Federal Court of Appeal | Cour d'appel fédérale

**Date: 20100611**

**Docket: A-399-09**

**Citation: 2010 FCA 159**

**CORAM:** **NOËL J.A.**
**DAWSON J.A.**
**TRUDEL J.A.**

**BETWEEN:**

**EXIDA.COM LIMITED LIABILITY COMPANY**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on May 25, 2010.

Judgment delivered at Ottawa, Ontario, on June 11, 2010.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

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**REASONS FOR JUDGMENT**

**NOËL J.A.**

[1] This is an appeal from a decision of Woods J. of the Tax Court of Canada (the Tax Court Judge) confirming the assessment of penalties against Exida.Com Limited Liability Company (the appellant) for the failure to file its tax returns for its 2003, 2004 and 2005 taxation years on the due date.

[2] At issue is whether non-resident corporations such as the appellant can be subjected to a penalty pursuant to subsection 162(2.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) for failure to file their tax returns on time for a given taxation year, in circumstances where

they have no taxes payable for that year. The Tax Court Judge found in the affirmative. In so doing, she declined to follow an earlier decision of her colleague Miller J. in *Goar, Allison & Associates Inc. v. The Queen*, 2009 TCC 174, 2009 DTC 1125 (*Goar*), who had come to the opposite conclusion.

[3] Both *Goar* and the present appeal were heard by the Tax Court pursuant to the informal procedure with the result that neither has precedential value (section 18.28 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2).

## FACTS AND STATUTORY BACKGROUND

[4] The relevant facts in each case are the same. The appellants carried on business in Canada in each of the taxation years in issue (2005 only in the case of *Goar*), but had no taxes payable on the due date. They were late in filing their tax return and were assessed late filing penalties in the amount of $2,500 pursuant to subsection 162(2.1) of the Act (i.e., $25/day to a maximum of 100 days).

[5] Paragraph 150(1)(*a*) sets out the circumstances in which a tax return must be filed:

| | |
|---|---|
| **150.** (1) Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer, | **150.** (1) Sous réserve du paragraphe (1.1), une déclaration de revenu sur le formulaire prescrit et contenant les renseignements prescrits doit être présentée au ministre, sans avis ni mise en demeure, pour chaque année d'imposition d'un contribuable : |
| (*a*) in the case of a corporation, by or on behalf of the corporation | *a*) dans le cas d'une société, par la société, ou en son nom, dans les |

within six months after the end of the year if

(i) at any time in the year the corporation

(A) is resident in Canada,

(B) carries on business in Canada, unless the corporation's only revenue from carrying on business in Canada in the year consists of amounts in respect of which tax was payable by the corporation under subsection 212(5.1),

(C) has a taxable capital gain (otherwise than from an excluded disposition), or

(D) disposes of a taxable Canadian property (otherwise than in an excluded disposition), or

(ii) tax under this Part

(A) is payable by the corporation for the year, or

(B) would be, but for a tax treaty, payable by the corporation for the year (otherwise than in respect of a disposition of taxable Canadian property that is treaty-protected property of the corporation);

six mois suivant la fin de l'année si, selon le cas :

(i) au cours de l'année, l'un des faits suivants se vérifie :

(A) la société réside au Canada,

(B) elle exploite une entreprise au Canada, sauf si ses seules recettes provenant de l'exploitation d'une entreprise au Canada au cours de l'année consistent en sommes au titre desquelles un impôt était payable par elle en vertu du paragraphe 212(5.1),

(C) elle a un gain en capital imposable (sauf celui provenant d'une disposition exclue),

(D) elle dispose d'un bien canadien imposable (autrement que par suite d'une disposition exclue),

(ii) l'impôt prévu par la présente partie :

(A) est payable par la société pour l'année,

(B) serait, en l'absence d'un traité fiscal, payable par la société pour l'année (autrement que relativement à la disposition d'un bien canadien imposable qui est un bien protégé par traité de la société);

[6] Subsection 162(2.1) provides:

| | |
|---|---|
| **162.** (2.1) Notwithstanding subsections (1) and (2), if a non-resident corporation is liable to a penalty under subsection (1) or (2) for failure to file a return of income for a taxation year, the amount of the penalty is the greater of | **162.** (2.1) Malgré les paragraphes (1) et (2), la pénalité dont une société non-résidente est passible pour défaut de produire une déclaration de revenu pour une année d'imposition aux termes de ces paragraphes correspond au plus élevé des montants suivants : |
| (*a*) the amount computed under subsection (1) or (2), as the case may be, and | *a*) le montant déterminé selon les paragraphes (1) ou (2), selon le cas; |
| (*b*) an amount equal to the greater of | *b*) le plus élevé des montants suivants : |
| (i) $100, and | (i) 100 $ |
| (ii) $25 times the number of days, not exceeding 100, from the day on which the return was required to be filed to the day on which the return is filed. | (ii) le produit de 25 $ par le nombre de jours, jusqu'à concurrence de 100, depuis le jour où la déclaration devait être produite jusqu'au jour où elle est produite. |

[Emphasis added.]

[7] It is also useful to set out subsections 162(1) and 162(2) :

| | |
|---|---|
| **162.** (1) Every person who fails to file a return of income for a taxation year as and when required by subsection 150(1) is liable to a penalty equal to the total of | **162.** (1) Toute personne qui ne produit pas de déclaration de revenu pour une année d'imposition selon les modalités et dans le délai prévus au paragraphe 150(1) est passible d'une pénalité égale au total des montants suivants : |
| (*a*) an amount equal to 5% of the person's tax payable under this Part for the year that was unpaid when the return was required to be | *a*) 5 % de l'impôt payable pour l'année en vertu de la présente |

filed, and

(*b*) the product obtained when 1% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 12, from the date on which the return was required to be filed to the date on which the return was filed.

partie qui était impayé à la date où, au plus tard, la déclaration devait être produite;

*b*) le produit de 1 % de cet impôt impayé par le nombre de mois entiers, jusqu'à concurrence de 12, compris dans la période commençant à la date où, au plus tard, la déclaration devait être produite et se terminant le jour où la déclaration est effectivement produite.

(2) Every person

(*a*) who fails to file a return of income for a taxation year as and when required by subsection 150(1),

(*b*) on whom a demand for a return for the year has been served under subsection 150(2), and

(*c*) by whom, before the time of failure, a penalty was payable under this subsection or subsection 162(1) in respect of a return of income for any of the 3 preceding taxation years is liable to a penalty equal to the total of

(*d*) an amount equal to 10% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and

(*e*) the product obtained when 2% of the person's tax payable under this Part for the year that was unpaid when the return was

(2) La personne qui ne produit pas de déclaration de revenu pour une année d'imposition selon les modalités et dans le délai prévus au paragraphe 150(1) après avoir été mise en demeure de le faire conformément au paragraphe 150(2) et qui, avant le moment du défaut, devait payer une pénalité en application du présent paragraphe ou du paragraphe (1) pour défaut de production d'une déclaration de revenu pour une des trois années d'imposition précédentes est passible d'une pénalité égale au total des montants suivants :

*a*) 10 % de l'impôt payable pour l'année en vertu de la présente partie qui était impayé à la date où, au plus tard, la déclaration devait être produite;

*b*) le produit de 2 % de cet impôt impayé par le nombre de mois entiers, jusqu'à concurrence de 20, compris dans la période commençant à la date où, au plus tard, la déclaration devait être produite et se terminant le jour où

| | |
|---|---|
| required to be filed is multiplied by the number of complete months, not exceeding 20, from the date on which the return was required to be filed to the date on which the return was filed. | la déclaration est effectivement produite. |

[Emphasis added.]

