Docket: 2016-3298(IT)G

BETWEEN:

MAREK JACEK POLUBIEC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 15, 2018, at Toronto, Ontario

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	Ted R. Laan
Counsel for the Respondent:	John Maskine

JUDGMENT

The Appeal is dismissed, with costs to the Respondent, if the Respondent so desires.

If the Respondent desires costs, the Parties shall have 30 days from the date of this Judgment to reach an agreement on costs, failing which the Respondent shall have a further 30 days to file written submissions on costs, and the Appellant shall have yet a further 30 days to file a written response. Any such submissions are to be limited to five pages in length. If the Respondent desires costs, if the Parties do not advise the Court that they have reached an agreement, and if no submissions are received within the foregoing time limits, costs shall be awarded to the Respondent in accordance with the Tariff.

Signed at Ottawa, Canada, this 4th day of July 2019.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2019 TCC 146
Date: 20190704
Docket: 2016-3298(IT)G

BETWEEN:

MAREK JACEK POLUBIEC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeal instituted by Marek Jacek Polubiec in respect of a penalty assessed under subsection 163(1) of the *Income Tax Act* (the "*ITA*"),[1] as set out in a notice of reassessment dated December 3, 2015, which was issued by the Canada Revenue Agency (the "CRA") on behalf of the Minister of National Revenue (the "Minister"), for Mr. Polubiec's 2014 taxation year. The basis of the reassessment (the "Reassessment") was that Mr. Polubiec failed to report all of his income for 2014, having previously failed to report one or more items of income for 2011.

II. ISSUES

[2] The issues in this Appeal are:

a) Did Mr. Polubiec fail to report one or more amounts required to be included in computing his income for 2011 and again for 2014?

b) Did Mr. Polubiec qualify for the due-diligence defence in respect of 2011 or 2014?

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[1] *Income Tax Act*, RSC 1985, c. 1 (5th Supplement), as amended.

III. FACTS

[3] Mr. Polubiec is a bright,[2] well-educated, retired businessman, who now holds and manages a variety of investments. Mr. Polubiec testified that he graduated with an honours business administration degree from the Ivey Business School at the University of Western Ontario, and subsequently earned a master of business administration degree at the Wharton Graduate School of Business at the University of Pennsylvania.[3]

[4] Mr. Polubiec had a successful business career, commencing with Canadian Pacific Railway for a couple of years, after which he worked at Burns Fry Ltd. for several years.[4] After leaving Burns Fry, Mr. Polubiec started his own investment banking business, which was carried on by a corporation that he owned, Fraser Mackenzie Limited. Mr. Polubiec worked in the investment banking business from 1980 until he began to close his business in 2013. Based on the tax-return extracts (referred to by the CRA as Option C printouts) produced in evidence for 2007 through 2011, it appears that Mr. Polubiec was very successful and well compensated in his career.

[5] As part of a phased retirement, in April 2013 Mr. Polubiec began to wind down the affairs of Fraser Mackenzie by means of a voluntary liquidation that stretched over several years. Ultimately, the business activities carried on through Fraser Mackenzie came to an end in December 2017.

[6] Although Mr. Polubiec had used an international accounting firm for many years to prepare his annual income tax returns, he ultimately began to prepare his returns himself, using UFile, an electronic tax-return-preparation software.

[7] Mr. Polubiec testified that, when the accounting firm was preparing his tax returns, he never had any difficulty in reporting all of his income. However, it seems that at about the time that he began to prepare his own tax returns, there was a series of taxation years for which he did not receive, or may have misplaced or overlooked, some or all of the information slips (colloquially referred to as "T slips") in respect of some or all of his sources of

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2 "Bright" is the word used by Mr. Polubiec's counsel to characterize Mr. Polubiec's intellectual acumen. I saw no reason to disagree with that characterization.

3 It is recognized that both of the above institutions are reputable and highly respected business schools.

4 Burns Fry Ltd. was a predecessor of BMO Nesbitt Burns Inc.

income. Consequently, there were several years for which Mr. Polubiec was reassessed in respect of unreported income, and for some of those years, a penalty was assessed under subsection 163(1) of the *ITA*.[5] A CRA litigation officer, Shabbir Datoo, provided a history of Mr. Polubiec's reporting omissions for 2007 through 2011 and for 2014. Dealing first with the initial group of five consecutive taxation years, Mr. Datoo went through the Option C reports for each of those years and testified that Mr. Polubiec failed to report the following amounts of investment income:

Year	Dividends	Interest	Other Income	Miscellaneous	s.163(1)(a) Amount
2007	$6,253	$73	$12,317	$630[6]	$12,316
2008	$6,814	$380	$16,447		$23,641
2009	$16,392	$534	$11,394		n/a
2010	$10,935		$8,876	$83[7]	$13,149
2011	$29,159			$122[8]	$20,516

[8] Mr. Datoo explained that in 2007, 2008, 2010 and 2011 a penalty under subsection 163(1) of the *ITA* was assessed against Mr. Polubiec. The amount of unreported income that was used by the CRA to calculate the amount of the penalty (i.e., the amount described in paragraph 163(1)(*a*) of the *ITA*) is shown in the right-hand column in the above table. For reasons which were not explained by Mr. Datoo, in calculating the penalties for 2007, 2010 and 2011, the CRA used a paragraph 163(1)(*a*) amount that was less than the total unreported income for the particular year. Mr. Datoo also stated that for 2009 the CRA chose not to assess a penalty under subsection 163(1), although it did reassess Mr. Polubiec to include the unreported income in computing his income for the year.

[9] Although Mr. Datoo did not have with him at the hearing any documents pertaining to taxation years before 2007, he stated that, given that a

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5 The penalty under subsection 163(1) is sometimes referred to as a "repeated-failure-to-report-income penalty" (see *Ruremesha v The Queen*, 2018 TCC 57, ¶3) or as an "omission penalty" (see *Knight v The Queen*, 2012 TCC 118, ¶2-3).

6 In the 2007 Option C report, the omitted amount of $630 was described as foreign income.

7 In the 2010 Option C report, the omitted amount of $83 was described as a capital gain reported on a T3 information slip.

8 In the 2011 Option C report, the omitted amount of $122 was described as other dividends.

subsection 163(1) penalty was assessed against Mr. Polubiec for 2007, Mr. Polubiec must have failed to report income in one of the three taxation years preceding 2007 (i.e., 2004, 2005 or 2006), otherwise the condition set out in paragraph 163(1)(*b*) of the *ITA* would have not have been satisfied for 2007, such that it would not have been possible for the CRA to have assessed a penalty for that year.

[10] Mr. Polubiec stated that in 2014 he desired to use some of the money in his registered retirement savings plan ("RRSP") to invest in real estate. Accordingly, he instructed BMO Nesbitt Burns Inc. ("BMONB"), which was the trustee of his RRSP, to withdraw $700,000 from his RRSP and remit the net proceeds to him. Notwithstanding the amount in the instruction given by Mr. Polubiec, the actual amount of the withdrawal from the RRSP was only $699,887.01. From that amount, BMONB withheld the requisite income tax in the amount of $209,966.11,[9] which BMO said was calculated at the rate of 30%, and paid the balance (presumably in the amount of $489,920.90, i.e., $699,887.01 – $209,966.11) to Mr. Polubiec. Mr. Polubiec testified that he asked a representative of BMONB whether he had any further tax obligations in respect of the amount withdrawn from his RRSP and, on the basis of the advice that he received from BMONB, he understood that nothing further was required of him. Accordingly, when he prepared his income tax return for 2014, he reported employment income of $1, but did not report any other income. In particular, he did not report the RRSP withdrawal in the amount of $699,887.01, nor did he claim a credit for the income tax in the amount of $209,966.11 that had been withheld by BMONB and presumably remitted by BMONB to the CRA.

[11] When it matched the various T slips that it had received for 2014 in respect of Mr. Polubiec with the amounts reported on his 2014 income tax return, the CRA found that the income shown on three T slips had not been reported, as follows:

T Slip	Payor/Issuer	Description	Amount
T4RSP10	BMONB	RRSP withdrawal	$699,887.01
T511	BMONB	Foreign income &	9,808.79

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9 Exhibit R-12.

10 *Ibid.*

11 Exhibit R-13, which shows foreign income in the amount of $1,217.61, the actual amount of eligible dividends of $6,225.49 and the taxable amount of eligible dividends of $8,591.18 ($1,217.61 + $8,591.18 = $9,808.79).

		eligible dividends	
T312	iShares S&P/TSX Capped Financials Index ETF	Capital gains & eligible dividends	69.44
		Total	$709,765.24

[12] In tabulating the unreported income, the CRA grouped the taxable amounts of the two eligible dividends together, categorized the foreign income as interest or investment income and omitted the capital gains, such that the unreported income was shown as follows:[13]

Description	Amount
Dividend income	$8,657
Interest/investment income	1,217
RRSP income	699,887
Total	$709,761

[13] On December 3, 2015, the CRA issued the notice of reassessment that is the subject of this Appeal. In addition to assessing tax on the unreported income, the notice of reassessment also assessed a penalty in the amount of $70,976 under subsection 163(1) of the *ITA* and a similar penalty, in the same amount, under the corresponding provision of the Ontario income tax legislation.[14]

[14] Mr. Polubiec objected to the Reassessment, which the Minister subsequently confirmed, whereupon Mr. Polubiec commenced this Appeal.

IV. ANALYSIS

A. Provincial Penalty

[15] The pleadings of both Mr. Polubiec and the Crown state that a penalty in the amount of $70,976 was assessed by the Ontario fiscal authority. However, Mr.

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[12] Exhibit R-14, which shows capital gains in the amount of $3.59, the actual amount of eligible dividends of $47.72 and the taxable amount of eligible dividends of $65.85 ($3.59 + $65.85 = $69.44).

[13] Reply, ¶2.

[14] Notice of Appeal, ¶3(g); Reply, ¶2; and Exhibit R-6, which is the Option C report for 2014 and which shows the base against which the subsection 163(1) penalty was calculated as being $709,762.

Polubiec's Notice of Appeal did not claim any relief in respect of the provincial penalty. As the Tax Court of Canada has no jurisdiction to determine the validity of an assessment of a provincial penalty,[15] I will not consider this issue any further.

B. Federal Penalty

[16] In 2014, subsection 163(1) of the *ITA* read as follows:

> 163(1) Every person who
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> (*a*) fails to report an amount required to be included in computing the person's income in a return filed under section 150 for a taxation year, and
>
> (*b*) had failed to report an amount required to be so included in any return filed under section 150 for any of the three preceding taxation years
>
> is liable to a penalty equal to 10% of the amount described in paragraph (*a*), except where the person is liable to a penalty under subsection (2) in respect of that amount.

The penalty imposed by subsection 163(1) is one of strict liability; however, it will not apply if the taxpayer demonstrates that he, she or it exercised a requisite degree of due diligence.[16]

[17] A penalty assessed under subsection 163(1) of the *ITA* can be harsh, particularly where source deductions have been withheld and remitted in respect of the unreported income.[17]

[18] By reason of subsection 163(3) of the *ITA*, the Minister has the burden of establishing the facts to justify the assessment of a penalty under subsection 163(1) of the *ITA*.[18] However, a taxpayer who raises, and relies on, a defence of due diligence has the burden of proving that such defence is available.[19]

C. Were There Failures to Report Income?

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15 *The Queen v Sutcliffe*, 2004 FCA 376, ¶14; *Gardner v The Queen*, 2001 FCA 401, ¶17; *Raboud v The Queen*, 2009 TCC 99, ¶12; *Norlock v The Queen*, 2012 TCC 121, ¶2; and *Dunlop v The Queen*, 2009 TCC 177, ¶32.

16 *Mignault v The Queen*, 2011 TCC 500, ¶23-24; *Saunders v The Queen*, 2006 TCC 51, ¶12; and *Dunlop*, *supra* note 15, ¶4.

17 *Raboud*, *supra* note 15, ¶4.

18 See also *Raboud*, *supra* note 15, ¶22.

19 *Ciobanu v The Queen*, 2011 TCC 319, ¶8.

[19] The primary position taken by counsel for Mr. Polubiec was that, on the basis of the *Khalil* case, there was not actually a failure to report income, given that all of the amounts identified by the CRA as unreported income were the subject of various T slips that had been filed with the CRA, albeit by the issuers of those T slips, and not by Mr. Polubiec.[20] The relevant passage from Justice Mogan's decision in *Khalil* is as follows:

> I cannot conclude that a person has "failed to report an amount" within the meaning of subsection 163(1) when the person knows (i) that the amount was payable to her as income by a particular payor; (ii) that the payor withheld a certain portion of the amount as income tax to remit to Revenue Canada; (iii) that the payor actually paid to the person only the balance remaining after deducting the tax withheld; and (iv) that the payor was required to report to Revenue Canada on a form prescribed by Revenue Canada the gross amount payable to the person and the portion withheld and remitted as tax….[21]

The decision in *Khalil* has been followed by several other judges of this Court; for instance, see *Iszcenko*,[22] *Alcala*[23] and *Franck*.[24]

[20] At the commencement of the hearing of this Appeal, with the oral consent of counsel for the Crown, I granted leave to Mr. Polubiec to amend his Notice of Appeal,[25] so as to add the following provision, which was designated as subparagraph 3(k) and which set out additional material facts upon which he was relying:

> The Appellant [i.e., Mr. Polubiec] knew that the RRSP withdrawal was payable to him as income by BMO [presumably referring to BMO Nesbitt Burns Inc., which I have abbreviated as "BMONB"], that BMO withheld a portion of the amount as income tax to remit to Revenue Canada [now known as the Canada Revenue Agency, which I have abbreviated as "CRA"], that BMO actually paid to the Appellant only the balance remaining after deducting the tax withheld, and that

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20 If Mr. Polubiec had sent copies of the T slips to the CRA, he may have been able to take the position that he came within the principle enunciated in *Raboud*, *supra* note 15, ¶17-19, 22, 26-29 and 31-32.

21 *Khalil v The Queen*, [2003] 1 CTC 2263, ¶13.

22 *Iszcenko v The Queen*, 2009 TCC 229, ¶11-12.

23 *Alcala v The Queen*, 2010 TCC 198, ¶25-26.

24 *Franck v The Queen*, 2011 TCC 179, ¶6-10.

25 After the hearing had concluded, I noticed that Mr. Polubiec's surname was misspelled in the style of cause in the Amended Notice of Appeal, and that it had also been misspelled in the style of cause in the original Notice of Appeal. I am inclined to treat the misspelling as a clerical error, but if either Party is of the view that a remedial amendment is required, I am willing to entertain a motion to that effect.

> BMO was required to report to Revenue Canada on a form prescribed by Revenue Canada the gross amount payable to the Appellant and the portion withheld and remitted as tax.

When I asked counsel for the Crown whether he had any concerns about the above amendment being made to the Notice of Appeal at such a late stage in the proceedings, he said that he did not and that he admitted the facts pleaded in the amended provision.[26]

[21] A careful reading of subparagraph 3(k) of the Amended Notice of Appeal shows that it paraphrases the above-quoted statement in paragraph 13 of the *Khalil* decision, and that it closely tracks the language of clauses (i) through (iv) of that statement. During direct examination, counsel for Mr. Polubiec took him through the factual components of subparagraph 3(k), and Mr. Polubiec ultimately confirmed the factual components of that subparagraph.[27] However, Mr. Polubiec faces two hurdles, the first being that he acknowledged during cross-examination that many of the assumptions of fact set out in paragraph 5 of the Crown's Reply were correct. The assumptions in paragraph 5 of the Reply are as follows:

> a) The Appellant withdrew $699,887 from his RRSP;
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> b) The Appellant received dividends totaling $8,591.18 from BMO Nesbitt Burns Inc.;
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> c) The Appellant received foreign investment income totaling $1,217 from BMO Nesbitt Burns Inc.;
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> d) The Appellant received dividends totaling $65.85 from IShares [*sic*] S&P/TSX Capped Financials Index ETF;
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> e) The Appellant failed to report the amounts referenced in paragraphs 5 a), b), c) and d) as income on his 2014 tax return;

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[26] *Transcript*, p. 7, lines 4-19.

[27] During the course of this line of questioning in his direct examination, Mr. Polubiec initially stated that he did not consider the amount withdrawn from his RRSP to be payable to him as income; however, he subsequently gave further testimony which was supportive of the first item of knowledge set out in paragraph 3(k) of the Amended Notice of Appeal. Furthermore, as indicated above, counsel for the Crown stated that he accepted the factual statements set out in subparagraph 3(k). Accordingly, I accept that Mr. Polubiec has proven the facts alleged in subparagraph 3(k) of the Amended Notice of Appeal.

f) The Appellant declared dividend income totaling $6,535 in the 2011 taxation year;

g) The Appellant received dividend income totaling $35,694 in the 2011 taxation year;

h) The Appellant failed to report dividend income totaling $29,159 in the 2011 taxation year; and

i) The Appellant also failed to report income in the 2007, 2008, 2009 and 2010 taxation years.

Mr. Polubiec stated that the assumptions set out in subparagraphs a) and d) through i) were correct, that the assumption set out in subparagraph c) seemed to be correct, but that the assumption set out in subparagraph b) above was not correct.[28] Thus, Mr. Polubiec acknowledged that he failed to report most, if not all, of the items that the CRA had identified as unreported income. Hence, there appears to be somewhat of a contradiction, given that counsel for Mr. Polubiec urged me to find, on the basis of *Khalil*, that there was no failure to report, but Mr. Polubiec has acknowledged that he did fail to report, the specified items of income for 2014.

[22] Apart from the above hurdle, a further hurdle is that, while some of the post-2002 decisions of this Court have followed or applied *Khalil*, other decisions have distinguished it,[29] restricted it to its unique facts,[30] or declined to follow it.[31] In fact, several cases have stated, in essence, that a taxpayer "cannot invoke the fact that income tax was deducted at the source in order to avoid the penalty imposed under subsection 163(1) of the [*ITA*]."[32] In my view, the proper approach was enunciated by Justice Webb, when he was a member of this Court, in *Symonds*:

> It seems to me that the Appellant cannot simply rely on the fact that income tax was deducted at source to avoid the penalty imposed under subsection 163(1) of the [*ITA*]…. In order to avoid the imposition of the penalty, the Appellant must

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28 *Transcript*, p. 87, line 2 to p. 90, line 23.

29 *Ignatzi v The Queen*, 2003 TCC 60, ¶15; and *Ciobanu*, *supra* note19, ¶12.

30 *Peterson v The Queen*, 2010 TCC 559, p. 6; Docket 2009-682(IT)I; [2010] TCJ No. 479 (QL), ¶14.

31 *Ciobanu*, *supra* note 19, ¶12.

32 *Chendrean v The Queen*, 2012 TCC 205, ¶10. See also *Knight*, *supra* note 5, ¶32, which states, "Subsection 163(1) makes no distinction between circumstances where the omitted amount was subject to withholdings and circumstances where it was not." In addition, see *Porter v The Queen*, 2010 TCC 251, ¶2; and *Chiasson v The Queen*, 2014 TCC 158, ¶29.

> establish that the requirements of the due diligence defence, as set out by the Federal Court of Appeal in *Les Résidences Majeau Inc.*, … have been satisfied.[33]

[23] In the course of his evidence-in-chief, Mr. Datoo (the CRA litigation officer) reviewed in detail the relevant aspects of the Option C reports, which digitally captured and summarized the information taken from Mr. Polubiec's income tax returns for 2007 through 2011 and 2014. Those reports itemized the income which Mr. Polubiec had failed to report in the respective years. In addition, Mr. Datoo produced and explained copies of each of the T slips for the various items of income that Mr. Polubiec had failed to report. On the basis of that evidence, which was not shaken by cross-examination, I have concluded that the Crown has satisfied its burden of proving the facts necessary to justify the assessment of the penalty levied against Mr. Polubiec.

[24] I do not read *Khalil* as establishing a universal test to be applied in all situations. Furthermore, the situation of Mr. Polubiec, who obtained an honours business administration degree and a master of business administration degree from prestigious business schools and who worked for many years as an investment banker, is markedly different from the respective situations of Ms. Khalil and Ms. Alcala (who were recent immigrants to Canada and who were not familiar with the Canadian tax system), Ms. Iszcenko (who was suffering from depression due to the death of her husband, and who received mistaken advice from her father-in-law), and Mr. Franck (who had a very limited understanding of the Canadian tax system).

D. Did Mr. Polubiec Exercise Due Diligence?

[25] The Federal Court of Appeal explained the defence of due diligence in this manner:

> 8. According to *Corporation de l'école polytechnique v. Canada*, 2004 FCA 127, a defendant may rely on a defence of due diligence if either of the following can be established: that the defendant made a reasonable mistake of fact, or that the defendant took reasonable precautions to avoid the event leading to imposition of the penalty.
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> 9. A reasonable mistake of fact requires a twofold test: subjective and objective. The subjective test is met if the defendant establishes that he or she was mistaken as to a factual situation which, if it had existed, would have made his or her act or omission innocent. In addition, for this aspect of the defence to be

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[33] *Symonds v The Queen*, 2011 TCC 274, ¶16.

> effective, the mistake must be reasonable, i.e. a mistake a reasonable person in the same circumstances would have made. This is the objective test.
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> 10. As already stated, the second aspect of the defence requires that all reasonable precautions or measures be taken to avoid the event leading to imposition of the penalty.[34]

[26] With respect to the failure to report the RRSP withdrawal in 2014, Mr. Polubiec freely acknowledged that he made a mistake in failing to report the various items of income that are the subject of this Appeal. Counsel for Mr. Polubiec submitted that Mr. Polubiec, in preparing various income tax returns, was honest, desired to comply with the reporting requirements of the *ITA*, and did not deliberately fail to report all of his income.[35] I concur with those submissions. The difficulty that I have is that Mr. Polubiec has failed to show that he made a reasonable mistake of fact or that he took reasonable precautions to avoid the failure to report.

[27] In the context of a withdrawal from an RRSP, the distinction between a mistake of fact and a mistake of law was illustrated by Justice Webb (when he was a member of this Court) in *Mignault*:

> In order to establish that the Appellant had made a reasonable mistake of fact, the Appellant must establish both the subjective and the objective elements of this test [as set out in *Les Résidences Majeau Inc.*]. The Appellant stated that it was his understanding that he was not withdrawing funds from his RRSP but simply making arrangements to reinvest the money with The Great West Life Assurance Company. However, the relevant fact for the purposes of the [*ITA*] is the receipt of an amount. If the Appellant had ***received*** the amounts from his RRSP, then he would have been required to include the amounts in his income. The mistake of fact would have to be a mistake with respect to whether he received the amounts. However it appears that the Appellant was not mistaken with respect to whether he received the amounts since he clearly acknowledged that he had received the amounts. The Appellant's mistake was with respect to the legal implications arising from the transactions orchestrated by [the Appellant's financial advisor] and whether these transactions would result in an amount being included in his income under the [*ITA*]. This is a mistake of law not a mistake of fact and cannot be used to support a defence of due diligence.[36] [*Bold-faced and italicized emphasis in the original.*]

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34 *Les Résidences Majeau Inc. v The Queen*, 2010 FCA 28, ¶8-10.

35 *Transcript*, p. 139, lines 2-6.

36 *Mignault*, *supra* note 16, ¶32.

I will first consider whether Mr. Polubiec made a reasonable mistake of fact and will then consider whether he took reasonable precautions to avoid the failure to report all of his income.

(a) Reasonable Mistake of Fact

[28] It is Mr. Polubiec's position that, by reason of the statement made to him by a representative of BMONB, he mistakenly understood that he had satisfied his tax obligations in respect of the RRSP withdrawal in 2014. The question for this Court to answer is whether this was a reasonable mistake of fact.

[29] Dealing first with the subjective test described in *Mignault*, Mr. Polubiec acknowledged that he knew in 2014 that the RRSP withdrawal was payable to him as income by BMONB and that BMONB had withheld a portion of the RRSP withdrawal as income tax to be remitted to the CRA. Mr. Polubiec thought that the withholding and remittance of tax by BMONB satisfied his tax reporting obligations. Mr. Polubiec's mistake pertained to his obligation under the *ITA* to report all of his income. This was a mistake of law, not a mistake of fact.

[30] As indicated in *Mignault*, not only must there be a mistake of fact, but the mistake must be reasonable. In other words, there is a twofold test, involving both a subjective element and an objective element. I have expressed the view above, in considering the subjective element, that Mr. Polubiec's mistake was a mistake of law, rather than a mistake of fact. However, if my view of the subjective element is incorrect, Mr. Polubiec faces a further hurdle in satisfying the objective element of the test, given that I do not think that his mistake was reasonable. In other words, it was not "a mistake a reasonable person in the same circumstances would have made."[37]

[31] Mr. Polubiec testified that, when he learned from BMONB that tax at the rate of 30% had been withheld from the RRSP withdrawal, he mistakenly understood that he had no further reporting obligation in respect of the RRSP withdrawal, particularly since no one at BMONB told him that he was required to report the RRSP withdrawal on his tax return. He explained that most of the growth in his RRSP had arisen by reason of capital gains realized in respect of the properties held in the RRSP, and he knew that capital gains are taxed at an effective rate less than that applicable to other forms of income. Accordingly, he concluded that the 30% withholding rate represented his entire tax obligation in

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[37] *Les Résidences Majeau*, *supra* note 34, ¶9.

respect of the RRSP withdrawal, such that there was no need to report it on his income tax return.[38] In my view, this was not a reasonable conclusion, given the manner in which Mr. Polubiec reported his employment income, as explained below.

[32] In 2010, Mr. Polubiec earned a substantial amount of employment income,[39] and income tax was withheld at source in respect thereof.[40] The amount of the tax withheld at source and the various deductions and credits available to Mr. Polubiec were collectively great enough that he received a tax refund.[41] Notwithstanding that income tax had been withheld at source in respect of his 2010 employment income, Mr. Polubiec reported the full amount of that employment income on his 2010 income tax return.

[33] Similarly, in 2011, Mr. Polubiec earned an even greater amount of employment income,[42] and income tax was withheld at source in respect thereof.[43] As he had done for 2010, Mr. Polubiec reported all of his employment income for 2011 on his 2011 income tax return, notwithstanding that he knew that income tax had been withheld from that employment income.

[34] Thus, given that Mr. Polubiec was familiar with the concept of income tax being withheld from various sources of income, such as his employment income in 2010 and 2011, and was aware that the withholding of such tax did not absolve him from reporting that employment income, it was not reasonable for him to have concluded that there was no obligation to report his RRSP withdrawal in 2014 merely because tax at the rate of 30% had been withheld therefrom. In other words, a reasonable person would have understood that the withholding of an instalment in respect of an income tax liability does not excuse the particular taxpayer from the statutory requirement to report the income in question.

[35] It is Mr. Polubiec's position that, in addition to the tax in respect of the RRSP withdrawal being withheld, he was told by a representative of BMONB that

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38 *Transcript*, p. 74, lines 5-26.

39 Exhibit R-15.

40 *Transcript*, p. 106, lines 10-23.

41 Exhibit R-15. Only a portion of the UFile Online copy of Mr. Polubiec's 2010 income tax return was entered into evidence. Therefore, there is no indication in the evidence as to the precise amount of tax that was withheld at source.

42 Exhibit R-16.

43 *Transcript*, p. 106, lines 10-23.

he was "good to go."[44] As best I can tell, the person who told him that was an assistant stockbroker or an investment representative.[45] A reasonable person would have sought tax advice from a tax advisor, such as a tax accountant or a tax lawyer, and not from an assistant stockbroker, investment representative or other similar person.

(b) Reasonable Precautions

[36] There has been a lack of consensus among the judges of this Court as to whether, in advancing the defence of due diligence in respect of a penalty under subsection 163(1) of the *ITA*, it is necessary to prove that due diligence was exercised in respect of the year for which the penalty was issued, or whether it will suffice if the taxpayer proves due diligence in respect of the earlier year referred to in paragraph 163(1)(*b*) (i.e., one of the three preceding taxation years). Several decisions of this Court have held that the penalty can be avoided by establishing a due-diligence defence for either of the two years within the four-year period.[46] Other judges take the "view that the taxpayer must establish a due diligence defense for the year that the penalty was imposed."[47] Rather than endeavouring to decide between the two lines of authority myself, I will, as Justice V. Miller did in *Dhanoa*,[48] give the benefit of the doubt to Mr. Polubiec, and will consider whether he has proven the defence of due diligence for either 2011 or 2014.

(i) 2011

[37] As noted above, in one or more of the three taxation years preceding 2007, as well as in 2007, 2008, 2009 and 2010, Mr. Polubiec failed to report certain items of income set out on various T slips. It is the position of Mr. Polubiec that he did not receive those T slips and he suggested, at least in the case of BMONB, that BMONB had failed to send the T slips to him. He testified that, after each

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44 This was the phrase used by Mr. Polubiec's counsel. See *Transcript*, p. 134, lines 1-7.

45 At one point in his testimony, Mr. Polubiec described the BMONB representative with whom he was communicating as an employee of his stockbroker and as an assistant stockbroker; *Transcript*, p. 71, lines 7-12. The signature block of this individual in Exhibit A-1 describes her as an investment representative.

46 *Symonds*, *supra* note 33, ¶19; *Franck*, *supra* note 24, ¶2 ("… a due diligence defence for either year will nullify the penalty."); *Chan v The Queen*, 2012 TCC 168, ¶7, 18, 21 & 27; and *Galachiuk v The Queen*, 2014 TCC 188, ¶ 6-10.

47 *Dhanoa v The Queen*, 2015 TCC 164, ¶5. See also *Chendrean*, *supra* note 32, ¶13; and *Chiasson*, *supra* note 32, ¶37.

48 *Dhanoa*, *supra* note 47, ¶6.

reassessment in respect of unreported income, he telephoned a representative of BMONB to complain about the failure to send the T slips to him and to request that such failure not be repeated.

[38] I am not convinced that BMONB failed to send the T slips in question to Mr. Polubiec. Mr. Datoo testified that copies of each of the T slips relating to the unreported income were received by the CRA from BMONB. Thus, it is clear that BMONB had a system for preparing those T slips and sending them, at least to the CRA, if not to Mr. Polubiec. Regrettably, Mr. Polubiec did not call as a witness any representative of BMONB. Mr. Polubiec has not proven that the missing T slips were not mailed to him. It is possible that the T slips were not mailed to him or were lost in the mail, but it is also possible that they were misplaced or overlooked by Mr. Polubiec.

[39] In any event, by the time that Mr. Polubiec had been reassessed (which occurred on October 31, 2011) for his failure to report certain items of income for 2010, he had experienced four consecutive years of failing to report all of his income (as well as having failed to report all of his income in one or more of the three taxation years preceding 2007). Therefore, when Mr. Polubiec prepared his 2011 income tax return, a reasonable precaution would have been to double check to ensure that he had received all of the T slips. He could have done that by reviewing his income tax returns and notices of reassessment for the years preceding 2011 to identify all of his sources of investment income and ensure that he had T slips for 2011 from those same sources (assuming that he still held those investments). Mr. Polubiec testified that, at some point during the period from 2007 to 2011, he noticed a pattern: it was generally the T slips from certain corporations or other issuers that seemed to go missing. Therefore, when he prepared his 2011 income tax return, a reasonable precaution would have been to ensure that he had a T slip from each issuer that he had identified in the past as being an issuer whose T slip had not been available when he was preparing his previous income tax returns.

[40] During his testimony, Mr. Polubiec did not describe any type of system that he had in place for collecting and reviewing his mail, filing and organizing all his tax documents, including T slips, and ensuring that none of his tax documentation was misplaced or overlooked when he prepared his income tax returns, particularly the return for 2011. In essence, Mr. Polubiec took no steps to prevent the failure to report for 2011, other than to have called BMONB sometime in 2011 (presumably after October 31, 2011, when he received the 2010 notice of reassessment) to complain about the missing T slips. In other words, the pattern followed by Mr.

Polubiec was to react to each notice of reassessment in respect of a failure to report income in a previous taxation year, rather than taking active steps in respect of the current taxation year to ensure that all T slips for that year were available.[49]

[41] Accordingly, I find that Mr. Polubiec failed to take reasonable precautions to avoid the failure to report all of his income for 2011.

(ii) 2014

[42] For 2014, Mr. Polubiec failed to report three items of income, being the RRSP withdrawal, foreign income and eligible dividends paid by BMONB, and a capital gain and eligible dividends allocated by iShares. There was no suggestion by Mr. Polubiec that he failed to receive the T4RSP slip in respect of the RRSP withdrawal. Rather, the reason which he gave for failing to report that item of income was the mistake that he made, as discussed above.

[43] Mr. Polubiec submitted that, by asking a BMONB employee, who worked for Mr. Polubiec's stockbroker, whether the 30% withholding tax satisfied Mr. Polubiec's tax obligations in respect of the RRSP withdrawal, he had taken reasonable precautions to avoid failing to report his RRSP withdrawal as income. I do not agree with that submission, as I think that a reasonable person would have asked such a question of a tax advisor, rather than asking an assistant stockbroker or an investment representative.[50]

[44] Mr. Polubiec took the position that BMONB had failed to prepare or to send to him the T5 slip for the foreign income and eligible dividends and the T3 slip for the capital gain and eligible dividends allocated by iShares. Rather than calling, as a witness, a representative of BMONB to confirm that BMONB had failed to prepare and mail those T slips, Mr. Polubiec produced two email chains, one dated July 26, 2016 and the other dated October 7, 2016.[51] In the first email chain, Mr. Polubiec asked Christine Wert of BMONB to confirm that he "had taxable dividend income from a BMO account of $8657.00 and other investment income of $1217.00 that year [i.e., 2014]".[52] Upon Mr. Polubiec learning that Ms. Wert

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49 During oral submissions, counsel for Mr. Polubiec acknowledged that the above comment, to the effect that Mr. Polubiec's approach was reactive rather than proactive, was true; *Transcript*, p. 119, lines 21-27.

50 See paragraph 35 above.

51 Both email chains were entered together as Exhibit A-1.

52 Exhibit A-1, email sent at 1:06 p.m. on July 26, 2016. The taxable dividend income of $8,657 referred to by Mr. Polubiec appears to have been comprised of the taxable amount

was on maternity leave, he redirected his email inquiry to Allison Jarvie, who replied that she had "searched for tax slips for the 2014 tax year for both of your [i.e., Mr. Polubiec's] personal taxable accounts" but she "was not able to pull up any tax slips for these accounts relating to the 2014 tax year."[53] Mr. Polubiec made the argument at the hearing of this Appeal that Ms. Jarvie's statement that she had not been able to pull up any tax slips for his accounts for 2014 meant that BMONB had not prepared those slips.

[45] On October 7, 2016, Ms. Jarvie sent another email to Mr. Polubiec, in which she reiterated that she had not been able to find any T slips for 2014 for Mr. Polubiec's personal taxable accounts. However, she went on to say that she had remembered that Mr. Polubiec also had a family account that had been closed a couple of years previously, and that she had searched for, found and attached to her email, T slips for that account. The same day, Mr. Polubiec replied to Ms. Jarvie to advise her that one of the T slips matched the unreported income and the other T slip was close, but was not an exact match. He then asked, "Any chance that the bank failed to mail these tax slips to me in 2014?"[54] Ms. Jarvie replied to Mr. Polubiec's inquiry to state, "All of the tax slips are sent out automatically to the address on file, but it's possible there could have been an issue where you didn't receive them."[55] Although Mr. Polubiec takes the position that BMONB did not send the T slips to him, I read Ms. Jarvie's last email as indicating that BMONB had a system in place to arrange for T slips to be sent automatically to its clients. As Mr. Polubiec did not call Ms. Jarvie or any other representative of BMONB as a witness, I do not accept his submission that BMONB failed to mail the 2014 T slips to him.

[46] I acknowledge that Mr. Polubiec may not have received the T slips, but that is not sufficient to show that he took reasonable precautions to avoid failing to report all of his income for 2014. Although the failures to report income for 2007 through 2011, as described above, were now several years in the past, they were still recent enough that a reasonable person would have taken steps to ensure that there were no missing T slips for 2014, as there had been for previous years. The comments made above in paragraphs 38 to 40 are applicable here.

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of eligible dividends of $8,591.18 shown on Exhibit R-13 and the taxable amount of eligible dividends of $65.85 shown on Exhibit R-14. The other investment income of $1,217 referred to by Mr. Polubiec appears to have been a reference to the foreign income of $1,217.61 shown on Exhibit R-13.

53 Exhibit A-1, email sent at 2:56 p.m. on July 26, 2016.

54 Exhibit A-1, email sent at 12:45 p.m. on October 7, 2016.

55 Exhibit A-1, email sent at 12:56 p.m. on October 7, 2016.

(c) Availability of Due-Diligence Defence

[47] The facts of Mr. Polubiec's Appeal are somewhat similar to the facts in the *Grosdanof* case. In that case, Mr. Grosdanof withdrew, and failed to report, $8,737 from his RRSP in 1990, already having failed to report $564 of employment income earned in 1988, which led the CRA to impose a penalty under subsection 163(1) of the *ITA*. In dismissing Mr. Grosdanof's appeal, Justice Taylor stated:

> 2. … His reasons for failing to report the RRSP amount … was [*sic*] that he knew 20 per cent had been deducted as income tax and remitted by his bank from that amount and he had not received the form T4RSP before filing his income tax return. He assumed that it was not necessary for him to report it because of these two factors. The tax had been paid in his view and nothing further needed to be done. After the assessment at issue, he had checked with [the] bank and been informed a proper T4RSP had been sent to him but he said he did not receive it….
>
> 5. In my view, the simple explanation by this taxpayer that he assumed the income need not be reported because a deduction for estimated income tax had been made and because he had not received form T4RSP, although he had received the proceeds from the RRSP, does not provide an excusable basis for his failure to report on time and properly….[56]

[48] For the reasons set out above, I have concluded that Mr. Polubiec has not proven on a balance of probabilities that he made a reasonable mistake of fact or that he took reasonable precautions in either 2011 or 2014 to avoid failing to report the income in question for either of those years.

V. TAXPAYER RELIEF

[49] In his Amended Notice of Appeal, Mr. Polubiec stated that he is no longer employed and that payment of the subsection 163(1) penalty would create a hardship.[57] In its Reply, the Crown noted that a claim of financial hardship is beyond the jurisdiction of this Court, and further stated that the issue of financial hardship was already part of a request that Mr. Polubiec had submitted to the Minister for taxpayer relief.[58]

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56 *Grosdanof v The Queen*, [1993] 2 CTC 2319, ¶2 & 5.

57 Amended Notice of Appeal, ¶3(j).

58 Reply, ¶A.1.e. See subsection 220(3.1) of the *ITA*.

[50] I concur with the Crown's submission that the taxpayer-relief provisions of the *ITA* are beyond the jurisdiction of this Court. However, given that:

a) Mr. Polubiec has retired and is no longer employed,

b) tax in the amount of $209,966.11 was withheld and remitted in respect of the RRSP withdrawal,

c) Mr. Polubiec genuinely (but mistakenly) understood that he had fulfilled his tax-paying and tax-reporting obligations in respect of the RRSP withdrawal,

d) the magnitude of the penalty assessed under subsection 163(1) is substantial, and

e) a hardship will undoubtedly be imposed upon Mr. Polubiec by his having to pay a penalty of that magnitude (as well as a corresponding provincial penalty),

I am of the view that this would be an appropriate situation for a favourable exercise of the discretion granted to the Minister by subsection 220(3.1) of the *ITA*.

[51] As well, in other cases decided by the courts in respect of subsection 163(1) of the *ITA*, it has been stated that:

a) the penalty imposed by subsection 163(1) can be harsh, particularly where source deductions have been withheld and remitted in respect of the unreported income;[59]

b) the penalty imposed by subsection 163(1) can be disproportionate in nature;[60]

c) the severity of the penalty can be inappropriate and unforeseen;[61]

d) the result obtained under subsection 163(1) can be counterintuitive;[62]

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[59] *Raboud*, *supra* note 15, ¶4; *Galachiuk*, *supra* note 46, ¶10; and *Morgan v The Queen*, 2013 TCC 232, ¶27.

[60] *Galachiuk*, *supra* note 46, ¶10. See also *Knight*, *supra* note 5, ¶2-3, 25 & 30.

[61] *Knight*, *supra* note 5, ¶8.

[62] *Chan*, *supra* note 46, ¶15.

e) the penalty under subsection 163(1) can be imposed even where the failure to report income was innocent;[63] and

f) the scope of the due-diligence defence is quite limited, as it does not apply to unreasonable mistakes of fact made in good faith, to mistakes of law made in good faith, or to reasonable mistakes of law.[64]

Accordingly, I invite and encourage the Minister (as well as the Ontario fiscal authority) to cancel, or at least reduce, the repeated-failure-to-report-income penalties.

VI. CONCLUSION

[52] For the reasons set out above, this Appeal is dismissed.

[53] If the Crown so desires, it is entitled to costs, in which case the Parties shall have 30 days from the date of the Judgment in respect of this Appeal to reach an agreement on costs, failing which the Crown shall have a further 30 days to file written submissions on costs, and Mr. Polubiec shall have yet a further 30 days to file a written response. Any such submissions are to be limited to five pages in length. If the Crown desires costs, if the Parties do not advise the Court that they have reached an agreement, and if no submissions are received within the foregoing time limits, costs shall be awarded to the Crown in accordance with the Tariff.[65]

Signed at Ottawa, Canada, this 4th day of July 2019.

"Don R. Sommerfeldt"

Sommerfeldt J.

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63 *Norlock*, *supra* note 15, ¶15.

64 *Corporation de l'école polytechnique v The Queen*, 2004 FCA 127, ¶29 & 32-38. As explained by the Federal Court of Appeal, a mistake of law made in good faith and a reasonable mistake of law, as well as an officially induced mistake of law and an invincible mistake of law, are separate types of mistakes of law.

65 Tariff B of Schedule II to the *Tax Court of Canada Rules (General Procedure)*.

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