Federal Court of Appeal | Cour d'appel fédérale

Date: 20140131

Docket: A-555-12

Citation: 2014 FCA 25

CORAM: **SHARLOW J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ALLEN BERG

Respondent

Heard at Toronto, Ontario, on September 16, 2013.

Judgment delivered at Ottawa, Ontario, on January 31, 2014.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: SHARLOW J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

[1] The Crown appeals from the November 19, 2012 judgment of Justice Bocock of the Tax Court of Canada: 2012 TCC 406 (amended reasons for judgment issued December 14, 2012). The judgment partially allowed Mr. Berg's appeal from assessments made by the Minister of National Revenue for the 2002, 2003, and 2004 taxation years pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[2] For the reasons that follow, I would allow the Crown's appeal.

I. Facts

[3] In 2002 and 2003, Mr. Berg participated in a so-called charitable donation program where he received inflated tax receipts. The program involved a series of transactions that included the purchase and subsequent transfer of timeshare units located on Young Island in St. Vincent and the Grenadines that were transferred soon afterward to a registered charity. As part of the same series of transactions, the participants also received documents designed to enable the participants to receive tax credits based on a falsely inflated value of the timeshare units. In these reasons, I refer to those documents as the "pretence documents."

[4] Participating in the program involved entering into a series of transactions with Young Island Timeshare Inc. (a British Virgin Islands corporation) and SVG Bancorp Inc. (represented as a St. Vincent and the Grenadines corporation). Young Island Timeshare Inc. sold the timeshare units to participants including Mr. Berg, and SVG Bancorp Inc. provided participants including Mr. Berg with the pretence documents that were intended to deceive the Minister into believing that Mr. Berg's cost of the timeshare units was far in excess of what he actually paid for them.

[5] On November 19, 2002, Mr. Berg purchased 68 timeshare units with a fair market value (FMV) of $242,000. He paid $242,000 for them. The promoters provided Mr. Berg with the pretence documents, the most important of which was a document purporting to be a promissory note proving that Mr. Berg still owed $2,178,000 for the purchase of the timeshare units. Mr. Berg also paid a fee of $508,200 to the program promoters.

[6] On December 6, 2002, Mr. Berg transferred the timeshare units to Cheder Chabad which, at all times material to this case, was a registered charity under the Act. Cheder Chabad issued him with a charitable gift receipt for $2,420,000 (ten times the FMV of the timeshare units and equal to the money Mr. Berg paid for the units plus the face amount of the purported promissory note). On his 2002 tax return, Mr. Berg claimed a tax credit based on the $2,420,000 receipt. When the 2002 tax return was initially assessed, the tax credit was allowed as claimed.

[7] In 2003, Mr. Berg again participated in the charitable donation program, which differed from his 2002 participation only in the dollar amounts of the transaction. The program structure remained the same. On February 12, 2003, Mr. Berg purchased timeshare units with a FMV of $133,950 for which he paid $133,950. Again the promoters provided him with pretence documents, the most important of which was a document purporting to be a promissory note proving that Mr. Berg still owed $1,652,050 for the timeshare units. Mr. Berg paid the promoters a fee of $366,130.

[8] On February 14, 2003, Mr. Berg transferred his timeshare units to Cheder Chabad. The charity provided him with a charitable tax receipt in the amount of $1,786,000, on the basis of which he claimed tax credits on his 2003 and 2004 tax returns ($1,067,620 in 2003 and $718,380 in 2004). Again, the tax credits as claimed were allowed on initial assessment.

[9] Mr. Berg admitted in a Partial Agreed Statement of Facts filed in the Tax Court that there was never an intention that he would pay more than FMV for the timeshare units. After the examinations for discovery but before the trial, Mr. Berg disclosed the existence of documents

executed contemporaneously with the 2002 and 2003 timeshare purchases that discharged Mr. Berg from any liability under the purported promissory notes of $2,178,000 and $1,652,050.

[10] As illustrated by the following table, Mr. Berg anticipated a net cash return of $684,480 for the 2002 and 2003 transactions, assuming his claims for tax credits based on the inflated charitable donation receipts had been allowed in full.

	2002	**2003**
FMV of property	$242,000	$133,950
Amount paid for property	$242,000	$133,950
Face amount of purported promissory note	$2,178,000	$1,652,050
Inflated value of property as shown on gift receipt	$2,420,000	$1,786,000
Total federal and provincial tax credits anticipated	$1,113,200	$821,560
Less: Fee paid to promoters	$(508,200)	$(366,130)
Less: Amount paid for property	$(242,000)	$(133,950)
Net cash return anticipated by Mr. Berg	$363,000	$321,480

II. Procedural History

[11] On January 4, 2007, the Minister issued a notice of reassessment covering the 2003 and 2004 taxation years, and on June 19, 2009, the Minister issued a notice of reassessment covering the 2002 taxation year. These reassessments disallowed Mr. Berg's entire claim for tax credits based on the transfers of the timeshare units to Cheder Chabad.

