

Date: 20071115

Docket: A-284-06

Citation: 2007 FCA 366

**CORAM: SEXTON J.A.
PELLETIER J.A.
RYER J.A.**

BETWEEN:

ALBERT ROSS DEEP

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 8, 2007.

Judgment delivered at Ottawa, Ontario, on November 15, 2007.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**SEXTON J.A.
RYER J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from the decision of Mr. Justice Campbell Miller of the Tax Court of Canada dismissing the appellant's appeal from the reassessment of his liability for income tax for the 1994, 1995, 1996 and 1997 taxation years. The appellant filed twice in 1995 as a result of a change in fiscal year end so that there is a 1995A and a 1995B return for that year. The judgment dismissing the appeals contains a typographical error in that it refers to the 1995, 1996, 1997 and 1998 taxation years. The appeal should be allowed to extent of correcting that error. In all other respects, I have concluded that the appeal should be dismissed.

[2] At the time of reassessment, the 1994, 1995, and 1996 taxation years were statute barred in the sense that the normal reassessment period had expired in respect of each of those years. In addition to reassessing beyond the normal reassessment period, the Minister imposed penalties under subsection 163(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended on the basis that the appellant "... knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of false statement or omissions.": see Reply to Amended Notice of Appeal, at paragraph 12 j. It is not contested that if the evidence supports the conclusion that the Minister was entitled to impose penalties under subsection 163(2), it necessarily supports the conclusion that the Minister was entitled to reassess beyond the normal reassessment period.

[3] Counsel for the appellant, who made as much as could be made of a difficult case, argued that the Tax Court judge's conclusion, at paragraph 77 of his reasons, "... that [the appellant] has dealt with his tax responsibilities on the basis of what he believes tax laws logically should be..." precludes a finding of gross negligence. In effect, counsel asks the Court to find that the many questionable entries in the appellant's income tax returns are the result of honest error.

[4] Had the Tax Court judge limited his comments to those cited by counsel for the appellant, it may have been possible to grant him some relief. Unfortunately for the appellant, the Tax Court judge did not stop there, he went on to say "... with no reasonable effort to determine what they really are." In the next paragraph, the Tax Court judge added, "I conclude that Dr. Deep knew he

was making false statements with respect to interest and with respect to his other expenses, in that they were personal and not business expenses, under circumstances amounting to gross negligence."

[5] These are conclusions of fact and mixed fact and law by a trial judge after a trial, both of which are reviewable on the standard of palpable and overriding error. The record amply supports the trial judge's conclusion with respect to each conclusion. The Tax Court judge's conclusion on these questions is immune from review. Consequently, the Minister was entitled to levy the penalties which he imposed, and he was entitled to reassess the appellant beyond the normal reassessment period.

[6] That leaves the matter of the deductions disallowed by the Minister. By far the most important of these is the appellant's deduction for interest (as it was claimed on his tax returns) or non-capital loss carryforward (as it was characterized before the Tax Court judge). As was pointed out at the hearing of this appeal, the appellant's trading losses were incurred when he disposed (or was dispossessed) of the securities in which he was trading. The repayment of the money borrowed to finance those trading transactions does not give rise to a loss, nor is interest on that loan deductible where it accumulated after the disposition of the source of that income, i.e. the securities themselves. As a result, the appellant's settlement with the Bank of Montreal, which formed the basis of his interest/loss calculation, gave rise to no deductible expense or loss.

[7] As for the office expenses which the Minister disallowed, the evidence fully supports the Tax Court judge's conclusion which, in any event, is only reviewable on the standard of palpable and overriding error. The same is true of vehicle expenses and legal expenses. As for the issue of unreported income, the appellant was not entitled to claim a deduction in respect of income which he says he earned but which was not paid to him. The appellant did not recognize the income earned but not received, with an offsetting deduction for bad debts. He simply failed to recognize the income but claimed a deduction in respect of the amounts not received. This, he was not entitled to do.

[8] In the end result, while I appreciate the difficulty in which the appellant now finds himself, I am unable to assist him. The Tax Court judge properly applied the law to the facts and drew the appropriate conclusions.

[9] As a result, the appeal will be allowed for the sole purpose of amending the judgment of the Tax Court of Canada to read:

The appeals from assessments made under the *Income Tax Act* for the 1994, 1995, 1996 and 1997 taxation years are allowed and the matters are referred back to the Minister of National Revenue for reconsideration and reassessment on the limited basis set forth in Appendix "A" attached to these Reasons for Judgment. The Respondent is entitled to costs.

[10] In all other respects, the appeal will be dismissed with costs.

"J.D. Denis Pelletier"

J.A.

"I agree

J. Edgar Sexton J.A."

"I agree

C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-284-06

(AN APPEAL TO THE FEDERAL COURT OF APPEAL, FROM THE ORDER OF MILLER, J., OF THE TAX COURT OF CANADA, DATED JUNE 5, 2006. [2002-2009 (IT) G].)

STYLE OF CAUSE: *ALBERT ROSS DEEP and
HER MAJESTY THE QUEEN*

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 8, 2007

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: SEXTON J.A.
RYER J.A.

DATED: NOVEMBER 15, 2007

APPEARANCES:

Jeffrey Radnoff FOR THE APPELLANT

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Ottawa, Ontario

Date: 20071115

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Ottawa, Ontario, November 15, 2007

**CORAM: SEXTON J.A.
PELLETIER J.A.
RYER J.A.**

BETWEEN:

ALBERT ROSS DEEP

Appellant

and

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JUDGMENT

The appeal is allowed for the sole purpose of amending the judgment of the Tax Court of Canada to read:

The appeals from assessments made under the *Income Tax Act* for the 1994, 1995, 1996 and 1997 taxation years are allowed and the matters are referred back to the Minister of National Revenue for reconsideration and reassessment on the limited basis set forth in Appendix "A" attached to these Reasons for Judgment. The Respondent is entitled to costs.

In all other respects, the appeal is dismissed with costs.

"J. Edgar Sexton"

J.A.