

Federal Court of Appeal



CANADA

Cour d'appel fédérale

Date: 20101013

Docket: A-264-09

Citation: 2010 FCA 266

**CORAM: EVANS J.A.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

RUSSELL W. LAVOIE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 13, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on October 13, 2010.

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 October 13, 2010)

DAWSON J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada, rendered under the informal procedure. In reasons reported as 2009 D.T.C. 1183, 2009 TCC 293 a Judge dismissed the appellant's appeal from a reassessment made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act).

[2] The facts giving rise to this appeal are carefully set out in the reasons of the Judge. Briefly, the appellant has a registered retirement savings plan (RRSP). Included in the appellant's RRSP were units in certain mutual funds managed by Franklin Templeton Mutual Funds and AIC Mutual Funds (together the Companies). The Ontario Securities Commission (OSC) found that the Companies had allowed improper market timing transactions to occur. The Companies entered into settlement agreements with the OSC in which they agreed to pay monies to fund holders who had suffered losses in their RRSPs as a result of the market timing transactions. In return, the OSC agreed not to initiate proceedings against the Companies. In 2005, the appellant received the total sum of \$313 from the Companies (payments). The Companies had agreed to pay the settlement funds directly to the annuitants of the RRSPs. The appellant did not deposit the payments into his RRSP because he had already contributed the maximum amount allowed for the 2005 taxation year. Nor did the appellant include the sum of \$313 as income in his 2005 tax return. A notice of reassessment later issued, including the sum of \$313 in the appellant's income.

[3] The Judge concluded on the evidence before him that the payments from the Companies were not windfalls, but rather were payments from a source. Applying the *surrogatum* principle, the Judge characterized the payments to be benefits received out of, or under, the appellant's RRSP. As such the Judge found the payments to be taxable and he dismissed the appellant's appeal from the reassessment.

[4] For the following reasons, we are of the view that the appeal should be dismissed.

[5] In finding the payments to be income from a source the Judge considered and rejected the appellant's argument that the payments were a windfall. On this appeal counsel for the appellant concedes that in so doing, the Judge applied the correct test at law: that set out in *The Queen v. Cranswick*, [1982] 1 F.C. 813 (C.A.).

[6] No palpable or overriding error has been shown in the Judge's findings of fact or in his application of the evidence to the factors identified in *Cranswick*. It was open to the Judge to conclude that the payments were properly characterized as being in the nature of compensation. While the purpose of the payments was in part to impose a penalty on the Companies, the payments were also made to compensate investors, at least in part, for their losses. It was also open to the Judge to find that while the appellant did not pursue claims or negotiate settlements with the Companies, this was done on his behalf by the OSC as part of its statutory mandate to protect investors from unfair, improper or fraudulent practices. These findings were based upon the evidence, including the Settlement Agreements and the Plans of Distribution.

[7] Further, we have not been persuaded that the Judge erred in law in concluding that the *surrogatum* principle applied.

[8] As noted above, the Judge found as a fact that the payments were made, at least in part, to compensate the appellant for the loss in value of his RRSP. Accordingly, the Judge properly found that the payments should be treated for tax purposes as though they were part of the Registered Plan held by the trustee. Applying subsections 146(8) and 146(1) of the Act, the Judge concluded that

the payments fell to be treated as benefits out of, or under, the appellant's RRSP. In reaching this conclusion the Judge applied the correct legal test and his findings of fact were supported by the evidence.

[9] For these reasons, the appeal will be dismissed, with costs payable to the respondent.

“Eleanor R. Dawson”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-264-09

**AN APPEAL FROM THE JUDGMENT OF THE HONOURABLE JUSTICE E. A. BOWIE,
FROM THE TAX COURT OF CANADA, DATED JANUARY 29, 2007, IN TAX COURT
FILE NO.: 2007-33811 (IT) I.**

STYLE OF CAUSE: RUSSELL W. LAVOIE v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 13, 2010

**REASONS FOR JUDGMENT
OF THE COURT BY:** EVANS, DAWSON & STRATAS
J.J.A.

**DELIVERED FROM THE
BENCH BY:** DAWSON J.A.

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