Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20120203

Docket: A-183-10

Citation: 2012 FCA 38

CORAM: **EVANS J.A.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

RALPH DONCASTER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, on November 3, 2011.

Judgment delivered at Ottawa, Ontario, on February 3, 2012.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: EVANS J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The appellant Ralph Doncaster is appealing the judgment of the Tax Court of Canada dated April 8, 2010 (*Doncaster v. Canada*, 2010 TCC 190). The judgment dismissed Mr. Doncaster's appeal of an assessment made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, for goods and services tax (GST) in the amount of $93,550.97. The basis of the assessment was that, from January 1, 1999 to June 6, 2005, Mr. Doncaster was a director of a corporation named Doncaster Consulting Inc. that collected GST during that period and failed to remit it. Doncaster Consulting Inc. became bankrupt on June 6, 2005.

Section 323 of the *Excise Tax Act* – directors' liability

[2] The statutory authority for the assessment under appeal is section 323 of the *Excise Tax Act*, the relevant portions of which read as follows:

323. (1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.	**323**. (1) Les administrateurs d'une personne morale au moment où elle était tenue de verser, comme l'exigent les paragraphes 228(2) ou (2.3), un montant de taxe nette ou, comme l'exige l'article 230.1, un montant au titre d'un remboursement de taxe nette qui lui a été payé ou qui a été déduit d'une somme dont elle est redevable, sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer le montant ainsi que les intérêts et pénalités afférents.
(2) A director of a corporation is not liable under subsection (1) unless	(2) L'administrateur n'encourt de responsabilité selon le paragraphe (1) que si :
…	[…]
(*c*) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.	*c*) la personne morale a fait une cession, ou une ordonnance de faillite a été rendue contre elle en application de la *Loi sur la faillite et l'insolvabilité*, et une réclamation de la somme pour laquelle elle est responsable a été établie dans les six mois suivant la cession ou l'ordonnance.
(3) A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent	(3) L'administrateur n'encourt pas de responsabilité s'il a agi avec autant de soin, de diligence et de compétence pour prévenir le manquement visé au paragraphe (1) que ne l'aurait fait une

person would have exercised in comparable circumstances.	personne raisonnablement prudente dans les mêmes circonstances.
…	[…]
(5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.	(5) L'établissement d'une telle cotisation pour un montant payable par un administrateur se prescrit par deux ans après qu'il a cessé pour la dernière fois d'être administrateur.

Proceedings in the Tax Court

[3] Mr. Doncaster's appeal in the Tax Court was conducted under the informal procedure rules of that Court. Mr. Doncaster represented himself. His appeal was based on a number of grounds, none of which were accepted by the Tax Court judge.

Grounds for appeal

[4] In his notice of appeal in this Court, and in his written submissions, Mr. Doncaster has again raised a number of grounds of appeal. However, it became apparent in the course of oral argument that Mr. Doncaster also had a further ground of appeal, which is that he was unfairly deprived of a chance to produce evidence that might prove that the assessment was wrong.

[5] Given the unusual manner in which this new ground of appeal was revealed, and that Mr. Doncaster was self represented, the Court concluded that this new issue should be fully considered. Therefore, the parties were requested to make supplementary submissions on the new ground of appeal, which they have done. Those submissions have now been considered.

[6] For the reasons that follow, I have concluded that this ground of appeal is a sufficient basis for allowing this appeal and ordering a new hearing before a different judge.

Discussion

[7] Generally, a decision by a trial judge to grant or refuse an adjournment is an exercise of discretion that will not be disturbed on appeal unless the decision is based on an error in principle, or the discretion is not exercised judicially. Useful guidance on the appellate review of a decision to refuse an adjournment is found in Donald J.M Brown Q.C., *Civil Appeals*, looseleaf (Toronto: Canvasback Publishing, 2011) at 12:2111 (footnotes omitted):

> As with all procedural and structural decisions, the fundamental objective in determining whether to grant an adjournment involves its impact on the fairness of the trial. Accordingly, the effect of a refusal to adjourn on the ability of a party to present both its evidence and argument is weighed against the prejudice that might result should an adjournment be granted. So in the absence of overriding implications for the administration of justice or irremediable prejudice to the parties opposing the adjournment, where the denial of an adjournment materially affects the ability of a party effectively to present its proofs and arguments, either a new trial will be ordered, or an appellate court may decide the matter afresh.

[8] I summarize as follows the facts that are relevant to this new ground of appeal. The amount of the GST liability for which the Minister considered Doncaster Consulting Inc. to be liable, and for which Mr. Doncaster was assessed, is based on the work of officials of the Canada Revenue Agency. This is explained by the Tax Court judge as follows at paragraphs 27 to 32:

> [27] The [Crown] called Greg Scott Wright who has been a trust examiner for twelve years and before that was a collections officer for seven years. He attempted to do an examination of the business of [Doncaster Consulting Inc.] without success. [Mr. Doncaster] would not meet with him.

> [28] A computer-generated notional assessment was recommended. The file was then sent to collections. In cross-examination [Mr. Wright] said that when notional assessments are done no input tax credits are given as it is up to the taxpayer to prove them. He was responsible for the spreadsheet.
>
> [29] Gilles Jules Chartrand was a trust account examiner with Canada Revenue Agency. He had twenty-five years experience. He did the bankruptcy examination for [Doncaster Consulting Inc.] here. This can be seen at Tab 8 of Exhibit R-1.
>
> [30] There were nineteen outstanding returns for G.S.T. by [Doncaster Consulting Inc.] from January 6, 1985 to January 1, 1999. He received five of the returns from the [trustee in bankruptcy]. The remainder were "nil returns".
>
> [31] [Mr. Chartrand] went to the Trustee's office and then to [Mr. Doncaster's] residence. He received one box of supposed records. These were mostly invoices dealing with cost of goods sold to the Company and had nothing to do with the Company's G.S.T. collected on sales. He gave these documents to the Trustee in September of 2005. He picked up five returns and gave the information to the Trustee to prepare the returns as seen in Tab 12 of Exhibit R-1. They processed the fourteen remaining returns as zero. Collections filed a Proof of Claim with the Trustee on the basis of his results.
>
> [32] In cross-examination [Mr. Chartrand] said that he examined the bank statements provided by the Trustee. The sales were based upon the bank deposits. There was no other information provided.

[9] The quoted excerpt also explains that Mr. Doncaster gave Mr. Chartrand a box of corporate documents relating to the financial transactions of Doncaster Consulting Inc., and that Mr. Chartrand gave those documents to the trustee in bankruptcy. According to Mr. Doncaster, the documents may have included invoices for amounts owed by Doncaster Consulting Inc. to its suppliers. Mr. Doncaster argued in the Tax Court, and in this Court, that those invoices would have showed amounts that could form the basis of a valid claim for input tax credits that would have reduced the GST liability of Doncaster Consulting Inc. No input tax credits had previously been claimed.

[10] It appears that the business of Doncaster Consulting Inc. was acquiring “wholesale internet services” from Bell Nexxia and selling those services to retail customers. It is reasonable to infer that any liability incurred by Doncaster Consulting Inc. in relation to GST collected from its customers would have been partially offset by input tax credits arising from GST that Bell Nexxia would have charged to Doncaster Consulting Inc.

[11] Mr. Doncaster was aware that he bore the onus of establishing that the amount of the assessment was incorrect. He could do that only by obtaining the required documents, or copies of them, from the trustee in bankruptcy. The record indicates that Mr. Doncaster was aware that this would require serving a subpoena to the trustee in bankruptcy. However, his uncontradicted evidence is that the trustee in bankruptcy told him that no subpoena would be honoured unless the trustee in bankruptcy was paid substantial fees. Mr. Doncaster apparently believed what he was told.

[12] At the Tax Court hearing, the problem of the subpoena was discussed. The Tax Court judge explained to Mr. Doncaster that the trustee in bankruptcy would have been obliged to honour the subpoena if the appropriate travel costs were tendered, but he could not refuse to appear on the basis of any failure on the part of Mr. Doncaster to pay him professional fees. However, even though it is clear that Mr. Doncaster had been misinformed by the trustee in bankruptcy and that the Tax Court judge was made aware of that fact, the Tax Court judge refused Mr. Doncaster’s request to adjourn the proceedings to enable Mr. Doncaster to serve the necessary subpoenas.

