Federal Court of Appeal  Cour d'appel fédérale

Date: 20130415

Docket: A-158-12

Citation: 2013 FCA 101

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

BETWEEN:

JAMES G. MULLEN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 15, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on April 15, 2013.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on April 15, 2013)

STRATAS J.A.

[1] The appellant appeals from the judgment of the Tax Court (*per* Justice V. Miller) dated April 30, 2012: 2012 TCC 139.

[2] The Tax Court dismissed the appellant's appeal from a reassessment made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for the 1999 and 2001 years. In the reassessment, $1,954,540 and $472,177 were included into the appellant's income for the 1999 and 2001 years, respectively.

[3] In the Tax Court, the appellant contended he was not ordinarily resident in Canada in those years. The Tax Court rejected the appellant's contention. The Tax Court also accepted the Minister's alternative position that even if the appellant was not ordinarily resident in Canada in 1999, he should have included $851,035.89 into income, which represented the amount of his gain realized from options granted respecting the time he was employed in Canada.

[4] Further, the Tax Court found that the appellant knowingly misrepresented his 1999 income and so the reassessment for that year was not statute-barred. The Tax Court also found him liable for gross negligence penalties for 1999 and 2001.

[5] In reaching these conclusions, the Tax Court examined the evidence before it, made certain factual findings and applied relevant legal principles to its factual findings. In our view, the factual findings must stand as they are supported by evidence. The appellant has not demonstrated that any findings are vitiated by palpable and overriding error. Further, we see no error in the legal principles applied by the Tax Court or the application of those principles to the facts of this case.

[6] In oral argument before us, the appellant placed particular emphasis on the Tax Court's finding (in paragraph 66) that reassessment of the 1999 year was not statute-barred because the appellant engaged in misrepresentations attributable to wilful default under subsection 152(4) of the

Act. In particular, he challenged the sufficiency of the evidence relied upon by the Tax Court in support of its finding of wilful default and the Tax Court's use of evidence of the appellant's behaviour during the later tax audit. The appellant suggested that the evidence went no higher than showing that the appellant's tax planning was unsuccessful.

[7] In our view, the Tax Court's reasons suggest that the appellant wilfully tried to create an impression that did not fit the real facts. This is not a case where subsection 152(4) is being used to redress innocent but unsuccessful tax planning. Further, in our view, the Tax Court used the appellant's conduct during the audit as evidence from which an inference could be drawn as to his state of mind at the relevant time. This is a proper use of that evidence: *Pinto v. The Queen*, 2004 CCI 230 at paragraph 33, approved on this point at 2005 FCA 162 at paragraph 4.

[8] In this Court, the appellant submitted that a treaty between Canada and Thailand applies and determines his residency for the 2001 tax year. He did not raise this point in the Tax Court. Had the point been raised there, the Crown might well have adduced evidence on the point. As the Supreme Court has cautioned in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at paragraph 32, "[u]nless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts." See also *671905 Alberta Inc. v. Q'Max Solutions Inc.*, 2003 FCA 241, [2003] 4 F.C. 713. Accordingly, in these circumstances, we exercise our discretion against entertaining this new point.

[9] Therefore, for the foregoing reasons, we will dismiss the appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-158-12
APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE V.A. MILLER DATED APRIL 30, 2012, DOCKET NO. 2009-2337(IT)G	
STYLE OF CAUSE:	James G. Mullen v. Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 15, 2013
REASONS FOR JUDGMENT OF THE COURT BY:	Evans, Stratas, Near JJ.A.
DELIVERED FROM THE BENCH BY:	Stratas J.A.

APPEARANCES:

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