Federal Court of Appeal | Cour d'appel fédérale

Date: 20160513

Docket: A-245-15

Citation: 2016 FCA 150

CORAM: **BOIVIN J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

OSBORNE G. BARNWELL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 4, 2016.

Judgment delivered at Ottawa, Ontario, on May 13, 2016.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160513

Docket: A-245-15

Citation: 2016 FCA 150

CORAM: **BOIVIN J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

OSBORNE G. BARNWELL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This is an appeal of a judgment rendered by a Judge of the Tax Court of Canada (the Judge) on April 21, 2015 (2015 TCC 98). The Judge dismissed Mr. Osborne G. Barnwell's (the appellant) appeal of a decision of the Minister of National Revenue (the Minister) that disallowed his claim for a $39,150 allowable business investment loss (ABIL) deduction

pursuant to subparagraph 39(1)(*c*)(iv) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the Act).

I. Factual Background

[2] The facts underlying this appeal are straightforward and undisputed.

[3] In the early 2000s, Mr. Nicholas Austin, a long-standing acquaintance of the appellant, decided to create and publish a travel magazine targeted at passengers on commercial airlines.

[4] In 2004, Mr. Austin incorporated Whitesand Group of Companies Inc. (Whitesand) as part of his publication venture. In need of funding, Mr. Austin approached the appellant to fund the travel magazine. The appellant agreed to extend funds in the form of loans to Mr. Austin but no formal agreement was ever concluded in this regard. Whitesand published three issues of its *Whitesand magazine* (Winter 2007, Spring 2008 and Winter 2009) but ceased operations shortly thereafter, in 2009.

[5] Subparagraph 39(1)(*c*)(iv) of the Act allows a taxpayer to deduct one half of the taxpayer's ABIL for the year from the taxpayer's income on the basis that a debt is owed to the taxpayer by a Canadian-controlled private corporation (CCPC):

Meaning of capital gain and capital loss	**Sens de gain en capital et de perte en capital**
39 (1) For the purposes of this Act,	**39 (1)** Pour l'application de la présente loi :
…	[…]
(*c*) a taxpayer's business	***c*)** une perte au titre d'un

investment loss for a taxation year from the disposition of any property is the amount, if any, by which the taxpayer's capital loss for the year from a disposition after 1977	placement d'entreprise subie par un contribuable, pour une année d'imposition, résultant de la disposition d'un bien quelconque s'entend de l'excédent éventuel de la perte en capital que le contribuable a subie pour l'année résultant d'une disposition, après 1977:
…	[…]
of any property that is	d'un bien qui est :
…	[…]
(iv) a debt owing to the taxpayer by a Canadian-controlled private corporation (other than, where the taxpayer is a corporation, a debt owing to it by a corporation with which it does not deal at arm's length) that is	**(iv)** soit une créance du contribuable sur une société privée sous contrôle canadien (sauf une créance, si le contribuable est une société, sur une société avec laquelle il a un lien de dépendance) qui est :
(A) a small business corporation,	**(A)** une société exploitant une petite entreprise,
…	[…]

[6] In 2011, the appellant claimed an ABIL of $39,150 in his income tax return. The Minister disallowed the claim. The appellant appealed the notice of assessment to the Tax Court of Canada and the Judge dismissed the appeal on the basis that Mr. Austin was the debtor of the loans, not the CCPC Whitesand.

[7] This is an appeal of the Judge's judgment.

II. Issue

[8] The sole issue raised in this appeal is the following: Did the Judge err in dismissing the appeal on the grounds that the loans at issue were made to Mr. Austin personally and not to Whitesand?

III. Standard of Review

[9] The parties agree that the standard of review framework in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 applies to this appeal. For extricable questions of law, the standard is correctness (para. 8). For questions of fact, it must be established that the judge made a "palpable and overriding error" (para. 10). For mixed questions of law and fact, the stricter standard applicable to pure questions of facts also applies (para. 29).

IV. Analysis

[10] Although the appellant accepts the Judge's findings of fact and acknowledges that the documentary evidence is to the effect that the loans at issue were made to Mr. Austin as opposed to Whitesand, he essentially argues that the *viva voce* – oral – evidence was ignored by the Judge. It is the appellant's position that, had the Judge properly considered the oral evidence, he could only have reasonably concluded that the loans were made to Whitesand and not to Mr. Austin.

