Federal Court of Appeal | Cour d'appel fédérale

Date: 20220513

Docket: A-190-19

Citation: 2022 FCA 81

CORAM: **GLEASON J.A.**
RIVOALEN J.A.
MONAGHAN J.A.

BETWEEN:

ALLEN JEFFERSON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 27, 2022.

Judgment delivered at Ottawa, Ontario, on May 13, 2022.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: GLEASON J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The appellant, Allen Jefferson, appeals a decision of the Tax Court of Canada, reported at 2019 TCC 91 (*per* Paris J.), dismissing his appeal of an assessment under section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Section 160 permits the Minister of National Revenue (Minister) to assess a particular person (transferee) for the unpaid income tax debt of another person (tax debtor) if, at the time the tax debt is outstanding, the tax debtor transfers

property to the transferee for less than fair market value consideration, and the tax debtor and transferee are not dealing with each other at arm's length.

[2] The appellant was the sole shareholder of Sidtay Ltd. (Sidtay). As an employee of Sidtay, the appellant acted as Vice-President and one of five account executives of Global Benefit Plan Consultants Inc. (Global), a corporation controlled by his father. Global provided employee benefit and pension administrative services to multi-employer trusteed plans.

[3] The appellant explained he had responsibility for managing at least 20 clients and for growing Global's business by securing new clients and developing new products for existing clients. This, the appellant told the Tax Court, involved significant travel and entertaining. Global paid Sidtay $15,000 per month for the appellant's services.

[4] In 2003, Global issued cheques to the appellant aggregating more than $542,000. The cheques were issued after the appellant submitted expense claims to Global in 2003 covering expenses incurred between April 2002 and October 2003. At the time the cheques were issued to the appellant, Global had an income tax debt relating to its 1999, 2000 and 2001 taxation years.

[5] The Minister assessed the appellant under section 160 on the basis that the amounts Global paid to him in reimbursement of expenses were transfers of property made without consideration. The appellant appealed the assessment to the Tax Court but did not dispute that he was not at arm's length with Global, or that Global had a tax debt at the time it issued the

cheques to him. Thus, the only issue before the Tax Court was whether the appellant had provided consideration to Global for the payments.

[6] The appellant's position was that the cheques were reimbursements for expenses he had incurred, that Global had agreed to reimburse those expenses and so was bound to do so, and therefore he had provided consideration for the cheques. The respondent's position was that there was no legally enforceable agreement between Global and the appellant for reimbursement of expenses. In the alternative, the respondent submitted that not all of the reimbursed expenses were incurred on behalf of Global and a significant portion were of a personal nature.

[7] At the outset of the hearing before the Tax Court, the appellant conceded that Global should not have reimbursed $78,572.59 of his expenses. In the course of the hearing, the appellant conceded an additional $20,710.15 of his expenses were not properly reimbursed by Global.

[8] The Tax Court found that Global had agreed to reimburse the appellant for expenses incurred on its behalf. However, the Tax Court decided that only approximately 26% of the reimbursed expenses (other than those conceded by the appellant) were incurred for purposes of Global's business, and so were consideration for the cheques. It allowed the appeal and ordered the Minister to reassess the appellant to reduce his liability under section 160 by approximately $116,000.

[9] The appellant appeals that decision to this Court, asserting that the Tax Court made two errors:

1. The Tax Court erred in considering the reasonableness (i.e., the business purpose) of the consideration that the appellant provided to Global because section 160 is concerned with whether there is consideration for the payments, not the reasonableness of the expenses claimed.

2. Because the only assumption pleaded by the Minister was that the appellant "provided no consideration for the cheques", and the Tax Court agreed that some expenses were properly reimbursed, the appellant demolished the Minister's assumption. As a result, the onus shifted to the respondent to prove that the appellant provided less than fair market value consideration for the cheques and, as the respondent adduced no evidence, the appellant is entitled to succeed.

[10] In this appeal, the appellate standard of review applies. Thus, questions of fact or mixed fact and law are reviewed on a standard of palpable and overriding error; any question of law is reviewed on a correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*].

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

[12] The appellant asserts that the Tax Court erred in considering the reasonableness of the expenses—something he describes as the business purpose of the expenses. However, in doing so, the appellant seeks to overturn the Tax Court's finding about the terms of the agreement he had with Global. In particular, he claims that the agreement provided for reimbursement of expenses he incurred and submitted for reimbursement to Global without regard to whether they were incurred for Global's business purposes.

[13] The appellant's memorandum suggests that the Tax Court agreed with this characterization of the agreement: "the trial judge found there was a genuine and legally binding agreement by Global to reimburse the Appellant personally for expenses he incurred and submitted to Global". I disagree with the appellant's characterization of the Tax Court's finding about the agreement.

[14] In the absence of a written agreement, based on the Tax Court's assessment of the evidence, the Tax Court was required to decide whether there was a reimbursement agreement, and if so, determine its terms. The Tax Court found there was an agreement between the appellant and Global but that it required Global to reimburse the appellant for expenses he incurred on behalf of Global. It is clear from the Tax Court's reasons that "expenses incurred on behalf of Global" means expenses incurred for Global's business purposes. This explains why the Tax Court's analysis of the evidence is focused on the business purpose of the expenses.

[15] The Tax Court's finding about the terms of the reimbursement agreement between the appellant and Global is a finding of fact. Thus, to overturn it, the appellant must demonstrate that the Tax Court made a palpable and overriding error.

[16] Before this Court, the appellant claimed that nothing precluded Global from agreeing to reimburse all of his expenses, whether or not related to Global's business. That may be so, but those are not the terms of the agreement as found to exist by the Tax Court. In essence, the appellant's complaint is that the Tax Court did not accept his description of the agreement. The Tax Court is in the best position to determine the facts based on the evidence. It is not required to accept the position of either party. I see no palpable and overriding error in the Tax Court's conclusion about the terms of the agreement between the appellant and Global.

[17] Similarly, there is no merit to the appellant's assertion that the Tax Court erred in law by considering the reasonableness (i.e., the business purpose) of the consideration because section 160 is concerned with consideration, not the reasonableness of the expenses claimed. I agree section 160 is concerned with consideration. However, nothing in the Tax Court's reasons suggests it was concerned with anything other than whether there was consideration for the cheques.

[18] The Tax Court's focus on the purpose of the expenses was motivated by its finding about the terms of the reimbursement agreement, not by some misunderstanding about section 160. Having found that the agreement applied only to expenses incurred for purposes of Global's business, the Tax Court was required to determine which expenses were incurred for that

purpose—expenses incurred for another purpose were not reimbursable pursuant to the terms of the agreement and thus were reimbursed without consideration.

[19] Finally, the appellant submits that he successfully demolished the respondent's assumption that he "provided no consideration for the cheques" so the burden shifted to the respondent. Because the respondent led no evidence, the appellant claims he is entitled to succeed. In advancing this argument, the appellant points to the following passage from *Hickman Motors Ltd. v. Canada*, [1997] 2 SCR 336, 148 D.L.R. (4th) 1, at paras. 92-93 [*Hickman*]:

> 92. …The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. Minister of National Revenue*, 1948 CanLII 1 (SCC), [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.
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> 93. This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case: *Kamin v. M.N.R.*, 93 D.T.C. 62 (T.C.C.); *Goodwin v. M.N.R.*, 82 D.T.C. 1679 (T.R.B.)….

[20] The appellant asserts all he needs do is demolish the "exact" assumption made by the Minister and no more. Here, says the appellant, the exact assumption was that he provided no consideration for the cheques. The Tax Court's finding there was some consideration for the cheques demonstrates he demolished the exact assumption.

[21] I disagree. The appellant places far too much emphasis on the word "exact" and gives insufficient weight to the word "demolish" in the passage from *Hickman*.

[22] The appellant's argument is similar to that advanced by the taxpayer in *Laliberté v. Canada*, 2020 FCA 97, 2020 D.T.C. 5052 [*Laliberté*]. There, the taxpayer was assessed a significant shareholder benefit because a corporation of which he was a controlling shareholder paid for a trip he took to space. In assessing the taxpayer, the Minister assumed, among other things, that the corporation paid all of the expenses on behalf and for the benefit of the taxpayer, that the space flight was not undertaken to promote the reputation, image, name, trademarks, brands or activities of the corporation, and that the expenses were not incurred for the purposes of earning business income or for any *bona fide* business purpose. Although the Tax Court found the expenses were largely for the personal benefit of the taxpayer, it decided that there were some business purposes and promotional benefits to the corporation. The Tax Court determined that 10% of the expenses were related to the corporation's business, notwithstanding that only the taxpayer led evidence concerning the value of the trip to the corporation.

[23] On appeal to this Court, the taxpayer in *Laliberté* asserted that because he had demolished the Minister's factual assumptions, the onus shifted to the Crown to lead sufficient evidence to establish the proportion of the expenses that were personal rather than business-related. As the Crown called no evidence, the taxpayer claimed the Tax Court was obliged to allow his appeal.

[24] This Court did not agree that the taxpayer had demolished the Minister's assumptions; to demolish them the taxpayer "was required to show that the space trip was a *bona fide* business venture in its entirety": *Laliberté* at para 54. In other words, establishing some business purpose

was not sufficient. Similarly, in this appeal, establishing some consideration for the cheques is not sufficient to demolish the Minister's assumption.

[25] The purpose of pleading the assumption is to provide the appellant with notice of the case the appellant has to meet: *Paletta International Corporation v. Canada*, 2021 FCA 182, 2021 D.T.C. 5109, at para. 20. The appellant knew the case he had to meet—the only issue under section 160 was whether the appellant provided consideration for the payments Global made to him by cheque, which, in the context of section 160, means fair market value consideration, not merely some consideration.

[26] It is clear the appellant understood this. Under the Reasons section of his Notice of Appeal before the Tax Court, the appellant submitted "there was no transfer of property to him for less than fair market value consideration". He did not limit his evidence to establishing that Global had reimbursed his expenses pursuant to a legally enforceable agreement by describing the agreement and providing some examples of reimbursed expenses and the rationale for them. Rather, he adduced significant evidence about the expenses themselves: what they were, where they were incurred, and why they were incurred. He placed all of the expense claims he submitted to Global for reimbursement in 2003, including the associated receipts and credit card statements, before the Tax Court. He testified about the various expenses and called three witnesses to testify for him. Thus, the Tax Court had substantial evidence about the expenses the appellant submitted to Global for reimbursement.

[27] The respondent is not required to call witnesses or tender its own evidence to make its case. A similar argument was rejected by this Court in *Laliberté;* it was open to the Tax Court in that case to determine the value of the shareholder benefit received "based on all the evidence tendered, including the Crown's cross-examination of the [taxpayer's] witnesses": *Laliberté* at para 56. Similarly, it was open to the Tax Court to determine the value of the consideration the appellant gave for the cheques based on all the evidence tendered.

[28] This is not a new principle. Even where a taxpayer succeeds in demolishing the Minister's assumptions or the Minister does not rely on any assumptions, the Minister may nonetheless establish the correctness of an assessment based on the all the evidence tendered. As this Court observed in *Pollock v. R.* (1993), 161 N.R. 232, 94 D.T.C 6050 (F.C.A.):

> 20. Where, however, the Minister has pleaded no assumptions, or where some or all of the pleaded assumptions have been successfully rebutted, it remains open to the Minister, as defendant, to establish the correctness of his assessment if he can. In undertaking this task, the Minister bears the ordinary burden of any party to a lawsuit, namely to prove the facts which support his position unless those facts have already been put in evidence by his opponent. This is settled law.
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> 21. Accordingly, in my view, McNair, J. was entirely right to ask himself, as he did, "whether the facts of the case support the conclusion that the plaintiff was in fact engaged in an adventure in the nature of trade?" In answering that question he was entitled, and indeed obliged, to rely on those assumptions which had not been disproved and on the evidence as a whole. [Emphasis added.]

(See also *Lacroix v. Canada* 2008 FCA 241, 302 DLR (4th) 372 at para. 32; *Deyab v Canada* 2020 FCA 222, 2021 D.T.C. 5001, at para 56, leave to appeal to SCC dismissed.) The simple reason is that the taxpayer typically has the relevant information; the respondent does not. Thus, in appeals before the Tax Court, the respondent is often limited to challenging the taxpayer's evidence.

[29] Before the Tax Court in this case the respondent relied on the appellant's evidence—his documents and the oral testimony of his witnesses—to make its case. On cross-examination of the appellant, the respondent questioned whether certain reimbursed expenses were related to Global's business, suggesting they were personal or related to the appellant's other business interests. On cross-examination of the other witnesses, the respondent undermined the value of their testimony to the issues before the Tax Court and to corroborating the appellant's evidence.

[30] Having determined the existence of an agreement for reimbursement of expenses incurred for Global's business, the Tax Court had to ask itself which expenses reimbursed by Global were reimbursed under that agreement. Once again, the Tax Court is in the best position to consider and weigh the evidence.

[31] Moreover, "where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged": Housen at para. 24. The Tax Court characterized the appellant's evidence as "not sufficiently credible or reliable to convince" it that "all of the expenses he claimed … were incurred for the purposes of Global's business", for reasons it explained. The appellant conceded almost $100,000 in expenses were not properly reimbursed, there were inconsistencies between his testimony and his expense claims, duplicate claims for the same expenses were reimbursed, there were inconsistencies between his evidence and that of Global's financial manager, and there was a lack of persuasive corroborating evidence.

[32] The Tax Court must consider all of the evidence and determine whether the assessment is correct. That is precisely what the Tax Court did in this case. Based on that evidence the Tax Court found that 26.21% of the expenses the appellant submitted to Global for reimbursement in 2003 (other than those the appellant conceded) were reimbursed by Global pursuant to its agreement with the appellant. Any other expenses were reimbursed outside the terms of the agreement and so without consideration. I see no reason to interfere with that conclusion.

[33] As is evident from the above reasons, I see no error of law or palpable and overriding error of fact made by the Tax Court. Accordingly, I would dismiss the appeal with costs.

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

“I agree
Mary J.L. Gleason J.A.”

“I agree
Marianne Rivoalen J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE BRENT PARIS DATED APRIL 29, 2019, NO. 2016-1477(IT)G

DOCKET:	A-190-19
STYLE OF CAUSE:	ALLEN JEFFERSON v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
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REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	GLEASON J.A. RIVOALEN J.A.
DATED:	MAY 13, 2022

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