Federal Court of Appeal | Cour d'appel fédérale

Date: 20140501

Docket: A-88-12

Citation: 2014 FCA 109

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

AZIZULLAH HAFIZY 2009-1160(IT)G
FOROOZAN HONARI-2009-1159(IT)G
MELANIE TACANAY 2009-1148(IT)G

Appellants

and

HER MAJESTY THE QUEEN
(MINISTRY OF REVENUE)

Respondent

Heard at Toronto, Ontario, on April 30, 2014.

Judgment delivered at Ottawa, Ontario, on May 1, 2014.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

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

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal from the judgment of Sheridan J. (the judge) of the Tax Court of Canada whereby the appeals from the reassessments made under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (ITA) for the 2003 and 2004 taxation years were allowed. The judge

referred the reassessments back to the Minister of National Revenue (the Minister) for reconsideration and reassessment only to give effect to the Minister's concessions made at the beginning of the hearing. In doing this, the judge rejected the rest of the expenses claimed by the appellants. This rejection is the subject of the appeal.

[2] In the reassessment of the 2003 and 2004 taxation years of Azizullah Hafizy, Foroozan Honari and Melanie Tacanay (the appellants), the Minister disallowed various expenses claimed relating to the appellants' real estate business, such as advertising, professional dues, phones, parking, client incentives, gifts for referrals, clients' meals, office supplies, and third party costs. The Minister based her decision on the insufficiency of supporting documentation and the poor quality of the documents produced.

[3] Before the judge, Mr. Hafizy gave evidence on behalf of all three appellants and Ms. Honari provided some additional information regarding certain points that Mr. Hafizy raised in his testimony. All of the documentation was produced during the said testimonies and Mr. Hafizy was cross-examined extensively.

[4] The judge emphasized that the onus was on the appellants to show that they incurred the expenses claimed and that these had a business purpose. She then observed that the appellants' failure to keep proper books and records, combined with their practice of dealing in cash, made it impossible for the appellants to prove their claims.

[5] In her reasons (2012 TCC 56), the judge stated that following the hearing, she made her own review of the documents and that the testimony of Mr. Hafizy and Ms. Honari did not serve to correct or justify the various irregularities identified in their documentary evidence. At paragraph 10 of her reasons, the judge lists various irregularities. She then concludes that in this context, the Minister's concessions were more than fair.

[6] The appellants argue that the judge did not consider their evidence carefully and fully and so her judgment was unfair and unjust. After identifying what they consider to be factual errors (for example, in subparagraph 10(2) of her reasons regarding the reference to Exhibit A-7, "Afghan Hindara"), they allege that the failure to consider all the evidence constitutes a breach of procedural fairness.

[7] They further submit that a judge can accept supplementary evidence in the absence of documentary records, such as oral evidence, and that in this case, the judge failed to do so.

[8] Finally, they allege that the adjustments made by the Appeal Officer on behalf of the Minister were unfounded, as these were solely based on assumptions and estimations from Statistics Canada and other approximations based on what the Appeal Officer thought was reasonable.

[9] The standard of review of the judge's findings of mixed fact and law (absent an extricable legal principle) is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33,

[2002] 2 S.C.R. 235 at paragraph 36 (*Housen*). The weighing of evidence is subject to this same deferential standard of review.

[10] Under the standard of palpable and overriding error, the appellants have "a heavy burden to meet": *Hokhold v. Canada*, 2013 FCA 86 at paragraph 24. Based on the evidentiary record before the judge, I am satisfied that she was entitled to reach the conclusion that she did.

[11] As Stratas J.A. explained in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at paragraph 46, "[w]hen arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall." Here, the appellants have indeed succeeded at pulling certain leaves off the tree, as at least one of the judge's references appears to be factually incorrect if read literally (Exhibit A-7, "Afghan Hindara"). That being said, the tree has not fallen. There are a number of irregularities with the evidence provided by the appellants that support the judge's decision not to recognize any further expenses.

[12] As for the appellants' allegations that there was a breach of procedural fairness, I see none. The appellants had the benefit of a full hearing where they were able to present all of their arguments. In fact, during the hearing, the judge explicitly sought further testimony on expense items that the witness had failed to address during his examination and cross-examination (A.B., page 185, lines 1 to 6).

[13] In *Housen*, at paragraph 46, the Supreme Court of Canada made it clear that a judge is presumed to have considered all the evidence in the record. Here, not only did the judge tell the

appellants at the hearing that she "would look through the documents carefully later" (A.B., page 163, lines 2 to 4; see also A.B., page 161, lines 15 to 19), she was taken through many of the documents. And the judge expressly stated in her reasons that she made her own review of the documents filed by the appellants (Reasons at paragraph 10). She also detailed at length the imperfections in the evidence, citing specific examples that the appellants argued the respondent had not properly considered (see for example, Exhibit A-7, "Likha", Exhibit A-2, "Taliba" and Reasons, subparagraph 10(4)).

[14] In these circumstances, the presumption that the judge reviewed all of the documents in the record has not been rebutted.

[15] In these circumstances, the appeal should be dismissed.

"Johanne Gauthier"

J.A.

"I agree
David Stratas J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-88-12

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE SHERIDAN, DATED FEBRUARY 16, 2012, DOCKET NUMBERS 2009-1160 (IT)G, 2009-1159(IT)G AND 2009-1148(IT)G

DOCKET:	A-88-12
STYLE OF CAUSE:	AZIZULLAH HAFIZY 2009-1160 (IT)G, FOROOZAN HONARI- 2009-1159(IT)G, MELANIE TACANAY 2009-1148(IT)G v. HER MAJESTY THE QUEEN (MINISTRY OF REVENUE)
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 30, 2014
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.
DATED:	MAY 1, 2014

APPEARANCES:

Azizullah Hafizy Foroozan Honari Melanie Tacanay	ON THEIR OWN BEHALF
Alisa Apostle Carol Calabrese	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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