clearly be defined and described as an ordinary reasonable person. Yet, the finding of malfeasance was made very quickly, as was the denunciation. The individual in question clearly does not have the same assets as the appellant but still noticed Mr. Simard's malfeasance quickly and just as quickly reported it.

[56] In short, the appellant clearly made an error by putting his absolute trust in a person who did not deserve it, and who had shown many signs that should have raised suspicions in a reasonable person.

[57] The appellant's choice is also rather debatable; indeed, an informed person knows or should know that giving a mandate to a person who is not a member of a professional association such as CA, CGA, etc. can have serious consequences and be very costly. The mandator takes full responsibility for the deeds and actions of his mandataries with the exception of penal or criminal faults. The appellant had the knowledge to very quickly make an appropriate verification. He did not do so. He simply made assumptions.

[58] Indeed, the mandator has an advantageous civil liability remedy, but the outcome could be very disappointing if the mandatary is insolvent, which seems to be the situation in the present case. The third party is not responsible for nor the insurer of the facts and behaviour of the mandatary; consequently, the appellant must assume all the consequences of his carelessness.

[59] Indeed, Mr. Simard had to be creative and/or imaginative to gain and retain the appellant's trust. He acted fraudulently by setting up various strategies. But this same fraudster was easily and quickly denounced by another person, which was established by the appellant's own expert.

[60] I do not believe that the businessman in question was a great investigative detective. He essentially acted from normal and reasonable actions and reflexes, which the appellant did not do.

[61] The mandator is liable to third parties, including the Agency, for the actions of the person executing the mandate conferred by a taxpayer to complete his or her annual tax returns, notwithstanding the rights of that mandator against the mandatary with regard to liability, in particular in terms of following the trade practices or any other errors, whether of ignorance or otherwise. In other words, all that is civil and not criminal entails a liability for the mandator to third parties.

[62] He preferred to remain silent with people who were processing his file regarding the insurability of his employment. He unconvincingly submits that he believed a settlement in the insurability case would also settle his tax case. This unjustified passiveness was fed by negative feelings towards the authorities; in fact, the appellant felt that he was being harassed.

[63] It seems that the appellant was much harsher with the audit department than with his accountant. Interpreting their various requests as harassment, he did not think it was relevant to question the competence of his own representative, although he had shown some questionable and suspicious actions.

[64] Astoundingly, as I mentioned during the hearing, the appellant had built an exceptional reputation with many businesses, for which he met many equally exceptional challenges. However, when it came to his tax case, which was rather simple, his memory became selective, his explanations incomplete and confused; moreover, it is completely impossible to make sense of the replies with respect to the importance he granted his annual tax returns.

[65] First, he stated that he verified, analyzed, questioned and validated by his signature the quality of Mr. Simard's work. Second, claiming to trust Mr. Simard, he blindly signed wherever he was told to, did not keep any copies, etc., and wrote cheques to people who were not the beneficiaries.

[66] Similar contradictions undermine the appellant's credibility with regard to the attention he paid or devoted to his tax obligations; this led to the validation of many elements that, overall, constitute a degree of fault severe enough to conclude that the respondent has met the burden of proof that allows for an assessment to be made outside the statutory period. In this case, the appellant's excessive tolerance and unwarranted and disproportionate trust in Mr. Simard constitutes a fault sufficiently serious to allow the respondent to make an assessment outside the normal reassessment period. As a result, I feel that it is appropriate and warranted to conclude there was a severe enough fault or error to set aside the benefits of the limitation period provided for in subparagraph 152(4)(a)(i) of the Act.

Penalties

[67] The evidence showed that the appellant was unequivocally the victim of a fraud. The appellant is also requesting that the penalties added to the assessments be cancelled.

[68] The various complaints brought against the appellant, including his lack of vigilance, certain recklessness, and near indifference, are attributable to him, and this surely made Mr. Simard's strategy easier to carry out.

[69] As for the penalties, it is completely different; the appellant's breaches, his lack of attention regarding his attitude and his behaviour with Mr. Simard do not seem to me to have the degree of seriousness to call for penalties.

[70] Although we cannot refer to *mens rea*, an essential element in criminal law, it seems important to me that to call for penalties in tax matters, the person in question must have shown, whether passively or actively, a minimal intention to hide certain data with a direct impact on his fiscal duty.

[71] Wilful blindness, the lack of attention, unwarranted or unjustified trust in an agent are factors that, under the circumstances, could correspond to gross negligence justifying the imposition of penalties.

[72] In this case, I believe the appellant when he states that he never had the intention or desire to evade part of his fiscal duty.

[73] Is the appellant accountable for the penalties for which Mr. Simard is primarily responsible as Mr. Simard clearly orchestrated a fraud against the appellant who, I must restate, was to a certain extent, the architect of his own misfortune?

[74] Despite this, I must say the answer is negative since it seems very difficult, if not impossible, for me to conclude that there was gross negligence or any intention to voluntarily and/or knowingly evade his tax obligations. The recklessness, lack of vigilance and carelessness that the appellant showed do not constitute gross negligence within the meaning of subsection 162(2) of the Act.

[75] Lack of vigilance, carelessness and even a lack of concern are not sufficiently serious reasons to call for the imposition of a penalty when there is no malicious intent.

[76] Imposing penalties requires negligence to the extent that the alleged carelessness is significant and reckless enough that is it possible to detect some degree of complicity—at the very least implied—that leads to the finding that there was wilful blindness.

[77] In this case, the appellant was very experienced, very educated and had the specific abilities to assess human resources skills. He should have been able to put into practice his own expertise, which would have quickly allowed him to discover the fraud and the significant and crude abuse perpetrated by his accountant. Despite this reality, there is no doubt that the appellant did not want to avoid his tax burden for the benefit of Mr. Simard.

[78] Penalties imply gross negligence, wilful default, wilful blindness, etc. The basis for imposing a penalty is closer to a criminal law concept.

[79] Criminal law is a field with very specific rules. First of all, in tax matters, the burden of proof is on the respondent, not the taxpayer who is being assessed the penalty.

[80] In tax law, the degree of proof required is the balance of probabilities, whereas in criminal law, it is much more stringent; there must be proof beyond a reasonable doubt.

[81] In tax law, there is no requirement for proof beyond a reasonable doubt at all; there must, however, be a likelihood that the person being assessed has committed a fault to the degree that it could be considered gross negligence and not a fault resulting from a lack of vigilance.

[82] In criminal law, unless the mandator is complicit or is associated implicitly or explicitly with the facts and behaviour attributed to the mandatary, or benefits from the scheme, the mandator cannot be responsible for the criminal responsibility resulting from the mandatary's facts and behaviour, which benefited the mandatary to the detriment of his or her mandator.

[83] In this case, it seems clear to me that there is no such complicity. The appellant's negligence and carelessness are not sufficient to lead to a conclusion that there was wilful blindness; in fact, it would be unreasonable to accept that a person would voluntarily or involuntarily accept that amounts paid for his or her tax debts would benefit someone else.

[84] For all these reasons, the appeal is allowed and the penalties are cancelled. With regard to the other elements of the assessments, they remain the same, all of which is subject to the attached consent entered into by the parties for the 2002 taxation year, with costs to the respondent.

Signed at Ottawa, Canada, this 24th day of October 2013.

"Alain Tardif"

Tardif J.

Translation certified true
on this 11th day of February 2014.

François Brunet, Revisor

[TRANSLATION]

2011-1901(IT)G

TAX COURT OF CANADA

BETWEEN:

NORMAND VACHON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

CONSENT TO JUDGMENT
(2002 taxation year)

The parties consent to the Court rendering judgment, allowing the appeal from the assessment for the 2002 taxation year and referring the case to the Minister of National Revenue for reconsideration and reassessment, made as follows:

Employment income:	\$33,677
Gross business income:	\$312,514
Total expenses:	\$27,365
Net business income:	\$285,150
Total income:	\$318,827

In all other respects, the reassessment shall remain unchanged.

WITHOUT COSTS.

Montreal, May 8, 2013

By: (Signature)
Dominic C. Belley

Montreal, May 8, 2013

William F. Pentney
Deputy Attorney General of Canada
Counsel for the respondent

By: (Signature)
Anne Poirier
Counsel

CITATION: 2013 TCC 330

COURT FILE NO.: 2011-1901(IT)G

STYLE OF CAUSE: NORMAND VACHON v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATES OF HEARING: May 7 and 8, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: October 24, 2013

APPEARANCES:

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