

**INCOME TAX****ASSESSMENT AND REASSESSMENT**

Appeal from Tax Court of Canada decision (Tax Court Docket: 2016-410(IT)G)) dismissing appellant's appeal from reassessments made under *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 in 2015 to include substantial sums in appellant's income as shareholder benefits for 2007 to 2011 taxation years — Sums at issue excluded certain amounts parties agreeing to — Gross negligence penalties included in reassessments — Appellant, industrial engineer — After leaving employment, incorporated numbered company for purpose of carrying on engineering consulting work — Later, appellant formed M.D. Consulting 2005 Inc. (M.D. Consulting), which relevant corporation in present appeal — M.D. Consulting continued to carry on engineering consulting work; appellant then transferred everything from numbered company to M.D. Consulting company — During years 2007 to 2011, various amounts withdrawn from M.D. Consulting account, transferred to appellant's personal account or accounts of his immediate family members — M.D. Consulting also paid certain personal expenses — Reassessed on basis amounts representing benefits that were conferred on appellant as shareholder of M.D. Consulting; hence were included in appellant's income under Act, s. 15(1) — For years 2007 to 2010, notices of reassessment issued after expiration of normal reassessment period — As well, for each taxation year, gross negligence penalties assessed under Act, s. 163(2) — Appellant submitting was simply withdrawing money that he had previously transferred to M.D. Consulting — Tax Court determining that Minister of National Revenue (Minister) could reassess appellant's statute-barred years, assess gross negligence penalties — Whether Tax Court erring by: shifting burden of proof from Minister to appellant in relation to reassessing statute barred years, assessing gross negligence penalties; relying on adverse inferences that Tax Court drawing against appellant before Minister established *prima facie* case; and misapplying evidence to legal test in *Lacroix v. Canada, 2008 FCA 241* — Given absence of fraud allegation in present appeal, in order to reassess statute-barred years (2007 to 2010), Minister having to prove, on balance of probabilities, that appellant made misrepresentation; that such misrepresentation attributable to neglect, carelessness or wilful default — In present appeal, reassessment for 2011 before Tax Court not statute-barred — Regarding burden of proof, appellant emphasized that no dispute that he transferred substantial sums to M.D. consulting, argued that Tax Court not considering such evidence — However, details concerning exact amounts transferred, timing of transfers were missing — Act requiring specific amount in order to calculate taxpayer's income, not general, vague description of uncertain amounts — Also clear that appellant did not maintain shareholder loan account for M.D. Consulting that accurately included amounts in issue; that even reconciliation completed for appellant's objection, appeal failed to include substantial transfers from M.D. Consulting to appellant, his family that were subject of present appeal — As result, while Tax Court should have first acknowledged that onus was on Minister to establish facts that would justify reassessments issued for statute-barred years, sufficient evidence existed before Tax Court to conclude that Minister satisfied this onus — Appellant had made misrepresentation in his tax returns for 2007 to 2010 by not reporting amounts that were transferred to him, his family by M.D. Consulting, which, based on evidence, were not, on balance of probabilities, repayments of amounts due to him — Such misrepresentation attributable to neglect or carelessness of appellant in not properly maintaining shareholders' loan account that might have justified payment of amounts to him as repayment of his shareholder's loan — Therefore, appellant could not succeed on this ground of appeal in relation to reassessments issued for statute-barred years — Only objection appellant stated about adverse inference Tax Court drawing was Minister's alleged failure to first establish *prima facie* case that appellant had made misrepresentation that was attributable to neglect or

carelessness — In present case, given substantial sums transferred from M.D. Consulting to appellant, his family which sums not included in his income, not reflected in shareholders' loan account, Minister therefore establishing *prima facie* case that appellant made misrepresentation in not including these amounts in his income for years in question — As result, no basis to interfere with drawing of adverse inference against appellant for failing to call his accountant or bookkeeper or presenting properly completed shareholders' loan account reconciliation — Tax Court erring in applying Court's decision in *Lacroix* to facts of present case — Statutory requirements for reassessing statute-barred year not same as those for assessing gross negligence penalties — Right to reassess statute-barred year set out in Act, 152(4)(a) — Unless taxpayer filing waiver within prescribed period of time, Minister may only reassess taxpayer in relation to statute-barred year if "the taxpayer or person filing the return (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act" — By contrast, penalties can only be assessed under Act, s. 163(2) if taxpayer's conduct amounting to gross negligence — Neglect or carelessness should not be confused with gross negligence — Conduct that would justify assessment of gross negligence penalty is conduct that is tantamount to intentional acting — Simply finding that unreported amount is taxable not inevitably leading to conclusion that gross negligence penalty justified — Tax Court effectively equating test for determining whether gross negligence penalty should be assessed with test for determining whether amounts were taxable; erring in doing so — Right to reassess statute-barred year, to assess gross negligence penalty both premised on taxpayer having unreported income for particular taxation year — Once established that taxpayer had unreported income, circumstances relating to failure to report income must be examined to determine if such failure was attributable to neglect, carelessness, wilful default or fraud (to reassess statute-barred year) or gross negligence (to justify assessment of gross negligence penalty) — Since appellant's position was that he was simply repaying himself amounts that he had previously advanced to M.D. Consulting, no basis for conclusion that appellant admittedly knew he received shareholder benefits — Such conclusion formed foundation for Tax Court's finding that gross negligence penalties should be confirmed — Therefore, Tax Court made palpable, overriding error in reaching this conclusion — In confirming assessment of gross negligence penalties, Tax Court not considering evidence that M.D. Consulting lost money in every taxation year — Fact that M.D. Consulting incurred losses throughout its corporate history supported viable, reasonable hypothesis that M.D. Consulting could have been simply repaying appellant amounts that he had previously advanced to M.D. Consulting — No other identified source for these funds — Appellant's failure to maintain proper records that might have established that M.D. Consulting was repaying amounts payable to appellant not establishing that his failure to include amounts withdrawn in his income demonstrated "high degree of negligence tantamount to intentional acting" or that appellant indifferent whether he complied with Act — Consequently, appellant's failure to include amounts reassessed in his income, in circumstances of case, not amounting to gross negligence — Appeal allowed in relation to assessment of gross negligence penalties but dismissed in relation to amounts included in appellant's income.

DEYAB V. CANADA (A--363--19, 2020 FCA 222, Webb J.A., reasons for judgment dated December 21, 2020, 29 pp.)