

Dockets: 2010-3252(IT)G, 2012-115(GST)I

BETWEEN:

830480 ALBERTA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 15, 2012, at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant: James Yaskowich
Counsel for the Respondent: Margaret M. McCabe

JUDGMENT

The appeals from the assessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended, for the appellant's 2003 and 2006 taxation years and the appeals from the assessments made under the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, for the appellant's reporting periods ending July 31, 2005, January 31, 2006, April 30, 2006, July 31, 2006, January 31, 2007, July 31, 2009, August 31, 2009, September 30, 2009 and October 31, 2009 are dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 3rd day of December 2012.

"Robert J. Hogan"

Hogan J.

Citation: 2012 TCC 424

Date: 20121203

Dockets: 2010-3252(IT)G, 2012-115(GST)I

BETWEEN:

830480 ALBERTA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] The appellant, 830480 Alberta Inc., a land developer, has appealed assessments imposing late filing penalties under the *Income Tax Act* (the “ITA”) (the “IT Late Filing Penalties”) for its 2003 and 2006 taxation years and assessments imposing late filing penalties under the *Excise Tax Act* (the “ETA”) (the “GST Late Filing Penalties”) for the reporting periods ending July 31, 2005, January 31, 2006, April 30, 2006, July 31, 2006, January 31, 2007, July 31, 2009, August 31, 2009, September 30, 2009 and October 31, 2009 (the “Reporting Periods”).

[2] In assessing the IT Late Filing Penalties against the appellant, the Minister of National Revenue (the “Minister”) relied on the following assumptions of fact set out in the Reply to the Notice of Appeal:

10. In so assessing the Appellant in respect of the 2003 and 2006 taxation years, the Minister assumed the following facts:
 - a) the return of income of the Appellant for the 2003 taxation year was required to be filed with the Respondent on or before April 30, 2004;

- b) a request to file a return of income for the 2003 taxation year was issued by the Respondent on October 26, 2004;
- c) the Appellant's return of income for the 2003 taxation year was not received until November 04, 2004;
- d) by letter dated November 14, 2008, the Appellant's representative provided an amended return of income for the 2003 taxation year;
- e) by its amended return of income for the 2003 taxation year, the Appellant reported net income of \$292,232;
- f) by its amended return of income for the 2003 taxation year, the Appellant reported it owed tax in the amount of \$28,659.00;
- g) by its amended return of income, the Appellant deducted the amount of \$73,798 as non-capital losses from prior years in its 2003 taxation year;
- h) the Minister accepted the amended return of income for the 2003 taxation year as filed;
- i) the Appellant did not pay the tax amount owing of \$28,659 upon filing the amended return of income for its 2003 taxation year;
- j) the Appellant was assessed a LFP in the amount of \$3,152.49, in respect of the 2003 taxation year, calculated as follows:

2003 tax unpaid		\$28,659
Amount unpaid	x 5%	1432.95
Add to		
Amount unpaid	x 1%	286.59
	x 6	1719.54
Total penalty		\$3,152.49

- k) the return of income for the 2006 taxation year was required to be filed April 30, 2007;
- l) a request to file a return of income for the 2006 taxation year was issued by the Respondent on January 10, 2008;
- m) the Appellant's return of income for the 2006 taxation year was not received until August 27, 2009;
- n) by its return of income for the 2006 taxation year, the Appellant reported net income of \$8,485,199;

- o) by its return of income for the 2006 taxation year, the Appellant reported it owed tax in the amount of \$1,409,036;
- p) the Minister applied losses from prior years in the amount of \$2,606,345 to reduce the Appellant's income to \$5,878,854 in the 2006 taxation year;
- q) the Minister determined that the Appellant's tax liability for the 2006 taxation year was \$1,273,403;
- r) the Appellant did not pay the tax amount owing of \$1,273,403 upon filing its return of income for the 2006 taxation year;
- s) the Appellant was assessed a LFP in the amount of \$216,478.51, in respect of the 2006 taxation year, calculated as follows:

2006 tax unpaid		\$1,273,403
Amount unpaid	x 5%	63,670.15
Add to		
Amount unpaid	x 1%	12,734.03
	x 12	152,808.36
Total penalty		\$216,478.51

[3] At the hearing, the appellant's counsel conceded that the assumptions of fact set out in subparagraphs (a), (c), (d), (k) and (m) are accurate.

[4] In assessing the GST Late Filing Penalties against the appellant for the Reporting Periods, the Minister relied on the following assumptions of fact:

15. In so assessing the Appellant, the Minister relied on the following assumptions of fact:
 - a) the Appellant is a GST registrant;
 - b) the Appellant was a corporation involved in the business of land development and sales;
 - c) during the material time, Riaz and Rukhsana Choudhry were each 50% shareholders of the Appellant and were husband and wife;
 - d) Mr. Choudhry was the principal of the Appellant during the material time;
 - e) the Appellant is required by the Act to file its GST returns on a fiscal quarterly basis;

- f) for the reporting periods a [sic] at issue the Appellant was required to file returns, and filed returns, as follows:

Reporting Period Ending	Return Due	Date return Filed	GST Reported	ITC Claimed	Net tax Reported
31-Jul-05	31-Aug-05	27-Aug-09	3169.6	-26048.51	-22878.91
31-Jan-06	28-Feb-06	27-Aug-09	90942.03	-135809.59	-44867.56
30-Apr-06	31-May-06	27-Aug-09	15235.15	-26777.4	-11542.25
31-Jul-06	31-Aug-06	27-Aug-09	0	-19289.59	-19289.59
31-Jan-07	28-Feb-07	27-Aug-09	22291.68	-29880.48	-7588.8
31-Jul-09	31-Aug-09	29-Jul-10	13650	-1931.92	11718.08
31-Aug-09	30-Sep-09	29-Jul-10	58900	-3377.13	55522.87
30-Sep-09	31-Oct-09	29-Jul-10	7400	-2279.16	5120.84
31-Oct-09	30-Nov-09	29-Jul-10	29825	-3965.31	25859.69

- g) for the reporting periods at issue the Appellant was required to report and remit net tax by the due date of the returns as follows:

Reporting Period Ending	Return and Remittance Due date	Date return Filed	Net tax Assessed
31-Jul-05	31-Aug-05	27-Aug-09	34,014.74
31-Jan-06	28-Feb-06	27-Aug-09	37789.53
30-Apr-06	31-May-06	27-Aug-09	258,612.24
31-Jul-06	31-Aug-06	27-Aug-09	212,201.48
31-Jan-07	28-Feb-07	27-Aug-09	4,175.77
31-Jul-09	31-Aug-09	29-Jul-10	11,718.08
31-Aug-09	30-Sep-09	29-Jul-10	55,522.87
30-Sep-09	31-Oct-09	29-Jul-10	5,120.84
31-Oct-09	30-Nov-09	29-Jul-10	25,859.69

- h) for the reporting periods at issue the Appellant failed to file and make remittances as required by the Act and the Minister correctly assessed administrative penalties as follows:

Reporting Period ending	Date return Filed	Reassessment Date	Net tax Reported	Net tax Assessed	Late Remitting Penalty	Failure to File Penalty
31-Jul-05	27-Aug-09	09-Sep-10	-22878.91	34,014.74	3,361.29	1,320.58
31-Jan-06	27-Aug-09	28-July-2010	-44867.56	37789.53	2,520.99	1,471.57
30-Apr-06	27-Aug-09	28-July-2010	-11542.25	258,612.24	13,398.81	10304.48
31-Jul-06	27-Aug-09	28-July-2010	-19289.59	212,201.48	7603.34	8,488.05
31-Jan-07	27-Aug-09	28-July-2010	-7588.8	4,175.77	21.36	167.02
31-Jul-09	29-Jul-10	20-Aug-2010	11718.08	11,718.08		410.13
31-Aug-09	29-Jul-10	20-Aug-2010	55522.87	55,522.87		1,804.48
30-Sep-09	29-Jul-10	20-Aug-2010	5120.84	5,120.84		153.61
31-Oct-09	29-Jul-10	20-Aug-2010	25859.69	25,859.69		711.13

[5] At the hearing, the appellant's counsel conceded that paragraph (f) was accurate.

[6] The appeals were heard on common evidence.

[7] Mr. Riaz Choudhry, the sole shareholder of the appellant, was the only witness to appear for the appellant.

[8] Prior to 1999, Mr. Choudhry had worked as a civil engineer for the City of Edmonton. The evidence shows that Mr. Choudhry has a Master's degree in engineering.

[9] In or around 1999, Mr. Choudhry caused the appellant to be incorporated to engage in land development projects in Alberta.

[10] Mr. Choudhry testified that the appellant's first project was in the city of Beaumont. The appellant acquired approximately 60 acres of land in the city of Beaumont in 1999 and 2000. That land development project was known as the Four Seasons Estates.

[11] The appellant spent the 2000 taxation year developing plans for the project and obtaining zoning changes. According to Mr. Choudhry, the appellant incurred significant expenses leading to a non-capital loss carry-forward for that year.

[12] Phase I of the Four Seasons Estates project commenced in 2001. To sell the lots in Phase I, the appellant had to construct all of the above and below ground utilities including access roads, sewage and rainwater systems, and gas, phone and electrical lines. At the end of Phase I, the appellant had completed construction for approximately 30 lots. Mr. Choudhry testified that only nine lots were sold in 2001 and that the appellant incurred a loss that was attributable to the significant development expenses incurred in that year and which gave rise to a loss carry-over.

[13] Development work on Phase II of the Four Seasons Estates project commenced in 2002. Work also continued on Phase I in that year. According to Mr. Choudhry, the appellant sold approximately 31 lots that year and incurred a loss giving rise to a carry-forward because its expenses continued to exceed its revenue.

[14] Mr. Choudhry testified that the appellant commenced Phase III of the Four Seasons Estates project in 2003. It sold approximately 30 building lots in that year. In the fall of 2003, the appellant acquired approximately 80 acres of land on Ellerslie Road and 66th Street in the city of Edmonton. This project became known as the Sunset Valley Estates project. Development work on the Sunset Valley project began in late 2003. No lots in that project were sold that year.

[15] Mr. Choudhry testified that he was not in a hurry to prepare and file the appellant's 2003 return because he believed the appellant had incurred losses in that year. Moreover, he was aware that the appellant had unused non-capital losses from prior years to offset any income that it may have realized.

[16] The appellant was finally sent a request from the Minister to file its return for the 2003 taxation year on October 26, 2004. The appellant waited until November 4, 2004 to file its 2003 return. No tax payable was shown on the tax return filed at that time. On November 14, 2008, the appellant filed an amended return for the 2003 taxation year which showed that it had earned net income of \$292,232 and still had tax payable of \$28,659 after application of a loss carry-forward from prior years of \$73,798.

[17] Mr. Choudhry claimed that he had failed to take into account that certain so-called "soft costs" were not deductible when he filed the first return for 2003.

[18] His accountant prepared the amended return and properly capitalized expenses that were not immediately deductible.

[19] Development work on the two projects continued in 2005 and 2006. According to Mr. Choudhry, the appellant continued to incur losses.

[20] Mr. Choudhry explained that he was in no rush to prepare the appellant's 2006 tax return because he believed that the corporation's loss carry-forward of \$2,606,345 from prior years was sufficient to offset any income earned in that year, which he estimated to be approximately \$2 million. In the return that was eventually filed for the 2006 taxation year, the appellant disclosed that its net income was at least \$5.8 million greater than its loss carry-over from prior years. Mr. Choudhry offered no explanation as to how he had underestimated the appellant's income by more than \$5.8 million for that year.

[21] Regarding the late filing of the appellant's GST returns for the Reporting Periods, Mr. Choudhry offered an explanation similar to that given with respect to the late filing of the appellant's income tax returns. According to Mr. Choudhry, he was not in a rush to file the returns because he believed that the appellant's overall input tax credits for the Reporting Periods would exceed its net tax owing for these periods, resulting in a GST refund to the corporation when the returns were eventually filed.

[22] The issue in this appeal is whether the appellant has successfully established that it exercised the requisite level of due diligence in relation to its failure to file within the times required by the *ITA* and *ETA* respectively income tax returns for the 2003 and 2006 taxation years and GST returns for the Reporting Periods. In the present case, the appellant would need to establish that it made a reasonable mistake of fact in order for the due diligence defence to be successful.

[23] The appellant's counsel conceded that the appellant did not identify any circumstances that would have prevented it from filing its income tax and GST returns on time. Nonetheless, counsel insisted that the late filing penalties assessed against the appellant should be vacated because Mr. Choudhry had reasonable grounds for believing that the appellant did not owe any taxes for the periods for which the returns were filed late.

[24] In the case of the 2003 income tax return, counsel pointed out that the first return filed by the appellant reported nil net income. In the case of the 2006 income tax return, counsel noted that Mr. Choudhry testified that he believed the appellant's

net income would be equal to or less than its loss carry-forward from prior years. Finally, counsel observed that Mr. Choudhry testified that he believed that the appellant's input tax credits exceeded the amount of GST collected by it for the Reporting Periods for which GST returns were filed late.

[25] Counsel relied on the decision of the Federal Court of Appeal ("FCA") in *Corporation de l'École Polytechnique v. The Queen*, 2004 FCA 127, as support for his submission that a reasonable mistake of fact, such as that allegedly made by Mr. Choudhry, can serve as the foundation of a proper due diligence defence to a late filing penalty. Counsel quoted the following excerpts from that decision:

27 This Court has held that there is no bar to the defence argument of due diligence, which a person may rely on against charges involving strict liability, being put forward in opposition to administrative penalties. In particular, it has held that section 280 of the *Excise Tax Act*, by its wording and content, gives rise to that defence: *Canada (A.G.) v. Consolidated Canadian Contractors Inc.*, [1999] 1 F.C. 209 (F.C.A.). It may be worth reviewing the principles governing the defence of due diligence before applying them to the facts of the case at bar.

28 The due diligence defence allows a person to avoid the imposition of a penalty if he or she presents evidence that he or she was not negligent. It involves considering whether the person believed on reasonable grounds in a non-existent state of facts which, if it had existed, would have made his or her act or omission innocent, or whether he or she took all reasonable precautions to avoid the event leading to imposition of the penalty. See *The Queen v. Sault Ste-Marie*, [1978] 2 S.C.R. 1299; *The Queen v. Chapin*, [1979] 2 S.C.R. 121. In other words, due diligence excuses either a reasonable error of fact, or the taking of reasonable precautions to comply with the Act.

30 A person relying on a reasonable mistake of fact must meet a twofold test: subjective and objective. It will not be sufficient to say that a reasonable person would have made the same mistake in the circumstances. The person must first establish that he or she was mistaken as to the factual situation: that is the subjective test. Clearly, the defence fails if there is no evidence that the person relying on it was in fact misled and that this mistake led to the act committed. He or she must then establish that the mistake was reasonable in the circumstances: that is the objective test.

31 As soon as the defence of due diligence accepted for strict liability offences is raised, the question arises of whether the defence of error of law could also be relied on to avoid imposition of a penalty. That question does not arise only in connection with strict liability offences, although with the growth in regulations and the multiplication of statutory offences the field of strict liability has proven to be the most fertile for the emergence of this defence.

[Emphasis added.]

[26] I agree with counsel's submission that a taxpayer can avoid late filing penalties if the taxpayer can show, on a balance of probabilities, that he or she had reasonable grounds to believe that no taxes were owed in connection with the returns that were filed late. If such were the case, it would make the late filing of the returns innocent. To succeed with this defence, the taxpayer must show how the error was made and demonstrate that he relied on the error in deciding to postpone the filing of the returns beyond their due date. This is required in order to satisfy the subjective test. To satisfy the objective test, the taxpayer must then establish that a reasonable person would have made and relied on the same error in deciding to postpone the filing of the returns.

[27] Weighing the evidence as a whole, I am of the opinion that the appellant's evidence falls short on both counts. Mr. Choudhry's testimony was largely self-serving. For example, for the 2006 taxation year, he simply stated that he believed that the appellant's net income would be equal to or less than the loss carry-forward.

[28] In fact, when the return was filed, the appellant reported net income of \$8,485,199, which was at least \$5.8 million greater than its non-capital losses of \$2.6 million from prior years. Mr. Choudhry did not explain how he came to significantly underestimate the appellant's income for 2006. He offered no evidence to suggest that he actually attempted to calculate the appellant's income tax liability for that year on or before the due date of the return. Moreover, assuming an error was indeed made, Mr. Choudhry offered no evidence to explain how the mistake could be considered objectively reasonable. Similarly, Mr. Choudhry did not establish that he actually tried to calculate the appellant's GST liability for the Reporting Periods.

[29] Weighing the evidence as a whole, I conclude that Mr. Choudhry's actions show that he simply did not treat the appellant's tax compliance obligations as a priority.

[30] For these reasons, the appeals are dismissed, with costs.

Signed at Ottawa, Canada, this 3rd day of December 2012.

"Robert J. Hogan"

Hogan J.

CITATION: 2012 TCC 424

COURT FILE NOS.: 2010-3252(IT)G, 2012-115(GST)I

STYLE OF CAUSE: 830480 ALBERTA INC. v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: October 15, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: December 3, 2012

APPEARANCES:

 Counsel for the Appellant: James Yaskowich

 Counsel for the Respondent: Margaret M. McCabe

COUNSEL OF RECORD:

 For the Appellant:

 Name: James Yaskowich

 Firm: Felesky Flynn LLP
Edmonton, Alberta

 For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada