Docket: 2013-2131(IT)I

BETWEEN:

HEATHER CHIASSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 26, 2013, at Ottawa, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Agent for the Appellant:	Edmond Chiasson
Counsel for the Respondent:	Natasha Wallace

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2011 taxation year is dismissed.

Signed at Montreal, Quebec, this 20th day of May 2014.

"Johanne D'Auray"

D'Auray J.

Citation: 2014 TCC 158
Date: 20140520
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BETWEEN:

HEATHER CHIASSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

Introduction

[1] Under subsection 163(1) of the *Income Tax Act* (the "Act"), a taxpayer who fails to report an amount in his or her income tax return for two taxation years within a four-year period is subject to a penalty equal to 10 percent of the unreported income for the most recent taxation year.

[2] The appellant, Ms. Heather Chiasson, has been assessed a penalty by the Minister of National Revenue (the "Minister"), pursuant to subsection 163(1) of the Act, for her failure to report income in more than one taxation year within a four-year period. In order to avoid the penalty, Ms. Chiasson has to establish that she exercised due diligence in reporting her income.

Issue to be decided

[3] The issue to be decided in this appeal is whether the Minister correctly applied the penalty pursuant to subsection 163(1) of the Act.

Evidence

[4] Ms. Chiasson failed to report income for her 2007, 2009 and 2011 taxation years. For 2007, she omitted to report $5,011 of employment income. For 2009, she omitted to report $9,832 of employment income. For 2011, she omitted to report $67,599 as employment income and $4,216 as a retiring allowance.

[5] Ms. Chiasson is a nurse by profession. Since the 1980's, Ms. Chiasson has been involved in politics, both as a volunteer and in paid positions. Ms. Chiasson and her spouse, Mr. Edmond Chiasson, moved to Ottawa from Nova Scotia in 1991.

[6] Until the end of 2007, Ms. Chiasson worked for the National Capital Commission (the "NCC"). After leaving the NCC, she began working for the Federal Liberal Agency of Canada (the "Liberal Agency").

[7] In 2007, Ms. Chiasson received employment income from three employers: the NCC, her spouse's corporation 1323666 Ontario Inc. ("Ontario Inc.") and the Liberal Agency.

[8] Ms. Chiasson received T4 slips from these three employers at her home address. For the 2007 taxation year, she reported employment income from Ontario Inc. and the NCC. She however failed to report the income of $5,011 she received from the Liberal Agency.

[9] In 2008, Ms. Chiasson was employed only by the Liberal Agency and was paid by direct deposit on a biweekly basis. For that year, she reported all her income.

[10] In the fall of 2009, although Ms. Chiasson was still working for the leader of the Liberal Party, following a staff reorganization she became an employee of the Government of Canada. As a result, she received her paycheques from the Government of Canada at her office.

[11] In reporting her income for the 2009 taxation year, she reported employment income from the Liberal Agency in the amount of $65,802, but omitted to report the employment income that she received from the Government of Canada, namely an amount of $9,832.

[12] From the end of 2009 onwards, Ms. Chiasson was employed by the Government of Canada, except for a six-week period in the spring of 2011, after a federal election had been called. During the "writ period", she received her remuneration from the Liberal Agency.

[13] In reporting her employment income for her 2011 taxation year, Ms. Chiasson reported an amount of $11,440 received from the Liberal Agency, but she omitted to report her employment income of $67,599 from the Government of Canada. For 2011, she also omitted to report a retiring allowance in the amount of $4,216.

[14] Ms. Chiasson did not dispute that she omitted to report income for the 2007, 2009 and 2011 taxation years. She stated that she received her T4 slips from the Liberal Agency at her home address, but she could not remember if she had received T4 slips from the Government of Canada.

[15] Ms. Chiasson explained that at the end of each taxation year, she gave all her relevant income tax information and related documents to her spouse, Mr. Chiasson. He was responsible for contacting their accountant, Ms. Nancy Leong. Ms. Leong has been their accountant for the past ten years and was responsible for preparing the Chiasson family's income tax returns.

