Docket: 2015-397(IT)I

BETWEEN:

GEORGE SAMSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of Elizabeth Hilliard (2015-393(IT)I) on March 1, 2016, at Ottawa, Canada.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Dean Blachford
Counsel for the Respondent:	Charlotte Deslauriers

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* with respect to the Appellant's 2008, 2009, 2010 and 2011 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia this 10th day of May 2016.

"Patrick Boyle"

Boyle J.

Docket: 2015-393(IT)I

BETWEEN:

ELIZABETH HILLIARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Boyle J.

Citation: 2016 TCC 115
Date: 20160510
Dockets: 2015-397(IT)I
2015-393(IT)I

BETWEEN:

GEORGE SAMSON,
ELIZABETH HILLIARD,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The Appellants George Samson and Elizabeth Hilliard are married. Their informal appeals were heard together on common evidence in Ottawa. They were each assessed $2,500 penalties under subsection 162(7) for each of the years 2008 through 2011 for failing to file forms T1135 in respect of their foreign property by the end of April of the following year as required by section 233.3 of the *Income Tax Act (Canada)* (the "Act").

[2] The Appellants do not dispute that they each owned foreign property in excess of the $100,000 threshold throughout the period. Nor do they dispute that they did not file their form T1135 information returns for any of these years within the time required. They were not required to file income tax returns for each of these years as a result of losses claimed from their foreign and Canadian rental properties which have not been challenged. It is their position that they are entitled to maintaining a so-called due diligence defence to the subsection 162(7) administrative penalties, and that they were reasonable in their belief at the time that they did not have to report their foreign property and file T1135 forms for the years in question because they did not have any income tax payable for the year and hence did not have to file T1 income tax returns.

[3] The Appellants now accept that the definition of filing-due date for purposes of their T1135s is expressly not affected by subparagraph 150(1.1)(*b*)(i) dealing with income tax returns for years in which no tax is payable, as the definition of filing-due date in section 248 says that the filing-due date for a taxation year is the day on or before which the taxpayer's Part I tax return for the year is required to be filed or would be required to be filed if tax under Part I were payable by the taxpayer for the year.

[4] The issue to be decided in these appeals is whether the taxpayers were diligent in their compliance efforts and acted reasonably.

[5] Each of the Appellants testified. They also called their accountant, Ken Grant, who made a voluntary disclosure for the Appellants in 2013 for each of the years 2007 to 2012, which include all of the years in issue in these appeals. It appears 2007 was statute-barred and their objections for that year were allowed by Canada Revenue Agency ("CRA") Appeals. The Respondent did not call any witnesses.

[6] The Appellants are each both real estate agents and real estate investors. They own a real estate brokerage company operating under the name All Pro. The Appellants co-own rental properties in Mont-Tremblant, Quebec and on the Outer Banks of North Carolina. These generated annual rental revenue for them in the hundreds of thousands of dollars, but resulted in net losses for them in each of the years in issue. Their losses exceeded their income from their real estate sales activities and other income. Their son is also a real estate agent and was earning most of the income from the activities of their brokerage. The cost of the Outer Banks rental property in 2002 was approximately US$500,000. They complied with the U.S. Internal Revenue Service filing obligations on a timely basis throughout the period.

[7] The Appellants had previously done a voluntary disclosure to CRA in 2007 for the years 1997 to 2006. T1 returns were filed for each of those years under the Voluntary Disclosure Program. T1135 forms were filed in respect of the Outer Banks property for 2002 to 2006 under this voluntary disclosure. They were represented by DioGuardi Tax Law LLP in this voluntary disclosure. There was income tax payable in the eight years out of the ten in which they were taxable. At a meeting with CRA regarding this voluntary disclosure, Mr. Samson acknowledges that his T1135 filing obligations were explained to him.

