Citation: 2007TCC746
Date: 20071221
Docket: 2006-1932(IT)I

BETWEEN:

MITESH ANJARIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(Delivered orally from the Bench
at Hamilton, Ontario on December 5, 2007)

V.A. Miller, J.

[1] The Appellant was in the business of selling illicit drugs. On May 4, 2000, the amount of $33,974 was seized from him as the proceeds from crime. In either 2000 or 2001, the Appellant was convicted of "possession for the purposes of trafficking" and "conspiracy to traffic" in an illegal substance. The Appellant does not remember the date of his conviction; however, on the date of his conviction the amount of $33,974 was forfeited to the Crown. The Minister of National Revenue (the "Minister") by Notice of Reassessment dated January 24, 2005 included the forfeited amount in the Appellant's income for the 2000 taxation year and assessed subsection 163(2) penalties.

[2] The issues raised by the Appellant in this appeal are whether he is entitled to deduct the forfeited amount as an expense of doing business and whether the subsection 163(2) penalties were properly assessed.

THE FORFEITED AMOUNT

[3] The Appellant was represented by an agent, Janet Thompson, CA. The Appellant and Harald Mattson, a lawyer who practised criminal law, appeared as witnesses at the hearing of this appeal. The Appellant's position is that "funds forfeited as proceeds of crime are deductible as an expense since there was an income-earning purpose to the act that resulted in the loss to the taxpayer". The agent stated that forfeiture is punitive in nature and is similar to a penalty or fine. The Appellant's act was selling drugs and that act resulted in a penalty. The forfeiture was directly related to the Appellant's act of selling drugs. The agent then relied on the decision from the Supreme Court of Canada in *65302 British Columbia Ltd. v. R.*, [2000] 1 C.T.C. 57 to support the Appellant's position that expenses incurred to earn income from illegal acts are deductible.

[4] The Respondent's position was that the forfeiture did not constitute a business expense. The amount forfeited was in fact the Appellant's profit or net income from selling drugs and the forfeiture was not incurred to earn income from business. In *65302 British Columbia Ltd. v. R.*, at paragraph 69 Justice Iacobucci stated:

> 69 Finally, at para. 17, my colleague states that penal fines are not, in the legal sense, incurred for the purpose of gaining income. It is true that s. 18(1)(a) expressly authorizes the deduction of expenses incurred for the purpose of gaining or producing income from that business. But it is equally true that if the taxpayer cannot establish that the fine was in fact incurred for the purpose of gaining or producing income, then the fine or penalty cannot be deducted and the analysis stops here.

[5] Paragraph 18(1)(a) of the *Income Tax Act* (the "Act") sets out the limitations on the deductions that can be made from business income as follows:

> SECTION 18: General limitations.
>
> (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of
>
> (a) General limitation - an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

[6] When I ask the question whether the forfeiture of the amount of $33,974 was an outlay made by the Appellant for the purpose of gaining or producing income from his business of selling drugs, the unequivocal answer is no. First of all, the

forfeiture of the proceeds of crime was not an expense or outlay incurred by the Appellant. The proceeds of crime were the profits or net income earned by the Appellant. The forfeiture was not incurred to gain or produce income from business and did not assist the Appellant in producing income from his business of selling drugs. Justice Angers recently decided the appeal of *Brizzi* v. *R.*, [2007] 4 C.T.C. 2334, an appeal where the facts were very similar to those in the present appeal. I agree with his decision and especially in paragraph 7 when he stated the following:

> … The loss incurred through the forfeiture is in my opinion a consequence of carrying on an illegal business activity and therefore certainly not an expense that assisted or resulted in producing income.

[7] The Appellant is not entitled to deduct the amount of $33,974 which was forfeited to the Crown as proceeds of crime.

SUBSECTION 163(2) PENALTIES

[8] In order to sustain the imposition of penalties under subsection 163(2) of the *Act* the Minister has the burden of establishing that the Appellant made a false statement or omission in his return "knowingly or under circumstances amounting to gross negligence".

[9] The only evidence tendered by the Minister to support the subsection 163(2) penalties was affidavit evidence of Denis Desloges, a Litigation Officer with the Canada Revenue Agency ("CRA") in Ottawa. His evidence was that the Appellant had filed his 2000 tax return reporting nil income.

[10] The Appellant stated that his income tax returns have always been prepared by his father. The Appellant did not tell his father that he earned income in 2000 and his return was filed indicating nil income. The Appellant was not aware that income from an illegal business was taxable. In 2000, the Appellant was 22 years old. There was no evidence of the Appellant's level of education.

[11] I find that the Appellant made an omission in his 2000 return. However, I also find that the Respondent has not met its burden of establishing that the omission was made under circumstances amounting to gross negligence.

[12] In conclusion, the appeal is allowed only to the extent of deleting the penalty.

Signed at Halifax, Nova Scotia this 21st day of December, 2007.

"V.A. Miller"

V.A. Miller, J.

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PLACE OF HEARING:	Hamilton, Ontario
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REASONS FOR JUDGEMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	December 21, 2007

APPEARANCES:

Agent for the Appellant:	Janet C. Thompson
Counsel for the Respondent:	Laurent Bartleman

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada