Federal Court of Appeal | Cour d'appel fédérale

Date: 20180111

Docket: A-92-17

Citation: 2018 FCA 6

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

BETWEEN:

THANH TRUC TRUONG

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on January 11, 2018.
Judgment delivered from the Bench at Toronto, Ontario, on January 11, 2018.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 11, 2018).

WOODS J.A.

[1] This is an appeal by Thanh Truc Truong from a judgment of the Tax Court of Canada concerning net worth assessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and the *Excise Tax Act*, R.S.C. 1985, c. E-15.

[2] Net worth assessments were issued by the Minister of National Revenue in this case because the records provided by the appellant were grossly inadequate. The assessment methodology involves making an estimate of increases to a taxpayer's net worth. This is acknowledged to be a very rough assessment tool, but its use is justified in this case by the appellant's failure to keep proper records as required by the relevant legislation.

[3] The assessments under the *Income Tax Act* added to income an aggregate amount of $1,682,509 for the 2005 to 2009 taxation years, inclusive. They also imposed gross negligence penalties with respect to these amounts. The assessments under the *Excise Tax Act* assumed that the appellant had unreported GST collectible for the same periods in an aggregate amount of $92,185. Gross negligence penalties were also imposed on these amounts.

[4] The assessments were appealed to the Tax Court, which upheld them except for a very small reduction in unreported income (2017 TCC 22).

[5] In the Tax Court's analysis (*per* Justice Bocock), it determined that the appellant had operated several businesses, owned five properties and maintained various bank accounts over the relevant period. It also commented that no books or records were ever produced.

[6] In reference to the Minister's determination of unreported income and GST, the Tax Court commented at paragraph 51 of its decision that the appellant had admitted that she owned a substantial amount of assets and yet no explanation was provided as to non-taxable sources of funds for the amounts assessed.

[7] In largely upholding the Minister's determinations, the Court stated its general conclusion in this way, at paragraph 48 of the decision: "Vague assertions, inconsistent challenges of actual evidence from interested and related parties and no documentary evidence cannot defeat the cogent third party documentation, disinterested testimony and logical conclusions embedded within the Minister's alternative assessment, based upon third party records and buttressed by clear testimony at trial."

[8] As for the assessment of gross negligence penalties, the Tax Court determined that the facts amply supported the imposition of the penalties, especially given the magnitude of the difference between the income, as reported by the appellant, and her admitted net worth and business activity.

[9] I now turn to a consideration of the issues in this appeal, and begin with the well-known standard of review described in the case of *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Essentially, this Court must uphold the decision of the Tax Court unless the Court made an error in determining a question of law or made a palpable and overriding error in respect of questions of fact or factually suffused questions of mixed fact and law. The terms "palpable" and "overriding" in this context mean obvious and affecting the heart of the result in the case.

[10] In this case, we are satisfied that the Tax Court made no such reviewable error, and that the appeal should be dismissed.

[11] The appellant submits that the Tax Court made two errors of law, first in admitting records of gambling that were obtained from casinos, and second in requesting proof from the appellant that her expenditures were funded from non-taxable sources. In our view, no such errors were made.

[12] As for the Tax Court's admission of gambling records, these records appear to be computer-generated records of gambling results received from several casinos that the appellant frequented. In general, net gambling losses would be added to unreported income in a net worth determination where the source of the funding for the losses is not known. This appears to be a significant item in the net worth determination. Based on the auditor's worksheet at page 389 of the Appeal Book, it appears that the Minister concluded that the appellant had gaming losses in an aggregate amount of over $750,000 over the five years at issue.

[13] The appellant submits that the Tax Court erred in admitting these documents on the grounds that they were hearsay. Although the appellant does not challenge the authenticity of the records as being computer-generated records of the casinos, she submits that the records do not reliably represent the amounts spent at the casinos by the appellant.

[14] In our view, there is no reviewable error in the approach taken by the Tax Court with respect to these documents. The records were admissible as business records. From there, the Tax Court had to assess what weight to place on the documents in determining the likely amount of the appellant's gambling losses.

[15] The Tax Court acknowledged that the records do not establish the amount spent by the appellant with perfect accuracy, but it concluded based on the evidence as a whole that it was proper to take the records into account in the net worth determination. This is a question of mixed fact and law for which the test is palpable and overriding error. There is no such error in the Tax Court's approach. Net worth assessments are recognized as blunt instruments to determine income, but as mentioned earlier it is an accepted method if a taxpayer fails to produce adequate books and records, as required by law.

[16] At the hearing, when asked what approach the Tax Court should have taken to gambling expenditures in the net worth determination, counsel for the appellant stated that the Tax Court should have preferred the evidence of the appellant's friends and relatives over the evidence of a former boyfriend. As discussed below, there is no palpable error in the Tax Court's conclusion to prefer the evidence of the former boyfriend.

[17] The appellant also submits that the Tax Court made an error of law when at paragraph 37 of the decision it requested proof from the appellant that the assessed amounts were sourced from non-taxable funds.

[18] Again, we disagree. The appellant misapprehends the test that is set out in paragraph 37 of the Tax Court's decision. In that paragraph, reference is made to the need for evidence of non-taxable sources of funds. However, this reference, which is from an excerpt from the case of *Golden v. The Queen*, 2009 TCC 396, 2009 D.T.C. 1273, only applies if the taxpayer challenges

the need for a net worth assessment at all. This is not the case here. The appellant is only challenging specific aspects of the net worth determination.

[19] The appellant also submits that the Tax Court made a palpable and overriding error in its assessment of facts due to bias on the part of the trial judge. We also disagree with this submission.

[20] First, it is important to note that allegations of bias on the part of a judge are serious allegations which should not be made lightly (*Es-Sayyid v. Canada (Public Safety and Emergency Preparedness*), 2012 FCA 59, [2013] 4 F.C.R. 3 at paragraph 50). In this case, the appellant has failed to establish any real foundation for an allegation of bias. The allegation is bald and falls far short of the mark.

[21] Second, the appellant suggests that the Tax Court was partial in preferring the testimony of the appellant's former boyfriend over the testimony of the appellant and her friends and relatives. The Tax Court's determination in this regard is based on a *bona fide* assessment of credibility and weight and is, thus, entitled to deference. It does not amount to a palpable error.

[22] The appellant also suggests that the Tax Court misstated some of the evidence and ignored other evidence. The instances of error mentioned in the appellant's memorandum are relatively minor. Taken individually or together, they do not amount to an overriding error that would go to the heart of the outcome in the case.

[23] We have concluded that this appeal should be dismissed, with costs to the respondent.

"Judith Woods"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-92-17
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BOCOCK OF THE TAX COURT OF CANADA DATED FEBRUARY 8, 2017 IN DOCKET NOS. 2013-2653(IT)G AND 2013-2654(GST)G.	
STYLE OF CAUSE:	THANH TRUC TRUONG v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	JANUARY 11, 2018
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. NEAR J.A. WOODS J.A.
DELIVERED FROM THE BENCH BY:	WOODS J.A.

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