Federal Court of Appeal | Cour d'appel fédérale

Date: 20111018

Docket: A-345-10

Citation: 2011 FCA 287

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

SAEED KORKI

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on October 18, 2011.

Judgment delivered from the Bench at Vancouver, British Columbia, on October 18, 2011.

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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20111018

Docket: A-345-10

Citation: 2011 FCA 287

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

SAEED KORKI

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on October 18, 2011)

STRATAS J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada (*per* Justice Little): 2010 TCC 384.

[2] In 2002 and 2003, the appellant reported net income of $19,100 and $22,312, respectively. The Minister conducted a net worth analysis of the appellant and filed reassessments. After

reviewing the appellant's notice of objection, the Minister issued a revised notice of reassessment. The revised notice of reassessment alleged that the appellant failed to report business and pension income in 2002 and 2003 of $287,340 and $177,380, respectively. The Minister also imposed gross negligence penalties for failing to report this income.

[3] The appellant appealed to the Tax Court against the revised reassessments. The Tax Court dismissed the appeal.

[4] We see no reviewable error in the Tax Court's decision. The Tax Court "found much of the evidence unreliable," noting "various contradictions and inconsistencies in the evidence" (at paragraph 47). That finding was supported by its detailed review of the evidence (at paragraphs 28-46). The appellant has not convinced us that the Tax Court's factual findings are vitiated by any palpable and overriding error.

[5] In his memorandum of fact and law and in his oral submissions before us, the appellant focused upon four particular grounds of objection to the Tax Court's decision.

[6] First, the appellant submitted that the Tax Court failed to understand the relevant burden of proof as explained in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336. In our view, a fair reading of the Tax Court's reasons shows that the Tax Court appreciated the burden of proof. It simply did not accept that the appellant had adduced credible evidence in the matter before it.

[7] Second, the appellant submitted that the Tax Court failed to have regard to certain sworn certificates and documents in Iran that established the existence of a trust held for his father. The appellant oversaw or participated in the creation of many of these certificates and documents. In our view, the Tax Court's overall view of the appellant's credibility combined with the absence of evidence from witnesses in Iran who were involved in the creation of these documents (which could have been obtained by way of motion under Rule 119 of the *Tax Court of Canada Rules*) caused it to ascribe little weight to these documents. In particular, we note that some of the evidence that the Tax Court considered to be inconsistent and unreliable related to the matters with which these certificates and documents were concerned. The appellant has not established any palpable and overriding error that would cause us to set aside these factual findings by the Tax Court.

[8] Third, the appellant submitted that the Tax Court did not have a basis for finding gross negligence so as to engage the penalty provisions of subsection 163(2) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1. It is true that in the particular section of its reasons in which the Tax Court stated that a penalty should be imposed, the Tax Court judge mentioned very few facts. However, the Tax Court's reasons for judgment, when read as a whole, set out ample facts capable of sustaining the Tax Court's finding of gross negligence.

[9] Fourth, the appellant took issue with certain comments made by the Tax Court judge during the appeal. The Tax Court judge commented that he would be better able to assess the appellant's credibility as a witness if he testified in English, rather than testifying through an interpreter. In this Court, the appellant complains that this comment and others suggest that the Tax Court judge had

pre-judged the appellant's credibility in some way, and, thus, was biased. We note that the appellant never objected in any way to the judge's comments. The judge gave the appellant and his counsel a break to consider whether the appellant should testify in English. After the break, the appellant expressly chose to testify in English. No timely objection based on pre-judgment of credibility or bias was made then, or at any time, during the proceedings. It was incumbent on the appellant to make a timely objection of bias if he felt that bias was present: *Bassila v. Canada*, 2003 FCA 276 at paragraph 10. The appellant's failure to object is a waiver of any issues arising from the judge's comments. In any event, we are not satisfied that the appellant has met the high standard of proof necessary to establish bias on the part of the judge.

[10] Before the appeal hearing in this Court, the appellant brought a motion to introduce certain evidence that was not before the Tax Court. The motion was dismissed, but without prejudice to the appellant's ability to reargue the motion before the panel hearing the appeal. During this appeal hearing, the appellant reargued his motion.

[11] The evidence the appellant seeks to admit is a video recording of an examination in chief of his father, conducted in Iran. Counsel for the appellant acknowledges that in the video the father simply repeats statements he made in a letter, signed by him, that was already before the Tax Court.

[12] The test for the admission of fresh evidence under rule 351 is set out in the decision of Justice Evans in *Canada v. Canada (Canadian Council for Refugees)*, 2008 FCA 171 at paragraph 8. The evidence must not have been "discoverable with reasonable diligence before the end of the

trial." It must also be credible. It must be "practically conclusive of the appeal." Finally, despite not satisfying these requirements, it might still be admissible "if the interests of justice require it."

[13] Counsel admitted before us that the evidence the appellant seeks to introduce in this Court was "discoverable with reasonable diligence" before the end of the Tax Court proceedings. Further, as evidence that merely corroborates evidence that was already before the Tax Court, it is not "practically conclusive" of the appeal in this Court. We see no other considerations in the interests of justice that would prompt us to admit it. Therefore, we decline to admit the evidence.

[14] Based on counsel's description of the video's contents, even if we had admitted the video into evidence, we still would have dismissed the appeal, for the reasons set out above.

[15] Therefore, we shall dismiss the appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-345-10
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE LITTLE OF THE TAX COURT OF CANADA, DATED JULY 15, 2010, DOCKET NUMBER 2008-74(IT)G (2010 TCC 384)	
STYLE OF CAUSE:	Saeed Korki v. Her Majesty The Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 18, 2011
REASONS FOR JUDGMENT OF THE COURT BY:	EVANS, LAYDEN-STEVENSON, STRATAS JJ.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

D. Laurence Armstrong	FOR THE APPELLANT
Bruce Senkpiel Max Matas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Armstrong Wellman Barristers & Solicitors Victoria, British Columbia	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT