

BETWEEN:

RICHARD OCHNIK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 13, 2010 and March 16, 2011
at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Thang Trieu

JUDGMENT

The appeal with respect to an assessment made under the *Income Tax Act* for the 2004 taxation year is dismissed.

Signed at Ottawa, Canada this 31st day of March 2011.

“J. M. Woods”

Woods J.

Citation: 2011 TCC 195
Date: 20110331
Docket: 2010-52(IT)I

BETWEEN:

RICHARD OCHNIK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Richard Ochnik, appeals from an assessment made under the *Income Tax Act* for the 2004 taxation year.

[2] There are three issues.

- (a) Did the Minister properly include \$66,000 in the appellant's income as self-employment income received in connection with a real estate project?
- (b) Did the Minister properly assess a penalty for failure to file the 2004 income tax return on time?
- (c) Did the Minister properly assess interest?

Background

[3] The appellant was involved in a large real estate project in Listowel, Ontario. The project was partially completed before it went into receivership.

[4] The appellant testified that he received no compensation for his involvement in the project.

[5] According to the appellant's testimony, the project was a family business and he was not a director or shareholder of any of the companies involved. He said that his brother was the only director and that he was unaware of who the shareholders were. He acknowledged working in the business, but said he did so to help the family and without compensation.

[6] In his testimony, the appellant downplayed his role with these companies. However, in two judicial decisions the appellant was described as a key player in at least one of the companies.

[7] The judicial decisions involved alleged securities breaches that occurred in the course of raising money for the project. The courts described the appellant as a directing mind and as acting in the position of president: *Richard Ochnik v Ontario Securities Commission*, [2007] OJ No 1730 and [2007] OJ No 2171. The appellant testified that he is currently in preparations to appeal one of the decisions to the Ontario Court of Appeal. However, the respondent introduced an order which indicated that leave to appeal was denied on November 19, 2007.

[8] The securities breaches relate to over \$1,500,000 that was raised from investors in connection with the project. The appellant was held to be jointly and severally liable with one of the corporations (referred to as "146") to pay \$1,128,400 as compensation and restitution ([2007] OJ No 2171). The appellant testified that there is an ongoing investigation that likely will affect the findings in this litigation. There was no corroboration of this.

[9] Cumming J. of the Ontario Superior Court of Justice described the securities breaches in the following manner (Ex. R-11):

[35] In the matter at hand, the record establishes that Mr. Ochnik and 146, together with others, engaged in a fraudulent scheme which preyed upon the financially vulnerable, employing falsehoods and prevarication. Investors in 146 failed to receive full, true and plain disclosure as required by Ontario securities law. The monies raised from the sale of shares in 146 were used to develop a property owned by Mr. Ochnik, with the investors left with securities in an insolvent company.

Self-employment income

[10] The appellant has been assessed for the 2004 taxation year on the basis that he

received self-employment income from his participation in the project. A collections officer with the Canada Revenue Agency (CRA) testified that they were informed by administrative staff at the companies that regular payments had been made to the appellant.

[11] It appears that it was difficult for the CRA to determine how much was paid to the appellant. The information was not in the financial records that were provided to the CRA. The appellant testified that he did not have a bank account.

[12] Based on the limited information that was available, the Minister assumed that the appellant received at least \$66,000 in compensation.

[13] The appellant's position is summarized in an email that he sent to counsel for the respondent, which is reproduced below.

I was not paid any wages for my work but I was given spending money in the form of allowance from my family. The allowance came from my father's personal accounts and at no time did money come from the company accounts and the company had no income. This money was a gift between a father and son. I had no obligation to perform any work for the money. In fact before and after the existence of the company I continued to receive money from my dad as a gift.

It is my understanding that gifts from a father to son are not taxable.

[14] The appellant submits that the amount of income assumed by the Minister has no factual foundation. The Minister assumed that the appellant had expenditures for support and mortgage obligations but the appellant denies this. Further, he submits that the assessment is unfair because the auditor was not called by the respondent to explain how the amount was determined and to be subject to cross examination. He also submits that it is unfair for him to bear the onus of proof because it is not possible to prove a negative, that is, that he did not receive any income.

[15] I am not persuaded by any of the appellant's submissions.

[16] It is completely reasonable, in my view, for the Minister to assume that the appellant received compensation for his key role in this project. The evidence suggests that a large sum of money had been raised for the project, and that the appellant was a key person directing the project. It is reasonable to assume that compensation would be received.

[17] It is true that there is not much support for the income amount assumed by the

Minister. However, the amount appears to have been based on the best information that was available.

[18] I do not agree that the respondent should have called the auditor as a witness. An explanation of the assessment was provided in a letter to the appellant dated August 13, 2009 (Ex. R-7). It was not necessary for the respondent to provide further explanation at the hearing. In addition, if the appellant had wished to cross examine the auditor, he could have issued a subpoena for the auditor to attend the hearing.

[19] As for the appellant's submission that he cannot prove a negative, what this argument fails to take into account is that proof beyond a reasonable doubt is not required.

[20] Taxpayers who come before this Court routinely are able to satisfactorily rebut Ministerial assumptions of this nature. It is a matter of presenting detailed and cogent testimony, with supporting witnesses and documentation. None of this was done here. In particular, there were no witnesses who were involved in the project other than the appellant.

[21] To a large extent, the appellant's case depends on his own self-interested testimony. The testimony as a whole did not have a ring of truth, and little corroboration was provided.

[22] As an example, the appellant introduced a credit card statement in the name of his brother which seems to include expenses relating to the project. This document was introduced by the appellant to establish that his brother was actively involved in the business.

[23] Even though the credit card statement had the brother's name on it, I am not satisfied that the card was used by the brother.

[24] The credit card is referred to on a cheque of one of the companies. The reference line on the cheque reads: "Card – Richard Ochnik." This suggests that the card was used by the appellant. The brother, Ian Ochnik, did not testify to provide clarity on this matter. It is quite possible that the brother obtained the card to provide assistance to the appellant. I would note that the appellant had previously declared bankruptcy.

[25] The appellant testified that his name was on the cheque in order to approve payment on the credit card. I do not find this statement to be credible.

[26] The appellant suggests that the Minister is incorrect in assuming that he made support payments to his former spouse and that he made mortgage payments on a house. In support, the appellant introduced evidence that the mortgage payments related to a house owned by the former spouse.

[27] I am not persuaded by the appellant's submissions regarding the support and mortgage obligations. The former spouse was not called to testify. In any event, even if it is accepted that the appellant did not make these expenditures, this is not sufficient to prove that the appellant did not receive self-employment income.

[28] The essential question is whether the appellant received income of at least \$66,000 from the real estate project. What is lacking in the appellant's case is satisfactory supporting evidence, either oral or written, that no compensation was received by the appellant. The Minister's assumption that compensation was received has not been satisfactorily rebutted.

Late-filing penalty and interest

[29] The appellant was assessed a late filing penalty under section 162(1) of the *Act* for failing to file his 2004 income tax return on time.

[30] The appellant submits that he had a good excuse not to file his income tax return because he thought the trustee from his prior bankruptcy was doing so.

[31] The appellant testified that he went into bankruptcy around 2001 and that the trustee was required to file his income tax returns for the following four years.

[32] The appellant testified that he could not obtain corroborating evidence as the trustee in bankruptcy appears to have gone out of business.

[33] I do not accept any of this testimony. I would also note that the respondent introduced the 2002 income tax return into evidence. It was filed by the appellant himself.

[34] As for the appellant's explanation for the 2002 tax return, his testimony on cross examination is not at all persuasive. The following excerpt is from the transcript, at page 89:

Q. So this tax return for 2002, you filed this return, right?

A. Mm-hmm.

Q. And you filed it around the time that is dated at the back?

A. I would assume so, yeah.

Q. So my question to you is this. If your position is that the trustee in bankruptcy was filing tax returns on your behalf and had an obligation to do so, why is it that as early as 2002 you were filing a tax return in your own name as shown in Exhibit R-6?

A. Because I -- what I am looking at is that I back-dated the document to coincide with the taxation year. [...]

[35] The appellant has not established to my satisfaction that the trustee had agreed to file the income tax return for the 2004 taxation year.

[36] I am not satisfied that the penalty or interest should be vacated.

Disposition

[37] For all these reasons, the appeal will be dismissed in its entirety.

Signed at Ottawa, Canada this 31st day of March 2011.

“J. M. Woods”

Woods J.

CITATION: 2011 TCC 195

COURT FILE NO.: 2010-52(IT)I

STYLE OF CAUSE: RICHARD OCHNIK and HER MAJESTY
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: December 13, 2010 and March 16, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: March 31, 2011

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Thang Trieu

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

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