[11] I disagree. The Judge carefully set forth the factual findings in his decision and the appellant accepts these facts as being "set accurately" (Judge's reasons at paras. 4-33 and appellant's memorandum of fact and law at para. 4). It is also clear from a reading of the Judge's reasons that he considered both the documentary evidence and the oral evidence before him. In particular, the Judge considered the following :

- all of the cheques were made out to Mr. Austin personally and none were made payable to Whitesand (paras. 16 and 50);
- Mr. Austin stated in his testimony that the promissory notes all provided that he promised to repay the loans (para. 29);
- the appellant's General Bank Journal described the amounts as loans to Mr. Austin (para. 18);
- Mr. Austin stated in his testimony from cross-examination that a majority of the cheques were deposited into his personal account (para. 32); and,
- Mr. Austin stated in his testimony that he understood the loans to be debts owed by him personally (para. 58).

[12] Upon weighing the evidence on record, the Judge concluded that Mr. Austin was the debtor of the loans – not Whitesand – and that there was no agency agreement or any testimony to suggest that Mr. Austin was acting as an agent for Whitesand when he was receiving monies from the appellant. Before us, the appellant is essentially asking this Court to reconsider and reweigh the evidence in order to reach a different conclusion. This is not the role of this Court and the appellant has otherwise failed to point to any error in the Judge's decision that would warrant the intervention of this Court.

[13] Next, the appellant argues that subsection 18.15(3) of the Act entitled him to have his evidence considered on a less onerous and technical standard in accordance with the objective of

the informal procedure. This argument fails as well. This provision of the Act has been interpreted by our Court to mean that the rules for the admission of evidence do not apply technically in the context of the informal procedure. As such, while subsection 18.15(3) of the Act is relevant to the admissibility of evidence in the informal procedure, it does not entitle the appellant to a more favourable weighting of certain portions of his evidence – i.e. the oral evidence in this case (*Suchon v. Canada*, 2002 FCA 282, 291 N.R. 250; *Selmeci v. Canada*, 2002 FCA 293, 292 N.R. 182 at paras. 4-10).

[14] The appellant further emphasized at the hearing that the Judge ignored the "commercial reality" of his "arrangement" with Mr. Austin and that the "mindset, all along, was that the monies were going to the *Whitesand magazine*". In other words, although the appellant did not provide the funds directly to Whitesand, they were provided to Mr. Austin for the benefit of Whitesand. On this basis, the appellant submits that the debt was owed to him by Whitesand and not by Mr. Austin. Again, this argument is without merit. The clear language of subparagraph 39(1)(*c*)(iv) of the Act requires that the debt be "owing to the taxpayer by a Canadian-controlled private corporation [CCPC]". Since Mr. Austin testified that the debts were owed by him personally (Judge's reasons at paras. 28, 52 and 58), there is evidence in the record to support the judge's conclusion that Mr. Austin, and not the CCPC, owed the appellant the debt.

[15] Finally, the appellant argues that the Judge erred when he relied on *Friedberg v. Canada (F.C.A.)*, 135 N.R. 61, [1991] F.C.J. No. 1255 (QL) for the proposition that in tax law subjective intent cannot displace the characterization of a transaction for tax purposes (Judge's reasons at paras. 53-56). The appellant insists that the circumstances of the present case are distinguishable

as "the cheques and the promissory notes were subjected to the orally expressed intention of the parties" (appellant's memorandum of fact and law at para 22). In so doing, the appellant is merely again asking this Court to prefer his after-the-fact explanation of the evidence. However, I am of the view that the Judge's conclusion was open to him on the basis of the facts established by the record.

[16] For these reasons, the appellant has failed to establish any overriding and palpable error on the part of the Judge. I would accordingly dismiss the appeal. However, given the circumstances of this case, I would decline to award costs.

"Richard Boivin"

J.A.

"I agree
Donald J. Rennie J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-245-15

(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE JOHN R. OWEN OF THE TAX COURT OF CANADA DATED APRIL 21, 2015, DOCKET NUMBER 2013-3552-IT(I).)

STYLE OF CAUSE:	OSBORNE G. BARNWELL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 4, 2016
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	RENNIE J.A. GLEASON J.A.
DATED:	MAY 13, 2016

APPEARANCES:

Osborne G. Barnwell	FOR THE APPELLANT (SELF-REPRESENTED)
Rita Araujo Michael Ezri	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT