Federal Court of Appeal | Cour d'appel fédérale

Date: 20170621

Docket: A-309-15

Citation: 2017 FCA 131

CORAM: **STRATAS J.A.**
WEBB J.A.
WOODS J.A.

BETWEEN:

SIROUS SARMADI

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 22, 2016.

Judgment delivered at Ottawa, Ontario, on June 21, 2017.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRING REASONS BY: WEBB J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The appellant, Sirous Sarmadi, appeals from a judgment of the Tax Court of Canada (2015 TCC 133) that upheld net worth assessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) for the 2003 and 2004 taxation years.

[2] During the period at issue, the appellant was married with three children and studying to be a denturist. He also was a taxi driver and had rental properties. The appellant reported income of $3,857 and $1,807 for the 2003 and 2004 taxation years, respectively.

[3] During the audit by the Canada Revenue Agency, the CRA was not satisfied with the information provided by the appellant and it decided to undertake a net worth analysis. As a result, the CRA concluded that the appellant had failed to report over $150,000 of income earned over the two taxation years. The Minister of National Revenue reassessed on this basis and gross negligence penalties were also imposed.

[4] On the appeal from the reassessments, the Tax Court of Canada, *per* Favreau J. (judge), upheld the reassessments.

[5] The only issue to be decided in this appeal is whether the judge made a palpable and overriding error in rejecting evidence that the appellant's father had loaned him a total of $90,000 during the relevant period. If this evidence had been accepted by the judge, the determination of income under the net worth analysis would have been reduced by $90,000.

[6] I am of the view that the judge did not make any such error.

[7] The judge concluded that there was not sufficient reliable evidence to substantiate the loans. In reaching this conclusion, the judge stated that he did not believe the testimony of either

the appellant or his father regarding the loans and he found that there was a lack of other reliable evidence.

[8] The appellant raises several points in support of the appeal. First, he submits that the CRA should not have conducted a net worth analysis in this particular case. Second, he suggests that it is absurd to conclude that the appellant earned substantial income at a time when he was a full-time student. Finally, the appellant suggests that the judge's reasons were inadequate and failed to properly explain why he lost.

[9] In my view, none of these submissions have merit.

[10] As for whether a net worth analysis was appropriate in this case, the appellant appears to suggest that the entirety of the net worth reassessments should be reviewed. This issue was not raised in the Court below and it would be unfair to the respondent to raise it in this Court because the respondent did not have an opportunity to lead evidence on it: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at paras. 35-37.

[11] At the hearing, counsel for the appellant submitted that since there were no aggravating circumstances that would justify the CRA's decision to undertake a net worth analysis, the judge should have accepted the evidence regarding the loans that was led by the appellant.

[12] I disagree. The judge found that the testimony of the appellant and his father was not credible. In the circumstances it was open for the judge to conclude that there was insufficient reliable evidence regarding the loans.

[13] As for the appellant's submission that the judge's conclusion was absurd because the appellant was a full-time student, I disagree that the conclusion is absurd. It is certainly possible for a full-time student to have a source of significant income, and the judge's conclusion to this effect is consistent with his credibility findings.

[14] Finally, as for the adequacy of the Tax Court of Canada reasons, I am satisfied that the reasons are well within the standards established by jurisprudence such as *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3. In particular, the judge's reasons were clear and detailed. When the reasons are read as a whole, they tell the appellant why he lost and why the testimony was found to be unreliable. I note in particular that specific concerns regarding the testimony were detailed in paragraphs 18 to 33 of the judge's reasons.

[15] I would also briefly address a suggestion made by the appellant that the judge appears to have pre-judged the facts. I have reviewed the relevant parts of the transcript and see no merit to this allegation. It appears that the judge's comments were an attempt to ensure that the appellant knew the case that he had to meet. This is not a case where the judge pre-judged the outcome.

[16] Finally, with respect to the concurring reasons of my colleagues Webb and Stratas JJ.A., I am in agreement with the comments of Stratas J.A.

[17] It follows that I would dismiss the appeal with costs.

"Judith M. Woods"

J.A.

WEBB J.A. (Concurring Reasons)

[18] I agree with the proposed disposition of Mr. Sarmadi's appeal. However, since Mr. Sarmadi has raised the issue of whether he only had to raise a *prima facie* case in his appeal before the Tax Court and whether this would be satisfied on a standard that is less than the balance of probabilities, in my view, this issue should be addressed. It would benefit the parties to any tax litigation before the Tax Court to know, before the hearing commences, who has the burden of proof and what level of proof will be required. As well, following the hearing of this appeal, the parties were provided an opportunity to make further written submissions on this issue and they did so.

[19] The general rule in civil cases is that the person who alleges a particular fact must prove that fact (*Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 at para. 28). This would mean, in an appeal to the Tax Court of Canada (Tax Court), that if a taxpayer in his, her or its notice of appeal alleges any particular fact and the Crown, in the reply to such notice of appeal, denies such fact then the taxpayer would have the onus to prove such fact.

