Federal Court of Appeal

Cour d'appel fédérale

**Date: 20120424**

**Docket: A-366-11**

**Citation: 2012 FCA 126**

**CORAM:** **EVANS J.A.**
**DAWSON J.A.**
**MACTAVISH J.A. (*ex officio*)**

**BETWEEN:**

**DONNA MCMILLAN**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on April 24, 2012.

Judgment delivered from the Bench at Toronto, Ontario, on April 24, 2012.

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

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**REASONS FOR JUDGMENT OF THE COURT**
**(Delivered from the Bench at Toronto, Ontario, on April 24, 2012)**

**DAWSON J.A.**

[1] During the 2002, 2003 and 2004 taxation years Ms. McMillan, the appellant, carried on a business in the Dominican Republic renting beach chairs, cars and scooters and selling drinks, cigarettes, T-shirts and towels. The Canada Revenue Agency assessed the appellant for the 2002, 2003 and 2004 taxation years on the basis that she had not incurred any amounts as expenses in connection with the carrying on of a business. The appellant appealed the assessments to the Tax Court of Canada.

[2] The only issues ultimately raised before the Tax Court were whether the amounts claimed as expenses were incurred by the appellant and, if so, whether they were incurred for the purpose of earning income.

[3] In reasons reported as 2011 TCC 393, [2012] 1 C.T.C. 2132 the Tax Court allowed the appeal in part. The Tax Court permitted the appellant to deduct the cost of goods sold from the gross income for the 2004 and 2005 taxation years. The balance of the appeal was dismissed because the Judge found the appellant failed to prove she had incurred the other amounts that she claimed as expenses.

[4] This is an appeal of that decision. The issue raised on this appeal is whether the Judge erred in determining that there was insufficient evidence to prove that the appellant incurred the amounts that she claimed as expenses. For the appellant to succeed on this ground of appeal she must show that the Judge committed a palpable and overriding error in his assessment of the evidence (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[5] The Judge made the following findings of fact:

1. The only evidence introduced by the appellant was her general statement that the Statements of Business Activities produced in connection with the business accurately reflected the expenses that were incurred (paragraph 28).
2. The evidence of the appellant's accountant, who was examined out of Court pursuant to Rule 119 of the *Tax Court of Canada Rules* (General Procedure), did not provide

any more details with respect to the goods and services that were acquired (paragraph 28).

3. The appellant did not introduce any receipts for the expenses she said she incurred, even though she testified that she had receipts (paragraph 29).
4. While the appellant did not need to introduce every single receipt, the appellant was required to prove that she incurred the expenses and that the expenses were incurred for the purpose of earning income. The Judge drew an adverse inference from the appellant’s failure to tender any receipts in evidence (paragraph 33).

[6] The appellant has not demonstrated that the Judge made any palpable and overriding error in making these findings. Nor has the appellant shown that in the circumstances before him, the Judge committed any reversible error by drawing an adverse inference from the failure of the appellant to tender any receipts to prove that she incurred some expenses for the purpose of earning income.

[7] Before concluding these reasons, we note that the appellant did not raise in her memorandum of fact and law any issue with respect to the Judge's statement at paragraph 19 of the reasons, and repeated at paragraph 21, that the appellant "has the initial onus of proving on a balance of probabilities (i.e. that it is more likely than not), that any of the assumptions that were made by the Minister in assessing (or reassessing) the Appellant with which the Appellant does not agree, are not correct." In our respectful view, it is settled law that the initial onus on an appellant taxpayer is to "demolish" the Minister's assumptions in the assessment. This initial onus of

"demolishing" the Minister's assumptions is met where the taxpayer makes out at least a *prima facie* case. Once the taxpayer shows a *prima facie* case, the burden is on the Minister to prove, on a balance of probabilities, that the assumptions were correct (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 at paragraphs 92 to 94; *House v. Canada*, 2011 FCA 234, 422 N.R. 144 at paragraph 30).

[8] In our view, in light of the findings of fact made by the Judge, this error in the recitation of the burden of proof was not material to his decision. The appellant failed to adduce even a *prima facie* case.

[9] For these reasons, the appeal will be dismissed with costs.

"Eleanor R. Dawson"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-366-11 |
| **STYLE OF CAUSE:** | DONNA MCMILLAN v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | April 24, 2012 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | (EVANS, DAWSON JJ.A. and MACTAVISH J.A. *ex officio*) |
| **DELIVERED FROM THE BENCH BY:** | DAWSON J.A. |

**APPEARANCES:**

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|---|---|
| Laurie Aitchison | FOR THE APPELLANT |
| Amit Ummat<br>John Grant | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Aitchison Law Office<br>Oshawa, Ontario | FOR THE APPELLANT |
| Myles J. Kirvan<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |