

Dividend Refunds for Private Corporations

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1057513 Ontario Inc v The Queen, [2014 TCC 272](#)

This case dealt with a private corporation's ability to obtain a dividend refund under Part IV of the *Income Tax Act*, subsection 129(1), and the conditions of getting the refund in order to integrate the taxation as between corporation and shareholder.

The ITA states that a dividend refund is to be made by the Minister to the Corporation where the corporation's income tax return is made within 3 years of the dividend payment. The Minister argues that the failure to file such a return within the time period is fatal, while the taxpayer disputes the Minister's refusal to refund the Part IV tax.

The Court held that the requirement to file a tax return within 3 years of the payment of the dividend is mandatory.

FACTS

The facts were not in dispute. The corporations declared and paid dividends from 1997-2004. However, because of a mistake of law by the directors, the corporation did not file any tax returns until 2008 (beyond the 3 year period described in 129(1)). When the returns were filed, the Minister assessed Part IV tax, interest, and penalties, while denying the dividend refund.

ANALYSIS

The Court looked at the text of subsection 129(1), and the decision of the TCC in *Tawa Developments Inc v R*, [2011 TCC 440](#), where it was stated:

[51] A textual analysis leads to the following conclusions. Because subsection 129(1) contains an unambiguous condition that a tax return be filed within a prescribed time, where that condition is not met subsection 129(1) does not come into play and the dividend refund cannot be determined. The condition contained in the preamble to subsection 129(1) is no different than the remaining conditions contained in that subsection, such as the condition that the corporation be a private corporation and that it has paid a dividend in the taxation year. If those conditions are not met, subsection 129(1) does not come into play either and the "dividend refund" is likewise indeterminable. The ordinary definitions of the word "refund" imply a repayment.

The Court also referred to the informal decision in *Ottawa Ritz Hotel Co. v Canada*, [2012 TCC 166](#), and the decision in *Ottawa Air Cargo Centre Ltd v R.*, [2007 TCC 193](#) at paragraphs 36, 37 and 38 (subsequently affirmed by the Federal Court of Appeal at [2008 FCA 54](#)), that held that missing the 3 year time limit rendered the refund provisions inoperative. The court concluded that there are no patent textual ambiguities present in "this ostensibly clear and unambiguous provision" (para14). The condition precedent of filing a return within the time period is made even more clear by considering the French version of the provision (para 16). The Court stated at paragraph 17:

[17] Patently, there is "no slippage betwixt hand and mouth." Parliament requires various entities to do various things in certain time-frames. The corporation must file its returns, exclusively within its power, control and knowledge whereupon the Minister makes the dividend refund. Textually, it is strikingly lucid and abundantly clear. On a pure textual basis, to suggest otherwise ignores the plain and obvious meaning of the words and requires, the very thing proposed by the Appellant, a virtual re-writing of the provision by the deletion of the time deadline: *Ludmer v. MNR* [\[2002\] 1 CTC 95 \(SCC\)](#) at paragraph 109.

The entire regime, in light of the context and purpose of integration, requires acknowledging the taxpayer's obligation to file tax returns, provides closure for the Minister after a reasonable amount of time, includes generous grace periods, and is in line with a voluntary filing and assessment system (para 22). The court noted that "from a policy perspective, upholding the filing deadline provides a generous, administrable and clear ability to claim a dividend refund for those taxpayers utilizing private holding companies and who should otherwise be cognizant of the additional requirements, complexities and formalities of those business structures when utilizing such entities: *R. v Neudorf*, 75 DTC 5213 (FCTD at paragraph 10)."

Next, the court asked whether the deadline was mandatory or declaratory:

[25] ... Legally, where a statute declares that something ought to be done, without signalling the result upon default or omission, the Court must determine whether the provision is mandatory or merely directory: *BC (Attorney General) v Canada (Attorney General)*, [\[1994\] 2 SCR 41](#) at paragraph 41.

The court noted that the consequence of not filing a return within the time period is not receiving a refund. The court noted that this was NOT:

- the case where the Minister has failed to do a certain act and thus has purportedly lost jurisdiction or authority: *Wang v Commissioner of Inland Revenue*, [1995] 1 All E.R. 367;
- the case of a government employee failing to undertake a technical filing: *Lewis v Brady*, 17 OR 377 (HCJ) and *Trenton (Town) v Dyer*, 1895 24 SCR 474;
- of an ancillary procedural step or technical form: *Moriyama v R.*, [TCC 311 \(TCC\)](#) affirmed in part at [2005 FCA 207](#).

The Court concluded that "The deadline is not only mandatory, but it embodies and emblazons a paramount requirement and purpose under the *Act*: the requirement of a taxpayer, who best knows the subject matter of its affairs to file its return of income" (para 28).

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