Federal Court of Appeal  Cour d'appel fédérale

Date: 20130320

Docket: A-167-12

Citation: 2013 FCA 86

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

BETWEEN:

FRANK CHARLES HOKHOLD D.D.S., B. S.C. (PHARM)

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on March 18, 2013

Judgment delivered at Vancouver, British Columbia, on March 20, 2013

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

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

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Dr. Hokhold appeals from a decision of Sheridan J. of the Tax Court of Canada (the Judge) whose reasons for judgment are cited as 2012 TCC 154.

[2] Dr. Hokhold is a dentist formerly practicing in Merritt, a small community in British Columbia. He filed his 2002 tax return very late (January 2005). He failed to file returns for the

2003 to 2006 years and filed his 2007 return in June 2008. Amended returns were filed for the years 2002 through 2007 in September 2008.

[3] Dr. Hokhold was assessed and reassessed by the Minister of National Revenue (the Minister) in April 2005 for the 2002 year, and in January 2006 for the 2003 tax year. He was subsequently assessed and reassessed for the 2004 to 2007 years.

[4] Dr. Hokhold appealed the Minister's assessments and reassessments for all of the above tax years (2002 through 2007) to the Tax Court of Canada because the Minister disallowed in large part a series of deductions for business expenses, including deductions related to the use of a motor vehicle, meals and entertainment, wages paid to the appellant's children, loss of income, loss of business equipment and loss of goodwill. He also contested the late filing penalties imposed by the Minister for the years 2004 to 2007. He included in his Notice of Appeal a claim for damages and he sought an apology from the respondent.

[5] In her decision, the Judge dismissed the appeal in respect of the 2002 and 2003 tax years because Dr. Hokhold had failed to file an objection before the expiration of the time period set out in section 165 of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the *Act*). Thus, Dr. Hokhold could not meet the conditions for appealing to the Tax Court of Canada set out in subsection 169(1) of the *Act*.

[6] The Judge adjusted upwards the deductions for vehicle use (50% rather than the 20% allowed by the Minister) and family wages (75% versus 10% originally allowed), and maintained

the Minister's evaluation of allowable deductions for meals and entertainment, as well as the Minister's position that the estimated business losses, loss of business equipment and loss of goodwill are not deductible business expenses within the meaning of the *Act* (subsection 18(1) of the *Act*). The Judge then noted that she had no jurisdiction to grant damages resulting from the alleged misconduct.

[7] Before the Judge, the Minister conceded that penalties ought not to be imposed in respect of the years 2004, 2005, and 2007. Thus, the Judge upheld the late filing penalty for the year 2006 only, noting that the evidence had not persuaded her that Mr. Hokhold had exercised due diligence that might excuse his late filing, despite evidence on the record with respect to the undoubted difficulties he faced.

[8] Dr. Hokhold challenges each of the Judge's determinations with respect to the specific deductions claimed as well as her finding confirming the late filing penalty for year 2006. In addition, he now argues before this Court that his rights under sections 8 and 12 of the *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act 1982*, enacted as Schedule B to the *Canada Act, 1982*, (U.K.) 1982 c. 11, (*Charter*), have been violated by the illegal and improper garnishment of his bank accounts by the Minister.

[9] At the hearing, Dr. Hokhold focused his representations particularly on the fact that the Judge ignored or failed to give proper weight to some of the evidence before her with respect to the 2002 and 2003 tax years. He referred to his correspondence with the Canada Revenue Agency (CRA) included in the Appeal Book, particularly to his letter dated June 19, 2006. Concerning the

evidence with respect to the use of his motor vehicle, he also submitted that the Judge's decision that only 50% is deductible is simply wrong given the evidence before her, particularly in respect of his weekly business trips to Kamloops, and his frequent travel to Vancouver for professional development courses and conferences. In his view, the mileage involved in attending those activities simply cannot be compared with the limited use his family made of the motor vehicle in and around Meritt.

[10] With respect to meals and entertainment, Dr. Hokhold conceded that he may have originally included meals that could not in fact be deducted (because of his initial misunderstanding of the applicable legislative provisions). However, he was adamant that the Judge's statement at paragraph 20 of her reasons that he had "attempted to characterize virtually every crumb that went into their mouths as meal expenses" simply did not make sense, and was insulting. This, he says, must be an error sufficient to warrant this Court's intervention.

[11] As for the wages paid to his children, Dr. Hokhold pointed to what he considers to be an error in the description of the rate paid per hour in the relevant years. If accepted, the rate of $15.00 per hour should be enough, in his view, to justify this Court allowing the deduction as claimed.

[12] Finally, with respect to the various losses suffered on account of the garnishment of his bank account, which allegedly prevented him from making payments in respect of his business equipment and his home (which was also his office), and which resulted in damage to his credit rating and goodwill associated with his business, Dr. Hokhold says that he simply does not have the resources to sue in tort as suggested by the Judge. He notes that these losses, are also very real. They

should qualify under the *Act* as business losses even though they are not "outlay or expenses made or incurred" by him to earn income (subsection 18(1) of the *Act*). He argues that, otherwise, this legal rule is simply unfair and, moreover, bad law.

[13] As explained at the hearing, this appeal is not a hearing *de novo* and this Court cannot simply substitute its own assessment of the evidence for that of the Judge.

[14] The standard of review to be applied by this Court in appeals from a trial court such as the Tax Court of Canada was set out by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33. In respect of questions of law, the standard of review is correctness. However, in respect of questions of facts or mixed facts and law (such as those raised by Dr. Hokhold) this Court can only intervene if the findings of the Judge contain a palpable and overriding error.

[15] As noted by this Court in *South Yukon Forest Corp. v Canada*, 2012 FCA 165 at paragraph 46:

> Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman, supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[16] Moreover, in *Housen*, above, at paragraph 46, the Supreme Court of Canada made it clear that a trial judge is presumed to have considered all the information on the record and that the failure to rely expressly on, or to mention, some of the evidence in the reasons is insufficient proof to reverse such a presumption.

[17] In respect of the new *Charter* argument, I need only to say that the Tax Court of Canada has no jurisdiction to deal with claims of this nature. Thus, the issue is not properly before us.

[18] The Judge's findings in respect of the 2002-2003 years were based on the fact that the Notices of Objection were filed on April 17, 2009. This was acknowledged by Dr. Hokhold at page 165 of the transcript (A. B. vol. 7, see also his answer as to why he did not object earlier at page 166-167). That said, even if Dr. Hokhold's letter to the CRA dated June 19, 2006 could constitute a Notice of Objection in respect of the 2002 and 2003 tax years, this correspondence took place more than 90 days after the day of sending of the relevant Notices of Assessment and Reassessment.

[19] Dr. Hokhold had the right to seek an extension of time to file his objection pursuant to subsection 166.1(1) and 166.2(1) of the *Act*, but he failed to do so. Thus, the Judge had no choice but to apply section 169 of the *Act*. She made no error by dismissing the appeal in respect of those two years.

[20] I have also concluded that the Judge made no error in applying subsection 18(1) of the *Act* to the losses claimed by the appellant.

[21] The Judge made clear findings in respect of the weight of the evidence she heard. She did not accept all the evidence that Dr. Hokhold submitted to her. For example, she did not accept that his weekly trips to Kamloops were strictly for business. This evidently had an impact on her assessment regarding the deduction for the use of the vehicle.

[22] Further, the Judge did not accept Dr. Hokhold's evidence that his family meals in Kamloops and during professional conferences attended by the family elsewhere were business expenses. She also noted that "where an expense would have been incurred in any case, for example to feed or cloth the taxpayer it cannot be claimed as a business deduction." She was entitled to make such findings. Although I agree that the statement referred to at paragraph 10 above was inappropriate, it should not be taken as literally as Dr. Hokhold suggests. When read in context, it means that the Judge found the amounts claimed for meals exaggerated.

[23] With respect to the children's wages, it is apparent that the evidence was far from perfect. Payments where often made in cash, records of hours worked where not properly kept and the hourly rates used by Dr. Hokhold were challenged during his cross examination. The appellant confirmed that the children were paid $10.00, even during the period where he had used $15.00 in his calculations. He admitted that he did not know why the rates used for 2007 fluctuated so much. (see pages 108-109, 114,122-123 of the transcript, A.B. Vol 6). Mrs Hokhold, a witness the Judge found convincing, did not address this issue. The Judge evidently had to make some estimates. Again, she was entitled to do so. In fact, despite the state of the evidentiary record before her, the Judge significantly increased the allowed deductions.

[24] Dr. Hokhold has a heavy burden to meet in this appeal. I have not been persuaded that the Judge committed a reviewable error that would justify our intervention. While I recognize the difficult situation in which Dr. Hokhold finds himself in, this Court's hands are tied.

[25] Therefore, I propose that the appeal be dismissed. The Judge determined that each party should bear its own costs. I believe that this solution is also appropriate in this appeal.

"Johanne Gauthier"

J.A.

“I agree
J. D. Denis Pelletier”

“I agree
Robert M. Mainville”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-167-12
APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA (MADAM JUSTICE SHERIDAN) DATED MAY 9, 2012, DOCKET NUMBER 2010-2393(IT)G	
STYLE OF CAUSE:	Dr. Frank Charles Hokhold, D.D.S., B. Sc. (Pharm) v. Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 18, 2013
REASONS FOR JUDGMENT BY:	GAUTHIER J. A.
CONCURRED IN BY:	PELLETIER J. A. MAINVILLE J. A.
DATED:	March 20, 2011

APPEARANCES:

Dr. Frank Charles Hokhold	ON HIS OWN BEHALF
Susan Wong	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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