

Docket: 2018-927(IT)I

BETWEEN:

SALLY TROWER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 7, 2019 at Halifax, Nova Scotia

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Max Kruger

JUDGMENT

In accordance with the attached Reasons for Judgment:

The appeal from a reassessment made under the *Income Tax Act* for the Appellant's 2016 taxation year is allowed, without costs, and the appeal is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the amount of \$58,900 should not be added as a taxable dividend to the Appellant's income for the 2016 taxation year.

Signed at Ottawa, Canada, this 8th day of April 2019.

“K.A. Siobhan Monaghan”

Monaghan J.

Citation: 2019 TCC 77
Date: 20190408
Docket: 2018-927(IT)I

BETWEEN:

SALLY TROWER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Monaghan J.

I. INTRODUCTION

[1] Sally Trower appeals an assessment dated October 23, 2017, which was confirmed by the Minister of National Revenue on January 10, 2018, following Ms. Trower's notice of objection. The assessment includes a taxable dividend of \$58,900 in Ms. Trower's 2016 income based on a T5 filed by Cove BD Inc. ("Cove") which indicates that it paid dividends of \$50,342 to Ms. Trower in 2016. Ms. Trower claims not to have received any dividends from Cove in 2016.

II. ISSUE

[2] Thus, the issue in this appeal is whether Ms. Trower received dividends from Cove in 2016 and, if so, the amount of dividends received.

[3] There is no real disagreement between the parties regarding the vast majority of the facts assumed by the Minister in making the assessment. However, Ms. Trower does dispute the Minister's assumption that "during the 2016 taxation year, BD [Cove] paid a dividend in the amount of \$50,342 to the Appellant which represent[s] a taxable amount of \$58,900." The onus to disprove that assumption of fact is on Ms. Trower. Thus, to prevail, she must convince me, on a balance of probabilities, that she did not receive any dividends from Cove in 2016.

[4] As noted above, a T5 indicating that a dividend was paid in 2016 to Ms. Trower was prepared and filed by Cove and so it is not surprising that Ms. Trower was assessed as she was, or that the Minister made this assumption of fact. Of course, the information on the T5 does not in and of itself establish that a dividend was paid or received or who it was paid to or received by. It is a reporting slip, presumably prepared in good faith on the basis of someone's assessment of the relevant facts. But, it is not determinative of the issue. If it can be established through other evidence that no dividends were paid to Ms. Trower in 2016, or that the dividends paid to her were an amount different than that stated on the T5 slip, the T5 slip becomes irrelevant to the computation of her income.

III. SUMMARY

[5] Ms. Trower resides in Nova Scotia and has been married to Mr. Alistair Trower for approximately 20 years. They separated in the Fall of 2015 and have been living separate and apart since that time. They are parents to two children, one of whom has some special needs.

[6] Cove is a company created under and governed by the *Companies Act* (Nova Scotia) ("NSCA").¹ Its taxation year ends on December 31. Although Mr. Trower currently is the sole shareholder of Cove, prior to October 2, 2016,² Ms. Trower also was a shareholder. While she was a shareholder, Ms. Trower owned 49% and Mr. Trower owned 51% of the equity of Cove. Ms. Trower was also a director of

¹ RSNS 1989, c.81.

² As is described below, it is unclear whether she ceased to be a shareholder on September 30, 2016 or October 2, 2016. However, nothing turns on which of the two dates is correct.

Cove prior to October 2, 2016³ but, following her resignation, Mr. Trower became the sole director.

[7] Mr. and Ms. Trower both testified at the hearing. Although it is clear that the relationship between Mr. and Ms. Trower is strained, in many respects Mr. Trower's evidence supported Ms. Trower's key claim – that is, that she did not receive any dividends from Cove in 2016. Ms. Trower also had a number of documents to support her version of events. Based on the evidence, I am satisfied that Ms. Trower did not receive dividends from Cove in 2016 and thus her appeal should be allowed.

IV. EVIDENCE

[8] I turn now to the evidence to explain why I have come to that conclusion.