[8] Finally, subsection 162(7) sets out a penalty for failure to file an information return as and when required under the Act, and also provides for a residual penalty for failing to comply with a duty or obligation imposed under the Act where no penalty is expressly set out for that breach :

| | |
|---|---|
| **162.** (7) Every person (other than a registered charity) or partnership who fails | **162.** (7) Toute personne (sauf un organisme de bienfaisance enregistré) ou société de personnes qui ne remplit pas une déclaration de renseignements selon les modalités et dans le délai prévus par la présente loi ou le *Règlement de l'impôt sur le revenu* ou qui ne se conforme pas à une obligation imposée par la présente loi ou ce règlement est passible, pour chaque défaut 00 sauf si une autre disposition de la présente loi (sauf les paragraphes (10) et (10.1) et 163(2.22)) prévoit une pénalité pour le défaut — d'une pénalité égale, sans être inférieure à 100 $, au produit de la multiplication de 25 $ par le nombre de jours, jusqu'à concurrence de 100, où le défaut persiste. |
| (*a*) to file an information return as and when required by this Act or the regulations, or | |
| (*b*) to comply with a duty or obligation imposed by this Act or the regulations is liable in respect of each such failure, except where another provision of this Act (other than subsection 162(10) or 162(10.1) or 163(2.22)) sets out a penalty for the failure, to a penalty equal to the greater of $100 and the product obtained when $25 is multiplied by the number of days, not exceeding 100, during which the failure continues. | |

[Emphasis added]

[9] It is also useful to reproduce the technical notes issued by the Department of Finance in October 1998 when subsection 162(2.1) was introduced (the October 1998 technical notes):

> New subsection 162(2.1) is a special rule for the computation of penalties under subsections 162(1) (failure to file return) and 162(2) (repeated failure to file). The rule, which applies to all non-resident corporations, provides that a penalty under either of those subsections is to be computed as the greater of two amounts. The first amount is the amount determined under subsection 162(1) or 162(2). The second amount is the greater of $100 and $25 for each day, up to 100, that the failure to file continues. New subsection 162(2.1) thus operates to subject non-resident corporations to the effect of the regular penalties under subsections 162(1) and (2) in respect of a failure to file an income tax return and, consistent with the role of that tax return as an information return for those corporations that claim an exception from Canadian tax as a result of the application of a tax treaty, to the alternative penalties that would apply under subsection 162(7) of the Act if a separate information return had been required in respect of those corporations.

## THE *GOAR* DECISION

[10] In *Goar*, Miller J. identified the question which he had to decide as follows (*Goar*, para. 5):

> The simple question is whether subsection 162(2.1) applies in a situation where, as in this case, there was no monetary penalty under subsection 162(1). I read the words in subsection 162(2.1) to mean exactly what they say; that is, where the taxpayer is liable to a penalty.

[11] According to Miller J., the appellant was not liable to a penalty under subsection 162(1) given that it had no taxes payable for the relevant taxation year (*Goar*, para. 6):

> … So, what penalty is the [a]ppellant liable to under subsection 162(1)? Nothing. Zero. No income, no penalty. …

[12] Giving the word “liable” the alternative meaning suggested by the Minister of National Revenue (the Minister), he went on to hold that the appellant was no more “at risk” of incurring this penalty as it owed no taxes (*Goar*, para. 8).

[13] In the course of his reasons, Miller J. also considered the Minister’s alternative submission that a non-resident corporation’s tax return filed in circumstances where no taxes are payable should be treated as an information return and penalized as such pursuant to paragraph 162(7)(*a*) when it is filed out of time.

[14] After referring to the October 1998 technical notes, Miller J. acknowledged that the intent may have been to treat tax returns as information returns. However, he held that it would take clearer words to make the penalty set out in subsection 162(7) with respect to information returns applicable to the situation before him (*Goar*, para. 11).

