Federal Court of Appeal

Cour d'appel fédérale

Date: 20101019

Docket: A-493-09

Citation: 2010 FCA 272

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

BETWEEN:

MICHAEL EDWARDS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

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

Judgment delivered at Ottawa, Ontario, on October 19, 2010.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.
STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20101019

Docket: A-493-09

Citation: 2010 FCA 272

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

BETWEEN:

MICHAEL EDWARDS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

[1] This is an appeal from an interlocutory order of a Judge of the Tax Court of Canada. In reasons reported as 2009 TCC 606, 2010 DTC 1006, the Judge dismissed a motion to strike all or part of two subparagraphs of the amended reply to the notice of appeal. The two subparagraphs are contained in the recitation of the assumptions relied upon by the Minister of National Revenue (Minister) when reassessing the appellant. The motion to strike was brought on the ground that the subparagraphs contained facts not assumed by the Minister. The two subparagraphs at issue are:

13. h) The Royalty Agreement had a nominal fair market value;

13. cc) The following parties were willing participants, acting in concert to facilitate execution of the Scheme:

i) Trafalgar Trading;

ii) ParkLane;

iii) Plaza Capital;

iv) Plaza Capital Finance Corporation ("Plaza Capital Finance");

v) Specialty Insurance;

vi) the Designated Associations; and

vii) the Participant.

[2] The appellant argues that the Judge erred in law by ruling that, for the purposes of Rule 49(1)(*d*) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688 assumptions can include implicit findings or conclusions that the Minister might logically have drawn when coming to the reassessment. In oral argument, counsel for the appellant initially argued that the analysis must be textual, meaning that the precise assumption must be recorded in the records that led to the issuance of the notice of reassessment (the audit record). However, counsel for the appellant later agreed that, as a matter of law, some assumptions may be inferred from the content of the audit record where they are blindingly obvious. In my view, assumptions may be inferred from the audit record in appropriate circumstances. In every case it will be a question of fact whether there is a sufficient basis in the audit record to support the inference that a particular fact was indeed an assumption relied upon by the Minister in the assessment or reassessment process.

[3] It follows that the Judge did not err in law in considering that assumptions can be inferred from the audit record. It further follows that where the Judge was prepared to infer the existence of an assumption, such a conclusion is one of fact, or mixed fact and law, that is reviewable on the standard of palpable and overriding error. See: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[4] Turning to the impugned subparagraphs, with respect to subparagraph 13(h) the Judge found as a fact that this assumption was made and relied upon at the time of the assessment. This finding was based upon the content of a letter sent to the appellant on the completion of the audit and upon the auditor's testimony on discovery. The finding is also consistent with the content of the GARR Referral and the Audit Report. No palpable or overriding error has been shown with respect to the Judge's finding of fact that the assumption was made and relied upon at the time of the reassessment.

[5] With respect to subparagraph 13(cc), the Judge acknowledged that the legal significance of the phrase “acting in concert” may well not have been considered by the auditor. However, the Judge considered that the issue of whether the facts would support the use of the phrase “acting in concert” was an issue best left to the trial judge.

[6] It is settled law that facts pleaded as assumptions must be complete, precise and accurate. See, for example, *The Queen v. Anchor Pointe Energy Ltd*, 2007 DTC 5379 (F.C.A.) at paragraph 29.

[7] The transcript of the auditor's examination was in evidence before the Judge. On discovery the auditor gave the following evidence:

> Q. You say there that the participants, little one through little seven were acting in concert. What do you mean by "acting in concert"?
>
> A. By acting in concert I mean they were acting together.
>
> Q. What does that mean?
>
> A. That means that they were part of a series of transactions or events as described in Section 248(10). And I am not reading their mind, I am not saying or suggesting that -- or it's not our position that they were acting non-arm's length.
>
> […]
>
> Q. But I just wanted to be clear, you're not saying that Edwards was acting in concert with, specifically, the Wrestling Association.
>
> A. Let's remove the word "acting in concert" because that ---
>
> Q. Well, that's what you're alleging.
>
> A. Okay. Acting together. Acting together might be a better -- use a synonym for acting in concert.
>
> […]
>
> Q. Coming back to acting in concert, I appreciate what you've said about acting in concert. Where in the audit material including the 30-day letter is there any reference to acting in concert?
>
> A. Where -- there is reference to series of transactions so we don't have the exact term "acting in concert," but we have the concept that was a series and that leads to saying that there was more than one transaction or you have more than one transaction. He may have wanted more than one party.
>
> So it's -- there's a series -- reference to series in parts of that concept.
>
> […]

> Q. And we will find no reference in addition to the audit report in the position paper or the GAAR referral or the GAAR referral letter, or the proposal letter to the taxpayer of any non-arm's length relationship between the donor and any of the participants in the program or any reference to the donor or any of the participants acting in concert.
>
> A. Yes, but we have mentioned a series of transactions or events.
>
> Q. You agree the answer to my question is yes?
>
> A. Yes.
>
> [Emphasis added.]

[8] The phrase "acting in concert" is part of the legal test for determining whether parties have acted at non-arm's length. On discovery the auditor denied that he was alleging non-arm's length transactions. Whether the parties acted at arm's length may be material in this proceeding. In oral argument counsel for the respondent conceded that in light of the auditor's answers on discovery the language used in subparagraph 13(cc) of the Minister's amended reply to the notice of appeal was not as precise as it could have been. In view of the auditor's evidence, subparagraph 13(cc) is not complete, precise and accurate as required. It follows that the assumption should have been struck.

[9] Counsel for the appellant acknowledged during his reply argument that the auditor did assume during the course of the audit that the participants were acting together in a series of transactions. In light of that advice, it is appropriate to give leave to the respondent to amend subparagraph 13(cc) of its reply in a manner consistent with the evidence given by the auditor on discovery.

[10] For these reasons, I would allow the appeal in part. Pronouncing the order that should have been given by the Judge, I would strike subparagraph 13(cc) of the Minister's amended reply with leave to amend in accordance with these reasons. In view of the divided success I would award no costs.

"Eleanor R. Dawson"
J.A.

"I agree.
John M. Evans"

"I agree.
David Stratas"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-493-09
STYLE OF CAUSE:	MICHAEL EDWARDS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 13, 2010
REASONS FOR JUDGMENT:	DAWSON J.A.
CONCURRED IN BY:	EVANS J.A. STRATAS J.A.
DATED:	OCTOBER 19, 2010

APPEARANCES:

Ian S. MacGregor, Q.C. Pooja Samtani	FOR THE APPELLANT
Martin Hickey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT