

Federal Court of Appeal



Cour d'appel fédérale

Date: 20171206

Docket: A-388-15

Citation: 2017 FCA 238

**CORAM: PELLETIER J.A.
STRATAS J.A.
DE MONTIGNY J.A.**

BETWEEN:

CECIL PEREIRA (PH.D.)

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on November 28, 2017.

Judgment delivered at Ottawa, Ontario, on December 6, 2017.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

**PELLETIER J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellant appeals from the judgment dated May 13, 2015 of the Tax Court of Canada (*per* Paris J.). The Tax Court upheld the assessment of tax for the appellant's 2013 taxation year under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[2] The Tax Court held that the appellant was properly assessed with interest because he failed to pay required instalments of tax due for the 2013 taxation year. The Tax Court found that the appellant was indeed required to pay instalments of tax due. Since he did not do so on a timely basis, he was liable for interest.

[3] On this, the Tax Court's conclusion is an issue of mixed fact and law. Unless the appellant can demonstrate an error in law or in extricable legal principle, he must persuade us that the Tax Court's conclusion is vitiated by palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Palpable and overriding error is a high threshold for interference: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46.

[4] Was the appellant required to pay instalments of tax due for the 2013 taxation year? This is governed by paragraph 156.1(2)(b) of the *Income Tax Act*. This paragraph provides that a taxpayer does not need to pay tax in instalments if "the individual's net tax owing for the particular year [here 2013], or for each of the 2 preceding taxation years [here 2011 and 2012], does not exceed the individual's instalment threshold for that year." The instalment threshold in this case is \$3,000.

[5] The appellant cannot establish either branch of paragraph 156.1(2)(b):

- In the Tax Court, the appellant admitted that his net tax owing for the 2013 taxation year was greater than \$3,000, namely \$6,207.75.

- The Tax Court did not examine whether the appellant's net tax owing in each of 2011 or 2012 was less than \$3,000. But according to a proper assumption made by the Minister and not addressed by the appellant, the appellant's net tax owing for the 2011 taxation year was over \$3,000: see Reply, para. 7(d).

[6] In the Tax Court, the appellant submitted that he was misled by instalment reminders sent out to him by the Canada Revenue Agency. He submitted that the notices told him that his net tax owing for 2013 was only \$2,888. But the Tax Court found that the notices told him that \$2,888 was the total of the instalments he was required to make, not his net tax owing for 2013. Thus, on the facts, the Tax Court found that the reminders were not misleading.

[7] I am not persuaded that the Tax Court erred in law or in extricable legal principle or committed any palpable and overriding error in making the findings and conclusions it did.

[8] In this Court, the appellant also alleged that the Tax Court hearing was procedurally unfair. He pointed to the fact that the Tax Court asked him whether he shared his documents with the respondent but never asked the respondent if it shared its documents with the appellant. In my view, this was not procedurally unfair. I note that the only exhibit produced by the respondent arose in cross-examination and even in more formal proceedings under the *Tax Court of Canada Rules (General Procedure)*, SOR 90-688a that sort of document need not be disclosed in advance: see Rule 89(2). I also note that during the hearing in the Tax Court the appellant did not express any concern about procedural unfairness and, judging by the transcript, he felt free to speak up whenever he needed to. Having read the transcript of the hearing, I conclude that the hearing in the Tax Court was procedurally fair in all respects.

[9] In this Court, the appellant raises additional issues and seeks relief for those issues.

[10] The starting point for analysis is the principle that this Court is restricted to the issues raised in the appellant's notice of appeal in this Court.

[11] To the extent that the notice of appeal in this Court raises issues that were not before the Tax Court, this Court ordinarily should not entertain them, particularly where they are fact-based and evidence in the record is lacking: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The record before us, which includes a full transcript of the hearing before the Tax Court, is not sufficient to deal with the additional issues the appellant urges upon us. In this case, this Court should not deal with issues that were not before the Tax Court.

[12] During oral argument in this Court, we asked the parties questions concerning the issues that were before the Tax Court. The appellant suggests that he placed much more than the issue of instalments before the Tax Court. The respondent submits that the Tax Court had only two issues before it: an issue about enforcement action taken by the Canada Revenue Agency that the Tax Court had no jurisdiction to decide, and the tax instalment issue that the Tax Court decided on its merits.

[13] For the reasons that follow, I agree with the respondent.

[14] In the Tax Court, the appellant set out only two grounds in his notice of appeal. One of the two grounds was the Canada Revenue Agency's garnishing of the appellant's pension while his appeal was in progress.

[15] The Tax Court had no jurisdiction to deal with this ground. The Tax Court can deal only with the validity of an assessment, not enforcement action taken by the Canada Revenue Agency. Challenges to decisions concerning enforcement can be pursued in the Federal Court by way of judicial review, but not in the Tax Court. See, *e.g.*, *A&E Precision Fabricating and Machine Shop Inc. v. Canada*, 2013 FCA 173 at para. 9.

[16] The other ground in the appellant's notice of appeal in the Tax Court was as follows: "a critical fact...was ignored by [a Canada Revenue Agency official], who focused 99% on items, irrelevant to [the appellant's] claim, that in 2013, allowed taxes were paid in full and on time."

[17] The Tax Court characterized this ground as relating only to the issue of the tax instalments.

[18] In reaching this characterization, the Tax Court put to the appellant at the beginning of the hearing that the issue of the tax instalments was the only issue in play. The appellant seemed to accept this. See transcript of the hearing at p. 5, ll. 8-19.

[19] There is more to support the Tax Court's characterization. The appellant's testimony in the Tax Court largely concerned the issue of the tax instalments and only that issue. Only later in

his testimony did the appellant start to discuss briefly an issue relating to foreign property and rent. But in submissions at the end of the hearing, the appellant restricted himself to the issue of the tax instalments. And when the Tax Court asked the appellant at the end of his submissions if he had more to add, the appellant confirmed he did not.

[20] Finally, and most importantly, the appellant admitted in the Tax Court that his net taxes owing for the 2013 taxation year were as assessed by the Minister, namely \$6,207.75: Appeal Book, p. 7. The Tax Court cannot be faulted for concluding that the appellant's taxable income was correctly determined, leaving the issue of instalment interest as the only matter for it to determine.

[21] The record before us suggests that the appellant may be confusing the 2013 taxation year, which is in issue here, with other taxation years. For example, at one point when discussing other issues during the hearing in the Tax Court the appellant referred to income using numbers found in his assessment for the 2010 taxation year, not the 2013 taxation year.

[22] Overall, I see no ground to interfere with the Tax Court's characterization of this ground of appeal as being restricted to the issue of the tax instalments. The Tax Court's characterization is a factually suffused one based on the material before it and on its evaluation of the responses and reactions, both verbal and non-verbal, of the appellant to the questions and comments it made during the hearing. Absent palpable and overriding error—and none has been demonstrated here—we cannot set its characterization aside.

[23] Therefore, for the foregoing reasons, I would dismiss the appeal with costs. The Crown seeks its costs. Costs should follow the event. Thus, I would award the Crown its costs. In the circumstances, I would fix costs in the amount of \$500, all inclusive.

"David Stratas"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-388-15

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE B. PARIS
DATED MAY 13, 2015, DOCKET NO. 2015-203(IT)I**

STYLE OF CAUSE: CECIL PEREIRA (PH.D.) v. THE
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: NOVEMBER 28, 2017

REASONS FOR JUDGMENT BY: STRATAS J.A.

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

DATED: DECEMBER 6, 2017

APPEARANCES:

Cecil Pereira (Ph.D.) ON HIS OWN BEHALF

Neil Goodridge FOR THE RESPONDENT

SOLICITORS OF RECORD:

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