

BETWEEN:

PAUL M. GAGNON,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on September 26, 2022, at Calgary, Alberta

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Lora Falkenberg Walsh

JUDGMENT

WHEREAS the Court has published its common reasons for judgment in this appeal on this date;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The appeal with respect to the 2019 taxation year is dismissed; and,
2. No costs are awarded.

Signed at Ottawa, Canada, this 9th day of November, 2022.

“R.S. Boccock”

Boccock J.

BETWEEN:

MAUREEN E. GAGNON,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on September 26, 2022, at Calgary, Alberta

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

Agent for the Appellant: Paul M. Gagnon

Counsel for the Respondent: Lora Falkenberg Walsh

JUDGMENT

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Signed at Ottawa, Canada, this 9th day of November, 2022.

“R.S. Boccock”

Boccock J.

Citation: 2022TCC139
Date: 20221109
Docket: 2020-2176(IT)I

BETWEEN:

PAUL M. GAGNON,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2020-2274(IT)I

AND BETWEEN:

MAUREEN E. GAGNON,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

COMMON REASONS FOR JUDGMENT

Bocock J.

I. INTRODUCTION

[1] These common reasons for judgment relate to two appeals of the Appellants, Paul and Maureen Gagnon. They are spouses of each other. During the 2019 taxation year, they both paid quarterly tax installments against estimated income taxes owing on the balance due date, April 30, 2020. The Minister says they under-remitted installments on the 15th of March, June and September, 2019. The Minister reassessed Mr. and Mrs. Gagnon arrears interest under subsection 161(2) of the *Income Tax Act*, RSC 1985, c.1, as amended (the “*Act*”). Further, in reliance of the minimum threshold in section 163.1 of the Act, the Minister assessed Mr. Gagnon a penalty.

II. NATURE OF APPEAL

[2] Mr. Gagnon represented himself and his wife. The sole basis of the appeal advanced by Mr. Gagnon is that an unanticipated, unforeseen dividend was declared in November, 2019, payable on or before December 15, 2019. That dividend materially increased both Appellants' incomes and related tax liability, and correspondingly their respective tax installments. The increased instalment balance was fully paid on December 15, 2019. Save for the impact of the declared and paid dividend, the parties agree no further installment interest or penalty was owed. Further, the parties agree that after the December 15, 2019 installment, there was no installment deficiency. The disputed deficiency relates to the March, June and September installments.

III. FACTS

[3] There are no facts in dispute. An agreed statement of facts was submitted for both appeals.

[4] Mr. and Mrs. Gagnon were required to pay installments because their net tax owing exceeded \$3,000 in the previous three taxation years ("quarterly remitters"). Their relative tax position in 2019 is described in the following chart (with rounded values):

Source of Income/ Tax Metric 2019	Mr. Gagnon	Mrs. Gagnon
Net Income	660,000	726,000
Net Tax Owing	104,808	118,000

[5] The remittance dates and amounts of estimated tax installments paid by each are outlined in the following chart (with rounded values):

Date of installment amounts received	Mr. Gagnon	Date of installment amounts received	Mrs. Gagnon
March 12, 2019	\$5,500	March 12, 2019	\$23,500
June 14, 2019	\$5,500	June 14, 2019	\$23,500
September 6, 2019	\$5,500	September 6, 2019	\$23,500
November 26, 2019	\$98,000	November 26, 2019	\$58,000
Total	\$114,500	Total	\$128,500

[6] Like all quarterly remitters, the Gagnons received written installment reminders from the CRA. Both received the reminder in August, 2019. As usual, the

reminder proposed one of three options: the no-calculation option, the prior-year option or the current-year option.

[7] The comparative no-calculation options proposed the following respective quarterly remittances for each taxpayer (with comparative paid by each remittances in parentheses):

Date	Mr. Gagnon	Mrs. Gagnon
March 15, 2019	41,963 (5,500)	44,490 (23,500)
June 15, 2019	41,963 (5,500)	44,490 (23,500)
September 15, 2019	10,982 (5,500)	44,490 (23,500)
December 15, 2019	10,982 (98,000)	19,223 (58,000)
Totals	105,890 (114,500)	127,446 (128,500)

[8] The Gagnon’s holding company, JFP Holdings Inc. (“JFP”), declared a dividend in the amount of \$600,000 on November 25, 2019. It was to be paid to the Class A holders of shares before December 15, 2019. The result was a recorded dividend of \$300,000 each for Mr. and Mrs. Gagnon from and after November 25, 2019.

[9] Mr. Gagnon testified that the dividend was not anticipated before the budget chatter in November 2019 concerning the possible alteration of tax treatment of Canadian dividend income. Mr. Gagnon asserted this created an unforeseen urgency, necessity and desirability to declare the dividend. The reason or impetus was not specified in the agreed statement of facts. However, Mr. Gagnon gave evidence under oath. The Court accepts that this budget speculation was the motivation for the exceptional, “late-developing”, one-time payment of the dividend. There have been no such dividends before or since.

[10] In short, Mr. Gagnon asserts:

1. The dividend payment was unforeseen, and without it his initial estimate of taxes payable and installments for both would have been compliant;
2. Their was no additional income received beyond the dividend which gave rise to any further incremental remittances before the December 15, 2019 installment;

3. Once the incremental income became known (November 25, 2019) and was paid, the final installment more than exceeded all tax liability payable on the balance due date or as advised within the August, 2019 installment reminder.

[11] Mr. Gagnon argues that no interest for arrears should be applied to the amounts owing for the March, June, and September instalments because when those quarterly payments were made, he did not expect to incur a sudden influx of income later in the year. Therefore, it would have been impossible to make instalment payments based on unknown future information. He also argues that if any interest was incurred, it should only be applied to the amount payable between the period when the dividend was first declared and the fourth instalment date (December 15, 2019).

[12] The Respondent asserts that by not selecting the no-calculation option, or at least by not paying the ultimate tax payable in equal installments over the course of the year, the Gagnon's authored a quarterly installment deficiency divergent from the no-calculation option. As such, interest and the penalty in Mr. Gagnon's case, was correctly calculated and assessed. The Respondent submits that interest is payable because each taxpayer failed to make the necessary instalment payments based on each total income for the taxation year.

IV. THE LAW

The Statute

Installment Payments

[13] Installments for taxpayers are described in subsection 156(1) and 156.1(4) which provide as follows:

Other individuals

156 (1) Subject to section 156.1, in respect of each taxation year every individual (other than one to whom section 155 applies for the year) shall pay to the Receiver General

(a) on or before March 15, June 15, September 15 and December 15 in the year, an amount equal to 1/4 of

(i) the amount estimated by the individual to be the tax payable under this Part by the individual for the year, or

(ii) the individual's instalment base for the preceding taxation year,
or

(b) on or before

(i) March 15 and June 15 in the year, an amount equal to 1/4 of the individual's instalment base for the second preceding taxation year, and

(ii) September 15 and December 15 in the year, an amount equal to 1/2 of the amount, if any, by which

(A) the individual's instalment base for the preceding taxation year

exceeds

(B) 1/2 of the individual's instalment base for the second preceding taxation year.

Payment of remainder

156.1(4) Every individual shall, on or before the individual's balance-due day for each taxation year, pay to the Receiver General in respect of the year the amount, if any, by which the individual's tax payable under this Part for the year exceeds the total of

(a) all amounts deducted or withheld under section 153 from remuneration or other payments received by the individual in the year, and

(b) all other amounts paid to the Receiver General on or before that day on account of the individual's tax payable under this Part for the year.

[14] The interpretative effect of these sections directs a taxpayer to pay by using one of 3 methods:

- a) Four quarterly installments of taxpayer estimated tax (Choice "A");
- b) Four quarterly installments identical to the taxpayers installment base for the preceding year (Choice "B");
- c) Two amounts in March and June equal to 1/4 of the taxpayer's instalment base the second preceding taxation year, which may be supplemented in September and December by the surfeit of 1/2 of the preceding tax years installment over the 1/2 of the installment base for the 2nd preceding year (Choice "C").

[15] Subsection 161(2) is qualified by subsection 161(4.01):

Limitation — other individuals

(4.01) For the purposes of subsection 161(2) and section 163.1, where an individual is required to pay a part or instalment of tax for a taxation year computed by reference to a method described in subsection 156(1), the individual shall be deemed to have been liable to pay on or before each day referred to in subsection 156(1) a part or instalment computed by reference to

(a) the amount, if any, by which

(i) the tax payable under this Part by the individual for the year, determined before taking into consideration the specified future tax consequences for the year,

exceeds

(ii) the amounts deemed by subsections 120(2) and (2.2) to have been paid on account of the individual's tax under this Part for the year, determined before taking into consideration the specified future tax consequences for the year,

(b) the individual's instalment base for the preceding taxation year,

(c) the amounts determined under paragraph 156(1)(b) in respect of the individual for the year, or

(d) the amounts stated to be the amounts of instalments payable by the individual for the year in the notices, if any, sent to the individual by the Minister,

reduced by the amount, if any, determined under paragraph 156(2)(b) in respect of the individual for the year, whichever method gives rise to the least total amount of such parts or instalments required to be paid by the individual by that day.

[16] The net impact of this section limits installment interest. It will only be charged where interest has not been paid on the lesser of:

- a) The tax payable under Part I (after 120(2) and 120(22) adjustments);
- b) The installment base for the previous year;
- c) As in (b) above, but using the 2nd preceding years first 2 quarterly installments; and

- d) The Minister's mid-year notice directing the installments for the balance of the year.

[17] In short, textually because the option is excluded from subsection 161(4.01), if a taxpayer calculated tax liability and remits according to those amounts, and is wrong, interest is due on the deficiency.

[18] The effect is that an insufficient installment will bear interest to the extent of deficiency unless the provisions of 162(4.01) apply.

Interest and Penalties on Deficient Installments

[19] Where not so paid, interest is charged pursuant to subsection 161(2):

Interest on instalments

(2) In addition to the interest payable under subsection 161(1), where a taxpayer who is required by this Part to pay a part or instalment of tax has failed to pay all or any part thereof on or before the day on or before which the tax or instalment, as the case may be, was required to be paid, the taxpayer shall pay to the Receiver General interest at the prescribed rate on the amount that the taxpayer failed to pay computed from the day on or before which the amount was required to be paid to the day of payment, or to the beginning of the period in respect of which the taxpayer is required to pay interest thereon under subsection 161(1), whichever is earlier.

[20] The penalty section is section 163.1 which provides as follows:

Penalty for late or deficient instalments

163.1 Every person who fails to pay all or any part of an instalment of tax for a taxation year on or before the day on or before which the instalment is required by this Part to be paid is liable to a penalty equal to 50% of the amount, if any, by which

(a) the interest payable by the person under section 161 in respect of all instalments for the year

exceeds the greater of

(b) \$1,000, and

(c) 25% of the interest that would have been payable by the person under section 161 in respect of all instalments for the year if no instalment had been made for that year.

The Jurisprudence

[21] The jurisprudence is invariably governed by informal procedure decisions because interest is a derivative amount arising from the installment deficiency, as it is in this appeal. Further, these decisions are not particularly consistent; however, they do fall into two identifiable lines of cases.

[22] The first line of reasoning holds that since a taxpayer has an alternative, safer method to calculate instalment payments, namely that proposed by the Minister or the previous year method (which considered a previous section of the *Act*), the taxpayer should do so. Where not followed, the taxpayer is liable for any underestimations made when independently estimating quarterly instalments.

[23] Certain cases of the Tax Court and the Federal Court of Appeal (FCA) share the view that because a taxpayer has an alternative to estimating tax payable, any underestimate of quarterly remittances cannot avoid the repercussions for such an underestimation.

[24] This line of reasoning was most prominent in *Corse v R*.¹ In that case, the taxpayer started the year exempt from having to make quarterly tax instalments, but then sold a rental property in August and became liable to make quarterly tax instalments. The Tax Court held that since the taxpayer could have used the former applicable section to calculate his quarterly tax instalments, the apparent unfairness of the interest accrual is of no consequence:

I would agree with this conclusion if the taxpayer was forced by subsection 156(1) to necessarily adopt the first formula referred to in subparagraph 156(1)(a)(i). This is not, however, the case since the method set out in subparagraph 156(1)(a)(ii) is also available to him. If the taxpayer does not want to indulge in speculation, in guesswork or in calculation of the probabilities, as he is in a sense confronted when he, resorting to the first method, makes his estimate of the tax payable for the year under Part I of the Act, he simply uses the second formula which does not carry with it this high degree of uncertainty.²

¹ [1993] 2 CTC 2017.

² *Ibid* at para 20.

[25] The FCA decisions cited by the parties, of *R v Ritchie*³ and *R v Ghai*⁴, explicitly agree with the reasoning used in *Corse* to deny the taxpayer's appeal.

[26] Two other TCC decisions, *Elkharadly v The Queen*⁵ and *Hutchins v Minister of National Revenue*⁶ also follow similar reasoning. In *Elkharadly*, the taxpayer claims he underestimated his tax liability due to ignorance of the tax rules. Justice Taylor dismissed the appeal because the taxpayer had an alternative option to estimation:

In my opinion, the Act is quite clear in requiring instalments of tax to be paid on at least the instalment base calculated in accordance with the formula related to the previous years income tax liability. Doing so should relieve a taxpayer from any prospect of interest on unpaid instalments, no matter what could develop to affect his current year's tax liability. In this instance, that option was available to Mr. Elkharadly but was not exercised.⁷

[27] In *Hutchins*⁸, the taxpayer sold a condominium in October, requiring him to make quarterly tax instalments. Justice Margeson dismissed the taxpayer's appeal because the taxpayer was not required to estimate his tax liability but simply employ the previous year's tax as his installment base.

[28] The second line of cases is embodied in *Paquette v Minister of National Revenue*⁹. It deviates from the above case law, and notably, it was decided before the two FCA decisions of *Ritchie* and *Ghai*. In *Paquette*, the taxpayer sold an apartment building in September, thus requiring him to make quarterly tax instalments throughout the year. Justice Proulx ruled in favour of the taxpayer on the grounds of *lex non cogit ad impossibilia* ("legislation cannot be interpreted to require the impossible").

[29] The usage of the maxim has not been applied in subsequent cases. In *Hutchins*, the Court explicitly notes the factual similarity to *Paquette* as both involved the sale of real estate later in the taxation year. However, Justice Margeson attempted to distinguish the case from *Paquette* because *Paquette* does not discuss the availability of using another form of estimation when determining the tax liability. Justice

³ 93 DTC 5160.

⁴ [1993] 2 CTC 2017.

⁵ [1995] 1 CTC 2273.

⁶ [1991] 1 CTC 2510.

⁷ *Elkharadly*, *supra* note 5 at para 4.

⁸ *Hutchins*, *supra* at paragraph 19.

⁹ [1990] 2 CTC 2016.

Margeson assumed that an alternative form of estimation was not available to the taxpayer in *Paquette*.¹⁰

V. ANALYSIS

[30] The facts of this case involve a material late-in-the-year increase in income and resulting tax liability. It is not the case of a consistent back ending of income to conserve cash flow or structure a large quarterly remittance in the final quarter. If it were, the Court would dismiss the appeal without further consideration.

[31] However, if the Court wholeheartedly adopts the Crown's position, the only safeguard against factually unforeseen or unanticipated increases in income and liability in the latter part of the year, which skew installments, is taxpayer choice in the early part of the year of the no-calculation option. In short, the no-calculation option becomes a kind of "no-choice" option, unless clairvoyant taxpayer certainty exists; and where that turns out to be wrong, the risk is assumed by the taxpayer for unforeseen developments.

[32] The Court must leave open the possibility of situations where taxpayers establish factually two things. First, that one had a probable reason to believe one's income would be reduced below the no-calculation option which militated against the non-calculation option. Second, that the event which led to the insufficient quarterly installments was beyond foreseeability and impossible to discern until occurrence. This consistently embraces the maxim *lex non cogit ad impossibilia*. Regrettably, for the Gagnons, it does not embody the facts of these appeals.

[33] The Gagnons were not asked to do the impossible here. Mr. Gagnon made a deliberate choice to declare the dividend. It was entirely within his control. The sizeable dividend was a text book, end of year provisional tax plan. It was neither unavoidable or extraneously circumstantial in the least. Mr. Gagnon conceived, effected and completed it, all by his own hand and effort. While the law may not interpret legislation to require the impossible, it does not accommodate a precautionary step of a tax plan, rendered moot by a legislative path not taken.

[34] Ironically perhaps, Mr. Gagnon was simply wrong in his prognosis. Parliament did not alter the regime concerning Canadian dividend income on the date anticipated. If it had, Mr. Gagnon would have been correct, his wager paid and the arrears interest and penalty likely a small price to pay for the return. But, all that

¹⁰ See *Hutchins*, *supra* note 6 at paras 15 and 19.

is speculative. And so was Mr. Gagnon's predicted tax change. Taxpayer authored action born of prediction is not an unforeseen and indiscernible event, just an event which may never happen. The arrears interest and penalty are the costs of that avoidable choice reflecting a deliberate, methodical, provisional and ultimately unnecessary advance of divided income. For these reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 9th day of November, 2022.

“R.S. Boccock”

Boccock J.

CITATION: 2022TCC139
COURT FILE NO.: 2020-2176(IT)I; 2020-2274(IT)I
STYLE OF CAUSE: PAUL M. GAGNON AND HIS
MAJESTY THE KING; MAUREEN E.
GAGNON AND HIS MAJESTY THE
KING

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: September 26, 2022

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.
Bocock

DATE OF JUDGMENT: November 9, 2022

APPEARANCES:

Agent for the Appellant: Paul M. Gagnon
Counsel for the Respondent: Princess Okechukwu
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