

BETWEEN:

DONALD IAN MOYES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 3, 2009 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Diana Aird

JUDGMENT

The appeal with respect to assessments made under the *Income Tax Act* for the 2004, 2005, 2006 and 2007 taxation years is dismissed.

Signed at Toronto, Ontario this 12th day of March 2009.

“J. Woods”

Woods J.

Citation: 2009 TCC 146
Date: 20090312
Docket: 2008-2830(IT)I

BETWEEN:

DONALD IAN MOYES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Donald I. Moyes, brings this appeal in respect of income tax assessments for the 2004, 2005, 2006 and 2007 taxation years. The issue concerns the tax treatment of certain distributions from foreign entities.

[2] Mr. Moyes submits that the distributions should be taxed as capital gains.

[3] The Minister submits that the distributions are in the nature of dividends from foreign corporations, and that as such the distributions are required to be included in computing income.

[4] The amount of the distributions at issue are: \$1,046 for 2004, \$1,220 for 2005, \$1,369 for 2006, and \$18,914 for 2007.

Preliminary issue

[5] Before considering the main issue, I would comment briefly on the burden of proof.

[6] According to the reply, the Minister assumed in making the assessments that the amounts in dispute were interest. This is clearly not the case.

[7] Shortly before the hearing, counsel for the Minister prepared an amended reply which, among other things, changed this assumption. The filing of this document was not in dispute.

[8] According to the amended reply, in making the assessments the Minister assumed that the distributions were “interest or other investment income.” This description originates from a line in the income tax return form. The line corresponds to the category of income under which the distributions were reported on T5 slips.

[9] Although the explanation for the amendment provided by counsel makes sense, I am left with an uneasy feeling as to what assumptions the Minister actually made in making the assessments. For this reason, I have concluded that it is appropriate for the Minister to bear the burden of proof on a *prima facie* basis to establish the nature of the amounts received.

Main issue

[10] Based on the evidence presented, I have concluded that the Minister’s characterization of these amounts as dividends from foreign corporations is correct on a *prima facie* basis, and that the appeal cannot succeed.

[11] By way of background, Mr. Moyes is a retired accountant who was a controller with a large company.

[12] Mr. Moyes maintains two US currency brokerage accounts with TD Waterhouse in which the following types of investments have been made: (1) American Depositary Receipts (ADRs), (2) Shares, and (3) Exchange Traded Funds (ETFs).

[13] In investment summaries provided to Mr. Moyes, TD Waterhouse categorized distributions from the above investments into two types.

[14] The first, described as code 3, represents ordinary dividends. There is no dispute about these.

[15] The second, described as code 5, appears to represent either stock dividends or distributions of long-term capital gains realized by investment funds. It is the code 5 distributions that are at issue.

[16] Some of the entities from which code 5 distributions were received by Mr. Moyes during the taxation years at issue are: Chile Fund Inc., H&Q Life Sciences Investors, Korea Fund Inc., Telfonica S.A., Latin America Equity Fund.

[17] Mr. Moyes submits that the code 5 distributions should be taxed as capital gains for purposes of the *Income Tax Act*. He does not submit that there are specific provisions in the *Act* that deal with distributions of this nature. He seems to suggest that they should be taxed as capital gains on general principles.

[18] In order for Mr. Moyes to succeed in this appeal, it must be determined that the code 5 distributions are not dividends from corporations.

[19] I have concluded, based on the evidence presented, that the distributions are likely dividends, paid either in cash or in stock.

[20] Mr. Moyes submits as follows:

- (a) the T5 slips prepared by TD Waterhouse are in error because the amounts are stated in US currency;
- (b) flow-through treatment should apply to capital gains realized by funds because the funds act in an agency capacity; and
- (c) the entities from which he received distributions are not corporations.

[21] I cannot agree with these submissions.

[22] As for the submission that the T5s were incorrectly prepared by TD Waterhouse, this is not a sufficient basis to allow the appeal even if the T5s are incorrect. The question to be determined is the nature of the distributions received. The fact that the T5 slips have been prepared in US currency is not relevant to that question.

[23] As for the other two submissions, I would conclude based on the evidence as a whole that the Minister has made a *prima facie* case that the distributions are dividends from foreign corporations.

[24] In documents introduced by Mr. Moyes, many of the relevant entities are described as management investment companies (e.g., Korea Fund Inc., Latin America Equity Fund, and H&Q Life Sciences Investors). It is not in dispute that the amounts at issue are distributions from these entities.

[25] Mr. Moyes has not been able to rebut the *prima facie* case made by the Minister. Other than the submissions of Mr. Moyes, there is no evidence before me that the entities involved are acting in an agency capacity or that they are not corporations.

[26] The appeal will be dismissed.

Signed at Toronto, Ontario this 12th day of March 2009.

“J. Woods”

Woods J.

CITATION: 2009 TCC 146
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STYLE OF CAUSE: DONALD IAN MOYES and
HER MAJESTY THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: March 3, 2009
REASONS FOR JUDGMENT BY: The Honourable Justice J. Woods
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APPEARANCES:

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Counsel for the Respondent: Diana Aird

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