Docket: 2006-3743(IT)I

BETWEEN:

NADEEM FRANCIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 31, 2007 at Halifax, Nova Scotia.

Before: The Honourable D.G.H. Bowman, Chief Justice

Appearances:

Counsel for the Appellant:	Gerard Tompkins, Q.C.
Counsel for the Respondent:	Deanna M. Frappier

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2004 taxation year is allowed with costs and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the $24,000 seized by the Royal Canadian Mounted Police from FedEx Courier on October 25, 2004 was not the property of the appellant and did not represent income of the appellant. The deletion of the penalties should follow automatically.

Signed at Ottawa, Canada, this 7th day of June 2007.

"D.G.H. Bowman"

Bowman, C.J.

Citation: 2007TCC323
Date: 20070607
Docket: 2006-3743(IT)I

BETWEEN:

NADEEM FRANCIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowman, C.J.

[1] This appeal is from a reassessment made under the *Income Tax Act* for the appellant's 2004 taxation year in which $24,000 was added to the appellant's income. Penalties under subsection 163(2) of the *Act* were imposed by reason of the appellant's failure to include the $24,000 in his income.

[2] The facts are a little unusual. In 2004 the appellant was about 28 years old. He had a somewhat nondescript career. He had studied at Acadia University but did not finish his degree. He did odd jobs such as painting or carpentry. He was married and his wife had a job in which she earned, in 2004, according to the appellant, about $45,000 annually. Initially he declared about $8,000 in that year as income from business and employment. He also testified that he and his wife received some money from his father-in-law in Sri Lanka.

[3] In October 2004 he attempted to send a package by FedEx overnight Courier to an address in Richmond, British Columbia. On October 25, 2004, the Integrated Proceeds of Crime Division of the Royal Canadian Mounted Police intercepted and seized the package. It contained some toys, a thank you card and $24,000 (Cdn) in cash.

[4] The $24,000 was forfeited to Her Majesty on February 23, 2006 by an order of the Honourable Hughes Randall. The appellant did not appear on the application before the Provincial Court although he had been served. The Court stated in the order:

> **AND UPON** being satisfied of the following:
>
> (1) that the Property was seized pursuant to lawful authority;
> (2) that the Property was ordered detained under section 490(1) of the *Criminal Code*;
> (3) that the continued detention of the Property is no longer required within the meaning of section 490(5) of the *Criminal Code*; and
> (4) that the lawful owner or person who is lawfully entitled to possession of the property is not known and cannot be ascertained.
>
> **I HEREBY ORDER THAT** the Property is forfeited to Her Majesty the Queen in Right of Canada pursuant to s. 490(9) of the *Criminal Code of Canada* to be disposed of as the Attorney General of Canada directs or otherwise in accordance with the law.

It should be noted that the forfeiture order was made on February 23, 2006, one month and ten days after the assessment on January 13, 2006 for the 2004 taxation year by which the Minister of National Revenue added the $24,000 to the appellant's income.

[5] The circumstances leading up to the reassessment for 2004 deserve to be mentioned briefly. Several meetings were held between Mr. Troy Grant of the Canada Revenue Agency and Mr. Francis or his counsel, Mr. Tompkins. They came close to signing an agreement whereby

(a) no net worth assessment would be made;

(b) $7,000 would be added to the appellant's income for each of 2002 and 2003;

(c) $24,000 would be added to the appellant's business income for 2004;

(d) no gross negligence penalties would be imposed;

(e) the appellant would waive his right to object.

[6] This proposal was conveyed in a letter from CRA dated November 16, 2005. In the result the deal did not materialize. Mr. Francis' reply to the proposal was as follows:

Nadeem Francis
3570 Windsor Street
Halifax NS B3K 5G8

December 9, 2005

PERSONAL AND CONFIDENTIAL

Mr. Troy Grant
CRA, Investigations
PO Box 638
HALIFAX, NS B3J 2T5

Dear Mr. Grant:

Income Tax Returns – 2002-04

I refer to your letters dated July 11 and November 16, 2005, to me. I have given to you details of my financial situation relating to those years, and have estimated my income for those years. I note that you have assured me that you are not conducting a criminal investigation relating to my income tax liabilities, and, based on that assurance, I have agreed to answer your questions and provide information to you.

I have advised you several times that I am not the owner of the $24,000 of cash that was seized from FEDEX Courier on or about October 25, 2004. Further, I was not carrying on any business during 2004 from which I made a profit of $24,000.

In your letter dated November 16, 2005, to me, you suggest a conclusion to your audit that will require me to accept ownership of this $24,000. As you know, there are other legal proceedings in process that relate to the ownership of that money, and I will not agree to a conclusion of the audit you are conducting in any way which will prejudice my position concerning those, or any other Court proceedings. I expect that those other Court proceedings will confirm my advice to you that I was not the owner of the $24,000, and this will contradict your theory concerning that money. As a result, I request that you postpone your audit until the other Court proceedings relating to the ownership of the $24,000 are concluded. A ruling in my favour in those proceedings should make an audit unnecessary. As a result, I request that you postpone your audit until the other Court proceedings are concluded.

> Regardless, if you proceed with any Notices of Assessment or Reassessment, I will file Objections relating to those so that my actual taxable income can be determined. In these circumstances, I suggest that you continuing the audit at this stage will cause me unnecessary expense and stress; therefore, I suggest we review the situation again by April 1, 2006. I await your response. Please confirm receipt of this at your earliest convenience.
>
> Yours truly,
>
> Nadeem Francis

[7] The basis of the reassessment of tax was the following as set out in paragraph 12 of the Reply to the Notice of Appeal:

> 12. (g) prior to the delivery of the package to FedEx and the subsequent seizure of the package by the RCMP, the Appellant had care and control of the Funds;
>
> (h) the Appellant's reported income was not sufficient to pay for his living expenses and asset purchases;
>
> (i) the Appellant did not obtain the funds from a non-taxable source of income; and
>
> (j) the Appellant obtained the Funds from a taxable source of income.

[8] Mr. Francis has maintained from the outset that the $24,000 was not his property and that he did not know what was in the package. The determinative issue is whether I believe him.

[9] The appellant was asked on cross-examination if he was paid to deliver the parcel to FedEx. He declined to answer because a criminal counsel whom he had retained had advised him not to answer such questions. Mr. Tompkins referred to section 5 of the *Canada Evidence Act* and I ordered the appellant to answer. We have become familiar with "taking the fifth" from watching American television but it has no place in Canada. He testified that he was paid $100 or $200 to deliver the parcel to FedEx. He has to date never been charged or accused of any criminal activity in connection with the funds and it was neither assumed nor alleged on assessing that the funds came from any illegal business. In fact, the nature of the alleged business which generated the funds was not identified by the assessor.

[10] There are a number of peculiarities about this case and a few unanswered questions. I was tempted to ask the appellant a number of questions that occurred to me such as

(a) If it isn't your money who do you say is the owner?

(b) You say you were paid $100 or $200 to deliver the package to FedEx. Who hired you to do so? Did it not occur to you to ask why you were being paid such an amount for so small a service?

(c) To whom was the parcel addressed and from whom was the thank you note?

[11] I should have liked to ask these and other questions but I am very strongly of the view that at least where we have experienced senior counsel on both sides it is highly inappropriate for a judge to descend into the forum and ask questions that he or she thinks one or other counsel ought to have asked. Judges are not there to fill in lacunae in either side's case.

[12] I agree that we are something more than mere referees in a boxing match but we are not continental inquisitors either. In *Corsaut v. Canada*, 2005 TCC 112; [2005] T.C.J. No. 148 (QL), I said:

> . . . While I believe that where a litigant is unrepresented, it is permissible for the trial judge to intervene more than he or she might where counsel are involved, there are limits. A judge cannot and should not simply take over the case. It can in some cases create an impression of bias. See *James v. The Queen*, 2001 DTC 5075, where the Federal Court of Appeal allowed an appeal and ordered a new trial when the trial judge intervened so excessively that he appeared to have taken on the role of counsel. See also *Jones v. National Coal Board* [1957] 2 All E.R. 155; [1957] 2 Q.B. 55. In *Thomson v. Glasgow Corporation*, Reports-1961, Scots Law Times, 237, (*The Lord Justice-Clerk (Thomson), Lords Patrick, Mackintosh and Strachan*) said at pages 245-6:
>
> > [. . .] It is an essential feature of the judge's function to see that the litigation is carried on fairly between the parties. Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administering justice in civil affairs proceeds on the footing that each side, working at arms length, selects its own evidence. Each side's selection of its own evidence may, for various reasons, be partial in every sense of the term. Much may depend on the diligence of the original investigators, or on the luck of finding witnesses or on the skill and judgment of those preparing the case. At the proof itself whom to call, what to ask, when to

> stop and so forth are matters of judgment. A witness of great value on one point may have to be left out because he is dangerous on another. Even during the progress of the proof values change, treasured material is scrapped and fresh avenues feverishly explored. It is on the basis of two carefully selected versions that the judge is finally called upon to adjudicate. He cannot make investigations on his own behalf; he cannot call witnesses; his undoubted right to question witnesses who are put in the box has to be exercised with caution. He is at the mercy of contending sides whose whole object is not to discover truth but to get his judgment. That judgment must be based only on what he is allowed to hear. He may suspect that witnesses who know the "truth" have never left the witness room for the witness box because neither side dares risk them but the most that he can do is to comment on their absence.
>
> A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests they see that the rules are kept and count the points.

[14] With respect, this somewhat jaundiced view of the court's role does not accurately reflect our obligations as judges. Our courts do have an interest in determining the truth because the determination of truth is an essential aspect of our commitment to ensure that justice be done. That determination must however be made within the rules and one of the rules is that we not descend into the arena. We are certainly more than referees at a boxing match. The justification for the adversarial system in our courts (as opposed to the inquisitorial system) is that it is assumed that the truth will emerge from the confrontation of opposing positions. The games theory expressed by the Scottish court implies that the paramount consideration is how you play the game and justice and the interests of the litigants are relegated to a subordinate position. Lord Denning's eloquent exposition in the *Jones* case of the role of a trial judge is worth repeating ([1957] 2 Q.B. at 63).

> No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases, and have done for centuries.
>
> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at

> large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon L.C. who said in a notable passage that "truth is best discovered by powerful "statements on both sides of the question"?: see *Ex parte Lloyd.* And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and "is liable to have his vision clouded by the dust of conflict": see *Yuill v. Yuill.*
>
> Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales – the "nicely calculated less or more" – but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties: see *In re Enoch & Zaretsky, Bock & Co.* So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other: see *Rex v. Cain*, *Rex v. Bateman,* and *Harris v. Harris,* by Birkett L.J. especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see *Reg. v. Clewer*. The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is not well-tuned cymbal."
>
> Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, out keenness may outrun our sureness, and we may trip and fall. That is what has happened here. A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties – nay, each of them – has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified.

[13] The point was made very forcefully by the Federal Court of Appeal in *James v. The Queen*, 2001 DTC 5075, following *Jones v. National Coal Board*, [1957] 2 All E.R. 155. In *James*, the Federal Court of Appeal referred a case back for re-hearing because the trial judge's interventions were excessive and inappropriate. I

assume that the Federal Court of Appeal in *Morley v. The Queen*, 2006 DTC 6351 did not intend to overrule its decision in *James*. In *Morley*, it was held that an extensive and lengthy cross-examination of witnesses by the trial judge did not contravene the principle that a judge must not descend into the forum. The Federal Court of Appeal decision in *James* was not referred to in the oral reasons of the Federal Court of Appeal in *Morley*.

[14] For this reason, despite the Federal Court of Appeal decision in *Morley*, I did not ask questions that I might have asked had I been counsel. I believe very strongly in the principles stated by the Federal Court of Appeal in *James* and by Lord Denning in *Jones*. I assume that if senior counsel do not ask a question they have a reason for not doing so.

[15] So I am back where I started, with a question of credibility. In *9129-9321 Quebec Inc. v. Canada*, [2007] T.C.J. No. 23 (QL), the following passage from *Faulkner v. M.N.R.*, 2006 TCC 239; [2006] T.C.J. No. 173 (QL) was quoted:

> [13] Where questions of credibility are concerned, I think it is important that judges not be too quick on the draw. In *1084767 Ontario Inc. (c.o.b. Celluland) v. Canada*, [2002] T.C.J. No. 227 (QL), I said this:
>
> > 8 The evidence of the two witnesses is diametrically opposed. I reserved judgment because I do not think findings of credibility should be made lightly or, generally speaking, given in oral judgments from the bench. The power and obligation that a trial judge has to assess credibility is one of the heaviest responsibilities that a judge has. It is a responsibility that should be exercised with care and reflection because an adverse finding of credibility implies that someone is lying under oath. It is a power that should not be misused as an excuse for expeditiously getting rid of a case. The responsibility that rests on a trial judge to exercise extreme care in making findings of credibility is particularly onerous when one considers that a finding of credibility is virtually unappealable.
>
> [14] I continue to be of the view that as judges we owe it to the people who appear before us to be careful about findings of credibility and not be too ready to shoot from the hip. Studies that I have seen indicate that judges are no better than any one else at accurately making findings of credibility. We do not have a corner on the sort of perceptiveness and acuity that makes us better than other people who have been tested such as psychologists, psychiatrists or lay people. Since it is part of our job to make findings of credibility, we should at least approach the task with a measure of humility and recognition of our own fallibility. I know that appellate courts state that they should show deference to findings of fact by trial judges because they have had the opportunity to observe the demeanour of the witness in the box. Well, I have seen some accomplished liars who will look you straight in the eye and come out with the most blatant falsehoods in a confident,

> forthright and frank way, whereas there are honest witnesses who will avoid eye contact, stammer, hesitate, contradict themselves and end up with their evidence in a complete shambles. Yet some judges seem to believe that they can instantly distinguish truth from falsehood and rap out a judgment from the bench based on credibility. The simple fact of the matter is that judges, faced with conflicting testimony, probably have no better than a 50/50 chance of getting it right and probably less than that when their finding is based on no more than a visceral reaction to a witness. Moreover, it is essential that if an adverse finding of credibility is made the reasons for it be articulated.

[16] It behooves a trial judge to approach questions of credibility with great humility, and with the full knowledge that any finding of credibility has a chance of being wrong.

[17] In this case the difficulty was compounded by at least one red herring. There was the forfeiture of the funds by court order in 2006. If the money did not belong to the appellant and did not arise from any business activity (legal or illegal) carried on by him the forfeiture really has nothing to do with the appellant and is irrelevant to this case. If the $24,000 did arise from a business carried on by the appellant, the forfeiture is equally irrelevant because it does not reduce the appellant's income. In *Neeb v. The Queen*, 97 DTC 895, the following was said:

> 29 Here we are dealing not with a penalty but with the forfeiture of a portion of the appellant's inventory. There can be doubt that the cost of inventory is an expense made or incurred to produce income and would normally be deductible in computing income in the way in which the cost of inventory is deductible, as a part of the cost of goods sold. As stated above, the loss of goods in inventory would reduce the closing inventory and increase the cost of goods sold. I am therefore faced squarely with the issue of public policy. The question whether the forfeiture of drugs to the authorities is "an unavoidable incident of carrying on the business" is susceptible of different answers in the context of a case such as this one, depending on one's point of view. Forfeiture is an unavoidable consequence of getting caught.
>
> 30 The question of avoidability is not germane here. Mr. Neeb did get caught and his marihuana and hashish were seized. I can see no reason why the Canadian public should be expected to subsidize a drug dealer's loss through forfeiture of illegal drugs, by allowing him to write-off the cost of drugs so forfeited, even if that cost had been established. If public policy has any role in fiscal matters it must deny such a claim.
>
> 2. The seizure of cash. Apart from considerations of public policy there is, however a further reason for denying the deduction. This is simply a disposition of income, albeit involuntary, after it had been earned. The principle is well settled:

> *Mersey Docks and Harbour Board v. Lucas* (1883) 8 App. Cas. 891, followed in *Fourth Conservancy Board v. IRC*, [1931] A.C. 540 and in *Woodward's Pension Society v. Minister of National Revenue*, 59 D.T.C. 1253 at 1261, aff'd 62 DTC 1002 at 1004.

See also *Svidal v. The Queen*, [1995] 1 C.T.C. 2692.

[18] On reflection, I am inclined to question, based on the Supreme Court of Canada decision in *65302 B.C. Ltd. v. The Queen*, 99 DTC 5199, whether my reliance on public policy considerations was as well founded as I evidently thought it was when I wrote *Neeb*.

[19] Despite Ms. Frappier's very able argument and Mr. Troy Grant's careful consideration of the assessment I think the better view is that the money did not belong to the appellant and that he was a rather naive dupe who was induced to take the parcel to FedEx for someone else for which he was paid a couple of hundred dollars. I am not surprised that Mr. Grant made the assessment as he did in light of the fact that Mr. Francis was less than forthcoming.

[20] The appellant's failure to contest the forfeiture application is consistent with his assertion that the money was not his property. It may well be consistent with other hypotheses, for example that the $24,000 represented the proceeds from an illegal activity by the appellant or someone else, but these hypotheses are conjectural and have no evidentiary foundation.

[21] While several conjectural hypotheses come to mind, the hypothesis that is most consistent with all of the evidence, despite the unanswered questions, is that the $24,000 did not belong to the appellant and did not represent his income, business or otherwise.

[22] The appeal is therefore allowed with costs and the assessment for the appellant's 2004 taxation year is referred back to the Minister for reconsideration and reassessment on the basis that the $24,000 seized by the R.C.M.P. from FedEx Courier on October 25, 2004 was not the property of the appellant and did not represent income of the appellant. The deletion of the penalties should follow automatically.

Signed at Ottawa, Canada, this 7th day of June 2007.

"D.G.H. Bowman"

Bowman, C.J.

CITATION:	2007TCC323
COURT FILE NO.:	2006-3743(IT)I
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PLACE OF HEARING:	Halifax, Nova Scotia
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DATE OF JUDGMENT:	June 7, 2007

APPEARANCES:

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