Federal Court of Appeal | Cour d'appel fédérale

Date: 20200520

Dockets: A-398-18
A-404-18

Citation: 2020 FCA 93

CORAM: **WEBB J.A.**
RENNIE J.A.
MACTAVISH J.A.

Docket: A-398-18

BETWEEN:

DIETER EISBRENNER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-404-18

AND BETWEEN:

V. ROSS MORRISON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 3, 2020.

Judgment delivered at Ottawa, Ontario, on May 20, 2020.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] These appeals arise under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) as a result of the reduction or denial of certain charitable donation tax credits that Mr. Morrison had claimed in relation to his participation in the Canadian Gift Initiatives donation program (the "CGI Program") and that Mr. Eisbrenner and Mr. Morrison had claimed in relation to their participation in the Canadian Humanitarian Trust donation program (the "CHT Program"). For the CGI Program, the amount allowed for Mr. Morrison as a charitable donation tax credit based on his donation of certain pharmaceuticals was substantially reduced. For both appellants, their charitable donation tax credits based on their claims that they had donated certain pharmaceuticals to a registered charity under the CHT Program were denied. Their appeals to the Tax Court, as they related to the tax credits associated with the pharmaceuticals, were dismissed (2018 TCC 220).

[2] These appeals were consolidated by the order of this Court dated January 25, 2019. The appeal in file A-398-18 was designated as the lead appeal. The original of these reasons will be placed in this file and a copy will be placed in A-404-18.

[3] For the reasons that follow, I would dismiss these appeals.

I. Background

[4] The appeals of Mr. Morrison and Mr. Eisbrenner were heard together on common evidence at the Tax Court. For Mr. Morrison, the taxation years under appeal were 2003, 2004 and 2005. For Mr. Eisbrenner, the only taxation year under appeal was 2005.

[5] The issue for Mr. Morrison's 2003 taxation year related to his participation in the CGI Program. Under this program, Mr. Morrison acquired certain pharmaceuticals for a purchase price of $9,500. He subsequently donated these pharmaceuticals to a registered charity and received a receipt in the amount of $56,503. Mr. Morrison reported a capital gain of $47,003 and claimed a charitable donation tax credit based on a donation of $56,503. The Minister of National Revenue (Minister) determined that the fair market value of the pharmaceuticals was only $1,759. As a result, the amount of the credit for a donation to a registered charity that Mr. Morrison was allowed to claim in 2003 was based on a donation of only $1,759.

[6] The CHT Program was created and promoted by World Health Initiatives Inc. (WHI). Both Mr. Morrison and Mr. Eisbrenner participated in the CHT Program in 2004 and 2005. However, the only taxation year for Mr. Eisbrenner that is in issue in this appeal is 2005.

[7] Under this program, Mr. Morrison made cash donations of $15,350 in 2004 and $15,075 in 2005. Mr. Eisbrenner made a cash donation of $39,966 in 2005. They each received charitable donation receipts for the amount of the cash contributed.

[8] As a result of these cash donations, Mr. Morrison and Mr. Eisbrenner were eligible to be selected as capital beneficiaries of one of the Canadian Humanitarian Trusts (the CH Trusts). Upon being selected as capital beneficiaries of one of these trusts, they were informed that they were entitled to receive a stipulated number of World Health Organization essential medicine units (WHOEM Units), subject to a lien. The certificate for the WHOEM Units that were issued to each individual included a list of different pharmaceuticals and their "pharmaceutical value". The amount of the lien was also noted. The Minister assumed that the amount of the lien was equal to the purchase price of these pharmaceuticals (paragraphs 14(mm) ii) to iv) of the reply filed by the Crown in relation to Mr. Morrison's notice of appeal for 2004 and the corresponding paragraphs 13(oo) to (qq) in the reply to Mr. Morrison's notice of appeal for 2005 and 18(pp) to (rr) in the reply to Mr. Eisbrenner's notice of appeal for 2005). KP Innovispharm Ltd. (KP Innovispharm) was identified as the holder of the liens (paragraph 56 of the reasons).

[9] Following receipt of these WHOEM Units, Mr. Morrison and Mr. Eisbrenner each executed deeds of gift in favour of a registered charity (the in-kind charity) and received receipts from the in-kind charity in the following amounts for these WHOEM Units:

	2004	2005
Mr. Morrison	$41,109	$37,815
Mr. Eisbrenner		$124,459

[10] It appears that the in-kind charity in turn was to transfer the pharmaceuticals to another charity (the distributing charity) that was to distribute the pharmaceuticals in certain countries, e.g. Vietnam, Ecuador and certain countries in Africa. The pharmaceuticals were sourced outside Canada and distributed outside Canada without ever entering Canada.

[11] Under the CHT Program, Mr. Morrison in 2004 contributed $15,350 in cash and received receipts for charitable donations totalling $56,459 ($15,350 + $41,109). In 2005, he contributed cash of $15,075 and received receipts for charitable donations totalling $52,890 ($15,075 + $37,815). Mr. Eisbrenner in 2005 contributed cash of $39,966 and received receipts for charitable donations totalling $164,425 ($39,966 + $124,459). Each individual received charitable donation receipts in excess of 300% of the amount of the cash contributed.

[12] In reassessing Mr. Morrison for 2004, he was not allowed any charitable donation tax credit for either the cash contributed or the WHOEM Units. This result did not change following the filing of a notice of objection. For 2005, initially neither Mr. Morrison nor Mr. Eisbrenner was allowed any charitable donation tax credit in relation to the CHT Program. Following the filing of notices of objection, they were each reassessed for 2005 to allow a claim for a charitable donation tax credit based on the amount of the cash contributed. The denial of the charitable donation tax credit based on the WHOEM Units was not affected by the reassessments for 2005.

[13] Mr. Morrison appealed to the Tax Court in relation to the determination of the fair market value of the pharmaceuticals that he donated in 2003 under the CGI Program and the denial of his charitable donation tax credit based on his cash contributed and the WHOEM Units under the CHT Program for 2004. Both Mr. Morrison and Mr. Eisbrenner appealed to the Tax Court in relation to the denial of the receipts based on the WHOEM Units under the CHT Program for 2005.

II. Decision of the Tax Court

[14] The Tax Court Judge found that Mr. Morrison had not established that the fair market value of the pharmaceuticals that he contributed under the CGI Program was a greater amount than the amount that had been determined by the Minister. Mr. Morrison did not lead any expert evidence in relation to the determination of this fair market value but rather relied on the valuation as prepared by the promoters of the CGI Program. The Crown called Professor Berndt, who had prepared an expert report on the valuation of the pharmaceuticals. His conclusion was that the valuation prepared by the promoters of the CGI Program substantially overstated the value of the pharmaceuticals. The Tax Court Judge accepted the evidence of the Crown's expert and dismissed Mr. Morrison's appeal.

[15] With respect to the CHT Program, the Tax Court Judge found that Mr. Morrison and Mr. Eisbrenner had not established that they had acquired the pharmaceuticals that were purportedly gifted to the in-kind charities. In particular, in paragraph 152 of his reasons, he described the certificates for the WHOEM Units as:

> …simply worthless pieces of paper used by WHI to give participants in the CHT Program the impression that pharmaceuticals passed from CHT to the participants and from the participants to the in-kind charities when in fact the pharmaceuticals associated with the CHT Program were sold by the manufacturers of those pharmaceuticals directly to offshore entities, were accumulated in a warehouse in Holland and were then distributed to charities in various countries to provide a veneer of charitable activity which WHI (through CDL) could use to market the CHT Program.

[16] He therefore upheld the reassessments denying the charitable donation tax credit based on the WHOEM Units.

[17] The Tax Court Judge allowed Mr. Morrison's appeal with respect to his 2004 taxation year for the cash contribution that he had made. Mr. Morrison was, therefore, entitled to a charitable donation tax credit based on the cash donation of $15,350. The Crown has not appealed that finding.

III. Issues and Standard of Review

[18] For Mr. Morrison's 2003 taxation year, his appeal is based on his allegation that the Tax Court Judge erred in determining that the fair market value of the pharmaceuticals donated in 2003 was only $1,759. This is a finding of fact and the standard of review is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[19] With respect to the appeals related to the CHT Program, the issue raised by the appellants is that the Tax Court Judge erred in finding that the certificates for the WHOEM Units were "worthless pieces of paper" and, therefore, that no pharmaceuticals were donated by either individual in 2004 or 2005. This broad issue is further refined as the issue of who had the onus of proving that these individuals acquired the pharmaceuticals. They also raise the issue of the admissibility of certain documents that were admitted by the Tax Court Judge. Mr. Morrison, in his memorandum, raised the issue of whether the Tax Court Judge made a finding in relation to an issue that had not been raised by the parties. To the extent that these issues raise a question of

law, the standard of review is correctness and to the extent that they raise a question of fact or mixed fact and law (for which there is no extricable question of law) the standard of review is palpable and overriding error (*Housen v. Nikolaisen*).

IV. Analysis

A. *Mr. Morrison's 2003 Taxation Year – the CGI Program*

[20] The first issue is related to the valuation of the pharmaceuticals under the CGI Program. The determination of the fair market value of these pharmaceuticals is a question of fact and Mr. Morrison, in this appeal, must establish that the Tax Court Judge made a palpable and overriding error.

[21] The Supreme Court of Canada adopted the following descriptions of a palpable and overriding error in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352:

> 38 It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
> > Palpable and overriding error is a highly deferential standard of review ... . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> 39 Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[22] In this appeal, Mr. Morrison did not establish that the Tax Court Judge made any error, let alone a palpable and overriding error, in finding that the fair market value of the pharmaceuticals was only $1,759. I would dismiss Mr. Morrison's appeal in relation to his 2003 taxation year.

B. *Mr. Morrison's 2004 and 2005 Taxation Years; Mr. Eisbrenner's 2005 Taxation Year – the CHT Program*

[23] The remaining issues in this appeal relate to the CHT Program and the amounts claimed by Mr. Morrison for 2004 and 2005 and Mr. Eisbrenner for 2005. The first issue raised is the question of who had the onus of proof. Mr. Eisbrenner took the lead in making submissions on this issue.

(1) Onus of Proof

[24] At the commencement of his analysis, the Tax Court Judge devoted several pages to the issue of who has the burden of proof in tax cases. The Tax Court Judge was responding to the invitation by Stratas J.A. in *Sarmadi v. The Queen*, 2017 FCA 131, [2017] D.T.C. 5081, for judges of the Tax Court to comment on the concurring reasons that I had written in *Sarmadi* in relation to the issue of the onus of proof. In *Sarmadi*, I reviewed the various cases that have discussed the onus of proof issue. I also reviewed the context of an appeal to the Tax Court. I concluded that:

> [61] In my view, a taxpayer should have the burden to prove, on a balance of probabilities, any facts that are alleged by that taxpayer in their notice of appeal and that are denied by the Crown. In most cases this should end the discussion of the onus of proof since the assumptions of fact made by the Minister in reassessing the taxpayer would generally be inconsistent with the facts pled by the taxpayer with respect to the material facts on which the reassessment was issued.
>
> [62] If there are facts that were assumed by the Minister in reassessing a taxpayer and that are not inconsistent with the facts as pled by that taxpayer, it would also seem logical to require the taxpayer to prove, on a balance of probabilities, that these facts assumed by the Minister (and which are in dispute and are not exclusively or peculiarly within the Minister's knowledge) are not correct. Requiring a taxpayer to disprove the facts assumed by the Minister in reassessing that taxpayer simply puts the onus on the person who knows (or ought to know) the facts. It also puts the onus on the person who indirectly asserted certain facts in filing their tax return that would be inconsistent with the facts assumed by the Minister in reassessing such taxpayer.
>
> [63] Once all of the evidence is presented, the Tax Court judge should then (and only then) determine whether the taxpayer has satisfied this burden. If the taxpayer has, on the balance of probabilities, disproven the particular facts assumed by the Minister, based on all of the evidence, there is no burden to shift to the Minister to disprove what the Tax Court judge has determined that the taxpayer has proven. Either the taxpayer has disproven the assumed facts or he, she or it has not.

[25] In paragraph 36 of *Sarmadi*, I had also noted that if the Minister alleges a fact that is not part of the facts that were assumed by the Minister in assessing a taxpayer or in confirming an assessment, then the Minister will have the onus of proof with respect to such facts (*Her Majesty the Queen v. Loewen*, 2004 FCA 146 at para. 11, 2004 D.T.C. 6321).

[26] *Sarmadi* did not address the onus of proof for facts justifying the assessment of a penalty under section 163 or section 163.2 of the Act (which is imposed in the Minister under subsection 163(3) of the Act). Also, *Sarmadi* did not address reassessments issued after the expiration of the normal reassessment period where the Minister has the onus of establishing the facts that would

justify such reassessment (*Vine Estate v. Canada*, 2015 FCA 125 at para. 24, [2015] 4 F.C.R. 698).

[27] Stratas J.A., in his concurring reasons in *Sarmadi* wrote:

> [69] I have read Justice Webb's reasons on the issue of the burden of proof in tax appeals. I commend him on his exploration of this issue.
>
> [70] The issue has been considered before in this Court. My colleague's reasons somewhat revisit this issue and articulate it somewhat differently. I find much of what my colleague says to be thoughtful, illuminating and attractive.
>
> [71] However, at this time and in these circumstances, I decline to express a definitive opinion on the correctness of his views on this fundamental point. The insights of commentators may be helpful. Judges in the Tax Court may also have useful insights. As well, in a future appeal in this Court where the issue matters, other counsel may also be able to assist.

[28] Woods J.A. agreed with the comments of Stratas J.A. (paragraph 16 of her reasons).

[29] While the Tax Court Judge in this case acknowledged that he was bound by the decision of this Court in *House v. The Queen*, 2011 FCA 234, [2011] D.T.C. 5142, his analysis of the burden of proof appears to generally support the findings that I had made in *Sarmadi*.

[30] The onus of proof issue in this case is important because of the very limited evidence in relation to the ownership of the pharmaceuticals and how the CH Trusts acquired the pharmaceuticals which they purported to convey to Mr. Eisbrenner and Mr. Morrison. As noted by the Tax Court Judge, none of the witnesses at the Tax Court hearing could explain exactly how the CHT Program worked. If the CH Trusts did not acquire the pharmaceuticals, they could

not convey these to Mr. Eisbrenner or Mr. Morrison. In turn, if they did not acquire the pharmaceuticals, they did not donate anything to the in-kind charities.

[31] The essential finding of the Tax Court Judge in this case is that neither Mr. Eisbrenner nor Mr. Morrison owned the pharmaceuticals in question and, therefore, they did not donate anything to the in-kind charities. While the Minister made a number of assumptions of fact that would not be within the knowledge of Mr. Eisbrenner or Mr. Morrison, such as the number of participants in the CHT Program and the total amount of donations in issue for all of the participants, these assumptions are not relevant to the issue of whether Mr. Eisbrenner and Mr. Morrison owned the pharmaceuticals in question. The issue in this appeal is who had the onus of proving that they owned these pharmaceuticals.

[32] In my view, this case illustrates a point that I had raised in *Sarmadi* in relation to the relevant facts as pled by an appellant in an appeal to the Tax Court. It raises the issue of what role does the notice of appeal play in a Tax Court hearing? Focusing solely on the assumptions made by the Minister in a reply filed in a Tax Court hearing disregards the material facts that a taxpayer had pled in their notice of appeal or that the taxpayer would need to rely on to support the tax return that they had filed.

[33] Under the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (TCC General Rules), "[e]very notice of appeal shall be in Form 21(1)(a), (d), (e) or (f)" (Rule 48) (emphasis added). Form 21(1)(a) is the general form for an appeal from a reassessment and it provides that the notice of appeal is to include "the material facts relied on". The failure to describe material

facts in a notice of appeal could result in that appeal being struck under Rule 53 of the TCC General Rules for failing to disclose reasonable grounds for the appeal.

[34] Under Rule 49 of the TCC General Rules, the Crown in filing its reply is to state, among other matters, "(a) the facts that are admitted, (b) the facts that are denied, (c) the facts of which the respondent has no knowledge and puts in issue, (d) the findings or assumptions of fact made by the Minister when making the assessment…".

[35] As I had noted in *Sarmadi*, the rules related to pleadings are different for informal procedure proceedings in the Tax Court. The informal procedure generally applies to appeals to the Tax Court where the amount (excluding interest) in dispute is $25,000 or less and the taxpayer elects for this procedure (section 18 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2). Rule 4 of the *Tax Court of Canada Rules (Informal Procedure)*, SOR/90-688b, does not require the taxpayer to use the form that is set out in Schedule 4: "[a]n appeal referred to in section 3 shall be instituted by filing a notice of appeal, which may be in the form set out in Schedule 4" (emphasis added). Given the informal nature of such proceedings, in many informal procedure cases the only place where any indication of what facts are in dispute can be found is in the reply filed by the Crown.

[36] It is important to note that when the Minister reassesses a person who has filed a tax return (or does not assess the tax return as filed), it is because the Minister does not agree with an amount (or amounts) that the person has included in their tax return or the Minister has determined that the taxpayer omitted an amount that should have been included in income.

In appealing such reassessment (or assessment), the absence in a notice of appeal of material facts that would be required to support the tax return as filed should not result in any burden being shifted to the Minister in relation to such material facts (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486 at pp. 480-490, [1948] 4 D.L.R. 321).

[37] In this case, the material fact that Mr. Eisbrenner owned the pharmaceuticals in question was included in his notice of appeal to the Tax Court as part of his "Statement of Relevant Facts in Support of the Appeal":

> 5. The second donation was made in kind. Specifically, in 2005, I acquired and subsequently donated certain pharmaceuticals (the "Pharmaceuticals") to a Canadian registered charity (the "Pharmaceuticals Donee")….
>
> 6. I was the legal and beneficial owner of the Pharmaceuticals immediately prior to the gift by me of the Pharmaceuticals to the Pharmaceuticals Donee….

[38] Similarly, Mr. Morrison in his notices of appeal to the Tax Court in relation to the 2004 and 2005 taxation years also included these same pleadings. This statement that they each owned the pharmaceuticals that they allegedly donated to the in-kind charities would also be implicit in the statement that they made in filing their tax returns for 2004 and 2005. In determining his tax credits, Mr. Morrison included a charitable donation amount of $41,109 for 2004 and a charitable donation amount of $37,815 for 2005 that were based on donating certain pharmaceuticals to the in-kind charity. In determining his tax credits for 2005, Mr. Eisbrenner included a charitable donation amount of $124,459 that was based on donating certain pharmaceuticals to the in-kind charity. Since these individuals claimed these amounts as charitable donations, they should be able to establish that they were entitled to include these

amounts. Taxpayers should not be encouraged to claim amounts on their tax returns without knowing or wanting to know if the amount is properly claimed.

[39] In the reply to Mr. Eisbrenner's notice of appeal at the Tax Court, the Crown stated:

> 6. With respect to paragraph 5 of the Notice of Appeal, he states that the in kind donations were not charitable gifts within the meaning of subsection 118.1 of the *Act*. He has no knowledge and puts in issue the remaining allegations of fact in paragraph 5.
>
> 7. With respect to paragraph 6 of the Notice of Appeal, he denies that the appellant was the legal and beneficial owner of the pharmaceuticals. …

[40] The Crown, in its replies to Mr. Morrison's notices of appeal for 2004 and 2005, stated that the Crown had no knowledge of and put in issue the facts as alleged in the paragraphs of Mr. Morrison's notices of appeal that corresponded to paragraphs 5 and 6 in Mr. Eisbrenner's notice of appeal.

[41] Therefore, the Crown either denied the allegations of fact related to the ownership of the pharmaceuticals or stated that it had no knowledge of this fact and was putting this fact in issue.

[42] Mr. Morrison, in his memorandum, raises the issue of whether the assumptions related to the ownership of pharmaceuticals made by the Minister in the replies filed with respect to his notices of appeal raise questions of mixed fact and law. There is no indication in either of his notices of appeal to the Tax Court or in the replies filed by the Crown that either party was raising any question of law with respect to the determination of the ownership of the pharmaceuticals. Rather, in his notices of appeal, Mr. Morrison simply states, as a fact, that he

was the legal and beneficial owner of the pharmaceuticals. In my view, as discussed further below, since Mr. Morrison pled that he was the legal and beneficial owner of the pharmaceuticals, to the extent that this would require the establishment of any facts, the onus was on Mr. Morrison to establish the underlying facts to support his allegation that he owned the pharmaceuticals.

[43] In paragraph 28(e) of his memorandum of fact and law, Mr. Eisbrenner noted "the taxpayer and the Crown each bear the burden of proving the respective facts that they alleged (mid-level, low-level)". The reference to mid-level and low-level is to paragraph 25 of his memorandum where mid-level is "an issue to be determined" and low-level is "the existence or non-existence of a fact". Whether Mr. Eisbrenner had acquired title to the pharmaceuticals and transferred title to a registered charity would be questions of fact and, therefore, would be "low-level". There is no allegation by Mr. Eisbrenner that there was any question of law in relation to the ownership of the pharmaceuticals. His entire memorandum is written on the basis that this was only a question of fact.

[44] Despite having made this statement in his memorandum, when questioned during the hearing about the onus of proof related to the facts as pled by Mr. Eisbrenner, counsel for Mr. Eisbrenner responded that what he had pled in his notice of appeal should not be taken into account. In effect, his submission was that the notice of appeal is to be disregarded and the only document to be considered in a Tax Court appeal is the reply filed by the Crown.

[45] Further, in Mr. Eisbrenner's submission, he did not have to establish that he owned the pharmaceuticals on a balance of probabilities. Rather, he only had to raise a *prima facie* case, which he submitted was a lower standard than the balance of probabilities. Therefore, in Mr. Eisbrenner's submission, even though Mr. Eisbrenner had pled the fact that he owned the pharmaceuticals, he was not required to prove this fact on a balance of probabilities.

[46] Justice McIntyre on behalf of the Supreme Court of Canada stated in *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at page 558, 1985 CanLII 18 (SCC):

> To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy — it will vary with particular cases — and it may not apply to one party on all issues in the case; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to insure a clear result in any judicial proceeding, to have available as a 'tie-breaker' the concept of the onus of proof. I agree then with the Board of Inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. <u>He who alleges must prove</u>….
>
> (emphasis added)

[47] As noted by the Supreme Court of Canada, the well-settled rule in civil cases is that the person who alleges must prove. However, despite acknowledging this principle in his memorandum, Mr. Eisbrenner effectively submitted that it is not binding on him. Nor did Mr. Eisbrenner address how his position that he only had to raise a *prima facie* case that he owned the pharmaceuticals on a lower standard than balance of probabilities was consistent with

the conclusion of the Supreme Court of Canada in *F.H. v. McDougall,* 2008 SCC 53, [2008] 3 S.C.R. 41:

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[48] In this case, if, as submitted by Mr. Eisbrenner, the facts that he has pled in his notice of appeal are irrelevant and only the assumptions of fact made by the Minister are relevant, why would the TCC General Rules require an appellant to identify the material facts that *the appellant will be relying on*? The reference to the requirement in Form 21(1)(a) of the TCC General Rules that an appellant in a notice of appeal is to "[r]elate the material facts relied on", supports a finding that in a Tax Court hearing, the general principle of "he who alleges must prove" is still applicable. It is only logical that an appellant, who is relying on certain material facts, should have the onus of proving such facts. Since both Mr. Eisbrenner and Mr. Morrison pled that they owned the pharmaceuticals, they should have the onus of proving this on the civil standard of proof — a balance of probabilities.

[49] This result should not change simply because in the reply to Mr. Eisbrenner's notice of appeal the Crown noted in paragraph 18(eee) that one of the assumptions that was made by the Minister was that "the appellant never took possession of, nor acquired title to, any Pharmaceuticals". The making of this assumption does not alter the fact that Mr. Eisbrenner had pled that he owned the pharmaceuticals and that this was a material fact required to establish the amount that he claimed as a charitable donation in his tax return related to these pharmaceuticals.

[50] It also should be noted that, in paragraph 13 of his memorandum, Mr. Eisbrenner stated, "Mr. Eisbrenner had direct knowledge of the Minister's assumptions of fact as set out in subparagraphs 18(p), (qq), (yy) to (ccc), and (eee) to (iii) of the Crown's reply". Mr. Eisbrenner, therefore, acknowledged that he had direct knowledge of whether he had acquired title to the pharmaceuticals. However, despite Mr. Eisbrenner's statement that he had direct knowledge of whether he owned the pharmaceuticals and that he had pled this fact in his notice of appeal, in his submissions, he did not have to prove this fact on a balance of probabilities. I do not agree with this position.

[51] The Tax Court Judge in his reasons also noted that the Minister made inconsistent assumptions in the replies filed in response to Mr. Eisbrenner's and Mr. Morrison's notices of appeal. However, the Crown was consistent in denying or putting into issue the fact that these individuals owned the particular pharmaceuticals. The inconsistency in the assumptions is implicit in the assumptions made by the Minister that the fair market value of the pharmaceuticals that were transferred was less than the amount stated by the appellants. Since, in my view, the appellants had the onus of proof with respect to the ownership of the pharmaceuticals as a result of having pled this in their notices of appeal, any inconsistency in the assumptions of the Minister is not relevant with respect to the determination of who had the onus of proof.

[52] In my view, because Mr. Eisbrenner pled that he had acquired ownership of certain pharmaceuticals and transferred these pharmaceuticals to the in-kind charity, he had the onus of proving that he owned these particular pharmaceuticals on a balance of probabilities. Likewise,

because Mr. Morrison pled that he had acquired ownership of certain pharmaceuticals and transferred these pharmaceuticals to the in-kind charity, he also had the onus of proving that he owned these particular pharmaceuticals on a balance of probabilities. Unless they owned these pharmaceuticals, they did not have any property to donate to the in-kind charities.

(2) Admissibility of Invoices and Bank Statements

[53] The second alleged error is in relation to the admission into evidence of certain invoices and bank statements. At the Tax Court hearing, counsel for Mr. Eisbrenner objected to the admission of various invoices from pharmaceutical manufacturing companies based in Italy, India, Germany and France into evidence. An objection was also made in relation to the admissibility of certain bank statements from the Bank of Cyprus.

[54] In paragraph 55 of his reasons, the Tax Court Judge described the invoices:

> 55 Mr. Monahan testified that he was able to identify pharmaceuticals associated with the CHT Program based on materials provided by counsel for WHI cross-referenced against other information obtained through the course of the CRA audit of the CHT Program. Mr. Monahan used this information to identify manufacturers and issue requests to those manufacturers for copies of invoices for the pharmaceuticals identified with the CHT Program. In response, Mr. Monahan received copies of invoices from the manufacturers (the "Invoices"). Mr. Monahan testified that based on the Invoices the only purchasers of the pharmaceuticals that the CRA identified with the CHT Program were MedPharm, Amstelfarma (the owner of the warehouse in Holland) and PK Bonapharm. In the course of the audit, the CRA did not find any evidence that the pharmaceuticals identified with the CHT Program by WHI were purchased by Crunin or KP Innovispharm….
>
> (footnote references omitted)

[55] Mr. Monahan was the lead auditor with the Canada Revenue Agency in relation to the claims of the participants in the CHT Program. Crunin Investments (Crunin) was identified as the settlor of the CH Trusts. KP Innovispharm was identified in the "discharge" stamp affixed to the certificates for the WHOEM Units and, as noted above, was identified as the holder of the liens.

[56] The bank statements from the Bank of Cyprus were obtained following a request made by the Canadian Competent Authority to the Cyprus Competent Authority. The invoices and bank statements relate to the issue of whether any pharmaceuticals were acquired by Crunin or KP Innovispharm and whether any funds were transferred from the Cyprus bank account of KP Innovispharm to the pharmaceutical manufacturing companies to pay for the pharmaceuticals.

[57] During the hearing, the Tax Court Judge provided detailed reasons in support of his conclusion that the invoices and the bank statements were admissible into evidence as proof of the truth of their contents under the principled exception to the hearsay rule. The Tax Court Judge referred to the decision of Cromwell, J.A. (as he then was) writing on behalf of the Nova Scotia Court of Appeal in *R. v. Wilcox*, 2001 NSCA 45, 192 N.S.R. (2d) 159 and to the decision of the British Columbia Court of Appeal in *R. v. Lemay*, 2004 BCCA 604, 247 D.L.R. (4th) 470.

[58] Although the transcript of the decision of the Tax Court Judge in relation to the admissibility of these documents covers approximately 14 pages, there is very little reference to these reasons in the memorandum of Mr. Eisbrenner. Mr. Morrison, in his memorandum, simply relies on the submissions of Mr. Eisbrenner.

[59] The submissions of Mr. Eisbrenner in relation to these documents (which he describes as the "Contested Documents") commences at paragraph 63 of his memorandum. He notes that they were found to be admissible under the principled exception to the hearsay rule. The first objection that he raises relates to the authentication of the documents in question. However, Mr. Eisbrenner does not indicate on what basis he is alleging that the invoices were not invoices that came from the pharmaceutical manufacturing companies or that the bank statements were not statements that came from the Bank of Cyprus.

[60] The CRA auditor testified with respect to the process that he followed to obtain these documents and this was considered by the Tax Court Judge in his ruling. The question of whether the documents were invoices from the various pharmaceutical manufacturing companies and bank statements from the Bank of Cyprus are questions of fact. Mr. Eisbrenner would need to show a palpable and overriding error made by the Tax Court Judge. No such palpable or overriding error is even alleged in the memorandum.

[61] Mr. Eisbrenner notes, in paragraph 68 of his memorandum: "[t]he trial judge found that the Contested Documents were necessary on the flawed premise that no one would likely have first-hand knowledge of the detailed information recorded on the documents, given that they were prepared so long ago". Although Mr. Eisbrenner has referred to this as a "flawed premise" he does not indicate why this was flawed. As noted by the Tax Court Judge in his reasons, the invoices from the pharmaceutical manufacturing companies were issued approximately 12 to 14 years prior to the time of the hearing of the appeal. It is far from clear why Mr. Eisbrenner would suggest that any person would have detailed knowledge of particular invoices issued

approximately 12 to 14 years earlier, even if the person who actually issued the invoices could be found. This again is a question of fact. Mr. Eisbrenner has not established that the Tax Court Judge made any palpable and overriding error in making this determination that the documents were necessary.

[62] Mr. Eisbrenner in paragraph 68 of his memorandum also states that the Tax Court Judge "found that they were reliable because he presumed that the documents were the kind of documents prepared in the ordinary course of business". It is far from clear why an invoice would not be a document prepared in the ordinary course of business of a pharmaceutical manufacturing company or why a bank statement would not be a document prepared in the ordinary course of business of a bank.

[63] In an appeal, an appellant is to identify what error or errors are alleged to have been made by the Tax Court Judge and to explain why, in the appellant's view, an error was made in sufficient detail to allow this Court to determine if an error was made. Bald assertions that the Tax Court Judge erred are not sufficient. Mr. Eisbrenner has failed to identify why, in his view, these documents were not necessary or reliable. There is simply no basis for this Court to intervene in the findings of the Tax Court Judge in relation to the necessity or reliability of the documents.

[64] The fact that the documents do not support Mr. Eisbrenner's claim that he owned the pharmaceuticals is not a sufficient basis to deny the admission of the documents on the basis that he might suffer undue prejudice.

[65] Therefore, in my view, Mr. Eisbrenner has not established any basis on which we could interfere with the finding of the Tax Court Judge that the invoices and the bank statements were admissible.

(3) Additional Argument of Mr. Morrison

[66] Mr. Morrison also raises an additional issue in his notice of appeal with respect to whether the Tax Court Judge made a finding in relation to an issue that had not been raised by the parties. This relates to the Tax Court Judge's finding that the certificates were "worthless pieces of paper" and that the individuals did not have any pharmaceuticals to gift to the registered charity. However, since Mr. Morrison in his notice of appeal had pled that he owned the pharmaceuticals, the ownership of the pharmaceuticals was an issue that was before the Tax Court. There is no merit to his argument in his memorandum (identified as Issue B) that "the Tax Court Judge [made] an error of law by rendering a conclusion based on certain matters or principles which were not pleaded and/or argued by the parties".

(4) Certificates for the WHOEM Units

[67] The only evidence presented by Mr. Morrison and Mr. Eisbrenner in support of their claim that they had acquired ownership of the pharmaceuticals was the certificates that were

issued by one of the CH Trusts. As noted above, the Tax Court Judge found these to be "worthless pieces of paper". These certificates indicate that the particular individual in the CHT Program was entitled to receive a distribution of a certain number of WHOEM Units. This document also certifies that the particular individual is the owner of the WHOEM units that are set out in the attached schedule. The attached schedule lists various pharmaceuticals and an amount identified as the "pharmaceutical value" of the drugs and the amount of the encumbrance.

[68] On the back of the certificates are two endorsements. Mr. Eisbrenner had two certificates – one for 78 WHOEM Units and the other for 66 WHOEM Units. The first endorsement on the back of each certificate is identical and reads as follows:

> I hereby transfer, give, assign, convey, and deliver any and all title to my Units listed herein, to Choson Kallah Fund of Toronto unconditionally and absolutely. For this purpose, I further state that it is my intention that such rights vest absolutely in the aforesaid Units as of the date of this deed of transfer, subject only to a lien against the title of said Units.
>
> Delivery of a copy of this deed of trust shall serve as good and sufficient authority to complete the transfer and conveyance of the Units to the above noted on my behalf.

[69] Following this description, there is a place for the date, the signature of transferor, and the name of transferee. The Choson Kallah Fund of Toronto is identified as the transferee. There is an illegible signature in the space provided for the transferor to sign.

[70] Below this endorsement on each certificate is a second endorsement which states:

> I hereby transfer, give, assign, convey, and deliver any and all title to my Units listed herein, to Escarpment Biosphere Foundation unconditionally and absolutely. For this purpose, I further state that it is my intention that such rights vest absolutely in the aforesaid Units as of the date of this deed of transfer, subject only to a lien against the title of said Units.
>
> Delivery of a copy of this deed of trust shall serve as good and sufficient authority to complete the transfer and conveyance of the Units to the above noted on my behalf.

[71] Following this description, there is a place for the date, the signature of transferor, and the name of transferee. The Escarpment Biosphere Foundation is identified as the transferee. However, there is nothing, other than the pronoun "I", to identify the transferor. There is a signature of an individual in the space for the signature of the transferor (which appears to be signed by a different person than the one who signed the first endorsement) but there is nothing to indicate that this person is not signing on their own behalf. Counsel for Mr. Eisbrenner stated during the hearing that the second endorsement was for the transfer of the WHOEM Units by the Choson Kallah Fund of Toronto to Escarpment Biosphere Foundation. However, there is nothing in the endorsement itself that indicates that it purports to be anything other than a transfer by the particular individual who signed this endorsement.

[72] In my view, this raises the question of whether these certificates were intended to establish any ownership in the significant quantity of the pharmaceuticals that are listed in the schedule. According to the schedules for Mr. Eisbrenner, pharmaceuticals with a "pharmaceutical value" of $80,516 were transferred in one certificate and $66,984 in another. According to Mr. Eisbrenner, these pharmaceuticals were to have been transferred by him to the

in-kind charity and then by the in-kind charity to the distributing charity. However, the wording of the second endorsement on the back of the certificates falls short of completing this second conveyance.

[73] For Mr. Morrison, the certificate issued for 2004 has the same endorsements, except the transferee in the first endorsement is Meoroth and the transferee in the second endorsement is Canadian Physicians for Aid Relief. It does not appear that the certificate for Mr. Morrison for 2005 is included in the record. The 2004 certificate for Mr. Morrison also has the same problem with the second endorsement. There is nothing in this endorsement to indicate that the person signing as the transferor is doing so on behalf of any other person as the endorsement also commences with "I" and there is nothing to indicate that the person who signed as the transferor was not doing so on their own behalf.

[74] As a result, in my view, Mr. Eisbrenner and Mr. Morrison have failed to establish that the Tax Court Judge made a palpable and overriding error in finding that the certificates were "worthless pieces of paper" and that they did not own the pharmaceuticals that they purported to donate to the in-kind charities.

V. Conclusion

[75] As a result, I would dismiss the appeals.

[76] Following the hearing, the parties submitted a letter indicating that they had agreed that, if the Crown was successful in this appeal, the Crown would be entitled to costs fixed in the total amount of $4,000. I would, therefore, award $2,000 in costs to the Crown for each appeal ($4,000 in total).

"Wyman W. Webb"
J.A.

“I agree
Donald J. Rennie J.A.”

“I agree
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM THE JUDGMENTS OF THE TAX COURT OF CANADA DATED NOVEMBER 7, 2018, DOCKET NOS. 2015-858(IT)G for A-398-18 and 2008-2759(IT)G), 2008-2779(IT)G, and 2014-3231(IT)G for A-404-18

DOCKET:	A-398-18
STYLE OF CAUSE:	DIETER EISBRENNER v. HER MAJESTY THE QUEEN
AND DOCKET:	A-404-18
STYLE OF CAUSE:	V. ROSS MORRISON v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 3, 2020
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RENNIE J.A. MACTAVISH J.A.
DATED:	MAY 20, 2020

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