Federal Court of Appeal | Cour d'appel fédérale

Date: 20161129

Dockets: A-491-15
A-492-15

Citation: 2016 FCA 304

CORAM: **NOËL C.J.**
TRUDEL J.A.
BOIVIN J.A.

BETWEEN:

BAREJO HOLDINGS ULC

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on November 29, 2016.
Judgment delivered from the Bench at Montréal, Quebec, on November 29, 2016.

REASONS FOR JUDGMENT OF THE COURT BY: NOËL C.J.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on November 29, 2016).

NOËL C.J.

[1] These are consolidated appeals brought by Barejo Holdings ULC (the appellant) from two orders of the Tax Court of Canada (2015 TCC 274) wherein Boyle J. (the Tax Court judge) made a pre-hearing determination of the following question of mixed fact and law, the

application for which had been previously granted by him pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a:

> Whether the two [Notes] held by [St. Lawrence Trading], a non-resident entity, constitute debt for the purposes of the [*Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the Act)]? (the Rule 58 Question)

[2] The Tax Court judge answered the Rule 58 Question in the affirmative.

[3] Four weeks prior to the hearing of the appeal, the Court issued the following direction:

> Direction
>
> The parties are asked to provide written submissions as to why these consolidated appeals should not be dismissed on the basis that disposing of them would resolve nothing and give rise to an improper use of judicial resources.
>
> The underlying issue in the appeal before the Tax Court turns on the meaning of the word "debt" as it appears in section 94.1 of the Act. In response to the broad question submitted to him jointly by the parties, – i.e.: whether the two [Notes] in issue at trial "constitute debt for the purposes of the *Income Tax Act*" – the Tax Court judge identified "the core essential characteristics of debt generally for purposes of the Act" (Reasons, para. 129) and determined that the two [Notes] were debt within that description. This affirmative answer is the subject matter of the appeal before this Court, the appellant challenging it and the respondent supporting it.
>
> Subject to the submissions of the parties on this point, it does not appear as though the answer to the question asked will resolve anything in the context of the underlying appeal which turns on the meaning of the word "debt" in section 94.1 of the Act. A related difficulty is that there would appear to be no statutory criteria against which the correctness of the opinion expressed by the Tax Court judge can be assessed as no legal consequence attaches under the Act to an instrument found to be a debt "for the purpose of the act as a whole" (Reasons, para. 132).
>
> The parties have attempted to overcome this difficulty by asserting that "[i]t is common ground that…there is no special meaning to the word 'debt' in section 94.1" (Memorandum of the appellant, para. 25), thereby suggesting that the general meaning ascribed by the Tax Court judge to the word "debt" coincides with the meaning of that word in subsection 94.1. Again, subject to the parties' submissions, this reading seems problematic as the Tax Court judge has expressly

> provided that his opinion cannot be read as applying to the word "debt" as it appears in section 94.1 or for that matter in any other section of the Act (Reasons, paras. 5 to 13 and 132).
>
> The parties are asked to provide written submissions not exceeding five (5) pages in each case on or before November 15, 2016 and to address the issue orally at the beginning of the hearing, on November [29], 2016.

[4] In conformity with this last paragraph, joint submissions were received on November 15, 2016 and the parties were given the opportunity to address the issue raised in the direction orally at the beginning of the hearing, on November 29, 2016.

[5] In their submissions, the parties attempt to explain as best they can why the Rule 58 Question was framed in the broad terms that it was (Joint Submissions, paras. 10 and 18). However, nothing that they say takes away from the fact that the problem now confronting them would not have arisen had they framed the question by reference to the provisions of the Act that were in issue in the underlying appeals.

[6] As the Tax Court judge indicates at the beginning of his reasons, the meaning of the words "debt obligations" for purposes of subsection 95(1) and "debt" under section 94.1 were initially at issue. However, prior to the Rule 58 hearing, he was advised that the only issue which remained live as between the parties was the meaning of the word "debt" in section 94.1 of the Act (Reasons, para. 4).

[7] The Tax Court judge understood from the broad question which had been jointly submitted to him by the parties that he was to devise a general opinion about the meaning of the word "debt" for purposes of the Act generally. He further understood that he was not to opine on

the meaning of the word “debt” as it appears in the provisions at play in the underlying appeals (Reasons, paras. 5, 7, 11, 13, 132, and footnote 25). That is the context in which he concluded that the two Notes in issue at trial constitute debt “for the purpose of the Act as a whole” (Reasons, para. 132), or “for the purposes of the Income Tax Act” (Reasons, para. 134).

[8] As indicated in the above direction, it does not appear as though the general answer given by the Tax Court judge will resolve anything in the context of the underlying appeal which, as noted, turns on the meaning of the word “debt” as it appears in section 94.1 of the Act.

[9] In responding to the direction, the parties assert that the legal and factual context makes it clear that the Tax Court judge was being asked to determine whether the Notes were “debt” for purposes of 94.1 (Joint Submissions, para. 19). They go on to suggest that the general opinion given by the Tax Court judge identifies the “ordinary meaning” of the word “debt” and that the word “debt” as it is used in section 94.1 is intended to be given its “ordinary meaning” (Joint Submissions, para. 20).

[10] The difficulty is that the Tax Court judge did not understand that he was to give an opinion as to the meaning of the word “debt” in section 94.1 and that, as a result, his answer cannot be read as addressing this question.

[11] The issue in an appeal from an order answering a Rule 58 question is whether the answer can withstand appellate scrutiny. In making this determination, this Court must consider the answer that was given to the question asked as it is the answer that is under appeal. In the present

case, the answer given by the Tax Court judge, whether read on its own or with the reasons given in support of it, leaves no doubt about the fact that he makes no pronouncement on the meaning of the word “debt” in section 94.1. It is therefore not possible to review his opinion as if he had, as the parties invite us to do (Joint Submissions, para. 20).

[12] The parties insist that they did not intend the Tax Court judge to give an academic opinion (Joint Submissions, para. 19). No doubt that is so. However, they do not confront the fact that the broad answer which he gave was responsive to the question asked. In this respect, the reasons make it clear that the Tax Court judge assumed that the question had been drafted as it was for a reason and that some usefulness could be derived from the general answer which it called for (Reasons, para. 2):

> This question was referred to the Court by joint application of the parties. The parties were each of the view that the determination of this question prior to a full hearing and trial could dispose of all or part of their dispute, or result in a substantially shorter hearing or in a substantial savings of costs.

[13] As it turns out however, the parties have been unable to identify what that usefulness might be.

[14] The end result is that nothing in the underlying appeals turns on whether the Tax Court judge was right or wrong in holding that the two Notes in issue were debt for the purposes of the Act as a whole.

[15] It follows that endeavouring to dispose the appeals on the merits would serve no useful purpose and give rise to an improper use of judicial resources.

[16] At the end of his oral submissions, counsel for the appellant asked that we amend the question so as to refer to section 94.1, and provide the appropriate answer.

[17] As indicated in open court, only the Tax Court has the jurisdiction to answer a Rule 58 question at first instance, the jurisdiction of this Court being limited to the appellate review of the answer given by the Tax Court.

[18] For these reasons, these appeals are dismissed, the parties assuming their respective costs.

"Marc Noël"

Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-491-15, A-492-15
(APPEALS FROM TWO ORDERS OF THE TAX COURT OF CANADA RENDERED BY THE HONOURABLE BOYLE J. DATED NOVEMBER 4, 2015, DOCKETS NO. (2014-4290(IT)G & 2014-353(IT)G)	
STYLE OF CAUSE:	BAREJO HOLDINGS ULC v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	NOVEMBER 29, 2016
REASONS FOR JUDGMENT OF THE COURT BY:	NOËL C.J. TRUDEL J.A. BOIVIN J.A.
DELIVERED FROM THE BENCH BY:	NOËL C.J.

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