[16] Before filing the Chiasson family's income tax returns with the Canada Revenue Agency (the "CRA"), Ms. Leong, in order to ensure the accuracy of the returns, forwarded them to Mr. Chiasson for review by each member of the Chiasson family. Ms. Leong also prepared for review a summary sheet indicating the gross income, the personal expenses and the net income of each member of the Chiasson family.

[17] Ms. Chiasson stated that if she had examined the 2011 summary sheet prepared by her accountant she would have noticed that her income was inaccurate since she knew that she had earned more than $11,440 in employment income during her 2011 taxation year.

[18] The evidence revealed that Ms. Leong had advised Mr. Chiasson of Ms. Chiasson's failure to report all her income in previous years. By letter dated January 6, 2009, Ms. Leong advised Ms. Chiasson that the CRA had reassessed her 2007 taxation year, including in income additional employment income received

from the Liberal Agency. In her letter, Ms. Leong wrote: "If there is no dispute regarding the Liberal Party of Canada income, then the reassessment is correct".

[19] In an e-mail dated October 5, 2010 to Mr. Chiasson, Ms. Leong stated that Ms. Chiasson had been reassessed for the 2009 taxation year to include employment income from the Government of Canada. In her e-mail, she asked Mr. Chiasson the following question: "Did Heather work for the government or another company in 2009? Is the re-assessment correct? If not I will contact CRA . . . If the re-assessment is correct, please forward to our office a cheque payable to "Receiver General for Canada" in the amount of $333.34 asap . . . ."

[20] After being reassessed for additional employment income for the 2007 and 2009 taxation years, Ms. Chiasson did not take any steps to determine why the omissions had occurred. For example, she did not get in touch with Human Resources at the Government of Canada to determine to which address her T4 slip had been sent.

[21] Ms. Chiasson's income tax returns for the 2009 and 2011 taxation years were filed electronically. Ms. Chiasson signed part F in which she declared that the amounts shown in Part B, which included her total income, were correct and complete.

[22] At trial, Ms. Chiasson did not blame her accountant for not reporting all of her income.

Positions of the parties

[23] Ms. Chiasson submitted that no penalty should be assessed since tax had been withheld on the income that she failed to report. In addition, the Government of Canada was her employer; it was the entity issuing T4 slips and it therefore cannot be said that her income was not reported.

[24] She also argued that none of the three omissions were intentional and that the Court should not consider the omission in her 2007 income tax return because it was not raised in the Reply filed by the respondent in response to the Notice of Appeal. Ms. Chiasson was also of the view that the CRA should have informed her about the possible assessment of a penalty after her first omission to report income. Finally, she argued that she exercised due diligence in 2009 as the amount of

income that she failed to report in her tax return was insignificant. Her failure to report the amount was an innocent mistake. She relied on the decision *Franck v The Queen*, 2011 TCC 179, 2011 DTC 1142, in which Justice Hogan stated that the penalty under subsection 163(1) of the Act will be cancelled if the taxpayer proves that he or she exercised due diligence with respect to either the first or the second omission. She submitted that she had proven that she exercised due diligence in reporting her income for the 2009 taxation year; accordingly, the penalty should be cancelled.

[25] The respondent argued that the due diligence defence is only applicable with respect to the year for which the penalty was imposed, namely, 2011 in this appeal. She submitted that Ms. Chiasson did not establish that she exercised due diligence in reporting her income for the 2011 taxation year. In the alternative, she argued that Ms. Chiasson did not establish that she exercised due diligence in reporting her income for the 2009 taxation year.

Analysis and applicable law

[26] Ms. Chiasson argued that she should not be liable to pay the penalty since the Government of Canada was not out of pocket, the tax having been withheld by her employers through source deductions. In addition, she submitted that her employer was the Government of Canada and that, since it issued T4 slips, the Government of Canada ought to have known the amount she received as employment income.

[27] These two arguments have been raised many times and this Court has rejected both of them.

[28] With respect to the argument regarding source deductions, the wording of subsection 163(1) of the Act is clear; it states that the penalty is applied when there are repeated failures by a taxpayer to report income. The Act does not refer to "unpaid tax".

[29] With respect to the argument concerning the issuance of a T4 slip by the employer, Justice Webb, in *Porter v The Queen*, 2010 TCC 251, [2011] 1 CTC 2322, responded in the following manner to such an argument at paragraph 2 of his reasons for judgment:

> . . . 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 [her] 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.

Therefore, this argument must fail.

[30] Ms. Chiasson argued that she did not intentionally omit to report income and therefore the penalty should be cancelled.

[31] It is clear from the evidence that Ms. Chiasson did not intentionally omit to report income, but the test in order to avoid the penalty provided for in subsection 163(1) of the Act is not whether Ms. Chiasson intentionally omitted to report income in filing her tax returns, but whether she acted diligently in reporting her income.

[32] Ms. Chiasson also argued that she exercised due diligence in reporting her income.

[33] Justice Dickson of the Supreme Court of Canada, in *R v Sault Ste. Marie*, [1978] 2 SCR 1299, at page 1326, indicated that there are two possible bases for the defence of due diligence applicable to strict liability offences:

- reasonable mistake of fact, that is, an honest belief, on reasonable grounds, in a mistaken set of facts which, if true, would render the act or omission innocent; or

- reasonable care taken to comply with the law, that is, taking all reasonable precautions in order to avoid the event that gave rise to the offence.

[34] In *Pillar Oilfield Projects Ltd v Canada*, [1993] GSTC 49, Justice Bowman stated that the due diligence defence set out in *Sault Ste. Marie* applied to administrative penalties under the *Income Tax Act* and the *Excise Tax Act*. The

Federal Court of Appeal upheld this position in *Consolidated Canadian Contractors Inc.* v *Canada*, [1998] GSTC 91.

[35] In 2004, the Federal Court of Appeal, in *Corporation de l'École Polytechnique v Canada*, 2004 FCA 127, [2004] GSTC 102, stated that a person relying on a reasonable mistake of fact must meet a two fold test that is both subjective and objective: subjective[1] in that the person must first establish that he or she was mistaken as to the factual situation, and objective in that the person must establish that a reasonable person would have made the same mistake in the circumstances. As for the matter of reasonable precautions, the test with regard thereto is only objective as the precautions taken by the taxpayer will be compared with those that a reasonable person would have taken in the same circumstances.

[36] Ms. Chiasson submitted that, if she proves that she exercised due diligence with respect to one of either the 2009 or 2011 taxation years, I would have to find that she is not liable to pay the penalty pursuant to subsection 163(1) of the Act.

[37] On the question of the particular failure to report income to which the due diligence defence should be applied, this Court is divided. One approach is that the due diligence defence applies to either one or the other of the first or second failure to report, whereas the second approach is that the due diligence defence will only apply to the second failure. I agree with the second approach since it is the second failure that gives rise to the imposition of a penalty and not the first, and the penalty is calculated on the amount involved in the second failure. Therefore, under the second approach, Ms. Chiasson would have to prove that she exercised due diligence in reporting her income for the 2011 taxation year.

[38] In light of the evidence and the admissions made by Mr. Chiasson and Ms. Chiasson regarding the 2011 taxation year, I would have to dismiss the appeal. Mr. Chiasson, who was acting on behalf of Ms. Chiasson, stated during argument that his spouse had not been diligent in reporting her income for her 2011 taxation year. Ms. Chiasson, for her part, testified that, if she had read what her accountant

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[1] I personally believe that describing the subjective element of the reasonable mistake of fact test is irrelevant because every time a taxpayer claims that he or she made a reasonable mistake of fact, the taxpayer will obviously maintain that he or she was misled or that the error led to the action giving rise to the penalty. In my view, what is required is that the taxpayer prove that a reasonable person would have made the same mistake in similar circumstances.

had prepared with respect to her 2011 taxation year, she would have noticed that her employment income was much higher than $11,440. It goes without saying that the test enunciated in *Sault Ste. Marie* with regard to the due diligence defence has not been met.

[39] However, Ms. Chiasson argued that she did exercise due diligence in reporting her income for the 2009 taxation year. Since the question of which failure should be taken into account for the purpose of the due diligence defence has not been canvassed by the Federal Court of Appeal, I shall consider whether Ms. Chiasson was diligent in reporting her income for the 2009 taxation year.

[40] In the 2009 taxation year, Ms. Chiasson received from two employers income totalling $75,634. She argued that the amount she omitted to report, namely $9,832, was small in relation to her total income. In her view, it was an innocent mistake. She also stated that 2009 was a difficult year for her because she was very busy at work and was also diagnosed with multiple sclerosis. That said, the appellant has not claimed that her health problems prevented her from obtaining her T4 slips or reporting her income.

[41] She argued that she did exercise due diligence in reporting her income for her 2009 taxation year. The difference between her income reported of $65,802 and the income of $75,634 she should have reported was so insignificant and the mistake was such an innocent one, she argued that a reasonable person placed in the same circumstances could have made the same mistake. Ms. Chiasson pointed out as well that she had referred her tax affairs to an accountant in order to ensure that they were in order.

[42] I find it difficult to agree that Ms. Chiasson made a mistake of fact with regard to the situation in 2009. She knew that, following the staff reorganization in 2009, she had two employers that year: the Liberal Agency and the Government of Canada. During her testimony, she stated that she did not realize that only the T4 slip issued by the Liberal Agency had been forwarded to her accountant. She testified that she did not look at her T4 slips and thus did not know that the one issued by the Government of Canada was missing and that the corresponding income was not reported.

[43] In addition, on January 6, 2009, that is, before filing her income tax return for the 2009 taxation year, Ms. Chiasson was advised by Ms. Leong, her

accountant, that she had omitted to report employment income for the 2007 taxation year. After having been so advised, Ms. Chiasson did not attempt to determine why the omission occurred in 2007 so as to avoid further omissions. Once she had been warned by Ms. Leong, one would have expected Ms. Chiasson to have been more diligent in filing her income tax returns for future years. The evidence revealed, however, that Ms. Chiasson did not take any steps to ensure that she received all her T4 slips. She did not carefully review her income tax returns or the summary sheet forwarded by Ms. Leong, and as a result she failed to report income three times in a five-year period.

[44] Ms. Chiasson argued that she was unaware of the consequences of her repeated failure to report all of her income and contended that the CRA should have warned her. It is true that the penalty under subsection 163(1) of the Act has serious consequences.[2] If it is not already being done, it would be advisable for the CRA to warn taxpayers after a first failure to report that if there is a second such failure within four years a penalty equal to ten percent of the unreported income will be assessed. That said, the case law is clear in establishing that ignorance of the law or an error in the interpretation of legislation does not constitute a reasonable mistake of fact. For example, in *Leclerc v The Queen*, 2010 TCC 99, 2010 DTC 1209, the taxpayer did not know the consequences of failing to file form T1135 by the due date and Justice Favreau ruled that this did not constitute a defence.

[45] I am aware of the harshness of the penalty under subsection 163(1) of the Act and I understand that Ms. Chiasson's failure to report her income was not deliberate, but as Justice Woods stated in *Morgan v The Queen*, 2013 TCC 232, 2013 DTC 1188, at paragraph 27: "Despite the harshness, it is not up to courts to rewrite the law. Parliament has seen fit to enact the penalty under subsection 163(1) and it is the duty of the courts to apply it."

[46] In my opinion, Ms. Chiasson did not establish that she exercised due diligence with respect to either her 2009 or her 2011 taxation year. Consequently, the imposition of the penalty under subsection 163(1) of the Act is justified and the appeal is dismissed.

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[2] *Knight v The Queen*, 2012 TCC 118, 2012 DTC 1144.

Signed at Montreal, Quebec, this 20th day of May 2014.

"Johanne D'Auray"

D'Auray J.

CITATION:	2014 TCC 158
COURT FILE NO.:	2013-2131(IT)I
STYLE OF CAUSE:	HEATHER CHIASSON v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	May 20, 2014

APPEARANCES:

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