

Docket: 2008-3957(IT)G

BETWEEN:

RICARDO CADAY, JR.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 11, 2011, at Windsor, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Joanna Hill

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years are allowed and referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment. The Respondent is entitled fixed costs of \$500.

Signed at Vancouver, British Columbia this 31st day of January, 2011.

“G. A. Sheridan”

Sheridan J.

Citation: 2011TCC61
Date: 20110131
Docket: 2008-3957(IT)G

BETWEEN:

RICARDO CADAY, JR.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, Ricardo Caday, Jr., is appealing the arbitrary assessment¹ of the Minister of National Revenue which included in income for the 2003, 2004 and 2005 taxation years of \$67,138, \$59,253 and \$58,138, respectively. Because, even after having been requested to do so, the Appellant did not file income tax returns for those three years, the Minister also assessed late and repeat late filing penalties under subsections 162(1) and (2) of the *Income Tax Act*. As of the date of the hearing of this appeal, the Appellant had still not filed any of his returns.

[2] The Appellant represented himself in this General Procedure appeal and was the only witness to testify. A generally credible witness, the Appellant's real difficulties lay in his lack of organization. As well as not having filed returns as required, he had not maintained proper records of his employment income or expenses. Thus, the better part of the day it took to hear this matter was spent trying to make sense of the Appellant's testimony while sifting through what few documents he had produced in the hope of arriving at a just determination of his tax liability. Thanks in no small part to the patience and forbearance of counsel for the

¹ Subsection 152(7).

Respondent, the Appellant was able to establish that his income in the taxation years was less than assessed and that he was entitled to certain expenses as set out below.

Employment Income for 2003, 2004 and 2005

[3] During these years, the Appellant was employed as an insurance agent for various firms in the Windsor area. The Minister's assessment of his income in each of the taxation years was apparently based on information gleaned from his spouse's income tax returns. However, having reviewed the T-4's² and T-4A's³ produced by the Appellant, the Respondent conceded that the Appellant's income in each year was \$26,389, \$23,496, \$38,923.

Employment Expenses and Other Deductions

[4] As mentioned above, the Appellant never filed income tax returns for 2003, 2004 and 2005. He did, however, on the eve of trial prepare draft returns for 2003⁴ and 2004⁵ which he used as reference material at the hearing. He did not have enough time, he said, to complete the 2005 return.

[5] In his 2003 and 2004 draft returns, the Appellant claimed deductions of approximately \$8,000 and \$10,000, respectively, for motor vehicle expenses, costs incurred for seminar fees, professional licensing dues, parking, magazine subscriptions, client entertainment, advertising and promotion, office supplies and his home office. He also testified that he paid \$157 per month for 5 months in 2003 and 12 months in 2004 under a computer leasing contract. Finally, he sought to deduct \$611 as *Canada Pension Plan* contributions.

[6] Counsel for the Respondent argued that not all of these deductions ought to be allowed as some were not supported with receipts or other documentation and/or the estimated amounts were not reasonable. Further, this was a General Procedure matter and the Appellant had not fully complied with orders for the production of documents.

² Exhibits R-1 and R-3.

³ Exhibits R-2, R-4, R-5, R-6.

⁴ Exhibit A-2.

⁵ Exhibit A-5.

[7] I accept the submissions of counsel for the Respondent that there is insufficient evidence to justify allowing in full the expenses claimed by the Appellant. Like many taxpayers who appear without legal counsel, the Appellant was quite overwhelmed by his obligations under the rules and with the complexity of establishing his entitlements; however, there is a limit to the leeway the Court can permit in a General Procedure appeal.

[8] Beginning, then, with the *Canada Pension Plan* deductions, there was nothing to show the amount claimed had actually been paid. As for his home office expenses, the Appellant claimed 6/7th of the total cost of utilities, property tax and insurance for his residence in each year. While I accept his testimony that his work as an insurance agent required him to have office space in his home for use in the evening or on weekends and that he would have paid something towards such expenses, he produced no invoices for his residential utilities, taxes and insurance. There was the same lack of documentation for his motor vehicle expenses: I accept that he used one of his two cars to travel around selling insurance but the Appellant did not maintain a motor vehicle log and could only estimate his costs based on average gasoline prices and odometer readings in each year. Similarly, he did not provide to the Respondent or bring to Court receipts for client entertainment, magazine subscriptions, office supplies, parking and so on. He did have a receipt for \$299 paid for a professional development seminar in 2003. Accordingly, I have allowed a reasonable amount for such expenses and where applicable, I have given effect to the concessions made by the Minister as set out below.

The 2003 Taxation Year

[9] The Respondent concedes that in 2003, the Appellant's income was \$26,389. His employer deducted at source \$1,732 in respect of income tax which, for some reason, was not reported on the T-4 issued by his employer; that amount should be taken into account by the Minister when reassessing. Similarly, the Appellant produced an "Instalment Payment Summary" issued to him by the Canada Revenue Agency for 2004⁶ which refers to a "total instalment credit" for 2003 of \$2,230.75. In reassessing the Appellant's 2003 taxation year in accordance with these Reasons for Judgment, the Minister ought to determine the amount of and, if applicable, take into account any instalment payments the Appellant may have made in that year. As for the \$8,000 claimed as other employment expenses in 2003, I find that the Appellant incurred 25% of that amount, \$2,000.

⁶ Exhibit A-1.

The 2004 Taxation Year

[10] The Respondent conceded that in 2004, the Appellant's income was \$23,496. He made instalments of \$2,980.84⁷, a figure which ought to be considered by the Minister in reassessing. His employer withheld \$2,648⁸ in income tax but as was the case in 2003, neglected to show this amount on the Appellant's T-4A. Also deducted directly from his pay cheque was \$5,712⁹ for employee expenses. As for the \$10,000 in other expenses claimed by the Appellant, I find that he incurred employment expenses of 20% of that amount, \$2,000.

The 2005 Taxation Year

[11] The Respondent conceded that in 2005, the Appellant's income was \$38,923. At the hearing, the Appellant did not have any supporting documentation other than the T-4¹⁰ and a sample Earnings Summary¹¹ for January 2005. I accept the submission of counsel for the Respondent that based on these documents, it is likely that on average, his employer withheld from his monthly pay cheque approximately \$478 for employment expenses in January 2005, making for an annual deduction of \$5,736.

Late Filing Penalties

[12] The Appellant was required under subsection 150(1) of the *Act* to file an income tax return in each of the taxation years under appeal:

150(1) Filing returns of income - general rule. Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,

[13] The Appellant's failure to file his returns triggered the operation of the late-filing provisions, subsections 162(1) and (2):

⁷ Exhibit A-1.

⁸ Exhibits A-6 and R-4.

⁹ Exhibit A-6.

¹⁰ Exhibit R-6.

¹¹ Exhibit R-7.

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.

(2) Repeated failure to file. Every person

(a) who fails to file a return of income for a taxation year as and when required by subsection 150(1),

(b) on whom a demand for a return for the year has been served under subsection 150(2), and

(c) by whom, before the time of failure, a penalty was payable under this subsection or subsection (1) in respect of a return of income for any of the 3 preceding taxation years

is liable to a penalty equal to the total of

(d) an amount equal to 10% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and

(e) the product obtained when 2% 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 20, from the date on which the return was required to be filed to the date on which the return was filed.

[14] The Appellant admitted that he did not file returns in 2003, 2004 and 2005 and that he did not comply with the Minister's request to do so. However, assuming as the Minister did that tax was owing in those years, it was open to the Appellant to avoid the imposition of such penalties if he were able to show that he exercised "due diligence"; in other words, that he took all reasonable steps to comply with his obligations under the *Act*.

[15] The Appellant's evidence was that he did not file his returns when due on the 30th of April of the following year because he believed (apparently on the advice of his tax preparer) that he had no taxable income in any of the taxation years. He also told the Court that he and his wife had numerous health and financial problems throughout these years, many of which continue to the present time.

[16] The standard a taxpayer must meet to avoid the imposition of late-filing penalties is a high one. Here, the Appellant has failed to satisfy me that he took any steps to comply with his obligations under the *Income Tax Act*. Whatever his motives may have been, the evidence shows carelessness in records keeping and indifference to his obligations as a taxpayer, a pattern that remained unaltered even after the receipt of the Minister's request to file returns and continued unabated throughout the prosecution of his appeal. As for his personal difficulties, while I accept his evidence on that score and am sympathetic to his plight, his evidence did not provide the basis for concluding that they prevented him from filing his returns in a timely fashion.

[17] Accordingly, if after reassessing in accordance with these Reasons for Judgment tax was owed in any or all or the years under appeal, the Minister will be justified in imposing penalties under subsections 162(1) and/or (2), as the case may be.

[18] Counsel for the Respondent also asked for fixed costs of \$500, an amount which she quite rightly submitted did not come close to covering the expenses incurred to ensure that the Appellant had his day in Court. Counsel acknowledged his financial difficulties - which are significant - but argued that given the Appellant's failure to comply with the *Tax Court of Canada Rules (General Procedure)* and orders of this Court, the awarding of costs was justified. I must say I was disappointed at the Appellant's lack of preparation at the hearing given the time that had been spent at the interlocutory stage to explain what would be expected of him and having made allowances, at that time, for his lack of strict compliance with the *Rules*. I regret to say that his behaviour caused unnecessary delay and expense for the Respondent, the Court and as counsel pointed out, even himself. In the circumstances, I am more receptive to the Respondent's request than I otherwise might have been given the Appellant's financial troubles. Accordingly, costs are awarded to the Respondent in the amount of \$500.

[19] For the reasons set out above, the appeals of the 2003, 2004 and 2005 taxation years are allowed and the assessments are referred back to the Minister for reconsideration and reassessment in accordance with these Reasons for Judgment.

Signed at Vancouver, British Columbia, this 31st day of January, 2011.

“G. A. Sheridan”

Sheridan J.

CITATION: 2011TCC61

COURT FILE NO.: 2008-3957(IT)G

STYLE OF CAUSE: RICARDO CADAY, JR., AND
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PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: January 11, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: January 31, 2011

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Joanna Hill

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan
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