

BETWEEN:

JOHN SHERRICK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 5, 2009 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant: Nick Ranieri

Counsel for the Respondent: Diana Aird

JUDGMENT

The appeal with respect to an assessment made under the *Income Tax Act* for the 2006 taxation year is dismissed.

Signed at Toronto, Ontario this 12th day of March 2009.

“J. Woods”

Woods J.

Citation: 2009 TCC 148
Date: 20090312
Docket: 2008-3041(IT)I

BETWEEN:

JOHN SHERRICK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] In this appeal, John Sherrick disputes the imposition of a late-filing penalty under subsection 162(1) the *Income Tax Act*. A penalty in the amount of \$584.97 was assessed for the 2006 taxation year.

[2] The question to be decided is a simple one: Was the 2006 income tax return filed by the deadline, which was June 15, 2007?

[3] The appellant is a commissioned real estate broker who is required to file income tax returns by June 15 of each year.

[4] The Minister's conclusion that the income tax return was not filed on time appears to have been based on an envelope postmarked by Canada Post on June 19, 2007, and a Canada Revenue Agency (CRA) receipt stamp dated June 22, 2007 which was affixed to the income tax return.

[5] The appellant did not file the income tax return himself. This was attended to on his behalf by Taxperts Corp., a corporation that specializes in tax return preparation.

[6] A lawyer who is the principal of Taxperts testified that in his view it is most likely that the income tax return was personally delivered to a CRA office in Toronto on the afternoon of the filing deadline. He further speculated that the envelope on which the CRA were relying contained other correspondence related to the appellant's business, such as non-resident real estate forms.

[7] Subsection 162(1) provides:

162. (1) Failure to file return of income. Every person who fails to file a return of income for a taxation year as and when required by subsection 150(1) is liable to a penalty equal to the total of

- (a) an amount equal to 5% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and
- (b) the product obtained when 1% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 12, from the date on which the return was required to be filed to the date on which the return was filed.

[8] For purposes of this appeal, it is necessary to decide which party's position is more likely based on the evidence as a whole. If the appellant's submissions are accepted, then the income tax return was filed on time. On the other hand, if the Minister's assumptions are accepted, then the income tax return missed the filing deadline by a few days and the assessment is correct. The strict wording of subsection 162(1) does not allow for a grace period.

[9] After reviewing the evidence, I have concluded that the Minister's position is more consistent with the evidence as a whole.

The appellant's position

[10] For several years, the appellant has used the tax preparation services of Taxpert Corp., and in particular the services of the principal of the corporation, William Howse. Mr. Howse is a barrister and solicitor.

[11] The appellant testified that he came into Mr. Howse's office on June 15, 2007 to execute the income tax return. He signed it, put it in an envelope, and left the envelope to be filed by Taxperts. While the appellant was at the office, he stated that he remembers having a brief chat with Mr. Howse and a real estate colleague who was there for the same reason.

[12] Mr. Howse also testified. The main part of his testimony was in describing the procedures that are used by Taxperts to file returns but Mr. Howse also stated that he recollected having a chat with the appellant and one of his real estate colleagues on the day of the filing deadline.

[13] Mr. Howse described in significant detail the procedures that Taxperts follows in order to timely file the hundreds of tax returns that are processed so that late-filing penalties are avoided.

[14] According to his testimony, it is the usual practice for the office manager to keep a list of tax returns that are ready to be delivered to the CRA on June 15. Although the office manager did not testify, his list for the 2006 taxation year was entered into evidence. The appellant's name was on the list, which suggests, according to Mr. Howse's testimony, that the income tax return was likely delivered late in the afternoon on the day of the filing deadline.

[15] Mr. Howse also testified that, although a few of Taxperts's clients have been assessed late-filing penalties, all previous assessments have been reversed by the CRA except for this one.

The Minister's position

[16] The Minister's case depends on two things, an envelope and a receipt stamp on the income tax return.

[17] Counsel for the Minister stated that she received the envelope stapled to the income tax return. Colour-coded copies of the envelope were provided for the Court.

[18] The envelope has the following details: (1) it is addressed to the International Tax Services Office in Ottawa, (2) it contains the appellant's name, hand-written by Mr. Howse, below the meter stamp, (3) it contains Taxpert's postal meter stamp dated June 15, 2006 (one year earlier), and (4) it contains a Canada Post postmark dated "07 06 19."

[19] Counsel also introduced the execution page of the appellant's tax return. It bore two stamps. The first states: "NCR Mailroom, #5, Jun 22, 2007." It is not in dispute that "NCR" refers to the National Capital Region. The second stamp is also dated June 22, 2007 and contains the following: "Recu, Agence du Revnu Canada, June 22, 2007, ITSO Penalty."

[20] The reference on the penalty stamp to "ITSO" was not referred to at the hearing. If the reference is to "International Tax Services Office," this provides a further possible connection between the envelope (addressed to that office) and the income tax return. However, there is no evidence before me that this is what ITSO means. It might refer to something else, such as, Income Tax Services Office. Accordingly, I have not taken the reference to "ITSO" into account.

Analysis

[21] Based on the evidence presented at the hearing, in my view the Minister's position is more consistent with this evidence.

[22] If the envelope entered into evidence contained the income tax return, then the return could have not been filed on time because the envelope was postmarked June 19, which was after the filing deadline.

[23] It is necessary to consider, then, whether the envelope did contain the income tax return.

[24] On the face of the documents, this seems to be the case. The return was stamped in the Ottawa region where the envelope was addressed. The received stamp on the return says June 22, 2007, which is consistent with the postmark on the envelope of 07 06 19, which was assumed by all at the hearing to be June 19, 2007.

[25] Mr. Howse testified that he would never use this particular envelope for regular income tax returns because it was addressed to the International Tax Services Office.

[26] It might be the case that Taxperts does not generally send income tax returns to the International Tax Services Office. I would note, though, that this envelope was clearly handled by Mr. Howse because he wrote the appellant's name on it. In my view, Mr. Howse did not provide a sufficiently detailed explanation as to the circumstances in which this envelope was likely used. He stated that the envelope likely contained non-resident forms for the appellant. I am not satisfied with this brief

explanation. I would also note that the appellant did not testify as to filing non-resident forms.

[27] I would also comment that there is something out of the ordinary about this envelope. The meter stamp is dated a year before the postmark. I also note that the meter stamp is dated June 15, which is likely an extremely busy day for Taxperts in filing regular tax returns for Canadian real estate agents. It seems odd that non-resident forms would be sent on this day.

[28] In his testimony, the appellant testified that he had a distinct recollection of placing the income tax return in an envelope that was smaller than the envelope that was in evidence. I have taken this testimony into account but I do not think that it is sufficient to outweigh the evidence led by the Minister. It is possible that the income tax return was taken out of the smaller envelope and mailed in the larger envelope a few days later.

[29] In the result, I would conclude that the evidence as a whole is more consistent with the Minister's position. It is possible that the appellant signed the income tax return on June 15 as he testified, but the evidence as a whole suggests that the income tax return did not make it to the CRA office in Toronto on that day.

[30] On a final note, I would mention that it is unfortunate that no one provided testimony on behalf of the Minister. It would have been helpful to have someone testify as to the processing of tax returns and penalties.

[31] I considered whether an adverse inference should be made from the failure of the Minister to lead this evidence. Ultimately, I have concluded that none should be taken. The appellant's position changed at the hearing and it took a turn that was not expected by counsel for the Minister. This is one of the unfortunate aspects of appeals that are heard under the informal procedure where there are no discoveries and surprises are commonplace. In the circumstances, I do not think that an adverse inference is warranted.

[32] In the result, the appeal will be dismissed.

Signed at Toronto, Ontario this 12th day of March 2009.

“J. Woods”

Woods J.

CITATION: 2009 TCC 148

COURT FILE NO.: 2008-3041(IT)I

STYLE OF CAUSE: JOHN SHERRICK and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 5, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. Woods

DATE OF JUDGMENT: March 12, 2009

APPEARANCES:

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