## THE DECISION IN ISSUE

[15] The Tax Court Judge identified the position of the Minister as follows (Reasons, para. 41):

> … a taxpayer is liable to a penalty under [subsection] 162(1) at any time that an income tax return has not been filed on time. It is irrelevant, it is argued, that the formula in [subsection] 162(1) may produce a penalty of nil in the particular circumstances.

[16] The Tax Court Judge then conducted a contextual and purposive analysis of subsection 162(2.1). She first noted that “[t]o a great extent, the issue turns on the proper meaning of the word “liable” as it is used in subsection 162(2.1)” (Reasons, para. 45).

[17] The Tax Court Judge then referred to various definitions of the word “liable” and noted that its meaning can be quite broad (Reasons, paras. 46 to 49). Furthermore, the word “liable” in subsection 162(2.1) is distinct from the word “payable” in paragraph 162(2)(*c*). According to the Tax Court Judge, the use of different words suggests that a different meaning was contemplated (Reasons, paras. 50 and 51).

[18] The Tax Court Judge went on to consider the purpose of subsection 162(2.1). After considering the history of the legislation and the October 1998 technical notes, she found that the purpose was to impose a minimum penalty when a non-resident corporation fails to file a tax return on time, regardless of whether there are unpaid taxes (Reasons, paras. 57 and 58).

[19] She concluded this aspect of her reasons by saying (Reasons, para. 59):

> … the phrase “liable to a penalty under subsection 162(1) or (2) for failure to file a return of income for a taxation year” should encompass the circumstances in these appeals. In other words, it should apply if the non-resident corporation is potentially subject to a penalty under [subsection] 162(1) because it failed to file a tax return on time.

As the appellant was potentially subject to a penalty under subsection 162(1), the condition precedent for the application of subsection 162(2.1) was met.

[20] Earlier in her reasons, the Tax Court Judge considered the alternative submission of the Minister who repeated the alternative argument made in *Goar* that, in the event that subsection 162(2.1) was not applicable, the penalty set out in subsection 162(7) is nevertheless applicable (Reasons, paras. 27 to 36).

[21] While Miller J. disposed of this argument on the basis of paragraph 162(7)(*a*), the Tax Court Judge addressed it by reference to paragraph 162(7)(*b*) which provides for a residual penalty for the failure to comply with an obligation when no other penalty is set out under the Act. She held, focusing on this last condition, that subsection 162(1) provides for such a penalty and that accordingly paragraph 162(7)(*b*) has no application (Reasons, para. 32).

**ANALYSIS AND DECISION**

[22] The questions raised in this appeal give rise to issues of pure statutory construction which must be assessed on a standard of correctness.

[23] The history of the legislation leaves little doubt about what subsection 162(2.1) was intended to do. Prior to 1998, the Act did not spell out the circumstances in which a non-resident corporation had to file income tax returns in Canada. Subsection 150(1) simply provided that "in the case of a corporation" a return "shall" be filed "for each taxation year". Although no such distinction was made, it seems clear that with respect to non-resident corporations, the obligation to file could only extend to those that had some connection with Canada. To construe the provision as applying in the absence of any connection with Canada would give it a reach that could not have been intended. To this extent, I respectfully disagree with the Tax Court Judge when she says (Reasons, para. 15):

> Prior to these amendments, all corporations were required to file income tax returns in Canada, regardless of whether they were resident in Canada or had any connection to Canada. …
>
> [Emphasis added]

[24] Subsection 150(1) was amended in 1998 to expressly require corporations to file a tax return when, in a given taxation year, they reside in Canada, carry on business in Canada, have a taxable capital gain or dispose of Canadian taxable property. The amendment further created an obligation to file a tax return where in a given year, taxes would be payable by a corporation "but for a tax treaty". At the same time, the penalty set out in subsection 162(2.1) was added.

[25] The October 1998 technical notes which accompanied this amendment (see para. 9 above) make it clear that where a non-resident corporation has taxes payable in a given taxation year and fails to file its tax return on time, it will be subject to the "regular penalties" computed as a percentage of the taxes payable under subsection 162(1) and that in the event that the "regular penalties" are lower than the higher of the "alternative penalties" set out in paragraph 162(2.1)(*b*), the higher of the "alternative penalties" applies to the exclusion of the "regular penalties".

[26] To the extent just described, subsection 162(2.1) achieves the intended result. The difficulty arises where, as here, the non-resident corporation has no taxes payable in the year in issue and hence, cannot be subject to the "regular penalties" under subsection 162(1) or (2) since these penalties are computed by reference to a percentage of the taxes payable.

[27] The October 1998 technical notes do not address this problem. They simply state in the last four lines that consistent with the role of a tax return as an information return, where no taxes are payable by reason of the application of a tax treaty, the "alternative penalties" set out in subsection

162(2.1) apply the same way as the identical penalties set out in subsection 162(7) would apply if the non-resident corporation had failed to file an information return on time.

[28] No doubt this was the intention. As was found by the Tax Court Judge, the legislative history and context make it clear that the intention was to impose the higher of the "regular penalties" and the "alternative penalties" when a non-resident corporation has taxes payable and the higher of the "alternative penalties" when it has none (Reasons, para. 57). However, it is equally clear that those charged with implementing this last aspect of the legislative plan failed in their task. As noted, subsection 162(2.1) makes the application of the "alternative penalties" conditional upon the non-resident corporation being liable to the "regular penalties" under subsection 162(1) or (2), and no such liability can exist in circumstances where a non-resident corporation has no taxes payable. The question which arises in this appeal is whether this fundamental drafting error can be cured by the purposive interpretation proposed by the Tax Court Judge. In my respectful view, it cannot.

[29] The Tax Court Judge suggests that the word "liable" is capable of various meanings. She proposes a number of analogous expressions (Reasons, paras. 45 to 48). However, whichever one is used, a non-resident corporation which has no taxes to pay cannot be "bound or obliged to pay"; "answerable for"; "legally subject to", "amenable to" or "responsible for" a penalty under subsection 162(1) or (2) since no such penalty can be imposed.

[30] At the end of her analysis, the Tax Court Judge concludes that the phrase “liable to a penalty under subsection 162(1) or (2) …” should apply if the non-resident corporation is “potentially subject” to a penalty under subsection 162(1) (Reasons, para. 59). Again, a non-resident corporation which fails to file a tax return in circumstances where it has no taxes to pay is neither subject to, nor “potentially subject” to, a penalty under subsection 162(1) or (2) since no penalty can be imposed in these circumstances.

[31] On the other hand, if the Tax Court Judge is thereby suggesting that the appellant should be considered to be liable on the basis that it would have been liable if it had taxes to pay, she is rewriting the provision in a manner that is not permissible.

[32] While a contextual and purposive analysis is useful in identifying, amongst the meanings which a word (or phrase) can have the one that best reflects Parliamentary intent, it cannot be used to give the legislative language a meaning which it cannot bear (see *Canada (Attorney General) v. Mowat*, 2009 FCA 309, at para. 99 and the cases referred to therein). This is particularly so when regard is had to the fact that subsection 162(2.1) is a penalty provision. The reasoning of the Tax Court Judge results in a penalty being levied under subsection 162(2.1) even though the stated condition precedent for its application – “if a non-resident corporation is liable to a penalty under subsection 162(1) or (2)” – is not met. No contextual or purposive analysis can justify such a result.

[33] If, as I have found, subsection 162(2.1) has no application, the question becomes whether the appellant is nevertheless liable to the residual penalty set out in subsection 162(7) of the Act.

Both the Tax Court Judge and Miller J. held that this provision had no application, but for different reasons.

[34] In *Goar*, Miller J. only addressed the Minister's argument that a non-resident corporation's tax returns when filed in circumstances where no taxes are payable is to be treated as an information return and that as a result, the penalty set out in paragraph 162(7)(*a*) is applicable when the return is filed out of time. Miller J. rejected this argument. While acknowledging that this may have been the intent, he said (*Goar*, para. 11):

> … If the Government intended to treat the non-resident income tax return as an information return subject to subsection 162(7) penalties, more direct and unambiguous language could and should have been used.

[35] There is no doubt that the function of a non-resident corporation's tax return when filed in circumstances where no taxes are payable is that of an information return since it can have no other function. However, the fact that it fulfils that role in these circumstances does not alter its character as a tax return under the Act. In this respect, paragraph 150(1)(*a*) is drafted on the basis that a corporation's tax return filed in circumstances where it has no taxes to pay remains a tax return. In my respectful view, Miller J. correctly held that clearer language would be required in order to make a non-resident corporation who fails to file a tax return on time subject to the penalty set out in paragraph 162(7)(*a*) with respect to information returns.

[36] The Tax Court Judge for her part focused her attention on paragraph 162(7)(*b*) which provides for a residual penalty with respect to any failure to comply with an obligation under the

Act where no penalty is otherwise set out for that failure. She held that subsection 162(1) provides for such a penalty thereby excluding the application of subsection 162(7) (Reasons, para. 32):

> Subsection 162(7) refers to a failure to comply with an obligation imposed by the Act. In this case, the obligation that was not complied with was the obligation to file income tax returns by a specified deadline. A penalty for such circumstances is set out in [subsection] 162(1). In my view, it is not relevant that the penalty could be nil. A penalty for the failure to file returns on a timely basis is nevertheless set out in [subsection] 162(1).

[37] The difficulty with this reasoning is that non-resident corporations are not governed by subsection 162(1) but by subsection 162(2.1), which applies "notwithstanding" subsection 162(1). Furthermore, while Parliament can no doubt exclude corporations which have no taxes to pay from the application of the penalty by framing the penalty as a percentage of taxes payable, I do not believe that Parliament can thereby be said to be applying a "penalty of a nil amount". A "penalty", by definition, involves some form of punishment or disadvantage (see for instance *The Shorter Oxford Dictionary*, Oxford Press, 1973; *Canadian Oxford Dictionary*, Oxford Press, 2004; *Dictionary of Canadian Law*, Thomson Carswell, 3rd Edition, 2004) with the result that a "penalty of a nil amount" is not a penalty.

[38] In the present case, we have the advantage of knowing that the reason why no penalty can be imposed on a non-resident corporation pursuant to subsection 162(2.1) when no taxes are payable is that those charged with implementing the legislative plan failed in their task. The result, although unintended, is that no penalty is set out for the appellant's failure to file its tax return on time under the Act.

[39] It follows that the first condition for the application of the residual penalty under paragraph 162(7)(*b*) is met. As otherwise, it is common ground that the appellant failed to file its tax returns on time in breach of the obligation created by paragraph 150(1)(*a*), all the elements required for the application of the residual penalty set out in paragraph 162(7)(*b*) are present.

[40] As this penalty is identical to the ones that were levied, there is no basis for disturbing the assessments that are the subject of the appeal.

[41] The appeal will accordingly be dismissed. Given my reasoning for reaching this conclusion, I would award no costs.

"Marc Noël"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Johanne Trudel J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-399-09 |
| **(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE WOODS OF THE TAX COURT OF CANADA DATED JULY 21, 2009, NO. 2007-4892(IT)I.)** | |
| **STYLE OF CAUSE:** | EXIDA.COM LIMITED LIABILITY COMPANY and HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | May 25, 2010 |
| **REASONS FOR JUDGMENT BY:** | Noël J.A. |
| **CONCURRED IN BY:** | Dawson J.A.<br>Trudel J.A. |
| **DATED:** | June 11, 2010 |

**APPEARANCES:**

| | |
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| Bobby J. Sood<br>Amit Ummat | FOR THE RESPONDENT |

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