Federal Court of Appeal

Cour d'appel fédérale

Date: 20160414

Docket: A-287-15

Citation: 2016 FCA 113

CORAM: **DAWSON J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

BING ZHU

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 12, 2016.

Judgment delivered at Ottawa, Ontario, on April 14, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant raised a single issue before the Tax Court of Canada: whether the appellant was entitled to deduct losses incurred in 2008 from the sale of shares acquired under an employee stock option plan? For reasons cited as 2015 TCC 16, a Judge of the Tax Court found that, as business losses, the losses were not deductible because the appellant was a non-resident of Canada and the losses did not arise from a business carried on by the appellant in Canada.

[2] This is an appeal from the judgment of the Tax Court.

[3] In my view, two issues must be decided on this appeal. First, may the appellant (now represented by counsel) raise a new argument on appeal? Second, was the appellant carrying on business in Canada within the meaning of subsection 253(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act)?

[4] When an appellant seeks to raise an issue of law which does not require further evidence, and which will not cause prejudice to the respondent, it is an error of law for an appellate court to refuse to consider the argument (*Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at paragraph 51).

[5] In the present case, all of the evidence necessary to consider the applicability of subsection 253(*b*) of the Act was adduced at trial and I am satisfied that the respondent will not be prejudiced by allowing the appellant to raise this argument; it was the respondent who raised at trial the issue of whether the appellant was carrying on business in Canada when the loss on the sale of shares was incurred (Reply to Amended Notice of Appeal, at paragraph 14).

[6] The appellant submits that the Judge correctly concluded that pursuant to subparagraph 114(*a*)(i) of the Act a business loss can be deducted if it satisfies the requirements of paragraph 115(1)(*c*) of the Act. In the circumstances of this case, this required the appellant to show that the loss was from a business he carried on in Canada. I agree.

[7] The Judge, implicitly applying common law principles, found that the losses did not arise from a business carried on in Canada. In making this finding, because the issue was not raised before her, the Judge did not consider whether the activity carried on by the appellant met the less stringent requirements of subsection 253(*b*) of the Act.

[8] As relevant to this appeal, subsection 253(*b*) of the Act provides:

253. For the purposes of this Act, where in a taxation year a person who is a non-resident person…	**253.** Pour l'application de la présente loi, la personne — personne non-résidente […] — qui exerce les activités ou effectue les dispositions suivantes au cours d'une année d'imposition est réputée, <u>en ce qui concerne ces activités ou dispositions</u>, exploiter une entreprise au Canada au cours de l'année :
…	[…]
(*b*) <u>solicits orders or offers anything for sale in Canada through an agent or servant</u>, whether the contract or transaction is to be completed inside or outside Canada or partly in and partly outside Canada, …	*b*) <u>elle sollicite des commandes ou offre en vente quoi que ce soit au Canada par l'entremise d'un mandataire ou préposé</u>, que le contrat ou l'opération ait dû être parachevé au Canada ou à l'étranger ou en partie au Canada et en partie à l'étranger;
…	[…]
the person shall be deemed, <u>in respect of the activity or disposition</u>, to have been carrying on business in Canada in the year.	
[emphasis added]	[je souligne]

[9] In order to consider the application of subsection 253(*b*) it is necessary to set out the relevant facts:

- The appellant was the Chief Financial Officer of Canadian Solar Inc. (CSI) from 2005 to June 6, 2008.
- During his employment with CSI, the appellant was granted the option to purchase 116,000 shares of CSI.
- In the 2008 taxation year, the shares of CSI were listed on the NASDAQ stock exchange, an American stock exchange.
- Upon the appellant's resignation from CSI on June 6, 2008, the appellant ceased to be a resident of Canada for income tax purposes.
- On September 4, 2008, the appellant exercised his option to purchase 53,150 shares of CSI.
- On November 17, 2008, the appellant sold 25,000 shares at a price of $5.9065 (U.S.) per share.
- The next day, on November 18, 2008, the appellant sold the remaining 28,150 shares of CSI at a price of $5.3658 (U.S.) per share.
- As a result of the November 17 and 18, 2008, transactions, the appellant suffered a loss of $1,247,657.
- The appellant completed the November, 2008 trades through a stock broker based in the United States.

[10] The appellant submits that when an individual lists shares of a publicly listed corporation for sale on a particular stock exchange, the individual makes the share available to anyone who is willing to purchase the share, without any territorial restriction. It follows, the appellant submits, that the mere act of listing the sell order on a stock exchange in which a Canadian resident may purchase the shares is sufficient to meet the requirement that he solicited orders or offered the CSI shares for sale in Canada.

[11] I disagree.

[12] Assuming that listing publicly traded shares for sale on a stock exchange constitutes a solicitation or offer within the meaning of subsection 253(*b*), the solicitation or offer must take place in Canada. Offering shares listed on an American exchange through an American broker does not constitute the solicitation of orders or the offering of anything for sale in Canada by the offeror.

[13] The contrary conclusion would be inconsistent with the purpose of section 253, which has been held to be "to subject non-resident persons to Canadian tax provided they carry out a minimum amount of commercial activity within Canada's borders" (*Maya Forestales S.A. v. Canada*, 2005 TCC 66, 2005 D.T.C. 514, at paragraph 34; aff'd 2006 FCA 35, 354 N.R. 272).

[14] For these reasons, I would dismiss the appeal with costs.

"Eleanor R. Dawson"
J.A.

"I agree
D.G. Near J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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