Federal Court of Appeal  Cour d'appel fédérale

Date: 20170425

Docket: A-344-16

Citation: 2017 FCA 83

CORAM: **DAWSON J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

ANTHONY MELMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 25, 2017.
Judgment delivered from the Bench at Toronto, Ontario, on April 25, 2017.

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on April 25, 2017).

DAWSON J.A.

[1] For reasons cited as 2016 TCC 167, the Tax Court of Canada dismissed the appellant's appeal from a notice of reassessment which assessed gross negligence penalties arising from the appellant's failure to include certain taxable dividends in his return of income filed in respect of the 2007 taxation year.

[2] On this appeal from the judgment of the Tax Court, the appellant argues that the Tax Court erred by misapplying the legal test for gross negligence, by incorrectly determining that the respondent met her onus and by failing to weigh properly the totality of the evidence.

[3] Despite the able submissions of counsel for the appellant, we disagree for the following reasons.

[4] First, subsection 163(2) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) imposes a penalty on any taxpayer "who, knowingly, or under circumstances amounting to gross negligence" makes, participates or acquiesces in the making of an omission in a return. At paragraphs 29 to 30 of its reasons, the Tax Court articulated the correct legal test for establishing gross negligence: neglect beyond a failure to use reasonable care. The impugned conduct must include a high degree of negligence equal to intentional acting or indifference as to compliance (*Venne v. Her Majesty the Queen*, [1984] C.T.C. 223, 84 D.T.C. 6247, at paragraph 37).

[5] Contrary to the appellant's submission, the respondent need not establish that the appellant knowingly made an omission. Subsection 163(2) is disjunctive. It is sufficient for a taxpayer to make an omission in circumstances amounting to gross negligence.

[6] The Tax Court went on to make a number of findings of fact, including:

i. The appellant signed his tax return without reviewing or reading it in either draft or final form (reasons, paragraph 21).

ii. In so acting, the appellant departed from his usual practice of meeting in person with his primary accountant in order to conduct a page by page

review of the appellant's tax return. This departure "constituted an unusual casualness" on the part of the appellant and reflected "insouciance and an indifferent delegation of responsibility" (reasons, paragraphs 40 and 43).

iii. After the declaration and payment of the dividends, the appellant arranged for an escrowed investment to be made in an amount to cover his estimated tax liability due in April, 2008. This "'tickler' for that tax liability was unobserved, unmentioned and inexplicably redeployed contemporaneously with the filing of the 2007 return. The maturity of such a large, matching, purpose-specific investment reasonably constitutes a clear reminder to make a specific inquiry as to why such funds were no longer needed." (reasons, paragraphs 11 and 45).

[7] No palpable and overriding error has been demonstrated with respect to these findings and they support the Tax Court's finding of wilful blindness amounting to gross negligence.

[8] Second, at paragraph 33 of its reasons the Tax Court observed that in this case the respondent was required to prove that the appellant "was, more likely than not, wilfully blind to the warnings or markers set before him which would, if taken, have likely led to detection of the omission." In light of this statement of the law with respect to onus and the Court's findings of fact, the appellant has failed to demonstrate that the Tax Court erred in finding that the respondent had met her onus.

[9] Finally, the determination of whether a taxpayer is grossly negligent is highly fact-specific. The appellant has not demonstrated any palpable and overriding error in the Court's appreciation of the totality of the evidence.

[10] It follows that the appeal will be dismissed with costs.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-344-16
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REASONS FOR JUDGMENT OF THE COURT BY:	DAWSON J.A. WEBB J.A. RENNIE J.A.
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