Federal Court of Appeal | Cour d'appel fédérale

Date: 20220207

Docket: A-101-19

Citation: 2022 FCA 22

CORAM: **WEBB J.A.**
LEBLANC J.A.
MONAGHAN J.A.

BETWEEN:

ROLF DE GEEST

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on December 15, 2021.

Judgment delivered at Ottawa, Ontario, on February 7, 2022.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: LEBLANC J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The appellant is appealing the determination by the Tax Court of Canada, *per* Justice D'Arcy (2019 TCC 33), that he was carrying on a business in 2009, 2010 and 2011 for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The appellant is also appealing the dismissal by the Tax Court of his motion to strike, in whole or in part, the reply

filed by the respondent with the Tax Court and the dismissal of his appeal from the assessment of gross negligence penalties by the Minister of National Revenue (the Minister).

[2] Prior to 2006, the appellant carried on, as a sole proprietorship, the business of general construction work, which included the installation of windows. In early 2006, the appellant decided that he no longer wished to continue these activities as a business. The appellant stated that he formed the subjective intention to carry on the same activities that he carried on prior to 2006, as a "non-commercial personal endeavour" starting in 2006.

[3] As a result of his self-declared intentions, the appellant did not report the following amounts that he received for his services in 2009, 2010 and 2011:

Year	**Amount Received**
2009	$246,920
2010	$247,264
2011	$371,962
Total:	$866,146

[4] Since he did not report these amounts in his tax returns, he did not claim any expenses related to earning these amounts. In reassessing the appellant, the Minister allowed the following amounts as business expenses and reassessed the appellant based on the following amounts of net income/profit:

Year	Amount Received	Expenses Allowed	Net Income/Profit
2009	$246,920	$68,646	$178,274
2010	$247,264	$50,773	$196,491
2011	$371,962	$121,570	$250,392
Total:			$625,157

[5] Although the difference between the unreported revenue ($247,264) and the expenses allowed ($50,773) for 2010 is $196,491, the Tax Court Judge referred to $196,490 as the unreported net income for 2010. This minor discrepancy is not material in this appeal.

[6] In preparation for the appeal before the Tax Court, the parties exchanged documents and the appellant was examined for discovery. The parties filed a joint application for hearing. The matter was set down for hearing on April 10, 2018. The hearing was adjourned and rescheduled to be heard on September 13, 2018. On July 24, 2018, the appellant served his motion for an order to strike the reply in whole or in part. As noted by the Tax Court Judge, this motion was filed after the completion of all the litigation steps and over a year after the parties had submitted a joint application for hearing. The Tax Court Judge found that this motion was filed too late and the "fresh step rule" (Rule 8 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a) applied:

8. A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,	**8** La requête qui vise à contester, pour cause d'irrégularité, une instance ou une mesure prise, un document donné ou une directive rendue dans le cadre de celle-ci, ne peut être présentée, sauf avec l'autorisation de la Cour :

(*a*) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or	*a*) après l'expiration d'un délai raisonnable après que l'auteur de la requête a pris ou aurait raisonnablement dû prendre connaissance de l'irrégularité, ou
(*b*) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,	*b*) si l'auteur de la requête a pris une autre mesure dans le cadre de l'instance après avoir pris connaissance de l'irrégularité.

except with leave of the Court.

[7] The appellant submits that, for the purposes of Rule 8, the Tax Court Judge should not have dismissed his motion based on the timing of the motion. The appellant submitted that the Tax Court Judge erred by not considering when the appellant knew or ought to have known of the alleged deficiencies in the reply. However, it should be noted that the reply in this matter was filed with the Tax Court on or about January 14, 2016. Since the appellant stated that he consistently maintained that he was not carrying on a business after he formed the subjective intention to no longer do so, this would have been his position in January 2016 when he received the reply. The appellant did not explain why he could not have brought his motion to strike the reply after he received the reply and before any further steps in the litigation were completed since he had maintained the same position throughout this litigation.

[8] The appellant, in his part of the memorandum in relation to the dismissal of his motion to strike the reply, submits that the Tax Court lacked the jurisdiction to address his appeal because, in his submission, the necessary facts were not included in the reply. However, it is far from clear how this argument would assist the appellant. If the Tax Court did not have the jurisdiction to hear his appeal, then the reassessment would stand.

[9] The appellant referred to the case of *Klundert v. The Queen*, 2013 TCC 208. However, in *Klundert* the failure to plead material facts applied to the pleadings of the appellant in that case. The appellant is the person who is seeking to set aside a particular reassessment. It is the appellant's appeal to the Tax Court, not the respondent's appeal. There is no merit to the appellant's argument concerning the jurisdiction of the Tax Court.

[10] The appellant also argued that there was no evidence of any prejudice to the Crown that would arise from hearing the motion to strike on its merits as, in the appellant's words:

> Once put on notice that the **Reply** was materially deficient in failing to plead the required facts to show a subjective intention to pursue profit, the Crown reasonably would likely realize its case was doomed to fail, and abandon any opposition to the Appeal.
>
> [Paragraph 54 of the appellant's memorandum. Emphasis added by the appellant.]

[11] Since the Crown was successful in the appeal before the Tax Court, there is no merit to this argument.

[12] The appellant has not submitted any basis on which his appeal from the decision of the Tax Court Judge dismissing his motion to strike the reply should be allowed. Therefore, I would dismiss the appeal from the order of the Tax Court Judge dismissing the appellant's motion to strike the reply.

[13] With respect to the appellant's argument concerning the reassessment of his income for 2009, 2010 and 2011, there is no merit to the appellant's argument that a particular person could,

on their own, form a subjective intention to no longer carry on a business and, therefore, no longer have any income from a particular activity that would be subject to tax under the Act. Although the appellant submitted that only taxpayers have the power to determine if particular activities are a business, this is not correct. The courts have the authority to determine if particular activities are a business for the purpose of the Act.

[14] The appellant's submissions are based on reading a few sentences from the decision of the Supreme Court of Canada in *Stewart v. Canada*, 2002 SCC 46, without taking into account the context in which these sentences were written.

[15] For example, the appellant refers to the following question posed by the Supreme Court in paragraph 54 of its reasons in *Stewart*:

> "Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?"

[16] The appellant interprets this question as meaning that if he does not have the subjective intention to carry on an activity for profit, then he is not carrying on a business. However, the question was posed by the Supreme Court in a case where the issue was whether losses incurred by a taxpayer for three consecutive years were deductible. The question was whether a person who was losing money nonetheless had the intention to earn a profit and whether the evidence supported this intention. The Supreme Court was not addressing a situation where a person who was carrying on a business and earning a profit purports to decide that they would now be conducting the same activity as a personal endeavor.

[17] A taxpayer cannot simply decide that, even though the revenue arising from a particular activity exceeds the amount spent by that taxpayer to carry on that activity, the activity is not a business. Just because the appellant:

- changed his invoices to declare that they are not “business” invoices;
- ceased to have a “business” bank account;
- did not refer to the persons who engaged his services as “clients” or “business customers”;
- informed everyone that he was carrying on the activity as a personal endeavor and that his activity was non-commercial; and
- did not claim any business expenses;

it does not follow that he was not carrying on a business. A person cannot opt out of paying taxes on their earnings by simply making a unilateral declaration that they are no longer carrying on a business and by using different words to describe their contracts and their clients. Not claiming business expenses does not convert a business into a personal endeavor.

[18] It should also be noted that even though the appellant maintained that his activities were not carried out in the pursuit of profit, he acknowledged that the monies he received were used for his personal and living expenses. He therefore intended to receive monies in excess of the related expenditures incurred (otherwise he would not have had any monies for his personal and living expenses). Since profit is the amount by which revenue exceeds expenses, in effect he did

have the intention of earning a profit, *i.e.* the intention of receiving amounts in excess of his expenses.

[19] The appellant's submission that he could simply choose to carry on a personal endeavor and therefore not be taxed on the profit that he realized in carrying on his activity is devoid of any merit. I would, therefore, dismiss his appeal related to the assessment of taxes.

[20] The appellant was also assessed gross negligence penalties. The appellant argues that the Crown has the onus of establishing the facts justifying the assessment of the penalty. The appellant submitted that he should not be penalized "for his reasonable attempt to interpret and apply the [Act]". However, as noted above, there is no merit in the appellant's interpretation of the Act.

[21] The Tax Court Judge found that the Crown had established the facts justifying the assessment of the penalties as he found that the Crown had established, on a balance of probabilities, the "facts that lead to the conclusion that the making by the Appellant of the false statement in his 2009, 2010 and 2011 income tax returns was such a marked and substantial departure from the conduct of a reasonable person in the same circumstances that it constituted gross negligence". The Tax Court Judge did not err in making this finding.

[22] The appellant, in paragraph 138 of his memorandum, essentially reiterates the same arguments that he made in relation to the reassessment of his income:

> … the Appellant does have the fundamental power and liberty to structure himself to minimize or eliminate taxes, and has the sole power to determine his intentions. Non-taxability is the effect of the Appellant's legitimate intentions not to pursue profit.

[23] As noted above, there is no merit to the appellant's argument that a taxpayer can simply decide that they are no longer carrying on their activities as a business and, therefore, they are no longer required to pay tax on the profit from their endeavours.

[24] The Tax Court Judge properly identified and applied the test for the application of gross negligence penalties. I would dismiss the appellant's appeal from the assessment of gross negligence penalties.

[25] As a result, I would dismiss the appeal, with costs.

"Wyman W. Webb"
J.A.

"I agree
René LeBlanc J.A."

"I agree
K. A. Siobhan Monaghan 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 1, 2019, CITATION NO. 2019 TCC 33

DOCKET:	A-101-19
STYLE OF CAUSE:	ROLF DE GEEST v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	DECEMBER 15, 2021
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	LEBLANC J.A. MONAGHAN J.A.
DATED:	FEBRUARY 7, 2022

APPEARANCES:

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