Federal Court of Appeal  Cour d'appel fédérale

Date: 20121116

Docket: A-432-11

Citation: 2012 FCA 294

CORAM: **NOËL J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

PIERRE GOUGEON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on November 7, 2012.

Judgment delivered at Ottawa, Ontario, on November 16, 2012.

REASONS FOR JUDGMENT: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Justice Angers of the Tax Court of Canada (the Tax Court judge), under the informal procedure, confirming an assessment made with regard to Pierre Gougeon (the appellant) pursuant to section 323 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act). According to the assessment in question, Quadrisart Canada Ltd., a company of which the appellant was the sole shareholder, owed a total of $10,015.92 in unpaid goods and services tax (GST), plus interest and penalties.

[2] In support of his appeal to the Tax Court judge, the appellant, who represented himself, made two submissions. First, he attempted to show that he had acted with due diligence, and hence that he was not liable under subsection 323(1) of the Act. Second, he submitted that the amounts claimed from him as director had been paid but had not been applied against Quadrisart's debt as they should have been.

[3] The appellant relied on this second argument at the hearing before this Court. He argued that, in dismissing his appeal, the Tax Court judge did not take into account the fact that the payments had been made, and that the onus was on the respondent to prove that Quadrisart's debt was still outstanding.

[4] The GST claimed covers the period from February 28, 2006, to February 29, 2008. The amount assessed is based on the returns filed by Quadrisart for these periods and is therefore not in dispute. The notice of appeal filed by the appellant alleges that the amounts in question were indeed remitted to the Ministère du revenu du Québec (the MRQ), as agent of the Department of National Revenue, but for some unexplained reason, they were not applied against the unpaid GST, as they were supposed to have been (Notice of Appeal, paras. 6 (a), (d) and (e)).

[5] This allegation was denied in the reply to the notice of appeal signed by a lawyer from the MRQ's litigation service on behalf of the respondent. However, the reply was not filed within the prescribed time (i.e., within 60 days after the date the notice of appeal was served), and the motion to be relieved from this requirement was denied because the required affidavits

were not annexed to that motion. Instead of filing a new motion, as the presiding judge invited him to do, the lawyer elected to proceed to trial without having been relieved from his default.

[6] The consequences of this choice are significant. According to section 18.3003 of the *Tax Court of Canada Act* (R.S.C. 1985, c. T-2), not only the respondent may no longer benefit from the presumption that her assessment is valid, but the allegations of fact contained in the appellant's notice of appeal are "presumed to be true".

[7] In his reasons, the Tax Court judge only addressed the issue of whether the appellant had acted diligently. No mention was made of the submission that the amounts claimed had been duly paid and misapplied. The notice of appeal, the reply and the hearing transcript (Hearing Transcript of August 31, 2011, Appeal Record, Tab 21, pp. 80 to 83) all show that this argument was most clearly and unmistakably set out before the Tax Court judge.

[8] The matter could be referred back to him for reconsideration. However, we have before us all the evidence needed to dispose of this issue, and judicial economy will be better served if we address the issue ourselves.

[9] The evidence shows that, at the trial, to substantiate his argument that the GST payable had been paid, the appellant filed a table, with supporting documents, setting out the payments made on behalf of the MRQ during the period before the assessment was made (Exhibit A-10, Appeal Record, Tab 15). The amounts in question greatly exceed Quadrisart's debt which, according to the respondent's arguments, remains unpaid. The appellant was not cross-examined

regarding the payments made according to the table, except to have him state that he had prepared the table himself using his account ledgers (Hearing Transcript of August 31, 2011, Appeal Record, Tab 21, p. 80, lines 24 and 25; p. 81, line 1).

[10] The only evidence offered by the respondent to counter the appellant's argument is the testimony of the MRQ officer who was asked to make the assessment regarding the appellant. According to her testimony, her work had been limited to noting that a notice of bankruptcy had been issued with regard to Quadrisart and that the appellant was registered as the company's sole director. She also confirmed that the amount of the assessment had been established on the basis of returns that the appellant himself had completed on Quadrisart's behalf (Transcript of June 28, 2011, Appeal Record, Tab 23, pp. 20 to 26).

[11] This evidence is clearly insufficient to counter the appellant's statement in his notice of appeal to the effect that the amounts on which the assessment is based were paid but misapplied, a statement which, I would point out, must be presumed to be true.

[12] Given a shift of the burden of proof, and given the additional evidence that was filed by the appellant and regarding which he was not cross-examined, the onus was on the respondent to show either that the amounts in question were not remitted to the MRQ or that, if they were remitted, that these amounts did not have to be applied against Quadrisart's debt, as the appellant argues.

[13] No evidence regarding the first element was filed. Regarding the second element, the appellant cross-examined the MRQ officer at length regarding how the amounts paid to the MRQ were supposed to be applied. This series of questions gave rise to a general discussion to which the Tax Court judge eventually put an end by the following comment (Transcript of August 31, 2011, p. 16, lines 11 to 14):

> [TRANSLATION]
> . . . I cannot start changing the payments that should have been made, be they to the federal government or to the provincial government; that is not within this Court's province.

[14] With respect, that was not the issue at hand. The only issue that the Tax Court judge had to dispose of was whether the respondent had met her burden of proving that the amounts paid to the MRQ had been applied as they were supposed to have been and that the debt of Quadrisart for which the appellant was liable as director was still unpaid at the time the assessment was made. If he had considered that issue, he would have had no alternative but to find in favour of the appellant because the respondent had not completed a reconciliation of the amounts paid or even tried to do so.

[15] I would therefore allow the appeal, and rendering the judgment that the Tax Court judge should have rendered, I would allow the appeal and vacate the assessment dated January 6, 2009,

for the period from February 28, 2006, to February 29, 2008. The appellant is entitled to the disbursements he incurred to perfect his appeal.

"Marc Noël"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Robert M. Mainville J.A."

Certified true translation
François Brunet

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-432-11

APPEAL FROM A JUDGMENT BY THE HONOURABLE MR. JUSTICE ANGERS OF THE TAX COURT OF CANADA DATED OCTOBER 11, 2011, DOCKET NO. 2010-2628(GST)I.

STYLE OF CAUSE:	PIERRE GOUGEON and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 7, 2012
REASONS FOR JUDGMENT:	NOËL J.A.
CONCURRED IN BY:	Pelletier J.A. Mainville J.A.
DATED:	November 16, 2012

APPEARANCES:

Pierre Gougeon	FOR THE APPELLANT (for himself)
Eric Bernatchez	FOR THE RESPONDENT:

SOLICITORS OF RECORD:

n/a	FOR THE APPELLANT (for himself)
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT