

Docket: 2013-3379(IT)G

BETWEEN:

684761 B.C. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on October 22, 2015 at Vancouver, British Columbia

Before: The Honourable Justice Gerald J. Rip

Appearances:

Counsel for the Appellant: Gavin Laird

Counsel for the Respondent: Perry Derksen / David Everett

ORDER

UPON motion by the appellant, 684761 B.C. Ltd., for an Order to “determine if the ‘notice of additional assessment’ [for its 2008 taxation year] received by the Appellant is really a reassessment” and, in such case, the reassessment for the appellant’s 2007 taxation year, notice of which is dated December 16, 2011, appealed to this Court, is valid.

AND UPON reading the motion materials and hearing submissions from the parties;

IT IS ORDERED THAT:

This appeal shall be stayed for a period of 60 days from the date that the appellant files a Notice of Appeal from the additional assessment but not later than June 30, 2016.

The appellant's motion is otherwise dismissed with costs in the amount of \$500 to the respondent.

Signed at Ottawa, Canada, this 19th day of November 2015.

“Gerald J. Rip”

Rip J.

Citation: 2015 TCC 288
Date: 20151119
Docket: 2013-3379(IT)G

BETWEEN:

684761 B.C. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip J.

[1] The appellant, 684761 B.C. Ltd., made a motion for the Court to “determine if the ‘notice of additional assessment’ [for its 2008 taxation year] received by the Appellant is really a reassessment” and, if so, that the reassessment of income for the appellant’s 2008 taxation year before the Court is no longer valid.

[2] The appellant has appealed a reassessment of income for its taxation year ending June 30, 2008, dated December 16, 2011.

[3] The Minister of National Revenue subsequently issued a ‘Notice of Additional Assessment’ dated October 9, 2014 (the “NOAA”) assessing penalties under subsections 163(1) and (2) of the *Income Tax Act*.

[4] Both the reassessment and additional assessment are in respect of the appellant’s taxation year ending June 30, 2008.

[5] The Notice of Reassessment was introduced at the hearing of this motion as an exhibit to the Affidavit of Denise Gauthier, an auditor with the Canada Revenue Agency. It is this reassessment that has been appealed to this Court.

[6] The Minister issued the Notice of Reassessment shortly before the appellant’s normal reassessment period for its 2008 taxation year terminated. It

was after the 2008 taxation year became statute barred that the NOAA was issued by the Minister.¹

[7] The Notice of Reassessment was a reassessment of the appellant's income for the year under Part I of the *Income Tax Act*. The additional assessment was an assessment of penalties and interest. The appellant has not yet filed an appeal from the additional assessment. The additional assessment is not before this Court at this time. Nevertheless, the original reassessment is subject to an appeal in this Court and its validity may be considered by me.

[8] The appellant's "Corporation Notice of Additional Assessment Summary of Additional Assessment", Exhibit "E" to the Affidavit of Denise Gauthier, states:

[...]

Penalties:

[...]

Subsection 163(1), 163(2) and other penalty	\$ 97,381.00
Subsection 163(1) and 163(2) penalty	56,123.00

[...]

Interest:

[...]

Arrears Interest	52,381.98
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[...]

Result of this Assessment:	\$205,885.98
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No amount is described as assessed for Part I tax on the "Corporation Notice of Additional Assessment, Summary of Additional Assessment". According to the appellant's Notice of Reassessment for 2008, dated December 16, 2011, the revised taxable income of the appellant is \$2,445,020. This amount is not changed by the additional assessment.

¹ The Appellant refused to file a waiver in prescribed form within the normal reassessment period for 2008. The Minister then reassessed its income for the year within the said period.

[9] I note that if I find the additional assessment is a reassessment, the actual reassessment would be vacated and become null. Any subsequent reassessments of income would be issued after the appellant's 2008 taxation year has become statute barred and the Minister would have the onus of proving misrepresentation by the appellant that is attributable to neglect, carelessness or wilful default in filing its income tax return for 2008: subsection 152(4).

[10] Counsel for the appellant argues that the question before me is whether the additional assessment is in reality a reassessment because it revisits and changes the previous reassessment and is based, counsel argues, "upon the same transaction and necessarily involves similar facts and evidence". Hence, he submits, it is in substance a reassessment.

[11] Appellant's counsel refers to the additional assessment as an "esoteric" tool, a method by which the Minister "bifurcate[s] one assessment process into two distinct products ...". He also asks me to "err on the side of caution ... to protect the taxpayer's procedural rights."²

[12] I cannot agree with the appellant that the additional assessment is a reassessment. The opening words of subsection 152(4) of the *Act* read as follows:

The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part ... except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if ...	Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités qui sont payables par le contribuable en vertu de la présente partie ... Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation pour l'année que dans les cas suivants ...
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² Appellant's counsel wrote to the Court on November 4, 2015, after the hearing, with appellant's written submission and, again, on November 9, 2015 drawing attention to slight differences in the electronic and printed versions of the transcript of the hearing of the motion and, at the same time, enclosing a Book of Authorities and copies of same, all apparently with the consent of the Crown.

[13] In *Coleman C. Abrahams v MNR*, 66 DTC 5451, President Jackett, as he then was, explained that a first reassessment is displaced by a second reassessment; the first reassessment becomes a nullity. But, if a reassessment is followed by an “additional” assessment for the year, the prior assessment remains intact. The additional assessment adds an amount of tax, a penalty or interest in addition to that which has already been assessed. (See also *Lambert v The Queen*, 76 DTC 6363 (FCA)).

[14] In the matter at bar, the Minister had assessed an amount she had not assessed earlier, an additional assessment, an assessment of a penalty. Notwithstanding that the assessed penalty may be based on events culminating in the reassessment, it is still an amount, a penalty, in addition to tax previously assessed for 2008. There is nothing esoteric about the additional assessment. It is a procedure available to the Minister.

[15] The appeal from the reassessment of income for 2008 remains a valid and proper appeal; the reassessment is still valid.

[16] As of the date of this application, no appeal from the additional assessment had been filed. The appellant claims that the additional assessment must be based on the facts that led to the reassessment and the appellant will suffer prejudice due to its burden of proving the reassessment wrong while the Minister will have the onus of proving the additional assessment correct. The taxpayer suggests that the Minister should have the onus in appeals from both assessments. It is quite possible that the Minister may plead additional facts to support the additional assessment. At this stage we do not know what facts will be alleged by the Minister on any future appeal from the additional assessment. In any event, the appellant’s rights are not being violated. Many subsection 163(2) penalties are assessed in the same notice of assessment as a taxpayer’s income for a taxation year. In these appeals, the taxpayer is in the same position as the appellant: the taxpayer has the onus of defeating the income assessment; the Crown has the onus of proving the facts underlying the penalty. The procedure is described by Rouleau J. in *The Queen v Wellington Taylor*, 84 DTC 6459, [1985] 1 FC 331.

[17] Once the appellant appeals the additional assessment, it may wish to apply to the Court for an Order joining both appeals so that they may be heard together. At that time the trial judge will be in the best position to determine if any of the appellant’s rights have been violated. I will therefore stay proceedings in the

current appeal until 60 days after the filing of an appeal from the additional assessment but not later than June 30, 2016.

[18] The appellant's motion is otherwise dismissed with costs in the amount of \$500 to the respondent.

Signed at Ottawa, Canada, this 19th day of November 2015.

“Gerald J. Rip”

Rip J.

CITATION: 2015 TCC 288

COURT FILE NO.: 2013-3379(IT)G

STYLE OF CAUSE: 684761 B.C. LTD. and HER MAJESTY
THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 22, 2015

REASONS FOR ORDER BY: The Honourable Justice Gerald J. Rip

DATE OF ORDER: November 19, 2015

APPEARANCES:

Counsel for the Appellant: Gavin Laird
Counsel for the Respondent: Perry Derksen / David Everett

COUNSEL OF RECORD:

For the Appellant:

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