Dockets: 2011-1501(IT)G
2011-1504(IT)G

BETWEEN:

PANKAJ DOSHI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

JUDITH H. DOSHI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on September 22, 2011 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellants:	Pankaj Doshi
Counsel for the Respondent:	Samantha Hurst

ORDER

UPON motion by the respondent for orders pursuant to section 53 of the *Tax Court of Canada Rules (General Procedure)* to strike out the following portions of the Amended Notices of Appeal:

a. paragraphs 12, 13, 14, 15, 19 and 20 of section (c);

b. part II of section (d) and part II of section (f); and

c. paragraph 2(b) of section (g);

IT IS ORDERED THAT the motions are granted in part and

1. paragraphs 13, 14, 19 and 20 of section (c) and paragraph 2(b) of section (g) are struck out;

2. the appellants shall file and serve Fresh as Amended Notices of Appeal in conformity with this Order no later than October 17, 2011;

3. the respondent shall file and serve Replies no later than December 17, 2011; and

4. the respondent is entitled to one set of costs in respect of the motions in any event of the cause.

Signed at Toronto, Ontario this 5th day of October 2011.

"J. M. Woods"

Woods J.

Citation: 2011 TCC 470
Date: 20111005
Dockets: 2011-1501(IT)G
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REASONS FOR ORDER

Woods J.

[1] The respondent brings applications requesting orders to strike out notices of appeal filed by Pankaj and Judith Doshi. The issues are the same in both applications and the motions were heard together.

[2] The appellants responded to the applications by filing Amended Notices of Appeal at the hearing. The focus at the hearing was on these rather than the original

notices of appeal.

[3] Two main questions are raised: (1) Should part of the statement of facts in the Amended Notices of Appeal be struck out as not being relevant or material? (2) Should claims based on s. 15(1) of the *Canadian Charter of Rights and Freedoms* be struck out on the ground that it is scandalous, frivolous or vexatious?

Background

[4] The appellants emigrated from Canada in 1999 when Mr. Doshi was transferred by his employer to the United States. The appeals concern certain provisions of the *Income Tax Act* that are generally known as the departure tax. The main issue is whether the appellants were properly assessed tax on capital gains deemed to have been realized by them with respect to securities held at the time of emigration. It appears that the deemed gains are in the neighbourhood of $85,000 for each appellant.

[5] According to the facts in the Amended Notices of Appeal, the value of the securities dropped significantly after the appellants left Canada, with the result that the deemed gains were never realized. One security in particular represented 70 percent of the deemed gains. That security was still owned by the appellants when they returned to Canada in 2003. The appellants seek to have the tax adjusted so that it does not exceed the amount payable had they never left Canada.

[6] Three grounds of appeal are raised:

a) that the assessments are contrary to Parliament's intent in enacting subsection 128.1(4),

b) that the relevant provisions of the *Act* contravene subsection 15(1) of the *Charter*, and

c) that s. 128.1(4)(*b*) of the *Act* was not properly applied to pre-immigration securities.

[7] By way of background, it would have been very difficult for the respondent to reply to the original notices of appeal because the statement of facts seemed to contain quite a bit of evidence and argument. After these motions were instigated, the appellants made efforts to correct the deficiencies and sent amended notices of the appeal to the Court. Due to further objections from the respondent, which were

outlined in detail in written submissions, the appellants attempted to further remedy the deficiencies and new amended notices of appeal were filed at the hearing. Counsel for the respondent agreed to focus on these at the hearing.

Analysis

[8] I will consider the *Charter* issue first.

[9] The appellants argue that the departure tax provisions contravene subsection 15(1) of the *Charter*. The provision reads:

> **15. (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[10] The appellants' argument as set out in the Amended Notices of Appeal is reproduced below.

> **II. THE DEEMED DISPOSITION CLAUSE IS CONTRARY TO SECTION 15 OF THE CHARTER OF RIGHTS AND FREEDOMS**
>
> 1) Section 15(1) of the Canadian Charter of Rights and Freedoms provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination." The application of the deemed disposition sections of the Income Tax Act differentially burdens us, compared to other similarly-situated groups, in two ways.
>
> a. First, Canadians within Canada are treated more favorably than Canadians who were directed by their employer to leave Canada temporarily. Had we remained in Canada, we would be subject only to ordinary capital gains tax, measured at the time of actual sale of the Applicable Securities.
>
> b. Second, taxpayers subject to this clause are penalized if they happen to emigrate from Canada at a time when equity markets are at a peak, such that the deemed capital gains are high but actual equity values are likely to fall subsequently, taxpayers who emigrate from Canada when equity markets are at a low point would not see such unfavorable treatment.
>
> 2) When an employee of a Canadian employer is directed by his or her employer to relocate temporarily to work for the same employer outside of

> Canada, the employee's resulting status should be viewed as "constructively immutable", and thus an analogous ground of discrimination, within the meaning of Section 15 jurisprudence. Due to our resulting status as temporary emigrants, the deemed disposition sections of the Income Tax Act discriminate against us.

[11] The respondent submits that this ground of appeal has no chance of success and should be struck out. Counsel relies on the interpretative principles relating to s. 15(1) set out in *R. v Kapp*, 2008 SCC 41, [2008] 2 SCR 483. *Kapp* informs that there are two questions relating to s. 15: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[12] In this case, the question is whether the departure tax provisions create a distinction based on an analogous ground, and if so whether the distinction amounts to discrimination by perpetuating prejudice or stereotyping.

[13] I have some sympathy for the position of the respondent in these motions. Reading the Amended Notices of Appeal, it is difficult to determine a distinction that could be an analogous ground as interpreted by the jurisprudence. The distinctions suggested by the appellants seem to relate to the employer requiring the move and that the stock market was high at the relevant time. Moreover, even if there is a distinction based on an analogous ground, the Amended Notices of Appeal fail to clearly set out how the relevant provisions of the *Act* amount to discrimination in the sense of perpetuating a prejudice or stereotyping.

[14] In a nutshell, the appellants have a steep hill to climb to make a convincing *Charter* argument. However, two factors militate against striking out the argument at this preliminary stage.

[15] First, considerable latitude should be given to taxpayers who are *bona fide* in their belief that they have been discriminated against. Section 15 of the *Charter* is a difficult provision to interpret even for those learned in the law. It is a daunting task for the appellants, who are self-represented, to muster legal arguments on concepts such as analogous grounds, and discrimination. There is no reason for me to think that these appeals are motivated by reasons other than a genuine belief that the appellants have been victims of discrimination.

[16] Second, this Court has a laudable history of promoting access to the Court so that complaints about tax assessments may be heard. If the respondent's motions

were to succeed, the appellants would be denied the opportunity of making a*Charter* argument. I am reluctant to do this, unless making the argument would an amount to an abuse of the Court. It does not, in my view. The interests of justice in this case are best served by not striking out the *Charter* argument at this stage.

[17] I would comment that there are appropriate cases to strike out *Charter* arguments on the basis that they are scandalous, frivolous or vexatious, such as where the issue has been settled by jurisprudence or where the argument is so frivolous as to be an abuse of the judicial system. See for example *Sinclair v The Queen*, 2002 DTC 1988, aff'd 2003 FCA 348, 2003 DTC 5624. The appellants' argument does not fall into this category.

[18] The respondent submits it is settled law that residence is not a personal characteristic that gives a right under section 15 of the *Charter*. It is not clear to me that residence is the characteristic that the appellants seek to focus on. In any event, the respondent's submission overstates the applicable principles from the judicial decisions that were referred to me. The cases suggest that residence is not usually a distinction recognized for purposes of section 15, but the door has been specifically left open for an appropriate case.

[19] For these reasons, the respondent's request to strike out the *Charter* argument is denied.

[20] I now turn to the other relief requested by the respondent. It concerns the statement of facts in the Amended Notices of Appeal. I will refer only to Mrs. Doshi's pleading since there is no relevant difference between them.

[21] I would first comment that the appellants have tried to comply with the applicable rules relating to pleadings with the assistance of the respondent's motion material. The newly-filed pleadings overcome many of the original deficiencies, but a few remain. The appellants do not take issue with the respondent's arguments.

[22] The respondent submits that the following statements of fact from Mrs. Doshi's Amended Notice of Appeal are improper.

> 12) Pursuant to Section 128.1(4), CRA has asked me to pay $28,713 in capital gains for Tax Year 1999, and $18,404 of arrears interest, in connection with the Applicable Securities.
>
> 13) In a speech delivered to Parliament on March 27, 2001, Roy Cullen, who was Parliamentary Secretary to Finance Minister Paul Martin, described Bill

> C-22, which proposed to modify the Income Tax Act in various ways. Addressing the proposed change to the deemed disposition rules for emigrants, Mr. Cullen states that the bill "would allow returning former residents to reverse the tax effects of their departure, regardless of how long they were a non-resident."
>
> 14) Bill C-22 was passed on June 14, 2001. It modified, *inter alia*, Sections 7(1.6) and 220 of the Income Tax Act.
>
> 15) On February 4, 2003, I received a letter from CRA showing my foreign tax credit for capital gains income tax paid to the U.S. government in connection with the Applicable Securities.
>
> 19) Ms. Leslie Morancie-Alexis at CRA's International Tax Office in Toronto advised me on February 7, 2005 that the CRA had undertaken a review of the "Deemed Disposition" clause. She indicted that penalizing taxpayers were not the intent of the clause and that the appropriate government official(s) were reviewing the clause with the intent to modify it so the taxpayers would not be unnecessarily "penalized".
>
> 20) Throughout this process over the last 11 years, CRA took long periods of time (from months to years) to conduct most of the reviews.

[23] My comments will be brief since the appellants do not dispute this part of the motions. I accept the respondent's position with respect to all of the above paragraphs except paragraphs 12 and 15.

[24] Paragraphs 12 and 15 could be phrased differently but in substance they contain material facts. I propose that these paragraphs be left in. The remaining paragraphs should be struck out. Some are legal argument, some are irrelevant facts and some are evidence.

[25] Finally, I would address a paragraph that was added to the Amended Notices of Appeal for the first time. Paragraph (2)(b) of section (g) seeks a waiver of interest on the basis that the audit took an inordinate amount of time. The respondent submits that this paragraph should be struck out. I agree; this Court has no authority to grant such relief.

[26] In conclusion, the motions will be allowed in part. Paragraphs 13, 14, 19, and 20 of section (c) and paragraph (2)(b) of section (g) will be struck out with leave to file Fresh as Amended Notices of Appeal.

[27] As for costs, it is appropriate in my view to award costs to the respondent in

respect of these motions. The original notices of appeal were so defective that it would have been very difficult for the respondent to reply to them. It was only after the respondent prepared detailed submissions as to the defects that the appellants were able to substantially correct them. I appreciate that it is difficult for self-represented litigants to comply with the proper procedures of this Court, but on the other hand the respondent should be compensated for its costs where a notice of appeal is as defective as in this case.

[28] Finally, the appellants are reminded that notices of the *Charter* argument must be given to the appropriate authorities in accordance with the *Tax Court of Canada Act*. The relevant section provides:

> **19.2 (1)** If the constitutional validity, applicability or operability of an Act of Parliament or its regulations is in question before the Court, the Act or regulations shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).
>
> (2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Court orders otherwise.
>
> (3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal made in respect of the constitutional question.
>
> (4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Court in respect of the constitutional question.
>
> (5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

Signed at Toronto, Ontario this 5th day of October 2011.

"J. M. Woods"

Woods J.

CITATION:	2011 TCC 470
COURT FILE NOS.:	2011-1501(IT)G 2011-1504(IT)G
STYLES OF CAUSE:	PANKAJ DOSHI v. HER MAJESTY THE QUEEN and JUDITH H. DOSHI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 22, 2011
REASONS FOR ORDER BY:	Hon. J.M. Woods
DATE OF ORDER:	October 5, 2011

APPEARANCES:

Agent for the Appellants:	Pankaj Doshi
Counsel for the Respondent:	Samantha Hurst

COUNSEL OF RECORD:

For the Appellants:

Name:	N/A
Firm:	

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario