Federal Court of Appeal | Cour d'appel fédérale

Date: 20220331

Docket: A-155-19

Citation: 2022 FCA 58

CORAM: **STRATAS J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

RUMI VESUNA

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on March 31, 2022.

Judgment delivered from the Bench at Calgary, Alberta, on March 31, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: DE MONTIGNY J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Calgary, Alberta, on March 31, 2022).

DE MONTIGNY J.A.

[1] Mr. Vesuna appeals from a decision of the Tax Court of Canada (the Tax Court) delivered from the Bench in Calgary on March 22, 2019 (Transcript of Reasons for Judgment, Appeal Book, p. 16), whereby his appeal from a decision of the Minister of National Revenue (the Minister) to deny a business deduction for court-ordered costs that he paid in 2014 was

dismissed. These costs were incurred as a result of unsuccessful litigation against the British Columbia Government and owners of an adjacent property, to obtain road access to a parcel of land he purchased in 2005 to conduct a seasonal business of selling fruits and vegetables to the public.

[2] For his legal costs to be deductible, Mr. Vesuna had to show that they were incurred for the purpose of gaining or producing income from a business: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 18(1)(a). The Minister denied Mr. Vesuna's business expense claim on a number of grounds, among which was the failure by the appellant to demonstrate that his business had commenced in 2014. That decision was upheld by the Tax Court, on the basis that Mr. Vesuna had taken some preliminary steps to advance an idea and therefore had a subjective intention to conduct a business, but had not actually taken the essential steps to commence that business.

[3] It is well established that the essential elements of a business must have been in place for a taxpayer to be carrying on business, and that mere intention or the taking of preliminary steps is not sufficient: *Gartry v. Canada*, [1994] 2 C.T.C. 2021, 94 D.T.C. 1947 at 1949, cited in *Morris v. R.*, 2014 TCC 142, [2014] 5 C.T.C. 2099, *Tiede v. R.*, 2011 TCC 84, [2011] 3 C.T.C. 2153 at para. 12 and *Hourie v. R.*, 2010 TCC 525, 2010 D.T.C. 1378; *MacDonald v. R.*, [1997] 1 C.T.C. 2501, 97 D.T.C. 1554 (T.C.C.) at para. 18; *Samson & Frères Ltée c. R.*, [1995] TCJ No. 1385, 97 D.T.C. 642 at para. 22 (T.C.C.), cited in *Tri-O-Cycles Concept Inc. c. R.*, 2009 TCC 632, 2010 D.T.C. 1030 at paras. 21-23 and *Malin v. R.*, 2007 TCC 516, [2008] 2 C.T.C. 2055. It is not in dispute that the Tax Court Judge applied that legal test.

[4] Therefore, the only issue before us is confined to the application of that test to the facts of this case. That determination is a question of mixed fact and law, and as such is reviewable on a standard of palpable and overriding error. Despite Mr. Vesuna's sincere beliefs and the obvious hardships that he experienced over the years, we have not been convinced that this Court should interfere with the Tax Court's assessment of the evidence and application of the law.

[5] Mr. Vesuna's complaints with respect to the Tax Court Judge's assessment of the facts and of the evidence are either irrelevant, because they are not determinative of whether or not the essential elements of a business were in place, or they relate to the weight to be given to the evidence. Whether Mr. Vesuna could reasonably believe that he had road access to his land when he bought it, for example, is of no consequence when deciding whether he was actually carrying on his business in 2014. Similarly, it does not really matter whether Mr. Vesuna had previous experience selling fruits and vegetables.

[6] However, the Tax Court Judge was entitled to find, on the basis of the record, that the property did not have electricity, that he had no business plan, that there were no documented agreements with farmers to obtain their produce, and that he still had no means to commence operations. Despite Mr. Vesuna's best efforts to convince us otherwise, we can see no errors in these findings.

[7] Finally, the Reasons for Judgment in the British Columbia litigation were properly admitted at the hearing before the Tax Court. First of all, they are not mere opinion but a final decision of a provincial court of justice. More importantly, these reasons were not adduced for

the truth of their factual findings, since the Tax Court Judge made her own factual findings on the basis of the record before her.

[8] Mr. Vesuna sought to adduce fresh evidence on appeal. Even if admissible it would not change the result of this appeal.

[9] For all of the above reasons, the appeal will be dismissed, with costs.

"Yves de Montigny"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-155-19
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PLACE OF HEARING:	CALGARY, ALBERTA
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