1961
Jan. 16, 17
Apr. 21

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

MAURICE TAYLOR ..... RESPONDENT.

Revenue—Income War Tax Act, s. 55 as enacted by S. of C. 1944-45 c. 43, s. 15 and Income Tax Act 1948, S. of C. 1948, c. 52, s. 42(4)—Limitation period for re-assessment of taxes—Burden of proof on Minister to prove misrepresentation or fraud—"Any misrepresentation" in Act includes both innocent and fraudulent misrepresentation—Appeal allowed.

Respondent taxpayer in filing his income tax returns for the taxation years 1948 and 1949 failed to report debenture interest received by him, gifts made to his wife, and in filing his return submitted a balance sheet which in effect was a net worth statement and in which he failed to include certain debentures which were held by him as part of his personal assets, not connected with his business. In July, 1956, the appellant re-assessed the respondent for these two years from which re-assessment the respondent appealed to the Tax Appeal Board which allowed the appeals. The Minister now appeals from the decision of the Tax Appeal Board to this Court.

Respondent contends that the right of the Minister to re-assess after the lapse of the statutory period of limitation should be confined to cases in which the taxpayer has made a fraudulent misrepresentation or has committed a fraud.

Held: That in every appeal under the Act regarding a re-assessment made after the statutory period of limitation has expired and which is based on fraud or misrepresentation the burden of proof lies on the Minister to first establish to the satisfaction of the Court that the taxpayer has "made any misrepresentation or committed any fraud in filing the returns or in supplying any information under this Act", unless such is admitted by the taxpayer.

2. That the words *any misrepresentation* used in the section of the Act mean any representation that was false in substance and in fact at the material dates and includes both innocent and fraudulent misrepresentations.

3. That in each of the three matters mentioned the respondent made misrepresentations with respect to matters which were material at the times they were made and as the appellant has established that misrepresentations were made in the original returns for both 1948 and 1949 the re-assessments made by him and now under appeal could be made at any time.

APPEAL from the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Windsor, Ontario.

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G. L. Mitchell, Q.C., C. G. S. Dawson and *F. J. Dubrule* for appellant.

Keith Laird, Q.C. for respondent.

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

CAMERON J. now (April 21, 1961) delivered the following judgment:

This is an appeal by the Minister from a decision of the Tax Appeal Board dated January 29, 1958[1] which allowed the respondent's appeals from re-assessments made upon him for the taxation years 1948 and 1949. Each re-assessment was dated July 10, 1956, more than six years after the dates of the original assessments, and the main question for determination is whether such re-assessments were out of time. The Minister relies as to the year 1948 on the provisions of s. 55 of the *Income War Tax Act* and as to the year 1949 on s. 42(4) of the *1948 Income Tax Act*. These sections were as follows:

55. Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess any person for tax, interest and penalties and may

(*a*) at any time, if the taxpayer has made any misrepresentation or committed any fraud in making his return or supplying information under this Act, and

(*b*) within six years from the day of the original assessment in any other case,

re-assess or make additional assessments upon any person for tax, interest and penalties.

42.(4) The Minister may at any time assess tax, interest or penalties and may

(*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and

(*b*) within 6 years from the day of an original assessment in any other case,

re-assess or make additional assessments.

In the Notice of Appeal to this Court it is stated that the re-assessments were made on the assumption that the respondent in filing his returns for these years had made a misrepresentation as to his income, particulars of which were given and will be stated later. At the hearing of the

[1] 18 Tax A.B.C. 403.

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appeal, the Minister applied for leave to amend such notice so as to allege that the re-assessments were made on the assumption that the respondent, in filing his returns, "had made a misrepresentation and/or committed a fraud", and counsel for the respondent not objecting, the amendment was made.

At the commencement of the hearing of the appeal, counsel for the respondent submitted that as the re-assessments under appeal were made more than six years after the date of the original assessments (which I shall hereafter refer to as the statutory period of limitation), the Minister must first establish to the satisfaction of the Court that the taxpayer (or person filing the return) had "made any misrepresentation or committed any fraud in making his return or in supplying information under the Act". So far as I am aware, this is the first occasion on which this question has been before this Court. The general principle in appeals from assessments is that the onus of proving the assessment to be incorrect in fact or in law is on the taxpayer and in this Court that onus is on the taxpayer whether he be appellant or respondent. That principle has been uniformly followed in this Court since the case of *M.N.R. v. Simpson's Ltd.*[1]

After giving the matter the most careful consideration, I have come to the conclusion that in every appeal, whether to the Tax Appeal Board or to this Court, regarding a re-assessment made after the statutory period of limitation has expired and which is based on fraud or misrepresentation, the burden of proof lies on the Minister to first establish to the satisfaction of the Court that the taxpayer (or person filing the return) has "made any misrepresentation or committed any fraud in filing the return or in supplying any information under this Act" unless the taxpayer in the pleadings or in his Notice of Appeal (or, if he be a respondent in this Court, in his reply to the Notice of Appeal) or at the hearing of the appeal has admitted such misrepresentation or fraud. In re-assessing after the lapse of the statutory period for so doing, the Minister must be taken to have alleged misrepresentation or fraud and, if so, he must prove it.

[1] [1953] Ex. C.R. 93.

In Kerr on *Fraud and Mistake,* Seventh Ed., it is stated at p. 669:

> A man who alleges fraud must clearly and distinctly prove the fraud he alleges.

Again in *Halsbury,* Third Ed., vol. 26, at p. 838, it is stated:

> 1558. Since in every form of proceeding based on misrepresentation a misrepresentation of some kind must be established, it follows that the burden of alleging and proving that degree of falsity, which is required for the representation to be a misrepresentation, rests, in every case, on the party who sets it up.

At the hearing of the appeal I intimated that my view of the matter was as I have just stated, and on consideration, I find no reason to change it. Indeed, counsel for the Minister, in answer to a direct question, frankly admitted that he could not argue otherwise.

A further question arose as to the standard of proof applicable in considering the evidence as to whether a fraud had been committed or a misrepresentation made. In my opinion, the standard to be applied is not that applicable in criminal proceedings, namely, proof beyond reasonable doubt, but that applicable in civil proceedings, namely, the standard of balance of probability.

Reference may be made to *Halsbury,* Third Ed., vol. 26, p. 845, where, under the general heading of "Misrepresentation and Inducement", it is stated:

> 1572. In determining whether a representation alleged to have been fraudulent was so made, the standard of proof applicable is the civil standard of balance of probability and not the criminal standard of proof beyond reasonable doubt, but the degree of probability required to establish proof may vary according to the gravity of the allegation to be proved. The question, whether there is any evidence to support an allegation that a representation made was fraudulent, is a question of law. Subject to this, the question whether a false representation was actually fraudulent is, in every case, a question of fact.

As authority for the first proposition, reference is therein made to *Hornal v. Neuberger Products, Ltd.*[1], a decision of the English Court of Appeal, in which it was held:

> In determining the question of fact, viz., whether the representation had been made, the same standard of proof should be applied whether the cause of action was contractual warranty or fraud, and, the standard

[1] [1956] 3 All E.R. 970.

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of proof applicable was the civil standard of a preponderance of probability, which, however, was not an absolute standard, since within it the degree of probability required to establish proof might vary according to the gravity of the allegation to be proved;

In that case Denning L.J., at p. 977, referred to his own judgment in *Bater v. Bater*[1], where at p. 459 he said:

> A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

Finally, on this point I think that when the Minister has satisfied the Court that "any fraud has been committed or any misrepresentation made", he has done all that he is then required to do. He will thereby have fulfilled the statutory requirement which alone authorizes him to make a re-assessment beyond the statutory period of limitation. Thereafter, the onus of proof that there is error in fact or in law in the re-assessment falls on the taxpayer.

Before leaving this part of the case, I must refer to a recent decision in the English courts which is here of special interest. In *Amis v. Colls*[2], Cross J. considered and dismissed an appeal of a taxpayer from a decision of the General Commissioners relating to assessments made more than six years after the fiscal year to which the respective assessments related. The assessments were made under the proviso to s. 47(1) of the *Income Tax Act* 1952, which section was as follows:

> 47. *Time limit for assessments, additional* assessments and surcharges.—(1) Subject to the provisions of this section and to any provision of this Act allowing a longer period in any particular class of case, an assessment, an additional first assessment or a surcharge under any Schedule may be amended or made, as the case may be, under the preceding provisions of this Chapter at any time not later than six years after the end of the year to which the assessment relates or the year for which the person liable to income tax ought to have been charged:
>
> Provided that where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to income tax, assessments, additional assessments and surcharges on that person to income tax for that year may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be amended or made as aforesaid at any time.

[1] [1950] 2 All E.R. 458 at 459. [2] [1960] T.R. 213.

It will be noted that additional assessments could be made after the lapse of six years only where there had been fraud or wilful default and in that respect the section differs from that now under consideration. In that case, Cross J. stated at p. 214:

> It is clear that the onus of establishing that a case falls within the proviso lies on the Revenue authorities.

Then, in reference to the standard of satisfaction necessary in such a case, he said at p. 215:

> A point has been raised as to the standard of satisfaction necessary in such a case as this. Mr. Karmel argued that as the conduct alleged might have formed the subject of criminal proceedings, the proper standard is not satisfaction on the balance of probabilities, as is the normal test in civil proceedings, but satisfaction beyond reasonable doubt, the test in criminal cases. I should have thought that, as these are civil proceedings, the civil standard was the proper one to adopt, but I am prepared to assume for the purposes of argument that the General Commissioners had to be satisfied beyond reasonable doubt.

This is the first occasion in which this Court has had to consider the meaning of the phrase "If the taxpayer has made any misrepresentation or committed any fraud in making his return or in supplying information under the Act". Section 55 of the *Income War Tax Act* (*supra*) was enacted by s. 15 of c. 43, Statutes of Canada, 1944-45, and made applicable on passing. Prior to that date there was no limitation on the right of the Minister to re-assess or make additional assessments at any time, as will appear from the former s. 55, enacted by s. 8 of c. 14, Statutes of Canada, 1932-33, which was made applicable to income of the 1917 taxation period and all subsequent periods, and which read as follows:

> 55. Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess, re-assess or make additional assessments upon any person for tax, interest and penalties.

The effect of the new s. 55, enacted in 1944, was to limit the right of the Minister to make a reassessment more than six years after the date of the original assessment, to cases in which there was misrepresentation or fraud. The six-year period remained in effect until it was reduced to four years by s. 11 of c. 39, Statutes of Canada 1956, and effective January 1, 1957.

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At no time have the Canadian income tax acts defined either "fraud" or "misrepresentation". Those acts are not, in my opinion, matters of technical legislation and it follows, therefore, that the words are to be given their ordinary meaning.

It is to be noted at once that the section authorizes the Minister to re-assess or make further assessments at any time if the taxpayer (or, now, the person making a return) has either "made any misrepresentation" or "committed any fraud". While, therefore, the Minister may re-assess at any time if fraud has been committed, he may also do so if a misrepresentation has been made as provided in the section. I cannot agree with the submission of counsel for the respondent that the words "made any misrepresentation" are to be disregarded and that the commission of something in the nature of fraud alone authorizes the Minister to re-assess at any time, since a construction which would leave without effect any part of the language of the statute will normally be rejected. Reference may also be made to Maxwell on *Interpretation of Statutes,* Tenth Ed., p. 321, where it is stated: "Where analogous words are used each may be presumed to be susceptible of a separate and distinct meaning, for the legislature is not supposed to use words without meaning." For the purpose of this case, it is unnecessary to determine whether fraud has been committed since, in my opinion, the Minister has established that in each of the years the respondent made a misrepresentation in filing his returns or in supplying information under the Act.

Misrepresentations may be either fraudulent or innocent. A fraudulent misrepresentation is a false representation made with the knowledge that it is false, or without an honest belief in its truth, or recklessly without caring whether it is true or false. An innocent misrepresentation is one which is not fraudulent; it is a false statement made in the honest belief that it is true. (*Derry v. Peek*[1] per Lord Herschell)

[1] [1889] 14 A.C. 337.

