

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110315

Docket: A-60-10

Citation: 2011 FCA 100

**CORAM: DAWSON J.A.
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.**

BETWEEN:

EDMOND OHAYON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 15, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on March 15, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

(Delivered from the Bench at Toronto, Ontario on March 15, 2011)

LAYDEN-STEVENSON J.A.

[1] This is an appeal from the judgment of Paris J. of the Tax Court of Canada (the judge) dismissing Mr. Ohayon's appeal from income tax reassessments relating to unreported business income and corresponding gross negligence penalties for the 1996 and 1997 taxation years. The judge's reasons are reported at 2010 TCC 25, 2010 D.T.C. 1050.

[2] Mr. Ohayon did not take issue with the Minister's calculation of the unreported amounts for 1996 and 1997. Rather, he claimed that his income in excess of the amounts reported for the years in question was from non-taxable sources, specifically gambling wins and gifts of gold and cash from his father.

[3] We have not been persuaded that the judge erred "in holding Mr. Ohayon to an unduly high standard in rebutting the Minister's assumptions of undisclosed income by effectively requiring documentary evidence to corroborate evidence in support of the appellant's explanation for the differences between his reported income and total income for 1996 and 1997" as argued by Mr. Ohayon.

[4] To the contrary, following a comprehensive review and analysis of the evidence and reference to the applicable jurisprudence, the judge concluded, at paragraph 35 of his reasons, as follows:

[35] Having rejected the Appellant's explanation concerning the origin of the substantial amount of income he admitted having received in 1996 and 1997, and in the absence of any credible evidence that the income was from a non-taxable source or sources, I must conclude that the Appellant omitted to report taxable income in the amounts assessed for his 1996 and 1997 taxation years, and this omission was done knowingly or in circumstances amounting to gross negligence. The comments of the Federal Court of Appeal in *Lacroix*, to which I referred earlier in these reasons, apply equally to the Respondent's onus in proving the facts necessary to uphold the imposition of penalties under subsection 163(2) of the *Act*.

[5] This conclusion was not premised solely on a lack of corroborative documentary evidence. Rather, it represented the judge's finding based on a number of factors, including but not limited to: the vagueness of Mr. Ohayon's and his former wife's testimony, including the failure to specify to whom the gold was sold; the fact that the cash received from his father was received outside the period in issue; the fact that documentation from local casinos did not support Mr. Ohayon's alleged gambling success; the failure to produce further witnesses; the failure to disclose any large foreign gambling wins during his communications with the auditor; and the failure to produce documentary evidence. Moreover, where the judge considered the absence of documentary evidence to be problematic, he clearly explained the basis for his concerns and the reasons why he believed such documentation reasonably ought to have existed. The judge applied the facts, as he found them to be, to the law as articulated by this Court in *Lacroix v. Canada*, 2008 FCA 241, 302 D.L.R. (4th) 372 (*Lacroix*) and *Molenaar v. Canada*, 2004 FCA 349, 2004 D.T.C. 6688.

[6] The Minister discharges the burden of proof where a discrepancy in the taxpayer's income is established on the basis of reliable information and the taxpayer fails to provide a credible explanation for that discrepancy: *Lacroix* at paras. 32, 33. At the end of the day, the judge simply did not find Mr. Ohayon's explanations to be credible. His reasons provide a detailed and precise foundation for the credibility determination. Absent palpable and overriding error, which has not been demonstrated here, the issue of credibility lies within the exclusive purview of the trial judge and is entitled to deference.

[7] Mr. Ohayon has not demonstrated any error of principle or law or any palpable and overriding error warranting the intervention of this Court. Consequently, the appeal will be dismissed with costs.

“Carolyn Layden-Stevenson”

J.A.

COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-60-10

**(APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE B. PARIS
DATED JANUARY 14, 2010, IN THE TAX COURT FILE NO. 2006-796 (IT) G.)**

STYLE OF CAUSE: EDMOND OHAYON v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 15, 2011

**REASONS FOR JUDGMENT
OF THE COURT BY:** (DAWSON, LAYDEN-
STEVENSON & MAINVILLE JJ.A.)

**DELIVERED FROM
THE BENCH BY:** LAYDEN-STEVENSON J.A.

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