

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170403

Docket: A-109-16

Citation: 2017 FCA 69

**CORAM: NOËL C.J.
WEBB J.A.
WOODS J.A.**

BETWEEN:

HORST STRUCK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on March 22, 2017.

Judgment delivered at Ottawa, Ontario, on April 3, 2017.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**NOËL C.J.
WOODS J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170403

Docket: A-109-16

Citation: 2017 FCA 69

CORAM: NOËL C.J.
WEBB J.A.
WOODS J.A.

BETWEEN:

HORST STRUCK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

WEBB J.A.

[1] Mr. Struck is appealing the Judgment of D'Arcy J. of the Tax Court of Canada dated March 22, 2016 (Tax Court Docket: 2014-2421(IT)I) which granted the motion of the Crown and quashed Mr. Struck's appeal under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the ITA) in relation to his 2005 taxation year.

I. Background

[2] Mr. Struck transferred 150 shares of 468543 B.C. Ltd. and a one-half interest in a rental property to his son in 2005. Mr. Struck and his son reached an agreement on the amount that they determined as the fair market value of these assets and how his son would pay for these assets. Mr. Struck did not report any taxable capital gains in his tax return for 2005 in relation to these dispositions.

[3] On February 26, 2009 Mr. Struck was reassessed to include taxable capital gains of \$163,000 in relation to these dispositions. Mr. Struck served a notice of objection on the Minister of National Revenue (Minister) and on July 2, 2010 he was reassessed to reduce the taxable capital gains to \$110,500 with \$75,000 being the taxable capital gain arising from the disposition of the residential property and \$35,500 being the taxable capital gain arising from the disposition of the shares of the numbered company.

[4] Mr. Struck filed an appeal with the Tax Court of Canada. By a consent judgment dated January 8, 2013, the Tax Court accepted the parties' proposed consent to allowing Mr. Struck's appeal and reducing the total taxable capital gains to \$72,100, with the taxable capital gain attributable to the disposition of the residential property being \$49,850 and the taxable capital gain attributable to the disposition of the shares of the numbered company being \$22,250.

[5] When the reassessment to reflect the consent judgment was issued, Mr. Struck filed a notice of appeal with the Tax Court of Canada. The Crown brought a motion to quash this appeal and by Judgment dated March 22, 2016, this motion was granted and the appeal was quashed.

II. Issue

[6] The issue in this appeal is whether the Tax Court Judge committed any error in quashing Mr. Struck's appeal.

III. Analysis

[7] Mr. Struck's argument is that, although he agreed to the amount of the taxable capital gain he did not agree to the amount of taxes that would be payable for 2005. In particular, Mr. Struck raised three items that, if allowed, would reduce his taxes payable for 2005:

- (a) Mr. Struck claimed that he was entitled to claim a reserve under section 40 of the ITA;
- (b) Mr. Struck claimed that he had net capital losses of other years that he wanted to apply in 2005; and
- (c) Mr. Struck claimed that the shares of the numbered company were qualified small business corporation shares as defined in the ITA and therefore he was entitled to a deduction under section 110.6 of the ITA.

[8] During the hearing of this appeal, Mr. Struck's son confirmed that the Canada Revenue Agency has now allowed the net capital losses of other years to be claimed for 2005 so this item is no longer in dispute. He also confirmed that when he looked at the definition of a qualified small business corporation share more closely, he realized that the shares of the numbered

company did not satisfy this definition as it held a rental property. Therefore, Mr. Struck was no longer claiming that he was entitled to any deduction under section 110.6 of the ITA.

[9] As a result, the only item still in dispute is Mr. Struck's claim that he is still entitled to appeal in relation to the question of whether he should be allowed to claim a reserve under section 40 of the ITA.

[10] The right to appeal an assessment issued following an order or judgment of the Tax Court of Canada is restricted by subsection 169(2) of the ITA, the relevant parts of which are as follows:

(2) Notwithstanding subsection 169(1), where at any time the Minister assesses tax, interest, penalties or other amounts payable under this Part by, or makes a determination in respect of, a taxpayer

(a) ... in accordance with an order of a court ... referring the assessment back to the Minister for reconsideration and reassessment,

...

the taxpayer may appeal to the Tax Court of Canada within the time limit specified in subsection 169(1), but only to the extent that the reasons for the appeal can reasonably be regarded

(2) Malgré le paragraphe (1), dans le cas où, à un moment donné, le ministre établit une cotisation concernant l'impôt, les intérêts, les pénalités ou d'autres montants payables par un contribuable en vertu de la présente partie ou détermine un montant à l'égard d'un contribuable :

a) ... en conformité avec l'ordonnance d'un tribunal qui ... la renvoie au ministre pour nouvel examen et nouvelle cotisation;

...

le contribuable peut interjeter appel auprès de la Cour canadienne de l'impôt dans le délai précisé au paragraphe (1) seulement dans la mesure où il est raisonnable de considérer que les motifs d'appel sont liés à l'une des questions suivantes que la Cour n'a pas tranchée définitivement :

...

(e) in any other case, as relating to any matter that gave rise to the assessment or determination

and that was not conclusively determined by the Court ...

...

e) dans les autres cas, une question qui a donné lieu à la cotisation ou au montant déterminé.

[11] In this case, the relevant limitation is at the end of the English language version of subsection 169(2) of the ITA which provides that the matter that is being appealed cannot be one that was “conclusively determined by the Court”.

[12] To determine the matter that was “conclusively determined by the Court” it is necessary to review the Judgment that was signed by the Tax Court. The Judgment refers to the “Consent to Judgment filed December 31, 2012”, allows the appeal and refers the matter “back to the Minister of National Revenue for reconsideration and reassessment in accordance with the terms of the attached Consent to Judgment”. Therefore, the terms of the Consent to Judgment were incorporated by reference into the Judgment.

[13] The Consent to Judgment provided that:

The Appellant and the Respondent consent to judgment allowing the appeal with respect to the Appellant’s 2005 taxation year, without costs, and referring the matter back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The assessed taxable capital gains shall be reduced to \$72,100, comprised of:
 - a) \$49,850, representing 50 percent of a capital gain in the amount of \$99,700, from the disposition of a residential property located at 2485 Orchard Avenue, Sidney, British Columbia; and

- b) \$22,250, representing 50 percent of a capital gain in the amount of \$44,500, from the disposition of 150 common shares of 468543 B.C. Ltd.

[14] As a result, the total amount of the taxable capital gain and the amount of the capital gain arising from the dispositions of the properties in question were conclusively determined by the Tax Court. As acknowledged by Mr. Struck's son during the appeal, by agreeing to the amount of the taxable capital gain (which he does not dispute) he was agreeing to all of the consequences that would flow from that agreement.

[15] Taxable capital gain is defined in section 38 of the ITA. The relevant parts of this section are as follows:

38 For the purposes of this Act,

(a) ... a taxpayer's taxable capital gain for a taxation year from the disposition of any property is $\frac{1}{2}$ of the taxpayer's capital gain for the year from the disposition of the property...

38 Pour l'application de la présente loi:

a) ... le gain en capital imposable d'un contribuable pour une année d'imposition, tiré de la disposition d'un bien, est égal à la moitié du gain en capital qu'il a réalisé pour l'année à la disposition du bien...

[16] A taxable capital gain from the disposition of property is, therefore, simply one-half of the capital gain from the disposition of that property. Capital gain is defined in section 39 of the ITA and the relevant parts of this definition are as follows:

39 (1) For the purposes of this Act,

(a) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this

39 (1) Pour l'application de la présente loi :

a) un gain en capital d'un contribuable, tiré, pour une année d'imposition, de la disposition d'un bien quelconque, est le gain,

subdivision ... from the disposition of any property of the taxpayer...

déterminé conformément à la présente sous-section ... que ce contribuable a tiré, pour l'année, de la disposition d'un bien lui appartenant...

[17] This section simply provides that the capital gain from the disposition of any particular property is the gain as determined under the same subdivision of the ITA from the disposition of that property.

[18] The gain from the disposition of property is determined under section 40 (which is part of the same subdivision). The relevant parts of section 40 of the ITA are:

40 (1) Except as otherwise expressly provided in this Part

40 (1) Sauf indication contraire expresse de la présente partie :

(a) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which

a) le gain d'un contribuable tiré, pour une année d'imposition, de la disposition d'un bien est l'excédent éventuel :

(i) if the property was disposed of in the year, the amount, if any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, or

(i) en cas de disposition du bien au cours de l'année, de l'excédent éventuel du produit de disposition sur le total du prix de base rajusté du bien, pour le contribuable, calculé immédiatement avant la disposition, et des dépenses dans la mesure où celles-ci ont été engagées ou effectuées par lui en vue de réaliser la disposition,

...

...

exceeds

sur :

(iii) subject to subsection 40(1.1), such amount as the taxpayer may claim

(iii) sous réserve du paragraphe (1.1), le montant dont il peut demander la déduction, dans le cas d'un particulier ... sur le

formulaire prescrit présenté avec la déclaration de revenu prévue à la présente partie pour l'année ... jusqu'à concurrence du moins élevé des montants suivants :

(A) in the case of an individual ... in prescribed form filed with the taxpayer's return of income under this Part for the year, and

(A) un montant raisonnable à titre de provision à l'égard de toute partie du produit de disposition du bien qui lui est payable après la fin de l'année et qu'il est raisonnable de considérer comme une partie du montant déterminé en vertu du sous-alinéa (i) pour ce bien,

...

as a deduction, not exceeding the lesser of

(B) le produit de 1/5 de l'excédent déterminé en vertu du sous-alinéa (i) pour ce bien et de l'excédent éventuel de 4 sur le nombre d'années d'imposition antérieures du contribuable qui se terminent après la disposition du bien...

(C) a reasonable amount as a reserve in respect of such of the proceeds of disposition of the property that are payable to the taxpayer after the end of the year as can reasonably be regarded as a portion of the amount determined under subparagraph 40(1)(a)(i) in respect of the property, and

(D) an amount equal to the product obtained when 1/5 of the amount determined under subparagraph 40(1)(a)(i) in respect of the property is multiplied by the amount, if any, by which 4 exceeds the number of preceding taxation years of the taxpayer ending after the disposition of the property...

[19] As a result of this section, the gain from the disposition of a property, for the purposes of the ITA, will reflect any reserve that a particular taxpayer is entitled to claim and chooses to claim. The combined effect of sections 38, 39 and 40 of the ITA, is that by agreeing to a

particular amount as the taxable capital gain, Mr. Struck was also agreeing to the capital gain (which is simply two times the amount of the taxable capital gain and which was also identified in the Consent to Judgment), but more importantly for the purposes of this appeal, Mr. Struck was also agreeing to the amount of the gain, which was determined without any claim for a reserve. If a reserve were to now be claimed, the amount of the gain for 2005 from the dispositions of the properties would be reduced which would also reduce the capital gain and the taxable capital gain for 2005, since these amounts are simply the amount of the gain and one-half of that amount, respectively. Since the amount of the taxable capital gain has been conclusively determined by the Tax Court, Mr. Struck is precluded from advancing an appeal that would change this amount and the Tax Court Judge did not commit any error in quashing his appeal in relation to this claim for a reserve.

[20] As a result I would dismiss this appeal, with costs.

“Wyman W. Webb”

J.A.

“I agree
Marc Noël
Chief Justice”

“I agree
J. Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA
DATED MARCH 22, 2016, NO. 2014-2421(IT)I**

DOCKET: A-109-16

STYLE OF CAUSE: HORST STRUCK V. HER
MAJESTY THE QUEEN

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: MARCH 22, 2017

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NOËL C.J.
WOODS J.A.

DATED: APRIL 3 2017

APPEARANCES:

Horst Struck FOR THE APPELLANT
Bernie Struck

Whitney Dunn FOR THE RESPONDENT
Lisa Macdonell

SOLICITORS OF RECORD:

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada