Docket: 2010-2836(IT)I

BETWEEN:

KRISTINA PERUSCO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 10, 2011, at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Agent for the Appellant:	James Deacur
Counsel for the Respondent:	Alisa Apostle

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2008 taxation year is dismissed.

Signed at Ottawa, Canada, this 31th day of August 2011.

"Johanne D'Auray"

D'Auray J.

Citation: 2011 TCC 409
Date: 20110831
Docket: 2010-2836(IT)I

BETWEEN:

KRISTINA PERUSCO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

[1] This is an appeal by Kristina Perusco in respect of an assessment under the *Income Tax Act* (**ITA**) for her 2008 taxation year. The appeal concerns a penalty that the Minister of National Revenue (**Minister**) imposed for the appellant's failure to report income in more than one taxation year, pursuant the subsection 163(1) of the ITA.

[2] Subsection 163(1) of the ITA applies to taxpayers who fail to report income for two taxation years within a four year period. It makes such taxpayers subject to a penalty equal to 10 percent of the unreported income in the most recent taxation year. In the present appeal, the penalty amounts to $2,780.[1]

[1] With the provincial tax component, the penalty is $5,560.

[3] Ms. Perusco was represented at the hearing by an agent, namely an accountant from the accounting firm which prepared the tax returns of the appellant and her family.

[4] The appellant did not argue due diligence. Instead she submitted that no penalty should be imposed because the income which she failed to report was stated in her employer's T4 and the appropriate tax withheld. More fundamentally she submitted that subsection 163(1) of the ITA should be struck out on the basis that its application violates both section 7 and section 12 of the *Canadian Charter of Rights and Freedoms* (**Charter**).

Facts

[5] At the time of the hearing, the appellant was 26 years old. She studied in sociology and psychology.

[6] During the year under appeal, she was employed by the Hudson's Bay Company (**Hudson's Bay**) in their future executive program. Under the program, she had to work for all three banners of the Hudson's Bay's, The Bay, Zellers and Home Outfitters. At the time of the hearing, she was still studying.

[7] She testified that she was not familiar with the tax system. She did not open envelopes sent to her by the Canada Revenue Agency (**CRA**). Instead, she handed all papers related to her taxes to her father who, in turn, gave them to the family accountant's, Deacur & Associates. She signed her income tax returns, but did not review them before signing. She stated that she simply signed when her father told her it was time to sign.

[8] She testified that in 2008 she only worked for Zellers and could not remember seeing a T4 from the Hudson's Bay.

[9] She did not dispute that she failed to report certain income in both her 2007 and her 2008 tax returns. In 2007, she failed to include an eligible dividend of $660. In 2008, she failed to include employment income in the amount of $27,804 received from the Hudson's Bay.

[10] Mr. Allan Gordon testified on behalf of the appellant. He is a chartered accountant and an associate with Deacur & Associates. In his testimony, he compared the penalty under subsection 163(1) with that under subsection 163(2). What emerged from his testimony was that in the appellant's case, subsection 163(1) resulted in a higher penalty than would have been the case had a penalty been imposed under subsection 163(2). In other words, the appellant would have been assessed a lesser penalty if she had been assessed under subsection 163(2) for having been grossly negligent. See Exhibit A-4.[2]

[11] Mr. Leroy Evans, a litigation officer at the CRA testified on behalf of the respondent. In his testimony, he explained how the penalty for the 2008 taxation year was calculated. His calculation of the penalty was not disputed by the appellant. He stated that the amount of penalties under subsections 163(1) and 163(2) will depend on the circumstances of each case.

Position of the appellant

[12] The appellant raised two arguments. First, she submitted that since her employment income was reported in the T4 slip issued by her employer, the Hudson's Bay, and since source deductions were withheld on the income and remitted to CRA, she should not have been assessed a penalty under 163(1).

[13] The appellant's second argument was that subsection 163(1) contravenes sections 7 and 12 of the Charter. Her position was that the application of subsection 163(2) is unjust and not in accordance with the principles of fundamental justice. She also submitted that the application of 163(1) of the ITA to the appellant amounts to an unfair, cruel and unusual treatment or punishment.

[14] In support of both branches of her Charter argument, the appellant contrasts subsection 163(1) with subsection 163(2). The latter provision requires an intentional element of wrongdoing for a penalty to be imposed. It applies to taxpayers who "knowingly" or "under circumstances amounting to gross negligence" make a false statement or omission in a return. By contrast, subsection 163(1) does not require any intentional element for the imposition of a penalty. The appellant therefore submits that because subsection 163(1) involves less serious conduct than subsection 163(2),

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[2] The calculations of the penalties at Exhibit A-4 under subsections 163(1) and 163(2) include the federal and the provincial taxes.

it is fundamentally unjust that the penalty under subsection 163(1) can in some cases be greater than the penalty under subsection 163(2).

Position of the respondent

[15] In response to the appellant's first argument, the respondent pointed out that the case law has held that a taxpayer cannot avoid a penalty under subsection 163(1) simply by stating that the employment income was reported by the employer. The respondent referred to *Porter v. The Queen*,[3] where Webb J. stated at paragraph 2 of his judgment:

> 2 […] It seems to me that the words "in a return filed under section 150" mean that the conditions for the imposition of the penalty will be met (subject to a possible due diligence defence) if an amount of income is not included in a tax return filed by a taxpayer. Therefore it would not be sufficient for a taxpayer who is an employee and who fails to report an amount of employment income in his or tax return to simply state that an amount of employment income was reported by his or her employer when the employer filed T4 slips. When the employer files the T4 slips, the amount is reported by the employer not by the employee. The penalty is imposed upon the person who failed to report the amount of income in their tax return, who would be the employee in this case.

[16] With respect to the appellant's Charter argument, the respondent cited numerous cases where the courts have held that the civil penalties under the ITA do not contravene either sections 7 or 12 of the Charter.

Analysis

[17] I do not agree with the appellant's first argument. Subsection 163(1) is a strict liability provision. Once it is proven that a taxpayer failed to report income in two tax returns filed in two of the last four years, the provision with its penalty applies unless the taxpayer establishes due diligence. Due diligence is not met simply because the employment income in issue is indicated in the T4 slips filed by the taxpayer's employer. It is the taxpayer's obligation to file a complete and accurate income tax

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[3] *Porter v. The Queen*, 2010 TCC 251.

return. Subsection 163(1) seeks to reinforce that obligation. In this respect, I agree with and adopt Justice Webb's reasons for judgment in *Porter*.[4]

[18] I am also of the view that subsection 163(1) does not contravene the Charter. Therefore, the second argument of the appellant also fails.

[19] Subsections 163(1) and 163(2) of the ITA read as follows:

> 163 (1) Repeated failures [to report income] -- Every person who
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> > (*a*) fails to report an amount required to be included in computing the person's income in a return filed under section 150 for a taxation year, and
> >
> > (*b*) had failed to report an amount required to be so included in any return filed under section 150 for any of the three preceding taxation years
> >
> > is liable to a penalty equal to 10% of the amount described in paragraph (*a*), except where the person is liable to a penalty under subsection (2) in respect of that amount.
>
> 163(2) False statements or omissions -- 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) the amount, if any, by which
> > (A) the tax for the year that would be payable by the person under this Act
> >
> > exceeds
> >
> > > (B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year
> > > 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

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[4] Idem, footnote 3.

> 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
>
> exceeds
>
> (B) the amounts that would be deemed by subsections 120(2) and (2.2) to have been paid on account of the person's tax for the year 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, […]

[20] Sections 7 and 12 of the Charter read:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> […]
>
> **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[21] During the hearing, the appellant implied that subsection 163(2) is a criminal provision. It is not. Subsections 163(1) and 163(2) are civil in nature, not criminal. The penalties imposed under them are likewise civil in nature. The jurisprudence is clear on this point.

[22] As has been stated in numerous cases, section 7 of the Charter does not protect purely economic interests. This point was made in the context of income tax

assessments by Rothstein J.A. in *Kaulius v. The Queen*[5] where he stated at paragraphs 29 and 30:

> [29] I will accept that the power of reassessment of a taxpayer implicates the administration of justice. However, I do not accept that reassessments of taxpayers result in a deprivation of liberty or security of the person.
>
> [30] If there is a right at issue in the case of reassessments in income tax, it is an economic right. In *Gosselin*, McLachlin C.J.C., for the majority, observed that in *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 1003, Dickson C.J.C., for the majority, left open the question of whether section 7 could operate to protect "economic rights fundamental to human [...] survival". However, there is no suggestion in *Gosselin* that section 7 is broad enough to encompass economic rights generally or, in particular, in respect of reassessments of income tax. I am, therefore, of the view that the appellants have not demonstrated a deprivation of any right protected by section 7 of the Charter.

[23] With respect to section 12 of the Charter, I am of the view that an assessment under 163(1) is not cruel and unusual treatment or punishment, even if the penalty under subsection 163(1) is greater than the penalty under 163(2). The test for section 12 is summarized by McLachlin CJC in *R. v. Ferguson*,[6] at paragraph 14:

> [14] The test for whether a particular sentence constitutes cruel and unusual punishment is whether the sentence is grossly disproportionate: *R. v. Smith*, [1987] 1 S.C.R. 1045. As this Court has repeatedly held, to be considered grossly disproportionate, the sentence must be more than merely excessive. The sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable": *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84, at para. 4, citing *Smith*, at p. 1072, and *Morrisey*, at para. 26. The question thus becomes: is a four-year sentence of imprisonment grossly disproportionate to the offence of manslaughter as committed by Constable Ferguson?

[24] In *Mackenzie v. Canada*,[7] Justice Paris of this Court examined section 12 of the Charter in the context of a penalty under subsection 280(1) of the ITA. At paragraph 36, he stated:

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5 *Kaulius v. The Queen*, 2003 FCA 371, see also *Whitbread v. Walley*, [1988] 5 W.W.R. 313.

6 *R. v. Ferguson*, [2008] 1 S.C.R. 96.

7 *Mackenzie v. The Queen*, [2008] TCC 70.

> 36 The Appellant's argument that penalties levied under subsection 280(1) constituted cruel and unusual treatment or punishment, and therefore breached his rights under section 12 of the *Charter* must also fail. The test for determining whether a penalty is cruel or unusual treatment or punishment is whether the penalty is "grossly disproportionate in the sense that it is so excessive as to outrage standards of decency" (see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.). I can see nothing in the imposition of a penalty equal to 6% of the unpaid amount that would in any sense outrage standards of decency. A penalty of this magnitude is consistent with a purpose of general deterrence within the context of a self-reporting tax system.

[25] In my view, a penalty of 10% of the amount that a taxpayer omitted to report is not grossly disproportionate in the sense that it is so excessive as to outrage standards of decency.

[26] I am of the view that even if in some circumstances, the penalty under subsection 163(1) would be greater that a penalty under subsection 163(2), sections 7 and 12 of the Charter would not be infringed. The provisions have different requirements. The amount of the penalty under each will vary with the circumstances of each case. The penalty under subsection 163(2) will not invariably be less than that under subsection 163(1). The penalty under subsection 163(2) is cumulative in nature with the result that it can far exceed the penalty under subsection 163(1). In these circumstances and for the reasons given above, it cannot be said that the application of the penalty deprives the appellant of the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[27] The same is also true for section 12 of the Charter. Even if the penalty in a particular case is greater under subsection 163(1) than it would have been had subsection 163(2) applied, it cannot be said that this amounts to cruel or unusual treatment or punishment as contemplated by section 12.

[28] The appellant did not argue due diligence. Even if she had, the evidence does not support a finding that she acted with due diligence. The appellant did not pay any attention to her T4; did not open the envelopes she received from the CRA; and did not review her returns before signing them. She simply gave everything to her father and signed whatever he placed in front of her. As a result, she failed to report 44% of her income, that is she failed to report $27,804 out of a total income of $62,235 in her

2008 taxation year. The facts in this appeal are quite similar to those in *Porter*[8] where the Court also rejected an argument of due diligence.

[29] The appellant is young. She stated in Court that she will now pay attention to her tax affairs. Most of the tax payable by the appellant was withheld at source. As counsel for the respondent pointed out at the hearing, the appellant may ask the Minister to exercise his discretion under subsection 220(3.1) of the ITA to waive or cancel all or a portion of the penalty imposed.

[30] The appeal is dismissed.

Signed at Ottawa, Canada, this 31th day of August 2011.

"Johanne D'Auray"

D'Auray J

[8] *Ibid* Paragraph 15.

CITATION:	2011 TCC 409
COURT FILE NO.:	2010-2836(IT)I
STYLE OF CAUSE:	KRISTINA PERUSCO v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 10, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	August 31, 2011

APPEARANCES:

Agent for the Appellant:	James Deacur
Counsel for the Respondent:	Alisa Apostle

COUNSEL AND AGENT OF RECORD:

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