[9] For a significant part of 2016, Ms. Trower and Mr. Trower were negotiating the terms of their separation. They exchanged many emails and draft separation agreements, about many aspects of their financial arrangements. However, Ms. Trower continued to prepare the monthly household budgets, as she had done throughout their marriage.

[10] Ms. Trower explained that there were several bank accounts: Cove had a bank account, she and Mr. Trower had a joint chequing account, and they each had their own personal bank account. The monthly budget contemplated funds being deposited in the joint account to pay various expenses related to the properties they owned, debt obligations, school and camp fees, gas, food, clothing, etc. It also contemplated deposits to their personal accounts.

[11] The main source of funds was Cove, which was the business operated by Mr. Trower. Although Ms. Trower started a business in the taxation years leading up to their separation, her income and cash flow from that business was quite modest in the 2015 and 2016 taxation years.

[12] It is clear that funds were transferred directly from Cove's bank account to the joint account, and to the Trowers' personal accounts. Ms. Trower submitted

³ As is described below, it is unclear whether she ceased to be a director on September 30, 2016 or October 2, 2016. The Minister assumed it was October 2, 2016. Again, nothing turns on which of the two dates is correct.

bank statements for the Cove account for the period December 24, 2015 to August 26, 2016, as well as a web-based printout of the joint account for the period December 31, 2015 to December 30, 2016. A comparison of the account information from these two accounts shows a pattern of payments:

Date	Amount for Cove Account (Debits/Withdrawals)	Amount for Joint Account (Deposits)
December 30, 2015	\$8,500	\$8,500
February 1, 2016	\$8,500	\$8,500
February 29, 2016	\$8,000	\$8,000
March 31, 2016	\$8,500	\$8,500
April 29, 2016	\$9,000	\$9,000
May 31, 2016	\$10,000	\$10,000
June 30, 2016	\$8,500	\$8,500
August 1, 2016	\$8,500	\$8,500

[13] Ms. Trower did not have Cove bank statements for the period after August 26, 2016. However, based on a review of the joint account statements for 2016, it appears that these monthly transfers continued for the succeeding three months: \$6,092 on August 31, 2016, \$5,679 on September 30, 2016, and \$5,686 on October 31, 2016. (I observe that, in the Description column on the joint account statements, each of the deposits described in the chart and in this paragraph are described as “WWW #RD PTY DEP”. Information Mr. Trower provided to Tyler Dougan, Cove’s accountant, by email in February 2017, as described in detail below, also supports this inference.)

[14] Thus, the evidence establishes that Cove transferred \$78,457⁴ to the joint account in 2016.

[15] As indicated, Cove also made some direct transfers to Ms. Trower’s personal account and to Mr. Trower’s personal account. Although bank statements for the personal accounts were not made available to the Court, email correspondence between Tyler Dougan and Mr. Trower was submitted as evidence. In one email, Mr. Dougan summarizes a number of transfers from Cove’s bank account for the

⁴ This amount does not include the \$8,500 payment made in 2015, as that amount was not received in 2016. It is included in the chart above because it forms part of the pattern of payments and because it was on the bank statements Ms. Trower presented to the Court.

period August 31, 2016 to December 3, 2016. That summary shows direct transfers during that period totalling \$7,550.91 to Mr. Trower's personal account and totalling \$2,976.77 to Ms. Trower's personal account.

[16] However, the character of any of these payments cannot be determined simply from the fact that there were transfers. For example, those payments could have been advances, loans, consulting fees, employment income earned by Mr. Trower, returns of capital on shares, dividends, reimbursement of expenses, repayment of advances from shareholders, etc. Accordingly, to determine whether any or all of these payments were dividends requires an examination of other evidence.

[17] Ms. Trower testified that she had consistently advised Mr. Trower in 2016 that she did not want anything to do with Cove and that she was not interested in income splitting in 2016. She explained that the prior year she had agreed to income splitting, effected through a dividend payment to her by Cove but, at the time, had not understood the tax she would have to pay as a result. Once she understood that, she had no further interest in receiving dividends and told Mr. Trower that. A draft separation agreement, email exchanges between Ms. Trower and Mr. Trower, and between Ms. Trower and Mr. Dougan, are consistent with her testimony. In emails to Mr. Trower and Mr. Dougan, Ms. Trower repeatedly reasserts her position that she does not want to income split, that she does not want dividends, and that she believes she and Mr. Trower have agreed that she would not receive dividends.

[18] She explained her motivation was twofold. Primarily, she was concerned because any additional income she had could put at risk benefits for their child with special needs. She expressed that concern in emails to Mr. Trower in 2016. However, as their marriage was ending, she also wanted nothing to do with Cove which she claims she knew very little about, notwithstanding her status as shareholder and director.

[19] Mr. Trower did not dispute that Ms. Trower had told him a number of times that she did not want any dividends. However, his position is that Ms. Trower should have understood that, as they had split income in the prior years through dividend payments, income splitting would occur in 2016 as well. He stated that, as they were both shareholders, they both should receive dividends and that, because Ms. Trower had full access to the funds in the joint bank account, funds deposited by Cove to the joint bank account should be treated as dividends paid to her (and presumably to him as well).

[20] That the funds were deposited to the joint account does not, of course, mean that they are income to Ms. Trower or Mr. Trower. While it is true that both joint holders may have access to the funds, that does not determine the character of the funds deposited to the account.

[21] On the other hand, Ms. Trower claimed that she understood funds transferred by Cove to the accounts to be Mr. Trower's employment income. Mr. Trower asserted that he had not received any employment income from Cove and that the transfers were all dividends. Obviously, there is disagreement between the Trowers regarding the relevant facts.

[22] However, while the nature of the payments Cove made in 2016 is not agreed by the parties, the evidence is clear that:

- (i) the final decision to split income and the basis on which it would be split was not made until late February, 2017;
- (ii) that decision was made by Mr. Trower alone, in consultation with Mr. Dougan and despite the protestations of Ms. Trower; and
- (iii) the resolution approving the "dividend" payments was prepared and signed in 2017, and only by Mr. Trower, at that time the sole director and shareholder of Cove.

[23] The third point was admitted by Mr. Trower in his testimony. Indeed, at one point in his testimony, he told Ms. Trower that dividends are always done retrospectively. I obviously don't agree with that statement. In my experience, dividends are declared on a particular day, to be paid on that day or a future day, to shareholders of record on a specified date, which may be the declaration date, payment date or some other date.⁵

⁵ I accept that in some circumstances the nature of a payment made by a corporation on a particular day may be determined at a later date at which time, depending on the nature of the payment, a resolution of directors or shareholders might be required. For example, a directors' resolution may be passed near the end of a corporation's fiscal year to approve payment of a bonus to the owner manager and the set off of the amount thereby payable against advances made to the individual during the year. Similarly, a dividend might be declared and set off against prior advances. Section 164 of the default articles of association in Table A of the First Schedule to the NSCA expressly contemplates this: "The Directors may deduct from the dividends payable to any member all such sums of money as may be due and payable by the member to the Company. . .". There are limitations on this approach as described below under the heading "Commercial Law".

[24] Various emails put in evidence substantiate these facts, and much of Ms. Trower's testimony as well. For example, on February 14, 2017, Mr. Dougan sent Mr. Trower an email with a few questions relating to bank activity in 2016. Mr. Trower replied to that email inserting answers directly into Mr. Dougan's email, as indicated in bold face in the following passages from that email:

Hi Alistair

A few questions for you on 2016 activity:

1. There are two payments out of account 306-9 for \$1600 each, one on Nov 15 and the other Dec 16. Can you confirm what these are for?

Dividend payments to me to cover a monthly CRA personal tax payment (from last year)

2. In account 300-2 there are several payments I need confirmation on. Can you confirm the following for me?

Date	Amount	Comment
31-Aug	\$915.00	Transfer to Sally Trower (Dividend)
31-Aug	\$1440.00	Transfer to Sole Account (Dividend)
31-Aug	<u>\$6092.00</u>	Transfer to Joint Account (Dividend)
30-Sep	\$985.00	Transfer to Sally Trower (Dividend)
30-Sep	\$1801.00	Transfer to Sole Account (Dividend)
30-Sep	<u>\$5679.00</u>	Transfer to Joint Account (Dividend)
17-Oct	\$1200.00	Transfer to Sole Account (Dividend)

31- Oct	\$250.00	Transfer to Sole Account (Dividend)
31- Oct	\$500.00	Transfer to Sole Account (Dividend)
31- Oct	\$1076.77	Transfer to Sally Trower (Dividend)
31- Oct	\$1759.91	Transfer to Sole Account (Dividend)
31- Oct	<u>\$5686.00</u>	Transfer to Joint Account (Dividend)
03- Dec	\$600.00	\$600 on 23 Dec Transfer to Sole Account (Dividend)

3. . . .

4. Can you confirm the amount you have for total dividends taken out of Cove in 2016?

Not until you tell me! But is should be around \$110,000

5. . . .

[Italicizing and underlining of numbers added.]

[25] The underlined and italicized numbers correspond to the numbers found in the joint account statements and identified by Ms. Trower as amounts transferred by Cove. The list above also includes direct transfers from Cove's bank account to Ms. Trower⁶ or Mr. Trower.⁷ In this email, Mr. Trower advises Mr. Dougan that

⁶ Transfers of \$915 on August 31, 2016, \$985 on September 30, 2016, and \$1,076.77 on October 31, 2016.

⁷ Transfers of \$1,440 on August 31, 2016, \$1,801 on September 30, 2016, \$1,200 on October 17, 2016, \$250, \$500 and \$1,759.91 on October 31, 2016, and \$600 on December 23, 2016.

transfers to Ms. Trower's account on August 31, September 30 and October 31, 2016⁸ are dividends to Ms. Trower.

[26] What is more telling is the email dated February 15, 2017, sent by Mr. Dougan to Mr. Trower. It contains the following passages:

I have the following estimates for you:

Corporate tax

...

Personal tax

Total dividends for 2016 were \$100,000. I ran two personal tax scenarios for you, one where you report all of the income and the other where Sally reports 50% and you the other 50%. Results are:

- Alastair 100% - \$21,385

- 50.50 combined taxes -\$11,822

So by splitting the dividends 50/50, assuming no other income for either of you, will save you around \$9500.

Please let me know if you want to split the dividends and I will prepare the T5 slips and send final docs to you . . .

[Emphasis added]

[27] This email speaks for itself. Mr. Dougan is asking Mr. Trower if he wants to split the dividends based on the computations Mr. Dougan has prepared. Thus, it is clear that the amount paid by Cove in 2016 that was to be characterized as dividends paid to Ms. Trower was decided no earlier than February 15, 2017. In fact, as described below, it appears to have been decided on February 28, 2017.

⁸ That Ms. Trower was not a shareholder on October 31, 2016 does not mean the transfer to her could not be a dividend. A dividend may be declared payable to shareholders of record on a particular date (the "record date"), but not be payable until a future date. In such case, a person who was a shareholder on the record date but ceases to be a shareholder before the payment date would nonetheless be paid the dividend. However, in providing Mr. Dougan with this information Mr. Trower may have mistaken when Ms. Trower ceased to be a shareholder because, in an email to Ms. Trower on the topic later that month, he tells her she was a shareholder until the end of October.

[28] Mr. Dougan's February 15, 2017 email was forwarded to Ms. Trower by Mr. Trower on February 17, 2017, together with a covering email advising her that Mr. Dougan "suggests adding you to the dividend pool for 2016 as you were still a shareholder". From this it appears that Mr. Trower is both seeking Ms. Trower's concurrence to dividend treatment and telling her it is Mr. Dougan's suggestion. Ms. Trower replies the same day pointing out that she received \$2,949 directly and expressing concern about the taxes that would then be payable by her.

