

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121101

Docket: A-341-10

Citation: 2012 FCA 276

**CORAM: BLAIS C.J.
SHARLOW J.A.
MAINVILLE J.A.**

BETWEEN:

EARL BABICH

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on November 1, 2012.

Judgment delivered from the Bench at Vancouver, British Columbia, on November 1, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on November 1, 2012)

SHARLOW J.A.

[1] Mr. Earl Babich is appealing the judgment of Justice Valerie Miller of the Tax Court of Canada in an appeal under the informal procedure of that Court. Her judgment dismissed Mr. Babich's appeal of a reassessment under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for 2003, and quashed an appeal of a reassessment for 2004 for want of jurisdiction on the basis that it was a nil assessment (2010 TCC 352). The reassessments had included \$6,804 in the income of Mr. Babich for 2003, and the same amount in his income for 2004, on the basis that those amounts

represented the value of benefits conferred on Mr. Babich as the sole shareholder of Able Enterprises Ltd.

[2] The benefits consisted of the use of a vehicle owned by Able Enterprises Ltd. The amount of the benefit for each year was determined under the computation provisions of section 6 of the *Income Tax Act*, on the basis of certain factual assumptions relating to the cost of the vehicle, the number of kilometres driven and the allocation of the use of the vehicle between personal and business use. Those assumptions were based on determinations made by an auditor after a review.

[3] The Minister initially assumed that it was Mr. Babich himself who used the vehicle in question, presumably because that is what the auditor was led to believe by Mr. Babich. However, it became apparent at the Tax Court hearing that the vehicle was used only by Mr. Babich's parents, with Mr. Babich's permission, and that they used it for personal use and for the purposes of the business of Able Enterprises Ltd. The Crown took the position in the Tax Court that subsection 15(1) applied whether the vehicle was used by Mr. Babich or his parents, and that by virtue of subsection 15(5), the quantum of the benefit was to be determined under the relevant computation provisions of section 6 of the *Income Tax Act*. The judge agreed with the Crown. She concluded that the benefit was properly taxed in the hands of Mr. Babich, and that the amount of the benefit had been correctly determined. Mr. Babich's appeal for 2003 was dismissed accordingly.

[4] Mr. Babich has raised numerous grounds of appeal, some procedural and some substantive. It is convenient to consider the procedural issues first.

[5] Mr. Babich submits that it was procedurally unfair to require his income tax appeal to be heard together with an appeal of Able Enterprises Ltd. relating to goods and services tax assessed under section 173 of the *Excise Tax Act* in respect of the taxable benefit. We do not accept this argument. It is obvious that the appeals dealt with the same facts and involved the same evidence. We are not persuaded that any unfairness or prejudice resulted from the fact that Mr. Babich was required, in his words, to “wear two hats” by appearing in his own right and as a representative of Able Enterprises Ltd.

[6] The second procedural issue raised by Mr. Babich relates to two motions heard by the judge at the opening of the proceedings in the Tax Court. The Crown had moved to amend the pleadings to include a reference to subsection 15(1), and also to quash the appeal for 2004 because the assessment for that year was a nil assessment. The judge granted both motions. In this Court Mr. Babich argues that the motions should not have been granted because he had not been served with the notices of motion. However, it is apparent from the transcript that Mr. Babich spoke to both motions.

[7] We note also that Mr. Babich consented to the amendment to the pleadings, which was obviously a mere housekeeping matter. The material that had been provided to Mr. Babich after the objection indicated that the benefit was being assessed as a shareholder benefit, which is the subject of subsection 15(1) of the *Income Tax Act*, not section 6.

[8] Mr. Babich should also have been aware well in advance of the hearing that the validity of the 2004 assessment was in issue, because the Crown said as much in the reply filed in the Tax Court.

[9] As to the merits of the judge's decision to quash the 2004 appeal, Mr. Babich argues that the 2004 reassessment was not a nil assessment because it resulted in a loss of a \$368 refundable GST credit. However, he presented no evidence in the Tax Court to show any change to a GST tax credit claimed by him for 2004. The notice of reassessment for 2004, which was the subject of the appeal, states that no federal taxes were payable by Mr. Babich for that year. The judge made no error in concluding that Mr. Babich was attempting to appeal a nil assessment, and to quash the 2004 appeal for that reason.

[10] Finally, Mr. Babich asserts that he was put under undue pressure at the hearing, leading him to make what he now believes were unwise decisions with respect to the conduct of his case. Having considered Mr. Babich's arguments on this point, and having reviewed the transcript, we do not accept that the conduct of the trial was unfair in any respect, or that anything said or done by the judge improperly led Mr. Babich into any error that caused him prejudice.

[11] The main substantive argument raised by Mr. Babich is that the benefit in issue should have been taxed in the hands of his parents pursuant to section 6 of the *Income Tax Act*, rather than in his hands under subsection 15(1). The Tax Court judge concluded, for reasons that are well and fully stated, that the benefit was appropriately taxed in the hands of Mr. Babich. Having considered the

judge's reasons on this point, and the evidence, we are satisfied from the judge's reasons that her conclusion is correct in law and is consistent with the evidence presented to her.

[12] We appreciate that Mr. Babich believes that his evidence effectively demolished the Minister's assumptions, but the judge concluded otherwise. In our view, based on the totality of the evidence, it was open to the judge to conclude as she did.

[13] Mr. Babich also challenges the quantum of the benefit as determined by the Minister and accepted by the judge. Essentially, he disputes the proportion of business and personal use, and the acquisition cost of the vehicle. The judge accepted the Minister's allocation of 25% personal and 75% business use, and accepted the Minister's determination of the acquisition cost. Those are findings of fact that must stand absent a palpable and overriding error. Our review of the record discloses no such error.

[14] Mr. Babich argues that the amount of the taxable benefit should be reduced to nil because it could or should have been offset by a shareholder loan. The judge considered that question and rejected it, primarily on the basis that there was no evidence of a shareholder loan. While there was some mention of a shareholder loan in one of the audit papers, it was open to the judge to find that evidence to be insufficient to support an argument for the *ex post facto* set-off sought by Mr. Babich. Specifically, there is nothing in the record from which the judge could reasonably have concluded that there was any intention on the part of Mr. Babich, in 2003, to compensate Able

Enterprises Ltd. for his parents' personal use of the vehicle in that year by reducing the balance of his shareholder loan.

[15] The appeal will be dismissed with costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-341-10

STYLE OF CAUSE: Earl Babich v.
Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 1, 2012

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OF THE COURT BY:** BLAIS C.J.
SHARLOW J.A.
MAINVILLE J.A.

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

APPEARANCES:

Earl Babich FOR THE APPLICANT

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