Federal Court of Appeal

Cour d'appel fédérale

Date: 20151127

Docket: A-112-15

Citation: 2015 FCA 271

CORAM : **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

UY KEAK TANG, CHHANG ANG KANG,
BIJOUTERIE YONG MEER INC.

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, November 23, 2015.

Judgment delivered at Ottawa, Ontario, November 27, 2015.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20151127

Docket: A-112-15

Citation: 2015 FCA 271

CORAM : **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

UY KEAK TANG, CHHANG ANG KANG,
BIJOUTERIE YONG MEER INC.

Appellants

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

BOIVIN J.A.

[1] The appellants are appealing from a decision by a Tax Court of Canada judge (the judge) dated January 27, 2015 (2015 TCC 18) allowing, in part only, three appeals concerning notices of assessment for the 2007 tax year for Mr. Tang and Mr. Kang for the financial year ending March 31, 2007 in respect of La Bijouterie Yong Meer Inc. (the Bijouterie) seeking to reduce the amounts of unreported income applicable to each appellant, and hence the tax payable and the penalties imposed under subsection 163(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) (the Act).

[2] The appellants submit that the judge committed a number of palpable and overriding errors. They submit in particular that he erred in imposing an excessively heavy burden of proof on them. In their view, the judge could not conclude that the Minister of National Revenue (the Minister) had discharged his own burden of proof with respect to the penalties, given the evidence of record. The judge is said to have erred also in endorsing the taxing of the same sum in the hands of all three taxpayers, whereas there was no evidence to justify doing so in the case at hand.

[3] The applicable standard is that established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Findings of fact are to be reviewed against the standard of palpable and overriding error. The judge's conclusions as to questions of law are to be reviewed against the standard of review of correctness. Questions of fact and law are also subject to the standard of palpable and overriding error, unless there is an extricable error in law, in which case it is the standard of review of correctness that applies.

[4] While the judge's reasons could have been expressed in a more structured way, he clearly explains why the appellants failed to discharge their burden of proof so as to vitiate the Minister's assumptions in these cases. The testimonial and documentary evidence adduced by the appellants was so lacking in credibility, in his view, that it could not constitute *prima facie* evidence.

[5] Moreover, according to the judge, the appellants refused to cooperate with the auditor, providing her with no plausible explanation as to the source of the significant funds seized at the

residences of Mr. Tang and Mr. Kang, and on the premises of the Bijouterie. Given the circumstances of this case, the judge was satisfied that the Minister had no choice but to use the indirect assessment method of net worth in all three cases.

[6] As to the penalties, the judge found that despite the difficulties arising from the appellants' failure to cooperate, the Minister had established the essential factors for the application of subsection 163(2) of the Act by preponderance of the evidence.

[7] The judge nevertheless adjusted the unreported income as stated in the three notices of assessment. First, he deducted from the income an amount that the Bijouterie had previously reported in 2006. The parties agreed that such a deduction should have been made. He also reduced by half the amount of $856,285 the auditor had included in Mr. Tang and Mr. Kang's income. The same amount was also included in full in the Bijouterie's income. It is common ground that the auditor chose this manner of proceeding because she had no evidence or explanation to indicate ownership of the funds seized on the premises of the Bijouterie. She admitted under examination that she was aware of the inconsistency of her position on this point, and took it for granted that these amounts would be adjusted later in the process. Moreover, the Minister suggested in court that the amounts included in the assessments of Mr. Tang and Mr. Kang be reduced.

[8] In this case, I am of the view that the judge did not err in assessing the appellants' credibility. Since he did not believe them, he was also free to find as he did as to the shifting of the burden of proof. The judge also correctly applied the law pertaining to the imposition of

penalties and assigning the income to the 2007 tax year. I find no palpable or overriding error with respect to these issues.

[9] However, what does seem to me justified is the appellants' argument that the same sum of money, namely the full amount for the Bijouterie ($856,285) and half each ($428,142.50) for Mr. Tang and Mr. Kang, cannot be taxed simultaneously on all three taxpayers.

[10] Indeed, the Minister admitted, on the one hand, that the imposition of the same sum of money on the appellants was not supported by subsection 15(1) of the Act and, on the other hand, in the circumstances, the same sum of money could not be attributed to more than one taxpayer simultaneously as unreported income. The Minister frankly admitted, in fact, that he was unable to determine with certainty who was the owner of the sum of money in question.

[11] In his decision to maintain the taxing of the same amount of money at the same time in the hands of the Bijouterie, Mr. Tang and Mr. Kang, the judge failed to explain how the amount of $856,285 found on the premises of the Bijouterie during the seizure by the City of Montréal police department could also have been found in the hands of Mr. Tang and Mr. Kang. In the absence of any explanation to clarify the imposition of a tax on the same amount of money in the hands not only of the Bijouterie but also of Mr. Tang and Mr. Kang, the judge was not justified in approving the imposition of that tax in his analysis. In this case, he had to decide whether to allow the imposition of a tax on the same amount of money in the hands of the Bijouterie, Mr. Tang and Mr. Kang, or to reject it. In failing to do either, he erred.

[12] At the hearing, the parties agreed that this Court was as well-placed as the judge to rule on this question, since it was in possession of all the necessary elements on the record to do so. I agree. However, the parties do not agree on the question of whether it is the Bijouterie or the other two appellants who should be assessed.

[13] Since Mr. Tang and Mr. Kang's explanations as to the source of the $856,285 seized on the premises of the Bijouterie were dismissed outright by the judge as not credible, their testimony cannot be used in determining that the money belonged to Mr. Tang and Mr. Kang. On the other hand, the judge stated that he was able to regard the objective factors alone as uncontested, namely the amounts seized and the location of the seizure. In the circumstances, I find that the $856,285 seized on the premises of the Bijouterie could be taxed only in its hands.

[14] For these reasons, I would allow the appeal in part, and vary the decision of the Tax Court of Canada respecting the unreported taxable income attributable to Mr. Tang and Mr. Kang by reducing the said taxable income by $428,142.50 for each of them. The penalties should be adjusted accordingly.

[15] In view of the outcome, each party should assume its own costs.

"Richard Boivin"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Yves de Montigny J.A."

Translation

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-112-15
STYLE OF CAUSE:	UY KEAK TANG, CHHANG ANG KANG, BIJOUTERIE YONG MEER INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 23, 2015
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	GAUTHIER J.A. DE MONTIGNY J.A.
DATED:	NOVEMBER 27, 2015

APPEARANCES:

Jean-François Poulin Laurent Tessier	FOR THE APPELLANTS
Vlad Zolia	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ravinsky Ryan Lemoine L.L.P. Montréal, Quebec	FOR THE APPELLANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT