

Citation: 2013 TCC 90
Date: 20130410
Docket: 2012-2477(IT)I

BETWEEN:

NACOM INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Bocock J.

I. Brief Issue

[1] This matter concerns a taxpayer's assertion that it hand delivered two corporate tax returns to the Canada Revenue Agency ("CRA"). The CRA has no record of the taxpayer doing so until a much later date. At stake, is the Appellant's ability to receive the refundable dividend tax on hand for two tax years.

[2] The law in this matter is not in dispute. Section 129(1) of the *Income Tax Act* (the *Act*) provides as follows:

129. (1) Where a return of a corporation's income under this Part for a taxation year is made within 3 years after the end of the year, the Minister

(a) may, [...] refund without application an amount [...] equal to [...]

(i) 1/3 of all taxable dividends paid by the corporation on shares of its capital stock [...]

(ii) its refundable dividend tax on hand at the end of the year; [...]

[3] As well, only one factual matter is in dispute, but it is the critical one. The Minister asserts the Appellant's corporate tax returns for taxation year 2007 (ending January 31, 2007) (the "2007 Return") and taxation year 2008 (ending January 31, 2008) (the "2008 Return") were filed on March 29, 2011 ("the Minister's Filing Date"). The Appellant asserts both the 2007 Return and the 2008 Return (the "Returns") were delivered to the CRA on or about November 24, 2009 ("the Appellant's Filing Date").

[4] Simply put, if the Minister's Filing Date prevails, no dividend tax refund is due to the Appellant. Conversely, both parties agree that if the Appellant's Filing Date is correct, the dividend refund is owing to the Appellant.

[5] The parties and the Court agree that any authorities simply reinforce the legal rule which provides that in the absence of a finding that the Returns were filed on or before January 31, 2010 for the 2007 Return and January 31, 2011 for the 2008 Return then no dividend Refund is payable (collectively the "Statutory Deadlines").

II. Testimony at the Hearing

[6] There were four witnesses at trial. The Appellant's accountant, Mr. Ted Lemon and the Appellant's president and officer, Mr. Nathan Jacob, who is also acting as Agent for the Appellant at the Hearing, both testified for the Appellant. The Respondent called two employees of the CRA, a Ms. Schmall, a non-filer unit officer and a Ms. Rehal, a project coordinator responsible for mail operations at the Winnipeg Tax Centre and related offices.

[7] The relevant testimony may be summarized for each as follows:

a) The Appellant's Accountant

[8] Mr. Lemon, the Appellant Accountant provided the following uncontroverted testimony related to the issue of the time of filing by identifying the 2007 Return and 2008 Return, duplicate copies of which bore the printed date of November 15, 2009 and November 17, 2009, respectively. Although he could not be certain of the date Mr. Jacob received the returns from him, he suggested that this occurred sometime shortly after their preparation. The issue of whether duplicate copies could be generated by the computer software bearing a specific date at any time was raised on cross-examination, but conclusively answered. Mr. Lemon also identified the personal returns, of the shareholder receiving the dividend, the T5 reflecting same and duplicate cheque dated January 28, 2007 in the amount of the 2007 dividend.

Much of this testimony was not in dispute. Mr. Lemon provided anecdotal summary evidence of other lost T-1 personal returns, but in the absence of direct objective evidence, this was not given weight since it had no bearing on these T-2 corporate returns.

[9] The Appellant's officer and agent, Mr. Jacob testified that he went to Mr. Lemon's office sometime before November 24, 2009, reviewed the returns when he was in Winnipeg to visit his mother and hand delivered the two returns to the Broadway Avenue offices of CRA on or about the second business day of the week, which he reckons deductively was November 24, 2009. He stamped a CRA provided index card with the external date timer at the CRA, but cannot find the date stamped index card presently. He assumed the 2007 and 2008 Returns were received by CRA shortly thereafter. He could not recall if he put the 2007 and 2008 Returns in one or separate envelopes. He did nothing until he discovered in February of 2011 that CRA had not received the Returns. He delivered duplicate copies of the encoded Returns in late March, 2011. Prior to allegedly delivering the Returns in November 2009, Mr. Jacob was in communication with the CRA's non-filer department because both 2007 and 2008 Returns had not been filed on time. Such communications and requests for extensions ceased in April 2009 until the reinitiated contact with CRA in early 2011 regarding a GST dispute.

[10] On cross-examination, Mr. Jacob admitted that although he was expecting a refund, in relation to the Returns he spoke to no-one at CRA regarding the 2007 and 2008 Returns during the period from the Appellant Filing Date to February of 2011. He explained that, because he was not actually expecting a cheque, any refund would be offset against subsequent years' liabilities or assessments. He also acknowledged that he had not produced as evidence duplicate copies of subsequent years T-2 returns which he claims to have subsequently stamped.

[11] Mr. Jacob and also Mr. Lemon drew attention to the time delay between receipt by CRA of any tax return and acknowledgment in the CRA system that same had been received. At most, the evidence revealed a period of over 30 days and not more than 45. All agreed this was not material to the issue before the Court.

b) *Ms. Schmall, the Non-Filer Unit Officer*

[12] Ms. Schmall confirmed the hiatus of contact with CRA and Mr. Jacob between April of 2009 until February of 2011. This was supported by CRA diary notes taken by a CRA employee tasked with receiving non-filer queries. As to a non-reminder by CRA of the non-filing of the 2007 and 2008 Returns for over 25 months, Ms. Schmall simply indicated that demands to file and pay are issued to taxpayers once, and if, CRA desires to do so.

[13] Ms. Rehal, who was responsible for incoming mail and delivered correspondence for the Winnipeg Taxation Centre and related offices, outlined in great detail the step by step process CRA takes in receiving dropped mail at the Broadway facility, the pre-sort, the bagging, carting, preliminary dating and shipping of such dropped mail to the Winnipeg Tax Centre where a similar, but more refined process is undertaken, where the date stamp from Broadway is carried over, the bar coded return is identified and scanned and filed.

[14] She testified that the likelihood of permanent loss of a return was not likely at all because the mechanisms dealing with mail were so regimented.

[15] On cross-examination, she admitted the Winnipeg Tax Centre handles 1.7 million pieces of mail a year with less than a 1% temporary misplacement of mail. To her knowledge, it was very unlikely that any mail would be permanently lost.

III. Submissions

[16] Respondent's counsel and Appellant's agent summarized the factual evidence for the Court. In summary the Respondent identified the lack of direct evidence to prove the 2007 and 2008 Returns were actually delivered to CRA. The stamped index card, subsequently stamped year's returns and stamped installment statements were not produced to establish evidence of delivery or even a consistent code of conduct on the Appellant's part. As well, the Court should draw an adverse inference by the absence of such evidence. The period of non-communication by the Appellant, absence of opportunities for misplacement by CRA and the even more remote probability of losing two separate returns all suggest the returns simply were not delivered prior to the Statutory Deadlines.

[17] The Appellant submitted that all other steps to have the dividend reflected, returns prepared in 2009, relevant personal returns prepared and filed were otherwise

completed and documented. The volume of mail and misplacement rate, the non-contact by CRA and the business as usual undertakings on all other matters by the Appellant, at least on balance, provide a reasonable basis for finding that the Appellant taxpayer delivered the Returns in November of 2009.

IV. Analysis

[18] The Court must determine on a balance of probabilities whether the 2007 Return and 2008 Return were filed before the Statutory Deadlines, by determining whether the Returns were delivered to the CRA office on the Appellant's Filing Date, as claimed by Mr. Jacob, or on the Minister's Filing Date, as reflected by CRA.

[19] What the Court can believe with certainty is that CRA did not knowingly have within its possession a copy of the Returns until the March 29, 2011 date. The Court also can say with certainty, based upon testimony, that the CRA does its utmost, to identify, sort and act upon every piece of mail it receives. Beyond that, the CRA's cannot provide evidence as to what happened to the Returns prior to the date it records as having received them. Accordingly, the testimony of Mr. Jacob and his account must be analyzed.

[20] The Court can reliably accept and believe that the Returns were prepared in November of 2009 as corroborated by both Mr. Lemon and Mr. Jacob. It can also say Mr. Jacob received them from Mr. Lemon at that time.

[21] As to whether they were delivered to CRA, Mr. Jacob submits, as evidence of the delivery, that:

1. he delivered them to CRA on or around November 24, 2009 and date stamped an index card with that date;
2. he heard nothing further from CRA after the Demand to File and his initiated conversations with CRA in April 2009;
3. he did nothing further after November 2009 because he had filed the returns in that month;
4. his attention thus turned towards other tax matters such as GST in early 2011 and later his 2010 and 2011 Corporate Tax Returns; and

5. he subsequently stamped the duplicate 2007 and 2008 tax returns when again filed on the Minister's Filing Date.

[22] With respect to each of these assertions it is noted that:

1. although Mr. Jacob said he obtained same, the index card bearing the date stamp of the Appellant's Filing Date was not adduced into evidence before the Court;
2. CRA's non-response is a *non sequitur* because Mr. Jacob did not receive a Notice of (Re)Assessment or Revised Remittance Statement and himself did nothing;
3. by comparison, Mr. Jacob's inactivity cannot plausibly be explained through the absence of a prompt from CRA. The Appellant was not a model tax filer as witnessed by Mr. Jacob's familiarity with the non-filer unit and his repeated requests for extensions of the 2007 and 2008 prior to June of 2009 speak for themselves;
4. as to his mind turning to other matters, again Mr. Jacob appears to have been reactive to prompts from CRA. At law, CRA has no legal requirement to repeatedly or continually notify a non-filer of its failure. Mr. Jacob had been originally notified of his non-filed position and cannot claim CRA is estopped on that basis from claiming the Returns were not filed; and
5. although he said he stamped the duplicates, Mr. Jacob did not produce for the Court the filer stamped duplicate copies of the 2007 Returns and 2008 Returns when filed with the received by CRA on the Minister's Filing Date.

[23] Had some or perhaps any of the forgoing assertions been supported by some evidence, the Court might be able to say, on balance, that the 2007 Return and the 2008 Return were delivered to CRA on the Appellant's Filing Date and then improbably and irretrievably misplaced to this day. However, in the absence of some evidence in the form of a date timed receipt, subsequent complaint behaviour, continued and consistent contact with CRA or subsequent and habitual stamping of duplicate returns, the Court cannot find in the Appellant's favour. In short, for the Court to accept the improbable occurrence of CRA permanently losing two tax returns, the Appellant must have offered some evidence, any evidence, that he was

present at the CRA on the Appellant Filing Date, reacted at some subsequent time to the non-acknowledgment by CRA of the receipt of the Returns or otherwise habitually obtained date stamps of other filed returns. Absent any evidence of those probable actions, the improbable (the permanent misplacement of two corporate tax returns by CRA) cannot, on balance, be found to have occurred and the Minister's Filing Date is accepted.

[24] Accordingly, the Statutory Deadlines for filing the Returns were not met and the appeal is dismissed.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated March 28, 2013 in order to correct the typographical errors underscored in heading II b) and paragraphs 12, 15 and 16 hereof.

Signed at Ottawa, Canada, this 10th day of April 2013.

“R.S. Bocock”

Bocock J.

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