BETWEEN:

ALEX PASHOVITZ .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1961

Apr. 24, 25, 26, 27, 28
May 1, 2, 3, 4

May 30

Revenue—Income tax—Penalties—Wilful evasion of tax—Preponderance of evidence sufficient to disprove intention to evade—Evidence of ignorance of taxpayer—No intent to wilfully evade tax—Appeal allowed.

The appellant, a farmer with little knowledge of accounting, made incorrect income tax returns for several taxation years, and the Minister, following an investigation, added to what the appellant had declared in his returns certain unreported income from the operation by the appellant of a farm in partnership with his father and disallowed certain expenses which the appellant claimed as deductions and thereupon assessed tax and penalties under s. 51(1) of the 1948 *Income Tax Act* for late filing of returns, and under s. 51A of the same Act for wilfully evading or attempting to evade payment of tax. On appeal from the judgment of the Tax Appeal Board, which allowed the appellant's appeal in part

Held: That on an appeal to this Court from an assessment of penalties made by the Minister in the exercise of the power to assess penalties conferred on him by s. 42 of the 1948 *Income Tax Act* (now s. 46) the onus is on the taxpayer to show that the assessment is wrong.

2. That on the evidence the appellant was entitled to deductions in respect of some of the disputed items and that the assessments of tax and penalties under s. 51(1) should be varied accordingly.

3. That save in respect of one item the appellant has satisfied the onus of showing that he did not wilfully attempt to evade payment of tax and that the assessments of penalties under s. 51A should be discharged except in respect of the item as to which the onus had not been satisfied.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Saskatoon.

Andrew Hawrish for appellant.

E. N. Hughes and *C. S. Bergh* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (May 30, 1961) delivered the following judgment:

These are appeals from a judgment of the Income Tax Appeal Board, allowing in part appeals from assessments of income tax and penalties in respect of the taxation years

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1950, 1951, and 1952. The matters in issue are, first, the right of the appellant to certain deductions in computing his income and, second, whether he has incurred any of the penalties so assessed.

The appellant is a farmer and lives at Struan, Saskatchewan, where, in partnership with his father, Nick Pashovitz, he operates a farm consisting of nine quarter sections. On this farm he grows grain and raises cattle. He is now 38 years of age. He has a Grade VII education, and he speaks English plainly enough, but his vocabulary is limited, and he is slow in understanding anything but plain and simple words. On the other hand, once he thinks he understands a question, he does not seem to be lacking in either mental agility or candour. He knows little, if anything, of income tax law or accounting and knew even less of those subjects before the assessments in question were made. His father is 77 years of age and appears to have taken no very great part in the activities of the partnership even as far back as 1950 to 1952. He was not called as a witness.

The appellant filed an income tax return for 1947 but filed none thereafter until 1953, when he filed a return for the year 1952. He did not consider that he had any taxable income in the intervening years. Subsequently, in August, 1953, at the Minister's request he filed returns for the years 1950 and 1951. All three returns showed no taxable income. Some time later the appellant was requested to send in his records and vouchers, which he did, and ultimately, on January 6, 1956, the assessments giving rise to these appeals were made.

He thereupon filed notices of objection, raising a number of contentions respecting the computations of his income for the years in question and challenging the assessments of the penalties. He subsequently found some further vouchers and records of expenditures which he transmitted to the Department, and he arranged to have Mr. John Antonenko, a merchant who had supplied merchandise and repair services, prepare a summary (Ex. 1) of such purchases and services for the years in question. Some time later, at the request of the Department, Mr. Antonenko delivered to an officer of the Department his copies of the bills for such

merchandise supplied and services rendered. None of these vouchers or records have been in the appellant's possession since they were delivered to the Department in 1956. In January, 1958, the Minister by notification undertook to allow some further capital cost allowance in respect of each of the three years but otherwise confirmed the assessments, whereupon the appellant appealed to the Income Tax Appeal Board. The matter came before the Board on two occasions, the first in November, 1958, when, after a number of witnesses had been heard, it was adjourned without day, and the second in May, 1959. Following the latter hearing, the judgment now appealed from was rendered. By it, the appellant's appeals were allowed in part to reflect a revision of the net income of the partnership as follows:

	Net Income Assessed	*Revised Net Income*
1950	8,165.00	8,810.94
1951	6,313.80	5,464.39
1952	15,048.41	14,266.12

The appellant thereupon appealed to this Court, and the Minister cross-appealed, though the cross-appeal was abandoned at the opening of the trial.

As the appellant's return for the year 1952 was the first of the returns for the three years in question to be filed and the question of liability for penalty under s. 51A of the *Income Tax Act*, S. of C. 1948, c. 52, as amended by S. of C. 1950, c. 40, s. 19, arises first in connection with that year, it will be convenient to deal with it first.

In his return for 1952, the appellant reported the revenue of the partnership for the year as follows:

Crops and seeds—wheat	5,405.37
Participation certificates	3,405.40
Livestock sales cattle	1,035.41
	9,846.18

From this, there was deducted a total of $7,575.42 for expenses, including capital cost allowance of $2,494.24, to leave a net profit from the operation for the year of $2,270.76, of which the appellant's share was one half.

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In making the assessment, the Minister added to the computation of the partnership income for the year the following:

1. Omitted grain sales	10,073.89
2. Omitted Wheat Board payments	1,381.06
3. Rent expense claimed and not included in income	521.54
4. Overstatement of expenses	127.10
5. Capital cost allowance adjustment	424.06

and he assessed tax accordingly, together with a penalty of $58.23 pursuant to s. 51(1) of the Act for late filing of the return and a further penalty of $358.45 pursuant to s. 51A of the Act. So far as liability for tax is concerned, no issue is raised in this appeal with respect to the inclusion of items 1, 2 and 3 in computing the income of the partnership, though they enter into the question of liability for the penalty under s. 51A. With respect to item 5, the Minister in his notification undertook to allow an additional amount of $212.03 as a deduction in respect of capital cost allowance and, by an amendment to his reply made at the opening of the trial, conceded the right of the appellant to deduct in respect of capital cost allowance the whole sum claimed in his return. No issue, therefore, arises on this item as well, but the appellant is entitled to have the assessment varied so as to reflect this concession.

The real issue as to the tax assessed for 1952 revolves around item 4. No particulars were given in the reply, nor do they appear to have been demanded, as to what among the whole mass of items of expenses making up a total of over $4,000 the Minister had singled out for disallowance, the plea being simply that, in making the assessment, he assumed that in the "Statement of Income and Expenses" contained in the appellant's income tax return there was included as operating expenses of the partnership amounts aggregating in the sum of $127.10, which were not outlays or expenses made or incurred by the partnership for the purpose of gaining or producing income. On examination for discovery, however, an officer designated to answer for the Minister stated that what was disallowed was $190.55 out of a total sum of $880.27 which had been charged in the appellant's return as Repairs and Maintenance and Auto and Truck Expenses. The disallowance had, however, been

reduced by $63.47 because operating expenses of farm machinery (except repairs), which had been stated at $845.92, had been allowed at an amount higher to that extent, thus reducing the disallowance to $127.18. He further stated, however, that the Minister had since found vouchers for $879.57 for repairs, as well as vouchers for $933.15 for operating expenses for which only $845.92 had been claimed under the heading "Farm Machinery Expenses" (gas, oil, etc.—except repairs) and vouchers for $357.75 for fertilizer and spray, of which only $131.25 had been claimed. It is, therefore, obvious that the disallowance of $129.10 of the expenses claimed by the appellant in his return cannot stand.

The matter, however, does not end there, for the appellant by his notice of appeal claims the right to further deductions of $2,516.76 for what are referred to therein as additional operating expenses and $750 for livestock purchased in the year. Here again the record contains no particulars of the sum of $2,516.76, though the right to such deductions was not admitted.

On the evidence, including the admissions by the officer examined for discovery, I find that expenditures were made in respect of which the appellant is entitled to deductions as follows:

Repairs and maintenance, including repairs to buildings and machinery and auto and truck expense	2,023.00
Farm machinery operating expense	933.15
Fertilizer and spray	431.20
Livestock purchased	1,785.41

in place of the amounts claimed in respect of these items in the appellant's income tax return. The evidence leaves me unsatisfied that the appellant is entitled to further deductions in respect of any other items and deductions in respect of the remaining items other than capital cost allowance will stand as dealt with by the Minister in making the assessment.

The appellant's income for 1952 will be computed accordingly and the assessment of tax for the year varied as indicated.

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I turn now to the question of the penalty of $358.45 assessed by the Minister under s. 51A of the Act. That section read as follows:

> Every person who has wilfully, in any manner, evaded or attempted to evade payment of the tax payable by him under this Part for a taxation year or any part thereof is liable to a penalty, to be fixed by the Minister, of not less than 25% and not more than 50% of the amount of the tax evaded or sought to be evaded.

No particulars of what the appellant did to incur this penalty or of how it was calculated were given in the notice of assessment or in the Minister's reply. On the examination for discovery, however, it was stated that the Minister had "no factors other than the understatement of income and the overstatement of expenses", and at the trial it was not argued that the penalty had been incurred in any other manner.

The Minister's authority to assess such a penalty arose under s. 42, now s. 46 of the Act, by s-s. (1) of which he was required, with all due dispatch, to "examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable". By s-s. (4) of the same section, as it then read, he was also authorized to assess tax, interest or penalties at any time and within the times limited by clauses (*a*) and (*b*) to re-assess or make additional assessments.

Section 53 (now 58) provided that a taxpayer who objected to an assessment under Part I might serve a notice of objection on the Minister, who was thereupon required to reconsider the assessment and vacate, confirm, or modify it or reassess and to notify the taxpayer. By s. 54 (now s. 59) a right was given to the taxpayer who had served a notice of objection to an assessment to appeal to the Income Tax Appeal Board to have the assessment vacated or varied, and by s. 55 (now 60) both the taxpayer and the Minister were given rights to appeal to this Court. By s. 91 (now s. 100), after prescribing the material to be filed in this Court, it was provided in s-s. (3) that, upon the filing of such material, "the matter shall be deemed an action in the court and, unless the court otherwise orders, ready for hearing".

When assessments of tax are made, they are made pursuant to s. 42 (now s. 46), and it has been held under similar provisions contained in the *Income War Tax Act* that, on an appeal to this Court from such an assessment, the onus of proof that there is error in it falls on the taxpayer.

In *Johnson v. Minister of National Revenue*[1], Rand J., speaking for the majority of the Supreme Court, said at p. 489:

> Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.
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> The allegations necessary to the appeal depend upon the construction of the statute and its application to the facts and the pleadings are to facilitate the determination of the issues. It must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy. But unless the Crown is to be placed in the position of a plaintiff or appellant, I cannot see how pleadings shift the burden from what it would be without them. Since the taxpayer in this case must establish something, it seems to me that that something is the existence of facts or law showing an error in relation to the taxation imposed on him.

Kellock J. said at 492:

> As I read the provisions of the statute commencing with section 58, a person who objects to an assessment is obliged to place before the Minister on his appeal the evidence and the reasons which support his objection. It is for him to substantiate the objection. If he does not do so he would, in my opinion, fail in his appeal. That is not to say, of course that if he places before the Minister facts which entitle him to succeed, the Minister may arbitrarily dismiss the appeal. No question of that sort arises here, and I am deciding nothing with respect to it.
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> I further think that that situation persists right down to the time when the matter is in the Exchequer Court under the provisions of section 63. I regard the pleadings, which may be directed to be filed under subsection 2 of that section, as merely defining the issues which arise on the documents required to be filed in the court without changing the onus existing before any such order is made. In my opinion therefore the learned judge below was right in his view that the onus lay upon the appellant.

[1] [1948] S.C.R. 486.

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It was submitted that the rule was otherwise where a penalty has been assessed and that, in this instance, the onus of proving liability for the penalty rests on the Minister. In my opinion, a taxpayer upon whom an assessment of penalty is made is entitled as a matter of course to particulars of what the Minister has assumed as facts giving rise to the taxpayer's liability for the penalty assessed, but I can see no sufficient reason for making any distinction as to the onus of proof, and the reasoning of Rand and Kellock JJ. in the passages quoted appears to me to apply in the case of an assessment of a penalty just as forcibly as in the case of an assessment of tax. I am, therefore, of the opinion that it falls on the taxpayer appealing such an assessment to "demolish the basic fact" on which his liability for the penalty rests.

The proceedings are, however, of a civil nature, and a preponderance of evidence is sufficient. Moreover, the essential facts giving rise to liability for penalty under s. 51A are not the same as those which give rise to liability for tax. For example, errors in the taxpayer's returns, whether made intentionally or otherwise, have no effect on his liability for tax. Under s. 51A, however, the intention to evade taxation is of the first importance, and a taxpayer's ignorance of what is required of him, rather than an intention to evade, may account for the errors and absolve him from liability. To take another example, for purposes of liability for tax a taxpayer, failing to keep adequate records, may find himself in the unfortunate position of being unable to disprove the correctness of an assessment. But the failure to keep records is not necessarily accompanied by an intention to avoid payment of tax and by itself leads to no conclusion on the question of liability for penalty under s. 51A. It is also to be observed that liability for the penalty provided by s. 51A arises only from conduct by which a person "wilfully evades or attempts to evade payment of the tax payable by him for a taxation year or any part thereof", and the penalty is fixed at a percentage of the tax so evaded or sought to be evaded. This, in my opinion, directs the enquiry to particular years and particular tax, rather than to the picture that may be presented by viewing a taxpayer's conduct in respect of several years together, though the latter may be of assistance in determining the material questions.

Turning now to the allegation that the appellant understated his income for the year 1952, there is the fact that in the year 1952 to his knowledge the partners sold grain to the extent of $10,073.89 which was not included in the computation of the partnership income for the year. There is also, for what it is worth, the fact that the addition of this sum, as well as of $1,381.06 of Wheat Board payments, in the computation by the Minister is not now contested. The grain so sold, however, was undoubtedly part of a considerable stock of grain grown in earlier years which was on hand at the beginning of 1952. Moreover, the appellant had not filed returns for the years 1948 to 1951 and had established no method of computing income for income tax purposes from the partnership operations for those years, nor was he under any necessity to adopt a cash received method for computing the partnership income for 1952. He was obliged to compute the income by a method which would accurately reflect the profit from the operation for the year, but it was only that year that was being dealt with at that time, and to include in the computation the receipts from the sale during the year of grain held at the beginning of the year without deducting its value at the beginning of the year would have given a distorted result unless by chance the quantity of grain remaining on hand at the end of the year were the same as at its beginning. At the trial, the appellant stated that when, some years earlier, he filed an income tax return for 1947, he did so according to his understanding of the answer to a question set out in a Department of National Revenue publication entitled *Prairie Farmers Income Tax Guide* and that he followed the same principle in computing the partnership income for 1952, the principle being that only the crop grown in the year is regarded as income for the year. He figured out the acreage under cultivation for the year and the yield per acre and reported as receipts from grain only what he realized from the sale of that quantity of grain. There are no details in the record as to the year when the grain represented by the Wheat Board payments totalling $1,381.06 was grown, but the appellant said he followed approximately the same method in reporting Wheat Board payments. In this, he is borne out to some extent by the fact that, in his return for 1950, filed some months later, he included Wheat

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Board payments received in 1951 for 1950 crops, and it may be noted that this, while not consistent with a cash received method of accounting, was not challenged by the Minister in making the assessment for that year. In the circumstances, I would infer that the Wheat Board payments added by the Minister to the 1952 income were for wheat grown in an earlier year or years and received in 1952. The appellant was subjected to a searching cross-examination, extending over more than a full day of the trial, but, while conceding that there are errors in his returns, he stoutly maintained that he had not intentionally misrepresented anything, and in my judgment his evidence on this question remained unshaken. It is not surprising that his memory should be poor on matters of detail after a period of eight years, and particularly so in view of the fact that he has not had possession of his documents or records for most of that time. Nor did he or his counsel have them for the purpose of preparing and organizing the presentation of his case. On the whole, though I think his evidence is subject to some discount on matters of detail, I regard it as generally credible, and I find that he did not wilfully evade or attempt to evade the payment of tax by not including the sums in question in the partnership income reported in his income tax return for 1952.

It is also apparent from what has been said that, instead of overstating the partnership expenses, the appellant considerably understated them in the return, a result which, in my opinion, flowed from his unorganized method of keeping account of the expenditures, rather than from an intention to mislead. No explanation was given as to how the $521.54 charged for rent expense, the disallowance of which by the Minister is not now in issue, came to be included in the expenditures, but, having regard to the appellant's evidence that he made up the return to the best of his ability and did not intentionally misrepresent anything, I regard this as having been done through ignorance, and I find that he did not wilfully seek to evade payment of tax for the year by including the $524.54 in the deductible expenses of the partnership. The assessment of penalty under s. 51A will accordingly be vacated.

I turn next to the penalty of $58.23 for late filing of the return. The provision by which such a penalty was imposed was s. 51(1), which read as follows:

> Every person who has failed to make a return as and when required by subsection (1) of section 40 is liable to a penalty of
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> (*a*) an amount equal to 5% of the tax that was unpaid when the return was required to be filed, if the tax payable under this Part that was unpaid at that time was less than $10,000, and
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> (*b*) $500, if at the time the return was required to be filed tax payable under this Part equal to $10,000 or more was unpaid.

In the case of this section, as well, I am of the opinion that the onus of demolishing the basic fact on which the assessment rests is on the appellant.

The appellant on or about April 8, 1953 employed a Mr. Henderson, an insurance agent and income tax consultant, to make up the return, which Mr. Henderson did on the same day. At the appellant's request, he also made up a return for Nick Pashovitz, and the appellant took it to his father for signature, after which he returned it to Mr. Henderson. There is, however, no evidence that the returns were sent to or filed at the District Taxation Office on or before April 30, 1953, as was required by s. 40(1). The onus is, accordingly, not discharged, and the appellant is liable for a penalty under s. 51(1), but in view of the findings which I have made as to the appellant's income for the year the amount of the penalty must be varied so as not to exceed what s. 51(1) provided.

The appellant's returns for the years 1950 and 1951 were both dated August 25, 1953. In them he reported the income of the partnership as follows:

	1950	*1951*
Crops and seeds—wheat	5,383.03	3,262.82
Participation certificates	2,884.45	1,333.11
Livestock and livestock products		
5 head cattle		1,100.00
	8,267.48	5,695.93
Less total expenses	4,968.52	5,891.47
		deficit
	3,298.96	195.54

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In the assessments for these years, the Minister added to this income the following:

	1950	*1951*
1. Omitted grain sales	1,508.07	4,116.08
2. Omitted cattle sales	1,722.68	1,011.04
3. Rent expense claimed not paid	300.00	
4. Overstatement of operating expenses	800.79	812.22
5. Capital cost allowance not allowed	235.00	270.00

and he assessed tax accordingly, together with penalties of $16.78 and $8.31 respectively, under s. 51(1) for late filing of the returns and $76.96 and $26.82 respectively pursuant to s. 51A of the Act.

So far as liability for tax is concerned, no issue is now raised as to the inclusion of items 1 and 2 in the computation of income though, as in the case of the 1952 assessment, these items are involved in the question of liability for penalties under s. 51A. With respect to item 5, the Minister by his notification undertook to allow a portion of the disallowed capital cost allowance and now concedes the appellant's right to deduct the full amount claimed in the returns. The assessments must, accordingly, be varied so as to reflect these concessions.

Issue does arise, however, over items 3 and 4. With respect to item 3, I am not satisfied that the partnership paid rent otherwise than by delivery of grain for which payment was made by the purchaser directly to the landlord or that the amount of the rent paid was included in what was accounted for as receipts. The disallowance of the deduction claimed will, accordingly, stand.

With respect to item 4, it will be convenient to deal separately with each year. The officer examined for discovery stated that the expenses disallowed were as follows for 1950.

	Claimed	*Disallowed*
Insurance	30.00	30.00
Repairs & Maintenance 159.91 Auto 126.00 Truck 265.00 391.00	650.91	486.89
Operating expenses of farm machinery (except repairs)	1,011.11	283.90
		$ 800.79

The officer admitted, however, that he had vouchers which the Minister would allow under the item headed "Operating Expenses" amounting to $1,209.79 and $28.15 in excess of

what had been claimed in respect of small tools. The disallowance of $283.90 of the sum claimed as operating expenses of farm machinery is, therefore, not justified, and from these admissions alone it would appear that the total amount disallowed should be reduced by $510.73. The appellant, on the other hand, not only disputes the whole of the disallowance of $486.89 under the item "Repairs, etc." but claims the right to further deductions of $1,284.74 for what are referred to in his notice of appeal simply as additional expenses. The right to make such deductions was not admitted. On the evidence, including the admissions made by the officer examined for discovery, I find that expenditures were made in respect of which the appellant is entitled to deductions as follows:

Repairs and Maintenance (including repairs to buildings), Auto and Truck expenses	1,048.65
Operating expenses of farm machinery (except repairs)	1,209.79
Fertilizer and Spray	211.15
Small tools	58.15

in place of the amounts claimed in respect of these items in the appellant's income tax return. The evidence leaves me unsatisfied that the appellant is entitled to further deductions in respect of any other items, and deductions in respect of the remaining items other than capital cost allowance will stand as dealt with by the Minister in making the assessment.

The appellant's income for 1950 will be re-computed accordingly and the assessment of tax for the year varied to the extent indicated.

With respect to the year 1951, the officer examined for discovery stated that the expenses disallowed were as follows:

			Claimed	*Disallowed*
Taxes			459.25	70.00
Insurance			30.00	30.00
				[Fwd. 100.00]
Repairs and Maintenance		295.11		
Auto	123.20		676.31	326.93
Truck	258.00	381.20		
Operating expenses of farm machinery (except repairs)			950.76	293.29
Containers and twine			128.00	32.00
Fertilizer and spray			60.00	60.00
				812.22

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He also admitted, however, that the Minister had found that the expenses of maintenance and repairs had amounted to $386.35 and the auto and truck expenses to $476.24, the latter two totalling $862.59, and the fertilizer and spray expenses to $524.48. The disallowance of $326.93 of the amounts claimed under the items for repairs and maintenance and auto and truck expenses and $60 as claimed for fertilizer and spray is, therefore, not justified, and from these admissions alone it appears to me that not only should nothing have been disallowed under these items but that the deductions claimed by the appellant under them should have been increased. Again, however, the matter does not end there, for the appellant not only disputes the disallowances but claims the right to further deductions of $2,074.81 for what are referred to in his notice of appeal simply as additional expenses and $460.00 for livestock purchased. The right to make such deductions was not admitted. On the evidence, including the admissions made by the officer examined for discovery, I find that expenditures were made in respect of which the appellant is entitled to deductions as follows in place of the amounts claimed in respect of these items in the appellant's income tax return.

Repairs and maintenance (including repairs to buildings), auto and truck expenses	1,677.00
Operating expenses of farm machinery (except repairs)	942.34
Livestock purchased	481.25
Fertilizer and spray	524.48

The evidence leaves me unsatisfied that the appellant is entitled to additional deductions in respect of any other items and deductions in respect of the remaining items other than capital cost allowance will stand as dealt with by the Minister in making the assessment.

The appellant's income for 1951 will be re-computed accordingly and the assessment of tax for the year varied to the extent indicated.

I come now to the question whether the appellant incurred penalties under s. 51A by understating his income or overstating his expenses in his returns for 1950 and 1951. It is obvious from what I have found that, speaking generally, the operating expenses of the partnership for these years were understated rather than overstated, and while I am not satisfied on the evidence that the appellant is entitled to

a deduction in respect of the $300.00 rent expense claimed in 1950, I am satisfied that the appellant believed when making the return and still believes that it is a deduction to which he is entitled. Nor am I satisfied that the other expenses claimed which have not been allowed were not in fact incurred, even though the appellant has not succeeded in establishing them. It is a long step from this position to say that, by including them, he wilfully sought to evade tax and, while he sets out with a presumption to that effect against him and with the onus upon him of disproving it, his evidence satisfies me that he did not wilfully evade or attempt to evade the tax payable by including them. I am also satisfied that he knew nothing about the basis for computing capital cost allowances and that such errors as were shown to exist in the computations contained in his returns were not made for the purpose of evading tax. In respect to capital cost allowance claims, I am of the opinion that he relied on Mr. Henderson, whose integrity is unquestioned, and I do not think that he understood the computations which Mr. Henderson made or that he knew what information they were or ought to be based upon.

The most troublesome questions with respect to the penalties relate to the income from grain and cattle which the Minister added in making the assessments for 1950 and 1951. The grain sales so added were $1,508.07 in 1950 and $4,116.08 in 1951. That the partners made these sales is not in doubt, and the appellant had no hesitation in admitting that there were errors in his returns. His explanation of how these errors occurred was that, before making up the returns, he went to a Mr. Tetarenko, an elevator agent who had purchased grain from time to time for his employer from the appellant and his father, and had Tetarenko calculate the amount of his grain sales for each of these years. Tetarenko made the calculations and marked the result in the Wheat Board permit books of the appellant and his father, and the appellant copied these figures on a piece of paper and used them in compiling the information for his returns. From his knowledge of the number of acres under cultivation in the year and the yield per acre, it seemed to him to work out to the amount of the crop for the year. The permit books

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were always kept at the elevator, rather than at the appellant's home, and the entries therein were made by the elevator agent who purchased the grain. And though it was the producer's responsibility, as well as that of the agent, to see that all sales were entered, in practice this was left to the agent. In truth, all the sales of grain were not entered in the permit books, and it is the omitted sales which the Minister had added in making the assessments.

After a lengthy consideration of the evidence and bearing in mind that the appellant was a novice in these matters at the time, I have come to the conclusion that his explanation is sufficiently plausible to support his evidence that he did not intentionally misrepresent his income by not accounting for the sales which the Minister has added. I find it more difficult, however, to take this view of his omission to report for 1950 cattle sales amounting to $1,722.68. He said that, in reporting cattle sales, he reported only the excess of selling price over what they had cost him, but this affords at best only a partial explanation, since in 1950 he reported no proceeds at all from cattle sales. Moreover, the size of the amount is such that I find it difficult to believe he would entirely forget about it. If a satisfactory explanation of his failure to report this sum, or at least some portion of it, existed, it was not given in evidence, and in this instance his evidence has not tipped the scale in his favour or persuaded me that his returns from sales of livestock were not intentionally omitted. On the other hand, for 1951 he reported proceeds from the sale of cattle, and while his method of computing the amount was inadequate, I am satisfied by his evidence that he did not wilfully omit what the Minister added for the purpose of evading tax. The assessment of penalty under s. 51A for the year 1950 must, accordingly, be referred back to the Minister for reconsideration and reassessment, having regard to the tax payable by the appellant in respect of the $1,722.68 so omitted. The assessment of penalty under s. 51A for the year 1951 will be vacated.

On the evidence, the appellant's returns for 1950 and 1951 were clearly late, and penalties under s. 51(1) were, accordingly, incurred. The assessments of such penalties

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will, however, be varied so as not to exceed five per cent of the tax payable in respect of those years, based on the appellant's income computed in accordance with this judgment.

The appeals will be allowed to the extent indicated in these reasons, and the assessments varied, referred back or vacated, as stated therein. The appellant will have the costs of the appeals.

Judgment accordingly.