IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. MacNeil, 2007 NSPC 23

Date: May 25 2007
Docket: 1617498
1617499
1617500
1617501
1617502
Registry: Halifax

Her Majesty the Queen

v.

John Peter MacNeil

Judge: The Honourable Judge Castor H. Williams

Decision: May 25, 2007

Charge: 239(1)(a) Income Tax Act
239 (1)(a) Income Tax Act
239 (1)(a) Income Tax Act
239(1)(a) Income Tax Act
239(1)(d) Income Tax Act

Counsel: C. MacKinnon for the Crown
G. Tompkins for the Defendant

Introduction

[1] The accused, John Peter MacNeil earned professional income as a doctor. However, his accounting or recording of income and expenses was inadequate. Hence, a Revenue Canada Agency audit disclosed that there were discrepancies between the income he claimed and the amount he actually received. He had underreported his income and had exaggerated his expenses. As a result, the Canada Revenue Agency added the undisclosed and underreported amounts to his income and adjusted the expenses.

[2] Additionally, they have charged him with four counts of failure to include additional taxable income. The charges are based upon his making false and deceptive statements in the filing of his 1998, 1999, 2000 and 2001, T1 Income Tax and Benefit Returns for those stated years. They also have charged him with wilfully evading the payment of taxes by failing to report the additional taxable income between December 31, 1997 and November 13, 2002.

Summary of the Relevant Evidence

[3] The evidence disclosed that for the relevant time period, the accused was at one time privately employed and then became employed by several hospital institutions. His billings were for fee for service through the MSI system with income deposited into his bank account. At a point in time his now estranged wife assisted him in managing the bookkeeping, billings and correspondences of his practice with limited input and supervision and utilizing a subscribed software program.

[4] It was also apparent that he did not emphasize proper bookkeeping or accounting methods nor paid close attention to financial details as he lacked adequate books of accounting and supporting documentation. He habitually estimated his annual income by determining his income for a portion of the year and then converting that to an annual total. He also estimated his expenses. There was also evidence that he was experiencing financial difficulties as he was heavily in debt with cash flow problems.

[5] For the taxation years 1998 to 2000 he did not file a formal statement of income and expenses. Likewise, he claimed the full spousal deduction for his then spouse and claimed her income to be zero for the taxation years 1998, 1999 and 2000 and to be $100.00 for 2001. However, he claimed that he paid his spouse an honorarium for her assistance in the amount of $1200.00 in the taxation years 1999 and 2001 and $32, 000.00 in 2000. His spouse did not file a tax return for those relevant years.

[6] The Canada Revenue Agency investigated, audited and reassessed the accused for the taxation years 1998-2001. As a result of the audit the accused has admitted that he had additional taxable income and should have paid additional federal taxes. He, however, has submitted that his conduct did not rise to the level of any criminality as the surrounding circumstances including the state of his mind could have impacted on his action.

Issue

[7] Having admitted to the fact that he filed the statements and the evidence supports the filing of the documents the real issue therefore is

whether the statements were simply errors of omissions or, gross negligence or fraud with the intention to evade the payment of taxes.

Position of the Parties

[8] In the Crown's view, as a medical doctor where, professionally, accuracy is required and necessary, we have someone who because of his inauspicious financial circumstances was determined to reduce his taxable income by any means possible. Thus, by his system of estimations of his income and expenses, if he did not knowingly fail to report all of his income and overstated his expenses for the subject years, he was wilfully blind as to his actual income and expenses that could have been easily obtained from accessible bank statements and MSI and, he at least acted so negligently that it amounted to his being grossly negligent. Being sloppy was not criminal but one has to consider the frequency of these errors and omissions to see whether they were done consciously or inadvertently.

[9] On the other hand, the accused pointed to the various sections of the *Tax Act* and emphasized that on the various degrees of culpability he was at

least negligent but neither criminally fraudulent nor conduct amounting to a scheme of evasion. Significantly, however, he does not deny making the incorrect statements. In short, he did not wilfully or intentionally evade the payment of taxes.

Analysis

[10] It seems to me that the Crown only put questions to the accused about the errors and omissions which he said were correct or confirmed what he did. But, he was not asked the reasons for doing what he did in order to assess his motives or mind set. The suggestion was that he should be penalized criminally because he guessed his income and expenses and was very cavalier in his approach to tax preparation and reporting without consulting any tax specialists. However, the questioning did not elicit from him a rational or valid reason for his errors, save the reference of a busy practice and household problems.

[11] However, were the estimates reasonable? I gathered from his testimony that he was not contesting that he filed the statements and that the

information was not quite accurate. In fact, he has made that admission. He, however, is saying that he did not wilfully evade the payment of taxes. Thus, he has presented the proposition and it seems to me that, in a proper case, it is conceivable that one could make inaccurate statements in their tax return but did not intend to evade the payment of taxes in the sense that one did not deliberately set into motion a scheme or a plan with the sole intent to evade the payment of taxes although the net effect is not paying the proper amount of taxes. See: ***R.v. Hefler***, [1980] N.S.J.111 (Co. Ct.), ***R.v. Klundert***, 2004 D.T.C. 6609 (Ont. C.A.)

[12] Nonetheless, I agree with the submission of Crown counsel on the submission that it would have been a simple matter for the accused to obtain his bank statements to ascertain his true income in the same way as did the auditors. In the audit, material amounts were found not to be included as income and significant amounts were disallowed as expenses as they were either unreasonable or unsupported.

[13] With respect to his expenses, it was obvious that some could not be considered as legitimate in computing professional income. In particular, for

the taxation year 2000, when he was aware that his spouse was not assisting in doing any work for his practice, he claimed he paid her a salary of $32,000.00 but on his T1 he showed that she earned no income and claimed the maximum spousal non refundable credit. The net effect was to lessen his tax liability. Moreover, for the years 1999 and 2000 he filed no expense statements but submitted a global estimate for expenses that upon investigation he could not justify and which resulted in a large portion being disallowed.

[14] Thus, it would appear, and I conclude and find that the accused casually went about the business of reporting his income and expenses. Further, he gave no regard to the correct way of reporting his income and expenses and, as he sought no professional advise on these pertinent issues, he appeared to have interpreted the tax laws to his benefit. Moreover, I find that he, as a reasonable, intelligent, professional person, fully aware of all the facts and information available to him, and in his position, knew or ought to have known that he could have obtained his income particulars from the MSI and from his bank statements.

[15] Moreover, I find that he knew or must have known that he did not pay his spouse the amounts that he indicated that he did and as a result did not incur those expenses. For example, presuming that he could simply deduct the full amount of the spousal credit while at the same time claiming a salary expense that had the effect of diminishing further his tax liability, I find was reckless to the point of being fraudulent. Additionally, I find that there were no mistakes as to the facts that would have been supportable, no honest belief was asserted and, he gave no plausible explanations for the misleading statements.

[16] I therefore think that the accused quandary is due to the manner in how he handled his reporting responsibilities for the subject years. In any event, I find that notwithstanding any sentiments to the contrary, he knew that he was making false statements that with a minimum amount of inquiry could have been rectified. The reasonable inference is that he anticipated and knew that the Canada Revenue Agency would rely upon those statements to assess is tax liability. The Canada Revenue Agency did rely upon these deliberately untrue statements as if they were true and thereby lost potential tax revenues. As a result, I conclude and find that the statements he made

on his tax returns for the subject years were false and deceptive.

[17] Even so, the Canada Revenue Agency has determined that he not only made false and deceptive statements in his tax returns for the subject years, which he does not dispute and which I have found, but that he also wilfully evaded the payment of taxes, to which assertion he strongly objects. Therefore, on the facts, did he wilfully evade the payment of taxes?

[18] By allowing some expenses to be deducted I find that the Canada Revenue Agency is acknowledging that the accused was required to pay his own expenses. The issue really was the reasonableness of the expenses which the accused is entitled to contest before another forum. He has testified that he actually incurred expenses that he believed to be reasonable and proper and which were for the purpose of him earning an income. These expenses that could affect his tax liability, I understand, are the basis of objections that he has filed and has yet to be determined. It may yet be determined in his favour.

[19] Therefore, I do not think that the Crown, has laid the proper foundation

for me to conclude beyond a reasonable doubt that the taxes are indeed payable and that, criminally, he wilfully avoid payment by showing factors from which I could draw a reasonable inference that there existed, in fact, elements of an artifice, craft or strategy. I find support for this view in the words of Bergeron J., in ***R v. Redpath Industries Ltd., et al*** (1984) 84 D.T.C. 6349 (Q.S.C.), at 6351:

> A criminal court is not the forum to determine income taxability and to make determinations as to rights to tax assessment or absence of rights of assessment involved. In a tax evasion charge, it must appear prima facie from the evidence that the taxability is clear-cut, obvious, indisputable, unquestionable from lack of reporting, before entering the examination of the other facts of the charge, e.g. whether the undisputable taxability, based on income gained proven and undeclared, leads to a conclusion beyond a reasonable doubt that it was wilfully omitted by a taxpayer in his tax returns.
>
> If such basis is not present and there exists an obligation to enter into the examination of the merit of a possible assessment in respect of a declared income in order to weigh whether a taxpayer is susceptible to taxation or not, may or may not take advantage of claimed exemptions a criminal court usurps its function and appropriates itself of a jurisdiction which it does not possess.

[20] However, in considering the accused manner of operating, particularly his failure to have supporting vouchers for his expenses and inadequate bookkeeping concerning his income, I find him to be negligent but not grossly negligent. Even so, I find him to be genuinely at a loss concerning how to report properly his income and expenses and that he arranged his affairs in

a manner so as to attract the least tax liability by what he thought to be lawful means.

[21] Furthermore, even though, as he argued, that this was a case that could have been dealt with by way of reassessment rather than the laying of criminal charges which is undoubtably correct, there is the questionable method of calculation of income and expenses that over the subject period made it understandable why the Canada Revenue Agency would have decided to proceed in the manner as they have. However, this is a case, where in my analysis of the evidence, and on hearing the accused, I have some doubts that malicious intent, or deliberate planning, was present in his overall behaviour. See: ***R.v. Hefler***, [1980] N.S.J. No. 111. (Co.Ct.), ***R.v. Baker*** (1973), 16 C.C.C. (2d) 126 at 131 (N.S. Co.Ct.), ***R.v. Coffen***, [1993] O.J. N). 4157 (O.C.J. (Prov.Div.)).

Conclusion

[22] Consequently, I am not satisfied that the Crown has proved beyond a

reasonable doubt that the accused wilfully evaded the payment of taxes as alleged. In the result, I find him guilty of the four counts of filing false and deceptive statements as alleged but not guilty of wilfully evading the payment of taxes as alleged.

J.