

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20211005**

**Docket: A-278-19**

**Citation: 2021 FCA 196**

**CORAM: STRATAS J.A.  
RENNIE J.A.  
LASKIN J.A.**

**BETWEEN:**

**TAHER CHIBANI**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on October 5, 2021.  
Judgment delivered from the Bench at Toronto, Ontario, on October 5, 2021.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**RENNIE J.A.**

Federal Court of Appeal



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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on October 5, 2021).**

**RENNIE J.A.**

[1] The appellant appeals the judgment of the Tax Court of Canada (2019 TCC 122, *per* Paris J.) dismissing the appellant's appeal of reassessments made by the Minister of National Revenue. Those reassessments lowered the fair market value of in-kind charitable donations made by the appellant to a charity, which in turn lowered the charitable donation tax credits the appellant was eligible to receive for the 2001, 2002 and 2003 taxation years.

[2] The appellant, along with 2,094 other individuals, claimed charitable tax credits in respect of donations of software made to the National Children's Burn Society (NCBS).

[3] The Minister of National Revenue reassessed the appellant and reduced his charitable donation tax credits on the basis that the fair market value of the donated software at the time of the donation was substantially less than the amount claimed by the appellant. The Minister also assumed that the appellant lacked the requisite donative intent when he transferred the software to NCBS and therefore did not make any gift to the NCBS that would qualify for a charitable donation.

[4] The Tax Court judge heard and considered both fact and expert evidence on the fair market value software donated to NCBS. He accepted expert evidence demonstrating that the fair market value of the software was substantially less than that claimed, and concluded that some of the software had no value and was, more likely than not, pirated. As the onus was on the taxpayer to show that the fair market value of the software was higher than the one assigned by the Minister, the judge dismissed the appeals. In light of his findings as to the fair market value of software, the judge did not find it necessary to address the question of donative intent.

[5] The determination of the fair market value of a charitable donation is question of fact (*Brassard v. Canada*, 2017 FCA 205, 2017 D.T.C. 5117 at para. 8), the standard of review for which is that of palpable and overriding error (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at paras. 69-72, 79). A palpable error is one that is readily or easily seen; an over-riding error is one that is determinative of the

outcome of the case. We see no error in the Tax Court judge's assessment of the evidence or understanding of the law that would warrant our intervention.

[6] There was ample evidence before the Tax Court judge to support his conclusion.

[7] In first instance, the Minister introduced two expert witnesses to establish the fair market value of the donated software. One, a software engineer, substantiated extensive technical flaws in the donated CD-ROMs; another, an economist and software production executive, testified that the software was of no value. Another witness testified that without a license for the use of the software, which the donated software did not include, it could not be purchased lawfully (TCC Reasons at para. 41).

[8] The appellant contends that in completing his income tax return he relied on the "Manufacturers Suggested Retail Price" in assigning value to the in-kind donation, and that the judge erred in disregarding the MSRP in assessing the fair market value. He asserts that the Minister lowered the fair market value without explaining why the MSRP he provided was unacceptable.

[9] It was, however, up to the appellant to refute the fair market value established by the Minister. The appellant did not provide any probative evidence, and his argument that the MSRP reflected the fair market value was rejected by the judge as a mere assertion and speculation.

[10] The appellant asserts that the judge erred by not allowing a witness, Mr. Bramhall, to be qualified as an expert witness. The trial judge found that Mr. Bramhall was not qualified as an expert witness because he did not meet the requirements of the Informal Procedure Rules. Further, the judge did not assign any weight to Mr. Bramhall's testimony because he did not verify that sales of the software at the prices listed on the various websites had actually taken place. We see no reversible error in either of these findings.

[11] Finally, the appellant contends that the judge erred in the burden of proof. Again, we see no reversible error.

[12] Cases heard at the Tax Court of Canada are civil cases. Thus, the burden of proof is that of balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41). Only criminal proceedings engage proof beyond a reasonable doubt. As noted by the Tax Court judge, "assumptions of fact place on the taxpayers the initial onus of disproving, on a balance of probabilities, the facts that the Minister assumed." Thus, it is irrelevant that conclusions made by the trial judge may raise a reasonable doubt (*Sarmadi v. Canada*, 2017 FCA 131, [2017] D.T.C. 5081; *Eisbrenner v. Canada*, 2020 FCA 93; *Canada v. Anchor Pointe Energy Ltd.*, [2008] 1 F.C.R. 839, 2007 FCA 188; *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, 148 D.L.R. (4th) 1).

[13] We would therefore dismiss the appeal with costs.

"Donald J. Rennie"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BRENT  
PARIS, DATED MAY 24, 2019, DOCKET NO. 2015-1829(IT)I**

**DOCKET:** A-278-19

**STYLE OF CAUSE:** TAHER CHIBANI v. HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 5, 2021

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

**DELIVERED FROM THE BENCH BY:** RENNIE J.A.

**APPEARANCES:**

Taher Chibani ON HIS OWN BEHALF  
(BY VIDEO CONFERENCE)

Vlad Zolia FOR THE RESPONDENT  
Christina Ham (IN PERSON)

**SOLICITORS OF RECORD:**

A. François Daigle FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Ottawa, Ontario