Docket: 2018-2463(IT)I

BETWEEN:

RICK GREENSTREET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 3, 2019, at Belleville, Ontario

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Montano Cabezas

JUDGMENT

The appeal of the reassessment of the Appellant's 2016 taxation year is dismissed.

Signed at Ottawa, Canada, this 22nd day of October 2019.

"David E. Graham"

Graham J.

Citation: 2019 TCC 237
Date: 20191022
Docket: 2018-2463(IT)I

BETWEEN:

RICK GREENSTREET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] The Minister of National Revenue reviewed the T3 and T5 slips issued to Richard Greenstreet for his 2016 tax year and concluded that Mr. Greenstreet had under-reported his investment income by approximately $24,000. The Minister reassessed Mr. Greenstreet to include that amount in his income. The Minister also assessed repeat omission penalties under subsection 163(1) of the *Income Tax Act*. Mr. Greenstreet disputes both the inclusion of the income and the imposition of the penalties.

I. Unreported Income

[2] The amounts that Mr. Greenstreet is alleged not to have reported can be broken down into two categories: income from the Sun Life Assurance Company of Canada ("Sun Life") and income from other investments.

A. Sun Life

[3] Sun Life issued a T5 indicating that Mr. Greenstreet had $22,337.52 in other income from Canadian sources in 2016. Mr. Greenstreet acknowledges receiving $27,090 from Sun Life in 2016. However, he takes the position that no portion of the funds he received was taxable. I disagree.

[4] Mr. Greenstreet testified that he took out an insurance policy with Sun Life in 1965 when he was still a teenager. He explained that his understanding was that the policy involved both an insurance component and an investment component. He understood that the investment component allowed him to share in the profits of the insurance company. Mr. Greenstreet stated that the insurance salesperson told him that the policy was not taxable.

[5] Mr. Greenstreet testified that he also phoned what would then have been Revenue Canada and obtained verbal assurances that life insurance policies were not taxable.

[6] Mr. Greenstreet bears the burden of proving that the funds he received from Sun Life were not taxable. He is unable to meet that burden. Mr. Greenstreet knows little about the terms of the Sun Life policy beyond what he states he was told by the salesperson more than 50 years ago. He does not have a copy of his contract with Sun Life nor does he have copies of the annual statements that he received from Sun Life. He can neither explain why the funds he received were not taxable nor why Sun Life would think that they were.

[7] The taxation of insurance is very complicated and has undergone significant changes in the last half century. Although I do not have specific evidence of the nature of the Sun Life policy, Mr. Greenstreet's description of it suggests it may have been a whole life policy. At the time that Mr. Greenstreet acquired the Sun Life policy, the investment component of whole life policies was not taxed. If Mr. Greenstreet bought such a policy, then the advice he recalls receiving from the salesperson would have been accurate. However, new rules for the taxation of whole life policies came into effect in 1970.[1] In simple terms, the new rules treated a policyholder who surrendered his or her policy as having disposed of the policy. The modern equivalent of those rules is found in paragraph 56(1)(*j*) and subsection 148(1) of the Act. The rules require the policyholder to report the difference between the proceeds he or she receives and the adjusted cost base of the policy (being the excess of the premiums he or she had paid over the cost of pure insurance) in his or her income.[2]

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1 Paragraph 6(1)(*oa*) and section 79D of the *Income Tax Act*, R.S.C. 1952, c. 148 (as amended).

2 Mr. Greenstreet argued that the Sun Life policy was not caught by subsection 148(1) because it was a deferred profit-sharing plan and was therefore excluded by paragraph 148(1)(d). He did not provide me with any evidence that would support such a

[8] As set out above, Mr. Greenstreet received $27,090 from Sun Life but only $22,337 was reported on the T5. The difference between the amount received and the amount reported suggests that Sun Life believed that Mr. Greenstreet was not taxable on the entire proceeds. This supports the idea that the Sun Life policy was a whole life policy and that Sun Life made an adjustment to reflect Mr. Greenstreet's adjusted cost base of the policy. It is also consistent with Sun Life's obligations to report only the taxable portion of the proceeds.[3]

[9] I have included the above speculation as to the nature of the Sun Life policy in these Reasons for Judgment in order to help Mr. Greenstreet to better understand why a policy that he thought would not be taxable was treated by Sun Life as taxable. Ultimately, however, the fact remains that I have no evidence of the terms of the Sun Life policy. The best evidence that I have as to whether the funds that Mr. Greenstreet received were taxable is that Sun Life classified $22,337 of them as such. It is reasonable to presume that Sun Life is familiar with the tax attributes of its own products and would not have issued a T5 showing that Mr. Greenstreet had taxable income if that were not Sun Life's view.

[10] Mr. Greenstreet argues in the alternative that he should have been taxed on the Sun Life proceeds in 2015 when he says he became entitled to receive them, instead of 2016 when he actually received them. He testified that the policy matured in 2015 but that, through an administrative error, Sun Life did not pay the proceeds of the policy out to him until 2016. He testified that, as a result, Sun Life paid him some additional interest.[4]

[11] Mr. Greenstreet has not provided me with any documentary evidence that would support this position. He testified that his conclusion that the proceeds should have been payable in 2015 was based on a letter he received from Sun Life along with the cheque for the proceeds. Mr. Greenstreet did not keep that letter. Over the course of the trial I found that Mr. Greenstreet frequently drew incorrect conclusions from documents that he had read. As a result, I am not prepared to rely on Mr. Greenstreet's recollection of the letter he received in 2016. I find that he became entitled to receive the proceeds in the year he actually received them.

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conclusion. I find that the Sun Life policy was not a deferred profit-sharing plan. There was certainly no evidence that Mr. Greenstreet was an employee of Sun Life.

[3] Subsection 217(2) of the *Income Tax Regulations*.

[4] I note that Mr. Greenstreet did not report this purported interest in his 2016 return.

[12] Based on all of the foregoing, I find that the $22,337 shown on the T5 from Sun Life should be included in Mr. Greenstreet's income.

B. Income From Other Investments

[13] The Minister says that Mr. Greenstreet failed to report $545 in interest income, $6 in foreign non-business income, $9 in taxable capital gains, $1,144 in dividend income and $138 in other income in 2016. T3 and T5 slips evidencing this income were entered into evidence. Mr. Greenstreet argues that the vast majority of these amounts should not have been included in his income.[5] I disagree.

[14] Mr. Greenstreet raises four different arguments. First, he argues that he did not receive the T-slips in question. Second, he argues that the T-slips were issued after the statutory deadline for issuing them. Third, he argues that amounts reported on many of the T-slips had already been covered on other T-slips. Finally, he argues that many of the T-slips were not for investments that he had made. I will deal with each of these arguments separately.

Receipt of T-slips

[15] Mr. Greenstreet denies receiving the T3 and T5 slips. While Mr. Greenstreet's receipt of the T-slips is relevant to determining whether he should pay penalties, it is irrelevant to the question of whether he earned the income. Taxpayers have to pay tax on their income whether they receive a T-slip for it or not.

Timeliness of Issuance

[16] Mr. Greenstreet believes that the T3 and T5 slips were issued after the statutory deadlines for issuing the slips. He reaches this conclusion on the basis that the slips in question were not automatically downloaded into his tax return when he connected his e-filing software to the CRA's system. While that is a relevant consideration when it comes to the penalties, it is irrelevant to the question of whether Mr. Greenstreet earned the income. Taxpayers have to pay tax on their income whether T-slips are issued on time or not.

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[5] He accepts that $2.07 in interest income and $479.76 in taxable dividends should have been included.

Duplication of Amounts

[17] Mr. Greenstreet made many of his investments through RBC Dominion Securities ("RBC Dominion"). He testified that he gave his broker control over his account and that the broker made investments for him.

[18] Mr. Greenstreet believes that giving his broker the power to invest on his behalf meant that he bought a mutual fund operated by RBC Dominion. Because of this belief, be believes that it was that mutual fund that made the investments in question. As a result, Mr. Greenstreet believes that any T-slips issued as a result of investments made in his account should have been issued to the mutual fund and not to him. Because of these beliefs, Mr. Greenstreet concludes that the only T-slip he should have received in respect of these investments is a single T5 issued to him by RBC Dominion and that any other T–slips simply duplicate amounts already included on that T5. I find that Mr. Greenstreet is mistaken in both his beliefs and his conclusions.

[19] Mr. Greenstreet did not identify the name of the purported mutual fund. He did not keep copies of his RBC Dominion statements and thus cannot confirm what investments he held in 2016. He did not provide any documentary evidence to support his purported acquisition of units in the purported mutual fund. He did not direct me to any T-slips issued by the purported fund. He did not explain why T-slips in respect of the investments purportedly made by the mutual fund would have been issued to him instead of to the fund nor did he explain why RBC Dominion (as opposed to the purported mutual fund) would have issued a T5 to him. I find that no such mutual fund existed and that the investments reflected on the T3 and T5 slips issued to Mr. Greenstreet were investments made by Mr. Greenstreet through his RBC Dominion account. I also find that the income reflected on these slips was not duplicated on the T5 slips issued to Mr. Greenstreet by RBC Dominion.

Not His Investments

[20] Boxes 18 (T3) and 23 (T5) of the T-slips issued to Mr. Greenstreet contain one of two beneficiary codes or recipient types. The boxes either say "individual" or "joint account". The T-slips that say "joint account" refer to the account also being in the name of Mr. Greenstreet's daughter. Mr. Greenstreet testified that his RBC Dominion account was a joint account with his daughter but that he was the sole beneficial owner. He stated that he did not hold any account at RBC Dominion

other than the joint account and thus that any T-slips with the reference to "individual" could not be his. I do not accept Mr. Greenstreet's argument.

[21] Ultimately, Mr. Greenstreet is asking me to accept too many coincidences. He is asking me to accept that incorrect T-slips were issued in respect of four investments in 2016, that similar errors occurred three times in 2015 and four times in 2014, and that he did nothing to correct the problem. Furthermore, he is asking me to accept not only that these T-slips were independently issued in error, but also that the investments reflected on those slips happen to be investments that a purported mutual fund did make through his joint account. He wants me to accept that the T-slips for both the investments that he did not make and the investments that the purported mutual fund made were all issued after the statutory deadline for doing so and that he did not receive any of these T-slips. He is, in essence, asking me to assume that the worst possible confluence of bad luck happened to him not just once but multiple times with multiple different investments over three different years. Mr. Greenstreet is simply asking too much. While I do not know why some of the T-slips say "individual" on them, I do not accept his explanation. I find that it is more likely than not that they relate to investments made by Mr. Greenstreet.

Conclusion

[22] Based on all of the foregoing, I find that the income in question should be included in Mr. Greenstreet's income.

II. Repeat Omission Penalties

[23] Subsection 163(1) provides for a strict liability penalty where a taxpayer repeatedly fails to report income. The subsection was substantially changed in 2016 for omissions relating to taxation years beginning after 2014. The harsh outcomes that were sometimes seen under the previous version of subsection 163(1) are no longer present.

[24] In my view, for taxation years beginning after 2014, repeat omission penalties can be applied if the following conditions are met:

> (a) the Respondent proves that there was unreported income of at least $500 in the year for which the penalties are to be applied;[6]

[6] Subsection 163(3).

(b) the taxpayer has not been assessed a gross negligence penalty under subsection 163(2) in respect of that unreported income;

(c) the Respondent proves that there was unreported income of at least $500 in one of the taxpayer's three preceding taxation years;[7]

(d) the taxpayer does not prove that he or she exercised due diligence in filing his or her tax return for the year for which the penalties are to be applied;[8] and

(e) the taxpayer does not prove that he or she exercised due diligence in filing his or her tax return for each preceding year for which the Respondent proves there was unreported income.[9]

[25] I acknowledge that this fifth test has not been universally accepted by Tax Court judges.[10] For the reasons I set out in my decision in *Galachiuk v. The Queen,* I am of the view that the defence in the fifth test is available to taxpayers. *Galachiuk* is, to my knowledge, the only general procedure case to address this issue. The Minister of National Revenue did not appeal *Galachiuk* and my understanding is that the Minister now accepts its application. I note that *Galachiuk* was rendered prior to the 2016 amendments to subsection 163(1). Had Parliament wanted to clarify the application of the due diligence defence to subsection 163(1), it had the opportunity to do so as part of the amendments. Counsel for the Respondent certainly did not question Mr. Greenstreet's ability to use the due diligence defence in respect of the omissions for his 2014 or 2015 tax years.

[26] For the reasons that follow, I find that each of these conditions has been met and thus that the penalties were properly applied.

A. Unreported Income in the Current Year

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7 Subsection 163(3).

8 *Symonds v. The Queen,* 2011 TCC 274.

9 *Galachiuk v. The Queen,* 2014 TCC 188. See also *Franck v. The Queen,* 2011 TCC 179; *Symonds v. The Queen, supra*; *Chan v. The Queen,* 2012 TCC 168; and *Norlock v. The Queen,* 2012 TCC 121.

10 See: *Chendrean v. The Queen,* 2012 TCC 205; *Chiasson v. The Queen,* 2014 TCC 158 and *Dhanoa v. The Queen,* 2015 TCC 164.

[27] As set out above, I have concluded that Mr. Greenstreet had unreported income of more than $500 in his 2016 tax year.

B. No Gross Negligence Penalties

[28] No gross negligence penalties under subsection 163(2) were assessed in respect of Mr. Greenstreet's 2016 unreported income.

C. Unreported Income in a Preceding Year

[29] This is not Mr. Greenstreet's first experience with unreported investment income. The Minister reassessed Mr. Greenstreet's 2014 and 2015 tax years to include unreported investment income for those years as well. The Minister increased Mr. Greenstreet's income by $1,858 for 2014 and $1,629 for 2015. Mr. Greenstreet did not object to these reassessments but he now asserts that he was not taxable on the vast majority of that income either. Again, he claims not to have received the T-slips, that the T-slips were issued after the statutory deadlines, that the T-slips contained duplicate income and that they represent income that was not his income. I find there to be no merit to these arguments for the same reason that I so found for 2016. Accordingly, I find that Mr. Greenstreet had more than $500 in unreported income in both 2014 and 2015.

D. Due Diligence in a Preceding Year

[30] I find that Mr. Greenstreet was not duly diligent in filing his 2014 or 2015 tax returns.

[31] There are two ways that a taxpayer can satisfy the subsection 163(1) due diligence test.[11] First the taxpayer can show that he or she took reasonable precautions to avoid the event leading to the imposition of the penalty. Alternatively, the taxpayer can show that he or she was mistaken as to a factual situation which, if it had existed, would have made his or her mistake innocent. However, in this alternative case, the taxpayer must also show that it was a mistake that a reasonable person would have made in the same circumstances. I find that Mr. Greenstreet is unable to meet either of these tests for his 2014 and 2015 tax years.

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[11] *Les Residences Majeau Inc. v. The Queen*, 2010 FCA 28.

[32] I do not believe that Mr. Greenstreet did not receive the T-slips for the investment income that he failed to report for 2014 and 2015. He did not provide a plausible explanation as to why such a large number of slips from a variety of different investments would all have failed to be delivered year after year. Even if I accepted that Mr. Greenstreet did not receive the relevant T-slips for 2014, he was already aware of that fact by the time he filed his 2015 tax return. He had already been reassessed in respect of those slips and thus would already have known that he had a problem receiving slips. In the circumstances, a diligent taxpayer would have kept track of his or her investments, known which T-slips he or she should have been receiving and taken precautions to ensure that he or she had all of those slips before filing his or her return. Mr. Greenstreet took no such steps.

[33] Mr. Greenstreet's assertion that all of the T-slips he failed to report were issued late is unsupported by any documentary evidence. It seems very unlikely to me that all of the T-slips Mr. Greenstreet claims not to have received would also have been issued late.

[34] To the extent that Mr. Greenstreet's mistaken belief that he had invested in a mutual fund and that the T-slips issued for the investments made by RBC Dominion double counted the income could be characterized as a mistake of fact, I find that it is not an error that a reasonable person would have made. A reasonable person, upon receiving what he or she believed to be T-slips that contained income already reported on other slips would have asked questions. He or she would have doubted that so many different companies could have made the same error at the same time. A reasonable person would have sought tax advice. The Minister reassessed Mr. Greenstreet's 2014 tax return to include unreported investment income before Mr. Greenstreet filed his 2015 tax return. Faced with such a reassessment, a reasonable person would not have continued to ignore T-slips that he or she believed contained duplicate income.

E. Due Diligence in the Current Year

[35] I find that Mr. Greenstreet was not duly diligent with respect to 2016 either.

[36] I do not accept Mr. Greenstreet's explanation that he did not receive the thirteen T-slips in issue. Even if I did, Mr. Greenstreet had already been reassessed and penalized in respect of missing T-slips for 2014 and 2015 when he filed his 2016 return. A duly diligent taxpayer would certainly have taken extra precautions in the circumstances.

[37] I similarly do not accept Mr. Greenstreet's explanation that all thirteen of the T-slips that he says he never received were issued late.

[38] For the reasons already set out above, I do not accept that a reasonable person would have continued to believe that he did not have to report the income that he believed was duplicated on different T-slips when the Minister had already told him twice that this was not the case.

[39] Finally, turning specifically to the Sun Life proceeds, I do not accept Mr. Greenstreet's claim that he did not receive the T5 from Sun Life. He offered no explanation as to why he would have received a payout cheque from Sun Life and the annual statements but not the T5. Mr. Greenstreet's mistaken belief that the proceeds of the investment component of his life insurance policy were not taxable was a mistake of law, not a mistake of fact, and thus cannot form the basis for a due diligence defence. Even if it were a mistake of fact, faced with a T5 that told him he needed to report $22,337 in income, a reasonable person would not rely on tax advice he received in 1965 to decide whether to report the income in 2016.

III. **Conclusion**

[40] Based on all of the foregoing, the appeal is dismissed.

Signed at Ottawa, Canada, this 22nd day of October 2019.

"David E. Graham"

Graham J.

CITATION:	2019 TCC 237
COURT FILE NO.:	2018-2463(IT)I
STYLE OF CAUSE:	RICK GREENSTREET and HER MAJESTY THE QUEEN
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