

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130708

Docket: A-342-12

Citation: 2013 FCA 180

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

BETWEEN:

CLEARWATER SEAFOODS HOLDINGS TRUST

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, on June 25, 2013.

Judgment delivered at Ottawa, Ontario, on July 8, 2013.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

**DAWSON J.A.
STRATAS J.A.**

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] In 2011, the appellant Clearwater Seafoods Holdings Trust (the “Taxpayer Trust”) appealed an income tax assessment to the Tax Court of Canada. The trust was terminated in 2012 upon the disposition of all of its property. In order to obtain directions as to the continuation of the income tax appeal, a motion was made pursuant to Rule 29 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688. The motion was dismissed on June 1, 2012. The order dismissing the motion has been appealed to this Court. For the reasons that follow, I would allow the appeal.

[2] Prior to the hearing of the appeal, the Court directed the parties to consider certain issues not dealt with in their written submissions, and to consider whether it would be appropriate to adjourn the appeal to permit an alternative motion to be submitted to the Tax Court. An adjournment motion was filed on behalf of the Taxpayer Trust, and it was opposed by the Crown. The Court heard submissions on the motion and the appeal, and reserved its decision on both.

[3] For the purposes of this appeal and the Rule 29 motion, the facts are undisputed and may be summarized as follows. In 2012, as part of a series of transactions intended to achieve a permitted tax result, all of the property of the Taxpayer Trust was transferred to another trust named Clearwater Seafoods Income Fund (the “Fund”), which was then the holder of all units in the Taxpayer Trust. The same property was immediately transferred to a corporation named Clearwater Seafoods Incorporated (the “Corporation”), which was then the holder of all units in the Fund.

[4] It is common ground that the Taxpayer Trust ceased to exist when it ceased to own any property. However, the transactions described above did not automatically put an end to the Taxpayer Trust’s income tax appeal. To facilitate the continuation of that appeal despite the termination of the Taxpayer Trust, counsel for the Taxpayer Trust filed a motion in the Tax Court seeking directions under Rule 29, which reads as follows:

29. (1) Where at any stage of a proceeding the interest or liability of a person who is a party to a proceeding in the Court is transferred or transmitted to another person by assignment, bankruptcy, death or other means, no other proceedings shall be instituted until the Registrar is notified of the

29. (1) Lorsque l’intérêt ou la responsabilité d’une partie à l’instance est transféré ou transmis à une autre personne en raison d’une cession, d’une faillite, d’un décès ou de toute autre cause, à tout moment de l’instance, nulle autre procédure ne peut être engagée avant que le greffier ne soit

transfer or transmission and the particulars of it.

avisé du transfert ou de la transmission, ainsi que des modalités qui s'y rapportent.

(2) On receipt of the notice and particulars referred to in subsection (1) the Registrar shall consult with the parties regarding the circumstances under which the proceeding shall continue and he shall report on these consultations to the Chief Justice.

(2) Sur réception de l'avis dont il est fait mention au paragraphe (1), le greffier consulte les parties concernant les circonstances dans lesquelles l'instance doit être continuée et fait rapport de ces consultations au juge en chef.

(3) The Chief Justice or a judge designated by him to deal with the matter may direct the continuation of the proceeding or give such other direction as is just.

(3) Le juge en chef ou un juge désigné par lui pour traiter de l'affaire peut donner une directive de continuer l'instance ou toute autre directive qui lui semble appropriée.

[5] The motion sought a direction permitting the Corporation to be named as the appellant in place of the Taxpayer Trust. It was submitted that for three reasons, the Corporation is the appropriate person to conduct the litigation:

(1) The Corporation is the party to which all of the property of the Taxpayer Trust was transferred in the series of transactions described above, so that in practical terms, the Corporation is the successor in title and interest to the trust property.

(2) As the transferee of the trust property, the Corporation is at risk of being assessed under subsection 160(1) of the *Income Tax Act* for the tax liability of the Taxpayer Trust, if the appeal of its income tax assessment is not successful. In that regard, counsel for the Taxpayer Trust admitted in this Court that except for the existence of the tax liability of the Taxpayer Trust that is the subject of the appeal in the Tax Court, all of the conditions in subsection 160(1) are met.

(3) The series of transactions that included the transfer of all of the trust property was undertaken to take advantage of the "specified investment flow-through trust conversion rules" in the *Income Tax Act* (section 88.1 of the *Income Tax Act* and related provisions). Those rules were intended to permit the conversion, on a tax deferred basis, of certain income trusts to taxable Canadian corporations. To comply with those rules, it was essential to complete the series of transactions before January 1, 2013.

[6] As a result of the direction of this Court before the hearing, counsel for the Taxpayer Trust also admitted, properly in my view, that the trustees of the Taxpayer Trust are at risk of being assessed under subsection 159(3) of the *Income Tax Act* for the liability of the Taxpayer Trust.

[7] The Crown opposed the Rule 29 motion, mainly on the basis that the appeal cannot be continued because the taxpayer has ceased to exist. The Crown's position is that the merits of the Taxpayer Trust's income tax appeal should not be determined in the tax appeal now pending in the Tax Court. Rather, that appeal should be dismissed for want of an appellant. Then, if Minister issues one or more assessments under subsection 160(1) or 159(3), those assessments may be appealed. It is now well established that in an appeal of such derivative assessments, the correctness and validity of the underlying tax assessment can be raised: *Gaucher v. Canada* (2000), 264 N.R. 369, 2000 D.T.C. 6678, [2001] 1 C.T.C. 125 (FCA).

[8] The judge concluded that the circumstances of this case are not within the scope of Rule 29(1). On that basis, he considered Rule 29 to be inapplicable and dismissed the motion. In my view, the judge's decision is based on misinterpretation of Rule 29(1). He construed it too narrowly, disregarding its language and purpose.

[9] It is important to consider the purpose of Rule 29(1). In the course of any court proceeding, the circumstances of a litigant may change in such a way that the proceeding cannot continue without special accommodation in matters of procedure. Such a change in circumstances may be the result of the bankruptcy of the litigant, the incapacity of the litigant due to illness or injury, the death of a litigant who is an individual, or the dissolution of a litigant that is a corporation if the

dissolution cannot be reversed with retrospective effect. An analogous situation for a litigant that is a trust (or, more properly, the trustee or trustees of a trust) is the termination of the trust. Such a termination is the legal consequence of the disposition by the trust of all of its property. The purpose of Rule 29 is to deal with such situations, to the extent they are within the scope of Rule 29(1).

[10] Rule 29(1) is quoted above and is repeated here with only the words that appear to me to be relevant to this case, inserting names as appropriate:

29. (1) Where at any stage of a proceeding the ... liability of [Clearwater Seafoods Holdings Trust] is ... transmitted to another person by assignment, bankruptcy, death or other means ...

29. (1) Lorsque l'intérêt ... [de Clearwater Seafoods Holdings Trust] est ... transmis à une autre personne en raison d'une cession, d'une faillite, d'un décès ou de toute autre cause ...

[11] It is clear from the undisputed facts that the disposition of all of the property of the Taxpayer Trust had significant legal consequences. One consequence is that the Taxpayer Trust ceased to exist. Another consequence is that certain persons became liable for some or all the federal income tax liability of the Taxpayer Trust. One of those persons is the Corporation, by virtue of subsection 160(1) of the *Income Tax Act*. The others are the persons who were the trustees of the Taxpayer Trust when the property was transferred, by virtue of subsection 159(3) of the *Income Tax Act*.

[12] The liability of a person under subsection 160(1) or 159(3) is joint and several with the transferor of the property. In this case the transferor – the Taxpayer Trust – ceased to exist as a result of the transfer. In practical terms, only the Corporation and the trustees may be required to pay the federal income tax liability of the Taxpayer Trust if the income tax appeal is not successful.

In effect, the transfer of the trust property caused the Corporation and the trustees to become liable for that tax liability. While it is true that the Corporation and the trustees will be required to pay that liability only if the Minister chooses to assess and collect, the liability nevertheless exists.

[13] In my view, there has been in this case a transmission of the liability of the Taxpayer Trust to another person by “other means” – which I take to include the termination of the existence of the taxpayer. The disposition of property of the Taxpayer Trust resulted automatically in the termination of the Taxpayer Trust and the transmission of its federal income tax liability to one or more other persons. That is a sufficient basis for concluding that the circumstances are within the language and intended purpose Rule 29(1).

[14] Once a notification is made under Rule 29 and it is determined that the circumstances are within the scope of Rule 29(1), the Chief Justice or a judge designated by him must make the directions required by Rule 29(3). The content of such directions is a matter of judicial discretion, and may well vary from case to case. Therefore, I consider it appropriate to return this matter to the Tax Court so that the motion filed on behalf of the Taxpayer Trust may be reconsidered with a view to directing the continuation of the proceedings.

[15] For these reasons I would dismiss the motion to adjourn, without costs. I would allow the appeal with costs, set aside the order of the Tax Court of Canada dated June 1, 2012, and refer this matter back to the judge, or any other judge designated by the Chief Justice of the Tax Court of Canada, for reconsideration in accordance with the following directions:

- (1) The appeal in the Tax Court is to be allowed to continue if there is a person or group of persons who may appropriately be named as the appellant in the place of the Taxpayer Trust.

- (2) In determining whether there is a person or group of persons who may appropriately be named as the appellant in the place of the Taxpayer Trust, the judge is to consider all relevant factors including, without limitation, the following:
 - a) whether the person or group has the legal and financial capacity to retain and instruct counsel in this appeal, and has undertaken to do so;

 - b) whether the person or group has ability to ensure the completion of pre-trial discoveries in accordance with the relevant rules of the Tax Court, and has undertaken to do so;

 - c) whether the person or group has the financial resources to pay the costs of the appeal in the Tax Court in the event the appeal is unsuccessful, and has undertaken to do so.

- (3) In the reconsideration, both parties should be permitted to present fresh evidence relating to the factors listed above, as well as any other factors that they consider relevant to the application of Rule 29.

- (4) Any award of costs of the motion and the reconsideration are to be determined in the discretion of the judge who reconsiders the motion.

“K. Sharlow”

J.A.

“I agree

Eleanor R. Dawson J.A.”

“I agree

David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-342-12

(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE STEVEN K. D'ARCY OF THE TAX COURT OF CANADA DATED JUNE 1, 2012, DOCKET NUMBER 2011-2015(IT)G)

STYLE OF CAUSE: CLEARWATER SEAFOODS
HOLDINGS TRUST v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: June 25, 2013

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: (DAWSON, STRATAS JJ.A.)

DATED: July 8, 2013

APPEARANCES:

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