[29] Mr. Dougan's February 15, 2017 email assumed neither Mr. nor Ms. Trower had income other than the "dividends". On February 21, 2017 Mr. Trower asks Mr. Dougan to run another option taking into account Ms. Trower's estimated 2016 income of \$12,000. On February 22, 2017, Mr. Dougan reports on estimated taxes that would be payable if 55% of the dividend is allocated to Mr. Trower and 45% to Ms. Trower. Under this scenario, Ms. Trower's estimated tax payable exceeds Mr. Trower's estimated tax payable by approximately \$2,600. Mr. Trower forwards this email to Ms. Trower on February 22, 2017 advising her that he is happy to budget paying "this", by which I believe he means the tax payable by Ms. Trower on the dividends under this proposal. Ms. Trower replies the same day stating she thought they had agreed to file her income tax return on the basis of \$12,000 of income and expressing confusion about why she is being included in Cove dividend payments. Mr. Trower replies on February 28, 2017 advising her of the T5 deadline.

[30] Her reply again resists: "I have no money to pay your dividends and we had, as I understood, [sic] I was not receiving dividends in 2016. . .". While Mr. Trower then advises Ms. Trower that he is not asking her to pay the tax and offers to pay it, there is no evidence Ms. Trower agreed to this arrangement, other than Mr. Trower's testimony that she must have understood that was the case, given the arrangements the prior year.

[31] In addition to the other evidence summarized above, Mr. Dougan's October 24, 2017 email to Ms. Trower, following her email to him suggesting he had wrongly allocated dividends to her, is clear:

While preparing the 2016 year end for Cove BD Alastair and I had discussed the scenario of splitting the income solely in an effort to save the family unit the related tax. The T5 slips needed to be filed by February 28 and I believe at the time you were travelling in Africa. I took [Mr. Trower's] instruction to file the T5 slips with the income split with the understanding that [Mr. Trower] would be responsible for the related tax bill you would have from the dividend income.

Note that I did not, and would not, make the final decision on how to file the T5 slips, especially under the circumstances.

[Emphasis added.]

[32] Mr. Dougan confirms that he took instructions from Mr. Trower in February 2017. The T5s were prepared, on the basis that Mr. Trower and Ms. Trower each received dividends in the amount of \$50,342, and apparently were filed no later than March 1, 2017.⁹

[33] Ms. Trower testified that she did not receive the T5 until October 2017 when she received documentation relating to their separation agreement from Mr. Trower's counsel. Although that timing was not confirmed by Mr. Trower, in testimony he did express some regret that, due to what he describes as an administrative error, the T5 was not timely sent to Ms. Trower. Two copies of a T5 in Ms. Trower's name were available at the hearing, each with a different address on it. One had the same address as the Cove business address, which I understand to be the home where Mr. Trower lives and previously was the matrimonial home. The second had a different address, the one where Ms. Trower in fact resides. Finally, emails sent by Ms. Trower in October of 2017 refer to her surprise at receiving the T5.

[34] Based on the evidence, I am satisfied that Ms. Trower did not receive a copy of the T5 issued in her name until the Fall of 2017. However, just as receipt of a T5 does not by itself establish receipt of a dividend, non-receipt of a T5 does not mean a dividend was not received or relieve Ms. Trower of the tax liability if she in fact received dividends.

V. COMMERCIAL LAW

[35] So what does this all mean? As is well established, the tax analysis flows from the commercial relationships, absent some statutory provision that requires or permits the commercial relationship to be ignored. As stated by Justice Robertson in *Dale v The Queen*:¹⁰

⁹ An email from Mr. Dougan to Mr. Trower confirms this to be the case.

¹⁰ [1997] 2 CTC 286 (F.C.A.) at paragraphs 12 and 13.

There is also little doubt that the courts have been diligent in requiring adherence to legal formalities imposed at law or by statute if certain tax advantages are to be accorded. I am not suggesting that the standard to be met by the taxpayer is best described as one of "perfection". In *Stuart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, the Supreme Court of Canada acknowledged that certain deficiencies may be found to be inconsequential . . .

In determining whether a legal transaction will be recognized for tax purposes one must turn to the law as found in the jurisdiction in which the transaction is consummated. Often that determination will be made without the aid of guiding precedents which are on point and, hence, the effectiveness of a transaction may depend solely on the proper application of general common law and equitable principles. In some instances it will be necessary for the Tax Court to interpret the statutory law of a province.

