

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170613

Docket: A-369-16

Citation: 2017 FCA 122

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

BETWEEN:

GRAHAM ENGEL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on June 13, 2017.
Judgment delivered from the Bench at Toronto, Ontario, on June 13, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

GAUTHIER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on June 13, 2017).

GAUTHIER J.A.

[1] Graham Engel appeals from the judgment of Pizzitelli J. of the Tax Court of Canada (TCC) dismissing his appeal of tax assessments made pursuant to the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the *Act*) for the taxation years 2002-2006. The TCC denied deductions for business losses and upheld the gross negligence penalties assessed by the Minister of National Revenue (Minister).

[2] In filing his 2005 and 2006 income tax returns, Mr. Engel reported business losses in the amounts of \$426,511.40 and \$84,329.89 respectively. He also filed a Request for Loss Carryback with his 2005 return and sought and received refunds in the aggregate amount of over \$140,000.00 for the 2002 to 2006 taxation years.

[3] In upholding the disallowance of business losses, the TCC found that Mr. Engel led absolutely no evidence of carrying on any type of business whatsoever, nor of incurring any business expenses. In fact, Mr. Engel admitted before the TCC that he conducted no business in 2005 and 2006. Thus, it concluded that Mr. Engel had not met his burden of refuting the Minister's assumptions.

[4] The TCC was also satisfied that the Minister had established that, on a balance of probabilities, Mr. Engel was wilfully blind in placing his trust in Fiscal Arbitrators, an unscrupulous tax preparer, after reviewing the indicia set out in *Torres v. The Queen*, 2013 TCC 380, 235 A.C.W.S. (3d) 844, which decision was affirmed by this Court in *Strachan v. The Queen*, 2015 FCA 60, 250 A.C.W.S. (3d) 352.

[5] The TCC also dismissed as having no merit the constitutional argument of Mr. Engel based on subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Mr. Engel had argued that the *Act* discriminates against individuals, contrary to subsection 15(1) of the *Charter*, because individuals are not entitled to be taxed only on their profits like corporations. The TCC added that in any event, as Mr. Engel's *Charter* argument was not raised in the Notice of Appeal, and since no notice of constitutional question had been served on the

Attorney General of Canada and the Attorney General of each province, this argument should not be further entertained and the adjournment sought by Mr. Engel was denied as being too late.

[6] Before us, Mr. Engel made no submissions contesting the TCC's findings in respect of the lack of evidence to demolish the Minister's assumptions, and its conclusion that on the facts the Minister had established that gross negligence penalties were warranted.

[7] Rather, Mr. Engel argues that the TCC failed to properly consider his constitutional arguments based on subsection 15(1) of the *Charter*, despite the fact that his affidavit evidence which was read into the record as his testimony was uncontradicted. He also submits that the TCC breached the principles of procedural fairness in dismissing his request for an adjournment. Mr. Engel also appears to raise a new argument not raised before the TCC to the effect that his rights under paragraph 6(2)(b) of the *Charter* were violated as the Minister did not take into account his right to pursue "the gaining of a livelihood". No notice of a constitutional question was served.

[8] We are satisfied that the TCC made no error of law or any palpable and overriding error in reaching the conclusions that it did in respect of the merits of the assessments. Nor have we been persuaded that the TCC erred in refusing the adjournment or in dismissing the *Charter* argument.

[9] Among other things, it is clear that this case does not involve any discrimination made on the basis of a ground enumerated in subsection 15(1) of the *Charter* or of an analogous ground.

[10] Considering the lack of merit of the constitutional argument raised and the lateness of the request, the TCC did not breach procedural fairness by refusing to grant the adjournment.

[11] As mentioned during the hearing, the appellant did not raise the argument based on paragraph 6(2)(b) of the *Charter* before the TCC and thus, we shall not deal with it.

[12] Therefore, the appeal should be dismissed with costs fixed in the amount of \$1,000.00 (all inclusive).

“Johanne Gauthier”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PIZZITELLI
OF THE TAX COURT OF CANADA, DATED SEPTEMBER 8 2016, IN DOCKET NO.
2013-3930(IT)G.**

DOCKET: A-369-16

STYLE OF CAUSE: GRAHAM ENGEL v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: JUNE 13, 2017

REASONS FOR JUDGMENT OF THE COURT BY: GAUTHIER J.A.
DE MONTIGNY J.A.
WOODS J.A.

DELIVERED FROM THE BENCH BY: GAUTHIER J.A.

APPEARANCES:

Graham Engel FOR THE APPELLANT
(ON HIS OWN BEHALF)

Christopher M. Bartlett FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada