PENALTIES FOR FALSE STATEMENTS OR OMISSIONS - PART I

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm on penalties under the Income Tax Act (Canada) and the possible challenges to such assessments. Alpert Law Firm is experienced in providing legal services to its clients in tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions and estate administration.

A. SUBSECTION 163(2) PENALTIES

Pursuant to the provisions of subsection 163(2) of the Income Tax Act (the “Act”), the Minister of National Revenue (the “Minister”) may impose penalties on taxpayers who knowingly or under circumstances amounting to gross negligence make, participate in, assent to, or acquiesce in the making of a false statement or omission in a tax return, form, certificate, statement or answer filed or made in respect to a taxation year.

It is important to note, that the imposition of such a penalty requires either one of the following constituent elements to be proven: (i) the taxpayer had knowledge of the omission or false statement; or (ii) the taxpayer was grossly negligent in regards to the omission or false statement.

Pursuant to subsection 163(3) of the Act, the Minister has the onus of proving, on a balance of probabilities, the facts indicate that either of these elements exist. If the Minister fails to establish that the facts of the case justify the assessment of the penalty, then the penalty cannot be imposed. While the Minister has the burden of justifying the imposition of the penalty, the taxpayer still has the usual burden of challenging the Minister’s assessment.

The penalties imposed under subsection 163(2) can be substantial. The taxpayer will be liable for a penalty of the greater of $100 and 50% of the tax payable on the taxpayer’s understatement of income (i.e. 50% of the amount by which the tax that would have been payable by the taxpayer if the false statement had not been made in the taxation year exceeds the amount of tax which would have been payable if the return was accepted as filed).

In addition, pursuant to subsection 163(1) of the Act, the Minister may impose penalties on taxpayers who repeatedly fail to report income in their tax returns. The penalty under subsection 163(1) is 10% of the amount which was not reported in the tax
return. Under this penalty there is no requirement for the Minister to prove intent or negligence on the part of the re-offending taxpayer.

Also, a taxpayer who entirely fails to file a tax return, or files a tax return after the required time, can be subject to a penalty of 5% of the unpaid tax, pursuant to subsection 162(1) of the Act. There is also a similar penalty for repeated failures to file a tax return pursuant to subsection 162(2) of the Act.

The taxpayer could also be charged criminally with income tax evasion pursuant to the provisions of subsection 239(1) of the Act. However, a person who is criminally convicted under subsection 239(1) cannot be held liable to pay a penalty imposed under sections 162 or 163 for the same evasion, unless the person was assessed for that penalty under section 162 or 163 before the information or complaint giving rise to the criminal conviction was laid or made.

If the Department of Justice decides to prosecute a taxpayer for tax evasion, it can elect to proceed summarily or by indictment. Subsection 239(1) of the Act states that upon summary conviction for tax evasion, fines ranging from 50% to 200% of the amount sought to be evaded could be levied, as well as a possible imprisonment term of not more than two years. If the Department of Justice elects to proceed by indictment, upon conviction the offending taxpayer could pay fines ranging from 100% to 200% of the amount sought to be evaded, as well as face a maximum imprisonment term of five years, pursuant to subsection 239(2) of the Act.

In addition, third parties who advise or participate in the making of a false statement or omission in a tax return can also be held liable for civil penalties, pursuant to the provisions of subsection 163.2 of the Act. However, these penalties are limited to persons who either: (i) knew such statements or omissions were false; or (ii) should be reasonably expected to know that such statements or omissions were false.

B. DEFENCES AGAINST IMPOSITION OF PENALTIES

Where penalties under subsection 163(2) of the Act have been assessed, the Minister has the burden of justifying their imposition. The Minister must prove, on a balance of probabilities, that the taxpayer had knowledge of, or exhibited gross negligence in the making of, the false statement or omission. An attack upon any of these constituent elements amounts to a defence against the imposition of penalties.
(i) RELIANCE ON PROFESSIONAL ADVICE

Penalties under subsection 163(2) of the Act can be challenged by the taxpayer on the basis that the taxpayer relied upon the professional services of an accountant to prepare the income tax return, and as such the taxpayer did not have knowledge of, or was not grossly negligent in the making of, the false statement or omission.

In general, the Courts have said that where errors or omissions have been made in a tax return and there has been gross negligence on the part of the accountant who prepared the tax return, the accountant’s gross negligence cannot be automatically attributed to the taxpayer. Rather, it is up to the Minister to prove that the taxpayer is indeed liable for the accountant’s gross negligence by proving either that the taxpayer had knowledge of the mistakes, or that the taxpayer was grossly negligent himself for failing to notice the accountant’s mistakes.

To ascertain whether the taxpayer’s reliance on professional advice provides an adequate defence against the imposition of penalties, the Courts look at a variety of factors, including:

(i) whether the taxpayer was actually privy to the omission or error of the accountant;

(ii) the taxpayer’s level of participation in the preparation of the tax return by the accountant;

(iii) the taxpayer’s business expertise or knowledge of income tax and accounting principles that would have made it likely that the taxpayer actually knew of the errors or omissions made by the accountant;

(iv) whether the taxpayer had reason to believe that the accountant would make errors or omissions in the tax return (i.e. the qualifications and experience of the accountant; the duration of the taxpayer’s reliance on professional advice without any income tax problems arising); and

(v) whether the amount of the error or omission was such that the taxpayer would have reasonably been aware of it.

   In this leading Exchequer Court of Canada case, penalties were assessed against the taxpayer for three taxation years under what is now subsection 163(2) of the Act. For the years in question, the taxpayer, who was a farmer, followed his usual practice of providing his accountant with meticulously maintained, accurate records of all of his business transactions at the close of each taxation year. Despite receiving accurate records, the accountant made a number of substantial errors and omissions in the taxpayer's tax returns. These errors had the effect of understating the taxpayer's income during the three years in question.

   The Minister performed a net worth assessment for these years and found that the taxpayer had underreported his income. The Minister also assessed penalties for these three taxation years on the grounds that the taxpayer was guilty of *gross negligence* in that the taxpayer was not alerted to obvious mistakes made by the accountant.

   While the taxpayer did not challenge the Minister's assessment of his taxable income, the taxpayer disputed the penalties assessed against him. The taxpayer argued that while the accountant was grossly negligent in his preparation of the tax returns, the accountant's gross negligence should not be attributed to the taxpayer since: (i) the taxpayer provided the accountant with accurate records; and (ii) the taxpayer had no reason to believe that the accountant would make such errors since the accountant was highly qualified (even had extensive experience as an assessor for the Department of National Revenue) and the taxpayer had relied upon the accountant for many years to prepare his tax returns with no problems; and (iii) the taxpayer was not privy to the accountant's gross negligence, nor did he authorize it.

   The fact that the taxpayer gave accurate records to the accountant and had no reason to doubt the correctness of the accountant’s services led the Court to find that the taxpayer was not grossly negligent and as such could not be held liable for penalties. In finding that the taxpayer could not be held liable for penalties, the Court established that subsection 163(2) of the Act indicates that gross negligence on the part of the taxpayer's accountant cannot be attributed to the taxpayer. Instead, gross negligence of the taxpayer himself needs to be proven in order to justify the imposition of such penalties.

   In this Tax Review Board case, subsection 163(2) penalties were assessed against the taxpayer for three consecutive taxation years. The Minister conducted an audit of the taxpayer, who was a sole proprietor of a garage, and found that the taxpayer severely understated his income for three consecutive years, failing to disclose 80%, 50% and 30% of his income in each of the three years. The Minister also found that the taxpayer kept very poor and inaccurate accounting records, as many important documents, such as sales invoices and accounts payable and receivable books were simply missing. As a result, the taxpayer was assessed penalties on the grounds that the taxpayer had been grossly negligent in reporting his income in each of the years in question.

   While the taxpayer accepted the Minister’s assessment of additional income, he appealed against the imposition of penalties, arguing that he was not grossly negligent, claiming he entrusted an expert accountant with the preparation of his tax returns and did not contribute or participate in any wilful failure to report income.

   The Court found the taxpayer to be grossly negligent, given that the massive amounts of undisclosed income were too large to escape the taxpayer’s notice, and the taxpayer failed to keep all the documents necessary for the accurate preparation of his tax returns. As such, the Court found the imposition of penalties to be justified. Thus, the defence of reliance of professional advice may not be successful if either: (i) the amount of the error in the tax return was extremely high; or (ii) the taxpayer did not actually provide the tax professional with accurate information.


   In this Federal Court case, the taxpayer was reassessed for seven consecutive taxation years and assessed penalties under subsection 163(2). In reassessing the taxpayer, the Minister added over $348,000 of undisclosed interest income from mortgage investments for the seven-year period. The taxpayer admitted that over $283,000 of income was unreported.

   During most of this period, the taxpayer and his wife operated a service station and marine business. The other important source of income for the taxpayer during this period was mortgage interest. The taxpayer’s tax returns had been prepared by a succession of bookkeepers or accountants. The taxpayer had only a grade 5 education and used a relatively simple method of record keeping. Each month he took copies of all
receipts, cheque stubs, and other documents to the bookkeeper. At the end of the year, the taxpayer would provide the inventory information to the bookkeeper, who would prepare the tax return, which the taxpayer would sign. The taxpayer admitted that he did not read his tax returns before signing them, testifying that he found tax returns almost entirely incomprehensible, even though successive bookkeepers tried to explain these matters to him.

The Federal Court held that the Minister was justified in reassessing the taxpayer beyond the normal reassessment period, since the taxpayer’s negligence resulted in misrepresentations being made in his returns. First, the taxpayer did not exercise reasonable care when he failed to read his returns before signing them. Second, because of the magnitude of the unreported income, the errors in the return should have been sufficiently obvious that a reasonable man of even limited education and experience, especially one who was apparently a very successful businessman and investor, should have noticed them.

However, the Federal Court disallowed the imposition of subsection 163(2) penalties. The Court held that 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, indifference as to whether the law is complied with or not. In this case, it was quite conceivable that the taxpayer did not notice the errors in the returns and his neglect in not noticing them fell short of constituting gross negligence. Moreover, it was not improbable for the taxpayer to believe that only the amounts of interest income shown on the T-5 slips were taxable.


In this Federal Court of Appeal case, penalties under subsection 163(2) of the Act were assessed against the taxpayer for one taxation year. The taxpayer, who was a sole proprietor of three video stores, decided to incorporate his businesses in the year in question. During the incorporation process, the taxpayer rolled over his assets into the corporation, thereby generating large capital gains of $135,000. The taxpayer hired a tax-preparing company to prepare his tax returns, as he had done for several years with no income tax problems. In reviewing the taxpayer’s personal tax return, the Minister noticed that the $135,000 of capital gains generated from the rollover had been omitted. As a result, the Minister assessed penalties on the grounds that the taxpayer was grossly negligent in omitting these capital gains.
The taxpayer challenged the penalties assessed against him. The taxpayer maintained that while the professional tax preparer may have been grossly negligent, the taxpayer himself was not since: (i) the taxpayer was not actually privy to the tax preparer’s omission; and (ii) the taxpayer provided accurate records of the capital gains to the professional tax preparer. A representative of the tax-preparing company corroborated the taxpayer’s claim. He testified that it was not unreasonable for the taxpayer to overlook the fact that the capital gains was not declared in his personal return, given that the tax return was extremely complex and the taxpayer was under the false impression that very little tax would result from the rollover on account of faulty advice from his tax-preparing company.

On account of the testimony of the taxpayer and the representative of the tax-preparing company, the Court found that the taxpayer was not grossly negligent. In finding that the taxpayer could not be held liable for penalties, the Court reiterated the Udell principle: that gross negligence on the part on the taxpayer’s agent should not be attributed to the taxpayer.

5. **LaPlante v. The Queen, 2008 TCC 335**

The taxpayer was assessed for a period of three consecutive years for overstating deductions for expenses with respect to a rental property he owned and claiming a medical expense tax credit for one of the tax years based on expenses that he did not actually incur. The Minister assessed gross negligence penalties pursuant to subsection 163(2) of the Act. The taxpayer appealed the imposition of the penalties.

The Tax Court dismissed the taxpayer’s appeal. For the taxation years at issue, the taxpayer used the services of a chartered accountant to prepare his returns. The Tax Court held that that the taxpayer should have noticed the significant discrepancy between the net rental revenues for the years under appeal and the two preceding years, for which the taxpayer’s returns had been prepared by another person. Failure to question the accountant about this discrepancy amounted to wilful blindness on the part of the taxpayer.

Moreover, the Tax Court found that the taxpayer showed gross negligence by not reviewing his tax returns before signing them. The taxpayer testified that if he had reviewed the returns, he would have noticed the misrepresentations regarding his medical expenses, car rental expenses, and the distance driven for the purpose of earning income. The Tax Court found that the taxpayer’s cavalier attitude amounted to total indifference as to whether the law was complied with or not.
6. **Vachon v Canada, 2013 TCC 330**

In this Tax Court of Canada case, the taxpayer appealed the Minister's assessment pursuant to subsection 152(4)(a) of the Act for unreported income outside the normal assessment period and imposition of gross negligence penalties. The taxpayer was an experienced professional consultant, although he claimed to have minimal knowledge of tax matters. The taxpayer relied on a professional tax preparer to complete his annual tax return. Evidence revealed that the taxpayer paid the tax preparer significant amounts that were never remitted to the appropriate tax authorities, but were instead used to the profit and advantage of the tax preparer's personal interests. The taxpayer argued that the errors in his tax return were attributable to the fraudulent activities of tax preparer and could not be attributed to gross negligence on his part.

The Tax Court held that, in light of the taxpayer's business knowledge, the taxpayer's reliance on the tax preparer was sufficiently careless to merit a reassessment beyond the normal assessment period. However, the Court disagreed with the Minister's decision to impose a gross negligence penalty. On this point, the Court held that the taxpayer, while careless and reckless, never had the intention or desire to evade his fiscal duty. The Court stated that in order to impose penalties the taxpayer must be negligent to the extent that the alleged carelessness is enough to suggest some degree of complicity. This case indicates that when a tax preparer defrauds a taxpayer the Court may accept the defence of reliance on professional advice, provided the taxpayer has demonstrated no complicity in the fraud.

7. **Torres v. Canada, 2013 TCC 380**

The Tax Court of Canada dismissed the appeals of six taxpayers for penalties under section 163(2) of the Act. The taxpayers claimed significant false business losses, but the Court held that they had been willfully blind. In each case, the taxpayer had used Fiscal Arbitrators to prepare their tax return. The taxpayers appealed the Minister's assessment, claiming that they had no reason to question the work of Fiscal Arbitrators and therefore cannot be found to have been grossly negligent.

In all six cases, Fiscal Arbitrators prepared returns that included false business losses. Each of the taxpayers (i) did not fill in the box indicating completion by professional tax preparers; (ii) requested that the taxpayer put "per" before their signature on their return; (iii) signed the prepared tax returns with some degree of trust
in the professionalism of Fiscal Arbitrators; and (iv) without making inquiries into the
details of the return.

The taxpayers had a variety of levels of sophistication and tax understanding as
follows: (i) Maria Torres a nurse from the Philippine had always used a tax preparer.
Although claiming no understanding of business and tax returns, she did read the
materials prepared by Fiscal Arbitrators. (ii) Eva Torres had a Bachelor of Commerce
from the Philippines and worked as an insurance broker. She read over the prepared
returned but asked no questions regarding the declared business losses. (iii) Michael
McNulty had a Bachelor of Arts in Civil Engineering. He testified to having browsed the
prepared return. (iv) Andre Gautier was a HVAC technician with trade school
education. In addition to the false business losses, Mr Gautier’s tax return claimed loss
carrybacks for 2005, 2006 and 2007. When the CRA first contacted Mr. Gautier
requesting more information about the claimed losses, he became suspicious and went
to his previous accountant who was unable to explain the numbers. (v) Carrol Strachan
was a long time Air Canada flight attendant, who claimed to have a fair to good
understanding of accounting. She testified that she had been somewhat concerned
about the return prepared by Fiscal Arbitrators and as a result did not use them the
following year. (vi) Ansel Hyatali worked as a lead hand at a paint distribution centre.
He had a Grade 12 education and a welding certificate. He never owned or operated a
business. Upon having his return prepared by Fiscal Arbitrators, he did not ask about
the business loss numbers, and just signed where he was told without reviewing the
return.

Accepting that Fiscal Arbitrators were involved in a deceitful practice, the Tax
Court nonetheless dismissed the appeals on the grounds that the taxpayers had been
wilfully blind to the unscrupulous methods of the tax preparer. The Tax Court found that
the taxpayers were sufficiently educated and experienced to grasp the fraudulent nature
of the prepared returns. In addition, the Tax Court found that there were a host of
warning signs which should have motivated inquiries. These warning signs were: (i) the
magnitude of the tax advantages were substantial; (ii) the blatantness of the false
statements were readily detectable because none of the taxpayers were actually
engaged in business; (iii) the tax preparer did not complete the box for tax
professionals; (iv) the tax preparer made the unusual request of having the tax payers
sign their returns after the word “per”; (iv) Fiscal Arbitrators were unknown to most of
the taxpayers; and (v) some of the taxpayers testified to feelings of suspicion but did not
bother to make further investigation. The Tax Court admitted that some of these signs
were small, but held that in combination with the other signs, the taxpayers had
adequate indication of a need for inquiry.
This case stands for the proposition that reliance on professional advice does not constitute a defence in cases where the taxpayer has been wilfully blind to suspect activities of a tax preparer. The taxpayer has an obligation to make inquiries where (i) the magnitude of the advantage is substantial or unusual; or (ii) the tax preparer acts in suspicious ways.

The Tax Court emphasized that subsection 163(2) requires that two elements are necessary to justify a penalty; (i) a false statement; and (ii) knowledge or gross negligence of making, assenting to or acquiescing in the making of a false statement in a return. The Tax Court found that the first condition was easily and clearly met in all six cases. The Tax Court then reviewed relevant jurisprudence and set out the following principles: (i) knowledge of a false statement can be imputed by wilful blindness; (ii) the concept of wilful blindness can be applied to gross negligence penalties; (iii) in determining wilful blindness consideration must be given to the taxpayer’s education and experience; (iv) to find wilful blindness there must be a need or suspicion for an inquiry; (v) circumstances that indicate a need for inquiry prior to filling include the magnitude of the advantage or omission, the blatantness of the false statement, a lack of acknowledgment by the tax preparer, unusual requests made by the tax preparer, incomprehensible explanations by the tax preparer, and the reputation of the tax preparer; and (vi) a failure on the part of the taxpayer to make inquiries regarding the preparation of the return to a third party or the CRA itself.

(ii) MATERIALITY OF UNREPORTED INCOME

Where the Minister assesses penalties on the basis of gross negligence, a taxpayer can raise the defence that the size of the unreported amount was not substantial or material given the facts of the case. Case law has indicated when evaluating this defence, the Courts may take into account facts which indicate: (i) sizeable complexity of the taxpayer’s business transactions; and (ii) the overall size of the unreported income is inconsequential given the taxpayer’s total taxable income.

The Courts have also cancelled penalties where the discrepancy between the Minister’s net worth assessment and the taxpayer’s own figures are judged to not be significantly different. The Courts have also found the net worth assessment method to
be imprecise and the taxpayer may be given the benefit of the doubt in the above mentioned circumstances.

1. Mark v. M.N.R., 78 DTC 1205

In this Tax Review Board case, the Minister imposed penalties on the taxpayer for failing to report certain income in his tax return for one taxation year. In his defence, the taxpayer successfully claimed that the amount of unreported income was not substantial and material enough to support a finding of gross negligence and impose penalties.

The taxpayer was a businessman, whose business interests were wide and varied. In the year in question, the taxpayer was paid a management fee of $17,500 for acting as the secretary-treasurer of an investment company of which he owned fifty percent. However, the taxpayer’s accountant failed to include this payment as income in the taxpayer’s personal tax return.

The Minister assessed a penalty on the taxpayer, finding that the taxpayer was grossly negligent in understating his income by the $17,500. The Minister argued that the amount could not have escaped the taxpayer’s purview, as the amount would have arisen several times when the taxpayer was conducting the company’s affairs. To support this argument, the Minister provided documentary evidence that the taxpayer was indeed responsible for all the banking transactions of the investment company, indicating that the $17,500 must have come to his attention during his functions as a secretary-treasurer of the company.

The taxpayer appealed the Minister’s assessment of the penalty. The taxpayer claimed that the amount of unreported income was immaterial given the taxpayer’s much larger total income in the year in question, which was shown to be approximately $90,000. Furthermore, the taxpayer provided documentary evidence that his business affairs were extremely complex: the taxpayer’s income was derived from a variety of sources and the amounts of payments, receipts and expenses likely amounted to one or even two million dollars during the year in question. This complexity was further reiterated by the taxpayer’s sizeable fifty-three-page tax return.

The Court found that the taxpayer was not grossly negligent on the basis that the unreported amount was immaterial as: (i) the unreported amount was small in comparison to the taxpayer’s more significant total taxable income; and (ii) the
taxpayer’s business affairs were extremely complex, such that the error was inconsequential considering the taxpayer’s overall business complexity.

2. **Vigeant v. Canada, 2009 TCC 143**

In this case, the taxpayer appealed the assessment and penalties in respect of the 1998, 1999 and 2000 taxation years. The Minister added $6,512 for 1998, $74,548 for 1999 and $41,043 for 2000 as unreported business income, using the net worth assessment method. Because the Minister’s assessments were made beyond the normal reassessment period, the Minister was required to show the taxpayer made a misrepresentation that was attributable to neglect, carelessness or wilful default in addition to bearing the burden of establishing the facts justifying the penalties.

The Tax Court of Canada held that the Minister was justified in making the assessments outside the normal period. There was evidence that the taxpayer had made misrepresentations with respect to capital gains, capital cost allowances and income from an estate. The Tax Court of Canada ruled that: (i) the taxpayer was not justified in asking that only the errors in the assessment to his disadvantage be corrected, especially since the taxpayer did not provide evidence to establish his true cost of living; and (ii) the taxpayer had not adduced credible evidence regarding supposed gifts and expenses.

3. **Dao v. Canada, 2010 TCC 84**

In this Tax Court of Canada case, the taxpayer appealed the assessment and penalties in respect of the 1998, 1999, 2000 and 2001 taxation years. The taxpayer was audited in 2002 following a newspaper article, which described a police raid on a residence which was solely owned by the taxpayer. The raid resulted in seizure of marijuana plants and $50,000 worth of hydroponic equipment. The audit revealed that in the tax years in question, the taxpayer had substantial funds in her bank accounts that were not reported in her tax returns. The taxpayer asserted that these apparent increases in her net worth were attributable to non-taxable sources, in particular loans from relatives, friends and coworkers. The appeal involved two issues: whether the Minister was justified in auditing statute barred years, and whether the gross negligence penalties were justified.

In the audit, the taxpayer’s 1998 and 1999 taxation years were assessed beyond the normal assessment period. The reassessment relied on the net worth method, and
resulted in an increase in the taxpayer’s total income by the amounts of $78,000, $107,858, $42,585, and $129,942 respectively. In addition, the Minister imposed penalties pursuant to subsection 163(2) of the Act.

On the first issue, the Tax Court found that the Minister was justified in reassessing statute-barred years, on the grounds that the taxpayer’s misrepresentations relating to her income were attributable to neglect, carelessness, and to wilful deceit. Here, the Tax Court rejected the taxpayer’s assertion that the unreported net worth was attributable to loans, because her evidence regarding these loans was unconvincing. On the second issue, the Tax Court held in favor of the imposition of penalties. In coming to this conclusion, the Tax Court emphasized that a necessary ingredient to conduct justifying gross negligence penalties is the mens rea of intent or recklessness. This means that the Minister must show more than an inability to provide a credible explanation for unreported income.

The Tax Court found that (i) the omissions were significant in relation to the declared income, sometimes triple the amount of reported income; (ii) the omissions had occurred over a number of years; and (iii) the taxpayer had used a tax preparer and had controlled the information supplied to him to complete the returns. The Court concluded that the Minister had succeeded in establishing that (i) the taxpayer had been deliberately deceitful; and (ii) had engaged in a wilful misrepresentation with the intent of concealing taxable sources of income.

(iii) SINGLE OMISSION TO REPORT INCOME

1. **Snelgrove v. Canada, 79 DTC 780**

   In this Tax Review Board case, the taxpayer appealed against the penalty portion of an income tax assessment for one tax year. The taxpayer was a businessman with income from salary, commissions, dividends and interest. In January 1976, the taxpayer cashed Canada Savings Bond Coupons in the amount of $22,540.00 and received a T-600 form issued by the bank. However, when the taxpayer filed his income tax return in April 1977 in respect of his 1976 taxation year, he did not report this income.

   The taxpayer claimed that he misplaced the T-600 and forgot about it when giving all his 1976 income tax information to his accountants. He testified that this was the only experience he could recall with the T-600 form, and that if the bank had instead issued the T-5 form, with which he was familiar, the result might have been different.
The Tax Review Board allowed the taxpayer’s appeal. It held that when dealing with a taxpayer who is normally careful and diligent about his affairs, the “gross negligence” in an instance of a single transgression must be virtually indistinguishable from “knowingly.” The Board also noted that the fact that the omitted amount was substantial, both in itself and as a portion of the taxpayer’s total income, was not determinative: it was the taxpayer’s conduct, rather than the amount at issue, that established gross negligence. In this case, the single omission in an otherwise acceptable and appropriate record by the taxpayer fell considerably short of gross negligence.

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