Docket: 2005-2259(IT)G

BETWEEN:

SUSUMU GEORGE MOCHIZUKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on August 15, 2008 at Victoria, British Columbia

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Johanna Russell

ORDER

UPON motion by the Respondent for an Order to strike the Notice of Appeal, or, in the alternative, for an Order dismissing the Appellant's appeal from an assessment made under the *Income Tax Act* for the 2001 taxation year;

AND UPON reading the materials filed and hearing the Appellant and counsel for the Respondent;

IT IS ORDERED THAT:

1. The Appellant's appeal for the 2001 taxation year is dismissed.

2. There shall be no order as to costs.

Signed at Ottawa, Canada, this 17th day of September 2008.

"Campbell J. Miller"

C. Miller J.

Citation: 2008 TCC 526
Date: 20080917
Docket: 2005-2259(IT)G

BETWEEN:

SUSUMU GEORGE MOCHIZUKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Miller J.

[1] The Respondent's motion is for an Order striking the Notice of Appeal under paragraph 58(1)*(b)* and section 53 of the *Tax Court of Canada Rules (General Procedure)* ("the *Rules*") or, in the alternative, for an Order dismissing the Appellant's appeal for the 2001 taxation year under sections 7 and 64 and subsection 125(7) of the *Rules*. The only issues in this appeal are whether:

(a) The Minister of National Revenue ("the Minister") properly included a taxable dividend of $498,583 into the Appellant's income for the 2001 taxation year under section 3 and subsection 82(1) of the *Income Tax* Act,[1] that resulted from the deemed dividend of $398,866.88 under subsection 84(3) of the *Act*, as a result of Cariboo Western Lumber Ltd.'s redemption of the Appellant's shares in that year; and

(b) The Minister properly determined that in 2001 the Appellant was entitled to a shareholder loan repayment deduction in the amount of $164,056 under paragraph 20(1)*(j)* of the *Act*.

[2] The dividend and shareholder loan repayment arise from an Order of Justice Blair of the Supreme Court of British Columbia dated July 13, 2001 in litigation amongst the Appellant, his brother Kiyo Mochizuki and Cariboo Western

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[1] R.S.C. 1985, c. 1 (5th Supp.), as amended.

Lumber Ltd. (the "Company"). Justice Blair effectively ordered that the Company repurchase the Appellant's shares for $398,916.88, but that from that amount, the amount of $205,552 was to be deducted as a repayment of shareholder loan by Mr. Mochizuki to the company. Justice Blair's Order was filed on July 13, 2001. His reasons indicate the hearing was held on July 6, 2001.

[3] The Appellant's appeal appears to be that Justice Blair's Order is not valid as it is dated July 13, 2001 and no hearing took place that day, and further, that his brother and his brother's lawyers lied to Justice Blair leading to false conclusions by the Judge. The Appellant appealed Justice Blair's Order but eventually dropped that appeal. The Appellant also seems to suggest, though it is far from clear, that the shareholder loan repayment amount, which the Respondent allowed, is inaccurate again due to his brother's lies. The Appellant's Notice of Appeal, his attempt at a list of documents and his attempts at explaining his position are unfortunately rambling to the point of being incomprehensible. It is clear he has some serious concerns with his brother's handling of the affairs of the Company, but it is not at all clear how those concerns relate to the dividend and shareholder loan repayments specifically addressed by Justice Blair. According to the Respondent, this was not clarified by the Appellant at his discovery, nor did he provide any further explanation in answer to his undertakings on discovery to do so. Instead, the Appellant provided a package of documents, mainly in the form of his own notes and a repeat of what he had previously given to the Respondent in attempting to provide his list of documents. His list is a jumble of notes, many undated, with little listing of documents that are readily identifiable and that would appear to have any bearing whatsoever on the issues.

[4] Frankly, I have seen no greater example of the perils of an Appellant representing himself. Mr. Mochizuki has simply been unable to clearly set forth his position. While this is unfortunate, it is not for this Court, nor for the Respondent, to guess at the Appellant's case nor to attempt to make the case for him. I have been left with the impression that the Respondent has been helpful and patient, but remains frustrated with the complete lack of clarity, resulting in this application.

[5] I will deal with the Respondent's motion in the order presented.

(i) The Notice of Appeal should be struck pursuant to Rule 53 or Rule 58(1)*(b)* of the *General Procedure Rules*

[6] As a preliminary matter, although Mr. Mochizuki did not raise the fresh step rule, the Respondent quite properly addressed the procedural hurdle presented by Rule 8, which reads:

> 8. A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,
>
> (*a*) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or
>
> (*b*) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,
>
> except with leave of the Court.

[7] The Court has discretion to allow a motion to strike where there have been subsequent steps. See, for example, *Hawkes v. R.*[2] and *Imperial Oil Ltd. v. R.*[3] The Respondent has persistently attempted to obtain from Mr. Mochizuki a clear explanation of his case. This has been done through requests for documents, requests at examinations for discoveries and correspondence generally. I have no difficulty in exercising my discretion, even at this late stage, to hear a motion to strike, especially where, as here, it is not a matter of minor irregularities but such serious deficiencies that it would wreak havoc at trial. This position is supported by comments in *Gould v. R.*,[4] *Imperial Oil* and *Gee v. R.*[5]

[8] Rules 53 and 58(1)*(b)* state:

> 53 The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (*a*) may prejudice or delay the fair hearing of the action,
>
> (*b*) is scandalous, frivolous or vexatious, or

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2 97 DTC 5060 (F.C.A.).

3 2003 DTC 179.

4 2005 DTC 1311.

5 2003 DTC 1020.

(*c*) is an abuse of the process of the Court.

…

58(1) A party may apply to the Court,

(*a*) …

(*b*) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal,

and the Court may grant judgment accordingly.

[9] The test developed by the Courts for applying Rule 58(1)*(b)* is whether it is plain and obvious that the action cannot succeed even if the facts alleged in the appeal are true. See *Satin Finish Hardwood Flooring (Ontario) Ltd. v. Canada.*[6] The first obstacle in applying this test is discerning what the facts are in Mr. Mochizuki's appeal. I believe he is claiming that Justice Blair's Order is invalid:

(i) because there was no hearing on July 13, 2001; and

(ii) because it was based on falsehoods presented to Justice Blair by Mr. Mochizuki's brother.

[10] It remains a fact, however, that Justice Blair's Order of July 13, 2001 arose from a hearing on July 6, 2001: there is no basis for finding the Order invalid due to timing. With respect to the Appellant's allegation that Justice Blair was deceived, that would be a matter properly dealt with by an appeal of Justice Blair's Order. While Mr. Mochizuki started such an appeal, he did not proceed with it. The Order is valid and states what it states, which confirms the dividend and shareholder loan repayment. Mr. Mochizuki has provided nothing further in the form of documents or explanation before me to cast any doubt on Justice Blair's Order. There are no grounds for appeal that I can ascertain, let alone reasonable grounds. Mr. Mochizuki may have been wronged by his brother in any number of ways, but if he cannot demonstrate in his pleadings (and subsequently in the production of documents and on examination) how that relates to the tax issue surrounding the dividend and loan repayment, it is not material to this case. He has been unable to draw any cohesive connection. I would strike the Notice of Appeal on the basis that it is plain and obvious it cannot be successful.

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6 [1995] T.C.J. No. 240.

[11] For purposes of completeness, I will also address the Respondent's submissions regarding Rule 53.

[12] The Respondent presented three propositions as to what Courts have found to be scandalous, frivolous or vexatious:

(i) The failure to state any material facts upon which a cause of action can be brought that is within the jurisdiction of the Tax Court is vexatious. See the case of *Miller v. Her Majesty the Queen*.[7]

(ii) A pleading can be found to be frivolous and vexatious where it is so clearly futile that it does not have the slightest chance of success. A pleading that has no rational basis and does not provide evidence is frivolous. See the case of *Nelson v. Canada (Customs and Revenue Agency)*.[8]

(iii) A Statement of Claim which does not sufficiently reveal the facts on which the Plaintiff bases his cause of action to make it possible for the Defendant to answer it or for the Court to regulate the proceedings is vexatious, as would be a Statement of Claim which contains a number of irrelevant assertions. See the case of *O'Neil v. Minister of National Revenue*.[9]

[13] Although I may take some exception to the terms scandalous or frivolous (I have no doubt Mr. Mochizuki does not consider this matter either), I can readily apply vexatious to Mr. Mochizuki's litigation efforts: he has failed to state any material facts upon which a cause of action can be brought in the Tax Court of Canada. The Appellant does not clearly or concisely set out the facts: his pleading is illogical and barely coherent. The Respondent can only have the vaguest notion of what Mr. Mochizuki's case is, as it contains no rational basis.

[14] It is easy to have some sympathy for Mr. Mochizuki, as he has worked many years for the Company and feels that he has not received what was rightfully his. Yet even his position as to how he has been wronged has been confusing. He has not been able to enunciate whether he has not received any payment at all, received too

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7 [2007] 3 C.T.C. 2563.

8 2001 DTC 5644 (F.C.T.D.).

9 95 DTC 5060.

little from what he is entitled to or received only a loan repayment. It is impossible to determine from his pleadings. It is truly vexatious.

(ii) Rules 7, 64, 110 and 125 of the General Procedure Rules

[15] In the alternative, the Respondent relies on Rules 7, 64, 110 or 125(5) and (7) to seek dismissal of Mr. Mochizuki's action. These Rules read:

> 7 A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or direction in a proceeding a nullity, and the Court,
>
> (*a*) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute, or
>
> (*b*) only where and as necessary in the interests of justice, may set aside the proceeding or a step, document or direction in the proceeding in whole or in part.
>
> …
>
> 64 The respondent if not in default under these rules or a judgment of the Court, may move to have an appeal dismissed for delay where the appellant has failed to prosecute the appeal with due dispatch.
>
> …
>
> 110 Where a person fails to attend at the time and place fixed for an examination in the notice to attend or subpoena, or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that that person is required to produce or to comply with a direction under section 108, the Court may,
>
> (*a*) where an objection to a question is held to be improper, direct or permit the person being examined to reattend at that person's own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer,
>
> (*b*) where the person is a party or, on an examination for discovery, a person examined on behalf of or in place of a party, dismiss the appeal or allow the appeal as the case may be,

(*c*) strike out all or part of the person's evidence, including any affidavit made by the person, and

(*d*) direct any party or any other person to pay personally and forthwith costs of the motion, any costs thrown away and the costs of any continuation of the examination.

…

125(5) At the status hearing,

(*a*) if a reply has been filed, the judge may

(i) set time periods for the completion of any remaining steps in the appeal,

(ii) dismiss the appeal for delay, or

(iii) make any order or give any other direction that is appropriate; and

(*b*) if a reply has not been filed, the judge may,

(i) direct that the appeal be allowed if the facts alleged in the notice of appeal entitle the appellant to the judgment sought,

(ii) direct that the appeal be heard on the basis that the facts alleged in the notice of appeal are presumed to be true and make a direction regarding the hearing fee, or

(iii) make any order or give any other direction that is appropriate.

…

125(7) Where a party fails to comply with an order or direction made under subsection (5), the Court may, on application or of its own motion, allow the appeal, dismiss the appeal or make such other order as is just.

[16] Given my finding under the Respondent's primary argument, it is unnecessary to decide on the basis of this alternative position. I would like to comment, however, that in reviewing *D'Abbondanza v. R.*[10] and *Lichman v. R.,*[11] cited by the Respondent

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[10] 93 DTC 1042.

[11] 2004 DTC 2547.

in support of dismissing Mr. Mochizuki's case pursuant to these *Rules*, I noted that both Justice Hamlyn in *D'Abbondanza* and Justice Campbell in *Lichman* conclude that the Appellant's behaviour was such that it constituted deliberate intention to delay. While Mr. Mochizuki has failed to provide a proper list of documents, and has failed to comply with an Order of Justice Beaubier of this Court, I am not convinced that was so much from an intention to delay as it was from a complete lack of understanding of the *Rules* of this Court, the jurisdiction of this Court, the significance of an Order of another Court, and indeed, of his own position. Mr. Mochizuki cannot be faulted for not responding - the difficulty is that the responses just do not make any sense. All to say, it is unnecessary to decide on the basis of the Respondent's alternative argument, but the Respondent should appreciate I see a difference between deliberate delay and intention to thwart the *Rules* on one hand and, with respect, incapability on the other.

[17] By representing himself, Mr. Mochizuki has come to the end of the road in this Court. I do not make this decision lightly, as it denies Mr. Mochizuki his day in Court, yet I have been convinced, based on his own actions, that he does not have a case to take to Court. Mr. Mochizuki's appeal for the 2001 taxation year is dismissed. I am making no award of costs.

Signed at Ottawa, Canada, this 17th day of September 2008.

"Campbell J. Miller"

C. Miller J.

CITATION:	2008 TCC 526
COURT FILE NO.:	2005-2259(IT)G
STYLE OF CAUSE:	SUSUMU GEORGE MOCHIZUKI AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	August 15, 2008
REASONS FOR ORDER BY:	The Honourable Justice Campbell J. Miller
DATE OF ORDER:	September 17, 2008

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Johanna Russell

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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