In Halsbury's *Laws of England*, Third Ed., vol. 26, the nature of a misrepresentation, what constitutes its falsity, and the distinction between innocent and fraudulent misrepresentations, are stated as follows:

1556. *What constitutes falsity.* A representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. For the purpose of determining whether there has or has not been a misrepresentation at all, the knowledge, belief, or other state of mind of the representor is immaterial, save in cases where the representation relates to the representor's state of mind; though his state of mind is of the utmost importance for the purpose of considering whether the misrepresentation was fraudulent.

1557. *Standard for determining falsity.* The standard by which the truth or falsity of a representation is to be judged has been thus expressed. If the material circumstances are incorrectly stated, that is to say, if the discrepancy between the facts as represented and the actual facts is such as would be considered material by a reasonable representee, the representation is false; if otherwise, it is not. Another way of stating the rule is to say that substantial falsity is, on the one hand, necessary, and, on the other, adequate, to establish a misrepresentation. It results from the foregoing statement that where the entire representation is a faithful picture or transcript of the essential facts, no falsity is established, though there may have been any number of inaccuracies in unimportant details. Conversely, if the general impression conveyed is false, the most punctilious and scrupulous accuracy in immaterial minutiae will not avail to render the representation true.

1575. *Misrepresentation innocent if made with honest belief in its truth.* A misrepresentation must be either fraudulent or innocent. It cannot be both. Fraud and innocence, just as much as falsity and truth, are mutually exclusive categories. It follows, therefore, from the definition already given of a fraudulent misrepresentation, as a misrepresentation made in the absence of actual honest belief in its truth, that the essential characteristic of an innocent misrepresentation is the presence of such actual honest belief; and that, in neither case, is anything more than this absence, or presence, required to constitute fraud or innocence respectively.

1576. *Effect of negligence or incompetence in forming belief.* It is well established that a misrepresentation which was founded on a belief in its truth, if that belief really existed, and was genuinely and honestly entertained, is not deprived of its character of innocence by reason of the mere fact that the belief resulted from want of care, skill, or competence, or lapse of memory, though such conduct, in other aspects, may have been of a most culpable character. Negligence is not dishonesty; indeed, it is its direct antithesis. It has been stated that, though negligence does not amount to fraud, it may constitute evidence of it; but the true meaning of this statement is that there may be cases in which the want of care is such that the tribunal appointed to determine the question of fact would be justified in preferring the alternative hypothesis of want of honesty. Carelessness or stupidity in arriving at a genuine conviction must, however, be distinguished from that moral recklessness or callousness, already referred to, which prompts the putting forward of a misrepresentation as to which the representor has no belief at all. Similarly, absence of reasonable grounds for the representor's belief, if in fact it was a real and genuine belief, does not of itself constitute, or indicate fraud; though,

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here again, there may be cases where the alleged belief must have been based on grounds so utterly preposterous as to compel the inference that in fact it never did exist. On the same principle actual failure to recollect a fact, the omission of which renders the representation false, does not of itself render it fraudulent also.

Counsel for the respondent submits that on a true interpretation of the section a mere innocent misrepresentation by a taxpayer is not a ground for authorizing the Minister to re-assess at any time. If it were, he says that the general intention of Parliament to restrict the authority of the Minister to make re-assessments to a period of six years from the date of the original assessment would be so cut down as to be almost completely nullified. In effect, he submits that the right of the Minister to re-assess after the lapse of the statutory period of limitation should be confined to cases in which the taxpayer has made a fraudulent misrepresentation or committed a fraud. If that submission were correct, it would mean that the words "has made any misrepresentation" would be totally redundant and unnecessary since "to make a fraudulent misrepresentation" is to commit a fraud. If Parliament had intended to exclude innocent misrepresentation, it would have been a simple matter to have used the phrase "made any fraudulent misrepresentation".

The principles to be applied where the language of the statute is plain are summed up in a statement in Maxwell's text (and in the cases therein cited) at p. 4:

> When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. Such language best declares, without more, the intention of the lawgiver, and is decisive of it. The rule of construction is "to intend the legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the court as to what is just or expedient. The words cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.

The author then refers to *Sutters v. Briggs*[1], where at p. 8 Lord Birkenhead said:

> Where, as here, the legal issues are not open to serious doubt, our duty is to express a decision, and leave the remedy (if one be resolved upon) to others.

It is to be noted also that the section refers to "*any* misrepresentation" and it would be improper, therefore, to construe that term as excluding a particular sort of misrepresentation such as an innocent misrepresentation. I have reached the conclusion that the words "any misrepresentation", as used in the section, must be construed to mean any representation which was false in substance and in fact at the material date, and that it includes both innocent and fraudulent misrepresentations.

With these considerations in mind, I now turn to the particular facts of this case. The respondent was born in Latvia about sixty-nine years ago, came to Canada in 1903, and, after selling goods from door to door for a few years, established the Sarnia Bargain House in Sarnia, Ontario, selling workmen's clothing. He was the sole proprietor of that business from its inception until it was sold in 1955 and, as the tax returns indicate, the business has been a prosperous one. At all relevant times, he had a current account for his business at the Bank of Nova Scotia in Sarnia. He also had substantial dealings with the Lambton Loan and Investment Company of Sarnia (hereinafter called Lambton Loan) where he had a saving account and in whose debentures or bonds he appears to have invested a large part of his savings.

In the Notice of Appeal to this Court, the particulars of the alleged fraud or misrepresentation are stated to be as follows:

For 1948:

(*a*) That full bond interest was not reported.

(*b*) That two bonds having a combined face value of $5,000 did not appear on the Respondent's balance sheet for this year.

(*c*) That the amount opposite "Cash on Hand & in Bk." on the said balance sheet was improperly stated.

(*d*) That a savings account with the Lambton Loan and Investment Company was omitted from the said balance sheet.

For 1949:

(*a*) That two bonds having a combined face value of $5,000 did not appear on the Respondent's balance sheet for this year.

[1] [1922] 1 A.C. 1.

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(*b*) That the amount opposite "Cash on Hand and in Bank less outstanding Drafts" on the said balance sheet was improperly stated.

(*c*) That a savings account with the Lambton Loan and Investment Company was omitted from the said balance sheet.

(*d*) That the Respondent failed to indicate, in the space provided on his income tax return, that he had made gifts which were required to be reported on the income tax return.

As to Item (*a*) of 1948, the evidence of the appellant's witnesses established (indeed, it is now admitted) that in August, 1948 the respondent cashed four coupons, each of a value of $48.75 ($195 in all), representing interest on $2,000 of debentures of the Lambton Loan (Exhibit 2) purchased by him in March 1946, and which debentures he renewed in 1951 for a further period of five years. No part of that income was reported in his 1948 return.

Items (*b*), (*c*) and (*d*) for 1948, and Items (*a*), (*b*) and (*c*) for 1949 all relate to omissions from or misstatements in the "balance sheet" which formed part of the tax returns. The respondent employed W. L. Smith, a certified public accountant of Sarnia, to prepare his annual tax returns, and, while these were made on the T-1 General form, Smith did not follow the usual practice of completing the respondent's business income by using the form found on p. 4 thereof, entitled "Income from business, professional fees, commissions". In each year, he prepared a typewritten statement consisting of (1) a computation of profit for the business; and (2) a statement of assets and liabilities which is referred to in the Particulars as the "balance sheet". Since the assets specified include such items as the respondent's residence and another building from which he obtained rent, as well as the assets of his business, it was obviously intended to represent all the assets of the respondent, whether in the business or not; and the "surplus", which is the difference between the stated assets and liabilities, apparently refers to his total net worth.

The evidence adduced by the Minister clearly established (and it is now admitted) that the respondent (1) at December 31, 1948, owned (*a*) bonds or debentures of Lambton Loan to the value of $5,000, and (*b*) had a savings account at the Lambton Loan amounting to $823.81, and that neither of these items appeared in the balance sheet attached to the return for that year; and (2) that as

of December 31, 1949, the respondent owned (*a*) debentures or bonds of that company to the value of $8,000 (not $5,000 as stated in the particulars), and (*b*) had a savings account with that company amounting to $838.45 and that neither of these items appeared in the balance sheet forming part of his return for that year. The allegations of fact in Items (*b*) and (*d*) for 1948 and in Items (*a*) and (*c*) for 1949 of the particulars are therefore established.

Item (*c*) for 1948 and Item (*b*) for 1949 are of a similar nature, the former referring to "cash on hand and in bank" and the latter to "cash on hand and in bank less outstanding drafts". There is no evidence as to what cash was on hand at the end of either year, but the actual bank balances at the Bank of Nova Scotia are shown to have been respectively $15,179.81 and $15,439.03, instead of $12,329.81 and $13,439.03 as stated in the returns. In the absence of any evidence as to what drafts and/or cheques were in fact outstanding at the year end, I am unable to find that these items were improperly stated.

As to Item (*d*) for 1949, the appellant has established that in that year the respondent, out of his own monies, purchased $11,000 in debentures of the Lambton Loan in the name of his wife and it is now frankly admitted that these were gifts to her. It is also proven that the respondent in his return for that year did not complete in any way the questionnaire contained on p. 2 thereof, relating to "gift tax" and which was as follows:

Gift Tax.

Did you transfer any property, securities or cash of a value in excess of $1,000 to any person in 1949?

(Yes or No)

If yes, what was the total value of such gifts? $.....

If the total value of such gifts exceeded $4,000, complete and file a gift tax return on or before 30th April, 1950. The form may be obtained from your District Income Tax Office.

These questions remained unanswered, and no gift tax return was filed or gift tax paid thereon.

I must now determine if

(1) The failure of the respondent to include in his 1948 return the income of $195 from the Lambton Loan debentures;

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(2) The omission from the 1948 and 1949 balance sheets of $5,000 and $8,000 in debentures of Lambton Loan, and of the savings account with that company; and

(3) The failure to complete the questionnaire relating to gift tax in his 1949 return,

are "misrepresentations" within the meaning of the section.

It is to be observed that all these matters have nothing to do directly with the respondent's business operations and would be known to an accountant preparing the respondent's income tax returns only if they were communicated to him by the respondent. The evidence is that Mr. Smith prepared the respondent's returns for some thirty-three years, that the respondent annually turned over to him his Liberty Book, current bank account, cheque book, bank statements, as well as a statement of unpaid drafts. A Liberty Book was supplied annually by Smith and was in the simplest possible form, consisting only of a daily record of receipts for goods sold and all disbursements for purchases, wages and other business expenses, with a place at the end for an annual summary. No records for 1948 and 1949, except for the bank account, were produced, and it was suggested that they may have been destroyed by a tornado in 1953. Smith died before the appeal was heard and a search in his office failed to disclose the records for these years.

Now the respondent gave evidence and, while he says he told Smith to go to the Lambton Loan to ascertain the amount of his bonds, income therefrom and the details of his savings account, I find it difficult to believe that he did so. While the evidence is that Smith was extremely careless in preparing income tax returns and not fully conversant with the *Income Tax Act* or rulings made thereunder, it is difficult to believe that he would omit from the returns of income and the statements of the respondent's assets any mention of such bonds or savings account if he had any knowledge of them or had been instructed to look for them. In later years, the returns prepared by Smith did show very substantial holdings of the respondent in Lambton Loan debentures, but not in the proper amounts.

Moreover, I was not convinced that the respondent was entirely worthy of belief. He first swore positively that in purchasing the bonds of Lambton Loan, he invariably paid

for them in cash (not cheques) from surplus money out of the business. After an adjournment, however, he was recalled and he said that all bonds had been paid by cheques on the Bank of Nova Scotia, but a perusal of that bank account for 1948 and 1949 shows no cheques payable to the Lambton Loan. Further, he said that at all times his cash drawings at the store for his own use, and amounting to $50 to $75 per week, were listed in the Liberty Books, but it was found that no such entry was made in any of the later Liberty Books that were produced by the witnesses. It seems reasonable to infer, therefore, that all of these items were omitted from the returns and the balance sheets because the respondent had deliberately refrained from telling Smith about them. The appellant had full knowledge of all the bonds purchased, whether for himself or for his wife, and also of the savings account at the Lambton Loan, and could have given the necessary information to Smith or could have shown him the securities themselves.

It was undoubtedly the duty of the respondent, under the provisions of both the *Income War Tax Act* for 1948 and the *1948 Income Tax Act* for 1949 to make returns of his total income and in cases where the gift tax provision applied, to disclose the amounts of such gifts and pay tax thereon. Under s. 21(1) of the latter Act, the income from the $11,000 in debentures transferred by the respondent to his wife in 1949 was deemed to be his income. An examination of Exhibit 6 (the debenture for $10,000 purchased for his wife on March 25, 1949) indicates that a half year's interest thereon was due on September 25, 1949.

Then in each year the respondent signed the certificate on p. 1 of the return. It reads:

> I hereby certify that the information given in this return and in any document attached, is true, correct and complete in every respect, and fully discloses my income from all sources.

That certificate was untrue and the representations in the returns which related to matters entirely within the knowledge of the respondent and were intended to be accepted and acted upon by the Minister, were in a material sense false and therefore misrepresentations. For the year 1948 full bond interest was not reported, although the respondent had full knowledge that it should have been reported as income. For both the years 1948 and 1949,

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the balance sheets attached to and forming part of the returns and which purported to list all the assets and sources of income of the appellant were not "complete in every respect" in that they omitted all reference to his debenture holdings and his savings account at the Lambton Loan. While it may not have been necessary in a strict sense to furnish full details of all securities held, a balance sheet which purports to state all the assets of a taxpayer and all his sources of income is incorrect and constitutes a misrepresentation when it omits entirely substantial assets such as was the case here.

I think, also, that the failure to complete the gift tax questionnaire for 1949 was a misrepresentation since silence may in some cases constitute falsity. Reference may be made to Halsbury, Third Ed., vol. 26:

> 1562. There are two main classes of cases in which reticence may contribute to establish a misrepresentation, namely, (1) where known material qualifications of an absolute statement are omitted; and (2) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled as against the representor to infer their non-existence from the representor's silence as to them.

Here there was a duty on the respondent to complete the questionnaire relating to gift tax since it would affect the amount of his own personal income tax and would involve a payment of gift tax as well. The respondent alone knew of the gifts to his wife. I think, therefore, that the Minister was entitled in the circumstances to infer from the respondent's silence as to the gifts having been made, that no such gifts had in fact been made.

Counsel for the respondent submitted that the Court should take into consideration the comparative illiteracy of the respondent and his misplaced reliance on his accountant, Smith. The respondent's evidence is that he relied entirely on Smith, that he personally had no knowledge of the provisions relating to gift tax; and that when Smith had completed the returns, including the balance sheet, they were brought to him and on the assurance of Smith that the computations were correct, he signed them without checking them in any way, made out his cheque for the tax as computed and gave them to Smith to file.

It is urged that in these circumstances the respondent was at the most negligent and careless and that there was no evidence that he had wilfully misrepresented anything.

I am not satisfied that the respondent was as illiterate or as ignorant of income tax law as he pretended to be. He had made a success of his own business, had been paying income tax for many years, and I gained the impression that he was a shrewd business man. His own evidence was that he had referred Smith to Lambton Loan to secure particulars of his assets and income, and while I disbelieve that statement, it at least suggests that he was aware of what information had to be supplied in his returns. Before certifying as to the accuracy and completeness of the returns (even if he could not read them), he could have had Smith explain each item and thereby have assured himself that they were true and complete. Here there was at least gross negligence, and, while mere negligence is not dishonesty, the representations were false and therefore misrepresentations.

My conclusion, therefore, is that in each of the three matters above mentioned, the respondent made misrepresentations with respect to matters which were material at the time they were made. It follows, therefore, that as the Minister has established that misrepresentations were made in the original returns for both 1948 and 1949, the re-assessments here under appeal could be made "at any time".

No other problem arises in these appeals. Counsel for the respondent agreed at the trial that there was no error in the re-assessments as such.

Accordingly, for the reasons stated, the appeals of the Minister will be allowed, the decision of the Tax Appeal Board set aside, and the re-assessments made upon the respondent affirmed. The appellant is entitled to his costs after taxation.

Judgment accordingly.