Docket: 2019-160(IT)I

BETWEEN:

DEO KUMAR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard November 22, 2021 and September 14, 2022 at
Vancouver, British Columbia

Before: The Honourable Justice Bruce Russell

Appearances:

Agent for the Appellant:	Nick DiMambro
Counsel for the Respondent:	Mark Shearer

JUDGMENT

This appeal of the 2013 and 2014 taxation year reassessments raised April 3, 2017 is allowed, to the extent of denying the subsection 163(2) gross negligence penalty levied per subsection 163(2) of the federal *Income Tax Act* as part of each of these two reassessments; the whole without costs.

Signed at Halifax, Nova Scotia, this 31st day of July 2024.

"B. Russell"

Russell J.

Citation: 2024 TCC 105
Date: 20240731
Docket: 2019-160(IT)I

BETWEEN:

DEO KUMAR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Russell J.

I. Overview:

[1] The Appellant, Mr. Deo Kumar, appeals reassessments of his 2013 and 2014 taxation years, raised under the federal *Income Tax Act* (Act). He submits that unreported corporate payments made directly or indirectly to him in those years, were shareholder loan repayments and thus non-taxable; as opposed to being taxable benefits as reassessed by the Minister of National Revenue (Minister). Mr. Kumar also disputes the gross negligence penalties levied with these two reassessments.

[2] In 2001, Mr. Kumar and his late wife sought to assist the career development of their eldest son Reanae Kumar (RK), a qualified auto mechanic. Mr. Kumar mortgaged their home to finance a loan made to a newly formed corporation, named RDR Tire & Autocentre Ltd. (RDR), of which he and his wife were shareholders. These loaned funds enabled RDR to purchase and set up an operating tire/auto servicing business, to be run by son RK.

II. Reassessments:

[3] The appealed reassessments reflect:

> (a) unreported income totalling $24,249 (2013) and $41,680.40 (2014), as RDR payments made to and or for RDR shareholder Mr. Kumar, taxable per subsection 15(1) of the Act;

(b) unreported income totalling $13,693 (2013) and $28,131.40 (2014), as RDR payments made to and or for son RK, as Mr. Kumar directed or concurred in, indirectly benefitting Mr. Kumar and taxable per subsection 56(2) of the Act; and

(c) gross negligence penalties per subsection 163(2) of the Act, levied on unreported income.

[4] Subsections 15(1), 56(2) and 163(2) of the Act as of 2013 and 2014 provide as follow:

15(1) – benefit conferred on shareholder:

> If, at any time, a benefit is conferred by a corporation on a shareholder of the corporation…then the amount or value of the benefit is to be included in computing the income of the shareholder…

56(2) – indirect payments:

> A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to another person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred upon the other person...shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.

163(2) – false statements or omissions:

> Every person who, knowingly, or under circumstances amounting to gross negligence, has made or had participated in the making of, a false statement or omission in a return, form, certificate, statement or answer... filed or made in respect of a taxation year for the purpose of this Act, is liable to a penalty of the greater of $100 and 50% of the total of...

III. Issues:

[5] The issues are:

(i) were the reassessed amounts rightly taxable as income to Mr. Kumar per subsections 15(1) and 56(2) of the Act; and

(ii) were gross negligence penalties per subsection 163(2) of the Act rightly reassessed?

IV. Background:

[6] Only Mr. Kumar testified at the hearing. By then he was in his early 70s. He testified as to events eight, nine and more years earlier. English is not his first language. While certain answers were somewhat unclear, I found Mr. Kumar a credible witness.

[7] He testified that he was retired from fulltime employment as a maintenance worker. He had held this employment for numerous years including 2013 and 2014.

[8] Mr. Kumar had no accounting training. Decades earlier, in 1978 he had taken an H&R Block course for preparation of tax returns for individuals, but not for corporate tax returns.

[9] Mr. Kumar was not a mechanic. In 2001, he caused RDR to be incorporated and then loaned it $315,000 to acquire and set up an operating tire/auto servicing business. His son RK commenced to run this business and continued to do so until sometime after 2014. In 2018, RDR permanently ceased operations due to financial failure.

[10] Mr. Kumar, continuing through 2013 and 2014, went to RDR's rented business premises for two hours or so approximately every second weekend, when he had time away from his fulltime employment. He there would do clean-up and other miscellaneous work in RDR's shop and office. He submitted receipts to son RK for miscellaneous out-of-pocket expenses that he incurred on RDR's behalf in doing this work.

[11] Mr. Kumar said that RDR continuously struggled financially. In an unidentified year, he made a second, mortgage secured, loan to RDR; this for $335,000. As well, from time to time as necessary, he loaned RDR lesser cash amounts. His income source was his employment salary. RDR made repayments to him. No record or schedule of such payments and repayments was put in evidence.

[12] Mr. Kumar testified also that RDR made payments to or on behalf of son RK, for RK's mortgage payments and to pay for his "day-to-day" expenses. Unlike his father he had no other income. Mr. Kumar said the two reassessed amounts for the RDR payments to or on behalf of RK, totalling approximately $42,000, "could be right". (As noted above, the actual reassessed amounts that approximately total $42,000, are $13,693 (2013) and $28,131.40 (2014)).

[13] Mr. Kumar said also that RDR was unable to afford engaging a professional to prepare RDR's annual tax returns. Mr. Kumar thus took on the job himself of compiling (as distinguished from "preparing") these returns, using financial data that son RK provided. RK utilized computerized accounting software in keeping and maintaining RDR's accounting books and records.

[14] Mr. Kumar was not familiar with computers or accounting software. He manually compiled the tax returns using "the numbers" that RK provided.

[15] The RDR tax returns for the April 30, 2013 and 2014 taxation years, including balance sheets and income statements, were put in evidence (Exhibits A-1, A-2 and A-4 to A-6). By Canada Revenue Agency (CRA) letter dated October 17, 2013 (Ex. A-3), RDR was requested to file financial statements for its April 30, 2013 taxation year. It seems this had not previously been done.

[16] The 2013 and 2014 balance sheets show shareholder loans payable of $279,022.68 and $277,921.49, respectively. Mr. Kumar's representative observed that the annual shareholder loan balances moved up and down like a credit line account balance.

[17] Mr. Kumar said he did not know how to record shareholder loan repayments on the corporate side.[1]

[18] As well, Mr. Kumar compiled the GST returns for RDR, again with data provided by son RK, generated from the RDR accounting software.

[19] RDR reported for its 2013 and 2014 taxation years respective net losses of $13,224 and $102,490.

[20] Mr. Kumar signed the RDR tax returns as the authorized signing officer and in them named son RK as the contact person for CRA. Mr. Kumar testified that over the years he had not been aware of any CRA concerns, leaving him to understand that all was acceptable with RDR's corporate tax returns.

V. Parties' Positions:

[21] Mr. Kumar's representative argued that the 2013 taxation year reassessment was statute-barred, or potentially so. He also asserted that the amounts reassessed as

[1] Transcript, pp. 42, 43

taxable income were wrong, because Mr. Kumar had never received such amounts. Also asserted was that any amounts that Mr. Kumar did receive constituted shareholder loan repayments. The gross negligence penalties also were disputed.

[22] The Respondent Crown's position is that both appealed reassessments are correct.

VI. Analysis:

Statute-barred?

[23] I first address the submission of Mr. Kumar's representative, not pleaded in the Notice of Appeal, that the 2013 taxation year reassessment would be statute-barred, should I deny the gross negligence penalty that is part of that reassessment.[2]

[24] I do not concur. Subsection 152(4) of the Act provides that a reassessment may be raised within the applicable "normal reassessment period", which term is defined in paragraph 152(3.1)(b) of the Act as being the three year period commencing with the date of initial assessment.

[25] The representative did not dispute the assessment history of the 2013 taxation year reassessment, pleaded in the Respondent's Reply.[3] That history is that Mr. Kumar's 2013 taxation year was initially assessed May 20, 2014 and reassessed April 3, 2017.[4] Those two dates encompass a period slightly less than three years.

[26] Thus, with the April 3, 2017 reassessment having been raised within the applicable three-year normal reassessment period, it is not statute-barred. This is regardless of the fate of the appealed gross negligence penalty that is an element of this reassessment.

Shareholder loan repayments?

[27] I now address the matter of when shareholder loan repayments may be recognized as such, rather than as subsection 15(1) shareholder benefits.

[2] Transcript, p. 120
[3] Reply, paragraphs 3 to 6
[4] Reply, paragraphs 3 and 4

[28] First of course, there must exist a *bona fide* shareholder loan or loans made by the shareholder to the particular corporation, with an outstanding balance. Here, that is not questioned. At all relevant times, Mr. Kumar was RDR's sole shareholder.

[29] The Respondent cites *Tymchuk v. The Queen*, 2003 TCC 699 (TCC). In that matter, the taxpayer appellant (DT) was a realtor and sole shareholder of his corporation, which he also worked for, without formal compensation. For his 1997 and 1998 taxation years, DT did not report receiving any amounts from his corporation. Nevertheless, in those years the corporation had issued cheques to him and also had paid his Visa account. The corporation also paid 100% of his auto expenses and his life insurance premiums. The Minister assessed DT for shareholder benefits conferred on him by the corporation, allocating 20% of his car usage as personal.

[30] DT's position was that that these paid amounts constituted "income in his hands under paragraph 12(1)(a) for services rendered, or they should be credited as repayment of a portion of a shareholder's loan and not compensation for services rendered."[5] The Court (McArthur J.) understood that DW was a certified general accountant, and did the bookkeeping for his corporation.

[31] McArthur J. upheld the appealed reassessments that the payments constituted subsection 15(1) shareholder benefits, finding that the corporation had not recorded the payments to DW as being salary or anything else, nor had DW reported them as such. The payments only came to light after an audit. The Court considered that it was too late after the CRA audit for the payments to be recognized as shareholder loan repayments or payments for services rendered. This was not an accidental bookkeeping slip.

[32] McArthur J., at paragraph 12 of his reasons for judgment, in the context of considering the assessed gross negligence penalty, observed:

> …DW was his own bookkeeper and I believe he was a certified general accountant. He had no intention of entering the amounts as shareholder loans or anything else until they were revealed in the audit. He had the opportunity and obligation to accurately record the corporation's payments. Having been caught by the audit, he now asks that he be permitted to do some retroactive tax planning…

[5] *Tymchuk*, para. 4

[33] Also McArthur J. adopted language of Linden J.A. of the Federal Court of Appeal, in *The Queen v Friedberg*, 92 DTC 6031 (FCA) at 6032 as to the importance of corporate documentation:

> In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *The Queen v. Irving Oil*, 91 DTC 5106, per Mahoney, J.A.). If a taxpayer fails to take the correct formal steps, however, tax may have to be paid. If this were not so, Revenue Canada and the courts would be engaged in endless exercises to determine the true intentions behind certain transactions. Taxpayers and the Crown would seek to restructure dealings after the fact so as to take advantage of the tax law or to make taxpayers pay tax that they might otherwise not have to pay. While evidence of intention may be used by the Courts on occasion to clarify dealings, it is rarely determinative. In sum, evidence of subjective intention cannot be used to 'correct' documents which clearly point in a particular direction. [underlining added]

[34] In *Tymchuk*, McArthur J. also cited *Canada v. Chopp*, 95 DTC 527 (TCC), upheld [1998] 1 CTC 407 (FCA); writing as follows (paragraph 8):

> Counsel for the Respondent referred to the decision of Mogan J. of this Court in *Chopp v. The Queen*, 95 DTC 527. In *Chopp*, the taxpayer owned 99% of C Ltd. While he was on vacation, his corporation advanced $28,500 to his personal benefit for the purchase of his home. This advance was erroneously recorded as corporation expenses rather than a reduction to his shareholders loan account. The Minister of National Revenue disallowed it as an expense of the corporation and included in the taxpayer's income under subsection 15(1). Mogan J held that if the value of a benefit is to be included under subsection 15(1) in a shareholder's income, the benefit must be conferred with the knowledge or consent of the shareholder where it is reasonable to conclude that the shareholder ought to have known the benefit was conferred. I agree with this reasoning.

[35] *Chopp* speaks to a situation where a "one of" mistaken entry was made in the keeping of the corporation's books. That is a type of situation that for tax purposes may be retroactively corrected.

[36] Overall, I consider *Tymchuk* and *Chopp* indicative of considerations pertinent in distinguishing between benefits paid to or on behalf of the taxpayer and shareholder loan repayments. Basically, to be recognized as shareholder loan repayments, the payments ought to be recorded by the payer corporation as such, although allowing for "one of" accidental slips in not so doing. The subjective intent of the taxpayer, expressed after the fact, is at best of little relevance.

[37] Turning to the ministerial assumptions of fact pleaded in the Reply under the heading, "shareholder benefits", the paragraph 7(n) assumption reads:

> …there were no debit entries to the shareholder loan account in respect of the personal expenditures paid by [RDR] for the Appellant and the Son;

[38] This was not disputed. Mr. Kumar explained this by saying, as noted above, that he did not know how to reflect such payments in RDR's shareholder loan account.

[39] No records of RDR payments were submitted in evidence. Mr. Kumar testified in direct examination that RDR periodically paid small amounts to or for him. However, in cross-examination he said something different - that for each of his 2013 and 2014 taxation years RDR had paid him as personal expenses approximately the subsection 15(1) amounts that he had been reassessed, less approximately two thousand dollars.[6]

[40] The exchange with Respondent's counsel was as follows:

> Q. Now, the CRA and the Minister – the Minister has said that in 2013 and 2014 the personal expenses for you were roughly $66,000. Is that correct?
>
> A. That's correct, yeah.
>
> Q. And then there were further amounts owing for your son, correct?
>
> A. Yes.
>
> Q. And it's your position that those amounts are incorrect, is that right?
>
> A. I am not saying that's incorrect. Some of, some of - it was a very minimum was paid by the corporation to me [sic]. Not a huge amount.
>
> Q. So, you say in 2013 it was not $24,249 paid for you? It was less than that?
>
> A. Maybe a couple of thousand dollars less, but not very, not very much.
>
> Q. And in 2014, again it was less than $41,680?
>
> A. That's correct.

[6] Transcript, p. 75

> Q. And how much was it?
>
> A. Same, same amount maybe. Very minimum, couple of thousand less.

[41] In re-direct, Mr. Kumar's representative asked Mr. Kumar what were his personal expenses in 2013. Mr. Kumar's answer was, "[a] mortgage on the house. A mortgage payment. I didn't actually add it up, so."[7]

[42] The testimony thus suggests that Mr. Kumar's loans to RDR, largely funded by more than $600,000 raised via two mortgages above-mentioned, were being repaid at least in part via RDR payments that he acknowledged receiving.

[43] The problem here is that such payments were not recorded via debit entries to RDR's shareholder loan account. As noted, Mr. Kumar's evidence was that he did not know how to record payments for personal expenses in the shareholder loan account.[8]

[44] I heard no evidence as to there being any degree of difficulty in recording payments for personal expenses in the shareholder loan account. It seems to me that that is not a sufficient reason for RDR not debiting shareholder loan repayments to its shareholder loan account. Quite possibly, Mr. Kumar was unaware of the importance of the corporation maintaining a record of shareholder loan repayments (i.e., debit entries to the shareholder loan account) for corporate payments to or on behalf of the shareholder are to be accepted as being shareholder loan repayments.

[45] The choice is to pay for professional assistance to have the corporate records correctly maintained or to learn how to do it oneself. Mr. Kumar elected neither option.

[46] The same is so for the RDR payments made to or for son RK, for his mortgage payments and "day to day" expenses, noted above. I do not question that Mr. Kumar as sole RDR shareholder knew of these payments, in essence concurring re, if not directing, same.

Subsection 56(2) benefits?

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[7] Transcript, p. 91
[8] Transcript, pp. 42, 43

[47] In 1998, in *Neuman v. Minister of National Revenue*, the Supreme Court of Canada set out the following preconditions for application of subsection 56(2):

> (a) the payment must be to a person other than the reassessed taxpayer;
>
> (b) the allocation must be at the direction or with the concurrence of the reassessed taxpayer;
>
> (c) the payment must be for the benefit of the reassessed taxpayer or for the benefit of another person whom the reassessed taxpayer wished to benefit; and
>
> (d) the payment would have been included in the reassessed taxpayer's income if it had been received by him or her.9

[48] I consider that on the facts of this matter, all four of these provisions apply as to Mr. Kumar vis-a-vis son RK.

[49] Before leaving this benefits issue, I wish also to address the ministerial assumption of fact pleaded in the Reply at paragraph 7(e), which reads:

> …the Appellant conducted the administrative and bookkeeping duties of [RDR];

[50] Thus, the Minister decided to reassess Mr. Kumar because, at least in part, the Minister believed that he was the person who conducted RDR's administrative and bookkeeping duties.

[51] Mr. Kumar himself testified that he had nothing to do with RDR's administrative and bookkeeping duties.[10] His son RK was responsible for these duties.

[52] I tend to agree that RK was responsible for these duties. However, I do not think that this has much relevance to the issue as to whether corporate payments should be recognized as shareholder loan payments. That does not mean that Mr. Kumar was not involved at least to some extent in the carrying out of these RDR duties. After all it was Mr. Kumar, not his son, who decided that he himself would

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[9] *Neuman v. Minister of National Revenue*, [1998] 1 SCR 770, para. 32
[10] Transcript, p. 46

compile the corporate tax returns, rather than engage a professional to prepare same. He also did the GST returns.

Subsection 163(2) gross negligence penalties?

[53] As for the gross negligence penalties assessed for Mr. Kumar's 2013 and 2014 taxation years, I cite *Ralph Abdel Deyab v. Her Majesty*, 2020 FCA 222 (FCA) for the proposition that as Mr. Kumar believed he was simply causing RDR to repay himself amounts that he as shareholder had previously advanced, there is no basis to conclude that he had knowledge that instead he was receiving taxable shareholder benefits.[11]

[54] Additionally, in *Deyab* (paragraph 77), the Federal Court of Appeal observed that,

> Mr. Deyab's failure to maintain proper records that might have established that [his corporation] was repaying amounts payable to him (if such amounts had been properly recorded) does not establish that his failure to include the amounts withdrawn in his income demonstrated 'a high degree of negligence tantamount to intentional acting' or that he was indifferent as to whether he complied with the Act. Mr. Deyab's failure to include the amounts reassessed in his income, in the circumstances of this case, do not amount to gross negligence.

[55] I consider that this language readily applies to Mr. Kumar as well, in excusing him from the levying of gross negligence penalties as part of each of the two appealed reassessments. He did not have an understanding of income and expenses and tax law sufficient to be aware of the importance of debiting the shareholder loan account. I reject the asserted fact in subparagraph 8(c) of the Reply, under the heading "Subsection 163(2) Penalties", that, "the Appellant had an understanding of income and expenses, tax law, and the requirement to keep complete accurate [sic] books and records". Again, while Mr. Kumar had his above-mentioned H&R Block certificate from almost 40 years earlier, this did not deal with corporate tax requirements and reporting procedures.

VII. Conclusion:

[11] *Deyab*, para. 71

[56] The appeal of the two reassessments will be allowed, to the extent of denying the subsection 163(2) gross negligence penalty levied as part of each of the two reassessments.

Signed at Halifax, Nova Scotia, this 31st day of July 2024.

"B. Russell"

Russell J.

CITATION:	2024 TCC 105
COURT FILE NO.:	2019-160(IT)I
STYLE OF CAUSE:	DEO KUMAR AND HIS MAJESTY THE KING
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APPEARANCES:

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