[20] However, generally in tax appeals the focus is not on the facts as alleged by the taxpayer but rather on the assumptions of fact made by the Minister of National Revenue (Minister). This is illustrated in this case. The Tax Court judge, in paragraph 5 of his reasons, sets out the assumptions of fact made by the Minister. These assumptions related to the assets acquired by Mr. Sarmadi for cash, his personal expenditures and his reported income. The Minister assumed that the discrepancy was unreported rental income and unreported business income.

[21] The Tax Court judge then acknowledged, in paragraph 7 of his reasons, that Mr. Sarmadi, in paragraphs d) and e) of his notice of appeal, stated that he had received a loan of $90,000 from his father. In paragraph 8 the Tax Court judge confirmed that the only issue in the appeal was whether this loan had been made.

[22] However, in discussing the onus of proof, the Tax Court judge stated that:

> 36 In tax matters, the initial onus is on the taxpayer to demolish the assumptions on which the Minister based the assessments. The taxpayer meets his burden by presenting a *prima facie* case. Only if this condition is met, does the onus shift to the Minister, who must then rebut the taxpayer's evidence and prove on the balance of probabilities, the validity of the assumptions relied upon by the Minister.
>
> 37 In this case, the Minister assumed that the appellant had unreported rental and business income. The appellant has the onus to satisfy this Court with a degree of specificity that the $90,000 comes from a non-taxable source.
>
> 38 Evidence considered sufficient to establish a fact until proof of the contrary constitutes *prima facie* evidence. Although a *prima facie* case is not conclusive evidence, the burden of proof put on the taxpayer is not to be easily shifted considering that the taxation system is a self-reporting system and that the business carried on by the taxpayer is his own business. The jurisprudence has established that the analysis of the totality of the evidence is relevant when determining whether a *prima facie* case has been met.

[23] Therefore, even though Mr. Sarmadi had alleged in his notice of appeal that his father had lent him $90,000 (which the Crown in paragraph 4 of the Reply stated was not admitted and was put in issue), the Tax Court judge found that Mr. Sarmadi could "demolish" the assumptions made by the Minister by presenting a *prima facie* case and if he did, the Minister would then have to prove, on a balance of probabilities, the validity of the assumptions of unreported income.

[24] The history of references to taxpayers raising a "*prima facie* case" and "demolishing" facts, starts with *Anderson Logging Company v. His Majesty the King*, [1925] S.C.R. 45, 52 D.T.C. 1209. In that case, at page 50 of the Supreme Court Reports, the Supreme Court of Canada referred to a "*prima facie*" case being raised by a taxpayer:

> First, as to the contention on the point of onus. If, on an appeal to the judge of the Court of Revision, it appears that, on the true facts, the application of the pertinent enactment is doubtful, it would, on principle, seem that the Crown must fail. That seems to be necessarily involved in the principle according to which statutes imposing a burden upon the subject have, by inveterate practice, been interpreted and administered. But, as concerns the inquiry into the facts, the appellant is in the same position as any other appellant. He must shew that the impeached assessment is an assessment which ought not to have been made; that is to say, he must establish facts upon which it can be affirmatively asserted that the assessment was not authorized by the taxing statute, or which bring the matter into such a state of doubt that, on the principles alluded to, the liability of the appellant must be negatived. The true facts may be established, of course, by direct evidence or by probable inference. The appellant may adduce facts constituting a *prima facie* case which remains unanswered; but in considering whether this has been done it is important not to forget, if it be so, that the facts are, in a special degree if not exclusively, within the appellant's cognizance; although this last is a consideration which, for obvious reasons, must not be pressed too far.
>
> (emphasis added)

[25] While the Supreme Court of Canada does refer to a "*prima facie* case", in the context of the paragraph it does not seem to me that the Supreme Court was suggesting that that there would be a reduced burden for this "*prima facie* case". In the same paragraph the Supreme Court stated that the taxpayer had to "establish facts upon which it can be affirmatively asserted that the assessment was not authorized by the taxing statute, or which bring the matter into such a state of doubt that, on the principles alluded to, the liability of the appellant must be negatived".

In my view this language is more consistent with the taxpayer having the onus to establish facts on a balance of probabilities.

[26] In *Johnston v. Minister of National Revenue*, [1948] S.C.R. 486, at pp. 480-490, [1948] 4 D.L.R. 321 [*Johnston*], Rand J., writing on behalf of the majority of the judges of the Supreme Court of Canada, referred to a taxpayer demolishing facts:

> The appeal raises also the question of onus. By section 58 any person objecting to the amount at which he is assessed may appeal to the Minister. If the Minister rejects the appeal, under section 60(1) a Notice of Dissatisfaction may be served on the Minister and the taxpayer shall in it state that he desires his appeal to be set down for trial. By subsection (2),
>
> > The appellant shall forward therewith a final statement of such further facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal as were not included in the aforesaid Notice of Appeal, or in the alternative, a recapitulation of all facts, statutory provisions and reasons included in the aforesaid Notice of Appeal, together with such further facts, provisions and reasons as the appellant intends to submit to the Court in support of the appeal.
>
> …
>
> Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. <u>If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted.</u> For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but <u>the onus was his to demolish the basic fact on which the taxation rested</u>.
>
> Instead, the taxpayer abstained from making that allegation. As fact it was not raised by the defence although involved in the reference to the rule of the schedule applied by the assessor, but in the reply it was denied as fact. There, then, appeared the first reference to an allegation that should have been in the

> claim; and on principle I should call it an indulgence to the taxpayer, assuming that he desired to raise that point in appeal, to be permitted so to cure a defective declaration. The language of the statute is somewhat inapt to these technical considerations but its purpose is clear: and it is incumbent on the Court to see that the substance of a dispute is regarded and not its form.
>
> I am consequently unable to accede to the view that the proceeding takes on a basic change where pleadings are directed. The allegations necessary to the appeal depend upon the construction of the statute and its application to the facts and the pleadings are to facilitate the determination of the issues. It must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy. But unless the Crown is to be placed in the position of a plaintiff or appellant, I cannot see how pleadings shift the burden from what it would be without them. Since the taxpayer in this case must establish something, it seems to me that that something is the existence of facts or law showing an error in relation to the taxation imposed on him.
>
> (emphasis added)

[27] In my view, when this reference to the onus on the taxpayer "to demolish the basic fact on which the taxation rested" is read in the context of the surrounding paragraphs, it was not intended to reduce the burden on the taxpayer to a standard lower than "balance of probabilities". As well, the taxpayer, in that case, still had the onus of proof even though the taxpayer had not pled the material facts in his pleadings to the court.

[28] The combination of "demolishing" assumptions and raising a "*prima facie* case" appear in the reasons of L'Heureux-Dubé J. in *Hickman Motors Limited v. Her Majesty the Queen*, [1997] 2 S.C.R. 336, [1997] S.C.J. No. 62 [*Hickman Motors*]:

> 92 It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd. v. Minister of National Revenue*, [1966] S.C.R. 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Pallan v. M.N.R.*, 90 D.T.C. 1102 (T.C.C.), at p. 1106. The Minister, in making assessments, proceeds

on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.

93 This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case: *Kamin v. M.N.R.*, 93 D.T.C. 62 (T.C.C.); *Goodwin v. M.N.R.*, 82 D.T.C. 1679 (T.R.B.). In the case at bar, the appellant adduced evidence which met not only a *prima facie* standard, but also, in my view, even a higher one. In my view, the appellant "demolished" the following assumptions as follows: (a) the assumption of "two businesses", by adducing clear evidence of only one business; (b) the assumption of "no income", by adducing clear evidence of income. The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions: see for example *MacIsaac v. M.N.R.*, 74 D.T.C. 6380 (F.C.A.), at p. 6381; *Zink v. M.N.R.*, 87 D.T.C. 652 (T.C.C.). As stated above, all of the appellant's evidence in the case at bar remained unchallenged and uncontradicted. Accordingly, in my view, the assumptions of "two businesses" and "no income" have been "demolished" by the appellant.

94 Where the Minister's assumptions have been "demolished" by the appellant, "the onus . . . shifts to the Minister to rebut the *prima facie* case" made out by the appellant and to prove the assumptions: *Magilb Development Corp. v. The Queen*, 87 D.T.C. 5012 (F.C.T.D.), at p. 5018. Hence, in the case at bar, the onus has shifted to the Minister to prove its assumptions that there are "two businesses" and "no income".

95 Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed: see for example *MacIsaac, supra*, where the Federal Court of Appeal set aside the judgment of the Trial Division, on the grounds that (at p. 6381) the "evidence was not challenged or contradicted and no objection of any kind was taken thereto". See also *Waxstein v. M.N.R.*, 80 D.T.C. 1348 (T.R.B.); *Roselawn Investments Ltd. v. M.N.R.*, 80 D.T.C. 1271 (T.R.B.). Refer also to *Zink, supra*, at p. 653, where, even if the evidence contained "gaps in logic, chronology, and substance", the taxpayer's appeal was allowed as the Minister failed to present any evidence as to the source of income. I note that, in the case at bar, the evidence contains no such "gaps". Therefore, in the case at bar, since the Minister adduced no evidence whatsoever, and no question of credibility was ever raised by anyone, the appellant is entitled to succeed.

[29] Although in paragraph 92 the standard of proof is stated to be "balance of probabilities", the reference in paragraph 93 to the taxpayer "demolishing" the Minister's assumption by making out a *prima facie* case and to the taxpayer, in that case, not only meeting the *prima facie* standard but also "a higher one", could suggest that a *prima facie* case was intended to mean something less than "on a balance of probabilities". As well, the references to the onus or burden shifting to the Minister to prove the assumptions made by the Minister could suggest a lower standard of proof than balance of probabilities. If the taxpayer has established, on a balance of probabilities, that the assumptions are incorrect, what legal burden would shift to the Minister? Alternatively, since at paragraph 92 it is stated that "[i]t is trite law that in taxation the standard of proof is the civil balance of probabilities", this reference to the shifting onus or burden could be intended to be a reference to the evidentiary burden – the burden to introduce evidence to contradict the evidence presented by the taxpayer.

[30] The application of these comments of L'Heureux-Dubé J., in the context of an appeal to the Tax Court, has given rise to conflicting decisions. In *Samaroo v. Her Majesty the Queen*, 2016 TCC 290, [2016] T.C.J. No. 230, Bocock J., after referring to the comments of L'Heureux-Dubé J. in *Hickman Motors*, that the initial onus is on the taxpayer to "demolish" the assumptions and then the onus shifts to the Minister, noted that:

> 50 The SCC Justice continued by saying that "within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter." Further, the minimum case that the appellant needs to make to discharge her or his initial onus is "a *prima facie* case". Read together, these phrases seem to contemplate a shifting standard of proof in tax appeals. That is, the initial onus can be discharged on the basis of a standard less onerous than proof on a balance of probabilities.

> 51 This finding, technically a minority determination within *Hickman*, commenced an active and lively debate which continues unabated to this day concerning the enigma of the elusive *prima facie* case, its value, applicability and breadth in tax assessment appeals before this Court. Supported in certain authorities and rejected or minimized in others, these alternative views remain.
>
> To reconcile this subsisting debate and make it useful to the case at bar, some rendering of the hard edges is required. In tax appeals generally and in regards to the Findings specifically, a conclusion must be drawn. In tax appeals, the onus is on the appellant to demolish the Minister's assumptions on a balance of probabilities standard and nothing more or less than that. The "*prima facie*" qualification in *Hickman Motors* should not be interpreted as having altered the usual standard of proof in tax appeals. Where the initial requirement to marshall evidence tactically shifts from the appellant to the Minister, as discussed below, the applicable standard of proof still remains the same: proof on a balance of probabilities, not a lesser or differing standard. Simply, the change is the Court's requirement to next turn its attention to the Minister's assumptions to evaluate their correctness or incorrectness through cognizance of rebuttal evidence.
>
> (footnote references have not been included)

[31] In my view, the taxpayer has the onus of proving, on a balance of probabilities, for any facts that are in dispute:

(a) such facts as are alleged by the taxpayer in their notice of appeal; and

(b) subject to certain exceptions, that such facts as assumed by the Minister in reassessing the taxpayer are not true.

The Tax Court judge should, in each case, only evaluate the evidence once – after all of the evidence has been entered. Then, and only then, should the Tax Court judge determine whether, based on all of the evidence that was presented during the hearing, the taxpayer has satisfied this onus.

[32] To reach this conclusion it is necessary to review the history of cases decided since *Hickman Motors*, the description of the burden of proof in tax cases by the Supreme Court of Canada, and the context of an appeal to the Tax Court in the tax dispute process.

I. Cases Since Hickman Motors

[33] Subsequent to *Hickman Motors*, this Court stated in *Her Majesty the Queen v. Loewen*, 2004 FCA 146, 2004 D.T.C. 6321 [*Loewen*], in paragraph 8, that:

> 8 The Minister's factual assumptions, as stated in the Crown's pleadings, are taken as fact unless they are disproved or it is established that the Minister did not make the assumptions that are said to have been made. The taxpayer has the onus of proving that the Minister's assumptions are not true or that they were not made….

[34] Although there is no reference to the level of proof required by the taxpayer, it would seem to me that a person proves a fact in a civil matter by proving that fact on a balance of probabilities. In 2007 in *Her Majesty the Queen v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, 283 D.L.R. (4th) 434, at paras. 28 and 35 [*Anchor Pointe*], this Court clearly stated that:

> 28 When pleaded, assumptions of fact place on the taxpayers the initial onus of disproving, on a balance of probabilities, the facts that the Minister assumed: see *Canada v. Anchor Pointe Energy Ltd., supra*, at paragraph 2, *Hickman Motors Ltd. v. Canada* [1997] 2 S.C.R. 336, at paragraph 92….

[35] Authority for the proposition that the taxpayer has "the initial onus of disproving, on a balance of probabilities, the facts that the Minister assumed" is stated to be paragraph 92 of *Hickman Motors*. There is no reference to paragraph 93 of *Hickman Motors*.

[36] In *Anchor Pointe*, at para. 36, it was also noted if the facts that are assumed "are exclusively or peculiarly within the Minister's knowledge" then this general rule will not apply. Also, if the Minister alleges a fact that is not part of the facts that were assumed by the Minister in assessing a taxpayer or in confirming an assessment, then the Minister will have the onus of proof with respect to such facts (*Loewen*, at para. 11).

[37] In *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 [*McDougall*], the Supreme Court of Canada summarized the "various approaches in civil cases where criminal or morally blameworthy conduct is alleged" in paragraph 39 and then stated:

> 40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

[38] One of the alternatives that was rejected was the one in paragraph 39(3):

> (3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

[39] This alternative arises in *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559 (cited in paragraph 30 of *F.H. v. McDougall*). This is the same case relied upon by L'Heureux-Dubé J. in paragraph 92 of *Hickman Motors*.

