

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170328

Docket: A-15-16

Citation: 2017 FCA 60

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

BETWEEN:

VINCENT DICOSMO

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 28, 2017.

Judgment delivered from the Bench at Toronto, Ontario, on March 28, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

RENNIE J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on March 28, 2017)

[1] This is an appeal from the judgment of the Tax Court of Canada, whereby the Court dismissed the appellant's challenge to the Minister's reassessments for the 2003, 2004 and 2005 taxation years. The appellant claimed that the Minister erred in not allowing his claims for additional employment expenses, allowable business losses and a representation fee in respect of

the 2005 taxation year. At the hearing of this appeal, the appellant abandoned the appeal in respect of the deduction for allowable business losses and the representation fee.

[2] In dismissing the appeal, the judge found that the appellant's evidence fell far short of establishing a *prima facie* case that the reassessments were incorrect. This conclusion was predicated on her finding that the testimony of the appellant's witnesses was unreliable as well as the absence of any supporting documentation. The judge also found that the appellant may well have fabricated evidence with an intention to mislead, and had tendered that evidence to the Court.

[3] The Court made specific findings with respect to whether the appellant had raised a *prima facie* case on each of the three issues before it. With respect to the employment expense issue, the judge concluded that the appellant's testimony was "completely unsatisfactory"; with respect to the allowable business investment loss claim, the judge found the appellant's testimony unconvincing and noted that no documentation was produced supporting the claim that a loan had been made to the business as claimed. The judge found that no investment had in fact been made. The Court dismissed the claim for the representation fee, noting that there was insufficient evidence to link the expenditure to a permitted deduction.

[4] Before the Tax Court the appellant raised the issue whether the reassessments were statute-barred. The judge declined to consider the issue as it had not been raised by the appellant in his Notice of Appeal.

[5] In considering an appeal from a decision of the Tax Court, this Court is guided by the principles expressed in *Housen v. Nikolaisen* 2002 SCC 33 at para. 8. Questions of fact or mixed fact and law are reviewable on the basis of palpable and overriding error; questions of law, or extricable questions of law, are reviewable on the basis of correctness. Here, in requiring the appellant to establish a *prima facie* case that the Minister's assumptions were incorrect, the judge identified the correct legal standard. In applying that standard to the facts before her, no reviewable error has been demonstrated. The judge had the benefit of hearing and observing the witnesses, and in our view, the conclusions as to their veracity and reliability had a solid foundation in the record. Equally, the inferences which she drew from the absence of documentation in circumstances where it would be reasonable to expect documentation as in the claim for allowable business investment loss, were also reasonably open to her.

[6] The final ground of appeal concerns the failure of the Court to find that the reassessments were statute-barred.

[7] While the question of whether an assessment is statute barred is assessed against a correctness standard, no error has been established. In the absence of an allegation or assertion that the claims were statute-barred, the Minister has no obligation or onus to prove that the reassessments were made within the normal reassessment period; *Last v. R*, 2014 FCA 129 at para. 54.

[8] Counsel relied on the decision of the Tax Court of Canada in *Yunus v The Queen*, 2015 TCC 272, in support of the proposition that the fact that a reassessment is statute-barred can be inferred and be put in issue from the Minister's Reply pleading.

[9] In our view, the jurisprudence of this Court requires that the issue of whether an assessment is statute-barred must be specifically pleaded. The underlying rationale is to ensure fairness and to permit all evidence relevant to be before the Court.

[10] We therefore dismiss the appeal with costs.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED
DECEMBER 11, 2015, DOCKET NO. 2011-3407(IT)G)**

DOCKET: A-15-16

STYLE OF CAUSE: VINCENT DICOSMO v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: MARCH 28, 2017

REASONS FOR JUDGMENT OF THE COURT BY: NEAR J.A.
RENNIE J.A.
GLEASON J.A.

DELIVERED FROM THE BENCH BY: RENNIE J.A.

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