Federal Court of Appeal  Cour d'appel fédérale

Date: 20220111

Docket: A-100-17

Citation: 2022 FCA 5

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

BETWEEN:

THOMAS CARROLL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the Registry on December 9, 2021.

Judgment delivered at Ottawa, Ontario, on January 11, 2022.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

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

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] Thomas Carroll appeals a judgment of the Tax Court of Canada (*per* D'Arcy J.) issued on February 23, 2017, for reasons delivered from the bench on February 16, 2017. The judgment dismissed Mr. Carroll's appeal of an assessment of his 2009 taxation year. The only matter in dispute before the Tax Court was Mr. Carroll's liability for penalties under subsection 163(2) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (*Tax Act*).

[2] Under that provision, a person who "knowingly, or under circumstances amounting to gross negligence, participated in, assented to or acquiesced in the making of, a false statement … in a return, form, certificate, statement or answer … filed or made in respect of a taxation year" is liable to a penalty.

[3] The essential facts are not in dispute. Mr. Carroll engaged an organization known as Fiscal Arbitrators to prepare his income tax return for his 2009 taxation year. That return was prepared and filed on the basis that Mr. Carroll carried on a business in 2009 and thereby incurred a loss. The reported loss exceeded Mr. Carroll's income from other sources in 2009. Accordingly, Fiscal Arbitrators prepared, and Mr. Carroll filed, a request for loss carryback with his 2009 return, claiming a refund of taxes in his 2007 and 2008 taxation years.

[4] Before the Tax Court, Mr. Carroll admitted that in 2009 he did not carry on a business personally, that he engaged Fiscal Arbitrators to prepare his 2009 return, that Fiscal Arbitrators had prepared his 2009 return and request for loss carryback, and that he had reviewed and signed them.

[5] The Minister of National Revenue assessed Mr. Carroll's 2009 return on the basis that the reported gross business income, business expenses and net business loss were fictitious, and that Mr. Carroll was liable for subsection 163(2) penalties.

[6] Before the Tax Court, Mr. Carroll did not dispute the Minister's denial of the claimed loss, but disputed the penalties. The main thrust of Mr. Carroll's argument was that, unless the

Canada Revenue Agency (CRA) accepts the false statement so that a tax refund is paid or some other benefit is enjoyed, subsection 163(2) does not apply.

[7] The Tax Court rejected this argument concluding "there's no requirement in [subsection] 163(2) that a refund be paid." However, that did not end the appeal. Because the respondent has the onus to prove, on a balance of probabilities, that the conditions for the imposition of the subsection 163(2) penalties are satisfied, the Tax Court proceeded to determine whether the respondent had met that onus.

[8] Based on the evidence before it, the Tax Court concluded that Mr. Carroll had participated in the making of a false statement in a return in circumstances that amounted to gross negligence. Accordingly, the conditions for the application of subsection 163(2) were met and so it dismissed Mr. Carroll's appeal.

[9] Before this Court, Mr. Carroll raises the following arguments:

1. The Tax Court erred in its conclusion that subsection 163(2) penalties may be imposed in the absence of a refund being paid; Mr. Carroll now adds that subsection 163(2) penalties cannot be imposed unless the return as filed has been accepted or there is an amount of income or tax in dispute;

2. The conditions for the application of gross negligence penalties were not met as a factual matter; and

3. He was denied procedural fairness because he was not permitted to cross-examine a representative of the CRA and his attempts to read submissions and arguments into the record before the Tax Court were ignored.

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

I. Grounds of Appeal and Standards of Review

[11] As described above, Mr. Carroll has three grounds of appeal; each has its own standard of review addressed in the discussion of the grounds of appeal that follows.

A. *Interpretation of Subsection 163(2)*

[12] Mr. Carroll submits that, under a proper interpretation of subsection 163(2), it applies only where the return with a false statement is accepted, a refund is paid, or an amount of income or taxes is in dispute. Because his 2009 return and the request for loss carryback were never accepted, he says, he never received a refund or other benefit from the false statement. Moreover, he does not dispute the income or taxes assessed. Thus, he claims he cannot be liable for penalties under subsection 163(2).

[13] Interpretation of subsection 163(2) is a question of law and accordingly the relevant standard of review is correctness. However, I agree with the Tax Court that subsection 163(2) does not require a refund to have been paid as a precondition to liability for the penalties imposed by that provision.

[14] Before this Court, Mr. Carroll also argues that without an assessment accepting the false statement or an amount of income or tax in dispute, subsection 163(2) does not apply because there is no understatement of income. I disagree.

