Federal Court of Appeal | Cour d'appel fédérale

Date: 20190501

Docket: A-126-18

Citation: 2019 FCA 104

CORAM: **STRATAS J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

RON GOHEEN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on May 1, 2019.
Judgment delivered from the Bench at Vancouver, British Columbia, on May 1, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: RENNIE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20190501

Docket: A-126-18

Citation: 2019 FCA 104

CORAM: **STRATAS J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

RON GOHEEN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on May 1, 2019).

RENNIE J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada (2018 TCC 62, *per* Lyons J.). In that decision, the Tax Court dismissed the appellant's appeal from a reassessment by the Minister of National Revenue disallowing deductions claimed by the appellant for the 2000, 2001, 2002 and 2003 taxation years. The reassessments arose from a series of payments totalling US$30,000 made to Global Institute [Global], an organization cofounded by the appellant's

brother. The appellant asserted that the payments composed a charitable donation and were therefore eligible as deductions under section 118.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [Act]. The Minister disagreed, concluding that the payments did not constitute a gift and levied a gross negligence penalty.

[2] On the evidence before her, and applying the criteria of this Court in *Friedberg v. The Queen*, [1992] 1 C.T.C. 1, 92 D.T.C. 6031, the Tax Court judge was not satisfied that when making the payments to Global the appellant had the requisite donative intent for the payments to qualify as a gift. The judge, after hearing and considering the evidence of both the appellant and his wife, found the appellant's evidence as to whether he had the requisite intent to make a gift not to be credible.

[3] In reaching this conclusion, the judge (at para. 59) found that neither the appellant nor his wife had a history of making charitable donations, had no connection with or knowledge of Global's mandate, conducted no investigation or inquiry into its work, had annual incomes that were less than the amount of the purported donation and that the amount was paid notwithstanding that they had two children in university in the United States. The judge found many aspects of the testimony of the appellant on this point to be problematic and, in rejecting it, did not rely on an earlier credibility finding (at para. 36). These factual findings by themselves amply support the judge's dismissal of the appeal.

[4] The judge also found an independent basis for the dismissal of the appeal: a deposit for US$30,000 into the same bank account from which the payments to Global were made [Deposit].

Although the Minister had no knowledge of this particular Deposit until the fact arose during examinations for discovery, the judge ruled that reliance on this fact by the Minister did not depart from the underlying basis of the reassessments that the appellant lacked donative intent.

[5] The judge was also satisfied that there was sufficient evidence to establish that the gross negligence penalties levied against the appellant under subsection 163(2) of the Act were warranted.

[6] The thrust of the appellant's argument before us is trial unfairness arising from the Minister's failure to plead the return of the Deposit. This argument rests on the assertion that the Minister's reliance on the Deposit and asserting that it represented a repayment from Global was not captured in the Minister's reply pleading and constituted an alternative basis for the reassessments. The appellant says that the Minister was therefore required to seek leave to amend her reply on proper notice to the appellant and satisfy the preconditions under subsection 152(9) of the Act applicable to an alternative basis of assessment advanced after the normal reassessment period. The appellant asserts that to allow the Minister to press on under this new theory was an error of law.

[7] In the alternative, the appellant argues that the judge erred by failing to place the onus on the Minister to prove the facts relating to the Deposit. The appellant relies on the decision of this Court in *Canada v. Loewen*, 2004 FCA 146 at paragraph 11, 319 N.R. 97 for the proposition that where the Minister alleges facts that are not among those assumed by the Minister in her assessment of the taxpayer, the onus of proof lies with her.

[8] In our view, these arguments cannot succeed.

[9] The core issue in this appeal is whether the basis for the Minister's reassessment changed with her reliance on the Deposit. This is a question of mixed fact and law reviewable for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. As articulated in *Yu v. Canada*, 2018 FCA 68, a palpable and overriding error is a high threshold, one which requires the identification of an error which goes to the core of the decision. The question to whether the judge erred in respect of the onus to prove the facts pertaining to the Deposit namely that it represented consideration in return for the appellant's initial payment to Global is a question of law for which the appropriate standard of review is correctness.

[10] The basis of the reassessments that resulted in the disallowance of the deductions was, from the outset, that the appellant lacked donative intent when making the payments to Global. The Minister asserted this in her reply. In order to succeed before the Tax Court, the appellant had to establish that the payments were made without anticipating some benefit or consideration flowing back, directly or indirectly, to him. The question of how and why the Deposit came into the account was highly relevant to whether the deduction was properly claimed.

[11] The appellant had notice that the Deposit would form part of the Minister's case at trial. The question arose during discovery of the appellant and was confirmed in the course of the ensuing undertakings. The appellant testified at trial that he had intended to donate US$30,000 to Global and was cross-examined on that point. The appellant objected to cross examination on the issue of how US$30,000 subsequently came to be deposited into his wife's U.S. account on the

basis that it was irrelevant. The judge ruled that it was relevant to the question of intent. There is no error of law in this decision.

[12] We turn to the question as to whether this constituted a new theory of reassessment.

[13] In our view, the appellant's argument confuses a new theory or new set of assumptions with the evidence marshalled to support the Minister's theory or assumptions. The Deposit was not a new theory or basis of reassessment; rather, it was additional, particularized evidence, in support of the Minister's overarching theory. The Minister need not amend her pleadings every time an appellant produces new evidence that contradicts his own position. Nor do we accept the distinction that the appellant draws between a return on his investment as opposed to a return of his investment. Both are consistent with the Minister's pleading that there was no donative intent.

[14] In his memorandum the appellant relied on a number of cases dealing with subsection 152(9) of the Act. None of these cases are of assistance here, turning as they do on circumstances where new legal arguments are advanced; where a trial judge determined an issue on a basis that was neither pled nor argued by the parties (*e.g.*, *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175, 395 D.L.R. (4th) 529) or where there were legal or factual matters which a party has an onus to establish (*e.g.*, *Loewen*). These cases have no bearing on circumstances in this appeal where new facts arise which simply corroborate or reinforce the Minister's stated basis for reassessment.

[15] We would also dismiss the argument that the Minister had the burden to prove the Deposit was, in fact, consideration flowing back to the appellant from Global. A taxpayer challenging an assessment must prove the facts upon which they rely and disprove the Minister's assumptions related to those facts unless the assumed fact is particularly, or exclusively, within the Minister's knowledge. Here, the Minister was not privy to the transaction and it would be incorrect to shift the burden to her as the facts underlying that transaction were within the appellant's knowledge: see *Transocean Offshore Ltd. v. Canada*, 2005 FCA 104 at para. 35, 332 N.R. 21; *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188 at paras. 35-36, [2008] 1 F.C.R. 839.

[16] Finally, we reject the appellant's argument that the onus shifted to the Minister on the basis of the appellant's simple assertion that he had the requisite intent. There was no evidence or explanation from the appellant which, on a *prima facie* basis, justified shifting the onus to the Minister. To the contrary, the judge found the appellant's evidence to be inconsistent, unreliable and not to be believed.

[17] Despite the able argument of Mr. Campbell we would dismiss the appeal with costs.

"Donald J. Rennie"

J.A

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-126-18
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE LYONS OF THE TAX COURT OF CANADA, DATED MARCH 26, 2018, DOCKET NO. 2008-851(IT)G)	
STYLE OF CAUSE:	RON GOHEEN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 1, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. RENNIE J.A. LASKIN J.A.
DELIVERED FROM THE BENCH BY:	RENNIE J.A.

APPEARANCES:

Alistair G. Campbell Michelle Moriartey	FOR THE APPELLANT
Ron D.F. Wilhelm Geraldine Chen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Legacy Tax + Trust Lawyers Vancouver, British Columbia	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT