Docket: 2020-1626(IT)G

BETWEEN:

994552 N.W.T. LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on October 1 - 2, 2024, at Edmonton, Alberta with written submission completed January 10, 2025

Before: The Honourable Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Robert A. Neilson Jeremy Comeau
Counsel for the Respondent:	Rory Tighe

JUDGMENT

WHEREAS the Court has published its written reasons for judgment on this date;

NOW THEREFORE THIS COURT ORDERS THAT:

1. the appeal in respect of the 2014 and 2015 taxation years ending January 31, 2015 is dismissed because the Minister is permitted under subsection 152(4) of the *Income Tax Act* to reassess beyond the normal reassessment period concerning the 2015 unreported taxable capital gain and the 2014 and 2015 claimed deductions on account of capital cost allowance and omitted recapture, each of which was a misrepresentations attributable to neglect, carelessness or wilful default;

2. the penalties imposed in all years are vacated and the matter is returned to the Minister solely on that basis; and,

3. no costs are awarded because of the mixed result, subject to either party's right to make written submissions concerning an award of costs within 30 days of this judgment and the other party's right to respond thereto within 30 days thereafter. Neither written submission shall exceed 10 pages (excluding authorities); provided that should no cost submissions be made, this provisional order of no costs shall become final.

Signed at Ottawa, Ontario, this 17th day of April 2025.

"R.S. Bocock"

Bocock J.

Citation: 2025 TCC 55
Date: 20250417
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REASONS FOR JUDGMENT

Bocock J.

I. INTRODUCTION

Overview of nature of dispute

[1] No dispute exists in this appeal regarding the amount of tax the Appellant should otherwise have paid in any appealed taxation year, had the Minister reassessed within the normal reassessment period. The years, amounts and nature of the (re)assessed tax are as follows:

Taxation Year Ending Jan. 31	**Omitted Income or Improper Deduction**	**Amount**	**Nature of Error**
2014 (beyond normal reassessment period)	Capital Cost Allowance	$360,445 plus s.163(2) penalties	Unentitled deduction
	Realized Recapture	$257,771 plus s.163(2) penalties	Reporting Omission
2015	Taxable Capital Gain	$6,107,869	Reporting Omission

(beyond normal reassessment period)		(no penalties)	
	Capital Cost Allowance	$347,027 plus s.163(2) penalties	Unentitled deduction
2016 (no statute barred dispute)	Capital Cost Allowance	$319,980 plus s.163(2) penalties	Unentitled deduction

So why the appeal?

[2] If there is no dispute concerning the amounts of tax otherwise owing, why the appeal? To repeat, the issue for 2014 and 2015 is timeliness of the reassessment. For these two years, the Minister originally assessed the timely submitted corporate tax returns as filed with the above-noted errors included; however, the Minister did not reassess the Appellant until September 30, 2019, a date which was beyond the normal reassessment period.

2016 tax liability not in dispute; penalties disputed

[3] In contrast, the 2016 taxation year was reassessed within the normal period, so tax liability is not disputed. Gross negligence penalties are disputed. Penalties under subsection 163(2) of the *Income Tax Act* (the "Act") were levied for all three taxation years, but are limited to claimed capital cost allowance and omitted recapture.

The "inexplicable glitch" re: 2015 omitted capital gain

[4] The Appellant also objects to the statute barred reassessments for the approximately $6.1 million omitted taxable capital gain. Appropriately, the Appellant accounted for and included the capital gain in the draft financial statements ("F/S") initially approved by the taxpayer after preparation by the professional external accountants. Strangely, for some inexplicable and undetectable reason (the "inexplicable glitch"), the external accountants deleted the sum of $12,215,738 concerning the Nova Park building, capital gain and certain consequential amounts from subsequent versions and the final 2015 F/S. This inexplicable glitch occurred before client review of the final 2015 F/S and review and execution of the summary direction to e-file the T2 corporate tax return ("T2"),

the T185 (“T185”); both the final 2015 F/S and T185 incorrectly omitted the capital gain. Simply, the Appellant asserts the inexplicable glitch was undetectable and obliterates any notion of carelessness and neglect and renders wilful default impossible. In negligence pleadings before relevant superior courts, one might analogize it as a “true and unavoidable accident”.

Capital cost and recapture errors

[5] For tax years 2014 and 2015, the Appellant contests the overstated capital cost allowance (“CCA”) and omitted recapture (collectively, the “CCA Issue”) because negotiations and dealings with the Minister’s agents (“CRA”) concerning CCA audits were ongoing and remained an open issue, or at least not a concluded one, when the T2s were filed for 2014 and 2015. The CCA Issue arose because the CRA “failed to deliver” its accepted view of the 2012 and 2013 undepreciated capital cost (“UCC”) asset class continuity balances as the CRA said it would. The Appellant argues that without these balances, the 2014 and 2015 T2s did not utilize the updated opening UCC balances to derive accurate CCA deductions and recapture (the “outstanding baseline UCC balances”). Simply, the Appellants assert that a taxpayer in wait of the CRA’s input cannot be careless or neglectful for errors arising from not having unknown balances promised but undelivered by the Minister’s agents.

Tax year 2016 and subsection 163(2) penalties

[6] The Appellant fully concedes the 2016 tax liability because the year was reassessed within the normal reassessment period and the CCA claimed within the 2016 T2 was wrong. However, concerning the CCA Issue, the Appellant contends in this context as well that there was no gross negligence or insouciant disregard for complying with the law because of the CRA’s unfulfilled undertaking to provide revised outstanding baseline UCC balances for two critical preceding taxation years.

[7] For clarity, no penalties were assessed concerning the 2015 capital gain omission.

II. BACKGROUND FACTS

Nova Group of companies and its principal

[8] Generally, the Appellant is part of a very large business operation. More specifically, the Appellant is part of the Nova Group of companies ("Nova Group"). Milan ("Mike") Mrdjenovich is the principal of the Appellant and the substantial Nova Group. Mike testified he emigrated from Serbia to Canada in 1969. Over the next 40 years, he became an exemplar of a self-starting rags-to-riches saga of a successful immigrant. The Nova Group comprises real estate development, rental and management companies, centered in Edmonton, but also present in the northern territories. Mike was an electrician by trade; the transformation to regional real estate icon is due to his self-described "control-freak" hands-on decision making and management style. Mike candidly self-identified his weakness in accounting and business law. However, his keen and avid management skills motivate him to hire internal and external professionals to provide such otherwise unacquired expertise.

The internal accountant

[9] The Appellant's internal controller also testified. Zoran Bazdar ("Zoran") is a seriously focused and precise CPA. His delineation and categorization of responsibilities for preparation, authorization and finalization of F/S, tax returns and other business documentation was efficient and regimented. If something was someone else's responsibility, he appropriately delegated; anything in Zoran's bailiwick was efficiently reviewed, analyzed and sent along. Zoran, too, relied on others where the responsible party was not himself.

The former external accountant terminated in 2012

[10] Before 2011, the Nova Group retained an external accounting firm or practice, headed by one Mr. Berry. Mr. Berry "underserved" Nova Group. Nowhere was this more identifiable than in the continuity schedules reflecting Nova Group's acquisition, depreciation and disposition of real property assets. As part of a building development group, the Appellant's acquisition, cost, improvement, valuation, depreciation, amortization and disposition of large conjunctive asset pools, land, buildings and plant (operational systems), were all of critical importance. The delegation of oversight for these issues to Mr. Berry is the likely root problem of the present appeal.

Delegation and cleaning up the very "Berry" mess

[11] By 2011, the CRA had concluded an audit of the 2005 and 2006 taxation years of the Nova Group ("Audit #1"). It then re-commenced another during 2013 - 2014 ("Audit #2"). While several issues were the subject of the audits, the primary issues concerned the comingled, complex and rapid acquisition, development and disposition of residential, commercial and hotel real property assets by some two dozen entities in Nova Group. Of particular focus were the 2011 and 2012 years.

The CRA and external accountants remediate the mess

[12] The previous accountant, Mr. Berry, was not a particularly adept custodian of the related inventory in various stages of the many real property developments among the almost 30 companies in the Nova Group. This was despite his professional accreditations and assertions to the contrary. Sorting out his mess from a tax perspective was the CRA's task in Audit #1 and Audit #2. During Audit #2, sorting it out from an accounting, tax and compliance perspective for Nova Group became the job of Skolney LLP, an Edmonton-based, mid-size CPA firm.

Skolney and Associates – 2011 onward

[13] Two accountants testified for Skolney and Company ("Skolney & Co"): its then principal, Mr. Glenn Skolney ("Glenn"), and the accountant assigned to file, Wendy McDaniel ("Wendy"). Skolney & Co pursued the reconciliation of asset tracking within Nova Group and with the CRA (which impacted UCC amortization, and CCA expense) from a practical perspective. The approach is best described as follows. First, admit, concerning pre-2011 for each appropriate year, that the UCC mess was, if not self-made, at least the responsibility of the Nova Group because of Mr. Berry's poor record keeping. Secondly, obtain clear baselines and categorizations for all asset and asset class values and proceed to apply the same internally and then scrupulously comply subsequently. As described by Glenn, the trick was to "put a pin in it" given the multiple companies in Nova Group, the staggered year ends, and the legacy of poor pre-existing records. It was not exactly a race against time, as much as marking the point of commencement against the march of time. A little chronology of the process helps.

September 15, 2009 – Audit #1 results communicated

[14] First and foremost, in a September 15, 2009 CRA letter, was the message of insufficient records and record keeping was clear. Consequently, Nova Group

awakened to Mr. Berry's challenges and the dire consequences of ignoring it. His retainer was ultimately terminated.

The 2010 and 2011 Audit #2 begins – Skolney & Co present

[15] During 2012, Skolney & Co engaged with CRA representatives to conclude and deploy their practical and logical plan, assented to by Zoran. This involved meetings, emails and other communication.

October 4, 2012 Communication – Audit #2 ongoing

[16] Skolney & Co acknowledged the CRA's concern and correctness from the commencement of its retainer and worked along with the CRA. An internal memo dated October 4, 2012, confirmed that the following capital cost amounts were entered in error:

2010 Schedule 8	2,310,207
2011 Schedule 8	3,354,993

[17] These erroneous amounts, when prorated, become the source of the excess CCA claimed and omitted recapture which are the subject of the CCA Issue in this appeal.

June 10, 2014 – Audit #2 wraps up and UCC balances agreed

[18] Ultimately the CRA completed Audit #2 and provided its consequential findings and conclusive actions. CRA, in a letter to Skolney & Co, indicated that it would correct the Schedule 8 UCC balances for 2012 and 2013, based on the agreed errors above, and provide the revisions to the Nova Group. The CRA auditor wrote in his letter to Zoran:

> Please note we will make the changes to the 2012 and 2013 CCA schedules that are necessary because of the adjustments in 2011.

[19] Both Skolney & Co, under Zoran's written direction, affirmed they would abide by and implement the CRA calculations. Presumably, this was emblematic of finding a logical commencement point, adopting it and using the baseline values to

subsequently adjust, file and/or re-file the relevant CCA schedules within the F/S and T2s.

2014 does not include new balances

[20] This process continued towards the 2014 T2 filing date. On July 21, 2014, Zoran advised Skolney & Co to file the 2014 T2s employing the new CRA derived CCA balances. Skolney & Co filed the T2. However, since the CRA 2012 and 2013 CCA schedule balances were not in hand, Skolney & Co filed the 2014 T2 on July 29, 2014 without employing the updated outstanding baseline UCC balances. This missing CCA schedule balance information also telegraphed errors forward to the 2015 and 2016 T2s.

Reassessment for 2014 – 2016…. in 2019

[21] On September 30, 2019, the Minister reassessed the 3 taxation years as described above. The CRA also acknowledged that it did not fulfill the undertaking to provide the outstanding baseline UCC balances for the 2012 and 2013 fiscal years. The CRA did so in a September 25, 2019 explanatory letter outlining the basis for reassessment. Although reversion to existing balances applied for the 2012 and 2013 fiscal years, the same indulgence was not extended by the CRA to the 2014, 2015 and 2016 taxation years. The reassessed CCA and recapture amounted to a range of $89,000 to $92,000 in each of the three years.

Nova Group's year end completion process generally

[22] The interplay among Skolney & Co and the Appellant in completing the fiscal "year-end" statements was conjunctive and interactive. Various versions of draft F/S were sent back and forth to remove extraneous entries, clarify placeholders requiring finalization and answer specific queries requiring input, clarification and resolution of year end adjustments.

2015 Year-end specifically – the unexplained loss of a gain: the inexplicable glitch

[23] In the case of the missing capital gain for 2015, truth is stranger than fiction. All usual records, versions, emails and conversations were generally catalogued and produced at trial. None of these records denotes any advertent, acknowledged or observant inkling of the disappearance from the approved draft F/S of an almost $13 million gross capital gain, a six million plus taxable capital gain and the

consequential $3 million of taxes payable. These three sums were correctly reflected in the draft approved F/S. Incredibly, in its truest etymological sense, over 5 weeks the relevant numbers evaporated in the following sequence.

April 29 2015 approved draft financial statements

[24] In the April 29, 2015 version of the draft 2015 F/S, the gross gain ($11,522,890), reflected tax payable ($3,195,749) and net income ($11,249,407) were obvious, included and properly enumerated. An attached correct trial balance sheet also reflected the correct entry for the gain on sale of the property and the year end adjusted tax arising from the capital gain and its accrual. These F/S were approved by Zoran and acknowledged by Skolney & Co.

Some subsequent immaterial amendments

[25] During early May, certain emailed versions between Zoran of Nova Group and Skolney & Co address amendments to the 2015 F/S in order to make various year-end adjustments, immaterial to and entirely inconsequential to the gross gain, capital gain and tax payable. These minor adjustments should not have changed one iota the component values which accrued the capital gain.The final financial statements of May 7, 2015 and consequential T2s

[26] Ultimately, the final F/S were produced and sent to Zoran for review on May 7, 2015. Although the F/S reflected the same gross gain and income before taxes, the current income taxes payable had decreased by some $2,900,000. A similar decrease was reflected by Skolney & Co in the revised May 7, 2015 companion trial balance sheet. The T2s were not produced to Zoran for review. As a result, Zoran did not receive or approve T2s. Skolney & Co did generate the T2s, but not until they were filed with the Minister in late July 2015. As such, T2s were not reviewed by Zoran or Mike.

2015 T-183 – no "apparent" capital gain

[27] Zoran and Mike received and reviewed certain tax filings. The T-183 authorization to e-file was forwarded to Zoran for review and Mike for execution on June 18, 2015. The 2015 F/S accompanied the T183. Each dutifully and respectively reviewed and executed the T-183. The T-183 recorded net income as $2,015,810 and tax payable as $351,506; the capital gain, net income and taxes omitted the capital gain.

September 15, 2019 Reassessment – the capital gain is back; CCA denied and realized recapture added

[28] Ultimately, and entirely relevant to the issues before this Court, the Minister reassessed in September 2019. The Minister included the 2015 missing gross gain and capital gain and tax, and also denied the CCA and realized recapture related to the 2014 – 2016 CCA Issue and assessed gross negligence penalties.

III. The Law

(a) The Statute

[29] The relevant excerpted statue law is reproduced for ease of reference.

Assessment and reassessment

152**(**4) The Minister may at any time make an assessment, reassessment or additional assessment of tax […], payable under this Part by a taxpayer […], 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

[…]

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 […]

(b) The Jurisprudence

(i) 152(4)(a) attributable to carelessness, neglect or wilful default:

[30] Under subparagraph 152(4)(a)(i) the Minster may reassess outside the normal reassessment period, subject to the following condition: the "taxpayer or the person [in] filing the return … [has] made any misrepresentation that is attributable to neglect, carelessness or wilful default…"[1] As this very Court held, the misrepresentation is achieved when any statement made is materially incorrect.[2] This is only the first part of the condition.

[31] The second component to justify a reassessment beyond the normal reassessment period, requires the "Minister… to establish the minimum standard of failure to exercise reasonable care".[3] When filing a tax return, reasonable care requires a person to thoughtfully, deliberately, and carefully assesses the situation to ensure that they are filing in a manner they truly believed to be correct.[4] The Court may also infer negligence or carelessness from an omission to verify the validity of such a belief.[5]

[32] The phrase "taxpayer or the person filing the return" is not complex. Where the return is filed by someone other than the taxpayer, a negligent or careless misrepresentation by that other person is sufficient to afford reassessment beyond the normal reassessment period. In short, "[n]egligence in the preparation of an income tax return retains its consequences under subparagraph 152(4)(a)(i) whether it is the negligence of the taxpayer personally or that of the accountant who is his or her agent."[6]

[33] No one disputes who bears the onus under subsection 152(4); the Minister must prove, in this appeal, that each of the Appellant's returns for the 2014 and 2015 taxation years contained a misrepresentation and that such misrepresentation was due to neglect, carelessness or wilful default.[7]

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[1] *Income Tax Act*, RSC 1984, c 1 (5th Supp), s. 152(4)(a)(i) [The Act].
[2] *Francis & Associates v. The Queen*, 2014 TCC 137 at para 20 [*Francis*].
[3] *Francis, supra*, at para 21, citing *Venne v. R*, 1984 CanLII 5717 (FC) at para 16, [1984] CTC 223 at 228 [*Venne*].
[4] *Canada v. Paletta* (*Estate*), 2022 FCA 86 at para 65 [citations omitted] [*Paletta*].
[5] *Ibid.*
[6] *Snowball v. R*, [1996] 2 CTC 2513 at 2517, 1996 CanLII 21733 (TCC).
[7] *Deyab v. Canada*, 2020 FCA 222 at para 40. See also *Jencik v. R*, 2004 TCC 295.

[34] The point in time is also clear. Subsection 152(4) requires the misrepresentation to occur at the time the return was filed, not on later discovery of errors.[8]

(ii) 163(2) Penalties: wrongful act or gross negligence

[35] The penalty provisions are a different kettle of fish from that of misrepresentation. In *Venne*, the Court directs that gross negligence requires more than a failure to use reasonable care; it must involve a high degree of negligence tantamount to intentional disregard or indifference to compliance with the law.[9]

[36] Moreover, courts must employ caution when imposing penalties under subsection 163(2). By example, if a taxpayer's conduct aligns with two reasonable interpretations- one supporting the penalty and one not- the benefit of the doubt must go to the taxpayer, and the penalty should be deleted.[10]

[37] The Minister also bears the burden of proof on penalties. This burden of proving that a false statement was made "knowingly or under circumstances amounting to gross negligence" is achieved by direct or constructive evidence.[11] By way of explanation, "the law will impute knowledge to a taxpayer who, in circumstances that suggest inquiry should be made, chooses not to do so. The knowledge requirement is satisfied through the choice of the taxpayer not to inquire, not through a positive finding of an intention to cheat".[12] Gross negligence has deeper roots of error than negligence; taxpayer's conduct must fall markedly below what would be expected of a reasonable taxpayer. In that regard, averting the eyes, when the mind directs otherwise, rises to the level of gross negligence.[13]

[38] A taxpayer cannot avoid liability under s. 163(2) by blindly relying on one's accountant. A lack of inquiry and review are not excused by casting blame at one's accountant. Gross negligence penalties are not waived against a taxpayer who blames his accountant for the misrepresentation: "[an] appellant cannot simply throw

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[8] *Nesbitt v. Canada*, 121 FTR 79, 96 DTC 6588 at para 8 [*Nesbitt*]. See also *Vachon v. Canada*, 2014 FCA 224 at paras 3-4 [*Vachon*], *Johnston v. M.N.R*, [1948] SCR 486 and *Minister of National Revenue v. Taylor*, [1961] CTC 211 (Ex. Ct.).
[9] *Venne, supra,* at 1984 CanLII 5717 (FC) para 36, [1984] CTC 223 at 234.
[10] *Farm Business Consultants Inc. v. Canada*, [1994] 2 CTC 2450, affirmed by [1996] 2 CTC 200.
[11] *Paletta, supra, at paras 66-67.*
[12] *Paletta, supra*, at para 66; citing *Wynter v. Canada*, 2017 FCA 195 at para 16 [*Wynter*].
[13] *Paletta, supra*, at para 67, citing *Wynter* at paras 18-19.

his hands up and say that he blindly relied on his accountant, without making any attempt at seeking a better understanding of his obligations and without making any effort to verify the accuracy of the income reported in his income tax returns."[14]

IV. Issues, Sub-Issues

[39] To reiterate, there are three issues before the Court, none of which relate to the quantum of tax liability *per se*. The three issues are:

(i) Was the failure to report the approximately $12 million omitted capital gain in 2015 a misrepresentation attributable to neglect, carelessness or wilful default of the Appellant or the person filing the return for that year?

(ii) Were the overclaimed CCA and omitted recapture in 2014 and 2015 misrepresentations attributable to neglect, carelessness or wilful default of the Appellant or the person filing the returns in those years?

(iii) Did the overclaimed CCA and underclaimed recapture in each of 2014, 2015 and 2016 amount to statements or omissions made knowingly, or under circumstances amounting to gross negligence, which the Appellant made, participated in, assented to or acquiesced in.

V. Analysis

1. The Disappearing Capital Gain

Year end completion, financial statements and tax returns

[40] Reassessments arise from filed tax returns. Tax returns are approved, signed (if only virtually) and filed by taxpayers. What is included, or omitted for that reason, forms the basis of assessed tax, penalties and interest, and if revised by the Minister through the CRA, reassessments. While somewhat trite, analyzing that factual sequence is essential to this appeal.

[14] *Yadgar v. The King*, 2023 TCC 104 at para 35

[41] In dissecting the paragraph above, important principles are applicable for this Court:

a) The determinative document demanding reasonable care is expressly and exclusively the tax return: topically the 2015 T2 for the omitted capital gain issue;

b) The T2 is the document that the taxpayer or person filing must thoughtfully, deliberately and carefully review to ensure it is filed in a manner they believe to be correct; and,

c) Not verifying such belief is possibly evidence of neglect, carelessness or wilful default.

Was anyone careless, neglectful or wilfully defaulting?

[42] In this appeal was someone careless? Systems for verification, review and generation of the proffered documents had been individually devised, utilized and deployed. However, the T2 did not fall within the system of checks, reviews and approvals. Testimony across the board, and specifically extracted by Respondent's counsel in cross-examination, consistently revealed that the T2s for all years and specifically in 2014 and 2015 were the consequential output of the F/S, T183 and the trial balances. All such effort involved checking, review and approving. The volitional choice to arrange and structure business arrangements necessarily increases the necessity of the taxpayer to avidly monitor and examine every resulting and consequential tax effect.[15] However, no one, Zoran, Glenn, Wendy or Mike, reviewed an electronic or paper version of the final T2 return for any material year. In fact, Skolney & Co does not "generate" the actual T2 tax return until just before filing, and even then it is the total product of a computer program. The T183 provides the sole and singular glimpse of and authority to file the unreviewed T2.

[43] To recount, the irrefutable facts and legal obligations are:

a) The Act precludes the Minister from reassessing beyond three years unless she can prove a misrepresentation arising from neglect, carelessness or wilful default;

[15] *Univar Canada v. The Queen*, 2005 TCC 723 at para 65.

b) The taxpayer must ensure the taxpayer or person filing carefully reviews the tax return to ensure filing in a manner honestly believed to be correct;

c) By admission, no person (taxpayer or otherwise) reviewed the 2015 T2 tax return before filing; and,

d) The 2015 tax return contained a large misrepresentation of the more than missing $12 million gain, the $6 million tax capital gain and the $3 million of tax.

What is the standard?

[44] Filing a tax return, the T2, without review, is *per se* careless or neglectful. It may also exhibit wilful default. The Court cannot abide overlooked taxpayer or delegate review of this critical statute-anchored document before its filing.[16] If the draft T2 had been signed off as final by someone, and the inexplicable glitch subsequently occurred within the T2, then perhaps all the Appellant's submissions concerning the lacuna of the missing capital gain, taxable gain and tax may apply. But there was no inexplicable glitch within the preparation of the T2, or the T183 for that matter. The material omission existed for two months or more, embedded in the 2015 F/S and even then, several versions were reviewed by the Appellant's representative and accountants alike and the omission remained undetected. And yet, the last best chance, embedded within the document which carries the legal obligation to do so, the T2 corporate tax return was not reviewed by anyone, anywhere or at any time. That specific neglect and/or wilful default is communal to all concerned.

Did those responsible employ a reasonable standard of care?

[45] Taxpayers may delegate. Both internal and external accountants may assume such delegated responsibility. However, somewhere, somehow or at sometime taxpayers must review their actual tax returns, directly or vicariously, before filing.[17] The wording of subsection 152(4) explicitly says so. Collateral source or derivative documents do not count. Just as the Minister cannot succeed in reassessing under subsection 152(4) based upon misrepresentations within other source documents

[16] *Gestion Cholette Inc. V. The Queen,* 2020 TCC 75 at para 74.
[17] *Bondfield Construction Company (1983) Limited v. The Queen,* 2005 TCC 78; *Prima Properties (92) Ltd. v. The Queen,* 2019 TCC 4; *Nesbitt, supra, Vine Estate v. The Queen,* 2014 TCC 64.

which are not carried forward to the tax returns[18], the taxpayer cannot resile to a review of only source documents and not the mandated tax return *per se*.

Don't overlook the most important thing

[46] This is a fair result. The Appellant argues it did everything it could to detect the inexplicable glitch concerning the omitted gain and tax. The inexplicable glitch did not first occur within the T2, it was simply infused, repeated and confirmed there. There is no jurisprudence to suggest that where such a misrepresentation occurs, a failure to review the central, topical tax return may be excused. The standard of such review for the taxpayer is to carefully review the tax return. Even cases relieving the taxpayer from adviser error of law or incorrect conclusions of mixed fact and law necessarily require the taxpayer and adviser to have advertently reviewed and decided a certain filing position based solely on the accountant's error or negligence[19], or for the accountant to have acted in some unilateral manner.[20] The actual certification in the return, and incorporated by reference certification in the T183, both require so. Subsection 152(4) embeds that, and the jurisprudence directs that. Where no review is evidenced, no reasonable excuse for that omission aligns with a careful review of the return to ensure filing the return in a manner honestly believed to be correct.

2. The CCA Issue for 2014 and 2015

Not heeding the "resolved" 2010 and 2011 UCC balances: careless or neglectful or wilful default?

[47] The Appellant insisted it reviewed the F/S and T183 for both the 2014 and 2015 years; the missing updates UCC balances could not have been detected because the Appellant's Zoran believed he had instructed their use and inclusion. Zoran, on behalf of the Appellant, may not wring his hands so simply. The facts, extracted by the Respondent in testimony, illustrate that:

(i) The baseline UCC balances were agreed to in late June or early July of 2014;

[18] *Ross v. The Queen*, 2013 TCC 333.
[19] *Aridi v. The Queen*, 2013 TCC 74 at para 10 and 50; *Prima Properties (92) Ltd. v. The Queen*, 2019 TCC 4 at para 12.
[20] *Vachon*, *supra*, at paras 5 and 9.

(ii) Zoran, for the Appellant, directed those amounts be used;

(iii) Skolney & Co, the Appellant's accountants, also acknowledged they would use the balances *vis a vis* the Minister;

(iv) The T2 was the operative and controlling document to reflect their inclusion;

(v) The Appellant asserts the F/S and T183 are proxies for the T2;

(vi) No-one for the Appellant reviewed the 2015 T2 before filing; and,

(vii) No evidence was tendered to show that an acceptable best practice for accountants, external or otherwise, is to use the T183 and F/S as a proxy for and to the exclusion of the T2 and otherwise "ensure the filing of the return in a manner truly believed to be correct".

[48] It is the Appellants who chose to use the F/S and T183 as proxies for the T2, both directly by Zoran and vicariously by Skolney & Co. They assumed the risk for that choice. The legal obligation under the Act, as clearly stated in the T183 is that the T2s are accurate and correct, not the T183 or the F/S. Beyond legalities, since the issue is liability for the tax, the last best chance factually in these circumstances to identify the T2s were correct and free of error lay in a reasonable review by someone, somewhere, sometime, before filing, of the detailed, scheduled, tax-focused T2 return of income. That did not happen; failing to have someone review the T2 is evidence of carelessness, neglect or, possibly, wilful default. Only one of these transgressions is required, hence the 2014 and 2015 tax years may be re-opened.

Minister's own omission: the outstanding baseline UCC balances

[49] The Minister's failure to send the finalized outstanding baseline UCC balances is a red herring to the misrepresentation issue. Without a review of the T2s, one does not even get to the Minister's omission. Two weeks after the CCA balances issue was resolved, the Appellant compiled the T2s without regard to the freshly settled outstanding baseline UCC balances. This then current review and reliance on the F/S and T183 as a proxy was the Appellant's doing, even though all knew the resolution oversight would impact the 2014 and 2015 taxation years. The Appellant's last best opportunity to identify that the resolved UCC balances were missing was consequently overlooked. Why? Again, that choice was freely taken

and the consequential risk freely accepted by the Appellant and its authorized officers and advisors. No note, explanatory letter or other communication was sent with the T2 regarding the outstanding baseline UCC balances. Why? The fact of the "non-review" of the T2 requires the Court to look no further. The carelessness, neglect or wilful default through not reviewing the T2 occurred in contradiction of the legal requirement and certification at the time the T2 was filed. That is the controlling fact to determine that the misrepresentation was attributable to neglect, carelessness or wilful default in 2014. The Minister's gratuitous undertaking, not then fulfilled, does not relieve the Appellant of its own legal review requirement. The subsequent omission within the 2015 T2 is no different.

3. Subsection 163(2) penalties

Was anyone grossly negligent or wilfully blind on the CCA Issue?

[50] The penalties apply only to the CCA issue. The threshold needed to establish penalties is notably different than the statute barred reassessments. Gross negligence is legally graver and odious than *negligentia simpliciter*.[21] This worsening of classification is generally true at law, and tax law is no different.

[51] The decision and standing practice not to review a T2 (tax return) for both the Appellant and its external accountant was not without a reasonable or logical basis, even with the inherent risk. This is true despite that choice grinding against the legal requirement and practical sense to do so. The two working documents, and particularly the F/S, ought to have contained the outstanding baseline UCC balances, and in a perfect world, a note or reference to the new values. The claimed CCA and realized recapture amounts, unlike the capital gain, were "comparatively" inconspicuous.

[52] Penalties, unlike the negligence threshold for subsection 152(4), carry a requirement of actual intent (knowingly) or constructive intent, in the form of aversion to warnings tantamount to insouciance as to whether the Act is complied with.[22] Technically, the Act was not complied with, practically it was not for apparent want of trying based on the evidence. The practices followed by Skolney & Co in conjunction with the Appellant's Zoran were long established and previously uneventful. The neglectful and/or careless decision to use the normally

[21] *Venne, supra*, at 1984 CanLII 5717 (FC) para 36, [1984] CTC 223 at 234; See also *Findlay v. Canada*, [2000] 3 CTC 152, 54 DTC 6345.
[22] *Venne, supra*, 1984 CanLII 5717 (FC) at para 36, [1984] CTC 223 at 234.

reliable F/S and T183 in 2014 and 2015 was not necessarily a prudent choice; however, it was not a grossly negligent one tantamount to indifference to legal compliance.

[53] Further, in the factual landscape of the outstanding baseline UCC balances and penalties, there are two mitigating circumstances: the proximity in time of agreement of the new UCC balances to the filing of the initial 2014 T2 and the unfulfilled undertaking by the CRA of the outstanding baseline UCC balances. Further, the creation of the new UCC balances, *per se*, was borne from taxpayer pursuit to proactively resolve an ongoing compliance issue. And, although the 2015 T2s were not reviewed at the time of filing, the omission of including the new UCC balances and consequential omissions, in these circumstances, is more easily attributable to simple negligence through omission of the new amounts, even as an estimate or note to the F/S. While this technical omission was negligent or careless, in the situation it was not grossly negligent.

VI. Summary and Conclusion

[54] The reassessments for 2014, 2015 and 2016 (already conceded) tax years remain because the Minister, for 2014 and 2015, has met her burden of proving misrepresentation owing to neglect, carelessness or wilful neglect. The penalties are deleted.

[55] Given the mixed result, provisionally there shall be no costs awarded unless either party files cost submissions within 30 days from the date of this judgment, followed 30 days thereafter by responsive submissions, if any, none of which shall exceed 10 written pages, excluding authorities. Upon receipt, the Court shall consider those submissions. In the absence of any submissions, the provisional order shall become final and there shall be no costs.

Signed at Ottawa, Ontario, this 17th day of April 2025.

"R.S. Bocock"

Bocock J.

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