

Citation: 2022 TCC 57
Date: 20220606
Docket: 2021-1050(IT)G

BETWEEN:

BERNARDO KOHN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

(Edited from the transcript of Reasons for Order delivered orally from the Bench on May 11, 2022 at Ottawa, Ontario for punctuation, capitalization, spelling, paragraph breaks, and accuracy; to remove repetitive phrases where I stumbled over my words; and to add headings)

Graham J.

[1] Bernardo Kohn filed a Notice of Appeal in respect of his 2010, 2011, 2012, and 2013 tax years. The Respondent has brought a motion to strike the opening paragraph of Mr. Kohn's Notice of Appeal, along with paragraphs 69, 70, and 71, and Schedule 1, all without leave to amend.

[2] I am prepared to give my oral reasons on the motion at this time. I will not be issuing written reasons.

[3] The Respondent takes the position that the disputed portions of the Notice of Appeal relate to immaterial and irrelevant allegations that do not go to the correctness or validity of the reassessments and do not relate to any relief that the Court can grant. I agree. I am going to grant the Respondent's motion. The disputed portions of the Notice of Appeal raise issues about the Minister's conduct, not about the correctness or validity of the reassessments.

[4] Before turning to my analysis of each of the relevant portions of the Notice of Appeal, I first need to provide some background information about the audit of the Appellant and the audit techniques employed by the auditor.

I. ALTERNATIVE ASSESSMENT TECHNIQUES

[5] The Minister reassessed the Appellant in respect of a number of different issues. One of those issues was alleged unreported income. The alleged unreported income was determined under subsection 152(7) of the *Income Tax Act*. In simplified terms, that subsection states that the Minister is not bound by a return filed by a taxpayer, and may, in assessing the taxpayer, ignore the information that the taxpayer provided in the return and instead determine the taxpayer's income using a different method. I will refer to those different methods as "alternative assessment techniques".

[6] The Minister typically uses alternative assessment techniques if the Minister believes that a taxpayer's records are an inadequate means of verifying the taxpayer's income. The two most common alternative assessment techniques are net worth calculations and bank deposit analyses.

[7] Before turning to the disputed portions of the Notice of Appeal, I need to spend some time highlighting the difference between a net worth calculation and a bank deposit analysis. I need to do this because of the Appellant's insistence on referring to a certain working paper as a bank deposit analysis, which insistence has led to a lot of confusion today.

Net Worth Calculation

[8] I will start with an explanation of a net worth calculation. In simple terms, a net worth calculation involves four steps. First, the auditor compares the taxpayer's net worth at the end of the year under audit to his or her net worth at the end of the prior year. The Minister assumes that any increase in net worth was a result of the taxpayer having earned income.

[9] Second, the auditor adds to that change in net worth the taxpayer's expenditures for the year. Again, the Minister assumes that these expenditures were paid for using the taxpayer's income.

[10] Third, the auditor makes various adjustments to the total from step two in order to account for amounts that would not have been caught by the calculation

and amounts that would have been caught but are not taxable so need to be removed.

[11] Finally, the auditor compares the resulting total to the income reported by the taxpayer. If the total is higher than the reported income, the Minister reassesses the taxpayer to add the difference to his or her income.

Bank Deposits Analysis

[12] A bank deposit analysis is an entirely different method of calculating a taxpayer's income. A bank deposit analysis involves reviewing each deposit that a taxpayer has made to his or her bank account. The auditor asks the taxpayer to explain the source of each deposit. To the extent that the taxpayer cannot explain the source, provides an explanation that the auditor does not believe, or admits that the source of the money is taxable, and the income was not reported, the auditor includes the deposits in the taxpayer's income. If the taxpayer is able to satisfy the auditor that the deposit comes from a non-taxable source, is a transfer from another of the taxpayer's accounts, or has already been reported in the taxpayer's income, the auditor ignores the deposit.

[13] Sometimes an auditor will begin an audit by using a bank deposit analysis and then switch to a net worth calculation. This is what happened in the Appellant's case. I do not know why the auditor made the decision to switch techniques in the Appellant's case, nor do I need to know why. All that matters is that the auditor made the switch and that the Appellant was assessed using the net worth calculation.

[14] With that background in mind, I would like to turn to the disputed portions of the Notice of Appeal.

II. DISPUTED PORTIONS

[15] The disputed portions all revolve around the Appellant's assertion that the Minister did not provide a certain document to the Appellant in a timely manner. The Appellant refers to the document as a bank deposit analysis. That is a misleading description.

[16] As set out above, a bank deposit analysis looks solely at deposits to a taxpayer's bank account. The document in question examines every transaction that took place in the bank accounts, both deposits and withdrawals, and groups

them into different categories. It then uses the resulting information to determine the Appellant's personal expenses for the purpose of step two of the net worth calculation and to determine adjustments that should be made to his income at step three. In other words, it is a working paper that the auditor used to analyze the Appellant's bank account.

[17] Calling the document a bank deposit analysis can lead to significant confusion as evidenced by the significant amount of time that was wasted in oral submissions trying to understand why the Appellant thought that a bank deposit analysis formed the basis of the net worth calculation upon which he was assessed.

[18] A bank deposit analysis cannot form the basis of a net worth calculation. If an auditor performs a bank deposit analysis and then switches to a net worth calculation, the results of the bank deposit analysis are not incorporated into the net worth calculation. A net worth calculation is not an expansion of a bank deposit analysis, it is an entirely different audit technique.

[19] On the other hand, an audit working paper that reviews a taxpayer's bank account in order to classify withdrawals and certain types of non-taxable sources of income is part of a net worth calculation.

[20] For all of the above reasons, I will refer in the balance of these reasons to the document in question as the bank account working paper.

[21] Before moving on, given all of the confusion in oral argument, I want to be clear about something: I accept that the bank account working paper is a relevant document. While its relevance was unclear to me when I understood it to be a bank deposit analysis that did not form part of the basis of the reassessment, I now understand its relevance. My decision in this motion is in no way based on the document's relevance.

[22] In any event, the Appellant complains that he was not provided with a copy of the bank account working paper in a timely manner.

Paragraph 69

[23] The Appellant raises this issue in paragraph 69 of the Notice of Appeal. In that paragraph, the Appellant complains that the CRA did not provide him with a complete and original electronic version of the bank account working paper and that the paper version that was provided to him was incomplete and illegible. The

Appellant states that, without this information, it was inconceivable that he would be able to complete his own analysis of the working paper.

[24] These assertions relate purely to how the Minister conducted the audit, a matter over which this Court does not have jurisdiction. The Appellant argues that the purpose of paragraph 69 is not to complain about the auditor's conduct but rather: "To allege that the burden of proof should shift to the Minister as a result of her failure to disclose all assumptions of facts related to the deposits (part of the net worth) upon which she relied in making the reassessments in dispute." No such argument is actually made in any of the disputed paragraphs.

[25] In any event, I cannot see how the Minister could be said to have failed to disclose the assumptions of fact to the Appellant. The Minister reassessed the Appellant based on the net worth calculation. Paragraphs 47.23 to 47.27 of the Reply and the related net worth calculations contained in Schedules A to E of the Reply lay out the assumptions that the Minister made. While some of the figures in the Schedules are totals that come from the bank account working paper, there is no need for the Minister to attach that working paper to the Reply or to plead the specific figures and transactions that gave rise to those totals. That is evidence and does not belong in a pleading.

[26] The Appellant already has a copy of the bank deposit working paper and has had a copy since before he filed his Notice of Appeal. He knows the case he has to meet; he just wishes that he had known it during the audit process.

[27] The Appellant is simply trying to dress up an argument about the Minister's conduct in the language of burden of proof and assumptions of fact. The disputed paragraphs are located in the Reasons section of the Notice of Appeal, not the Facts section, yet they make no reference to any argument about burden of proof. They instead speak of "irreparable harm"; violations of the taxpayer's "rights to defend himself against the Reassessments"; the Minister's unreasonable refusal to provide the working paper; and his irreversible and irreparable damages. This is the language used by a taxpayer who is complaining about the Minister's conduct and is seeking redress for those actions — redress that this Court does not have the jurisdiction to give.

[28] Ultimately, even if the Minister did the things that the Appellant alleges, the actions that the Appellant complains of do not go to the correctness or validity of the reassessments, nor do they relate to any relief that this Court can grant. I will, therefore, strike paragraph 69.

[29] Having disposed of paragraph 69, I will now move on to paragraph 70.

Paragraph 70

[30] In paragraph 70, the Appellant details the amount of time that elapsed between his first request for the electronic version of the bank account working paper and the time that he ultimately received it. He describes how it was then too late for him to gather the information necessary to defend the assessment. He explains that the resource person who knew his affairs best and was heavily involved in the audit has since passed away and thus can no longer assist in fighting the reassessments.

[31] In essence, paragraph 70 simply expands upon the Appellant's complaints about the Minister's actions by emphasizing their effects. I will strike it as well.

[32] When the Appellant gets to trial, if he has difficulty recollecting a transaction because of the passage of time, if he cannot explain a transaction because his resource person is no longer alive or if he does not have a document because he can no longer obtain it, he can explain those things to the trial judge. Such explanations have no place in the pleadings.

Paragraph 71

[33] Turning then to paragraph 71. Paragraph 71 is a summary of paragraph 69 to 70 and should be struck for the same reasons.

Schedule I

[34] Turning then to Schedule 1. Schedule 1 contains a list of correspondence that the Appellant says supports his claim that the Minister did not provide him with the bank account working paper in a timely manner. I will strike it for the same reason as I struck the preceding paragraphs. In addition, I note that it is simply a list of evidence and thus has no place in a Notice of Appeal in any event.

Opening Paragraph

[35] Finally, I will turn to the opening paragraph of the Notice of Appeal. The opening paragraph is not so much an overview or introduction to the full appeal as it is a summary of the Appellant's argument about the bank account working

paper. I will strike both it and the title, “Preliminary Consideration” that accompanies it for the same reasons already noted above.

III. CONCLUSION

[36] In conclusion, for the reasons set out above, the Respondent’s Motion to Strike is granted. The following are struck from the Notice of Appeal without leave to amend: the opening paragraph and the associated title, “Preliminary Consideration”; paragraphs, 69, 70, and 71; and Schedule 1.

Signed at Ottawa, Canada, this 6th day of June 2022.

“David E. Graham”

Graham J.

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STYLE OF CAUSE: BERNARDO KOHN v HER MAJESTY
THE QUEEN

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APPEARANCES:

Counsel for the Appellant: Nicolas Simard
Bruno Di Dodo

Counsel for the Respondent: Christina Ham

COUNSEL OF RECORD:

For the Appellant:

Name: Nicolas Simard

Firm: Fasken Martineau DuMoulin LLP
Montreal, Quebec

For the Respondent:

François Daigle
Deputy Attorney General of Canada
Ottawa, Canada