

BETWEEN:

ROSETTA TYSKERUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 6, 2012, at Nanaimo, British Columbia.

Before: The Honourable Justice T.E. Margeson

Appearances:

Agent for the Appellant: Graydon Tyskerud

Counsel for the Respondent: Geraldine Chen

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is dismissed, and the Minister's reassessment is confirmed.

Signed at Ottawa, Canada, this 5th day of June 2012.

“T.E. Margeson”

Margeson J.

Citation: 2012 TCC 196
Date: 20120605
Docket: 2011-2880(IT)I

BETWEEN:

ROSETTA TYSKERUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Margeson J.

[1] This appeal is with reference to the 2005 taxation year when the Minister of National Revenue (the “Minister”) assessed the Appellant by increasing her income for that year by \$41,765.58 and assessed gross negligence penalties.

[2] The increased income came from a transfer from 647876 B.C. Ltd.’s (the “Corporation”) bank account to the personal line of credit account located at the TD Canada Trust which account was held jointly by her and her husband. This transferred amount was equal to the overdraft amount that existed in the account at that time.

[3] Following that transfer, the account was closed.

Evidence

[4] The Appellant testified that she was the incorporator, sole shareholder and sole director of the Corporation. It was incorporated in 2002. In December of 2005, it purchased Terminal Park Stationery. It sold lottery tickets, stationery and small gifts.

[5] The Corporation entered into a Small Business Banking Credit Agreement with the TD Canada Trust which advanced a \$204,000 line of credit to the Corporation.

[6] The Appellant and her husband had a \$50,000 personal line of credit. The \$41,765.58 transferred amount was owed by her and her husband personally.

[7] She identified a \$5,000 entry to the company's bank account shown in Exhibit A-1 at Tab 3 as the only personal deposit made to the Corporation's bank account. All of the other deposits were from business resources.

[8] She said that prior to December 15, 2005, there was \$41,765.58 owing on her personal line of credit and after that date the Corporation had an overdraft of \$17,962.71.

[9] She did not report the \$41,765.58 as personal income. Deposits made to the Corporation account were mostly cash.

[10] The Respondent called Roberta Groenig who was an investigator for Canada Revenue Agency ("CRA"). This case was referred to her to check on the flow of funds between the Appellant and her Corporation. There was a transfer of funds from the Corporation to pay out the Appellant's personal line of credit. An assessment was made for these funds and gross negligence penalties were assessed. The \$204,000 line of credit was used by the Corporation. She said that monies were transferred from the Corporation's account to close out the personal line of credit of the Appellant. There was a large flow of funds from the Corporation's account. These funds were used to pay off the husband's credit cards.

[11] All documents received from the Appellant were scanned and put on discs and provided to the Appellant.

[12] She recommended penalties under subsection 163(2) because the payment in question closed out a personal line of credit. The corporate line of credit was paid off. The size of the transfer compared to the amount of income was also a factor in deciding to assess penalties.

Argument on behalf of the Appellant

[13] In essence, the Appellant takes the position that the Corporation did not confer a benefit on her as a shareholder. She refers to the definition of "confer" as "to award,

grant or to be given away”. She opines that since she is personally liable for the \$41,765.58, there is no benefit.

[14] With respect to the “gross negligence penalties”, the Appellant says that she knows that the bank is holding her personally liable for this debt and it has to be paid back to the bank so there is no benefit to her and therefore no requirement for it to be included in her income.

[15] The Appellant asks the Court to allow the appeal and deem that the \$41,765.58 is not a benefit conferred upon her in her capacity as a shareholder and that the penalties should be deleted.

Argument on behalf of the Respondent

[16] In argument, counsel for the Respondent submitted that the Appellant did not loan the Corporation the \$41,765.58 at issue in this appeal nor was it a repayment of a shareholder’s loan.

[17] None of the exceptions in paragraphs 15(1)(a) through (d) apply. Therefore, the amount is required to be included by the Appellant in calculating her income. It was a benefit conferred upon her by the Corporation in her capacity as a shareholder. “The Appellant purposefully withdrew the money from the Corporation’s bank account, which consisted of business revenues and money withdrawn from the Corporation’s line of credit, and used this money for her own personal benefit.” She used the Corporation’s money to pay off her personal debts, and not for the purpose of paying off the Corporation’s debts. Through her own actions, her personal debt became the Corporation’s debt.

[18] The Appellant knew or ought to have known that she received a benefit as she used the Corporation’s money to retire her own personal debt. She knew or ought to have known that it was the Corporation’s business account and line of credit that she was taking the money from.

[19] She testified that apart from \$5,000, the \$21,527.31 in the Corporation’s bank account prior to the transfer was business revenue from Terminal Park Stationery. She knew this and said that she could not pay the amount out of her own account because she did not have the funds. This was not an innocent error such as a bookkeeping error and was an active appropriation. She knew or ought to have known what was happening here.

[20] The \$41,765.58 was not a shareholder's loan at all as alleged by the Appellant. It was the line of credit extended to the Corporation up to \$204,000. The Corporation was responsible for making payments on the line of credit. The Appellant provided security for the line of credit, by granting a mortgage on her personal residence but this does not make it a loan from the Appellant to the Corporation. The \$204,000 was not advanced to the Corporation by the Appellant.

[21] Apart from the \$5,000, the Appellant provided no evidence that she had made any loans to the Corporation.¹ Therefore, it was not the repayment of a shareholder's loan.

[22] The mere fact that a shareholder advances money to a Corporation is not sufficient to establish a loan to the Corporation nor as to the balance of any loan alleged to have been made in that the money advanced was even to be considered as a loan.²

[23] The Appellant was grossly negligent in not including the amount of \$41,765.58 in her income for the 2005 taxation year. She was the sole shareholder of the Corporation and was responsible for keeping the payroll records and for conducting the banking. She was involved in the daily operation of the Corporation. She personally withdrew the money from the Corporation's line of credit and used it to pay off her personal debt. She paid off her personal line of credit with the Corporation's money and she would no longer be required to make payments for this personal debt. How could she not have realized that she had received a personal benefit?

[24] The amount of the benefit was substantial in relation to her reported income of \$12,925. She either intentionally failed to report the income or was wilfully blind to the fact that this amount should have been included in her income tax return.

[25] The Appellant has failed to meet her burden of proof that the assessment was in error. The appeal should be dismissed.

Rebuttal

¹ *Pereira v. Canada*, 2009 TCC 388, 2009 DTC 1248.

² *Poushinsky v. Canada*, 2005 TCC 463, 2006 DTC 2108.

[26] In rebuttal, the Appellant argued that she has provided evidence that she was personally liable for the Corporation's debt.

[27] The Respondent has not provided the evidence that the Appellant received a benefit and has not refuted the Appellant's evidence that she did not receive a benefit. The Minister has not proved its claim.

Analysis and Decision

[28] In light of the Appellant's submission in the rebuttal that the Minister has not provided the evidence to dispute the Appellant's position that she did not receive a benefit, and therefore, the appeal should be allowed, the Court must point out that the burden upon the Appellant in this case is to satisfy the Court, on the balance of probabilities, that the assessment is incorrect. The Minister has no such burden as alleged by the Appellant. It is the Minister's duty to satisfy the Court that the requirements of subsection 163(2) have been met but that is the Minister's only burden.

[29] On the principle issues, the Court is satisfied that the Appellant received the benefit as alleged. There can be no doubt that the funds in question were those of the Corporation's and were not those of the Appellant.

[30] The Appellant clearly withdrew these funds and used them for her own purposes.

[31] The Court is not satisfied that the Appellant had an outstanding loan to the Corporation in the amount of the withdrawn funds or that the amount of \$5,000 referred to by the Appellant as having been advanced to the Corporation by the Appellant was ever a loan, ever intended to be and the outstanding balance has not been established. The Court is satisfied that the Appellant's actions in obtaining the line of credit for the Corporation did not amount to the making a loan to the Corporation for that amount. Therefore, the receipt of the funds in question by the Appellant from the Corporation was not the repayment of a shareholder's loan.

[32] The receipt of the funds in question by the Appellant from the Corporation was clearly a benefit conferred upon the Appellant in her capacity as a shareholder and as such is caught by the provisions of section 15 of the *Act*.

[33] With respect to the penalty, the Court is satisfied that the Minister has met the burden in that regard. The Appellant either knew or should have known that the

funds in question were a benefit received from the Corporation and should have been reported in the taxpayer's income in the year in question. The amount in question is significant in relation to her reported income. She was not a business novice and was indeed responsible for the Company's accounts, its banking and its operations. She obviously received accounting advice and banking advice throughout and was familiar with the Corporation's bank accounts.

[34] Under these circumstances, the Court must conclude that the Appellant is liable for the penalties assessed under subsection 163(2) of the *Act*.

[35] The appeal is dismissed and the Minister's reassessment is confirmed.

Signed at Ottawa, Canada, this 5th day of June 2012.

“T.E. Margeson”

Margeson J.

CITATION: 2012 TCC 196

COURT FILE NO.: 2011-2880(IT)I

STYLE OF CAUSE: ROSETTA TYSKERUD and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Nanaimo, British Columbia

DATE OF HEARING: March 6, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice T.E. Margeson

DATE OF JUDGMENT: June 5, 2012

APPEARANCES:

Agent for the Appellant: Graydon Tyskerud
Counsel for the Respondent: Geraldine Chen

COUNSEL OF RECORD:

For the Appellant:

Name: N\A

Firm:

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