[12] Mr. Berg appealed the reassessments to the Tax Court. The matter was heard by Justice Bocock on June 4, 2012 with the judgment released November 19, 2012 and amended reasons released December 14, 2012 (correcting certain figures in the reasons).

[13] At the outset of the hearing, Mr. Berg abandoned an issue in his appeal (he had initially attempted to claim a capital loss in relation to some of the guarantee fees). As a result, there was only one issue to be determined. The judge articulated it as follows (at paragraph 21):

> This […] is the precise legal issue for this Court to determine, namely, does the overall scheme of the Donation Program, the Inflated Gift Receipt and/or the bogus Transaction Documents submitted in vain by the Appellant to the CRA, vitiate the donative intent or *animus donandi* regarding the Transferred Units donated to the Charity.

[14] The judge determined that, in return for the transfer of the timeshare units to Cheder Chabad, Mr. Berg had received no benefit beyond the inflated tax receipts. His reading of the jurisprudence from the Tax Court and this Court was that (at paragraph 33):

> ... in the absence of some additional benefit or consideration beyond that of enhanced, supplementary or additional donation tax receipts, [the Courts] have been reluctant to impugn donative intent where the underlying gift has some tangible property and is not otherwise commingled with a received tangible or potential benefit beyond the donation tax receipt; however inflated or unsupportable.

[15] The judge determined that Mr. Berg was entitled to claim a charitable tax credit to the extent that he was actually impoverished by his purchase and subsequent transfer of the timeshare units (at paragraphs 47-48):

> The Appellant was not overwhelmingly and perhaps only marginally motivated by donative intent when he gave the Transferred Units to the Charity. Factually, the Appellant had an intention to give the Transferred Units purchased with the Cash Donation Amounts without the condition of receiving any benefit beyond that of the

> tax receipts, however perversely inflated they may have been. Both counsel agreed the Appellant received no consideration beyond the possibility of the overstated tax receipt and the concordantly inflated charitable tax credit.
>
> The fact remains however, that to the extent the Cash Donation Amount related to the Transferred Units, the Appellant was impoverished by, paid valuable consideration for, intended to give, and conveyed the Transferred Units which were, in turn, received by the Charity. Whatever opprobrium may be ascribed to the Donation Program, legally the Cash Donation Amount has met the legal test of a charitable gift. In the absence of some other benefit received beyond the Inflated Tax Receipts, no legal authority suggests donative intent as defined by the case law relevant to section 118.1 of the *Act* has been vitiated or nullified to the extent of the value of the Cash Donation Amount.

[16] The matter was referred back to the Minister for reconsideration and reassessment on the basis that Mr. Berg was entitled to claim charitable gifts in the amount of $242,000.00 and $133,950.00 for the 2002 and 2003 tax years, respectively.

[17] Notwithstanding Mr. Berg's success before the Tax Court, the judge declined to award Mr. Berg his costs because of his conduct in preparing his return, his dealings with the Canada Revenue Agency, his insistence in litigating a withdrawn issue, and his use of the pretence documents.

[18] The Crown has appealed to this Court on the basis that Mr. Berg should not have been entitled to any tax credits concerning the transfer of the timeshare units to Cheder Chabad.

III. Issue

[19] In my view, the sole question in this matter was whether the judge erred in finding that Mr. Berg made gifts entitling him to tax credits pursuant to section 118.1 of the Act.

IV. Standard of Review

[20] Questions of law are to be reviewed on the standard of correctness, while questions of fact are to be reviewed on the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2003 SCC 33 at paragraphs 8 and 10).

[21] As stated in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, "[t]he textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a question of law but the application of these provisions to the facts of a case is necessarily fact-intensive" (paragraph 44).

V. Analysis

[22] Section 118.1 of the Act provides individual taxpayers with tax credits for gifts they make to registered charities.

[23] The Act does not define the term "gift." The meaning of the term is determined under the applicable law, which in this case is the common law. The authoritative definition for this purpose is stated as follows in *The Queen v. Friedberg*, 92 D.T.C. 6031(F.C.A.) (*Friedberg*):

> […] a gift is a voluntary transfer of property owned by a donor to a done in return for which no benefit or consideration flows to the donor (at 6032).

[24] The underlying facts are not in dispute. The series of interconnected and pre-arranged transactions set out earlier in this judgment have been determined and are not in question, nor is the intention of Mr. Berg in dispute. It was accepted by the judge and it is evident from the record that Mr. Berg understood from the outset that the series of interconnected and pre-arranged transactions

(or the "deal" as Mr. Berg himself described them as referred to at paragraph 27 of the judge's reasons) were designed to mislead tax officials as to the FMV of the property transferred to Cheder Chabad. This was done solely for the purpose of receiving inflated tax receipts and claiming inflated tax credits. Nor can there be any doubt that Mr. Berg's participation in the scheme was conditional upon him receiving the pretence documents to support his inflated claims.

[25] Before this Court, counsel for both parties advanced a number of arguments in support of their respective positions. Counsel for Mr. Berg essentially took the position that no matter how egregious the behaviour of Mr. Berg in participating in the "deal," the fact is that the only benefit he received at the end of the day was charitable tax receipts entitling him to a charitable tax credit at least to that extent of the FMV of the property he transferred to the charity. Notwithstanding that he was motivated by greed in attempting to obtain tax treatment to which he was not entitled, the end result was that Mr. Berg was "impoverished" to the extent of the FMV of the property transferred to Cheder Chabad. As such, counsel for Mr. Berg submitted that the definition of gift pursuant to *Friedberg* was established. In large measure the judge accepted this position.

[26] The Crown took the position that Mr. Berg had received a significant benefit beyond the receipt of a charitable tax receipt, namely the provision of the pretence documents that would have allowed him to obtain a large profit as a result but for the reassessment by the Canada Revenue Agency. Thus, as per *Maréchaux v. The Queen*, 2010 FCA 287 (*Maréchaux*) and more recently *Kossow v. Canada*, 2013 FCA 283, this resulted in the interconnection of the transfer of the timeshare units to Cheder Chabad and the significant benefit of the ability to participate through the pretence documents, given that one was conditional upon the other. The judge rejected this position

largely based on his finding (and the Crown's admission) that the pretence documents were bogus. He concluded that this rendered the pretence documents of no value, and therefore they could not constitute a significant benefit (see paragraph 36 of the reasons).

[27] In so doing, the judge was led to the conclusion that the only benefit received by Mr. Berg was the inflated charitable tax receipt. In turn, this led the judge to conclude, based on his understanding of the case law, that Mr. Berg was entitled to a tax credit to the extent of the FMV of the property transferred to the registered charity (see paragraph 33 of the reasons).

[28] In my view, on this record, it was not open to the judge to conclude that the pretence documents were "of no value" at the time that Mr. Berg consummated the "deal." They clearly had value to Mr. Berg – he paid a substantial fee at that time, well in excess of the value of the timeshare units – and it is clear that the pretence documents were part of the package he received in return. Mr. Berg intended to rely on the pretence documents as though they were genuine, and he did so. He used them to support his initial claim for inflated tax credits. He continued to rely on them throughout the audit and objection, and even to the end of examinations for discovery. The fact that his position became untenable upon discovery of the discharge documents does not change the fact that the pretence documents had value when they were delivered to Mr. Berg. In my view, this case is indistinguishable from *Maréchaux*, and for that reason the Crown's appeal should succeed.

[29] The Crown is entitled to succeed for a further reason. In my view, it was not open to the judge on this record to conclude that, at the time of the transfer of the timeshare units to Cheder Chabad, Mr. Berg had the requisite donative intent for the purposes of section 118.1 of the Act. In

my view, Mr. Berg did not intend to impoverish himself by transferring the timeshare units to Cheder Chabad. On the contrary, he intended to enrich himself by making use of falsely inflated charitable gift receipts to profit from inflated tax credit claims. He consummated the "deal" solely with that objective, and he acted from beginning to end in a manner intended to achieve that result.

VI. Conclusion

[30] For these reasons, I would allow the appeal, set aside the judgment of the Tax Court, and, rendering the judgment that should have been rendered, dismiss Mr. Berg's appeal from the 2002, 2003, and 2004 taxation year reassessments. The Crown is entitled to its costs in this Court and in the Tax Court.

"David G. Near"
J.A.

"I agree
K. Sharlow J.A.:

"I agree
David Stratas J.A.:

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-555-12

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BOCOCK DATED NOVEMBER 19, 2012, NO. 2010-1429(IT)G

STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. ALLEN BERG
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 16, 2013
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	SHARLOW J.A. STRATAS J.A.
DATED:	JANUARY 31, 2014

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