

Docket: 2012-2757(IT)G

BETWEEN:

JOHN ROBERTSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2012-2758(IT)G

AND BETWEEN:

JOHN ROBERTSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 9, 2015, at Vancouver, British Columbia

Written Submissions due and received on or before August 31, 2015

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

Counsel for the Appellant: Gavin Laird
Counsel for the Respondent: Robin S. Whittaker

JUDGMENT

IN ACCORDANCE with the Reasons for Judgment attached, the appeals from the reassessments made under the *Income Tax Act* for the Appellant's 2006 and 2007 taxation years are hereby dismissed and costs are awarded to the Respondent on a party-and-party basis in accordance with the Tariff.

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Signed at Ottawa, Canada, this 21st day of October 2015.

“R.S. Boccock”

Boccock J.

Citation: 2015 TCC 246
Date: 2015-10-21
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AND BETWEEN:

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REASONS FOR JUDGMENT

Bocock J.

I. Introduction

[1] These appeals concern US-based stock options (the “Options”) received by the Appellant. The Appellant did not report the Option benefits within his 2006 and 2007 tax returns being the respective years he exercised the Options. Including benefits which arise from a stock option in the year exercised is required under the combined provisions of sections 3 and 7 of the *Income Tax Act*, RSC 1985, c.1 (5th Supp.) (the “Act”). This is conceded by the Appellant, Mr. Robertson.

II. Facts

[2] The facts relating to Mr. Robertson’s Options are not in dispute. Simply put, Mr. Robertson exercised the Options for shares in private US companies in 2006 and 2007. The benefits from the exercise of the Options totalled \$102,600.14 CAD

in 2006 and \$508,657.97 CAD in 2007. Mr. Robertson, a resident of Canada, did not report the benefits as required. The Options and the tax reassessed are not in dispute. At the conclusion of the first day of evidence, Mr. Robertson's counsel also conceded that failure to report the benefit was a misrepresentation, but not one attributable to neglect, carelessness or wilful default.

[3] Although originally assessed as filed, the Minister's subsequent reassessments for the 2006 and 2007 years were both dated June 8, 2011. In respect of the 2006 taxation year, this is indisputably beyond the normal reassessment period. The 2006 reassessment was therefore issued pursuant to section 152(4) on the basis of misrepresentation attributable to neglect, carelessness or wilful default.

[4] A separate issue is before the Court with respect to the 2007 taxation year. The last possible normal reassessment date for a notice of reassessment to have been sent was the very date of the Notice of Assessment: June 8, 2011. Mr. Robertson asserts that the Notice of Assessment was not sent on that date. While the Respondent led evidence at trial to prove service within the normal reassessment period, the Respondent alternatively asserts, that should the reassessment not be within the normal reassessment period, then the 2007 tax return also contained a misrepresentation, like that of 2006, attributable to neglect, carelessness or wilful default. Therefore, the Minister could reassess beyond the normal reassessment period.

III. Issues

[5] After the first day of hearing of the four scheduled, counsel for both parties made admissions and concessions affording simplification and mandating a specific sequencing of the needed analysis by the Court. As well, counsel requested that argument be made by written submissions during July and August 2015.

[6] Accordingly, the two issues and their sequence before the Court are:

1. was the misrepresentation which occurred in the relevant tax returns, attributable to neglect or carelessness (wilful default having been removed as a ground) (the "Misrepresentation Issue"); and,
2. was the 2007 Notice of Reassessment sent within the normal reassessment period? (the "Timely Assessment Issue")

[7] Both counsel agreed that the facts and submissions relating to the 2006 and 2007 Misrepresentation Issue were identical. Therefore, if the Court finds that misrepresentation was attributable to neglect or carelessness, then the Timely Assessment Issue is moot.

A. Misrepresentation on Account of Neglect or Carelessness

(1) Some additional facts

[8] In respect of the Misrepresentation Issue, the Respondent called Mr. Robertson as an adverse witness. Mr. Robertson's testimony was forthright, but interspersed with occasional failures to recollect specific conversations related to any review with his accountant of the Options and related information.

[9] Mr. Robertson acknowledged that he did file the appropriate insider trading notifications and disclosures and that he drew or caused to have drawn, cheques in relation to the issuance and filings of the Options. On the other hand, Mr. Robertson could not recall raising the Options with the accountant who prepared his 2006 and 2007 Canadian income tax returns.

[10] Mr. Robertson's tax returns were filed electronically for both taxation years. He reviewed the draft hard copies of those returns page-by-page with his accountant. He did not notice that the Options were not included. He noted nothing unusual within the returns. He signed the file copies of the returns. At that time, his certain view was that United States law applied to the Options because of their country of origin and therefore, legally, he needed to report the Options in the US when the Options were sold, but he need not include the benefits from the exercised US Options in Canada. Evidence of Mr. Robertson having included the Option benefits in US tax returns was not before the Court. Further, had he known these Option benefits should be included in his Canadian tax returns, Mr. Robertson would have delayed exercising the Options (through extensions) until immediately prior to their sale; such an extension would allow him to report the exercised Option, record the benefit, and have the money to pay the exigible tax all in one taxation year.

[11] Mr. Robertson could neither recall asking his accountant about the correctness of his understanding of the taxation of the US-based Options nor his "knowledge" of the treatment under Canadian law of the Options. For stock options issued to Mr. Robertson in respect of Canadian companies, he had

executed and filed Form T1212 (Statement of Deferred Security Option Benefits) in respect of stock options for other tax years, including the preceding year, 2005.

[12] With respect to his general business knowledge, Mr. Robertson was an attentive, knowledgeable, and organized president and/or director of many different Canadian, US, and offshore companies. Stock options in his name were commonplace. He directed various securities and other regulatory forms be filed with respect to such stock options.

[13] Mr. Robertson was involved in and acutely aware of the relevant audit by the CRA. He was focused upon and adeptly made direct representations to the CRA relating to the issue of whether certain share sales should be treated as a capital gain or income. Ultimately, the Notices of Reassessment in 2006 and 2007 addressed only the benefits for the Options and not the income versus capital issue.

[14] Mr. Robertson oversaw a reliable filing, recording and compliance system within his offices. Half-a-dozen staff assisted his direction for securities, corporate, and reporting compliance.

[15] The accountant, who prepared the tax returns for his review and signature, was otherwise a very knowledgeable person and had worked for Mr. Robertson for some 15 years. There was no evidence adduced of accountant negligence aside from Mr. Robertson's testimony that she, like him, did not raise the inclusion of the benefits from the Options in the 2006 and 2007 taxation years.

IV. The Law Generally and the Appellant's Submissions

A. The Law Generally on the Misrepresentation Issue

[16] Subparagraph 152(4)(a)(i) of the *Act* provides an exception to the normal reassessment period. For the Minister to raise an assessment after the normal reassessment period, the taxpayer or person filing the return must have committed: (i) a misrepresentation; and (ii) that it is attributable to neglect, carelessness or wilful default.

[17] The Minister has the onus to prove that both elements more likely than not occurred: *Vine Estate v. Canada*, 2015 FCA 125 ("*Vine*") at paragraph 24. In the present case, the Appellant conceded existence of the first element: misrepresentation.

[18] Therefore, with the Misrepresentation Issue, the evidentiary hurdle is whether sufficient evidence has been adduced by the Respondent to show, on balance, that misrepresentation occurred through the lack of reasonable care: *Venne v. Canada (Minister of National Revenue)*, [1984] FCJ No. 314 (QL), 84 DTC 6247 (“*Venne*”). In turn, reasonable care requires objective conduct expected of a “wise and prudent person” in analogous circumstances: *Angus v. R.*, [1996] TCJ No. 883, 96 DTC 1823 (“*Angus*”) at paragraph 29. This objective standard filters this Court’s analysis of Mr. Robertson’s conduct, omissions, and/or assumptions at the relevant time, namely, the time of the misrepresentation: *Vachon v. Canada*, 2014 FCA 224 (“*Vachon*”) at paragraph 4.

B. Appellant’s Submissions on Misrepresentation Issue

[19] In written submissions the Appellant submitted three broad bases for the appeal.

(1) No Neglect or Carelessness on the Part of the Appellant

[20] Mr. Robertson’s erroneous understanding of the treatment under US/Canadian tax law of stock options was a reasonably held belief not borne of neglect or carelessness. The belief was held as a result of a commingling of the Appellant’s compliant past practices, legal assumptions based upon the foreign origin of the Options and lack of advice to the contrary from the accountant upon whom he relied.

[21] With respect to the reliance upon the accountant, this longstanding relationship encompassed all of Mr. Robertson’s corporate and personal tax returns and filings. He and his advisors employed efficient and effective filing and reporting systems, all of which left the Appellant with a sense of certainty and assurance.