[15] Where a taxpayer falsely claims a loss in a return (whether that loss is accepted or not), there is an understatement of income as that term is defined in subsection 163(2.1) of the *Tax Act*. That definition focuses on the difference between what should have been reported in the return and what was reported in the return. What the Minister accepts or assesses is irrelevant. Because there was a difference between what Mr. Carroll should have reported in his 2009 return (no business, no business expenses and no resulting loss) and what Mr. Carroll did report in that return (a business that gave rise to a significant loss), Mr. Carroll had an understatement of income.

[16] Where there is an understatement of income, the gross negligence penalty is calculated in accordance with paragraph 163(2)(a). It requires a comparison of two notional amounts of tax, each determined in accordance with the assumptions specified.

[17] The first, described in subparagraph 163(2)(a)(i), is the tax that would be payable *if* the person's taxable income for the year were computed by adding the understatement of income reasonably attributable to the false statement to the taxable income *reported* by the person for the year. The second amount, described in subparagraph 163(2)(a)(ii), is the tax that would have been payable for the year *had* the person's tax payable for the year been assessed *on the basis of the information provided in the person's return* for the year.

[18] Nothing depends on what is accepted or assessed, the payment of a refund, or taxes or taxable income in dispute. What is relevant is what the taxes would have been *if* the return had

been accepted as filed, and what the taxes would have been if the false loss were added to the taxable income that was reported in the return filed.

[19] Thus, in my view, there is no merit to Mr. Carroll's submissions on the interpretation of subsection 163(2).

B. *The Conditions for the Application of Subsection 163(2)*

[20] Mr. Carroll also suggests that the Tax Court erred in concluding that the respondent met its onus to prove that the conditions for imposition of the subsection 163(2) penalties were satisfied. In other words, Mr. Carroll disputes the Tax Court's findings of fact and the application of the law to those findings of fact.

[21] On appeal, this Court must treat the Tax Court's findings of fact and the inferences drawn from those findings with a high degree of deference. We will interfere only if Mr. Carroll demonstrates that the Tax Court made a palpable and overriding error*: Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10, 23 and 25. This is a very high standard and one that is very difficult to meet. It means the error must be obvious and determinative of the outcome of the case: *Salomon v. Matte-Thompson,* 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33.

[22] After reviewing relevant jurisprudence, including *Venne v. The Queen*, (1984), 84 D.T.C. 6247, [1984] C.T.C. 223 (F.C.T.D.), and *Strachan v. The Queen*, 2015 FCA 60, [2015] 3 C.T.C.

87, the Tax Court found that Mr. Carroll was grossly negligent. In particular, the Tax Court concluded that:

(i) the 2009 tax return filed by Mr. Carroll contained a false statement because the reported business did not exist;

(ii) Mr. Carroll participated in, assented to, or acquiesced in the making of the false statement because he reviewed, signed and filed the tax return and request for loss carryback containing the false statement;

(iii) Mr. Carroll did so in circumstances that amounted to gross negligence because his conduct departed markedly and substantially from that of a reasonable person in the circumstances notwithstanding that Mr. Carroll was capable of understanding his duty not to make a false statement in a return and the presence of several factors that would raise suspicions in the mind of a reasonable person.

[23] In my view, there was ample evidence before the Tax Court, including Mr. Carroll's evidence given during cross-examination, to conclude that the test for gross negligence was satisfied. I see no palpable or overriding errors.

C. *Procedural fairness*

[24] Mr. Carroll alleges that he was denied procedural fairness because he was not permitted to cross-examine a representative of the CRA and the Tax Court ignored his attempts to read submissions and arguments into the record.

[25] Questions of procedural fairness are legal questions; the Court must be satisfied the duty of procedural fairness is met: *Lipskaia v. Canada (Attorney General)*, 2019 FCA 267, at para. 14.

The focus is on whether a fair and just process was followed having regard to all the circumstances: *Canadian Pacific Railway v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at para. 54.

[26] The Tax Court acknowledged that the respondent bore the burden of establishing that the preconditions to the subsection 163(2) penalties were present in Mr. Carroll's case. However, the respondent was not obliged to call a witness from the CRA to meet that burden. Rather, the respondent chose to establish the relevant facts through Mr. Carroll's documents and testimony. This is typical. Mr. Carroll is most familiar with the facts as they pertain to him.

[27] If Mr. Carroll wanted to examine a representative of the CRA, he should have either sought the agreement of the respondent to have a representative appear or compelled the attendance of that witness with a subpoena. While Mr. Carroll may not have understood that, I have carefully reviewed the transcripts from the Tax Court and Mr. Carroll did not ask the Tax Court about examining or cross-examining a witness from the CRA.

[28] As to Mr. Carroll's allegation that he was ignored when he sought to read submissions and arguments into the record, the transcripts indicate an entirely different story. The Tax Court both permitted Mr. Carroll to present his case and, following the respondent's cross-examination of him, asked Mr. Carroll if he wished to add anything further. When Mr. Carroll said he did, the Tax Court adjourned temporarily to afford him time to prepare. Following the respondent's argument, the Tax Court again invited Mr. Carroll to present any additional arguments he wished, an invitation he accepted.

[29] I am satisfied Mr. Carroll was given every opportunity to present his case and that he was heard. There was no procedural unfairness.

II. Other Matters

[30] I wish to briefly address two other matters.

A. *Hearing of the Appeal*

[31] Mr. Carroll filed his notice of appeal with this Court on March 17, 2017. The appeal book and memoranda of fact and law were filed in early 2018; the order fixing the date and time for the hearing was sent to the parties on November 10, 2021. Mr. Carroll wrote to the Court, no less than four times between November 25, 2021 and December 9, 2021, voicing objections to the hearing proceeding because he claims the matter is not within the jurisdiction of this Court.

[32] On December 7, 2021, Mr. Carroll informed the Court in writing that he would not attend the hearing. However, he did not seek an adjournment or discontinuance of his appeal. On December 9, 2021, Court opened in accordance with the notice of hearing. Mr. Carroll did not appear. The registrar confirmed Mr. Carroll was not present, but that he had received the link for the videoconference hearing. Following a 15-minute adjournment to ensure Mr. Carroll was not merely late, the registrar again confirmed Mr. Carroll's absence. Accordingly, the Court advised counsel for the respondent that the appeal would be decided based on the written submissions. Respondent's counsel had no objection but made brief submissions on costs, which I address

below. Thus, this appeal has been determined on the basis of the appeal book and the memoranda of fact and law filed by the parties.

B. *Motion on Contents of the Appeal Book*

[33] Mr. Carroll and the respondent did not agree on the contents of the appeal book. As required by Rule 343(3) of the *Federal Courts Rules*, SOR/98-106 (the Rules), in 2017 Mr. Carroll brought a motion to determine the contents. That motion was dealt with by this Court based on written submissions. The Court dismissed Mr. Carroll's motion to include in the appeal book certain documents that were not before the Tax Court.

[34] In his memorandum of fact and law, Mr. Carroll asserts that the motion was invalidly dismissed because it was never heard orally, that counsel for the respondent had unauthorized and secret discussions with the Court, and that Mr. Carroll was not informed about such discussions. This, he asserts, is a violation of the Rules.

[35] This is an appeal of the decision of the Tax Court, not an appeal of this Court's order concerning Mr. Carroll's motion. Nonetheless, I must be clear that Mr. Carroll's allegations are completely unfounded. Not surprisingly, he offers no evidence whatsoever in support of his claims.

[36] Giving Mr. Carroll the benefit of the doubt, it is obvious that he does not understand that motions before this Court are almost invariably decided based on written submissions. Rule 369

specifically permits it. Moreover, motions to determine the contents of the appeal book are always decided based on written representations as expressly provided in Rule 343(3).

III. Costs

[37] The respondent seeks costs of the appeal. As counsel for the respondent observed, while Mr. Carroll now objects to this Court's jurisdiction, it is his appeal: he filed a notice of appeal with this Court and has not discontinued his appeal.

[38] This Court has jurisdiction to hear appeals of final judgments of the Tax Court: section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The hearing was scheduled for the sole purpose of hearing Mr. Carroll's appeal; the respondent both prepared for it and appeared ready to proceed. Mr. Carroll was fully aware of the date and time of the hearing and chose not to attend.

[39] The respondent is the successful party and I agree that the respondent should be awarded costs.

IV. Conclusion

[40] For the above reasons, I would dismiss the appeal with costs to the respondent fixed at $2,500 all inclusive.

"K.A. Siobhan Monaghan"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED FEBRUARY 23, 2017, NO. 2016-1870(IT)I

DOCKET:	A-100-17
STYLE OF CAUSE:	THOMAS CARROLL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2021
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	RENNIE J.A. LASKIN J.A.
DATED:	JANUARY 11, 2022

APPEARANCES:

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SOLICITORS OF RECORD:

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