[8] Taxes payable for those years were approximately $85,000. Penalties were waived. In its one-page July 2008 letters to each Appellant concluding their first Voluntary Disclosures:

> (i) It is clear from the subject line that a separate case number was assigned to the T1 filings and the T1135 filings;
>
> (ii) The operative paragraph dispensing penalties for the taxable years and for the T1135 obligations reads "Please be advised that having reviewed the 1998 to 2006 T1 Income Tax Returns and 2002 to 2006 T1135 forms, are accepting [sic] the submission as a valid voluntary disclosure. Penalties that may otherwise apply are waived.";
>
> (iii) The next paragraph is a two sentence description of their income tax record keeping obligations; and
>
> (iv) The next paragraph reads "We also acknowledge receipt of your 1997 and 2006 T1 returns. As there is no tax payable, we have not considered them under the VDP. We will, however, forward them for processing."

[9] The September 2007 DioGuardi voluntary disclosure request to CRA specifically withdraws the 1997 and 2006 T1 income tax returns from the Voluntary Disclosure Program due to the fact that there is a credit or nil balance for these years. That is, the one-and-a-half page DioGuardi letter also makes it clear that a T1135 form remained due for 2006. It was included and not asked to be excluded from the Voluntary Disclosure Program, notwithstanding that no T1 return was due as no tax was payable. It is a reasonable inference that this would have been explained to the Appellants by Ms. DioGuardi. Further, this should have been relatively easily understood by Mr. Samson reviewing it on behalf of himself and his wife.

[10] It appears from the DioGuardi letter that the Appellants had also not filed returns for years prior to 1997, but that there were no longer any records to confirm their recollection that they were net loss years or to compute losses and report them in a return.

[11] Mr. Samson described himself as self-taught with respect to financial and record keeping matters. He said he learned his tax as he went along but would not consider himself an expert. His wife described him as being anally retentive in these departments.

[12] The Appellants retained their accountant, Mr. Grant, in late 2010 to deal with their unfiled T1135 forms going back to 2007. According to Mr. Samson, their new accountant told him he was not sure a second voluntary disclosure would be accepted with respect to T1135 forms but it was worth trying. Mr. Grant submitted a voluntary disclosure letter to CRA on August 30, 2013 with respect to T1135 forms for 2007 through 2012. In that letter Mr. Grant acknowledges the T1135s are past due. He also affirms that he informed the Appellants of their non-compliance. The T1135s were not put in to evidence.

[13] In his short voluntary disclosure letter, Mr. Grant sets out only one reason for the Appellants' non-compliance. He pointed out in bold and initial capitals that the T1135 states that specified foreign property does not include a property used or held exclusively in carrying on an active business. He goes on to write, again in bold initial capitals, that rental income for Canadian tax purposes is property income, not active business income as defined in CRA T4036, and that the taxpayers were not aware of this difference and believed they were exempt from filing a T1135 for rental income from a business. There was no suggestion whatsoever in his letter that the Appellants had not filed T1135s on time because they thought they didn't have to if no tax was payable.

[14] In his testimony, Mr. Grant acknowledged that the reason for the failure to comply set out in his voluntary disclosure letter was not correct and that there had been no such confusion or lack of understanding about rental versus business income. When asked why he wrote it, he said it was because he knew there was not a chance in hell of getting the voluntary disclosure accepted as it was their second with respect to T1135 non-compliance dealing with years shortly after their first voluntary disclosure. Apparently this irrelevant distinction between rental and business income had been relevant to some unrelated Quebec provincial tax compliance issue he was also working on with the Appellants with respect to their Mont-Tremblant chalet.

[15] Notwithstanding the clear language he used in his voluntary disclosure to CRA that the T1135 forms were past due and that this was non-compliant, in evidence he explained that he nonetheless thought they were not necessary. I do not accept this. Mr. Grant's credibility is very badly damaged by his acknowledged untruth in his voluntary disclosure letter to CRA about the reason for the Appellants' non-compliance. This explanation in his testimony smacks of after-the-fact advocacy, not credible testimony as to past facts.

[16] This second voluntary disclosure was not accepted by the CRA per its letter of October 2013. The Appellants were reassessed $2,500 penalties each for each of the years 2007 to 2011.

[17] The Appellants had another law firm act on their objections to these reassessed penalties. It was at this stage that it was pointed out to CRA Appeals that the 2007 reassessment was beyond the normal reassessment period. Apparently CRA had missed that when the reassessments were issued. Appeals decided to allow their objections with respect to 2007 only.

[18] The Appellants put the CRA Report on Objection with respect to Mr. Samson into evidence. With respect to 2007, the Report on Objection says "The 2007 year was reassessed even though it was statute-barred and it appears the Voluntary Disclosure officer did not realize that 2007 was statute-barred." The Appeals Officer's decision included "The taxpayer may have been negligent and 152(4) may have applied in the reassessment of the 2007 tax year. However, it is not the Appeal's [sic] mandate to prove that. The Voluntary Disclosure officer should have proved that and she did not. She requested that the 2007 tax year be reassessed without even acknowledging that it was statute-barred." The reassessments for 2007 were reversed.

[19] In its consideration of Mr. Samson's due diligence arguments in his objection, the Report on Objection includes:

> The taxpayer has a long history of non-compliance. He was arbitrarily assessed in 1988 and 1989. He filed his 1990 through 1993 T1's in 1994. He did not file from 1994 through 1996. He filed his 1997 through 2006 T1's in 2008, under Voluntary Disclosure. He filed his 2008 through 2011 T1's in 2013, after being contacted by the CRA's non-filers officer and asked to file the returns. As of the date of this report [October 2014], his 2012 and 2013 returns are not filed and he was contacted by non-filers regarding the returns.

(Obviously, to the extent any of Mr. Samson's unfiled T1 returns were in respect of years in which no tax was owing, he was entitled to not file unless and until CRA made demand.)

[20] The Report on Objection also indicates Mr. Samson was a GST/HST registrant and that his 2008 through 2011 GST/HST returns were all filed late, in 2013, and still had a balance owing.

[21] The Report on Objection also included the following entries from the CRA non-filers diary notes:

> *DATE: 25 Feb 2013*
>
> Called taxpayer at [redacted], spoke to him and he seems to blame his bookkeeper who currently has fallen way behind in their duties. Over the past few years, he says he has been lax in staying on his bookkeeper and accountant for service.

[22] It can be noted that his accountant, Mr. Grant, in his testimony at the hearing made it clear that he took offense at this explanation by Mr. Samson to CRA. Mr. Grant maintains that he did the whole voluntary disclosure within three weeks of receiving the work from Mr. Samson's second bookkeeper since he had been hired.

[23] The Report on Objection also included a non-filers diary entry in respect of a conversation with Mr. Grant:

> *DATE: 18 July 2014*
>
> Called Ken Grant at [redacted] and we discussed the account. He explains he has tried many times to discuss the filing requirements to this t/p and the consequences of not filing and has had little success. He explains that the t/p dropped off a banker's box after hours one day last week which contains the information for 2012 and 2013.

[24] I have already commented on my serious concern with Mr. Grant's credibility given his untruthful statement of the reason for the Appellants' failure to file in his voluntary disclosure request. My credibility concerns are heightened by the fact that he was at times evasive, would not give clear answers, and was argumentative.

[25] I also have serious concerns with Mr. Samson's credibility. He was evasive and repeatedly deflected clear questions about the clarity of CRA's one-page letter accepting the first voluntary disclosure on the issue of T1135s being due even in years in which income tax returns weren't due because no tax was payable. I do not believe that he did not understand the questions, and he strikes me as too smart to not understand this clear distinction from the CRA letter as well as the DioGuardi letter. Also, Mr. Samson allowed Mr. Grant to file the second voluntary disclosure with an untruthful explanation of the Appellants' confusion and

misunderstanding about rental income versus business income. This is not helped by the fact that it also didn't even mention the reason now being put forward in this hearing for the non-compliance. Further, Mr. Samson seems to continuously prefer to blame others. He blamed his first bookkeeper, then his second bookkeeper, then his accountant. He was visibly upset with his lawyer at the hearing of the appeal, notwithstanding that he was doing the best he could with the case he had. The accountant, Mr. Grant, disagreed with what was attributed to Mr. Samson in the Report on Objection about him. Mr. Grant did not suggest that he did not tell CRA that Mr. Samson did not meet his compliance obligations even though he had personally explained them to his client. Nor did he say that this was expressed but related solely to the 2012 and 2013 T1 returns – all of this was going on around the same time.

[26] On the facts of this case, there is no reasonable basis to believe that the Appellants were unaware of their obligation to file their 2007 T1135 form by April 2008 and in each of the years thereafter. This was clear from CRA's first voluntary disclosure acceptance letter. It is a very reasonable inference that this was similarly made clear when CRA explained the T1135 filing obligations at a meeting with the Appellants, or at least Mr. Samson, in the course of the first voluntary disclosure. It would also be a reasonable inference that Ms. DioGaurdi would have also explained that to them clearly. It was clear from Ms. DioGuardi's letter. There had been no real passage of time in which to forget what they were told. I do not accept as credible Mr. Grant's testimony that he may have told them otherwise because he believes he believed otherwise.

[27] In the circumstances of this case, due diligence and reasonable efforts to comply would have, at the very least, included reading and understanding CRA's first voluntary disclosure letter. It was a single page and written very clearly.

[28] Ms. Hilliard maintains that she behaved reasonably in relying on her husband to take care of their tax compliance obligations. On the facts of this case, there is again no reasonable basis for her to rely on him as she was well aware that he was regularly delinquent with his tax filings and, since this lead her to also make her first voluntary disclosure, this extended beyond optional tax filings or tax filings which were not required if there was no tax payable. It is not enough that she was not aware he ever "evaded" tax. (While this came out in evidence in chief, there was no suggestion in any of the evidence that Mr. Samson had in fact ever attempted to evade tax). Ms. Hilliard was aware her husband was a serial non-complier.

[29] Other facts were put in to evidence in support of their due diligence/reasonableness defence regarding Mr. Samson's mother being ill and then passing away, their son's very severe illness during the period and some of Mr. Samson's personal medical issues. None of these were present when the current round of T1135 non-compliance started with respect to the 2007 year due in April of 2008.

[30] According to his doctor's letter, Mr. Samson's thyroid condition developed in early 2009 and it took the better part of six months for the disorder to be controlled. Mr. Samson added he had gone to the hospital emergency department six months earlier to see an endocrinologist. His mother's dementia, her resulting move into a care home, and her later death began in 2011. Their son Robert's severe bacterial infection also commenced in 2011.

[31] It is hard to see that these have much relevance to overlooking filing T1135s, nor is there any evidence these impaired the Appellants' functioning to being beyond their ability to recall such things as their T1135 obligations. Some of the other medical conditions mentioned by Mr. Samson sounded like those typical of many Canadian men his age. Similarly, his caring for his elderly mother sounded rather similar to the situation that many Canadians of the Appellants' ages regularly find themselves in. There was no evidence that the Appellants could or did not work through these periods or that they hired anyone else to do the maintenance that they had always carried on with respect to their properties. The evidence is that they did cancel certain trips away while their son was ill and while Mr. Samson's mother was dying; they did not go south that winter.

[32] Again, these were well after the spate of non-compliance began. Indeed, the conditions of his mother and their son were after Mr. Samson retained Mr. Grant to deal with their not having filed their T1135s since 2006.

[33] Subsequent to the hearing of these appeals, Mr. Samson wrote to the Court asking to be permitted to file further written submissions. This was written by him personally, not his counsel who remained both Appellants' counsel of record. Mr. Samson does not appear to have copied his counsel. The Respondent wrote that it did not oppose the request "as long as the submissions are restricted to submissions on the evidence already adduced at the hearing and no further evidence is presented by the Appellant". In the circumstances of this case, after considering Mr. Samson's request, I decided that additional submissions would not be appropriate, necessary or helpful in this case.

[34] The Appeals are dismissed.

Signed at Vancouver, British Columbia this 10th day of May 2016.

"Patrick Boyle"

Boyle J.

CITATION:	2016 TCC 115
COURT FILE NOS.:	2015-397(IT)I 2015-393(IT)I
STYLE OF CAUSE:	GEORGE SAMSON, ELIZABETH HILLIARD, v. THE QUEEN
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REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
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APPEARANCES:

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