Federal Court of Appeal | Cour d'appel fédérale

Date: 20100923

Docket: A-553-08

Citation: 2010 FCA 239

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

FRANÇOIS GRAVIL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on September 21, 2010.

Judgment delivered at Québec, Quebec, on September 23, 2010.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an appeal from a judgment of Justice Bédard (the judge) of the Tax Court of Canada (the TCC) [2008 TCC 505] dismissing with costs François Gravil's appeal from the reassessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), for his 1999 and 2000 taxation years.

[2] In these reassessments, the Minister added the following amounts to the appellant's income:

	1999	**2000**
Fees received from the company Les produits Déli-Bon Inc.	$47,000	$60,000
Amounts advanced and written off by the company Les produits Déli-Bon Inc.		$136,430
Benefit received from the company Les produits Déli-Bon Inc. for the purchase of its shares		$213,162
Benefit received from the company Les produits Déli-Bon Inc.		$110,918

A penalty was assessed under subsection 163(2) of the *Income Tax Act* for these amounts.

[3] At the hearing before the TCC, the appellant conceded that the Minister was correct as regards the $47,000 in 1999; and the $60,000 and $136,430 in 2000.

[4] However, three issues remained: (1) the addition of $213,162 and $110,918 to the appellant's income for the 2000 taxation year; (2) the factoring in of $75,000 in calculating a business investment loss for the year 2000; and (3) the assessment of the penalty under subsection 163(2) of the Act for all of the income added by the Minister, including the amounts that the appellant admitted were taxable at the hearing.

[5] The judge rejected all of Mr Gravil's arguments. The issues before this Court are essentially questions of fact. This Court will intervene only if it is shown that the judge made a

palpable and overriding error in assessing the evidence. I find that the appellant has failed to discharge his burden.

[6] It is important to set forth certain relevant facts to fully understand not only the issues but also the amounts at stake.

[7] On October 11, 1999, the appellant and Guy Picard, a financial consultant, purchased as equal shareholders all of the shares of the company Déli-Bon Inc. (the company), for which François Gravil had been operations manager until then. At the time, the company was owned by The Unimark Group Inc. (Unimark), a Texas corporation that was the company's sole shareholder.

[8] The US$1,423,932 purchase agreement stated that the two men were acting "in trust for the company to be owned and operated by François Gravil and Guy Picard", that is, according to the appellant, the company Déli-Bon 2000 Inc., which was registered in February 2000, a few months after the company's shares were purchased. Neither this agreement nor any interest of the parties to the agreement could be transferred without the parties' consent.

[9] On October 13 and 21, 1999, payments of US$320,000 and US$380,000 for the purchase of the company's shares were made to Unimark using Déli-Bon Inc.'s own funds and recorded in its books as shareholder advances.

[10] During the fiscal year ending October 2, 2000, the balance of [TRANSLATION] “receivables from the shareholders” was only $75,000. This decrease was explained through accounting entries in the ledger, showing that the company had transferred, first, $426,324 to the item for [TRANSLATION] “accrued expenses as fees” and, second, $221,836 to the item for [TRANSLATION] “consulting fees”, even though the partners had not rendered any services to the company.

[11] The Minister allocated half of these amounts transferred by the company, that is, $213,162 and $110,918, to the appellant. As the judge noted, the appellant argued that the Minister had not been justified in adding these amounts to his income because the company Déli-Bon 2000 Inc. was the purchaser of the shares. The first two payments to Unimark for the purchase of the company’s shares therefore had to be regarded as advances made by the company to Les Produits Déli-Bon 2000 Inc. rather than advances made to the partners Picard and Gravil. The appellant’s position was based on the main argument that Déli-Bon 2000 Inc. had tacitly ratified the actions undertaken in its interest prior to its incorporation. This point will be discussed below.

[12] On June 15, 2000, Mr. Gravil and Mr. Picard ended their partnership. Their decision took the form of a contract stating as follows:

> [TRANSLATION]
> [The appellant] irrevocably transfers and renounces any right, title and interest in all the shares owned by him in Les Produits Déli-Bon Inc. and/or Les Produits Déli-Bon 2000 Inc., the whole in favour of Guy Picard.
>
> (Decision, p. 5, at para. 6)

[13] The same day, the appellant signed a document acknowledging that he had received $75,000 from Guy Picard for good and valuable consideration. At the same time, the appellant resigned as [TRANSLATION] “company president, operations manager, financial consultant and/or employee of Les Produits Déli-Bon Inc. and/or Les Produits Déli-Bon 2000 Inc”.

[14] On October 3, 2000, Unimark brought an action in Texas against the company Déli-Bon 2000 Inc., the appellant and Guy Picard, to recover the unpaid balance of the sale price of the company’s shares. On October 12, 2001, Déli-Bon Inc. made an assignment in bankruptcy.

Issues

A. The addition of $213,162 and $110,918 to the appellant’s income as benefits conferred on a shareholder for the 2000 taxation year

[15] As noted above, the appellant submitted that the company had advanced to Déli-Bon 2000 Inc. the necessary amounts for the purchase of the company’s shares, since Déli-Bon 2000 Inc. had tacitly ratified the acts done on its behalf prior to its formal incorporation, including the agreement to purchase the company’s shares dated October 11, 1999.

[16] Here, the appellant had no choice but to speak of tacit ratification. The judge noted that the appellant had been unable to adduce the minutes of Les Produits Déli-Bon 2000 Inc. showing that it had expressly ratified the transaction of October 11, 1999 (decision, at para. 17i).

[17] It is not disputed that the ratification may be express or tacit. An express ratification is a formal confirmation by the newly incorporated company that it considers itself to be bound by the acts done in its interest prior to its incorporation and that it intends to honour the obligations incurred on its behalf. A tacit ratification, however, is one that, albeit not formally expressed, may be deduced from facts, attitudes or acts of the company that cannot be explained otherwise than by the company's willingness to be bound by the contract (Maurice and Paul Martel, *La compagnie au Québec: Les aspects juridiques*, Montréal, Éditions Wilson & Lafleur, 2005, at pp. 4-5 and 4-6, Raymond Crête and Stéphane Rousseau, *Droit des sociétés par actions: principes fondamentaux*, Montréal, Les Éditions Thémis, 2002, at section 412, *Bureau international d'échange commercial (B.I.E.C.) ltée v. Boutin*, J.E. 90-1344 (Sup.Ct.), at para. 31, *Place de la Concorde Inc. v. Geday*, 2009 QCCS 6435, at paras. 35-36, *Durepos v. Pakua Shipi Construction Inc.*, J.E. 2006-1566 (C.Q.), at paras. 56-57) [emphasis added].

[18] In the absence of any evidence of an express ratification, the judge carefully considered the appellant's evidence, searching unsuccessfully for indications that Déli-Bon 2000 Inc. had ratified the original transaction.

[19] The judge noted that "neither the appellant nor Mr. Picard clearly stated that the transaction had been ratified or . . . when it had been ratified by Les Produits Déli-Bon 2000 Inc" (decision, at para. 18). He also concluded that the transaction had not been ratified, since "most of the documentary evidence [indicated] the contrary" (*ibidem*).

[20] Therefore, the appellant has failed to satisfy me that the judge erred in rejecting his argument. The judge's conclusion stems from a finding of fact that is supported by the evidence.

B. The $75,000 business investment loss for the year 2000

[21] The judge concluded that the $75,000 that Guy Picard had paid to the appellant in June 2000 was consideration for the sale to Guy Picard of the appellant's shares in the company. Before the TCC, the appellant argued that the payment of that amount had had nothing to do with the sale of the shares, which he had transferred to his partner gratuitously. Rather, it was the repayment by François Picard of an amount that the appellant had entrusted to him in cash, in the summer of 1999, for the joint purchase of a lot north of the Wendake Indian Reserve (appeal book, vol. II, at pp. 48 et seq.).

[22] The judge rejected the appellant's testimony as "implausible" (decision, at para. 16). On this issue, the judge considered all of the evidence, which supports his conclusion. I therefore find no error warranting this Court's intervention.

C. The penalty under subsection 163(2) of the Act

[23] The appellant challenged the penalties assessed by the Minister, arguing that the Minister had failed to [TRANSLATION] "get in touch with him prior to rendering his decision; had he done so, he would have discovered [the appellant's] lack of education . . . and complete inexperience with the tax issues raised and with business accounting" (Notice of Appeal, appeal book, vol. I,

tab 1, at p. 4). Before the TCC, the appellant contended that he had not reported the $47,000, $60,000 and $136,432 because his accountant had told him, for various reasons, that these amounts were not taxable.

[24] The judge did not believe the appellant. Moreover, he drew a negative inference from the fact that the appellant had chosen not to call his accountant as a witness to corroborate his version of the facts. Ultimately, the judge determined that the statements that the appellant attributed to his accountant were implausible (decision, at para. 20).

[25] As for the penalty for the omission of the $213,162 and $110,918, the judge stated that the Minister's evidence had satisfied him that the appellant had "knowingly" failed to report those amounts. He therefore upheld the penalty. While it is true that the judge did not provide reasons supporting his conclusion, unlike with the penalties for the other amounts discussed above, I have no difficulty in finding that his conclusion was justified in light of the factual framework of this case and the evidence adduced before the judge showing that the appellant had actively participated in writing off the company's funds.

Conclusion

[26] The Supreme Court of Canada, in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, issued the following reminder:

> 18. The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony viva voce, and the judge's familiarity with the case as a whole. Because the primary

> role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

[27] I am of the opinion that the judge made no palpable or overriding error in his assessment of the evidence. Accordingly, I would dismiss the appeal with costs.

"Johanne Trudel"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Tu-QuynhTrinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-553-08

(APPEAL FROM A JUDGMENT OF JUSTICE BÉDARD OF THE TAX COURT OF CANADA, DATED OCTOBER 7, 2008, DOCKET NO. 2006-1130(IT)G).

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DATED:	September 23, 2010

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