

Court File No. 2006-2950 (IT)G

Citation: 2007TCC326

TAX COURT OF CANADA

IN RE: the Income Tax Act

BETWEEN:

RICHARD M. KIERNICKI

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

**PROCEEDINGS AT MOTION BEFORE MR. JUSTICE LESLIE M. LITTLE
in the Courts Administration Service, Courtroom No. 6B,
Federal Judicial Centre, 180 Queen Street West, 6th Floor,
Toronto, Ontario
on Friday, June 1, 2007 at 9:29 a.m.**

APPEARANCES:

Mr. Richard M. Kiernicki

self-represented Appellant

Mr. Ryan Hall

for the Respondent

Mr. Charles Camirand

Also Present:

Mr. William O'Brien

Court Registrar

Mr. Robert Lee

Court Reporter

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1 Toronto, Ontario
2 --- Upon commencing on Friday, June 1, 2007
3 at 9:29 a.m.

4 THE REGISTRAR: This Court is now
5 resumed, the Honourable Justice Little is
6 presiding. Before the Court, Case No. 2006-
7 2950(IT)G, between Richard Kiernicki, appellant and
8 Her Majesty the Queen, respondent. The appellant is
9 appearing on his own behalf and for the respondent,
10 Mr. Ryan Hall and Mr. Charles Camirand.

11 JUSTICE LITTLE: Thank you. Good
12 morning, Mr. Kiernicki.

13 MR. KIERNICKI: Good morning, sir.

14 JUSTICE LITTLE: Good morning, Mr.
15 Hall.

16 MR. HALL: Good morning.

17 JUSTICE LITTLE: Mr. Camirand.

18 MR. CAMIRAND: Good morning.

19 JUSTICE LITTLE: Mr. Hall, Mr.
20 Camirand it is your motion; who wants to go first?

21 MR. HALL: I will.

22 JUSTICE LITTLE: Go ahead, sir.

23 SUBMISSIONS BY MR. HALL:

24 MR. HALL: At the outset, Mr.
25 Justice Little, I would like to point out an error

1 in the written submissions provided to the Court
2 and Mr. Kiernicki. Looking at the overview, it
3 speaks to redemptions occurring in the year 2001.

4 JUSTICE LITTLE: Your respondent's
5 written submissions, is that correct?

6 MR. HALL: That is correct.

7 JUSTICE LITTLE: What page, what
8 tab?

9 MR. HALL: Under tab 1.

10 JUSTICE LITTLE: Yes.

11 MR. HALL: At the overview.

12 JUSTICE LITTLE: Yes.

13 MR. HALL: It speaks only to
14 redemptions occurring in 2001 when, in fact, there
15 are redemptions occurring in 2001 and 2003. In
16 essence, what happens in 2001 is half of the shares
17 in question are redeemed. The other half of the
18 shares of the corporation held by the appellant
19 were redeemed in 2003.

20 JUSTICE LITTLE: Where do you want
21 me to add the new words? What is your wish?

22 MR. HALL: "The appellant redeemed
23 shares in 2001 and 2003."

24 JUSTICE LITTLE: Add the words
25 "and 2003"?

1 MR. HALL: Correct, thank you.

2 JUSTICE LITTLE: The first line.

3 Anything, else sir?

4 MR. HALL: Nothing else.

5 JUSTICE LITTLE: Can you outline

6 your position and then we will hear from Mr.

7 Kiernicki?

8 MR. HALL: My apologies, sorry Mr.

9 Justice Little. One more addition, if I may, in the

10 overview.

11 JUSTICE LITTLE: Yes?

12 MR. HALL: I am looking down the

13 fourth line, perhaps we should add "2001 and 2003",

14 yet again.

15 JUSTICE LITTLE: The fourth line,

16 the last part of that sentence, correct?

17 MR. HALL: That is correct. Then

18 looking at the background, the first paragraph,

19 third line, "in income for the 2001 and 2003

20 taxation year."

21 JUSTICE LITTLE: Taxation years?

22 MR. HALL: That is correct.

23 JUSTICE LITTLE: Yes. Go ahead,

24 sir.

25 MR. HALL: Nothing else by way of

1 erratum.

2 Before filing the respondent's
3 motion to quash the present appeal, the Notice of
4 Appeal was carefully reviewed with a view
5 determining whether it raised any issue over which
6 this Honourable Court has jurisdiction. No such
7 issue was found. Rather, what is sought by the
8 appellant in his Notice of Appeal is an amendment
9 to the *Income Tax Act*. I would refer the Court to
10 the Notice of Appeal, looking at the third
11 unnumbered page of the Notice of Appeal, under the
12 heading, "Issues to be Decided." I should note as
13 well, although it is phrased in the plural, the
14 appellant has put forward only one issue. That
15 issue reads:

16 "The taxpayer would like to
17 have the court consider
18 adding a subsection to 84(3),
19 or the relevant subsection,
20 that takes into consideration
21 when the said deemed dividend
22 is not actually paid out in
23 the same tax year as the
24 disposition occurs; taxes
25 owing should be based upon

1 income actually received by
2 the taxpayer."

3 Although not explicitly pleaded in
4 the Notice of Appeal, the appellant also appears to
5 seek some sort of equitable relief from this Court.
6 I refer the Court to page 4 of the Notice of
7 Appeal, looking under the heading, "Reasons for
8 Appeal," looking at paragraph 2. In this paragraph,
9 the appellant appears to be asking for some sort of
10 equitable relief based on financial hardship. He
11 writes in the second sentence:

12 "It is difficult to
13 understand why CCRA would
14 want to reassess a taxpayers
15 returns and adjust them based
16 on strict adherence to a
17 section of the *Income Tax Act*
18 that would place that
19 taxpayer back into hardship."

20 Further, the appellant appears to
21 be asking for some sort of equitable relief based
22 on joint liability with the T5 issuers and his tax
23 advisers, looking at paragraph 3 on the same page.
24 Looking at the second sentence, the appellant
25 writes:

1 "Given that AIC and Berkshire
2 ... "

3 ... the corporations from which
4 the appellant disposed of the shares ...

5 " ... are well known, have a
6 solid reputation and have tax
7 specialists on hand, they
8 should be held partially
9 accountable for their error
10 in not providing accurate
11 income tax reporting."

12 JUSTICE LITTLE: What is your
13 point on that aspect? In summary, I understand; I
14 saw the reference to that. What do you say about
15 that type of statement?

16 MR. HALL: In respect of that type
17 of statement, I am drawing it to the Court's
18 attention to highlight the issues which are being
19 raised by the appellant. This is one of four
20 potential issues upon which the appellant is
21 seeking relief and highlighting that as being an
22 issue in respect of which relief the Court has no
23 jurisdiction to provide.

24 JUSTICE LITTLE: Okay. Anything
25 further?

1 MR. HALL: There is one other
2 point or issue raised by the appellant, looking at
3 paragraph 8 on that same page. The appellant
4 appears to be seeking some sort of a relief akin to
5 a remission order. He writes in paragraph 8:

6 "In a letter received from
7 S. Sullivan, Hamilton Tax
8 Office, on June 22nd, 2006 she
9 states that "there may be an
10 unintended tax consequence
11 which requires further
12 research".

13 The appellant goes on to write:

14 "... and I do believe that in
15 this case that suggestion
16 makes sense".

17 Again, it is respectfully
18 submitted, Mr. Justice Little, that these issues
19 are issues over which the Court has no
20 jurisdiction. If the appellant wishes to raise an
21 issue today over which the Court does have
22 jurisdiction, an order allowing the appellant to
23 amend the Notice of Appeal and granting an
24 extension to reply to that amended notice of appeal
25 would be necessary, failing which the respondent

1 maintains the position that the Notice of Appeal
2 raises no issue over which this Court has
3 jurisdiction and discloses no reasonable ground of
4 appeal to which the Minister can reply.

5 JUSTICE LITTLE: Before you
6 conclude sir, have you discussed this appeal with
7 the taxpayer, with the appellant?

8 MR. HALL: We spoke on one
9 occasion, yes, Mr. Justice Little.

10 JUSTICE LITTLE: Did you discuss
11 the possibility of amendments to the appeal at that
12 time?

13 MR. HALL: No, I had not discussed
14 the possibility of amendments. The purpose of the
15 call was to inform the appellant of the Minister's
16 position and to discuss the motion.

17 JUSTICE LITTLE: Anything further?

18 MR. HALL: Nothing.

19 JUSTICE LITTLE: Thank you, very
20 much. Mr. Kiernicki.

21 MR. KIERNICKI: Yes, sir.

22 JUSTICE LITTLE: You have heard
23 the comments. I would like to hear your view of
24 your position and briefly, because this is not the
25 official hearing; this is simply a hearing of the

1 Minister's motion. But I want to make sure you are
2 given every opportunity to respond to their motion.
3 What are your comments sir?

4 SUBMISSIONS BY MR. KIERNICKI:

5 MR. KIERNICKI: Thank you, very
6 much. Very briefly going over the package that I
7 was served, with regards to respondent's written
8 submissions, the first thing that I would like to
9 do is make sure that my intention here is really
10 understood. I am not trying to abuse any such
11 systems or justice systems.

12 I am an individual who has
13 basically tried to deal with everybody up till this
14 point in time to come up with some sort of
15 resolution with regards to my particular case. Very
16 simply, as Mr. Hall previously stated, I received
17 dividends. To that note, your Honour, I filed my
18 income tax returns as I have received those
19 dividends and paid my taxes accordingly.
20 Subsequently, those dividends were the method by
21 which I could use that money to pay the tax
22 liabilities incurred on those particular dividends.

23 In 2001, in which the Revenue
24 Canada -- the CRA, wants to reassess my return. On
25 paper, that would look like I actually would owe

1 more in taxes than I had earned in that particular
2 year. Although I do not have that as a document in
3 front of me, it would be very easy to prove based
4 on the assessments that I have with regards to the
5 filings. Hence, my comments about being put into
6 financial hardship.

7 Prior to that, the statement about
8 financial hardship, I had been granted in the past
9 due to interest charges and late-filing charges.
10 Subsequently, my two major resources, if you will,
11 as far as my accountant is concerned. My
12 accountant has obviously not informed me of what my
13 real options were, nor my employer, who
14 subsequently had at their disposal really a lot of
15 tax people. They were the ones who issued the T5
16 slips and subsequently, in discussions with my
17 accountant, I was told that I should file as I
18 received the T5 slips from the organization.

19 JUSTICE LITTLE: When you say your
20 employer, was that Berkshire? Were you at one time
21 employed with Berkshire?

22 MR. KIERNICKI: Yes, sir, yes,
23 sir, and a shareholder of AIC, which is the parent
24 company of Berkshire. That is how all of this came
25 up.

1 I am asking really, I think that
2 in the Act and I realize that this Court may not
3 have the ability to change the Act, but it would
4 seem to me that getting here I could have been
5 redirected in another way to avoid wasting this
6 Honourable Court's time.

7 I am wondering what the Court can
8 do with regards to making a decision on my behalf
9 that would perhaps allow me the time to seek some
10 further work with Parliament, perhaps with regards
11 to looking at the tax act and subsequently the
12 hardship that it would face by rewriting all of the
13 tax years, given that I had claimed the dividend
14 and paid the taxes on that.

15 JUSTICE LITTLE: Right. You heard
16 Mr. Hall talk about four different points. As I
17 understood Mr. Hall, he referred to the issues as
18 outlined on page 3 of your appeal.

19 MR. KIERNICKI: Yes.

20 JUSTICE LITTLE: It said:

21 "The taxpayer would like to
22 have the court consider
23 adding a subsection to 84(3),
24 or the relevant subsection,
25 that takes into consideration

1 when the said deemed dividend
2 is not actually paid out in
3 the same tax year as the
4 disposition occurs; taxes
5 owing should be based upon
6 income actually received by
7 the taxpayer."

8 Mr. Hall points out, and I must
9 say I agree with him, that this Court has the power
10 to review any assessment; we are the Court of
11 original jurisdiction for all assessments under the
12 *Income Tax Act*. But we do not have the power to
13 amend the *Act*. The amendment to the *Income Tax Act*
14 is solely in the hands of Parliament. The Court can
15 make a decision only based upon the words of the
16 *Act*. I could make a suggestion in a judgment, for
17 example, to say that this seems unfair and that
18 Parliament should give consideration to amending
19 the *Act*. That is just a piece of paper; they can
20 ignore it if they wish.

21 Parliament has the supreme
22 authority to amend the *Act*. I do not have any
23 authority to amend the *Act*, no authority
24 whatsoever.

25 I think Mr. Hall is correct in

1 that aspect. That issue of amending the *Act* or
2 adding a subsection to subsection 84(3) is
3 certainly beyond my power. That is point no. one
4 that Mr. Hall says, and I agree with Mr. Hall.
5 There is no way I have any power to amend the *Act*;
6 do you understand what I mean?

7 MR. KIERNICKI: Yes, sir.

8 JUSTICE LITTLE: You have referred
9 somewhere in this material to talking to your MPP.
10 That is a member of the parliament of the
11 Government of Ontario.

12 MR. KIERNICKI: Yes.

13 JUSTICE LITTLE: Your Member of
14 Parliament is the person you should talk to in
15 terms of any amendment to the *Act*, either your MP
16 or the Minister of Finance or anyone you can get
17 to. But there is no way this Court has any
18 authority to amend the *Act*. It is totally in the
19 hands of Parliament and the politicians.

20 MR. KIERNICKI: Respectfully, sir,
21 I do understand those conditions.

22 JUSTICE LITTLE: Let me say a
23 second point: Mr. Hall talks about the fact, on
24 page 4 of your Notice of Appeal:

25 "Individual circumstances

1 need to be reviewed and
2 readdressed when a decision
3 to reassess a taxpayer may
4 place them again into
5 financial hardship.”

6 This Court does not have the
7 authority to grant an exemption to a person because
8 they are in financial hardship. We only have the
9 authority to interpret the words of the *Act*. The
10 Minister of National Revenue, as you pointed out in
11 your initial comment, has the authority under the
12 fairness package legislation, so called, to waive
13 penalties and do things of that nature because of
14 financial hardship.

15 I may feel very great sympathy for
16 a person who suffers from financial hardship, but
17 my authority only goes to interpreting the *Act*; it
18 does not go to any financial hardship. The Minister
19 does have that authority. Point no. 2, under reason
20 for appeal, talking about basing it on equitable
21 relief, is beyond my power. I may, as I say, have
22 great sympathy and I might do everything in my
23 power to find that the taxpayer is entitled to some
24 relief. But if the words of the section are black
25 and white, I have no authority to ignore those

1 words.

2 There is a third point that Mr.
3 Hall made. That is in reference to the fact that
4 the AIC and Berkshire are well known -- this is at
5 paragraph 3:

6 "... have a solid reputation and have tax
7 specialists on hand, they should be held
8 partially accountable for their error in
9 not providing accurate income tax
10 reporting."

11 I would say that that comment
12 would be between you, AIC and Berkshire. If you
13 feel that they made a mistake in how they dealt
14 with you and your tax situation, then that is
15 between you and them. I have no authority to give
16 any order against AIC or Berkshire. My only
17 authority goes to interpreting the words of the
18 *Income Tax Act*; do you understand what I mean?

19 MR. KIERNICKI: Yes, I do, sir.

20 JUSTICE LITTLE: I do not have any
21 reason to suggest one way or the other but if you
22 felt that you had a valid claim against the fact
23 that the AIC or Berkshire did not advise you
24 properly or did not treat you properly, then that
25 would be a situation where you may retain a lawyer

1 and seek relief from AIC and Berkshire.

2 I do not know enough about the
3 facts to suggest you have an action against AIC or
4 Berkshire; I am saying that would be between you
5 and them. It is not a situation that can come
6 before this Court.

7 Finally, Mr. Hall refers to
8 paragraph 8, where you say there may be unintended
9 tax consequences. This is partly perhaps a
10 reference to what is called a remission order. A
11 remission order basically can be described as
12 follows: If certain things happen and, let's say
13 for example, a Revenue Canada official makes a
14 mistake or gives you improper advice or things of
15 that nature, the Canada Revenue Agency may be
16 prepared to recommend a remission order to waive
17 the tax if they believe that they are at fault.

18 Then the Cabinet has the
19 authority, under section 22 of the *Financial*
20 *Administration Act*, to waive the tax if they feel
21 that there is a mistake or some other problem where
22 the tax should not have been applied. That is
23 beyond my power, too. That is between you and the
24 Cabinet or between you, the Canada Revenue Agency
25 and the Cabinet, the Federal Cabinet. A remission

1 order, I must say, is not used very often. It is
2 used in extreme and unusual circumstances. It is
3 used, I will not say on a regular basis, but it is
4 used periodically where there are real
5 complications that have occurred. It is not the
6 sort of thing that happens very often, as I
7 understand it. It is between you, the Canada
8 Revenue Agency and the Federal Cabinet.

9 Having said all that, I agree
10 basically with the points that Mr. Hall made.
11 Having said all that, I do not want to close the
12 door on you, if you think there is some way you can
13 amend the Notice of Appeal to raise what you think
14 are valid grounds of appeal.

15 Have you talked to a lawyer or an
16 accountant to determine whether you have any legal
17 right to stand on? Have you had a chance to
18 discuss this with anyone?

19 MR. KIERNICKI: I am not in that
20 position financially to be able to do so, sir, for
21 the most part. I have tried to acquire as much
22 knowledge as I possibly could with regards to
23 making my appeal. Subsequently I filed a copy with
24 my accountants who responded that they were not tax
25 lawyers and could not really help me in my appeal.

1 The statements that I make in my
2 appeal I think are more perhaps towards recognition
3 of the facts versus asking for you, sir, to make
4 changes specifically with regards to both those
5 issues. I realize those issues lie with those other
6 individuals or businesses, but I was hoping that
7 this Court would be able to grant me something
8 outside of, okay, "You have got this far,
9 Mr. Kiernicki, but we cannot deal with this issue."

10 JUSTICE LITTLE: I would say, Mr.
11 Kiernicki, that I do not want to shut the door on
12 you entirely, if you are able to raise valid
13 grounds for appeal. However, as I see the
14 situation, Mr. Hall has correctly summarized the
15 fact that your Notice of Appeal as presently
16 drafted does not contain proper grounds for
17 appealing the assessment.

18 It may be that you can amend the Notice
19 of Appeal in such a way as to raise an issue. I am
20 not here to give you legal advice; I am saying, as
21 a Judge, if you were to rephrase the issues, that
22 may give you a chance for your day in Court, if
23 that is what you wish. Right now, the issues are
24 not drafted in such a way that you are challenging
25 the notice of assessment issued against you.

1 MR. KIERNICKI: Would the Court be
2 in a position to grant me some time to follow
3 through with that recommendation?

4 JUSTICE LITTLE: Yes, I would be
5 prepared to do that; I was going to suggest that
6 Mr. Kiernicki. Would 30 days be sufficient time for
7 you to review the matter, consider what Mr. Hall
8 had said, what I have said and prepare an amended
9 Notice of Appeal? Would 30 days be sufficient or
10 do you want 60?

11 MR. KIERNICKI: Actually, I would
12 prefer a longer period of time. I found out
13 yesterday that my grandmother has cancer and I do
14 not know how long she has to live, right now.

15 JUSTICE LITTLE: Would 60 days be
16 sufficient?

17 MR. KIERNICKI: Yes, sir, I can
18 respond within a 60-day time frame.

19 JUSTICE LITTLE: I would like to
20 hear from Mr. Hall before I conclude this. Let me
21 suggest that I think it is appropriate to give you
22 some time to review what has been said by Mr. Hall
23 and by me. Therefore, my inclination until I hear
24 from Mr. Hall is to adjourn this matter for 60 days
25 to give you an opportunity to amend your Notice of

1 Appeal to deal with the issues raised by Mr. Hall
2 and to drop any reference to the fact that the
3 Court should amend the *Income Tax Act*, because we
4 cannot do that.

5 MR. KIERNICKI: Thank you, very
6 much.

7 JUSTICE LITTLE: That is my
8 present thinking. I want to hear from Mr. Hall
9 before I conclude.

10 MR. KIERNICKI: Thank you.

11 JUSTICE LITTLE: I also should
12 say, Mr. Kiernicki, that in terms of giving you an
13 adjournment, 60 days to deal with it, I will also
14 of course give Mr. Hall a chance to file a reply in
15 the appropriate time. Mr. Kiernicki, thank you. Let
16 me talk to Mr. Hall. Mr. Hall?

17 MR. KIERNICKI: Thank you.

18 MR. HALL: Thank you, Justice
19 Little.

20 JUSTICE LITTLE: You see, I do not
21 want to shut the door entirely, because Mr.
22 Kiernicki in his mind has an objection. You and I
23 do not think it quite meets the guidelines or the
24 structure of this Court in terms of our power to
25 hear appeals dealing with the provision of the

1 *Income Tax Act.* I do think that he should be given
2 a chance. He may decide that it is not worth the
3 fuss and bother but, at the same time, I do not
4 want to shut the door entirely at this time. What
5 are your comments?

6 MR. HALL: No, the respondent has
7 no concern and considers it perhaps reasonable in
8 the circumstances to allow Mr. Kiernicki 60 days to
9 perhaps review the Notice of Appeal and amend it so
10 that it can be properly before the Court.

11 In terms of granting the
12 respondent an extension of time to reply to that
13 amended Notice of Appeal, perhaps a further 60 days
14 from the date of filing and serving the Notice of
15 Appeal would be appropriate.

16 JUSTICE LITTLE: Okay. Anything
17 else, sir?

18 MR. HALL: Perhaps if the Order
19 could speak to dismissing the Notice of Appeal, if
20 no amended notice of appeal is filed within the 60-
21 day period?

22 JUSTICE LITTLE: Fine, thank you.

23 MR. HALL: Thank you, Mr. Justice
24 Little.

25 JUSTICE LITTLE: An Order will be

1 issued, Mr. Kiernicki, Mr. Hall, to the effect that
2 the appellant is given 60 days to amend his Notice
3 of Appeal. The respondent will be given 60 days
4 following the receipt of the amended notice of
5 appeal to issue and serve a reply to the notice of
6 appeal.

7 Finally, if the appellant does not
8 file an amended notice of appeal within the 60
9 days, then the Notice of Appeal will be dismissed.
10 Okay, Mr. Kiernicki?

11 MR. KIERNICKI: Thank you, very
12 much, your honour.

13 JUSTICE LITTLE: Mr. Hall?

14 MR. HALL: Thank you.

15 JUSTICE LITTLE: Thank you, very
16 much. Mr. Registrar, perhaps we could rise for five
17 minutes.

18 THE REGISTRAR: Yes, sir. The
19 Court will take a short adjournment.

20 --- Whereupon the hearing was concluded at 9:50
21 a.m. on Friday, June 1, 2007.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately recorded
by Stenomask and transcribed therefrom, the
foregoing proceeding.

A handwritten signature in blue ink, appearing to read "Robert Lee", is written over a solid horizontal line.

Robert Lee, Certified Court Reporter

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STYLE OF CAUSE: Richard M. Kiernicki
and
Her Majesty the Queen
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: June 1, 2007
REASONS FOR ORDER BY: The Honourable Justice
L.M. Little
DATE OF ORAL REASONS FOR ORDER: June 1, 2007

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Charles Camirand

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