Federal Court of Appeal | Cour d'appel fédérale

Date: 20220607

Docket: A-247-20

Citation: 2022 FCA 106

CORAM: **LASKIN J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DANIEL RATTAI

Respondent

Heard by online video conference hosted by the Registry, on March 7, 2022.

Judgment delivered at Ottawa, Ontario, on June 7, 2022.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20220607

Docket: A-247-20

Citation: 2022 FCA 106

CORAM: **LASKIN J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DANIEL RATTAI

Respondent

REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] DeMara Consulting Inc. (DeMara) promoted a program to clients (called members) under which DeMara prepared and filed income tax returns for members and their spouses. To become members, individuals were required to complete a confidentiality and non-disclosure agreement and to provide DeMara with detailed personal information including about personal living expenses and personal debt/financing obligations. DeMara used this information to prepare T5 and T5008 forms and then prepared members' returns deducting the personal expenses as

business losses and treating them as capital losses. DeMara also required members to appoint DeMara as their authorized representative with the Canada Revenue Agency (CRA).

[2] Daniel Rattai became a member and engaged DeMara to prepare 2010 tax returns for him and his then spouse. The returns claimed that the Rattais incurred significant losses from a business and significant capital losses from the disposition of securities. In addition, because the losses exceeded their 2010 income, DeMara filed loss carrybacks for each of the Rattais to claim the excess losses in other taxation years. However, the Rattais did not carry on a business and did not incur any capital losses.

[3] The Minister assessed the Rattais' returns to disallow the claimed losses and impose penalties under subsection 163(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). That provision renders liable to a penalty a person who "…knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return". The burden of establishing the facts justifying the imposition of penalties is on the Minister.

[4] The Rattais appealed the assessments of penalties to the Tax Court of Canada and the two appeals were heard on common evidence.

[5] The Tax Court concluded that Ms. Rattai's return contained a false statement or omission (a misrepresentation) but that the appellant did not establish that Ms. Rattai made the misrepresentation knowingly or in circumstances amounting to gross negligence. In contrast, in

the case of Mr. Rattai, the Tax Court concluded that the appellant established gross negligence, but not that Mr. Rattai's return contained a misrepresentation. Accordingly, the Tax Court (*per* Lyons, J., 2020 TCC 55) allowed both appeals and vacated the subsection 163(2) penalties.

[6] Before this Court, the appellant submits that the Tax Court erred in failing to find that Mr. Rattai's 2010 return contained a misrepresentation. In particular, says the appellant, the Tax Court drew that conclusion solely because the appellant failed to produce a true copy of Mr. Rattai's 2010 return. However, says the appellant, there was no dispute that Mr. Rattai's return contained a misrepresentation because Mr. Rattai admitted it did both in his notice of appeal and again before the Tax Court.

[7] For the reasons that follow, I would allow the appeal.

[8] In this appeal, the appellate standard of review applies. Questions of law are to be determined on the correctness standard, and questions of fact and questions of mixed fact and law (excluding extricable questions of law) are to be determined on the basis of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[9] The appellant does not dispute that it bore the burden of establishing that Mr. Rattai's return contained a misrepresentation but says that burden was met because Mr. Rattai admitted that DeMara filed his return with fictitious losses. The only condition left for the appellant to establish was that that misrepresentation was made knowingly or in circumstances amounting to gross negligence—which the Tax Court concluded the appellant did in the case of Mr. Rattai.

Thus, says the appellant, given Mr. Rattai's admissions, the evidentiary record at trial, and the Tax Court's factual findings, the Tax Court should have dismissed his appeal.

[10] The Tax Court concluded that the appellant established that Ms. Rattai's return had a misrepresentation, but had not established that Mr. Rattai's return did. The distinction rested on the fact that the 2010 return in evidence for Mr. Rattai was incomplete; the one for Ms. Rattai was not.

[11] In the following summary of the evidence of Mr. Larkin, the CRA appeals officer who reviewed the Rattais' returns following their notices of objection, the Tax Court identifies what it terms a "fundamental flaw" in the appellant's case:

> [81] It emerged during cross-examination of Mr. Larkin that the copy of the Return in Mr. Rattai's name that had been presented to prove the false statements (and previously thought to have been a copy of the Return filed by DeMara) was incomplete and not actually a copy of the Return filed by DeMara. When asked about missing pages, he said he did not recall if the two pages were missing from the Return when he reviewed the file assigned to him nor did he recall seeing any notes on the auditors file about the missing pages. When asked if he agreed that there is no way of knowing whether the missing pages were filed originally, he disagreed and said that the printouts contain numbers in the fields, which means the missing pages would have been filed as part of the Return. He then said there is no way of verifying whether the numbers were in the Return as filed by DeMara. He described one of the missing pages as providing all forms of income. I find that the fundamental flaw is that the Return is incomplete and is not a true copy of the Return filed by DeMara and cannot be relied on by the respondent in support of her case as it places into question what was reported by DeMara. [Emphasis added.]

[12] The appellant argues that it did not need the return to establish the misrepresentation and there was no dispute about what was reported by DeMara in Mr. Rattai's return. Thus, the appellant says that, even if the copy of Mr. Rattai's return had been inadmissible, the

misrepresentation was established. So, says the appellant, the Tax Court's decision must mean the appellant is required to produce a true copy of the complete return to establish the misrepresentation. This, says the appellant, is an error of law because while the appellant bears the burden of establishing the relevant facts on a balance of probabilities, neither the Act nor the jurisprudence dictates that a copy of the return is required to meet that burden.

[13] I agree.

[14] In *Minister of National Revenue v. Taylor*, [1961] C.T.C. 211, 61 DTC 1139 (Ex. Ct.) Justice Cameron stated, at page 1141:

> After giving the matter the most careful consideration, I have come to the conclusion that in every appeal … regarding a re-assessment …. which is based on fraud or misrepresentation, the burden of proof lies on the Minister to first establish to the satisfaction of the Court that the taxpayer … has "made any misrepresentation…." unless the taxpayer in the pleadings or in his Notice of Appeal…or at the hearing of the appeal has admitted such misrepresentation or fraud. [Emphasis added.]

[15] In this case, Mr. Rattai admitted the misrepresentation both in his notice of appeal and before the Tax Court at the hearing of the appeal.

[16] The *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a (the Rules), require an appellant to state the material facts relied on. Under the heading "Material Facts", Mr. Rattai's Fresh Notice of Appeal states, at paragraph 17:

> In or around March 2013, DeMara filed [Mr. Rattai's] tax return for his 2010 taxation year (the "Return"). In the Return, DeMara claimed a fictitious business loss in the amount of $482,258.36 and a fictitious capital loss in the amount of $481,858. In addition, DeMara filed a request for loss carryback for the Appellant's 2007, 2008 and 2009 taxation years (the "Request").

[17] The Rules also require the Minister to state in its reply the facts that are admitted. Here, the Minister did exactly that: in its Fresh Reply to Mr. Rattai's Fresh Notice of Appeal, the Minister admitted the allegation of fact contained in paragraph 17.

[18] While the statement in the Fresh Notice of Appeal was made well before the Tax Court hearing, it was expressly affirmed at the Tax Court hearing. On cross-examination of Mr. Rattai, appellant's counsel read paragraph 17 to Mr. Rattai and sought to ask him questions about it. His counsel objected and, in the course of addressing that objection, repeated an earlier statement before the Tax Court that anything in the Fresh Notice of Appeal should be considered correct. On that basis, appellant's counsel moved on.

[19] Therefore, there was no dispute between the parties about these facts: in or around March 2013, DeMara filed Mr. Rattai's tax return for his 2010 taxation year and in that return claimed a $482,258 fictitious business loss and a $481,858 fictitious capital loss. To put it bluntly, the parties agreed that Mr. Rattai's 2010 return filed by DeMara contained false statements—and so a misrepresentation.

[20] The Tax Court is not bound by an admission that is shown, through properly tendered evidence, to be contrary to the facts: *Hammill v. Canada*, 2005 FCA 252, 257 D.L.R. (4th) 1 (leave to appeal to the S.C.C. refused 31152 (January 18, 2007)); *Fiducie Alex Trust v. The Queen*, 2014 FCA 123. However, I see no contrary facts found by the Tax Court. While the copy of Mr. Rattai's return before the Court may not have been complete, it is not contrary to the admission at paragraph 17; rather, it is entirely consistent with it.

[21] Similarly, the following findings of fact made by the Tax Court are consistent with Mr. Rattai's admission and the Tax Court's finding that he participated in, assented to or acquiesced in the misrepresentation:

(i) The Rattais hired DeMara and authorized it as their tax representative [Reasons at paras. 18, 27, 88].

(ii) DeMara sent the returns to the CRA as the Rattais' authorized representative [Reasons at para. 30].

(iii) The Rattais admitted they never operated a business or disposed of securities and incurred no losses [Reasons at para. 39].

(iv) In March 2013, Mr. Rattai received an email from DeMara containing a 2010 Tax Return Summary and a Request for Loss Carryback prepared by DeMara for each of the Rattais [Reasons at para. 42].

(v) The attachments to that email contain DeMara's proposed filings as reflected in the returns [Reasons at para. 42].

(vi) The 2010 Tax Summary prepared by DeMara for Mr. Rattai, and attached to the email, shows a net business loss of $482,258.36 [Reasons at para. 43]. (I observe that this amount matches perfectly the amount in Mr. Rattai's admission.)

(vii) The Request for Loss Carryback for Mr. Rattai attached to the email is virtually identical to the one included in the copy of Mr. Rattai's return: it carries the same date and time of printing [Reasons at para. 46].

(viii) DeMara issued an invoice to the Rattais for the preparation and filing the returns on the same day as it sent that email [Reasons at para. 47].

(ix) Payment of the invoice signalled the Rattais' authorization to DeMara as their representative [Reasons at para. 90].

(x) Payment of the invoice also provided the Rattais' approval and consent to the proposed filings by DeMara of the returns reflected and mirrored in the 2013 email and attachments [Reasons at para. 90].

(xi) After payment of the invoice, DeMara filed the returns as agreed between DeMara and the Rattais [Reasons at para. 90].

(xii) The reported losses were manifestly false [Reasons at para. 87].

(xiii) T1 Adjustments filed by another representative on behalf of the Rattais following the assessments under appeal reaffirmed and reiterated the existence of false statements (losses) reported by DeMara in the returns [Reasons at para. 57].

[22] The Tax Court said the following of relevance to the missing pages:

> [82] I note that the missing page provides totals for each type of income which is then aggregated as the total income. Linked to each type of income are typically other documents included in the tax return. For example, net business income would have been reported on line 135 of one of the missing pages and is reflected (in more detail) on the Statement [of Business or Professional Activities]. These usually reconcile but, given the number reported is incapable of verification without the missing page, that presents a major difficulty for the respondent in being able to prove the first element of subsection 163(2).
>
> [83] The inability to verify reported income on one of the missing pages provides little comfort even where, as here, the Statement [of Business or Professional Activities] is also included in the Return and provides information about the Losses. Also, while the appellants made an admission in their pleadings regarding DeMara having filed the Losses, they also allege they were not aware of nor involved in the preparation of the Returns nor recognize these and first saw same during the discovery process. Was the admission premised on the Return with or without the missing pages or something else? Given the nature of the debate (what was reported in the Return by DeMara), a true copy of the Return that DeMara filed needs to be produced, especially where penalties might attach and is quantified based on the number reported. [Emphasis added.]

[23] The Tax Court's analysis concerning the missing pages in Mr. Rattai's return both fails to consider the significance of Mr. Rattai's reaffirmation of his admission before the Tax Court and suggests that, without the missing pages, the penalty cannot be quantified.

[24] Although Mr. Rattai may have seen the return only in the discovery process, that was not a basis on which to ignore it. As appellant's counsel observed, following discovery Mr. Rattai did not seek to amend his notice of appeal or withdraw his admission. Rather, he affirmed it

before the Tax Court. There was no debate about what was reported in the return filed by DeMara on behalf of Mr. Rattai—Mr. Rattai laid it out in his Fresh Notice of Appeal.

[25] The appellant also observes that while Mr. Rattai disputed that he was liable for the penalty, he did not suggest errors in the calculation of the penalty. I agree.

[26] In this case "the true copy of the Return that DeMara filed" does not need "to be produced", for purposes of calculating the penalty. Nothing suggests Mr. Rattai disputed the calculation of the penalty—his dispute was that he was liable at all. His Fresh Notice of Appeal describes the two issues to be decided as "whether [Mr. Rattai] made or participated or acquiesced in the making of a false statement in his 2010 tax return" and "whether he did so under circumstances amounting to gross negligence".

[27] In any case, his admission identifies the "number reported" exactly and so the "understatement of income", as defined in subsection 163(2.1) of the Act, on which the penalty is calculated, was known. Thus, in my view, the Tax Court erred.

[28] Accordingly, I would allow the appeal with costs in this Court and in the court below, set

aside the judgment of the Tax Court, and give the decision the Tax Court should have given, dismissing Mr. Rattai's appeal to the Tax Court.

"K.A. Siobhan Monaghan"
J.A.

"I agree
J.B. Laskin J.A."

"I agree
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE K. LYONS DATED JULY 17, 2020, NO. 2013-l603(IT)G

DOCKET:	A-247-20
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. DANIEL RATTAI
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	MARCH 7, 2022
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	LASKIN J.A. MACTAVISH J.A.
DATED:	JUNE 7, 2022

APPEARANCES:

Mary Softley	FOR THE APPELLANT
Duane R. Milot Kateryna Kozachuk	FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE APPELLANT
Milot Law Toronto, Ontario	FOR THE RESPONDENT