[13] I can understand the reluctance of a judge to grant an adjournment request that arises near the end of the hearing. However, in my respectful view, in the particular circumstances of this case, the refusal of the Tax Court judge to adjourn the Tax Court proceeding to enable Mr. Doncaster to take steps to obtain the documents was an improper exercise of discretion because it denied Mr. Doncaster a fair opportunity to produce potentially relevant evidence.

[14] I reach that conclusion because it is apparent from the record that Mr. Doncaster made considerable and largely successful efforts to inform himself about his obligations as an appellant. It is true that his approach was somewhat disorganized and to some extent his early failures to meet with Canada Revenue Agency officials may have caused or contributed to his difficulties. However, the documents in question were potentially of central importance to Mr. Doncaster, and the Tax Court judge was aware that Mr. Doncaster incorrectly believed that they were out of his reach because he had been misinformed by the trustee in bankruptcy. And, in the circumstances of this case, the Crown cannot be prejudiced by the possibility that Mr. Doncaster may discover proof that Doncaster Consulting Inc. is entitled to input tax credits.

[15] Given my conclusions on this ground of appeal, I need not consider Mr. Doncaster's other grounds of appeal. I will mention, however, that some of those grounds of appeal relate to evidence that Mr. Doncaster attempted without success to adduce. The judge who is assigned to rehear this case will be required to consider the admissibility of any evidence tendered by Mr. Doncaster, whether or not that evidence was tendered or rejected at the first hearing.

Motion to present evidence on appeal

[16] Mr. Doncaster has moved to present evidence on appeal. The motion was argued and the decision was reserved pending consideration of the merits of the appeal.

[17] The test for accepting evidence on appeal is well established. It was recently restated by Justice Noël, speaking for this Court in *General Electric Capital Canada Inc. v. Canada*, 2010 FCA 290, at paragraph 3:

> New evidence may exceptionally be presented on appeal if it can be shown that it could not have been discovered before the end of the trial, and that it is otherwise credible and practically conclusive of an issue on appeal: see *Amchem Products Inc. v. British Columbia (Worker's Compensation Board)*, [1992] S.C.J. No. 110, 192 N.R. 390 at paragraph 6 (*Amchem*); and *Franck Brunckhorst Co. v. Gainers Inc. et al.*, [1993] F.C.J. No. 874 (C.A.) at paragraph 2.

[18] Mr. Doncaster seeks to present as new evidence his own affidavit that is intended to establish that in August of 2011, he was diagnosed for the first time with attention deficit hyperactivity disorder (ADHD). Mr. Doncaster explains that this disorder is characterized by distractibility, a short temper, procrastination, and difficulty focussing, and that he has suffered from this condition for many years although he only recently came to recognize it and seek medical assistance. He argues that this evidence is relevant, and may well be conclusive, with regard to his defence of due diligence.

[19] The affidavit submitted by Mr. Doncaster is problematic in many respects. It is not supported by the affidavit or expert opinion of a medical practitioner as to Mr. Doncaster's

diagnosis, the likelihood that he suffered from ADHD during the relevant period (1999 to 2005), or whether ADHD affected or could have affected him during that period in a manner that is relevant to a due diligence defence. For that reason, it is not possible to conclude that the affidavit sought to be adduced in this appeal is practically conclusive of an issue on appeal. That is a sufficient basis for dismissing the motion to present evidence on appeal.

[20] However, it is open to Mr. Doncaster, at the new hearing in the Tax Court, to present evidence on this point. The judge at the new hearing will be obliged to consider the admissibility and relevance of any such evidence.

Conclusion

[21] For these reasons, I would allow Mr. Doncaster's appeal with costs, set aside the Tax Court judgment, and return this matter to the Tax Court for rehearing by a different judge.

"K. Sharlow"
J.A.

"I agree
John M. Evans J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-183-10
STYLE OF CAUSE:	Ralph Doncaster v. Her Majesty the Queen
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APPEARANCES:

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