Federal Court of Appeal Cour d'appel fédérale

Date: 20211126

Docket: A-460-19

Citation: 2021 FCA 229

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

6610048 CANADA INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on November 17, 2021.

Judgment delivered at Ottawa, Ontario, on November 26, 2021.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

Cour d'appel fédérale

Date: 20211126

Docket: A-460-19

Citation: 2021 FCA 229

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

6610048 CANADA INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This is an appeal from a judgment rendered by the Tax Court of Canada (TCC) on November 15, 2019. In that judgment (cited as 2019 TCC 255), the TCC dismissed the appellant's appeal from reassessments made by the respondent, represented in this matter by the Minister of National Revenue (the Minister), for the appellant's taxation years ending on

October 31, 2009, and 2010, on account of the gain realized by the appellant following the sale of vacant lots in a downtown area of Ville de Mascouche, Quebec.

[2] The appellant had purchased the lots from the City of Mascouche between 2006 and 2008. The city planned to undertake a mixed (commercial and residential) TOD (transportation-oriented development) on the lots near the planned site of the train station for the future "*Train de l'Est*" connecting the City of Mascouche to the City of Montréal. Prior to the acquisition of a portion of these lots, the appellant and the City of Mascouche had signed a memorandum of understanding pursuant to which the parties made various commitments in connection with the development planned by the City of Mascouche (the Memorandum of Understanding).

[3] The Minister was of the opinion that this $11,835,218 gain did not constitute a capital gain, as reported by the appellant, but was in fact business income taxable as such under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The Minister also denied the dividend refunds claimed by the appellant for the same taxation years and made an assessment under Part III of the Act.

[4] In a detailed decision, the TCC upheld the reassessments made by the Minister. First, the TCC stated that it was of the opinion that because the appellant had admitted that it did not acquire the lots at issue for the purpose of producing property income, they could only be considered assets in inventory, and the gain resulting from their sale could only be considered business income.

[5] The TCC also found that the application to the circumstances of this case of the factors in the case law for determining whether or not the sale of real estate constitutes business income confirmed the merits of the reassessments. In particular, the TCC came to the conclusion that the profit generated by the sale of the lots at issue was the result of an adventure in the nature of trade and was therefore business income within the meaning of the term “business” as defined in subsection 248(1) of the Act.

[6] The appellant submitted that the TCC erred in its assessment of at least six of the factors in the case law. It also argued that the TCC erred in law in finding, at paragraph 86 of its decision, that real estate acquired for a purpose other than producing property income, as is the case here, cannot be considered capital property giving rise to a capital gain or loss when sold. It argued that this error of law tainted the entire TCC decision.

[7] It is settled law that the TCC decision must be reviewed by this Court against the standard of review established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*). According to this standard, questions of law must be reviewed on a correctness standard, while questions of fact or of mixed fact and law are reviewable only if palpable and overriding errors were made.

[8] However, the appellant did not persuade me that there is any reason to intervene. Even assuming that paragraph 86 of the TCC decision contains an error of law, on which it is not necessary to rule, this error could not affect the correctness of that decision. This is because the TCC also held that the reassessments made by the Minister were valid based on its examination

of each criterion that, according to the case law, had to be used to resolve the issue before it, which was whether the profit generated by the sale of the lots at issue was to be taxed as business income or capital gain.

[9] As it stated at paragraph 87 of its reasons, this analysis “also lead[s] to the conclusion that the gain realized by the appellant following the sale of the lots is business income.” In other words, the TCC looked at the issue before it from both standpoints: with respect to the concept of property income and with respect to the concept of business income. Viewing the issue from either standpoint could have led the TCC to conclude as it did.

[10] In order to justify our intervention, the appellant also had to persuade us that the findings made by the TCC following this analysis, which—and this is not disputed by the parties—called into question the assessment of questions of mixed fact and law, were the result of palpable and overriding errors. However, this was not demonstrated.

[11] As the Supreme Court of Canada pointed out in *Friesen v. Canada*, [1995] 3 S.C.R. 103, 127 D.L.R. (4th) 193 (*Friesen*), the ground rules for the computation of a taxpayer’s income recognize two basic categories of income: “ordinary income” from office, employment, business and property, and income from a capital source. According to section 3 of the Act, business income is therefore taxable as “ordinary income” (*Friesen* at para. 5), whereas income from capital sources, which the appellant considers is the type of income at issue here, is partially exempt from tax (*Friesen* at para. 7). Since the amendments made to the Act in October 2000, up to 50% of this income is exempt.

[12] When dealing with a gain from the sale of real estate, it is not easy to distinguish between business income and income from a capital source, which is normally associated with the sale of a property acquired for the purpose of generating income. This is why the courts have developed a series of criteria that should be applied in this type of situation, particularly in determining whether the income from the sale of a property is part of an adventure in the nature of trade, a concept specific to the definition of "business" in subsection 248(1) of the Act.

[13] This Court set out these criteria in *Canada Safeway Ltd. v. The Queen*, 2008 FCA 24, 371 N.R. 337 (*Safeway*), a decision to which both parties made reference. The Court listed a dozen criteria:

(a) the taxpayer's intention with respect to the real estate at the time of its purchase;

(b) feasibility of the taxpayer's intention;

(c) geographical location and zoned use of the real estate acquired;

(d) extent to which intention carried out by the taxpayer;

(e) evidence that the taxpayer's intention changed after purchase of the real estate;

(f) the nature of the business, profession, calling or trade of the taxpayer and associates;

(g) the extent to which borrowed money was used to finance the real estate acquisition and the terms of the financing, if any, arranged;

(h) the length of time throughout which the real estate was held by the taxpayer;

(i) the existence of persons other than the taxpayer who share interests in the real estate;

(j) the nature of the occupation of the other persons referred to in (i) above as well as their stated intentions and courses of conduct;

(k) factors which motivated the sale of the real estate; and

(l) evidence that the taxpayer and/or associates had dealt extensively in real estate.

[14] After analyzing the case law in which the issue of whether a transaction constituted an adventure in the nature of trade arose, the majority of the court in *Safeway* made the following findings:

> [61] A number of principles emerge from these decisions which I believe can be summarized as follows. First, the boundary between income and capital gains cannot easily be drawn and, as a consequence, consideration of various factors, including the taxpayer's intent at the time of acquiring the property at issue, becomes necessary for a proper determination. Second, for the transaction to constitute an adventure in the nature of trade, the possibility of resale, as an operating motivation for the purchase, must have been in the mind of the taxpayer. In order to make that determination, inferences will have to be drawn from all of the circumstances. In other words, the taxpayer's whole course of conduct has to be assessed. Third, with respect to "secondary intention", it also must also have existed at the time of acquisition of the property and it must have been an operating motivation in the acquisition of the property. Fourth, the fact that the taxpayer contemplated the possibility of resale of his or her property is not, in itself, sufficient to conclude in the existence of an adventure in the nature of trade. In *Principles of Canadian Income Tax Law*, *supra*, the learned authors, in discussing the applicable test in relation to the existence of a "secondary intention", opine that "the secondary intention doctrine will not be satisfied unless the prospect of resale at a profit was an important consideration in the decision to acquire the property" (see page 337). I agree entirely with that proposition. Fifth, the *viva voce* evidence of the taxpayer with respect to his or her intention is not conclusive and has to be tested in the light of all the surrounding circumstances.

[15] In this case, the TCC scrupulously followed the approach—and adhered to the principles—that the Court was required to follow pursuant to *Safeway*. In particular, it concluded

from the evidence before it that the appellant's only motivation, when the lots at issue were acquired, was clearly to resell them at a profit, noting in this regard that the appellant never intended to carry out City of Mascouche's development project. The Court further noted that this motivation proved to be constant throughout the time that the appellant held the lots. With respect to the feasibility of the appellant's intention, the TCC found that the appellant had "clearly attempted to conceal the identity of its actual shareholders in order to concea[l] its real intention at the time the lots were acquired" (TCC decision at para. 89(b)).

[16] As for the factor of the geographical location and zoned use of the lots, the TCC noted that they were located near the future train station, whose project had been announced by the Government of Quebec a few months before the Memorandum of Understanding was signed. It further noted that the City of Mascouche, in order to promote the implementation of its development project in the area of the station, had committed to amending its urban plan and planning by-laws, having the lots open to the public before the end of 2007, and completing some infrastructure work. In the opinion of the TCC, all this made it objectively foreseeable that the value of the lots would rise rapidly.

[17] The TCC also concluded from the evidence before it that the true nature of the appellant's business consisted in acquiring lots for the purpose of reselling them. In this regard, it noted that, with the exception of two shareholders whom it deemed to be nominees, its actual officers and shareholders were "business people with significant and complementary collective experience in the real estate industry." They specialized "in real estate development and construction, business law, finance, taxation and accounting" (TCC decision at para. 89(f)).

Finally, the Court pointed out that the acquisition of the lots at issue entailed a significant commercial risk for the appellant because the consolidation of the lots that was required in order to implement City of Mascouche's development project depended on, among other things, expropriating lots belonging to third parties (TCC decision at para. 93).

[18] The appellant maintains that its true intention was to acquire the lots at issue in order to make a long-term investment, arguing that it could not be criticized for having changed its plans shortly after it acquired the lots because the offer that it received, and that led to the resale of the lots, was unsolicited. Furthermore, it was an offer that was hard to refuse because the lots had fortuitously experienced a significant increase in value.

[19] The TCC did not see things the same way. It was of the view that, in light of all the circumstances, the appellant's shareholders "never intended to make a long-term investment by purchasing the lots from the Ville de Mascouche." According to its assessment of the evidence, they clearly intended "to resell the land as quickly as possible" for profit (TCC decision at para. 89(k)). The TCC went on to say that if this was not the appellant's principal intention when it acquired the lots, it was at least its secondary intention (TCC decision at para. 90).

[20] The burden of demonstrating that there was a palpable and overriding error in this finding, which was fatal to the argument submitted by the appellant, is demanding. To borrow the metaphor used by this Court in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 431 N.R. 286 (*South Yukon Forest*), which has been often cited in subsequent judgments, in order to meet this burden, "it is not enough to pull at leaves and branches and leave the tree standing. The entire

tree must fall" (*South Yukon Forest* at para. 46; see also *J.G. c. Nadeau*, 2016 QCCA 167, AZ-51251059 at para. 77 and *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at paras. 38–39).

[21] That burden has not been met in this case. Instead, the appellant is asking us to reassess all of the evidence in the hope that we would draw our own conclusions. However, this Court cannot engage in such an exercise and reverse the TCC's decision in the absence of a palpable and overriding error by the TCC (*Housen* at para. 20; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729 at para. 106).

[22] Finally, I cannot accept the appellant's contention that the error of law allegedly made by the TCC in paragraph 86 of its decision tainted its entire decision. In this regard, the appellant is asking us to read into the TCC's analysis elements that were not actually in it, in particular in paragraph 89 of the decision. In fact, the analysis following paragraph 86 of the decision, which focused on the factors set out in *Safeway* with respect to determining whether the sale of real estate generated business income, did not contain any indications supporting the appellant's contention. This argument has no merit.

[23] In short, I am of the opinion that the record, as it stood before the TCC, contained sufficient evidence to warrant the validation of the reassessments made by the Minister. I therefore find that the appellant has not met the onus placed on it in this case, and accordingly, I would dismiss this appeal, with costs to the respondent.

[24] I note, in closing, that the style of cause on the appellant's notice of appeal and memorandum of fact and law names "the Minister of National Revenue" as the respondent, whereas the respondent before the TCC was "Her Majesty the Queen". This is how the respondent is named in the style of cause on the Attorney General's memorandum of fact and law, and this is how the appellant should have referred to the respondent in its proceedings before the Court. This will therefore be reflected in the style of cause of these reasons and in the style of cause of the judgment to be delivered in accordance with the reasons.

"René LeBlanc"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-460-19
STYLE OF CAUSE:	6610048 CANADA INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 17, 2021
REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
DATED:	NOVEMBER 26, 2021

APPEARANCES:

Philippe-Alexandre Otis Olivier Verdon	FOR THE APPELLANT
Anne Poirier Simon Vincent	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Starnino Mostovac SENC Montréal, Quebec	FOR THE APPELLANT
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT