

Docket: 2006-1055(IT)I

BETWEEN:

DAVID LEE DEAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of Gordon Dean
(2006-1056(IT)I) on February 20, 2007 at Regina, Saskatchewan

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: Dwayne M. Anderson

Counsel for the Respondent: Tracey Telford

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1999, 2000 and 2001 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Calgary, Alberta, this 15th day of June 2007.

"L.M. Little"

Little J.

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Little J.

Citation: 2007TCC356
Date: 20070615
Dockets: 2006-1055(IT)I
2006-1056(IT)I

BETWEEN:

DAVID LEE DEAN,
GORDON DEAN,

Appellants,

And

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The Appellants, Dr. Gordon Dean and Dr. David Lee Dean, are brothers. Both are dentists with very busy practices in the City of Regina, Saskatchewan.

[2] Each dentist operated his dental practice as a sole proprietorship. Dr. Gordon Dean has been in practice for over 20 years, while Dr. David Lee Dean has been in practice since 1994.

[3] In 1998, the Appellants entered into an agreement (the "Agreement") with Ash Temple Limited ("Ash Temple"), a dental supplier. Pursuant to the Agreement, Ash Temple agreed to sell to the Appellants dental equipment at a discounted price and to provide a favourable interest rate to finance the purchase. Ash Temple also agreed to assist the Appellants to design the office space and install the dental equipment.

[4] The Agreement also provided that the Appellants would purchase \$120,000 of sundry dental supplies from Ash Temple every year.

[5] The Agreement also provided that the Appellants would receive rebates calculated at 12% of the sundry dental supplies that were purchased (the "Rebates").

[6] The Agreement was designed so that the Rebates that the Appellants received each month would be approximately equal to the monthly payments for the dental equipment.

[7] The Appellants purchased sundry dental supplies from Ash Temple during the 1998, 1999, 2000 and 2001 taxation years. The Appellants claimed the dental supplies as expenses in calculating their income from their dental practices each year.

[8] The Rebates were paid by way of cheques issued to the Appellants.

[9] Originally, the Rebate cheques were issued to Dr. Gordon Dean and the cheques were deposited into his personal bank account. Dr. Gordon Dean would then write a cheque from his personal bank account to his brother for the brother's share of the Rebates. Dr. David Lee Dean would then deposit his portion of the Rebates into his personal bank account. Later, the Rebate cheques from Ash Temple were issued to each of the Appellants independently.

[10] The Appellants did not include the Rebates in computing their income from their dental practices. These amounts represented the "Unreported Rebate Income".

[11] The Appellants did not inform their accountant, Glen Berger, of the Agreement with Ash Temple. The evidence indicated that all payments made to Ash Temple for the purchase of the equipment were written off as expenses by the Appellants.

[12] After obtaining detailed information directly from Ash Temple with respect to the dental equipment purchased and outstanding loan balances, Mr. Berger set up the equipment as a capital asset, along with a corresponding loan. At this time, Mr. Berger was still not aware of the Rebates.

[13] In February 2002, the Canada Revenue Agency (the "CRA") commenced an audit of the Appellants.

[14] The Minister of National Revenue (the "Minister") issued Reassessments against each of the Appellants to include the Rebates in their income for the 1999,

2000 and 2001 taxation years. The Appellants did not file Notices of Objection to the inclusion of the Rebates in their income.

[15] The Minister also assessed penalties pursuant to subsection 163(2) of the *Income Tax Act* (the "*Act*") in respect of the Unreported Rebate Income, Appropriated Business Funds and, in the case of Dr. Gordon Dean, Overstated Dental Supply Expenses.

B. Issue

[16] The issue is whether the Appellants knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of, false statements or omissions in their income tax returns for the 1999, 2000 and 2001 taxation years pursuant to paragraph 163(2)(a) of the *Act*.

C. Analysis and Decision

[17] The relevant portions of paragraph 163(2)(a) of the *Act* provides:

Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of

(a) the amount, if any, by which

(i) ...

(A) the tax for the year that would be payable by the person under this Act

...

if the person's taxable income for the year were computed by adding to the taxable income reported by the person in the person's return for the year that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission and if the person's tax payable for the year were computed by subtracting from the deductions from the tax otherwise payable by the person for the year such portion of any such deduction as may reasonably be attributable to the false statement or omission

exceeds

(ii) the amount, if any, by which

(A) the tax for the year that would have been payable by the person under this Act

...

had the person's tax payable for the year been assessed on the basis of the information provided in the person's return for the year, [emphasis added]

[18] The concept of "gross negligence" was explained by Justice Strayer in the frequently cited case of *Venne v. The Queen*, [1984] C.T.C. 223, 84 DTC 6247, at paragraph 37:

... "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not. ...

[19] In *Nicholas v. The Queen*, [1996] 3 C.T.C. 2266, 96 DTC 1740, Justice Sobier of the Tax Court described a definition of "gross negligence" that mirrors the definition found in *Venne*. At paragraph 7, Sobier J. stated that:

... To amount to gross negligence, there must be something involving a greater neglect than simply a failure to use reasonable care, and must involve a high degree of negligence, tantamount to intentional acting, an indifference as to whether the law is complied with or not. ...

[20] In *Ganne v. The Queen*, [1994] 1 C.T.C. 2124, 95 DTC 363, Lamarre J. of this Court described the term at paragraph 7 thus:

The term "gross negligence" has often been described by the Courts as meaning "very great negligence".

[21] In *Klotz v. The Queen*, 2004 TCC 147, 2004 DTC 2236, [2004] 2 C.T.C. 2892, Chief Justice Bowman said at paragraph 68:

...It is important to emphasize that failure to exercise due diligence is not the same as gross negligence. Gross negligence connotes a much greater degree of negligence amounting to reprehensible recklessness.

[22] The above cases and definitions are clear and consistent about what constitutes "gross negligence".

[23] Subsection 163(3) of the *Act* puts the onus of proof on the Minister:

Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[24] I have carefully considered the argument of Counsel for the Appellants and Counsel for the Respondent plus the various Court decisions that they referred to. In my opinion the failure by the Appellants to report the Rebates and Appropriated Business Funds in their income in the 1999, 2000 and 2001 taxation years constituted "gross negligence" as referred to in subsection 163(2) of the *Act*.

[25] In the case of Dr. Gordon Dean I have concluded that the overstating of Dental Supply Expenses constituted gross negligence.

[26] I have also considered the arguments raised by counsel for the Appellants with respect to the application of paragraph 12(1)(x) and subsection 13(7.4). In my opinion these provisions have no application in this situation.

[27] I have concluded that the Minister was correct when he imposed penalties on the Appellants with respect to their failure to include in income the Rebate Income, Appropriated Business Funds and in the case of Dr. Gordon Lee, Overstated Dental Supply Expenses.

[28] The appeals are dismissed with costs.

Signed at Calgary, Alberta, this 15th day of June 2007.

"L.M. Little"

Little J

CITATION: 2007TCC356

COURT FILE NOS.: 2006-1055(IT)I
2006-1056(IT)I

STYLE OF CAUSE: David Lee Dean and Gordon Dean v.
Her Majesty The Queen

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: February 20, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: June 15, 2007

APPEARANCES:

| | |
|-----------------------------|--------------------|
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| Counsel for the Respondent: | Tracey Telford |

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