Docket: 2007-1561(IT)G
2007-1665(GST)G

BETWEEN:

DAVID WHITE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on September 11, 2009 at Toronto, Ontario
By: The Honourable Justice Brent Paris

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Shatru Ghan

ORDER

UPON motion by the Appellant for and Order pursuant to *Rule* 91(*c*) of the *Tax Court of Canada Rules (General Procedure)* allowing the appeals and setting aside the assessments;

AND UPON reading the materials filed;

AND UPON hearing the Appellant and counsel for the Respondent;

IT IS ORDERED that the motion is denied, without costs.

Signed at Ottawa, Canada, this 9th day of November, 2009.

"Brent Paris"

Paris J.

Citation: 2009 TCC 539
Date: 20091109
Dockets: 2007-1561(IT)G
2007-1665(GST)G

BETWEEN:

DAVID WHITE,

Appellant,

and

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Respondent.

REASONS FOR ORDER

Paris J.

[1] The Appellant is seeking an Order allowing his appeals and setting aside the income tax and goods and services tax assessments in issue. The grounds for the motion are (i) that the Respondent has failed and refused to make full and complete disclosure of all relevant documents as ordered by this Court on January 21, 2009; and (ii) that the officers of the Canada Revenue Agency have destroyed documents that were relevant to the Appellant's case.

[2] The Appellant alleges in his Notice of Motion that he has been severely prejudiced by the Respondent's continuing failure to produce relevant documents, and by the destruction of documents. He maintains that the actions of the Respondent and the officers of the CRA violate the principles of natural justice and deny him procedural fairness.

[3] The Appellant has been assessed under section 227.1 of the *Income Tax Act* and subsection 323(1) of the *Excise Tax Act* as a director of two corporations (Norcoat Powder Coating Ltd. and Norcoat Powder Barrie Ltd.) for income tax source deductions and GST which the corporations failed to remit. The corporations' liabilities for which the Appellant has been assessed accumulated between 1992 and 2002. The corporations went out of business in 2002, and the Appellant been unable to obtain any documents relating to the corporations' tax

liabilities because their books and records were lost, destroyed or misplaced when the corporations ceased operating.

[4] As a result, the Appellant has continuously sought copies of all communications between the Respondent and the corporations during the period in which the arrears accumulated. Prior to the commencement of these appeals, these requests were refused by the CRA, and subsequently by counsel for the Respondent who advised the Appellant to make a request for the documents under the *Access to Information Act*. At a status hearing in these appeals held on February 20, 2008, the Court directed the Respondent to provide the Appellant with the documents he was seeking. The Respondent has, since that time, filed its List of Documents as well as a supplementary List of Documents, and a second and third Supplementary List of Documents.

[5] According to the Appellant's affidavit, at the discovery of the Respondent's nominee, Ms. Patricia Neville, on December 14, 2008, he determined that:

- The production of the Respondent was incomplete and a number of documents were missing.

- The document books prepared by the Respondent were inconsistent and not identical.

- The document books prepared by the Respondent had unnumbered pages and the pages were out of order which made it impossible to effectively examine Patricia Neville.

[6] It appears that the Appellant advised the Court of the lack of full disclosure of documents by the Respondent at a further status hearing held on January 21, 2009. The Court then ordered the Respondent to "make complete and full disclosure in an organized fashion of all file notes, correspondence, memoranda, document, diary, e-mail and all correspondence in these appeals. Although it is not clear from the material before me, it appears that the Respondent produced additional documents to the Appellant after that Order was made.

[7] In a continuation of the examination of Ms. Neville in May 2009, however, Ms. Neville appeared to indicate that no search for relevant documents had been made in three CRA offices in which relevant documents might possibly have been located.

[8] As a result of the information he obtained from Ms. Neville on discovery, the Appellant brought this motion. Two days before the motion was heard, the Respondent filed an affidavit of Ms. Neville in which she stated that she reviewed the relevant physical and computer files held by the Agency and made inquiries of all other Agency officers that may have had knowledge of relevant files and who were still employed with the Agency. She stated in paragraph 3 of her affidavit that:

> As a result of my investigations, I verily believe that I have identified all relevant documents that are in the possession of the Agency.

This evidence appears to correct the answers that Ms. Neville gave on discovery that it was possible that additional undisclosed documents might be located in offices of the CRA other than her own.

[9] The Appellant did not seek to cross-examine Ms. Neville on her affidavit nor did he take issue with her evidence relating to her effort to identify all relevant documents, and I accept that evidence. On this basis, I find then that the Appellant has not shown that the Respondent is in breach of this Court's Order regarding the full disclosure of relevant documents. However, I would add that the Respondent's delay in providing the Appellant with this information is highly regrettable and I agree with the Appellant that it is a relevant matter to take into account in awarding costs.

[10] The second aspect of the Appellant's motion related to the destruction of documents that were at one point contained in the collection's file at the CRA. The particular documents consisted of correspondence received from the other director of the corporations, relating to the unremitted source deductions and GST. The Appellant states that Ms. Neville provided the following information at her examination for discovery on December 18, 2008:

- The Respondent had no formal document retention policy.

- Documents were randomly removed from the file and destroyed by the Respondent's officers using their own discretion with no formal policy, direction or procedure.

- The Respondent provided its employees and officers with no instructions, training or procedural manual in the use of electronic diary and the removal and destruction of documents.

- Each and every officer of the Respondent was permitted to remove and destroy documents at his or her own discretion.

- That many documents had been removed from the Corporations' files and it could only be assumed that these documents had been removed and destroyed.

- Much of the correspondence between the Respondent and the Corporations has been destroyed.

[11] The Appellant alleges that the Respondent's destruction of those documents amounts to a breach of natural justice and severely prejudices his ability to respond to the director's liability assessment made against him. The Appellant says that the Respondent had a duty to "protect the record", given the special nature of a director's liability assessment, and that he, as a third party to assessments against the corporation needs the protection of natural justice. The Appellant maintains that the Respondent is negligent in operating without a document retention policy that would ensure that a complete record is available where a derivative assessment has been made. He said that in light of the Respondent's inadequate document retention policy, the random, unsupervised destruction of documents in this case was tantamount to intention conduct, and was so egregious as to warrant allowing the appeals.

[12] The Appellant alleges that procedural fairness requires that the Respondent provide him with a full record of correspondence between the corporations' other director and the CRA during the period over which the source deductions and GST arrears accumulated since the Respondent is unable to do so, the Appellant says that he is irremediably prejudiced in the presentation of his appeals, and that the appeals should be allowed.

[13] The Appellant relies on the decision of the Federal Court of Appeal in *Alliance for Life v. The Minister of National Revenue*[1] as support for the proposition that procedural fairness requires that the Respondent provide a full record of the correspondence for the purposes of these appeal. The *Alliance for Life* case was an appeal from the decision of the Minister proposing to revoke the *Alliance's* charitable registration. One of the grounds on which the Appellant was challenging the decision was that it had been denied procedural fairness in the

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1 [1993] 3 F.C. 504.

process leading to the decision because the Minister had failed to disclose the full case against it and had failed to give it a full and fair opportunity to respond.

[14] While the Court in *Alliance for Life* rejected the Appellant's arguments, it noted in *obiter* that a failure on the part of the Minister to comply with the requirements of procedural fairness would not be cured by the appeal process that was provided. The Court referred to its earlier decision in *Re: Renaissance International v. The Minister of National Revenue*,[2] in which Pratte J.A. stated at page 866:

> … I therefore conclude that the appeal created by subsection 172(3) is what I would call an ordinary appeal which the Court normally decides on the sole basis of a record constituted by the tribunal of first instance. It follows, in my view, that the decision of the Minister to send a notice of revocation under subsection 168(1) must be arrived at in a manner enabling the Minister to create a record sufficiently complete to be used by this Court in deciding the appeal. This presupposes, in my view, that the Minister must follow a procedure enabling him to constitute a record reflecting not only his point of view but also that of the organization concerned.

[15] However, I find that this holding is not applicable in the case before me because these appeals are ones that will be decided after a full hearing at which the Appellant will have the right to call evidence and make arguments. The requirement in the *Alliance for Life* and the *Re: Renaissance* cases that the Minister provide a "sufficiently complete record" arose because that record was the sole basis on which the appeal was to be decided. Pratte J.A. recognized this distinction in *Re: Renaissance*, saying at page 865:

> … However, in this instance, the right of appeal created by subsection 172(3) is a right of appeal to a Court which, it is well known, normally decides appeals on a record created in the inferior Court and accepts to receive further evidence only "on special grounds" (see Rule 1102(1) [of the *Federal Court Rules*]). Moreover, when the provisions of the *Income Tax Act* applicable to that appeal are contrasted with those of section 175 governing the appeal to the Trial Division, it becomes apparent that it was not intended that the appeal to this Court be an appeal *de novo* like the appeal in the Trial Division. …

[16] I am not convinced therefore that the Respondent has a duty to provide a complete record of the correspondence sought by the Appellant. In my view, the

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[2] [1983] 1 F.C. 860.

Respondent's duty of fairness does not go beyond the production of those documents that are still in its possession.

[17] The matter of the destruction of documents by the Respondent does raise a possible issue of spoliation. Spoliation occurs where:

> 18. … a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him. [3]

[18] In this case, the Appellant has not led any evidence to suggest that the destruction of the documents was done intentionally by the Respondent. Nor has the Appellant shown that those documents were relevant to any of the issues in appeal. In his affidavit, the Appellant states that the documents would probably explain how the corporations were able to convince the Respondent to permit the arrears to continue and accumulate over a 10-year period, and that they would have assisted him in presenting his due diligence defence. No basis for these statements is given. Without any evidence as to the nature and contents of the documents that were destroyed, it appears to me that the Appellant is only speculating as to their relevance to his case. Furthermore, if the Appellant was misled by the corporations regarding the arrears, the Appellant himself should be able to provide the best evidence of what representations were made to him in that respect.

[19] Finally, it has not been established at what point the documents were destroyed, in order to establish that they were destroyed after litigation was first contemplated.

[20] On the material before me, therefore, I am not satisfied that spoliation has occurred here.

[21] It is perhaps helpful at this point to reiterate the finding of the Court in *McDougall* that the issue of spoliation is best dealt with at trial. At paragraphs 27 and 28 of that decision, the Court said:

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[3] *McDougall v. Black and Decker Canada Inc.*, 2008 ABCA 353.

27 … There is, however, one aspect of the law that Canadian courts appear to agree upon. Because spoliation is primarily an issue of fact, and the remedies based on prejudice (also a matter of fact), these are matters usually best left to a trial judge. Thus, it would be rare for a claim to be struck pre-trial. The reasoning behind this position was described by Clarke J. in *North American Road Ltd. v. Hitachi Construction Machinery Co.* He was asked, on a pre-trial motion, to grant access to privileged documents as a remedy for spoliation. His Lordship denied the application, stating, at paras. 21-22:

> I am satisfied that this is not the appropriate time for the question of spoliation to be addressed. ...The issue of spoliation is more appropriately raised at trial when all of the evidence will be available to be considered by the trial judge. In addition, the applicant does have other sources of evidence available to it that may be helpful for its defence, other than the respondents' privileged documents. ...Also, the applicant will have the opportunity through the discovery process and production of expert reports to become more fully informed of the facts on which the experts' opinions are based.
>
> At this point, the nature and potential impact or effect of the respondents' expert evidence is unknown. At trial, the judge will be in a position to determine the existence and extent of any prejudice that may have been caused to the applicant by the respondents' failure to preserve the evidence. Accordingly, the trial judge will also then be in a far more able position to determine what, if any, remedy would be appropriate under the particular circumstances of this case.

28 Other courts have come to a similar conclusion (see: *Telenga v. Raymond European Car Services Ltd.* (Ont. Gen. Div.); *Cheung (Litigation Guardian of) v. Toyota Canada Inc.* (Ont. Sup. Ct.); and *Douglas v. Inglis Ltd.* (Ont. Sup. Ct.)), although in the latter two cases the court acknowledged that in particularly egregious circumstances a pre-trial remedy might be available for spoliation up to and including dismissal of the claim. On this subject, I would add that it is important not to attempt to expand pre-trial remedies beyond those already recognized by the court in its rules of procedure. Not all litigation is equal. For example, it is not uncommon for accident scenes to be cleared before any experts have had an opportunity to investigate, or only one expert has been at the scene. The practice rules are designed to assure the process of proceeding to trial is fair. Thus the rules are generally the appropriate source of a pre-trial remedy. The concept of full pre-trial applications, however, along with *viva voce* evidence to determine whether spoliation (in the sense of intentional destruction) has occurred, should not be encouraged. This issue should be left for trial.

[22] For the above reasons, the Appellant's motion is denied. Even though the Appellant has been unsuccessful in this application, no costs will be awarded to the Respondent. Given the late production of the affidavit of Ms. Neville, and given the difficulties encountered by the Appellant in obtaining full disclosure of documents from the Respondent, no costs are awarded.

Signed at Ottawa, Canada, this 9th day of November, 2009.

"Brent Paris"

Paris J.

CITATION:	2009 TCC 539
COURT FILE NO.:	2007-1561(IT)G and 2007-1665(GST)G
STYLE OF CAUSE:	DAVID WHITE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR ORDER BY:	The Honourable Justice Brent Paris
DATE OF ORDER:	November 9, 2009

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Shatru Ghan

COUNSEL OF RECORD:

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Firm:	N/A
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