Federal Court of Appeal | Cour d'appel fédérale

Date: 20160226

Docket: A-166-15

Citation: 2016 FCA 65

CORAM: **GAUTHIER J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

DAVID BUTLER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, on February 23, 2016.

Judgment delivered at Ottawa, Ontario, on February 26, 2016.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: GAUTHIER J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] Mr. Butler appeals from the January 9, 2015 decision of Justice Valerie Miller of the Tax Court of Canada in which the Tax Court dismissed Mr. Butler's appeal and confirmed that Mr. Butler was required to repay the Old Age Security Pension [OAS] in the amount of $3269.00, which he received in 2012.

[2] The OAS repayment resulted from Mr. Butler's receipt in 2012 of a lump sum award under the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 [the *WCA*]. The Nova Scotia Workers' Compensation Board [WCB] issued a T5007 slip to Mr. Butler in the amount of the award but Mr. Butler did not include this amount in his income. He believes that the lump sum payment does not constitute income as he asserts that it is a non-economic loss award that was meant to compensate him for the pain and suffering associated with his injury. He argues that the award is akin to tort damages for pain and suffering, which are not characterized as income, and therefore that the lump sum payment he received from the WCB should not have been included in his income. In support of this assertion, he relies, among other things, on a web posting from the Ontario Workplace Safety and Insurance Board [WSIB] that indicates that the WSIB does not issue T5007 slips for non-economic loss compensation payments made to Ontario workers.

[3] The Tax Court found that the lump sum payment was properly included in Mr. Butler's income under paragraph 56(1)(*v*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [the *ITA*]. This paragraph provides:

56. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,	56. (1) Sans préjudice de la portée générale de l'article 3, sont à inclure dans le calcul du revenu d'un contribuable pour une année d'imposition :
[...]	[...]
(*v*) compensation received under an employees' or workers' compensation law of Canada or a province in respect of an injury, a disability or death;	v) une indemnité reçue en vertu d'une loi sur les accidents du travail du Canada ou d'une province à l'égard d'une blessure, d'une invalidité ou d'un décès;

[4] The Tax Court held that the term "in respect of an injury" is to be broadly interpreted to mean all amounts paid in relation to a compensable injury, relying on the decision of the Supreme Court of Canada in *Nowegijick v. The Queen* (1983), 144 D.L.R. (3d) 193 (S.C.C.), [1983] 1 S.C.R. 29 [*Nowegijick*] in support of this proposition. Contrary to what Mr. Butler asserts, the date of issuance of binding authority does not mean it is irrelevant and, given the issues canvassed in *Nowegijick*, it can properly be relied on in the interpretation of paragraph 56(1)(*v*) of the *ITA*.

[5] Mr. Butler argues that the Tax Court erred in determining that his lump sum constituted income as it failed to appreciate that the lump sum payment he received was for pain and suffering and erred in finding that all amounts received in respect of an injury are to be included in income under paragraph 56(1)(*v*) of the *ITA*. He notes that in the Canada Revenue Agency [CRA] publication, T5007 *Guide – Return of Benefits*, the CRA has indicated that several sorts of payments received from the WCB need not be reported as income, namely, payments or awards from the WCB for:

- medical expenses incurred by or for the employee;
- funeral expenses for the employee;
- legal expenses for the employee;
- job training or counselling for the employee that is not paid as part of, or in lieu of, wage replacement benefits; or
- the death of the employee, other than periodic payments made after the death of the employee.

[6] Mr. Butler submits that the lump sum payment he received is similar to the foregoing exceptions as it is not directed toward wage replacement loss and therefore should not have been included in his 2012 income.

[7] He also argues that some portion of his award must have been for interest and, according to CRA's T5007 *Guide – Return of Benefits*, ought not have been included in his 2012 income. This argument, however, was not made in his appeal to the Tax Court and therefore cannot be raised before this Court.

[8] Mr. Butler further submits that the Tax Court erred in giving no weight to a letter he received from the Income Tax Rulings Directorate that appears to indicate that the lump sum amount Mr. Butler received need not be included in his 2012 income. However, this letter was not an advance ruling and the Tax Court was not satisfied that it applied to the facts before the Court in Mr. Butler's case. We see no error in not finding the letter from the Income Tax Rulings Directorate to be determinative; indeed, determining whether the lump sum payment received by Mr. Butler falls within paragraph 56(1)(*v*) of the *ITA* is a matter of law for determination by this Court and cannot be settled by a letter like that sent to Mr. Butler.

[9] In terms of deciding whether the amount of the lump sum payment should have been included in Mr. Butler's 2012 income, it is not necessary to decide whether the Tax Court erred in failing to characterize the lump sum payment received by Mr. Butler as a non–economic loss payment as, even if the payment was made on account of a non-economic loss, it would nonetheless constitute income within the meaning of paragraph 56(1)(*v*) of the *ITA*.

[10] In this regard, the policies of the provincial WSIB or WCBs do not determine whether non-economic loss compensation payments for pain and suffering constitute income within the meaning of the *ITA*. Likewise, the way in which a T5007 form is completed is not determinative. Rather, this matter is governed by paragraph 56(1)(*v*) of the *ITA*. This provision is sufficiently broad to encompass non-economic loss payments received by injured workers under provincial workers' compensation legislation to compensate them for pain and suffering. Such payments are clearly "compensation" and also are received "in respect of an injury" or "in respect of a disability", within the meaning of paragraph 56(1)(*v*) of the *ITA*. As Justice Dickson (as he then was) held in *Nowegijick* at page 39:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[11] I also note that the result in this case is consistent with the result reached by the Tax Court in a previous case, involving payments for non-economic loss made to a worker under the Ontario workers' compensation legislation: *Larouche v. Canada (Human Resources and Social Development)*, 2007 T.C.C. 743, 2007 C.C.I. 743. There, the Tax Court held at paragraph 20 that:

> Both the current legislation and the former *Workers' Compensation Act* provide for compensation calculated on the basis of loss of earnings and non-economic losses. However, with regard to including, in computing income, compensation received under an employees' or workers' compensation law of Canada or a province in respect of an injury, a disability or death, paragraph 56(1)(*v*) of the [*ITA*] does not make any distinction in terms of the nature of the elements – be it loss of earnings or non-economic losses – included in computing this compensation. Therefore, the total amount must be included in the calculation of a taxpayer's income.

[12] The payment received in this case therefore is compensation and was made in respect of a compensable injury or disability. The payment is unlike those mentioned in CRA's T5007 *Guide – Return of Benefits*, as those payments are not compensatory, but, rather are more akin to repayment of expenses incurred or, in the case of interest, compensation flowing from delay in payment as opposed to flowing from an injury or disability.

[13] Thus, despite Mr. Butler's able arguments, I believe this appeal must be dismissed as the Tax Court was correct in holding that the lump sum payment received by Mr. Butler constituted income. Given Mr. Butler's personal circumstances, I would make no award of costs in respect of this appeal. I would also note that the present Judgment deals only with the interpretation of the *ITA* and should in no way be read as diminishing the nature and severity of the injuries suffered by Mr. Butler.

"Mary J.L. Gleason"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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