.

Citation: 2009 TCC 174
Date: 20090403
Docket: 2007-3173(IT)I

BETWEEN:

GOAR, ALLISON & ASSOCIATES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Agent for the Appellant: David Bazar
Counsel for the Respondent: Amit Ummat

REASONS FOR JUDGMENT

**(Delivered orally from the bench on
January 15, 2009, in Welland, Ontario.)**

Miller J.

[1] I am prepared to give judgment in this matter. It is an interesting case of statutory interpretation. This is an informal procedure case brought by Goar, Allison & Associates Inc. It concerns the interplay of two penalty provisions of the *Income Tax Act*, subsections 162(1) and 162(2.1).

[2] There is no dispute over the facts. They were laid out by the parties in an agreed statement of facts which is attached as Schedule "A". I am not going to go over them. I think everybody is aware of the facts.

[3] I am going to read the provisions in the *Act* however. Firstly, subsection 162(1) reads:

> 162(1) 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.
> …

And it then goes on to describe how to calculate the penalty.

[4] Subsection 162(2.1) reads:

> 162(2.1) Notwithstanding subsections (1) and (2), if a non-resident corporation is liable to a penalty under subsection (1) or (2) for failure to file a return of income for a taxation year, the amount of the penalty is the greater of
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> *(a)* the amount computed under subsection (1) or (2), as the case may be, and
>
> *(b)* an amount equal to the greater of
>
> (i) $100, and
>
> (ii) $25 times the number of days, not exceeding 100, from the day on which the return was required to be filed to the day on which the return is filed.

[5] The simple question is whether subsection 162(2.1) applies in a situation where, as in this case, there was no monetary penalty under subsection 162(1). I read the words in subsection 162(2.1) to mean exactly what they say; that is, where the taxpayer is liable to a penalty.

[6] The Appellant was not liable to a penalty as it had no income. The words of subsection 162(2.1) are not where the taxpayer files late, in which case clearly the taxpayer would be subject to the monetary penalties imposed under subsection 162(2.1). But the words do not say that. They say the Appellant must be liable to a penalty equal to a monetary amount. So, what penalty is the Appellant liable to under subsection 162(1)? Nothing. Zero. No income, no penalty. That being the case, the prerequisite for subsection 162(2.1) has simply not been met, and no penalty under subsection 162(2.1) can be imposed.

[7] The Respondent referred me to a comment of Justice Laskin in dissent in the case of *Minister of National Revenue v. Panko*.[1] Justice Laskin in his dissent stated:

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[1] [1972] S.C.R. 319.

> 27 … Indeed, to say that a person is liable to a penalty is merely to expose him to the risk thereof; only when the necessary action or step is taken to exact it does it become effective. …

[8] So, applying this to the facts before me, was the Appellant exposed to the risk of a subsection 162(1) penalty? I have to answer no. If the Appellant was a domestic corporation, it would not have been at risk of a penalty as it owed no tax. I do not believe Justice Laskin's comment helps the Respondent.

[9] Finally, the Respondent referred me to technical notes[2] issued in conjunction with the release of subsection 162(2.1) in October, 1998. It is worth repeating those. The technical note reads as follows:

> New subsection 162(2.1) is a special rule for the computation of penalties under subsections 162(1) (failure to file return) and 162(2) (repeated failure to file). The rule, which applies to all non-resident corporations, provides that a penalty under either of those subsections is to be computed as the greater of two amounts. The first amount is the amount determined under subsection 162(1) or 162(2). The second amount is the greater of $100 and $25 for each day, up to 100, that the failure to file continues. New subsection 162(2.1) thus operates to subject non-resident corporations to the effect of the "regular" penalties under subsections 162(1) and (2) in respect of a failure to file an income tax return and, consistent with the role of that tax return as an information return for those corporations that claim an exception from Canadian tax as a result of the application of a tax treaty, to the alternative penalties that would apply under subsection 162(7) of the *Act* if a separate information return had been required in respect of those corporations.

[10] The first part of the technical note, I suggest, supports the notion that there must be an amount of penalty under subsection 162(1). However, the latter part of the note could support the Crown's position.

[11] Respondent's counsel argues that the latter part of the note explains that the non-resident return is to be treated as an information return for purposes of the penalty. Information returns are penalized under subsection 162(7) on the same basis as subsection 162(2.1) supposedly. While this may have been the legislator's intention, I am not swayed frankly that they got it right. I find the words are clear as they are written and these technical notes cannot override that clear meaning. If the Government intended to treat the non-resident income tax return as an information return subject to subsection 162(7) penalties, more direct and unambiguous language could and should have been used.

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[2] *2005 Department of Finance Technical Notes* – Income Tax – 17th Edition, consolidated to October 24, 2005, page 1920, October 1998 technical note - subsection 162(2.1).

[12] Where the Government penalizes a taxpayer, and in this case a non-resident, I am of the view that such penalty provision should be absolutely crystal clear. If there is ambiguity, it should be resolved in favour of the taxpayer. However, in this particular provision, I find no ambiguity. If the non-resident does not owe tax, the non-resident is not subject to the subsection 162(2.1) penalty.

[13] The appeal is allowed and referred back to the Minister for reassessment on the basis there is no subsection 162(2.1) penalty.

Signed at Ottawa, Canada, this 3rd day of April, 2009.

"Campbell J. Miller"

C. Miller J.

SCHEDULE "A"

AGREED STATEMENT OF FACTS

1) The Appellant filed its T-2 Corporation Income Tax Return for 2005 on December 29, 2006.

2) The Minister initially assessed the Appellant's 2005 taxation year on January 16, 2007.

3) No Federal Tax was assessed.

4) The Minister assessed late filing penalties pursuant to subsection 162(2.1) of the *Income Tax Act* (the '*Act*') in the amount of $2,500.00.

5) The Appellant filed a Notice of Objection on January 22, 2007.

6) The Minister confirmed the Appellant's tax liability for the 2005 taxation year on June 11, 2007.

7) In so assessing and confirming the Appellant's tax liability for the 2005 taxation year, the Minister made the following assumptions of fact:

   a. the Appellant is a non-resident corporation;

   b. the Appellant carried on business in Canada during the 2005 taxation year;

   c. the Appellant's fiscal year end is December 31;

   d. the Appellant was required to file a T2 return within six months following the fiscal year end;

   e. the Appellant's 2005 tax return was received by the Minister on December 29, 2006; and

   f. the Appellant 2005 tax return was due on or before June 30, 2006.

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APPEARANCES:

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Firm:	N/A

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