

Docket: 2011-1717(IT)I

BETWEEN:

BARBARA A. NORLOCK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 5, 2012, at Hamilton, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: R. Brent Raby, Esq.

Counsel for the Respondent: Christopher Bartlett

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2008 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 13th day of April 2012.

“V.A. Miller”

V.A. Miller J.

Citation: 2012TCC121
Date: 20120413
Docket: 2011-1717(IT)I

BETWEEN:

BARBARA A. NORLOCK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] This is an appeal by Barbara Norlock from the reassessment of her 2008 taxation year. The issue raised in the appeal is in respect of a federal and provincial penalty imposed for the repeated failure to report income.

[2] This court does not have jurisdiction with respect to the provincial penalty. However, the relevant statutory provision for the federal penalty is subsection 163(1) of the *Income Tax Act* (the “Act”) and it reads:

(1) Repeated failures [to report income] -- Every person who
(a) fails to report an amount required to be included in computing the person's income in a return filed under section 150 for a taxation year, and
(b) had failed to report an amount required to be so included in any return filed under section 150 for any of the three preceding taxation years
is liable to a penalty equal to 10% of the amount described in paragraph (a), except where the person is liable to a penalty under subsection (2) in respect of that amount.

[3] A penalty pursuant to subsection 163(1) is applied when a taxpayer fails to report income in his tax return in any two taxation years within a four year period. The amount of the penalty is 10% of the amount of income not reported. In this appeal the amount of unreported interest income was \$18,376 and the federal penalty was \$1,837.60. There was an equal amount of provincial penalty imposed.

[4] The Appellant admits that she failed to report interest income of \$876 in her 2006 income tax return. She also admits that in 2008 she failed to report interest income of \$14,274 which she received from TD Waterhouse Canada and other income of \$4,102 which she received from TD Premium Money Market Fund.

[5] The only issue in this appeal is whether the Appellant exercised due diligence when she failed to report income.

[6] During the relevant period, the Appellant worked in the software industry. There was no evidence with respect to her actual duties or her education. However, in the years 2006 to 2008, her income was in excess of \$100,000 annually and she stated that in 2002 or 2003 she earned in excess of \$250,000.

[7] It was the Appellant's evidence that in January 2007 she sold her home in Milton and moved to a rental apartment in downtown Toronto. In spite of the fact that she paid the post office to redirect her mail, she did not receive a T5 for the interest income of \$876 for her 2006 taxation year.

[8] The Appellant stated that when she was reassessed for the 2006 taxation year she did not question the amount of interest income included in her income. She just paid the amount of the reassessment. It was her evidence that she has never received a T5 for the amount of \$876 for her 2006 taxation year. She surmised that the source of the interest income in 2006 was from an Amex savings account which she had. It was the only savings account which she had in 2006. Her only other investments in 2006 were RRSPs.

[9] When she sold her home in Milton, the proceeds from the sale were invested in a Guaranteed Investment Certificate ("GIC") and the Premium Money Market Fund with the Toronto Dominion Bank ("TD"). Sixteen months later, the principal and interest from her investments at the TD were applied directly to the purchase price of her current residence. She stated that all of the unreported income in 2008 was from this source. The interest income in 2008 was unusual and she did not receive a T5 for it.

[10] As stated earlier, the only issue in this appeal is whether the Appellant exercised due diligence when she failed to report income.

[11] Counsel for the Appellant relied on the decision in *Symonds v. Canada*, 2011 TCC 274 for the principle that a due diligence defence is available for either the first or second failure to report income. He stated that he thought that a due diligence defence could not be made for the 2008 taxation year and his submissions concentrated on the 2006 taxation year (the first failure to report income).

[12] He submitted that the Appellant's failure to report was a reasonable mistake of fact. The Appellant overlooked the interest income because she was not in the habit of earning and reporting interest income. On a subjective basis, her failure to report was innocent as she was not aware of the \$876 interest income which she earned in 2006. Viewed objectively, the mistake was reasonable as the amount of unreported income in 2006 was less than 1% of the income which the Appellant reported.

Analysis

[13] The penalty imposed pursuant to subsection 163(1) is one of strict liability but it is open to a taxpayer to defend against its imposition by establishing that he exercised due diligence. In *Saunders v. The Queen*, 2006 TCC 51, Justice Woods stated:

12 The penalty in subsection 163(1) is one of strict liability, although this Court has held that it can be vacated if the taxpayer can establish due diligence.

[14] Letourneau J. in *Résidences Majeau Inc. v. R.*, 2010 FCA 28 described the elements necessary to establish a due diligence defence to the imposition of a penalty as follows:

[7] As far as the penalty is concerned, we are satisfied that the judge did not make any mistake in upholding it. To avoid this penalty, the appellant had to establish that it was duly diligent.

[8] According to *Corporation de l'école polytechnique v. Canada*, 2004 FCA 127, a defendant may rely on a defence of due diligence if either of the following can be established: that the defendant made a reasonable mistake of fact, or that the defendant took reasonable precautions to avoid the event leading to imposition of the penalty.

[9] A reasonable mistake of fact requires a twofold test: subjective and objective. The subjective test is met if the defendant establishes that he or she was mistaken as to a factual situation which, if it had existed, would have made his or her act or omission innocent. In addition, for this aspect of the defence to be effective, the mistake must be reasonable, i.e. a mistake a reasonable person in the same circumstances would have made. This is the objective test.

[10] As already stated, the second aspect of the defence requires that all reasonable precautions or measures be taken to avoid the event leading to imposition of the penalty.

[15] I realize that the amount of unreported income in 2006 was only 1% of the Appellant's total income and I am satisfied that the failure to report was innocent.

[16] However, I am not satisfied that a reasonable person in the same circumstances would have made the same mistake. The Appellant is intelligent and she appeared to be a sophisticated business woman. She had only one savings account in 2006 and she received only one amount of interest income. She failed to report any interest income in her 2006 return.

[17] When she took her documents to her accountant to have her 2006 tax return prepared, she ought to have realized that she had not received the T5 with her interest income. She took no actions to get a T5 from Amex.

[18] Appellant's counsel argued that the facts in the present appeal were identical to those in *Symonds (supra)*. I disagree. In *Symonds*, Webb J. was not sure if that taxpayer had received and reported other interest income and he drew a negative inference from the Respondent's failure to introduce the Appellant's tax return. He stated the following:

30 It should also be noted that the Respondent was represented by counsel and the Appellant represented herself. It seems to me that an unfavourable inference can be drawn from the failure of the Respondent to introduce the income tax return that the Appellant had filed for 2006. The negative inference that I draw is that the return would have disclosed such other interest income that was reported so that a reasonable person would have made the same mistake as the Appellant did in these circumstances.

[19] In the circumstances of this appeal I conclude that the Appellant has not established a due diligence defence. The Appellant has not shown that she took reasonable measures to report all of her income in 2006 or 2008.

[20] The appeal is dismissed.

Signed at Ottawa, Canada, this 13th day of April 2012.

“V.A. Miller”

V.A. Miller J.

CITATION: 2012TCC121
COURT FILE NO.: 2011-1717(IT)I
STYLE OF CAUSE: BARBARA A. NORLOCK AND
HER MAJESTY THE QUEEN
PLACE OF HEARING: Hamilton, Ontario
DATE OF HEARING: April 5, 2012
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller
DATE OF JUDGMENT: April 13, 2012

APPEARANCES:

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Counsel for the Respondent: Christopher Bartlett

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