

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240611

Docket: A-69-23

Citation: 2024 FCA 108

**CORAM: STRATAS J.A.
BOIVIN J.A.
BIRINGER J.A.**

BETWEEN:

**CANADIAN WESTERN TRUST COMPANY
as TRUSTEE of the FAREED AHAMED
TFSA**

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Vancouver, British Columbia, on June 11, 2024.

Judgment delivered from the Bench at Vancouver, British Columbia, on June 11, 2024.

REASONS FOR JUDGMENT OF THE COURT BY:

BIRINGER J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on June 11, 2024).

BIRINGER J.A.

[1] The appellant appeals from a judgment of the Tax Court (*per* Spiro J.) dismissing its appeals of reassessments for the 2009-2012 taxation years: 2023 TCC 17 (Reasons).

[2] The Tax Court decision turned on the interpretation of subsection 146.2(6) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), which provides that no tax is payable by a tax-free savings account (TFSA) trust except if it carries on one or more businesses, or holds one or more non-qualified investments. It reads in part:

(6) No tax is payable under this Part by a trust that is governed by a TFSA on its taxable income for a taxation year, except that, if at any time in the taxation year, it carries on one or more businesses or holds one or more properties that are non-qualified investments (as defined in subsection 207.01(1)) for the trust, tax is payable under this Part by the trust on the amount that would be its taxable income for the taxation year if it had no incomes or losses from sources other than those businesses and properties, and no capital gains or capital losses other than from dispositions of those properties, ...

[emphasis added]

(6) Aucun impôt n'est à payer en vertu de la présente partie par une fiducie régie par un compte d'épargne libre d'impôt sur son revenu imposable pour une année d'imposition. Toutefois, si, au cours de l'année, la fiducie exploite une ou plusieurs entreprises ou détient un ou plusieurs biens qui sont, pour elle, des placements non admissibles, au sens du paragraphe 207.01(1), l'impôt prévu par la présente partie est à payer par la fiducie sur la somme qui correspondrait à son revenu imposable pour l'année si ses seules sources de revenu ou de perte étaient ces entreprises ou ces biens et ses seuls gains en capital ou pertes en capital découlaient de la disposition de ces biens. [...]

[mon soulignement]

[3] No facts were in dispute. The sole issue before the Tax Court was whether tax is payable by a TFSA trust on income from carrying on a business of trading in qualified investments. The Tax Court concluded that income earned by a TFSA trust from carrying on any business, including a business involving only qualified investments, is taxable under subsection 146.2(6). As the appellant carried on such a business, the Tax Court dismissed the appeals: Reasons at para. 8.

[4] The appellant raises two issues in this Court.

[5] First, the appellant argues that the Tax Court erred in interpreting subsection 146.2(6). The standard of review for a question of statutory interpretation is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *Canada v. Villa Ste-Rose Inc.*, 2021 FCA 35 at para. 27.

[6] Second, the appellant argues that the Tax Court erred in law by declining to admit the “Pook Letter”, which it sought to adduce, in a pre-trial motion, as an extrinsic aid to statutory interpretation. In our view, the decision on the letter did not involve an extricable question of law. The Tax Court refused to admit the Pook Letter because it was irrelevant. Accordingly, this aspect of the Tax Court’s decision is reviewable only for palpable and overriding error: *Housen* at para. 36; *Ahamed v. Canada*, 2020 FCA 213 at paras. 31-32.

[7] The appellant’s central statutory interpretation argument is that the exemption from tax for a registered retirement savings plan (RRSP) trust on business income from, or from the disposition of, qualified investments (paragraph 146(4)(b)) should be read into subsection 146.2(6). The appellant submits that the RRSP regime and the TFSA regime are “mirror images” of each other, and so the exemption should apply to both regimes. The Tax Court disagreed.

[8] The Tax Court conducted a detailed textual, contextual, and purposive analysis, as required: *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51 at para. 41. Beginning with the text, the Tax Court found the phrase “carries on one or more businesses” clear, and broad enough to capture all businesses: Reasons at paras. 67 and 89.

[9] In considering context, the Tax Court noted important differences between the TFSA and RRSP regimes; their components were not interchangeable: Reasons at para. 71. If Parliament had wanted to exempt the income of TFSA trusts from carrying on a business of trading in qualified investments, as it did for RRSP trusts, “[it] would have said so”: Reasons at para. 80.

[10] The Tax Court observed that both it and this Court have confirmed that the purpose of the TFSA regime is to allow Canadians to increase savings by earning tax-free investment income: Reasons at paras. 73-74. That purpose was advanced within certain limits, including the type of income that could accumulate tax-free within a TFSA trust: Reasons at para. 78. The Tax Court refused to override the clear language of subsection 146.2(6) based on purported policies transplanted from a different statutory regime: Reasons at paras. 89 and 92.

[11] We see no legal error in these conclusions.

[12] At the hearing, the appellant acknowledged that, on the basis of the factors set out in *Vancouver Art Metal Works Ltd. v. Canada*, [1993] 2 F.C. 179 (C.A.) at 187, 47 D.T.C. 5116, it would be considered to be carrying on a business of trading in qualified investments. The Tax Court correctly concluded that subsection 146.2(6) incorporates the well-established test for “carrying on business” (Reasons at para. 72), and *Vancouver Art* sets out some relevant factors to consider in determining whether the purchase and sale of securities amounts to the carrying on of a business. Nonetheless, the appellant submits that the phrase “carries on one or more businesses” in subsection 146.2(6) should be read so that a TFSA trust that carries on a business of trading investments under well-established common law principles should not be considered

to carry on a business for purposes of subsection 146.2(6) when the business involves only trading in qualified investments.

[13] We find that position untenable. We agree with the Tax Court that the appellant's reading is unsupported by the text, context, and purpose of subsection 146.2(6), and would amount to a re-drafting of the provision: Reasons at paras. 91-92. It is not for this Court to make new tax policy or amend existing tax legislation: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 41; *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at para. 96.

[14] Accordingly, we reject the appellant's statutory interpretation argument.

[15] We also find no palpable and overriding error in the Tax Court's decision not to admit the Pook Letter as an extrinsic aid. Contrary to the appellant's assertions, the Tax Court did not rule that the letter was inadmissible as a matter of law. Rather, the Tax Court determined that the letter, internal correspondence from 1969 between government officials concerning forthcoming changes to the RRSP regime, was irrelevant to the statutory interpretation exercise at hand. The letter did not assist in determining the purpose of subsection 146.2(6), a provision in the separate and unrelated TFSA regime: Reasons at para. 89. We see no reason to interfere with the Tax Court's determination.

[16] For these reasons, we will dismiss the appeal, with costs.

“Monica Biringer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-69-23

STYLE OF CAUSE: CANADIAN WESTERN TRUST
COMPANY AS TRUSTEE OF
THE FAREED AHAMED TFSA v.
HIS MAJESTY THE KING

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

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**REASONS FOR JUDGMENT OF THE COURT
BY:** STRATAS J.A.
BOIVIN J.A.
BIRINGER J.A.

DELIVERED FROM THE BENCH BY: BIRINGER J.A.

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