Federal Court of Appeal | Cour d'appel fédérale

Date: 20220929

Docket: A-68-20

Citation: 2022 FCA 163

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

HAROLD PEACH

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at St. John's, Newfoundland and Labrador, on September 20, 2022.
Judgment delivered at Ottawa, Ontario, on September 29, 2022.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada (2020 TCC 12, *per* Monaghan J.). In that decision, the Tax Court allowed, in part, the appellant's appeal from the Minister of National Revenue's reassessment of his income from the 2011 taxation year. The Tax Court reduced the appellant's capital gain to reflect a capital expense that the Minister had not accounted for, but otherwise dismissed all arguments presented by the appellant.

[2] The background to this appeal is fully set out in the judgment of the Tax Court. It is sufficient for the purposes of this appeal to note that the appellant owned several rental properties that he rented to his sons. He claimed significant losses on his tax return associated with these properties. The appellant transferred one of these rental properties to his son and did not report this disposition or any corresponding capital gain/loss on his 2011 tax return. The appellant also operated a business selling life insurance and mutual funds to a client base largely consisting of friends and family. The appellant earned $27 in revenue and deducted over $19,600 in business expenses in the 2011 taxation year.

[3] The Minister reassessed the appellant's 2011 income beyond the normal three-year reassessment period. The Minister removed all rental revenue and associated losses from his income, reduced the amount of business expenses claimed and added a capital gain on the transfer of the rental property to his son.

[4] The Tax Court judge found that the Minister was entitled to reassess the appellant beyond the normal reassessment period under subparagraph 152(4)(*a*)(i) of the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.) (the Act). The judge was satisfied that the appellant had made misrepresentations in his 2011 tax return attributable to carelessness or neglect.

[5] The judge also found that the appellant was not pursuing a profit in renting his rental properties to his sons in 2011, as he had been charging rent at rates below market value. Next, the judge held that the appellant's business expenses, beyond those allowed by the Minister, were unreasonable. Finally, the judge determined that the appellant had disposed of the rental

property upon transferring it to his son, with whom he did not deal at arm's length, and thereby realized a capital gain.

[6] In his oral submissions before this Court, the appellant stressed two points.

[7] First, the appellant submits that the respondent was not permitted to reassess any part of his income beyond the normal three-year reassessment period prescribed under paragraph 152(3.1)(*b*) of the Act. The appellant says that the Minister had sufficient time to review all necessary documentation and complete any reassessment within the three-year period and that CRA officials gave no valid reasons justifying the delay.

[8] Second, the appellant contends that the Tax Court breached its duty of procedural fairness. He says that the judge interfered with his right to make his case. Specifically, the appellant says the judge interrupted his cross-examination, directed him as to how he should proceed, and questioned him about his evidence.

[9] This Court must review the Tax Court's findings of fact and mixed fact and law on the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). With respect to the appellant's procedural fairness argument, this Court must "ask whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 54). The Court will assess allegations of an appearance of bias against the well-accepted test set out by

de Grandpré J. in dissent in *Committee for Justice and Liberty et al. v. National Energy Board et al.,* 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at 394.

[10] We see no reviewable error in the decision of the Tax Court judge or in the manner in which the judge conducted the trial.

[11] First, the Tax Court did not err in finding that the Minister was entitled to reassess the appellant beyond the normal reassessment period. To reassess a taxpayer after the normal three-year reassessment period under subparagraph 152(4)(*a*)(i) of the Act, the Minister must establish that the taxpayer made a "misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act." The Tax Court correctly identified the governing legal test and noted that the onus was on the Minister to prove that the appellant's conduct satisfied the statutory requirement (Reasons at paras. 71-73).

[12] The Tax Court found that the appellant had neither exercised reasonable care nor acted as a "wise and prudent person" in completing his 2011 tax returns (Reasons at paras. 82-84). This conclusion was readily open to the judge on the evidence.

[13] Nevertheless, the appellant submits that the Minister was not entitled to reassess him beyond the normal assessment period because the Minister had the necessary documentation and sufficient time to complete its audit before this period elapsed. There is no merit in this argument. The language in subparagraph 152(4)(*a*)(i) is clear that the Minister may reassess a

taxpayer after the normal reassessment period in the present circumstances. Whether the Minister had legitimate reasons for not reassessing within the three-year period is irrelevant in the face of a finding of a misrepresentation that is attributable to neglect or carelessness under subparagraph 152(4)(*a*)(i) of the Act.

[14] Second, the appellant argues that the Tax Court interfered with his right to present his evidence at the hearing. He also takes issue with what appears to be the judge's clarifying questions and indications of where she was not convinced of the appellant's legal position or evidence.

[15] Subsection 18.15(3) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 requires Tax Court judges to deal with appeals under the informal procedure "as informally and expeditiously as the circumstances and considerations of fairness permit."

[16] There is no rule prohibiting the intervention of a judge in a trial. There is, however, a prohibition against excessive or untimely interventions.

[17] A judge may ask questions for clarification and amplification; indeed, judges are obligated to ensure that they have the evidence necessary to decide the case before them, that it is reliable and that they fully understand it. That said, in pursuit of such evidence, judges' questioning should not give rise to an impression that they have a closed mind or were no longer impartial (*NCJ Educational Services Limited v. Canada (National Revenue)*, 2009 FCA 131, [2009] 4 C.T.C. 290 at paras. 39-42, 45). Excessive intervention may also interfere with the

effective and fair presentation of the case, and untimely intervention may effectively destroy a cross-examination (*Yuill v. Yuill*, [1945] 1 All E.R. 183, 172 L.T. 114 at 185).

[18] Nothing approaching these restraints on a judge during a trial occurred here. The transcript of the hearing before the Tax Court demonstrates that the judge intervened only to ensure that she fully understood the appellant's evidence and argument, and to direct the appellant towards the applicable legal considerations. The interventions were also necessary to ensure that the proceeding respected basic trial procedures, such as when the judge cautioned the appellant against giving evidence in the course of his cross-examination of the CRA witness. Further, the judge afforded the appellant an opportunity to cross-examine the respondent's witness, to fully testify, and went so far as to allow the appellant to give evidence in reply following his cross-examination by the respondent. In sum, the appellant's case reveals a proceeding that was both fair and accommodating. There is no merit in this ground of appeal.

[19] In his written submissions, the appellant also raised the following two issues.

[20] First, the appellant contended that the Tax Court incorrectly concluded that his rental properties were not a source of income, based on its misapplication of *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645 (*Stewart*) and its error in preferring the CRA's reports assessing the fair market rental rates to his own. Second, the appellant argued that the Tax Court erred in denying him deductible business expenses on the basis of his business judgment, citing *Keeping v. Canada*, 2001 FCA 182, [2001] 3 C.T.C. 120 (*Keeping*).

[21] The Tax Court made no reviewable error in concluding that the appellant's rental properties were not a source of income, and that the appellant could not therefore deduct any losses associated with these properties from his income. The Tax Court considered the test from *Stewart* to determine whether the properties were a source of income (Reasons at para. 14). The judge concluded that the appellant's rental activity involved a personal element and was not pursuing a profit. This conclusion was amply supported by the evidence, which established that all three of the appellant's tenants had been his sons, and that the appellant had set the properties' rental rates below market value.

[22] Further, the Tax Court made no error in concluding that the appellant's business expenses were unreasonable. The Tax Court carefully assessed the reasonableness of the business expenditures against the standard of how a commercially-minded business person would behave if they were in the appellant's circumstances. The judge found that the appellant's business had been operating for over ten years without making a profit, and had incurred business expenses that far exceeded that year's revenues without gaining any new clients or business opportunities. These findings support the Tax Court's determination that a commercially-minded business person would not have incurred such expenses in the appellant's circumstances.

[23] The appellant relied on *Keeping* to argue that the Tax Court erred in holding that his business expenses were not deductible based on his poor business judgment. This case does not assist the appellant. *Keeping* establishes that the Tax Court's role is not to evaluate a taxpayer's business acumen, a principle the Tax Court respected (Reasons at para. 49). The Tax Court

evaluated what a reasonable business person would have done in the appellant's position, without relying on hindsight or second-guessing the appellant's choices.

[24] The appeal is therefore dismissed with costs, which I would fix at $2,895.26.

"Donald J. Rennie"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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