Federal Court of Appeal | Cour d'appel fédérale

Date: 20141217

Dockets: A-340-13
A-120-14

Citation: 2014 FCA 301

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

IAN E. BROWN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on September 10, 2014.

Judgment delivered at Ottawa, Ontario, on December 17, 2014.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Ian Brown filed a notice of appeal (A-120-14) in relation to the order of Campbell J. dated January 27, 2014 (Docket: 2013-3386 (IT) I) striking Mr. Brown's Notice of Appeal dated September 10, 2013, Amended Notice of Appeal dated January 15, 2014 and Fresh Notice of Appeal dated January 20, 2014, which he had filed under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). Mr. Brown was attempting to appeal a reassessment of his 2010 taxation year. Mr. Brown also filed a notice of appeal (A-340-13) from the order of Boyle J. dated

September 25, 2013 (Docket: 2012-3456 (IT) G) striking his amended notice of appeal and dismissing his appeal in relation to the assessments for the 2006, 2007, 2008 and 2009 taxation years.

[2] Although these appeals were not consolidated, Mr. Brown raised the same issue in both appeals in relation to the assessment of penalties under subsection 163(2) of the Act (gross negligence penalties). In the appeal filed as A-340-13, Mr. Brown also raised an argument related to the constitutional validity of the Act. At the hearing Mr. Brown addressed the arguments for both appeals at the same time. As a result, these reasons will apply to both appeals and a copy of these reasons will be placed in each file.

Background

[3] In filing his income tax return for 2009, Mr. Brown claimed a loss from a business of $181,167. He also submitted the form to request that $140,939 of this loss from a business from 2009 be carried back to previous taxation years as a non-capital loss as follows: $41,985 to 2008, $64,666 to 2007 and $34,288 to 2006. In filing his income tax return for 2010, he claimed a loss from a business of $63,554.

[4] The Minister of National Revenue denied the losses from a business that he claimed in 2009 and 2010. Since the loss from a business for 2009 was denied, he was also denied the non-capital loss that he was attempting to carry back from 2009 to 2008, 2007 and 2006. Gross negligence penalties were also assessed in relation to the losses from a business that he had claimed in each of 2009 and 2010.

[5] Mr. Brown filed a notice of appeal under the General Procedure with the Tax Court of Canada in relation to his 2006, 2007, 2008 and 2009 taxation years, and a notice of appeal under the Informal Procedure with that Court in relation to his 2010 taxation year. In his notices of appeal he included statements indicating that he was appealing the assessment of the gross negligence penalties. The Crown brought motions to strike each notice of appeal on the basis that Mr. Brown did not disclose any material facts. Both notices of appeal were struck by the Tax Court.

Issues

[6] In the appeal to this Court Mr. Brown raises two issues:

(a) Whether, as a constitutional matter, the Act is null and void "due to vague and convoluted interpretations in the [Act]"; and,

(b) Whether his appeal to the Tax Court of Canada should be allowed to continue only in relation to the assessment of gross negligence penalties in 2009 and 2010.

Vagueness

[7] Mr. Brown's argument that the Act is void is based mainly on the definitions of "business", "employee", "employment", "person" and "taxpayer" in subsection 248(1) of the Act. These terms are defined in subsection 248(1) of the Act as follows:

"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an	« entreprise » Sont compris parmi les entreprises les professions, métiers, commerces, industries ou activités de quelque genre que ce soit et, sauf pour l'application de l'alinéa 18(2)c), de l'article 54.2, du paragraphe 95(1) et

adventure or concern in the nature of trade but does not include an office or employment;	de l'alinéa 110.6(14)f), les projets comportant un risque ou les affaires de caractère commercial, à l'exclusion toutefois d'une charge ou d'un emploi.
"employee" includes officer;	« employé » Sont compris parmi les employés les cadres ou fonctionnaires.
"employment" means the position of an individual in the service of some other person (including Her Majesty or a foreign state or sovereign) and "servant" or "employee" means a person holding such a position;	« emploi » Poste qu'occupe un particulier, au service d'une autre personne (y compris Sa Majesté ou un État ou souverain étrangers); « préposé » ou « employé » s'entend de la personne occupant un tel poste.
"person", or any word or expression descriptive of a person, includes any corporation, and any entity exempt, because of subsection 149(1), from tax under Part I on all or part of the entity's taxable income and the heirs, executors, liquidators of a succession, administrators or other legal representatives of such a person, according to the law of that part of Canada to which the context extends;	« personne » Sont comprises parmi les personnes tant les sociétés que les entités exonérées de l'impôt prévu à la partie I sur tout ou partie de leur revenu imposable par l'effet du paragraphe 149(1), ainsi que les héritiers, liquidateurs de succession, exécuteurs testamentaires, administrateurs ou autres représentants légaux d'une personne, selon la loi de la partie du Canada visée par le contexte. La notion est visée dans des formulations générales, impersonnelles ou comportant des pronoms ou adjectifs indéfinis.
"taxpayer" includes any person whether or not liable to pay tax;	« contribuables » Sont comprises parmi les contribuables toutes les personnes, même si elles ne sont pas tenues de payer l'impôt.

[8] His argument is that the definitions provided for "business", "employee", "person" and "taxpayer" are not complete definitions because the Act only provides specific references to what is included in these terms. As a result, he submits that these expressions are vague.

[9] However, this is simply the choice of Parliament in determining what guidance will be provided in the interpretation of these terms by ensuring that these terms will include what is specifically referenced. Even if no guidance would have been provided by Parliament, each of these terms would have a meaning that could be determined by a court for the purposes of the Act. By providing that these terms "include" what is specifically identified in these definitions, it does not make these provisions void, nor does it make the entire Act void.

[10] Lord Denning in *Fawcett Properties Ltd. v. Buckingham County Council,* [1961] A.C. 636 at 676 stated that:

> My Lords, it is a bold suggestion to make that these words, taken as they are from a statute, are void for uncertainty. Mr. Megarry was unable to point to any case where a statute has ever been held void for uncertainty. There are a few cases where a statute has been held void because it is meaningless but none because it is uncertain ... But when a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the courts have to say what meaning the statute is to bear, rather than reject it as a nullity. As Farwell J. put it when speaking of a statute: 'Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning, and not declare them void for uncertainty.'

[11] In *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67, Gonthier J. set out the following proposition:

> **71** The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

[12] The provisions of the Act to which Mr. Brown refers do not satisfy this proposition. Whether the defined terms will include, in addition to what is specifically identified, something

or someone else is a matter that can be resolved by a Court based on the ordinary meaning of these terms.

[13] For example, in this case, Mr. Brown raised the question of whether he was a person for the purposes of the Act since the definition of person only provides that it includes corporations, certain entities "and the heirs, executors, liquidators of a succession, administrators or other legal representatives of such a person". Human beings or individuals are not specifically included in the list.

[14] However, in *Canada (Minister of National Revenue) v. Stanchfield*, [2009] F.C.J. No. 133, 2009 FC 99, Gauthier J. (as she then was) stated:

> **23** When one uses simply the term "person", one necessarily includes the notion of the human being, as it is the very essence of the reality represented by this term. This explains why, in the Act, subsection 248(1) does not specifically mention the term "human being" in its definition of the term "person". This is not necessary given that, as explained by professors Duff, Alarie, Brooks and Philipps in *Canadian Income Tax Law*[4], "this definition merely expands on the ordinary meaning of the word "person"" (emphasis added). This is entirely consistent with the approach of the British Columbia Court of Appeal in *Lindsay* (see above at para. 10). There is thus absolutely no doubt that a natural person is directly included within the definition of the word "person" at subsection 248(1) of the Act.

[15] Mr. Brown is a person and a taxpayer for the purposes of the Act.

Standard of Review – Motion to Strike Pleadings

[16] The second issue raised by Mr. Brown is whether the provisions of his notices of appeal related to the assessment of gross negligence penalties should have been struck. In *Canadian*

Imperial Bank of Commerce v. The Queen, 2013 FCA 122, [2013] 4 C.T.C. 218, this Court noted that:

> **5** The decision of a judge to grant or refuse a motion to strike is discretionary. This Court will defer to such a decision on appeal in the absence of an error of law, a misapprehension of the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice: *Apotex Inc. v. Canada (Governor in Council), 2007 FCA 374*, *Collins v. Canada*, 2011 FCA 140.

Test For Striking Pleadings

[17] Iacobucci, J., writing on behalf of the Supreme Court of Canada in *Odhavji v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, set out the test for striking pleadings:

> **15** An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:
>
> > ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ...
>
> The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

Pleadings in Relation to Gross Negligence Penalties

[18] Mr. Brown confirmed during the hearing of his appeal before this Court that the only matter that he wants to pursue before the Tax Court of Canada is the assessment of the gross negligence penalties for 2009 and 2010. He is not pursuing his appeal in relation to the denial of the losses from a business in 2009 or 2010 or the denial of the carry back of a non-capital loss to 2008, 2007 or 2006.

[19] Subsection 163(3) of the Act provides that:

(3) Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.	(3) Dans tout appel interjeté, en vertu de la présente loi, au sujet d'une pénalité imposée par le ministre en vertu du présent article ou de l'article 163.2, le ministre a la charge d'établir les faits qui justifient l'imposition de la pénalité.

[20] Therefore the Minister, and not Mr. Brown, would have the burden of establishing the facts justifying the assessment of the gross negligence penalties imposed for 2009 and 2010. Since the only documents filed in these matters at the Tax Court of Canada were the notices of appeal (and amended notices of appeal) filed by Mr. Brown, it is not plain and obvious that the Minister will be successful in establishing the facts justifying the assessment of the gross negligence penalties. Since this is the Minister's burden, there are no material facts that Mr. Brown would need to allege (and then have the onus to prove) in his notices of appeal.

[21] The Tax Court erred in law in striking those parts of Mr. Brown's notices of appeal that address the issue of whether gross negligence penalties should have been assessed. Striking these parts of the notices of appeal means that he is denied a hearing in the Tax Court of Canada on a matter for which the onus of proof rests with the Minister.

Conclusion

[22] As a result, I would allow Mr. Brown's appeal in relation to striking the parts of his notices of appeal that address the assessment of gross negligence penalties for 2009 and 2010. The parts of his notices of appeal for 2009 and 2010 that relate to the loss from a business that he had claimed in these years would be struck and the parts of his notices of appeal for 2009 and 2010 that relate to the assessment of these penalties would not be struck. The provisions of his notice of appeal that relates to his appeal of the assessment of his 2006, 2007 and 2008 taxation years would be struck, as no penalties were assessed in relation to those years. Therefore, making the order that the Tax Court should have made, I would revise Mr. Brown's notices of appeal as follows:

> *Tax Court File Number 2012-3456(IT)G (Appeal A-340-13) - Mr. Brown's Amended Notice of Appeal dated November 26, 2012 (Appeal Book pages 35 to 38):*
>
> Paragraphs (a) and (b) contain personal information. These paragraphs, as written by Mr. Brown, would not be struck from this notice of appeal except that the reference to taxation years 2006, 2007, 2008 and 2009 would be changed to a reference to only the taxation year 2009.
>
> Paragraphs 1) to 4) (inclusive) and paragraph 9) relate to either Mr. Brown's right to appeal to the Tax Court of Canada or the assessment of the gross negligence penalty and would not be struck from this notice of appeal.

Paragraphs 30) and 31) indicate that the issue is "[w]hat constitutes a false statement" and "[w]hether the penalty imposed by the minister is supported by any facts" and would not be struck from this notice of appeal.

Paragraphs 33, 34, 35, 37 and 39 relate to either Mr. Brown's right to appeal to the Tax Court of Canada or the assessment of the gross negligence penalty and would not be struck from this notice of appeal.

The parts of the paragraph outlining the relief sought (identified as (g)) related to vacating the assessment, "vary[ing] the account to reflect the return which was originally filed" and granting other relief would be struck. As a result this paragraph would be as follows:

> The appellant is requesting that the court remove all penalties imposed on this account and all accrued interest on those penalties.

All of the other paragraphs of this notice of appeal would be struck.

Tax Court File Number 2013-3386(IT)I (Appeal A-120-14) - Mr. Brown's Fresh Notice of Appeal dated January 20, 2012 (Appeal Book pages 82 and 83):

This notice of appeal, in relation to his 2010 taxation year, would be as submitted by Mr. Brown except that the reference in paragraph 4 to his request that the court vacate the assessment would be struck and therefore this paragraph would be as follows:

> 4. The Appellant is requesting that the court remove all penalties imposed on this account and all accrued interest on those penalties and the costs of this appeal.

[23] I would set aside the awards of costs that were made by each Tax Court Judge and I would award Mr. Brown costs here and below.

"Wyman W. Webb"

J.A.

“I agree

J.D. Denis Pelletier J.A.”

“I agree

David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	PELLETIER J.A. STRATAS J.A.
DATED:	DECEMBER 17, 2014

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