Federal Court of Appeal Cour d'appel fédérale

Date: 20130426

Docket: A-355-12

Citation: 2013 FCA 111

CORAM: SHARLOW J.A.
DAWSON J.A.
WEBB J.A.

BETWEEN:

EVERTON BROWN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 11, 2013.

Judgment delivered at Ottawa, Ontario, on April 26, 2013.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: SHARLOW J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada. For reasons cited as 2012 TCC 251, 2012 DTC 1211, the Tax Court dismissed the appellant's appeal from reassessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act) for the 2004, 2005, 2006 and 2007 taxation years. The reassessments added undeclared income in respect of each taxation year (calculated using a modified deposit method) and also assessed gross negligence penalties for each taxation year.

[2] In reaching his decision to dismiss the appeal, the Judge made three key findings. First, he found the appellant not to be credible so that his evidence could not be accepted "without reliable corroborating evidence, of which there is none in the trial record" (reasons, paragraphs 45 and 56). Second, the appellant produced five witnesses to support his explanation with respect to both the sources and ownership of cash and the nature of certain transactions. The Judge found the appellant's witnesses all to be unreliable (reasons, paragraph 48). Third, he found no basis at law to exclude documents provided to the Canada Revenue Agency by the police in London, Ontario (reasons, paragraph 44).

[3] As a result of these findings, the Judge upheld the Minister's assessments.

[4] On this appeal the appellant raises a number of issues. Some are issues this Court does not have jurisdiction to consider. For example, the appellant seeks an order requiring that certain monies and a vehicle be returned to him and an order requiring that a lien placed against his home be removed. However, as was explained to the appellant during the hearing, on this appeal this Court can only dismiss the appeal from the decision of the Tax Court, give the decision that should have been given by the Tax Court or refer the matter back to the Tax Court (section 52, *Federal Courts Act*, R.S.C. 1985, c. F-7 (Act)). In turn, the jurisdiction of the Tax Court was confined to dismissing the appellant's appeal from the assessments or allowing the appeal by vacating the assessments, varying the assessments or referring the assessments back to the responsible Minister for reconsideration and reassessment (section 171 of the Act).

[5] The issues raised by the appellant that this Court has jurisdiction to deal with relate to the Judge's assessment of credibility and the evidence, and to the Judge's decision to accept into evidence documents provided to the Canada Revenue Agency by the police.

[6] To turn first to the issues raised by the appellant relating to the Judge's assessment of credibility and the evidence, the appellant argues that the Judge's assessment of his credibility was tainted by the suggestion that he had trafficked cocaine. The appellant also argues that the Judge erred by attributing transactions to him when he had provided documents (such as invoices) to show that property was purchased by someone else. The appellant also argues that the Judge erred by attributing transactions to him when the transactions involved joint bank accounts. Finally, the appellant argues that he was self-represented and did not know that he should give certain evidence to the Tax Court.

[7] As explained below in more detail, the appellant was charged with, but never convicted of, drug trafficking. In my view, this did not taint the Judge's assessment of credibility. The Judge knew that the Crown lacked sufficient evidence to support the charges against the appellant (reasons, paragraph 58). It is not reasonable to infer that the Judge's credibility finding was improperly tainted when the Judge knew there was insufficient evidence to proceed against the appellant. As well, a review of the transcript demonstrates that there was ample evidence to support the Judge's credibility finding.

[8] With respect to the attribution of transactions to the appellant, as explained during the hearing, the fact an individual is named in an invoice does not prove conclusively that the individual

paid for any item referred to in the invoice. The Judge must look at the whole of the evidence to determine who paid for the item or items in question. Similarly, with respect to deposits into joint bank accounts, the issue the Judge was required to decide was whether it was the appellant's money that was deposited into the account or accounts. This was a separate issue from whose name was on the account. The Judge had the opportunity to see and hear each witness and was obliged to make findings about whether it was the appellant's money that was used to make the purchases and deposits in issue. No palpable and overriding error has been shown in the Judge's findings of fact.

[9] As to the fact the appellant was self-represented at trial, I understand well the difficulty a non-lawyer faces when deciding what evidence is necessary to counter an assessment made by the Minister of National Revenue. However, again as explained at the appeal hearing, it is too late on an appeal from a trial decision to bring evidence that was available and could have been put into evidence at trial.

[10] It follows that the appellant has failed to show any error in the Judge's assessment of credibility or the evidence.

[11] The only remaining issue is: did the Judge err by finding that there was no basis in law to exclude documents the Canada Revenue Agency received from the London Police Service?

[12] The facts that give rise to this issue are as follows. On October 17, 2007, officers from the London Police Service executed a search warrant at the appellant's residence. The warrant was issued pursuant to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 and was based on

allegations that the appellant was trafficking cocaine. The warrant authorized the seizure of alleged proceeds of crime, illegal drugs, financial documents and other relevant information. Pursuant to this warrant certain evidence and documents were seized by the London Police Service. The appellant was charged with trafficking, but the charges did not proceed to trial due to the insufficiency of the evidence.

[13] The seized documents were given by the London Police Service to officials of the Canada Revenue Agency. An officer from the London Police Service testified before the Tax Court that the Canada Revenue Agency was not advised about the warrant, the search or the seizure.

[14] The documents passed from the police to the Canada Revenue Agency formed part of the record used by the Canada Revenue Agency to prepare the analysis of the appellant's income. At least some of the seized documents were tendered in evidence before the Tax Court.

[15] As noted above, the appellant says the documents should not have been accepted into evidence by the Judge. The appellant says that accepting the documents violated his rights that are guaranteed under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter).

[16] The Judge correctly concluded that the relevant Charter right was the section 8 guarantee against unreasonable search and seizure. The Judge then relied upon the decision of the Supreme Court of Canada in *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 to find the documents received from the London Police Service to be admissible. The essence of the Judge's reasoning is found at

paragraphs 37 to 39 of his reasons. The Judge reasoned that in *Jarvis* the Supreme Court of Canada ruled that it was permissible for an officer of the Canada Revenue Agency to pass on documents properly obtained in the course of an audit to officials later carrying on a criminal investigation. In the Judge's view, if this was permissible under the Charter it would be equally permissible for police to share information with Canada Revenue Agency auditors. The Judge also considered that in *Jarvis* the Supreme Court noted that taxpayers have very little privacy interest in documents they are obliged to keep and produce during an audit.

[17] For the reasons that follow, I have concluded that the Judge was correct when he found that documents received from the Canada Revenue Agency were admissible. I reach this conclusion, however, for somewhat different reasons than those given by the Judge.

[18] Section 8 of the Charter guarantees everyone "the right to be secure against unreasonable search or seizure". The Supreme Court of Canada has defined this right as one which protects a reasonable expectation of privacy (*R. v. Cole*, 2012 SCC 53, [2012] S.C.J. No. 53).

[19] The search and seizure conducted by the London Police Service was authorized by warrant. At no time has the appellant challenged the validity of the search warrant. It follows that the search and the seizure were lawful. The question then becomes whether the appellant had a reasonable expectation that the London Police Service would maintain the confidentiality of the documents it seized. The existence of any such expectation depends upon "the totality of the circumstances" (*Cole* at paragraph 39).

[20] The appellant did not point to any evidence or judicial authority which supports the conclusion that he had a reasonable expectation of privacy over the documents lawfully seized by the London Police Service.

[21] As to the evidence, the appellant's evidence before the Tax Court was inconsistent with any subjective expectation of privacy. In direct examination he stated that the documents seized by the police should have been returned to him, so that the Canada Revenue Agency could then ask him to deliver the documents to it (transcript of evidence given on February 28, 2012, at page 173).

[22] As to judicial authority, the jurisprudence does not support on an objective basis any significant expectation of privacy. As the Judge noted, in *Jarvis* (at paragraph 95) the Supreme Court observed that "taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the [Act], and that they are obliged to produce during an audit."

[23] Because the appellant failed to demonstrate that he had a reasonable expectation of privacy over the seized documents, it follows that the appellant's right to be free of any unreasonable search or seizure was not violated. It further follows that the Judge was correct to receive the documents into evidence.

[24] For these reasons, I would dismiss the appeal with costs.

"Eleanor R. Dawson"

J.A.

"I agree.
K. Sharlow J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	April 26, 2013

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