[36] The NSCA remains a memorandum of association style of company statute. Accordingly, unlike many modern incorporation statutes,¹¹ the NSCA does not explicitly confer management power on the directors of a company, although that power typically is conferred on them through the articles of association.¹² The memorandum and articles of association for Cove were not put in evidence. However, as described above, Mr. Trower testified he signed a directors' resolution approving the dividends in 2017. From that I infer that the authority to declare dividends rests with the Cove directors. Correspondence from Cove's legal counsel further supports the inference that Cove directors have the power to manage Cove's business. Accordingly, I find that, as is typical, the authority to declare dividends rested with the Cove directors.¹³

¹¹ See, for example, *Canada Business Corporations Act* RSC 1985, c C-44, *Business Corporations Act* (Ontario) RSO 1990, c B.16, and *Business Corporations Act* (Alberta) RSA 2000, c B-9.

¹² See, "Nova Scotia Companies Act and Commentary, 2018/2019 Edition" by Robert L Miedema (LexisNexis Canada Inc. 2018). See also section 21 of the NSCA and the default Articles of Association in Table A of the First Schedule to the NSCA, including sections 147 and 148 and sections 157-174 dealing with dividends.

¹³ This power may also be reserved to the shareholders by the articles of association (see NSCA s.92(1)). However, based on the scant evidence on the issue, that does not appear to be the case for Cove. In any event, in addition to her status as director, Ms. Trower was a shareholder for most of 2016 and quite clearly never agreed to dividend payments in either capacity. Thus, even if the power to declare dividends was reserved to shareholders, it would not change the result.

[37] No dividend is payable until such time as it is declared.¹⁴ In this case the dividend was not declared (or approved) until February 2017 and so no dividend was payable in 2016.

[38] While it is clear that best practice is that resolutions be considered, voted on and recorded in writing at the relevant time, I accept that practice in the “real world” does not always conform with best practice. Particularly in the case of closely held private corporations, I accept that directors and/or shareholders may make a decision and act upon it, even though they may not record that decision in writing until a later date. But that cannot be said to have happened here. All of the evidence is that the only two relevant people, Mr. and Ms. Trower, never agreed that the transfers would be dividends. The decision was a unilateral one by Mr. Trower. He did not have that power before he became the sole shareholder and director.

[39] If Ms. Trower were a Cove shareholder, but not a director, at the time the payments were made, presumably the directors at that time could have declared and paid a dividend to her without her agreement. However, she was a director from January 1, 2016 until October 2, 2016,¹⁵ a period during which she consistently was objecting to dividend payments. Payments made when she was one of two directors would have required her acquiescence to be authorized and declared as dividends. So no amount paid by Cove in 2016 before October 2, 2016 could be a dividend. It is true that Mr. Trower, as sole director and shareholder after that date, would have had the power to approve transfers occurring on or after that date as dividends without having followed the best practice described above.

¹⁴ *Bond v. Barrow Haematite Steel Co.*, [1902] 1 Ch. 353.

¹⁵ The paperwork addressing when Ms. Trower ceased to be a director is inconsistent. A reporting letter to Cove from Patterson Law, corporate counsel, states Ms. Trower’s shares of Cove were repurchased on September 30, 2016 and she tendered her resignation as director and officer on October 2, 2016. The corporate documents include a director’s resolution dated September 30, 2016 signed by Alistair Trower, who is described as “all the directors”. Paragraph 5 of that same resolution states Ms. Trower’s resignation as director and officer is accepted. Thus, it is unclear whether Ms. Trower ceased to be a director on September 30, 2016 (when Mr. Trower signed a resolution accepting her resignation and purported to act as “all the directors”) or on October 2, 2016, the date she apparently signed the resignation and described as the effective date in the reporting letter. The NSCA states that a director’s office is *ipso facto* vacated where the director resigns by notice in writing. However, it is not clear to me whether a director also may resign based on other forms of notice to the company (i.e. by verbal notice where the company agrees and acknowledges the resignation in writing, as might be said to have occurred here). I accept October 2, 2016 as the correct date.

However, Ms. Trower ceased to be a shareholder on September 30, 2016 and thus could not have received any dividends Mr. Trower himself might have approved after that date.

[40] For the same reason, in my view, this is not a circumstance where the February 2017 resolution can be viewed as remedying a minor deficiency in the corporate record, sometimes referred to as “coopering up”, through preparation of documents to evidence events that are assumed to have occurred based on subsequent events.¹⁶ Based on the evidence, it would be incorrect to assume that dividends had occurred in 2016, or at least prior to October 2, 2016. Rather, the overwhelming evidence is that no dividends had been approved by the directors or shareholders before that date in 2016.

[41] A third principle that is sometimes applied in these contexts is the principle of ratification, a rule of agency law. Under that principle, an agent acts for a principal without authority but the principal may subsequently accept and adopt the agent’s act, as if there had been prior authority to do what has been done. In such event, the ratification relates back – that is, the previously unauthorized agent is treated as having been authorized at the time the act was performed.¹⁷ It’s not clear to me that that principle applies here at all. However, if it did, in light of Ms. Trower’s opposition to the dividends, in my view, it was not open to Mr. Trower, as sole director in 2017, to ratify as dividends the transfers made in 2016 before Ms. Trower ceased to be a shareholder. The principal cannot ratify an action of the agent that the principal itself had no authority to perform at the time the agent acted.

[42] Mr. Trower testified that he alone signed the resolutions regarding the payment of the dividends and did so at the end of February 2017 or on March 1, 2017. He seems to believe that “dividends are always done retrospectively”.

¹⁶ For a discussion of this practice, and the legal maxim on which it is based (“all acts are presumed to have been done rightly and regularly”), see “*Canadian Business Corporations Law*” by Kevin P. McGuinness (LexisNexis Canada Inc., 2007) at 12.166 and following.

¹⁷ See “*Canadian Agency Law*” by Gerald Fridman (LexisNexis Canada Inc., 2009) at page 35.

[43] The evidence is abundantly clear that neither the character nor the allocation of the funds as between Mr. and Ms. Trower of the funds transferred by Cove¹⁸ in 2016 to the various bank accounts was determined before Ms. Trower ceased to be a director and shareholder.

[44] Based on the evidence, Ms. Trower did not agree to any portion of those funds from Cove being paid to her as a dividend. Indeed, she consistently protested that suggestion. Her concurrence to dividends was essential until she ceased to be a director and shareholder. I am satisfied that the decision was made by Mr. Trower alone and not until the taxation year following the year in which Cove made the transfers. Only at that time did Mr. Trower decide and give Mr. Dougan the instructions regarding the T5s.

VI. CONCLUSION

[45] I accept that funds were transferred by Cove to the various bank accounts as described above. However, Ms. Trower has satisfied me that, at no time prior to October 2, 2016, had those transfers been approved as dividends. Mr. Trower may have had one idea about the nature of the payments but Ms. Trower, his co-shareholder and co-director, clearly had an entirely different idea.

[46] While I am not able to determine the nature of the transfers in 2016, in my view, absent her agreement, they could not be and are not dividends paid to Ms. Trower in 2016. Ms. Trower has demolished the Minister's key assumption of fact underlying the assessment of her 2016 taxation year regarding dividends.

[47] Accordingly, her appeal is allowed. The parties shall bear their own costs.

Signed at Ottawa, Canada, this 8th day of April 2019.

“K.A. Siobhan Monaghan”

Monaghan J.

¹⁸ I draw a distinction between transferred by Cove and paid by Cove on account of an obligation it may have had. Amounts payable to Mr. Trower by Cove could have been directed to be transferred to, and so received by, another person.

CITATION: 2019 TCC 77

COURT FILE NO.: 2018-927(IT)I

STYLE OF CAUSE: SALLY TROWER v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: January 7, 2019

REASONS FOR JUDGMENT BY: The Honourable Justice K.A. Siobhan Monaghan

DATE OF JUDGMENT: April 8, 2019

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Max Kruger

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

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