Federal Court of Appeal  Cour d'appel fédérale

Date: 20161215

Docket: A-488-15

Citation: 2016 FCA 313

CORAM: **NADON J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

MASIH BOROUMAND

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 7, 2016.

Judgment delivered at Ottawa, Ontario, on December 15, 2016.

REASONS FOR JUDGMENT BY: NEAR J.A.

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

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REASONS FOR JUDGMENT

NEAR J.A.

[1] The appellant, Masih Boroumand, appeals from the Order of the Tax Court of Canada, dated October 15, 2015, as amended on November 5, 2015 (2015 TCC 239). In that decision, Associate Chief Justice Lamarre (the Judge) dismissed the appellant's appeals from reassessments made under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) and the *Excise Tax Act*, R.S.C., 1985, c. E-15 for the 2004, 2006 and 2007 taxation years and allowed those for the

2003 and 2005 taxation years only for the purpose of adjusting the underreported income to reflect the respondent's concessions.

[2] The Judge found that the appellant had unreported income of $3,669,458 and that he had not demonstrated that the source of the unreported funds was not taxable. The Judge also found that the Minister of National Revenue (the Minister) was justified in reassessing the taxation years outside the statutory period and in imposing gross negligence penalties. In coming to her decision, the Judge refused to admit documents from money exchange enterprises purporting to show that the appellant received nearly two million dollars from Iran. The appellant's main ground of appeal is that the Judge erred in refusing to admit the documents under an exception to the rule excluding hearsay evidence.

[3] The Supreme Court of Canada has found that "the trial judge is well placed to determine the extent to which the hearsay dangers of a particular case are of concern and whether they can be sufficiently alleviated." Further, a trial judge's ruling on admissibility is entitled to deference so long as it is informed by correct principles of law (*R v. Blackman*, 2008 SCC 37 at para 36, [2008] 2 S.C.R. 298). In my view, there is no reason to interfere with the Judge's ruling on the admissibility of the money exchange documents.

[4] It was not disputed that the relevant documents were hearsay and, therefore, presumptively inadmissible.

[5] Section 30 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (*CEA*) provides a statutory hearsay exception for records made in the usual and ordinary course of business (i.e. business records).

[6] To determine whether the evidence meets the statutory exception, the court may, pursuant to subsection 30(6) of the *CEA*, examine the documents and hear evidence as to the circumstances of the creation of the documents and draw any reasonable inference. Despite assertions by the appellant that the money exchange documents were created in the usual and ordinary course of business of the money exchange enterprise, these assertions were unsupported by evidence. There was no affidavit evidence and the appellant did not call any witnesses from the money exchange enterprises. The Judge found that "the appellant offered no explanation as to the circumstances in which the records were made" (reasons at para. 49). As such, there is no basis on which to interfere with the Judge's finding.

[7] In addition, subsection 30(7) of the *CEA* required the appellant to give the respondent seven days' notice of his intention to introduce the money exchange documents as business records. The Judge found that the appellant did not provide the required notice (reasons at para. 45). The appellant argued that he satisfied this requirement when he produced the money exchange documents along with other documents as part of discovery. Further, one day before the hearing, appellant's previous counsel asked respondent's counsel if he was going to allow the "significant documentation from the businesses which received the money" as business records or whether summoning witnesses was necessary. Respondent's counsel replied that he expected counsel to follow the rules of evidence (AB, Vol. 3, Tab I (1), p. 695). While the *CEA* does not

specify the form of notice required, the notice should sufficiently describe which documents are to be introduced and indicate the intention to introduce them as business records. As such, I find no reviewable error in the Judge's finding that the appellant had not provided the required notice. Further, while the Judge has discretion to dispense with the notice requirement under subsection 30(7), the appellant has provided no reason to interfere with the Judge's decision not to do so, other than the possible failings of his previous counsel.

[8] Alternatively, the appellant argued that documents that do not satisfy the requirements under section 30 of the *CEA* may still be admitted under the common law business records exception. As the appellant provided no evidence as to the circumstances in which the money exchange documents were made, he cannot satisfy the three requirements of the common law business records exception, specifically that: the creator(s) of the records had personal knowledge of the information in those records; the records were made contemporaneously with the act; and the creator(s) had a duty to record the information (*Ares v. Venner*, [1970] S.C.R. 608, 14 D.L.R. (3d) 4).

[9] The appellant also suggested that the money exchange documents were admissible through the principled approach. As the Judge correctly indicated, hearsay evidence may overcome the general exclusionary rule if shown to be reliable and necessary (reasons at para. 47). Through the principled approach, hearsay evidence may only be admitted if its contents are trustworthy because of the way it came into existence or if the circumstances allow the ultimate trier of fact to adequately assess its worth (*R v. Khelawon*, 2006 SCC 57 at paras. 2-3, [2006] 2 S.C.R. 787). In addition to finding that the appellant provided no evidence as to the creation of

the money exchange documents, the Judge found that some of the documents showed the appellant as both the sender and recipient of the funds. Further, the appellant testified that he occasionally made loans to one of the money service businesses, which, the Judge found, raised questions about the relationship between the two (reasons at para. 49). In light of those findings, the Judge determined that the hearsay evidence did not satisfy the requirement of reliability. The Judge did not err in refusing to admit the money exchange documents on that basis.

[10] The remaining issues raised by the appellants are questions of fact or of mixed fact and law, and the court may only intervene if a palpable and overriding error is established (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[11] The appellant submits that, because the Judge failed to admit the money exchange documents, she made a palpable and overriding error in finding that the appellant did not identify the source of the funds nor show that the funds were not taxable income. As I am of the view that the Judge correctly determined that the hearsay evidence was inadmissible, the appellant's argument lacks foundation. As such, I find no reviewable error in the Judge's findings. In any event, even if the hearsay evidence had been admitted by the Judge, I am of the view that the money exchange documents do not identify the source of funds nor show that the funds were not taxable.

[12] The appellant also alleges that the Judge made a palpable and overriding error in upholding the Minister's reassessment outside the statutory period and imposition of gross negligence penalties under subparagraph 152(4)(*a*)(i) and subsection 163(2) of the *Income Tax*

Act. No error is alleged in the Judge's articulation of what is required to apply those provisions. The Judge found that the appellant had unreported income and did not provide a plausible explanation for the discrepancy between his reported income and net worth (reasons at para. 67). The Judge also found that the appellant made serious and lengthy omissions in income declared and provided inconsistent and incomplete evidence (reasons at para. 70). There is no basis on which to interfere with the Judge's determination that the Minister met her burden and was entitled to impose gross negligence penalties and reassess outside the statutory period.

[13] I would dismiss the appeal with costs.

"David G. Near"
J.A.

"I agree.
M. Nadon J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM AN ORDER OF ACJ LUCIE LAMARRE OF THE TAX COURT OF CANADA DATED OCTOBER 15, 2015, NO. (2015 TCC 239)

DOCKET:	A-488-15
STYLE OF CAUSE:	MASIH BOROUMAND v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 7, 2016
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	NADON J.A. RENNIE J.A.
DATED:	DECEMBER 15, 2016

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