Docket: 2015-2013(IT)I

BETWEEN:

KOKANEE PLACER LTD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 5 and 9, 2016,
at Vancouver, British Columbia.
Before: The Honourable Justice B. Paris

Appearances:

Agent for the Appellant: Laurence Stephenson
Counsel for the Respondent: Devi Ramachandran

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2014 taxation year is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of March 2016.

"B.Paris"

Paris J.

Citation: 2016 TCC 63
Date: 20160314
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BETWEEN:

KOKANEE PLACER LTD.,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] The issue in this appeal is whether the Minister of National Revenue (the "Minister") properly imposed a penalty of $1000 on the Appellant pursuant to subsection 162(7.2) of the *Income Tax Act* (the "*Act*") for the Appellant's tax year ending January 31, 2014.

[2] Subsection 162(7.2) provides for a penalty in cases where a prescribed corporation fails to file its return of income for a taxation year by way of electronic filing, as required by subsection 150.1(2.1) of the *Act*.

[3] The relevant provisions of the *Act* read as follows:

> 150.1(2.1) If a corporation is, in respect of a taxation year, a prescribed corporation, the corporation shall file its return of income for the taxation year by way of electronic filing.
>
> 162 (7.2) Every person who fails to file a return of income for a taxation year as required by subsection 150.1(2.1) is liable to a penalty equal to $1,000.

[4] Subsection 250.1(2) of the *Income Tax Regulations* sets out the definition of a prescribed corporation, which includes any corporation whose gross revenue exceeds $1 million. That provision reads:

> 205.1(2) For purposes of subsection 150.1(2.1) of the *Act*, a prescribed corporation is any corporation whose gross revenue exceeds $1 million except
>
> > (a) an insurance corporation as defined in subsection 248(1) of the Act;
> >
> > (b) a non-resident corporation;
> >
> > (c) a corporation reporting in functional currency as defined in subsection 261(1) of the Act; or
> >
> > (d) a corporation that is exempt under section 149 of the Act from tax payable.

[5] The issues in this appeal are: whether the penalty in subsection 162(7.2) can apply where no tax is payable for the taxation year, whether the Appellant was a prescribed corporation at the material time, and whether the Appellant has made out a due diligence defence to the penalty.

[6] The Appellant was represented at the hearing by its sole shareholder and director Mr. Laurence Stephenson. Mr. Stephenson testified that the Appellant has been in operation for over 20 years and that he has always been solely responsible for the managing of its financial affairs and for filing all of its income tax returns.

[7] The Appellant's business is mineral exploration and development. During the period in issue it was most actively involved in a project in Tanzania, which resulted in Mr. Stephenson's absence from Canada during 2013 and part of 2014. When he returned to Canada in July 2014, he caused the Appellant's 2014 tax return to be filed in paper form. That return showed that the Appellant's gross revenue was $1,073,838.56.

[8] Mr. Stephenson said that he was unaware at that time that the Appellant was required to file electronically. He also testified that certain amounts reported as revenue were, in fact, repayable advances made to the Appellant by himself and another corporation owned by him personally. Mr. Stephenson admitted in cross-examination that the Appellant had been assessed a subsection 162(7.2) penalty of $500 for its tax year ending January 31, 2012. The Notice of Assessment which imposed the penalty was dated June 13, 2013. Mr. Stephenson could not recall whether he received that Notice prior to filing the 2014 return because he was away in Tanzania when it was sent, and he did not return to Canada until July, 2014. He also testified that 2012 and 2013 were the only years that the corporation reported revenue in excess of $1 million.

[9] The Appellant's principal argument is that no penalty may be imposed under the *Act* where no tax is payable for the year. Mr. Stephenson maintained that the decision of this Court in *Goar, Allison & Associates Inc. v. The Queen*, 2009 TCC 174 supports its position and in particular, paragraph 6 of that decision, which reads:

> The Appellant was not liable to a penalty as it had no income. The words of subsection 162(2.1) are not where the taxpayer files late, in which case clearly the taxpayer would be subject to the monetary penalties imposed under subsection 162(2.1). But the words do not say that. They say the Appellant must be liable to a penalty equal to a monetary amount. So, what penalty is the Appellant liable to under subsection 162(1)? Nothing. Zero. No income, no penalty. That being the case, the prerequisite for subsection 162(2.1) has simply not been met, and no penalty under subsection 162(2.1) can be imposed.

[10] The Appellant's argument must be rejected. First, the *Goar, Allison & Associates Inc.* decision dealt with a different penalty provision, subsection 162(2.1), and turned on the particular wording of that provision. It applies where a non-resident corporation has failed to file a tax return on time. As a condition to its application, it requires that the non-resident corporation be liable to a penalty under subsection 162(1), which is a monetary amount based on the tax payable by the corporation for the year. The Court held that since there was no tax payable, the corporation could not be liable to a subsection 162(2.1) penalty.

[11] The wording of subsection 162(7.2), however, does not make the penalty for failing to file an electronic return conditional in any way on tax being payable by the corporation. The only condition to the imposition of the penalty is a failure to file an electronic return as required by subsection 150.1(2.1) which applies where the taxpayer is a prescribed corporation as defined in subsection 205.1(2) of the *Income Tax Regulations*.

[12] Second, the decision in *Goar, Allison & Associates Inc.* was effectively overturned by the Federal Court of Appeal in *Exida.com Limited Liability Company v. The Queen*, 2010 FCA 159, which involved facts identical in all material respects. In *Exida.com*, the Court held that, although a penalty under subsection 162(2.1) could not be imposed where a non-resident corporation failed to file a tax return on time if there was no tax payable, a penalty under paragraph 162(7)(*b*) of the *Act* was applicable. Paragraph 162(7)(*b*) provides for a penalty where a taxpayer fails to comply with a duty or obligation under the *Act*. Clearly then, there is a no general rule that prohibits the imposition of a penalty under the *Act* in cases where no tax is payable.

[13] The next question is whether the Appellant was a prescribed corporation as defined in subsection 205.1(2) of the *Regulations*. In the Reply to the Notice of Appeal, the Respondent has pleaded that one of the assumptions made by the Minister in assessing the penalty was that the Appellant had revenues in excess of $1 million in its 2014 taxation year. Therefore, in order to show that it was not a prescribed corporation, the Appellant bears the onus of proving that its revenue did not exceed $1 million. Despite Mr. Stephenson's suggestion that the revenue was misreported in the Appellant's return, no clear or convincing evidence on this point was presented to the Court, and I find that the Appellant has not refuted the Minister's assumption.

[14] Although the Appellant did not explicitly raise a due diligence argument, in light of his testimony that he was unaware of the electronic filing requirement and that he did his best to meet all tax filing requirements, a due diligence defence should be considered. The requirements of a due diligence defence are described by Boyle J. in *Comtronic Computer Inc. v. The Queen*, 2010 TCC 55 at paragraph 35 as follows:

> 1. in order to establish a due diligence defence to a penalty an appellant must show he either (a) made a reasonable error in his or her understanding of the facts, or (b) took reasonable precautions to avoid the event leading to the penalty, and
>
> 2. subject to very limited exceptions, mistakes of law as to the existence or interpretation of legislation are not recognized as an excuse or defence to a section 280 penalty. The exceptions are officially induced mistake of law and invincible mistake of law involving a defect in the promulgation or publication of the law.

[15] A mistake as to the existence of the electronic filing requirement set out in subsection 150.1(2.1) of the *Act* is a mistake of law and is not a defence to the subsection 162(7.2) penalty in issue, since neither exception set out in paragraph 2 of the portion of the *Comtronic* decision cited above is applicable.

[16] The only question that remains is whether Mr. Stephenson, acting on behalf of the Appellant, took reasonable precautions to avoid the events leading to the penalty. I find that it has not been shown that he did. The evidence shows that prior to Mr. Stephenson filing the Appellant's 2014 tax return, the Canada Revenue Agency had assessed a subsection 162(7.2) penalty on the Appellant for its 2012 taxation year, and it was only because Mr. Stephenson was away from Canada for an extended period that he did not become aware of the Notice of Assessment for

2012 or the electronic filing requirement. There was no evidence that Mr. Stephenson had put in place any system to deal with matters like the 2012 Notice of Assessment during his absence or to have them brought to his attention. If he had, it is clear that he would have learned of the electronic filing requirement. Finally, there was no evidence that Mr. Stephenson sought any professional assistance in handling the Appellant's tax matters, or made any efforts to keep his knowledge of tax filing requirements up-to-date.

[17] For all of these reasons, the appeal is dismissed.

Signed at Ottawa, Canada this 14th day of March 2016.

"B.Paris"

Paris J.

CITATION:	2016 TCC 63
COURT FILE NO.:	2015-2013(IT)I
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APPEARANCES:

Agent for the Appellant:	Laurence Stephenson
Counsel for the Respondent:	Devi Ramachandran

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada