

Docket: 2008-2117(IT)I

BETWEEN:

ALANNA D. ISZCENKO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 13, 2009 at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Valerie Meier

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2006 taxation year is allowed, without costs, in accordance with the attached Reasons for Judgment.

It is further ordered that the filing fee in the amount of \$100 be reimbursed to the Appellant.

Signed at Ottawa, Canada, this 27th day of April 2009.

"Robert J. Hogan"

Hogan J.

Citation: 2009 TCC 229
Date: 20090427
Docket: 2008-2117(IT)I

BETWEEN:

ALANNA D. ISZCENKO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] This is an appeal by Alanna D. Iszcenko (the “Appellant”) in respect of the assessment of a penalty by the Minister of National Revenue (the “Minister”) pursuant to subsection 163(1) of the *Income Tax Act* (the “Act”) for failure to report income in more than one taxation years.

[2] Subsection 163(1) applies if a taxpayer fails to report income for two taxation years within a four-year period.

[3] On December 24, 2007, the Minister reassessed the Appellant as follows for the 2006 taxation year, the notice of reassessment being issued on that same day (the “2006 Reassessment”):

- (a) to include income from 647230 Alberta Ltd. T5, Bell Aliant T3 and Altagas Income Trust T3; and
- (b) to assess a Federal Income Tax penalty in the amount of \$4,006.80, being 10% of the taxable dividend income of \$40,068.00 from 647230 Alberta Ltd that the Appellant failed to report, pursuant to subsection 163(1) of the Income Tax Act,

R.S.C. 1998 (5th Supp.) c.1, (the “Act”), as amended, for the 2006 taxation year.

[4] In so reassessing the Appellant, the Minister made the following assumptions of fact:

- (a) the Appellant received dividend income from 647230 Alberta Ltd in the actual amount of \$32,055.08 in the 2006 taxation year;
- (b) the dividend income received from 647230 Alberta Ltd was required to be included in the Appellant’s income as a taxable dividend of \$40,068.00, for the 2006 taxation year;
- (c) the Appellant failed to report the dividend income received from 647230 Alberta Ltd in computing her income for the 2006 taxation year;
- (d) the Appellant received interest and investment income of \$73.00 and other income of \$205.00 from Seg. Fund Trust Marketfund MM Fund and GWL Aggressive Portfolio Fund (the “Funds”) in the 2003 taxation year;
- (e) the income received from the Funds was required to be included in the Appellant’s income for the 2003 taxation year;
- (f) the Appellant failed to report the income received from the Funds in computing her income for the 2003 taxation year; and
- (g) the Minister reassessed the Appellant for the 2003 taxation year to include the income received from the Funds.

[5] The facts that were assumed by the Minister are not contested. In brief, the Appellant testified that her husband had passed away. Following the Appellant’s husband’s death, her father-in-law caused 647230 Alberta Ltd (“647230 Alberta”) to sell the building it owned. This building was used as the premises of a flower shop business operated by the company. Following the sale of the building, the Appellant received a distribution of \$32,055.08 from 647230 Alberta.

[6] The Appellant alleges that two things caused her to omit to report the dividend income. She had asked her father-in-law whether there any documents or forms that she needed to give her accountant in connection with the distribution received from

647230 Alberta. He responded no. She claims that the situation was not an unusual one as she had in the past received a return of capital on her shares. She was of the misguided belief that 647230 Alberta had not made a profit on the sale of the building and that the shareholders recovered only part of their initial investment. Her father-in-law reinforced this belief by responding that there was nothing for the Appellant to report in connection with this transaction.

[7] The second reason invoked by the Appellant was her state of mind following the death of her husband, which appears to have been very sudden. She claims that she was extremely depressed and had trouble coping with the void left by his death. This caused her not to second-guess the advice received from her father-in-law, who was responsible for the sale. Her father-in-law was also responsible for dealing with the external auditors of the company and requiring them to prepare the tax forms, if any, necessary for the purpose of reporting the transaction at the corporate and shareholder levels.

[8] The Appellant contacted her father-in-law after she was audited and assessed for failure to report the taxable dividend from 647230 Alberta. She testified that it was only then that she learned that her father-in-law had failed to provide her with the tax forms he had received from the outside accountant.

II. Issues

[9] The issues for me to determine are:

- (a) whether the Appellant was properly assessed a penalty pursuant to subsection 163(1) of the Act in the amount of \$4,006.80 for the 2006 taxation year; and
- (b) whether I can grant the relief sought by the Appellant.

III. Analysis

[10] Counsel for the Respondent argues that subsection 163(1) is a provision of strict liability, that the Minister must show that there were two failures to report income in two returns filed for two separate taxation years within a 4-year period in order for the penalty to apply, that this Court does not have authority to cancel the penalty when the aforementioned conditions are met, and that only the Minister has the

discretion to waive or cancel the penalty under subsection 220(3.1). Counsel cited the cases of *Saunders*¹ and *Lestage Giguère*² in support of the Minister's position.

[11] I agree with the Respondent's position that the Minister must show two repeated failures in order for the provision to apply. This being stated, the Appellant's actions must nonetheless rise to the standard of a "failure". In brief, the Appellant must be the one that fails to report the income in both cases. The key question is whether the Appellant's actions, in the present case, constitute a failure on her part, or whether the failure is due to the actions of another person, thus giving rise to a due diligence defence. Such a defence was accepted by my colleague Justice Mogan in the case of *Khail*³, where he decided as follows:

13 I cannot conclude that a person has "failed to report an amount" within the meaning of subsection 163(1) when the person knows (i) that the amount was payable to her as income by a particular payor; (ii) that the payor withheld a certain portion of the amount as income tax to remit to Revenue Canada; (iii) that the payor actually paid to the person only the balance remaining after deducting the tax withheld; and (iv) that the payor was required to report to Revenue Canada on a form prescribed by Revenue Canada the gross amount payable to the person and the portion withheld and remitted as tax. Accordingly, I will allow the appeal. If I should be correct in my interpretation of subsection 163(1), there is no prior "failure to report" with respect to the interest of \$320.12 received from the Royal Bank of Canada.

14 If I should be wrong in my interpretation of subsection 163(1), then I would respectfully ask the Minister to consider exercising the discretion permitted in subsection 220(3.1) of the *Act* to waive or cancel all or most of the penalty imposed relating to the Symcor earnings.

[12] I adopt both of Mogan J.'s conclusions. In short, I cannot conclude that the Appellant failed to include in income the amount of \$40,068 as a taxable dividend received from 647230 Alberta when she had asked her father-in-law whether there were any tax forms required in order to report the transaction and he responded no and led her to believe that the amount received was a non-taxable capital receipt.

[13] In the event that my interpretation of subsection 163(1) should be wrong, I would respectfully ask the Minister to consider exercising the discretion permitted in subsection 220(3.1) of the *Act* in light of the troubled state that the Appellant found herself in following the death of her husband. It is a known fact that people suffering from depression have serious lapses of concentration that can prevent them from accomplishing tasks that are simple for healthy individuals.

¹ *Saunders v. The Queen*, 2006 TCC 51, [2006] 2 C.T.C. 2255.

² *Lestage Giguère v. The Queen*, 2005 TCC 201, [2007] 5 C.T.C. 2217.

³ *Khail v. R.*, 2002 CarswellNat 2669, [2003] 1 C.T.C. 2263.

[14] The appeal is allowed without costs.

Signed at Ottawa, Canada, this 27th day of April 2009.

"Robert J. Hogan"

Hogan J.

CITATION: 2009 TCC 229

COURT FILE NO.: 2008-2117(IT)I

STYLE OF CAUSE: ALANNA D. ISZCENKO v. HER
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PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: February 13, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: April 27, 2009

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Valerie Meier

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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