

Income Tax Act

penalty. Perhaps he has, but I have not heard him. It seems to me that there must be some reason that the parliamentary secretary, on behalf of the minister, has found it necessary to increase the penalty from 25 per cent to 50 per cent, keeping in mind that a person who is eventually charged with wilfully attempting to evade payment of tax can, in the long run, be faced with another penalty. Why is it necessary to have this section amended in order to increase the penalty?

• (4:00 p.m.)

Mr. Mahoney: Mr. Chairman, previously under this section the minister had discretion to levy a penalty of between 25 per cent and 50 per cent. It is felt inappropriate that the minister should have discretion in this particular situation, and it is also felt appropriate that the 50 per cent penalty be retained.

Mr. Alexander: With respect to the penalties previously levied or exacted, is the parliamentary secretary in a position to advise whether they were mainly in the lower range of the percentage or in the higher range? Were there more penalties on the 25 per cent level than on the 50 per cent level?

Mr. Mahoney: I am afraid I have no idea, nor do I have any idea whether that information is available. I will be glad to inquire and, if it is available, I will supply it.

Mr. Alexander: I can recall, from some limited experience I had with respect to court actions concerning the Income Tax Act, that it was always the minimum penalty that was exacted. If the precedents indicate that the minimum was always exacted, why is it now necessary to go to the maximum?

Mr. Mahoney: Mr. Chairman, I would dispute the hon. member's assertion that the minimum was always exacted. He says he is speaking of court cases where a magistrate levied a penalty, and I have no information on the matter he raised regarding the practice of the Minister of National Revenue in exacting penalties under the section as it stood previously.

Mr. Hogarth: Mr. Chairman, I have a question for the parliamentary secretary on section 163(1). First, am I correctly construing that section, in the Crown's view or in the minister's view, when I suggest that two things are required to be proven under section 163? First of all is it required to be proven that there was a failure to file the return and, secondly, that in addition there was a wilful attempt to evade or is the failure to file the return automatically considered a wilful attempt to evade? It appears to me that it can be read either way.

Secondly, in drafting the statute why did the minister not follow the usual wording of penal sections and say "is guilty of an offence, and is liable on conviction to—"? Why is there a deliberate evasion, if I may use that phrase, of the customary phraseology for penal sections in statutes?

Mr. Mahoney: In answer to the first question, the hon. member's observation is correct. Both elements of the offence have to be established. The hon. member might look at section 162 where the simple case of failure to file a return is dealt with.

On the second question, this is not an offence under section 163 at this point. We get to that when we reach section 239. What we have in section 163 is the minister making a determination that there was a wilful attempt to evade payment of tax by failure to file a return. Then, the minister makes the penalty assessment, and of course the taxpayer has the regular right of appeal to the Tax Appeal Board and on to the Federal Court, as a result of the assessment made by the Minister of National Revenue. It is at this point that section 163(3) comes in, and where there is an appeal by the taxpayer the burden of proof rests upon the minister.

Mr. Alexander: Mr. Chairman, I do not want to pursue this much longer but I point out that in line 28 the words "is liable" appear, which may mean that a person may be liable to a fine, but not necessarily so. I ask the further question as to why this section does not read as similar sections do in other legislation, for example, "liable to not more than" say, 50 per cent? That would give some leeway. I ask the question directly: does "is liable" mean that a mandatory penalty will be exacted? Further, why has some leeway not been provided, as in many other sections, so that whoever is going to administer the law may exercise some judgment? Was this not considered?

Mr. Mahoney: Mr. Chairman, obviously that was considered because the determination was made to change the previous law which allowed the minister discretion to levy a penalty of from 25 per cent to 50 per cent. With regard to the first part of the hon. member's question, it would be the government's feeling that once the minister made the determination that a wilful attempt had been made to evade payment of tax by failure to file a return, he would have a duty to enforce the penalty.

Mr. Alexander: So then it is mandatory.

Mr. Smerchanski: Mr. Chairman, I would like some clarification of section 163(2) which reads:

Every person who, knowingly, or under circumstances amounting to gross negligence in the carrying out of any duty or obligation—

The insertion of the word "knowingly" is self-explanatory, but I would like an explanation of what is meant by "amounting to gross negligence"?

Mr. Mahoney: Mr. Chairman, the term "gross negligence" is one that has been subject to a great many determinations at law in various cases under various circumstances. It is not a term that is defined in the Income Tax Act. This is getting into something that we encountered with the hon. member for Battle River and one or two others the other day, in trying to say what is or is not at arm's length. We can give an example and say that something is or is not a non-arm's length transaction, but to ask for an over-all simple definition of the concept of gross negligence is to ask an impossible question.

Mr. Smerchanski: In order to get clarification of a piece of legislation being considered by members of the House of Commons is it necessary to leave it in such a vague state that the ordinary taxpayer has to seek an interpretation from the courts? Is this the intention, to frame our rules and laws in such a way as to place this added burden on the taxpayer? Mr. Chairman, I say that this is