[22] Given his sophisticated systems, compliant past practices and reliance upon his professional advisors, why would Mr. Robertson ask a question about the Canadian tax treatment of US-based Options?

(2) Respondent’s Evidentiary Burden Not Met

[23] No evidence led by the Respondent, either through CRA witnesses or Mr. Robertson himself, shows that Mr. Robertson failed to exercise reasonable

care in filing his returns; the honestly held, but incorrect view, explains why a careful review would not have revealed the misrepresentation.

(3) Previous Section 7 Remission Orders

[24] As an alternative ground, certain previously granted remission orders illustrate that section 7 reporting omissions, which have occurred with others before, have not necessarily arisen from carelessness or neglect. Further, executive orders have granted tax remissions for principal and interest under section 7. While not relying upon the previous remission orders, Mr. Robertson asserts these illustrate and recognize a systemic problem with the inclusion of stock option benefits under section 7 and demonstrate that Mr. Robertson's misunderstanding was not unique.

V. Analysis on the Misrepresentation Issue

[25] For the reasons which follow, the appeal is dismissed.

A. Neglect or Carelessness

[26] Mr. Robertson was knowledgeably sophisticated on certain matters, but consistently certain in ignorance on the root issue. With respect to filings, compliance in the context of securities, corporate existence, and likely in terms of US tax law, Mr. Robertson's knowledge may have exceeded that of his Canadian accountant. By contrast, his unwavering assumptions regarding the applicability of US tax law were simply an error of law within the context of the Canadian tax system.

[27] The legal principle of *ignorantia non excusat lex* is longstanding and is a principal cornerstone of the rule of law and utilized also within the context of tax legislation: *Trsic v. R*, [1998] 3 CTC 2852, 1997 CarswellNat 2779 (TCC) at paragraph 11. It is fundamental that at law a reasonably informed person exercises reasonable care in the circumstances that would be expected of a wise and prudent person to recognize and know the law or retain someone who does. This is also consistent with the relevant and topical taxation case law: *Venne* at page 6251, *Angus* at paragraph 29, *Vine* at paragraphs 47 and 48, *supra*, and *Aridi v. The Queen*, 2013 TCC 74 ("*Aridi*") at paragraph 32. A wise and prudent person, as Mr. Robertson was in other related corporate, securities, and business matters, from time-to-time ought to solicit confirmation of, or at least question, such an assumption which is patently an error of law.

[28] In *Corporation de l'École Polytechnique v. Canada*, 2004 FCA 127, the Federal Court of Appeal considered whether the defence of error of law could be relied upon to avoid the imposition of a penalty under the *Excise Tax Act*. At paragraph 32 of its decision, the Court stated the following:

There is no distinction between mistake of law and ignorance of the law as such: *Molis v. The Queen*, [1980] 2 SCR 356. Both in criminal law and in statutory and regulatory law, its justification can be found in the following factors set out by Prof. Don Stuart, *Canadian Criminal Law, A Treatise*, 3d ed., 1995, at pp. 295 to 298:

1. Allowing a defence of ignorance of the law would involve the courts in insuperable evidential problems.
2. It would encourage ignorance where knowledge is socially desirable.
3. Otherwise every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law.
4. Ignorance of the law is blameworthy in itself.

[Emphasis added]

[29] In considering the application of subsection 163(2) of the *Act*, Justice Strayer in *Venne* stated the following at page 6258:

The section has in the past been applied subjectively to taxpayers, taking into account their intelligence, education, experience, etc., and I believe this implies that an ignorance of the law which is not unreasonable for the particular taxpayer in question and the particular circumstances may be acceptable as a defence to the application of penalties. [Emphasis added]

[30] Regarding mistaken interpretation of the law, in *Seni v. R.*, [2005] GSTC 15, [2005] GTC 756 (“*Seni*”), Justice McArthur found that the taxpayer had made a mistake of law while acting in good faith. This characterization is somewhat similar to Mr. Robertson’s alleged “honest mistake of law”. Despite such a reasonable mistake Justice McArthur further found that the taxpayer had made a misrepresentation due to carelessness because consequently the taxpayer had not filed a return with respect to the sale of certain real estate. While the taxpayer in *Seni* may have made a mistake of mixed law and fact, nonetheless, contrary to Mr. Robertson’s argument, an honest mistake of law has led to a finding of neglect or carelessness before this Court.

[31] Mr. Robertson was not mistaken as to the existence of legislation concerning the taxation of stock option benefits, nor was he mistaken as to the interpretation of section 7 of the *Act*. Furthermore, Mr. Robertson was not mistaken as to the interpretation that should be given to section 7 because he never genuinely interpreted it. Rather, he incorrectly assumed the law and ignored the provision.

[32] As stated, the application of subparagraph 152(4)(a)(i) utilizes an objective test: the conduct expected of a wise and prudent person in analogous circumstances. This implies that a taxpayer's ignorance of the law is not a defence to the application of subparagraph 152(4)(a)(i). A wise and prudent person is, generally by definition, not unknowledgeable of the law. However, a wise and prudent person is also not all-knowing. He or she may be ignorant of specific legislative provisions – section 7 of the *Act*, for example. The question to be asked is this: was it reasonable for a wise and prudent person to remain ignorant, in the circumstances, at the time the misrepresentation was made? In the present case, the answer to this question is no. A wise and prudent person in Mr. Robertson's situation should have at least raised the issue of the taxation of the Options in his own mind or with his accountant or another professional advisor.

[33] Mr. Robertson's testimony surrounding his own knowledge of the law at the time of the tax filing was unequivocal as stated. The time of filing is relevant: *Vine* at paragraph 33 describing paragraph 8 of *Nesbitt v. Canada*, [1996] FCJ No. 1470. He firmly held a view that Canadian law did not require him to report the stock options in 2006 and 2007: the years of exercise. On questioning from both counsel, he remained forceful, unequivocal, and assured of his view at the time of filing.

[34] By contrast, Mr. Robertson's testimony surrounding his discussions with his accountant regarding the Options was ambivalent and uncertain. He stated he could not recall specifically raising the issue of the inclusion of the Options in his tax returns. He also indicated that he would not have raised the issue because of his pre-existing view that the US origin of the Options precluded the necessity of including the benefits in his Canadian tax returns. Given his strongly held belief, even if raised by his accountant, the correct inclusion of the Options in the tax returns may not have occurred. The failure of Mr. Robertson to raise the issue at all is inconsistent with conduct expected of a wise and prudent taxpayer in the circumstances.

[35] Importantly, subsection 152(4)(a)(i) is not punitive in its purpose, but rather remedial: *College Park Motors v. The Queen*, 2009 TCC 409 at paragraph 13. Since it is not concerned with establishing culpability on the taxpayer's part, even

innocent and honest mistakes can lead to a finding of neglect, carelessness, or wilful default under subsection 152(4)(a)(i). Its purpose is to ensure that, in a self-reporting tax system, misrepresentations that occur as a result of honest mistakes do not go unassessed through taxpayer inadvertence. This is such a case. The Minister should not be robbed of her reassessment rights by virtue of an honestly held mistake of law and consequent undisclosed benefits where such a mistake and misrepresentation arise from a lack of reasonable care.

B. Evidentiary Burden of Respondent

[36] The Respondent, through Mr. Robertson's testimony as an adverse witness, established Mr. Robertson's neglect, *per se*, at the time of the misrepresentations. On the evidence, this is his error or mistake of law more than his accountant's. Mr. Robertson never was of the view that the benefits from the Options need be included in his Canadian tax returns. There was evidence the accountant never offered a contrary, or indeed any opinion to that effect. As well, there was testimony by Mr. Robertson that there was never a query, explanation or discussion regarding the mistake of law that led to the misrepresentation. Lastly, there was evidence Mr. Robertson never directly or indirectly relied upon advice from his professional advisor regarding the specific misrepresentation which may have dissuaded Mr. Robertson from an otherwise compliant filing position. Quite the opposite occurred. The conduct, omissions, and assumptions at the time of filing are at least as much, if not more, Mr. Robertson's, the taxpayer, than his accountant's. Simply put, based upon his testimony as a witness called by the Respondent, the Court finds that Mr. Robertson contributed conjunctively, if not primarily, to the misrepresentation because of this mistake of law attributable to and occasioned by an unequivocally held opinion inconsistent with his other legal knowledge, business experience and compliance systems.

[37] In rebutting the Respondent's evidence, counsel for the Appellant has raised the case of *Aridi*, a decision of Justice Hogan of this court. In that particular case, Justice Hogan indicated that it is not the accountant's neglect that makes it possible to disregard the limitation under subparagraph 152(4)(a)(i). Instead, the taxpayer's neglect at the time of the misrepresentation must be analyzed. Justice Hogan further states at paragraph 34 that even where neglect or carelessness of the accountant is established, a necessary countervailing factual issue remains: "can the taxpayer establish his own prudence and diligence and state that the misrepresentation is attributable to his accountant's neglect?"

[38] In his analysis of the facts in *Aridi*, Justice Hogan identified that there were generally four different factual elements that reveal conduct of a wise and prudent person where reliance upon an accountant is asserted. They occur where: (1) the taxpayer submits all materials to the professional advisor; (2) a discussion is had between the advisor and the taxpayer touching upon the inclusion or exclusion from income of the item; (3) that discussion gives rise to a review of the facts related to the inclusion or exclusion; and (4) a clear, factual confirmation made by the professional advisor leads to the misrepresentation.

[39] The evidence of Mr. Robertson in response to the Respondent's questions before this Court simply does not support the required factual elements of *Aridi*. This is quite apart from the still live issue in *Aridi* and discussed in *Vine* as to whether subsection 152(4) affords the taxpayer the opportunity to assert the foregoing elements where the accountant provides such advice. As detailed factually in paragraph 36 above, none of the four constituent factual elements found in *Aridi* exists in this appeal.

C. Section 7 Remission Orders

[40] If Appellant's counsel is correct regarding the then looming confusion in the law concerning section 7 and the reporting of stock option benefits, such confusion does not justify Mr. Robertson's certaintude of his legal filing position. Certain remission orders regarding section 7 in respect of unrelated taxpayers were issued by the Governor-in-Council before Mr. Robertson's 2007 tax return was filed. The asserted confusion around section 7 ought to have triggered reasonable care to cause a wise and prudent person to seek and obtain an opinion or undertake conversation with his professional advisors regarding the inclusion of stock option benefits in his Canadian tax returns. Factually, the Respondent has proven that it was Mr. Robertson's neglect which primarily led Mr. Robertson not to solicit such an opinion or question his own. The existence of the remission orders should have heightened, not have lessened, a wise and prudent person's attentiveness to the issue. As such, there is no opportunity for Mr. Robertson to argue that a wise and prudent taxpayer would not have questions or sought advice in such a purportedly vague and confused area of the law where such remission orders were issuing with regard to section 7 during Mr. Robertson's relevant filing period.

[41] This lack of query or equivocation, while perhaps not tantamount to indifference as to compliance with the law (the test for subsection 163(2) penalties), at least constituted ignorance borne of misplaced confidence on Mr. Robertson's part. Based upon his answers, Mr. Robertson neglected to further

query and explore his own unsubstantiated certainty regarding the Canadian tax treatment of stock option benefits. Factually, the Court finds that the decision to not include these amounts in the 2006 and 2007 tax returns arose firstly, foremostly, and determinatively in the mind of Mr. Robertson. Based on his own evidence, he asked no questions because of his certainty. The fact that such a question was not raised is evidence of neglect inconsistent with the requirement at law of a wise and prudent person in the circumstances at the time the return was filed: *Vine* at paragraphs 50 and 51.

VI. Summary and Costs

[42] As stated, for these reasons the Minister has met her onus, has established misrepresentation attributable to neglect, and has not otherwise acknowledged that an uninformed mistake of law related to section 7 stock option benefits warrants cancellation or remission of the reassessments in this appeal.

[43] Since misrepresentation on account of neglect has been determined to have occurred in respect of both the 2006 and 2007 tax returns, the Timely Assessment Issue is moot and shall not be considered.

[44] The Respondent is awarded costs on a party-and-party basis in accordance with the Tariff, subject to the right of either party to make written submissions before this Court on that matter within 30 days of the date of this Judgment.

Signed at Ottawa, Canada, this 21st day of October 2015.

“R.S. Boccock”

Boccock J.

CITATION: 2015 TCC 246

COURT FILE NOS.: 2012-2757(IT)G and 2012-2758(IT)G

STYLE OF CAUSE: JOHN ROBERTSON AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

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REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.
Bocock

DATE OF JUDGMENT: October 21, 2015

APPEARANCES:

Counsel for the Appellant: Gavin Laird
Counsel for the Respondent: Robin S. Whittaker

COUNSEL OF RECORD:

For the Appellant:

Name: Gavin Laird
Firm: Laird & Company

For the Respondent:

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada