Docket: 2007-764(IT)G

BETWEEN:

MARK BESNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 28, 2008, at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Brent B. Olthuis
Counsel for the Respondent:	Selena Sit

JUDGMENT

The appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 3rd day of July 2008.

"V.A. Miller"

V.A. Miller, J.

Citation: 2008TCC404
Date: July 3, 2008
Docket: 2007-764(IT)G

BETWEEN:

MARK BESNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] The Appellant appeals from Notices of Reassessment dated January 6, 2005 for his 2000 and 2001 taxation years wherein the Minister of National Revenue ("the Minister") increased the Appellant's income by $109,732 and $175,191 respectively and assessed penalties on the additional income amounts pursuant to subsection 163(2) ("gross negligence penalties") of the *Income Tax Act* ("the *Act*").

[2] The principal issue that the Appellant argued at the hearing is whether subsection 239(3) of the *Act* applies so that the gross negligence penalties should not have been assessed. He does not dispute the amount of taxes assessed. Subsection 239(3) of the *Act* reads as follows:

> 239(3) Penalty on conviction -- Where a person is convicted under this section, the person is not liable to pay a penalty imposed under section 162, 163 or 163.2 for the same contravention unless the penalty is assessed before the information or complaint giving rise to the conviction was laid or made.

[3] In particular it is the Appellant's position that a "complaint" was made prior to the assessment of gross negligence penalties and for that reason these penalties should be deleted. He also raised the following three issues:

a) Whether paragraph 11(h) of the Charter applied in the circumstances;

b) Whether the principle in *R.* v. *Kienapple* applied in the circumstances; and,
c) Whether the interest that has accrued from the date of the notice of objection should be deleted?

[4] It is my opinion that there was never a complaint made; the penalties were properly assessed and the appeal should be dismissed.

FACTS

[5] In 2000 and 2001, the Appellant was the sole shareholder of The Gulf Islands Food Company Inc. ("TGIF") and a director of Quinnbesner and Associates Inc. ("QB") which was operated by his then wife, Barbara Quinn. The Appellant and Barbara Quinn also owned 55% of The CAIL Consulting Group of Companies Inc. ("CAIL"). The Appellant maintained the books and records of TGIF, QB and CAIL.

[6] The documentary evidence showed that the Canada Customs and Revenue Agency (hereinafter referred to as "CRA") started to audit the books of TGIF and QB in February 2003. Kyam Smith was the auditor assigned to work on the files of TGIF, QB, Barbara Quinn and the Appellant. He referred these files to the Investigations Division of the CRA on September 16, 2003 by means of a Form T134. On this form Mr. Smith outlined his reasons for requesting that there be an investigation of the books and documents for the Appellant, Barbara Quinn, QB and TGIF. On November 24, 2003, Leo Resk, an Investigator with the Investigations Division, and his supervisor accepted the files for investigation.

[7] On February 3, 2004 Leo Resk swore an Information to Obtain a Search Warrant to search various places where he believed there were documents that would enable him to determine the taxable income and tax payable by QB, TGIF and the Appellant and the GST and net GST required to be reported by QB and TGIF. Mr. Resk believed that this evidence would disclose the commission of offences against the *Act* and the *Excise Tax Act.*

[8] As a consequence of the search and an analysis of the documents seized, Mr. Resk prepared a Prosecution Report ("the Report") dated January 10, 2005 which he sent to the Department of Justice ("DOJ"). The Report detailed the investigation undertaken by the CRA and included a draft of the proposed charges to be laid. It appears that the Report was sent to DOJ on January 11, 2005 or shortly thereafter. Prior to sending the Report to the DOJ, the Minister, through Mr. Resk, assessed the gross negligence penalties by Notice of Reassessment dated January 6, 2005.

[9] On February 9, 2005 an Information was laid which charged the Appellant with evading income tax and causing both TGIF and QB to evade income tax and the remittance of GST.

[10] On February 14, 2006 an Agreed Statement of Facts and Joint Submission on Sentence was filed with the Provincial Court of British Columbia wherein the parties agreed that the Appellant would pay a fine of $112,262.67. At the hearing of this appeal the Appellant stated that in addition to the fine, he received a sentence of one year house arrest. He also admitted that he knowingly made a false statement or omission in his tax returns for the 2000 and 2001 taxation years. In other words he admitted that but for subsection 239(3) of the *Act* or the operation of any principle against double jeopardy, the gross negligence penalties were properly assessed.

[11] It is the Appellant's position that a "complaint" was made prior to the imposition of the gross negligence penalties. He stated that the word "complaint" in subsection 239(3) must be given its ordinary everyday meaning. Counsel for the Appellant argued that in this case a complaint was made when Mr. Smith referred the file to the Investigations Division of the CRA on September 16, 2003. He argued in the alternative that, the complaint was made when the Investigations Division accepted the file or when Mr. Resk swore an Information to Obtain Search Warrants or at the very latest when the search warrants were executed. All of these events occurred prior to the assessment of the gross negligence penalties on January 6, 2005.

ANALYSIS

What does the word " complaint" in subsection 239(3) mean?

[12] The term "complaint" as it is used in subsection 239(3) of the *Act* has never been judicially considered. However, the term is used in many other statutes and in particular, the *Criminal Code*, and in this context it has been considered by other courts.

[13] The legal meaning of the terms "information" and "complaint" was best stated by Justice Saint-Pierre in *The King* v. *Mercier* (1910), 18 C.C.C. 363 (Que. K.B.) at page 366:

> When an order for payment of money is sought for," says Stone (Stone's Petty Sessions, p. 35), "or a judgement upon a demand of a civil nature it is designated a 'complaint,' while the same step is called an 'information' when it is the foundation of proceedings of a criminal nature, which are followed

> either by a conviction or an acquittal."
> However, there were often cases of a mixed character which made it difficult for the practitioner to determine whether the word "complaint" should be used or the word "information." With a view to avoid trouble, the practice finally prevailed to join the two words together. This circumstance accounts for the fact that in the text-books of the commentators in our statute books, and even in our [*Criminal Code*, R.S.C. 1906, c. 146] the words "information and complaint" are so often coupled together. Under the ancient practice, when a complaint was made, the justice issued a summons, but when an "information" was laid he had to issue his warrant. Under our present system this distinction has virtually disappeared and now the justice who desires to compel the attendance of an accused before him may either issue his summons or his warrant as circumstances require.

[14] In the case of *Regina* v. *Bourassa* (1954), 109 C.C.C. 44 (B.C.C.A.) at page 47 Sloan C.J. speaking for the court had this to say about the term "complaint" as it was used in the *Criminal Code*:

> Neither the related terms "information" or "complaint" are defined by the Code.
> Crankshaw's Criminal Code, 6th ed., p. 833, defines their meaning to be: "When the proceeding is one taken against the party charged with a criminal offence for which he is liable, on summary conviction, to imprisonment, fine, penalty or other punishment, an INFORMATION is laid; and when the proceeding is one against a person liable by law to have an order made upon him to pay a sum of money or to do some act which he had illegally failed, neglected or refused to do, a COMPLAINT is made."
> Tremeear's Criminal Code, 5th ed., p.721 states as follows:
> "Strictly speaking the word 'complaint' should be used where an order is sought for the payment of money, or the demand is of a civil nature, while the word 'information' should be restricted to the document which is the foundation of a criminal proceedings, to be followed by either a conviction or an acquittal."
> Sir Joseph Chisholm C.J. in speaking for the majority of the Supreme Court of Nova Scotia *en banc* in *Re Farmer*, [1937] 2 D.L.R. 529 at p.532, 68 Can. C.C. 50 at p.53, 11 M.P.R. 366 said in relation to "informant or complaintant": "These terms in criminal or quasi criminal proceedings have a well-understood meaning. They mean one who appears before a Magistrate or other judicial authority and lays a charge that some one has committed a specified offence for which he should be tried."

[15] Stated simply, a "complaint" is a means of initiating a judicial proceeding. In my opinion the word "complaint" as it is used in subsection 239(3) has this same meaning.

[16] The word "complaint" in subsection 239(3) cannot be read in isolation to the rest of section 239 or the *Act* itself. Section 239 of the *Act* creates a number of criminal offences. It also gives penalties that may be imposed by the courts if the person is convicted of an offence. The purpose of subsection 239(3) is twofold. It

prevents the Minister from waiting to see if a taxpayer will be convicted under section 239 before he assesses gross negligence penalties. It also allows a court which convicts a taxpayer on account of the violation of certain duties under the Act to take into account whether or not the Minister has already imposed a penalty (*Robertson* v. *Minister of National Revenue*, [1972] C.T.C. 2588 at paragraph 7).

[17] The word "complaint" when read in conjunction with the rest of section 239 must have a legal meaning and not an everyday, ordinary meaning. This is especially so where it is joined to the word "information". If nothing else, the principle of *noscitur a sociis*, that is the associated word rule, invites the reader to look for the common feature between the words linked by "and" or "or". In this situation, the common feature between "information" and "complaint" are that they are both processes for bringing a matter before the court. See *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths Canada Ltd., 2002) at page 173.

[18] The expression "information or complaint" is also used in section 244 of the *Act* and a textual, contextual and purposive approach to interpretation would mandate that the phrase has the same meaning in section 244 as it has in section 239. Section 244 reads as follows:

> **244. (1) Information or complaint** -- An information or complaint under this Act may be laid or made by any officer of the Canada Revenue Agency, by a member of the Royal Canadian Mounted Police or by any person thereto authorized by the Minister and, where an information or complaint purports to have been laid or made under this Act, it shall be deemed to have been laid or made by a person thereto authorized by the Minister and shall not be called in question for lack of authority of the informant or complainant except by the Minister or by a person acting for the Minister or Her Majesty.
>
> **(2) Two or more offences** -- An information or complaint in respect of an offence under this Act may be for one or more offences and no information, complaint, warrant, conviction or other proceeding in a prosecution under this Act is objectionable or insufficient by reason of the fact that it relates to two or more offences.
>
> **(3) Venue** -- An information or complaint in respect of an offence under this Act may be heard, tried or determined by any court, judge or justice if the accused is resident, carrying on business, found or apprehended or is in custody within the territorial jurisdiction of the court, judge or justice, as the case may be, although the matter of the information or complaint did not arise within that jurisdiction.
>
> **(4) Limitation period** -- An information or complaint under the provisions of the *Criminal Code* relating to summary convictions, in respect of an offence under this

> Act, may be laid or made at any time but not later than 8 years after the day on which the matter of the information or complaint arose.

[19] It is clear from the reading of section 244 that the term "complaint" does not have its ordinary, everyday meaning. It is used in the technical sense. It has a legal meaning that refers to a process which initiates a judicial proceeding. A "complaint" is heard in the courts (see subsection 244(3)) and by extension, a "complaint" is made to the court system.

[20] Mr. Smith's referral of the files to the Investigations Section of the CRA, that is, Form T134 does not have the essential legal characteristics of a "complaint". None of the scenarios put forward by Appellant's counsel constitute a "complaint" as that word is used in the *Act*. There was no complaint made in this case. An Information was laid and the gross negligence penalties were assessed prior to the Information being laid.

[21] The Appellant's counsel submitted that because it is CRA's practice to have the same person assess the gross negligence penalties and prepare the Report upon which the Information is based, subsection 239(3) could never be invoked. He stated that CRA's practice was an abuse of process and contrary to the decision in *R.* v. *Jarvis*, [2002] SCC 73.

[22] I disagree with the Appellant's counsel. CRA's practice is in accord with the decision in *Jarvis* (*supra*) in that, it ensures that once a file is referred to the Investigations Division, only CRA's investigative powers are used. With respect to counsel's abuse of process argument, I note that the Tax Court does not have jurisdiction to set aside an assessment based on the actions of a CRA official or the practice of CRA. See *Main Rehabilition* v. *R.*, [2005] 1 C.T.C. 212 (FCA).

Paragraph 11(h) of the Charter

[23] Appellant's counsel relied on the dissenting reasons of Lambert, J in *Lavers et al.* v. *Minister of Finance of B.C. et al.*, [**1990] 1 C.T.C. 265** (BCCA) for the proposition that the "offence" was the wilful attempt to evade tax and it was that act which gave rise to both the administrative penalty and the criminal conviction and the fines. Justice Lambert found that the taxpayers were subject to double jeopardy and their rights under the *Charter* had been infringed.

[24] Paragraph 11(h) of the Charter reads as follows:

> Any person charged with an offence has the right
>
> . . . . .
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again

[25] Judge Sarchuk, in his decision in *Sommers* v. *M.N.R.*, 91 DTC 656, reviewed the application of paragraph 11(h) of the *Charter* to subsection 163(2) penalties. He found that the imposition of penalties under subsection 163(2) does not constitute a "finding of guilty or a punishment for an offence which comes within paragraph 11(h) of the Charter".

[26] In the case of *Taylor* v. *The Queen*, 95 DTC 591, Judge Sobier relied on the decision in *Sommers* (*supra*) to find that the "penalties do not amount to a 'true penal consequence'". The penalties under subsection 163(2) are not fines in a criminal or quasi criminal proceeding. They are assessed administratively for unreported income. There is no offence committed and the penalties are based on a set percentage of unreported income and applied when the taxpayer makes a false statement in his return either knowingly or under circumstances amounting to gross negligence.

[27] The Appellant's rights under the *Charter* have not been infringed.

The Principle in Kienapple

[28] The principle that arose out of the decision in *R.* v. *Kienapple*, [1975] 1 S.C.R. 729 is that an accused should not suffer multiple convictions from the same act. Appellant's counsel did not argue this issue at the hearing but as it was raised in the pleadings I will speak briefly to it.

[29] The decision and comments of Justice Dambrot in *R.* v. *Hamilton*, [2006] G.S.T.C. 104 are applicable to the facts in the present appeal. With respect to the gross negligence penalties assessed under the *Excise Tax Act* he stated the following at paragraph 43:

> [43] It is well settled, particularly in relation to revenue schemes, that the imposition of a civil penalty does not preclude a prosecution for the same conduct. Neither s.11(h) of the *Charter*, nor the case of *R. v. Kienapple*, 1974 CanLII 14 (S.C.C.), [1975] 1 S.C.R. 729, invoked by the appellant, have application. They preclude multiple convictions for the same offence. They have no application to civil penalties. In any event, s.326 of the *Act* is dispositive of this issue, absent

> inconsistency with the *Charter*, which has not been alleged. It provides that everyone who fails to file a return when required under the *Act* is guilty of an offence, and, in addition to any penalty otherwise provided, is liable on summary conviction to a fine and imprisonment. The *Act* clearly contemplates a penalty and a prosecution for the same conduct.

Interest

[30] It was the Appellant's position that he disagreed only with the imposition of penalties. He argued that if it is decided he did not have to pay the penalties, then he should be relieved of the interest that has accrued on the actual tax liability since the date of the notice of objection.

[31] The Appellant was not successful in this appeal. However, even if he had been successful, this Court does not have the jurisdiction to delete or reduce interest that was properly calculated and properly imposed (See *Mohamed Moledina v. The Queen*, 2007 TCC 354 at para. 5).

[32] The appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 3rd day of July 2008.

"V.A. Miller"

V. A. Miller, J.

CITATION:	2008TCC404
COURT FILE NO.:	2007-764(IT)G
STYLE OF CAUSE:	MARK BESNER AND HER MAJESTY THE QUEEN
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APPEARANCES:

Counsel for the Appellant:	Brent B. Olthuis
Counsel for the Respondent:	Selena Sit

COUNSEL OF RECORD:

For the Appellant:

Name:	Brent B. Olthuis
Firm:	Hunter Litigation Chambers 2100 – 1040 West Georgia Street Vancouver, B.C.

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada