Federal Court of Appeal  Cour d'appel fédérale

Date: 20190722

Docket: A-430-17

Citation: 2019 FCA 210

CORAM: **WEBB J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

YONGWOO KIM

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 8, 2019.

Judgment delivered at Ottawa, Ontario, on July 22, 2019.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: BOIVIN J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the judgment of Smith J. (2017 TCC 246) that dismissed Mr. Kim's appeal to the Tax Court of Canada. He was appealing the assessments issued for his 2009 and 2010 taxation years. The Minister of National Revenue (Minister) denied certain business losses and also imposed penalties under subsection 163(2) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (Act). The issue that arises in this appeal relates to the conduct of the hearing that

was held before the Tax Court and whether there was any breach of procedural fairness that would warrant the intervention of this Court.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] Mr. Kim was employed by Bombardier Inc. and he reported employment income of $81,568 in 2009 and $85,568 in 2010. He also claimed business losses of $256,375 in 2009 and $114,848 in 2010. Mr. Kim's claim for business losses appears to have been based on information that he received from DSC Lifestyle Services. This organization was associated with the tax preparer known as "Fiscal Arbitrators". The claimed business losses appear to have been based on Mr. Kim's unrealistic notion that his employment income was linked to an artificial legal entity and that it was possible to distinguish between this artificial legal entity and a human being. He could therefore have his artificial entity pay his real entity expenses which resulted in the losses that he had claimed.

[4] In addition to denying the losses claimed for 2009 and 2010, penalties under subsection 163(2) of the Act were imposed.

II. Decision of the Tax Court

[5] The Tax Court judge found that Mr. Kim did not carry on any activity in 2009 or 2010 that could be recognized as a business for the purposes of the Act. He found that the business

income and expenses were “entirely fictitious” and “simply fabricated”. The assessment of the penalties was upheld.

III. Issue and Standard of Review

[6] Although Mr. Kim has identified a number of issues in his memorandum, essentially the issues can be consolidated and summarized as whether there was a breach of procedural fairness as a result of the way that the hearing was conducted before the Tax Court and, if so, whether such breach would warrant the intervention of this Court.

[7] In *Canadian Pacific Railway Company v. Canada* (*Attorney General*), 2018 FCA 69, [2018] F.C.J. No. 382, this Court noted in paragraph 54 that:

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the … factors [as set out in *Baker v. Canada* (*Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 at 837-841, 174 D.L.R. (4th) 193].

IV. Analysis

[8] In paragraph 2 of his reasons, the Tax Court judge stated that:

> [2] The issues are whether the Appellant was entitled to claim business losses for the years in question and if not, whether the Minister was entitled to impose gross negligence penalties.

[9] While this suggests that both the claim for business losses and the imposition of the penalties were in issue, in paragraph 4 of his reasons, the Tax Court judge noted that:

> [4] The Appellant insisted from the beginning that the issue before the Court was whether the Crown was able to provide evidence to support the gross negligence penalties. He repeatedly called upon the Crown to produce this evidence. According to him, there were no other issues.

[10] At the Tax Court hearing, Mr. Kim spoke through an interpreter. The following exchange took place at the commencement of the hearing, before any witnesses were called:

The Interpreter:	I have a question, Your Honour.
Justice Smith:	You have a question? What is the question?
The Interpreter:	I would like to limit today's theme of discussion to the penalties.
Justice Smith:	That's fine. Can we just talk about penalties today, then?
Justice Smith:	The penalties flow from some facts. We have to look – the Court has to have an understanding of what the facts are.
The Interpreter:	Maybe we are going to discuss the facts behind it.
Justice Smith:	Yes. There's something -- let me see now -- there's a concept under Canadian law, under Canadian income tax law which says that taxpayers have to report their income. They have to self-assess. Okay? In part, because of that, the facts have been set out in the reply prepared by the Crown. Do you have a copy of the reply?
…	…
Justice Smith:	Reading is fine, okay, that's fine. So he can read it, then. This is what I'm going to say. Paragraph ten, A to Q, those paragraphs are the facts that the Minister relied on to make his assessment. And those are the facts on which the Minister based himself to assess the penalties. So - -
The Interpreter:	But I think the assumption is wrong.
Justice Smith:	Okay. Well, that's why you have an opportunity today to come forward and present oral testimony by yourself and by your witness. Because you have the burden of convincing the Court that these facts are wrong.
The Interpreter:	So we are talking about the penalty today?
Justice Smith:	Yes.

[11] An appeal is brought by a taxpayer to the Tax Court from an assessment (or reassessment) issued by the Minister. Since it is the taxpayer's appeal, the taxpayer should have the right to limit the appeal to only the assessment of the penalties imposed under subsection 163(2) of the Act. Although the notices of appeal that Mr. Kim had filed suggested that both the denial of the business losses and the imposition of the penalties were in issue, as a result of the exchange referred to above, Mr. Kim was limiting the appeal to only the imposition of the penalties. As the appellant, he had the right to limit his appeal to only this matter.

[12] When giving his testimony later during the hearing, Mr. Kim indicated that he was perhaps also challenging the denial of the business losses that were claimed, which would be contrary to his submission that the only issue at the Tax Court hearing was related to the imposition of the penalties. Mr. Kim's arguments in relation to a breach of procedural fairness are predicated on the Tax Court hearing being restricted to the imposition of penalties. Since, in my view, even accepting that the appeal was to be restricted to only the issue of the imposition of the penalties, the errors that were made (as more fully described below) were not sufficient to warrant the intervention of this Court, the analysis will proceed on the basis that the only issue before the Tax Court at the hearing of Mr. Kim's appeal was the imposition of the penalties.

[13] Proceeding on this basis, the alleged errors can be classified as an error related to who had the onus of proof and the order of presentation at the hearing before the Tax Court.

A. *Onus of Proof*

[14] As provided in subsection 163(3) of the Act, the onus to establish the facts justifying the assessment of penalties is on the Minister, not the taxpayer.

Burden of proof in respect of penalties	Charge de la preuve relativement aux pénalités
(3) Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.	(3) Dans tout appel interjeté, en vertu de la présente loi, au sujet d'une pénalité imposée par le ministre en vertu du présent article ou de l'article 163.2, le ministre a la charge d'établir les faits qui justifient l'imposition de la pénalité.

[15] The Minister bears the onus of proof in relation to establishing the facts that would justify the imposition of a penalty under subsection 163(2) of the Act. Recognizing that there is a clear statutory authority placing this burden on the Minister, the replies separated the assumptions of fact on which the Minister was relying in denying the business losses claimed (which are set out in paragraph 10 of the reply to the Fresh Notice of Appeal filed for 2009 and paragraph 8 of the reply to the Further Fresh Notice of Appeal filed for 2010) from the facts that the Minister alleged would justify the penalties (which are set out in paragraph 12 of the reply to the Fresh Notice of Appeal filed for 2009 and paragraph 10 of the reply to the Further Fresh Notice of Appeal filed for 2010).

[16] Since the burden of establishing the facts justifying the assessment of the penalty is on the Minister, the Minister cannot simply rely on allegations of facts as set out in the reply to establish these facts. The Minister must introduce evidence to establish these facts. If no evidence is introduced at the hearing, there would be no facts that would be established to justify the assessment of the penalties. This evidence could, however, be introduced through the testimony of the taxpayer – either as a witness called by the Crown or through the cross-examination of the taxpayer by the Crown.

[17] In my view, the Tax Court judge committed an error when he told Mr. Kim that the onus was on him to lead evidence to refute the alleged facts as set out by the Minister in the replies once Mr. Kim stated that the issue before the Tax Court was limited to the imposition of the penalties. While the Tax Court judge did acknowledge in his written reasons that the onus was on the Minister to establish the facts that would justify the imposition of the penalties, this was well after the Tax Court hearing was concluded.

[18] However, even though the Tax Court judge erred in stating that Mr. Kim had the onus of proof to establish that the facts related to the penalties as alleged by the Minister in the replies were wrong (which would mean that he would have to establish the facts that would lead to the conclusion that the penalties should not have been imposed), it does not necessarily follow that Mr. Kim will be entitled to a new hearing.

[19] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339

Binnie J, writing on behalf of the majority of the Supreme Court, stated that:

> 43 Judicial intervention is also authorized where a federal board, commission or other tribunal
>
> > *(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*
>
> No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review. Relief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice (*Pal*, at para. 9). This is confirmed by s. 18.1(5). It may have been thought that the Federal Court, being a statutory court, required a specific grant of power to "make an order validating the decision" (s. 18.1(5)) where appropriate.
>
> (emphasis added)

[20] In *Mercure v Canada*, 2013 FCA 102, Pelletier J.A. stated that:

> [21] It remains to be decided to what remedy Mercure is entitled. As a general rule, in the case of a breach of procedural fairness, the court does not consider whether the breach had an effect on the outcome of the dispute. The mere fact that a breach of procedural fairness occurred is enough to warrant a new trial. This general rule has only one exception, which is the case in which the question before the court has an inevitable answer: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at paras. 50-54.

[21] As a result of these cases, if the question of the imposition of the penalties has an inevitable answer, Mr. Kim will not be entitled to a new hearing.

[22] In the appeal before the Tax Court, there were only two witnesses – Mr. Kim and Lawrence Watts. Mr. Watts was called as a witness by Mr. Kim. Mr. Watts stated that he was the person who created Fiscal Arbitrators and that he operated this organization. On cross-examination Mr. Watts confirmed that he been convicted of fraud in relation to his involvement with Fiscal Arbitrators.

[23] The evidence that the Crown was obligated to introduce could be (and it was) introduced as a result of the testimony of these two witnesses. Although Mr. Kim repeatedly asked the Crown to produce its evidence, he did not appreciate that his own words could be used to establish the facts that would justify the imposition of the penalties.

[24] Any party who is required to prove facts during the hearing must prove those facts by introducing evidence. Evidence can be in the form of oral testimony or documents that are either introduced by agreement or through a witness. Therefore the Crown could (and in this case it did) establish the necessary facts that would justify the penalties through the testimony of Mr. Kim and Mr. Watts. Errors were made at the beginning of the trial in relation to the statements concerning who had the onus of proof and what role the factual allegations made in the replies would play in the hearing. However, based on the testimony of Mr. Kim and Mr. Watts the outcome was inevitable. There was sufficient evidence introduced through the witnesses to justify the assessment of the penalties.

[25] As a result, Mr. Kim has failed to establish that his appeal should be allowed and that he should be granted a new hearing before the Tax Court (or any other remedy) based on the statements made by the Tax Court judge related to who had the onus of proof and what role the allegations of fact, as set out in the replies, would play in relation to the assessment of the penalties.

B. *Order of Presentation*

[26] Mr. Kim also submits that the Tax Court judge insisted that he testify first at the hearing. Although the Tax Court judge did not specifically direct him to testify first, given the exchange between the Tax Court judge and Mr. Kim during which the Tax Court judge indicated that the onus was on Mr. Kim to prove the facts that would result in the elimination of the penalty, it would be logical for Mr. Kim to assume that he was being directed to testify first.

[27] Rule 135(2) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, provides that:

(2) Unless the judge directs otherwise, the parties shall put in their respective cases by evidence or by putting before the Court the facts on which they rely, in the following order,	(2) Sauf directive contraire du juge, les parties font valoir leurs arguments en présentant des preuves ou en présentant à la Cour les faits sur lesquels elles se fondent, dans l'ordre suivant :
(a) the appellant,	a) l'appelant;
(b) the respondent, and	b) l'intimée;
(c) the appellant in respect of rebuttal evidence.	c) l'appelant à l'égard d'une contre-preuve.

[28] The general rule is that the appellant will proceed first in a hearing before the Tax Court. However, this Rule also provides that the judge could direct otherwise. In cases where the only issue is the assessment of penalties and, therefore, the Crown has the onus of proof, the judge should consider whether it is appropriate for the taxpayer or the Crown to proceed first. If the taxpayer proceeds first, what evidence would the taxpayer introduce? The taxpayer does not have any onus of proof. The taxpayer will generally want to see and hear the evidence that the Crown will be presenting and then have the opportunity to introduce his or her evidence. If the taxpayer goes first and chooses not to introduce any evidence, then the taxpayer may be limited in introducing rebuttal evidence and the Crown may be denied the opportunity to introduce evidence to rebut the taxpayer's evidence.

[29] There were only two witnesses – Mr. Kim and Mr. Watts. There is also no reason why the Crown could not have called Mr. Kim to testify at the Tax Court hearing. Rule 146 (2) provides that either party to a proceeding before the Tax Court may call the opposing party as a witness without notice or the payment of witness fees if that person is in attendance at the hearing. As Mr. Kim was in attendance at the hearing, the Crown had the right to call him as a witness. In this case, it should be noted that prior to the hearing, the Further Fresh Notices of Appeal indicated that Mr. Kim was still seeking to have the assessments vacated, which would indicate that he was also challenging the denial of the losses that were claimed. Therefore, prior to the hearing, it would be expected that he would be in attendance and that he would be testifying.

[30] Whether Mr. Kim testified first because he was presenting his case first or because he was called by the Crown as a witness, his testimony would presumably have been the same. In this case, the order of presentation was not a material factor and the Tax Court judge did not commit any reviewable error in indicating that Mr. Kim would testify first.

C. *Mr. Kim's Charter Arguments*

[31] Mr. Kim also referred to paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms* in his memorandum. However, his argument is based on the premise that the imposition of a penalty under subsection 163(2) of the Act is a criminal matter. Since the imposition of this penalty is a civil matter and not a criminal matter, these submissions are without any merit (*Cranston v. Canada*, 2011 FCA 5, at para. 7).

[32] In addition, Mr. Kim referred to subsection 15(1) of the *Charter* in his memorandum. However, he did not identify any claim for discrimination based on any enumerated or analogous ground. There is no basis for his claim for discrimination under subsection 15(1) of the *Charter*.

D. *Costs Awarded by the Tax Court*

[33] In his notice of appeal, Mr. Kim alleged that the costs that were awarded against him in the amount of $5,000 were "excessive and unwarranted". In his memorandum he did not provide any submissions to support his allegation that this cost award was "excessive and unwarranted". The awarding of costs is a highly discretionary matter (*Prévost Car Inc. v. Canada*, 2014 FCA

86, 2014 D.T.C. 5047, at para. 2) and Mr. Kim has failed to establish that the judge made any error in awarding those costs.

E. *Conclusion*

[34] As a result I would dismiss his appeal with costs.

"Wyman W. Webb"
J.A.

“I agree
Richard Boivin J.A.”

“I agree
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED DECEMBER 7, 2017, CITATION NUMBER 2017 TCC 246, DOCKET NUMBERS 2011-4095(IT)G AND 2012-4057(IT)G

DOCKET:	A-430-17
STYLE OF CAUSE:	YONGWOO KIM v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 8, 2019
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	BOIVIN J.A. RENNIE J.A.
DATED:	JULY 22, 2019

APPEARANCES:

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