

CANADA / JUDGMENT

Burzuk v. The King

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Docket: 2016-1087(IT)G

BETWEEN: ATTILA JOHN BURZUK,
Appellant,
and
HIS MAJESTY THE KING,
Respondent .
Appeal heard on February 2 and 3, 2026, at Edmonton, Alberta
Written Submissions filed by the Respondent on March 23, 2026 and April 9, 2026
Written Submissions filed by the Appellant on April 24, 2026
Before: The Honourable Justice Lara G. Friedlander

Appearances :

For the Appellant: The Appellant himself

Counsel for the Respondent: Alexander Millman

JUDGMENT

UPON hearing the evidence and reviewing the submissions from the parties;

IN ACCORDANCE with the attached Reasons for Judgment, the appeal from the reassessment under the Income Tax Act for the Appellant's 2007 taxation year is dismissed, without costs.

Signed this 22nd day of May 2026.

"Lara Friedlander"

Friedlander J.

Citation: 2026 TCC 95

Date: 202605 22

Docket: 2016-1087(IT)G

BETWEEN:

ATTILA JOHN BURZUK,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Friedlander J.

[1] This appeal concerns gross negligence penalties of \$358,412.74 imposed under subsection 163(2) of the Income Tax Act (the “Act”) in respect of a request filed on behalf of the Appellant to amend the Appellant’s 2007 federal income tax return and apply associated loss carrybacks. As the request was denied, such penalties are the sole issue in this appeal.

[2] I understand from the parties that the Appellant had not paid the penalties as of the commencement of the hearing, and that therefore interest has been accruing. Counsel for the Respondent indicated at trial that the total amount of penalties plus accrued interest in issue was close to \$1.3 million as of the commencement of the hearing.

Procedural History

[3] There is some procedural history to this matter. In 2016 the Respondent moved to strike portions of the Notice of Appeal and require the Appellant to amend his Notice of Appeal to comply with the requirements of the Tax Court Rules (General Procedure) . An amended Notice of Appeal was filed which, in the Respondent’s view, contained similar deficiencies. In early February of 2017 this Court ordered (the “February 2017 Order”) the Appellant to file a further amended Notice of Appeal. That further amended Notice of Appeal was filed in April of 2017 (the “April Notice of Appeal”) which, in the view of the Respondent, did not comply with the February 2017 Order. A further order (the “July 2017 Order”), to the same effect as the February 2017 Order, was issued by this Court in July of 2017. No further amended Notice of Appeal was filed, although extensions with respect to timetable matters were requested. The Respondent communicated with the Court and suggested that a dismissal of the Appeal as a result of the lack of compliance with the July 2017 Order was appropriate. No response was received from the Appellant.

[4] In 2018 the parties jointly requested that this matter be held in abeyance pending the outcome of certain decisions involving similar issues, and that request was granted by this Court. A status hearing was scheduled for September of 2022; the Appellant refused to appear on the grounds that the Appeal was still in abeyance. The matter had been released from abeyance in early 2022, and the Appeal was therefore dismissed by this Court. The Appellant then moved to set aside the judgment on the grounds that he was mistaken in his belief that he did not have to appear. The Respondent took no position on the motion, and this Court issued an order in early 2023 setting aside the judgment. Case management ensued, and ultimately this Appeal was set

down for trial. No further amended Notice of Appeal was ever filed.

[5] At trial the Appellant testified on his own behalf. I will comment on the Appellant's credibility and reliability later on in this judgment. Mr. Sean Zhou, an auditor and former appeals officer at the Canada Revenue Agency, appeared as a witness for the Respondent. I found Mr. Zhou to be a credible and reliable witness.

Factual Background

[6] This appeal relates to the Appellant's 2007 taxation year. Around that time the Appellant was in the business of IT (information technology) consulting, in particular helping small businesses set up their computers and teaching them how to use software. The Appellant testified that he had a diploma in business administration and was self-taught in respect of IT matters.

[7] From an income tax perspective, Mr. Zhou testified that the Appellant did not file his federal income tax return for 2007 on time, and that a request for filing a return was issued on May 12, 2009. Mr. Zhou testified that an arbitrary assessment was then issued by the CRA. Ultimately the Appellant did file his 2007 federal income tax return at some point in 2011, which was assessed as filed.

[8] Some time before the end of June of 2011, the Appellant began discussions with DeMara Consulting Inc. ("DeMara"). The Appellant indicated that he was referred to DeMara by an acquaintance who owned a small business and whom the Appellant described as a "satisfied customer" of DeMara. The Appellant went to a sales meeting where DeMara representatives explained the types of tax preparation services that they could provide to clients.

[9] Some correspondence during that period was introduced into evidence.

[10] In an email dated October 21, 2011, a Jennifer Aasen from DeMara requested a non-disclosure/confidentiality agreement from the Appellant and his wife Marilyn. The email chain also indicated that DeMara was requesting information from the Appellant about his mortgage "[i]n order to utilize your mortgage for the remedy process" . Another email on that date from the Appellant refers to a request for DeMara to contact the CRA to reduce or postpone the garnishment of the Appellant's employment income. An email dated November 22, 2011 from "Amanda" at DeMara states that they are sending a copy of a letter they received from CRA stating that the CRA will forego the next garnishment on the Appellant's wages, as well as requesting information about corporate accounts referenced by the CRA.

[11] A response from the taxpayer dated November 26, 2011 states "[L]et's tread lightly with the corporate info. My overstanding is that a corporation is a entity on its own not sure how it is linked to me as my liability." [sic] I note that in his testimony, the Appellant stated in respect of this document that "I don't recall any corporate accounts, so I'm just really — I'm trying to take myself back to this time. I don't remember. Like, my business has been a sole proprietorship pretty much since it started, so I'm not too sure what corporate accounts they're referring to." [1] (I note that paragraph 25 of the Reply assumes that at all material times the Appellant owned all

the shares of two corporations and a 50% interest in a third corporation, but neither of these assumptions were addressed at trial.)

[12] In addition, part of an email chain in early December of 2011 was introduced into evidence. One part, dated December 1, 2011, is an email from “Elaina” from DeMara stating the following:

Hello AJ & Marilyn,

Please find attached the following in respect to your 2007 remedy:

- a. Cover letter
- b. RC72 (Notice of the Actual Amount of the refund of Tax) for Attila [sic]
- c. Request for Loss carryback for Attila [sic]
- d. GST/HST credit for Attila
- e. Tax Return Summary for Marilyn
- f. Child Tax Benefit for Marilyn

[13] I note that each “Request for Loss Carryback” (Form 1A E) filed with the CRA by DeMara indicates a non-capital loss of \$1,654,421.95 and a net capital loss of \$839,679.50 in the Appellant’s 2007 taxation year.

[14] The remainder of that email was not included in evidence, but there was a reply from the Appellant dated December 6, 2011 providing a copy of his credit card authorization “to expedite the processing for the 2007 tax year as per invoice” .

[15] Other documents submitted by the Appellant to DeMara included an authorization to release personal information dated June 28, 2011, a notification dated June 28, 2011 that the Appellant wished to become a member of the Serenity Bound Society, a member information sheet containing personal information, a signed “Request for a Business Number” Form RC1, indicating a sole proprietorship in the IT consulting business, dated June 28, 2011, a signed “Business Consent form” , a signed “Request for an Information Return Program Account” form and a signed “Authorizing or Cancelling a Representative” form. Some of the information indicated on some of these forms was filled out by someone other than the Appellant or his wife. The Appellant also provided to DeMara two car lease agreements and certain information about the mortgage for his residence, out of which he had been operating a business.

[16] On December 12, 2011, a request to amend the Appellant’s 2007 federal income tax return was filed on behalf of the Appellant by DeMara. This amended return included a claim for interest expense of \$1,679,359.99 (line 8710 of a Statement of Business Activities Schedule to the T1 federal income tax return), which factored into a claim for a net business loss of \$1,654,421.95 (line 135 of the T1), and resulted in a claim that total income for the year was a loss of \$1,639,592.57 (line 150 of the T1). That return also claimed a capital loss of \$1,679,359.00 (see the Capital Gains (or Losses) Schedule of the T1). A second request for an amended return was filed

on October 22, 2012. This amended return made the same claims, but also included a number of T5008 slips that, Mr. Zhou testified, were fictitious. This amendment request also included a Request for Loss Carryback requesting a carryback of \$65,635.00 to the 2004 taxation year, \$55,186.00 to the 2005 taxation year and \$164,283.00 to the 2006 taxation year. Yet a third request (this and the other two requests being the “T1 Adjustment Requests”) for an amended return for the Appellant’s 2007 taxation year was filed on February 26, 2013, which appeared to contain the same items, including the fraudulent T5008s, as mentioned above. None of the three requests was signed by the Appellant. However, in cross-examination the Appellant did indicate that a number of pieces of information on the T1 Adjustment Requests, such as his personal details, entries for dividend income and other business income and the name of his unincorporated business were correct and would have been provided by him to DeMara.

[17] None of the T1 Adjustment Requests were signed. On each was typed “C/O DEMARA CONSULTING INC.” and an address in Vernon, BC in the box next to the signature box “for professional tax preparers only” . The T1 Adjustment Requests filed in 2012 and 2013 had a stamp on the signature line that read “certified under dssa.me/Mbl1EErYEOcl1rRvMD4v” and “Per DSSA: Mbl1EErYEOcl1rRvMD4v” respectively.

[18] The Appellant did not prepare the T1 Adjustment Requests. Regarding whether the Appellant had reviewed the T1 Adjustments Requests, at one point the Appellant was asked about whether he had inquired as to the meaning of the stamp described above in one of the returns:

Q: Did you ever inquire about that as to why there’s a website listed here under a signature?

A: Just that it would be for reference to CRA, yeah.

Q: Oh, okay. So you – so you saw –

A: I didn’t – I didn’t reference this, no.

Q: So you just thought it was a reference for CRA’s use.

A: Yes. [2]

[19] However it was not clear from the testimony whether and when an actual inquiry took place, and when the Appellant actually saw the stamps.

[20] A letter (the “July 2013 Letter”) dated July 23, 2013 from Darrell Hill in the CRA’s Winnipeg Tax Centre was sent to the Appellant. The letter is a request for further information. The second paragraph references a net business loss for the 2007 taxation year of \$1,679,359.99 and a disposition of securities of \$1,679,359, and requests information in connection therewith. I will discuss the reaction to this letter below.

Legal Framework

[21] The charging provision in issue in this case is subsection 163(2) of the Act, which states in relevant part:

False statements or omissions Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a “return”) filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of

(a) the amount, if any, by which

(i) the amount, if any, by which

(A) the tax for the year that would be payable by the person under this Act

exceeds

(B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year

if the person's taxable income for the year were computed by adding to the taxable income reported by the person in the person's return for the year that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission and if the person's tax payable for the year were computed by subtracting from the deductions from the tax otherwise payable by the person for the year such portion of any such deduction as may reasonably be attributable to the false statement or omission

exceeds

(ii) the amount, if any, by which

(A) the tax for the year that would have been payable by the person under this Act

exceeds

(B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year

had the person's tax payable for the year been assessed on the basis of the information provided in the person's return for the year...

[22] The first part of this decision will address the question of whether the penalty applies, as contemplated by the opening words of subsection 163(2). The second part will discuss the amount of the penalty, as contemplated by paragraph 163(2)(a).

[23] I note that subsection 163(3) of the Act provides that the Minister has the burden of establishing the facts justifying the assessment of the penalty.

Is the Penalty Applicable?

[24] As contemplated by the opening words of subsection 163(2) of the Act, a penalty under this section can be imposed only if three requirements are met. First, there must be a “false statement or omission in a return, form, certificate, statement or answer” (those documents being referred to as a “return”). Second, the person must have “made or [have] participated in, assented to or acquiesced in the making of” that statement. Third, that making or participation must have been done “knowingly or under circumstances amounting to gross negligence” .

False Statement in a Return

[25] The Appellant admitted during his cross-examination that the claims in each of the T1 Adjustment Requests in respect of the interest expense of \$1,679,359.99 and the resulting non-capital loss of \$1,654,421.95 were false, although I note that the Appellant was initially reluctant to make that admission and addressed the questions in a somewhat evasive fashion.

[26] In respect of the claim in each of the T1 Adjustment Requests regarding the capital losses of \$1,679,359.00, Mr. Zhou’s testimony was that the associated T5008s submitted in support of that claim were fictitious. The Appellant did not offer any testimony indicating that the losses were indeed suffered and/or the T5008s were not fictitious, and indeed offered no evidence that he knew anything at all about the T5008s.

[27] I find that the statements regarding the interest and resulting non-capital loss and regarding the capital losses, including the T5008s, in the T1 Adjustment Requests were “false statements” for purposes of subsection 163(2).

[28] I considered whether the T1 Adjustment Requests and the Requests for Loss Carryback were “returns” , as contemplated by the opening words of subsection 163(2) — namely, whether a T1 Adjustment Request or a Request for Loss Carryback is a “return, form, certificate, statement or answer” . In respect of the T1 Adjustment Request, the Court in *Morton v The Queen* , 2014 TCC 72 and *Morrison v The Queen* , 2016 TCC 99, considering a very similar question, concluded that it was. The Court in *Morton* notes that the T1 Adjustment Request is very similar to a T1 income tax return in form and content, and, more importantly, includes a certification from the taxpayer that all the information in the T1 Adjustment Request is correct. In respect of a Request for Loss Carryback, this form is to be attached to a T1, contains a summary of key items of income and loss in a format similar to an income tax return, and also contains a taxpayer certification regarding the correctness and completeness of the form. I find that the Request for Loss Carryback is also a “return” for purposes of subsection 163(2) of the Act.

[29] I considered whether the false statements were made in a return for purposes of subsection 163(2) of the Act notwithstanding that the T1 Adjustment Requests and Requests for Loss Carryback were not accepted by the CRA. This issue was addressed by the Federal Court of Appeal in *Carroll v. The Queen* , 2022 FCA 5. That Court stated at paragraphs 15 and 18, in relevant part, the following:

Where a taxpayer falsely claims a loss in a return (whether that loss is accepted or not), there is an understatement of income as that term is defined in subsection 163(2.1) of the Tax Act . That definition focuses on the difference between what should have been reported in the return and what was reported in the return. What the Minister accepts or assesses is irrelevant. Because there was a difference between what Mr. Carroll should have reported in his 2009 return (no business, no business expenses and no resulting loss) and what Mr. Carroll did report in that return (a business that gave rise to a significant loss), Mr. Carroll had an understatement of income...

Nothing depends on what is accepted or assessed, the payment of a refund, or taxes or taxable income in dispute. What is relevant is what the taxes would have been if the return had been accepted as filed, and what the taxes would have been if the false loss were added to the taxable income that was reported in the return filed. [3]

[30] In his written submissions the Appellant states that Carroll “is distinguishable because that case involved an original return that was processed and assessed. Here, the amendments were rejected before any reassessment [was] issued on the basis of the false statement.” The Appellant goes on to say that “subparagraph 163(2)(a)(ii) directs the Court to consider the tax that would have been payable had the person’s tax payable for the year been assessed on the basis of the information provided in the person’s return. Because the amendments were denied, the information provided in the person’s return that was actually assessed was the original return. The penalty cannot be calculated on a hypothetical acceptance of a statement the Minister expressly rejected.” I will return to the calculation point later on in this judgment. For purposes of determining whether the opening words of subsection 163(2) were satisfied, I disagree that Carroll is distinguishable on the basis that the false statements were made in an initial tax return that was not accepted by the Minister, in contrast with an amended return that was not accepted by the Minister. Carroll stands for the view that a false statement can be considered to have been made in a return regardless of whether the return was accepted by the Minister. Whether the return is an original return or an amended return is not relevant to that particular point. See also Morton , discussed above, where a T1 Adjustment Request was made by the Appellant but not accepted by the CRA, and yet subsection 163(2) penalties were imposed. I also note that an amended income tax return was one of the subjects of this Court’s decision in McCutcheon v. The King , 2026 TCC 57, discussed further below.

“[M]ade or has participated in, assented to or acquiesced in the making of” the false statement

[31] In Bowker v The Queen , 2021 TCC 14 (appeal of costs decision at 2022 TCC 43 rev’d at 2023 FCA 133), another decision involving DeMara and facts similar to those in issue here, the Court held that providing a signed Request for a Business Number form and Business Consent form to be used by DeMara were sufficient to constitute the participation in, assenting to or acquiescing in the making of the false statements. In Rattai v The Queen , 2020 TCC 55 (decision relating to Mr. Rattai rev’d by FCA at 2022 FCA 106 on different grounds), another decision involving DeMara and facts similar to those in issue here, the Court found that certain payments to DeMara by Ms. Rattai in that case as well as approval and consent to file the return containing the false

statements were again sufficient to satisfy this requirement. In *Saunders v The Queen*, 2019 TCC 39, yet another decision involving DeMara and facts similar to the facts in issue here, this Court found that the taxpayer's consenting to DeMara filing his income tax return satisfied this requirement.

[32] In this case the Appellant admitted that he provided information to DeMara for the purpose of enabling DeMara to file returns with the CRA and the emails admitted into evidence show that the Appellant consented to DeMara filing such returns. These emails also show that the Appellant had paid DeMara for those services. Accordingly, I find that the Appellant had "participated in, assented to or acquiesced in the making of" the false statements.

"Knowingly" or "Gross Negligence"

[33] As set out above, subsection 163(2) does not apply unless the taxpayer made or participated in, assented to or acquiesced in the making of the statement "knowingly, or under circumstances amounting to gross negligence". "Knowingly" and "under circumstances amounting to gross negligence" are different standards. These two standards were described as follows in *Wynter v The Queen*, 2017 FCA 195 in these passages from paragraphs 12-13 and 18-21:

The distinction between gross negligence—determined by an objective assessment of the comportment of the taxpayer—and wilful blindness—determined by reference to the taxpayer's subjective state of mind—has a long history. Admittedly, it is, on occasion, a fine distinction and one that is not always clearly drawn. Nonetheless, Parliament is taken to have been cognizant of the distinction.

A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: *R. v. Briscoe*, 2010 SCC 13 (S.C.C.) at paras. 23-24, [2010] 1 S.C.R. 411 (S.C.C.) (*Briscoe*); *Sansregret* at para. 24. In these circumstances, the doctrine of wilful blindness imputes knowledge to a taxpayer: *Briscoe* at para. 21. Wilful blindness is the doctrine or mechanism by which the knowledge requirement under subsection 163(2) is met....

Gross negligence is distinct from wilful blindness. It arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer. Simply put, if the wilfully blind taxpayer knew better, the grossly negligent taxpayer ought to have known better.

Gross negligence requires a higher degree of neglect than a mere failure to take reasonable care. It is a marked or significant departure from what would be expected. It is more than carelessness or misstatements. The point is captured in the decision of this Court in *Zsoldos v. R.*, 2004 FCA 338 (F.C.A.) at para. 21, 2004 D.T.C. 6672 (F.C.A.)

In assessing the penalties for gross negligence, the Minister must prove a high degree of negligence, one that is tantamount to intentional acting or an indifference as to whether the law is complied with or not. (See *Venne v. R.* (1984), 84 D.T.C. 6247 (Fed. T.D.), at 6256.)

There is no question that, while conceptually different, gross negligence and wilful blindness may merge to some extent in their application. A taxpayer who turns a blind eye to the truth and accuracy of statements made in their income tax return is wilfully blind, and is also grossly negligent. The converse is not, however, necessarily true. A grossly negligent taxpayer is not necessarily wilfully blind. The possibility of this dual characterization of the same conduct may, on occasion, give rise to imprecision in the jurisprudence in the description of the alternative ways in which the Crown may meet its burden. Similarly, the common practice of referring to penalties imposed under subsection 163(2) as “gross negligence penalties” blurs the fact that the penalties may arise under either the knowledge or gross negligence heading. This ought to be avoided. What is at issue under subsection 163(2) is a penalty, which may be imposed either by a finding of knowledge or a finding of gross negligence.

While subjective considerations may play a role in either analysis, gross negligence is determined with reference to an objective test. In particular, where gross negligence is alleged, I would expect consideration of whether the conduct of the taxpayer at issue is such a marked departure from what would be expected that it constitutes a high degree of negligence sufficient to be characterized as a marked departure from the standards, practices, and due diligence expected of a responsible taxpayer. The cautionary words of the Supreme Court of Canada in *Guindon*, at paragraph 61, are equally applicable here; these penalties “are meant to capture serious conduct, not ordinary negligence or simple mistakes”.

Knowledge/Wilful Blindness

[34] Beginning with the “knowledge” branch of this test, there was no evidence adduced to show that the Appellant had actual knowledge of the making of the false statements. However, as stated in *Wynter* and a number of other decisions, an appellant will be considered to “know” about the making of the false statement where that taxpayer is “willfully blind”, which in turn is described in *Wynter* as the situation where: “the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance.” As articulated in *Torres v The Queen*, 2013 TCC 380 (aff’d at 2015 FCA 60) at paragraph 65, “[k]nowledge of a false statement can be imputed by wilful blindness”. *Torres* goes on, at paragraph 65, to provide the following guidance with respect to wilful blindness:

...c) In determining wilful blindness, consideration must be given to the education and experience of the taxpayer.

- d) To find wilful blindness there must be a need or a suspicion for an inquiry.
- e) Circumstances that would indicate a need for an inquiry prior to filing, or flashing red lights as I called it in the *Bhatti* decision, include the following:
 - i) the magnitude of the advantage or omission;
 - ii) the blatantness of the false statement and how readily detectable it is;

- iii) the lack of acknowledgment by the tax preparer who prepared the return in the return itself;
 - iv) unusual requests made by the tax preparer;
 - v) the tax preparer being previously unknown to the taxpayer;
 - vi) incomprehensible explanations by the tax preparer;
 - vii) whether others engaged the tax preparer or warned against doing so, or the taxpayer himself or herself expresses concern about telling others.
- f) The final requirement for wilful blindness is that the taxpayer makes no inquiry of the tax preparer to understand the return, nor makes any inquiry of a third party, nor the CRA itself.

[35] Keeping this guidance in mind, I begin by noting that the Appellant had a diploma in business administration, had been operating a sole proprietorship for at least several years prior to 2011, had filed his own tax returns on at least some occasions and had had previous dealings with the CRA. The November email referenced above shows that the Appellant was aware of the concept of separate legal personality of corporations. Similar to the conclusion reached in Torres at paragraph 67 (see also paragraph 59-60 of Saunders), these factors demonstrate that the Appellant was sufficiently educated and experienced to be capable of recognizing the need for an inquiry or having a suspicion that an inquiry was needed in respect of the false statements.

[36] I proceed, then, to the question of whether there was a need or a suspicion for an inquiry, with particular regard to the Torres factors.

[37] I begin with the Appellant's reaction to the July 2013 Letter, as the testimony on this point is, to my mind, illuminating. The Appellant stated that he contacted DeMara but that "I don't recall what I said, other than probably help, but I mean, any — as I've seen in some other case law, we'll look after it is a very common term that we all heard" . [4] Although I recognize that these events occurred almost ten years ago, I would expect that a potential CRA audit in respect of losses of well over \$1 million would be memorable and would elicit a less tepid response. Slightly later in the cross-examination was the following exchange, again with respect to the same letter: [5]

Q: So right off the bat you see a very large number here. Net business loss for 2007 of 1,679,000, dot, dot, dot.

A: I see that, yes.

Q: Correct? That's – that's pretty much front page and centre.

A: Yes.

Q: Did this at all strike you as unusual?

A: Well, based on the information I submitted to DeMara for their work, I mean, there was a mortgage. There was vehicles. It didn't seem – I mean it's unusual as a loss, but, again, I don't know how they were preparing the taxes, but as transactions that I've done in my lifetime, it's not unusual.

Q: Oh, okay. So – so you would think, okay, that's – that's – looking at – looking at, kind of, like, all of the transactions you've done, all of the expenditures you've had over your lifetime, that would be – that would not be –

A: Well, you made reference to a mortgage earlier, which was seven hundred and some thousand, which is almost half of that, and there's a couple vehicles, and – so, yeah. I – [6]

...

Q: All right. So there was – there's – at this time, then, you didn't take any – any – how – how would I put this?

A: I forwarded it to be answered.

Q: Okay.

A: If that's what you're requesting.

Q: You – you just sent it to DeMara and asked them to – to respond.

A: Well, yes. They're the authorized representative, yes.

[38] I note several aspects of this exchange. First is that the concepts that the entirety of a mortgage for a residence (that admittedly was used in part for a business) can constitute an immediately deductible expense and that the total leasing costs of two vehicles can constitute an immediately deductible expense are simply implausible, particularly recalling that the Appellant is a person who has a diploma in business administration, who had been operating a sole proprietorship for a number of years, who had previously filed tax returns and who had knowledge of the separate legal personality of corporations. This is clearly a “flashing red light”. All the more so given that, at another point [7] the Appellant stated that he understood that interest on the mortgage for his residence could be deductible only to the extent of the portion of the home that was used for the business. Second, the Appellant did not describe any deep concern, questioning of DeMara or others or other actions that one would expect from a person who just received a letter from the CRA indicating that they were auditing such a large amount of business losses and capital losses. Rather, as he put it, he just forwarded the letter to DeMara.

[39] At this point I will depart from the narrative slightly to reflect on the Appellant's credibility. Much of the Appellant's testimony constituted statements that the Appellant could not remember the relevant facts, or statements agreeing that something appeared in a document rather than commenting on the truth of statement itself. One noteworthy example is the following exchange: [8]

Q: Now, did you have a loss of over one and a half million dollars in that year?

A: I'm not sure, because I didn't prepare this, but – I don't recall.

Q: Have you ever had a business loss of over \$1 million?

A: I have not.

Q: Okay. So clearly you did not have a loss of over one and a half million dollars in this year.

[There an interjection from me and a discussion with the Appellant attempting to confirm that the Appellant understood the question.]

JUSTICE: Okay. So your answer is?

A: Well, I – this was prepared for me, so – and I don't know how that was come to that number, so –

[Further interjection from me and discussion with the Appellant confirming that the Appellant understood the question.]

A: I don't recall a loss of over a million dollars that year.

[40] To provide some more perspective on this, the Appellant's gross income (setting aside the false statements) reported on the Statement of Business Activities for his IT business as reported on his T1 Adjustment Requests was approximately \$45,000. Although I recognize that the taxation year in issue is almost 20 years in the past, in light of the sheer magnitude of the losses in issue in comparison to the Appellant's gross income for that year, and in light of the fact that that taxation year has been under audit and the subject of litigation for many of the intervening years, I find the Appellant's initial claim that he did not remember such a loss to be implausible, and his attempt to shift the focus onto the fact that he did not prepare the T1 Adjustment Requests to be evasive. Another example is the Appellant's testimony that he did not recall receiving a letter from a J Sawatzky at CRA, [9] to be contrasted with his statement in paragraph 7 of his April Notice of Appeal that he had in fact received that letter. Accordingly, I am skeptical of the Appellant's repeated denials of recollection of the relevant facts. However, this skepticism may be of little import as this decision relies primarily on documentary evidence and a handful of admissions by the Appellant, generally relating to the source of information used by DeMara on the Appellant's behalf.

[41] Moving on to the remaining Torres factors, there was no clear evidence adduced as to whether the Appellant had actually reviewed the T1 Adjustment Requests. As set out above, there was some testimony of the Appellant regarding some kind of inquiry about the usage of the stamps, which does suggest that the Appellant may have reviewed the returns at some point. Other than the claim by DeMara that a stamp with a series of letters and numbers was an appropriate replacement for a signature (or so I infer from the Appellant's testimony), there was virtually no evidence adduced in respect of incomprehensible explanations provided by DeMara, aside from the implausibility of deducting the entirety of a residential mortgage (albeit used in

part for a business) plus the leasing cost of two vehicles in a single taxation year, as has already been noted. There was also no evidence adduced as to whether the Appellant was warned against using DeMara or whether the Appellant had expressed concern about telling others.

[42] As stated above, the Appellant's testimony that he asked DeMara about the usage of the stamps on the signature lines does provide some evidence that the Appellant saw the T1 Adjustment Requests at some point. What is more clear is the December, 2011 email chain, which indicates that the Appellant was sent the Request for Loss Carryback form which, as indicated above, set out the large non- capital and capital losses being claimed. If the Appellant did review the Request for Loss Carryback forms, the December email chain suggests that he had no issues with them, and in his cross examination regarding inquiries made of DeMara I infer that he did not discuss with DeMara or anyone else any concerns regarding the content or accuracy of the Request for Loss Carryback forms; there was certainly no indication to the contrary notwithstanding the Appellant's opportunity to provide helpful evidence on his own behalf. Conversely, if the Appellant did not review the Request for Loss Carryback forms, given the unusual circumstances set out above such as the sales meeting, the confidentiality agreement and the types of information requested by DeMara, not reviewing the Request for Loss Carryback form was akin to "sticking one's head in the sand" for gross negligence purposes, as will be discussed below. Similar logic applies to the T1 Adjustment Requests themselves. Either he did review them, but was content with an implausible response regarding the usage of stamps on the signature line, or he did not review them and was, again, "sticking his head in the sand" . And in this respect I note that the amount of interest claimed and the amount of capital losses claimed were both \$1,679,359 — an extraordinary coincidence that in and of itself cried out for further inquiry.

[43] Regarding unusual requests made by the tax preparer, as noted in decisions such as *McCutcheon* , yet another decision involving DeMara and the facts similar to the ones in issue here, the confidentiality and non-disclosure agreement were very unusual requests that should have raised red flags for the Appellant. In other DeMara cases, such as *McCutcheon* , the request for a business number was also considered to be a red flag or flashing red light. However in this case, the Appellant already operated a business. It was not clear on the evidence whether the Appellant already had a business number for his existing business; accordingly, I find that the Request for a Business Number was not a "flashing red light" . The Appellant did admit, however, that DeMara requested much more information than had any previous tax preparer. It was also the case that the events described here were the Appellant's first contact with DeMara.

[44] In totality, I find that bright red flashing lights existed in this case.

[45] The last point made in *Torres* is whether, in view of any flashing red lights, the Appellant made any inquiries of DeMara, any third party or the CRA to understand the T1 Adjustment Requests or the Requests for Loss Carryback. The email chain in early December of 2011 shows that the Appellant had been sent a copy of the Request for Loss Carryback, and his reply was merely to provide payment to ensure that the filing was done quickly. Further, the discussion above regarding the Appellant's reaction to the July 2013 Letter does not demonstrate any

curiosity of any kind about the basis for the T1 Adjustment Requests, or the accuracy of the information provided to the CRA. Again, the Appellant had the opportunity to present any evidence on this point that might have supported his case, but did not provide any such evidence. Accordingly, I find that the Appellant made no material efforts to understand the Requests for Loss Carryback or the T1 Adjustment Requests.

[46] I therefore find that the Appellant was wilfully blind with respect to, and therefore is considered to have had knowledge of, the false statements in/to which he participated, assented and acquiesced.

Gross Negligence

[47] I have also considered whether the Appellant could be found to have been grossly negligent in respect of the participation in, assenting to and acquiescing in the false statements.

[48] The threshold for determining whether a taxpayer has been grossly negligent for purposes of subsection 163(2) has been discussed above. To that discussion I add the comments of the Federal Court (then the Federal Court — Trial Division) in *Venne v The Queen* , [1984] C.T.C. 223 (F.C.T.D.) at paragraph 37:

...“Gross negligence” must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not. I do not find that high degree of negligence in connection with the misstatements of business income. To be sure, the plaintiff did not exercise the care of a reasonable man and, as I have noted earlier, should have at least reviewed his tax returns before signing them. A reasonable man in doing so, having regard to other information available to him, would have been led to believe that something was amiss and would have pursued the matter further with his bookkeeper.

[49] These concepts have been considered in the context of DeMara appeals. I cite paragraphs 63 to 68 of Saunders as follows:

63 The Appellant testified that he participated in a conference call and received material from DeMara describing the “Remedy” process. He stated that he did not understand the process. He also testified that he believed it would generate large refunds. A reasonable person would have sought professional advice from either an accountant or a lawyer before allowing DeMara to file income tax returns using the Remedy process, especially when the person was aware of the fact that the process involved claiming personal expenses as business expenses that would result in large refunds.

64 A reasonable person would certainly have sought advice after receiving the letters from the CRA denying the business and capital losses claimed in other years.

65 As a result of receiving the CRA letters, the Appellant was aware, before DeMara filed his 2011 income tax return, that DeMara had claimed fictitious business losses and capital losses in his previous income tax returns. In such a situation, a reasonable person would have reviewed the 2011 income tax returns before they were filed to ensure that DeMara was not claiming any additional fictitious losses.

66 The Appellant was certainly aware that a person should review his or her income tax returns before they are filed with the CRA. He reviewed the 2008 and 2009 income tax returns prepared by Mr. Rossworn, a chartered accountant, before they were filed with the CRA. Also, the Appellant acknowledged in the agreement he signed with DeMara that he was responsible for reviewing his income tax returns.

67 However, he chose not to review the income tax returns prepared by DeMara. This is particularly troublesome since he testified that he knew very little about the principals behind DeMara and, in particular, did not know if they were accountants.

68 In my view, on the evidence before me, the Appellant's conduct with respect to DeMara represents such a marked and substantial departure from the conduct of a reasonable person in the same circumstances that it constitutes gross negligence as described in Venne .

[50] See, similarly, although in a somewhat different factual context, *Peck v The Queen* , 2018 TCC 52.

[51] This Appeal is somewhat different than *Saunders* in that there was little evidence regarding the Appellant's understanding of the "remedy" process and no testimony regarding a belief that that process would generate large refunds. However, the Request for Loss Carryback certainly indicates that large refunds were being requested. In addition, the Appellant did admit that mortgage interest could only be allocated to that portion of the home being used for his business, which is analogous to the reference in *Saunders* to claiming personal expenses as business expenses. Accordingly, generally the analytical approach set out above in *Saunders* is applicable in this Appeal as well.

[52] Applying that analytical approach, the facts considered above in relation to wilful blindness also demonstrate gross negligence on the part of the Appellant. In this respect I note in particular the Appellant's possible failure to review but certainly his failure to ask questions of DeMara or other parties regarding the T1 Adjustment Requests and Requests for Loss Carryback submitted to the CRA — in particular regarding the rationale and background relating to the very large loss numbers — as well as his lack of inquiry in response to the communications from the CRA.

[53] The Appellant's April Notice of Appeal states at paragraph 3 that "Demara confidently said the returns they did was legal and showed that other clients' returns had been accepted. This led me to believe the returns were acceptable" [sic] and at paragraph 18: "With the Principals of Demara being convicted it is evident I was a victim of a scam" . I infer from these statements that the Appellant may be arguing that he should not be subject to gross negligence penalties because he relied on DeMara in good faith.

[54] This type of argument has been considered by this Court on numerous occasions. I cite paragraphs 84 and 85 from *Fransen v The King* , 2023 TCC 107 as follows:

[84] A number of cases have found gross negligence and upheld penalties in instances where taxpayers had blindly relied on the advice of their tax preparer without reading or reviewing their returns and without making any effort whatsoever to verify the accuracy of the returns.

[85] In *Bhatti v The Queen*, 2013 TCC 143, Justice C. Miller points out:

30. ...It is simply insufficient to say, 'I did not review my returns.' Blindingly entrusting your affairs to another without even a minimal amount of verifying the correctness of the return goes beyond carelessness. So, even if she did not knowingly make a false omission, she certainly displayed the cavalier attitude of not caring one way or another.

[citations omitted]

[55] At paragraph 79 in *Peck* the Court states: “The Appellant cannot simply throw up his hands and say ‘I blindly relied on my tax preparer’ when the materials provided by that tax preparer are so obviously wrong, deficient and nonsensical, and when the tax result purportedly obtained is so extraordinary and suspicious.”

[56] Although, again, there is little evidence as to whether the Appellant reviewed the T1 Adjustment Requests or the Requests for Loss Carryback, these passages demonstrate that simply trusting DeMara to file accurate tax returns in these circumstances is not sufficient to escape subsection 163(2) penalties.

[57] Taking into account the Appellant’s educational background, experience of running his own business, experience filing tax returns and awareness of the separate legal identity of corporations, I find that a reasonable person in the Appellant’s position would have made concerted efforts to ask questions of DeMara and/or third parties to better understand the content and approach that had been taken by DeMara in filing the T1 Adjustment Requests and the Requests for Loss Carryback, and that the Appellant did not take those steps. Accordingly, I find that the Appellant was grossly negligent in participating in, assenting to and acquiescing in the making of the false statements under consideration here.

Calculation of the Penalty

Who Has the Burden?

[58] As set out above, subsection 163(3) of the Act provides that where a penalty is assessed under section 163, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[59] The Respondent adduced no evidence during the hearing as to how the penalty was calculated. In written submissions made after the hearing, the Respondent provided a spreadsheet (the “Spreadsheet”) created by the CRA to demonstrate how the penalty was

calculated. In his written submissions the Appellant argued that the Spreadsheet should not be admitted into evidence as it was submitted after trial and therefore lacked “foundation, authentication, or witness testimony”. I agree with the Appellant that the Spreadsheet cannot be accepted by this Court as evidence as it was not tendered during the hearing and therefore it was not authenticated nor was the Appellant given the opportunity to conduct any cross-examination in connection therewith. That being said, I note that counsel for the Respondent specifically stated in his submissions that he did not intend to rely on the Spreadsheet as evidence, but rather was producing it only to assist the Appellant in making his own submissions. And indeed I have not relied on or used that Spreadsheet in these Reasons for Judgment.

[60] The Respondent has submitted that subsection 163(3) is ambiguous as to whether this onus is limited to the opening words of subsection 163(2), or whether it extends to the calculation of the amount of the penalty. The Respondent has stated that given that the Appellant is self-represented, the Respondent accepts the onus of proving the quantum of the penalty, but submits that this onus does not extend to proving the exact quantum. The example given by the Respondent is the following: “if a taxpayer is assessed a penalty of \$100,000, but the evidence admitted at trial shows that the penalty should only be \$95,000, then the penalty should not be completely vacated solely because the Minister was unable to justify the full \$100,000 penalty” .

[61] A number of decisions have discussed the Respondent’s onus regarding the calculation of the subsection 163(2) penalty. In *Urpesz v The Queen* , [2001] 3 C.T.C 2256 (T.C.C.), the Court at paragraph 15 states: “[u]nder subsection 163(3) the respondent has the onus of proving all necessary constituent elements under subsection 163(2). This includes proving the amount of the understatement of income, the correctness of the amount of penalty and the fact that the understatement was made knowingly or in circumstances amounting to gross negligence.” In *Hans v The Queen* , 2003 TCC 576, in which a number of different expenses were in issue, this Court stated at paragraph 20:

I agree with Associate Chief Justice Bowman's view, as he expressed it in *Urpesz* that the Minister can only sustain the penalties if he puts before the Court some evidence to establish that they have been correctly computed. He has not done so in this case. Although I consider that to a considerable degree the Appellant's income tax returns were a work of fiction, I must allow the appeals insofar as the penalties are concerned. The Minister has not discharged his burden of showing that the precise penalties imposed were justified. Neither the Reply nor the evidence reveals how the Minister computed the penalties that he imposed.

[62] I note that in *Hans* some but not all expenses were allowed.

[63] In 3278735 *Nova Scotia Limited v The King* , 2026 TCC 65, the appeals officer admitted to computational errors in the calculation of the penalties; accordingly, on the basis of *Hans* , Court found that the Respondent had not discharged its burden regarding the computation of the penalties. In that case, which concerns liability for GST/HST and input tax credits, the Court found that the appellant was not wilfully blind or grossly negligent; at paragraph 40 the Court also notes that it “was given no details at all regarding why or how the GST/HST amounts were

under-collected or claim to ITCs were overstated” . Accordingly, the factual foundation for the Respondent’s case was extremely unclear.

[64] In *Sandia Mountain Holdings Inc. v The Queen* , 2006 TCC 348, the Court stated the following at paragraphs 37 to 40:

37 While the Judge's comment in *Urpesz* , an appeal under the informal procedure, does not elaborate as to what is meant by, or what it might take to prove, the correctness of the amount of the penalty, the suggestion of Appellants' counsel that it requires evidence of the correctness of the calculation to be brought at trial does not follow and Justice Bowie's observations in *Hans* , an appeal under the general procedure, do not go that far either. In *Hans* Justice Bowie stated that in that case the Minister had not discharged his burden of showing that the precise penalties imposed were justified. He added and I quote: “Neither the Reply nor the evidence reveals how the Minister computed the penalties that he imposed.”

38 The question then arises as to what is meant by “how the Minister computed the penalties that he imposed”. For one, it might mean that the Reply must set out the exact calculation of the income subject to the penalty and the percentage applied. If the Reply sets out the penalty amount that is shown clearly as 50% of the income shown as subject to the penalty, then the Reply in my view has met the test set out by Justice Bowie in cases such as the one at bar where identifying the amount that the penalty is assessed against and the applicable percentage are clearly the only relevant amounts needed to establish the correctness of the penalty assessed.

39 The importance of the Reply dealing adequately with the calculation of penalties is also shown in *Francavilla v. R.* where the Minister's Reply did not refer to the penalties and on that basis Justice Rip deleted the penalties. That is clearly not the case in respect of the appeals at bar.

40 Accordingly, Appellants' counsel's submission that in order for a penalty to be assessed properly the Minister must call an auditor to the stand and have them testify as the calculation of the penalties is one with which I cannot agree. Unlike the case of *Hans* and *Francavilla* , the Replies in the subject appeals sufficiently address the 163(2) penalties. Furthermore, Respondent's counsel presented documentary evidence (exhibit R-15) to demonstrate the income upon which the 163(2) taxes would be based. There is no possible debate as to the correctness of the calculations of the penalties in respect of either appeal. They are fixed and afford no discretion or variation even by this Court once the income amounts properly subject to penalty have been proven. [citations omitted]

[65] In *Rattai* (FCA), the Federal Court of Appeal acknowledged that the taxpayer did not suggest errors in the calculation of the penalty, but in obiter stated at paragraph 27 “[i]n any case, his admission identifies the ‘number reported’ exactly and so the ‘understatement of income’ as defined in subsection 163(2.1) of the Act, on which the penalty is calculated, was known.”

[66] And at paragraph 39 of *Kalwa v The King* , 2025 TCC 89 this Court states:

The reasons, amounts of the disallowed capital outlays, the amount of the taxable gain and the amount of the penalties are cumulatively pleaded in the Respondent's pleadings. While some further maths may be required to ascertain the precise methodology and amount of the penalties, all elements are there and sufficient for the Court's purposes.

[67] At first glance it may appear that there is some divergence in the case law — is it necessary for the Respondent to demonstrate how the penalty was calculated, or not? However, in my view these two approaches are not in conflict. As stated above, subsection 163(3) places upon the Respondent “the burden of establishing the facts justifying the assessment of the penalty” . I draw a distinction between the facts that are required to calculate the penalty, and the calculation of the penalty itself. To provide a very simplistic example, assume that a taxpayer had \$100 of gross income and claimed a deduction of a \$100 expense. Assume also that the taxpayer was found to be liable for a penalty under subsection 163(2) relating to the \$100 deduction on the basis that the Respondent had adduced the evidence necessary to prove all the facts necessary to support that liability, including the facts necessary to identify the claim for the deduction of the \$100 expense as a false statement made in a return (as well as all the other elements of the opening words of subsection 163(2)). In this case, it should not be necessary for an auditor to testify as to the precise calculation of the difference between the tax that would have been exigible had the taxpayer earned \$100 of net income versus the tax that would have been exigible had the taxpayer earned nil net income. The reason for this is that the calculation of those two amounts is merely a matter of applying the Act, from a formulaic or mathematical perspective, to the net income [10] in those two scenarios and then comparing the two. However, the Court must be able to determine whether it indeed has all the necessary facts and whether all that is left is that formulaic or mathematical application of the Act to net income. In cases such as *Hans and 328735 Nova Scotia Limited* , it may have been far from clear that all the relevant facts had been proven, and therefore the burden was on the Respondent to so demonstrate. However, if the Court is able to identify which facts are required and make sufficient findings of fact so as to be able to conclude that all that remains is the formulaic or mathematical application of the Act, then the case law above supports the view that it is not necessary, from an evidentiary perspective, for an auditor to walk through those calculations in court. Of course the Court may request submissions to aid the Court in determining whether the mathematical calculations are correct; the absence of submissions regarding such calculations, particularly where computational errors made by the Respondent have already been identified, may have consequences in particular cases.

[68] How does that approach apply here? In this case the Court was not provided with the initial notice of assessment. Nor did the Reply review the calculation of the penalty. However, the Court does have a copy of the T1 Adjustment Requests, which include the amended tax returns. All that is necessary is to calculate the amount of tax payable with, and without, the false statements relating to non-capital and capital losses (as discussed further below). Accordingly, all the facts necessary to calculate, mathematically, the tax that would be payable if the non-capital losses and capital losses claimed were taken into account and the tax that would be payable if they were not, has been adduced as evidence. The Appellant did not adduce any evidence casting any doubt

on those facts (other than facts relating to the application of the opening words of subsection 163(2)). In this respect, the analysis is similar to that reflected in the citation from Rattai above. I find that the Respondent has discharged his burden under subsection 163(3) of the Act in this respect.

[69] Before leaving this topic, I note that the Appellant did not make any arguments relating to the calculation of the penalty other than the ones specifically described in these reasons. In other words, the Appellant did not make any arguments regarding the correctness of the actual mathematical calculation, notwithstanding that the Appellant had the opportunity — including in post-trial submissions — to do so. The Spreadsheet provided by counsel for the Respondent in his post-trial submissions was available to aid the Appellant in reviewing those calculations, although the Appellant could certainly have done that review in the absence of the Spreadsheet. Accordingly, I do not consider the correctness of the Respondent's mathematical calculations any further here.

Tax Payable in the Year

[70] The calculation of the subsection 163(2) penalty, as applicable to this appeal, is found in paragraph 163(2)(a), reproduced above. Generally, the formula requires the comparison of two amounts. The first amount (in subparagraph 163(2)(A)(i)) is equal to the tax that would be payable by the person under the Act for the year if the person's taxable income for the year were computed by adding to that income that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission and if the person's tax payable for the year were computed by subtracting from the deductions from the tax otherwise payable by the person for the year such portion of any such deduction as may reasonably be attributable to the false statement or omission.

[71] The second amount is the tax payable by the person under the Act for the year if the person's taxable income for the year were computed on the basis of the information provided in the person's return for the year. In other words, the second number is the tax payable under the Act that would be calculated if the false statement or omissions were not disregarded. The excess (if any) of the first amount over the second amount is the basis for the penalty calculation.

False Statements Not Accepted by CRA

[72] The Appellant makes two arguments in respect of this formula. First, in the Appellant's written submissions, the Appellant states that "[t]he penalty cannot be calculated on a hypothetical acceptance of a statement the Minister expressly rejected". And further the Appellant states that because the T1 Adjustment Requests "were denied, the taxable income reported in the return for the purposes of subparagraph 163(2)(a)(ii) is the taxable income reported in the original 2007 return as filed".

[73] I do not agree with the Appellant. Subparagraph 163(2)(a)(ii) requires a calculation of tax based on the tax that “would have been payable by the person under the Act...had the person’s tax payable for the year been assessed on the basis of the information provided in the person’s return for the year” . This clause contemplates a hypothetical calculation based on information that includes the false statements provided by the taxpayer. The fact that the false statements were rejected by the Minister is irrelevant to this calculation. In regard to both of these issues, the decisions of the Federal Court of Appeal in Carroll , as well as that of this Court in Morton, discussed above, are directly on point.

Carrybacks and Potential Carryforwards

[74] The Appellant’s second argument is that “[t]he portion of the understatement reasonably attributable to the false statement cannot exceed the amount required to reduce the taxable income reported in the original return to nil. The excess loss that was purportedly carried back was never accepted by the Minister and produced no tax consequence.” The second sentence relates primarily to the argument above regarding statements that have not been accepted by the CRA. (It is set out here merely for the record.)

[75] However the first sentence reflects the argument — also set out in the April Notice of Appeal — that the penalty should be based only on the tax that would have been saved in the 2007 taxation year. There is a related question — not explicitly articulated by the Appellant — as to whether the penalty should be limited to tax saved in 2007 plus the tax saved in 2004-2006 (the years to which the loss carrybacks were requested in the Requests for Loss Carryback), and should not include the remainder of the loss in respect of which no application to any taxation year had yet been requested.

[76] The response to this argument is contained in a series of supporting rules in subsection 163(2.1), which states as follows:

For the purposes of subsection 163(2), the taxable income reported by a person in the person’s return for a taxation year shall be deemed not to be less than nil and the understatement of income for a year of a person means the total of

- (a) the amount, if any, by which
- (i) the total of all amounts that were not reported by the person in the person’s return and that were required to be included in computing the person’s income for the year

exceeds

- (ii) the total of such of the amounts deductible by the person in computing the person’s income for the year under the provisions of this Act as were wholly applicable to the amounts referred to in subparagraph 163(2.1)(a)(i) and were not deducted by the person in computing the person’s income for the year reported by the person in the person’s return,

- (b) the amount, if any, by which

- (i) the total of all amounts deducted by the person in computing the person's income for the year reported by the person in the person's return

exceeds

- (ii) the total of such of the amounts referred to in subparagraph 163(2.1)(b)(i) as were deductible by the person in computing the person's income for the year in accordance with the provisions of this Act, and

- (c) the amount, if any, by which

- (i) the total of all amounts deducted by the person (otherwise than by virtue of section 111) from the person's income for the purpose of computing the person's taxable income for the year reported by the person in the person's return

exceeds

- (ii) the total of all amounts deductible by the person (otherwise than by virtue of section 111) from the person's income for the purpose of computing the person's taxable income for the year in accordance with the provisions of this Act. [11]

[77] In his submissions, the Respondent relies on CRA Document No. 2013- 0485161I7 (April 23, 2013), for support for the view that the subsection 163(2) penalty is calculated by adding to the taxable income reported by the taxpayer the amount of the understatement of income for a particular year. The Appellant in his written submissions in turn argues that this statement of the CRA is not law and does not override the statutory requirement that the understatement be reasonably attributable to the false statement.

[78] I agree that the aforementioned CRA statement is not law. However, in my view it accurately states the law; indeed, recourse to that statement is not needed given that subsections 163(2) and (2.1) speak for themselves.

[79] More specifically, subparagraph 163(2)(a)(i) refers to the amount of tax for the year that would be payable by the person under the Act "if the person's taxable income for the year were computed by adding to the taxable income reported by the person in the person's return for the year that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission..." Accordingly, the calculation of the penalty begins by taking the taxable income reported by the Appellant for his 2007 taxation year — which here, in T1 Adjustment Request, was nil — and adding to that the portion of the person's understatement of income for the year that is reasonably attributable to the false statement.

[80] The Appellant argues that the understatement of income for his 2007 taxation year that is attributable to the false statement is limited to the losses claimed that would have brought the taxable income for his 2007 taxation year alone to zero.

[81] However, as set out above, subsection 163(2.1) provides a specific definition of “understatement of income” for a year. Paragraph 163(2.1)(b) includes in that understatement of income all amounts deducted by the person in computing the person’s income for the year net of the amounts that were deductible in computing the person’s income for the year. Keeping in mind that subsection 163(2.1) specifies that for these purposes, the taxable income reported by a person in the person’s return is deemed not to be less than nil, the entirety of the non-capital loss claimed by the Appellant that was not actually deductible (so here, the entirety of the non-capital loss) is added to his understatement of income for the 2007 taxation year. Similar logic applies to the entirety of 50% of the Appellant’s capital losses (i.e. , the Appellant’s erstwhile allowable capital losses). Therefore the amount in subparagraph 163(2)(a)(i) in this case is the Appellant’s taxable income in the 2007 taxation year calculated as if the non-deductible deductions claimed (i.e. , the non- capital losses of \$1,679,359.99 and the allowable capital losses of \$839,679.50) were added to his taxable income otherwise reported in his 2007 taxation year (i.e., nil).

[82] This interpretation is confirmed in decisions such as *Wardlaw v The Queen* , 2019 TCC 199 and *McLeod*. At paragraph 50 in *Hine v The Queen* , 2012 TCC 95, the Court provides some background to the policy underlying subsection 163(2.1), stating that it

is there to ensure that the penalty is assessed as if the full loss had been available to save tax in the year the false statement was made. The policy and wisdom of that penalty is not questionable. Setting up losses that were not incurred by reporting false costs or false proceeds might well best be prevented by not giving any weight to whether there was any attempt to use the loss.

[83] The Court goes on to say that

...surely the absence of evidence that the taxpayer intended the reduction in tax afforded by the creation of a loss might properly inform the question of whether the circumstance of the case were such that the making of the false statements amounted to gross negligence or to turning a blind eye to the truth of the statement.

[84] In respect of this latter comment, here there is no evidence that the Appellant intended to carry forward the remainder of the losses claimed in the T1 Adjusted Returns. However this lack of evidence is not relevant here given that my earlier finding that the Appellant was wilfully blind and grossly negligent would not change even if the Appellant did not intend to use the remaining losses, and given that the language of subsection 163(2.1) does not turn on the intention of the taxpayer.

[85] I also note that paragraph 8 of the April Notice of Appeal states that “[t]here was no understatement of the Income re remuneration, only expenses” . As set out above, subsection 163(2.1) clearly contemplates that the deduction of amounts that are not actually deductible — which would include expenses — is taken into account in calculating the understatement of income for a year.

Other Arguments Raised by the Appellant: Choptiany Governs

[86] In his written submissions, the Appellant states that:

[t]he controlling authority is Choptiany v. The King , 2022 TCC 112. That case involved participants in the same Demara Consulting tax scheme. One promoter had been convicted and sentenced to jail. Nevertheless, Justice Boyle allowed the appeals and vacated the gross negligence penalties, stating that such a result is the fault of the Respondent alone.

The same principle applies here. The Respondent has failed to discharge its burden under subsection 163(3) to prove the facts justifying the specific penalty assessed. The false statement was caught before it produced any tax consequence. No reassessment issued on the basis of the fabricated loss. The Respondent has not proven the statutory quantum with admissible evidence. These failures are the fault of the Respondent alone.

[87] I have already concluded that the Respondent has discharged the burden of proof with respect to both the opening words of subsection 163(2) and the quantum of the penalty. With respect to Choptiany , this decision was not based on the merits of the appeal, but rather was in response to a motion brought by the appellants in that case to have their appeals allowed on the basis that, during the discovery phase of the litigation, the Respondent had repeatedly failed to have a knowledgeable and informed official answer proper and relevant questions, failed to produce relevant documents, failed to correct incomplete answers and breached two previous orders of this Court. See paragraph 97 of that decision in particular for a very clear articulation of the Court as to the basis for allowing the appeal. Accordingly, Choptiany is not relevant to this Appeal.

[88] In the words of Justice Campbell at paragraph 33 of Bhatti , I do not intend to pour salt into an open wound by ordering any costs.

Signed this 22nd day of May 2026.

“Lara Friedlander”

Friedlander J.

CITATION:

2026 TCC 95

COURT FILE NO.:

2016-1087(IT)G

STYLE OF CAUSE:

ATTILA JOHN BURZUK AND HIS MAJESTY THE KING

PLACE OF HEARING:

Edmonton, Alberta

DATE OF HEARING:

February 2, 2026

REASONS FOR JUDGMENT BY:

The Honourable Justice Lara G. Friedlander

DATE OF JUDGMENT:

May 22, 2026

APPEARANCES:

For the Appellant:

The Appellant himself

Counsel for the Respondent:

Alexander Millman

COUNSEL OF RECORD:

For the Appellant:

Name:

N/A

Firm:

N/A

For the Respondent:

Marie-Josée Hogue

Deputy Attorney General of Canada

Ottawa, Canada

[1] February 3, 2026 Transcript, at page 135.

[2] February 3, 2026 Transcript, at page 156.

[3] For another example in a slightly different context, see *McLeod v The Queen*, 2013 TCC 228.

[4] February 3, 2026 Transcript, at page 162.

[5] February 3, 2026 Transcript, at pages 162-164.

[6] See similarly:

Q: Did you ever question why they were asking for more documents?

A: More documents than anyone else?

Q: Yes.

A: I believe it was covered in their, like, presentation where they were claiming interest and things, so I – I just assumed they needed it for whatever process they were doing. It's not assumed. It was explained that they would need this information to do their process, their remedy, or whatever it's referred to.

Q: Oh, okay. So would they – when this was explained to you, they explained that they needed all of these expenses, basically – I – I think you described it before as all of your expenses for the last – I don't know if you said lifetime, or – or a lengthy period. All personal expense –

...

Q: And your understanding was that those would all be charged or marked as interest on your return, correct?

A: I believe so, yeah. I'm not sure I recall how they were going to put it on the tax return, but they were asking for that information.

Q: And that's why when you saw the 1.6 million, you said you didn't think that was unusual because that was about what you had submitted in terms of all of these expenses or mortgages, or car payments, of everything.

A: Yeah. Yes. Yeah.

(February 3, 2026 Transcript, at pages 191-193.)

[7] February 3, 2026 Transcript, at pages 190-191.

[8] February 3, 2026 Transcript, at page 149.

[9] February 3, 2026 Transcript, at page 168.

[10] I leave aside whether there could be scenarios in which other facts might be relevant to the computation of tax, such as loss carryforwards, available credits or information relevant to the determination of rates, as those items are not in issue here.

[11] I also note subsection 163(4) of the Act, which excludes from the calculation of the understatement of income certain items that impact multiple taxation years; those items are not relevant here, but the provision confirms the intention to group loss carryforwards and carrybacks into the calculation for the single taxation year.

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