[40] The conclusion of the Supreme Court of Canada on the burden of proof in civil cases in *F.H. v. McDougall* is stated in paragraph 49:

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[41] In *Amiante Spec Inc. v. Her Majesty the Queen*, 2009 FCA 139, [2009] G.S.T.C. 71 [*Amiante Spec*]; *House v. Her Majesty the Queen*, 2011 FCA 234, 2011 D.T.C. 5142 [*House*]; *McMillan v. Her Majesty the Queen*, 2012 FCA 126, 2012 D.T.C. 5105 [*McMillan*]; and *Newmont Canada Corp. v. Her Majesty the Queen*, 2012 FCA 214, 433 N.R. 216 [*Newmont*]; this Court indicated or suggested that the "initial onus" on the taxpayer is to establish facts on a standard that is lower than the balance of probabilities. Any reference to proof on a balance of probabilities in these cases was in relation to the stated burden on the Minister to prove its assumptions on a balance of probabilities (paragraph 69 of *House*, paragraph 63 of *Newmont*). *F.H. v. McDougall* was not addressed in *Amiante Spec*, *House*, *McMillan* or *Newmont* nor was there any reference to *Anchor Pointe* or *Loewen* in these cases.

[42] In *Northland Properties Corp. v. Her Majesty the Queen in Right of the Province of British Columbia*, 2010 BCCA 177, 319 D.L.R. (4th) 334, the British Columbia Court of Appeal concluded that the standard of proof imposed on a taxpayer in a tax case is the balance of probabilities:

> 27 The standard of proof in discharging this burden is nothing more or less than the balance of probabilities….

[43] In *F.H. v. McDougall*, the Supreme Court of Canada confirmed that "in civil cases there is only one standard of proof and that is proof on a balance of probabilities". As a result, in my view, in all cases before the Tax Court, the standard of proof should be proof on a balance of probabilities. It would also be logical that only one party would have the burden of proof with respect to a particular fact. A judge should not, before all of the evidence has been presented, be determining whether a taxpayer has established, on a balance of probabilities, that a particular fact (which was assumed by the Minister and which is not exclusively or peculiarly within the Minister's knowledge) is incorrect. Rather, the judge should scrutinize all of the relevant evidence when the hearing is concluded and then make the determination of whether the taxpayer has established that the particular fact, on the balance of probabilities, is not as assumed by the Minister. Having made this determination, it would be illogical for the judge to then make a second determination of whether the Crown, with respect to the same fact, has proven that the assumption of fact was correct.

II. Description of the Onus of Proof by the Supreme Court of Canada

[44] The Supreme Court of Canada, in the cases since *Hickman Motors*, has not explicitly stated whether a taxpayer only needs to raise a *prima facie* case or whether the taxpayer's burden of proof is to establish facts on a balance of probabilities or a lower standard. However, the description of the burden imposed on taxpayers used by the Supreme Court of Canada after *Hickman Motors* and after *F.H. v. McDougall* is instructive.

[45] *Hickman Motors* was decided on June 26, 1997. Less than a year later, the Supreme Court of Canada decided *Canderel Limited v. Her Majesty the Queen*, [1998] 1 S.C.R. 147, [1998] S.C.J. No. 13. In that case, Iacobucci J., writing on behalf of the Court, stated that:

> 52 Revenue Canada is free to indicate its disapproval of the taxpayer's chosen method of computation by means of assessment. In *Johnston v. M.N.R.*, [1948] S.C.R. 486, this Court held that the onus is on the taxpayer, in the face of an assessment, to establish that the factual findings on which the assessment is based are wrong. However, to satisfy this onus where the dispute is over the appropriate method of computation, the taxpayer need only show that his or her income was calculated in a manner consistent with the foregoing paragraph, that is, that the figure attained was in conformity with the then-existing legal framework and represents an accurate picture of his or her financial position for the year in question. The onus then shifts to the Minister to prove either that the figure does not constitute an accurate picture of income or that some other method of computation would yield a more accurate picture. In so doing, however, I emphasize that the Minister is not entitled to rely on particular well-accepted business principles as being inherently preferable over others. If the method chosen by the taxpayer is otherwise acceptable by law and in accordance with such well-accepted principles, then it is no answer for the Minister to say that other principles should have been employed unless to do so would have yielded a more accurate picture of income.
>
> (emphasis added)

[46] There is no reference to *Hickman Motors* nor is there any reference to the taxpayer only needing to raise a *prima facie* case. The onus that is on the taxpayer is "to establish that the factual findings on which the assessment is based are wrong". This language is consistent with the level of proof being on a balance of probabilities. Although there is a reference to the onus shifting to the Minister, it is not clear whether was intended to mean a shift in the legal onus of proof or a shift in the evidentiary burden.

[47] In *Canada Trustco Mortgage Co. v. Her Majesty The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601 [*Canada Trustco*], the onus on the taxpayer was described as follows:

> 5.6 *Burden of Proof*
>
> 63 The determination of the existence of a tax benefit and an avoidance transaction under s. 245(1), (2) and (3) involves factual decisions. As such, the burden of proof is the same as in any tax proceeding where the taxpayer disputes the Minister's assessment and its underlying assumptions of facts. The initial obligation is on the taxpayer to "refute" or challenge the Minister's factual assumptions by contesting the existence of a tax benefit or by showing that a *bona fide* non-tax purpose primarily drove the transaction: see *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, at para. 92. It is not unfair to impose this burden, as the taxpayer would presumably have knowledge of the factual background of the transaction.

[48] This paragraph indicates that the "initial obligation" is on the taxpayer and this obligation is to "refute" or challenge the assumptions made by the Minister. Reference is only made to paragraph 92 of *Hickman Motors*. The reference to the taxpayer "demolishing" an assumption by making out a *prima facie* case is in paragraph 93 of *Hickman Motors*. In paragraph 66 of *Canada Trustco* this obligation on the taxpayer to refute the assumptions is repeated:

> 5.7 *Summary*
>
> 66 The approach to s. 245 of the *Income Tax Act* may be summarized as follows.
>
> 1. Three requirements must be established to permit application of the GAAR:
>
> (1) A *tax benefit resulting from a transaction* or part of a series of transactions (s. 245(1) and (2));
>
> (2) that the transaction is an *avoidance transaction* in the sense that it cannot be said to have been reasonably undertaken or arranged primarily for a *bona fide* purpose other than to obtain a tax benefit; and

> (3) that there was *abusive tax avoidance* in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer.
>
> 2. The burden is on the taxpayer to refute (1) and (2), and on the Minister to establish (3).
>
> (emphasis added)

[49] In *Copthorne Holdings Ltd. v. Her Majesty the Queen*, 2011 SCC 63, [2011] 3 S.C.R. 721 [*Copthorne*], the onus on the taxpayer was described as follows:

> 34 The first question that must be answered is whether there was a tax benefit. The burden is on the taxpayer to refute the Minister's assumption of the existence of a tax benefit (*Trustco*, at para. 63). Where, as here, the Tax Court judge has made a finding of fact on the existence of a tax benefit, it is only appropriate for a reviewing court to overturn such a finding where an appellant can show a palpable and overriding error.
>
> …
>
> 38 The comparison was entirely appropriate. Copthorne has not satisfied its onus of showing that there was no tax benefit. I would affirm the finding of the Tax Court that there was a tax benefit.
>
> (emphasis added)

[50] Although the reference in *Copthorne* is to paragraph 63 of *Canada Trustco*, the onus as described in *Copthorne*, is not stated to be an "initial onus" but rather is simply described as the burden on the taxpayer and the burden is stated to be to refute (without any quotation marks) the Minister's assumptions. There is also no reference to the taxpayer only being required to raise a *prima facie* case. To indicate that the taxpayer has to refute the assumption or show that the assumption was incorrect, would seem to indicate a requirement that the taxpayer establish this on a balance of probabilities and not on a lower standard.

[51] *Her Majesty The Queen v. GlaxoSmithKline Inc.*, 2012 SCC 52, [2012] 3 S.C.R. 3, was a transfer pricing case. The Supreme Court of Canada noted that:

> 70 The basis of the assessment is found in the assumptions in the Minister's Amended Reply to Glaxo Canada's Amended Notice of Appeal. Assumptions 14p) and r.A) provide:
>
> > p) the Appellant paid Adechsa, with whom it was not dealing at arm's length, a price for ranitidine which was greater than the amount that would have been reasonable in the circumstances if the Appellant and Adechsa had been dealing at arm's length;
> >
> > r.A) any amounts paid by the appellant to Adechsa over and above the prices paid by other Canadian pharmaceutical companies (as detailed in Schedule A attached) were not for the supply of ranitidine;
>
> …
>
> 72 In *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, Justice L'Heureux-Dubé states that the taxpayer's burden is to "'demolish' the exact assumptions made by the Minister but no more" (para. 92 (emphasis deleted)). Here, it is safe to say that assumption 14r.A) by the Minister of the prices paid by Apotex and Novopharm as CUP transactions, without adjustments, was indeed demolished. However, assumption 14p) was not.
>
> 73 Indeed, at the Tax Court, Glaxo Canada sought to establish the reasonableness of the prices it paid, though its evidence and argument were not accepted by the Tax Court judge. In other words, <u>it accepted the burden of demonstrating that the prices it paid were reasonable within the meaning of s. 69(2). Had it been successful in establishing that the prices it paid were reasonable, assumption 14p) as well as 14r.A), would have been demolished.</u>
>
> (emphasis added)

[52] The reference to *Hickman Motors* is only to paragraph 92 of *Hickman Motors*. Also the references to the burden are not modified by the word "initial" and also state that this burden was to demonstrate or establish the facts that the taxpayer wanted to dispute. These words suggest that the taxpayer is required to do more than just make out a *prima facie* case on a lower standard

than balance of probabilities. In my view, these references support the position that the onus that is on the taxpayer is to prove, on a balance of probabilities, that the particular fact assumed by the Minister is wrong.

III. Context of an Appeal to the Tax Court

[53] In my view it is also important to recognize that tax disputes do not commence with the notice of appeal to the Tax Court. In most cases that are before the Tax Court the taxpayer has filed a tax return in which the taxpayer indirectly represented that a certain set of facts existed which would support the income as reported by the taxpayer in their tax return. There are some tax disputes before the Tax Court in which the taxpayer did not file a tax return. However, a taxpayer who did not file a tax return should not be in a better position when the matter is before the Tax Court than a taxpayer who did file a tax return.

[54] In most cases the return as filed by the taxpayer is assessed as filed. Following an audit of that person's tax return the Minister may determine that the facts are not as represented by the particular taxpayer. Although disputes may also arise with respect to the interpretation of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the Act), since the issue in this case relates to the burden of proof in relation to facts only factual disputes will be relevant for this discussion. Because the Minister has determined that the facts are different from those as represented by the taxpayer a notice of reassessment will be issued. Following the notice of reassessment the next step in the process is the filing of a notice of objection under the Act if the taxpayer wants to challenge the reassessment.

[55] If the matter is not satisfactorily resolved at this stage the taxpayer will then file an appeal to the Tax Court if the taxpayer wants to pursue this matter further. There are two procedures that could be applicable – either the General Procedure or the Informal Procedure. Under the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, "[e]very notice of appeal shall be in Form 21(1)(a), (d), (e) or (f)" (Rule 48) (emphasis added). Form 21(1)(a) is the general form for an appeal from a reassessment and it provides that the notice of appeal is to include "the material facts relied on". Under Rule 49 the Crown, in filing the reply, is to state, among other matters, "(a) the facts that are admitted, (b) the facts that are denied, (c) the facts of which the respondent has no knowledge and puts in issue, (d) the findings or assumptions of fact made by the Minister when making the assessment".

[56] As a result, under the General Procedure the taxpayer is to identify the relevant facts in the notice of appeal and the Crown is to indicate which facts the Crown denies. It would seem that generally for factual disputes before the Tax Court, the taxpayer would be alleging the facts that would support the tax return the taxpayer had filed and the Crown would be denying those facts. The assumptions of fact made by the Minister would generally be facts that are inconsistent with the facts as pled by the taxpayer. Since the taxpayer filed a tax return based on a particular set of facts and related the material facts on which the taxpayer would be relying in the notice of appeal, the taxpayer should have the onus of proof, on a balance of probabilities, of any facts that are denied by the Crown. The result of establishing such facts would generally mean that the assumptions of fact made by the Minister cannot also be true.

[57] Under the *Tax Court of Canada Rules (Informal Procedure)* SOR/90-688b, Rule 4 provides that an appeal shall be instituted by filing a notice of appeal but it only provides that such notice may be in the form as set out in Schedule 4. Therefore, there is no particular form that a taxpayer must use in an Informal Procedure matter. As a result there may well be cases where the only disclosure of facts in an Informal Procedure appeal are those set out in the reply as the assumptions of fact made by the Minister. It does not seem to me that a taxpayer in an Informal Procedure appeal should have a reduced burden of proof simply because the taxpayer was not obligated to disclose in the notice of appeal the material facts on which that taxpayer relied in filing his/her or its tax return or will be relying on in the appeal before the Tax Court. This would also be consistent with *Johnston* where the Supreme Court of Canada found that the taxpayer's failure to plead the relevant facts in his pleadings to the Court did not relieve the taxpayer of his burden of proof.

[58] For example assume that two taxpayers are each carrying on a business. In each case the taxpayer claims as a deduction in determining their income from a business an amount paid for certain services for which there is no receipt. Each taxpayer is reassessed on the basis that the Minister does not accept that the expenditure was incurred, and if it was incurred the Minister does not accept that it was incurred for the purpose of earning income. Assume that each taxpayer files a notice of objection and the Minister confirms the reassessment.

[59] If the first taxpayer files an appeal under the General Procedure, the taxpayer will presumably allege, as material facts, that the amount was incurred and that it was incurred for the purpose of earning income. The Crown in the reply will presumably deny this fact and also

indicate that the Minister assumed, as a fact in reassessing the taxpayer, that the amount was not incurred and if the amount was incurred, it was not incurred for the purpose of earning income. What burden should be placed on the taxpayer to establish that the expenditure was incurred? If the burden on the taxpayer is to raise a *prima facie* case with a standard of proof that is less than the balance of probabilities, then the only person with the burden of proving the relevant facts on a balance of probabilities would be the Minister who, following the taxpayer raising a *prima facie* case, would have to prove that the taxpayer did not incur the expenditure in question even though the taxpayer alleged such fact in their notice of appeal and the Crown denied it in the reply. This does not seem to me to be the correct result.

[60] If the second taxpayer files an appeal under the Informal Procedure why should the burden be any less on this taxpayer simply because he does not disclose any particular facts in his notice of appeal? It would seem to me that this taxpayer should have the same burden as the taxpayer in the first case. This taxpayer should also have the burden of establishing, on a balance of probabilities, that the expenditure was incurred and that it was incurred for the purpose of earning income.

IV. Conclusion on Onus of Proof

[61] In my view, a taxpayer should have the burden to prove, on a balance of probabilities, any facts that are alleged by that taxpayer in their notice of appeal and that are denied by the Crown. In most cases this should end the discussion of the onus of proof since the assumptions of fact made by the Minister in reassessing the taxpayer would generally be inconsistent with the

facts pled by the taxpayer with respect to the material facts on which the reassessment was issued.

[62] If there are facts that were assumed by the Minister in reassessing a taxpayer and that are not inconsistent with the facts as pled by that taxpayer, it would also seem logical to require the taxpayer to prove, on a balance of probabilities, that these facts assumed by the Minister (and which are in dispute and are not exclusively or peculiarly within the Minister's knowledge) are not correct. Requiring a taxpayer to disprove the facts assumed by the Minister in reassessing that taxpayer simply puts the onus on the person who knows (or ought to know) the facts. It also puts the onus on the person who indirectly asserted certain facts in filing their tax return that would be inconsistent with the facts assumed by the Minister in reassessing such taxpayer.

[63] Once all of the evidence is presented, the Tax Court judge should then (and only then) determine whether the taxpayer has satisfied this burden. If the taxpayer has, on the balance of probabilities, disproven the particular facts assumed by the Minister, based on all of the evidence, there is no burden to shift to the Minister to disprove what the Tax Court judge has determined that the taxpayer has proven. Either the taxpayer has disproven the assumed facts or he, she or it has not.

V. Application to this Case

[64] In this case, Mr. Sarmadi, in paragraph d) of his notice of appeal, stated that:

> Also during the course of the objection, evidence was provided to the appeals division to show that about $90,000 was loaned to me from my father in 2003 and 2004. This amount was not taken into account in the net worth calculation, and would in fact explain a significant portion of the net worth variance for those years on which I was reassessed.

[65] In paragraph 4 of the Reply, the Crown acknowledged that Mr. Sarmadi's position was that he had received this loan from his father but stated that the Crown did not admit this and put in issue whether Mr. Sarmadi's father had lent him this money. Although no assumption was made by the Minister that the loan had not been made, implicitly this assumption is made as the Minister noted, as part of the assumptions made by the Minister, the assets acquired by Mr. Sarmadi for cash and his reported income and personal expenditures. The Minister also assumed that the discrepancy was unreported income.

[66] In this particular case, Mr. Sarmadi had reported only modest income for 2003 and 2004. Based on a net worth assessment which identified certain properties acquired by Mr. Sarmadi and certain personal expenditures, the Minister assumed that he had unreported income for these taxation years. Mr. Sarmadi did not dispute that he had acquired the properties identified by the Minister or that he had incurred the personal expenditures.

[67] The only dispute related to whether Mr. Sarmadi had received a loan of $90,000 from his father to acquire the properties or finance his expenditures. If he had received this loan, then the

Minister's assumption of unreported income would not be entirely accurate and his income would have been reduced by this amount.

[68] In this case Mr. Sarmadi alleged that the Minister's assumption of unreported income is overstated by $90,000. Mr. Sarmadi also alleged, in his notice of appeal, that he had received a loan from his father for this amount. Since Mr. Sarmadi alleged that he had received a loan from his father, in my view, he would have had the onus to prove this on a balance of probabilities. This would place the onus on Mr. Sarmadi who would know the facts related to the financing of the acquisition of the properties. If the onus on Mr. Sarmadi was only to raise a *prima facie* case and the onus then shifted to the Minister to prove on a balance of probabilities that Mr. Sarmadi had not received a loan from his father, this would place the burden of proof on the person who would not have the direct knowledge of whether Mr. Sarmadi's father had lent him $90,000. In my view, this would not be the correct approach and the onus was on Mr. Sarmadi to establish, on a balance of probabilities, that he had received a $90,000 loan from his father. Having failed to do so, his appeal was properly dismissed by the Tax Court judge.

"Wyman W. Webb"

J.A.

STRATAS J.A. (Concurring Reasons)

[69] I have read Justice Webb's reasons on the issue of the burden of proof in tax appeals. I commend him on his exploration of this issue.

[70] The issue has been considered before in this Court. My colleague's reasons somewhat revisit this issue and articulate it somewhat differently. I find much of what my colleague says to be thoughtful, illuminating and attractive.

[71] However, at this time and in these circumstances, I decline to express a definitive opinion on the correctness of his views on this fundamental point. The insights of commentators may be helpful. Judges in the Tax Court may also have useful insights. As well, in a future appeal in this Court where the issue matters, other counsel may also be able to assist.

[72] I concur with the reasons of my colleague, Woods J.A.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-309-15
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE FAVREAU DATED JUNE 3, 2015, 2010-361(IT)G	
STYLE OF CAUSE:	SIROUS SARMADI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 22, 2016
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRING REASONS BY:	WEBB J.A. STRATAS J.A.
DATED:	JUNE 21, 2017

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